

# **Judicial Review of Administrative Actions**

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## Issues

- Why more people are now applying for judicial review in HK in recent years?
- Who are the people applying for judicial review?
- What kind of matters are these applications concerned with?
- What people can get from an application for judicial review?
- What are the existing principles of judicial review?
- Why such principles are being adopted?

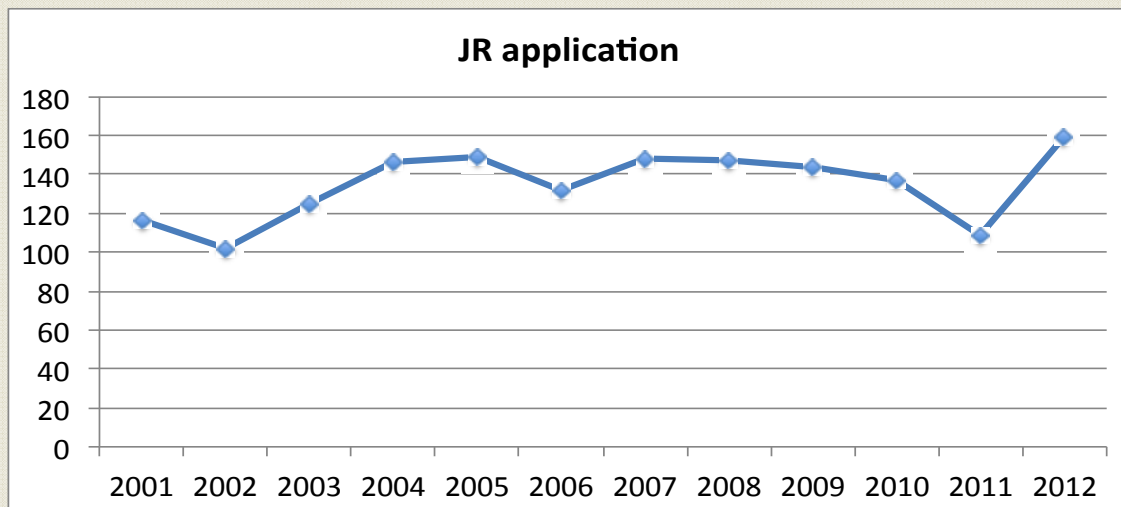
## Issues

- How far the courts' power of judicial review has influenced administrative decisions?
- Will there be a change in the rationale behind judicial review?
- What may be a new principle of judicial review to be developed by the court?
- Will the court adopt this new principle?
- How will this new principle affect governance?
- Can this principle enhance good governance?

**Why more people are now applying  
for judicial review in HK?**

### Nos. of Application for Judicial Review

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
116	102	125	146	149	132	148	151	144	132	<i>109</i>	<i>159</i>



*Chief Justice Andrew Li's speech at  
Ceremonial Opening of the legal Year 2010*

*“I have previously explained publicly the factors which have led to it in the Hong Kong context: the growth in the volume of legislation to deal with an increasingly complex society, the enactment of the Bill of Rights and the Basic Law and the greater awareness on the part of citizens of their rights.”*

**a 4<sup>th</sup> reason?**

**Who are the people  
applying for judicial review?**

- **Leung Kwok Hung**
- **Lo Siu Lan** in *Lo Siu Lan and Another v. HK Housing Authority*, HCAL 154/2004, CACV No. 378/2004, FAMP 2/2004, FACV 10/2005, **Ho Choi Wan** in *Ho Choi Wan and Another v. Housing Authority* FACV 1/2005, **Chu Yee Wah** in *Chu Yee Wah v. Director of Environmental Protection* HCAL 9/2010, CACV 84/2011
- **Society for Protection of the Harbour** in *Town Planning Board v Society for Protection of the Harbour Ltd* FACV 14/2003
- **Chu Hoi Dick** in *Chu Hoi Dick and another v. Secretary for Home Affairs* HCAL 87/2007



- **Cho Man Kit** in *Cho Man Kit v. Broadcasting Authority* HCAL 69/2007 and **W in W.** v. *Registrar of Marriage* HCAL 120/2009
- **PCCW** in *PCCW Media Limited v. The Broadcasting Authority and Galaxy Satellite Broadcasting Limited* HCAL 97/2005; **ATV** in *ASIA TELEVISION LTD v. CHIEF EXECUTIVE IN COUNCIL*, HCAL20/2012
- **Building Authority** in *Building Authority v. Appeal Tribunal (Building)* HCAL 47/2009
- **Secretary for Justice** in *Secretary for Justice v. Commission of Inquiry on Allegations Relating to the Hong Kong Institute of Education* HCAL 108/2007

## Types of applicants

	2005	2008
An individual	55.8%	53.6%
More than one individual	7.1%	12%
Private corporations	31.8%	27.3%
Citizens groups	1.8%	7.1%
Government agencies	3.5%	0%
Public Authorities	0%	0%

