# Clayton Comments

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## CONTEMPORARY ISSUES IN PUBLIC LAW IN HONG KONG: FREEDOM OF EXPRESSION

**INTRODUCTION**

1. It is a great privilege to speak to you on a subject which has such a central role to Hong Kong's democracy and governance. Hong Kong has a long and distinguished legal tradition of analysing the scope and limitations of constitutional rights. All of us familiar with the UK legal tradition will be aware of the development and refinement of common law rights. But rights issues have, undoubtedly, become centre stage after the enactment of human rights instruments. The Hong Kong courts have of course been considering these constitutional issues under the Bill of Rights Ordinance since 1991, almost 10 years before British lawyers began to wrestle with the UK's Human Rights Act, when it came into effect.

2. I propose during the course of this week to talk about contemporary issues in public law by discussing recent developments in the Hong Courts in three distinct areas:
   - the right to freedom of expression;
   - the right to equality and non-discrimination; and
   - the right to property.

3. I shall examine these developments by making comparisons (where relevant) with developments in parallel human rights jurisdictions and will specifically consider freedom of expression issues in relation to:
   - judicial review and freedom of expression
   - the impact of freedom of expression on practice and procedure; and
   - the impact of freedom of expression on private law litigation.

4. The Final Court of Appeal in ***Hysan Development Co. Ltd. v Town Planning Board*** reaffirmed the generous approach[1] the Hong Kong courts have always taken to human rights decisions from other jurisdictions, drawing heavily on the jurisprudence of the ECtHR's jurisprudence, the UK case law on the Human Rights Act 1998 and the decisions of the Canadian Supreme Court: see ***HKSAR v Lam Kwong Wai***.[2]

5. I believe that there is great value when doing human rights work of examining the case law of different jurisdictions. So many human rights questions are universal in nature- and it is often illuminating to draw upon the collective wisdom emerging from different constitutional approaches to the same issue. The merit of comprehensively analysing

[1] [2016] HKCFA 66; (2016) 19 HKCFAR 372; [2016] 6 HKC 58; FACV 21/2015 (26 September 2016) para 50

[2] [2006] HKCFA 84; (2006) 9 HKCFAR 574 at para 37

foreign human rights authorities is, in particular, demonstrated by the decisions of the South African Constitutional Court, which is expressly enjoined by s 39(1) of its Constitution Act to interpret its bill of rights in line with international law and has a discretion to consider foreign law.

6. Nevertheless, Courts when, applying comparative legal principles must always be astute to recognise the importance of different legal, political and cultural traditions, as well as, if appropriate giving effect to the particular language used in a specific rights instrument.

**General principles**

7. **Article 27 of the Basic Law** guarantees that:

> *Hong Kong residents shall have freedom of speech ... of assembly ... and of demonstration*

8. Such freedoms may however be restricted as prescribed by law: see **Article 39(2) of the Basic Law**.

9. **Article 16(2) of the Hong Kong Bill of Rights** protects the freedom of expression:

> *(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

10. The protection is not absolute as **Article 16(3)** states:

> *(3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary-*
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> *(a) for respect of the rights or reputations of others; or*
> *(b) for the protection of national security or of public order (ordre public), or of public health or morals.*

11. **Article 19 of the International Covenant on Civil and Political Rights** states:

> *1. Everyone shall have the right to hold opinions without interference.*
>
> *2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

> *3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> > *(a) For respect of the rights or reputations of others;*
> > *(b) For the protection of national security or of public order (ordre public), or of public health or morals.*

12. As Lord Steyn pointed out in ***R v Secretary of State for the Home Department ex p Simms***, freedom of expression enjoys a privileged position in the hierarchy of rights:[3]

> *Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market:" **Abrams v. United States** (1919) 250 U.S. 616, 630, per Holmes J. (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country: see Stone, Seidman, Sunstein and Tushnet, **Constitutional Law**, 3rd ed. (1996), pp. 1078-1086*

Lord Steyn's views were accepted as a general proposition which applies to Hong Kong by Ma CJ in ***Leung Kwok Hung v HKSAR***.[4]

13. The right to freedom of expression is closely allied to other rights such as the freedom to demonstrate and protest. **Article 17 of the Hong Kong Bill of Rights** provides that the right of peaceful assembly shall be recognized. It goes on to deal with restrictions:

> *The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*

14. The Hong Kong courts have regularly stressed that freedoms of speech, peaceful assembly and demonstration, protected by Article 27 of the Basic Law, Articles 16 and 17 of the Bill of Rights, are all fundamental rights. They are precious and lie at the very foundation of Hong

[3] [2000] 2 A.C. 115 at 126

[4] [2005] HKCFA 40; (2005) 8 HKCFAR 229

Kong as a democratic society. As the Court of Final Appeal put it in ***Leung Kwok Hung v HKSAR***:[5]

> *2. These freedoms are of cardinal importance for the stability and progress of society for a number of inter-related reasons. The resolution of conflicts, tensions and problems through open dialogue and debate is of the essence of a democratic society. These freedoms enable such dialogue and debate to take place and ensure their vigour. A democratic society is one where the market place of ideas must thrive. These freedoms enable citizens to voice criticisms, air grievances and seek redress. This is relevant not only to institutions exercising powers of government but also to organizations outside the public sector which in modern times have tremendous influence over the lives of citizens. Minority views may be disagreeable, unpopular, distasteful or even offensive to others. But tolerance is a hallmark of a pluralistic society. Through the exercise of these freedoms minority views can be properly ventilated.*

15. The limitations placed on interfering with constitutional rights by the "*prescribed by law*" and proportionality requirements are recognised in virtually all human rights systems as key principles and are well-established public law concepts in Hong Kong. In Hong Kong the Final Court of Appeal has taken the view that the obligation to show that the existence of law for the purposes of "*prescribed by law*" can be satisfied by a non-statutory scheme of administrative law and policies.[6] The "*prescribed by law*" obligation also requires a principle of legal certainty, that law must be adequately accessible to the citizen and must be formulated with sufficient precision to enable the citizen to regulate his conduct.[7]

16. Proportionality, as the Court of Final Appeal also emphasised in ***Leung Kwok Hung v HKSAR***, requires that:
    - a restriction must be rationally connected with a legitimate purpose; and that
    - the means used to impair the right must be no more than necessary to accomplish the legitimate purpose in question;
    - this does not mean that the Government must show the least intrusive route, but rather that it has chosen from a range of solutions which, whilst commensurate with the legitimate object, infringes the right, as little as reasonably possible;
    - the burden lies on the Government to justify any restriction and any restriction must be narrowly interpreted.

17. I now turn to some the recent development concerning freedom of expression questions, which merit further discussion.

