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THE ECONOMIC STRUCTURE OF HONG KONG ADMINISTRATIVE LAW: EFFICIENCY AND LEGALITY OF GOVERNMENT DECISION- MAKING SINCE CHINA'S RESUMPTION OF SOVEREIGNTY

ERIC C. IP*

ABSTRACT

In contemporary Hong Kong, China's first special administrative region, administrative law has become ever more influential over government decision-making, notwithstanding the semi-authoritarian political framework of the territory. Contrary to existing scholarship, this Article argues that neither rule-of-law concerns nor misguided judicial adventures satisfactorily explain the evolution of administrative law in this former British colony. Administrative law doctrines are better understood as decisional devices developed to promote "administrative efficiency," achieved through the reduction of agency costs inflicted by administrative agencies due to imperfect compliance with statutory goals on their political principal—the Hong Kong Legislative Council—to the optimal point where further reduction would yield no benefit to the latter, and the de facto imposition of minimal Kaldor-Hicks efficiency requirements on agency policy outcomes when substantive statutory goals are ambiguous. This Article conjectures that, given the absence of any enabling

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administrative procedure act, judges' desire for popular legitimacy and reputation, fear of legislative reversals, and practical needs to conserve their scarce resources explain the underlying design of these doctrines.

I. INTRODUCTION

The Hong Kong Special Administrative Region (“Hong Kong SAR”) was established on July 1, 1997 pursuant to the Sino-British Joint Declaration of 1984,¹ a binding international treaty registered with the United Nations forged between two veto-wielding Permanent Members of the Security Council—the People’s Republic of China and the United Kingdom. Since then, the ability of the territory’s Westernized legal, market, and political institutions to thrive under Chinese sovereignty has attracted the attention of governments, businesses, and international organizations with interests in East Asia and beyond.² Of particular interest is whether the imported common law’s traditional constraints over government decision-making can still be rigorously enforced after the withdrawal of British rule. Formally, the Hong Kong Basic Law,³ enacted in accord with the Joint Declaration, precluded the applicability of more than 99% of all mainland Chinese laws over the SAR,⁴ and conserved much of the former colony’s separate identity, including its capitalist economy, multi-party legislature, common law judiciary, and the civil rights of residents, including the right “to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.”⁵ China’s own rapid economic growth has benefited and should continue to benefit immensely from the continuation of Hong Kong’s world class legal and economic arrangements.⁶ But a rule-of-law oasis on the Chinese

1. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, U.K.-China, Dec. 19, 1984, 1399 U.N.T.S. 61.

2. Michael Davis, *The Basic Law and Democratization in Hong Kong*, 3 LOY. U. CHI. INT’L L. REV. 165 (2006). For example, the United States enacted the United States-Hong Kong Policy Act S. 1731 in 1992 to delineate its relationship with the Hong Kong SAR as an entity that is practically different from the People’s Republic of China.

3. BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA (H.K.) [hereinafter H.K.B.L.].

4. H.K.B.L. art. 8 (H.K.); Albert Chen, *The Theory, Constitution and Practice of Autonomy: The Case of Hong Kong, in One Country, Two Systems, Three Legal Orders—Perspectives of Evolution: Essays on Macau’s Autonomy after the Resumption of Sovereignty by China* (Jorge Oliveira & Paulo Cardinal eds., 2009).

5. H.K.B.L. art. 35 (H.K.).

6. See generally Peter Cheung, *Who’s Influencing Whom? Exploring the Influence of Hong Kong on Politics and Governance in China*, 51 ASIAN SURVEY 713 (2011).

periphery might become the tail that wags the dog,⁷ and thus, may not always be perceived as desirable by the Party-state.⁸

Undoubtedly due to the magnitude of China's social and economic transformation since 1978, mainland administrative law has taken a very different approach from that of Hong Kong's.⁹ Administrative law, instead of constituting a genuine constraint on administrative discretion, has served primarily as an instrument for retroactive and prospective legal legitimization of the decisions of powerful bureaucrats charged with implementing China's massive market reforms.¹⁰ Nonetheless, the Chinese government continued to treat judicial review with great caution.¹¹ This concern has been reflected in the myriad administrative law statutes enacted by the National People's Congress¹² which feature relatively few clear provisions sanctioning illegal agency conduct by judicial means.¹³ Bureaucratic bodies, often acting against the express letter of the law, have benefitted substantially from the development of mainland China's administrative law regime in the past twenty years.¹⁴

7. See generally Andrew Scobell, *Hong Kong's Influence on China: The Tail that Wags the Dog?*, 28 ASIAN SURVEY 599 (1988).

8. YORAM BARZEL, *A THEORY OF THE STATE: ECONOMIC RIGHTS, LEGAL RIGHTS, AND THE SCOPE OF THE STATE* 275 (2002).

9. See generally Albert Chen, *Reflections on Administrative Law in China: A Hong Kong Perspective*, 6 HARV. CHINA REV. 66 (2010).

10. See generally Tom Ginsburg, *Administrative Law and the Judicial Control of Agents in Authoritarian Regimes*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 58 (Tom Ginsburg & Tamir Moustafa eds., 2008).

11. For example, the Administrative Procedure Law (promulgated by Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990), arts. 1, 2, available at <http://www.cecc.gov/pages/newLaws/adminLitigationENG.php> (P.R.C.), provides that the scope of review of "concrete" administrative acts shall extend no further than infringements against bodily and property rights of private parties, and excludes from review "abstract" acts such as generally binding commands and decisions and "final" agency decisions made "according to law." Furthermore, the Administrative Reconsideration Law (promulgated by Standing Comm. Nat'l People's Cong., Apr. 29, 1999, effective Oct. 1, 1999) (P.R.C.), creates an additional layer of bureaucratic adjudication that must be exhausted before judicial review becomes available. See Eric Ip, *The Supreme People's Court and the Political Economy of Judicial Empowerment in Contemporary China*, 25 COLUM. J. ASIAN L. 367 (2011); Eric Ip, *Judicial Review in China: A Positive Political Economy Analysis*, 8 REV. L. & ECON. 331 (2012).

12. See, e.g., the State Compensation Law (promulgated by Standing Comm. Nat'l People's Cong., May 12, 1994, effective Jan. 1, 1995) (P.R.C.), the Administrative Penalty Law (promulgated by Nat'l People's Cong., Mar. 17, 1996, effective Oct. 1, 1996) (P.R.C.), the Administrative Supervision Law (promulgated by Standing Comm. Nat'l People's Cong., May 9, 1997, effective May 9, 1997) (P.R.C.), the Administrative Reconsideration Law (promulgated by Nat'l People's Cong., Apr. 29, 1999, effective Oct. 1, 1999) (P.R.C.), the Administrative Licensing Law (promulgated by Standing Comm. Nat'l People's Cong., Aug. 27, 2003, effective July 1, 2004) (P.R.C.), and the Administrative Compulsory Enforcement Law (promulgated by Standing Comm. Nat'l People's Cong., June 30, 2011, effective Jan. 1, 2012) (P.R.C.).

13. ALBERT CHEN, *AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 333 (4th ed. 2011).

14. MINXIN PEI, *CHINA TRAPPED IN TRANSITION: THE DEVELOPMENTAL LIMITS OF AUTOCRACY*

By contrast, administrative law has become ever more influential in Hong Kong after the transfer of sovereignty, notwithstanding the persistence of “authoritarian”¹⁵ and “autocratic”¹⁶ politics. Often tackling divisive political issues,¹⁷ judicial review of administrative action has been described as economically, socially, and politically consequential,¹⁸ due to its encroachment on such policy domains as aviation,¹⁹ censorship,²⁰ educational policy,²¹ environmental policy,²² financial regulation,²³ public health,²⁴ immigration,²⁵ land policy,²⁶ professional licensing,²⁷ pharmacy,²⁸ privatization,²⁹ public housing,³⁰ reclamation,³¹ social welfare,³² telecommunications,³³ transportation,³⁴ and so on. Local jurists of Hong Kong administrative law conventionally treat considerations of justice,³⁵

58 (2006).

15. Wai-man, Lam, *Political Context*, in CONTEMPORARY HONG KONG POLITICS: GOVERNANCE IN THE POST-1997 ERA 1, 11 (Lam Wai-man et al. eds., 2007).

16. NGOK, MA, POLITICAL DEVELOPMENT IN HONG KONG: STATE, POLITICAL SOCIETY, AND CIVIL SOCIETY 90 (2007).

17. IAN SCOTT, THE PUBLIC SECTOR IN HONG KONG 46 (2010).

18. Johannes Chan, *Administrative Law, Politics and Governance: The Hong Kong Experience*, in ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES 143 (Tom Ginsburg & Albert Chen eds., 2009).

19. See *Cathay Pacific Airways Flight Attendants Union v. The Director-General of Civil Aviation*, [2007] 2 H.K.C. 393 (C.A.).

20. See *The Sun News Publisher Ltd. & Anor. v. Comm’r for Television and Entm’t Licensing Auth.*, [2006] H.K.C.U. 1279 (C.F.I.).

21. See *Lam Yuet Mei v. Permanent Sec. for Educ. and Manpower*, [2004] H.K.C.U. 922 (C.F.I.).

22. See *Shiu Wing Steel Ltd. v. Dir. of Env’tl. Prot.*, [2006] 4 H.K.C. 111 (C.F.A.).

23. See *Sanyuan Group Ltd. v. Stock Exch. of H.K. Ltd.*, [2008] 4 H.K.C. 367 (C.F.I.).

24. See *Lam Che Wai v. Dir. of Food and Env’tl. Hygiene*, [2003] H.K.C.U. 1389 (C.F.I.).

25. See *Tam Nga Yin v. The Dir. of Immigration*, [2001] H.K.C.U. 661 (C.F.I.).

26. See *Rank Profit Indus. Ltd. v. Dir. of Lands*, [2009] H.K.C.U. 926 (C.F.A.).

27. See *Law Sze Yan v. The Chinese Med. Practitioners Board of the Chinese Med. Council of H.K.*, [2005] H.K.C.U. 1579 (C.F.I.).

