HKU-Boase Cohen & Collins Lecture Series in Criminal Law

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A Civil Practitioner Enters the World of Criminal Law

1. Dean of the Faculty of Law, Professors and teachers of the Faculty, Judges, Distinguished Guests, Students, Ladies and Gentlemen, it is my privilege and honour to be invited to deliver this year's HKU-Boase Cohen & Collins Lecture. I thank you for the kind invitation to speak. I shall do my best to approach the standards of those illustrious persons who have delivered this important lecture before me.

2. Some of you will perhaps be a little surprised that a civil lawyer by training is talking to you this evening about criminal law, but to put matters in context, there was a significant window in my legal career when criminal law became very much a part of my judicial duties. This window consisted of the time when, in the Court of Appeal and in the Court of Final Appeal, I had the responsibility of presiding in criminal appeals. This was a responsibility that I have never regretted. I would like to share with you my thinking and approach over the years.

3. The reference to "responsibility" just now is directed at the community and this of course has to be the key to the application and enforcement of the law; indeed, this is ultimately the underlying function of the rule of law itself. This concept of the community interest, or the public interest as it often called, is the key theme in my address today. However, before elaborating, I must first answer a question often asked of me over the years: is there a difference in approach or mindset between the civil and criminal lawyer?

4. I used to think not. Like many civil practitioners, I thought that if one could practice civil law competently, with its many extremely difficult concepts, one should be able comfortably to master dealing with the complexities of the criminal law (of which there were many but perhaps not quite as abundant as in the civil law). Surely, the basic approach must be similar? Even accepting, as Lord Goff of Chieveley put it in the postscript to his speech in *Spiliada Maritime Corporation v Cansulex Limited*[1] that there is an "*endless road to unattainable perfection*", we lawyers prefer to see order and logic in the way the law operates. Lawyers would like to think that the outcome of any case can be represented in a simple mathematical formula along the lines of $a \times b = c$, where '*a*' is the relevant legal principle to be applied, '*b*' represents the facts of any given case and '*c*' is the product (the outcome of the case). In mathematical or scientific terms: '*a*' is a constant, '*b*' is a variable. There is much attraction in this simple formula, and it is one that legal practice and the way law is taught to us in law schools, encourages. The format of examination questions (at least in my time) centered very much not on essay questions (except where jurisprudence was involved) but on factual type problems where legal principles were to be applied to facts. Perhaps this would explain just why it was thought that a mathematical or scientific background was seen by many as a desirable attribute

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[1] [1987] AC 460, at 488.

for the practice of law. It is no coincidence that some of our most eminent judges have had such a background.[2] However, this simple formula, while workable in many cases, is not an easy one to apply when novel situations arise for consideration. Part of the difficulty lies in the fact that the 'variables' part of the equation (our '*b*') is so massive and wide-ranging. This is inevitable given that it comprises the breadth and variety of human behaviour and circumstances. But it is the constant ('*a*') that can cause the most difficulty. How is the correct principle of law or the correct legal approach to be found? Legal textbooks and precedents will naturally be the first points of reference, but in novel situations, the right approach needs to be found elsewhere. Yet, any approach must be a principled one. Justice and integrity characterise the work of the courts but only by the application of transparent legal principles. I emphasise the word 'principles' for it is no part of a court's function to reach conclusions and to decide cases on some sort of random – or worse, arbitrary – basis. A principled approach is always and indeed the only method.[3]

5. For me, it became imperative to understand the nature of criminal law and to identify the relevant public interest. I resorted to first principles and even looked into legal history. I accept you may hold different views to mine but this approach has guided me through the years.

6. Civil litigation involves two or more parties in dispute with one another, and they are almost invariably the only interested parties. This dynamic dramatically changes when one deals with cases involving public law (judicial

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[2] Lord Neuberger of Abbotsbury, the former President of the Supreme Court in the United Kingdom, took a degree in chemistry at Oxford. Lord Denning studied mathematics at Oxford. Lord Diplock also took a degree in chemistry at Oxford. Some of our own judges in Hong Kong hold science degrees.

