

## Week 1 Introduction

### *O'Reilly v Mackman* [1983] 2 AC 237

Facts	4 prisoners challenged disciplinary decision by a prison authority; sought declarations by way of ordinary action, even though the core of their respective challenges was regarded as sounding in public law.
Issue	<ul style="list-style-type: none"> <li>whether a declaration or injunction can be obtained in respect of "public law liability" in an <u>ordinary action</u>,</li> <li>or whether they would have to be obtained using an application for <u>review</u> in respect of such liability</li> </ul> <p>(as some remedies e.g., declaration and injunction can be obtained either on an application for JR or in an ordinary action)</p>
Held (HL)	<ul style="list-style-type: none"> <li>it would be an <b>abuse of process</b> for Ps to <u>seek protection of their public law rights by way of ordinary action</u>,</li> <li>which would deny the respondents the protections afforded to them by Order 53, e.g., example those on standing and time limits (JR having no limitation in time, ppl might abuse this advantage)</li> <li>Wrong procedure selected in this case: where involving public law issues &gt; exclusively by way of JR &gt; procedural exclusivity</li> <li>There exists a "[<b>general rule</b>]" requiring persons seeking to <b>establish a public law wrong to proceed by way of judicial review and not otherwise.</b>"</li> </ul>

### *Next Digital Limited v Commissioner of Police* [2021] HKCFI 1677

Facts	<p>Search warrant to go into the premise; private law proceeding;</p> <ul style="list-style-type: none"> <li>Challenge the validity &amp; constitutionality of the search warrant that the police obtained; argued that the matter is not a collateral one (amenable to JR), whether it is valid is a matter of public law</li> <li>Public law arguments: challenge the legality and connotationally of (possibly) unlawful search and entrance; can also challenge it to be abuse the procedure; need to obtain leave for JR</li> </ul>
Issue	Whether collateral challenge on public law grounds
Held	<ul style="list-style-type: none"> <li><b>Not using the right process/mechanism to obtain the warrant &gt; public law</b> matter, procedural exclusivity</li> <li>Court not concerning whether the issuance of the search warrant itself is a good decision or not; merely decided on the legality of the mechanism involved</li> <li><b>Not merely collateral or incidental to the private claims</b> for damages based on trespass, detainue and conversion</li> <li>Public law matter, can be subject to JR</li> </ul>

### Hang Wah Chong Investment Co Ltd v AG [1981] 1 WLR 1141

Facts	KLT land; <b>the lease w/ DDH clause</b> with <u>restriction on the design and height of the structure on the land</u> ; tenant seeks approval of Director for development- approval conditional on payment of premium
Issue	<ul style="list-style-type: none"> <li>whether the govt can control of <b>charging certain premium of the land</b>;</li> <li>govt argued that: in exercising the right to decide whether or not to release or modify of a user cabinet; <u>the govt acting in its private capacity</u></li> <li>whether a challenge to the decision of the Director of Lands in respect of <b>modification of the terms of a Government Lease</b> can be mounted by way of judicial review.</li> </ul>
Held	<ul style="list-style-type: none"> <li><b>Conditions of sale operated in lieu of the terms of the proposed lease</b> <ul style="list-style-type: none"> <li>➤ the Crown was entitled to charge a premium for agreeing to any modification of the conditions</li> </ul> </li> <li><b>Principle:</b> where the Govt official acts in his role as <b>protector of the public interest</b> in making the decision -&gt; his decision is almost certainly <b>liable to JR</b> <ul style="list-style-type: none"> <li>It is within the Director's responsibility; had not abused the power</li> </ul> </li> <li>whether to grant a modification and on the amount of premium to be extracted -&gt; in the nature of <b>private commercial or economic decisions of a private landlord</b></li> </ul>
Held	<b>Govt can exercise the right in private capacity as a landlord not susceptible to judicial review</b> [landmark case]

### Hong Kong and China Gas Co Ltd v Director of Lands [1997] 1 HKLRD 1291

Facts	<ul style="list-style-type: none"> <li>Govt lease; <b>special purpose lease</b>: govt land leased to a company or individual to a specified purpose (land only be leased to do only to do LPG manufacture or storage): <b>the only exception</b></li> <li><i>In terms that policy provided for the extension of special purpose leases <u>unless the land was required for public purposes or was no longer being used for the purpose for which it was originally granted.</u></i></li> <li><b>Applicant no longer use the land for that purpose</b> (from LPG to sth else, land used as for emergency and maintenance to support the operators): change of original use</li> <li>Concern of public after 1997: expired status and the system to continue the leases; previously existing lease under the principle could continue</li> <li>Decision by Director of Lands: continue generally, <b>except (1) the land in question in needed by the govt for other purposes; (2) if the land in question is longer used by the occupier for original purpose</b> (now that the change of use, the govt intend to get back the land)</li> <li>Applicant takes the record of land to court of the use of land</li> </ul>
Issue	Issue regarding special purpose lease

	<ul style="list-style-type: none"> <li>Whether the making of the decision was the performance of a function within the public domain</li> </ul>
Held	<ul style="list-style-type: none"> <li>Decided that the case is in <b>public domain</b> &gt; <b>could be challenged by JR</b> <ul style="list-style-type: none"> <li>Challenge fail, did not substantiate the ground</li> </ul> </li> <li><b>Amenability:</b> In deciding whether an act was done in the public domain <ul style="list-style-type: none"> <li>the <b>nature of the function</b> performed was all important.</li> <li>the decision related to a Crown lease governed by the law of contract was not decisive</li> </ul> </li> <li>The question was <b>whether the making of the decision was the performance of a function within the public domain.</b></li> <li>in deciding whether or not to renew the lease, involves the <b><u>balancing public interests</u> consideration</b> <ul style="list-style-type: none"> <li>if allow to renew the lease: an emergency and maintenance gas depot on the land vs.</li> <li>if the lease was not extended: the land can be used by other parties for other purposes, the disadvantage of the land being unavailable to other potential lessees at a significant premium.</li> </ul> </li> <li><b>Exercise of public function &gt; amenable to JR</b> <ul style="list-style-type: none"> <li>Due to the <b>competing interests to be balanced</b> in the context of the policy statement relating to the extension of large numbers of Crown leases in the New Territories, R's decision not to extend the lease was made <b>in the exercise of his public functions</b> and was <b>amenable</b> to judicial review.</li> </ul> </li> <li>Also consider it is a <b>publicly stated policy</b>, which has made known to everyone in HK &gt; sufficient public element</li> <li>Amenable but application dismissed</li> </ul>
Note	<ul style="list-style-type: none"> <li>Pao: Important feature seems to be balancing public interest, but it might not be that convincing, as all other cases involve balancing of public interest)</li> <li><b>The policy being "publicly stated policy" might be the firmer point</b></li> <li>Other interest could also be considered? E.g., environmental impact (analysis might not so convicting) <b>[REVISE]</b> <ul style="list-style-type: none"> <li>A special application of the general principle in land matter</li> </ul> </li> </ul>

## Anderson Asphalt Ltd v SJ [2009] 3 HKLRD 215

Facts	<ul style="list-style-type: none"> <li>Commercial consideration motivated asphalt producers to apply for JR against a decision of Director of Lands to <u>grant short-term waivers in relation to various pieces of agricultural land</u>;</li> <li>P is the competitor of the producer who obtained the waiver &amp; requested termination of the waiver; Director refused, P claimed that the decision is unlawful; Director claimed it is a private matter in line with <i>Hang Wah Chong</i></li> </ul>
Held	<p><b>Summary of principles:</b> para 57, <i>apply the Hang Wah Chong principles</i></p> <ul style="list-style-type: none"> <li>where the Govt official acts in <b>his role as protector of the public interest</b> in making the decision -&gt; his decision is almost certainly liable to JR</li> <li>Consider: <b>nature of the functions</b> that the decision-maker was performing when making the decision <ul style="list-style-type: none"> <li>Question of use of land; <b>its nature</b> will <b>impact public interest</b> e.g., town planning, environmental impact</li> </ul> </li> <li>the restrictive user covenant in lease or grants plainly serve the <b>commercial and economic interest of Govt as landlord</b> and serve the <b>purpose of town planning</b> <ul style="list-style-type: none"> <li>there is always a <b>built-in town planning element</b> in land grants and the system of land-holding in HK</li> </ul> </li> </ul> <p>→ <b>However</b>, not sufficient in itself to turn a decision in relation to modifying a restrictive user covenant in a grant or demanding a premium for the modification into a public law decision</p> <p>→ the <b>mere presence of some public element may not be sufficient</b> to render the decision a public law decision</p> <p>→ <b>The crucial Q:</b> whether some <b>additional public elements of sufficient weight is/are present</b> in the decision-making process to render the decision made a public one (e.g., <b>whether the role played or function performed is sufficiently public</b>)</p> <ul style="list-style-type: none"> <li>depends on the facts &amp; a matter of overall impression and degree</li> </ul> <ul style="list-style-type: none"> <li><b>HELD:</b> Hence, <b>the role of the Govt in a permanent lease modification case in granting a short-term waiver was in the nature of a private land owner</b>, looking after its own economic or other interest &gt; a matter of <b>private law contract</b> &gt; <b>not amenable to JR</b></li> </ul>
Note	<p>SJ as the respondent: Not suing secretary of justice directly but his representative</p> <ul style="list-style-type: none"> <li>Guidelines provided to the public? Not just a lease, <b>a lease statement coupled with policy</b> &gt; <b>a public case</b></li> </ul>

### Rank Profit Industries Ltd v Director of Lands [2009] 1 HKLRD 177

Facts	Variation of the term on the lease on the landowner; where the landowner wanted to bear <b>the lease for the use of carpark</b> ; govt requires <u>(1) paying premium (2) in the litigation applicant need to drop the claim</u> , if allowing the landowner to bear the lease
Issue	Whether Director acted in public domain
Held	<ul style="list-style-type: none"> <li>On contract, terms and condition upon which the lease modification would be granted; absolute discretion of the govt</li> <li>reasonable for the govt to say this is in their <u>private capacity</u>; case driven by <b>commercial consideration &gt; private law matter</b></li> <li><b>Rejected the argument on published policy</b>: having a policy regarding modification and publishing it does not make it a public matter (analogy of a private landlord of large estate)</li> <li><b>Public consultation is not sufficient to make the decision reviewable</b> (argument of the applicant that consultation with other govt department is public element): exercise its power for the public's benefit; the consultation was consistent with this power</li> <li>In <b>private law</b> domain, appeal dismissed</li> </ul>
Note	<p>Director of lands consulted other govt department (consultation): on ground that the applicant is not doing things completely privately</p> <ul style="list-style-type: none"> <li><b>Issue: consultation as a compelling element?</b> An potential argument only, but <u>not determinative</u></li> <li><b>As it does not change the nature of the function</b> being exercised (private landowner wanting premium, which is commercial decision; even with degree of govt communication might not amount sufficiently to JR)</li> <li>Sought to appeal and CFA: refused applicant's leave to appeal</li> </ul>

### Koon Bing Leung v Directors of Lands [2012] HKCFI 65

Facts	<ul style="list-style-type: none"> <li><b>Small house policy</b> for new territories indigenous villagers</li> <li><u>Refusal to grant government land by way of private treaty under small house grant</u>; as applicant could not satisfy the <u>residence requirement</u>; challenged the requirement by JR; respondents argued District Lands Officer (DLO)'s decision was not amenable to JR</li> <li><b>another exception</b>: implementation of <b>small house policy</b> (granting to male descendent of a person who live in a recognized village back then; 丁屋 ; can build the house if you have the land</li> <li>The govt granting the land pursuant to the policy; the power to refuse the grant of land;</li> </ul>
Issue	DLO's decision regarding small house policy > amenable to JR?
Held	<ul style="list-style-type: none"> <li>involves <b>public policy statement &gt; amenable to JR</b> <ul style="list-style-type: none"> <li>Statement as to who is entitled to the land, make known to the public</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ the DLO carried out a <b>public function</b> in making a decision under a published Government policy dealing with the <b><u>housing needs of the indigenous villagers</u></b> of the New Territories.</li> <li>• sufficient public element</li> <li>• JR &gt; applicant's claim failed, as he never had greater rights</li> </ul>
Note	A <b>direct application of SHP</b> to the villager & <b>direct determination of whether that villager should be given the benefit</b> of a plot of government land under that policy for building a small house

### *Sime Darby Motor Services Ltd v. Director of Lands [2022] 4 HKLRD 714*

Facts	<p>applicant wanted to use the land for wholesale of cars; wants a <b>modification of the lease</b>; (to change the lease to operate for another purpose of automobile); <b>land exchange application</b> (a land for a land in addition to some restriction); <u>but the land in question locates very close to a recognized village in NT</u>; concerning villages environment (not in the village but close to the village), that could touch on the <u>land exchange application</u></p> <p>decision of District Lands Officer refusing to process in-situ land exchange application in New Territories — <b>refusal on ground of purported government policy of <u>not entertaining non-small house land exchange applications within village boundaries</u></b></p>
Issue	<p>problem: small house policy constitutional protected; govt having obligation to hold the land, to preserve the land for the purpose under our constitution; directors of houses refuse the grant</p> <p>whether such policy existed — whether decision nevertheless contrary to public law — when Government's decisions concerning land susceptible to judicial review</p>
Held	<p><b>Decision amenable to JR:</b></p> <ul style="list-style-type: none"> <li>○ <b>govt's role as <u>protector of the public interest</u></b> including the <u>implementation of the Small House Policy</u>, <u>use of limited land</u> in HK and <u>promotion of HK's economic development</u>.</li> </ul> <p><b>Applicant wins on:</b></p> <p>(1) <b>Practice of the policy was only on part and partial of the implementation of the small house policy itself;</b></p> <ul style="list-style-type: none"> <li>○ w/o the land to support the policy, the policy could not be implemented (that SHP is the main focus to be dealt with in this case?)</li> </ul> <p>(2) <b><u>sufficient public element present</u> as it involved an <u>optimal use of land</u></b> to deny the applicant's right; which is a right protected in the Bill</p> <ul style="list-style-type: none"> <li>○ <b>land as scare source in HK;</b></li> <li>○ the question is of public interest; about how the land is utilized</li> </ul>

	<ul style="list-style-type: none"> <li>• Applicant wins; decision amenable</li> </ul>
Note	<p>Comment on the 2 points where applicant wins on:</p> <p><b>(1) involves SHP &gt; public matter</b></p> <ul style="list-style-type: none"> <li>○ superviral argument to say if the case involve SHP would be a public case (Involving SHP so amenable? Might not be that logical)</li> <li>○ vs <i>Koon Ping Leung</i>: where there is direct application of SHP, whereas in this case it is not</li> </ul> <p><u>Possible argument for this:</u></p> <ul style="list-style-type: none"> <li>○ in case of small house policy, entitlement of an eligible person to enjoy the benefit brought by the policy; regarding the granting of land, which is a public policy;</li> <li>○ but <u>this case is not about granting the land</u>, but about <b>govt's preservation for the policy</b></li> <li>○ i.e. govt's reservation to build a hospital vs reserving land for eligible person (the latter might be a much weaker argument, the purpose of having the land reserved might not involve public interest)</li> </ul> <p><b>(2) Issue of optimal use of land &gt; sufficient public interest</b></p> <ul style="list-style-type: none"> <li>○ Bad point? Only judges copying applicant's argument, but not a product of independent analysis</li> <li>○ Town-planning point might not be sufficient; despite being a public element</li> </ul> <ul style="list-style-type: none"> <li>• On appeal the applicant argues: to have a deeper and more fundamental look at <b><u>what is mean by public interest</u></b>; look at: <ul style="list-style-type: none"> <li>○ the <b><u>purpose</u></b> of having the land to serve for the small house</li> <li>○ whether there is a <b><u>public function</u></b> being performed</li> <li>○ Is it involved the government as active in <b>the protector of the public interest</b></li> </ul> </li> <li>○ potentially future development of the case (further appeal)</li> <li>○ <u>Q: of where to draw the line</u>; "there has to be something else", but what is that sth else</li> </ul> <p>See questions</p> <ul style="list-style-type: none"> <li>• Wrongly decided? only relevant to SHP but not concerning building a small house</li> </ul>



***Wan Yung Sang v Housing Authority, HCAL 135/2009 (unrep., 6 July 2011)***

Facts	HA serving <b>notice to quit</b> , requesting tenants/occupants to leave; power granted by tenancy agreement
Held	<ul style="list-style-type: none"> <li>Although the power to evict is supported by tenancy agreement; but the <b>eviction involves public house</b>, involves public power</li> <li>the <b>service of the quit is governed by statute</b> -&gt; involve public element, rights of individual</li> </ul>

***Ngo Kee Construction Co Ltd v Housing Authority [2001] 1 HKC 493***

Issue	Whether or not the particular project engineer operator has the right to submit tender to public works; (vs. usual practice would be fair competition between tenders) tenders to be selected; – <u>Housing Authority's decision to suspend contractor from tendering on all its projects for a limited period</u> – Whether Housing Authority's decision amenable to judicial review
Held	Govt having freedom to contract; commercial purpose; in deciding who is eligible as a tender; private issue > private law matter
Note	These two cases: govt body's decision with the private function

***Leung Sze Ho Albert v Bar Council of the Hong Kong Bar Association [2015] 5 HKLRD 791***

Facts	Engage in supplementary occupation;
Issue	constitutional question of whether this is allowed (but before going to this question it should be dealt with the JR issue); not amenable to JR; decided not entitled to have two occupations  Bar Council — decision refusing to permit practising barrister to engage in neuro-beautology as supplementary occupation — decision amenable to judicial review
Held	<ul style="list-style-type: none"> <li>Bar Association: not established by statute but recognized by statute; based on <b>bar code of conduct</b>; the purpose is to uphold the professional standard; to <u>ensure public interest</u>; integrity of barrister -&gt; <b>public matter</b></li> <li><b>Function of Bar Association</b>: not just a private association, <b>amenable by JR</b></li> </ul>

***Li Fung Kei v Council of the University of Hong Kong [2018] 4 HKC 231***

Facts	Election of post in council of HKU; promotion to the post refused by the council; no firm conclusion but decided on another ground; first need to establish whether amenable to JR
Held	Empowerment of staff by educational institution is not amenable to JR; as employment is based on contract



