

referring to the Joint Declaration in interpreting the Basic Law because the Joint Declaration is part of the history leading to the enactment of the Basic Law.<sup>108</sup> Chief Justice Li said in *Ng Ka Ling v Director of Immigration* that the purpose of the Basic Law is to give Hong Kong a high degree of autonomy in accordance with China's basic policies as set out and elaborated in the Joint Declaration, and that the Joint Declaration was a relevant extrinsic aid in interpreting the Basic Law.<sup>109</sup>

75. In *Ng Ka Ling v Director of Immigration*, the Court of Final Appeal was dealing with the question of right of abode in Hong Kong and did not find the Joint Declaration useful in ascertaining the meaning of Articles 24 and 22(4) of the Basic Law, which relate to the right of abode of persons of Chinese nationality born outside Hong Kong.<sup>110</sup>

76. The Basic Law specifically refers to the applicability of certain treaties in Hong Kong. Article 39 provides that: 'the provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region'. The second paragraph of that Article states that 'the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.'

77. The relevance of the international conventions referred to in the Basic Law, particularly the ICCPR, has been discussed in several cases. In *HKSAR v Pun Ganga Chandra*,<sup>111</sup> it was unsuccessfully argued that the common law requirement as to intention for the offence of murder<sup>112</sup> was arbitrary and unreasonable, and therefore was inconsistent with Article 5 of the Bill of Rights Ordinance (which

108. It has been said that the Joint Declaration and the Basic Law carry the overwhelming theme of a seamless transition: *HKSAR v Ma Wai Kwan, David* [1997] HKLRD 761, (CA), at 790, per Nazareth VP.

109. *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315, 340; (1999) 2 HKCFAR 4, (CFA) 28H. See also *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, (CFA), 224, where Li CJ said: 'Extrinsic materials which throw light on the context or purpose of the Basic Law, or its particular provisions, may generally be used as an aid to the interpretation of the Basic Law. Extrinsic materials which can be considered include the Joint Declaration and the Explanations on the Basic Law (draft) given at the NPC on 28 March 1990 shortly before its adoption on 4 April 1990. The state of domestic legislation at that time and the time of the Joint Declaration will often also serve as an aid to the interpretation of the Basic Law. Because the context and purpose of the Basic Law were established at the time of its enactment in 1990, the extrinsic materials relevant to its interpretation are, generally speaking, pre-enactment materials, that is, materials brought into existence prior to or contemporaneous with the enactment of the Basic Law, although it only came into effect on 1 July 1997'.

110. *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, (CFA), 35G.

111. *HKSAR v Pun Ganga Chandra* [2001] 2 HKLRD 151, (CA).

112. The mens rea of murder is that at the time he killed the deceased, the defendant intended either to kill the deceased or to cause him at least really serious bodily injury (the 'grievous bodily harm' rule).

reproduces Articles 9 of the ICCPR) Article 28 of the Basic Law.<sup>113</sup> In *HKSAR v Coady*,<sup>114</sup> it was held that the grievous bodily harm rule<sup>115</sup> did not offend Article 5(1) of the Bill of Rights Ordinance. The Court held that the Common Law requirement was not inconsistent with the relevant provision in the ICCPR. In *HKSAR v Ng Kung Siu and Another*, the Court of Final Appeal upheld the validity of legislation which criminalized desecration of the national flag, as a reasonable restriction of the freedom of expression. The legislation was held to be human rights compliant.<sup>116</sup>

78. The relevance and applicability of international treaties in Hong Kong was explained by Cheung J in *Mok Chi Hung v Director of Immigration*.<sup>117</sup> Cheung stated the following propositions:

- (1) An international covenant or treaty, unless it is incorporated into domestic legislation, is not part of the domestic law.<sup>118</sup> The Convention on the Rights of the Child, which the applicant relied upon in the instant case, for instance, was not incorporated into Hong Kong law.
- (2) Rectification of an international covenant gives rise to a legitimate expectation, absence statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the international covenants.<sup>119</sup>

113. This view was confirmed by the Court of Final Appeal in *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415, (CFA), [49]: 'A person convicted of murder under the rule is one who acts with the intention of causing someone really serious bodily harm and whose actions in the event cause another's death. A person who takes another's life in such circumstances brings to realisation the risk which is necessarily inherent in his conduct. In our view, there is nothing capricious or unreasonable in classing such conduct as murder as a matter of legal policy. A person may not subjectively intend or even foresee that he will cause death. He may desire to limit the consequences of his actions to the infliction of grievous bodily injury. However, as a matter of common sense it is impossible to predict that the consequences of an intentional infliction of really serious bodily harm will necessarily be successfully limited and will not prove to be life-threatening.'

114. *HKSAR v Coady* [2000] 2 HKLRD 195, (CA).

115. Namely that a person may be found guilty of murder if his intention was to cause serious bodily injury to the deceased, even though he did not intend to kill the deceased.

116. *HKSAR v Ng Kung Siu and Another* (1999) 2 HKCFAR 442, (CFA). The Court of Final Appeal has in *HKSAR v Koo Sze Yiu*, (2014) 17 HKCFAR 811, (CFA), reaffirmed the correctness of the ruling in *Ng Kung Siu* case. Chief Justice Ma observed in *Koo Sze Yiu* case that 'Article 16 of the Hong Kong Bill of Rights ... brings into domestic legislation the provisions of Art. 19 of the International Covenant on Civil and Political Rights.' The following are some cases where reference is made to the effect of ICCPR in Hong Kong: *Hong Kong Television Network Ltd v Chief Executive in Council* [2016] HKEC 785, (CA), [39]; *Pagtama Victorina Alegre v Director of Immigration* [2016] HKEC 85, (CFI), [58]-[60]; *HKSAR v Md Enran Hossain* (2016) 19 HKCFAR 679, (CFA), [21]; *HKSAR v Fong Kwok Shan Christine* (2017) 20 HKCFAR 425, (CFA); *Comilang Milagros Tescon v Director of Immigration* (2019) 22 HKCFAR 59, (CFA), [14] and *Kwok Wing Hang v Chief Executive in Council* (2020) 23 HKCFAR 518, (CFA), [68]-[70].

117. *Mok Chi Hung v Director of Immigration* [2001] 1 HKC 281, (CFI) 289-291.

118. *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, (HL).

119. Following two Australian cases, namely: *Minister of State for Immigration and Multicultural Affairs v Teoh* (1994-1995) 183 CLR 273, (HC), and *Tien v Minister for Immigration and Multicultural Affairs* (1998) 159 ALR 405, (Federal Court).

