

Contents

Preface to Second Edition	v
Preface to First Edition	ix
Table of Cases	xix
Table of Statutes and Constitutional Instruments	xlvi
Table of Foreign Legislation	xlix
Table of Other Enactments	li

PART 1 – ADMINISTRATIVE LAW IN HONG KONG

CHAPTER 1

THE PURPOSE AND NATURE OF ADMINISTRATIVE LAW IN HONG KONG

1. The Purpose of Administrative Law	1
(a) Red light and amber light theories of the purpose of administrative law.....	4
(i) <i>Red Light Theory</i>	4
(ii) <i>Green Light Theory</i>	5
(iii) <i>Amber Light Theory</i>	5
(b) Further purpose of administrative law	6
2. Government in Hong Kong	8
(a) Before 1997: Colonial Government in Hong Kong.....	8
(b) 1997, Basic Law and ‘New’ Government of Hong Kong.....	12
(c) The nature of Government in Hong Kong.....	22
3. The Constitutional Basis for Judicial Review in Hong Kong Today	24
(a) The <i>ultra vires</i> doctrine	25
(b) The common law theory of judicial review.....	29
(c) Alternatives to <i>ultra vires</i> and common law theories: Rights-based approaches, abuse of power and fairness	31
(i) <i>The rights-based approach</i>	31
(ii) <i>Abuse of power</i>	32
(iii) <i>Fairness</i>	33
(d) Applying theories of constitutional justification for judicial review in Hong Kong today.....	33
(e) Conclusion	36

**CHAPTER 5
THE LIMITS OF JUDICIAL REVIEW**

.....1	1. Introduction	183
..40	2. Constitutional Limits on Judicial Review	185
..41	(a) Acts of state	185
..41	(b) Prerogative of mercy	187
..41	(c) Prosecutorial discretion	190
..42	(d) Policy Formulation	201
..45	3. Statutory Limits on Judicial Review	207
.47	(a) Time limit clauses	207
.62	(b) Ouster clauses	209
.71	(c) Broad statutory terminology	215
80	(d) Imprecise statutory provisions	221

**CHAPTER 6
REMEDIES**

80	1. Introduction	229
80	2. Public Law Remedies	232
81	(a) Certiorari and prohibition	232
7	(i) <i>Certiorari and prohibition: definition and scope</i>	232
5	(ii) <i>Certiorari and prohibition as complementary remedies</i>	233
1	(iii) <i>The need for a final determination</i>	233
9	(b) Mandamus	239
7	3. Private Law Remedies	241
7	(a) Declarations	241
7	(i) <i>Introduction</i>	241
7	(ii) <i>Academic or hypothetical declarations</i>	242
7	(b) Injunctions	265
7	(c) Damages	267
7	(i) <i>Damages for private law wrongs</i>	267
7	(ii) <i>Damages for public law wrongs</i>	268
7	4. Discretion to Refuse a Remedy	269
7	(a) Misconduct by the applicant	269
7	(b) Futility	270
7	(c) Delay	274
7	(d) Suitable alternative remedy	281
7	5. Costs	290
7	(a) Costs in representative standing cases: unsuccessful applicants	291
7	(b) Costs in representative standing cases: successful applicants	294
7	(c) Costs in representative standing cases: conclusions	295

CHAPTER 2

NON-JUDICIAL CONTROLS ON GOVERNMENT

1.	Introduction.....	1
2.	Relationship between Judicial Review and Non-Judicial Controls	40
3.	Non-Judicial Controls in Hong Kong: Introduction.....	41
	(a) Principal Officials Accountability System (POAS).....	41
	(b) Access to Information	41
	(c) Public consultations and engagement	42
	(d) Statutory Advisory Bodies.....	45
4.	Non-Judicial Controls in Hong Kong: Tribunals	47
5.	Non-Judicial Controls in Hong Kong: Commissions of Inquiry	62
6.	Non-Judicial Controls in Hong Kong: Ombudsman	71
7.	Non-Judicial Controls in Hong Kong: Political Accountability through the Legislative Council	80
	(a) Questions during Legislative Council meetings	80
	(b) Special Committees/ Sub-Committees.....	80
	(c) Special powers and privileges of the Legislative Council	81