28. See *Lee Hong Dispensary Superstore Co. Ltd. v. Pharmacy and Poisons Board*, [2007] H.K.C.U. 379 (C.F.I.).

29. See *Lo Siu Lan v. H.K. Hous. Auth.*, [2005] H.K.C.U. 259 (C.A.).

30. See *Ho Choi Wan v. H.K. Hous. Auth.*, [2006] H.K.C.U. 18 (C.F.A.).

31. See *Soc’y for the Prot. of Harbour Ltd. v. Town Planning Board*, [2003] 4 H.K.C. 463 (C.F.I.).

32. See *Cheung Man Wai v. Dir. of Soc. Welfare*, [2000] 3 H.K.L.R.D. 255. (C.A.).

33. See *PCCW-HKT Tel. Ltd. v. The Telecomm. Auth.*, [2005] H.K.C.U. 553 (C.A.).

34. See *Chit Fai Motors Co. Ltd. v. Comm’r for Transp.*, [2004] 1 H.K.C. 465 (C.A.).

35. See generally W.S. Clarke, *Judicial Review in Hong Kong in the Nineties*, in LAW LECTURES FOR PRACTITIONERS 1994, at 296 (1994).

fairness,³⁶ individual rights,³⁷ transparency,³⁸ and redress of power abuses³⁹ as determinants of its development. Conversely, mainland Chinese scholars who keep an eye on the SAR typically characterize judicial review of administrative action as a politicized weapon targeting the executive,⁴⁰ an inefficient constraint on public policy,⁴¹ and the vehicle of a judicial ambition that seeks to undermine government authority and usurp control over social development.⁴²

In contrast to these two polarized schools of thought, this Article argues that Hong Kong's administrative law doctrines emanating from judicial review are not exclusively premised on rule-of-law values or undue judicial and social activism. Judges crafted these doctrines *as if* they were reacting to inefficiencies caused by the expansion of the administrative state and incongruence between legislative and bureaucratic interests. Judge-made administrative law is thus better understood as a set of decisional devices developed to promote the reduction of agency costs imposed by public administrators on their political principal—the Hong Kong Legislative Council—to the optimal point where further reduction would yield no benefit to the latter.⁴³ Hence, there arises a positive theory of Hong Kong administrative law that leaves to normative theorists questions regarding the merits and desirableness of the various doctrines.⁴⁴

36. BENNY TAI, *THE PASSION FOR RULE OF LAW: VALUES BEYOND LEGAL TEXT AND LEGAL INSTITUTIONS* 202 (2010).

37. Benedict Lai & Johannes Chan, *Remedies in Administrative Law*, in *EFFECTIVE JUDICIAL REVIEW: A CORNERSTONE OF GOOD GOVERNANCE* 359, 360 (Christopher Forsyth et al. eds., 2010).

38. *See generally* Mark Daly, *Judicial Review in the Hong Kong Special Administrative Region: Necessary Because of Bad Governance*, in *EFFECTIVE JUDICIAL REVIEW: A CORNERSTONE OF GOOD GOVERNANCE* 413 (Christopher Forsyth et al. eds., 2010).

39. *See generally* Philip Dykes, *The Functions of Judicial Review in Hong Kong*, in *EFFECTIVE JUDICIAL REVIEW: A CORNERSTONE OF GOOD GOVERNANCE* 416 (Christopher Forsyth et al. eds., 2010).

40. *See, e.g.*, JIANZHEN HAO, XIANGGANG TEBIE XINGZHENGQU XINGZHENG YU LIFA DE GUANXI [EXECUTIVE-LEGISLATIVE RELATIONS IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION] (2010).

41. *See, e.g.*, CHEN RUILIAN & WANG YONGCHENG, XIANGGANG TEQU GONGGONG GUANLI MOSHI YANJIU [A STUDY OF THE PUBLIC MANAGEMENT MODEL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION] 38 (2009).

42. *See, e.g.*, Dingwai Zhang, *Xianggang de Xingzheng Zhudao Tizhi: Xingzhi, Kunjing yu Fazhan* [Hong Kong's System of Executive Dominance: Nature, Problems, and Development], in XIANGGANG HUIGUI HOU SHEHUI JINGJI FAZHAN DE HUIGU YU ZHANWANG [HONG KONG'S POST-REUNIFICATION SOCIO-ECONOMIC DEVELOPMENT: RETROSPECT AND PROSPECTS] 248–58 (Chen Guanghan et al. eds., 2009); Gao Xuchen, *Applicability of Hong Kong Basic Law*, in *A NEW UNDERSTANDING OF THE RULE OF LAW: A COMPARATIVE ANALYSIS* 299 (Li Lin et al. eds., 2011).

43. *See* Tonja Jacobi & Emerson Tiller, *Legal Doctrine and Political Control*, 23 *J. L. ECON. & ORG.* 326 (2007).

44. I will avoid a discussion of constitutional law in this Article. Constitutional law involves judicial decisions that explicitly enforce the Basic Law, which invoke an entirely different principal-

The Article is organized as follows. Part II lays out the ideal concept of administrative efficiency deployed herein, discussing it in the context of Hong Kong public administration. Part III demonstrates how the structure of post-1997 administrative law coheres with this ideal of administrative efficiency, discussing several conjectures that may explain the underlying design of these doctrines. Part IV concludes with a summary of findings.

II. EFFICIENCY IN THE HONG KONG ADMINISTRATIVE STATE

This Article's argument draws heavily on two traditions in the economic analysis of law: the economic theory of common law,⁴⁵ which theorizes that judge-made law may be understood as a pricing mechanism which tends to produce efficient outcomes, and the positive political theory, which posits that inter-branch strategic games underlie the causal nexus between procedural rules and policy outcomes.⁴⁶ This article shows that Hong Kong administrative law doctrines are consistent with the goals of "administrative efficiency" in at least two ways. First, they promote optimal compliance of administrative agencies with statutes, which express the preferences of their political principal, the Legislative Council.⁴⁷ Second, when the Legislative Council has not unequivocally specified its preferences (e.g., when substantive statutory goals are ambiguous), they compel agencies' adherence to the minimal requirements of Kaldor-Hicks efficiency, which ensure beneficiaries of administrative

agent relationship wherein the Chinese National People's Congress and its Standing Committee is the principal, and each of all three branches of government in Hong Kong are the agents. This is entirely beyond the ambit of the present discussion, which emphasizes the administrative rather than constitutional level of analysis.

45. The law and economics movement has made progress in many areas of market-related law, *viz.* commercial law, corporate law, antitrust law, and taxation law. *See generally* Richard Posner, *The Law and Economics Movement*, in *LAW AND ECONOMICS: A READER* 40 (Alain Marciano ed., 2009). Nonetheless, economists and lawyers have exhibited considerable unease in applying it to non-market domains such as crimes, torts, the environment, the family, administrative law, constitutional law, legal history, and so on. *Id.*

46. *See* David Law, *Introduction: Positive Political Theory and the Law*, 15 *J. CONTEMP. LEGAL ISSUES* 1, 2 (2006).

47. *See* ROBERT COOTER, *THE STRATEGIC CONSTITUTION* 96–97 (2000); KENNETH SHEPSLE, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* 424 (2d ed. 2010). A core tenet of principal-agent theory is that an increase in agency costs results in a decline in efficiency. *See* RICHARD MCKENZIE & DWIGHT LEE, *IN DEFENSE OF MONOPOLY: HOW MARKET POWER FOSTERS CREATIVE PRODUCTION* 62 (2008); Simon Deakin & Ajit Singh, *The Stock Market, the Market for Corporate Control and the Theory of the Firm: Legal and Economic Perspectives and Implications for Public Policy*, in *THE MODERN FIRM, CORPORATE GOVERNANCE, AND INVESTMENT* 210 (Per-Olof Bjeggren & Denis C. Mueller eds., 2009).

policies can in principle compensate those who have been injured by those policies and remain better off nonetheless.⁴⁸

This section analyzes the concept of efficiency in the context of the Hong Kong administrative state using the generalized principal-agent model. It is assumed that rulers, regardless of their omnipotence, have limited material capacity to implement public policy choices.⁴⁹ Implementation requires a chain of command by which rulers delegate to agents with instructions.⁵⁰ Despite its relative political weakness vis-à-vis the Chief Executive,⁵¹ the Legislative Council, as Hong Kong's principal lawmaking organ, has been constitutionally empowered to hold the Executive Authorities to account;⁵² simultaneously, the Executive Authorities must duly implement its enactments.⁵³ In the context of administrative law, the relationship between the Legislative Council and the Executive Authorities is parallel to principal-agent relations in private corporations:⁵⁴ the Legislative Council is analogous to a board of directors, exercising broad oversight over managers (the Chief Executive and his cabinet), but unable to pay close attention to the daily activities of subordinate employees (administrative agencies).⁵⁵ The Legislative Council enacts bills proposed by the Chief Executive (and fine-tuned by legislators) into statutes, and delegates their implementation to administrative officials, who also have considerable decision-making discretion. Such delegation to the modern administrative state is commonly justified by the argument that administrators have more expertise and experience than politicians, *e.g.*, more accurate information about the comparative impacts of different implementation choices.⁵⁶

48. See CENTO VELJANOVSKI, *ECONOMIC PRINCIPLES OF LAW* 33 (2007).

49. See Yadira Gonzalez de Lara et al., *The Administrative Foundations of Self-Enforcing Constitutions*, 98 AM. ECON. REV.: PAPERS & PROCEEDINGS 105 (2008).

50. COOTER, *supra* note 47, at 80.

51. IAN SCOTT, *PUBLIC ADMINISTRATION IN HONG KONG: REGIME CHANGE AND ITS IMPACT ON THE PUBLIC SECTOR* 283 (2005).

52. H.K.B.L. art. 73 empowers the Legislative Council to hold the Executive Authorities to account by controlling taxation and public expenditure, questioning and scrutinizing Government policies, and debating the Chief Executive's Policy Addresses to the Council.

53. H.K.B.L. art. 64 requires the Executive Authorities to abide by and implement laws enacted by the Legislative Council and be accountable to the latter; H.K.B.L. arts. 8 & 18 tacitly preserve the British tradition that the Executive Authorities could only enact subordinate legislation as authorized by primary legislation made by the Legislative Council, and that the Legislative Council is entitled to control the content of subsidiary legislation through the amendment or repeal of relevant primary legislation.

54. See generally COOTER, *supra* note 47, at 80.

55. See generally FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 4 (2009).

56. See generally John D. Huber & Charles R. Shipan, *Politics, Delegation, and Bureaucracy*, in

However, the generalized principal-agent model holds that, as information asymmetry intensifies, agents have incentives to pursue courses of action inconsistent with the original terms of delegation set by the principals.⁵⁷ With better information about the effects of their acts than the principals, agents can make choices with impunity that benefit themselves at the expense of their principals.⁵⁸ This is the problem of “agency cost.”

In public administration, agency costs are those borne by the legislature when inducing agencies to faithfully implement legislative intent and include the losses arising from the imperfection of inducements.⁵⁹ These costs add to the total cost of public administration and render it less efficient.⁶⁰ As agency costs mount, principals are normally incentivized to reclaim their authority by dismissing agents outright or monitoring and nudging their behavior. They can do so, however, only insofar as agents’ acts are observable.⁶¹ Thus, governments around the world enact laws and institute mechanisms for policing administrators in order to minimize agency costs.⁶² Agency costs in Hong Kong were low in the British colonial era (1842–1997), as principal-agent interests significantly overlapped. During that time, senior civil servant-public administrators served concurrently as Government ministers as part of the Executive Council and as *ex officio* members of the Legislative Council majority. As we shall see, since China’s resumption of sovereignty, the Hong Kong SAR’s agency costs have skyrocketed owing to the divergence of identity and interests between legislators and administrative officials.

The British founded what was to become modern Hong Kong on the island granted to it by the Treaty of Nanking after its victory in the First Anglo-Chinese War over the Manchurian Dynasty that was then ruling China. Unlike most British colonies, Hong Kong was meant to be a trading outpost rather than a territorial settlement.⁶³ The “expatriates” who governed it never numbered more than one percent of the population.⁶⁴

THE OXFORD HANDBOOK OF POLITICAL ECONOMY 256 (Barry R. Weingast & Donald A. Wittman eds., 2006).

57. Matthew Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J. L. ECON. & ORG. 469, 469–70 (2007).

58. See Tom Ginsburg & Eric Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1585 (2010).

59. See Nuno Garoupa & Tom Ginsburg, *Hybrid Judicial Career Structures: Reputation Versus Legal Tradition*, 3 J. LEGAL ANALYSIS 489 (2011).