**JUDICIAL REVIEW AND FREEDOM OF EXPRESSION**

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[5] Above

[6] ***Kong Yumming v Director of Social Welfare*** [2009] 4 HKLRD 382

[7] ***Shum Kwok Sher v HKSAR*** (2002) 5 HKCFAR 381 para 60

**Freedom to demonstrate** ***Chee Fei Ming v Director of Food and Environmental Hygiene (No 2)*** (2016)
***Lai Man Lok*** (2017)

*Regulating bill boards*

18. In ***Chee Fei Ming v Director of Food and Environmental Hygiene (No 2)*** the Court of Appeal were considering the constitutionality of the statutory scheme under Part IX of the Public Health and Municipal Services Ordinance Cap 132, which regulates the display and affixing of bills and posters. Issues of constitutionality are engaged because the Director exercised his power under Section 104C to remove materials displayed without his permission (as required by Section 104A) on Government land in respect of banners, placards and frames used in connection with Falun Gong static demonstrations at various spots in Hong Kong.[8] The appeal arose out of an appeal from a rolled up first instance hearing, which raised several procedural issues I shall not address. In effect, the Court of Appeal treated the appeal as an application for leave. It is also of interest to note that the Court of Appeal dealt with the case, despite an objection that the Applicant had never applied for approval before applying for judicial review.

19. The Court of Appeal decided that leave should be granted on the "*prescribed by law*" challenge. Section 104A does not give any guidance on how the power on granting or withholding permission should be exercised, having regard to (i) the objectives of the statutory scheme, (ii) the provisions in the Management Scheme and the common law requirement of proportionality as part of the underlying legal context in which the power must be exercised.

20. Unsurprisingly, the Court of Appeal did not regard the mere fact that approval is required is disproportionate since there are many authorities showing that when such measure is introduced with legitimate aims safeguarding public interest, a requirement to obtain prior approval can be a justifiable restriction on the freedom of expression: see ***T v Commissioner of Police*** where Ribeiro PJ discussed s 4(15) of the Summary Offences Ordinance as adequate control over buskers.[9]

21. Nonetheless, the Court of Appeal granted leave on the new proportionality ground. The Court took the view that it was reasonably arguable that the outcome on the application of proportionality test would be different if the discretion is exercised solely by reference considerations like road safety and streetscape, fair and equal allocation of public space for dissemination of information, as compared with the situation where the discretion is exercised in a manner which amounts in substance to censorship on materials that could be displayed in public.

[8] [2016] HKCA 242

[9] [2014] HKCFA 71 paras 125 to 128

*Whether rights are engaged when undertaking activity which is unlawful*

22. The High Court decision in ***Lai Man Lok v Director of Home Affairs***[10] appears to resolve the question of whether or not the right of freedom of assembly and expression entitled an individual to demonstrate at whatever locality the protesters chose. But the approach adopted by Chow J appears to be inconsistent with the decision in ***Secretary of Justice v Leung Kwok Wah***[11] and out of line with the jurisprudence of the UK Courts under the HRA and of the ECtHR.

23. Chow J held that the Applicant's rights to the freedom of expression, assembly and demonstration were not engaged because these rights do not entail a the ability to choose the forum where these rights could be exercised. In ***Lai Man Lo*** the Applicant chose to demonstrate in a viewing area at a flag waving ceremony where he was not entitled to be.

24. In 2012 in ***Leung Kwok Wah*** Lam J had earlier reviewed a number of different positions the Courts have taken when considering these issues.[12] In ***HKSAR v Au Kwok Kuen*** A Cheung J (as he then was) held that the right of peaceful assembly and the right to freedom of expression stopped at the boundary of private residential property belonging to others in the absence of any permission to enter and said:

> *In my view, in Hong Kong, notwithstanding the acknowledged importance of the right of peaceful assembly and the right to freedom of expression, neither the provisions in the Basic Law nor those in the Hong Kong Bill of Rights bestow any freedom of forum for the exercise of those rights….*

25. However, Lam J went on to contrast the case concerning camping by the Occupy Movement at St Paul's Cathedral churchyard, ***Mayor of London v Hall***, where Lord Neuberger MR put the point differently:[13]

> *37. The right to express views publicly, particularly on the important issues about which the defendants feel so strongly, and the right of the defendants to assemble for the purpose of expressing and discussing those views, extends to the manner in which the defendants wish to express their views and to the location where they wish to express and exchange their views. If it were otherwise, these fundamental human rights would be at risk of emasculation. Accordingly, the defendants' desire to express their views in Parliament Square, the open space opposite the main entrance to the Houses of Parliament, and to do so in the form of the Democracy Village, on*

[10] [2017] HKCFI 909
[11] [2012] HKCFI 1605
[12] [2012] HKCFI 1605; [2012] 5 HKLRD 55
[13] [2011] 1 WLR 5

> *the basis of relatively long-term occupation with tents and placards, are all, in my opinion, within the scope of articles 10 and 11.*

26. But this does not mean that the protesters have an absolute right in choosing the place and the manner in which they demonstrate- for Lord Neuberger continued:[14]

> *Having said that, the greater the extent of the right claimed under article 10.1 or article 11.1, the greater the potential for the exercise of the claimed right interfering with the rights of others, and, consequently, the greater the risk of the claim having to be curtailed or rejected by virtue of article 10.2 or article 11.2.*

27. In the subsequent case of ***City of London Corp v Samede*** Lord Neuberger said:[15]

> *the answer to the question [whether the interference with the defendants' rights would be lawful, necessary and proportionate] is inevitably fact-sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public.*

28. However, Chow J followed the approach taken by Lam J and concluded that the applicant could not rely on his constitutional rights- because he was not lawfully entitled to be at area where he was demonstrating from.

29. However, the conclusion of Chow J appears to conflict with in ***Leung Kwok Hung v HKSAR*** (which I have already discussed) as well as the UK decisions under the HRA and with longstanding principles used by the ECtHR. In ***G v Germany*** the EComHR decided that:[16]

> *finds that, in the circumstances of the present case, the applicant's conviction for having participated in a sit-in can reasonably be considered as necessary in a democratic society for the prevention of disorder and crime. In this respect, the Commission considers especially that the applicant had not been punished for his participation in the demonstration of 12 December 1982 as such, but for particular behaviour in the course of the demonstration, namely the blocking of a public road, thereby causing more obstruction than would normally arise from the exercise of the right of peaceful assembly. The applicant and the other demonstrators had thereby intended to attract broader public attention to their political opinions concerning nuclear armament. However, balancing the public interest in the prevention of*

[14] Above, at para 38
[15] [2012] 2 All ER 1039
[16] App No. 13079/87

*disorder and the interest of the applicant and the other demonstrators in choosing the particular form of a sit-in, the applicant's conviction for the criminal offence of unlawful coercion does not appear disproportionate to the aims pursued.*

30. The general proposition that applicant may, nevertheless, acquire rights even though they are acting unlawfully has been expressly addressed in the ECtHR cases concerning right of respect for the home. In ***Buckley v United Kingdom*** the ECtHR rejected in terms the Government's submission that only a legally established home could attract the protection of the right of respect for the home.[17]

31. If the Hong Kong courts come to adopt the approach I have outlined, the legal analysis certainly will be different- although this may not affect the outcome of the particular case the Court is considering.