## Week 2- Leave, Delay, Standing & Limits of JR

### 1. Leave to Apply for Judicial Review

**Po Fun Chan v Winnie Cheung (2007) 10 HKCFAR 676**

### 2. Promptness and Delay

**Law Chun Loy v Secretary for Justice, HCAL 13/2006, 26 October 2006**

**AW v Director of Immigration [2016] 2 HKC 393**

Facts	Leave for judicial review more than six months out of time – Legal principles to extend time – Legal aid application – Whether leave should be granted for humanitarian protection– Seriousness of potential prejudice to applicant – High Court Ordinance (Cap 4) s 21K(6) – Rules of the High Court (Cap 4A) O 53 r 4(1)
Facts	The applicant sought to attribute the six-month delay in filing his application to the following matters: (1) the time taken to apply for and obtain legal aid; (2) the time taken to obtain relevant documents from the Immigration Department; (3) the need to consider the three judgments aforesaid before filing his application; and (4) the time taken for applications to the Legal Aid Department to extend the scope of the legal aid certificate, for him to make the contribution of \$2,000 and to obtain the anonymity order.
Held	<ul style="list-style-type: none"><li>• A ‘multi-faceted question’, the answer to which would depend on the circumstances of each case. See the following factors considered</li><li>• Applicant’s appeal dismissed;<ul style="list-style-type: none"><li>○ not necessary to consider merits of applicant’s substantive challenge, as it serves no practical purpose &amp; would be detrimental to good administration</li></ul></li></ul>

**R v Dairy Tribunal ex p Caswell [1990] 2 AC 738**

Facts	Milk producer applying for dairy quota; 2 years later found out that remedies could be challenged; however during the period there are regular decision to other producers
Held	<b>Relief refused:</b> due to <b>Prejudice to other parties and good administration</b> <ul style="list-style-type: none"><li>○ Despite having good reason on delay, court can still refuse relief if it could be detrimental to other parties or good administration</li></ul>

### 3. Sufficient Interest & Standing

#### R v IRC ex p National Federation of Self-Employed and Small Businesses [1982] AC 617.

Facts	<ul style="list-style-type: none"><li>• IRC: inland revenue; tax issue against the casual workers on the street; argument that they falsely reported their avenue; IRC reached settlement with the group, that it would not investigate anything before, in return for the requirement of payment of tax</li><li>• However the deal challenged by National Federation; on unfairness, as the members of the federation do not have the same treatment</li><li>• Argument that the federation has interest that the members would benefit</li></ul>
Issue	National Federation having standing? For which the case to be challenged
Held	Did not have sufficient interest in the case, lacks standing to complain the case
Note	Takes a strict approach here, but the trend nowadays: explosion of no. of JR (due to good legal aid, dissatisfaction with the govt...) > the trend further becomes again stricken the approach

#### Re Wong Chi Kin, CACV 80/2014, 26 September 2014.

Facts	<ul style="list-style-type: none"><li>• Vessel sunk; inquiry of investigation of the accident; report contained findings about Wong; Wong challenged the whole report</li></ul>
Held	<ul style="list-style-type: none"><li>• Conclusion: applicant being directly affected; however other parts of the report do not deal with his responsibly -&gt; no need to challenge the whole report &gt; no sufficient interest to do so</li><li>• Fact-sensitive, not all-or-nothing, court acknowledge part of the facts in favor of the applicant but other part not (<b>identifying which part the applicant has standing on</b>)</li><li>• Mere fact that there is general public interest in the finding; not sufficient for the applicant has sufficient interest; requires something more than that</li></ul>
Held	Applicant does not have sufficient standing

#### Kwok Cheuk Kin v Commissioner of Police [2017] 6 HKC 93.

Facts	<ul style="list-style-type: none"><li>• 2 police association wanted to support and unify the police officers by organizing a gathering on social premises; 30,000 attended the meeting; however there were other members of the society invited</li><li>• Applicant challenged unauthorized assembly; inquiry of investigation report: claimed personal interest on that (1) he attended protest, (2) on public interest</li></ul>
Issue	Whether special meeting held by Hong Kong Police Inspectors' Association and Junior Police Officers' Association exempted from notice requirement
Held	<ul style="list-style-type: none"><li>• Court rejected both arguments: <u>on 1<sup>st</sup> argument</u> that types of protest are different in nature; <u>2<sup>nd</sup> argument rejected</u> on that his argument is not genuine (arguing for less strict requirement for protest, contradictory to his claimed interest to protect public interest; where he seems to just to challenge the police but not the instance itself)</li></ul>

	<ul style="list-style-type: none"> <li>The applicant lacks standing: <b>Para 31-34 (summary of principles)</b> <ul style="list-style-type: none"> <li>the court adopts a holistic approach by taking into account a host of relevant considerations including <u>the merits of the application</u>, the <u>importance of vindicating the rule of law</u>, <u>the importance of the issue raised</u>, <u>the existence and absence of any other challengers who have a greater interest in the matter</u>, and <u>the nature of the breach of duty</u> against which relief is sought.</li> </ul> </li> </ul>
Held	No standing; application dismissed.

### Ho Kar Hei v Director of Immigration [2018] HKCFI 2517.

Facts	<ul style="list-style-type: none"> <li>Student journalist, challenges online medium policy of the govt of allowing member on online media to several events (that the govt only allow certain members to the event)</li> <li>on ground that it would affect job opportunity</li> </ul>
Held	Not a member of online media to be affected; not a journalist No sufficient standing
Note	Another concurrent JR on the same matter, by HK association of journalist (?) with sufficient standing

### 803 Funds Ltd v Director of Buildings [2021] 2 HKLRD 1274.

### Kwok Cheuk Kin v President of LegCo [2021] 1 HKLRD 1247.

Facts	Challenged change of rules in LegCo meetings; regarding resolution amending Rules of Procedure reducing quorum of meeting of committee of whole Council (COWC)
Held	<ul style="list-style-type: none"> <li><b>Not being a member</b> of the Council, Mr Kwok has <b>no right to participate</b> at the meetings in the legislative process, including the COWC. -para 19</li> <li>The change of rule has <b>no effect in the internal work in LegCo</b>: The Committee Stage is only an interim stage in the legislative process and ultimately a bill has to go through the Third Reading at which the decision would be made by the Council with a quorum complying with BL 75(1) – para19</li> <li>Held not affected in the internal work in LegCo; No sufficient standing</li> </ul>

### Kwok Cheuk Kin v Director of Lands [2021] HKCFA 38.

Facts	<ul style="list-style-type: none"> <li>SHP case, lost in case, as having no standing in the matter, no relationship with anyone in the matter</li> <li>But CFA disagreed here in this case, Kwok won standing</li> </ul>
Held	<ul style="list-style-type: none"> <li>Focus on the question of <b>application of rule of law</b>; regarding the constitutionality of the policy</li> <li>Q of asking who has the direct interest (might well be indigenous inhabitants), where Kwok (not eligible or potentially eligible under the policy) has no greater interest in the constitutionality of SHP than any other member of the public.</li> <li>However, discrimination as the nature of the challenge; a constitutional matter; that can be said the alleged discrimination to affect everyone equally</li> </ul>

	<ul style="list-style-type: none"> <li>• If not allowing persons like Kwok to be heard by the court to challenge the policy would mean no one would be allowed to (as those who can be said to have a manifestly greater interest in the SHP are actual or potential beneficiaries of the policy with no interest challenging it)</li> <li>• In this circumstances involving a more complex matter and concerning the reality Kwok can be said to have standing</li> </ul>
Note	An exceptional case (?) a holistic approach but not just looking at applicant's standing itself; focus on rule of law

### **Kwok Cheuk Kin v Chief Executive in Council [2023] HKCFI 3074.**

Facts	DC election, changed stricter nomination requirement; Kwok challenged unconstitutional under BOR (having right to vote and stand on election; right engaged)
Held	contrary to his position he was not even registered; where evidence shown the officer had called and asked Kwok if he wants to be included in the list > Kwok being untrue, his own action contradict to his claim of right; court hover doubts over Kwok's standing

## **4. Alternative Remedies**

### **Stock Exchange of Hong Kong Ltd v New World Development Co Ltd (2006) 9 HKCFAR 234**

Facts	Challenged made against (?); procedural directions for hearing; claimed procedurally unfair,
Issue	whether complaints could be addressed before JR
Held	<ul style="list-style-type: none"> <li>• rule that applicant should exhaust domestic remedies before seeking judicial review;</li> <li>• exceptional circumstances required for court to allow departure from rule</li> </ul>

### **Leung Ka Lau v Medical Council of Hong Kong [2021] HKCFI 2914**

Facts	<ul style="list-style-type: none"> <li>• Doctor advertising on FB post, contrary to code of ethics; claimed infringement in freedom of expression</li> <li>• Disciplinary proceeding (alternative remedy) not yet completed, before he applied for JR</li> </ul>
Held	<ul style="list-style-type: none"> <li>• Application needs to be exhausted all other alternative, JR should be the last resort; if having other alternatives (that can actually address the issue, applicant should resort to that first</li> <li>• Otherwise at leave stage it would be refused</li> <li>• only in some exceptional cases court would depart from this rule</li> </ul>

## 5. Limitations on Judicial Review

### Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 (check)

Facts	<ul style="list-style-type: none"><li>Concern the determination of any application made to the permission compensation to pay</li><li>any error of law made by a public body will make its decision a nullity and that a statutory exclusion clause (known as an ouster clause) does not deprive the courts from their jurisdiction in judicial review unless it expressly states this.</li></ul>
Issue	whether a court's jurisdiction to review a tribunal's decision could be excluded by an "ouster clause" in the relevant legislation even if the tribunal had made an error of law.
Held	<ul style="list-style-type: none"><li>The permission cannot be questioned by law???</li><li>if determination is unlawful, in law treated as null and void; no determination bc determination treated in legal eyes</li><li>By a 3–2 majority, the House of Lords decided that section 4(4) of the Foreign Compensation Act did not preclude a court from reviewing the tribunal's decision.</li></ul>
Note	The decision illustrates <b>the courts' reluctance to give effect to any legislative provision that attempts to exclude their jurisdiction</b> in judicial review.

### Bahadur v Director of Immigration [2001] 3 HKLRD 225.

### Clean Air Foundation v Government of HKSAR, HCAL 35/2007 (unrep., 26 July 2007)

Facts	Challenge HK govt's policy on environment protection regarding air pollution; affecting public's health
Held	<ul style="list-style-type: none"><li>Court decided as a policy, not a matter of the court but of the government</li><li>Not question of legality</li></ul>
Note	Court will not indicate its own preference on the policy adopted but only on its legality; not the role of court

### Leung Chun Ying v Albert Ho Chun Yan (2013) 16 HKCFAR 735

## Week 3 Procedural Fairness I

### 1. Concepts of Procedural Fairness and Natural Justice

#### Ridge v Baldwin [1964] AC 40, esp 66, 79, 121, 124, 132

Facts	Statutory instruction; power of watch committee to dismiss chief constable for neglect of duty; Ridge was charged of conspiracy of defraud but acquitted by court; J made adverse comment on him; P brought claim about the committee, challenge the dismissal
Held	<p>p. 121-122</p> <ul style="list-style-type: none"> <li>• Elements of fair hearing rules to consider</li> <li>• Fair hearing rules applied in diff context (e.g., where a person may be dismissed; or to be sanctioned); content of the defense may be different</li> <li>• <b>Fairness is a procedural matter</b>, not concerned with its merits: Whether or not the person is a cork does not matter, he still deserves to be heard</li> </ul> <p><i>"In any case he had not been heard and the court said: " And although they have lawful authority either by charter or prescription to remove anyone from the freedom, "and that they have just cause to remove him; yet it appears by the return, <u>that they have proceeded against him without "hearing him answer to what was objected, or that he was not "reasonably warned, such removal is void, and shall not bind the party."</u> Such a removal was "against justice and right."</i> -p.122</p> <ul style="list-style-type: none"> <li>• Principles of natural justice  <i>"(1) the right to be heard by an unbiased tribunal; (2) the right to have notice of charges of misconduct; (3) the right to be heard in answer to those charges"</i> - P.132</li> </ul>

#### R v Secretary of State for the Home Department, ex p Doody [1994] 1 AC 531, 560D-G\*

Facts	<ul style="list-style-type: none"> <li>• 4 applicants serving mandatory sentence of life imprisonment following the conviction of murder; Secretary of State fixing period for retribution and deterrence after consultation with judiciary— on whether they should be released by a license; but w/o consulting applicants, but only told applicants a period earlier before the serving;</li> <li>• applicants applied for JR; on ground that they were entitled to be given the opportunity to make representation before the period is determined</li> </ul>
Issue	Whether prisoner to be informed of judicial recommendation—Whether prisoner entitled to make D representations to Secretary of State before period fixed—Whether prisoner entitled to know Secretary of State's reasons for fixing period
Ruling	p.560 (D-G) What does fairness require in the present case?

*"(1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.*

*(2) **The standards of fairness are not immutable.** They may change with the passage of time, both in the general and in their application to decisions of a particular type.*

- not immutable: context-dependent, depends on the decision that is being made
- e.g., if the possible sanction entails seriousness like losing license, ought to be warned; where the decision maker is touching on fundamental rights, court to be attach high importance on fairness

*(3) The principles of fairness are not to be applied by rote identically in every situation. **What fairness demands is dependent on the context of the decision**, and this is to be taken into account in all its aspects.*

*(4) An essential feature of the context is **the statute which creates the discretion**, as regards both its language and the shape of the legal and administrative system within which the decision is taken.*

*(5) Fairness will very often require **that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf** either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.*

- fairness: do not look at one snippets of but the entirety; of which the decision arrived; judgement on view of all of that; look at the entire process
- e.g., whether the person is entitled to have legal representation before the decision or after decision to change the court's mind)

*(6) Since the person affected usually cannot make worthwhile representations without Q knowing what factors may weigh against his interests fairness will very often require that he is **informed of the gist of the case which he has to answer**.*

- D ought to know about the charge to make meaningful legal representation and defense to argue the case
- e.g., material against him (crucial to raise defense); right to documents relied on the other side..., access to the documents



## Chu Ping Tak v Commissioner of Police [2002] 3 HKC 663, §§53-73

Ruling	<p>P53-73; *para 61-62, 72</p> <ul style="list-style-type: none"> <li>Requirement of demonstrating <b>substantial prejudice</b> <ul style="list-style-type: none"> <li>It is not sufficient to merely demonstrate the existences of unfairness; (e.g., claiming not given documents against him &gt; not sufficient to win on unfairness,</li> <li>if cannot <b>demonstrate substantial prejudice placed on him as to the outcome</b> &gt; unlikely to grant relief</li> </ul> </li> <li><b>Risk of prejudice</b> vs actual prejudice <ul style="list-style-type: none"> <li>But, if can show outcome of possible prejudice (the risk), that could change the outcome of the case&gt; likely to grant relief</li> <li>whether applicant can establish the risk or the actual prejudice to possibly <b>affect the outcome of the decision</b> (risk is enough)</li> </ul> </li> </ul>
Note	Principle applied in HK

## Wong Tak Wai v Commissioner of Correctional Services [2010] 4 HKLRD 409, §37

- Para 37 the distinguishment

## 2. Right to be informed and to be heard

### Liu Pik Han v Hong Kong Federation of Insurers Appeal Tribunal [2005] 3 HKC 242

### Ng Nga Wo v Director of Health, HCAL 16/2006 (unrep., 16 May 2006)

### ATV v Communications Authority [2013] 3 HKLRD 618

Facts	<p>Mr Wong's investment in ATV; did not qualified under relevant statue on person exercising control on free-licensing of television programme; but in fact he had control, which is reviewed by a person on an interview, procedural proceeding reviewed he did have control; Mr Wong required disclosure of identify interviewed on ground to make meaningful and but authority refused; JR on the refusal on the disclosure</p> <p><b>level of disclosure</b> to enable affected person to make meaningful and focused representations to adverse materials — investigation by Communications Authority against domestic free television programme service licensee — refusal by Authority to disclose identity of persons interviewed in investigation — interviewees' fear of reprisal</p>
Issue	Whether de facto control on ATV; determine the level of disclosure
Held	Non-disclosure of the identity of the interviewee did not breach the rule; <b>identity of the interviewee was irrelevant</b> ; as evidence concerning his behavior shows no dispute; Only thing in dispute is the perception and interpretation of facts (his behavior)

	<ul style="list-style-type: none"> <li>○ Para 61: <i>“the level of disclosure required to meet the standard of fairness is to enable the affected person to make <b>“meaningful and focused representations”</b> to the adverse materials.”</i></li> <li>○ Para 64: <i>“It is not possible or appropriate to lay down hard and fast rules if verbatim disclosure and the disclosure of the identity of a witness should be made. Each case must be <b>considered on its own facts and circumstances to see what fairness requires.</b>”</i></li> </ul> <ul style="list-style-type: none"> <li>• Q: what is in fact in dispute; whether it really has impact on D’s claim</li> </ul>
Note	<p>What is required and what is not:</p> <p>Level of disclosure &gt; depends on the effect of the disclosure</p> <p>Context-dependent; look at all the facts; to see whether d is really deprived of legal representation to argue his case</p>

### **ST v Betty Kwan [2014] 4 HKC 419**

Facts	Applicant is a tortured claimant; no right of oral hearing at the petition stage; request dismissed on paper by Adjudicator (where they have the power to decide either oral hearing or not; P claimed that she should be given chance of oral hearing)
Held	<p>Para 20-36, 38-35</p> <p>Para 38: interest at stake (fundamental right of free from torture, might indicate that oral hearing should be given); e.g., sanctions and interest involved</p> <p>Para 40: evidence material to the claim (in terms of facts and law, whether better addressed at oral hearing); depends on what relevant facts and issue are in dispute; also consider the complexity of the case (to be better address orally; if adjudicator not sure about the form of hearing&gt; might indicate there should be oral hearing</p> <p>Para 45: benefits; decision maker to ask the question of whether oral hearing could bring benefits, to lead to a better process and outcome</p> <p>Para 46-48: inherent limitation of written submission; an indicator for oral hearing</p> <p>Para 49-50: nature of the issue involved would give you the ans</p>

### **鍾凱研 v General of the Salvation Army [2023] HKCFI 3273**

Facts	<ul style="list-style-type: none"> <li>• Former employee of the salvation army to challenge human resources officers’ decision dismissing her appeal against the decision of the director’s issuance of written warning for her performance;</li> <li>• applicant complained the disciplinary action was procedurally unfair, that not she was (i) not properly informed of the allegations she faced in the disciplinary investigation/proceedings, and consequently (ii) she was not provided with an opportunity to refute the allegations made against her, in particular through an oral interview/meeting.</li> </ul>
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Held	<p>Not public law matter (court refused leave);</p> <ul style="list-style-type: none"> <li>• Para 80: how applicants frame her complaint, 2<sup>nd</sup> ground of review: procedural unfairness</li> <li>• Para 81-82: <b>flexible content</b> (of what is required) <b>of procedural fairness</b>: not depending on rigid rules but on the subject matter</li> <li>• Right to be heard vs right to oral hearing; <b>Matter of spectrum</b>: decision affecting applicant vs regulatory decision; where there can be middle cases (e.g., planning cases of land; different purpose of land, involving interest of people who own the land or who are nearby the land; where there could be public consultation and notification to invite public gives opinion; court could decide that some alternatives like consultation would be enough to protect rights);</li> <li>• look at facts and decide what the facts indicates to which extreme (involving fundamental matters), or less serious, or somewhere in the middle;</li> <li>• Para 83: relevant consideration of what fairness requires: an <b>intuitive judgment based on facts</b>; look at all the facts</li> </ul>
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### 3. Legal representation

