

protection of the national flag and the national emblem in the Hong Kong Special Administrative Region ('HKSAR'). The national flag or the national emblem or both must be displayed at main government buildings.⁴ The Chief Executive may stipulate the organisations which must display or use the national flag and the national emblem, and the other places at which, the occasions on which, the manner in which and the conditions under which, the national flag and the national emblem must be displayed or used; and he may also authorise, restrict or prohibit the display or use of the national flag, the national emblem, or their designs in the stipulation.⁵ He may stipulate the organisations that must include the design of the national emblem in their seals, and other uses to which the national emblem may be applied.⁶ Conditions under which the national flag is flown at half staff, the priority, the raising and lowering of the national flag are specified.⁷ A national flag or national emblem which is damaged, defiled, faded or substandard may not be displayed or used.⁸

The national flag for flying and the national emblem for hanging may be manufactured in the HKSAR only by enterprises designated by the Central People's Government,⁹ and must be manufactured in accordance with prescribed specifications.¹⁰ The national flag or its design must not be displayed or used in trademarks or advertisements; private funeral activities; or other occasions on which or places at which its display or use is restricted or prohibited under a stipulation by the Chief Executive.¹¹ Similarly, the national emblem or its design must not be displayed or used in trademarks or advertisements; furnishings or ornaments in everyday life; private activities of celebration or condolence; or other occasions on which or places at which its display or use is so restricted or prohibited by the Chief Executive.¹² A person who without lawful authority or reasonable excuse displays or uses the national flag, national emblem or the design of the national flag or of the national emblem contrary to the provisions mentioned above commits an offence and on conviction is liable to a fine.¹³

A person who desecrates the national flag or national emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and on conviction is liable to a penalty.¹⁴ A copy of the national flag or national emblem that is not an exact copy but that so closely resembles the national flag or national emblem as to lead to the belief that the copy in question is the national flag or national emblem is taken to be the national flag or national emblem.¹⁵ Offences in relation to the national flag and the national emblem in the HKSAR are investigated and persons are prosecuted

according to the laws in force in the HKSAR. If there are any inconsistencies between the National Flag and National Emblem Ordinance and a national law,¹⁶ the Ordinance is to be interpreted and applied as a special application or adaptation of the national law.¹⁷

1. In the Basic Law Annex III: see [105.008] note 21. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.
2. See [105.060].
3. In the National Flag and National Emblem Ordinance (Cap 2401).
4. National Flag and National Emblem Ordinances 3(1). For these purposes 'national flag' means the national flag of the People's Republic of China adopted by resolution of the First Plenary Session of the Chinese People's Political Consultative Conference on 27 September 1949; and 'national emblem' means the national emblem of the People's Republic of China adopted by the Eighth Session of the Central People's Government Committee on 28 June 1950: s 2(1). The specifications for the national flag are set out in Sch 1: s 2(2), while those for the national emblem are set out in Sch 2: s 2(3). See also [105.023].
5. National Flag and National Emblem Ordinances 3(2).
6. National Flag and National Emblem Ordinances 3(3).
7. It is specified in National Flag and National Emblem Ordinance Sch 3: s 3(4).
8. National Flag and National Emblem Ordinances 4. See also [105.028]-[105.031].
9. National Flag and National Emblem Ordinances 5(1).
10. The specifications for the manufacture of the national flag are set out in National Flag and National Emblem Ordinance Sch 1: s 5(2); while those for the manufacture of the national emblem are set out in Sch 2: s 5(3). The display or use of the national emblem in unusual dimensions is subject to the prior approval of the Central People's Government: s 5(3). Where there is contravention of these provisions the Secretary of Justice may apply for an injunction or order of forfeiture: see s 5(4), (5).
11. National Flag and National Emblem Ordinances 6(1)(a)-(c). A stipulation made by the Chief Executive is not subsidiary legislation, and must be published in the Gazette as soon as is reasonably practicable after it is made: s 10. As to the Chief Executive see [105.072]-[105.080].
12. National Flag and National Emblem Ordinances 6(2)(a)-(d).
13. National Flag and National Emblem Ordinances 6(3). For an offence against s 6(1)(a) or (2)(a) the fine is at level 5: s 6(3)(a); and for an offence against s 6(1)(b) or (c) or (2)(b), (c) or (d) the fine is at level 2: s 6(3)(b). As to levels of fine see the Criminal Procedure Ordinance (Cap 221) s 113B(1), Sch 8; and CRIMINAL LAW (2013 Reissue) [130.139].
14. National Flag and National Emblem Ordinance s 7. The penalty on conviction is a fine at level 5 and imprisonment for three years: s 7.

- 15 National Flag and National Emblem Ordinance s 8.
- 16 *Ie* a national law promulgated under the Basic Law Annex III.
- 17 National Flag and National Emblem Ordinance s 9.

[105.026] **Regional flag** The regional flag of the Hong Kong Special Administrative Region ('HKSAR') was indorsed at the Fourth Plenum of the Preparatory Committee of the HKSAR.¹ The designs of the regional flag and emblem had previously been adopted by the National People's Congress² in its Decision on the Basic Law.³ Before that Decision was made, the Chairman of the Drafting Committee of the Basic Law⁴ had explained the selection process for the regional flag and emblem in his address to the National People's Congress. 'The regional flag carries a design of five bauhinia petals, each with a star in the middle, on a red background. The red flag represents the motherland and the bauhinia represents Hong Kong. The design implies that Hong Kong is an inalienable part of China⁵ and prospers in the embrace of the motherland. The five stars on the flower symbolise the fact that all Hong Kong compatriots love their motherland, while the red and white colours embody the principle of 'one country, two systems'.⁶

- 1 *Ie* on 10 August 1996.
- 2 *Ie* on 4 April 1990.
- 3 See [105.014]. As to the legal status of the Basic Law see [105.008].
- 4 As to the drafting of the Basic Law see [105.009].
- 5 See [105.022].
- 6 See further [105.027].

[105.027] **Regional Flag and Regional Emblem Ordinance** The Regional Flag and Regional Emblem Ordinance¹ was enacted to provide for the use and protection of the regional flag and regional emblem. The Ordinance empowers the Chief Executive² to stipulate the organisations which must display or use the regional flag and the regional emblem, and the places at which, the occasions on which, the manner in which, and the conditions under which, the regional flag and the regional emblem must be displayed or used.³ The Chief Executive may also authorise, restrict or prohibit the display or use of the regional flag, the regional emblem, or their designs in the

stipulation.⁴ A regional flag or regional emblem which is damaged, defiled, faded or substandard must not be displayed or used.⁵

The regional flag and emblem must be manufactured in accordance with the prescribed specifications.⁶ The regional flag, the regional emblem, or their designs must not be displayed or used in trademarks or advertisements; or other occasions on which or places at which the display or use of the regional flag or regional emblem or their designs is restricted or prohibited under a stipulation by the Chief Executive.⁷ A person who without lawful authority or reasonable excuse displays or uses the regional flag, regional emblem or the design of the regional flag or regional emblem contrary to the provisions mentioned above commits an offence and is liable on summary conviction to a fine.⁸ A person who desecrates the regional flag or regional emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence; the penalty on conviction on indictment is different from that on summary conviction.⁹

A copy of the regional flag or regional emblem that is not an exact copy but that so closely resembles the regional flag or regional emblem as to lead to the belief that the copy in question is the regional flag or regional emblem is taken to be the regional flag or regional emblem.¹⁰

- 1 *Ie* the Regional Flag and Regional Emblem Ordinance (Cap 2602). Its provisions had originally been passed by the Preparatory Committee as provisional arrangements to safeguard the dignity of the regional flag and emblem which are the symbol and ensign of the Hong Kong Special Administrative Region. Each and every Hong Kong resident (see [105.038]) and organisation should respect and cherish the regional flag and the regional emblem.
- 2 As to the Chief Executive see [105.072]-[105.080].
- 3 Regional Flag and Regional Emblem Ordinance s 3(1). For these purposes 'regional flag' means the regional flag of, and 'regional emblem' means the regional emblem of the Hong Kong Special Administrative Region indorsed at the Fourth Plenum of the Preparatory Committee of the Hong Kong Special Administrative Region on 10 August 1996: s 2(1). The specifications for the regional flag are set out in Sch 1: s 2(2); while those for the regional emblem are set out in Sch 2: s 2(3). The arrangements for the display and use of the regional flag and regional emblem are set out in Sch 3: s 3(2); and the conditions under which the regional flag is flown at half staff are set out in Sch 4: s 3(3).
- 4 Regional Flag and Regional Emblem Ordinance s 3(1). A stipulation made by the Chief Executive is not subsidiary legislation, and it must be published in the Gazette as soon as is reasonably practicable after it is made: s 9.
- 5 Regional Flag and Regional Emblem Ordinance s 4.

- 6 The specifications for the manufacture of the regional flag are set out in Regional Flag and Regional Emblem Ordinance Sch 1: s 5(1); while those for the manufacture of the regional emblem are set out in Sch 2: s 5(2). If a person manufactures a regional flag or regional emblem other than in accordance with these provisions the Secretary for Justice may apply for an injunction or order of forfeiture: see s 5(3), (4).
- 7 Regional Flag and Regional Emblem Ordinance s 6(1)(a), (b).
- 8 Regional Flag and Regional Emblem Ordinance s 6(2). For an offence against s 6(1)(a) the fine is at level 5: s 6(2)(a); and for an offence against s 6(1)(b) the fine is at level 2: s 6(2)(b). As to levels of fines see the Criminal Procedure Ordinance (Cap 221) s 113B(1), Sch 8; and CRIMINAL LAW (2013 Reissue) [130.139].
- 9 On conviction on indictment the penalty is a fine at level 5 and imprisonment for three years: Regional Flag and Regional Emblem Ordinance s 7(a); while on summary conviction the penalty is a fine at level 3 and imprisonment for one year: s 7(b).
- 10 Regional Flag and Regional Emblem Ordinance s 9.

[105.028] **Desecration of the national and regional flags** The desecration of the national or regional flag may be a criminal offence,¹ and there is a question whether it contravenes the freedom of expression which is guaranteed by the Basic Law.² This question arose following a public demonstration in Hong Kong on 1 January 1998, organised by the Hong Kong Alliance in Support of the Patriotic Democratic Movement in China.³ During the procession, two persons were seen carrying in their hands and waving in the air along the route what appeared to be a defaced national flag and a defaced regional flag. They chanted 'build up a democratic China'. One of them was reported to have stated to the press that 'the damaging and defiling of the national and regional flags was a way to express the dissatisfaction and resistance to the ruler who was not elected by the people'.⁴

- 1 As to desecration of the national flag as a criminal offence see the National Flag and National Emblem Ordinance (Cap 2401) s 7 and [105.025]; as to desecration of the regional flag as a criminal offence see the Regional Flag and Regional Emblem Ordinance (Cap 2602) s 7 and [105.027]. As to the national flag and the regional flag see [105.023] and [105.026] respectively.
- 2 Ie the Basic Law arts 27, 39. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.
- 3 The demonstration consisted of a public meeting and a public procession from Victoria Park to the Central Government Offices of the Hong Kong Government at Lower Albert Road. The public meeting and the public procession were both lawful and orderly. During the public procession, the two persons tied the two defaced flags to the railings of the Central Government

Offices from where the police seized them. It was found that both flags had been extensively defaced. On the national flag, a circular portion of the centre had been cut off. Black ink had been daubed over the large yellow five-pointed star and the star itself had been punctured. Similar damage appeared on the reverse side. Further, the Chinese character 'shame' had been written in black ink on the four small stars, and on the reverse side a black cross had been daubed on the lowest of the four small stars. On the regional flag, one section had been torn off obliterating a portion of the bauhinia design. A black cross had been drawn across that design. Three of the remaining four red stars had black crosses daubed over them. The Chinese character 'shame' was written on the flag in black ink. Similar damage appeared on the reverse side.

- 4 See *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442.

