

「校規：法理情」研討會-校規的法理依據

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Outline of the Notes:

A. Legal Basis of School Regulations

B. Restraints on the exercise of school discipline:

1. Best Interest principle enshrined in the UN Convention on the Rights of the Child (CRC)
2. other Human Rights protection enshrined in the CRC
3. Fairness and Reasonableness Requirement

C. Beware of:

1. Offending Criminal Laws
2. Committing Negligence
3. Infringing Laws against Discrimination
4. Infringing Laws protecting Privacy

D. General Reminders:

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A. Legal Basis of School Regulations:

A1 Section 58 Education Ordinance (Cap 279):

1. Principals are responsible for discipline ... have authority over ... pupils
2. Schools possess power in making (**legislation**) and enforcing school regulations (**law enforcement**) and passing judgments and imposing punishment (**judicial power**) on students.

A2 Loco Parentis (代家長):

Schools exercise parental rights as delegated over students

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B. Restraints on the exercise of school discipline:

B1 Best Interest principle enshrined in the UN Convention on the Rights of the Child (CRC):

1. Article 1: A child means every human ... below the age of 18 ...
2. Article 3: ... **best interests** of the child ... a primary consideration.
3. Article 12: ... views of the child being given due weight in accordance with the age and maturity ...
4. Article 28: ... school discipline ... consistent with ... human dignity...

Best Interest (Gillick v West Norfolk & Wisbech Area Health Authority & Department of Health & Social Security [1986] 1 A.C. 112)

**BASIC FACTS:**

1. The Department of Health and Social Security's circular: A doctor acts in good faith to protect a girl under 16 against the harmful effects of sexual intercourse can lawfully prescribe contraceptives.
2. **P** sought a declaration that the advice in the circular amounted to advice to doctors to commit offence of causing or encouraging unlawful sexual intercourse with a girl under 16 or the offence of being an accessory to unlawful sexual intercourse with a girl under 16.

**JUDGEMENT:**

1. House of Lords recognized the best interest principle.
2. Parental rights were to serve child's best interest and yield to his right to make his decisions if he had enough understanding & intelligence.
3. A doctor had discretion to give contraceptive advice or treatment to a girl under 16 without her parents' knowledge or consent if the girl had a sufficient intelligence to understand fully what was proposed.

**RELEVANT REMINDERS:**

1. Parental rights were to serve child's best interest
2. All school regulations in particular those restricting the rights of children should be justified on the best interest principle

B2 other Human Rights protection enshrined in the CRC:

1. Article 13: Freedom of expression
2. Article 14: Freedom of thought, conscience and religion
3. Article 15: Freedom of association and peaceful assembly
4. Article 19: Protection against all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse
5. Article 2: Protection against discrimination
6. Article 16: No... arbitrary or unlawful interference with his privacy ...
7. Article 23: ... a mentally or physically disabled child should enjoy a full and decent life ... ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

**Freedom of religion:**

可否堅持回教徒女學生必須穿著校服，不准穿著長袍及面紗回校，如有違反者，則作紀律處分？

**High R (Begum) v Head-teacher and Governors of Denbigh School [2007] 1 AC 100**

**KEY ISSUE:**

A case before the House of Lords to decide if the school infringed a Muslim pupil's right to manifest her religion under Article 9 the European Convention on Human Rights in prohibiting her from wearing jilbab

**BACKGROUND:**

1. The pupil refused to attend school unless she was allowed to wear jilbab.
2. The school disallowed her attendance unless she conformed to the uniform code.

**JUDGEMENT:**

1. Article 9 did not bestow the freedom to manifest one's religion at any time and place one chose.
2. Article 9 rights had not been infringed.
3. Her family knew the school uniform requirements.
4. She could have sought the help of the school and the LEA.

**R (Play-foot) v Governing Body of Millais School [2007] ELR 484:**

**KEY ISSUE:**

Whether it is justifiable for the school to disallow the claimant to put on a ring to express her belief in pre-marriage celibacy

**JUDGEMENT:**

1. Putting on a ring is not closely linked to belief in pre-marital chastity.
2. The school suggested other alternatives to practise her belief such as attaching the ring to a chain or to a bag.
3. The rules were clearly communicated to the claimant.