**What kinds of matters  
are these applications concerned with?**

## Ranking of Government departments or government officials as respondent (2001-2010)

Ranking	<b>Government departments or government officials</b>
1 <sup>st</sup>	Immigration Department / Director of Immigration
2 <sup>nd</sup>	Commissioner of Police
3 <sup>rd</sup>	Secretary for Justice
4 <sup>th</sup>	Commissioner of Civil Service
5 <sup>th</sup>	The Chief Executive
6 <sup>th</sup>	Secretary for Security
6 <sup>th</sup>	Commissioner of Inland Revenue
8 <sup>th</sup>	Lands Department
9 <sup>th</sup>	Correctional Services Department
10 <sup>th</sup>	HKSAR

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## Ranking of Governance areas (2001-2010)

Ranking	Governance areas
1 <sup>st</sup>	Immigration
2 <sup>nd</sup>	Disciplinary actions of civil service
3 <sup>rd</sup>	Registration and disciplinary actions of professional bodies
4 <sup>th</sup>	Land / Town planning
5 <sup>th</sup>	Court proceedings
6 <sup>th</sup>	Criminal proceedings
7 <sup>th</sup>	Others
8 <sup>th</sup>	Housing
8 <sup>th</sup>	Transport
8 <sup>th</sup>	Correctional services

***Chu Hoi Dick and another v. Secretary for Home Affairs HCAL 87/2007***

- The Applicants challenged the decision of the Secretary for Home Affairs on 22 May 2007 as the Authority under the Antiquities and Monuments Ordinance Cap.53 not to declare the Queen's Pier to be a monument under Section 3 of the Ordinance.

## *Chief Executive Policy Address 2007-08*

### **Heritage Conservation**

49. Cultural life is a key component of a quality city life. A progressive city treasures its own culture and history along with a living experience unique to the city. In recent years, Hong Kong people have expressed our passion for our culture and lifestyle. This is something we should cherish. In the next five years, I will press ahead with our work on heritage conservation.

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*Ng Ngau Chai v. Town Planning Board & Planning  
Department HCAL 64/2007*

- Mr. Ng is a resident of West Kowloon. He seeks leave to apply for judicial review of:-  
“[t]he decision of the Town Planning Board and/or Planning Department to designate all that piece of land situated at the west seashore of Tai Kok Tsui and registered in the Land Registry as KIL 11146 as residential use”.



*Ng Ngau Chai v. Town Planning Board & Planning  
Department HCAL 64/2007*

- Mr. Ng says that the decision of which he complains was one whereby, despite objection from the Yau Tsim Mong District Council, “the Planning Department and Town Planning Board still determined to designate KIL 11146 as a piece of land for residential development without any height restriction”.
- The result (according to Mr. Ng) is that the living environment in West Kowloon has deteriorated. Breezeways and view corridors have been cut off and public open spaces (especially for leisure activities) have been drastically reduced. This means (Mr. Ng contends) that **no “wall-like structures” should be built** along the Tai Kok Tsui waterfront.

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## *Chief Executive Policy Address 2010-11*

### **Sustainable Built Environment**

40. The Government is committed to enhancing the design standard of new buildings to foster a quality and sustainable built environment for our next generation. In light of the recommendations of the Council for Sustainable Development, the Government will introduce a series of measures, requiring the incorporation of such design elements as *building separation* or enhancement of *building permeability*, setback and greenery in new buildings. To widely promote green building in Hong Kong, we will raise the building energy efficiency standards and require developers to provide environmental and energy consumption information of buildings for the reference of potential users.

*Chief Justice Andrew Li's speech at  
Ceremonial Opening of the legal Year 2006*

“With judicial review passing into everyday parlance and with "JR" rolling readily off everyone's lips, it is important for the public to understand the courts' proper role. On judicial review, the courts do not assume the role of the maker of the challenged decision. The courts are concerned and only concerned with the *legality* of the decision in question, adjudged in accordance with common law principles and the relevant statutory and constitutional provisions. It follows that the courts' judgment can only establish the limits of legality. The *courts could not* possibly provide an answer to, let alone a *panacea* for, any of the various *political, social and economic problems* which confront society in modern times.”

*Chief Justice Andrew Li's speech at  
Ceremonial Opening of the legal Year 2006*

“Within the parameters of legality, the appropriate solution to any political, social or economic problem can only be properly *explored through the political process*. Such problems are usually complex involving many dimensions and there are no easy or ready solutions to them. It is only through the political process that a suitable compromise may be found, reconciling the conflicting interests and considerations in question and balancing short term needs and long term goals. The responsibility for the proper functioning of the political process in the interests of the community rests with the *Administration and the Legislature*.”

## **Trends in application for judicial review**

- From decisions to policies
- From civil and political rights to social and economic rights
- From individual interests to collective interests
- From material interests to post-material interests

**What people can get from  
an application for judicial review?**

## Remedies

- Mandamus
- Prohibition
- Certiorari
- Injunction
- Declaration
- Suspension/Temporary validity order
- Prospective overruling
- Damages?