**Elections** ***Wong Ching Fung*** (2016)
***Kwok Chen Kin*** (2017)

*The right to become legislators at 18*

32. In ***Wong Ching Fung v Secretary of Justice*** the Applicant, who was then 19 years old, said he wanted to stand for the election as a member of the Legislative Council for the geographical constituency.[18] However, he is prevented from doing so since s 37(1)(a) of the Legislative Council Ordinance (Cap 542) provides that a person may only stand as a candidate at an election for the Legislative Council if he or she is at least 21 years old. The principal interest in the case was the rejection by Au J of the Applicant's contentions that it was incumbent upon the Respondent to provide evidence to demonstrate that the restriction was proportionate.

33. Leave will only be granted the grounds of the intended judicial review are reasonably arguable with a realistic prospect of success.[19] It was accepted that it is for the Government to demonstrate that the setting of the minimum candidature age requirement at 21 years old (a) is to achieve a legitimate aim; (b) is rationally connected to that legitimate aim; and (c) is no more than necessary to achieve that aim.

34. In principle there appears to be different minimum age restrictions on the right to elect and the right to stand for election, as the case law of the ECtHR recognises.[20] Secondly, it is well

[17] (1997) 23 E.H.R.R. 101 paras 52-55

[18] [2016] HKCFI 1047; [ 2016] 3 HKLRD 835

[19] ***Po Fun Chan v Winnie Cheung*** [2007] HKCFA 77; (2007) 10 HKCFAR 676 at paragraphs14 - 17, per Li CJ.

[20] ***Ždanoka v Latvia*** at para 106; ***Melnychenko v Ukraine*** (2006) 42 EHRR 39 at para 57; ***Yumak v Turkey*** [2008] ECHR 1888; (2009) 48 EHRR 4 ECtHR at para 109; Schabas, The European Convention

established that when the court is dealing with a proportionality challenge which concerns political or economic judgment, due margin of appreciation should be accorded to the relevant authority's decision on that issue in deciding whether the restriction is no more than necessary. ***In Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs*** Cheung CJHC emphasized that the court in applying the proportionality test should give a broad margin of appreciation to the government or legislature regarding its discretionary judgment on issues relating to political judgment, explaining:[21]

> *5. It is true that generally speaking, the intensity of scrutiny varies with the nature of the right involved when applying the proportionality test. But this is not the only relevant consideration. The nature of each individual issue encountered on the facts of the case when applying the proportionality test is also highly relevant. And different limbs of the test may throw up different issues of different nature.*
>
> *6. Generally speaking, the court is neither constitutionally positioned nor institutionally equipped to deal with a political issue, that is, an issue essentially involving political rather than legal judgment, or for that matter, a complicated polycentric socio-economic issue raising sensitive questions of resource allocation. This is so regardless of whether the right sought to be restricted is a fundamental right, and also whether the issue is encountered at the first limb or the third limb of the proportionality test. For good reasons, the court should, generally speaking, accord the government/legislature a broad margin of appreciation regarding their discretionary judgment on such an issue.*

35. It was, nevertheless, argued for the Applicant that it is *prima facie* illogical to suggest that a person of 18 years old can elect (and thus decide) who could represent him or her as a member of the Legislative Council, but the very same person himself or herself cannot stand for the election as a member.

36. Au J rejected the fundamental proposition that the right to vote and the right to stand for election are rights of similar nature which justify similar restrictions both because of the ECtHR authorities and the decision of Lam J in ***Wong Hin Wai v Secretary of Justice***.[22]

*The right of legislators to create bye elections*

37. In ***Kwok Chen Kin v Secretary for Constitutional and Mainland Affairs*** the Final Court of Appeal the appellant challenged the constitutionality of s 39(2A) of the Legislative Council Ordinance, Cap 542, which affects the right to stand for election as contained in Article 26 of

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on Human Rights page 1029; Lester Pannick & Herberg, Human Rights Law and Practice, 3rd edn, paragraph 4.21.11; Clayton and Tomlinson, The Law of Human Rights, 2nd edn, paragraph 20.36.

[21] [2015] HKCA 499; [2015] 5 HKLRD 881

[22] [2012] 4 HKLRD

the Basic Law and Article 21 of the Hong Kong Bill of Rights.[23] Section 39(2A) barred a legislator who resigned from the Legislative Council from standing in the by-election within 6 months of resignation.

38. Since the right to stand for election is not an absolute right, the proper approach in determining the constitutionality of section 39(2A) was through asking whether the Government was acting proportionately.

39. Electoral laws that involve political or policy considerations ought generally to be accorded a wide margin of appreciation, as the Courts are generally not equipped to determine political questions. Consequently, the appropriate intensity of review regarding section 39(2A) should be the "*manifestly without reasonable foundation*" test.

40. Section 39(2A) fell within the range of reasonable options open to the Legislature to adopt in order to deal with the perceived mischief of the undermining of the electoral system by legislators resigning in order to cause a by-election in which they would stand. The encroachment on the constitutional right to stand for election was a relatively small one, as it only applied to by-elections and the bar was solely against the resigning member who was perfectly entitled to stay in office as a legislator if he or she had wanted to. Even then, the bar was only for six months.

41. Thus, the Court found s 39(2A) to be proportionate and constitutionally valid and considered a number of international cases, when considering the critical proportionality question, whether the interference was "*no more than necessary*".

42. The statutory bar on bye elections had been the subject of intensive debate. The proposal to resign to trigger by elections was said to provide a *de facto* referendum on the political manifesto of the League of Social Democrats to press for universal suffrage and the abolition of functional constituencies. The bye elections created in 2011 led to a consultation because the Government regarded it an "*abuse*" for a member to resign in order to cause a by-election in which that member intended to stand. Following the consultation, the Government gave effect to the proposal that any member who resigned from the Legislative Council should be prohibited from taking part in any bye election within 6 months of resignation. The political debate in the Legislative Council was heated and a judicial review challenge by Mr Leuang was unsuccessful.[24]

43. However, the Government's complaint that it is an abuse of process for a legislator to resign on political grounds to provoke a bye election to promote their own political views appears to be open to question. For what it is worth, there are no such prohibitions on UK parliamentarians: and in recent years a number of MPs have do so. For example, David Davis MP, the current Secretary of State for Exiting the European Union, resigned in 2008 to

[23] FACV No 12 of 2016

[24] ***Leung Kwok Hung v President of the Legislative Council (No. 1)*** (2014) 17 HKCFAR 689

spark a wider debate on civil liberties arising from anti-terrorist legislation. In 2016 Zac Goldsmith MP resigned in protest at the Government's proposal to build a third runway at Heathrow Airport, stood as an independent candidate and lost the bye election, but was reselected as a Conservative Party candidate in 2017, when he narrowly won. Even more strikingly, this year the British Prime Minister called an early General Election to consolidate her position for the negotiations to take place to leave the European Union, overriding the recently enacted Fixed Term Parliament Act in doing so. Regrettably, however, the outcome of the General Elections has not been congenial for the Prime Minster.