[3] All of you will recall from your law study days that cases were never to be decided according to the length of the "*Chancellor's foot*". This is a reference to the criticism made of the courts of equity in the 17th century when it was perceived that the Lord Chancellor was arbitrary in the way cases were decided. John Selden, the 17th century jurist and philosopher, referred to the Chancellor's foot being "long, short or indifferent" depending on who occupied the office (Selden's *Table Talk Writings*, 1689).

review cases). Here, an individual or group of individuals are pitted against a public body, often (but not exclusively) involving the Government or a statutory institution. The interested parties are the relevant sections of the public (who are or may be in a similar situation as the applicant in the judicial review proceedings) and the relevant public body. The position, however, changes even more starkly when it comes to criminal cases. Here, the public interest is fully engaged: it is a straight contest between an individual (the accused) and the public as a whole (the prosecution which is identified in charges and indictments as the HKSAR). This view of the prosecution as representing the public (the community) as a whole reflects (for those interested in legal philosophy) Jeremy Bentham's doctrine of utility and ethics ("*it is the greatest happiness of the greatest number that is the measure of right and wrong*").[4] The expectation of the community is that there must be law and order, a keeping of the peace, the prevention of crime and due punishment for those who commit crimes.

7. In criminal proceedings, the critical balance ("**the Critical Balance**") is between (on the one hand) the protection of an accused from loss of liberty or property and (on the other) the expectation of the community that criminals should not escape conviction and punishment for criminal acts. Stating the concept in such simplistic terms seems obvious to the point of being a truism, but it is in my view the key to understanding the correct approach to the administration of criminal justice. It defines the very tension that exists in the criminal law and explains the approach adopted by courts. It is this concept, the Critical Balance (as I have called it), that I wish to explore a little in this address. In order to help understand the importance of it, I begin by delving into English legal history, then discuss an important facet of the administration of justice

[4] Bentham: *A Fragment on Government* (1891).

(duties of counsel) before providing some examples, including the relevance of human rights and fundamental freedoms.

8. I start with legal history. I have often found it useful to look at legal history in order to understand the background to common law concepts. But why should we, in modern day Hong Kong, be looking at English legal history; we are after all past 25 years beyond the resumption of the exercise of sovereignty over Hong Kong in 1997. But it would be a mistake to think along these lines for the simple reason that Hong Kong's legal system is rooted in the common law (I remind you that the common law legal system is mandated for Hong Kong under the Basic Law).

9. The Critical Balance was not always the accepted precept. In early times, criminal conduct was dealt with very harshly and without doubt, the balance tilted heavily in favour of a finding of guilt (and therefore punishment) rather than an acquittal. This could perhaps be explained by the fact that the experience of war and strife leading to a period of relative peace drove many communities to want to treat any form of anti-social behaviour decisively and harshly. In 12th Century England, which is said very much to be the period in which the common law made substantial developments[5], the criminal law can politely be described as fairly basic. For example, the criminal law followed the law of torts in the treatment of causation. If harm resulted to another person from what a person did, even if unintended and without motive, that person would be criminally liable. The effect of *Leges Henrici* 88, ss 9 & 11 was stated to be this: "*Damages which the modern English lawyer would assuredly describe as 'too remote', were not too remote for the author of Leges Henrici. At your request, I accompany you when you are about your own affairs; my enemies fall upon you*

[5] For example, the origins of the jury system are traceable to the reign of Henry II.

and kill me; you must pay for my death. You take me to see a wild-beast-show [and] a beast or madman kills me; you must pay. You hang up your sword; someone else knocks it down so that it cuts me; you must pay. In none of these cases can you honestly swear that you did nothing that helped bring about death or wound".[6]

10. Even Magna Carta in 1215 with its promises of the rule of law (as we now understand it) did not apply beyond certain privileged classes.[7] As Pollock & Maitland somewhat pithily put it, "*some of these celebrated clauses [of Magna Carta] are premature*".[8]

11. However, maturity in the sense of a greater awareness for rights for the protection of the accused did gradually develop. Where the common law might have been found wanting, ecclesiastical law (which had always laid a great deal of emphasis on a person's conscience) assisted. The seeds of the doctrine of a requisite intention or *mens rea* before a crime could be found to exist began to germinate in the 13th Century in relation to acts of self defence.[9]

12. Yet, it is only in the 19th Century that we see real signs of the Critical Balance being developed. Until then, the heavy tilt towards convicting accused persons could be seen by the fact that for the more serious offences (so-called felonies), an accused was not even entitled to legal representation. From the 1820s, some changes, however, began to emerge: "*the entrenched anomalous debarring of felony defendants from the right to counsel had been radically relaxed by the judiciary to permit full examination and cross-examination of*