[105.029] **Flag desecration is a form of expression** Flag desecration¹ is a form of non-verbal speech or expression.² A person desecrating a national flag would usually be expressing a message of protest.³ Freedom of expression is a fundamental freedom in a democratic society and lies at the heart of civil society and of Hong Kong's system and way of life.⁴ Since the courts must give a generous interpretation to its constitutional guarantee, statutory provisions criminalising desecration of the national and regional flags⁵ constitute a restriction of the freedom of expression⁶ guaranteed under the Basic Law.⁷

- 1 As to desecration of the national flag as a criminal offence see the National Flag and National Emblem Ordinance (Cap 2401) s 7 and [105.025]; as to desecration of the regional flag as a criminal offence see the Regional Flag and Regional Emblem Ordinance (Cap 2602) s 7 and [105.027]. As to the national flag and the regional flag see [105.023] and [105.026] respectively.
- 2 *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 920, [2000] 1 HKC 117 at 135, CFA, per Li CJ.
- 3 In *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907, [2000] 1 HKC 117, CFA, the protest was against the system of government in Mainland China.
- 4 In *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 920, [2000] 1 HKC 117 at 135, the Court of Final Appeal held that freedom of expression includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticise governmental institutions and the conduct of public officials.
- 5 See note 1 above.
- 6 *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 921, [2000] 1 HKC 117 at 135, [2000] 1 HKC 117, CFA, per Li CJ.
- 7 Ie the Basic Law arts 27, 39, also Art 16 of the Hong Kong Bill of Rights. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.

[105.030] **Freedom of expression not an absolute right** Freedom of expression is not an absolute right; its exercise carries with it special duties and responsibilities and may, therefore, be restricted by law to the extent necessary for respect of the rights or reputations of others, or for the protection of national security or of public order (*ordre public*), or of public health or morals.¹ A national flag is a unique symbol of a nation. The national flag of the People's Republic of China is the symbol of the state and the sovereignty of the state; and the regional flag is the unique symbol of the Hong Kong Special Administrative Region ('HKSAR') as an inalienable part of the Republic under the principle of 'one country, two systems'.² The intrinsic importance of the national flag and the regional flag to the HKSAR as such unique symbols is demonstrated by the fact that the handover ceremony in Hong Kong³ to mark the Republic's resumption of sovereignty over Hong Kong,⁴ began with the raising of the national flag and the regional flag.⁵ Thus, the society in the Republic, the country as a whole, including the HKSAR, has a legitimate interest in protecting their national flag, the unique symbol of the nation. Similarly, the community in the HKSAR has a legitimate interest in protecting the regional flag, the unique symbol of the Region as an inalienable part of the Republic under the principle of 'one country, two systems'.⁶ The statutory provisions criminalising the desecration of the national and regional flags have been found to be constitutional.⁷

- 1 *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907, (1999) 2 HKCFAR 442, [2000] 1 HKC 117, CFA.
- 2 *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 912, [2000] 1 HKC 117 at 126, CFA, per Li CJ. As to the national flag see [105.023]; and as to the regional flag see [105.024], [105.026].
- 3 Ie the historical moment on the stroke of midnight on 1 July 1997.
- 4 As to the transfer of sovereignty see [105.002].
- 5 *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 912, [2000] 1 HKC 117 at 126, CFA, per Li CJ. The speech, which the President of the People's Republic of China then delivered, began with the words: 'The national flag of the People's Republic of China and the regional flag of the Hong Kong Special Administrative Region of the People's Republic of China have now solemnly risen over this land'.
- 6 *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 912, [2000] 1 HKC 117 at 126-127, CFA, per Li CJ.
- 7 See *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907, (1999) 2 HKCFAR 442, [2000] 1 HKC 117, CFA (involving the national and regional flags), and also

HKSAR v Koo Sze Yiu and Another (2014) 17 HKCFAR 811, CFA, also the magistracy appeal below: [2014] 4 HKLRD 565, CFI (involving only the regional flag). As to desecration of the national flag as a criminal offence see the National Flag and National Emblem Ordinance (Cap 2401) s 7 and [105.024]; and as to desecration of the regional flag as a criminal offence see the Regional Flag and Regional Emblem Ordinance (Cap 2602) s 7 and [105.026].

[105.031] **Prohibition of desecration is a reasonable restriction** The prohibition of desecration of the national and regional flags by statutory provisions¹ is not a wide restriction of the freedom of expression. It is a limited one; it bans one mode of expressing whatever message the person concerned may wish to express, but it does not interfere with the person's freedom to express the same message by other modes.² The Court of Final Appeal has held and affirmed that legitimate societal interest in protecting the national flag and the regional flag fall within the concept of public order (*ordre public*), and that the criminalisation of desecration of the national and regional flags constitutes necessary restriction on the right to freedom of expression.^{2a} Scrawling words of praise on the flags (as opposed to words of protest) may constitute an offence.³ This means that the prohibition is neutral and not only bans expression by a message of protest, but also other messages including a message of praise in order to protect the dignity of the flag. Thus, a law prohibiting desecration of national and regional flags as a symbol must, in order to be effective, protect it against desecration generally.⁴

- 1 As to desecration of the national flag as a criminal offence see the National Flag and National Emblem Ordinance (Cap 2401) s 7 and [105.025]; and as to desecration of the regional flag as a criminal offence see the Regional Flag and Regional Emblem Ordinance (Cap 2602) s 7 and [105.027]. As to the national flag see [105.023]; and as to the regional flag see [105.024], [105.026].
- 2 *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 921, [2000] 1 HKC 117 at 136, CFA, per Li CJ.
- 2a See *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907, (1999) 2 HKCFAR 442, [2000] 1 HKC 117, CFA (involving the national and regional flags), affirmed in *HKSAR v Koo Sze Yiu and Another* (2014) 17 HKCFAR 811, CFA (involving only the regional flag). See also the magistracy appeal below: *HKSAR v Koo Sze Yiu* [2014] 4 HKLRD 565, CFI.
- 3 Ie within the National Flag and National Emblem Ordinance s 7; and the Regional Flag and Regional Emblem Ordinance s 7: see note 1 above.
- 4 *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 921, [2000] 1 HKC 117 at 136, CFA, per Li CJ.

[105.032] **Protection of public order** Are the legitimate societal and community interests in the protection of the national and regional flags¹ within the concept of public order (*ordre public*)? It has been held that the concept of public order (*ordre public*) is not limited to public order in terms of law and order.² The inclusion of the words '*ordre public*' shows that the phrase 'public order' should be given a wider meaning.³ Firstly, the concept is an imprecise and elusive one; its boundaries cannot be precisely defined. Secondly, the concept includes what is necessary for the protection of the general welfare or for the interests of the collectivity as a whole. Thirdly, the concept must remain a function of time, place and circumstances.⁴ As to the time, place and circumstances, it should be noted that Hong Kong had a new constitutional order when the People's Republic of China resumed the exercise of sovereignty over Hong Kong⁵ and established the Hong Kong Special Administrative Region.⁶ The resumption of sovereignty is recited as 'fulfilling the long-cherished common aspiration of the Chinese people for the recovery of Hong Kong'.⁷ In these circumstances, the legitimate societal interests in protecting the national flag and the legitimate community interests in the protection of the regional flag are interests⁸ which are within the scope of the concept of public order (*ordre public*).⁹

- 1 As to desecration of the national flag as a criminal offence see the National Flag and National Emblem Ordinance (Cap 2401) s 7 and [105.025]; and as to desecration of the regional flag as a criminal offence see the Regional Flag and Regional Emblem Ordinance (Cap 2602) s 7 and [105.027]. As to the national flag see [105.023]; and as to the regional flag see [105.024], [105.026].
- 2 *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 922, [2000] 1 HKC 117 at 137, CFA, per Li CJ. See also *Tam Hing-ye v Wu Tai-wai* [1992] 1 HKLR 185 at 190, CA, per Sir Derek Cons V-P; *SJ v Oriental Press Group Ltd* [1998] 2 HKLRD 123 at 161, [1998] 2 HKC 627 at 669; *Wong Yeung Ng v SJ* [1999] 2 HKLRD 293 at 307, [1999] 2 HKC 24 at 39, CA, per Mortimer V-P.
- 3 *SJ v Oriental Press Group Ltd* [1998] 2 HKLRD 123 at 161, [1998] 2 HKC 627 at 669.
- 4 *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 924-925, [2000] 1 HKC 117 at 139, CFA, per Li CJ.
- 5 *Ie* on 1 July 1997. As to the transfer of sovereignty see [105.002].
- 6 The HKSAR was established under the principle of 'one country, two systems'. As to the establishment of the HKSAR see [105.021].
- 7 See the Preamble of the Basic Law.
- 8 These legitimate interests form part of the general welfare and the interests of the collectivity as a whole: *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 925, [2000] 1 HKC 117 at 140, CFA, per Li CJ.

- 9 *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 925, [2000] 1 HKC 117 at 139, CFA, per Li CJ. For a discussion on the concept of '*ordre public*', see Chan & Lim, Ch 16, paras 16.052-16.055.

[105.033] **Whether restriction necessary** The legitimate societal interests in protecting the national flag and the legitimate community interests in the protection of the regional flag¹ are interests which are within the scope of the concept of public order (*ordre public*).² The question is whether the restriction on the guaranteed right to freedom of expression³ is necessary for the protection of such legitimate interests as fall within the concept of public order (*ordre public*). The word 'necessary' must be given its ordinary meaning, rather than 'a pressing social need', which is the meaning given to the word by the United Nations Human Rights Committee and the European Court of Human Rights.⁴ In considering the question of necessity, due weight must be given to the view of the Hong Kong Special Administrative Region ('HKSAR') legislature⁵ that the enactment of the National Flag and National Emblem Ordinance⁶ was appropriate for the discharge of the HKSAR's obligation to apply the national law arising from its addition to the Basic Law.⁷ Similarly, due weight must also be accorded to the view of the HKSAR legislature that it was appropriate to enact the Regional Flag and Regional Emblem Ordinance.⁸

In applying the test of necessity, the question as to whether the restriction on the guaranteed right to freedom of expression was proportionate to the aims sought to be achieved thereby⁹ must also be considered.¹⁰ Having regard to what is only a limited restriction on the right to the freedom of expression, the test of necessity is satisfied; the limited restriction is proportionate to the aims sought to be achieved and does not go beyond what is proportionate.¹¹ The HKSAR is at the early stage of the new order following resumption of the exercise of sovereignty by the People's Republic of China.¹² 'The implementation of the principle of 'one country, two systems' is a matter of fundamental importance, as is the reinforcement of national unity and territorial integrity. Protection of the national flag and the regional flag from desecration, having regard to their unique symbolism, will play an important part in the attainment of these goals. In these circumstances, there are strong grounds for concluding that the criminalisation of flag desecration is a justifiable restriction on the guaranteed right to the freedom of expression.'¹³

There is another explanation why the criminalisation of flag desecration may be considered a justifiable restriction on the guaranteed right to freedom of expression.¹⁴ Freedom of expression

covers both substance (what is expressed) and mode (how it is expressed); the national and regional flag and emblem protection laws affect only the latter.¹⁵ A symbol such as a flag, emblem or totem impartially representing the whole of a group, be it a small band or a large nation, is inherently and essentially different, both in substance and form, from a statement conveying a specific message whether bland or controversial. It is natural for a society to wish to protect its symbols. Given the difference between symbols and statements, it is possible (even if by no means easy) for a society to protect its flags and emblems while at the same time maintaining its freedom of expression.¹⁶ It is possible if a nation's flag and emblem protection laws are specific, do not affect the substance of expression, and touch upon the mode of expression only to the extent of keeping the flags and emblems impartially beyond politics and strife. The HKSAR legislation meets such criteria.¹⁷

- 1 As to desecration of the national flag as a criminal offence see the National Flag and National Emblem Ordinance (Cap 2401) s 7 and [105.025]; and as to desecration of the regional flag as a criminal offence see the Regional Flag and Regional Emblem Ordinance (Cap 2602) s 7 and [105.027]. As to the national flag see [105.023]; and as to the regional flag see [105.024], [105.026].
- 2 See [105.032].
- 3 As to freedom of expression not as an absolute right see [105.030].
- 4 *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 925, [2000] 1 HKC 117 at 140, CFA, per Li CJ. See also *Tam Hing-ye v Wu Tai-wai* [1992] 1 HKLR 185 at 191, CA, per Sir Derek Cons V-P; *Ming Pao Newspapers Ltd v A-G* [1996] 2 HKLR 239 at 246, [1996] AC 907 at 919, PC, per Lord Jauncey of Tullichettle; *Wong Yeung Ng v S-J* [1999] 2 HKLRD 293 at 328, [1999] 2 HKC 24 at 59, CA, per Leong JA.
- 5 As to the legislature see [105.060].
- 6 In the National Flag and National Emblem Ordinance (Cap 2401).
- 7 In the Basic Law Annex III: see [105.001]. See also [105.008] note 21. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.
- 8 In the Regional Flag and Regional Emblem Ordinance (Cap 2602): *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 925-926, [2000] 1 HKC 117 at 140, CFA, per Li CJ.
- 9 The aims sought to be achieved are the protection of the national flag as a unique symbol of the nation and the regional flag as a unique symbol of the HKSAR in accordance with what are unquestionably legitimate societal and community interests in their protection: *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 926, [2000] 1 HKC 117 at 140, CFA, per Li CJ.