44. It is also of interest to consider the approach taken in the Venice Commission's ***Report on the Exclusion of Offenders from Parliament***.[25] The Venice Commission is the Council of Europe advisory body on constitutional law. The judicial arm of the Council of Europe is the ECtHR, the Venice Commission is the Council of Europe's advisory body on constitutional law and I have the honour of representing the United Kingdom. The ***Report*** came to be written when this issue came up in 2015 when the majority and the opposition in Albania in 2015 agreed to end the boycott of Parliament by the opposition. The Report states that about one third of the Council of Europe countries have more detailed constitutional provisions concerning parliamentary candidates containing various restrictions that prevent convicted persons from running for elections including convictions for certain offences eg electoral offences or for certain identified offences (such as convicted for an offence involving moral values such as honesty, worthiness, honour and reputation). The ***Report*** does not consider disqualification for any offence which is comparable to the one considered by the Final Court of Appeal.

45. The legal submissions advanced in the Final Court of Appeal by the Government covered many relevant authorities and the Court's approach to the proportionality analysis essentially applied the approach taken in ***Hysan Development***. In particular, the Court acceded to the submission that:[26]

> *political decisions or legislative provisions reflecting political judgments are often precisely those areas where the courts are likely to afford a large margin of appreciation. Where electoral laws involve political or policy considerations, a wider margin of appreciation ought generally to be accorded. The authorities from the United Kingdom [and the European Court of Human Rights are consistent with this approach when politics and political judgments are involved. In particular, where there has been active political debate on an issue or piece of legislation, the Court will again be inclined to give a wider margin of appreciation. The reason for this approach is evident: the courts are generally not equipped (certainly not better equipped than others) to determine political questions, although of course there are limits.*

[25] 30 June 2015, Opinion No. 807 / 2015

[26] FACV No 12 of 2016 para 42

46. The Court considered the Grand Chamber decision in ***Ždanoka v Latvia*** where the Grand Chamber said:[27]

> *The Convention institutions have had fewer occasions to deal with an alleged violation of an individual's right to stand as a candidate for election, ie, the so-called 'passive' aspect of the rights under article 3 of the First Protocol. In this regard the court has emphasised that the contracting states enjoy considerable latitude in establishing constitutional rules on the status of members of parliament, including criteria governing eligibility to stand for election. Although they have a common origin in the need to ensure both the independence of elected representatives and the freedom of choice of electors, these criteria vary in accordance with the historical and political factors specific to each state. The multiplicity of situations provided for in the constitutions and electoral legislation of numerous member states of the Council of Europe shows the diversity of possible approaches in this area. Therefore, for the purposes of applying article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned.*

47. The Court went on to distinguish the Canadian case barring prisoners from voting, ***Sauvé v The Attorney General of Canada*** and reached a clear conclusion on a difficult and highly political issue where there were no decided cases which addressed restrictions on legislators in precisely these terms it was considering.

48. Nonetheless, it is worth noting that the Court was not taken to the Strasbourg Grand Chamber decisions on prison voting like ***Hirst v United King*****d*****om (No 2)*** where the Grand Chamber controversially stated the general principles in these terms:[28]

> *59. As pointed out by the applicant, the right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion, as may be illustrated, for example, by the parliamentary history of the United Kingdom and other countries where the franchise was gradually extended over the centuries from select individuals, elite groupings or sections of the population approved of by those in power. Universal suffrage has become the basic principle (see **Mathieu-Mohin and Clerfay**t, cited above, p. 23, § 51, citing **X v. Ger**many, no. 2728/66, Commission decision of 6 October 1967, Collection 25, pp. 38-41).*
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> *60. Nonetheless, the rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere.*
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> *61. There has been much discussion of the breadth of this margin in the present case. The Court reaffirms that the margin in this area is wide (see **Mathieu-Mohin and***

[27] 45 EHRR 478 , para 106

[28] (2004) 38 EHRR 82

> ***Clerfayt**, cited above, p. 23, § 52, and, more recently, **Matthews v. the United Kingdom** [GC], no. 24833/94, § 63, ECHR 1999-I; see also **Labita v. Italy** [GC], no. 26772/95, § 201, ECHR 2000-IV, and **Podkolzina v. Latvia**, no. 46726/99, § 33, ECHR 2002-II). There are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision.*
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> *62. It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see **Mathieu-Mohin and Clerfayt**, p. 23, § 52). In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. For example, the imposition of a minimum age may be envisaged with a view to ensuring the maturity of those participating in the electoral process or, in some circumstances, eligibility may be geared to criteria, such as residence, to identify those with sufficiently continuous or close links to, or a stake in, the country concerned (see **Hilbe v. Liechtenstein** (dec.), no. 31981/96, ECHR 1999-VI, and **Melnychenko v. Ukraine**, no. 17707/02, § 56, ECHR 2004-X). Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, mutatis mutandis, **Aziz v. Cyprus**, no. 69949/01, § 28, ECHR 2004-V).*

49. It is also worth saying that the Grand Chamber rejected the UK's argument that ***Hirst*** should be reversed in ***Scoppola v Italy (No*** 3),[29] as did the UK Supreme Court in ***R(Chester) v Secretary of State for Justice***.[30]

50. It was not possible to present any authorities to the Court which directly concerned prohibitions on legislators resigning to provoke bye elections. The Court did consider the Supreme Court decision in ***R(Lord Carlile) v Secretary of State for the Home Department*** where a dissident Iranian politician was excluded from entering the UK to address parliamentarians.[31] But the context in which deference was required was very different in the ***Lord Carlile*** case. In the ***Lord Carlile*** case the Supreme Court held that the Home Secretary's decision, based on the advice of the Foreign Secretary, was, as such, a decision of the executive with which the court would be extremely reluctant to interfere; the risk of

[29] (2012) 56 EHRR 66

[30] [2014] A.C. 271

[31] [2015] A.C. 945

assessing potentially substantial harm to the United Kingdom's interests was very much a matter for assessment by the executive rather than by the court. More relevant, perhaps, was a decision the South African Constitutional Court which the Final Court of Appeal did not consider: ***United Democratic Movement v President of the Republic of South Africa*** held that a prohibition on legislators prohibiting floor crossing, is not an essential component of multi-party democracy, nor of proportional representation, and the Constitution does not demand an anti-defection provision.[32]

**Television licensing** ***Hong Kong Television Network*** (2016)

51. In ***Hong Kong Television Network v Chief Executive in Council*** the Court of Appeal were considering an appeal from an order quashed the decision of the CE in Council dated 15 October 2013 rejecting its application for the grant of a domestic free television programme service licence under the Broadcasting Ordinance, Cap 562.[33]

52. As you will know, since the late 1970s until 1991, Hong Kong only had two television operators, Television Broadcasts Limited and Asia Television Limited. Both were terrestrial broadcasters and had almost 100% local household penetration. Since 1991, Hong Kong viewers could also watch programmes provided by regional satellite broadcasters. On top of this, in 1993, one pay television operator (Wharf Cable) was given an exclusive right to operate subscription television for three years. In February 1998, a commercial "Video on Demand" licence was granted. With the continuing advance in broadcasting science, the number of television channels technically possible was no longer limited by previous transmission technology which had become outdated by 1990s. In 1998 Government adopted, as a long term policy objective and in line with the global trend of deregulation for the telecommunication and broadcasting industries, a commitment to further liberalizing the television industry and opening up the market for more competition. As a result of the consultation and review, policy recommendations were made to the Chief Executive in Council who on 8 December 1998 decided to adopt them. One consequence of that decision was the enactment of the Ordinance in 2000.