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[6] Pollock & Maitland: *The History of English Law* (2nd ed.) Vol.2 at Pg.471.
[7] Such as clause 39 "No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way destroyed, save by the lawful judgment of his peers or the law of the land".
[8] Vol.1 at Pg.172.
[9] See Pollock & Maitland at Pg.479.

witnesses was permitted. Participation of lawyers for both defence and prosecution with the consequential rise of adversarialism, transformed the nature of the [criminal] trial process in two fundamental ways: first, a gradual de facto relegation of the interventionary judicial role towards that of a neutral umpire; and secondly, the bringing about of a refinement and sharpening of rules of evidence".[10] In 1836, the Defendants' Counsel Act was enacted, cementing the right of defence counsel to address a jury in criminal proceedings.[11] The way that defence counsel perceived their role (and this, as we shall see presently, is the present day position) was described in this way, "*counsel's business was to see that the [accused] loses no advantage*".[12]

13. This sea-change in the dynamics of criminal law in the 19th Century in England towards the recognition of the Critical Balance (which was transplanted to Hong Kong when English law came to be applied here), marked a change in the way justice was administered in the criminal courts. Its effect cannot be underestimated, because it led directly to the development of the administration of criminal justice we now recognise and take for granted. At this point, I now continue the discussion of the role of defence counsel. Lawyers and judges are in many ways the main players in the administration of justice. While judges are the so-called "neutral umpires", what duties are owed by defence counsel? The scene has already been set by the said quotation from Chitty.[13]

14. It is useful to compare these duties with the position of counsel in civil proceedings. The underlying basis for the duties in civil proceedings is best summed up in the following quote from the speech delivered by the Honourable

[10] The Oxford History of the Laws of England Vol.XIII at Pg.7.
[11] Up to the 19th Century, judges were reluctant to allow much participation by lawyers, for fear that trials would be prolonged. Criminal judges therefore entered into a quasi-partnership with jurors whereby judges and juries would often work together to secure what was seen to be a just result. Lawyers, in short, were seen to be an impediment to the smooth and efficient operation of the wheels of justice.
[12] J. Chitty*: A Treatise on the Criminal Law* (2nd edition, 1826) at Pg.407.
[13] That counsel's duty was to ensure that the accused loses no advantage.

Chief Justice Marilyn Warren on 9 October 2009 at the Judicial Conference of Australia Colloquium in Melbourne:-

"*The paramountcy of the duty to the court is of the utmost importance to the effective functioning of the legal system. It is imperative that lawyers, clients and the public understand this. The integrity of the rule of law, and the public interest in the proper administration of justice, depend upon it.*"

15. In other words, lawyers have a duty to assist in the efficient and effective adjudication of cases, and their duties to the court in this regard (which are paramount and which trump the duties owed to the client) reflect this. The duty owed to the administration of justice goes beyond simply not misleading the court. The point was made by Mason CJ in *Giannarelli v Wraith*[14]:-

> "*a barrister's duty to the court epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case*."

[14] (1988) 165 CLR 543.

16. The position is quite different as far as defence counsel in criminal proceedings are concerned. The usual example taken is the situation in which the client has admitted guilt to the offence charged. While some may argue that counsel should at least withdraw from representing the client, this is not the case. In Hong Kong, as elsewhere, the only bar on counsel is putting forward a positive case inconsistent with the confession. Within this limitation, counsel is able (and if he continues to act for the client, expected) to challenge the prosecution witnesses by way of credibility or otherwise. The Code of Conduct of the Hong Kong Bar Association[15] states this to be the duty of counsel (Annex 12), "*His duty is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which he is charged*". In *Saif Ali v Sydney Mitchell and Co (a firm)*[16], Lord Diplock observed that in criminal proceedings, defence counsel may passively stand by and watch the court being misled by the prosecution by reason of its failure to ascertain facts which happen to be within defence counsel's knowledge. This was seen to be consistent with the rule that it was up to the prosecution to prove its case. I have found useful a passage contained in *The Law and Conduct of the Legal Profession in New South Wales*[17] by Richard Teece QC (a former President of the New South Wales Bar Association):-

"*Nevertheless, the principal function of a barrister or a solicitor is to aid his client and present his client's case in the most favourable light to the Court. This limits his duty to the Court. His main function is to do the best he can to help his*

[15] Updated as at 2 August 2022.
[16] [1980] AC 198, at 220.
[17] (2nd edition, 1963) at 31-32.