- 10 See *Ming Pao Newspapers Ltd v A-G of Hong Kong* [1996] 2 HKLR 239 at 244, [1996] AC 907 at 917, PC.
- 11 *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 926, [2000] 1 HKC 117 at 140-141, CFA, per Li CJ.
- 12 As to the transfer of sovereignty see [105.002].
- 13 *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 926, [2000] 1 HKC 117 at 141, CFA, per Li CJ.
- 14 See the dicta of Bokhary PJ in *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907, [2000] 1 HKC 117, CFA.
- 15 *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 929, [2000] 1 HKC 117 at 144, CFA, per Bokhary PJ. According to his Lordship (at 930-932 and 145-147) there were two coherent approaches in constitutional law. One approach is that even though there are always far more effective ways of making a point than by desecrating the national or regional flag or emblem, such desecration, however boorish and offensive, should nevertheless be tolerated as a form of expression (see *Texas v Johnson* (1989) 491 US 397; *United States v Eichman* (1990) 496 US 310). The other approach is that by reason of the reverence due to them for what they represent and because so protecting them would never prevent anyone from getting his or her point across in any one or more of a wide variety of ways, those flags and emblems should be protected from desecration (see *Re Paris Renato* (1988) Judgment No 1218 (Italy's Supreme Court of Cassation, Corte Suprema di Cassazione); *German Flag Desecration Case Decision* (1990) 81 Entscheidungen des Bundersverfassungsgerichts 278 (Germany's Federal Constitutional Court)). While both these approaches lead to opposite results, they share certain similarities. Both accord respect to the national and regional flags and emblems, and both recognise that freedom of expression is not confined only to what is expressed but extends also to how it is expressed. However, the question before the court is not which approach the judge personally prefers but whether the approach chosen by the legislature is one permitted by the constitution. This does not involve deference to the legislature; it is simply a matter of maintaining the separation of powers. The legislature having chosen the approach which protects the national and regional flags and emblems from desecration (having so chosen by enacting laws which provide such protection) the question before the court is whether those laws are constitutional. The answer depends on whether such laws are reconcilable with the freedom of expression guaranteed by the constitution; the test is one of reconcilability.
- 16 *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 932-933, [2000] 1 HKC 117 at 148, CFA, per Bokhary PJ. For the application of a similar principle in a different context see *Levy v Victoria* (1997) 189 CLR 579.
- 17 'They place no restriction at all on what people may express. Even in regard to how people may express themselves, the only restriction placed is against the desecration of objects which hardly anyone would dream of desecrating even if there was no law against it. No idea would be suppressed by the restriction. Neither political outspokenness nor any other form of outspokenness would be inhibited . . . Beneath the national and regional flags and emblems, all persons in Hong are- and can be confident that they will remain - equally free under our law to express their views on all matters whether political or non-political:

[105.148] **A generous approach** As to interpreting the language of the Basic Law, a literal, technical, narrow or rigid approach must be avoided.¹ The courts must consider the context. The context of a particular provision is to be found in the Basic Law itself as well as relevant extrinsic materials including the Joint Declaration.² Assistance can also be gained from any traditions and usages that may have given meaning to the language used, a good example being the statement of fundamental rights in the Basic Law,³ where a generous interpretation should be given to these constitutional guarantees in order that Hong Kong residents may enjoy in full measure the fundamental rights and freedoms so constitutionally guaranteed.⁴ On the other hand, when interpreting the provisions in the same chapter that define the class of Hong Kong residents, including in particular the class of permanent residents⁵ (as opposed to the constitutional guarantees of their rights and freedoms), the courts should simply consider the language in the light of any ascertainable purpose and the context. The context would include other provisions of the Basic Law.⁶

- 1 See *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 at 340, [1999] 1 HKC 291 at 326, CFA.
- 2 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.
- 3 I.e. the Basic Law Chapter III.
- 4 See note 1 above.
- 5 As to permanent residents see [105.038].
- 6 See note 1 above. Of particular relevance would be the provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong which remain in force by virtue of Basic Law art 39 and any relevant principles which can be distilled from the International Covenant on Civil and Political Rights. As to the Basic Law generally see [105.008]-[105.009]. See also *Gurung Kesh Bahadur v Director of Immigration* [2001] 3 HKLRD 32, CA; affd on appeal [2002] 2 HKLRD 775, CFA. (where the court held that restrictions which contravene the right of residents to travel may be unlawful).

[105.149] **Interpretation is essentially question specific** Constitutional interpretation, like other forms of interpretation, is essentially question specific.¹ As and when questions of interpretation arise, the courts will address the challenges posed by the questions raised and develop principles as necessary to meet them.² The contextual framework for any interpretation of the Basic Law must

begin with a text of the Basic Law itself.³ While the Basic Law uses ample and general language, and is a living instrument intended to meet changing needs and circumstances, and though a literal, technical, narrow or rigid approach is to be avoided, any question of interpretation is question specific.⁴

- 1 The Court of Final Appeal in *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 at 340, [1999] 1 HKC 291 at 326 cautioned that the purposive approach and generous approach (see [105.138]-[105.148]) could not be and was not intended to be an exhaustive statement of the principles the courts should adopt in approaching the interpretation of the Basic Law.
- 2 See *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 at 340, [1999] 1 HKC 291 at 326.
- 3 See *Chong Fung Yuen (an infant) v Director of Immigration* [2000] 1 HKC 359 at 371 per Stock J. As to the Basic Law generally see [105.008]-[105.009].
- 4 See note 3 above.

[105.150] **Use of extrinsic material** The purpose of a particular provision may be ascertainable from its nature or other provisions of the Basic Law or relevant extrinsic materials¹ including the Joint Declaration.² While there are phrases in the Basic Law which are open to argument as to their intent and meaning, it does not follow that where a constitution as a whole uses general language, provisions which are crystal clear must nonetheless be regarded *ab initio* as ambiguous or vague or half-baked, simply because they appear in a constitutional instrument.³

- 1 For the distinction between pre-enactment and post-enactment materials, there had to be very cogent justification for the court to have regard to post-enactment materials: *Vallejos v Commissioner of Registration & Anor* [2011] 6 HKC 469, CFI.
- 2 I.e. the 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. See *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 at 340, [1999] 1 HKC 291 at 326. See also [105.151].
- 3 *Chong Fung Yuen (an infant) v Director of Immigration* [2000] 1 HKC 359 at 372 per Stock J.

[105.151] **The Joint Declaration** The Joint Declaration¹ may be used as an aid in construing the Basic Law, because the Joint Declaration is expressly referred to in the preamble to the Basic Law as

containing the elaboration of the basic policies of China regarding Hong Kong, and because the Basic Law² was enacted in order to ensure the implementation of those policies. However, no *travaux préparatoires* explaining why the relevant provisions in the Joint Declaration and the Basic Law were couched in the particular language which was used appears to exist.³

- 1 In the 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. As to the Joint Declaration generally see [105.001]-[105.006].
- 2 As to the Basic Law generally see [105.008]-[105.009].
- 3 See *Chan Kam Nga (an infant) v Director of Immigration* [1998] 1 HKLRD 142, [1998] 1 HKC 16 per Keith J.

[105.152] **Consequences of construing a provision in a particular way** The canons of statutory construction encourage the court to find against a construction which would produce anomalies, since anomalies are unlikely to have been intended; and to find against a construction which involves the splitting up of families, since 'the family is the natural and fundamental group unit of society and is entitled to be protected by society and the State.'¹

- 1 In International Covenant on Civil and Political Rights, art 23(1) which the Basic Law art 39 requires to be implemented through the laws of the HKSAR. See *Chan Kam Nga (an infant) v Director of Immigration* [1998] 1 HKLRD 142 at 148, [1998] 1 HKC 16 at 24 per Keith J.

[105.153] **Opinions of the Preparatory Committee** Evidence was placed before the Court of First Instance that within the framework of the Joint Liaison Group¹ (JLG), the Governments of the People's Republic of China and the United Kingdom agreed that the Immigration Ordinance² should be brought gradually into line with the provisions of the Joint Declaration.³

The Court of First Instance asked whether the point that was being sought to be made was that future legislation was necessary to give effect to the Basic Law, and that such domestic legislation would have to comply with the Basic Law? If so, the suggestion was unassailable. If it was to say that local legislation giving effect to the Basic Law was expected to define or clarify or complement broad words or phrases in the Basic Law, then that too cannot be gainsaid. But if the reference to

'only ... a framework' implies for the Basic Law guidance and nothing more, such a suggestion is off the mark.⁴

In another instance the Court of Appeal⁵ was invited to take into account as a valid interpretative tool the 'Opinion of the Preparatory Committee for the HKSAR of the National People's Congress on the Implementation of the Basic Law⁶ of the HKSAR of the People's Republic of China' issued on 10 August 1996. The court found it unnecessary in that case to consider the relevance of that extrinsic material.⁷

The Court of First Instance⁸ was invited to decide that the meaning of the words in the Basic Law⁹ were 'doubtful' by reference to context in its widest sense, namely, the text of the Basic Law itself, the Joint Declaration,¹⁰ and legislative history, including post-promulgation history (meaning history after the promulgation of the Basic Law). Included in post-promulgation history were an Opinion of the Preparatory Committee for the Hong Kong Special Administrative Region, a Working Report presented by that Committee to the NPC, and an approval of that Report by Resolution of the National People's Congress.¹¹

The Court of First Instance held that the particular article of the Basic Law¹² had a character of its own in the context of the Basic Law. It was self-evidently intended to be more specific than other articles which provided for broadly stated rights. Given that the particular article itself expressed the right of abode in certain categories of individuals to arise by virtue of descent from those who had acquired a certain residential status in Hong Kong, the fact that there was no such qualification in the Basic Law¹³ was highly significant.

The Basic Law¹⁴ was not some generalisation to future legislatures as to the path that might be taken. It was a constitutional bedrock conferring rights, from which rights there was to be no derogation. The Basic Law itself defined who was to have the status of permanent resident. Whatever understanding was reached in the meeting rooms of the Joint Liaison Group could not provide a *carte blanche* for the draftsman of local legislation, or for the legislature, to cut down on the terms of the Basic Law, and to start redefining those entitled to right of abode.¹⁵

The Basic Law enjoined the courts of the HKSAR to apply laws previously in force in Hong Kong and that required the application of common law principles of interpretation. The sole mechanism by which mainland methods of interpretation had binding impact in Hong Kong was the mechanism provided by the Basic Law.¹⁶ The

Opinions of the Preparatory Committee did not constitute an interpretation under the Basic Law. In any case the Preparatory Committee had no power to make such an interpretation. Similarly, neither the Working Report of the Preparatory Committee nor the Resolution of the National People's Congress which approved the Working Report constituted, either separately or cumulatively, such an interpretation. None of these instruments were binding on the court.¹⁷ Further, the Opinions, Working Report and Resolution, arising some six years after promulgation of the Basic Law, could not be called contemporaneous expositions which might throw light on the legislative intention.¹⁸

- 1 As to the Joint Liaison Group see [105.005].
- 2 Ie the Immigration Ordinance (Cap 115).
- 3 See *Chong Fung Yuen v Director of Immigration* [2000] 1 HKC 359 at 376. As to the Joint Declaration see [105.001]-[105.006].
The evidence before the court was as follows: (1) following the amendment of the Immigration Ordinance in 1987, the Chinese and British sides of the JLG continued to discuss how the Immigration Ordinance should be further amended to bring it in line with the provisions of the Joint Declaration and the corresponding provisions in the Basic Law to be enacted by the National People's Congress in due course; (2) it was originally envisaged that a further amended Immigration Ordinance in full alignment with all the right of abode (see [105.039]) and related provisions in the Joint Declaration and the corresponding provisions in the Basic Law would be made by the Legislative Council (see [105.061]) on a later date and would come into force on 1 July 1997; (3) there was a mutual understanding between the Chinese and British sides of the JLG that the Basic Law only provided a framework for defining who would be permanent residents (see [105.038]) of the HKSAR, but the Immigration Ordinance, when amended to bring it into line with the provisions of the Basic Law, would need to set out definitions with more precision in the manner agreed between both sides. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.
- 4 See *Chong Fung Yuen v Director of Immigration* [2000] 1 HKC 359 at 376 per Stock J.
'The Basic Law in art 24, was not some generalisation to future legislatures as to the path that *might* be taken. It is a constitutional bedrock conferring rights, from which rights there was to be no derogation. The instrument itself defined who was to have the status of permanent resident. That is not to say that there was left no room for particularisation or clarification, *properly so-called*. So, for example, there is, in the Ordinance which was subsequently enacted a definition of 'Chinese citizen'; a prescription for the calculation of the period of seven years; and a definition or explanation of the term 'born . . . of those residents' by reference to the status of the parents at the time of birth; and so on. But whatever understanding was reached in the meeting rooms of the JLG could not provide a *carte blanche* for the draftsman of local legislation, or for

the legislature, to cut down on the terms of the Basic Law, and to start redefining those entitled to the right of abode'.