60. *Id.*

61. Eric Posner, *Cost-Benefit Analysis as a Solution to a Principal-agent Problem*, 53 ADMIN. L. REV. 289, 291 (2001).

62. COOTER, *supra* note 47, at 98.

63. See Hilda Selwyn-Clarke, *Hong Kong Dilemma*, 16 FAR EASTERN SURVEY 5 (1947).

64. LEO GOODSTADT, *UNEASY PARTNERS: THE CONFLICT BETWEEN PUBLIC INTEREST AND*

The colony's strategic importance escalated in the late 1940s and early 1950s after the United Nations imposed a trade embargo on the new Communist government ruling China for its role in the Korean War.⁶⁵ Hong Kong became a magnet for refugees fleeing Communism, including many who were skillful or wealthy.⁶⁶ By 1970 it had become Communist China's main economic gateway.⁶⁷ Nevertheless, Hong Kong was unique in the British Empire for such little progress to have been made toward representative democracy.⁶⁸ Indeed, in 1952, the Governor had persuaded London to abandon plans for transition to self-rule in face of the threat of Communist invasion.⁶⁹

Agency costs were virtually negligible during the colonial era. The "agents" of the Hong Kong state were the "chameleon-like" tenured senior civil servants who staffed ministerial offices, and were formally politically neutral, and hence not accountable to any electorate.⁷⁰ The "principal" was the unicameral Legislative Council, which consisted of three parts: the White-hall appointed Governor (as President of the Legislative Council *ex officio*), the Official Members (*viz.* the civil-servant ministers), and the Unofficial Members. Together, they exercised wide-ranging powers to make laws for "the peace, order, and good government of the Colony." From 1843 to 1976 the Official Members, following a twisted version of the Westminster model, constituted the Legislative Council majority.⁷¹ Notwithstanding subsequent electoral reforms, these civil servant-ministers more or less dominated the legislative agenda until 1997.⁷² In short, the identity and interests of the principal (the Legislative Council) and the agents (senior administrative officials) almost entirely overlapped. Essentially, the bureaucracy was the sole political institution, monopolizing almost all political power in the colony "from policy making to policy execution, and from law making to law enforcement."⁷³

PRIVATE PROFIT IN HONG KONG 8 (2005).

65. Ming Sing, *Introduction*, in HONG KONG GOVERNMENT AND POLITICS 7 (Ming Sing ed., 2003).

66. JOHN M. CARROLL, *A CONCISE HISTORY OF HONG KONG* 143 (2007).

67. Dexter Boniface & Ilan Alon, *Is Hong Kong Democratizing?*, 50 *ASIAN SURVEY* 786, 792 (2010).

68. Albert Chen, *Development of Representative Government*, in *LAW OF THE HONG KONG CONSTITUTION* 219 (Johannes Chan & C.L. Lim eds., 2011).

69. MING SING, *HONG KONG'S TORTUOUS DEMOCRATIZATION: A COMPARATIVE ANALYSIS* 36 (2004).

70. John Burns et al., *Changing Governance Structures and the Evolution of Public Services Bargains in Hong Kong*, 79 *INT'L REV. ADMIN. SCI.* 135 (2012).

71. CARROLL, *supra* note 66, at 199.

72. *Id.*

73. Kathleen Cheek-Milby, *The Changing Political Role of the Hong Kong Civil Servant*, 62

Instead of a proper cabinet, the Executive Council was more akin to a “sounding board” for policies, which mostly originated from the bureaucracy—albeit modified by suggestions from advisory committees drawn from local businesses and social elites.⁷⁴ The Governor was technically omnipotent; though, admittedly, he rarely exercised his power at the expense of his civil service subordinates.⁷⁵

Since the early twentieth century, the Hong Kong civil service has earned a distinguished reputation for efficiency and integrity.⁷⁶ As a cost-conscious, meritocratic, benevolently authoritarian “bureaucratic polity” or “pure administrative state,” it has grounded its legitimacy⁷⁷ on its policy output performance and its administrative legality.⁷⁸ Since the 1970s, this largely clean bureaucracy has effectively implemented many important housing, health, education, and welfare reform programs that have lifted multitudes out of poverty, while conserving a minimalist approach to economic management on a macro level.⁷⁹ Notably, the colonial civil service significantly outperformed those of most other East Asian countries and was on par with Singapore and Japan.⁸⁰ Following the 1989 Tiananmen Square incident, Governor Chris Patten’s expansion of direct legislative elections in response to the local populace’s growing fears about the 1997 transfer of sovereignty to China weakened bureaucratic dominance of politics and policy in the mid-1990s.⁸¹

The post-1997 era began with China’s roll-back of the Patten reforms. Chee-hwa Tung, the first Chief Executive of Hong Kong appointed by Beijing to succeed the British Governor, wielded wide-ranging powers conferred by the Basic Law, which exceeded those of the majority of the world’s presidents, at least on paper.⁸² Yet, the problem of agency cost and administrative inefficiency is now far more prominent than it ever was in colonial times. The Chief Executive’s “Confucian” and “patriarchal” ideological tendencies, supported by the pro-China parties dominating the

PAC. AFF. 219, 221 (1989).

74. IAN SCOTT, PUBLIC ADMINISTRATION IN HONG KONG: REGIME CHANGE AND ITS IMPACT ON THE PUBLIC SECTOR 33 (2005).

75. *Id.*

76. CHARLES COLLINS, PUBLIC ADMINISTRATION IN HONG KONG: LONDON: ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS 163 (1952).

77. SCOTT, *supra* note 74, at 36.

78. AHMED SHAFIQUH HUQUE ET AL., THE CIVIL SERVICE IN HONG KONG: CONTINUITY AND CHANGE 6 (1998).

79. See Anthony Cheung, *Strong Executive, Weak Policy Capacity: The Changing Environment of Policy-making in Hong Kong*, 12 ASIAN J. POL. SCI. 2 (2004).

80. JOHN BURNS, GOVERNMENT CAPACITY AND THE HONG KONG CIVIL SERVICE 349 (2004).

81. CARROLL, *supra* note 66, at 199.

82. See MA, *supra* note 16, at 59.

Legislative Council,⁸³ eventually clashed with the policy preferences of the British-trained bureaucracy.⁸⁴

The Legislative Council and the Executive Authorities have become separately constituted under the Basic Law; civil servant-ministers no longer double as legislators. Nonetheless, the pro-China camp, to which the Chief Executive was a member, has always been the legislative majority in this 60-Member legislature.⁸⁵ What is more, the new majority's self-aggrandizing preferences steadily diverged from those of their civil service agents serving as ministers in the government.⁸⁶ In many ways, the Legislative Council majority, if not also the Chief Executive, have remained "outsiders" to workaday policy making and implementation thanks to the severe information asymmetry between themselves and the bureaucracy.⁸⁷ Notably, Chief Executive Tung and his supporters have chosen to believe that the civil service establishment is a relic of the past and a major source of administrative inefficiency.⁸⁸ Partly because of exogenous shocks never experienced before by the bureaucracy, and partly because of discord between political principals and administrative agents, serious incidents of maladministration have transpired one after another. Some examples include the mishandling of the Avian Flu and the Severe Acute Respiratory Syndrome sagas, the public housing piling scandal, and conflicting housing policies that were widely believed to have caused the collapse of housing prices and perceived government-business collusion.⁸⁹

Consistent with the principal-agent model's predictions, the Chief Executive has implemented a panoply of reforms aimed at enlarging politicians' authority *vis-à-vis* public administrators, by appointing the leaders of the Legislative Council majority to non-portfolio positions on the Executive Council, by altering the employment status of civil servants, increasing outsourcing, corporatizing services, and by setting performance targets and efficiency-oriented goals.⁹⁰ None of these reforms have

83. See GOODSTADT, *supra* note 64, at 138.

84. Richard Cullen, Xiaonan Yang & Christine Loh, *Executive Government*, in *LAW OF THE HONG KONG CONSTITUTION* 252–53 (Johannes Chan & C.L. Lim eds., 2011).

85. Li Pang-kwong, *The Executive*, in *CONTEMPORARY HONG KONG GOVERNMENT AND POLITICS* 34–35 (Lam Wai-man, Percy L. Lui & Wilson Wong eds., 2012).

86. Wilson Wong, *The Civil Service*, in *CONTEMPORARY HONG KONG GOVERNMENT AND POLITICS* 98 (Lam Wai-man, Percy L. Lui & Wilson Wong eds., 2012).

87. *Id.* at 89.

88. See generally Ian Scott, *Legitimacy, Governance and Public Policy in Post-Handover Hong Kong*, 29 *ASIA PAC. J. PUB. ADMIN.* 29, 39–40 (2007).

89. Wai Fung Lam, *Coordinating the Government Bureaucracy in Hong Kong: An Institutional Analysis*, 18 *GOVERNANCE* 633, 634 (2005).

90. See Richard Walker, *Institutional Reform in the Provision of Public Services in Hong Kong: An Efficiency Evaluation*, 24 *ENV'T & PLANNING C: GOVT' & POL'Y* 597 (2006).

touched administrative officials' privileged positions, precisely because of the classical agency problem: ministers in charge of implementing public policies were themselves an integral part of the bureaucracy with adverse interests.⁹¹ Pursuing their own utility, civil servants have strongly resisted compensation reform, rallying instead around their entrenched belief that promotion must be rooted in seniority, not performance.⁹²

Now consider the oversight mechanisms, which have grown in number since the 1980s, available to the Legislative Council to control its administrative agents.⁹³ The Legislative Council engages in "police patrol oversight": direct inspection of defiant administrative behavior, which allows parliamentarians to proactively identify bureaucratic malfeasance and impose sanctions accordingly. For instance, the Legislative Council has sought to increase its control over the bureaucracy through policy panels and select committees.⁹⁴ The Legislative Council (Power and Privileges) Ordinance was enacted just for this purpose.⁹⁵ Nevertheless, "police patrols" have proved costly to the legislature given the scarcity of parliamentary time and resource. In fact, select committees armed with special investigative powers have not been deployed save for the most exceptional public controversies.⁹⁶

Apart from this, there is a plethora of "fire alarms" in the form of administrative tribunals, which are established by statute within the executive branch of government and enable individual citizens and interest groups to bring problematic administrative behavior to politicians' attention.⁹⁷ Major "fire alarms" include the Administrative Appeals Board, the flagship generalist administrative tribunal, and specialist tribunals such as the Immigration Tribunal, the Social Security Appeals Board, and the

91. BURNS, *supra* note 80, at 351.

92. *Id.* at 339–40.

93. See Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SC. 165 (1984).

94. Ngok Ma, *Executive-Legislative Relations: Assessing Legislative Influence in an Executive-Dominant System*, in THE FIRST TUNG CHEE-HWA ADMINISTRATION: THE FIRST FIVE YEARS OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION 349, 359–74 (Lau Siu-Kai ed., 2002).

95. Legislative Council (Power and Privileges) Ordinance, (1985) Cap. 382 (H.K.).

96. Percy Luen-tim Lui, *The Legislature*, in CONTEMPORARY HONG KONG GOVERNMENT AND POLITICS 60–61 (Lam Wai-man, Percy L. Lui & Wilson Wong eds., 2012).

