Clayton Comments

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CONTEMPORARY ISSUES IN PUBLIC LAW: THE RIGHT TO PROPERTY

Introduction

1. I am now coming to the end of this series of lectures, having spoken on freedom of expression on Monday and equality rights on Tuesday. I am grateful to those of you who have attended earlier and would like to welcome those who have decided to attend this particular event.

2. As I said at my first lecture on Monday, I propose to take my lead from the approach taken by the Final Court of Appeal in ***Hysan Development Co. Ltd. v Town Planning Board*** which reaffirmed the generous approach[1] that the Hong Kong courts have always taken to human rights decisions from other jurisdictions. For these purposes I shall look at cases from the

3. If you will forgive me for repeating a theme of these papers, 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. 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 particular rights instrument.

General principles

4. Article 105 states:

> *The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.*
>
> *Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.*
>
> *The ownership of enterprises and the investments from outside the Region shall be protected by law.*

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

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5. Article 6 of the Basic Law states:

> *The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law. The land and natural resources within the Hong Kong Special Administrative Region shall be State property.*

6. I shall first discuss the impact of Arts 6 and 105 on property before considering its implications on real property.

The impact of Art 105 on property

The meaning of property

7. '*Property*' is to be widely construed and is '*not confined*' to instances in which the deprivation suffered by the owner is accompanied by a corresponding acquisition by the state.[2] 'Property' is defined by s 3 of the Interpretation and General Clauses Ordinance as including:

> *(a) money, goods, choses in action and land; and*
> *(b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a) of this definition*

8. In ***Kowloon Poultry v Director of Agriculture*** the Court of Appeal assumed without deciding that profit, business or goodwill can amount to '*property*' for the purposes of Art 105.[3]

Deprivation of land vs control

9. The distinction the Courts have made between a deprivation of property and a control or limit in the public interest over how the property is used is a matter of degree.[4] As Hartmann J in ***Fine Tower Associates v Town Planning Board*** observed:[5]

> *If measures restricting the use and enjoyment of property go too far that will be recognised under long-enshrined common law principles as constituting a taking; that is, a deprivation, in respect of which compensation must be paid. In* ***Pennsylvania Coal Co. v. Mahon****, Mr Justice Holmes expressed it thus in general constitutional terms :*[6]

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[2] ***Ying Ho Co v Secretary of Justice*** (2004) 7 HKCFAR 333, 348 *per* Bokary PJ

[3] [2002] 4 KHKC 277 para 5

[4] ***Grape Bay Ltd v A-G of Bermuda*** [2000] 1 WLR 574, 583 (Lord Hoffmann) applied by Hartmann J in ***Fine Tower Associates v Town Planning Board*** [2006] 2 HKC 507

[5] Above, para 54

[6] (1922) US 393 para 413

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> *"Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts."*

10. In ***Fine Tower Associates v Town Planning Board*** Reyes J took the view that, in deciding whether there was, in fact, an expropriation, it was relevant to consider the following:[7]

    - Whether the land could be used in its existing state;
    - Whether the land was marketable; and
    - Whether the land might be used or developed, even if such use or development might be contingent on obtaining planning permission.

Methods of effecting a deprivation of land

11. An owner of land in Hong Kong may be lawfully deprived of land:

    - Re-entry and resumption by the Government
    - Deprivation of land use through zoning imposed by the Town Planning Board; and
    - Adverse possession

12. Where the Government re-enters, a question will arise concerning whether a claim for compensation could be made, based on Art 105. It is normally assumed that the Basic Law cannot apply because the Government re-entering under its lease is acting in a private capacity. However, a decision of the English Court of Appeal in ***R((Weaver) v London and Quadrant Housing Trust*** suggests that a more nuanced approach may be necessary.[8]

13. In ***Weave***r the tenant sought judicial review of the landlord's decision to evict her, claiming that it had acted in breach of a legitimate expectation generated by guidance issued by the Housing Corporation and thereby infringing her right of respect for private life under Article 8 of the CEHR. The HRA makes an important distinction between core public authorities like central or local government which are liable for breaches of Convention rights across the whole range of its activities and hybrid public authorities, which are liable for breaches of convention rights- except where the act in question is '*private*'.

[7] [2006] 4 HKLRD 347

[8] [2010] 1 W.L.R. 363

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14. To establish her case, the tenant needed to show that in the exercise of its eviction powers the landlord was a public authority within the meaning of s 6(3)(b) of the Human Rights Act 1998 and susceptible to judicial review, and that the act of terminating her tenancy was not a private act within the meaning of s 6(5) of the 1998 Act. The landlord enjoyed a substantial public subsidy and its allocation and management of housing stock was subject to statutory regulation. It was common ground that the landlord, although not a core public authority, was a hybrid authority in the sense that it had the power to obtain parenting orders and anti-social behaviour orders, which were functions of a public nature.

15. The English Court of Appeal held under the HRA that the relevant question for determination was whether the act of terminating the tenancy was a '*private*' act within the meaning of s 6(5) of the 1998 Act, requiring the Court to focus on the context in which the act occurred and considering both the source and nature of the landlord's activities. In determining the question in s 6(5) of whether the act of the hybrid authority was '*private*', it was necessary to consider whether the act was in pursuance of, or at least connected with, performance of functions of a public nature. The Court of Appeal decided that a number of factors cumulatively established sufficient public flavour to make provision of social housing by the landlord a public function, namely that the landlord:

    - received significant capital payments from public funds to provide subsidised social housing to meet the needs of the poor, which was a publicly desirable objective and could properly be described as a governmental function;
    - worked in close harmony with local government and helped to fulfil the latter's statutory obligations, in particular through allocation agreements which severely circumscribed the landlord's freedom to allocate properties; and
    - was itself subject to regulations designed to further the objectives of government policy in housing the poor.

    An act done in pursuance of a public function was not necessarily a '*private*' act merely because it involved the exercise of rights conferred by private law, since so to hold would significantly undermine the protection which Parliament intended to afford the potential victim of a hybrid authority; and the act of terminating the tenancy of a person in social housing, though probably not the termination by a social landlord of a tenancy at market rent, was necessarily involved in the regulation of the landlord's public function and was thus, itself, a public act subject to the HRA.

16. It is strongly arguable that an act of re-entry would breach Art 105 in the absence of adequate compensation so that the exercise of the power must not be disproportionate to the breach. This approach is consistent with the Grand Chamber decision in ***Pye v United Kingdom*** where Strasbourg's highest court decided that in relation to a control of use, a reasonable relationship of proportionality must exist between the means used and aim to be

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realised.[9] However, in practice, the Court of First Instance would be likely to grant relief against re-entry.