## §2. THE MAIN FEATURES OF THE BASIC LAW

84. The Basic Law provides for the establishment of the three principal branches of the Hong Kong Government – the legislature, the executive and the judiciary – and their interrelationships. It also sets out the relationship between the Chinese Central Government and the Hong Kong SAR. As will be more fully described elsewhere, the Basic Law demarcates matters that are within the autonomy of Hong Kong SAR and matters that are within the competence of the Central Authorities. The Basic Law regulates the manner in which Chinese national laws might become applicable in Hong Kong SAR and provides for intervention in Hong Kong affairs by the Central Authorities in certain specified circumstances. Although this outline of the Basic Law has some flavour of a federal constitution, the relationship between the Chinese Central Government and the Hong Kong SAR cannot fit into the typical classification of a federal constitution. The Basic Law creates a unique constitutional arrangement that guarantees the continuation of Hong Kong's system of government and way of life, while at the same time Hong Kong remains an integral part of China.<sup>122</sup>

85. Chapter I of the Basic Law, entitled 'General Principles', sets out the basic policies of the Chinese Government regarding Hong Kong. These principles are:

- (1) Hong Kong is an inalienable part of China (Article 1) ;
- (2) the Chinese Central Government authorizes Hong Kong to exercise a high degree of autonomy (Article 2);
- (3) Hong Kong's executive authorities and the legislature must consist of permanent residents of Hong Kong, thereby ensuring that Hong Kong is governed by Hong Kong people (Article 3) ;
- (4) the rights and freedoms of people in Hong Kong, including right of private property, will be protected (Articles 4 and 6);
- (5) the socialist policies will not be practised in Hong Kong and Hong Kong's capitalist system and way of life will remain unchanged for fifty years from 1997 (Article 5) ;
- (6) while land in Hong Kong is State property, their management will be exclusively by the Hong Kong Government (Article 7);
- (7) laws of Hong Kong as previously in force will continue to be maintained, subject to being consistent with the Basic Law Article 8);
- (8) English and Chinese will be the official languages (Article 9);
- (9) Hong Kong may have a regional flag in addition to the use of the national flag and the national anthem of China (Article 10).

86. Chapter II of the Basic Law, entitled 'Relationship Between the Central authorities and the Hong Kong Special Administrative Region', deals with the relationship between the Central Authorities of the People's Republic of China and Hong Kong SAR. The Basic Law reserves two important powers to the Central

122. For the relationship between the central and regional authorities, see Part III, Ch. 1.

Authorities: The Central People's Government is responsible for foreign affairs relating to the Hong Kong SAR (Article 13) and for the defence of the Hong Kong SAR (Article 14). However, the Central People's Government authorizes the Hong Kong SAR to conduct relevant external affairs on its own in accordance with the Basic Law.<sup>123</sup> Similarly, while the Central Government is responsible for the defence of Hong Kong, Hong Kong Government is responsible for the maintenance of public order in Hong Kong (Article 14). The military forces stationed by the Central Government in Hong Kong SAR shall not interfere in the local affairs. The Hong Kong Government may, when necessary, ask the Central People's Government for assistance from the garrison in the maintenance of public order and in disaster relief.<sup>124</sup>

Hong Kong has legislative power, subject to the limitation that the NPCSC may invalidate any Hong Kong law on the ground that it is not in conformity with the provisions of the Basic Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Hong Kong SAR.<sup>125</sup>

The only national laws that apply in Hong Kong are those listed in Annex III of the Basic Law. The NPCSC may add to delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong SAR and the Government of the Hong Kong SAR.<sup>126</sup>

Article 22 of the Basic Law provides that no province, autonomous region, or municipality directly under the Chinese Central Government may interfere in the affairs which the Hong Kong SAR administers on its own in accordance with the Basic Law. It also provides that all offices set up in the Hong Kong SAR by departments of the Central Government, or by provinces, autonomous regions, or municipalities directly under the Central Government, and the personnel of these offices shall abide by the laws of the Hong Kong SAR.

87. Chapter III of the Basic Law, entitled 'Fundamental Rights and Duties of Residents', deals with Fundamental Rights and Duties. The Basic Law protects not only civil and political rights but also cultural and social rights. Article 39 provides a very useful safeguard:

The provisions of the ICCPR, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through laws of the Hong Kong Special Administrative Region.

123. Basic Law, Art. 13.

124. *Ibid.*, Art. 14.

125. *Ibid.*, Art. 17. This invalidation procedure comes into operation when a law is reported to the Standing Committee (all laws passed by the Hong Kong Special Administrative Region must be reported to the Standing Committee). Where the Standing Committee decides that any law that has been so submitted infringes Art. 17, it may return it to the Hong Kong Special Administrative Region. It has no power to amend the law to make it Basic Law compliant. If the law is returned to Hong Kong Special Administrative Region, it 'shall immediately be invalidated'. The invalidation does not have retrospective effect, unless otherwise provided for in the laws of Hong Kong.

126. *Ibid.*, Art. 18.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

88. Chapter IV, entitled 'Political Structure', deals with Hong Kong's governmental structure. Section 1 deals with the Chief Executive, and Section 2 deals with the Executive Authorities. Section 3 is entitled 'The Legislature' and Section 4, 'The Judiciary'. Section 5 deals with district organizations and Section 6 deals with public servants. These provisions are discussed in appropriate places in this monograph.

89. Chapter V, entitled 'Economy', has four sections: Section 1 'Public Finance, Monetary Affairs, Trade, Industry and Commerce', Section 2 'Land Leases', Section 3 'Shipping', and Section 4 'Civil Aviation'. Chapter VI deals with education, science, culture, sports, religion, labour and social services. Chapter VII deals with external affairs.

The purpose of these chapters is to enumerate various powers that are within the autonomy of Hong Kong and to highlight how these autonomous rights will have to be accommodated within the equally important principle that China exercises sovereign rights over Hong Kong.

90. Chapter VIII, which deals with the interpretation and amendment of the Basic Law, contains provisions on the relationship between central and regional authorities. Articles 158 and 159, which make up this chapter, will be fully discussed later in this monograph.