97. Other examples include the Transport Tribunal under the Road Traffic Ordinance, (1982) Cap. 374 (H.K.); Appeal Board under the Electricity Ordinance, (1990) Cap. 406 (H.K.); Drainage Appeal Board under the Land Drainage Ordinance, (1994) Cap. 446 (H.K.); Appeal Board under the Energy Efficiency (Labelling of Products) Ordinance, (2008) Cap. 598 (H.K.); Board of Review under the Film Censorship Ordinance, (1988) Cap. 392 (H.K.); Appeal Board under the Construction Workers Registration Ordinance, (2004) Cap. 584 (H.K.); Licensing Appeals Board under the Public Health and Municipal Services Ordinance, (1960) Cap. 132 (H.K.). See ANDREW MAK, DISCIPLINARY AND REGULATORY PROCEEDINGS IN HONG KONG 52 (2011).

Appeal Board Panel (Town Planning).⁹⁸ However, a leading public administration scholar has questioned the efficacy of the Administrative Appeals Board in light of its lack of publicity.⁹⁹ Additionally, the Office of the Ombudsman is an institution that exhibits the characteristics of both “police patrols” and “fire alarms.” Nevertheless, it has been said to be an ineffective oversight device given its largely advisory and non-coercive nature.¹⁰⁰

The mechanism of appointments and dismissals is arguably the most powerful principal-agent control device to curb agency costs. However, the post-1997 Legislative Council is constitutionally incompetent to sack defiant bureaucrat-ministers and the Chief Executive’s ability to do so had been severely circumscribed by the Basic Law’s protection of civil servants’ tenure.¹⁰¹ Again in line with the principal-agent interpretation, the Legislative Council approved the Chief Executive’s initiative to reestablish his authority by restructuring the political system in 2002. The so-called “Principal Officials Accountability System” (“POAS”) replaced the civil servants, holding all fourteen ministerial positions, with political appointees selected by the Chief Executive.¹⁰² The rationale for the POAS was that it would maximize the Chief Executive’s control of the bureaucracy, as well as eliminate bureaucratic red tape and policy incoherence between the Executive Authorities and the Legislative Council.¹⁰³ Unintended consequences, however, overwhelmed Tung’s scheme. The POAS aggravated agency costs and administrative inefficiencies. The new appointees had no organized political party background or network to rely on and functioned in many ways like an *ad hoc* group with little experience in public administration.¹⁰⁴ Imperfect information made them depend on—and hence compromise with—public administrators to implement policies successfully.¹⁰⁵ At the same time, mutual distrust and tensions between the old political executive (now the

98. SWATI JHAVERI ET AL., HONG KONG ADMINISTRATIVE LAW 76 (2010).

99. IAN SCOTT, THE PUBLIC SECTOR IN HONG KONG 287 (2010).

100. ANTON COORAY, CONSTITUTIONAL LAW IN HONG KONG 240 (2010).

101. See H.K.B.L. arts. 100, 103.

102. See Burns et al., *supra* note 70, at 135.

103. Wilson Wong, *supra* note 86, at 98.

104. Chan, *supra* note 18, at 167.

105. See generally Anthony Cheung, *Executive-led Governance or Executive Power “Hollowed Out”*—*The Political Quagmire of Hong Kong*, 15 ASIAN J. POL. SCI. 17, 27 (2007).

senior bureaucracy), and the new political executive (constituted by the Chief Executive's own political appointees), created agency costs of its own, handicapping the governing capacity of the SAR Government as a whole.¹⁰⁶

Another major source of agency costs was administrative agency proliferation along with the increasing magnitude of their work. Numerous weighty decisions must be resolved at the administrative level due to the complexity of modern governance and the impracticability of foreseeing everything in legislation.¹⁰⁷ Indeed, the Executive Authorities of the Hong Kong SAR are a highly complex organization. Horizontally, as of June 2012, there are eleven Bureaus organized under the Department of Administration and the Department of Finance, five divisions under the Department of Justice, and more than 60 sub-departments and offices, each of which is highly specialized.¹⁰⁸ Additionally, there are over 500 statutory agencies and advisory committees addressing virtually every dimension of administration.¹⁰⁹ They often wield extensive powers. For instance, the Housing Authority, established by the Housing Ordinance,¹¹⁰ is charged with developing and implementing public housing programs. The Airport Authority, pursuant to the Airport Authority Ordinance,¹¹¹ is entrusted with maximizing the value of Hong Kong International Airport, one of the largest and busiest airports in the world. The huge number of specialized agencies has inevitably aggrandized the range and impact of their own administrative decisions, effectively limiting and retarding the ability of the Legislative Council to police and impose appropriate and timely sanctions.¹¹² In sum, the development of public administration in Hong Kong follows the predictions of the generalized principal-agent model. Administrative inefficiency as a consequence of principal-agent incongruence has become a real and pressing problem for Hong Kong's political leaders.

106. See Burns et al., *supra* note 70, at 143.

107. MURRAY HORN, *THE POLITICAL ECONOMY OF PUBLIC ADMINISTRATION: INSTITUTIONAL CHOICE IN THE PUBLIC SECTOR* 192 (1995).

108. Wilson Wong, *supra* note 86, at 84.

109. Chan, *supra* note 18, at 150.

110. Housing Ordinance, (2003) Cap. 283 (H.K.).

111. Airport Authority Ordinance, (1997) Cap. 483 (H.K.).

112. See Matthew McCubbins et al., *Positive Political Theory and the Law: Conditions for Judicial Independence*, 15 J. CONTEMP. LEGAL ISSUES 105 (2006).

III. ECONOMIC FOUNDATIONS OF ADMINISTRATIVE LAW

A. Overview

Hong Kong administrative law is an anomaly in the general development of administrative law in other East Asian jurisdictions such as Japan, Taiwan, and South Korea. These latter countries are rooted in a Confucian past, reformed in adherence to German and American ideals, and structured to suit the needs of the developmental state.¹¹³ By contrast, judge-made law is the backbone of administrative law in Hong Kong. The territory's administrative law doctrines derive their principles and practices directly from English administrative law, which dates back to the seventeenth century.¹¹⁴ The English courts did not acquire their judicial review competence from Acts of Parliament; instead, they asserted it for themselves.¹¹⁵ English administrative law entered a new phase in 1963 when the Appellate Committee of the House of Lords revived the principles of natural justice;¹¹⁶ roughly two decades later, in just two decades, it was satisfied that judge-made administrative law principles were sophisticated enough to be classified into three main grounds for review in *Council of Civil Service Unions v. Minister for Civil Service*:¹¹⁷ illegality, irrationality, and procedural impropriety.

Having inherited the Colony's common law system, the courts of the Hong Kong SAR increasingly deal with challenges to administrative decisions. In the absence of any enabling legislation, the courts have maintained that their role in the judicial review of administrative acts is supervisory rather than appellate—they are concerned with the legality of agency decisions, not their merits.¹¹⁸ Applications for judicial review may be made in accordance with Order 53 of the Rules of High Court, modeled after the now defunct Order 53 of the Supreme Court of England and Wales.¹¹⁹ Appeals can be made to the Court of Appeal of the High Court, and ultimately, to the Hong Kong Court of Final Appeal, which as the

113. See generally John Ohnesorge, *Administrative Law in East Asia: A Comparative Historical Analysis*, in *COMPARATIVE ADMINISTRATIVE LAW* 78 (Susan Rose-Ackerman & Peter Lindseth eds., 2011).

114. See Chen, *supra* note 9, at 11–12, 14.

115. See H.R.W. WADE & C.F. FORSYTH, *ADMINISTRATIVE LAW* 29 (10th ed. 2009).

116. *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.) 72 (appeal taken from C.A.) (U.K.).

117. [1985] A.C. 374, 410–11 (H.L.) (appeal taken from C.A.) (U.K.).

118. See, e.g., *Incorp. Owners of Wah Kai Indust. Ctr.*, [2000] 2 H.K.L.R.D. 268, ¶ 34 (H.K.); *Wong Wai Fan v. Comm'r of Corr. Serv.*, [2000] 1 H.K.L.R.D. C2 (C.F.I.) (H.K.); *Fin. Sec'y v. Felix Wong*, [2003] 6 H.K.C.F.A.R. 476, 487 (C.F.A.) (H.K.).

119. JHAVERI ET AL., *supra* note 98, at 117.

territory's apex court, is wholly independent and autonomous from the Supreme People's Court of China in Beijing. Applications are classified under the Constitutional and Administrative Law List, managed by a Judge of the Court of First Instance of the High Court. The Court's judicial review competence stems from Subsections 21 I, J, and K of the High Court Ordinance, which enables it to issue writs of *mandamus* (directing compliance), prohibition (prohibiting acts), and *certiorari* (quashing unlawful proceedings) upon reviewing administrative conduct.¹²⁰ Applications for judicial review have risen steadily, beginning with the final phase of British rule. Only 29 applications for judicial review were filed in 1988.¹²¹ Their increase only stabilized in the mid-2000s, at 150 per year on average.¹²² The rise has notably paralleled the increase of agency costs to the Legislative Council during the same period.

This section argues that administrative law doctrines show an implicit economic logic by seeking efficient administration through a system of incentives and disincentives. Legal doctrines consist of rules and standards explicit or implicit in judicial opinions, which set the terms for resolution of future cases under similar circumstances and may be confined to certain facts or sweepingly broad.¹²³ Administrative law doctrines stemming from legality review, rationality review, and procedural review mitigate agency costs by facilitating the Legislative Council's monitoring of administrative conduct, reducing agency discretion, and holding agency decision-making processes to implicit cost-benefit tests. While judicial review may promote administrative efficiency by credibly threatening to strike down decisions contrary to administrative law, it must be noted that judges are themselves in a sense agents of the legislature¹²⁴ and may try to impose their own preferences on policy outcomes.¹²⁵ This issue will be addressed in Part IV.

120. Henry Litton, *Administrative Law: Passionate Disagreement between Reasonable People*, in LAW LECTURES FOR PRACTITIONERS 1998, at 171 (1998).

121. DAVID CLARK & GERARD MCCOY, HONG KONG ADMINISTRATIVE LAW 1 (2d ed. 1993).

122. Chan, *supra* note 18, at 143.

123. See generally Emerson Tiller & Frank Cross, *What is Legal Doctrine?*, 100 NW. U. L. REV. 517 (2006).

124. Constitutional cases aside, the judiciary is clearly an agent of the Legislative Council under the Basic Law. For example, H.K.B.L. art. 84 mandates the courts to adjudicate cases in accordance with laws enacted by the Legislative Council.

125. See generally Mathew D. McCubbins & Daniel B. Rodriguez, *The Judiciary and the Role of Law*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY 273 (Barry R. Weingast & Donald A. Wittman eds., 2006).