Resumption under the Land Resumption Ordinance

17. In Hong Kong a landowner merely holds a leasehold estate from the Government, the appropriate procedure to compulsorily recover land is by resumption which is principally regulated by the Land Resumption Ordinance. Section 9 of the Ordinance states that no action shall lie against the Government for any loss or damage- other than that provided by the Ordinance.

18. However, Art 105 confers a right to compensation at an open market value. The basic principles were expressed by Lord Nicholls in ***Director of Buildings and Lands v Shun Fung Ironworks***[10] (and approved by the CFA in ***Director of Lands v Yin Sheen Enterprises***)[11] where he said:

> *The purpose of these provisions, in Hong Kong and England, is to provide fair compensation for a claimant whose land has been compulsorily taken from him. This is sometimes described as the principle of equivalence. No allowance is to be made because the resumption or acquisition was compulsory; and land is to be valued at the price it might be expected to realise if sold by a willing seller, not an unwilling seller. But subject to these qualifications, a claimant is entitled to be compensated fairly and fully for his loss. Conversely, and built into the concept of fair compensation, is the corollary that a claimant is not entitled to receive more than fair compensation: a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. It is ultimately by this touchstone, with its two facets, that all claims for compensation succeed or fail.*

19. The fair balance test in ***Pye v United Kingdom*** means that a reasonable relationship of proportionality must exist between the means used and aim to be realised.

20. Compensation will be determined by the Land Tribunal. The CFA has confirmed in ***Director of Lands v Yin Shuen Enterprises***[12] and ***Dragon House Investment v Secretary of Transport***[13] that no increased compensation is payable where land values are subject to a restrictive covenant and evidence shows that purchasers of comparable plots are willing to pay an increased price. The principles the Land Tribunal use have been subject to numerous judicial challenges and there are no obvious grounds for suggesting that these breach Art 105.

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9 (2008) 46 EHHR 45 para 75

10 [1995] 2 A.C. 111, 125

11 [2003] 6HKCFAR 1

12 (2003) 6 HKCFAR 1

13 (2005) 8 HKCFAR 668

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21. Under the HRA compulsory purchase orders in the UK are also subject to A1P1. The order must be in accordance with law, for a legitimate aim and must be proportionate.[14] However, under A1P1, the fact that there may be '*less intrusive*' ways of achieving the same aim does not mean that an order will be disproportionate—it will be sufficient if the measure chosen is '*reasonably necessary*' in the public interest.[15] It has been suggested that once a compelling public interest has been established it is not necessary to consider the rights of each landowner individually,[16] but it is submitted that that it is probably necessary to consider the individual circumstances of each owner before making the order.

Eviction of owners following resumption of their land

22. The constitutionality of this process was challenged in ***Wong Wei v Director of Lands***.[17] Although a challenge could be made by way of judicial review, Andrew Cheug J held that the fact that occupiers were evicted before the quantum of compensation had been finalised did not breach Art 105 nor was the Government required to provide alternative accommodation of comparable character, size and location before eviction.

Deprivation of land by planning controls

23. Planning restrictions and reductions of plot ratios deprive a landowner of substantial use of land. The critical question is whether they amount to a breach of Art 105. The Court of Appeal found a deprivation in ***Fine Tower Associates v Town Planning Board*** that Conditions of Exchange limiting the applicant's land use to industrial and go-down purposes where the Draft Outline Zoning Plan designated 44% of the land as '*Open Space*' and '56% '*Other Specified Uses*'.[18] However, it will require truly exceptional circumstances before a Court decides that a deprivation via planning controls entitles the landowner to compensation under Art 105.

Deprivation of land by adverse possession

24. As a result of ***Pye v United Kingdom***, the question which arises is whether squatters who acquire possessory titles have to pay compensation to the dispossessed owners. However, this possibility has been rejected in two first instance decisions, ***Harvest Good Development***

[14] See the discussion in ***Pascoe v First Secretary of State*** [2007] JPL 607, paras 54–55.
[15] See ***R (Fisher) v English Nature*** [2004] 1 WLR 503, para 46 (relying on ***James v United Kingdom*** (1986) 8 EHRR 123); ***Lough v First Secretary of State*** [2004] 1 WLR 2557; ***R (Clays Lane Housing) v Housing Corporation*** [2005] 1 WLR 2229, para 25 and ***Pascoe v First Secretary of State*** above, paras 68–75 (summarising the authorities); the approach in ***Baker v First Secretary of State*** [2003] EWHC Admin 2511 (applying the strict proportionality test) has not been followed.
[16] ***Alliance Spring Co v First Secretary of State*** [2005] EWHC (Admin) 18.
[17] [2010] HKEC 1485
[18] [2008] 1 HKLRD 553

v Secretary of Justice[19] and ***Hong Kong Kam Lan v Realray Investments***.[20] In ***Harvest Good Development*** the constitutional point was taken only after the case had gone to the CFA,[21] so not surprisingly, the Court of First Instance rejected the challenge on the ground of abuse of process.

The right to personal property

25. The starting point for the definition of '*property*' is the approach taken by the common law. The paradigm cases of '*property*' are land and goods but the concept is much wider. It is, perhaps, not surprising that English law has not attempted to provide any complete definition of '*property*'. In ***National Provincial Bank Ltd v Ainsworth*** Lord Wilberforce said:[22]

> *Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.*

Although property is generally assignable it is not always so.[23]

26. The relatively limited case law in relation to personal property has encouraged the Hong Kong courts to look at international jurisprudence, particularly A1P1 of the ECHR. The Court of Appeal has said that it is '*often appropriate*' to take account of the decisions of the ECtHR[24] even when there are '*certain differences in wording*' between the two.[25]

27. A1P1 states:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

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[19] [2007] 4 HKC 1

[20] [2007] 5 HKC 122

[21] [2006] HKCFA 8; [2006] 1 HKLRD 185; (2006) 9 HKCFAR 29; FACV 21/2005

[22] [1965] AC 1175, 1247–1248.

[23] See ***Commissioner of Stamp Duties (NSW) v Yeend*** (1929) 43 CLR 235, 245, per Isaacs J: '*assignability is a consequence, not a test' of a proprietary right*; and see ***Don King Productions v Warren*** [2000] Ch 291 (nonassignable contract 'property' for the purposes of the Partnership Act 1890).