- 5 See *Comr for Registration v Registration of Persons Tribunal* [1999] 3 HKLRD 199.
- 6 Ie the Basic Law art 24 para 2.
- 7 See *Comr for Registration v Registration of Persons Tribunal* [1999] 3 HKLRD 199.
'These opinions did not purport to be interpretation of the Basic Law art 24, at least not what we in the common law world understand interpretation to involve, namely, to identify the legislative intent which lay behind art 24. The opinions merely purported to lay down the way in which the Preparatory Committee wanted art 24 to be implemented in Hong Kong.': *Comr for Registration v Registration of Persons Tribunal* above at 213 per Keith J.
- 8 See *Chong Fung Yuen v Director of Immigration* [2000] 1 HKC 359.
- 9 Ie the Basic Law art 24 para 2 category (1).
- 10 As to the Joint Declaration see [105.001]-[105.006].
- 11 See note 8 above.
- 12 Ie the Basic Law art 24.
- 13 Ie the Basic Law art 24 para 2 category (1).
In *Chong Fung Yuen v Director of Immigration* [2000] 1 HKC 359, it was held that the language of the Basic Law art 24 para 2 category 1 was clear and unqualified. There were no gaps and ambiguities, either from the language used, or from the context in which that language appeared. The court could not read in a qualification that was simply not there. Dictum of Lord Goddard CJ in *R v Wimbledon Justices, ex p Derwent* [1953] 1 QB 380 applied; dictum of Ng Ka Ling *v Director of Immigration* [1999] 1 HKLRD 315, [1999] 1 HKC 291 considered; *Comr for Registration v Registration of Persons Tribunal* [1999] 3 HKLRD 199 distinguished.
The Interpretation issued by the Standing Committee on 26 June 1999 was an interpretation under the Basic Law art 158 of arts 22 para 4 and 24 para 2 category (3). It was not an interpretation under art 158 of art 24 para 2 category (1). The court was not bound by a suggested prospect that the Standing Committee would interpret art 24 para 2 category (1) in accordance with the Preparatory Committee's Opinions simply because the Standing Committee had said in the addendum to the Interpretation that the Opinions reflected legislative intent (at 382-383).
Article 24 para 2 category (1) meant what it said on its face. It conferred the status of permanent residents on Chinese citizens who had been born in Hong Kong. The words in the Immigration Ordinance Sch 1 para 2(a) were incompatible with, and contravened art 24 para 2 category (1) (at 383).
- 14 Ie the Basic Law art 24.
- 15 See *Chong Fung Yuen v Director of Immigration* [2000] 1 HKC 359 at 377 where the dicta of Chan CJHC in *Chan Kam Nga (an infant) v Director of Immigration* [1998] 1 HKLRD 752, [1998] 2 HKC 405, CA, and of Keith JA in *Comr for Registration v Registration of Persons Tribunal* [1999] 3 HKLRD 199 were applied.

- 16 Ie the Basic Law art 158.
- 17 Ie the Basic Law art 158. See *Chong Fung Yuen v Director of Immigration* [2000] 1 HKC 359 at 378 and 382 applying the dictum of Keith JA in *Comr for Registration v Registration of Persons Tribunal* [1999] 3 HKLRD 199.
- 18 See *Chong Fung Yuen v Director of Immigration* [2000] 1 HKC 359 at 379. On appeal the Court of Appeal in *Master Chong Fung Yuen as Infant by his Grandfather and Next Friend Chong Yiu Shing v The Director of Immigration* (unreported, 27 July 2000; CACV 61/2000), [2000] HKCU 580, confirmed that, even though it had been adopted by resolution of the NPC, the Opinion is not an interpretation of the Basic Law art 24. It is different from the Interpretation of the Standing Committee on arts 22 para (4) and 24 para 2 category (3) which was made after consulting the Basic Law Committee of the National People's Congress under the Constitution of the People's Republic of China art 67(4) and the Basic Law art 158 para 1. The Interpretation is binding of all institutions in Hong Kong, whereas the Opinion is not.

[105.154] **Agreements reached in the Sino-British Joint Liaison Group** Before the Court of Final Appeal, in a matter relating to the right of abode in the Hong Kong Special Administrative Region ('HKSAR'), it was argued that a booklet published by the Immigration Department in April 1997 which stated that it was compiled on the basis of the existing immigration regulations and practices and the common view of the British and Chinese sides in the Sino-British Joint Liaison Group contained a subsequent agreement between the parties regarding the interpretation of the Joint Declaration¹ or the application of its provisions within the meaning of the Vienna Convention on the Law of Treaties.² The record of the agreement was not produced.³ The Court of Final Appeal held that, even assuming that the functions of the Sino-British Joint Liaison Group included the making of a subsequent agreement between the two governments regarding the interpretation of the Joint Declaration⁴ or the application of its provisions in terms of the Vienna Convention,⁵ the agreement did not affect the matter in dispute.⁶

Earlier, in the Court of First Instance, in another matter relating to the right of abode in the HKSAR, the Director of Immigration sought to lead in evidence an agreement reached by the Sino-British Joint Liaison Group at the twenty-fourth meeting of the Group with regard to how the Basic Law⁷ should be understood. However the court did not regard this agreement as a permissible aid to the construction.⁸

The Court of Appeal declined to take into account the agreement reached by the Sino-British Joint Liaison Group but noted that the Sino-British Joint Liaison Group was set up under the Joint Declaration.⁹ Under the Joint Declaration,¹⁰ one of the functions of

the Sino-British Joint Liaison Group was to conduct consultations on the implementation of the Joint Declaration. While the Basic Law reflects an international treaty, ie the Joint Declaration, it is also a national law of the People's Republic of China and a domestic law and the constitution of the HKSAR.¹¹ While an international treaty can, of course, be subsequently varied by the states parties, if the international treaty has become part of the domestic law, and in this case also a national law, then before this variation can take effect, it must be reflected by an amendment to the national and/or domestic laws. Nothing short of an amendment to the Basic Law can suffice to bring in any variation to the international treaty which it reflects.¹²

The Court of Appeal also cited a more fundamental reason why it was not appropriate to have resort to agreements of the Sino-British Joint Liaison Group as an aid to the interpretation of the Basic Law. The proceedings of the Sino-British Joint Liaison Group and its records are required to be kept confidential. It is up to the Sino-British Joint Liaison Group to reveal what sort of record is to be used for its purpose.¹³ In the present case, the Sino-British Joint Liaison Group had clearly agreed to the revelation of this subsequent agreement which was also disclosed to the former Legislative Council. But the idea of having to seek the consent of the Sino-British Joint Liaison Group to reveal some but not all of its deliberations and/or conclusions in order to assist in the construction of the provisions of the Basic Law is not acceptable. It is not right that the government can pick and choose as to what sort of document it thinks is useful or helpful to the construction of the provisions of the Basic Law.¹⁴ It is therefore clearly not right to rely on the confidential material from Sino-British Joint Liaison Group meetings to assist in the construction of the Basic Law.¹⁵

1 Ie the 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. As to the Joint Declaration generally see [105.001]-[105.006].

2 Ie the Vienna Convention on the Law of Treaties art 31(3)(a).

3 See *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 at 353-354, [1999] 1 HKC 291 at 340-341, CFA.

4 See note 1 above.

5 Ie the Vienna Convention on the Law of Treaties art 31(3)(a).

6 First, the basis on which the agreement was reached was uncertain. It may have been reached on the basis of a pragmatic solution to the matter and not as a

matter of interpretation or application. Secondly, even if the 'agreement' reached were on the basis of interpretation or application, the Vienna Convention on the Law of Treaties art 31(3)(a) only provides that it shall be taken into account. Having done so, the court can reach a different view: *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 at 353-354, [1999] 1 HKC 291 at 340-341, CFA.

- 7 Ie the Basic Law art 24 para 2 category 3.
- 8 See *Chan Kam Nga (an infant) v Director of Immigration* [1998] 1 HKLRD 142 at 146-147, [1998] 1 HKC 16 at 22-23. It is important to note that the agreement was reached well after the promulgation of the provision which the court has to construe. I accept that events which occurred in relation to a legislative provision subsequent to its enactment may, in an appropriate case, clarify the meaning intended by the legislature. But although the agreement reached in the Joint Liaison Group purported to interpret Basic Law art 24 para 2 category (3) in a particular way, that agreement does not mean that both sides believed that that was the correct interpretation or that it was the interpretation which those who drafted the Basic Law and the National People's Congress which adopted it had in mind. The agreement may simply have reflected the way in which both sides wanted Basic Law art 24 para 2 category (3) to be implemented. In other words, there is no evidence before me whatsoever which suggests that the agreement reflected what both sides thought had originally been intended: *Chan Kam Nga (an infant) v Director of Immigration* above per Keith J.
- 9 See note 1 above; and *Chan Kam Nga (an infant) v Director of Immigration* [1998] 1 HKLRD 752, [1998] 2 HKC 405, CA, per Chan CJHC.
- 10 Ie the 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 Annex II para 3(a).
- 11 See *Chan Kam Nga (an infant) v Director of Immigration* [1998] 1 HKLRD 752, [1998] 2 HKC 405, CA.
- 12 See *Chan Kam Nga (an infant) v Director of Immigration* [1998] 1 HKLRD 752, [1998] 2 HKC 405, CA.

Chan CJHC (in *Chan Kam Nga (an infant) v Director of Immigration* above at 759 and 415) pointed out that the court was concerned with what the Basic Law art 24 para 2 category (3) meant. The document which is said to witness a subsequent agreement of the Sino-British Joint Liaison Group refers to what the two states parties agreed should be understood by that article. This agreement was reached well after the promulgation of the Basic Law. It is the Basic Law which the court has to construe, not the provisions of the treaty, let alone any subsequent agreement to it. The agreement simply reflected the way in which both sides wanted the Basic Law art 24 para 2 category (3) to be implemented. There is no evidence to suggest that the agreement reflected what both sides thought had originally been intended. Moreover, citing annex II to the joint Declaration, the judge questioned whether the so-called agreement could have been reached through the Sino-British Joint Liaison Group. It is doubtful whether the Sino-British Joint Liaison Group was acting *intra vires* in reaching such an agreement.

Mortimer VP in *Chan Kam Nga (an infant) v Director of Immigration* above at 765 and 423 was more emphatic. He held that the agreement in the Joint

Liaison Group was not a proper aid to construction under the Vienna Convention because the Joint Liaison Group had no power to make agreements between the two governments.

- 13 See *Chan Kam Nga (an infant) v Director of Immigration* [1998] 1 HKLRD 752 at 759, [1998] 2 HKC 405 at 416, CA.
- 14 See note 13 above.
- 15 See note 13 above.

[105.155] **Opinions of academics** While the court has taken into account the opinions of academics in the interpretation of the Basic Law, it has held that the proper construction of a provision in the Basic Law is not a question of foreign law which a judge must decide as a question of fact.¹

- 1 See *Cheung Lai Wah (an infant) v Director of Immigration* [1997] HKLRD 1081 at 1092, [1997] 3 HKC 64 at 85, per Keith J.