B. Legality Review

Statutes enacted by the Legislative Council may be analyzed not only as *policy bargains* struck between the pro-China, and sometimes also Pan-Democratic, partisan factions, but also as *principal-agent contracts* between legislators and administrative agents that instruct the latter on how to achieve the intentions of the former. Indeed, the very structures and competences of administrative agencies, as well as their objectives, are usually founded by statute,¹²⁶ elaborated in delegated legislation, and supplemented by practices and procedures in internal circulars, memoranda, and the like.¹²⁷ The most common problem principal-agent contracts attempt to address is that of *agent drift*, which occurs when administrators adopt agenda inconsistent with the agreements forged between legislators and executive officials, causing many of the ills of administrative inefficiency.¹²⁸

The doctrine of *ultra vires* has always been considered by the Hong Kong courts to be a fundamental principle of administrative law.¹²⁹ The doctrine focuses judicial attention on boundary maintenance, that is, the issue of whether the administrator has stayed within the zone of discretion conferred on it by the Legislative Council. Yet merely bringing administrators into strict compliance with statutory provisions taken out of context does not necessarily lead to sensible judicial outcomes.¹³⁰ Thus, in determining whether an administrative act is in fact *ultra vires*, the courts normally focus on the *purposes* of the governing statute. Importantly, the Court of Final Appeal has made a distinction between a statute's *ends* (*viz.* policy bargains) and the *means* (*viz.* principal-agent contracts) to accomplish them. It was prepared to recognize as *intra vires* an agency's discretion whether to use statutorily provided means so long as it is exercised in pursuit of the statutory ends.¹³¹ In other words, the essence of legality was based in the agencies' furtherance of the statutory purpose regardless of their own choice of means, provided the lawfulness of the means themselves.¹³² This judicial doctrine is consistent with the ideals of

126. See JERRY MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 124 (1997).

127. Chan, *supra* note 18, at 149.

128. See generally Kenneth Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J. L. ECON. & ORG. 111 (1992).

129. RICHARD GORDON & JOHNNY MOK, JUDICIAL REVIEW IN HONG KONG 70 (2009).

130. See Cass Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L. J. 522, 536 (1989).

131. Lo Siu Lan v. Hong Kong Housing Auth., [2005] 8 H.K.C.F.A.R. 363, 379 (C.F.A.) (H.K.).

132. JHAVERI ET AL., *supra* note 98, at 329.

administrative efficiency because agencies are often better positioned to choose the most efficient means in pursuit of statutory ends given their informational advantages over courts.

Doctrines correcting agency drift from lawmakers' preferences embodied in statutory ends are accordingly sanctioned.¹³³ First, Hong Kong courts have generally followed a landmark House of Lords case¹³⁴ in holding that statutory "ouster clauses," which purport to exempt certain classes of administrative tribunal acts from judicial review, protect only decisions made *intra vires*.¹³⁵ Acts found *ultra vires* are amenable to review notwithstanding an ouster clause.¹³⁶ Second, the Legislative Council is presumed to allow agencies to relate the evidence that they consider to the reasons governing their administrative acts; inability to do so is regarded as failure to act on a rational, evidentiary basis.¹³⁷ Third, an act may be invalidated if the agency fails to take account of "relevant considerations."¹³⁸ The relevancy principle implies that courts elicit and assess all factors that served as a basis for agency acts.¹³⁹ For instance, any administrative act lacking evidential support is *ultra vires*.¹⁴⁰ In fact, one of the main groundbreaking doctrinal advancements of the Court of Final Appeal is to classify "substantive legitimate expectations" as one of the "relevant considerations" agencies must take into account,¹⁴¹ in the absence of any precedent from major apex courts in the Commonwealth, including the United Kingdom House of Lords, the Canadian Supreme Court, and the Australian High Court.¹⁴² The substantive legitimate expectation doctrine holds that failure to honor a legitimate expectation—a promise, representation, practice, or policy made by a public body—may

133. See generally Benny Tai, *The Administrative Litigation System in Hong Kong*, in CROSS-STRAIT, FOUR-REGION: LAW DEVELOPMENTS IN TAIWAN, CHINA, HONG KONG AND MACAU, VOLUME ONE: CONSTITUTIONAL REVIEW AND ADMINISTRATIVE LITIGATION (D.T.C. Tang & P.H. Wang eds., 2007).

134. *Anisimic Ltd. v. Foreign Compensation Comm'n*, [1969] 2 A.C. 147 (H.L.) (appeal taken from C.A.) (U.K.).

135. See *Thai Muoi v. Hong Kong Housing Auth.*, [2000] H.K.C.U. 370 (C.F.I.) (H.K.).

136. *Id.*

137. *Incorp. Owners of Wah Kai Indust. Ctr.*, [2000] 2 H.K.L.R.D. 268, ¶ 35 (H.K.).

138. JHAVERI ET AL., *supra* note 98, at 334.

139. See M. Elizabeth Magill & Daniel R. Ortiz, *Comparative Positive Political Theory*, in COMPARATIVE ADMINISTRATIVE LAW 134, 141 (Susan Rose-Ackerman & Peter Lindseth eds., 2011).

140. See *Yeung Cheong Fat v. An Investigation Comm. Appointed Pursuant to Section 6 of the Pub. Serv. (Discipline) Regulation and Section 10 of the Pub. Serv. (Administration) Order 1997*, [2005] H.K.E.C. 65 (C.F.I.) (H.K.).

141. *Ng Siu Tung v. The Dir. of Immigration*, [2002] 1 H.K.L.R.D. 561, 600–01 (C.F.A.) (H.K.).

142. Anthony Mason, *The Analytical Foundations, Scope and Comparative Analysis of the Judicial Review of Administrative Action*, THE MASON PAPERS 197–206 (Geoffrey Lindell ed., 2007).

cause immense unfair harm, constituting an unlawful abuse of power.¹⁴³ Notably, an act involving a political or policy choice is not exempt from the doctrine of substantive legitimate expectation; failure to consider such an expectation is considered failure to take account of relevant considerations.¹⁴⁴ This helps promote agencies' commitment to its own promises—an invaluable asset in the long run¹⁴⁵—by imposing transaction costs on those that indulge in cheap talk that will eventually undermine the interests of the legislature. Fourth, an act is unlawful if the administrator took account of an “irrelevant consideration.”¹⁴⁶ Administrative bodies are prohibited to exercise statutory means for non-statutory ends and to act under the influence of irrelevant considerations, including taking into account incorrect factual findings.¹⁴⁷ Administrators are thus encouraged to use their scarce resources in the efficient achievement of statutory goals, eschewing considerations that have little or no role to play.

Statutes sometimes vest administrators with broad discretion to balance the pursuit of competing ends. In such cases, the Court of Final Appeal endeavors to push agencies toward cost-benefit optimality in their decisional processes. Consider *Society for the Protection of the Harbour Limited v. Town Planning Board*,¹⁴⁸ where the Town Planning Board's proposals to reclaim the scenic and symbolic Victoria Harbour was challenged as *ultra vires* under the Protection of the Harbour Ordinance,¹⁴⁹ wherein Section 3 raises a presumption against such reclamation. The Court found the Board acted *ultra vires* in treating the statutory presumption as a mere material consideration to be given ordinary attention.¹⁵⁰ Instead, the Court found that the Board should have given the presumption more weight and formulated the “overriding public needs” test. The Court held:

The statute, in conferring on the harbour a unique legal status, recognises the strong public need to protect and preserve it. The

143. *Id.* at 600.

144. *Id.* at 601.

145. Stefan Voigt, *Constitutional Political Economy: Analyzing Formal Institutions at the Most Elementary Level*, in *NEW INSTITUTIONAL ECONOMICS: A GUIDEBOOK* 368 (Eric Brousseau & Jean Michel-Glachant eds., 2008).

146. JHAVERI ET AL., *supra* note 98, at 334.

147. *Incorp. Owners of Wah Kai Indust. Ctr.*, [2000] 2 H.K.L.R.D. 268, ¶ 61 (H.K.); *Building Auth. v. Appeal Tribunal (Buildings)*, [2005] H.K.E.C. 1963, ¶ 22 (C.F.I.) (H.K.); *Smart Gain Inv. Ltd. v. The Chief Exec. in Council and Another*, [2007] H.K.C.U. 1817, ¶ 93–94 (C.F.I.) (H.K.); *see also* GORDON & MOK, *supra* note 129, at 74–75.

148. [2004] 7 H.K.C.F.A.R. 1 (C.F.A.) (H.K.).

149. Protection of the Harbour Ordinance, (1999) Cap. 531 (H.K.).

150. *Society for the Protection of the Harbour Limited*, 7 H.K.C.F.A.R. at 16–17.

statute envisages that irreversible loss to the extent of the reclamation would only be justified where there is a much stronger public need to override the statutory principle of protection and preservation.¹⁵¹

It further defined that “overriding public need” does not rest on extremes: it is neither no more than “desirable, preferable, or beneficial,” nor nothing less than what the public cannot function without,¹⁵² but rather an economic, environmental, or social need that cannot be fulfilled by any reasonable, available alternative.¹⁵³ Consequently, it is incumbent on the Board to prove with “cogent and convincing evidence”¹⁵⁴ that its proposal has such economic or social benefit to some as would justify the environmental or cultural cost imposed on others. Echoing the logic of Kaldor-Hicks efficiency, the Court has, in effect, permitted the “preferences of both winners and losers [to] enter into a principled framework” wherein “the weighing of opposing preferences is explicit.”¹⁵⁵ On remand to the Town Planning Board for reconsideration, the proposed reclamation was substantially scaled back and a government committee was set up to scrutinize any future Board proposals in light of the considerable opposition to the Harbour reclamation.¹⁵⁶

Similarly, in *Shiu Wing Steel Ltd v. Director of Environmental Protection & Airport Authority (No. 2)*,¹⁵⁷ the Court of Final Appeal struck down the Director of Environmental Protection’s approval of the Airport Authority’s proposed aviation fuel storage facility on the grounds that it might credibly threaten life and property in the neighborhood. The proposal was alleged necessary to meet the expected demand for fuel at the Hong Kong International Airport. The ruling implied a cost-benefit analysis that weighs the interests of those benefitting from environmental protection against those advantaged by timely implementation of public projects. The Court condemned the environmental agency’s failure to conduct quantitative risk assessments for disaster scenarios that put human life at risk and, accordingly, held that project assessments must go beyond merely predicted risks to embrace the full statistical range of scenarios that

151. *Id.* at 17.

152. *Id.*

153. *Id.*

154. *Id.* at 18.

155. See John Graham, *Saving Lives through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 411 (2008).

156. Chan, *supra* note 18, at 162.

157. [2006] 9 H.K.C.F.A.R. 478 (C.F.A.) (H.K.).

include estimates of fatalities.¹⁵⁸ The Court's reasoning, however imperfect, implied that the loss of human life is a critical social cost and the extent to which such an irretrievable loss potentially exists must be carefully assessed. Indeed, a project cannot be Kaldor-Hicks-efficient unless the beneficiaries can in principle compensate the disadvantaged; no project beneficiary, even if they wanted to, could compensate for the lives that were lost.

Enabling statutes alone cannot self-execute the will of the political principals, nor guarantee that agencies do not drift away from it.¹⁵⁹ In sum, *ultra vires* doctrines have been designed to enforce the preferences of the legislature as embodied in statutory provisions.¹⁶⁰ These doctrines constitute a common law framework in which judges and litigants can identify agent drift to ensure the efficiency of administrators' compliance with regulatory and enabling acts without imposing excessive opportunity and transaction costs on the Legislative Council.

C. Rationality Review

Legislators cannot foresee every contingency. Practical necessity obliges them to render their statutory instructions in terms that are general and, in a sense, incomplete. As a result, administrative agencies charged with implementing statutes inevitably exercise wide-ranging discretionary powers, which may or may not be used in coherence with the ideals of administrative efficiency. The Hong Kong courts, following their English counterparts, have undertaken "rationality" review, constructing additional constraints on administrative acts beyond the precepts of statutory construction. The classical rule known as "*Wednesbury* unreasonableness" allows courts to invalidate acts "so absurd that no sensible person could ever dream that it lay within the powers of the authority"¹⁶¹ or a decision "so unreasonable that no reasonable authority could ever have come to it."¹⁶²

In Hong Kong, rationality review is conceptually distinct from legality review. Even when an administrative decision is *intra vires*, courts may still strike it down due to such factors as extreme inconsistencies and logical flaws.¹⁶³ Although some cases have conserved the traditional

158. *Id.* at 481, 508, 513–16.

159. RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 355 (1990).

160. JHAVERI ET AL., *supra* note 132, at 6.

161. *Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (K.B.) (U.K.).

162. *Id.* at 229.

163. GORDON & MOK, *supra* note 129, at 75.

Wednesbury test,¹⁶⁴ the Hong Kong courts have articulated important modifications that relaxed the stringent structure of “irrationality” doctrines. Indeed, “considerable diversity” is found in the willingness of courts to scrutinize the merits of administrative acts beyond strict unreasonableness.¹⁶⁵ An administrator’s failure to deal with important factors could be regarded as not only illegal, but also as irrational.¹⁶⁶ The High Court (Court of First Instance) nullified as “irrational” an act by the Telecommunications Authority, which imposed its policy views on a cable television license holder even though the license did not allow such imposition.¹⁶⁷ The same court has also invalidated an act of the Telecommunication Authority based on the Authority’s failure to include interim terms and conditions in licenses at the expense of the commercial interests of the parties to the case.¹⁶⁸ And it has accepted that administratively imposed penalties that ignore all rational relation between “the seriousness of the offence and the situation of the offender,”¹⁶⁹ or “excessive and out of proportion” has to be nullified.¹⁷⁰ The concept of proportionality is a special species of cost-benefit analysis, which asks whether the costs of the administrative decision are *excessive* with regard to the benefits.¹⁷¹ By extension, disproportionate administrative penalties are likely to be Kaldor-Hicks inefficient.

The High Court (Court of First Instance) extended these doctrines by ruling that the Chief Executive-in-Council’s decision to approve a Victoria Harbor reclamation plan (based on evidence drawn from an engineering report endorsed by an independent university expert) should be subject to a “heightened scrutiny test,” given the Harbor’s “unique legal status” pursuant to the Protection of Harbour Ordinance.¹⁷² Arguments and evidence submitted in support of such an important decision must “on their face” be “reasonable” and of “relevance.”¹⁷³ Rationality review thus

164. See, e.g., *Chu Yee Wah v. Dir. of Env’t Prot.*, [2011] 3 H.K.C. 227 (C.F.I.) (H.K.).

165. Johannes Chan, *A Sliding Scale of Reasonableness in Judicial Review*, 2006 ACTA JURIDICA 233, 235 (2006).

166. *Pun Tai Sung v. Immigration Tribunal*, [2006] H.K.E.C. 2013, ¶ 51 (C.F.I.) (H.K.).

167. See *H.K. Cable Television Ltd. v. Telecomm. Auth.*, [2004] H.K.C.U. 1266 (H.K.).

168. See *PCCW-HKT Tel. Ltd. v. Telecomm. Auth.*, [2003] H.K.E.C. 902 (C.F.I.) (H.K.).

169. See *Wong Wai Tak v. Sec’y for Civil Serv.*, [2001] H.K.E.C. 167, ¶ 40 (C.F.I.) (H.K.).

170. *Chu Ping Tak v. Comm’r of Police*, [2002] 3 H.K.L.R.D. 679, at 696 (C.F.I.) (H.K.); *Chow Kwok Leong v. Sec’y for the Civil Serv.*, [2011] H.K.C.F.I. 459, ¶ 2 (C.F.I.) (H.K.); see also *Liu Pik Han v. Hong Kong Fed’n of Insurers Appeal Tribunal*, [2005] H.K.C.F.I. 539, ¶ 50 (C.F.I.) (H.K.).

171. See Joel P. Trachtman, *Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EUR. J. INT’L L. 35 (1998).

172. *Soc’y for Prot. of the Harbour Ltd. v. Chief Exec. in Council*, [2004] 2 H.K.L.R.D. 902, ¶ 74 (C.F.I.) (H.K.).

173. *Id.* ¶ 39.

requires that a logical nexus always exists between the means adopted by agencies and the statutory ends. They are designed for the comprehensive assessment of whether the chosen course of action is consistent with the governing statute and also whether the power of choice was soundly exercised.¹⁷⁴ Outrageous and irrational administrative acts are usually more costly than beneficial to those affected by them. Rationality review does not formally require administrators to adopt Kaldor-Hicks cost-benefit analyses, but they do help courts scale back inefficient administrative impediments. Besides, rationality review limits administrator discretion to pursue unsound policies that stray too far from the preferences of the legislature. Accordingly, they potentially free the Legislative Council of political blame for the outrageous acts of its administrative agents.

D. Procedural Review

Legislatures ordinarily impose procedural requirements of various sorts on the decisional processes of administrative bodies. Procedural requirements may be understood as devices for achieving the goals of optimal political control.¹⁷⁵ They do so by increasing the transaction costs to administrators, in terms of time and resources, of pursuing courses of action inconsistent with legislative preferences as expressed in statutory goals.¹⁷⁶ As mentioned above, Hong Kong, unlike Taiwan or Japan, does not have an American-style Administrative Procedures Act to impose statutorily sanctioned procedural constraints on agency behavior. Hong Kong courts have instead required administrators to adhere to the procedures set forth in individual Legislative Council enactments, but additional to this, they have supplemented the legislature with other procedural safeguards that promote fairer outcomes.¹⁷⁷ For example, the judicial doctrine of procedural legitimate expectation has been brought to bear to impose procedural constraints on agencies (namely hearings legitimately anticipated by persons affected by administrative acts) over and above those mandated by statute.

174. See generally *Yeung Cheong Fat v. An Investigation Comm. Appointed Pursuant to Section 6 of the Pub. Serv. (Discipline) Regulation and Section 10 of the Pub. Serv. (Administration) Order 1997*, [2005] H.K.E.C. 65 (C.F.I.) (H.K.).

175. Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1115 (2002).

176. Lisa Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1768 (2007).

177. *So Chung v. Comm'r of Corr. Serv.*, [2001] H.K.C.F.I. 1107, ¶¶ 21–22 (C.F.I.) (H.K.).

The Court of Final Appeal averred that “the purpose of judicial review,” in the procedural review of agency adjudication, “is to ensure procedural fairness, observance of the rules of natural justice, and the prevention of excess or abuse of power;” administrative tribunals must therefore act “in a manner which was not only fair but seen to be fair.”¹⁷⁸ There is no fixed set of procedural rules that the courts must apply in every single instance of administrative action: the courts are to choose the appropriate doctrines with regard to the context of the impugned acts,¹⁷⁹ and procedural demands will vary according to “[t]he character of the decision-making body, the nature of the decision, and the statutory or other framework in which it operates.”¹⁸⁰

While the Legislative Council has drafted some statutes to require administrators to give reasons for their acts,¹⁸¹ the courts have decided that no general legal duty requires them to do so, but have in various circumstances required administrators to give reasons. The High Court (Court of First Instance) has acknowledged a growing judicial trend insisting on greater transparency of administrative proceedings, and courts increasingly lean toward an administrative duty to give reasons for their decisions.¹⁸² Such a duty, when enforced, obligates administrators to spend more of their scarce resources on improving their decisional processes and less on dreaming up policies that they cannot justify on their face.¹⁸³ Administrative law also faults administrators that exhibit “apparent” bias. It is of the essence in Hong Kong law that courts are seen as impartial, especially when agencies adjudicate.¹⁸⁴ The test of a tribunal’s impartiality is whether the conduct of the proceedings would cause a fair-minded and “informed observer to conclude that there was a real possibility . . . that the tribunal was biased.”¹⁸⁵ Rules such as this may be understood as designed to reduce agency costs and promote administrative efficiency insofar as biased agencies are likely to overvalue their own or third-party

178. *Fin. Sec’y v. Felix Wong* (2003) 6 H.K.C.F.A.R. 476, ¶¶ 35–48 (C.F.A.) (H.K.)

179. *See generally* *Chit Fai Motors Co. Ltd. v. Comm’r for Tr.*, [2004] 1 H.K.C. 465, ¶ 21 (C.A.) (H.K.).

180. *Lam Yuet Mei v. Permanent Sec. for Educ. and Manpower*, [2004] H.K.C.U. 922, ¶ 54 (C.F.I.) (H.K.).

181. *See, e.g.*, *Administrative Appeals Board Ordinance*, (1994) Cap. 442 (H.K.); *Air Pollution Control Ordinance*, (1997) Cap. 311 (H.K.).

182. *Wong Chi Sung v. The Chinese Med. Practitioners Board of the Chinese Med. Council of H.K.*, [2004] H.K.C.F.I. 734, ¶ 37 (C.F.I.) (H.K.).

183. Emerson Tiller, *Resource-Based Strategies in Law and Positive Political Theory: Cost-Benefit Analysis and the Like*, 150 U. PA. L. REV. 1452, 1459 (2002).

184. *Michael John Treloar Rowse v. The Sec’y for the Civil Serv.*, [2008] 5 H.K.L.R.D. 217, ¶ 61 (C.F.I.) (H.K.).

185. *Deacons v. White & Case LLP*, [2003] 6 H.K.C.F.A.R. 322, ¶ 20 (C.F.A.) (H.K.).

interests. Appearances count: administrative decision-makers who *seem* biased may well have allowed inappropriate concerns, like favoritism or pecuniary self-interest, actually to affect their judgment.¹⁸⁶ Administrative law thus reduces administrative bias by increasing the transaction costs (efforts and resources devoted to minimizing even perceived lack of neutrality) of enacting policies that the administrator prefers more strongly than the median member of the Legislative Council.¹⁸⁷

While no absolute rule requires an adjudicating agency to grant an oral hearing to the parties in interest, the courts have held that a hearing may be required in some situations, such as disputes that involve the credibility of a witness or party.¹⁸⁸ Procedural review doctrines nudge private interests toward policing agency malfeasance, lending aggrieved citizens a sense of vindication.¹⁸⁹ Courts have increasingly granted parties adversely affected by an impending agency act an opportunity to be consulted before the act is carried out.¹⁹⁰ Such consultation allows agencies to acquire relevant information from those who may be affected by particular acts, facilitating the weighing of costs and benefits before final outcomes are reached indirectly.¹⁹¹ Additionally, the enforcement of this set of procedures is decentralized in the sense that it does not require any direct action by the Legislative Council and so spares the opportunity costs of individual legislators.¹⁹²

Above all, the mechanism of procedural review facilitates optimal political control by providing legislators, interest groups, and the general public with more information on the bureaucracy, thereby reducing the information asymmetry between them. More information is better than less as for principals;¹⁹³ legislators can only reward and punish agents when they can evaluate their performance.¹⁹⁴ The expanded formulae of procedural review conduce to the legislature having the requisite information to perform oversight of agency conduct if necessary,

186. JHAVERI ET AL., *supra* note 98, at 310.

187. See Matthew Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1445 (2011).

188. Liu Pik Han v. H.K. Fed'n of Ins. Appeals Tribunal, [2005] 3 H.K.C. 242, ¶¶ 33, 45 (C.F.I.) (H.K.).

189. See generally Ohnesorge, *supra* note 113.

190. Lam Yuet Mei v. Permanent Sec. for Educ. and Manpower, [2004] H.K.C.U. 922, ¶ 55 (C.F.I.) (H.K.).

191. Mathew McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 258–59 (1987).

192. *Id.* at 263.