**R (Watkins-Singh) v Governing Body of Aberdare Girls' High School:**

**KEY ISSUE:**

Whether it was unlawful for the school to exclude a Sikh pupil who believed putting on the Kara bangle was an extremely important expression of her race and culture.

**JUDGEMENT:**

1. D failed to comply with its obligations under Section 71 of the Race Relations Act 1976 and that race equality should have been taken into account into its decision-making process but it was not.
2. Wearing the bangle unlikely encroached upon the school uniform policy.
3. Discriminatory effect outweighed justification for exclusion.

**RELEVANT REMINDERS:**

1. As a general principle, schools have considerable freedom in setting their school regulations for students' best interest.
2. At times, the Court interprets human rights provisions in such a manner as to limit their application.
3. In most circumstances, Courts are unwilling to interfere with school decisions

**PROVIDED THAT:**

- (a) Alternatives available to express the students' freedom
- (b) Proper considerations have been taken by the schools

**UNLESS:**

- (a) Prejudicial effect outweighed schools' justification
- (b) The school decision involves excluding students from schools or depriving students of learning opportunities or other harsh punishments

**B3. Fairness and Reasonableness Requirement:**

In theory, school regulations could be subjected to judicial review on the ground of unreasonableness or unfairness.

**BACKGROUND:**

1. R was a primary school student
2. His regular violent outbursts included verbal superiority, thumping and snatching equipment from others

**CHRONOLOGY:**

1. 2001: a psychologist opined R's gift was the cause of easy irritation.
2. 2002-2003: R underwent weekly counseling sessions with a school nurse with a master degree in guidance and counseling.
3. 2003-2004: the school established a 'circle of friends' for him.
4. 5 March 2004: R committed violence by chasing another boy. R was required to spend his school breaks with a staff member.
5. 23 March 2004: R committed violence by holding a boy's throat.

**EXCLUSION FROM SCHOOL:**

1. R was excluded from school on the grounds:
  - (a) His regular anger outbursts presented risk to other students.
  - (b) The school has a duty of care to the other students.
2. 26 March 2004: R's parents insisted full and fair procedures had to be followed including consulting with them and interviewing R.
3. 30 March 2004: a meeting was held with the conclusion that the exclusion would be reviewed and a subsequent meeting would be held to allow R's parents to make their representations
4. 15 April 2004: R's parents were informed the school had determined to expel R. R's parents protested for not being given the chance to state their case before a final decision was made.

**WHETHER COURT HAS JURISDICTION:**

1. The ESF is established under the English Schools Foundation Ordinance (Cap.117).
2. Expelling a student from an ESF school involves a public function.
3. S.10 of Cap. 117 empowers the ESF to make regulations for the 'management, operation, administration and control' of all its schools.
4. Court of Appeal held these regulations constitute subsidiary legislation
5. Regulations concerning school discipline therefore constituted subordinate legislation and are subject to judicial review.
6. In deciding whether to exercise judicial review, Court would take into account the effect of order on the administration and if the granting is necessary in the interests of justice.

**JUDGMENT:**

**Reasonableness:**

1. The school must act in good faith and ensure its decision is reasonable.
2. ESF came to a reasoned decision based on a long history that R must be expelled in the interests of all the other pupils.

**Fairness:**

1. The undertaking R's parents would have the opportunity to make representations before final decision was not honoured.
2. Such failure is a breach of natural justice which may prejudice R.
3. The decision to exclude R was struck down.

**RELEVANT REMINDERS:**

1. School regulations should be clearly written down
2. They should be duly informed to parents.
3. Wide consultation should precede the implementation of controversial regulations

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**C. Beware of:**

**C1 Offending Criminal Laws:**

1. Perverting the course of justice
2. Assisting offenders by any act with intent to impede his apprehension or prosecution
3. Aiding, abetting, counseling or procuring the commission of offence

Aiding, abetting, counseling or procuring the commission of offence: Section 89 Criminal Procedure Ordinance (Cap. 221): Secondary parties are liable to be dealt with at trial and punished as a principal offender.

**BASIC FACTS:** Can a person be convicted as an accomplice merely for standing by and doing nothing when an offence is being committed?