[105.156] **Constitutional jurisdiction of Hong Kong courts of law** The courts of HKSAR have the power to interpret on their own, in adjudicating cases, the provisions of the Basic Law which are within the limits of HKSAR's autonomy.¹ The Basic Law contains many provisions which limit the competence of legislature and the executive. In addition, the Bill of Rights Ordinance and the International Covenant on Civil and Political Rights do have special status in Hong Kong through their close affiliations with the Basic Law. The Basic Law provides that the International Covenant in Civil and Political Rights, as applied in Hong Kong, will remain in force and that any restrictions that may be placed on rights and freedoms must be prescribed by law which comply with the covenant.² The Hong Kong Bill of Rights Ordinance,³ which strictly speaking has no special constitutional status, has nevertheless been regarded consistently by Hong Kong courts as a standard with reference to which validity of laws fall to be determined.⁴ Hong Kong Courts have therefore, the power to question constitutionality of administrative as well as legislative action. In the absence of any Constitutional provision which restricts the power of judicial review to any particular court, this is a power that may be exercised by any court of Hong Kong in appropriate circumstances and in accordance with relevant legislative provisions and principles of common law.⁵

The Basic Law, unlike the constitution of some other common law jurisdictions,⁶ does not restrict to any particular court the power to

question the validity of legislation on account of unconstitutionality. Where a court of law declares any statutory provision to be invalid that statutory provision is considered void ab initio, the judicial decision takes retrospective effect and anything done under the unconstitutional provision is deemed invalid. In some common law jurisdictions courts have resorted to prospective overruling, meaning that an unconstitutional provision is declared invalid only for the future, without invalidating anything that has been done in pursuance of that provision in the past. The Court of Final Appeal has declined to make a declaration of unconstitutionality with only prospective effect, since the circumstances of the case did not warrant such action.⁷

Hong Kong Courts have considered conferring temporary validity on legislative or executive measures which are found to be invalid or suspending the declaration of invalidity for a specified period of time. The reason for granting temporary validity or suspending the order of invalidity is to give a reasonable period of time for the government to introduce a valid legislative or executive measure. The courts exercise such power only in exceptional circumstances a power that is inherent in common law courts.⁸

It has been judicially held that constitutionality of legislation could be challenged by way of an application for judicial review, even where the applicant is not aggrieved by any administrative decision pursuant to an allegedly unconstitutional legislative provision.⁹ Where the applicant is able to establish that the impugned legislative provision will infringe any of his fundamental rights if a government agency were to enforce that provision against him, he can directly challenge the constitutionality of such legislative provision.¹⁰ In such circumstances the appropriate remedy would be a declaration that the relevant statutory provision is unconstitutional.¹¹ It is only in exceptional circumstances that the Court will grant a declaratory remedy where no administrative action has yet taken place.¹²

1 Basic Law art 158.

2 Basic Law art 39. This sentence is a simplified version of art 39.

3 Ie the Hong Kong Bill of Rights Ordinance (Cap 383).

4 See eg *Mok Chi Hung v Director of Immigration* [2001] 1 HKC 281 at 291.

5 For instance, judicial review of administrative action must be exercised by the Court of First Instance, subject to appeal to the Court of Appeal and the Court of Final Appeal. No such restriction applies in respect of judicial review of legislation. Any court or tribunal may refuse to obey legislation which it considers unconstitutional.

6 For instance in Sri Lanka it is only the Supreme Court of Sri Lanka that can declare any provision in a proposed statute unconstitutional. The position there before 1972 was that courts assumed that they had the power to declare statutory provisions unconstitutional, in the absence of any express constitutional provision to that effect. See MJA Cooray 'Three Models of Constitutional Litigation: Lessons from Sri Lanka' (1992) 21 *Anglo-American Law Review* 430-448.

7 *HKSAR v Hung Chan Wa* [2006] 3 HKLRD 841.

8 In *Leung Kwok Hung v Chief Executive of HKSAR* [2006] HKCU 230 para 172 (the court also referred to Canadian and Strasbourg jurisprudence), the Court of First Instance declared that an Executive Order (see [105.078]) which made provisions to be followed by public servants in relation to covert surveillance and the Telecommunications Ordinance s 33 (Cap 106) were unconstitutional as being inconsistent with the Basic Law and the Hong Kong Bill of Rights Ordinance (paras 180-184). However, invalidation of these would have created a vacuum with the result that law enforcement agencies will have no authority to conduct covert surveillance for the safety and security of the State and the public. A contributing factor to this legislative vacuum was the failure of the Chief Executive for more than eight years to bring into effect a statute enacted in 1997 to provide for a regulatory regime (paras 180-184). The Court, having considered that the government was proposing to pass a new comprehensive statute relating to covert surveillance within six months, declared that its ruling of unconstitutionality in respect of the Executive Order and the Telecommunications Ordinance s 33 would be suspended for six months to allow the government time to enact and implement appropriate legislation. This decision was affirmed by the Court of Appeal. The Court of Final Appeal did not, however, consider that the circumstances of the case justified a declaration of temporary validity, the effect would be that the unconstitutional statutory provision and the Executive Order were 'valid and of legal effect for a period of six months'. The Court of Final Appeal set aside the order of temporary validity and, in its place, substituted an order of suspension at the declaration of invalidity for the same period of six months. Unlike a temporary validity order, an order of suspension does not validate anything done in pursuance of the unconstitutional law during the period of suspension. The Court of Final Appeal held that an order of temporary validity should be granted only in situations where there was a virtual legal vacuum. See *Koo v Chief Executive* (2006) 9 HKCU 441, especially paragraphs [33]-[35] per Bokhary PJ and paragraphs [60]-[62] per Anthony Mason NPJ, who doubted whether there was any real difference between an order of temporary validity and an order of suspension: paragraph [56].

9 *Leung v Secretary for Justice* [2005] 3 HKLRD 657 para 56. This decision was affirmed by the Court of Appeal in [2006] 4 HKLRD 211.

10 In *Leung v Secretary for Justice* [2005] 3 HKLRD 657 para 57, the applicant challenged the validity of certain provisions of the Crimes Ordinance (Cap 200) which made certain sexual acts criminal, for the reason that they discriminated against homosexuals. It was held that if judicial review was available only where the applicant has been affected by an unlawful executive action, such as prosecution for breach of the allegedly unconstitutional statutory provision, the applicant would be compelled to commit a criminal act first: 'If his cause of action must be founded on the exercise of executive power

by a public authority, he must bring about a relevant exercise of power by such an authority. In the present case that authority would have to be the police and the only way he could get the police to act would be to commit a criminal offence or series of offences under Pt XII of the Crimes Ordinance. In short, the applicant would have to break the law-risking imprisonment in order to challenge it' (para 57). See [2006] 4 HKLRD 211, paragraph 28, where Chief Judge Ma in the Court of Appeal expressed a similar sentiment.

- 11 *Leung v Secretary for Justice* [2005] 3 HKLRD 657 para 62.
- 12 'It is up to the court on a case-by-case basis to determine whether sufficiently exceptional circumstances exist to enable it to exercise the discretion to hear cases notwithstanding that future conduct or a hypothetical situation is involved': *Leung v Secretary for Justice* [2006] 4 HKLRD 211, para 28 per Chief Judge Ma in the Court of Appeal.

(9) THE ECONOMIC SYSTEM

(1) PUBLIC FINANCE

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[105.157] **Independent finances** The Hong Kong Special Administrative Region ('HKSAR') has independent finances.¹ It may use its financial resources exclusively for its own purposes, and they will not be handed over to the Central People's Government.² The Central People's Government may not levy taxes in the HKSAR.³

- 1 Basic Law art 106 para 1. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.
- 2 Basic Law art 106 para 2.

- 3 Basic Law art 106 para 3.

[105.158] **The budget** In drawing up its budget, the Hong Kong Special Administrative Region is required to follow the principle of keeping expenditure within the limits of revenues, and to strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product.¹

- 1 Basic Law art 107. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.

[105.159] **Independent taxation system** The Hong Kong Special Administrative Region is required to practise an independent taxation system.¹ Taking the low tax policy previously pursued in Hong Kong as reference, the Region is authorised to enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation.²

- 1 Basic Law art 108 para 1. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.
- 2 Basic Law art 108 para 2. See generally [370] TAXATION AND REVENUE (2012 Reissue).

[105.160] **International financial centre** The Government of the Hong Kong Special Administrative Region is required to provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial centre.¹

- 1 Basic Law art 109. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.

[105.161] **Monetary and financial systems** The monetary and financial systems of the Hong Kong Special Administrative Region must be prescribed by law.¹ The Government of the Region is required, on its own, to formulate monetary and financial policies, safeguard the free operation of financial business and financial markets, and regulate and supervise them in accordance with law.²

- 1 Basic Law art 110 para 1. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.

- 2 Basic Law art 110 para 2.

[105.162] **Currency** The Hong Kong dollar, as the legal tender in the Hong Kong Special Administrative Region, will continue to circulate.¹ The authority to issue Hong Kong currency is vested in the Government of the Region.² The Government may authorise designated banks to issue or continue to issue Hong Kong currency under statutory authority, after satisfying itself that any issue of currency will be soundly based and that the arrangements for such issue are consistent with the object of maintaining the stability of the currency.³

- 1 Basic Law art 111 para 1. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.
- 2 Basic Law art 111 para 2. The issue of Hong Kong currency must be backed by a 100% reserve fund. The system regarding the issue of Hong Kong currency and the reserve fund must be prescribed by law: art 111 para 2.
- 3 Basic Law art 111 para 3.

[105.163] **Foreign exchange** No foreign exchange control policies may be applied in the Hong Kong Special Administrative Region.¹ The Hong Kong dollar must be freely convertible.² Markets for foreign exchange, gold, securities, futures and the like will continue.³ The Government of the Region is required to safeguard the free flow of capital within, into and out of the Region.⁴

- 1 Basic Law art 112 para 1. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.
- 2 Basic Law art 112 para 1. As to the issue of Hong Kong currency see [105.162].
- 3 Basic Law art 112 para 1.
- 4 Basic Law art 112 para 2.

[105.164] **Exchange Fund** The Exchange Fund of the Hong Kong Special Administrative Region will be managed and controlled by the Government of the Region, primarily for regulating the exchange value of the Hong Kong dollar.¹

- 1 Basic Law art 113. As to the issue of Hong Kong currency see [105.162]; and as to foreign exchange see [105.163]. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.

(2) TRADE, INDUSTRY AND COMMERCE

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[105.165] **Free port** The Hong Kong Special Administrative Region is required to maintain the status of a free port¹ and may not impose any tariff unless otherwise prescribed by law.²

- 1 As to the policy of free trade see [105.166].
- 2 Basic Law art 114. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.

[105.166] **Policy of free trade** The Hong Kong Special Administrative Region is required to pursue the policy of free trade¹ and safeguard the free movement of goods, intangible assets and capital.²

- 1 As to the requirement to maintain the status of a free port see [105.165].
- 2 Basic Law art 115. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.

[105.167] **Separate customs territory** The Hong Kong Special Administrative Region is a separate customs territory.¹ Using the name 'Hong Kong, China', the Region may participate in relevant international organisations² and international trade agreements³ (including preferential trade arrangements) such as the General

Agreement on Tariffs and Trade and arrangements regarding international trade in textiles.⁴ Export quotas, tariff preferences and other similar arrangements which are obtained or made by the Region or which were obtained or made and remain valid, will be enjoyed exclusively by the Region.⁵ The Region may issue its own certificates of origin for products in accordance with prevailing rules of origin.⁶

- 1 Basic Law art 116 para 1. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.
- 2 As to representation in international organisations see [105.204].
- 3 As to representation in international agreements see [105.203].
- 4 Basic Law art 116 para 2.
- 5 Basic Law art 116 para 3.
- 6 Basic Law art 117.

[105.168] Investments The Government of the Hong Kong Special Administrative Region is required to provide an economic and legal environment for encouraging investments, technological progress and the development of industries.¹

- 1 Basic Law art 118. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.

[105.169] Formulation of policies The Government of the Hong Kong Special Administrative Region is authorised to formulate appropriate policies to promote and co-ordinate the development of various trades such as manufacturing, commerce, tourism, real estate, transport¹ public utilities² services³ agriculture and fisheries, and is required to pay regard to the protection of the environment.⁴

- 1 See generally [395] TRANSPORT (2013 Reissue).
- 2 See generally [320] PUBLIC HEALTH AND MUNICIPAL SERVICES (2014 Reissue).
- 3 See generally [360] SOCIAL WELFARE AND SERVICES (2012 Reissue).
- 4 Basic Law art 119; and see generally [160] ENVIRONMENT (2013 Reissue). As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.

(3) LAND

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[105.170] Land and resources are state property The land and natural resources within the Hong Kong Special Administrative Region are declared to be State property.¹ The Government of the Region is responsible for their management, use and development and for their lease or grant to individuals, legal persons or organisations for use or development.² The revenues derived therefrom will be exclusively at the disposal of the Government.³

- 1 Basic Law art 7. As to the right to private ownership of property see [105.171]. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.
- 2 Basic Law art 7. As to the Government lease see LAND (2013 Reissue) [230.0101]. See also [105.173].
- 3 Basic Law art 7; and see generally [370] TAXATION AND REVENUE (2012 Reissue).