[24] ***Chow Shun Yung v Wei Pei*** (2003) 6 HKCFAR 299, 314

[25] ***Lam Shiu Po v Commissioner of*** Police (2009) 12 HKCFAR 137 para 62

28. There are a number of important differences in the wording of Art 105 and A1P1. For example, Art 105 refers to '*property*' whereas A1P1 refers to '*possessions*'. The term '*possessions*' is used in the English text of A1P1 but the word used in the French text, '*biens*', is substantially wider, covering all property rights. The Grand Chamber in ***Anheuser-Busch Inc v Portugal*** stated that it is primarily for the national legal system to attribute and identify property rights, the concept of '*possessions*', but that the issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by A1P1.[26]

29. Under A1P1 the concept of '*possessions*' has an autonomous Convention meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as *'property rights*', and thus as '*possessions*' for the purposes of this provision.[27] '*Possessions*' have been held to include immovable and movable property; corporeal and incorporeal interests, such as shares;[28] and intellectual property such as patents[29] copyrights[30] and applications for registration of trade marks.[31] It also includes contractual rights[32] (including leases,[33] an option to renew a lease[34] and covenants in a lease[35]), property which is subject to a retention of title clause,[36] and judgment debts.[37]

30. A legitimate expectation is treated under A1P1 as a form of '*present property*' and can be a '*possession*', even if it is beyond the powers of the public authority to realize that expectation by the British courts applying the HRA.[38] However, the question of whether this

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[26] See ***Iatridis v Greece*** (2000) EHRR 30 EHRR 97; ***Beyeler v Italy*** (2001) 33 EHRR 52 para 100; and ***Broniowski v Poland*** (2005) 40 E.H.R.R. 21 para 129.

[27] ***Gasus Dösier-und Fördertechnik GmbH v Netherlands*** (1995) 20 EHRR 403 para 53; ***Beyeler v Italy*** (2001) 33 EHRR 52, para 100; ***Zwierzynski v Poland***, Judgment of 19 June 2001, para 63.

[28] ***Bramelid and Malmström v Sweden*** (1982) 29 DR 64.

[29] ***Smith Kline and French Laboratories Ltd v Netherlands*** (1990) 66 DR 70; ***Lenzing AG v United Kingdom*** [1999] EHRLR 132.

[30] ***Melnychuk v Ukraine*** (2006) 42 EHRR 42.

[31] ***Anheuser-Busch Inc v Portugal*** (2007) 45 EHRR 36 (GC), paras 66–78.

[32] ***A, B and Company AS v Germany*** (1978) 14 DR 146, 168 and ***Association of General Practitioners v Denmark*** (1989) 62 DR 226, 234; ***Paeffgen GmBH v Germany*** Decision of 18 Sep 2007 (contracts giving applicant right to use or transfer internet domain names).

[33] ***Mellacher v Austria*** (1989) 12 EHRR 391 para 43.

[34] ***Stretch v United Kingdom*** (2004) 38 EHRR 12.

[35] ***S v United Kingdom*** (1984) 41 DR 226, 232.

[36] ***Gasus Dösier-under Fördertechnik GmbH v Netherlands*** (1995) 20 EHRR 403.

[37] ***Stran Greek Refi neries and Stratis Andreadis v Greece*** (1994) 19 EHRR 293 paras 61–62 (arbitral award); ***Timofeyev v Russia*** (2005) 40 EHRR 38, paras 44–48 (award of compensation).

[38] ***Rowland v Environment Agency*** [2003] Ch 581 (Lightman J) para 80 and [2005] 1 Ch 1 (CA), paras 86–89; see also ***PW & Co v Milton Gate Investments*** [2004] Ch 142, paras 116–126.

falls within the scope of Art 105 has yet to been definitively decided. Nevertheless, doubts have been expressed in several cases about whether the Hong Kong government can agree by contract not legislate in a future manner.[39]

31. Welfare benefits can be '*possessions*' for the purposes of A1P1. In ***Gaygusuz v Austria***[40] the ECtHR held that the right to an advance on a state pension by way of emergency assistance was a '*pecuniary right*' and was protected by A1P1.[41] It has been accepted that statutory widow's benefit,[42] unemployment benefit[43] and a disability allowance for adults[44] are possessions.

32. The position in relation to non-contributory state benefits was long unclear in the Strasbourg case law. A number of ECtCom decisions suggested that these could not be '*possessions*' for the purposes of A1P1.[45] However, in other cases, it was held that noncontributory benefits could constitute possessions.[46] The point was resolved by the Grand Chamber in ***Stec v United Kingdom***[47] which noted the two distinct lines of authority and also noted that it had been held that Art 6(1) applied disputes to entitlement to non-contributory benefits.[48] The ECtHR went on to say that, in the interests of coherence of the Convention as a whole the autonomous concept of 'possessions' should be interpreted in a way which is consistent with the concept of pecuniary rights under Art 6(1). More importantly, it was important

> *to adopt an interpretation of Art 1 of Protocol No.1 which avoids inequalities in treatment based on distinctions which, at the present day, appear illogical and unsustainable*[49]

33. As a result, it held that there was no ground to justify the UK courts continuing to distinguish between contributory and non-contributory benefits for the purposes of

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[39] ***Secretary of Justice v Lau Kwok Fau*** (2005) 8 HKCFAR 304, per Sir Anthony Mason NPJ at 103-104; ***Fairland Overseas Development v Secretary for Justice*** [2007] 4 HKLRD 949.

[40] (1996) 23 EHRR 365 para 41.

[41] As a result, the refusal to give an emergency payment to a Turkish national was a violation of Art 1 taken in conjunction with Art 14 (non-discrimination)

[42] ***Cornwell v United Kingdom*** (1999) 27 EHRR CD 62.

[43] ***Claes v Belgium*** (1987) 54 DR 88; ***Nahon v United Kingdom*** Decision of 23 Oct 1997; see also ***Carlin v United Kingdom*** (1997), 25 EHRR CD 75 in which the Commission was prepared to assume that Industrial Injuries Invalidity benefi t was a 'possession'.

[44] ***Koua Poirrez v France*** (Judgment of 30 September 2003).

[45] See eg. ***G v Austria*** (1984) 38 DR 84***; Coke v United*** *Kingdom* [1999] EHRLR 130 (no claim in respect of interference with rights of service widows who had not contributed to the Armed Forces Pension Scheme).

[46] See ***Koua Poirrez v France*** (above), para 42***; Wessels-Bergervoet v Netherlands*** (2004) 38 EHRR 37.

[47] (2005) 41 EHRR SE18.

[48] Above, para 47 (referring to ***Salesi v*** *Italy* (1998) 26 EHRR 187).

[49] Ibid, para 48.