**Lord Woolf in Preface to *Effective Judicial Review: A Cornerstone of Good Governance* (2010)**

*“...if on occasion the Minister tending to promote action whose legality was questionable, prior to taking action, could **seek a declaration that the action was lawful**. The legality of the action proposed could then be debated, as far as possible in public, and the court could rule in the normal way. A judgment could be given granting a declaration one way or another as to the various choices which the Minister wanted to be considered. I do not accept that there could be difficulty in ensuing that the appropriate views were represented before the court. This could achieve an improvement in relations between the judiciary and the executive.”*



**What are the existing principles  
of judicial review?**

## Basic Law

### **Article 35(2):**

“Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.”

## Basic Law

### **Article 19:**

“The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.”

***Financial Secretary v. Felix Wong*** FACV No. 5  
of 2003, per Justice Litton NPJ

“...judicial review is an exceptional remedy. It is not granted as of right. The origin *of the jurisdiction lies in the old prerogative writs whereby... it was the sovereign himself who called upon the inferior tribunal to account for its action.*

...As regards the procedure for applying for judicial review, the first - and *perhaps the most obvious - point to note is that the aggrieved party must first obtain leave* before he can make his application...The *intention behind the rule is that public authorities and the like should not be vexed with hopeless applications.*

The second point to note is that the remedy lies in the court's discretion: Hence, it is relevant to see whether there is *some other remedy open to the aggrieved party*...it is a cardinal principle that, save in the most exceptional circumstances, the jurisdiction will not be exercised where other remedies are available and have not been used.”

***Financial Secretary v. Felix Wong* FACV No. 5  
of 2003, per Justice Litton NPJ**

“...As to jurisdiction, s.21I (1) of the High Court Ordinance merely says that the Court of First Instance shall have jurisdiction to make orders of mandamus, prohibition and certiorari in those classes of cases in which it had power to do so immediately before the commencement of the Supreme Court (Amendment) Ordinance 1987, without stating what the scope of those remedies might be. Where the matter is as wide as that, it is of particular relevance to adhere to established principles, lest these important remedies be debased and their procedures abused by over-zealous applications.

Turning more specifically to the scope of judicial review, it is, broadly speaking, the means by which judicial control of administrative action is exercised. It is ***not every decision by a decision maker which is susceptible to review***: Were it otherwise the functioning of the executive arm of government and of statutory bodies and tribunals would be ensnared in multiple applications in the courts.“

*Council of Civil Service Unions v. Minister for the Civil Services* [1985] A.C. 374, Lord Diplock

“Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call *"illegality,"* the second *"irrationality"* and the third *"procedural impropriety."*

*Council of Civil Service Unions v. Minister for the Civil Services* [1985] A.C. 374, Lord Diplock

“By ***“illegality”*** as a ground for judicial review I mean that the decision-maker ***must understand correctly the law*** that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.”

*Council of Civil Service Unions v. Minister for the Civil Services* [1985] A.C. 374, Lord Diplock

“By *“irrationality”* I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is *so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.* Whether a decision falls within this category is a 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.”

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*Council of Civil Service Unions v. Minister for the Civil Services* [1985] A.C. 374, Lord Diplock

“I have described the third head *as "procedural impropriety"* rather than failure to observe basic rules of *natural justice or failure to act with procedural fairness* towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also *failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument* by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”

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***Chief Justice Geoffrey Ma's speech at  
Ceremonial Opening of the legal Year 2011***