[105.171] Right to private ownership of property The Hong Kong Special Administrative Region is required to protect the right of private ownership of property in accordance with law.¹

The Hong Kong Special Administrative Region shall, in accordance with law, protect the rights of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property. Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without delay.² This provision of the Basic Law protects private property against unlawful deprivation and guarantees fair and sufficient compensation for lawful deprivation.³

Deprivation in this context means not only physical taking but also regulatory taking. Physical taking includes not only compulsory acquisition or, as it is known in Hong Kong, resumption of land. It also includes lesser degrees of physical deprivation such as extinguishment of easements and causing disturbances.⁴ Regulatory deprivation refers to situations where a lawful government action affects the use and enjoyment of land to such an extent that it could be said that the landowner has been deprived of the beneficial use of the land, although his legal title remains intact.⁵

Where compensation is payable, the award must correspond to the 'real value' of the land or property right affected. The concept of 'real value' is said to correspond to market value supplemented by other relevant valuation principles which were in place when the Basic Law came into effect.⁶

- 1 Basic Law art 6. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively.
- 2 Basic Law art 105.
- 3 Anton Cooray, 'Government as Ground Landlord and Land Use Regulator: The Hong Kong Experience' in T Kotaka and David L Callies, *Taking Land: Compulsory Purchase and Regulation in Asian-Pacific Countries* (2002, Hawaii University Press) 96-143.
- 4 See generally Gordon N Cruden, *Land Compensation and Valuation Law in Hong Kong* (3rd edn, 2009, LexisNexis).
- 5 In *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553, paras 17-25, the Court of Appeal observed that mere regulatory restriction on use, falling short of *de facto* deprivation of the property, gave no right to compensation. It conceded that an action that adversely affected the use of property, short of formal expropriation, might in certain circumstances amount to deprivation within the meaning of art. 105. The Court explained that such *de facto* expropriation could occur where the interference with use of the property was so substantial that the owner was deprived of any meaningful use of the property or, in other words, all economically viable use. The Court added that the question whether there is a 'de facto appropriation' was necessarily case specific, a question of fact and degree. The burden of establishing removal of all meaningful or economically viable use resided with the party asserting a violation of art. 105.
- 6 As Lord Millett said in *Director of Lands v Yin Shuen Enterprises Ltd* (2003) HKCFA 1, para 56: "In general, property is worth what it will fetch and its open market value reflects its real value". See generally Gordon N Cruden, *Land Compensation and Valuation Law in Hong Kong* (3rd ed., 2009, LexisNexis, chapter 22 "Valuation Methods".

[105.172] **Traditional rights of indigenous inhabitants** The lawful traditional rights and interests of the indigenous inhabitants of the 'New Territories'¹ must be protected by the Hong Kong Special Administrative Region.²

- 1 See generally [285] NEW TERRITORIES (2014 Reissue).
- 2 Basic Law art 40. As to the legal status and drafting of the Basic Law see [105.008] and [105.009] respectively. Section 4 of the Government Rent (Assessment and Collection) Ordinance (GRACO) (Cap 515) restricts the right to exemption from government rent for land leases in the New Territories to lawful successors. This is governed by Basic Law art 122 which specifically provided for exemption in respect for a lease renewed under s 121. 'Lawful successor' in art 122 refers to a succession on the death of the relevant ancestor and does not include an inter vivos transfer. S 4 of GRACO is not inconsistent with art 40: *Lai Hay On v Commissioner of Rating and Valuation* [2010] HKCU 739, [2010] 3 HKLRD 286, CA.

[105.173] **Land leases** All leases of land granted, decided upon or renewed before the establishment of the Hong Kong Special Administrative Region¹ which extend beyond 30 June 1997, and all rights in relation to such leases, will continue to be recognised and protected under the law of the Region.² As regards all leases of land granted or renewed where the original leases contain no right of renewal, during the period from 27 May 1985 to 30 June 1997, which extend beyond 30 June 1997 and expire not later than 30 June 2047, the lessee is not required to pay an additional premium as from 1 July 1997, but an annual rent equivalent to 3 per cent of the rateable value of the property at that date, adjusted in step with any changes in the rateable value thereafter, will be charged.³

The term 'rateable value' is intended to have a meaning readily ascertainable and must be given the meaning popularly understood⁴ which is the same as under the Rating Ordinance.⁵ The formula for assessing rent⁶ is only a general policy; the details and methods of implementing that policy are left to the legislature.⁷ The purpose of the policy is to ensure a smooth transition and to guarantee continuity and prosperity.⁸

In the case of old schedule lots, village lots, small houses and similar rural holdings, where the property was on 30 June 1984 held by, or, in the case of small houses granted after that date, where the property is granted to, a lessee descended through the male line from a person who was in 1898 a resident of an established village in Hong Kong, the

a 'judge' or 'other officer authorised by law to exercise judicial power', it is implicit in such a choice that these categories are not identical. Nevertheless, the 'other officer' must have some of the attributes of a 'judge' and offer guarantees befitting the 'judicial power' conferred on him by law, that is to say, he must satisfy certain conditions each of which constitutes a guarantee for the person arrested: (1) an institutional guarantee: he must be independent of the executive and of the parties; (2) a procedural guarantee: he must be obliged to himself hear the individual brought before him; and (3) a substantive guarantee: he must be obliged to review the circumstances militating for or against detention, to decide, by reference to legal criteria, whether there are reasons to justify detention, and to order release if there are no such reasons.⁶

- 1 The usual practice in Hong Kong is 48 hours upon arrest.
- 2 Hong Kong Bill of Rights Ordinance (Cap 383) s 8, art 5(3); cf the International Covenant on Civil and Political Rights art 9(3). As to the International Covenant on Civil and Political Rights see [105.218]; as to its application in Hong Kong see [105.278]. See also [105.325]. As to the Hong Kong Bill of Rights see [105.257].
As to the right to liberty and security of person see also [105.342], [105.343], [105.345]–[105.350].
- 3 *McGoff v Sweden* (1983) 6 EHRR 101.
- 4 Human Rights Committee (HRC) General Comment 8 (16th session, 1982). A delay of 5 days is unacceptable: *Jijon v Ecuador*, Communication No 277/1988, HRC 1992 Report, Annex IX.I. As to the HRC see [105.220].
- 5 *TW v Malta* (1999) 29 EHRR 185. Subject to the existence of adequate safeguards, the context of terrorism has the effect of prolonging the period during which authorities might keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer. But the difficulties of judicial control over decisions to arrest and detain suspected terrorists does not justify dispensing altogether with 'prompt' judicial control. Accordingly, even a period of 4 days and 6 hours spent in police custody fell outside the permitted constraints as to time: *Brogan v United Kingdom* (1988) 11 EHRR 117.
- 6 *Scheisser v Switzerland* (1979) 2 EHRR 417. It is inherent in the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with: *Kulomin v Hungary* Communication No 521/1992, 22 March 1996. See also [105.371].

[105.342] **Right to trial within a reasonable time** Anyone arrested or detained on a criminal charge is entitled to trial within a reasonable time or to release.¹ The period of detention covered by the

requirement of a 'reasonable time' begins with the accused person's arrest. The word 'trial' refers to the whole of the proceedings before the court, not merely to its commencement. The words 'entitled to trial' are not to be equated with 'entitled to be brought to trial'. However, the end of the period of detention with which article 9 of the International Covenant on Civil and Political Rights is concerned is the day on which the charge is determined by a court of first instance, and not the day on which a conviction becomes final.² A delay will not be reasonable if detention is due to the slowness of the investigations, or to the lapse of time which occurs either between the end of the investigation and the service of the indictment or between them and the commencement of the trial, or to the length of the trial.³ Neither the lack of adequate budgetary appropriations for the administration of criminal justice, nor the fact that investigations into a criminal case are, in essence, carried out by way of written proceedings, justifies unreasonable delay in the adjudication of a criminal case.⁴ What constitutes 'reasonable time' is a matter of assessment in each particular case.⁵

In interpreting those articles of the Hong Kong Bill of Rights which bear upon questions of 'reasonableness' or the meaning of expressions such as 'undue delay' in relation to criminal proceedings, due regard is to be taken of local cultural, social and economic factors. In determining whether there is undue delay in criminal proceedings, Hong Kong should not be compared with jurisdiction such as Jamaica or Mauritius where long delays may be readily excusable. The administration in Hong Kong has at its disposal the means to provide adequate resources to ensure the proper, efficient and timely disposal of its criminal proceedings.⁶

- 1 Hong Kong Bill of Rights Ordinance (Cap 383) s 8, art 5(3); cf International Covenant on Civil and Political Rights art 9(3). As to the International Covenant on Civil and Political Rights see [105.218]; as to its application in Hong Kong see [105.278]. See also [105.325]. As to the Hong Kong Bill of Rights see [105.257].
As to the right to liberty and security of person see also [105.342], [105.343], [105.345]–[105.350].
- 2 *Wemhoff v Germany* (1969) 1 EHRR 55.
- 3 See note 2 above.
- 4 *Fillastre v Bolivia* Communication No 336/1988, HRC 1992 Report, Annex IX.N. See also *Kone v Senegal*, Communication No 386/1989, 21 October 1994.
- 5 *Wemhoff v Germany* (1969) 1 EHRR 55. Two principal questions must be examined when deciding upon the reasonableness of the period of detention on

remand: (1) whether a genuine requirement of public interest justifying a departure from the rule of respect for individual liberty exists; (2) assuming that relevant and sufficient circumstances do exist for not releasing the accused person pending trial, whether the authorities have conducted the case in a manner which had unreasonably prolonged the detention on remand, thus imposing on the accused person a greater sacrifice than could reasonably be expected of a person presumed to be innocent.

6 *R v William Hung* [1992] 2 HKCLR 90, (1992) 2 HKPLR 49 at 57 per Duffy J.

[105.343] **Release pending trial** It is not the general rule that persons awaiting trial be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of judgment.¹ Article 5(3) of the Hong Kong Bill of Rights embodies a presumption that bail be granted and that any defendant is entitled to trial within a reasonable time.² Pre-trial detention should be an exception and as short as possible.³ Detention before trial may be resorted to only where it is lawful, reasonable and necessary. Detention may be necessary 'to prevent flight, interference with evidence, or the recurrence of crime';⁴ or 'where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner'.⁵ The seriousness of a crime or the need for continued investigation, considered alone, do not justify pre-trial detention.⁶ The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of continued detention, but after a certain lapse of time it no longer suffices. The court must then establish whether there are other grounds to justify the continued deprivation of liberty. Where such grounds are 'relevant' and 'sufficient', the court must ascertain whether the competent authorities have displayed 'special diligence' in the conduct of the proceedings.⁷

1 Hong Kong Bill of Rights Ordinance (Cap 383) s 8, art 5(3); cf the International Covenant on Civil and Political Rights art 9(3). As to the International Covenant on Civil and Political Rights see [105.218]; as to its application in Hong Kong see [105.278]. See also [105.325]. As to the Hong Kong Bill of Rights see [105.257].

As to the right to liberty and security of person see also [105.342], [105.343], [105.345]–[105.350].

2 *R v Lau Kwok-hung* (1991) 1 HKPLR 19. Where the likely delay is in breach of the Bill of Rights art 5, the court considers three factors in order to determine whether bail is appropriate, ie, the nature of the offence charged; whether releasing the defendant may endanger the public; and whether his release could affect the process of the trial, either by preventing the prosecution from

presenting their evidence in a fair and uninfluenced manner, or by the defendant's failure to appear at the time of the trial.

3 Human Rights Committee (HRC) General Comment No 8 (16th session, 1982). As to the HRC see [105.220].

4 *Von Alphen v Netherlands* Communication No 305/1988, HRC 1990 Report, Annex IX.M.

5 *Schweizer v Uruguay* Communication No 66/1980, HRC 1983 Report, Annex VIII.

6 *Bolanos v Ecuador* Communication No 238/1987, HRC 1989 Report, Annex X.1.

7 *Kemmache v France* European Court, 27 November 1991. The complexity and special characteristics of the investigation are factors to be considered in this respect. See also *R v Lau Kwok-hung (No 2)* (1992) 2 HKPLR 261, where a period of 17 months between the applicant's arrest and his application for bail was unreasonable within the meaning of Hong Kong Bill of Rights Ordinance s 8, art 5(3), and the applicant was prima facie entitled to be released on bail. In determining whether he should be released, it was necessary to take into account other factors, including whether the applicant had contributed to the delay or whether he was such a danger to the community that he should never be allowed out of custody.