#### *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd (2006) 9 HKCFAR 234*

FACTS	Procedural direction issued by the chairman;
ISSUE	Para 93: The issue in the present case therefore concerns <b>the precise mode and extent of legal representation</b> which should be permitted at the hearing.
HELD	<ul style="list-style-type: none"> <li>• Para 93: concerns <b>the precise mode and extent of legal representation</b>: The answer must depend on what is <b><u>fair and proportionate</u></b>, applying the <b><u>common law approach</u></b>.</li> <li>• Para 95-98: argument of the absolute right of hearing &gt; court rejected</li> <li>• Para 100: <b><u>discretion on decision maker</u></b> (disciplinary tribunal) of <b><u>whether to allow legal representation</u></b> (e.g., applicants need to apply for permission from them to have legal representation); here the decision lies with the decision maker the consideration of whether to allow the legal representation would be depending on the <b>need of fairness</b></li> <li>• another situation: where some decision made by applicant itself (to appear before the court, meeting counsel):</li> <li>• Para 101: <b>factors guiding how discretion should be exercised</b> in a particular case; but <b><u>not comprehensive</u></b>: <ul style="list-style-type: none"> <li>○ the seriousness of the charge and potential penalty;</li> <li>○ whether any points of law are likely to arise;</li> <li>○ the capacity of the individual to present his own case; procedural difficulties;</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ the need for reasonable speed in making the adjudication;</li> <li>○ and the need for fairness among the individuals concerned.</li> <li>● Para 101: The common law principles of <b>fairness operate flexibly</b>: <ul style="list-style-type: none"> <li>○ requiring the tribunal to respond reasonably to the requirements of fairness arising in each case,</li> <li>○ balancing any competing interests and</li> <li>○ considering what, if any, limits may proportionately be imposed on legal representation in consequence.</li> </ul> </li> </ul>
Note	<ul style="list-style-type: none"> <li>● If there is a statute or system that impose a blanket ban on legal representation: most likely that the statute or system would fall foul of the fairness requirement &gt; see <b>Lam Siu Po</b></li> <li>● When concerning fundamental right: more rigorous approach with higher standard of fairness when fundamental rights are at stake; also see <b>Betty Kwan, Secretary for Security v Prabakar</b></li> </ul>

#### 4. Specific issues

##### (1) Fundamental rights and high standard of fairness

##### **R v Home Secretary, ex p Bugdaycay [1987] 1 AC 514**

##### **Secretary for Security v Prabakar (2004) 7 HKCFAR 187**

Facts	Applicant claimed tortured if returned to his home state; Secretary for Security did not make independent investigation on the case but relied on UNHCR's refusal of his refugee status and deported him, despite not being able to find the reason of the UNHCR's refusal; applicant challenged the decision to refuse his status
Held	<p>(citing R v Home Secretary, ex p Bugdaycay)</p> <p>Para 43-44:</p> <ul style="list-style-type: none"> <li>● <b>standard not immutable</b>, no universal set of standards applicable to all situation; the appropriate standards of fairness depends on an <b>examination of all aspects</b> relating to <u>the decision in question, including its context and its nature and subject matter</u></li> <li>● <b>fundamental right</b> at stake (freedom from inhumane treatment in the context of exercising the power deport) &gt; apply <b>higher standard of fairness</b></li> </ul> <p>Para 45:</p> <ul style="list-style-type: none"> <li>● subject <b>rigorous examination</b> and <b>anxious scrutiny</b> for procedural fairness (but not about the correctness of the decision) to ensure that the required high standards of fairness have been;</li> </ul>
Note	In ground of procedural fairness in JR: not talking about the substance of the case (the right or wrong of the decision) but <b>simply about procedural fairness</b> : whether he is given the right to;

	<b>Limitation of JR on fairness challenge ground:</b> remitting the decision, where decision maker may reconsider the decision, where the decision might still get the same unfavorable result
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**MA v Director of Immigration, HCAL 10/2010, (unrep., 6 January 2011), §§94-95**

**(2) BOR10 - “fair and public hearing by a competent, independent and impartial tribunal established by law” – the “curative” principle**

See **chung hoi yin para 85**: examine the entirety of the process to evidence

**Lam Siu Po v Commissioner of Police (2009) 12 HKCFAR 234**

**Wong Tak Wai v Commissioner of Correctional Services [2010] 4 HKLRD 409**

Reasoning	<ul style="list-style-type: none"> <li>• Para 71-85: fact sensitive question of whether further hearing or an appeal is sufficiently required; consider: <ul style="list-style-type: none"> <li>○ The subject matter of the decision appealed against,</li> <li>○ the manner in which that decision was arrived at,</li> <li>○ the content of the dispute,</li> <li>○ the proposed grounds of challenge of the decision (e.g., matter of legal representation, look at 2<sup>nd</sup> stage to see whether the issue is cured)</li> </ul> </li> </ul> <p>p.410 Curative principle</p>
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### 1. Duty to provide adequate reasons

#### \**Oriental Daily Publisher Ltd v Commissioner for Television and Entertainment Licensing Authority (1997-1998) 1 HKCFAR 279*

Facts	The respondent, Obscene Articles Tribunal, determined that two photographs of semi-naked women published by the appellant, Oriental Daily Publisher Ltd, were indecent. It was agreed that the Tribunal was under a duty to give reasons. However, the question was whether they had discharged this duty by giving adequate reasons. The appellant argued that the respondent merely identified the criteria in s 10 of the Control of Obscene and Indecent Articles Ordinance (Cap 390) without anymore. The respondent argued that the concepts of indecency and obscenity were habstract and difficult to express and that the reasons given by the tribunal were adequate.
Issue	whether properly discharged — adequacy of reasons
Ruling	<ul style="list-style-type: none"> <li>• there is no general common law duty to give reasons, but such a duty may arise <b>from statute</b> either expressly or by necessary implication.</li> <li>• General observation given to the reasons that should be given by the tribunal</li> <li>• <b>P.290 D-H benefits for giving reasons</b> <ul style="list-style-type: none"> <li>○ Duty of the decision maker: exercise power legitimately and fairly;</li> <li>○ impose desirable intellectual discipline and concentrate attention on the relevant issues</li> <li>○ assist in demonstrating to the parties that the tribunal has carried out its task properly and would enable them to decide on the appropriate course of action in the case at hand; justice seen to be done</li> <li>○ promote and enhance consistency in decision making; promoting legality and fairness of a decision (like cases to be treated alike)</li> <li>○ demonstrate to the community that the tribunal is functioning properly and this would <b>engender public confidence</b>; promotes transparency and legality (in the public body and decision making process)</li> </ul> </li> <li>• Trend of giving reasons (p.288J) <ul style="list-style-type: none"> <li>○ the law does not at present recognize a general duty to give reasons, but recent cases on JR review a review a perceptible trend towards an insistence on greater openness of decision making and spoke of a continuing momentum (citing ex p Doody)</li> </ul> </li> <li>• p.288J-289 <b>The duty to give reasons</b> <ul style="list-style-type: none"> <li>○ the source of duty: arisen from statue, or as a matter of common law duty</li> </ul> </li> <li>• <b>Adequacy of reasons</b> (p291) <ul style="list-style-type: none"> <li>○ No need to address every issue; <b>only address serious/substantial ones</b></li> <li>○ <b>Some content would speak for themselves</b>, the duty to give reasons could be discharged by describing the contents without much more (e.g., a decision on indecency or obscenity here in this case)</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ The reasons <b>may not require great elaboration</b> and they <b>may be brief</b>; approach sensibly in circumstances of a particular case as to what adequate reasons should be</li> <li>○ where a point of law is raised the point has to be decided by the presiding magistrate and the <b>statute expressly requires</b> reasons to be given in writing</li> </ul>
Held	The reasons given by the tribunal are inadequate to discharge the tribunal's duty to give reasons in the circumstances of this case

*R v Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 WLR 242 – types of cases where reasons need not to be given

- p.262H-263A: duty to give reasons  
*“But it is **necessary** for public decision-making bodies to appreciate that there are already **some circumstances** (for example, where unlawful race or sex discrimination is alleged), and more may well come, in which their legal position may depend on their ability to **account intelligibly for their decisions** by **explaining** not simply how but **why** they have reached them. This much, we think, bears a practical relationship to the movement of the law towards **open or “transparent” decision making** to which Lord Mustill refers in *Ex parte Doody*...”*
- source of duty: from common law or statute

256H-257E, 258G-259D:

- **debate of whether there should be a more precise test**
  - argument against it: ‘one aspect of unfairness may be precisely the inability to know whether an error of law or of process has occurred ... the need to know whether there has been an error of law or of process is rightly seen not as an alternative to the demands of fairness but as an aspect of them’
  - argument for it: ‘it may place an undue burden upon decision makers; demand an appearance of unanimity when there is diversity; call for articulation of sometimes inexpressible value judgments; and offer an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge’
- Court: **not possible to formulate a different or more precise rule or test**
  - consider all factors, see whether the decision in question falls more closely to the call for reasons, or reasons are entirely reaction (common law position: a more **initiative** way of reasoning)
- **Summary:** p.263A
  - (1) There is no general duty to give reasons for a decision, but there are classes of case where there is such a duty.
  - (2) One such class is where the subject matter is an interest so highly regarded by the law



(for example, personal liberty), that fairness requires that reasons, at least for particular decisions, be given as of right.

(3) (a) Another such class is where the decision appears aberrant. Here fairness may require reasons so that the recipient may know whether the aberration is in the legal sense real (and so challengeable) or apparent;

(b) it follows that this class does not include decisions which are themselves challengeable by reference only to the reasons for them. A pure exercise of academic judgment is such a decision. And

(c) Procedurally, the grant of leave in such cases will depend upon prima facie evidence that something has gone wrong. The respondent may then seek to demonstrate that it is not so and that the decision is an unalloyed exercise of an intrinsically unchallengeable judgment. If the respondent succeeds, the application fails. If the respondent fails, relief may take the form of an order of mandamus to give reason

**\**Lister v CEIC*, CACV 172/2012 (unrep., 25 April 2013)**

Facts	Owners of a building applied for JR to challenge a decision not giving reason; owners claimed they are affected by the construction regarding govt resuming the sub-strata 225 metres under the building; applicants cannot rely on statute, but switch to common law
Ruling	<ul style="list-style-type: none"> <li>• Para 19: No general duty to give reason under common law;</li> <li>• 2 exceptions: Para 21 <ul style="list-style-type: none"> <li>○ <b>The first is where the decision appears aberrant</b>, so that the reasons for reaching that decision should be made known to the recipient so that he may know whether the aberration is a legal one (and so challengeable) or apparent.</li> <li>○ <b>The second is where the decision engages an interest</b> such as personal liberty <b>that is so highly regarded by the law</b> that fairness requires that reasons be given as of right.</li> <li>○ Note: principles developed out of; no difference of principles derived from common law on questions on fairness</li> </ul> </li> <li>• Para 23, 25, 26: the case <b>does not involve fundamental rights; decision is not aberrant</b>; does not fall within the two exceptions</li> <li>• Para 26: Argument being that it would affect the re-development potential; a govt scheme providing fair compensation (which is an open and transparent process); not sufficiently regarded as question of law</li> <li>• Para 28: no statutory duty; indicates that they have thought about the question and decided not to give reason; relevant consideration for the court that there is already a detailed compensation scheme, which is not flawed and inadequate; applicants are not really that affected</li> <li>• Para 29: it is a <b>broad macro-economic policy</b>; is an exercise of weighing potential disruption and harm to private interests, for which compensation may</li> </ul>

	<p>be payable, against the public benefit from the new railway scheme... do not obviously lend themselves to the giving of reasons</p> <ul style="list-style-type: none"> <li>• Para 30-31: during the stages of the matter, there is <b>an open and transparent process dealing with objection</b>; it was a <u>mature decision after public consultation</u>; does not show unfairness</li> <li>• Para 32: consider <b>nature of the matter</b>: technical issues in which court does not deal with; (where court deals with rights, interests), leaving the technical to the govt; macro-social/economic question not susceptible to impose duty to give reason</li> </ul>
Note	<p>Court considers:</p> <ul style="list-style-type: none"> <li>• Look at all facts, whether as a matter of fairness, the decision maker ought to give reasons;</li> </ul>

### *Pearl Securities Ltd v Stock Exchange of Hong Kong [1999] 2 HKLRD 243*

Facts	to be a registered member, ought to satisfy 3 conditions (shareholder; the Council of the Stock Exchange refused to approve an application for corporate membership of the Stock Exchange (known as 'blackballing'); which is by what individual member think
Issue	No knowing who imposes the decision and how the decision is made
Ruling	<p>Given the rarity of the occasions on which an application for corporate membership had been blackballed, especially after the approval of the membership committee, the Council's rejection of the application was an 'absolutely classic' example of a decision which appeared to be <b>aberrant</b>.</p> <ul style="list-style-type: none"> <li>• 259D, 261: <b>the rarity of the occasion</b>; and the commission has considered all the factors; suggesting that there should be reasons</li> <li>• <b>When the decision is inconsistent to previous decisions</b>, cry out for reasons why decision marker deviated from them</li> </ul>
Held	Court of Appeal held that the Council was under a duty to give reasons.
Note	Where a decision appears aberrant without reasons, then it will have to be explained to assess the decision's legality

### *Secretary for Security v Prabakar (2004) 7 HKCFAR 187*

Facts	Deporting
Ruling	<ul style="list-style-type: none"> <li>• Para 43: <b>Standard of fairness; no universal set of test</b> applicable to all situations, examination of all aspects relating to the decision in question, including its context and its nature and subject matter</li> <li>• Para 44: <b>fundamental rights</b> &gt; higher standard of fairness</li> <li>• Para 47-49: secretary not entitled to just follow the UNHCR's decision without knowing its reasons and without independent investigation; demonstrating that the decision is unfair, no intellectual process of conducting its own investigation</li> </ul>

	<ul style="list-style-type: none"> <li>• Para 51: what fairness requires in this circumstances: gives adequate reasons; the law requires <u>addressing all the points in a way that is easily understood by parties</u></li> <li>• see para p290j-291D &amp; G of Oriental for adequate reason: <b>address substantial/serious issue</b> (not required to address all issues raised by the party; as it would waste resources and cause inefficiency); <b>some cases may speak for themselves</b> (not just stating the conclusion, but when there is obviously a reason why there is no need to give reasons);</li> </ul>
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*Smart Gain Investment Ltd v Town Planning Board, HCAL 12/2006 (unrep., 6 November 2007)*

Facts	Applicant challenge town planning board decision (where the area is zoned as conversation area CA); applicant's land fall within the area & objected the zoning of the area; board refused to amend the zone to meet applicant's objection; JR, applicant claimed TPB failed to give reason and a whole scale copying of govt' decision, without applying judgment into the decision
Ruling	Para 100-105: copying per se may not be conclusive but it may <u>indicate whether the process as a whole was fair</u> ; reason being that it may raise issue as to <u>whether the board has properly considered the positions of both sides</u> before reaching the judgment (encourage decision maker to think about the issue carefully); where the copy is to the extent that may <b>affect public confidence</b> it could be problematic
Note	Whether decision maker may savage their case by putting reasons to their decision? put in additional material to justify their decision? see case 10 Ermakov: below

*R v Westminster City Council, ex p Ermakov [1996] 2 All ER 302*

Facts	applicant applied a house where he and his family is the owner; decided that he became homeless intentionally which is required by statue; applicant challenged decision by JR, made affidavit to give reasons, later a different reason was given
Ruling	<ul style="list-style-type: none"> <li>• Additional reasons may be permissible; but <b>court being cautious to the additional reason given</b></li> <li>• Court applying <b>susceptible view</b>, take a cautious approach on the decision</li> <li>• p.315H: more caution on the additional reason</li> <li>• <b>policy reason</b> (p.316) <ul style="list-style-type: none"> <li>○ To permit wholesale amendment or reversal of the stated reasons is inimical to the purpose of informing the parties why the parties lost in case</li> <li>○ encourages sloppy decision making (additional reasons being a second thought to remedy an otherwise fatal error exposed by JR)</li> <li>○ if initial reason given show that the decision is flawed, court would not allow them to put the reason fresh out to savage the decision</li> </ul> </li> <li>• but <u>does not mean that the parties cannot do so</u> to submit bona fide exchange after the decision is made; as after the decision is made there could be genuine discussion, and decision maker may change their mind (good administration as</li> </ul>

	the final goal, encourage good decision making)
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### *PVQ v Permanent Secretary for Security [2021] HKCA 444*

Ruling	<p>Para 41-42: relief, 3 alternatives</p> <p>(1) court may order decision maker to <b>give reason</b>;</p> <p>(2) in a case where the reason demonstrate the decision is flawed and illegal, court may order that <b>decision be quashed</b></p> <p>(3) court accepting the duty to give reason and that is not given, <u>but do not regard that the party is treated unfairly</u>: not ordering any relief (due to the fundamental reason of public law not to give relief that is useless on ground of there is no unfairness); <b>no relief granted</b></p>
Note	<p>when advising clients: <u>ascertain the objective of the client</u>; to know the reason or to quash the decision (argument would be focus on the reason given initially and that no further reason is required as the decision itself is unlawful and seek to quash it); avoid the third situation</p> <ul style="list-style-type: none"> <li>• <u>reason challenge is a weak challenge</u>, as the outcome might well be court ordering decision maker to give reasons, and the outcome might nevertheless be the same</li> </ul>

## **2. Rule against bias**

### **\*R v Bow Street Metropolitan Stipendiary Magistrate Ex p Pinochet Ugarte (No.2) [2000] 1 AC 119**

Facts	Involving Augusto Pinochet, the former President of Chile, who had been arrested in London and claimed immunity as a former head of state. His legal entitlement to immunity was decided by a bench including Lord Hoffmann, who had links with Amnesty International which had campaigned against Pinochet.
Issue	whether Lord Hoffmann's links with Amnesty International were such as to give the appearance that he might have been biased against Pinochet.
Ruling	<p><i>As explained by Lord Hutton, "the links . . . were so strong that <b>public confidence in the integrity of the administration of justice</b> would be shaken if his decision were allowed to stand"</i></p> <ul style="list-style-type: none"> <li>• P129E: this case is not about actual bias, no evidence showing Lord Hoffman has actual bias</li> <li>• P132G: but about appearance bias: "there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased"</li> <li>• 132H-133B: discussion of the <b>two situation of appearance bias</b> <p>(1) <i>'if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification.'</i></p> <p>(2) <i>'Where a judge is not a party to the suit and does not have a financial interest</i></p> </li> </ul>

	<p><i>in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.'</i></p> <ul style="list-style-type: none"> <li>• 133B-C: which situation the case falls into: found bias as a matter of fact vs having interest of that proceeding; <b>The fact of judge having interest is sufficient to cause doubt</b></li> <li>• 133H-135G: principle does not only apply where proprietary interest is at stake, as long as there is a cause that the judge is identified in the case</li> </ul>
Held	The court held that the links with Amnesty disqualified Lord Hoffmann, and the decision in which he participated was set aside.
Note	extending automatic disqualification where a judge had a pecuniary or proprietary interest in the outcome of the decision to one in which his interest was neither pecuniary nor proprietary.