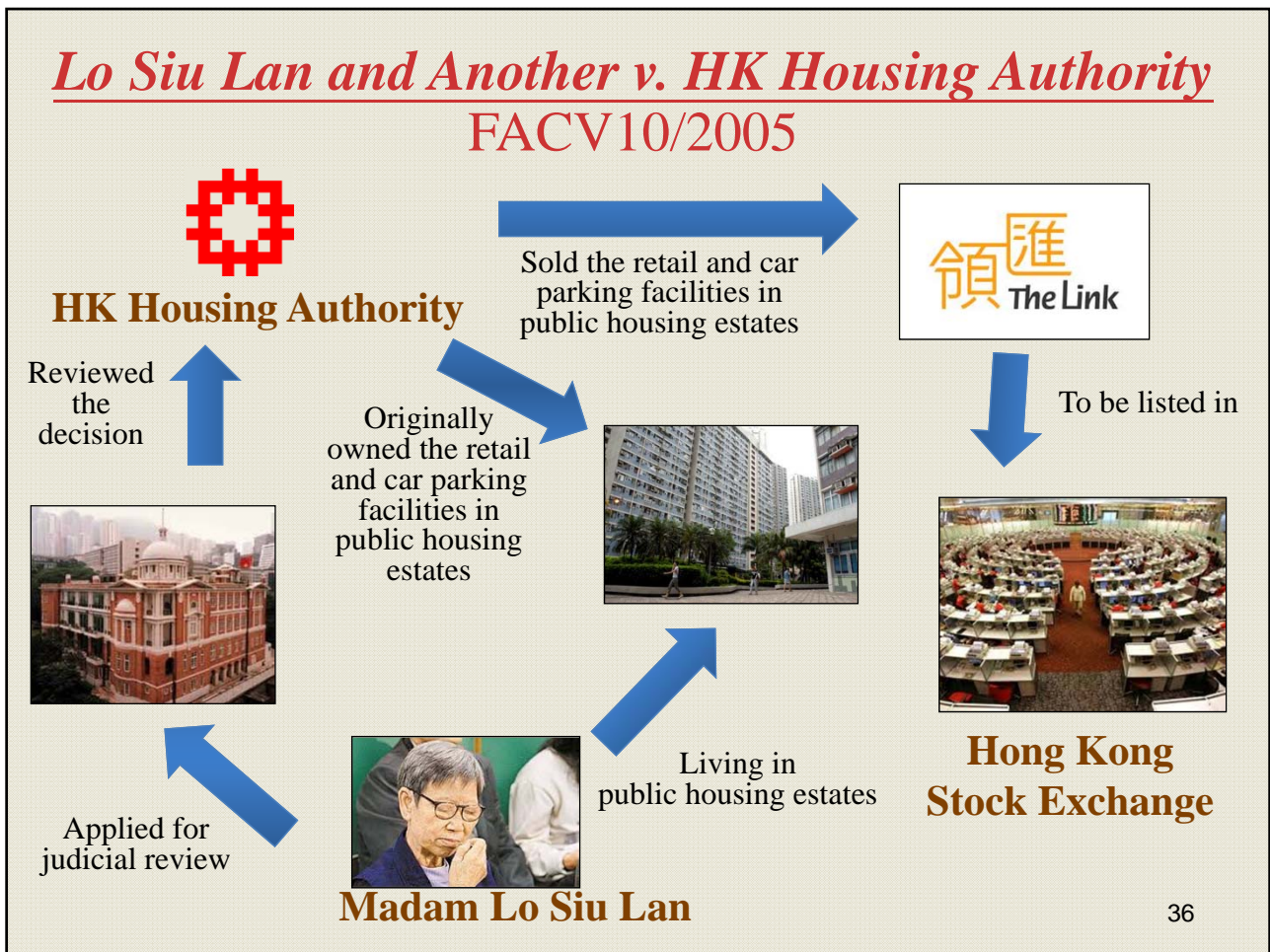
“The judicial oath requires judges to look no further than the ***law as applied to the facts***. The starting point and the end position in any case, is the law. This is the true role of the courts. The courts do ***not serve the people by solving political, social or economic issues***. They are neither qualified nor constitutionally able to do so. However, where legal issues are concerned, this is the business of the courts and whatever the context or the controversy, the courts and judges will deal with these legal issues.”

## Kinds of invalidated decisions

	2008 (15 cases)
Wrong legal interpretation	9
Rigid policy	1
Considered irrelevant matters	3
Failed to consider relevant matters	6
<i>Wednesbury</i> unreasonable (irrational)	2
Fair hearing	4
Fail to give reason/inadequate reason	3

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## Lo Siu Lan and Another v. HK Housing Authority FACV 10/2005



*Lo Siu Lan and Another v. HK Housing Authority*  
FACV10/2005

Section 4(1) of the Housing Ordinance provides that:

“The Authority shall exercise its powers and discharge its duties under this Ordinance so as to *secure* the provision of housing and such *amenities ancillary* thereto as the Authority thinks fit for such kinds or classes of persons as the Authority may, subject to the approval of the Chief Executive, determine.”

*Lo Siu Lan and Another v. HK Housing Authority*  
FACV10/2005

**Decision of the Court of Final Appeal:**

“To *secure* the provision of the facilities does *not mean* that the Authority must itself be the *direct provider* (which would involve control by the Authority) or that, having been the direct provider for some years, the Authority may not cease to be the direct provider (and so relinquish control). There is no basis for suggesting that the statute contains any provision, either express or implied, that tenants of public rental housing have any statutory right to the continued retention and control by the Authority of the retail and carpark facilities, while the tenants are still using the facilities. *The Authority secures the provision of the facilities so long as the facilities are available, although they are provided not by the Authority but by Link REIT, a third party over whom the Authority has no control.*”

*Town Planning Board v. Society for Protection of the Harbour Ltd* FACV 14/2003

**Protection of the Harbour Ordinance: presumption against reclamation in the harbour; *to rebut?***

**compulsory material consideration**



**overriding public need**



**Town Planning Board v.**  
**Society for Protection of the Harbour Ltd FACV 14/2003**

- The Secretary for Planning and Lands, under the delegated authority of the Chief Executive and pursuant to Town Planning Ordinance (TPO), directed the Town Planning Board to prepare a new draft outline zoning plan (OZP) for the Wan Chai Development Phase II project.
- The Board decided that the OZP as amended is suitable for submission to the Chief Executive in Council for approval under section 8 of the TPO.
- Society for Protection of the Harbour commenced the judicial review action to challenge the decision of the Board on the grounds that the Board has made an error in law in reaching the decisions in that it had misinterpreted the section 3 of The Protection of Harbour Ordinance (PHO) and had failed to apply the correct legal principles.



*Town Planning Board v.  
Society for Protection of the Harbour Ltd* FACV 14/2003

Section 3 of the Protection of the Harbour Ordinance provides that:

"(1)The harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a ***presumption against*** reclamation in the harbour.

(2) All public officers and public bodies shall have regard to the principle stated in subsection(1) for guidance in the exercise of any powers vested in them."