[105.344] **Right of access to a court** Anyone who is deprived of his liberty by arrest or detention is entitled to take proceedings before a court, in order for that court to decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.¹ The purpose of this requirement is to assure to persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected. An arrested or detained person is therefore entitled to a review hearing upon the procedural and substantive conditions which are essential for the lawfulness of his deprivation of liberty. This means that such a person will have available to him a remedy allowing a competent court to examine not only compliance with the procedural requirement set out in the relevant law, but also the reasonableness of the suspicion forming the basis of the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention. These conditions are usually met in the practice of courts in relation to the remedy of habeas corpus.² The arrested or detained person is entitled to a court decision as to the lawfulness of his detention 'without delay'.³

The scope of the obligation imposed on a state to enable a person who is arrested or detained to take proceedings in court is not necessarily the same in all circumstances and as regards every category of persons deprived of their liberty. For instance, in the case of a

person suffering from a mental disorder, it is often impossible to determine in advance the period for which detention will prove necessary, and the validity of continued confinement will depend upon the persistence of the disorder. The very nature of such deprivation of liberty requires a review of lawfulness to be available at reasonable intervals.⁴ Accordingly, a person of unsound mind compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, particularly where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court to put in issue the lawfulness of his detention, whether the detention was ordered by a civil or criminal court or by some other authority.⁵

The principles referred to above also apply to the detention of a recidivist or habitual offender who is placed at the government's disposal;⁶ to a person who, having been given an indeterminate life sentence, is released on licence and later recalled in prison;⁷ and to the detention for security reasons of a person with an underdeveloped or permanently impaired mental capacity.⁸ They are also applicable to a person on whom a discretionary life sentence is imposed. Such a sentence comprises a punitive element or 'tariff' (a period of detention considered necessary to meet the requirements of retribution and deterrence) and a security element (a measure developed to deal with mentally unstable and dangerous offenders). In such a case the factors of mental instability and dangerousness are susceptible to change over the passage of time and new issues of lawfulness may thus arise in the course of detention. It follows that at this phase in the execution of a sentence, a person is entitled to take proceedings to have the lawfulness of his continued detention decided by a court at reasonable intervals and to have the lawfulness of any re-detention determined by a court.⁹

A court review of the lawfulness of detention must include the possibility of ordering release; it is not limited to mere compliance of the detention with domestic law. What is decisive for the purposes of article 9(4) of the International Covenant on Civil and Political Rights is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release 'if the detention is not lawful', article 9(4) requires that the court be empowered to order release if the detention is incompatible with the requirements in article 9(1) or in other provisions of the International Covenant on Civil and Political Rights.¹⁰

A court must be distinguished from a tribunal which is essentially advisory in nature.¹¹ In order to constitute a court, an authority must

be independent of the executive and of the parties to the case, and also provide the fundamental guarantees of judicial procedure.¹² It is essential that the person concerned be present at an oral hearing, where he has the opportunity to be heard either in person or through a lawyer, and the possibility of calling and questioning witnesses.¹³ Also required is the benefit of an adversarial procedure.¹⁴ Where the procedure fails to ensure equality of arms, it is not truly adversarial.¹⁵

- 1 Hong Kong Bill of Rights Ordinance (Cap 383) s 8, art 5(4); cf the International Covenant on Civil and Political Rights art 9(4). As to the International Covenant on Civil and Political Rights see [105.218]; as to its application in Hong Kong see [105.278]. See also [105.325]. As to the Hong Kong Bill of Rights see [105.257].
As to the right to liberty and security of person see also [105.342], [105.348], [105.345]–[105.350].
- 2 *Brogan v United Kingdom* (1988) 11 EHRR 117.
- 3 *Toivies v Finland* Communication No 291/1988, Human Rights Committee (HRC) 1990 Report, Annex IX.K. A delay of seven days violates International Covenant on Civil and Political Rights art 9(4). As to the HRC see [105.220].
- 4 *Winterwerp v Netherlands* (1979) 2 EHRR 387.
- 5 *X v United Kingdom* (1981) 4 EHRR 188.
- 6 *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443.
- 7 *Weeks v United Kingdom* (1987) 10 EHRR 293.
- 8 *E v Norway* European Court, 29 August 1990.
- 9 *Thynne, Wilson and Gunnell v United Kingdom* (1990) 13 EHRR 666. The same principles apply to a mandatory sentence of detention 'during Her Majesty's pleasure' imposed in the United Kingdom on a person under the age of 18 convicted of murder which has the effect of rendering such person 'liable to be detained in such place under such conditions as the Secretary of State may direct'. The detention following the expiry of the tariff is comparable to a discretionary life sentence: *Singh v United Kingdom* European Court, 21 February 1996.
- 10 *A v Australia* Communication No 560/1993, 3 April 1997. This conclusion is supported by International Covenant on Civil and Political Rights art 9(5) which governs the granting of compensation for detention that is 'unlawful' either under the terms of domestic law or within the meaning of the Covenant. See also *Weeks v United Kingdom* (1987) 10 EHRR 292.
- 11 *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443; *Weeks v United Kingdom* (1987) 10 EHRR 293; *Bouamar v Belgium* (1987) 11 EHRR 1; *Singh v United Kingdom* European Court, 21 February 1996.
- 12 *De Wilde, Ooms and Versyp v Belgium* (1970) 1 EHRR 373.
- 13 *Singh v United Kingdom* European Court, 21 February 1996.

- 14 *Sanchez-Reisse v Switzerland* (1986) 9 EHRR 71.
- 15 *Lamy v Belgium* (1989) 15 EHRR 529. See also *Torres v Finland* Communication No 291.1988, HRC 1990 Report, Annex IX.K.

[105.345] Right not to be imprisoned for breach of contract No one may be imprisoned merely on the ground of inability to fulfill a contractual obligation.¹

- 1 Hong Kong Bill of Rights Ordinance (Cap 383) s 8, art 7; cf the International Covenant on Civil and Political Rights art 11. As to the International Covenant on Civil and Political Rights see [105.218]; as to its application in Hong Kong see [105.278]. See also [105.325]. As to the Hong Kong Bill of Rights see [105.257].

As to the right to liberty and security of person see also [105.342], [105.347], [105.349]–[105.350]. As to the law of contract in general see [115] CONTRACT (2015 Reissue).

[105.346] Right to compensation Anyone who has been the victim of unlawful arrest or detention has an enforceable right to compensation.¹

- 1 Hong Kong Bill of Rights Ordinance (Cap 383) s 8, art 5(5); cf the International Covenant on Civil and Political Rights art 9(5). As to the International Covenant on Civil and Political Rights see [105.218]; as to its application in Hong Kong see [105.278]. See also [105.325]. As to the Hong Kong Bill of Rights see [105.257].

As to the right to liberty and security of person see also [105.342]–[105.348], [105.350].

[105.347] Preventive detention If so-called preventive detention is used, for reasons of public security, it must not be arbitrary, and must be based on grounds and procedures established by law. Information of the reasons must be given, and court control of the detention must be available as well as compensation¹ in the case of a breach. In addition, if criminal charges are brought in such cases, the full protection of article 9(2)² and (3)³ of the International Covenant on Civil and Political Rights, as well as article 14,⁴ must also be granted.⁵

1 As to the right to compensation see [105.349].

2 See [105.340] (right to be informed of reasons for arrest).

3 See [105.341] (right to be brought before a judge).

- 4 See [105.359] (right to a fair trial); [105.360] (right to equality before courts); [105.366] (exceptions to a public hearing); [105.370] (judgment to be made public); [105.373] (presumption of innocence); [105.375] (right to be informed of the nature and cause of the charge); [105.376] (right to adequate time and facilities to prepare his defence and to communicate with counsel of his own choosing); [105.377] (right to be tried without undue delay); [105.378] (right to be present at trial); [105.379] (right to defend himself); [105.380] (right to legal aid); [105.381] (right to examine witnesses); [105.383] (right to an interpreter); [105.384] (protection against self-incrimination); [105.386] (right of juveniles to special procedures); and [105.387] (right of appeal).

- 5 Human Rights Committee (HRC) General Comment No 8 (16th session, 1982). See also *Kalenga v Zambia* Communication No 326/1988, 27 July 1993. As to the HRC see [105.220].

As to the right to liberty and security of person see also [105.339]–[105.347].

(6) RIGHTS OF PERSONS DEPRIVED OF THEIR LIBERTY

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[105.348] Right to be treated with humanity All persons deprived of liberty must be treated humanely and with respect for the inherent dignity of the human person.¹ This right applies to any one deprived of liberty under the laws and authority of the state who is held in a prison, a hospital (particularly a psychiatric hospital), a detention camp or correctional institution, or elsewhere. Article 10(1) of the International Covenant on Civil and Political Rights imposes on a state a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the International Covenant on Civil and Political Rights. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but also neither may they be subjected to any hardship or constraint other than that resulting from the deprivation

of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the International Covenant on Civil and Political Rights, subject to the restrictions that are unavoidable in a closed environment. Treating all persons deprived of liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, cannot be dependent on the material resources available in the state. This rule must be applied without any distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²

While the Standard Minimum Rules for the Treatment of Prisoners 1955 are not referred to in article 10(1) of the International Covenant on Civil and Political Rights, they are intended to be taken into account in its application, with nothing in article 10 prejudicing the application of the Rules.³ Among the requirements in these Rules are minimum floor space and cubic content of air for each prisoner; adequate sanitary facilities; clothing which may not be in any manner degrading or humiliating; provision of a separate bed; and provision of food of nutritional value adequate for health and strength. These are minimum requirements which must always be observed, even if budgetary considerations may make compliance with these obligations difficult.⁴ However, the Court has held that these Rules are aspirational and have to be applied in the light of local conditions, and that means that these Rules have to be interpreted and applied with an eye on the practical resource constraints.⁵

The Human Rights Committee has held that article 10(1) of the International Covenant on Civil and Political Rights is violated when a prisoner is held incommunicado for any length of time;⁶ is beaten by prison warders;⁷ shackled and blind-folded;⁸ refused medical attention;⁹ subjected to ridicule;¹⁰ denied reading facilities and not allowed to listen to the radio;¹¹ confined to his cell for an inordinately long period each day;¹² or is confined in a special cell together with a mentally disturbed prisoner;¹³ when electric lights are kept continuously on in a prisoner's cell;¹⁴ or if prison cells are overcrowded and unhygienic.¹⁵

While prisoners are subjected to custodial discipline, the mere fact of imprisonment does not mean that they are deprived of all constitutional rights, save that the rights or their exercise or enjoyment is necessarily inconsistent with the fact of imprisonment, such as a right to freedom of movement.¹⁶ Any restriction of their

constitutional rights have to be authorised by law and be proportionate.¹⁷ The restrictions imposed by the Prison Rules¹⁸ on the receipt by prisoners of material from outside prison, with the result that the removal of the racing supplements which contained the most up-to-date information concerning horse racing was a lawful and proportionate response to the problem of illegal gambling in prison and hence did not violate the prisoners' rights to receive information.¹⁹ On the other hand, it was a disproportionate response to deny prisoners of their right to vote in general elections.²⁰

1 Hong Kong Bill of Rights Ordinance (Cap 383) s 8, art 6(1); cf the International Covenant on Civil and Political Rights art 10(1). As to the International Covenant on Civil and Political Rights see [105.218]; as to its application in Hong Kong see [105.278]. See also [105.325]. As to the Hong Kong Bill of Rights see [105.257]. As to the rights of persons deprived of their liberty see also [105.339]–[105.347].

2 Human Rights Committee (HRC) General Comment No 21 (44th session, 1992). As to the HRC see [105.220].

See also the relevant United Nations standards applicable to the treatment of prisoners ie the Standard Minimum Rules for the Treatment of Prisoners (1957); the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988); the Code of Conduct for Law Enforcement Officials (1978); and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982).

3 United Nations document A/4045 s 84.

4 *Mukong v Cameroon* Communication No 458/1991, 21 July 1994.

5 *Chieng A Lac v Director of Immigration* [1997] HKLRD 271 at 295D-E, per Keith J.

6 *Caldas v Uruguay* Communication No 43/1979, HRC 1983 Report, Annex VIII; *Espinoza de Polay v Peru* Communication No 577/1994, 15 March 1996.

7 *Solorzano v Venezuela* Communication No 156/1983, HRC 1986 Report, Annex VIII.C; *Walter v Jamaica* Communication No 639/1995, 28 July 1997.

8 *Jijon v Ecuador* Communication No 277/1988, HRC 1992 Report, Annex IX.I.

9 *Mpandanjila v Zaire* Communication No 138/1983, HRC 1986 Report, Annex VIII.A; *Lewis v Jamaica* Communication No 527/1993, 18 July 1996.

10 *Francis v Jamaica* Communication No 606/1994, 25 July 1995.

11 *Nieto v Uruguay* Communication No 92/1981, HRC 1983 Report, Annex XX.

12 *Cabreira v Uruguay* Communication No 105/1981, HRC 1983 Report, Annex XXI.