53. Following a public statement by the then Secretary for Commerce and Economic Development in July 2009 that the Government would welcome applications for domestic free television licences from interested parties, the applicant (then known as City Telecom (HK) Limited ) put in an application on 31 December 2009. That was followed by a second application made by Fantastic Television Limited of the i-Cable group on 15 January 2010; and a third one by HK Television Entertainment Company Limited of the PCCW group on 31 March 2010. The Communication Authority recommended all three applications be approved-in-principle. In the end, the Chief Executive in Council took the view that, if one free television licence were to be granted, it should be awarded to Fantastic TV; whereas if two licences were to be granted, the second one should be awarded to HKTVE. The CE in

[32] 2003 (1) SA 495

[33] [2016] HKCA 124; [2016] 2 HKLRD 1005; [2016] 3 HKC 80

Council accordingly decided to grant approval-in-principle to Fantastic TV and HKTVE, whilst rejecting the applicant's application.

54. The case was heard before Au J who decided that in favour of the Applicant on two related grounds, that is, misinterpretation of (and thus non-adherence to) the Government's own broadcasting policy since 1998, and breach of a legitimate expectation. He rejected, on the other hand, the other judicial review grounds advanced as well as a constitutional challenge based on breaching freedom of expression.

55. Cheung CJHC reversed the judge on the two successful judicial review challenges but also upheld his grounds for rejecting the constitutional challenge. The principal complaint was whether the consideration of "public interest" by the Chief Executive in Council under s 10(1) was sufficiently certain to satisfy the "*prescribed by law*" requirement. He expressed the view that whether a norm or legal concept is legally certain to pass the prescribed by law requirement must depend on the content of law in question, the field it is designed to cover and the number and status of those to whom it is addressed. A norm will be "*foreseeable*" if it affords a measure of protection against arbitrary interference by the public authorities. Cheung CJHC stressed that it is important to bear in mind the relevant factual and legal contexts when authorities are cited and considered, even though the same norm may be involved. In his view, context is all important and upheld the ruling that there was no breach of the "prescribed by law" obligation.

56. Cheung CJHC also expressed serious reservations regarding the proportionality argument. The Applicant had chosen against challenging the licensing regime itself as infringing its constitutional right to freedom of expression. In his view, this approach involved the Applicant's acceptance that the licencing regime, including the discretionary grant of licence under section 10(1), was not a disproportionate restriction on its freedom of expression. Cheung CJHC took the view that it was not easy to see why and how the proportionality test should be applied a second time in reviewing the discretionary decision made under s 10(1) pursuant to and under this licensing regime, which, *ex hypothesi*, is a constitutional one passing the proportionality test. On the other hand, he accepted that the House of Lords' decision in ***Belfast City Council v Miss Behavin' Ltd*** involving an application for a licence to use premises as a sex shop which was refused by the local city council, appears to suggest that the refusal should be reviewed in accordance with the proportionality test as a Convention right was involved, despite that there was no challenge against the licensing system itself.[34] But he went on to find that even applying the proportionality test as the correct standard of review, that is, the "*no more than is necessary*" standard, that the challenge failed.

**Interim relief and freedom of expression** ***Hong Kong Journalists Association*** (2017)

[34] [2007] 1 WLR 1420

57. In the ***Hong Kong Journalists Association*** an application on very short notice by the Association for a mandatory injunction against the Director of Information Services and the Secretary for Home Affairs to require them to allow all full members of the Applicant access to the media centre and facilities and all press events relating to the Chief Executive Election to be held on this Sunday, 26 March 2017, at the Hong Kong Convention and Exhibition Centre. The complaint related to online only media that solely disseminate information via the Internet, since journalists from online media attached to traditional media (newspapers, radio and television stations) are granted full access.

58. The Applicant alleged that the Government's policies have not kept up with changing circumstances because these arrangements are only available to traditional media (newspapers, radio and television stations) but not Internet media. In 2016 the Ombudsman had issued a report which was critical of the Information Service Department's practice.

59. The principles governing the grant of interlocutory injunction were not in dispute. They involve examining (i) whether there are serious issues to be tried in the application for judicial review; (ii) whether damages would be an adequate remedy for either party (though, in a public law case of this kind, the adequacy of damages as an alternative remedy is of less relevance); and (iii) whether the balance of convenience lies in favour of granting or refusing interim relief. In this last stage, in the public law context, it is important to have regard to the wider perspective of public interest. [35]

60. Importantly, the Applicant was seeking a mandatory injunction — an order requiring the Government to do a certain thing. Moreover, if granted, it will be an order that finally determines and effectively disposes of the underlying proceedings so far as the second decision is concerned. In the context of mandatory injunction in private law, as Ma J (as the Chief Justice then was) stated in ***Music Advance Ltd v The Incorporated Owners of Argyle Centre Phase I***:[36]

> *… generally a court will have to feel a high degree of assurance that at the trial of an action it will be shown that the interlocutory injunction was rightly granted before an interlocutory mandatory injunction will be given …*

61. Lam J was prepared to assume that the Applicant had sufficient standing to make the application, that the relevant constitutional provisions are engaged, and that the challenge of the existing policy raises serious issues to be considered at the substantive hearing of the judicial review application. The critical question in the urgent hearing is not primarily the

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[35] See ***Society for Protection of the Harbour Ltd v Chief Executive in Council*** [2003] HKCFI 800; [2003] 3 HKLRD 960, §§10–13 per Hartmann J; ***Man Hing Medical Suppliers (International) Ltd v Director of Health and Another*** (unrep, HCAL 62/2014, 7 January 2015), §7 per Au J; see also ***Cheung Tak Wing v Communications Authority*** (unrep, HCAL 60/2015, 12 June 2015) at §§23–30 per Au J.

[36] [2010] 2 HKLRD 1041[3] at §12(7)

merits of the underlying challenge but whether or not the interim mandatory injunction sought by the Applicant should be granted.

62. Lam J refused the application, having regard to all the circumstances including the nature of the injunction sought, the proper separation of the courts from executive functions, the lack of a high degree of assurance that the interim injunction sought would be found at trial to have been rightly granted, the lateness of the application, and the concern for maintenance of security and order at the Chief Executive Election.

63. The approach taken by Lam J is unsurprising, in view of the fact that the application was for an interim mandatory injunction. The decision is, perhaps, a salutary reminder of the need to provide ample notice, particularly where the Applicant needed to address difficult issues on the evidence.