91. The provisions of the Basic Law are supplemented by three annexes and a number of decisions. The three annexes deal with the procedures for setting up the Legislative Council, the selection of the Chief Executive and the application of national laws in Hong Kong. Important decisions that relate to the Basic Law may be found published along with the text of the Basic Law as Instruments. These deal with matters preparatory to the establishment of the Basic Law, amendments to the three annexes, explanations of various decisions taken in relation to Hong Kong and constitutional interpretations rendered by the Standing Committee.<sup>127</sup>

127. The text of the Basic Law and matters relevant to the Basic Law are available at: <https://www.basiclaw.gov.hk/en/basiclaw/index.html>.

## Chapter 3. Legislation and Other Equivalent Legal Norms

92. The most important written source of Hong Kong's constitutional law is the Basic Law, which prevails over any ordinance, subsidiary legislation and unwritten law of Hong Kong. There are other statutes that supplement the Basic Law, such as the Hong Kong Bill of Rights (Cap. 383) and the Legislative Council Ordinance (Cap. 542) and thereby constitute sources of constitutional law. Before 1 July 1997, Imperial legislation constituted an important source of Hong Kong's constitutional law, because the Imperial Government had the overriding power to legislate for Hong Kong. In contrast, today Chinese national legislation applies in Hong Kong only as provided by the Basic Law.

### §1. CHINESE NATIONAL LAWS

93. National laws of China apply throughout the territory of Mainland China, other than in the two Special Administrative Regions, Hong Kong and Macau. The application of Chinese national laws in Hong Kong is regulated by the Basic Law. Article 18 of the Basic Law (whose counterpart in Macau Basic Law is Article 18), provides two different avenues for them to be extended to Hong Kong. First, China may extend a national law to Hong Kong by including it in Annex III of the Basic Law. Second, China may extend any national law to Hong Kong in an emergency.

94. As regards the first method of extending Chinese national laws to Hong Kong, Article 18 of the Basic Law provides as follows: 'National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to [the Basic Law]. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.' Annex III in its original form listed the following national laws:

- (1) Resolution on the Capital, Calendar, National Anthem and National Flag of the People's Republic of China.
- (2) Resolution on the National Day of the People's Republic of China.
- (3) Order on the National Emblem of the People's Republic of China proclaimed by the Central People's Government.
- (4) Declaration of the Government of the People's Republic of China on the Territorial Sea.
- (5) Nationality Law of the People's Republic of China.
- (6) Regulations of the People's Republic of China concerning diplomatic privileges and immunities.

95. Article 18 of the Basic Law further provides that the NPCSC 'may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to [the Basic Law] shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by [the Basic Law]'.

96. The NPCSC has amended the list of national laws in Annex III (by adding to or deleting from the list) on five occasions, and they are found in the decisions which appear as Instrument 5 (dated 1 July 1997), Instrument 6 (dated 4 November 1998), Instrument 7 (dated 27 October 2005), Instrument 8 (4 November 2017) and Instrument 9 (30 June 2020).

97. On 1 July 1997, the NPCSC added the following national laws to Annex III:

- (a) Law of the People's Republic of China on the National Flag;
- (b) Regulations of the People's Republic of China concerning consular privileges and immunities;
- (c) Law of the People's Republic of China on the National Emblem;
- (d) Law of the People's Republic of China on the Territorial Sea and the Contiguous zone; and
- (e) Law of the People's Republic of China on the garrisoning of the Hong Kong Special Administrative Region.

The NPCSC Decision of 1 July 1997 (Instrument 5) deleted the Order on the National Emblem of the PRC proclaimed by the Central People's Government from the list and replaced that with the national law on the Design of the national emblem, notes of explanation and instructions for use.

98. On 4 November 1998, the NPCSC added another national law to the list, the Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf. See Instrument 6.

99. On 27 October 2005, the NPCSC added the Law of the People's Republic of China on Judicial Immunity from Compulsory Measures Concerning the Property of Foreign Central Banks. See Instrument 7.

100. On 4 November 2017, was added the Law of the People's Republic of China on the National Anthem. See Instrument 8.

101. On 30 June 2020, the NPCSC added the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region. See Instrument 9.

102. National laws that are listed in Annex III do not apply automatically in Hong Kong. They have to be brought into effect by the Hong Kong Government by way of proclamation or legislation (Article 18). The national laws originally listed in Annex III, together with some national laws added in 1997, were brought into effect in Hong Kong by way of Proclamations published in 1997.<sup>128</sup> The national laws that were added subsequently were also similarly brought into effect by way

128. See Legal Notices 379 and 386 of 1997.

of Proclamation.<sup>129</sup> Promulgation simply requires the Hong Kong Government to state that the promulgated national law will apply in Hong Kong, in the form in which it was enacted in China.

103. If it is necessary to adapt a Chinese national law, which has been made applicable in Hong Kong, to Hong Kong's peculiar circumstances, it might be necessary to pass legislation for that purpose. The enactment of the National Flag and National Emblem Ordinance (No. 116 of 1997) and the Regional Flag and Regional Emblem Ordinance (No. 117 of 1997) provides an example.<sup>130</sup> When, on 1 July 1997, the Chinese authorities added the People's Republic of China Law on the National Flag to Annex III, the local legislature passed the National Flag and National Emblem Ordinance and the Regional Flag and Regional Emblem Ordinance because there was a need to adapt the national law for application in Hong Kong. For instance, these ordinances deal with the power of the Chief Executive to stipulate the organizations that must display or use the national flag and the other places at which, the occasions on which, the manner in which, and the conditions under which, the national flag must be displayed or used.<sup>131</sup>

104. Even where a national law of China has been brought into effect through a Proclamation, there may be a need to pass supplementary legislation in Hong Kong. A good illustration is provided by the Chinese Nationality (Miscellaneous Provisions) Ordinance (Cap. 540), which was passed in 1997 to provide for matters relating to the operation in Hong Kong of the Nationality Law of the People's Republic of China. It deals with the manner in which applications for Chinese nationality should be made and dealt with. The promulgation of the National Security Law of 2020 provides another example. The promulgation of the National Security Law on 30 June 2020 was followed by the bringing into force of the Implementation Rules for Article 43 of the National Security Law on Safeguarding National Security in Hong Kong SAR on 7 July 2020.<sup>132</sup>

105. The national laws listed in Annex III include laws relating to the capital, the calendar, the national anthem, the national emblem and the national flag of the

129. See, for instance, Legal Notice of 1998. For promulgation of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region by Gazette on 30 June 2020, see [https://www.news.govhk/eng/2020/07/20200706/20200706\\_204612\\_065.html](https://www.news.govhk/eng/2020/07/20200706/20200706_204612_065.html).