**Town Planning Board v.**  
**Society for Protection of the Harbour Ltd** FACV 14/2003

Long Title of the Protection of the Harbour Ordinance provides that:

“An Ordinance to protect and preserve the harbour by establishing a presumption against reclamation in the harbour.”

**Town Planning Board v.**  
**Society for Protection of the Harbour Ltd** FACV 14/2003

**Decision of the Court of Final Appeal:**

“In applying a *purposive approach to interpretation*, the legislative purpose must first be identified. It is sometimes not easy to discern the purpose of a statute or a particular provision. In the present case, there is no difficulty in identifying the legislative purpose. It is referred to in the preamble to the Ordinance and is spelt out in s 3(1) itself. *The purpose is to make sure that the harbour will be so protected*... There must be protection, that is, it must be *kept from harm, defended and guarded*. And there must be not merely protection.

Reclamation would result in permanent destruction and irreversible loss of what should be protected and preserved under the statutory principle. *The statutory presumption was therefore enacted to implement the principle of protection and preservation*. It is a legal concept and is a means or method for achieving protection and preservation. Its legal effect is not to impose an absolute bar against any reclamation. It does not prohibit reclamation altogether. *As a presumption, it is capable of being rebutted.*”

**Town Planning Board v.**  
**Society for Protection of the Harbour Ltd FACV 14/2003**

**Decision of the Court of Final Appeal:**

“The critical question is: as a matter of statutory interpretation, what should be regarded as sufficient to rebut it?”

This question of interpretation is to be approached, bearing in mind that considerable reclamation has already taken place and that the need to protect and preserve the harbour is therefore all the more important and compelling.

Having regard to the strong and vigorous statutory principle of protection and preservation, *it would plainly be wrong to interpret the presumption against reclamation merely as a compulsory material consideration* to which the decision-maker must pay due regard in undertaking a weighing exercise for the purpose of deciding whether the public benefits of the proposed reclamation would outweigh the need to preserve the harbour. This was essentially the Board’s approach and it must be rejected. On this approach, the presumption against reclamation is relegated to no more than a planning consideration required by statute to be taken into account. And the strong public need to prevent permanent destruction and irreversible loss of the harbour is demoted to the same level as any other town planning need. Such an approach is clearly inconsistent with the statutory principle of protection and preservation and the legislative intent behind it.”

**Town Planning Board v.**  
**Society for Protection of the Harbour Ltd** FACV 14/2003

**Decision of the Court of Final Appeal:**

*“In order to implement the strong and vigorous statutory principle of protection and preservation, the presumption must be interpreted in such a way that it can only be rebutted by establishing an overriding public need for reclamation. This can conveniently be referred to as "the overriding public need test".*

The statute, in conferring on the harbour a unique legal status, recognises the strong public need to protect and preserve it. The statute envisages that irreversible loss to the extent of the reclamation would only be justified where there is a much stronger public need to override the statutory principle of protection and preservation.”

*Lekhanath Gurung v. Director of Immigration*  
HCAL 11/2005

- Gurung is a national of Nepal. He came to Hong Kong on **27 July 2004** as a visitor
- Gurung **enrolled to study** a Diploma in Management course in Hong Kong on **5 August 2004**. He had studied in a **similar programme in Nepal but had withdrawn** from it.
- On **6 August 2004**, he applied for an extension of his visitor's visa.
- On **9 August 2004**, he submitted a further application for an extension of stay as a student.
- His application for student visa was rejected on 31 August 2004

*Lekhanath Gurung v. Director of Immigration*  
HCAL 11/2005

- The Director was not satisfied that the applicant has any *genuine intention* to take up a course of study in Hong Kong:
  - (a) If it was true that Gurung wanted to pursue further studies in Hong Kong and use it as a springboard for studies overseas, it would be ***strange he only applied for entry to Hong Kong as a visitor*** and declared that it was only a social visit and he would not apply for change of status
  - (b) Gurung ***still applied for an extension as a visitor*** on the basis that his cousin was not well after he was enrolled into a course of study in Hong Kong.
  - (c) Gurung's alleged intention and need to study in Hong Kong to pave way for further studies in the USA or other European countries was considered not logical as he ***could further study*** in the USA or other countries immediately after completing his study in Nepal ***without coming to Hong Kong first.***

*Lekhanath Gurung v. Director of Immigration*  
HCAL 11/2005

**Decision of the Court:**

“...there is no evidence that this applicant, when the application was made for him to come to Hong Kong, knew then that he would be taking up studies in Hong Kong. It would be *entirely sensible for the applicant to come to Hong Kong as a visitor in order to look around*, in order, as he said in one of his letters, to read advertisements, consider prices and also the nature of courses in Hong Kong. Only then would he be able to make his decision.