client, not the best he can to help the Court. He may in a particular case be of the opinion that the adversary has a just cause, but he is under no general duty to admit allegations or disclose information in order that justice may be done. If a party cannot prove his case no doubt that is unfortunate for him, and justice may fail; but the law does not strain human nature to the extent of making it the other party's duty to help his adversary out of difficulties. In this respect the lawyer acting for a party is in the same position as his client. It is not his business to pass judgment on the merits of the case. It is his duty to help his client, and indeed it would be contrary to his duty to help the opponent (even though the Court were thereby helped) by making admissions or giving information where there was no duty laid on his client to do so. Thus in In re Cooke (5 T.L.R. 407) Lord Esher, by way of illustration, said that a barrister or solicitor was not bound to inform the adversary of a witness who would help the adversary, but on the contrary would be betraying his client if he did so. He must be honest, just as the client must be honest. He must not deceive the Court, but neither should his client. If his client owes a duty to the Court, he should see that the client carries out that duty or refuse to act for him. But beyond this, with rare exceptions, he is not required to go."

17. This professional duty of defence counsel (as I have just articulated) is repeated in many other codes of conduct and in many writings in other common law jurisdictions. Sometimes, the sentiments that are expressed are as literary as they are poignant. In the history leading up to the landmark decision of the US Supreme Court in *Brown v Board of Education of Topeka*,[18] two outstanding lawyers feature prominently: Charles Houston, Dean of Howard Law[19] and Thurgood Marshall, a graduate of Howard Law and the first African-American

[18] 347 US 483 (1954). This case reversed the "separate but equal"principle.
[19] The Howard University School of Law in Washington D.C.

to be appointed as an Associate Justice of the Supreme Court.[20] Charles Houston[21] was an immensely influential figure, teaching law the practical way. His attitude to practise at the Bar was best described by Thurgood Marshall: "*And he taught us how the law was practiced, not how it read. Because, you see, in those days Harvard, Yale, Columbia – you name them, the big law schools – were bragging that they didn't train lawyers, they trained clerks to start off in big Wall Street law firms. Charlie Houston was training lawyers to go out and go in the courts and fight and die for their people*".[22] This for me represents the most significant part of the criminal Bar's function, namely to fight to the best of one's ability for the client's rights in a court of law, using the law – and nothing else – for the benefit of the client. South Africa provides the next example and the point was made by Sir Sydney Kentridge KC. In his talk, *The Ethics of Advocacy* given at the Inner Temple in January 2003,[23] he reflected:

> "*During the long years of apartheid in South Africa, I believe that one of the things which kept the flame of liberty flickering was that opponents of the apartheid regime charged with offences including high treason were able to find members of the Bar to defend them with such skill as they had and with vigour. This was not because they necessarily sympathised with the aims or methods of the accused, but rather because they recognised their professional duty to take on those cases*."

[20] Justice Marshall (1908-1993) was appointed to SCOTUS in 1967. He graduated first in his class at Howard Law in 1933.
[21] 1895-1950.

[22] Tribute to Charles H Houston: Amherst Magazine 1978 (reproduced in *Thurgood Marshall: His Speeches, Writings, Arguments, Opinions and Reminiscence* (ed. Mark Tushnet, 2001).
[23] This speech is reproduced in his book *Free Country : Selected Lectures and Talks* (2012) at page 65.

This quote sums it all for me. It signifies courage, a belief in justice, the respect for the dignity of the individual according to law and one's professional duty to act in a principled manner.

18. I would now like to move on to the content of the law itself. The way the criminal law had largely operated began to change quite substantially in the 19th Century. As mentioned earlier, the rise of adversarialism, brought about "a refinement and sharpening of rules of evidence". But such refinements in the law were based on principle, not on some random or arbitrary application of the Critical Balance.

20. To start with, while the presumption of innocence was more or less in place long before the 19th Century, it was not entirely clear just what weight of evidence was required to displace it. It is in the 19th Century that we see the first real indication of the requisite standard of the prosecution having to prove guilt beyond a reasonable doubt. This was probably first articulated in Starkie's *Practical Treatise on the Law of Evidence*[24]: "*It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt*."