**JUDGEMENT:**

1. CA accepted the principles applied in JF Alford Transport [1997] 2 Cr App R 326 that willful blindness suffices.

2. A company did nothing to prevent its employees from illegally falsifying tachograph records of its transport vehicles
3. Elements for establishing secondary liability:
  - (a) Knowledge of the principal offence; and
  - (b) Ability to control the offender's action; and
  - (c) Deliberate decision to refrain from so doing
4. D need not have intended that the crime be committed
5. D only need to intend to do the acts which he knows to be capable of assisting or encouraging the commission of the crime

**RELEVANT REMINDERS:**

1. Willful blindness is sufficient.
2. No defence to say willful blindness is not to encourage the commission of offence

C2 Committing Negligence:

We educators have a positive duty to take reasonable care of our students

1. Negligence:
  - (a) **D** owes a legal duty of care to **P**
  - (b) **D** has breached the duty of care
  - (c) **P** suffers injury or damage
  - (d) **P**'s injury or damage must be reasonable foreseeable
2. Vicarious Liability: Employers are **legally liable** for employees' / agents' negligence when they are acting in the **course of duty**.
3. Contribution: Section 3 (1) Civil Liability (Contribution) Ordinance (Cap. 377): ... any person liable ... may recover contribution from any other person liable in respect of the same damage ...
4. Case Illustration 1:

**PARTIES:**

1. F.6 student (**P**)
2. Principal (**D1**) / The School (**D2**)

**BASIC FACTS:**

1. **P** failed to hand in his homework and was late for school
2. Teachers' repeated advice and warning did not change **P**'s attitude

3. **D1** suspended **P** from classes and required **P** to do his work
4. The punishment lasted for 9 days, 7 being at the main entrance hall.
5. **P** was ultimately diagnosed as schizophrenic.

**NEGLIGENCE CLAIMS:**

1. **P** claimed that his schizophrenia was caused by **D1**'s negligence.
2. **D2** was to be vicariously liable

**JUDGEMENT:**

1<sup>st</sup> Element: Duty of Care:

1. **D1** & **P** were in a relationship of teacher and pupil
2. **D1** has a duty of care to take reasonable steps to protect **P**'s welfare.
3. That **P** was aged 18 made no difference.

2<sup>nd</sup> Element: Breach of Duty:

1. **D1** breached that duty
2. Unreasonable punishment subject **P** to prolonged stress
3. Exposed **P** to the rest of the school at the main entrance hall
4. Not specified the exact requirements to end the punishment

3<sup>rd</sup> Element: Breach of Duty causes injury:

**P**'s medical evidence that the punishment caused the illness was accepted.

4<sup>th</sup> Element: The injury is reasonable foreseeable:

1. The punishment was stressful to any normal person
2. It is common sense that prolonged stress can cause mental disorder.
3. **D1**, as a reasonable person must foresee his punishment would cause **P**'s mental illness

**RELEVANT REMINDER:**

*It is difficult for him (the principal) to escape criticism for not giving time for counseling to be tried, even though he says that the two methods of correction could go ahead at the same time."*

5. Case Illustration 2:

**PARTIES:**

1. A teacher with 7-year-teaching experience (**P**)
2. The school (**D**)

**BASIC FACTS:**

1. In holding a school based remedial support program, P was assaulted by a student whom D know having serious discipline problem.
2. No physical injury was sustained but was emotional disturbed and had to consult psychiatrist
3. About 7-month sick leave was prescribed by doctor

**NEGLIGENCE CLAIMS:**

1. The principal's undertaking to arrange in-service training for the School Based Remedial Support Program for P was not honoured.
2. The school was in breach of its general duties to ensure **P's** safety by failing to take reasonable steps to control the discipline of students in his class in particular the perpetrator.
3. **D** failed to take appropriate steps in response to the incidents of violence involving students in particular the perpetrator.

**JUDGEMENT:**

**P's** problems in maintaining discipline and the perpetrator student's misbehaviors should have alerted the school of a real risk rather than a mere possibility of assault by the perpetrator student on others.