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A1P1:[50] if legislation was in force for the provision of welfare benefits as of right, these must be regarded as possessions of people satisfying the requirements for entitlement. However, the Grand Chamber in ***Stec*** emphasized that A1P1

> *does not create a right to acquire property. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme . . . If, however, a Contracting State has in force legislation providing for the payment as of right of a welfare benefit—whether conditional or not on the prior payment of contributions—that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No 1*.[51]

34. A1P1 also protects rights under a state pension scheme. Although the Convention does not provide a general right to a pension[52] or an individual a right to a pension in a particular amount,[53] the right to a pension under a state scheme will be a possession whether the scheme is contributory[54] or non-contributory.[55] A right to a widow's payment and widowed mother's allowance under the Social Security Contributions and Benefits Act 1992 is a '*possession*' under A1P1.[56] Thus, in ***Willis v United Kingdom*** [57] a widower who had failed to qualify for such benefits by reason of his sex successfully argued that this failure breached Article 14 read with A1P1.

35. I am afraid I am not sufficiently familiar with the Hong Kong legal system to express a view on how these principles play out here.

"In accordance with law"

36. Both Arts 6 and 105 require an interference to be "*in accordance with law*". In ***Securities and Futures Commission v C*** Kwan JA (Mrs) recognised at first instance that these principles

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[50] Ibid, para 52.
[51] Ibid, para 54.
[52] ***X v Germany*** (1966) 23 CD 10; ***X v Sweden*** (1986) 8 EHRR 269; ***JW and EW v United Kingdom*** (1983) 34 DR 153.
[53] ***Kuna v Germany*** (Decision of 10 April 2001) and ***Rajkovic v Croatia*** (Decision of 3 May 2001).
[54] ***Müller v Austria*** (1975) 3 DR 25; ***C v France*** (1988) 56 DR 20 at 34; ***Szbrabjer and Clarke v United Kingdom*** [1998] EHRLR 230 (interest in State Earnings Related Pension scheme).
[55] ***Wessels-Bergervoet v Netherlands*** (see above); the approach in this case, which was inconsistent with the Commission case law on 'non-contributory pensions' was approved by the Grand Chamber in ***Stec*** (see above), para 49ff.
[56] ***Willis v United Kingdom*** (2002) 35 EHRR 21.
[57] Ibid.

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had to apply to Arts 6 and 105 and concluded that there was no breach of legal certainty.[58] The Court of Appeal reversed her decision on other grounds.[59]

Deprivations and compensation

37. The Hong Kong courts have considered this question in several cases.

38. In ***Man Yee Transport Bus v Transport Tribunal*** Andrew Cheung J considered the administrative cancellation of a licence to operate a commercial bus service and proceeded on the basis that the bus itself was the property- rather than the licence of the good will.[60] He applied a decision of the Court of Appeal on land,[61] holding that in the absence of a clear taking, the use of property had to be "*so substantial that the owner is deprived of any meaningful use of the property or … all economically viable use*'. He, therefore held there was no deprivation.

39. It is, respectfully, submitted that a different conclusion would have been reached applying A1P1. Under the HRA licences or permissions to trade will in some but not all circumstances, be '*possessions*'. Licences which are *'marketable*' are clearly protected by A1P1.[62] The position in relation to '*personal*' licences with no '*market value*' is less clear cut. It has been held that an existing haulage operator's licence is a possession[63] and the court has assumed that permissions to act as doormen fall also within A1P1.[64] The prospect of a licence being renewed when it had been awarded in past years and there was no relevant change of circumstances was, arguably, a possession.[65] In contrast, in ***R (Royden) v Wirral Metropolitan BC*** [85] it was held that the premium value of a hackney carriage licence—which would be adversely affected by changes in the regulatory regime—was not a possession. As

[58] [2008] HKFC 1853

[59] (2009) 4 HKLRD 315

[60] [2008] HKEC 1775

[61] ***Fine Tower Associates v Town Planning Board*** [2008] 1 HKLRD 553

[62] See *R (**Nicholds) v Security Industry Authority*** [2007] 1 WLR 2067, para 74.

[63] See ***Crompton v Department of Transport North Western Traffic Area*** [2003] RT 517 (however, the point does not seem to have been the subject of argument).

[64] See ***Nicholds*** , para 83 (the judge expressed considerable reservations on the point).

[65] ***R (t/a Quark Fishing Ltd) v Secretary of State for The Foreign & Commonwealth Affairs*** [2004] EWCA Civ 527 (it was held that the refusal to renew such a licence was an arguable deprivation of possessions); see also ***Davies v Crawley Borough Council*** [2001] EWHC 854 Admin (Court prepared to assume that a certificate of lawful use and planning permission relating to a mobile catering van was a 'possession').

[85] [2003] LGR 290.

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a result, the conclusion in ***Roydon*** is open to question- because the judge appeared to have applied the decisions of the EComHR[66] instead of the ECtHR.[67]

40. The ECtHR has held that a liquor licence[68] has also been held to be a '*possession*' in spite of the fact that it conferred no rights in national law. This was because it was essential to the successful conduct of the restaurant owned by the applicant and its withdrawal had adverse effects on the goodwill and value of the business. On the other hand, a licence will not be protected under A1P1 if the licence holder did not have a reasonable and legitimate expectation as to the lasting nature of the licence.[69] Thus no property rights arise where a provisional licence is withdrawn on the ground that the applicant has failed to comply with the conditions on which it was granted[70] or where it is withdrawn in accordance with the provisions of the law which were in force when the licence was issued.[71]

41. Another contention issue concerns whether a deprivation must involve an acquisition from the state or whether a transfer to a third party is within the scope of Art 105. Although Hartmann JA sitting at first instance took the view that restricting deprivation to state acquisitions flowed from the paramount Chinese version of Art 105,[72] he did not appear to take account of *obiter* remarks of the Court of Appeal.[73]

42. The Hong Kong courts have decided that Art 105 has no application to taxation[74] By contrast, the ECtHR has held that the conventional A1P1 principles apply: the state can only justify an interference with the enjoyment of possessions if it can show that a 'fair balance' has been kept between community interests and the rights of the person entitled to enjoyment of the possessions.

Acquisition, use, disposal and inheritance

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[66] ***Pudas v Sweden*** (1984) 20 DR 234, ***Gudmundsson v Iceland*** 21 EHRR CD 89; **Zacher v Germany** (1996) 22 EHRR 136.

[67] ***Tre Traktorer Aktiebolag v Sweden*** (1991) 13 EHRR 309; ***Fredin v Sweden*** (No 1) 13 EHRR 784.