21. Problems of evidence did not of course end with resolving who had the burden of proof (the prosecution) or the appropriate standard to be applied (beyond a reasonable doubt). What if matters were within the peculiar knowledge of the accused? While clearly it was unacceptable to place a legal burden on the accused to prove innocence, this did not mean that in some situations, an accused should not have shoulder some evidential responsibilities. In recognition of both sides of the Critical Balance, the law came up with a number of principles and presumptions. One of them was the presumption of intended consequences, that

[24] (1824) at Pg.514.

a person would be taken to intend certain consequences by his or her actions unless demonstrated otherwise. For instance, the Critical Balance was addressed in the following way in the 19th Century regarding the plea of insanity:[25] "*The safety of society, joined to the difficulty of proving psychological facts renders imperatively necessary a presumption which may seem severe; viz, that which casts on the accused the onus of justifying or explaining acts prima facie illegal. It is on this principle that sanity is presumed [and an accused is] bound to prove [insanity]. So a party who is proved to have killed another is presumed in the first instance, to have done it maliciously… until the contrary is shown.*" However, the burden on an accused was to be on a balance of probabilities. This recognition of the burden on an accused was seen to satisfy the community interest while at the same time recognising the need to be satisfied beyond a reasonable doubt before a person became subject to any loss of liberty or property.

22. The Critical Balance is now readily be seen in the respective burdens placed on the prosecution and the defence in those statutory offences which states that a person commits an offence if "without lawful authority or reasonable excuse" that person does something. An example of this in Hong Kong is the offence of possessing a forged ID card or someone else's ID card.[26] The evidential burden is on the accused to show lawful authority or reasonable excuse. As the Court of Appeal said in *HKSAR v Chung Ka Wai*[27], "*The Court cannot expect the prosecution to conduct cases like a blind man*".

23. In money laundering cases,[28] where the state of the accused's knowledge in relation to the alleged tainted property is crucial, the courts have

[25] W.Best: *Treatise on the Principles of Evidence* (1849) at 344-5.
[26] See ss.7A(1) & (2) of the Registration of Persons Ordinance Cap.177.
[27] [2018] 2 HKLRD 1090, at para.38.
[28] Section 25(1) of Organized and Serious Crimes Ordinance Cap.200 (**"OSCO**") states, "Subject to section 25A, a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he deal with that property".

developed principles (without the assistance of statute) in this extremely difficult area of the law to reflect the Critical Balance. One of the common scenarios in this type of case is where an accused, in seeking to explain why they were dealing with the property in question, gives evidence of their beliefs or perceptions.[29] If believed, this would constitute a defence, but the recognition of the Critical Balance requires a jury or court to be satisfied that these beliefs or perceptions are themselves based on reasonable grounds: see *HKSAR v Harjani Haresh Murlidhar*.[30] As the CFA said,[31] "*That is why the important question is not merely what beliefs or perceptions the defendant may have had but the grounds advanced by the defendant for holding the alleged beliefs or perceptions*". Defining the requisite *mens rea* in the offence under s.25(1) OSCO has been one of the most difficult exercises undertaken by the courts in Hong Kong and these difficulties reflect the recognition in this particularly serious offence of the need to arrive at the Critical Balance.

24. The Basic Law, in setting out basic rights and fundamental freedoms,[32] arguably only reiterated what had implicitly always been accepted under the common law. For example:-

(1) BL 25 (and BOR 1) refer to equality before the law.

(2) BL 28 (and BOR 5) state that the freedom of the person is inviolable and no one should be subject to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body

[29] For example, that they believed that the property was clean (as in *HKSAR v Li Kwok Cheung George* (2014) 17 HKCFAR 319; or that the person from whom the accused received the property was honest or above board (as in *HKSAR v Pang Hung Fai* (2014) 17 HKCFAR 778.
[30] (2019) 22 HKCFAR 446 at paras.49-58.
[31] At para.51.
[32] And, through Article 39, implementing the ICCPR through the Bill of Rights ("**BOR**") contained in the Hong Kong Bill of Rights Ordinance Cap.383.

of any resident or deprivation or restriction of the freedom of the person shall be prohibited.

(3) BL 29 (and BOR 14) refer to the prohibition of the arbitrary or unlawful search of, or intrusion into, a resident's home or other premises.

(4) BL 30 (and BOR 14) refer to the protection of the freedom and privacy of communications of residents.

(5) BL 35 states that residents shall have the right to confidential legal advice and the choice of lawyers for the protection of their lawful rights and interests. BOR 11, apart from stating the cardinal principle that everyone is to be presumed innocent until proven guilty, emphasises the importance of the right to communicate with lawyers.