**RELEVANT REMINDER:**

1. One cannot assume an experienced teacher is able to handle a task involving special skills
2. Provide support and training

C3 Infringing Laws against Discrimination:

Relevant Provisions to note:

1. Section 25 Sex **Discrimination** Ordinance (Cap 480)
2. Section 24 Disability **Discrimination** Ordinance (Cap 487)
3. Section 18 Family Status **Discrimination** Ordinance (Cap. 527):
4. Section 26 (1) Race Discrimination Ordinance (Cap. 602)

These provisions prohibit an educational establishment to discriminate against persons

1. In admission
2. Denying access to any benefit, service or facility
3. Expelling students; or
4. Subjecting students to any other detriment

#### C4 Infringing Laws protecting Privacy:

##### 1. Common Questions:

- (a) 學校有否權利安裝閉路電視？在那些地方安裝才不侵權？
- (b) 如學生涉及校外行為問題，學校可否發放個案資料與校外人士，例如：提供學生相片？

##### 2. Data Protection Principles (DDP) of the Personal Data (Privacy) Ordinance (Cap. 486):

- (a) Principle 1: ... lawful purpose ... in a lawful and fair manner ... the data subject duly informed
- (b) Principle 2: Not kept longer than necessary.
- (c) Principle 3: Used only for the purpose at the time of collection
- (d) Principle 4: Protected against unauthorized or accidental access
- (e) Principle 5: Ensure a person can ascertain a data user's policies and practices
- (f) Principle 6: A data subject is entitled to request access

##### 3. Relevant Exemptions from Principle 3:

- (a) Section 58: strict application would likely prejudice the detection or prevention of crime, unlawful or seriously improper conduct.
- (b) Section 59: strict application would likely cause serious harm to the physical or mental health of the data subject or any other individuals

##### 4. Privacy Commissioner 18.05.2009: Organizations which intend to install CCTVs should, at least, post a notice in a prominent position near the installation, stating that the area is being monitored, the purposes of monitoring, as well as how the records will be handled.

##### 5. Eastweek v Privacy Commissioner (CACV 331/1999):

- (a) Eastweek took photo of an unidentified woman in the street without consent for criticizing her fashion sense.
- (b) DDP1 was not violated. Personal data might be collected by means

of a photo but to be considered an act of personal data collection, the data user must compile information about an identified person.

(c) Legitimate journalistic activity particularly photo-journalism as the common practice of running photos of unidentified persons in public areas to illustrate a news article was not to be ‘unduly inhibited’.

6. Breach of confidence:

3 elements for breach of confidence (Coco v Clark [1969] RPC 41):

- (i) The information had the necessary quality of confidence
- (ii) The information was originally given under circumstances obligating the second person to keep the information confidential
- (iii) The person disclosed it without authority

7. Li Yau Wai v Genesis Films Ltd [1987] HKLR 711:

- (a) Li agreed to let a film company photo him for casting purposes only but his photo was used as a comedic prop in a film.
  - (b) Unauthorized disclosure constitutes breach of confidence
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D. General Reminders:

- 1. School regulations should promote students’ welfare and discipline with the long-term vision of training them to be law-abiding citizens.
  - 2. Restraint on students’ rights must be justified by the best interest principle (educational purpose) instead of administrative convenience.
  - 3. School regulations must be consistent with students’ human rights.
  - 4. School regulations must meet the fairness and reasonableness requirements.
  - 5. Care must be taken to avoid falling into criminal pitfalls and committing negligence in the course of enforcing school regulations.
  - 6. School regulations should be subject to regular review to take into account the most up-to-date legal development.
  - 7. Students, parents and teachers should be properly informed of the school regulations.
  - 8. School regulations should be comprehensible and clearly written down.
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注意: 本講義僅為講解法律原則，不可視為提供法律意見。

**Key references**

1. Archbold Hong Kong: criminal law, pleading, evidence and practice, 2012  
Hong Kong: Sweet & Maxwell Asia
2. Ford, J, Hughes, M and Ruebain, D (2010). Education law and practice:  
Bristol : Jordans
3. Justice Kemal Bokhary and Neville Sarony and D.K. Srivastava (2010). Tort  
law and practice in Hong Kong: Sweet & Maxwell/Thomson Reuters
4. Patterson, F et al. (2011). Judicial Review: Law and Practice: Bristol: Jordan  
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