130. These Ordinances have not been given a chapter number and they appear on Hong Kong e-Legislation as Instrument A401 and Instrument A602. For a discussion of these two Ordinances, see *HKSAR v Ng Kung Siu and Another* (1999) 2 HKCFAR 442, (CFA), and *Hong Kong Special Administrative Region v Koo Sze Yiu* (2017) HKCFAR 811, (CFA) (reaffirming *Ng Kung Siu* decision).

131. National Flag and National Emblem Ordinance (Instrument A401), s. 3 and Regional Flag and Regional Emblem Ordinance (Instrument A601), s. 3. Article 7 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, which was added to Annex III of the Basic Law on 30 June 2020, states that Hong Kong shall complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law and 'shall refine relevant laws'.

132. For National Security Law, see r 'Legislation on Security' paragraphs [875]-[897].

People's Republic of China,<sup>133</sup> and laws relating to the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of China. Regulations of the People's Republic of China concerning consular privileges and immunities are an important entry in Annex III. The Law of the People's Republic of China on the Garrisoning of the Hong Kong Special Administrative Region and, most importantly, the 2020 Law on Safeguarding National Security in Hong Kong are national laws that were made especially for Hong Kong, which will be discussed elsewhere in this work.<sup>134</sup>

106. As regards the second method of extending Chinese national laws to Hong Kong, Article 18 provides as follows: 'In the event that the Standing Committee of the National People's Congress decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region.'<sup>135</sup> The Chinese Government has not so far extended any Chinese laws to Hong Kong under this provision.

## §2. HONG KONG LEGISLATION

107. Article 23 of the Basic Law requires the Hong Kong Government to enact laws for the following purposes:

- (1) to prohibit any act of treason, secession, sedition, subversion against the Chinese Central Government or theft of state secrets;
- (2) to prohibit foreign political organizations or bodies from conducting political activities in Hong Kong; and
- (3) to prohibit political organizations or bodies of Hong Kong from establishing ties with foreign political organizations or bodies.

108. In September 2002, the Security Bureau of the Hong Kong Government published a consultation paper on the proposed legislation to implement Article 23. This led to widespread public concern and attracted much international attention.

133. In *HKSAR v Ng Kung Siu* (1999) HKCFAR 442, (CFA), the Court of Final Appeal dealt with an offence under the National Flag and National Emblem Ordinance No 116 of 1997 (Instrument A401), which was enacted to give effect to the People's Republic of China Law on the National Flag.

134. For Garrison Law, see 484–486, below. For National Security Law, see §2, I. The National Security Law, paras 875–897.

135. As regards the rest of China, Art. 67(21) of the Constitution of China provides that the Standing Committee of the National People's Congress may decide on entering a state of emergency nationwide or in particular provinces, autonomous regions or cities directly under the Central Government jurisdiction. Article 89(16) provides that the State Council has the power to decide, in accordance with the provisions of law, on entering a state of emergency in parts of provinces, autonomous regions and cities directly under the Central Government jurisdiction.

The consultation was followed by the publication of a legislative measure on 14 February 2003, namely the National Security (Legislative Provisions) Bill. There was widespread opposition to the Bill which led to the resignation of the Secretary for Security in July 2003. The government was compelled to withdraw the Bill from the Legislative Council. So far there has been no serious attempt to introduce legislation to comply with Article 23.<sup>136</sup>

109. The Hong Kong Bill of Rights Ordinance continues to be an important constitutional document. When passed in 1991, the Bill of Rights Ordinance enjoyed a quasi-constitutional status for two reasons: First, any legislation in existence at the time that the Bill of Rights Ordinance came into effect, namely 8 June 1991, stood repealed to the extent that such legislation did not admit a construction consistent with the Ordinance.<sup>137</sup> Second, the courts were required to interpret any legislation passed subsequent to the enactment of the Bill of Rights Ordinance to be consistent with the ICCPR as applied to Hong Kong.<sup>138</sup> The Hong Kong Bill of Rights contained in Part II of the Hong Kong Bill of Rights Ordinance substantially reproduces the ICCPR as applied to Hong Kong. It must be noted, however, that the NPCSC deleted sections 2(3), 3 and 4 of the Bill of Rights. The intention of that amendment was to remove the effectiveness of the Bill of Rights Ordinance as an aid to interpretation of legislation. However, courts in fact continue to make reference to the Bill of Rights Ordinance in determining cases dealing with human rights, for the reason that Basic Law gives a higher status to ICCPR whose provisions are reflected in the Hong Kong Bill of Rights.<sup>139</sup>

110. Legislation is an important supplementary source in areas such as powers and privileges of the Legislative Council, election of the Chief Executive and Legislative Council elections, and the powers and functions of courts of law. A particularly important legislative measure is the Emergency Regulations Ordinance (Cap. 241). That Ordinance empowers the Chief Executive to make any regulations whatsoever that he may consider desirable in the public interest, whenever the Chief Executive in Council considers that there is an occasion of emergency or public danger. The ambit of regulations that he may make is plenary, as appears from the list

136. See for the enactment and extension to Hong Kong of the National Security Law by the National People's Congress in 2020, to fill this gap, paras 876, 879 and 883 below.

137. Bill of Rights Ordinance (Cap. 383), s. 3(2). The following are examples of cases where the Bill of Rights Ordinance was invoked successfully to question the validity of pre-existing legislation: *R v Sin Yau-ming* [1992] 1 HKCLR 127, (CA) (presumptions contained in the Dangerous Drugs Ordinance (Cap. 134)); *R v Chong Ah-choi* [1994] 2 HKCLR 263, (CA) (s. 17 of the Summary Offences Ordinance (Cap. 228), which created the offence of possession of an offensive weapon without a satisfactory explanation); *R v Man Wai-keung (No 2)* [1992] 2 HKCLR 207, (CA), (s. 83XX(3)(a) of the Criminal Procedure Ordinance (Cap. 221), which stated that a defendant who on appeal succeeded in obtaining a retrial was not entitled to costs).

138. *Ibid.*, s. 4.

139. See *Leung Fuk Wah Oil v Secretary for Justice* [2015] HKEC 1752, (CFA), footnote 7, where Ma CJ observed that 'Article 39 states that the provisions of the International Covenant on Civil and Political Rights remain in force in Hong Kong. The relevant provision is Article 14.1 of the ICCPR, implemented into Hong Kong's laws as Article 10 of the Bill of Rights by the Hong Kong Bill of Rights Ordinance (Cap 383).'