[68] ***Tre Traktörer Aktiebolag v Sweden*** (1989) 13 EHRR 309 para 53; see also ***Fredin v Sweden (No 1)*** (1991) 13 EHRR 784 para 53 (a licence to extract gravel); ***Bimer v Moldova*** Judgment of 10 July 2007; (licence to operate a duty free shop); ***Megadat.com srl v Moldova,*** Judgment of 8 April 2008 (licence to provide internet services).

[69] ***Gudmunsson v Iceland*** (1996) 21 EHRR CD 89.

[70] ***Pudas v Sweden*** (1984) 20 DR 234; ***JS v Netherlands*** (1995) 20 EHRR CD 42; ***Gudmunsson v Iceland*** above

[71] ***Gudmunsson v Iceland*** above,; ***Størksen v Norway*** (1994) 78-A DR 88.

[72] ***Harvest Good Development v Secretary for Justice*** [2007] 4 HKC paras 129-152

[73] ***Ying Ho v Secretary of Justice*** (2004) 7 HKCFAR 333, 347 *per* Bokhary PJ, 250 *per* Chan PJ

[74] See eg ***Wilson Investment v Commissioner of Inland Revenue*** [2005] 3 HKLRID 643, 655-666

43. Art 105 expressly recognises a right to acquisition, use, disposal and inheritance. In ***HSKAR v Asaduzzaman*** the appellant was convicted of the offence of keeping life chickens at his premises overnight.[75] He successfully argued that under Art 105 the restriction must satisfy the well-known proportionality test, that the restriction pursues a legitimate aim, that it is rationally connected to the legitimate aim and that the restriction was no more than is necessary to accomplish the aim.

SPECIFIC AREAS

44. I shall now discuss how the constitutional right to property has affected the Court's approach in a number of different areas.

Criminal law ***HKSAR v Wong Sui Ching*** (2012)

45. The CFA in ***HKSAR v Wong Sui Ching*** considered how the offence of criminal damage contrary to s.60(1) of the Crimes Ordinance, operates.[76] The prosecution appealed against the High Court's quashing of the defendant's conviction in the Magistrates' Court. The High Court found that she was the owner of the property concerned or at least had acted as the agent of the owner of property, which property consisted of sheds annexed to the land as fixtures and trees growing on that land.

46. Section 60(1) provides that:

> *A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.*

Section 60(1) has to be read together with s.59(2) which provides that property shall be treated as belonging to any person who –

> *(a) having the custody or control of it;*
> *(b) having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest); or*
> *(c) having a charge on it.*

47. The certified question was whether "*custody or control*" under s 59(2)(a) was limited to lawful custody or control.

[75] [2010] HKEC 707

[76] (2012) 15 HKCFAR 199 ; [2012] 4 HKC 36

48. The defendant's submission called for the reading-in of the word "*lawf*ul" as being necessary for the protection of owners. The CFA were not of that view. Owners are already sufficiently protected by reason of the prosecution having to prove the absence of "lawful excuse".

49. The offence was committed in the following circumstances. In the morning of 15 April 2008, PW2 was sleeping in a shed and was rudely awakened by the noise of an excavator and a gang of more than 10 workmen who were setting about demolishing the tenement structures and cutting down some 74 fruit trees on the property. PW2 ran to the village grocery shop to call the police. His father, PW1, arrived at the scene, having been alerted to what was happening. PW1 remonstrated with the respondent who was present and who claimed to be acting for the registered owner of the property, but to no avail. Two corrugated iron sheds, a pigsty and the fruit trees were destroyed in what was termed a "clearance" by the respondent and her contractors.

50. The respondent, together with the leader of the demolition crew, were charged under section 60(1) of the Crimes Ordinance with criminal damage in respect of those sheds, the pigsty and the trees.

51. Ribeiro PJ took the view that, to commit an offence under s 60(1), an offender must damage or destroy "*property belonging to another*". Because of the extended meaning given to that phrase by section 59(2), such other person includes, but is not confined to, the property's owner. The offence is also committed if the offender (without lawful excuse and intentionally or recklessly) damages or destroys property in another's custody or control; property in which another person has a proprietary right or interest short of ownership; or property subject to a charge in favour of another. In this case, the Magistrate found that the structures and fruit trees destroyed by the respondent were, to her knowledge, in the custody or control of PW1.

52. Ribeiro PJ observed that an item of property may be regarded as simultaneously belonging to more than one person. To take a commonly cited example, where A, the owner of a book, lends it to B who hands it to C to examine, A owns, while B has possession and C has custody or control of the book. Should D damage the book in C's hands with the necessary intent and without lawful excuse, D commits the offence in respect of property which may be regarded as simultaneously belonging to A, B and C within the meaning of s 59(2).

53. He then considered the position if (leaving B aside) the person who destroys the books in C's hands is its owner A? One approach would be to continue to treat the book as "property belonging to another", applying s 59(2), since it was in C's custody or control. The competing approach would be to argue that the extended meaning does not apply because under the civil law A has, as against C, a right to immediate possession of the book.

54. He referred to the first approach as the "*unqualified approach*". It does not regard the wording of s 59(2) as in any way qualified so that it is irrelevant that the offender may enjoy

superior proprietary rights under the law of property. So long as another person has one of the proprietary interests referred to in section 59(2) in respect of the property damaged or destroyed, the "property belonging to another" requirement is satisfied, even where the offender is its owner.

55. He called the second approach the "*qualified approach*". Its adherents argue that in applying s 59(2), one must take into account the relative civil law positions of the parties. Thus, a person having custody or control of property (even unlawfully) has, by virtue of s 59(2), an interest protected by the criminal law against a mere stranger who damages or destroys the property. But the position is different if the defendant is the property's owner. If, under the civil law, the owner has an immediate right to possession of the property, such property should not be regarded as against its owner as belonging to a person who has mere physical custody or control. The owner should only be liable (so the argument runs), if such custody or control is accompanied by proprietary rights which restrict the owner's right to immediate possession.

56. He pointed out that the relevant sections in the Crimes Ordinance adopt the provisions in the English Criminal Damage Act 1971, which in turn stem from a report of the English Law Commission.[77] He then discussed the unqualified approach, which was adopted by the English Court of Appeal in ***R v Turner (No 2***), a decision that has proved controversial.[78] However, the various academic commentators he considered argued that the unqualified approach is likely to lead to an unacceptable inconsistency between the criminal and the civil law.

57. Nevertheless, Ribeiro PJ held that the unqualified approach should be applied:
    - as a matter of language, there is no reason apparent for implying any qualification to the plain words of section 59(2);
    - he did not agree that the unqualified approach results in a collision between the civil and criminal law; and
    - In his view, to subject the words "*custody or control*" to civil law refinements is unnecessary and produced undesirable results.