...the study of college in Hong Kong is better than Nepal. Because of science and technology, the way of studying method are different than Nepal. So to *further ...career in future to study in Hong Kong is better than Nepal.*

...the application made on 6 August was made in the belief that, if it was not made, the applicant would then be in breach of his conditions of stay. It was therefore essentially a short ‘holding exercise’ so that the applicant would *not find himself breaching his conditions of stay* and would have *an extra day or two within which to put in his full application.*”

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*Lekhanath Gurung v. Director of Immigration*  
HCAL 11/2005

**Decision of the Court:**

“I am not suggesting that the Director was necessarily wrong in the decision he made. I emphasise again that it is *not my job to look to the merits*. My job is to look to the legality of process and, viewed as a whole, in my judgment, the Director looked simply to the one side of the picture, *shutting his eyes to the other side*. For a proper decision to be made, both sides of the picture must be considered and weighed. I do not believe this was done in the present case....*Relevant material...has been ignored...*

A decision-maker may, for valid reason, exercise *scepticism* but he is *not permitted to allow scepticism to blind him* to the need to conduct *an objective weighing exercise of all relevant matters.*”

*Lam Kai Hing and Others v Hong Kong Housing Authority* MP No. 1923 of 1990

- The Hong Kong Housing Authority served notices to quit on the tenants of a factory estate pursuant to s 19(1)(b) of the Housing Ordinance (Cap 283).
- The Authority had decided that the building was *beyond economic repair* and needed to be demolished.
- Section 20 of the Ordinance gives a right of appeal to the tenant who has received a notice to quit under s 19(1)(b). The Tenancy Appeals Committee responsible for hearing the appeal may confirm, amend, suspend or cancel the notice to quit.
- Appeals were lodged by the tenants.
- There was a hearing by the Tenancy Appeals Committee.

*Lam Kai Hing and Others v Hong Kong Housing Authority* MP No. 1923 of 1990

- The only paper placed before the Tenancy Appeals Committee by the Housing Authority was *Paper No AC9/90*, a copy of which was supplied to the tenants before the hearing.
- This set out the background to the matter leading up to the service of the notices to quit.
- It made reference to a number of papers by other committees of the Authority, in particular, *Paper No MOC6/89, by the Management and Operations Committee, Paper No BC68/89 by the Buildings Committee and Paper No CPC25/89, by the Commercial Properties Committee*. These other papers were *not placed* before the Tenancy Appeals Committee. Paper No AC9/90 also contained submissions by the Housing Authority that the block was beyond economic repair and should be demolished taking into account the age and structural deficiency.

*Lam Kai Hing and Others v Hong Kong Housing  
Authority* MP No. 1923 of 1990

- During the hearing, the Chairman of the Tenancy Appeals Committee said that the Tenancy Appeals Committee would not go into the details of the structural survey, etc. at the hearing.
- However, she could appreciate that, as public money was involved, the cost of repairing a structurally deficient block should be evaluated against the alternative of demolishing it.
- The tenants were also seeking in the hearing, as an alternative, a further *grace period of one year* before quitting their units.
- After hearing the submission from the Housing Authority and the tenants, the Tenancy Appeals Committee sat *in a meeting by itself* to discuss the matters.
- The Tenancy Appeals Committee initially agreed that, while the notices to quit should be confirmed, the possibility of granting a longer grace period for the affected tenants should be explored.

*Lam Kai Hing and Others v Hong Kong Housing Authority* MP No. 1923 of 1990

- On the invitation of the Tenancy Appeals Committee, *relevant Housing Department staff returned to the meeting.*
- The representative of the Housing Authority reiterated that the assessment made of the structural condition in April 1989 was such that a deadline should be set for evacuation.
- One of the members of the Tenancy Appeals Committee added that the Housing Department had, in its submission to the CPC (*Paper No CPC22/90*), reaffirmed the risk of structural failure and considered it imperative for this building to be cleared as soon as possible.
- After further deliberations, the Tenancy Appeals Committee decided to *confirm the notices* to quit served on the tenants.
- The tenants applied for judicial review against the decision of the Tenancy Appeals Committee.
- *Any breach of the rules of fair hearing?*

*Lam Kai Hing and Others v Hong Kong Housing  
Authority* MP No. 1923 of 1990

**Decision of the Court of First Instance:**

“In order to reach a decision on whether to confirm, amend, suspend or cancel the notices to quit, the Tenancy Appeals Committee must examine the reasons why the leases were being terminated by the notices to quit.

The requirement that a person exercising quasi-judicial functions must base his decision on *evidence* means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any *probative value*, the *weight* to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the *High Court does not entitle it to usurp* this responsibility and to substitute its own view for his.

I am satisfied that there was *no material of a probative value before the Tenancy Appeals Committee* to justify the conclusion that Block 1 was beyond economic repair. “

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*Lam Kai Hing and Others v Hong Kong Housing  
Authority* MP No. 1923 of 1990

**Decision of the Court of First Instance:**

“I am satisfied that the Tenancy Appeals Committee did not reach a final decision to confirm the notices to quit until after it had heard further submissions in the absence of the tenants.