304. Within the precincts of the Legislative Council, every officer of the Council has, for the purpose of the Legislative Council (Powers and Privileges) Ordinance and the application of the criminal law, all the powers, and every officer has all the privileges of a police officer.<sup>521</sup>

305. The Legislative Council of Hong Kong has no powers to punish any person for a breach of its powers or privileges, unlike in Britain and many Commonwealth jurisdictions.<sup>522</sup> The power of punishment remains with the courts of law. No prosecution for an offence under the Legislative Council (Powers and Privileges) Ordinance may be instituted without the consent of the Secretary for Justice.<sup>523</sup>

### §3. COMPETENCE

#### I. Legislative Power

306. The legislative competence of the Legislative Council of the Hong Kong Special Administrative Region is set out in the Basic Law, which intends to confer a ‘high degree of autonomy’ on Hong Kong.<sup>524</sup> The laws in force in Hong Kong are the Basic Law, laws previously in force in Hong Kong<sup>525</sup> and laws enacted by the legislature of Hong Kong.<sup>526</sup> Legislation operative in Hong Kong are ordinances passed by the Hong Kong Legislative Council. National laws of the People’s Republic of China, except those listed in Annex III of the Basic Law,<sup>527</sup> are not applicable in Hong Kong.<sup>528</sup> The NPCSC may, after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region, add to or delete from the list of laws in Annex III. Laws listed in Annex III must be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of Hong Kong.<sup>529</sup> Where the NPCSC decides that Hong Kong is in a state of emergency, the Central Government may issue an order applying the relevant national laws in Hong Kong.

521. *Ibid.*, s. 24. *HKSAR v Wong Yeung Tat* [2015] HKEC 2796, (CFI), concerns a successful criminal charge of unlawful assembly in the precincts of the Legislative Council. There, the security officers of the Legislative Council had asked the protestors to leave and were unable to force their eviction. See also *HKSAR v Fong Kwok Shan Christine* (2017) 20 HKCFAR 425, (CFA), and *HKSAR v Cheung Kwai Choi* [2018] HKEC 2910, (CFI), where protestors were found guilty of unlawful assembly in the precincts of the Legislative Council.

522. For the position in Britain, see A.W. Bradley & K.D. Ewing, *Constitutional and Administrative Law* (13th edn, London and New York: Pearson Education, 2003), 221–223.

523. Legislative Council (Powers and Privileges) Ordinance (Cap. 382), s. 26.

524. Basic Law, Art. 2.

525. ‘Laws previously in force in Hong Kong’ is a reference to the common law, rules of equity, ordinances, subordinate legislation and customary law in force on 1 July 1997.

526. Basic Law, Art. 18.

527. They relate to, e.g., the Capital, National Anthem, National Flag and National Day of the People’s Republic of China; territorial sea of People’s Republic of China; Nationality Law of the People’s Republic of China; and regulations of the People’s Republic of China concerning diplomatic privileges and immunities.

528. Basic Law, Art. 18.

529. *Ibid.*

307. The Legislative Council of Hong Kong has the power to enact, amend or repeal laws in accordance with the provisions of the Basic Law and legal procedures.<sup>530</sup> The Basic Law contains many provisions recognizing Hong Kong’s authority to formulate policies and legislate on a variety of subjects. These provisions do recognize a range of rights and privileges of individuals as well as various communities and organizations, and to that extent impose limitations on Hong Kong’s legislative and administrative competence. These limitations do not have the effect of transferring any jurisdiction in those subject areas to the Chinese Central Government. What they do is to require the Legislative Council and the government to comply with the guarantees set out in the Basic Law. In the following paragraphs, we examine some Basic Law provisions that are illustrative of the legislative competence of the Legislative Council as well as the possible limitations on the Legislative Council’s power in those subject areas. Thereafter, we examine the implications of the fact that Hong Kong’s Legislative Council has to operate within an ‘Executive-led system of government’ where the Legislative Council does not have plenary legislative competence because of certain procedural limitations.<sup>531</sup>

308. The Basic Law demarcates the legislative competence of Hong Kong’s Legislative Council by way of expressly enumerating the legislative powers of the Chinese Central Government. Matters that are not expressly reserved to the Central Government are understood to lie within the ‘high degree of autonomy’ of the Hong Kong Special Administrative Region. The only two areas in respect of which the Central Government has retained jurisdiction are defence and foreign affairs.

#### II. Foreign Affairs and Defence

309. Even in respect of foreign affairs and defence, what one finds is not an exclusive vesting of power in the Central Government, but a delicate balance between Hong Kong’s high degree of autonomy and the sovereignty of the People’s Republic of China. The Chinese Central Government is responsible for foreign affairs relating to the Hong Kong Special Administrative Region. However, the Central Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with the Basic Law.<sup>532</sup> Note the difference in terminology: The Central Government is responsible for ‘foreign affairs’, while the Hong Kong Government is authorized to exercise ‘relevant external affairs’. Chapter VII of the Basic Law deals with ‘External Affairs’ and provides, for instance, that the Hong Kong Government may participate, as members of the Chinese Government’s delegation, in negotiations at the diplomatic level

530. *Ibid.*, Art. 73(1).

531. For a thorough and scholarly treatment of these issues, see Yash Ghai, *Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd edn, Hong Kong: Hong Kong University Press, 1998).

532. Basic Law, Art. 13.

directly affecting the Region conducted by the Central Government,<sup>533</sup> that it may participate in conferences not limited to States,<sup>534</sup> that it may establish economic and trade missions in foreign countries,<sup>535</sup> and that it may maintain and develop relations and implement agreements with foreign states and international organizations.<sup>536</sup>

310. The Chinese Central Government is responsible for the defence of Hong Kong, while the Hong Kong Government is responsible for the maintenance of public order in Hong Kong. The military forces stationed by the Central Government in Hong Kong for defence must not interfere in Hong Kong's local affairs, but the Hong Kong Government may ask the Central Government for assistance from the garrison in the maintenance of public order and in disaster relief. Moreover, the members of the garrison must, in addition to abiding by national laws, abide by the laws of Hong Kong.<sup>537</sup>

### III. Public Finance

311. It is a basic principle of constitutional law in the Anglo-American tradition that the government may not collect or spend public revenue without the approval of the legislature. The Basic Law recognizes that principle when it enacts that the Government of the Hong Kong SAR must obtain approval from the Legislative Council for taxation and public expenditure,<sup>538</sup> and that the Legislative Council has the power to examine and approve budgets introduced by the government and to approve taxation and public expenditure.<sup>539</sup> The Legislative Council's paramount authority over public finance is also clear from Article 51 of the Basic Law, which provides that if the Legislative Council refuses to pass the budget introduced by the government, the Chief Executive may apply to the Legislative Council for provisional appropriations. The only occasion when the Chief Executive may approve public expenditure without the Legislative Council's approval arises when the Legislative Council has been dissolved. Article 51 provides that at such a time the Chief

533. *Ibid.*, Art. 150.