**\*Deacons v White & Carter (Councils) Ltd [2003] 6 HKCFAR 322**

Facts	P, law firm, against former partner, judge excused himself as he is a friend of one of the firm; challenged bias in the interlocutory
Ruling	<ul style="list-style-type: none"> <li>• Test for apparent bias (Para 18-24) <ul style="list-style-type: none"> <li>○ English: <b>Test of real danger of bias</b>, objective test</li> <li>○ In other counties: reasonable apprehension of bias test (reasonable likelihood, whether there was suspicion of bias through the eyes of the reasonable man who was aware of the circumstances)</li> <li>○ <b>Difference:</b> lies in the former test focused on <u>the court's view on bias</u>, looks at facts and come to the fact that whether there is real danger; vs <u>the latter focus on the public perception</u>, impression created by the judge <u>from the view of the fair-minded and informed observer</u></li> </ul> </li> <li>• Para 24: <b>2 stages of the test</b> <ol style="list-style-type: none"> <li>(1) Court first <b>ascertains all circumstances</b> which have the bearing to suggest the judge is biased; <ul style="list-style-type: none"> <li>○ E.g., <u>Whether the judge was aware</u> of the key facts that his frd is a partner in the law firm, and whether the frd has an interest in the outcome (if no sign showing he knew there)</li> </ul> </li> <li>(2) Whether those would lead to a <b>reasonable and fair observer/bystander</b> to conclude that there could be bias <ul style="list-style-type: none"> <li>○ E.g., whether a reasonable and fair observer/bystander would consider there is bias (objective test)</li> </ul> </li> </ol> </li> <li>• Para 16: attributes of a fair bystander; objective test</li> </ul>
Note	Apparent bias case

## Chui v Cheng [2023] 3 HKLRD 950

Ruling	<ul style="list-style-type: none"> <li>• Para 51: <b>apparent bias test</b>; reasonable and informed person <ul style="list-style-type: none"> <li>○ <i>the question is “whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not brought or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and the submissions of counsel”</i></li> </ul> </li> <li>• Para 52: <b>permissible</b> for the judge to have <b>preconceived views</b> <ul style="list-style-type: none"> <li>○ <i>‘The fact that a judge has some preconceived views, or has expressed such views, on a disputed issue or on the merits of a case is not sufficient to establish apparent bias’</i></li> <li>○ but <b><u>not permissible that judge turns blind eye on the opposite side</u></b>  <i>‘What is required to be shown is that the judge is not willing to listen fairly to argument contrary to such views’</i></li> </ul> </li> <li>• Para 53: <b>judicial intervention</b> <ul style="list-style-type: none"> <li>○ <u>asking question per se is not problematic</u> i.e., judges asking question, not objectionable of simply asking question to counsels, on discussion on law, cannot say this is preconceived views but to clarify)</li> <li>○ vs <u>intervening in evidence</u> (asking too many question on the victim, where this is usually counsels’ job to cross-examine the parties), intervening to the extend to dissent or remain above the arena, takes over the role of one party’s representation</li> </ul> </li> </ul>
Note	<p>Apparent bias case: Predetermined issue; show that parties might not have a fair hearing and process</p> <ul style="list-style-type: none"> <li>• Not a JR case, but gives a flavor on the topic</li> <li>• Side note: criminal case more concerned that judges asking above the arena</li> </ul>

## Granton Natural Resources Co Ltd v Armco Metals International Ltd (HCCT 5/2012, 7 Dec 2012)

Ruling	Para 21: the other school of thoughts; actual and apparent bias are the same, where the difference lies in the degrees
Note	Not a JR case



## Week 5 – Illegality

### Analytical Framework in Assessing Legality

*HKSAR v Chan Chun Kit (2022) 25 HKCFAR 191*

Held	<p>Para 10-11: Principles of statutory interpretation</p> <ul style="list-style-type: none"> <li>• <b>Modern approach:</b> consider <b>context</b> and <b>purpose</b>, what is the mischief the statute is to combat</li> <li>• Tension between words and the purpose: but cannot simply look at the purpose, actual words are important too</li> <li>• Context here: taken in its widest sense (including history of the provision, e.g., statutory amendment, showing the reason behind the change)</li> </ul>
Note	<p>Not in common law, otherwise it would be hard to identify</p> <p>One approach: <b>purposive approach</b>, not just read it literally, but the purpose <u>underlined</u>, informing the reading of the words to resolve ambiguity</p>

1. A statute may say “Decision-maker can do X”; the decision-maker in purported exercise of that power does Y. In such a case **Y clearly exceeds the authority** and is *ultra vires*

*No.27 Building Authority v Appeal Tribunal (Buildings) [2016] 1 HKRLD 1381*

Facts	Appeal Tribunal (Buildings) — decision of chairman ordering Building Authority to disclose documents for inspection under s.6(3) — Disclosure decision – statute states the tribunal can make decision
Issue	Whether the chairman alone has the power to make decision
Held	<p>chairman alone does not constitute Tribunal, on his own has no power; no underlined statutory power; order could only be made by chairman and members and not by chairman alone</p> <p>p1382:  <i>‘Since s.2 of the Regulation defines “Tribunal” in relation to an appeal as the tribunal appointed under s.48(1) of the Buildings Ordinance (Cap.123), which <b>consists of a chairman and not less than two members</b>, the reference to “the Tribunal” in s.6(3) was the chairman and the members, unless the context required a different view to be taken.’</i></p>
Note	Pure ultra vires case; decision maker simply has no power to make decision

*No. 7 Re Sea Dragon Billiard and Snooker Association [1991] 1 HKLR 711*

Facts	<p>Fire Hazard Abatement Notice - S.9 Fire Services Ordinance Cap.95;</p> <p>The director of fire service served a fire hazard abatement notice on A, in which the only way to abate the fire hazard therein is A cease its business at the premises.</p>
Issue	whether the use to which the premises have lawfully been put can amount to a fire hazard



Held	<p>By the interpretation of the ordinance, person must have done something which constitutes a fire hazard other than lawfully running of a business. The power to compel the cessation of business at the premise was not ancillary to the power to issue such notice.</p> <p>The claimed consideration does not fit in statutory description Plain words of the statute: fire hazard from a thing</p> <ul style="list-style-type: none"> <li>• Court concluded that this is not the purpose of the statute</li> <li>• Director has the power under certain circumstances?</li> </ul>
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2. If a decision-maker **unreasonably refuses to use the power** conferred upon him or to consider using such power (“outright refusal to consider the relevant matter”), this frustrates the policy and object of statute

**No. 8: Padfield v Minister for Agriculture, Fisheries and Food [1968] AC 997;**

Facts	<ul style="list-style-type: none"> <li>• Claimants complained to the minister that the prices to be paid for their milk should be increased, as the costs of transport have increased</li> <li>• The price to be paid to the producers is fixed by the Milk Marketing Board, and the cost of transport is to be taken into account when affixing the price</li> <li>• <u>The Minister refused to appoint a committee of investigation</u> due to the political and economic difficulty it would cause if the committee found in favour of the claimants</li> <li>• The claimants applied for judicial review and a mandamus order (ie mandatory order) to compel the Minister to appoint a committee of investigation under s19 Agricultural Marketing Act 1958 which he refused</li> <li>• The Court of Appeal held that the minister’s discretion could not be challenged</li> </ul>
Issue	What is the extent of the Minister’s duty in deciding whether or not to refer a complaint? Does the Minister have an unfettered discretion to refer a complaint?
Held	<p>Appel allowed; the Minister’s reason for refusing to appoint a committee would frustrate the purpose of the Act, by allowing the appeal, judicial review can now be brought to address discretionary powers</p> <ul style="list-style-type: none"> <li>• P1030B: Improper purpose <i>‘Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.’</i></li> <li>• p1033: no reason for refusal</li> </ul>

	<p><i>'The fact that the Minister has given no reasons for his refusal does not mean that his decision cannot be questioned: 'If it is the Minister's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the court must be entitled to act'</i></p> <p>'I have found no authority to support the unreasonable proposition that it must be all or nothing – either no discretion at all or an unfettered discretion p1002 para 23: general nature of the scheme</p>
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#### No.9: Chan Noi Heung v Chief Executive in Council [2008] 3 HKC 452

Facts	Applicants sought to compel the CE to use his powers to set minimum wages for the benefit of cleaners and security guards, where existing wages were considered unreasonably low; an appeal against the dismissal of JR of the CE's powers to set minimum wages in accordance with the Trade Boards Ordinance (Cap 63) (TBO); argued on a more general basis that the CE had failed to consider exercising his powers under the TBO and this amounted to a breach of duty. It was submitted that the CE had frustrated the policy and purpose of the TBO by refusing ever to use the Ordinance.
Issue	Whether Chief Executive obliged to use power under statute to set minimum wages
Held	<p>Held, dismissing the appeal:</p> <p>(1) Section 2 of the Trade Boards Ordinance <b>did not impose an obligation on the Chief Executive to set minimum wages</b>; he retained a <b>discretion</b> whether or not to use his powers under the Ordinance (paras 10, 11).</p> <p>(2) <u>The discretion of the Chief Executive to consider whether to fix minimum wages or not was a wide one but it was not an absolute discretion. He could not irrationally refuse to use the discretion or to consider using it.</u> He was not found to have refused such consideration in the instant case (paras 11, 12).</p> <p>(3) The Chief Executive was entitled to take into account outside circumstances when considering whether to fix minimum wages or not, such as whether any perceived problem of unreasonably low wages was being addressed elsewhere (para 23).</p> <p>(4) <b>The burden was on the applicant</b> to show, by compelling evidence that the Chief Executive had renounced the applicability of the TBO. On the evidence, at no stage had the respondent committed the Government to a position in which the TBO had been renounced at all (paras 24-25, 27).</p>

#### No.11: Wheeler v Leicester City Council [1985] AC 1054

- Not always clear as to the right interpretation of the statute

Facts	a city council discontinued permission for a rugby club to use its facilities for games and training purposes. The decision was taken because three members of the team agreed to serve in the English Rugby Football Union team on a tour of South Africa, where the government administered a policy of apartheid. The tour was alleged to be an endorsement of the apartheid policies of the South African government, and the council claimed that in taking its decision it was exercising its statutory duty under the Race Relations Act 1976 to promote good race relations.
Held	<p>Appeal allowed; The House of Lords held that <u>the rugby club had done nothing legally wrong</u>, and that <u>the council's purported exercise of its statutory power was a misuse of that power</u> and therefore unlawful</p> <p>Neill LJ: the authority "cannot use its statutory powers in order to punish a body or person who has done nothing contrary to English law". Nor could it "exercise its statutory powers in a way which involves some procedural impropriety or some unfairness towards a body or person who has acted reasonably and in no way in a hostile attitude" towards the authority.</p>
Note	<p>1060: Race Relations Act 1976, relevant section:</p> <p>"It shall be the duty of every local authority to make appropriate arrangements with a view to securing that their various functions are carried out with due regard to the need ... (b) to promote ... good relations between persons of different racial groups."</p>

3. If a decision-maker uses the power for a **purpose different** from the purpose of the power-conferring statute

4. If a decision-maker takes into account **irrelevant considerations** or **fails to take into account relevant considerations** (also described as a species of "misdirection in point of law")

### No. 13. Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014

Facts	<p>Local education authority (T) proposing to introduce comprehensive system of education - Scheme approved by Secretary of State – later the Conservatives won the local authority election and reversed the policy (retention of grammar schools).</p> <p>Under s.68 Education Act 1944, the Education Secretary would be entitled to direct the performance of any duty under the act if he was satisfied the local authority's decision was 'unreasonable'. Authority (T) proposing selective entry D to grammar schools - Direction by Secretary of State to implement scheme of comprehensive education</p>
Issue	Whether authority "proposing to act unreasonably"; whether the Secretary of State has given sufficient, or any, weight to this particular factor in the exercise of his judgement
Held	<ul style="list-style-type: none"> <li>Quashed the order; council appealed, appeal dismissed</li> <li>the Education Secretary's decision to reverse the education policy was unreasonable</li> </ul>

	<ul style="list-style-type: none"> <li>• <u>s68 did not empower the Secretary of State for Education and Science to substitute his own opinion for that of the local education authority</u> as to the course of action which it should take, he could only give directions if, on the material before him, he was entitled to be satisfied that no reasonable local education authority would act as the authority in question was proposing to act</li> </ul> <p>1064D-:</p> <ul style="list-style-type: none"> <li>• purpose of the statue being avoiding council from acting unreasonably: <i>'The Act leaves to local education authorities a broad discretion to choose what in their judgment are the means best suited to their areas for B providing the variety of instruction called for by those provisions...'</i></li> <li>• Two courses to choose, and the right to choose was prima facie that of the council alone: <i>'The Secretary of the State's power to overrule their choice by giving them a direction under section 68 to act in some other way that he himself preferred and they did not was exercisable only if he had satisfied himself that the council were proposing to act" unreasonably.'</i></li> <li>• P1065: <i>'the question for the court is, <b>did the Secretary-of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information</b> to enable him to answer it correctly?'</i></li> <li>• Meaning of unreasonable p.1074-1075: 'Unreasonable in s.68 means 'the course that is proposed is one that in the circumstances no reasonable local authority, with the interests at heart of the education of the young in its area, would take'</li> <li>• The secretary failed to consider p.1977: <i>'...the extent to which head teachers would be likely to persist in a policy of non-cooperation if he himself was known to have declined to stop the council from proceeding with their plan.'</i></li> </ul>
Note	<ul style="list-style-type: none"> <li>• Due duty to act to inquire, not a defence for decision maker to say the consideration has never come to their mind</li> </ul>

#### No.14 R v Somerset County Council exp Fewings [1995] 1 WLR 1037

Facts	The council acquired a large piece of land in 1921 – land which featured matured woodlands and a population of red deer. Acting under s.120 of the Local Government Act, which allows councils to acquire and maintain land for “ <b>the benefit, improvement or development of their area</b> ,” the council decided to <u>ban deer hunting on the land because hunting is unnecessarily cruel</u>
Issue	Whether decision lawful—Local Government Act 1972 (c. 70), s. 120
Held	The council’s decision to ban hunting was quashed. This was because the council <b>failed to take into account what would be for the “benefit, improvement or development of their area”,</b> <u>the prescribed objects</u> or to <u>appreciate the overriding</u>

	<p><u>statutory constraint</u> to which as local authority landowners, as distinct from private landowner, and were <u>motivated instead by ethical or moral considerations relating to hunting</u>.</p> <ul style="list-style-type: none"> <li>• Bingham made a clear distinction between private persons and public bodies → public bodies may only take into account lawful considerations when exercising their discretion</li> <li>• Per Sir Thomas Bingham M.R. Given the broad language of section 120(1) (b) neither the cruelty argument nor the contrary argument is necessarily irrelevant to consideration of what is for the benefit of the area (post, p. 1045F-G).</li> <li>• p.1048: minority view: cruelty argument can be relevant to public interest and good (i.e. human wellbeing for many will depend upon their satisfaction to animal welfare)</li> <li>• p1049 Dissenting: <b>3 categories of consideration</b> <ol style="list-style-type: none"> <li>(1) First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had.</li> <li>(2) Second, those clearly identified by the statute as considerations to which regard must not be had.</li> <li>(3) Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. (dissenting view on cruelty argument is also a consideration being one, decision maker entitled to regard it as decisive)</li> </ol> </li> <li>• in practice the 3<sup>rd</sup> one is more practical than 1<sup>st</sup>?</li> </ul>
Note	<p>The crown has the power to bring proceeding (R); exparte?</p> <p>Judges with diff views but leading to the same conclusion</p> <p>Can also be seen as pure ultra vires?</p>

## No. 28 Riaz Hussain v Permanent Secretary for Security [2020] HKCFI 253

Facts	<p>JR of the decision of Permanent Secretary for Security refusing applicant's request for a suspension or rescission of a deportation order made against him; applicant was convicted of two counts of "indecent assault"; while serving his sentence the Immigration Department informed the 1st Applicant of an intended deportation against him and served on him a "Notice of Consideration of Deportation", applicant objected to the intended deportation on the ground that his wife, the 2nd Applicant, was a Hong Kong permanent resident and he wished to stay with her in Hong Kong.</p> <p>Applicant challenged decision on The [Permanent Secretary] "Failing to take into account relevant considerations (i.e. whether the offences for which the 1st Applicant was convicted were the most serious so as to justify [the refusal of]</p>
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	suspension/rescission [of the Deportation Order]; and whether the 1st Applicant had been rehabilitated when he was released from prison as his dependent visa was not cancelled, and he successfully applied for a visa renewal of 3 years.”
Held	<ul style="list-style-type: none"> <li>• Para 22: the ordinance (from which the Deportation Order was made)</li> <li>• Para 27-28: “as he thinks fit”: no mandatory description of what the decision maker ought to take into account; discretion granted to decision maker</li> <li>• Para 30: public interest; had been taken into account during decision making (i.e. recognised that the conviction were not the worst compared to other cases where deportation orders were issued, but considered the seriousness of the applicant’s offence, it will not be in the public interest to allow him to remain in or come to Hong Kong again)</li> <li>• Leave was rejected</li> </ul>
Note	Case where decision maker has taken into account relevant consideration to reach the decision