193. See Rui de Figueiredo et al., *An Informational Perspective on Administrative Procedures*, 15 J. L. ECON. & ORG. 283, 301 (1999).

194. Posner, *supra* note 61, at 291–92.

furnished by the various discovery processes springing from the rules of natural justice.¹⁹⁵

E. Offsetting Judicial Agency Costs

Globally, administrative law “reflects a tension between two fundamental impulses that pull in opposite directions”: administrative power has to be constrained in order to be legitimate on the one hand; the distribution of discretionary power to administrative agencies is crucial to effective government on the other.¹⁹⁶ Courts may undermine administrative efficiency if they intervene excessively in the administrative process, imposing their own preferences on agencies and legislators. This would “rob agencies of their effectiveness”¹⁹⁷ and incur another kind of agency costs—judicial agency costs.¹⁹⁸ Inconsistent application of administrative law rules may breed uncertainty among agencies, driving them to adopt defensive, risk-averse courses of action that may just as easily compromise the achievement of statutory goals and upset administrative efficiency.¹⁹⁹ Given information asymmetry, reviewing courts may sometimes be tempted to act inconsistently with the preferences of the Legislative Council.

The courts, apparently recognizing these pitfalls, have tied their own hands with a set of deferential doctrines. On balance, courts have been cautious about interfering in administrative decisions, and judicial review applicants have been disappointed in most cases.²⁰⁰ Between 2000 and 2008, the courts affirmed the lawfulness of administrative acts in eighty percent of all cases.²⁰¹ This is partly due to courts applying deference doctrines countervailing the potential judicial overreach that might disrupt the *status quo*.²⁰² Courts are forbidden to substitute their own policy preferences for those of administrators.²⁰³ In practice, there is a general

195. See Bressman, *supra* note 176, at 1776–77.

196. Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 6 (2009).

197. *Id.*

198. See Garoupa & Ginsburg, *supra* note 59, at 429.

199. See MARK ELLIOTT & ROBERT THOMAS, PUBLIC LAW 590 (2011).

200. Anthony Cheung & Max Wong, *Judicial Review and Policy Making in Hong Kong: Changing Interface between the Legal and the Political*, 28 ASIA PAC. J. PUB. ADMIN. 117, 136 (2006).

201. Wong Yan Lung, Sec’y for Justice, Speech at Conference on Effective Judicial Review: A Cornerstone of Good Governance (Dec. 11, 2008) [hereinafter Secretary for Justice’s Speech], available at <http://www.info.gov.hk/gia/general/200812/11/P200812110116.htm>.

202. See generally Cheung & Wong, *supra* note 200.

203. *Chu Hoi Dick v. Sec’y for Home Affairs*, [2007] 4 H.K.C. 428, ¶ 20 (C.F.I.) (H.K.).

judicial deference to the Executive Authorities.²⁰⁴ They have expressed reluctance to attack agency acts merely because they are unfair.²⁰⁵ The Hong Kong courts have been conscious to keep their own acts within the bounds of statutorily permissible judicial behavior. Courts have ruled against judicial intervention in cases where the Legislative Council gave “absolute discretion” to an agency on a certain matter unless the agency exercised its discretion unlawfully.²⁰⁶ Courts must not interfere with the Legislative Council’s delegation to agencies of different, sometimes overlapping powers, and the broader agency competence contained in one statute must not be circumscribed to meet the requirements of another statute.²⁰⁷

The courts have also toned down potentially activist doctrines by hedging them with important qualifications. For example, the Court of Final Appeal, domesticating the *Wednesbury* doctrine, has admonished the lower courts that,

Where a departmental head of government is entrusted by the legislature with administrative responsibilities it is not for the courts to say how those responsibilities should be discharged. It is only where the administrator has acted beyond the range of responses reasonably open to him under the statutory scheme that the court’s power of intervention . . . can properly be invoked.²⁰⁸

Under the doctrine of substantive legitimate expectation, some courts have expressed reluctance to interpret expansively the content of the administrative promise relied on; if the language of the promise is capable of more than one interpretation, judges should accept the agency’s version of what they intended the promise to mean.²⁰⁹ Indeed, the Court of Final Appeal itself has declared, “when [the courts] enforce legitimate expectations substantively (rather than merely procedurally) . . . [they] must take particular care to avoid trespassing upon the policy preserve of the executive.”²¹⁰ The courts have also explicitly declined to recognize the doctrine of proportionality, which among other things requires the courts to assess the legitimacy of an impugned decision’s underlying motives, as

204. *Clean Air Foundation v. HKSAR*, [2007] H.K.C.F.I. 757, ¶¶ 9, 31 (C.F.I.) (H.K.).

205. *Yook Tong Electric Co. Ltd. v. Comm’r for Tr.*, [2003] H.K.C.F.I. 626, ¶ 67 (C.F.I.) (H.K.).

206. *Med. Council of H.K. v. David Chow Siu Shek*, [2002] H.K.C.F.I. 54, ¶ 29 (C.F.I.) (H.K.).

207. *H.K. Cable Television Ltd. v. Telecomm. Auth.*, [2004] H.K.C.F.I. 975, ¶ 88 (C.F.I.) (H.K.).

208. *Lau Kong Yung v. The Dir. of Immigration*, [1999] 2 H.K.C.F.A.R. 300, ¶ 115 (C.F.A.) (H.K.).

209. *GORDON AND MOK*, *supra* note 129, at 96.

210. *Ng Siu Tung v. The Dir. of Immigration*, [2002] 1 H.K.L.R.D. 561, ¶ 347 (C.F.A.) (H.K.).

a free-standing basis of judicial review outside of the contexts of human rights and excessive penalties,²¹¹ and have ruled that the burden of proving an allegation of actual bias rests with the applicants.²¹²

Eschewing the rigorous Pareto efficiency standard, which forbids bettering the welfare of one at the expense of another, and judges conducting substantive cost-benefit tests, Hong Kong courts have confined themselves to preventing agent drift and promoting more lenient Kaldor-Hicks efficiency in the decisional processes of agencies, without interfering with substantive outcomes. Indeed, an efficient regime of administrative law does not enthrone the courts as public overseers, but merely checks if agencies are acting in line with their statutory mandates, not their self-interest.²¹³ Recall that the legislature's delegation of discretion to administrative agencies is typically justified by their superior expertise. The taboo against substituting judicial policy preferences for agencies' preferences reflects an assumption that, *ceteris paribus*, policy judgments of agencies are more likely to translate legislative preferences the best.²¹⁴ The competence of courts to control agencies' proceedings wanes in proportion as these become more technical or more politicized.²¹⁵

F. Strategic Case Selection

Apparently recognizing that judicial review is only useful if it reduces agency costs,²¹⁶ the courts have strategically crafted the rules of standing and reviewability to select only the "right" cases to review and to conserve their own scarce organizational resources. Hong Kong's multifaceted administrative state occasionally sees agencies engaging in private business dealings; out of principles derived from English common law, therefore, the courts have elaborated doctrines to screen out certain appeals. It is axiomatic in Hong Kong law that judicial scrutiny of an act is founded not only on the source, but also on the nature of the acting organization's power.²¹⁷ For example, an agency's "purely commercial"

211. JHAVERI ET AL., *supra* note 98, at 411.

212. *Yeung Tin Leung Vincent v. Chief Exec.*, [2005] H.K.C.F.I. 158, ¶ 20 (C.F.I.) (H.K.).

213. See William Bishop, *A Theory of Administrative Law*, 19 J. LEGAL STUD. 489, 510 (1990).

214. See Bressman, *supra* note 176, at 1782.

215. See David Rubenstein, *Relative Checks: Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2238 (2010).

216. See Bishop, *supra* note 213, at 522.

217. See *Lee Shing Yue Constr. Co. Ltd. v. Dir. of Architectural Serv.*, [2001] 1 H.K.L.R.D. 715, ¶ 49 (C.F.I.) (H.K.); *Wong Yui Hin James v. H.K. Arts Dev. Council*, [2004] H.K.C.F.I. 797, ¶ 34 (C.F.I.) (H.K.); see also *R v. Panel on Takeovers and Mergers Ex p. Datafin Plc.*, [1987] 1 All E.R. 564 (C.A.) (H.K.).

decision, such as to award contracts or to purchase goods, is not reviewable absent fraud, corruption, or bad faith.²¹⁸ To be reviewable, an act “must be one of a public nature as opposed to one of a purely private or domestic character.”²¹⁹ The High Court (Court of First Instance) has declared:

[T]he presence of a public element(s) of sufficient significance in the decision-making process could turn an otherwise commercial decision into a public law decision, amenable to judicial review. . . . [T]he crucial question is whether the role played or function performed by the Government official is sufficiently public to render the decision a public one, susceptible to judicial review.²²⁰

As well as satisfying the public role test, judicial review appellants usually have to meet those principles of standing under the House of Lords ruling of *O’Reilly v. Mackman*,²²¹ which held it was an abuse of judicial process to allow applicants to challenge a public act without following the special review procedures provided in Order 53 of the Rules of the High Court. The Court of Final Appeal noted that applications not in strict compliance with Order 53 have become an “extravaganza,” which the High Court (Court of First Instance) should stop.²²² Exceptions from compliance with Order 53 are acceptable only in limited circumstances, such as when the applicant had no intention of evading it.²²³ The rules of standing have also been changed in light of the recent development that “activists” increasingly pursue judicial review litigation to attract public attention, promote their ideology, and boost their bargaining power *vis-à-vis* the government.²²⁴ The Court has responded by tightening the standing test for judicial review applicants, ruling that leave will only be granted to “arguable,” not just “potentially arguable” applications.²²⁵ This is consistent with the view that judicial review must usefully promote administrative efficiency on behalf of the legislature and its constituencies, and only in cases that the courts are interested in and capable of handling. Doctrinal tendencies to offset judicial agency costs and protect the

218. *Matteograssi SPA v. Airport Auth.*, [1998] 2 H.K.L.R.D. 213, ¶ 2 (C.I.) (H.K.); *Ngo Kee Constr. Ltd. v. Hong Kong Housing Auth.*, [2001] H.K.C.F.I. 867, ¶ 19, 23, 30–33 (C.F.I.) (H.K.).

219. *Cheng Chun Ngai v. Hospital Authority*, [2004] H.K.C.F.I. 1023, ¶ 16 (C.F.I.) (H.K.).

220. *Anderson Asphalt Ltd. v. Sec’y for Justice*, [2009] 3 H.K.L.R.D. 215, ¶ 57 (C.F.I.) (H.K.).

221. *O’Reilly v. Mackman*, [1983] 2 A.C. 237 (H.L.) (appeal taken from A.C.) (U.K.).

222. *Lau Kong Yung v. Dir. of Immigration*, [1999] 2 H.K.C.F.A.R. 300, ¶ 137 (C.F.A.) (H.K.).

223. *Lau Chi Fai v. Sec’y for Justice*, [1999] 2 H.K.L.R.D. 494, ¶ 18 (C.F.I.) (H.K.).

224. *Cheung & Wong*, *supra* note 200, at 131.

225. *Peter Po Fun Chan v. Winnie C.W. Cheung*, [2007] 10 H.K.C.F.A.R. 676, ¶ 7 (C.F.A.) (H.K.).

administrative state from certain classes of challenges regardless of plausibly negative effects on administrative fairness and the protection of human rights evidence that rule-of-law values do not necessarily dominate the calculus of reviewing courts.