58. Ribeiro PJ rejected the appellant's submission that the unqualified approach was unconstitutional as it breached Arts 6 and 105. He held:

> *There is no question of any infringement of either Article. The relevant provisions in fact constitute a measure affording protection in accordance with law to private property rights – of owners as well as others with protected proprietary interests – as*

[77] English Law Commission Report on Offences of Damage to Property (Law Com No 29) (23 July 1970).

[78] [1971] 1 WLR 901

required by both Articles. The unqualified approach to the extended meaning does not deprive the owner of any property rights. The owner commits no offence unless, without lawful excuse, he damages or destroys his property in which someone else also has a protected proprietary interest. And should he commit the offence, he (and everyone concerned) may be deprived of the property as a result of his own destructive acts, but not by operation of the law. The Articles are simply not engaged.

<u>*Money laundering*</u> ***Interush v Commissioner of Police*** (2015)

59. ***Interush v Commissioner of Police*** concerned the constitutionality of sections 25 and 25A of the Organised and Serious Crimes Ordinance, Cap 455 and the propriety of the no consent regime under decision making process under section 25A(2)(a).[79] Police officers of the Commercial Crime Bureau investigated the applicant for promoting an alleged pyramid scheme.

60. Section 25(1) provides:

> *Subject to section 25A, a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he deals with the property.*

Section 25A(1) provides:

> *When a person knows or suspects that any property—*
>
> > *(i) in whole or in part directly or indirectly represents any person's proceeds of;*
> > *(ii) was used in connection with; or*
> > *(iii) is intended to be used in connection with,*
>
> *an indictable offence, he shall as soon as reasonable for him to do so disclose that knowledge or suspicion….to an authorised officer.*

Section 25A(1) creates a duty to disclose any suspicious property to an authorised officer and a failure is an offence under s 25A(7).

61. Section 25A(2)(a), which is the main dispute in the case, provides:

> *If a person who has made a disclosure….. does any act in contravention of section 25(1)…..he does not commit an offence under that section if –*

[79] [2015] 4 HKLRD 706 ; [2015] 5 HKC 158

(a) that disclosure was made before he does that act and he does that act with the consent of an authorised officer…."

Section 25A(2)(a)creates a defence to a charge under s 25(1) if the person, who has made a disclosure, has consent from an authorised officer prior to further dealing with the suspicious property.

62. The applicant argued that s 25, in conjunction with s 25A, infringes Articles 6 and/or 105. Section 25 interfered with the use or disposal of the property of the applicants. It imposed criminal liability without prescribing:

    - any time limit within which the authorised officer should decide whether or not to give consent under s 25A(2)(a);
    - any time limit for the expiry of a 'no consent' decision; and/or
    - any compensation by the Government for the loss of an applicant whose property was withheld under a 'no consent' letter.

63. The applicant therefore argued that s 25(1) creates an offence of dealing with property. At the time of the dealing a person knows or has reasonable grounds to believe that the property represents proceeds of an indictable offence.

0Section 25A(1) requires a person to disclose to an authorised officer any property he knows or suspects of representing proceeds of an indictable offence, or used in connection with an indictable offence.

64. Under s 25A(2)(a), if a person deals with any property which is disclosed to an authorised officer, he would be guilty of an offence under s 25(1) unless he has prior consent from that officer.

65. Given this legislative scheme, the applicant argued that, so long as the authorised officer refuses to give consent, he may freeze the property of a suspect for an indefinite period. The person who makes the disclosure would not deal with the property as that amounts to an offence under s 25(1).

66. It was stressed that the suspect would not be able to claim any compensation under OSCO even if the freeze turns out to be unwarranted.

67. However, the Commissioner argued that:
    - a Section 25 created an offence of dealing with proceeds of an indictable offence.
    - Sections 25A(1) & (7) created an offence for failure to disclose suspicious property.
    - Section 25A(2)(a) provided that if there is consent from the authorised officer, it shall be a defence for continue dealing with the suspicious property

- None of the above provisions empower intervention of a person's property. Art 6 and 105 of the Basic Law are not engaged.
- The relevant banks refused to honour their contractual duty as they were suspicious of the activities in the accounts of the applicants. The applicants had actually initiated civil proceedings against the banks. It has no connection with the operation of the criminal law.

68. P. Li held that the proof of an offence under s 25(1) does not depend on s 25A at all. The two sections deal with different situations. The former creates an offence of dealing with any property representing proceeds of an indictable offence. The latter creates a duty to disclose suspicious property.

69. The Commissioner also relied on a decision of the Court of Appeal in Guernsey considered the consent scheme under s 39(3) of the Proceeds of Crime Law in Guernsey, which was substantially the same as s 25A OSCO. The central argument by the appellant in that case was that s 39(3) permitted the police to freeze funds suspected of being proceeds of a crime to facilitate subsequent applications of a restraint order or confiscation order.[80] However, the Guernsey Court of Appeal held that the principal purpose of the consent regime was to provide an opportunity to the police to give an exemption from criminal liability by consent but only where it was in the interests of law enforcement to do so. It was not the Financial Intelligence Service that was denying of the applicant to its property and preventing judicial oversight- it resulted from the impact of the width of the criminal law and its chilling effect upon the person holding the fund, namely BNP.

70. P. Li, therefore, decided that the "no consent regime" under s 25A(2)(a) did not operate to freeze suspicious property, so that Art 6 and 105 of the Basic Law were not engaged.

Property issues ***Chan Kam Chuen v Director of Lands*** (2015)

71. In ***Chan Kam Chuen v Director of Lands*** applicants applied for leave to judicially review the decision of the Director of Lands to create certain easements and permanent rights ("the EPRs") on certain parcels of land in DD 76 and DD 85 in New Territories North District for the purpose of a public work project.[81] At the hearing before P Li it was argued:

> (1) The EPRs created were, in effect, not "*easement*s" in nature but deprivation of the applicants' use of the lands under Art 105 of the Basic Law. This, in substance, amounted to resumption of the substrata of the Lands under s 13 of the Ordinance. The Director's purported reliance on s 15 of the Ordinance to create the "EPRs" was, thus, unlawful. This was particularly so, as the standard of compensation assessment

[80] *The Chief Officer, Customs & Excise, Immigration & Nationality Service v Garnet Investment* 18/2011.