5. If a decision-maker **fetters its own discretion** (usually in context of rigid policy)

**No.19 British Oxygen Co Ltd v Board of Trade [1971] AC 610**

Facts	British Oxygen Co applied for grants for their gas cylinders which cost £20 each; their application was refused. British Oxygen Co applied for judicial review on the grounds that it was unreasonable to disregard the application simply because the cylinders were under £25 each
Held	<p><b>Extent of discretion</b></p> <ul style="list-style-type: none"> <li>• ‘Does the Act read as a whole indicate any policy which the Board is to follow or even give any guidance to the Board? If it does then <b>the Board must exercise its discretion in accordance with such policy or guidance</b> (Padfield)...But I can find nothing to guide the Board as to the circumstances in which they should pay or the circumstances in which they should not pay grants to such persons’: p. 633D – p. 634A</li> <li>• ‘There are two general grounds on which the exercise of an unqualified discretion can be attacked. <b>It must not be exercised in bad faith, and it must not be so unreasonably exercised as to show that there cannot have been any real or genuine exercise of the discretion.</b> But, apart from that, if the Minister thinks that policy or good administration requires the operation of some limiting rule, I find nothing to stop him.’: p. 634E</li> </ul> <p><b>Fettering of discretion</b></p> <ul style="list-style-type: none"> <li>• ‘The general rule is that anyone who has to exercise a statutory discretion <b>must not ‘shut his ears to an application’</b> (to adapt from Bankes L.J. [in Kynoch [1919] 1 KB 176] on p. 183)...There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. <b>What the authority must not do is to refuse to listen at all</b>’: p. 625B</li> </ul>



	<ul style="list-style-type: none"> <li>• ‘a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say’: p. 625B</li> </ul>
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#### No.20 Wise Union Industries Ltd v Hong Kong Science and Technology Parks Corp [2009] 5 HKLRD 620

Facts	Hong Kong Science and Technology Parks Corp had a “standing policy” since 1996 that disallowed concrete batching plants on its industrial sites (the Concrete Policy), dismissed X1 and X2’s application to set up some kind of plants.
Issue	Xs sought to judicially review the decisions, arguing that: (a) in X1’s case, C had fettered its discretion by rigidly adhering to the Concrete and Asphalt Policies without real consideration of the merits of its application; and (b) in X2’s case, there had been an unlawful sub-delegation of the Committee’s duty to determine its application to C’s Management.
Held	<p>Held, dismissing X1’s application, but allowing X2’s application, that:</p> <ul style="list-style-type: none"> <li>• A decision-maker must not apply his policy blindly and rigidly so as to “fetter” his discretion. The policy must fairly admit of exceptions. So a decision-maker like C was: <b>(a) not entitled to adopt a policy which precluded it from departing from or taking into account the circumstances of the particular case</b>; and (b) equally, it was <b>unacceptable for a policy which, while on the face of it did not preclude the decision-maker from departing from it, was implemented as if it were such a policy</b>. Here, X1 had not established that the Committee had rigidly adhered to the Concrete and Asphalt Policies in rejecting its application.</li> <li>• In X2’s case, the determination by C’s Management was unauthorised</li> </ul>

#### No.29 Lo Yuet Hing v Hong Kong Housing Authority [2002] 4 HKC 391

Facts	Elderly, living in public housing, adopted son convicted of drug trafficking, drug found in the flat; HA terminated their residency; challenged decision on basis that the lady has no knowledge on the incident and HA has no authority to displace person who is not involved in the matter
Held	<ul style="list-style-type: none"> <li>• The knowledge or the lack of knowledge on the part of the tenant of the illegal activities that had been carried on in the premises was a relevant factor or consideration in the exercise of the statutory power and discretion to issue a notice to quit</li> <li>• Despite the difficulty of investigating the truthfulness of the claim of ignorance or innocence could not justify the failure to perform the task</li> <li>• There was no meaningful consideration of other relevant factors in the deliberation process</li> </ul>



	<ul style="list-style-type: none"> <li>• Para 27: notice and internal guideline of what to do in these circumstances; judge found that they are not rules</li> <li>• Para 30</li> </ul>
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6. If a decision-maker **wrongfully delegates his power**

7. If a decision **makes an error of fact** – but note the **high standard of review** for factual errors

#### No.25 Smart Gain Investment Ltd v Town Planning Board (HCAL 12/2006, 6.11.2007)

Facts	Town planning JR, decision that the area is left for the green, rezoning the area, P challenged
Held	<ul style="list-style-type: none"> <li>• a finding by the board that the land in question comprised of “wooded slopes and river valley” was found to be plainly wrong on evidence; factually incorrect that there are many species in the area</li> <li>• Since this error led to objective unfairness, the decision was quashed and the case was remitted to the board for reconsideration.</li> </ul>
Note	High threshold, need to show that the facts are wrong; rare challenge, threshold

#### No. 15 Capital Rich Development v Town Planning Board [2007] 2 HKLRD 155

Facts	<p>The Urban Renewal Authority published a Development Scheme for a residential area, and a draft plan was submitted to the Town Planning Board. Objections were made by the owners of various buildings within the proposed development area, who wanted their site to be excluded from the proposed development area. The Board refused to change the Development Scheme.</p> <p>The evidence suggested that <u>the Board relied on financial implications which would follow from excluding the objectors' site from the Scheme</u> as a consideration in refusing to change the Scheme.</p>
Held	<ul style="list-style-type: none"> <li>• The court regarded <b>financial viability as a relevant consideration</b>;</li> <li>• however Cheung JA opined that when the Board relied on financial viability as its basis for asserting that the Scheme would be jeopardised there was "insufficient evidence for it to come to such a conclusion".</li> <li>• Accordingly, "[i]n the context of public law the [Board] had taken an <b>irrelevant consideration</b> into account".</li> </ul>
Note	Odd line of reasoning: an ostensibly relevant consideration (financial viability) was taken into account, but as there was insufficient evidence to support the contention that the Scheme would be financially jeopardised, the ostensibly relevant consideration (financial viability) was concluded to be an irrelevant consideration.

## Week 6 – Unreasonableness and Irrationality

### 1. Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

Facts	W was empowered to grant licences for Sunday entertainment and impose conditions on these licenses. A movie theatre was licensed, subject to the condition that no children under 15 were permitted on Sundays. Decision challenged.
Issue	Was Wednesbury's decision unreasonable?
Held	<p>Appeal dismissed, the decision was reasonable based on the Wednesbury test laid down in this case</p> <p><b>Reasonableness review</b></p> <ul style="list-style-type: none"> <li>A decision can be unreasonable on two grounds: <ul style="list-style-type: none"> <li>1) improper purpose, mala fide actions or considering irrelevant matters, and</li> <li>2) Wednesbury unreasonableness</li> </ul> </li> <li><b>Wednesbury unreasonableness</b> is a <u>decision so unreasonable that no reasonable decision maker could ever have come to it</u> <ul style="list-style-type: none"> <li>Hartmann J: "<u>so flawed that no reasonable decision maker could have reached those decisions</u>"</li> <li>"beyond rational justification"</li> </ul> </li> <li>The court's consideration of what is 'reasonable' is irrelevant; it must be unreasonable in the Wednesbury sense</li> </ul> <p>Current case</p> <ul style="list-style-type: none"> <li>The first ground of unreasonableness was not applicable to the facts of the case</li> <li>Banning children on Sundays was within the range of decisions a reasonable decision maker could have made, the facts 'do not come anywhere near' the Wednesbury standard: p.231</li> </ul> <p>P229-230:</p> <ul style="list-style-type: none"> <li>Meaning of unreasonableness: "it is so unreasonable that it might almost be described as being done in bad faith"</li> <li>Court concluded that the decision is reasonable</li> </ul>
Note	<ul style="list-style-type: none"> <li>This case was significant for creating a standardised test of unreasonableness with a very <b>high threshold of 'something overwhelming'</b> (p.230)</li> <li>The allegation of substantive unreasonableness is "<u>often asserted but seldom with success</u>" (Lau Kung Yung v Director of Immigration)</li> <li>Over the years the threshold has fallen and now Wednesbury reasonableness is applied similarly to proportionality by English courts</li> </ul>

## 2. Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374

Facts	In the 1980's, with the United Kingdom under the Conservative government led by Margaret Thatcher, it was ruled that any and all employees of the Government Communications Headquarters ( <u>GCHQ</u> ) <u>were prohibited from joining any trade union</u> . This decision was justified based on the <u>potential threat to national security</u> , and enforced using an <u>Order of Council</u> which is an <u>exercise of the Royal Prerogative Power</u> .
Issue	By limiting access, or completely refusing access to trade unions to employees, certain individuals affected were not able to rely on certain employment legislative provisions or be represented by a Union.
Held	<p>Held, dismissing the appeal, decision reasonable??</p> <p>Substitutive review: the classic formulation of unreasonableness</p> <ul style="list-style-type: none"> <li>• P410: threshold being; question of the court, conducting a sensitive view of reasonableness:</li> <li>• Lord Diplock: <u>Wednesbury unreasonableness applied to a decision "so outrageous in [their] defiance of logic or of accepted moral standard that no sensible person who had applied his mind to the question to be decided could have arrived at it"</u></li> <li>• Whether a decision falls within this category is a <u>question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system</u></li> <li>• The importance of the case is found in the departure from the unwillingness of the courts to judicially review prerogative powers. <ul style="list-style-type: none"> <li>○ Lord Diplock found that where a person's '<b>private rights or legitimate expectations</b>' are effected by the execution of the prerogative power, then that execution of power should be <b>amenable to review</b>.</li> <li>○ Lord Fraser and Lord Brightman came to the same conclusion based on the view that where the <u>prerogative power was delegated from the monarch</u>, the exercise of that power could be reviewed via judicial review.</li> </ul> </li> </ul>
Note	Following the GCHQ case, it was found that prerogative powers (bar for national security reasons) can be judicially reviewed for legality

3. **Lau Kong Yung v Director of Immigration (1999) 2 HKCFAR 300, 334.**

Facts	Lau Kong Yung and his 16 fellow applicants were mainland Chinese-born children of Hong Kong permanent residents and on that basis claimed to be entitled to the right of abode. The Director of Immigration made removal orders against them on the grounds that they had arrived in Hong Kong on two-way permits and subsequently breached their limits of stay, and did not hold certificates of entitlement to demonstrate their right of abode (which would include the right not to be subject to a removal order). They sued the Director in the Court of First Instance to quash the removal orders, stating that the Director had acted unlawfully in refusing to consider other evidence that they had the right of abode.
Held	<p>P334</p> <ul style="list-style-type: none"> <li>• Wednesbury unreasonableness not as the ground, but constitutional argument</li> <li>• the threshold is necessarily high: “where a department head of government is entrusted by the Legislature with administrative responsibility it is not for the courts to say how those responsibility should be discharged”</li> <li>• Illegality and irrationality: two ends of the spectrum of Wednesbury unreasonableness <ul style="list-style-type: none"> <li>○ Illegality: e.g., decision maker taken into account consideration outside the scope of the statute, gone outside the statutory purpose</li> <li>○ Irrationality: Wednesbury unreasonable</li> </ul> </li> </ul>
Note	Case following closely on the heels of the landmark Ng Ka Ling v. Director of Immigration decision earlier that year, the first case in which the CFA had to take into account an NPCSC interpretation in applying the Basic Law.

4. **Zestra Asia Ltd v Commissioner of Transport [2007] 4 HKLRD 722.**

Facts	Zestra produces product an oil for sexual arousal and wanted to have registered vehicle licence and wanted name Zestra on licence plate – initially application refused as thought that this is obscene but Zestra decided to JR the decision
Held	<p>Decision held to be Wednesbury <b>unreasonable</b> and <b>quashed</b></p> <ul style="list-style-type: none"> <li>• the problem lay in the <b>process</b> by which the decision was made</li> <li>• <b>Factors which in its view vitiated by the process</b> by which the decision was made: <ul style="list-style-type: none"> <li>(1) <b>The Commissioner had failed to show a “cogent and objective basis” for his view:</b> there has been no automatic conclusion from the fact that the local population was predominately ethnically Chinese that the general public would be likely to be upset by a reference to a sexual intercourse.</li> <li>(2) <b>Consultation of three bodies in the course of making his decision only provided incoherent statements</b>, but not substantial support for the Commissioner’s conclusion.</li> </ul> </li> </ul> <p><b>Procedural review adopted:</b></p>

	<ul style="list-style-type: none"> <li>• The vitiating factors related to the process leading to the decision, rather than the decision itself</li> <li>• The decision maker had substantively remained within the four corners of his statutory powers</li> <li>• The deficiencies not as “overwhelmingly” egregious as they should be regarded as impairing the legality of the decision <ul style="list-style-type: none"> <li>▪ if applying the Wednesbury unreasonableness, the test would not be satisfied</li> <li>▪ court here does not apply the substantive review</li> </ul> </li> <li>• Held that no reasonable decision maker would have made his decision <i>in this way</i> (procedural review)</li> </ul>
Note	<ul style="list-style-type: none"> <li>• <b>The lack of cogent, objective and rational justification for a decision</b> applied here, is a <b>lower standard</b> than that encapsulated in the traditional Wednesbury standard</li> </ul>

5. **Society for Protection of Harbour Ltd v Chief Executive in Council (No.2) [2004] 2 HKLRD 902.**

Facts	Decision regarding reclamation of harbour; ordinance to protect it; the society against the reclamation
Held	<p>p.928 para 73- :</p> <ul style="list-style-type: none"> <li>• <b>departure from Wednesbury test</b> <ul style="list-style-type: none"> <li>○ the test itself does not tell the principle of intensity of review):</li> <li>○ it is only a <b>flexible test</b>, the standard is not set and stone, the classic standard can vary e.g., when fundamental human rights are involved</li> <li>○ also implying that Wednesbury test is a loose test itself?</li> </ul> </li> <li>• Something more rigorous than the standard Wednesbury test is required <ul style="list-style-type: none"> <li>○ But not as the level of anxious scrutiny applied when there is a substantial interference with a fundamental human right</li> </ul> </li> </ul>

6. **R v Secretary of State for the Home Department, ex p Bugdaycay [1987] AC 514.**

Facts	The Pakistani government issued a decree <u>introducing new and additional discrimination against members of the sect to which the claimants belonged</u> . Shortly after this, the claimants arrived In the United Kingdom claiming political asylum, on the basis of the steps taken by the Pakistani government. The Secretary of State for the Home Department <u>refused their applications</u> on the basis that he considered <u>they did not in fact face persecution if they were returned to Pakistan</u> , nor did they have a well founded fear that they would do so as required by international asylum law. The claimants applied for judicial review of the Secretary of State’s decision.
Issue	<ul style="list-style-type: none"> <li>• the scope of the court’s jurisdiction to review the decision made by the Secretary of State; whether the decision itself was substantively unsound</li> </ul>

Held	<ul style="list-style-type: none"> <li>although it was for the Secretary of State to determine whether, on the facts of the specific case, the applicants faced a risk of persecution if they were returned to Pakistan, or had a well founded fear of this, <b>the Court had jurisdiction to review this decision on the grounds of Wednesbury unreasonableness.</b></li> <li>This <b>standard of review</b> required that the decision must be '<u>perverse</u>' or else <u>so unreasonable that no reasonable decision maker could support it in order to warrant the intervention of the court.</u> <ul style="list-style-type: none"> <li>In this case, there was no such unreasonableness and the Secretary of State had not erred in his approach to the decision.</li> </ul> </li> <li>P525H, P525G, P.528H</li> <li>531 E: standard of review; involving <b>fundamental human rights</b>, call for the <b>most anxious scrutiny</b>; court went through all evidence</li> </ul>
Note	<p>Wednesbury unreasonable:</p> <ul style="list-style-type: none"> <li>can mean different things in different context, does not itself tells what standard it should be, does not specifically tells how intense the test should be</li> <li>different threshold in some cases, the court might not even examine all the evidence, depending on how hard the court would judge the case;</li> </ul> <p><b>High intensity of review</b></p>

#### 7. **R v Ministry of Defence, ex p Smith and Ors [1996] QB 517.**

Facts	<ul style="list-style-type: none"> <li>The Ministry of Defence created <u>a policy to dismiss any personnel known to be homosexual or engaging in homosexual activity</u></li> <li>4 personnel were dismissed from the armed forces. They applied for <u>judicial review on the grounds of irrationality</u>, violation of article 8 of the ECHR (private and family life), and the European Equal treatment directive</li> <li>The divisional court held that the policy was not so outrageous to be unreasonable; S appealed</li> </ul>
Issue	Was it unreasonable to ban all homosexuals from the armed forces?
Held	<p>Appeal dismissed; it was <b>reasonable</b> to ban all homosexuals from the armed forces</p> <p>On irrationality generally</p> <ul style="list-style-type: none"> <li>The more <b>substantial the interference with human rights</b>, the more is needed by way of justification to prove the decision is reasonable (p.554)</li> <li>Sir Thomas Bingham MR: (p.556) <ul style="list-style-type: none"> <li><b>"The greater the policy content of a decision, and the more remote the subject matter from ordinary judicial experience, the more cautious the courts must be before holding a decision to be irrational"</b></li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ “Where decisions of a <b>policy-laden, esoteric</b> or <b>security based</b> nature are in issue even greater caution than normal must be shown in applying the test, but the test itself is sufficiently <b>flexible</b> to cover all situations.”</li> </ul> <p>In the present case</p> <ul style="list-style-type: none"> <li>• The policy cannot be stigmatised as irrational since it was <u>supported by both houses of Parliament</u> and <u>by those the Ministry looked to for advice</u> (p.558)</li> <li>• The Ministry did not have time to consider the full range of arguments put before the court (such as the issues with a ‘blanket rule’ on homosexuality, and the disciplined nature of the army), which means the decision was not, at the time, irrational (p.558)</li> <li>• The <b>threshold of irrationality is a high one</b>, and was not crossed in this case. (p.558)</li> </ul> <p><b>The Human rights issue</b></p> <ul style="list-style-type: none"> <li>• The convention requirements are only binding in international law and not enforceable by domestic courts (p.558)</li> <li>• The fact that a minister failed to take account of Convention obligations is not a ground to impugn that decision (p.558)</li> <li>• There is nothing to suggest that the equal treatment directive was concerned with sexual orientation; rather, it was written to prevent sex/gender discrimination (p.560-561)</li> <li>• P.551E –</li> <li>• 554D- : fundamental right involved, more rigid scrutiny</li> </ul>
Note	<p><b>Low intensity of review</b></p> <ul style="list-style-type: none"> <li>• A heightened scrutiny test will be applied when a decision affects human rights, requiring sufficient justification before a decision is held to be reasonable</li> </ul> <p><b>Completing factors:</b></p> <ul style="list-style-type: none"> <li>• Smith was a particularly controversial case, concerning both <b>interference with human rights</b> (which normally requires ‘heightened scrutiny’) and a <b>complex policy matter</b> (which normally demands judicial deference)</li> <li>• There is an internal contradiction since many cases would involve both human rights and complex policy matters, thus <u>pulling the standard of review in opposite directions</u></li> </ul> <p>On appeal to the Strasbourg Court (Smith and Grady v United Kingdom (1999) 29 EHRR 493), it was held that the standard of review was still not high enough as compared to proportionality review and thus the case was overturned</p>