PART II – PROCEDURAL ASPECTS AND SCOPE OF JUDICIAL REVIEW

CHAPTER 3

PROCEDURAL EXCLUSIVITY AND PUBLIC-PRIVATE TRADE

1.	Introduction	87
2.	The Exclusivity Principle	95
3.	Exceptions to the Exclusivity Principle	91
4.	What is a ‘Public Law’ Matter?	109
5.	Conclusion	137

CHAPTER 4

LEAVE AND STANDING

1.	Introduction	139
2.	Leave.....	139
	(a) Threshold for granting leave: potential arguability	141
	(b) Threshold for granting leave: reasonable arguability	145
	(c) Procedural issues at the leave stage.....	154
3.	Standing	156
	(a) Rationale behind rules on standing	157
	(b) Starting point for rules on standing: ‘sufficient interest’	159
	(c) Personal standing.....	169
	(d) Representative standing	173

PART III – GROUNDS OF JUDICIAL REVIEW

CHAPTER 7

PROCEDURAL FAIRNESS

1. Introduction	297
2. Statutory Procedures.....	300
(a) Examples of statutory procedural requirements	300
(b) Relationship between statute and common law.....	301
(c) Directory and mandatory requirements	302
3. Fair Hearing Rule	304
(a) Evolution of the duty to act fairly.....	305
(b) Scope of procedural fairness	307
(c) Using fundamental rights to fashion a 'high standard of fairness'	313
(d) Components of a 'fair hearing'	320
(i) <i>Requirement for notice</i>	320
(ii) <i>The need for a 'hearing'</i>	321
(iii) <i>Right to challenge the opposing case</i>	327
(iv) <i>Legal representation</i>	329
(v) <i>The duty to provide adequate reasons</i>	337
4. Rule Against Bias	344
(a) Interests that give rise to bias.....	344
(b) 'Actual bias', 'apparent bias' and 'automatic disqualification'	346
(c) Test for apparent bias.....	348
(d) Exceptions to the Rule Against Bias	357
(i) <i>Statutory override</i>	357
(ii) <i>Necessity</i>	358
(iii) <i>Waiver</i>	359

CHAPTER 8

ILLEGALITY

1. Introduction	361
2. Unfettered Statutory Discretion and the Context of the Legislative Framework as a Whole.....	361
3. Excess of Power.....	375
4. Improper Purpose	381
5. Relevant and Irrelevant Considerations	392
6. Fettering Discretion	401
7. Wrongful Delegation	410
8. Error of Law and Jurisdiction.....	419
9. Error of Fact	428
10. Conclusion	434

CHAPTER 9 IRRATIONALITY

1. Introduction	435
2. Dual Use of Irrationality	435
3. Using Irrationality with Other Grounds of Review	438
(a) Relevancy of considerations	438
(b) Material error of fact	446
(c) Irrationality as a longstop for other grounds of review	448
(d) Irrationality as a tool for statutory interpretation	449
4. Irrationality as an Independent Ground of Review: Starting Point	450
5. Irrationality as an Independent Ground of Review: Use of the Original Threshold	453
(a) Exercises of statutory discretion	454
(b) Relative expertise of courts and the decision-maker	455
(i) <i>Allocation of scarce resources</i>	455
(ii) <i>Specialist areas of policy: immigration</i>	456
(iii) <i>Specialist areas of policy: planning</i>	457
(iv) <i>Disciplinary bodies</i>	458
(c) Decisions subject to political control	460
6. Irrationality as an Independent Ground of Review: Heightened Scrutiny (1) – Non-rights Cases	461
7. Irrationality as an Independent Ground of Review: Heightened Scrutiny (2) – Human Rights Cases	464
(a) Approach (1): Amendment of original Wednesbury test and use of anxious scrutiny	465
(b) Approach (2): Assimilation of Proportionality and Irrationality	468
(c) Approach (3): Approach in Hong Kong	470
8. Irrationality as an Independent Ground of Review: Evaluation	473