534. *Ibid.*, Art. 152.

535. *Ibid.*, Art. 156.

536. *Ibid.*, Art. 151.

537. *Ibid.*, Art. 14.

538. *Ibid.*, Art. 64. This reflects Annex I 'Elaboration by the Government of the People's Republic of China of the Basic Policies Regarding Hong Kong', s. V 'Finance', of the Sino-British Joint Declaration: 'The systems by which taxation and public expenditure must be approved by the legislature, and by which there is accountability to the legislature for all public expenditure, and the system for auditing public accounts shall be maintained.'

539. *Ibid.*, Art. 73(2) and (3). See *PCCW-HKT Telephone Ltd v The Secretary for Commerce and Economic Development* [2016] HKEC 1089, (CA), where the Court of Appeal upheld the legality of the power of an administrative authority to prescribe fees by way of subsidiary legislation, which are subject to legislative scrutiny. In *Hui Sin Hang v Chief Executive in Council* [2016] HKEC 608, (CFI), it was argued unsuccessfully that the Airport Authority could not impose certain fees, the court holding that there was ample legislative approval for the scheme.

Executive may, prior to the election of the new Legislative Council, approve provisional short-term appropriations. There is, however, a limit on such appropriations: They must be according to the level of the previous fiscal year.

312. Hong Kong has its own independent finances and is not required to hand over any of its finances to the Chinese Central Government.<sup>540</sup> The Legislative Council's right to levy taxes is exclusive, the Central Government having no power to levy any tax in Hong Kong.<sup>541</sup> Hong Kong will have its independent taxation system and may enact laws on its own concerning types of taxes, tax rates, tax deductions, allowances and exemptions, and other matters of taxation.<sup>542</sup> These provisions are clearly enabling provisions, strengthening the legislative power of the Hong Kong Legislative Council. The only limitation appears to be the reference in Article 108 that in enacting tax legislation, the Hong Kong Legislative Council must take 'the low tax policy previously pursued in Hong Kong as reference'. It is a moot question whether the Hong Kong Legislative Council will act in contravention of this provision if it were to increase tax out of line with the previous tax regime.

### IV. Hong Kong's Financial System

313. Article 110 provides that the monetary and financial system of the Hong Kong Special Administrative Region shall be prescribed by law (law in this context means Hong Kong law). The power given to Hong Kong in this regard is an exclusive one: 'The Government of the Hong Kong Special Administrative Region shall, on its own, formulate monetary and financial policies, safeguard the free operation of business and financial markets, and regulate and supervise them in accordance with the law.'<sup>543</sup> Although the primary importance of this provision lies in the guarantee that the Chinese Central Government will not have any legal power to regulate the monetary and financial system of Hong Kong, it is also important as an illustration of the scope of Hong Kong's legislative competence.

314. Article 107 provides that the Hong Kong Special Administrative Region must follow the principle of keeping expenditure within the limits of revenues in drawing up its budget and must strive to achieve fiscal balance, avoid deficits and keep budget commensurate with the growth rate of its GDP. Although not couched in terms of a prohibition, the principles set out in that article must impose some limitation on Hong Kong's legislative competence.<sup>544</sup> Article 111 is more assertive:

540. *Ibid.*, Art. 106.

541. *Ibid.*, Art. 106.

542. *Ibid.*, Art. 108.

543. *Ibid.*, Art. 110.

544. In *Lau Kwok Fai v Secretary for Justice* [2003] HKEC 711, (CFI), [110], Hartmann J said that Art. 107 imposes a 'broad constitutional obligation ... The language used is, of course, ample. It allows for the necessary use of financial discretion. But that said, Art. 107 directs Hong Kong to a particular course. It employs forceful language: The Government shall "strive" to achieve a fiscal balance.'

para. 66], a constitutional provision in such terms would only inhibit a development which was “such a material change that it resulted in the abandonment of the previous system”.’

321. The second paragraph of Article 137 seems to impose another limitation, when it provides that ‘Students shall enjoy freedom of choice of educational institutions and freedom to pursue their education outside the Hong Kong Administrative Region.’

### VIII. Miscellaneous Matters

322. The Basic Law recognizes the legislative competence of the Legislative Council in respect of several other areas of law. Article 138 provides that community organizations and individuals may provide various medical and health services in accordance with the law.<sup>547</sup> Article 143 provides that non-governmental sports organizations may continue to exist and develop in accordance with the law. These provisions, while they have been intended as guarantees to the organizations concerned, are also illustrative of the wide scope of the Legislative Council’s legislative competence. Article 145 of the Basic Law provides that on the basis of the previous welfare system, the Government of Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of this system in the light of economic conditions and social needs.

323. In *Kong Yunming v Director of Social Welfare* the Court of First Instance held that the Hong Kong Government was entitled to make payment of social welfare benefits dependent on a seven-year residence requirement, without violating Article 145, Article 25 (equality before the law) or Article 36 (right to social welfare).<sup>548</sup> The Court of Final Appeal, while conceding that the Hong Kong Government was competent to replace the one-year resident requirement that was applicable at the time of the hand over in 1997, was of the opinion that the seven-year period was not a justifiable restriction, and thus a disproportionate, restriction placed on the right to receive welfare benefits. The seven-year rule was, accordingly, held to be invalid.<sup>549</sup> In *Yao Man Fai George v Director of Social Welfare*,

547. See *Re Financial Services and Systems Ltd* [2007] HKEC 1230, (CFI), where the Court of First Instance upheld the constitutionality of a regulatory legislation relating to Chinese medical practitioners, where Barnabas Fung J said: ‘A rational and fair minded person would recognize a genuine need for allowing only appropriately qualified [Chinese medical practitioners] to be given the rights and responsibilities to perform the medical functions and issue the medical certificates under the relevant Ordinances. It is within the Government’s power under Art. 138 of the Basic Law to formulate policies for the development of Chinese medicine. Hence, the decision of the legislature was reasonable, rational and proportional to attain a legitimate social objective.’