8. **Pagtama Victorina Alegere v Director of Immigration, HCAL 13/2014**

Facts	The complainants sought judicial review of a decision by the Director of Immigration to reject applications by the mothers or grandmothers of permanent resident children for permission to remain in Hong Kong to take care of them.
Issue	Immigration and the application of international treaties. The Court reiterated that the CRC has not been domesticated into Hong Kong law, and does not confer enforceable rights to the applicants to allow them to extend their stay to take care of the children.
Held	<p>The Court confirmed that the CRC has no legal force in Hong Kong because it has not yet been incorporated into domestic law. The Court considered further that, even if the CRC applied in Hong Kong domestic law, <u>the reservation entered by Hong Kong clearly excludes its application to immigration legislation</u>. This means that the complainants could not rely on the Convention to require the Director to consider the best interests of the child, nor could they have a legitimate expectation that the Director would consider Article 3 of the CRC. The Court held that there is <u>no general principle in Hong Kong law which holds that the best interests of the child must always be a primary consideration in any case affecting a child's welfare and wellbeing</u>. The best interests of the child will only be a primary consideration in cases where the main focus is to determine the guardianship and maintenance of the child.</p> <p>Para 199-200: Standard of review</p> <ul style="list-style-type: none"> <li>• <b>A sliding scale of review</b> <ul style="list-style-type: none"> <li>○ the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required.</li> </ul> </li> <li>• <b>Conventional Wednesbury test vs the proportionality test</b> <ul style="list-style-type: none"> <li>○ Wednesbury test : where no human rights are engaged (adopted here)</li> <li>○ proportionality test: where human and fundamental rights are engaged and said to be violated</li> <li>○ In between: in the Wednesbury sense, to review with increasing vigilance</li> </ul> </li> </ul>
Note	Court opening to constitutional ground as one ground for JR? Where there can be overlaps

9. **Kong Yunming v Director of Social Welfare (2013) 16 HKCFAR 950.**

Facts	A policy to refuse grant social welfare to non-permanent resident
Held	<p>Para 39-41: proportionality test</p> <p>Social economic policy &gt; light touch view</p> <p>Did not satisfy the proportionality analysis, appeal allowed</p>
Note	Court primarily not familiar with policy case; might be reluctant to rule

## Week 7 Legitimate Expectation

### 1. AG of Hong Kong v. **Ng Yuen Shiu** [1983] 2 AC 629.

Facts	<ul style="list-style-type: none"> <li>Immigration policy, ppl entering into HK from Macau illegally: reach base safely policy ; govt does not look at how ppl enter HK, will not deport them to their origin;</li> <li>govt later announced the cease of policy (immigrant control), now look at individual case with interviews of the immigrants whom are invited to explain the illegal entry</li> <li>On fact, no opportunity for immigrants to explain their entries, despite action taken by immigration department, no opportunity for legal representation</li> </ul>
Held	<p><b>Decision to deport quashed</b>; overturned by court</p> <ul style="list-style-type: none"> <li>Based on legitimate expectation</li> <li>May be based on a statement undertaking by a public authority; if authority acted in another way can cause unfairness, court may intervene</li> <li>On <b>procedure</b>, where promised to follow certain procedure, in the interest of good administration, it should fair implement to follow through with the procedure/promise</li> <li>P.638: <i>"when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty"</i></li> <li><b>Procedural legitimate expectation</b> case: <ul style="list-style-type: none"> <li>(1) Opportunity to be heard</li> <li>(2) Remedies: quash of decision, remittance, director to allow representation of individual, to actually hear the individual <ul style="list-style-type: none"> <li>question for the director to further evaluation, even it might lead to the same conclusion</li> </ul> </li> </ul> </li> </ul>
Note	Leading common law case, privy council appeal from HK

### 2. **CCSU** v. Minister for the Civil Service [1985] AC 374.

Facts	Policy that civil servants are not allowed to join union; GCHQ ensures integrity/security of communication of the govt to the outside; national security affair; previously underwent consultation with trade union (CCSU as one); <u>govt minister had a practice of consulting a trade union</u> on proposed changed to the employment terms of employees)
Issue	argument: departed from past practice, made the decision without consultation with the trade unions, contrary to legitimate expectation
Held	<ul style="list-style-type: none"> <li><b>Procedural</b> legitimate expectation (regarding who the public body consulted)</li> <li><b>Representation</b>: can be from <b>past conduct/practice</b> of the public authority</li> </ul>

	<ul style="list-style-type: none"> <li>○ <u>a course of conduct that is so regular and long-standing</u> to become a representation, such that public would expect that practice would be valid in the future</li> <li>○ does not need to be express e.g., directly communication</li> <li>• Case result: <b>on ground of security interest</b>, govt has intention to not to discuss with the union, sufficient reason why the decision was held to be valid</li> </ul>
Note	3 main grounds of review; an early case dealing with legitimate expectation

### 3. R v. Secretary of State for Education and Employment, ex p **Begbie** [2000] 1 WLR 1115.

Facts	<p>Promised made by a political party who is seeking an election; <u>at time of representation was made, election has not been complete</u>; representation that that certain children holding the school regime would continue to hold that place (independent school receiving subsidy); After the election, no longer able to continue the position at school; claimed on behalf of the child on what the party said that he would continue to have the position; <u>After the representation made, before election, party acknowledged that it was actually a mistake, which later rectified in 6 weeks</u></p>
Held	<ul style="list-style-type: none"> <li>• Appeal dismissed; applicant did not have legitimate expectation</li> <li>• Statement made before the election, at time it was made, it was <b>not made by a public authority</b></li> <li>• After statement is made, it was <b>clarified</b> as mistake, rectified by the party <ul style="list-style-type: none"> <li>○ Even if there is expectation, it cannot be legitimately held</li> </ul> </li> <li>• <b>Proof of reliance</b> is important: pre-election statement; <ul style="list-style-type: none"> <li>○ applicant unable to show detriment reliance within that 6 weeks, as the statement was rectified in 6 weeks</li> <li>○ Wrong to undervalue the importance of reliance</li> <li>○ Very exceptional for this claim to succeed if there is no reliance</li> <li>○ Reliance as the prerequisite to show unfairness</li> <li>○ <i>'It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field</i></li> </ul> </li> </ul>
Note	<p>The peak of the adoption of the doctrine  <b>Substantial legitimate expectation</b>  Overlaps between the grounds but different in substance</p>

4. R v. North and East Devon Health Authority, ex p **Coughlan** [2001] QB 213.

Facts	Elderly lady, suffered from illness, originally kept in hospital; govt had speciality care home for these elderly who suffer from serious diseases; <u>promise made about a new care home being their home for life w/o worrying the need to change accommodation</u> ; but in fact there is <u>proposal that the govt order closure of the house</u> , no alternative plan for the elderly
Issue	<b>Substantive</b> : regarding the outcome and their entitlement to stay there
Held	<ul style="list-style-type: none"> <li>• Substantive: Principle stated broadly, but see facts (strong facts in this case)</li> <li>• Decision quashed: unfairness, substantive legitimate expectation</li> <li>• <b>Strong facts</b>: <ul style="list-style-type: none"> <li>(1) they are of high age</li> <li>(2) they are a small class of ppl (a <b>defined class of ppl</b>)</li> <li>(3) <b>acutely unfair</b> for them; (unfairness)</li> <li>(4) <b>does not involve other macro-economic grounds</b></li> <li>(5) <b>clear misrepresentation</b> directly to them</li> </ul> </li> <li>• <b>classification of cases</b>: 3 categories/possible outcomes to a public authority's promise or representation (Jin: not helpful in his view) <ul style="list-style-type: none"> <li><b>(1) A non-legitimate expectation</b> The public authority is only required to <u>bear in mind its previous policy or other representation</u>, giving it the weight it thinks right, but no more (the <u>weight attached to the expectation</u> is a matter for the decision maker to decide)</li> <li><b>(2) A procedural legitimate expectation</b> Court requires opportunity for consultation and interview <u>unless there is an overriding reason</u></li> <li><b>(3) A substantive legitimate expectation</b> Where the promise or practice has induced a legitimate <b>expectation of a substantive benefit</b>; <u>weigh the requirement of fairness in overriding interest</u> to decide whether to frustrate a substantive to be unfair to be abuse of power <ul style="list-style-type: none"> <li>➤ On facts this case belongs to category 3 as: <ol style="list-style-type: none"> <li>1. The importance of what was promised to Ms Coughlan</li> <li>2. The promise was limited to a few individuals</li> <li>3. The consequences to the health authority of honouring the promise are financial only</li> </ol> </li> </ul> </li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>• Before the closure of order is made, govt authorities purported to engage in a consultation; CA rejected so, as consultation is flawed, missing material considerations</li> <li>• <b>Requirement of proper consultation:</b> p222 <ul style="list-style-type: none"> <li>(1) Put out proposal at informative stage, cannot be after when the decision is out</li> <li>(2) Give reasons to support the decision, about intelligent decision, enable the public to understand and to respond</li> <li>(3) Give adequate time to respond</li> <li>(4) Conscientious consideration in the proposal</li> </ul> </li> </ul>
Note	<p><b>*important case &amp; facts</b></p> <p>Jin's comment on the categorisation: <b>[revisit]</b></p> <ul style="list-style-type: none"> <li>• however when looking at different matter, when can one depart from the legitimate expectation is another question (usual practice being a valid reason to be provided)</li> <li>• But these categories are talking about different things: cat 1, predisposes that there is legitimate expectation</li> </ul>

#### 5. **R (Bibi) v. Newham LBC** [2002] 1 WLR 237.

Facts	Provision of housing to homeless ppl, council provided temporary housing to them, promised them they are legally secured to have accommodation within 18 months; but local authority is not obliged to provide so; applicants argued representation
Issue	<p>It was argued for the local authority on appeal that it was not unfair to deny the applicants secured tenancy as:</p> <ul style="list-style-type: none"> <li>• the applicants had not detrimentally relied upon the promise; and</li> <li>• granting the applicants secured tenancy will give them special preference against other families on the housing list</li> </ul>
Held	<p>Decision maker did not have regard legitimate expectation in the case (did not think that the promise would amount to legitimate expectation in the first place)</p> <ol style="list-style-type: none"> <li>1. What has the public authority by practice or promise committed itself? <ul style="list-style-type: none"> <li>• the authority has lawfully committed itself to providing the applicants with suitable accommodation with secure tenure: [48]</li> </ul> </li> <li>2. Has the public authority acted or proposed to act unlawfully? <ul style="list-style-type: none"> <li>• <b>Detrimental reliance</b> though potentially <b>relevant</b> in most cases, is <b>not essential</b> (at [28]) and its significance is factual, not legal (at [31])</li> <li>• Not only must the legitimate expectation of the applicant be taken into account, but also the legitimate expectation of others who have been given promises by the public authority, in this case other families who had been promised housing: [35] – [37]</li> </ul> </li> </ol>

	<p>3. What order should the court make?</p> <ul style="list-style-type: none"> <li>If a case is in the <b>macro-political</b> field, the court is likely to take a <b>less intrusive</b> role and <u>send the matter back to the decision taker to decide afresh</u> according to law rather than making the substantive decision itself: [22] – [23]</li> <li>“The court, even where it finds that the applicant has a legitimate expectation of some benefit, will not order the authority to honour its promise where to do so would be to <u>assume the powers of the executive</u>.”: [41]</li> </ul> <p>Summary: Ways dealing with such case</p> <ul style="list-style-type: none"> <li>Deny there is no legitimate expectation (then cannot in good faith saying that in good faith party has no ground for having legitimate expectation) <ul style="list-style-type: none"> <li>note: need to be consistent in argument</li> </ul> </li> <li><b>detrimental reliance is relevant</b></li> <li>when decided not to give them housing, does not concern the breach of promise  <b>&gt; the law can JR on ground of failure to take into relevant consideration &gt;</b>  decision to be struck down</li> <li>when depart from the legitimate expectation, ought to <b>provide with sufficient reasons</b>, as required by <b>fairness</b>; if no reasons given, decision likely to be quashed</li> <li>relief: in substantive legitimate expectation, <b>court reluctant to decide how the decision should be</b>, not to order decision maker to honour his promise, but <b>merely quashing it/remission</b></li> </ul>
Note	<p>Key points:</p> <ol style="list-style-type: none"> <li>A decision that frustrates legitimate expectations is illegal where the legitimate expectations were not taken into account in the decision making process</li> <li>Detrimental reliance, though a relevant factor, is not necessary to establish a legitimate expectation</li> <li>Where a case involves social and policy value judgments, a substantial legitimate expectation may receive only procedural protection from the court</li> </ol>

**6. Ng Siu Tung v Director of Immigration (2002) 5 HKCFAR 1 at §§87-119, 348-374. [revisit]**

Facts	<ul style="list-style-type: none"> <li>Art 24 of BL, right of abode: born of permanent resident would acquire permanent residence; BL: no right if born at the time parents are not HK permanent resident</li> <li>Later new legislation (Immigration Ordinance) made and specified that at least one of the parents had become a HK permanent resident</li> <li>Constitutional challenge, legislation strikes down by CFA, confirming that these ppl would have right of adobe, but NPSCS interpretation revert the decision</li> <li>Over 5000 claimants sought legal aid for this purpose, but faced express discouragement by the govt that applicants not to apply for the case; claimants claimed this amount to representation</li> </ul>
Issue	Whether HK govt's representation created a legitimate expectation that:

	<p>(1) The applicants who were refused legal aid or discouraged from applying for legal aid and received specific representations</p> <p>(2) The 600,000 ppl putatively eligible for the right of abode who purposed to rely on general representations, would receive the same treatment as the applicants in Ng Ka Ling and Chan Kam Nga</p>
Held	<ul style="list-style-type: none"> <li>• a define class of ppl discouraged to not to join JR, court in favour of them on ground of unfairness</li> <li>• consideration of flood of ppl coming, need to have legitimate reason for the defence</li> <li>• expectation unsuccessful, even promised to be treated the same way</li> <li>• more likely to establish legitimate expectation <b>if the class of ppl is defined</b> (differentiate the categories)</li> <li>• <b>para 94-: principles to apply</b> (adopting no.5 BiBi case) <ol style="list-style-type: none"> <li>1. Legitimate expectation arising from <b>a promise or representation</b>, the expectation being that the promise or representation would be honoured, be properly taken into account in the decision-making process so long as to do so falls within the power, statutory or otherwise, of the decision-maker</li> <li>2. Secondly, <u>unless there are reasons recognised by law</u> for not giving effect to <b>legitimate expectations</b>, then <b>effect should be given to them</b>. Where the conduct of the public official has given rise to a legitimate expectation, then <b>fairness</b> requires that, if effect is not given to the expectation, the decision-maker <b>should express its reasons</b> so that they may be <b>tested by a court</b> in the event that <b>the decision is challenged</b></li> <li>3. Thirdly, even if the decision involves the making of a political choice by reference to policy considerations, the decision-maker must <b>make the choice in the light of the legitimate expectation</b> of the parties</li> <li>4. Fourthly, it follows that if the decision-maker <u>does not comply with the third requirement</u> just stated, the decision will be <b>vitiated by reason of failure to take account of a relevant consideration</b>. The failure to take account of the legitimate expectation constitutes an <b>abuse of power</b>. Once the court has established such an abuse, it may <b>ask the decision-maker</b> to exercise his discretion by <b>taking the legitimate expectation</b> into account</li> </ol> </li> </ul>

7. **Yook Tong Electric Co Ltd v Commissioner for Transport**, HCAL 94/2002, 7 February 2003.

Facts	Owner of a shop, part of the walkway outside the shop declared to be pedestrian access only; alleged legitimate expectation based on representation made by urban council that the passage in front of the street was good enough for loading and uploading purposes; statement made in 1990s by urban council but not commissioner for transport
Held	<b>Meaning of representation</b> which is not clear and equivocal



	<ul style="list-style-type: none"> <li>Urban council was not responsible for transport but hawkers <ul style="list-style-type: none"> <li>But <b>no clear &amp; equivocal representation</b> that the access for loading and unloading the goods is clear and not to be disrupted</li> </ul> </li> <li>Who is the public body that make the statement: urban council not under power of law authorises to deal with traffic issue; <ul style="list-style-type: none"> <li><b>identity of the decision maker</b> &gt; suggests the context of what is actually said by the decision maker</li> </ul> </li> </ul>
Note	Requirement of representation being clear and equivocal

8. Paponette v. AG of **Trinidad and Tobago** [2012] 1 AC 1.

Facts	Taxi services, drivers relocated from taxi stand which they have control (no need to pay money as it is free); transferred to stand where they have no control; promised that the new premises would maintain to be free; but party in control charged \$1 for every trip, taxi drivers were worse off
Held	<ul style="list-style-type: none"> <li>Cs has an enforceable substantive legitimate expectation</li> <li>Representation made by govt was <b>clear and unambiguous</b>, no evidence to have explained why the promise is departed from and to charge new fee;</li> </ul> <p><b>The burden of proof</b> in legitimate expectation cases:</p> <ul style="list-style-type: none"> <li>The initial burden: <b>an applicant to prove the legitimacy of his expectation.</b> <ul style="list-style-type: none"> <li><i>This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too.</i></li> </ul> </li> <li>Once proved by applicant, onus shifts to the <b>authority to justify the frustration of the legitimate expectation.</b> <ul style="list-style-type: none"> <li><i>It is for the authority to <u>identify any overriding interest</u> on which it relies to <u>justify the frustration of the expectation</u>. It will then be a matter for the court to <u>weigh the requirements of fairness</u> against that interest."</i></li> <li>Provision of reasons lies with the decision maker; <b><u>the burden of proof to establish an overriding public interest is on the public bodies</u></b></li> <li>Whether there is frustration of substantive legitimate expectation</li> </ul> </li> </ul>
Note	Summary: Clear promise made to a defined class of ppl; absence of reasons to justify decision, govt did not satisfy the burden of proof

9. **Re Thomas Lai** [2014] 6 HKC 1.

Facts	Country park case, areas in NT, govt promised that the village would not be subject to the control of country park ordinance; but later parts of the village was proposed for inclusion of the country park
Held	<p>Look into the merits of applicant's claim</p> <p>Rejected argument on legitimate expectation, applicants lost</p> <ul style="list-style-type: none"> <li>• Size of class of representation (para 62): broad category <ul style="list-style-type: none"> <li>○ The broader the class claiming the benefit, the more likely it is that the supervening public interest would be held to justify the change of position</li> </ul> </li> <li>• Land use and planning (para 63): balance against the interest and needs of the public</li> <li>• Reliance (para 76): on facts, no evidence of reliance, absence of reliance</li> </ul>

10. **The United Policyholders Group v AG of Trinidad and Tobago** [2016] 1 WLR 3383.