26. I have already emphasised the point that the common law system of law mandated for Hong Kong is the common law system, this being a recognition in the legal context of the "one country, two systems" constitutional model: see *Lau Kong Yung v Director of Immigration*.[33] Accordingly, if it was right to recognise the Critical Balance under the common law, it was certainly correct to do so after the Basic Law came into effect. What did this mean when human rights featured in criminal prosecutions? Of course, the rights and freedoms of residents and other persons in Hong Kong had to be safeguarded.[34] But what of the other side of the equation under the Critical Balance, the community interest in ensuring that persons who commit crimes are brought to justice?

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[33] (1999) 2 HKCFAR 300, at 344.
[34] See BL 4.

27. This is of course a huge and at times extremely complex topic. Time does not permit me to do any more than to skim the surface.

28. Nothing in the Basic Law or the BOR states that statutes must be construed to be as far as possible compatible with constitutional rights and freedoms but this is clearly the position.[35] The more difficult exercise is to arrive at the Critical Balance: what are the limits of individual rights and freedoms and how are such limits to be determined as a matter of principle?

30. In *HKSAR v Lam Kwong Wai*,[36] the CFA was concerned with s.20(3) of the Firearms and Ammunition Ordinance[37] which, as a matter of statutory construction, places a legal or persuasive burden of proof on a person charged with possession of an imitation firearm.[38] As such, it was contrary to the presumption of innocence constitutionally protected under BL 87(2) and BOR 11(1) as well as under the common law. However, the other side of the Critical Balance to be considered as well. As Sir Anthony Mason NPJ said in his judgment,[39] the aim of the legislation was "the prevention, suppression and punishment of serious crime, being the use of imitation firearms for a purpose dangerous to the public peace or of committing an offence".

31. I have earlier mentioned the necessity of dealing with cases in a principled, and not arbitrary, way. The principle that has been applied by the courts to arrive at the Critical Balance, is that of proportionality. This is a four-step process: (1) First, to examine whether a guaranteed right is engaged. This involves analysing

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[35] See, for example, *R v Secretary of State for the Home Department Ex p Simms* [2000[AC 115; s.2A(1) of the Interpretation and General Clauses Ordinance cap.1*; Archbold Hong Kong 2022* Vol.2 at para.19-31.
[36] (2006) 9 HKCFAR 574.
[37] Cap.238.
[38] "A person shall not commit an offence under sub-s.(1) if he satisfies the magistrate that…."
[39] At para.42.

the applicability of the right in question to the facts of the case and to the relevant legislative provision; (2) Secondly, if engaged, then to see whether the purported restriction on that right pursues a legitimate aim; (3) Thirdly, to make sure there is a rational connection between the restriction and the legitimate aim as identified; and (4) Fourthly, that the restriction is no more than reasonably necessary to achieve that purpose; and (5) Lastly, making sure that that "a reasonable balance has been struck between the societal benefits of the encroaching measure on the one hand and the inroads made into the guaranteed right on the other".[40] In my view, the proportionality test thus stated fully reflects the Critical Balance. It was applied in *Lam Kwong Wai* and in other decisions of the Hong Kong courts. *Lam Kwong Wai* is also an important case in demonstrating the extent to which the court felt it was able to go in arriving at the Critical Balance. Having found that the relevant legislative provision, when properly construed, amounted to placing a legal burden of proof on the accused (which was impermissible[41]), rather than striking down the provision, the Court applied the common law technique of "reading down" provisions so that in place of a legal burden, a so-called evidential burden was instead imposed on the accused.[42] Other cases demonstrate the courts wrestling with the Critical Balance but time does not permit me to deal with them.

32. I have now reached the end of the present journey. It has been to say the least enriching for me to have had the opportunity to be involved in criminal law, especially in a number of cases that have been of some importance as well. No other area of the law quite engages the public interest like criminal law and it is for this reason that although I will no longer be involved in the

[40] Statements of the principle of proportionality appear in many cases. I have referred in this respect to the judgment of Ribeiro PJ in *HKSAR v Fong Kwok Shan Christine* (2017) 20 HKSAR 425, at para.39. That case, as well as *Lam Kwong Wai*, provide very good illustrations of the application of that principle in the context of criminal cases.
[41] See paras.29-35, 40.
[42] See para.84.

adjudication of such cases, I will always be interested in them. I thank the University and Boase Cohen & Collins again for the kind invitation to speak.