CHAPTER 10

LEGITIMATE EXPECTATIONS

1. Introduction	481
2. How Legitimate Expectations Arise	486
(a) The need for a 'representation'	486
(b) The expectation induced by the representation must be objectively reasonable	489
3. Protection of Legitimate Expectations	517

CHAPTER 11 PROPORTIONALITY

1. Introduction	535
-----------------------	-----

Contents

2. Nature of Proportionality	535
3. Uses of Proportionality	536
(a) Proportionality and procedural impropriety	536
(b) Proportionality and substantive legitimate expectations	539
(c) Proportionality and statutory interpretation	540
(d) Proportionality and penalties	540
4. Future of Proportionality	544
5. Concluding Remarks	545
	552

CHAPTER 12
HUMAN RIGHTS AND JUDICIAL REVIEW

1. Introduction	553
2. System of Rights Protection in Hong Kong: BORO, Basic Law and the ICCPR	553
(a) Rights in BORO and the Basic Law 553	
(b) 'Incorporation' of the ICCPR by BORO and the Basic Law ...	554
(c) Constitutional significance of BORO	554
3. Assessing Restrictions on Rights: General Approach	555
4. Assessing Restrictions on Rights: Interpretation of Rights	556
5. Assessing Restrictions on Rights: Justifying Infringements (1) ~ Proportionality and Other Tests.....	558
6. Assessing Restrictions on Rights: Justifying Restrictions (2) ~ Margin of Appreciation	564
	574
<i>Index</i>	589

TABLE OF CASES

A	
A Company, In re [1981] AC 374	421
Ahmed v Secretary of State for the Home Department [1999] Imm AR 22	498
Airedale N.H.S. Trust v Bland [1993] AC 789	244, 251
Aita Bahadur Limbu v Director of Immigration HCAL 133/1999, 10 December 1999 (CFI)	143, 457
Akram v Secretary for Security [2000] 1 HKLRD 164	211
Alconbury Developments Ltd & Ors v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295	396
American Cyanamid Co v Ethicon Ltd [1975] AC 396	266
Amoy Properties Ltd v The Committee for Takeovers and Mergers and the Commissioner for Securities [1989] 1 HKLR 170 (HC)	359
An Bord Bainne Cooperative Ltd v Milk Marketing Board [1984] 2 CMLR 584	101, 104
Anderson Asphalt & Ors v The Secretary for Justice [2009] HKCU 378; [2010] 5 HKLRD 490 (CA)	109, 115, 132
Anderson Asphalt and Others v Town Planning Board and Another [2007] 3 HKLRD 18 (CA)	169, 170
Anderson Asphalt v Secretary for Justice [2009] 3 HKLRD 215.....	95, 118, 120, 272
Anderson Asphalt Ltd v Secretary for Justice [2009] HKEC 415	126
Anisminic Ltd v Foreign Compensation Commission (No 2) [1969] 2 AC 147, [1969] 1 All ER 208.	212, 213, 214, 215, 421, 422, 425, 426
Apple Daily Ltd v Commissioner of the Independent Commission against Corruption [2000] 1 HKC 295	239
Ashbury Railway Carriage and Iron Co Ltd v Riche (1875) LR 7 HL 653	376
Asia Master Ltd v Commissioner of Inland Revenue [2006] HKEC 2187 CFA	281
Asia Television Ltd v Communications Authority (No 2) [2013] HKCU 1128 (unreported, CACV 258/2012, 15 May 2013).	1
Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 (CA)	25, 393, 420, 436, 521, 526, 549