548. *Kong Yunming v Director of Social Welfare* [2009] HKCU 912, (CFI). Appeal was dismissed by the Court of Appeal in [2012] HKEC 229, (CA). Reversed by the Court of Final Appeal in *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950, (CFA).

549. *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950, (CFA). See also *MS v Director of Social Welfare* [2016] HKEC 344, (CFI), which following the Court of Final Appeal decision in *Kong Yunming* held that non-residents (in this case) were not entitled to social welfare benefits.

the applicant was a 66-year man who had worked continuously in Hong Kong from 1962. In 2006, the employer sent him to China to work there. In 2008, his employment was terminated. He returned to Hong Kong and immediately but unsuccessfully applied for social welfare benefits. The Court of First Instance held that the requirement that a permanent resident of Hong Kong should have been resident in Hong Kong for one year immediately before applying for social security assistance was discriminatory and unconstitutional for two reasons: (1) there was no justification for the different treatment of permanent residents on the basis of residence immediately before making an application, because imposing such a rigid residence requirement was not proportionate to the achieving of the objective of proper management of the social security system, there was no evidence to show that the residence requirement served any other possible legitimate aim, and the relevant guidelines did not permit consideration of personal circumstances of the applicant in determining if he could waive the residence requirement; (2) The continuous residence requirement that an applicant must not have been away for more than fifty-six days in the immediately preceding one year imposed an unreasonable restriction on the right to travel.<sup>550</sup>

### IX. Fundamental Rights and Freedoms

324. Perhaps the most significant limitation on the autonomous legislative power of the Hong Kong Legislative Council is the recognition of fundamental rights and freedoms. Chapter I of the Basic Law, which sets out the General Principles, contains the two fundamental provisions: ‘The Hong Kong Special Administrative Region shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with law.’<sup>551</sup> ‘The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.’<sup>552</sup> Article 11 provides the crucial procedural framework for the protection of fundamental rights: ‘In accordance with Article 31 of the Constitution of the People’s Republic of China, the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of [the Basic] Law.’ Chapter III of the Basic Law is entitled ‘Fundamental Rights and Duties of Residents’ and sets out not only civil and political rights, but also economic, social, and cultural rights. The protections that Chapter III provide are supplemented by certain other provisions such as Article 141, which provides that the Government of the Hong Kong Special Administrative Region shall not restrict the freedom of religion, interfere in internal affairs of religious organizations or restrict religious activities that do not contravene laws of Hong Kong.

550. *Yao Man Fai George v Director of Social Welfare* [2011] 1 HKLRD A2, (CFI).

551. Basic Law, Art. 4.

552. *Ibid.*, Art. 6.



## Chapter 4. The Executive

## §1. INTRODUCTION

333. The Executive branch of the Hong Kong Government consists of the Chief Executive, who is at the apex of the government structure; the Executive Council, which mainly serves as a consultant and advisor to the Chief Executive; and the civil service that helps formulate and implement government policy and carry out law into effect. Section 2 of Chapter IV of the Basic Law, containing Articles 59-65, is entitled 'The Executive Authorities'. Article 59 states that the Government of Hong Kong shall be the executive authority of the Region. Article 60 states that the Chief Executive is the Head of Hong Kong. Article 61 refers to principal officials of the government. Article 62 sets out the powers of the Hong Kong Government and Article 64 emphasises the accountability of the Hong Kong Government to the Legislative Council. These provisions, read together with the Basic Law provisions relating to the Chief Executive and the Executive Council, provide the basic structure of the Executive.

## §2. THE CHIEF EXECUTIVE

334. The Chief Executive is the Head of the Hong Kong SAR and represents the Region.<sup>559</sup> He is responsible for the implementation of the Basic Law and the laws that apply in Hong Kong. He decides on government policies and directs legislation to be moved in the Legislative Council for debate and passage. A law passed by the Legislative Council will not become law unless the Chief Executive signifies his assent to it. The Chief Executive must approve the introduction of motions regarding revenue and expenditure to the Legislative Council. He has been given the power to nominate principal government officials for appointment by the Chinese Central Government and he has the power to appoint and remove judges according to law.<sup>560</sup> The Chief Executive provides an important link between the Chinese Central Government and Hong Kong and is accountable to the Central Government and to the Hong Kong Special Administrative Region. The Chief Executive is required to implement any directive issued by the Central Government in respect of matters specified in the Basic Law.<sup>561</sup>

335. Chinese military forces stationed in Hong Kong will intervene in disaster relief and maintenance of public order, only at the request of the Hong Kong Government, a request which is presumably given by the Chief Executive.<sup>562</sup> When it is

559. Basic Law, Art. 43.

560. *Ibid.*, Art. 48. For further discussion of the powers and functions of the Chief Executive, see Part II, Ch. 2 'The Head of State'.

561. *Ibid.*, Art. 48.

562. *Ibid.*, Art. 14.

appropriate for the Chief Executive to issue a certificate regarding acts of state at the request of a court of law, he must obtain 'a certifying document', from the Central Government.<sup>563</sup>

## §3. THE EXECUTIVE COUNCIL

336. The Executive Council is the rough equivalent of the Cabinet of Ministers in a 'Westminster Model' system, but there are significant differences between them. Unlike a Cabinet of Ministers in a 'Westminster Model' system, drawn from and answerable to the Legislature, the members of the Executive Council are all appointees of the Chief Executive. Unlike before 1997, there is no constitutional requirement for there to be a certain number of ex officio members in the Executive Council.<sup>564</sup> However, the practice has been to appoint as its members the three principal secretaries namely, the Chief Secretary for the Administration (who is the head of the civil service), the Financial Secretary and the Secretary for Justice. In addition to these three official members, there are currently eleven other secretaries on the Executive Council and sixteen non-official members.<sup>565</sup> The Basic Law recognizes the possibility of having Legislative Council Members in the Executive Council by permitting the Chief Executive to make appointments to the Executive Council 'from among the principal officials of the executive authorities, members of the Legislative Council, and public figures'.<sup>566</sup>

337. The Executive Council is weaker than a Cabinet of Ministers because the Chief Executive, unlike a Prime Minister, is not bound by advice given by his Executive Council. The Chief Executive is required (except for the appointment, removal and disciplining of officials and the adoption of measures in emergencies),<sup>567</sup> to consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, making subordinate legislation or dissolving the Legislative Council. He is not bound to accept the majority opinion of the Council,<sup>568</sup> but if he disagrees, he must put down specific reasons on record.<sup>569</sup> The established convention during the British period was that the Governor would generally not go against the majority view of the Executive Council,

563. *Ibid.*, Art. 19.