...Quite clearly, the tenants were *deprived of the opportunity of hearing and commenting on the further submissions* of the respondent. Further, the *Paper No CPC22/90 referred to...was never brought to the tenants' attention*. The tenants may well have tried to persuade the Tenancy Appeals Committee not to finalize their tentative or initial decision to confirm the notices to quit but instead, to grant them a suspension of the same for some period. They may or may not have succeeded. That is not the point. The point is they were deprived of the opportunity of hearing the further submissions and of being heard thereon. They should have been given such an opportunity. Fair play demands this. In my judgment, there was a *clear breach of the rules of natural justice* which seriously flaws the decision made by the Tenancy Appeals Committee.“

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**Why such principles  
are being adopted?**



*Ng Siu Tung v Director of Immigration*  
FACV Nos. 1-3 of 2001

“...the [English] Court of Appeal in a series of decisions has decided that judicial review for substantive unfairness is not so limited and that, in a case where official conduct has generated a legitimate expectation of a substantive benefit, an administrative decision based on government policy which frustrates the expectation may be reviewable on wider grounds, in particular substantive unfairness and abuse of power ... We accept... that the doctrine forms part of the administrative law of Hong Kong. As such, the doctrine is an important element in the exercise of the court's inherent supervisory jurisdiction to ensure, first, that *statutory powers are exercised lawfully and are not abused* and, secondly, that they are exercised so as to result in *administrative fairness* in relation to both procedural and substantive benefits.”

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*Ng Siu Tung v Director of Immigration*  
FACV Nos. 1-3 of 2001, Justice Bokhary

***“Protection against such misuse or abuse***  
is reason enough for the doctrine of  
legitimate expectation...There is another  
reason for it. As the executive itself would  
probably be the first to recognise, it surely  
facilitates the task of governance that  
***people feel able to put their faith in what  
their government says and does.”***

**How far the courts' power of  
judicial review has influenced  
administrative decisions?**

### Judicial Review Figures

Type of cases	Year									
	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
1. Applications for JR considered by the CFI	116	102	125	146	149	132	148	151	144	132
1.1. Application for leave refused	10	12	7	20	28	15	15	34 (64)	25 (56)	32
1.2. Application for leave granted	32	44	50	48	50	43	58	38 (66)	47 (63)	33
2. Full Hearing of JR cases by the CFI	28	42	55	45	47	42	57	38	39	31
2.1. Remedies not granted	22	29	44	32	28	33	48	23	28	10
2.2. Remedies granted	6	13	11	13	19	9	20	15	11	16
3. JR cases considered by the CA (full hearings only)	20	8	20	3	12	27	6	15	16	2
3.1. Remedies not granted	11	4	11	1	9	23	6	12	13	0
3.2. Remedies granted	9	4	9	2	3	4	0	3	3	2
4. JR cases considered by the CFA	5	2	4	3	5	2	2	1	2	0
4.1. Remedies not granted as against the Administration	4	1	1	3	4	0	2	0	1	/
4.2. Remedies granted as against the Administration	1	1	3	0	1	2	0	1	0	/

**Will there be a change  
in the rationale behind  
judicial review?**

- From negative review to positive review?
- From concrete review to abstract review?
- From less intensive review to more intensive review?

**What may be a new principle of judicial review to be developed by the court?**

*Council of Civil Service Unions v. Minister for the Civil Services* [1985] A.C. 374, Lord Diplock

“..possible adoption in the future of the principle of *"proportionality"* which is recognised in the administrative law of several of our fellow members of the European Economic Community.”



### *Proportionality*

1. What are the interests of the citizens affected by the administrative decision? What is the nature of these interests?
2. What is the purpose of that administrative decision? Is that purpose a legitimate objective?
3. Is there a rational connection between the administrative action and the purpose?
4. Is the administrative decision necessary for achieving the purpose? Is there any alternative that can achieve the purpose but affect citizens' interests to a lesser degree?
5. Can the social benefits gained from achieving the purpose by the administrative decision outweigh the losses suffered by citizens?