G. *Why Efficiency?*

This section attempts to conjecture why Hong Kong administrative law doctrines resemble decisional devices that promote administrative efficiency. Consider first what is not claimed: it is not asserted that judicial application of administrative law will automatically lead to efficient outcomes. A persistent risk in the modern regulatory environment is that judicial review could trigger reactions from the political branches and interest groups that would render the administrative process less efficient than it would without such intervention.²²⁶ Equally, efficient doctrines are not necessarily applied perfectly. As Secretary for Justice Wong Yan-lung said in a 2008 speech, “misconceived judicial reviews, apart from being costly for the community, may also cause unnecessary uncertainty, interruption or delay to essential public works,” and public administrators, to shield themselves from judicial scrutiny, “may become inclined to promulgate more rules, turning into excessive regulatory fetters, which in turn may generate more judicial reviews.”²²⁷ Nor is it claimed that administrative efficiency is an explicit or the overriding ideal pursued by Hong Kong courts; indeed, efficiency is extremely controversial when made the overriding pursuit of legal institutions.²²⁸ What is claimed is that judge-made administrative law may be understood as conducive to the promotion of administrative efficiency *as if* judges had intended it: administrative law doctrines are economically sensible notwithstanding that they are not expressly economic.²²⁹ While judges and traditional legal scholars tend to think that concerns for justice and fairness predominate in the evolution of legal doctrines, this article has attempted to show that these doctrines are no less premised on functional and instrumental considerations.²³⁰ It is important to note that although many of the former colony’s administrative law doctrines originated in the United Kingdom, it is unnecessary to inquire why English judges ever designed these

226. See Daniel Rodriguez, *Delegation, Risk Diversification, and the Properly Political Project of Administrative Law*, 119 HARV. L. REV. F. 202, 208 (2006).

227. Secretary for Justice’s Speech, *supra* note 201.

228. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 252 (6th ed. 2003).

229. *Id.*

230. *Id.*

administrative law doctrines in the first place, as after 1997 the Hong Kong Court of Final Appeal was no longer bound by Privy Council precedents, given the termination of Hong Kong's British Empire membership. Essentially, the Court has been left on its own to develop the SAR's own local rules of public administration in unprecedented circumstances to suit the needs of the "new" Hong Kong.

Consider the case of Singapore as a useful "controlled experiment" to illustrate the significant correlation between rapid growth of administrative law and proliferation of administrative agency costs. Singapore, like Hong Kong, is a common law jurisdiction and former British dependency. Both jurisdictions have been "newly industrialized economies" or "Asian Tigers," characterized by relative political stability, the complex cohabitation of authoritarian politics and flourishing capitalist economies, high levels of education, and low levels of corruption.²³¹ However, the path of administrative law in each of these jurisdictions diverges significantly from each other. Similar to British Hong Kong but dissimilar to the Hong Kong SAR, principal-agent incongruence is a non-problem for Singapore's rulers. The People's Action Party ("PAP") has commanded a supermajority of votes in the Parliament of Singapore since the country gained independence in 1965.²³² Government ministers, including the Prime Minister, are invariably drawn from incumbent PAP parliamentarians under the Westminster model. There is little space for judicial review of administrative action given the extensive overlap of principal-agent interests and the effective role of the PAP Government in resolving any residue agency problem.

Despite superficially resembling their Hong Kong counterparts due to the two city-state's common British inheritance, Singapore's administrative law doctrines have neither been extended nor invoked to control agency costs: merely seventy nine judicial review decisions were reported throughout the fifty three years between 1957 and 2008;²³³ the courts have not yet domesticated more rigorous doctrines such as substantive legitimate expectation and proportionality;²³⁴ and as of 2011,

231. See generally Anthony Cheung, *The Story of Two Administrative States: State Capacity in Hong Kong and Singapore*, 21 PAC. REV. 121 (2008).

232. See generally JON QUAH, *PUBLIC ADMINISTRATION SINGAPORE STYLE* (2010); Eric Ip, *A Positive Theory of Constitutional Judicial Review: Evidence from Singapore and Taiwan*, 2 ASIAN J. L. & ECON. 1 (2011).

233. Sek Keong Chan, *Judicial Review – From Angst to Empathy*, 22 SINGAPORE ACAD. L.J. 474 (2010).

234. See generally, Siraj Shaik Aziz & Sui Yi Siong, *Expecting the Right Thing: The Imperative for Recognising Substantive Legitimate Expectations in Singapore*, 30 SINGAPORE L. R. 147 (2012).

“the development of administrative law was still in its infancy.”²³⁵ However, the fact that Singapore’s administrative law has made much less progress than that of Hong Kong does not necessarily suggest that the former is less efficient than the latter. In Singapore’s administrative state, agency problems are mostly negligible and non-judicial oversight mechanisms tend to be reliable. These are factors that substantially reduce political demand for judicial oversight. Any wholesale transplantation of Hong Kong’s administrative law doctrines into Singapore, by implication, is likely to unleash severe inefficiencies in government decision-making, and *vice versa*.

The mechanism driving most judicial doctrines towards efficiency is invisible.²³⁶ Three conjectures, open to further empirical testing in the future, might be tentatively offered. First, judges might have a taste for promoting administrative efficiency, which would enhance their reputation among citizens, interest groups, legislators, and government officials, because optimal judicial oversight tends to improve the quality of government decision-making. They might desire to safeguard popular support for the Court, to be embraced by the social and business elite, or to maintain personal friendships with members of the other branches of government.²³⁷ Note also that the Basic Law provides that courts are to “exercise judicial power independently, free from any interference,”²³⁸ and that “the judicial system previously practiced in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal.”²³⁹ The entrenched constitutional rules and political practices that support (yet hem in) judicial independence tend to reduce the likelihood of judges using the office for any purpose other than acquiring judicial reputation.²⁴⁰ Successive Chief Executives of Hong Kong have expressed a strong desire for efficient bureaucracy as evidenced by their administrative reforms, and the Legislative Council would never have delegated to agencies had it not wanted its preferences, embodied in statutes, to be implemented. Administrative law doctrines, in constraining agencies to the advantage of the legislature, and sometimes also interest groups and individual citizens, have the potential of enhancing the reputation of courts. The courts’ extremely high affirmation

235. KEVIN TAN, CONSTITUTIONAL LAW IN SINGAPORE 188 (2011).

236. See COOTER, *supra* note 47, at 199.

237. See generally Lawrence Baum, Judges and their Audiences: A Perspective on Judicial Behavior (2006).

238. H.K.B.L. art. 85 (H.K.).

239. *Id.* art. 81 (H.K.).

240. Bishop, *supra* note 213, at 492.

rate of impugned administrative decisions enables judges to win the trust of those occupying the higher echelons of policy and administrative decision-making.

Second, policy-seeking courts, if they wish to maintain their review prerogatives or implement their own preferences, might be under tacit political pressure to adopt and develop administratively efficient doctrines. Judicial oversight on the consistency of administrative acts with statutory law and minimal requirements of efficiency cannot be taken for granted under authoritarian regimes.²⁴¹ Given the proliferation of agency costs and administrative inefficiencies and weaknesses in non-judicial oversight mechanisms described in Part II above, it would not be surprising if the Legislative Council was willing to experiment with alternative agency cost-control devices, if not actually finding the courts' work politically useful. Furthermore, administratively inefficient judicial doctrines, which hamper the faithful implementation of statutory objectives by agencies, are particularly prone to attack by legislators *via* statutory reversals, jurisdictional limits, and outright non-compliance. Courts must craft doctrines that make the legislature better off in order to preserve the competitiveness of judicial oversight over other means of control (e.g., "police patrols" and "fire alarms").²⁴²

Third, there is a practical need for judges to conserve scarce resources and speed their adjudicative and rule-making work.²⁴³ Efficient administrative law doctrines are mentally economical, nudging judges toward resolving disputes quicker by not meddling with the philosophical underpinnings of normative principles (unless they elect to do so).²⁴⁴ Because courts lack expertise in substantive policy issues, it is natural for them to concentrate instead on statutory interpretation, something they are indisputably better equipped to handle.²⁴⁵ Moreover, inefficient doctrines tend to instigate more complicated disputes than efficient ones; thus overburdening the courts.²⁴⁶ Judges are, however, well positioned to witness repeatedly the consequences of applying a given doctrine to actual

241. Martin Shapiro, *Courts in Authoritarian Regimes*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 326, 328 (Tom Ginsburg & Tamir Moustafa eds., 2008).

242. See generally Daniel Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 93 (1994).

243. See generally Jonathan Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994).

244. See Tiller & Cross, *supra* note 123, at 530.

245. See Rubenstein, *supra* note 215, at 2189.

246. See COOTER, *supra* note 47, at 199–200.

cases, which may nudge them to make marginal adjustments that render their doctrines more efficient.²⁴⁷

IV. CONCLUSION

In contemporary Hong Kong, administrative law grew in tandem with the expansion of the administrative state. Judicial review of administrative action has become more influential than ever notwithstanding the transfer of sovereignty from the United Kingdom to the People's Republic of China, and the semi-authoritarian constitutional framework set up by the Basic Law. The mainstream literature has overlooked the fact that administrative law doctrines may have been developed, *inter alia*, to promote administrative efficiency in response to rising agency costs and the shortcomings of existing principal-agent control mechanisms such as the Legislative Council's "police patrols" and "fire alarms" in the form of administrative tribunals. In addressing this gap, this article has sought to provide a superior empirically based explanation of these doctrines for the post-1997 era. To do so, it has adopted a theoretical framework, borrowing from law and economics and positive political theory, within which it was shown how the courts of the Hong Kong SAR have assisted the Legislative Council to exercise optimal control over agency action and agencies to deliver Kaldor-Hicks efficient outcomes with the doctrinal mechanisms of legality, rationality, and procedural review, while leaving to the legislature and the bureaucracy the substantive content of socio-economic policy together with its efficiency levels.

Despite the aggravation of agency costs and administrative inefficiencies after 1997, recent comparative surveys of government performance continue to highly rank the Hong Kong civil service.²⁴⁸ Judicial review of administrative action may not be the proximate cause of efficient public administration, but it likely exerts a positive influence on administrative conduct. Policy proposals must now undergo a Judicial Review Test in the formulation stage to ensure that they do not breach this judge-made law.²⁴⁹ The mere threat of judicial intervention, rather than

247. *Id.*

248. Hong Kong shared the title of "the world's most competitive economy" with the United States in the World Competitiveness Yearbook 2011, published by the Swiss-based International Institute for Management Development (IMD) on May 18, 2011. Particularly, Hong Kong's scores for "government efficiency" and "economic performance" remained first and fourth respectively. *World Competitiveness Yearbook 2012 Results*, IMD, <http://www.imd.org/research/publications/wcy/World-Competitiveness-Yearbook-Results/#/wcy-2010-rankings/> (last visited Oct. 27, 2012).

249. See Cheung & Wong, *supra* note 200, at 132.

actual invalidation by the courts, is often sufficient to deter agency defiance of statutory mandates and minimal criteria of economic efficiency. The utility of judge-made administrative law thus helps explain why Hong Kong lawmakers and mainland China political decision-makers have been so tolerant to the courts' encroachment of the administrative process, even if some judicial decisions have brought government officials occasional inconvenience.