[81] [2015] HKCFI 363; HCAL 145/2014 (13 March 2015)

under s 15 (for easements) is different from that to resumption under s 10 of the Lands resumption Ordinance.
(2) The Decision was tainted with procedural irregularity or unfairness as the Director had failed to properly affix the EPRs Notice and/or serve the EPRs Notice on the applicants pursuant to s 16 of the Ordinance

72. However, P Li decided that grounds of judicial review were not reasonably arguable.

73. He rejected the easement arguments ground that they did not fall within the scope of s 15 of the, Roads (Works, Use and Compensation) Ordinance. The main thrust of the applicant's contentions were:

> (1) The meaning of "easements" is not defined in s 15 of the Ordinance. Thus, the common law meaning of easements applies.
>
> (2) Under common law, it is trite that an easement cannot substantially deprive the servient owner of proprietorship or possession. This meaning should equally apply to the meaning of "permanent rights" under s 15.
>
> (3) The EPRs created for the substantial underneath land strata of the Lands for the purposes of building road tunnel would be permanently and exclusively occupied by the Government.
>
> (4) This amounts to an exclusion of the applicants from possession of a substantial portion of their land, ie, the underground strata. This cannot be regarded as "*easements or permanent rights*" under s 15 of the Ordinance. The purported exercise of the power under s 15 to create the EPRs is thus unlawful.
>
> (5) If the Government wants to do that, she should seek to exercise the power under s 13 to resume the underground strata.

74. However, P Li decided it was reasonably arguable that the meaning of "*permanent rights*" under s 15 should bear the same meaning of "*easements*" as suggested. He also took the view that the unfairness ground was not reasonably arguable.

Proportionality in relation to property rights ***Hysan Development Company Limited v Town Planning Board***

75. In the important case of ***Hysan*** the FCA concerned the protection conferred by Articles 6 and 105 of the Basic Law on private property rights in connection with planning restrictions laid down by the Town Planning Board.[82] The appellants, who are property owners and developers, had succeeded in having the TPB's decisions quashed on traditional judicial

[82] (2016) 19 HKCFAR 372

review grounds in the lower courts, but unsuccessfully contended that the planning restrictions represented a disproportionate and therefore unconstitutional infringement of their property
rights. The Court of Appeal made orders for remitter to direct the TPB to reconsider its decisions in accordance with the Court of Appeal's judgment, which included its conclusion that the planning restrictions did not engage the constitutional rights in Arts 6 and 105. The appellants challenged that conclusion in these appeals and sought a direction that the TPB consider whether the restrictions were unconstitutional.

76. The first question for the Court was whether Arts 6 and 105 were engaged in relation to planning restrictions imposed by the TPB on the use of land. Both Articles stipulate that the obligation to protect private property rights is to be discharged "in accordance with law". The CFA held that this obligation did not qualify or limit the rights protection conferred but provides an additional layer of legal certainty.

77. Even though the statutory power to impose planning restrictions existed prior to the appellants' acquisition of the sites, this did not mean that the new and more intrusive constraints imposed by the TPB after the land's acquisition could be disregarded as mere incidents of ownership so as to exclude the protection of Arts 6 and 105. The FCA therefore concluded that both Articles were plainly engaged.
78. But the CFA also stressed that Arts 6 and 105 were not absolute rights. It is for the Court to determine the permissible extent of any restrictions that limit such rights by a process referred to as a proportionality analysis. In addition to the existing three-step inquiry taken in a proportionality analysis, a fourth step should be added which involves asking whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual.

79. The first two steps of the proportionality analysis were satisfied as it was assumed that the planning restrictions did pursue a legitimate aim and that they were rationally connected to them. It was at the third stage of the inquiry, assessing the permissible extent of the incursion into the protected right, that two main standards have been applied: (i) whether the intruding measure is "no more than necessary" to achieve the legitimate aim (for which standard the appellants and interveners argued), and (ii) whether the encroaching measure is "manifestly
without reasonable foundation" (for which standard the respondents argued).

80. Ribeiro PJ reviewed the development of a structured proportionality analysis and discussed the Privy Council decisions in ***A-G v Lee Kwong-kut***[83] (which rejected the Canadian approach

[83] [1993] AC 951.

to proportionality) and the rather different test applied in ***Ming Pao Newspapers Ltd v AG of Hong Kong***.[84]

81. The CFA next considered ***Bank Mellat v Her Majesty's Treasury*** where Lord Sumption held (in the context of an A1P1): [85]

> *that proportionality depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.*

82. He pointed out that the tendency of the Hong Kong courts to adopt a three-step approach to proportionality is in line with the influential 1999 judgment of Lord Clyde in ***de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing***, where he stated a test which asks:[86]

> *... whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.*

83. However, Ribeiro PJ recognised that substantial body of authority exists for adding a fourth step, as exemplified by Lord Sumption's judgment in the ***Bank Mellat*** case. Indeed, in common law jurisprudence, a four-step approach can be found dating back to the important judgment in 1986 of Dickson CJ in ***R v Oakes*** dealing with proportionality in the context of section 1 of the Canadian Charter of Rights and Freedoms.[87]

84. Ribeiro PJ said that the case for accepting in principle the applicability of a fourth step in the proportionality analysis is logically compelling- although in the great majority of cases, its application would not invalidate a restriction which has satisfied the requirements of the first three stages of the inquiry.

85. He next turned to the standards applicable at the third stage of the proportionality inquiry. He considered an A1P1 deprivation case, the ECtHR in ***James v United Kingdom***,[88] and the ECtHR decisions, where being a supra-national Court, recognizes that in some cases, it is appropriate to regard the national courts of Member States as being better placed to assess the legitimacy and importance of national policy objectives and to determine what

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[84] [1996] AC 907
[85] [2014] AC 700 [20]
[86] [1999] 1 AC 69 at 80.
[87] [1986] 1 SCR 103
[88] (1986) 8 EHRR 123

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encroachments on Convention rights are acceptable as the means of advancing those aims: see eg ***James v United Kingdom***,[89] a case concerned with leasehold enfranchisement legislation which the applicants claimed violated A1P1, ***Lithgow v United Kingdom***,[90] and town planning decisions like ***Sporrong and Lonnroth v Sweden***,[91] and ***Phocas v France***:[92] where the ECtHR said:

> *Like the Government and the Commission, the Court reiterates that the Contracting States enjoy a wide margin of appreciation in order to implement their town-planning policy.*

86. Ribeiro PJ then examined the UK xamined the UK cases, ***R(Carson) v Secretary of State for Work and Pensions***,[93] ***R (SG) Secretary of State for Work and Pensions***,[94] as well as Hong Kong decisions like ***Lau Cheong v HKSAR***,[95] ***HKSAR v Lam Kwong Wai***,[96] ***Fok Chun Wa v Hospital Authority***,[97] and ***Kong Yunming v Director of Social***

87. The difference between the standards is one of degree and both standards are on a spectrum of reasonableness. The "*manifest*" standard has been used in cases where the Court recognizes that the originator of the impugned measure is better placed to assess the appropriate means to advance the legitimate aim espoused and is afforded a wide margin of discretion. It has been applied in cases involving implementation of political, social or economic policies but is not confined to such cases.