Yook Tong Electric Company Limited v. Commissioner for Transport HCAL 94/2002



**Will the court adopt this new principle?**

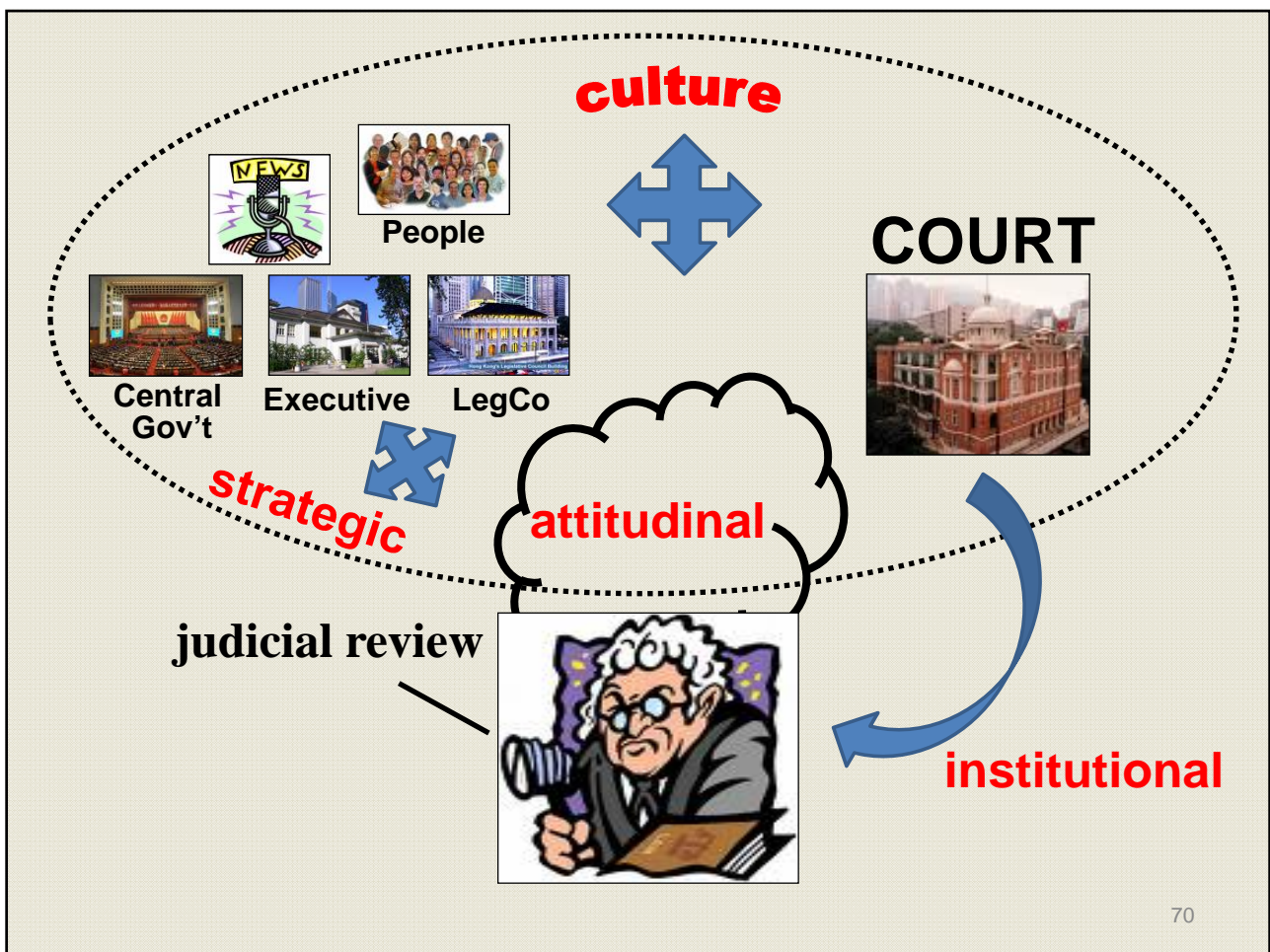
*Xi jin-ping, Vice-President of the People's  
Republic of China, July 2008*

“...there should be solidarity and sincere co-operation within the governance team of the HKSAR and there should be mutual understanding and support amongst the executive, the legislature and the judiciary of the HKSAR.”

*Lord Woolf in Preface to Effective Judicial Review:  
A Cornerstone of Good Governance (2010)*

“...a *partnership* between the executive and the judiciary...I envisage is one where the courts assist the executive by preventing them from acting unlawfully – something which I presume they never intended to do – and, in addition, improve the *standards of administration*. I know what I have just said would not satisfy [some officials]. They would complain that the judiciary had responsibility... of weighing the benefits of what is proposed to the public as a whole (on whose behalf the government proposed to act) against the disadvantages to the individual. They would suggest the judiciary to come to the wrong conclusion as to where the balance lies....Their complaint is the government is left with no idea of what actions they can or cannot take. They do not know what will be acceptable to the judiciary.”

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**How will this new principle  
affect governance?**

## *Judicialization of Governance*

“...the expansion of judicial involvement in the formation and regulation of public policy. Expanded judicial power may come...in the establishment of vigorous systems of judicial review of administrative action and judicially policed processes of sub-legislative rule formation...[or]..***political decision making is shaped and constrained by higher order principles articulated by judges***...[or]...freedom [of private actors] to create and organize rules is constrained by judicially created or enforced public policies.”

Ginsburg, 2009



## *Judicialization of Governance*

“Judicialization involves more than simply the direct articulation and application of rules by judges; it also involves decisions by other political actors made in the shadow of judicial processes. *An agency that refrains from certain conduct, or provides extensive legal justification for actions that it does take, or introduces trial-like processes to defend itself from claims of arbitrariness, may be acting to avoid being brought before courts.*”

Ginsburg, 2009

**Can this principle enhance good governance?**

## *Good Governance*

“public participation, transparency, the accountability to the public and justice or fairness are essential components of good governance. Some of these components are interconnected.”

Linda C. Reif, *The Ombudsman, Good Governance, and the International Human Rights System* (Leiden: M. Nijhoff, 2004)

*Chief Justice Andrew Li's speech at  
Ceremonial Opening of the legal Year 2007*

“It would not be right for judicial review to be viewed negatively as a hindrance to government. On the contrary, it should be seen as providing *an essential foundation for good governance under the rule of law.*”

... But I must reiterate that ...courts are only concerned with what is legally valid, and what is not, in accordance with legal norms and principles.”

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