**The constitutionality of criminal charges** ***Fong Kwok Shan*** (2016)

64. In ***HKSAR v Fong Kwok Shan*** three defendants stood trial. D1 and one other were jointly charged with two counts of contravening an administrative instruction of the Legislative Council.[37] D3 was charged with one count of obstructing an officer of the Legislative Council in the execution of duty.

65. Wong J dismissed the appeal but the Court of Final Appeal has granted permission because the case raises several issues of importance.[38] Section 12(1) of the Administrative Instructions states:

> *"No person shall, in a press or public gallery, display any sign, message or banner."*

66. The magistrate made the following findings of facts:

*First Charge (D1)*

On 7 May 2014, D1 displayed the "Defend Tseung Kwan O" T-shirt that she wore in the public gallery of the Legislative Council Chamber and also handed a piece of paper with a "swastika" on it to the second defendant, which was then displayed on the glass curtain wall of the public gallery by the second defendant. The defence had not challenged the course of the events.

**Second charge (D3)**

[37] [2016] HKCFI 820; HCMA 666/2015 (19 May 2016)
[38] [2017] HKCFA 4; FAMC 29/2016 (8 February 2017)

The second defendant displayed a message with the "swastika" on it on the glass curtain wall of the public gallery of the Legislative Council. PW1 raised her hands to pull this message with force. PW1 was clearly executing her duties and D3 pulled the right hand of the first witness in order that PW1 would shake off D3's hand to break free from the grip of the second defendant. And PW1 had also received the order to tear away the message. PW1 pulled that message with force but it was being pressed down with force by the second defendant. Afterwards, PW1 felt numb pain in her right hand which was also red and swollen. PW1 was a security assistant of the area in question which did not permit the display of sign and message. So there was basis for PW1 to stop the second defendant from displaying sign or message. What D3 did obstructed the first witness from stopping the second defendant from displaying a sign or message. In other words, these actions were obstructing the first witness who was an officer of the Legislative Council in the course of executing her duties.

*The third charge: failing to behave in an orderly manner (D1)*

On 13 May 2014, the second witness also saw the first, second and third defendants linking hands and inviting others to link hands. The second witness had already warned the trio, and read out the contents of section 17(c), Cap 382 of the Ordinance. Due to the loud noise of the rowdiness at the scene, he later read out the warning with an amplifier once more, but the three defendants were still behaving in a noisy manner. Councillor Gary Fan announced that the meeting had to be moved to conference room number 3. The first and second defendants were "loud", while the third defendant was relatively softer. The second witness confirmed that if a meeting was in session beneath the public gallery, it would no doubt be affected. The second witness confirmed that the first and second defendants were both noisy. The second witness' testimony was borne out by exhibits P14 and P16. The Chairman of the meeting had made repeated warnings, and asked the staff to escort the noisy people out of the conference room. The court takes the view that the prosecution had called sufficient factual evidence to prove the elements of the third offence, and that the first and second defendants did fail to behave in an orderly manner.

67. The magistrate also found that all the relevant charges were constitutional and found the two appellants guilty of the relevant charges.

68. According to ***Secretary for Justice v Latker***, when the issue in question is whether the criminal charges are unconstitutional, the court should consider the following matters one by one:[39]

> (1) Whether the relevant offence engages any constitutional right;
> (2) If it does, whether the rights have been denied or infringed;
> (3) If they have, whether the prosecution has proven that such denial or infringement can be justified;

[39] [2009] HKCFI 55; [2009] 2 HK C 100.

(4) Where the prosecution cannot show such justification, the relevant offence should be held unconstitutional and therefore void.

69. In ***Leung Kwok Hung v HKSAR*** the Court of Final Appeal stressed that the courts must give such a fundamental right a generous interpretation so as to give individuals its full measure, and that restrictions on it must be narrowly interpreted.[40] Wong J regard to the following principles:

(1) The Court of Final Appeal held in ***HKSAR v Ng Kung Siu*** that freedom of speech and expression are not absolute rights.[41]
(2) Neither the Basic Law nor the Bill of Rights gives the right to exercise the right to freedom of expression in all places: see ***HKSAR v Au Kwok Kuen***.[42]
(3) When considering the right to freedom of expression, different considerations should be had with regard to the different natures of the premises involved, including whether it is open to public.
(4) Even for premises with a public character, one must consider whether it is a premises generally open to the public and if there are restrictions, what those restrictions are, and what the objectives for those restrictions are. Whether the property owner, including governmental agencies, who set the conditions for the use of the property is in exercise of his/their proprietary right and if the conditions are consistent with the rules in public law: see ***HKSAR v Leung kwok Wah***.[43]
(5) There is no absolute right to demonstrate even at public places or premises of a public nature.[44]
(6) In the case of a government premises not open to the public, there is no right of access to demonstrate at such premises.[45]
(7) With regards to the Legislative Council Chamber, despite the fact that this is a premises of a public nature, but special considerations should be given, in particular with regard to the principle of separation of powers: see ***Leung Kwok Hung v President of the Legislative Council (No.1)***.[46] The Legislative Council has the power to govern its own affairs, and this includes the power to exercise control over the premises occupied by it: see ***Zundel v Liberal Party of Canada***.[47]

70. Wong J held that members of the public do not have the right to demonstrate in the Legislative Council Building, especially when meetings are in session. Neither the Basic Law nor the Bill of Rights gives members of the public the freedom to exercise such rights inside

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40 [2005] HKCFA 40; (2005) 8 HKCFAR 229
41 [1999] HKCFA 10; (1999) 2 HKCFAR 442, at 4561
42 [2010] HKCFI 487; [2010] 4 HKC 235: see para 28
43 [2012] HKCFI 1605; [2012] 5 HKLRD 556: see paras 29-30
44 ***Leung Kwok Wah*** above, para 57
45 ***Leung Kwok Wah*** para 30
46 [2014] HKCFA 74; (2014) 17 HKCFAR 689.
47 1999] 181 D.L.R. (4th ) 463.

the Legislative Council Chamber, especially when they in fact do not have the absolute right to enter the Chamber. He rejected the complaint that the interference was not prescribed by law, and decided that freedom of expression is only restricted at the press or public gallery. He sent on to hold that s 12(1) seeks to restrict are the display of sign, message or banner, that to allow someone to display sign, message or banner in the press or public gallery that is capable of conveying certain view, position or ideology makes it hard not to allow other people to display sign, message or banner that expresses a different view, position or ideology and that to express idea by means of these items is different from doing so with words; these methods of expression last, as long as the items are being displayed, they continue to be an eyesore to people who hold a different view or position. He concluded by stating that to think that to allow people holding different views or positions to do this will only create a scene where there is mutual display and not any risk to safety or order is a view that is divorced from reality.

71. The approach taken by Wong J is, however, difficult to reconcile with the principles expressed by the Final Court of Appeal, various decisions of the ECtHR or of the UK courts under the HRA.