- 13 *Wolf v Panama* Communication No 289/1988, HRC 1992 Report, Annex IX.K
- 14 *Lluberias v Uruguay* Communication No 123/1982, HRC 1984 Report, Annex XII.
- 15 *Massiotti v Uruguay* Communication No R.6/25, HRC 1982 Report, Annex XVIII; *Perkins v Jamaica* Communication No 733/1997, 30 July 1998.
- 16 *Raymond v Honey* [1983] 1 AC 1 at 10, per Lord Wilberforce; *R v Secretary of State for Home Affairs, ex parte Tarrant* [1985] QB 251 at 272; *Patsalis v State of New South Wales* [2012] NSWCA 307, para 52; *Taunoa v Attorney General* [2007] NZSC 70, para 97; *R v Hill* [1995] BCJ No 1530; *Chan Kin Sum v Secretary for Justice* [2009] 2 HKLRD 166, para 93.
- 17 *Re the Hong Kong Bill of Rights Ordinance* (Cap 383) s 9.
- 18 *Re the Prison Rules* (Cap 234 sub leg A) r 56.
- 19 *Re under the Hong Kong Bill of Rights Ordinance* s 8, art 16(2). *Chim Shing Chung v Commissioner of Correctional Services* (1996) 6 HKPLR 313, CA, per Litton V-P. Illegal gambling in prisons was an acknowledged problem and the policy of removing the racing supplements from newspapers was an attempt to alleviate that problem. It could not be said that, in ordering the removal of the supplements, the commissioner of prisons had acted unreasonably or irrationally. See also Liu J: 'When balancing the competing interests of a prisoner's access to racing supplements against the commissioner's concern in maintaining prison discipline, the court would give preference to the public good over the prisoner's individual rights'. Cf *Chim Shing Chung v Commissioner of Correctional Services* (1995) 5 HKPLR 570, where Sears J held that the decision of the commissioner was irrational for three reasons: (1) there was no causal connection between the provision of racing information and the illegal gambling taking place in prisons; (2) only part of the racing information was removed; the racing supplement is not the only part of the newspaper containing racing information; and (3) the censorship was not effective.
- 20 *Chan Kin Sum v Secretary for Justice* [2009] 2 HKLRD 166.

[105.349] **Rights of unconvicted persons** Accused persons must, save in exceptional circumstances, be segregated from convicted persons and are subject to separate treatment appropriate to their status as unconvicted persons who enjoy the right to the presumption of innocence.¹ Accused juvenile persons must be separated from adults and brought as speedily as possible for adjudication.² Where at any time there is a lack of suitable prison facilities or where the mixing of adults and juveniles is mutually beneficial, juveniles who are detained in the Hong Kong Special Administrative Region are not required to be accommodated separately from adults.³

1 Hong Kong Bill of Rights Ordinance (Cap 383) s 8, art 6(2)(a); cf the International Covenant on Civil and Political Rights art 10(2)(a). Such

segregation is required in order to emphasise their status as unconvicted persons who at the same time enjoy the right to be presumed innocent as stated in International Covenant on Civil and Political Rights art 14(2): Human Rights Committee (HRC) General Comment No 21 (44th session, 1992).

As to the International Covenant on Civil and Political Rights see [105.218]; as to its application in Hong Kong see [105.278]. See also [105.325]. As to the Hong Kong Bill of Rights see [105.257]. As to the HRC see [105.220]. In relation to voting rights, see *Chan Kin Sum Simon v Secretary for Justice* [2009] HKCU 360.

As to the rights of persons deprived of their liberty see also [105.339]–[105.347].

- 2 Hong Kong Bill of Rights Ordinance s 8, art 6(2)(b); cf International Covenant on Civil and Political Rights art 10(2)(c).
- 3 Hong Kong Bill of Rights Ordinance s 10.

[105.350] **Treatment of convicted persons** The penitentiary system must comprise treatment of prisoners the essential aim of which must be their reformation and social rehabilitation.¹ No penitentiary system may be retributory only.²

- 1 Hong Kong Bill of Rights Ordinance (Cap 383) s 8, art 6(3), cf the International Covenant on Civil and Political Rights art 10(3). As to the International Covenant on Civil and Political Rights see [105.218]; as to its application in Hong Kong see [105.278]. See also [105.325]. As to the Hong Kong Bill of Rights see [105.257].

As to the rights of persons deprived of their liberty see also [105.339]–[105.347].

- 2 Human Rights Committee (HRC) General Comment No 21 (44th session, 1992). As to the HRC see [105.220]. See also *Regina v Wilmott* [1966] OJ 1031 at para 10: 'Where the sentence is one of imprisonment the protection of society is accomplished in an absolute sense by preventing the offender from repeating his unlawful acts during the term of his imprisonment. But that is not the only purpose of imprisonment for the sentence is designed to deter the offender from committing other offences on his release and also to deter others from committing the same or different offences. Imprisonment also provides an opportunity for the reform and rehabilitation of the offender.'

[105.351] **Treatment of convicted juveniles** Juvenile offenders must be segregated from adults and be accorded treatment appropriate to their age and legal status.¹ While article 10(3) of the International Covenant on Civil and Political Rights does not indicate any limits of juvenile age, this is to be determined in light of relevant social, cultural and other conditions. The Human Rights Committee has suggested that all persons under the age of 18 be treated as juveniles, at least in matters relating to criminal justice.² Where at any

time there is a lack of suitable prison facilities or where the mixing of adults and juveniles is mutually beneficial, juveniles who are detained in the Hong Kong Special Administrative Region are not required to be accommodated separately from adults.³

1 Hong Kong Bill of Rights Ordinance (Cap 383) s 8, art 6(3); cf the International Covenant on Civil and Political Rights art 10(3). Treatment appropriate to their age and legal status include shorter working hours and contact with relatives: Human Rights Committee (HRC) General Comment No 21 (44th session, 1992).

As to the International Covenant on Civil and Political Rights see [105.218]; as to its application in Hong Kong see [105.278]. See also [105.325]. As to the Hong Kong Bill of Rights see [105.257]. As to the HRC see [105.220].

2 HRC General Comment No 21 (44th session, 1992).

3 Hong Kong Bill of Rights Ordinance s 10. As to the rights of persons deprived of their liberty, including the rights of unconvicted persons see also [105.339]–[105.347].

(7) RIGHT TO FREEDOM OF MOVEMENT

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[105.352] **Right to freedom of movement** This right encompasses four distinct rights: (1) the right of everyone lawfully in the Hong Kong Special Administrative Region (HKSAR) to liberty of movement within the HKSAR; (2) the right of everyone lawfully in the HKSAR to choose a residence within the HKSAR; (3) the right of everyone in the HKSAR to leave the HKSAR,¹ and (4) the right of everyone who has the right of abode in the HKSAR to enter the HKSAR.² The permissible limitations which may be imposed on these rights must not nullify the principle of liberty of movement, and are governed by

the requirement of necessity provided for in article 12(3) of the International Covenant on Civil and Political Rights, and by the need for consistency with the other rights recognised in the International Covenant on Civil and Political Rights. These rights are protected not only from public but also from private interference.³

1 In *Yao Man Fai George v Director Of Social Welfare* [2012] 4 HKC 180, the application for judicial review challenged the constitutionality of the requirement that, subject to a grace period of 56 days, an adult applicant for comprehensive social security assistance ('CSSA') must have resided in Hong Kong continuously for at least one year immediately before the date of application ('continuous residence requirement'). The applicant was a Hong Kong permanent resident and holder of a Hong Kong permanent identity card. He was born in Hong Kong but worked for about 2 years in the mainland. The applicant applied for CSSA on the ground of unemployment. He was told that he was not eligible for CSSA as he failed to satisfy the 1-year continuous residence requirement and that he was not considered to be in immediate genuine hardship for the purposes of invoking the discretion of the Director of Social Welfare to waive the 1-year continuous residence requirement. The issue that the court had to consider was whether any genuine need was shown for such differential treatment so as to render the stated aim legitimate for the purposes of the justification test or whether the freedom to travel had been curtailed unlawfully. The Court of Appeal departed from the finding of the first-instance judge that there was not established a legitimate aim for the 1-year continuous residence requirement, and found that the problem with the stated justification is not for the aim but for the measure adopted to achieve the aim: *Kong Yunming v Director of Social Welfare* [2012] 4 HKC 180 (consolidated with the appeal of the Director of Social Welfare in *Yao Man Fai George v Director of Social Welfare*, CACV 153/2010), para 161-169.

2 Hong Kong Bill of Rights Ordinance (Cap 383) s 8, art 8; cf the International Covenant on Civil and Political Rights art 12. See Basic Law art 31. See also [105.358].

As to the International Covenant on Civil and Political Rights see [105.218]; as to its application in Hong Kong see [105.278]. See also [105.325]. As to the Hong Kong Bill of Rights see [105.257]. As to the Basic Law see [105.264]; and see also [105] CONSTITUTIONAL LAW (2015 Reissue).

3 Human Rights Committee (HRC) General Comment No 27 (67th session, 1999). As to the HRC see [105.220]. As to the restrictions on the exercise of the right to freedom of movement see [105.353]. See also [105.354]–[105.358]. See also *Gurung Kesh Bahadur v Director of Immigration* [2001] 3 HKLRD 32, CA (where the court held that restrictions which contravene the right of residents to travel may be unlawful).

[105.353] **Restrictions on the exercise of the right to freedom of movement** Article 12(3) of the International Covenant on Civil and Political Rights provides for the exceptional circumstances in which the rights under article 12(1) and (2) may be restricted. The law itself

has to establish the conditions under which the rights may be limited.¹ Restrictions which are not provided for in the law or are not in conformity with the requirements of article 12(3) of the International Covenant on Civil and Political Rights would violate the rights guaranteed by article 12(1) and (2).²

In adopting laws providing for restrictions permitted by article 12(3), the legislature must always be guided by the principle that the restrictions must not impair the essence of the right. The relation between right and restrictions, between norm and exception, must not be reversed. The laws authorising the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.³

Article 12(3) clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.⁴ The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. The state must ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.⁵

The application of the restrictions permissible under article 12(3) needs to be consistent with the other rights guaranteed in the International Covenant on Civil and Political Rights and with the fundamental principles of equality and non-discrimination. Thus, it would be a clear violation of the International Covenant on Civil and Political Rights if the rights enshrined in article 12(1) and (2) were restricted by making distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In particular, measures preventing women from moving freely or from leaving the country by requiring them to have the consent or the escort of a male person constitutes a violation of this right.⁶

1 As to the right to freedom of movement see [105.352]. See also [105.354]–[105.358].

2 Human Rights Committee (HRC) General Comment No 27 (67th session, 1999). As to the HRC see [105.220].

3 HRC General Comment No 27 (67th session, 1999).

4 In *Official Receiver v Chan Wing Hing* (2006) 9 HKCFAR 545, the Court of Final Appeal by a majority of four to one held that a statutory provision which required a bankrupt to notify the trustee of his departure from and return to Hong Kong was unconstitutional as being contrary to the 'right to travel'. See also *Official Receiver v Chang Hyun Chi & Anor* [2015] 1 HKLRD 512.

5 HRC General Comment No 27 (67th session, 1999). The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality. These conditions would not be met, eg, if an individual were prevented from leaving a country merely on the ground that he or she is the holder of 'state secrets', or if an individual were prevented from travelling internally without a specific permit. On the other hand, the conditions could be met by restrictions on access to military zones on national security grounds, or limitations on the freedom to settle in areas inhabited by indigenous or minorities communities.

6 HRC General Comment No 27 (67th session, 1999).

[105.354] **Liberty of movement within Hong Kong** Everyone lawfully within the Hong Kong Special Administrative Region (HKSAR) has the right to liberty of movement.¹ This right is not subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the Hong Kong Bill of Rights.² As regards persons not having the right to enter and remain in the HKSAR, any immigration legislation governing stay in the HKSAR, or the application of any such legislation, is unaffected.³

In principle, citizens of a state are always lawfully within the territory of that state. The question whether an alien is 'lawfully' within the territory of a state is a matter governed by domestic law, which may subject the entry of an alien to the territory of a state to restrictions, provided they are in compliance with the state's international obligations.⁴ An alien who entered the state illegally, but whose status has been regularised, must be considered to be lawfully within the territory for the purposes of article 12 of the International Covenant on Civil and Political Rights.⁵ Once a person is lawfully within a state, any restrictions on his or her rights guaranteed by article 13(1) and (2) of the International Covenant on Civil and Political Rights, as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for by article 12(3) of the International Covenant on Civil and Political Rights.⁶