88. Ribeiro PJ summarised his conclusion as follows:
    - At the third stage, assessing the permissible extent of the incursion into the protected right, two main standards have been applied. The first is the test of whether the intruding measure is "no more than necessary" to achieve the legitimate aim in question. This must be understood to be a test of reasonable necessity. If the Court is satisfied that a significantly less intrusive and equally effective measure is available, the impugned measure may be disallowed.
    - An alternative standard which may be applied at the third stage is one which asks whether the encroaching measure is "*manifestly without reasonable foundation*", being a standard closely related to the concept of "margin of appreciation" in ECtHR jurisprudence.
    - At the supra-national level of the ECtHR, the margin of appreciation doctrine involves the recognition that on certain issues, the Court should allow Member State

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89 Above
90 (1986) 8 EHRR 329
91 (2001) 32 EHRR 11
92 (2001) 32 EHRR 11
93 [2006] 1 AC 173
94 [2015] 1 WLR 1449
95 [2002] HKCFA 46; (2002) 5 HKCFAR 415
96 [2006] HKCFA 84; (2006) 9 HKCFAR 574
97 [2012] HKCFA 34; (2012) 15 HKCFAR 409

latitude to decide on the legitimacy of their societal aims and the means to achieve them since they are better placed to make the assessment. Similar considerations have led the Court at a domestic level to allow the legislative and executive authorities latitude or a "*margin of discretion*" to do the same, applying the "*manifestly without reasonable foundation*" standard in such cases.

- The "*manifest*" standard has been used in cases where the Court recognizes that the originator of the impugned measure is better placed to assess the appropriate means to advance the legitimate aim espoused. This has occurred in cases involving implementation of the legislature's or executive's political, social or economic policies but the principle is not confined to such cases.
- The location of the standard in the spectrum of reasonableness depends on many factors relating principally to the significance and degree of interference with the right; the identity of the decision-maker; and the nature and features of the encroaching measure relevant to setting the margin of discretion.
- The difference between the two standards is one of degree, with the Court in both cases, scrutinising the circumstances of the case and the factual bases claimed for the incursion.
- No extant planning restrictions fall to be considered since the Board is to reconsider its decisions. In general terms, where the Board reaches decisions which are not flawed on traditional judicially reviewable grounds, any imposed restrictions which encroach upon a landowner's property rights should be subject to constitutional review applying the "*manifestly without reasonable foundation*" standard. It is considered to be highly unlikely that Board decisions imposing planning restrictions arrived at lawfully and in conformity with the principles of traditional judicial review,would be susceptible to constitutional review unless the measures are exceptionally unreasonable.

89. Thus, the CFA decided that, having considered jurisprudence from of the ECtHR, the CFA concluded that the application of either standard would depend on the circumstances of the underlying case and the factual bases claimed for the incursion. The location of the standard in the spectrum of reasonableness depends on many factors relating principally to the significance and degree of interference with the right, the identity of the decision-maker, and the nature and features of the encroaching measure relevant to setting the margin of discretion.

90. In general, where the TPB reaches decisions which are not flawed on traditional judicial review grounds, any planning restrictions should be subject to review applying the "*manifestly without reasonable foundation*" test. It is highly unlikely that decisions arrived at lawfully and in conformity with principles of traditional review would be susceptible to constitutional review unless the incursions are exceptionally unreasonable.

91. The views of the FCA on Arts 6 and 105 differed from those of the Court of Appeal. It was ordered that the order of the Court of Appeal remitting the matter to the TPB for

reconsideration of its decisions would remain, but the order for such reconsideration to be in accordance with the Court of Appeal's views on the two Articles would be deleted.

92. The judgment in ***Hysan*** is a magisterial survey of the various approaches courts round the world have taken when identifying the key elements of the proportionality doctrine; and implicitly articulates a methodology for developing a theory of judicial deference. At the same time the views expressed by Ribeiro PJ leave a number of issues of principle uncertain:
    - are the different standards for proportionality he identifies for an A1P1 case ("*reasonable necessity*" vs "*manifestly without foundation*" convincing when the UK Supreme Court in ***Bank Mellat*** reached such a very different conclusion, holding that the "***reasonable necessity***" test applied (albeit P1A1 in an national security context);
    - how and in what respects does the "manifestly without foundation" principle differ from the conventional rationality principle in administrative case law;
    - have the Hong Kong courts gone back to a rationality standard- at a time when the UK Supreme Court may be moving towards proportionality replacing rationality as the key judicial review principle used to review merits decisions, although Lord Neuberger stressed in R(Keyu) v Secretary of State for Foreign and Commonwealth Affairs thatwas not appropriate for a five-judge panel of the Supreme Court to accept or reject the claimants' argument that the traditional rationality basis for challenging executive
      decisions should be replaced by a more structured and principled challenge based on proportionality, because of its potential implications which are profound in constitutional terms and very wide in applicable scope. As he pointed out, this would involve the court considering the merits of the decision at issue, and would require courts to consider the balance which the decision-maker has struck between competing interests and the weight to be accorded to each such interest;[98]
    - how will a town planning officer apply such a broad "*manifestly without foundation'* test;
    - will decision makers, in practice, be according respect to constitutional rights by applying such a generous standard, which is so differential to the decision maker;
    - to what extent does the analysis of Ribeiro PJ extend beyond planning questions and if so, to what areas?

Conclusion

93. As you will all know, the case law on Art 6 and 105 is still developing. It is instructive to consider the approach taken by comparison with decisions in the UK and the ECtHR, since these provide pointers for future directions. My sense is that much has yet to emerge and there will be many property rights issues for Hong Kong lawyers to grabble with in future years.

[98] [2016] A.C. 1355

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94. I hope, however, that I have succeeded in sketching out some indicia about the sort of directions the new case law might take.

95. I also want to say that I feel immensely privileged in giving these lectures in Hong Kong, by being given this opportunity to examine how important constitutional rights are addressed here. Judicial dialogue between courts concerned with international rights jurisprudence of course cuts two ways- and these lectures have helped me enormously to see how the case law developed by the Hong Kong courts will help to inform how courts elsewhere can develop answers to some universal human rights questions.

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