72. As the Final Court of Appeal has stressed going back to Li CJ in the flag desecration case, ***HKSAR v Ng Kung Siu***:[48]

> *Freedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong's system and way of life. The courts must give a generous interpretation to its constitutional guarantee. This freedom includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticise governmental institutions and the conduct of public officials.*

73. His views mirror the Strasbourg courts which routinely states that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to justification under Article 10(2), freedom of expression applies not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.[49] Such are the demands of pluralism, tolerance and broadmindedness without which there is no '*democratic society*'.

74. Consequently, the ECtHR in ***Eon v France*** decided that it was a disproportionate interference with freedom of expression to prosecute for insulting the French President by a placard

[48] [1999] HKCFA 10; [1999] 3 HKLRD 907; (1999) 2 HKCFAR 442; [2000] 1 HKC 117 para 41

[49] ***Sunday Times v United Kingdom*** (1979) 2 EHRR 245 para 65 and repeatedly reaffirmed.

lampooning the with the phrase "*Get lost, you sad prick*".[50] The point was further explained by Sedley J in ***Redmond-Bate v Director of Public Prosecutions***:[51]

> *Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.*

75. It is also important to recognise that the point in issue is comparatively narrow and focuses on giving vent to expression by signs, rather than looking the defendants' conduct. In any case, the approach taken to proportionality by Wong J is open to question as being overly broad.

76. On the other hand, analogies will be made with the conclusion reached by the Final Court of Appeal in ***Ng Kung Siu***, where it decided that the flag desecration Ordinances were not unconstitutional because it only banned one means of expression and did not interfere with the freedom to express the same message by another means.[52]

77. It will be interesting to see how the Final Court of Appeal tackles these issues.

**THE IMPACT OF FREEDOM OF EXPRESSION ON PRACTICE AND PROCEDURE**

**Civil procedure Disclosure Order** ***Wong Wing Yue Roseline*** (2017)

78. In ***Wong Wing Yue Roseline v Next Media Interactive*** plaintiff made a claim for copyright infringement and breach of confidence, based on edited copy of the two photographs taken by her domestic helper with a mobile phone provided to her for her use in the course of her employment.[53] Following the grant of an interim injunction an application for disclosure was made to explain whether the defendants had received a copy of the Original Photos and they did the editing to blur the faces of the two other persons to produce the Infringing Photos themselves or they simply received the edited version.

79. The defendants oppose disclosure of the source of the Original Photos/Infringing Photos on the basis that the source is insistent on its confidentiality. It was argued that the smooth operation of a free press is wholly dependent on the disclosure of information matched by an express or implied undertaking to keep the source confidential highlighting the importance of protection of journalistic sources so as to protect freedom of speech and press freedom. Reliance was placed on the ECtHR decision in ***Goodwin v United Kingdom*** where a journalist refused to disclose the identity of his informant who wished to remain

[50] Judgment, 14 March 2013
[51] [2000] H.R.L.R. 249 para 20
[52] Above at 459
[53] [2017] HKCFI 269; HCA 2701/2016

anonymous despite a disclosure order made against him under s 10 of the Contempt of Court Act 1981.[54] The ECtHR found that found that his freedom of expression under Article 10 was violated by the disclosure order.

80. The ***Goodwin*** case was considered by the House of Lords in ***Ashworth Hospital Authority v MGN Ltd***.[55] The House of Lords decided that that there were exceptional circumstances to justify disclosure of sources because of the security of patients' record essential to the care of the patients and the need to deter the same or similar wrongdoing in the future rendered disclosure necessary and proportionate and justified.

81. Leaving to one side the freedom of expression debate, public policy is always a prime consideration in the grant of a ***Norwich Pharmacal*** order.[56] Hong Kong residents' rights under Article 27 of the Basic Law are guaranteed and cannot be easily taken away just because the newspaper is not published by a natural person or a local incorporation. It is illogical to say that such freedoms are only confined to such newspapers published by natural persons who are Hong Kong residents. It plainly cannot be the true and meaningful construction of Article 27. Although the authorities had no strict application to the present case, the Deputy High Court Judge accepted that in exercising his discretion to grant or refuse to grant disclosure orders at this interlocutory stage, he had to undertake a balancing exercise, weighing the individual rights on the one hand against the public interests on the other. He held that judges should be vigilant to protect the freedom of the press, which is the bulwark of a democratic society and that protection of press sources is of paramount importance to the freedom of the press, which can only be removed in view of cogent reasons. However, having considered the particular circumstances of the case, he refused to grant the order for disclosure.

**Interlocutory injunctions** ***University of Hong Kong*** (2015)

82. One of the issues considered by Lam J in ***University of Hong Kong v Hong Kong Commercial Broadcasting Co Ltd*** litigation was the implications of freedom of expression on an application for an interim injunction to remove all audio recording of a confidential meeting of the University Council.[57] It was argued that, having regard to Article 27 of the Basic Law and Article 16 of the HKBOR, the Court should not decide an interim injunction application by applying the ***American Cyanmid Co v Ethicon*** principles.[58] The court should, instead, require the plaintiff to establish its case to a much higher threshold, based upon s 12(3) of the (UK) Human Rights Act 1998 and the cases decided under that provision. Section 12(1)(3) provides:

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[54] (1996) 22 EHRR 123

[55] [2002] 1 WLR 2033

[56] ***Norwich Pharmacal Co.v Customs & Excise Commissioners*** [1974] AC 133 per Lord Reid at p.175D.

[57] [2015] HKCFI 2178; [2016] 1 HKLRD 536; [2015] 6 HKC 677; HCMP 2801/2015 (30 November 2015)

[58] [1975] AC 396.

> *(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression ….*
> *(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.*

83. Section 12(3) is the product of UK legislation which was explained in ***Cream Holdings Ltd v Banerjee***.[59] There is no similar legislation in Hong Kong and Lam J held that is not for the Court of First Instance to rewrite the law by a judicial decision to adopt an equivalent approach. He said he was highly conscious of the dimension of free speech, but there is nothing in the authorities to show that the traditional approach suitably adjusted and applied would necessarily fail to give due recognition and effect to any fundamental rights: see ***A-G v Guardian Newspapers*** at the interlocutory stage of the famous Spycatcher case, the Court of Appeal[60] applying the ***American Cyanmid*** approach and the ECtHR decision in ***The Observer and The Guardian v United Kingdom***.[61]

**THE IMPACT OF FREEDOM OF EXPRESSION ON PRIVATE LAW LITIGATION**

**Breach of Confidence** ***University of Hong Kong (no 2)*** (2016)

84. In ***University of Hong Kong v Hong Kong Commercial Broadcasting Co Ltd*** Lam J also had to decide at the final hearing declaratory and injunctive relief to preserve the confidentiality of the meetings of its Council.[62] The action was not defended, but the case is of interest because Lam J analysed the public interest defence, taking into account the constitutional right to freedom of expression and summarised the principles as follows:

    (1) There is a constitutionally guaranteed freedom of expression (Art 16 of the Bill of Rights; Art 27 of the Basic Law), but the freedom is not absolute. It is qualified by, inter alia, the need to respect the right of others to confidentiality. There is a public interest that confidences should be preserved and protected by the law, but that public interest may in turn be outweighed by some other countervailing public interest which favours disclosure: ***A-G v Guardian Newspapers Ltd (No 2***).[63]
    (2) The test is not whether the matters disclosed would interest the public or be of interest to the public or even "*newsworthy*", but whether it is in the public interest that disclosure

[59] [2005] 1 AC 253, §15
[60] 1989] 2 FSR 3, 18
[61] [1991) 14 EHRR 153.
[62] [2016] HKCFI 1130; [2016] 4 HKLRD 113; [2016] 4 HKC 583; HCMP 2801/2015 (8 July 2016)
[63] 1990] 1 AC 109, 282E

should be made and the confidence breached: ***Prince of Wales v Associated Newspapers Ltd***;[64] ***Jameel (Mohammed) v Wall Street Journal Europe Sprl***.[65]

(3) Nor is the test merely whether it is in the particular judge's view desirable for the information to be made public. The disclosure, to the proposed extent, in the proposed manner and to the proposed recipient, must be shown to be required in the public interest.