Facts	Govt took over an insurance company, balance sheet in substantial deficit; govt promised to make good to the public about the assurance in the insurance; new govt elected & discovered there is serious disruption to the state's financial system (change of circumstance)
Held	<p>On facts, there are circumstances that arise which would not be appropriate to require the public body to adhere to their promise; even tho there is clear representation, there is new information that arose, on that basis, privy council displaced it by ordering payment</p> <p>Para 121: a diff view</p> <ul style="list-style-type: none"> <li>• Standard of review: proportionality, not traditional Wednesbury</li> <li>• Unsettled in HK: has to be resolved in future cases</li> </ul>
Note	<p>How PC predicting about future development of substantive legitimate expectation in macro-economic issue</p> <ul style="list-style-type: none"> <li>• Majority speech (para 39): It is, for instance, clear that legitimate expectation can be invoked in relation to most, if not all, statements as to the procedure to be adopted in a particular context: see again Ng Yuen Shiu [1983] 2 AC 629, 636. However, it is unclear quite how far it can be applied in relation to statements as to substantive matters, for instance statements in relation to what Laws LJ called "the macro-political field"</li> </ul>

## Week 8 – Proportionality

1. Jhaveri, Ramsden & Scully-Hill, Administrative Law in Hong Kong, 2nd ed., pp435-480

### Proportionality at Common Law

2. Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374

Facts	In the 1980's, with the United Kingdom under the Conservative government led by Margaret Thatcher, it was ruled that any and all employees of the Government Communications Headquarters (GCHQ) were prohibited from joining any trade union. This decision was justified based on the potential threat to national security, and enforced using an Order of Council which is an exercise of the Royal Prerogative Power.
Issue	By limiting access, or completely refusing access to trade unions to employees, certain individuals affected were not able to rely on certain employment legislative provisions or be represented by a Union.
Held	<p>The importance of the case is found in the departure from the unwillingness of the courts to judicially review prerogative powers. Lord Diplock found that where a person's 'private rights or legitimate expectations' are effected by the execution of the prerogative power, then that execution of power should be amenable to review. Lord Fraser and Lord Brightman came to the same conclusion based on the view that where the prerogative power was delegated from the monarch, the exercise of that power could be reviewed via judicial review.</p> <p>Following the GCHQ case, it was found that prerogative powers (bar for national security reasons) can be judicially reviewed for legality</p> <p><b>410C-E:</b></p> <ul style="list-style-type: none"> <li>• Classic ground stated: legality?, irrationality, and the third procedural impropriety.</li> <li>• referring to doctrine of necessity, developed in pressure in modern Germany, considering police power; First statute that requires 'balancing act between rights of private individual? see note</li> </ul>

3. R v Secretary of State, ex p Bugdaycay [1987] AC 514

Facts	Mr. M was temporarily admitted to UK pending his application or permission to enter Kenya as a visitor. <u>Refused application to entry</u> on the ground that he is not genuine refugee & <u>Home Secretary did not seek to verify the statement</u>
Held	<ul style="list-style-type: none"> <li>• decision-making process was defective, as Secretary of State did not verify the statement</li> </ul>

	<ul style="list-style-type: none"> <li>○ “The actions of a statutory decision-making body may be controlled by the court in judicial review proceedings if there has been a defect in the decision-making process”</li> </ul> <p>P537 F - 538A:</p> <ul style="list-style-type: none"> <li>• started with classic <b>Wednesbury analysis</b> (classic administrative law territory): <b>failed to take into account relevant factors</b> <ul style="list-style-type: none"> <li>○ "with a view to seeing whether they have taken into account matters which ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account"</li> </ul> </li> </ul> <p>531E:</p> <ul style="list-style-type: none"> <li>• Special responsibility of court: <b>sliding scale of review</b>; move from classic Wednesbury &gt; <b><u>when fundamental right at stake &gt; a duty to apply the most anxious scrutiny</u></b> (still within Wednesbury as but re-formulated) <ul style="list-style-type: none"> <li>○ “... be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The <b>most fundamental of all human rights</b> is the <b>individual's right to life</b> and when an administrative decision under challenge is said to be one which may <b>put the applicant's life at risk</b>, the basis of the decision must surely call for the <b><u>most anxious scrutiny</u></b>...”</li> <li>○ “but where the result of flawed decision may <b><u>imperil life or liberty</u></b> a <b>special responsibility lies with the court</b> in the examination of the decision-making process”</li> </ul> </li> </ul>
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4. R v Ministry of Defence, ex p Smith and Ors [1996] QB 517

Facts	Constitutional challenge to military policy of a blanket ban of homosexuals from serving. (see facts above); challenged as irrational; on judicial ground & constitutional ground
Held	<p>P554D-G:</p> <ul style="list-style-type: none"> <li>• Issue of irrationality: test as classic Wednesbury unreasonableness <ul style="list-style-type: none"> <li>○ "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker.</li> </ul> </li> <li>• when involving basic human rights &gt; different intensity of review, apply anxious scrutiny; otherwise adopt the classic Wednesbury test <ul style="list-style-type: none"> <li>○ “But in judging whether the decision-maker has exceeded this margin of appreciation the <b>human rights context</b> is important. The <b><u>more substantial the interference with human rights, the more the court will require by way</u></b></li> </ul> </li> </ul>

	<p><u>of justification</u> before it is satisfied that the decision is reasonable in the sense outlined above."</p> <ul style="list-style-type: none"> <li>• p.556B -E: court will not develop a more stringent Wednesbury reasonableness test as the test itself is already with sufficient flexibility <ul style="list-style-type: none"> <li>○ <b>flexibility of the test:</b> when important right at stake &gt; heightened standard; (otherwise adopt the classic test)</li> <li>○ heightened scrutiny &gt; <b>the burden is on the decision maker to provide justification</b></li> </ul> </li> </ul> <p><b>Competing Rights in concern &amp; tension between these matters</b></p> <ul style="list-style-type: none"> <li>• matters that court has expertise to review e.g., fundamental human rights <ul style="list-style-type: none"> <li>○ preventing ppl who are homosexual to enter the army, serious matter as to their fundamental identity; should be applying anxious scrutiny</li> </ul> </li> <li>• vs if involving policy, economic, societal matters, court not having the expertise dealing with this <ul style="list-style-type: none"> <li>○ then within the Wednesbury rubric, <b>apply margin of appreciation</b>, defer from the judgement of the decision maker &gt; understanding of <u>separation of power, defer to the executive</u></li> <li>○ about defence in this case, deployment of army &gt; court does not have the relevant expertise or confident to do so &gt; <u>apply deference to govt</u></li> </ul> </li> <li>• 566B-E: court does not engage in merits consideration,</li> <li>• 558B ruled: dismissing the appeal, applying deference, administrative decision upheld: these are matters within the expertise and purview of the ministry</li> <li>• a manifestation or an understanding of the different constitutional roles of the three branches of government.</li> <li>• European Convention: ECHR (article 8 about family right, privacy) at that time not domesticated in UK yet; effect being applicants cannot rely on the convention &gt; reason why applicants lost in this case <ul style="list-style-type: none"> <li>○ later succeed in European Court under article 8 of the European Convention</li> <li>○ proportionality test applied: intensity of review applied by the court, is much more stringent than either the anxious scrutiny or the traditional Wednesbury reasonableness</li> </ul> </li> </ul> <p>➤ <b>can lead to different outcome depending on the test applied</b></p>
Note	<p>What are the difference between the two test?</p> <ul style="list-style-type: none"> <li>• One involving fundamental human right</li> <li>• When it comes to h&gt; burden on decision maker to provide justification</li> </ul>

5. *Pagtagama v Director of Immigration*, HCAL 13/2014 (unrep., 12 January 2016)

Facts	Challenged refusal of applicant coming to HK to take care of his children; relying on BL rights, where the Director rejected the grounds: immigration reservation (exclusion that cannot rely on this ground if one wants to stay in HK)
Held	<ul style="list-style-type: none"> <li>• applicants could not rely on either BL or BORO <ul style="list-style-type: none"> <li>○ immigration reservation under Section 11 of the Bill of Rights: application fall within the immigration exclusion, as they are not HK residents</li> <li>○ BL also not relied on: Art37 not engaged, only right conferred on parents, of fostering children; but it does not deal with these matters to take care of children</li> </ul> </li> <li>• not about Constitutional right, but firmly on common law ground</li> </ul> <p>Para 200: <b>3 categories of rights</b></p> <p>(1) No human rights are engaged: conventional Wednesbury test</p> <p>(2) Fundamental human rights engaged (where BORO and BL rights are engaged): proportionality test</p> <p>(3) (in between case) <b>important rights with grave and adverse impact on the affected person</b> <u>but short of referable human rights</u></p> <ul style="list-style-type: none"> <li>○ <i>“What it means however is that, <u>the graver the decision has an impact on the affected person, the more vigilant and closely the court would look at the reasons of and all matters taken into account</u> by the decision maker to see if there is Wednesbury unreasonableness in that decision, including for example, whether <b>certain matters or factors should or should not be taken into account as a matter of relevance</b>, and whether there is procedural impropriety.”</i></li> </ul>
Note	<p><b>recognition of a sliding scale of view in HK</b></p> <ul style="list-style-type: none"> <li>• there is little or no room for the application of proportionality in purely administrative law cases or where you're only invoking common law rights.</li> <li>• further see case.7 Harbour case for cat.3 right</li> </ul>

6. *Pham v Secretary of State for the Home Department* [2015] UKSC 19

Held	<p>Para 107:</p> <ul style="list-style-type: none"> <li>• The differences between proportionality at common law and other ways of looking at Wednesbury reasonableness: <ul style="list-style-type: none"> <li>○ <b>Proportionality</b>: requires the <b>court to balance the competing concerns itself &amp; form its own view</b> of the balance which the decision-maker has struck, come to a view that whether the decision is a constitutional infringement</li> <li>○ <b>Common law</b>: only requires the court to consider whether the balance struck by the government was <b>within the range of rational balances</b> that might be struck</li> </ul> </li> </ul>
Note	See the comparison diagram for more difference between these two approaches

## Proportionality in Statutory Context

7. Town Planning Board v Society for Protection of Harbour Ltd (2004) 7 HKCFAR 1; [2004] 2 HKLRD 902

Facts	he town planning board decided to submit what has been called the Wan Chai plan, proposing the recommendation of 26 hectares from Victoria Harbour; vs. Protection of Harbour Ordinance
Held	<p>Para 68:</p> <ul style="list-style-type: none"> <li>• issue raised as to which approach to take in regard to cat.3 right</li> <li>• not about human rights; but <b>unique legal statue of the harbour</b>, left open to <b>question of the intensity of standard should apply</b> (answered in 7b) <ul style="list-style-type: none"> <li>○ <i>“Specifically, in relation to a decision of the Board in relation to any reclamation proposal, although as was accepted by counsel for the Society and as noted above, the Ordinance does not give rise to any fundamental or constitutional right, what is the appropriate standard of judicial review remains for future consideration: <u>whether the standard should only be the traditional standard of irrationality or whether, having regard to the unique legal status of the harbour, the standard should be a more intensive one.</u>”</i></li> </ul> </li> </ul> <p>7b: para 78-79:</p> <ul style="list-style-type: none"> <li>• not about human rights, but <b>sufficiently important right</b> (affect HK ppl as the whole) &gt; <b>anxious scrutiny apply instead of classic Wednesbury</b> <ul style="list-style-type: none"> <li>○ <i>“It is plain that the Harbour Ordinance <u>does not enshrine a fundamental human right</u>, even if that right is restricted to Hong Kong people. Nevertheless in Chu J’s judgment <u>the enshrined status of the harbour as a natural heritage of all Hong Kong people was underscored</u>. Its preservation, it was said, was therefore to be afforded a high propriety; <u>the presumption against reclamation being a strong presumption.</u>”</i></li> </ul> </li> </ul>

## Proportionality and Fundamental Rights

10. MA v Director of Immigration HCAL 10/2010, (unrep., 6 January 2013)

Facts	Applicant challenged blanket policy of banning refugee to work in HK, even if they have been in HK for a long period of time (para 12, formulation of challenge); complained that the policy breach right of cruel or inhuman or degrading treatment, right of employment, right to life(para 13)
Held	<p>Para 24-25: immigration reservation was not constitutional</p> <p>Para 56-59: <u>none of BL provision engaged</u> &gt; applicants left with <b>common law principles</b> rather than constitutional principles</p> <p>Para 85-99:</p>



- (1) **sliding scale** depending on the importance of the rights and interests at stake
- (2) dealing with **balancing of competing issues and interests**;
- (3) **margin of appreciation** to the executive based on constitutional role and institutional competence
  - anxious scrutiny does not mean the court is usurping or approaching into domains of the executive and the legislative
  - the court's role is only supervisory

Para 98: what the court is not entitled to do

- court will **take into account the entire circumstances**, including humanitarian or other similar considerations when considering how he exercises his discretion on a case-by-case basis
  - *"In my view, therefore, when deciding whether the decision of the Director, whether at the policy level or at the individual decision level, is rational or reasonable in the public law sense, the court is bound to have substantial regard to the overall immigration picture as a general justification for the Director's policy or exercise of discretion concerned, in deciding whether the Director has acted outwith the degree of latitude public law allows to him."*
- **not for the court to tell the Director how to do the job**;
  - *The court must firmly bear in mind that it is not entitled, even under the anxious scrutiny approach, to dictate to the Director what policy he should make or how he should exercise his discretion or otherwise act, in accordance with the relevant fundamental right (which is not directly enforceable).*
  - *Nor does the anxious scrutiny approach entitle the court to tell the Director that he must take into account humanitarian or similar considerations under any or any particular circumstances when exercising his wide discretions.*

Para 99: what the court is entitled to do

- Court to exercise his discretion on a **case-by-case basis**
  - *"whereas here, it is **part of the director's own policy** that each case will be looked at **on its individual merits**; and he will take into account the **entire circumstances**, including humanitarian or other similar considerations, when considering how to exercise his discretion on a **case-by-case basis**"*
- the court is entitled to hold the Director, with an **appropriate degree of strictness** that is commensurate **with the importance or seriousness of the fundamental right at stake**, to his own policy, so as to ensure due compliance thereof
  - *e.g., the **lawfulness of the decision** depends on **whether he has taken into account all relevant considerations** and has **disregarded all that are***

	<p><i>irrelevant, the court would examine the record and evidence carefully to see <u>whether the Director has really done so conscientiously</u> or is just paying lip service to the law's requirement.</i></p> <p><b>Tension executive and court's role</b> (para 98 vs 99)</p> <ul style="list-style-type: none"> <li>• adopt case by case approach; showing deference in policy-based decision; but also suitable for court to decide looking at all circumstances</li> <li>• immigration matters, matters for the executive &gt; show deference, apply margin of appreciation; vs</li> <li>• even talking about fundamental rights, if decision falls within the preview of govt power, court would give deference)</li> </ul> <p>para 86:</p> <ul style="list-style-type: none"> <li>• issue of one of review, court is still not stepping into the merits and it's not usurping the executive role in making decisions.</li> </ul>
Note	<ul style="list-style-type: none"> <li>• Similar with Pagtama, left with common law principal, constitutional ground not available</li> <li>• Court not overstepping its mark, show deference to executive</li> </ul>

#### 11. Kong Yunming v Director of Social Welfare (2013) 16 HKCFAR 950

Facts	<p>The applicant arrived in Hong Kong by way of a one-way permit to join the husband, who died the day after arrival. She applied for what is known as CSSA, so Comprehensive Social Security Assistance, and was refused on the basis that she <u>failed to meet the seven-year residence requirement</u>. Challenged decision on two grounds of constitutional right: art. 22, 25 of BORO (equality) &amp; <b>BL art.36 (right of social security, read tgt with art 145)</b> (Claiming right to rear their children in HK &gt; claimed right protected under art.37)</p>
Held	<p>Para 39: Steps of questions</p> <p><b><u>Step 1</u></b></p> <ul style="list-style-type: none"> <li>• <i>"The starting-point is the <b>identification of the constitutional right engaged</b> — <u>art.36 in the present case.</u></i></li> <li>• <b>what is the right claimed engaged</b> (being infringement or you want to protect</li> <li>• Whether the right falls within the ambit of the provision that you seek to rely on; <b>constitutional construction</b>: construe the provision and see whether you can actually rely on that provision</li> </ul> <p>para 33 -37: construction of art 36</p> <ul style="list-style-type: none"> <li>• art 37 not engaged: family/parental right: means the right to procreate and rear children, but <u>does not guarantee the particular way applicant want to wear her children</u> &gt; <b>proportionality test does not apply</b></li> </ul>

para 35:

- rights enshrined in art.36: right that applicants gets from CSSA policy prior to the 1st of July 1997.
- Art. 145: but **art.36 is not immutable**, the govt can alter its social welfare policy.
  - Social welfare rights, which qualify as rights protected by Article 36, are subject to modification pursuant to the policies generated by the government in accordance with Article 145...