(4) Where there is justification to disclose, the disclosure should be to one who has a proper interest to receive the information: ***Initial Services v Putterill***;[66] ***Corrs Pavey Whiting & Byrne v Collector of Customs***; ***A-G v Guardian Newspapers Ltd (No 2)***.[67] Self-help is generally greeted by the law with circumspection. As the High Court of New Zealand stated in ***Solicitor-General v Alice***:[68]

> *... where there are available legal remedies to be pursued there can as a rule be no room for either whistle-blowing or indeed any other remedy or self-help. That principle is a simple application of the rule of law: that disputes are to be resolved within the law by the courts and tribunals established to do justice. ... [S]elf help is the very antithesis of the rule of law.*

(5) The defence has to be kept within limits, lest it becomes *"... not so much a rule of law as an invitation to judicial idiosyncracy by deciding each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence*": ***Smith Kline and French Laboratories (Australia) Ltd v Department of Community Services and Health***,[69] a risk recognised also by the English Court of Appeal in ***R v Department of Health ex p Source Informatics Ltd***.[70]

(6) It is well established that there is no confidence in iniquity: ***Gartside v Outram***,[71] but the University has not so contended and, as at present advised, I am not prepared to limit the public interest defence to situations involving "*the existence of an iniquity in the sense of a crime, a civil wrong or serious misdeed of public importance*": cf. ***Corrs Pavey Whiting & Byrne v Collector of Customs***.[72] The defence may well extend to disclosure of activities that are "*seriously contrary to the public interest*": ***Francome v Mirror Group Newspapers Ltd*** [73]or disclosure necessary to prevent a "*serious risk of public harm*": Toulson & Phipps, ***Confidentiality*** (3rd ed) §6-058; ***London Regional Transport v Mayor of London***.[74] I doubt if these categories can be regarded as closed. The freedom of speech and the associated right of the public to receive information are in this kind of case always a central consideration.

(7) In such cases whether disclosure should be permitted may depend on the nature of the confidential information, the degree of confidentiality, the seriousness and probability of

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64 2008] Ch 57 para 68
65 [2007] 1 AC 359, §147
66 [1968] 1 QB 396, 405G
67 at p 282H
68 [2007] NZHC 48 at §§63 & 64
69 [1990] FSR 617, 663 per Gummon J
70 [2001] QB 424 at §52
71 (1856) 26 LJ Ch 113, 114
72 Supra, at p 450 per Gummon J.
73 [1984] 1 WLR 892, 895-896)
74 [2003] EMLR 4 at §36

harm to public as well as the extent to which disclosure would redress that harm. On the other hand, it is not only necessary to take into account the prejudice that would be caused to the plaintiff and other specific parties by the disclosure of the information in the particular case, but also the risk of harm generally resulting from the confidentiality being undermined by disclosure. An example is given in Toulson & Phipps, supra, at §6-075: if the law too readily permits a doctor to disclose information about a patient, it may impair a patient's willingness to confide in the doctor and receive treatment.

(8) It is in my view not always sufficient merely to show that the confidential information if published would contribute to a debate of general interest. Where the information is impressed with a duty of confidence, as the English Court of Appeal stated in ***Prince of Wales v Associated Newspapers Ltd***, it is "*not enough to justify publication that the information in question is a matter of public interest*".[75] In that case, both the English High Court and the Court of Appeal held that publication of the Prince of Wales's journal of his travels in Hong Kong, leaked by an employee in breach of confidence, was not justified, notwithstanding that it contained information which would, inter alia, enable the public to assess the political conduct of the heir to the throne.

(9) Absent some specific public need for disclosure, to say that disclosure of confidential information by a person subject to a private law duty of confidence is necessarily justified simply because there is a public interest in having the matter discussed or debated by the public seems to me to be too wide as a general proposition.

**Defamation** ***Bawang International*** (2016)

85. You will all know that the right to freedom of expression has had significant implications for defamation work here- ever since the landmark decision in ***Cheng v Tse Wai Chan*** where Lord Nichols decided that the fair comment defence would only be lost if a defendant knew his comments were untrue or was reckless.[76] The recent case of ***Bawang International v Next Magazine Publishing*** concerned a claim for libel and malicious falsehood in respect of an article published in the Next Magazine about the presence of a chemical known as 1,4-dioxane in the Plaintiffs' shampoos.[77] The trial lasted for 39 days, covered many complex legal issues and examined difficult expert evidence.

86. Lok J carefully analysed the technical evidence and found that 1,4-dioxane is a confirmed animal carcinogen and is a possible human carcinogen. But the actual effect of the substance on humans is unknown because of the lack of empirical data. He applied the well-established principle that it is the burden on the defendant to establish the truth of the alleged libel to prove the defence of justification. However, the plaintiff argued that the article involved a matter of public interest and the ECtHR decisions in ***Lingens v Austria***[78]

[75] [2008] Ch 57, §67

[76] (2000) HKCFAR 339, 360

[77] [2016] HKCFI 850; HCA 1109/2010 (23 May 2016)

[78] (1986) 8 E.H.R.R. 407

and ***Thorgeirson v Iceland***[79] meant it would be unfair to place a burden on the Defendant to prove the impossible, which would adversely affect the freedom of speech and the right of the public to know.

87. Lok J rejected this submission in robust terms:[80]

> *there should be a clear distinction between the defence of justification and the defence of publication in the public interest. Whilst the court will certainly take into account civil right considerations in determining the defence of publication in the public interest, it would not be right to relax the burden of proof in respect of the defence of justification. Ultimately, the defence of justification only concerns the truthfulness of the alleged libel, and so the normal rule in respect of burden of proof should apply.*

88. However, Lok J accepted that the right to freedom of expression was significant when considering the defence of publication in the public interest, the ***Reynolds*** defence.[81] He then applied a number of well-known authorities under the HRA and from the ECtHR.

**1 September 2017**

[79] (1992) 14 E.H.R.R. 843

[80] Above, para 325

[81] ***Reynolds v Times Newspaper*** [2001] 2 A.C. 127