**para 36:**

- insofar as the government introduces any policy or measures that restrict or confines the body of rights as emanating from the policy as standing as at shortly before midnight, 13th of June 1997, then the restriction in order to survive will have to pass through the proportionality analysis.
  - fact here: Applicant was challenging the seven year residence requirement, which was introduced after 1997 in replace of the one year residence requirement, claim art.36 is engaged

### **Step 2**

- *The next step is to **identify the legal or administrative measure** said to infringe or restrict that right — the imposition of the seven-year residence requirement in the present case*
  - how it infringe the said right
  - if the measure does not infringe on that right or is not a restriction > constitutional challenge fails > does not need to go to proportionality (as there is no right infringed in the first place)

### **Step 3**

- Determine if right is absolute
  - if **right is absolute**, no room for competition between rights & no infringement is permitted > constitutional challenge should succeed > does not need to go to proportionality
  - If **right is not absolute**, so long the restriction can be **justified on proportionality test**

### **Step 4:**

- **Proportionality test if right is not absolute:** 3-stage analysis
- **1<sup>st</sup> stage:** whether that restriction pursues a **legitimate societal aim**
  - Para 49: rationale behind the decision (claimed legitimate societal aim)
    - rise in expenditure in CSSA, to save money

- prevalence of one-way permit immigration scheme, attracting more new blood to HK
- govt aim to deal with aging population in HK

- **2<sup>nd</sup> Stage: whether *the restriction is rationally connected with the aim***

- Para 61-63: court viewed that there is **no rational connection** between the one-way permit & the residential restriction
  - the one-way permit gives preference to young children, but they need adults to care for them; here such families are poor, one would expect social security to assist; under 18s with one-way permits are exempted from the residential restriction, whereas their parents are not, and there's no rational reason for that.
- Para 72: no rational connection between the restriction and HK aging population
  - OWP is important as an immigration policy in the rejuvenation of the population > the social welfare should be made more readily available rather than more restricted
- saving achievable is also not material (insignificant impact)
- claim failed at 2<sup>nd</sup> stage

- **3<sup>rd</sup> Stage: whether the means employed are proportionate** or whether they are excessive

para 24-28: **In accordance with law**

- if a right is not absolute, then it is accepted that the government may make measures or legislate to restrict that particular right.
- **Sources of law** (meaning of in accordance with law)
  - law passed by LegCo
  - common law
  - government policies, as long as they are sufficiently clear
  - BL & BORO

- proportionality granted in BL and BORO, not sth that the court made up

Takeaway: para 40-41

- different tests for stage 3 analysis: whether the means are proportionate and whether they are excessive
- when involving suspect ground (involving more important rights) > apply the more stringent, minimal impairment test (requires the govt to satisfy a more exacting standard)

	<ul style="list-style-type: none"> <li>vs poly-centric &amp; socially forming considerations ones (more deference): the court would adopt the less stringent manifestly without reasonable, depending on the nature of the decision</li> </ul>
Note	<p>Not absolute right &gt; proportionality (3-stage)</p> <p>Hysan: added with one more stage</p>

## 12. Hysan Development Co Ltd v Town Planning Board (2016) 19 HKCFAR 372

Facts	<p>Hysan owns extensive land, TPB posing restriction of building, affects P's property, the land in question and how they develop it; affected property right guaranteed under art.6 &amp; 105 of BL</p> <p>(Para 13-14: provisions, "in accordance with law", "lawful deprivation" &gt; not absolute right &gt; can be restricted &gt; proportionality may come into play)</p>
Held	<p>Para 28-29</p> <ul style="list-style-type: none"> <li>1<sup>st</sup> Q: whether provision is engaged; CFA disagree with CA</li> <li>29: meaning of "in accordance with the law"</li> </ul> <p>Para 30</p> <ul style="list-style-type: none"> <li>Has to be <b>in accordance with law</b> and <b>prescribed by law</b>, also has to be <b>clear</b> law (e.g., even public policy, but need to be sufficiently clear, <b>form a layer of protection</b> &gt; cannot put out wishy-washy policy and to say it is law, need to be clear law &amp; publicly accessible)</li> </ul> <p>Para 43-44:</p> <ul style="list-style-type: none"> <li>discussion on whether property rights are absolute or not absolute rights</li> <li>conclusion being that property right is not absolute</li> </ul> <p>Para 46:</p> <ul style="list-style-type: none"> <li>Concept of proportionality provided under BL Art. 39, look at BL as a whole: Article 39 tells you that proportionality is in play for most of the rights apart from the absolute rights.</li> </ul> <p>Para 50-51</p> <ul style="list-style-type: none"> <li><b>Provision silent:</b> Where the constitutional right involved is not absolute, but no express guidance is given by the Basic Law or the Hong Kong Bill of Rights as to the allowable limits of derogations from that right. <ul style="list-style-type: none"> <li>example: not sufficient to just say the provision does not expressly stated "necessary" or "in accordance with the law", then it will be absolute</li> <li>1<sup>st</sup>: need to <u>look at Article 39 of the Basic Law</u></li> <li>2<sup>nd</sup>: have to <u>look at other cases</u> which discuss the particular rights to see whether it's absolute.</li> </ul> </li> </ul>

- matter of **constitutional construction** as to the ambit of a particular provision, as to what the right it protects, and whether it's absolute or not.

Para 54: **4-stage** (para 134-135 for summary)

- **Stage 4:** whether a **reasonable balance** has been struck between the societal benefits of the encroachment (measure) and the inroads made into the constitutionally protected rights of the individual (harm to the individual right).
  - whether the rights of restriction be considered & accepted as public good, or whether this particular restriction is unduly harsh on the group that is being affected (the 4<sup>th</sup> stage to aim at)
- what is required in Stage 4 (para 76):
  - court to examine **overall impact of the impudent measure**
  - decide **whether fair balance has been struck** between the general interest and the individual rights intruded upon the requirement of such a fair balance being inherent in the protection of fundamental rights.
  - balance done by the court when there are stage 4: vs common law  
Wednesbury test does not require court to balance interests themselves
- rationale in putting in the 4<sup>th</sup> step: para 70-72
  - Stages 1-3: concern with the law's purpose; concern with the legality of the measure, the law in question that restrict ppl's right
  - 4<sup>th</sup>: takes into account the adverse effect of the measure on the group affected

Para 81, 87-88: **what standard** should the court adopt in assessing proportionality at the 3<sup>rd</sup> stage; differences between the two main standards

- first test: **"no more than necessary"**, reasonable necessity & "minimal impairment" approach
  - para 121: *The legislative or executive authority must show that the measure impairs the right as little as reasonably possible in order to achieve the legislative objective*
  - *if the authority "fails to explain why a significantly less intrusive and equally effective measure was not chosen" the measure may fail*
- the second: **"manifestly without foundation"**, the less stringent one
  - para 120: *"the Court will not be astute to insist on a potentially less intrusive measure but will only intervene to strike down the impugned provision as unconstitutional if "the option chosen is clearly beyond the spectrum of reasonable options" to deal with the problem"*

	<p>Para 99: <b>why there are two test &amp; diff level of scrutiny</b></p> <ul style="list-style-type: none"> <li>even in proportionality recognise of a <b>different constitutional role</b> of the judiciary: <u>executive</u> vs <u>legislature</u> role</li> </ul> <p>Para 100-102: <b>Margin of discretion</b></p> <ul style="list-style-type: none"> <li>if talking about policy-heavy cases, court more likely to apply less stringent test, manifestly without foundation test.</li> <li>if hardcore test, adopt more stringent test, no more than necessary</li> </ul> <p>Para 105-108: how court <b>decide the nature of the cases</b>, list of factors</p> <ul style="list-style-type: none"> <li>How important is the right concerned</li> <li>The extent of the interference of the right in question/How serious is the infringement</li> <li>The extent of the margin of appreciation given, depends on the nature of the decision (e.g, policy/economic-based decision &gt; tend to give more deference)</li> <li>Content and the feature of the measure</li> <li>Identity of decision maker (they might well have different expertise suitable to decide diff matter, each branch of government they have their own constitutional role, expertise and competence, relate to extent of margin of appreciation given)</li> <li>Non-exhaustive factors</li> </ul> <p>Para 119-122: different between the two test on <b>degree of intensity</b></p> <ul style="list-style-type: none"> <li>Proportionality (within constitutional challenge): <ul style="list-style-type: none"> <li>1<sup>st</sup> Q: asking whether constitutional right is engaged (a matter of constitutional construction that whether the provision can be relied on)</li> <li>2<sup>nd</sup> Q: whether the measure or law you complain of infringe upon or restrict</li> <li>3<sup>rd</sup> Q: whether the right is absolute or not</li> <li>4<sup>th</sup> Q: where right is engaged: proportionality test (4-step analysis) <ul style="list-style-type: none"> <li>(1) the measure intended to <u>achieve legitimate aim</u>? (2) Whether the measure complained about <u>rationally connected</u> to this aim? (3) The <u>reasonableness</u> of the measure? (4) Whether pursuit of societal legitimate interest place extreme harshness on the individual</li> </ul> </li> </ul> </li> <li>Within the 3<sup>rd</sup> step: reasonableness of the measure, distinction between the two test used here</li> </ul>
Note	4-stage analysis



## Week 9 – Judicial Review Remedies

Textbook

Chapter 20, Thomson, Administrative Law in Hong Kong.

### Availability of Relief Against Preliminary Decisions / Prematurity

TVB v Communications Authority [2013] 5 HKC 593

Facts	TVB applied for leave for judicial review seeking to prohibit the Chief Executive in Council (CEIC) from making an ‘apprehended’ decision under the Broadcasting Ordinance (Cap 562) (the BO). The decision concerned whether or not to approve three pending applications for TV licences. TVB requested the Authorities to revise or withdraw the Recommendation.
Held	<ul style="list-style-type: none"> <li>• Held, dismissing the application.</li> <li>• The court should adopt a <b>strict approach</b> in deciding whether or not to entertain a JR of intermediary or preparatory steps in the decision-making process</li> <li>• <b>Exception to the general principle</b>, where relief could be granted: <ul style="list-style-type: none"> <li>○ The challenge involved a <b>clear and discrete sharp question of law</b></li> <li>○ A <b>useful purpose would be served</b>, or real utility or practical advantages would be achieved</li> <li>○ Exceptional circumstances where the decision had substantial legal consequences and would <b>cause X clear and irretrievable prejudice</b>.</li> </ul> </li> </ul>

Kwok Cheuk Kin v Chief Executive of the HKSAR [2017] 5 HKC 579

Facts	Application for leave – Co-location arrangement for high speed rail link with Mainland – Constitutional challenge – Whether application premature – Whether exceptional circumstances to justify court granting leave despite prematurity of applications
Held	<ul style="list-style-type: none"> <li>• Concerned an <u>intermediate or procedural decision</u>, which didn’t give rise to any substantive consequence or wasn’t a decision of a decisive nature</li> <li>• When the application was made, the <b>relevant legal/factual events</b> to which the application related <b>hadn’t yet occurred</b></li> <li>• It was generally <u>not part of a court’s function to restrain the legislature from making unconstitutional laws</u>. The court should <b>avoid interfering in the legislative process</b> or entertaining a pre-enactment challenge</li> <li>• Error of fact in a procedural decision shouldn’t of themselves generally amount to exceptional circumstances <ul style="list-style-type: none"> <li>○ Example: The CEIC hadn’t yet made a decision. The challenge was <u>interlocutory and preparatory procedures</u>. The recommendations were only <u>advisory</u> and CEIC wasn’t bound to follow them. The application was premature. No substantive legal consequences resulted from the alleged wrongs committed by the Authority. There were no exceptional circumstances to justify judicial intervention at this stage.</li> </ul> </li> </ul>
Note	General rule: The court will reject an application for leave to apply for JR on the ground of prematurity: Kwok Cheuk Kin

## Academic Questions

Chit Fai Motors v Commissioner for Transport [2004] 1 HKC 465

Facts	<p>Lis affecting rights and obligations of parties no longer in existence by time of application, Chit Fai's application for judicial review was dismissed by the judge on 17 April 2003 for want of real issue for determination because Koon Chung's licence was no longer valid at the time of the hearing; Transport – Public light bus services – Duty to consult interested parties – Whether Commissioner for Transport required to consult existing bus operator before issuing licence to third party operators – Licence expired before matter heard by court – Whether proceedings merely academic</p>
Held	<p><b>General rule:</b></p> <ul style="list-style-type: none"> <li>Where a question is <u>purely hypothetical/academic</u> (no events that have occurred that form the basis for the question to be answered), <u>court will not entertain it</u>.</li> <li><b>Two reasons:</b> <ul style="list-style-type: none"> <li>The court's function is to adjudicate on real disputes, not imaginary ones</li> <li>To decide on points of law/principles when there are no facts before the court isn't only undesirable, it can have unfortunate or even dangerous consequences</li> </ul> </li> </ul> <p><b>Exception:</b> Other situations which might justify a so-called hypothetical or academic question being determine by the court</p> <ul style="list-style-type: none"> <li>If the <b>real dispute</b> (where the dispute is real and had actually taken place) that drove the parties to litigation is <b>no longer in existence</b> at the <u>time of the hearing</u>, the <u>court has the discretion</u> to determine the issue in question but will <b>closely examine the relevant or utility of any such decision</b></li> <li>the discretion to hear a dispute which is academic between the parties must be exercised with caution and should not be heard <u>unless</u> there is <b>good reason in the public interest</b> for doing so, but a factor weighting in favour of its being heard is where the same point is likely to or may well arise between the same parties.</li> <li>this may be easier to demonstrate in the public law sphere:             <ul style="list-style-type: none"> <li>"very often in public or administrative law cases, <b>the duties of public bodies fall to be exercised on a continuing basis</b> not only in relation to the parties before the court <b>but also perhaps to others in the future</b>"</li> </ul> </li> <li><b>The point might arise again</b> as between the same parties; sufficient for the court to <u>provide useful guidance for the future</u>; the controversy between the parties was on-going and should be fully explored and argued</li> </ul>

Leung v Secretary for Justice [2006] 4 HKLRD 211

Facts	<p>The applicant was a 20-yr-old homosexual man who sought to challenge the constitutionality of section 119C of the Crimes Ordinance (cap.200), which purported to criminalise homosexual buggery with or by a man under the age of 21-years. However, the applicant had not yet performed the act of homosexual buggery, but would nevertheless have to demonstrate sufficient interest in his application for</p>
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	JR. (Despite s21(K) provides flexibility for the court to grant declaration, it would be deeply unsatisfactory to require the applicant to perform homosexual buggery and obtain a conviction under the crime before recognising that he had standing to challenge the constitutionality of that section)
Issue	Issue in that sense <b>hypothetical</b> , as he had not been convicted under section 118C
Held	<ul style="list-style-type: none"> <li>• Question of whether to permit judicial review in this case was <b>one of discretion</b>, not jurisdiction</li> <li>• <b>A number of reasons</b> why it would be proper to <b>allow a declaration</b> to issue in this case, <u>notwithstanding that the question to be addressed was hypothetical</u> <ul style="list-style-type: none"> <li>○ the Q was one of <b>significant public interest</b>, and a <u>whole class of persons (homosexual men) had a direct interest</u> in the outcome of the case</li> <li>○ contrary to one of the reasons for the general rule that not all the facts may be available at the litigation stage, in the present case there were <b>no further findings of facts necessary</b> – what was at issue was a <b>pure point of law</b></li> <li>○ where the <b>constitutionality of a law</b> was involved, especially a criminal law, the sooner the constitutionality or otherwise of that law was established, the better</li> <li>○ there was <b>no question of this decision opening the floodgates</b>, as the <b>applicant had sufficient interest</b> in the matter to which the application related</li> </ul> </li> </ul>
Note	<p>An example of when there are <b>strong policy reasons</b> favouring the <b>court's ruling on a so-called hypothetical question</b></p> <ul style="list-style-type: none"> <li>• <b><u>exception to the general rule</u></b> that declaration is not available to hypothetical question</li> </ul>

Law Mei Mei v Airport Authority [2018] 4 HKLRD 312 [1:22:00]

Facts	Airport Authority was in charge of providing security baggage screening at the International Airport; <u>allow cabin baggage through security screening at airport without presence of passenger; whether contrary to prevailing cabin baggage screening regulations</u> in Hong Kong Aviation Security Programme (HKASP) — whether amendments to HKASP subsequent to grant of leave to apply for judicial review rendered review application academic
Held	<ul style="list-style-type: none"> <li>• The application should not be dismissed without <b>consideration of its substantive merits</b> on the sole ground that it has become academic. <ul style="list-style-type: none"> <li>○ In the circumstances of this case, <b><u>the injustice of dismissing the application for judicial review without consideration of its substantive merits</u></b> simply because the Secretary for Security has exercised the power to amend the relevant regulations after the event would be stark.</li> </ul> </li> <li>• <b>Consider fairness</b> <ul style="list-style-type: none"> <li>○ It would be unjust to X to dismiss her application only because it is academic, an argument which is made possible only because S changed relevant regulations after the event.</li> <li>○ The court retained a discretion to hear and determine the issue concerned</li> </ul> </li> </ul>

## Exhaustion of Alternative Remedies

Tsang Kin Chiu v Commissioner for Police [2015] 4 HKLRD 71

Facts	X alleged that he was assaulted by police officers, who were subsequently suspended and arrested, but not charged (the Officers). The Commissioner of Police declined X's request for the Officers' identities so he could commence a private prosecution against them. X applied for <u>leave to apply for judicial review seeking inter alia a declaration</u> that <u>the assaults violated the constitutional prohibition on torture and also damages, including aggravated and exemplary damages</u> (Grounds 1-2); and an <b>order of mandamus to compel the Commissioner to reveal the Officers' identities</b> . X argued that he had a right to seek such disclosure and the police were obliged to supply victims of crime with their assailants' identities so that the failure to do so amounted to an obstruction of the administration of justice (Ground 4).
Issue	leave to apply for judicial review — <b>whether effective alternative remedy</b> — whether exceptional circumstances to warrant grant of leave
Held	<p><b>HELD: refusing leave on Grounds 1-2, but granting leave on Ground</b></p> <p><b><u>Q1 Whether the alternative remedy provides a more effective and appropriate remedy</u></b></p> <ul style="list-style-type: none"> <li>○ <b>JR should only be a remedy of last resort.</b></li> <li>○ Where an effective alternative remedy exists which hasn't been exhausted, save in exceptional circumstances, the court will not generally exercise its discretion to grant remedy in JR.</li> <li>○ availability of a private law remedy &gt; an effective alternative remedy strong reason to refuse leave</li> </ul> <p>On fact:</p> <ul style="list-style-type: none"> <li>• A is effectively and substantively seeking as a remedy is a claim for damages &gt; A <u>private law action for damages can effectively achieve the same</u></li> <li>• The claim is likely to involve the determination of disputed facts &gt; A private law writ action is more appropriate</li> </ul> <p><b><u>Q2 Whether there are exceptional circumstances to justify the continuation of the public law proceedings notwithstanding the alternative remedy:</u></b></p> <ul style="list-style-type: none"> <li>• The fact that the claim for damages was based on an alleged breach of public duty by public officials didn't constitute exceptional circumstances so as to justify the grant of leave.</li> </ul>

## Potential Impact on Third Parties

Shek Lai San v. SFC [2010] 4 HKC 168

Held	Relief in JR proceedings is discretionary. The court was entitled to take into account the potential impact of the relief sought on third parties.
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## Futility

Leung Fuk Wah v Commissioner for Police [2002] 3 HKLRD 653.

Facts	Procedural fairness – non disclosure on appeal whether principle of fairness drew distinction between first instance and appeal hearing
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Held	<ul style="list-style-type: none"> <li>• The non-disclosure of new docs to X wouldn't have made the slightest difference. JR was a discretionary remedy.</li> <li>• If <u>breach of the principle of fairness didn't produce a substantial prejudice</u> to X, there was no ground to quash the question</li> </ul>
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Chu Ping Tak v. Commissioner of Police [2002] 3 HKLRD 679.

Facts	X was a policy constable, lent money to his gf but later bankrupt > faced disciplinary review from the Commissioner of Police & was dismissed
Held	<ul style="list-style-type: none"> <li>• As a <b>matter of fairness and natural justice</b>, the documents ought to have been disclosed to</li> <li>• There was a <u>risk of the undisclosed docs having worked to A's prejudice</u> &gt; There was <b>indeed actual prejudice to A by the non-disclosure of the relevant memos</b></li> <li>• Relief should be granted to A (decision was quash)</li> </ul>
Note	Breach of natural justice > rare for court to refuse relief

### Delay

Section 21K(6) of the High Court Ordinance.

- The court retains discretion to refuse to grant relief sought on the application on the basis of delay