564. See Hong Kong Royal Instructions 1917-1994, Cl. II. The ex officio members in the last years of British rule were the Chief Secretary, the Attorney General and the Financial Secretary.

565. See the website of the Executive Council: <https://www.ceo.gov.hk/exco/eng/index.html>. Biographical notes of the members can be accessed through this link.

566. Basic Law, Art. 55.

567. See *The Association of Expatriate Civil Servants of Hong Kong v The Chief Executive of Hong Kong SAR* [1998] 1 HKLRD 615, (CFI) where Keith J said: 'The Chief Executive could reasonably regard the establishment of procedures for the appointment and removal of holders of public office as an important policy decision, requiring him to consult the Executive Council' (at p. 623).

568. See *Sung Man Cho v The Superintendent of Prisons* (1931) HKLR 62, at 66 (FC): 'The act of the Governor in Council is the act of the Governor and not the act of the Executive Council. It is he who makes the order, after taking the advice of the Council, but not necessarily in accordance with that advice.' This observation continues to be accurate under the Basic Law too.

569. Basic Law, Art. 56.

it would be lawful to deprive a non-resident of the freedom from arbitrary detention or imprisonment. On the other hand, it would be a non-purposive construction that supposed that art 41 intended that non-residents be accorded all the same privileges and benefits as residents, unqualified by considerations of residence status, or other connection with Hong Kong, and regardless of the impact of according such privileges and benefits on Hong Kong residents, benefits such as the freedom of occupation (art 33) or the right to social welfare (art 36).<sup>1054</sup>

582. Franchise is not a right that is extended to all residents, let alone non-residents: It is a right that only permanent residents enjoy. Article 26 of the Basic Law states that 'permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law'. As will be explained in relation to the public service, 'the principal officials of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country and have ordinarily resided in Hong Kong for a continuous period of not less than 15 years'.<sup>1055</sup>

583. The Basic Law seems to perpetuate inequality in relation to the acquisition of the status of a permanent resident of Hong Kong. A basic requirement for acquisition of permanent residence is a seven-year continuous period of residence in Hong Kong. While this requirement applies equally to Chinese citizens and non-Chinese citizens, the Immigration Ordinance requires a non-Chinese applicant to show that he was 'settled' in Hong Kong at the time of application to satisfy that he has taken Hong Kong to be his permanent place of residence. The statute provides that a person could be said to be settled if he is ordinarily resident in Hong Kong and 'he is not subject to any limit of stay in Hong Kong' or he has what is commonly known as 'unconditional leave to stay'. There is a further condition that a non-Chinese resident has to satisfy, namely, that he has taken Hong Kong to be his permanent place of residence: Article 24(4) of the Basic Law. In *Prem Singh v Director of Immigration*, the Court of Final Appeal held Article 24(4) of the Basic Law envisaged a situation where a person may be said to have taken Hong Kong as his permanent place of residence, even at a time his stay was subject to a limit on stay and that therefore the Immigration Ordinance conflicted with the Basic Law when it additionally required an applicant to be a person who had the right to unconditional stay at the time of the application.<sup>1056</sup>

584. Article 42 states the obvious: 'Hong Kong residents and other persons in Hong Kong shall have the obligation to abide by the laws in force in the Hong Kong

1054. *Fok Chun Wa v Hospital Authority* [2011] 1 HKLRD A1, (CA), [70]. See also Chief Justice Ma delivering the judgment of the Court of Final Appeal affirming the decision of the Court of Appeal (2012) 15 HKCFAR 409, (CFA), [52].

1055. Basic Law, Art. 61.

1056. *Prem Singh v Director of Immigration* (2003) 6 HKCFAR 26, (CFA), especially [63].

Special Administrative Region.' Thus, although Chapter III is titled 'Fundamental Rights and Duties of Residents' there is no list of fundamental duties as one could see in the Indian Constitution.<sup>1057</sup> The obligation in Article 42 to abide by the law does not impose any duty which would not have existed had that article not been added. If Article 42 serves any purpose, it is in fact to reassure people of Hong Kong that they need obey only laws of Hong Kong (and any Chinese law that are in operation in Hong Kong under the Basic Law) and not laws of the People's Republic of China.<sup>1058</sup> A similar qualification applies to membership of the Legislative Council. Article 67 provides that 'the Legislative Council of the Hong Kong Special Administrative Region shall be composed of Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country. However, permanent residents of the Region who are not of Chinese nationality or who have the right of abode in foreign countries may also be elected members of the Legislative Council of the Region, provided that the proportion of such members does not exceed 20 percent of the total membership of the Council.'

585. Article 105 is a significant recognition of right to property. It says that 'the Hong Kong Special Administrative Region shall, in accordance with law, protect the right 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 undue delay. The ownership of enterprises and the investments from outside the Region shall be protected by law.'

586. Article 120 provides that 'all leases of land granted, decided upon or renewed before the establishment of the Hong Kong Special Administrative Region which extend beyond 30 June 1997, and all rights in relation to such leases, shall continue to be recognized and protected under the law of the Region'. Articles 121, 122 and 123 provide specific protections relating to leased land.

587. Chapter III of the Basic Law lists not only civil and political rights but also social and economic rights. For instance, Article 33 provides that Hong Kong residents shall have the freedom of choice of occupation, and Article 34 provides that Hong Kong residents shall have the freedom to engage in academic research, literary and artistic creation, and other cultural activities.<sup>1059</sup>

1057. Article 51A of the Indian Constitution requires every Indian citizen to, for instance, 'uphold and protect the sovereignty, unity and integrity of India and to defend the country and render national service when called upon to do so'.

1058. See P.Y. Lo, *The Hong Kong Basic Law* (Hong Kong: LexisNexis, 2011), 271-272 citing Wang Shuwen's *Introduction to the Basic Law*.

1059. Since Art. 6 of the ICESCR has not been incorporated by legislation, Hong Kong does not recognise a constitutional right to work: *GA v Director of Immigration* (2014) 17 HKCFAR 60, (CFA). It has also been held that there is no right to employment in a particular field of occupation: *Cheng Chun Ngai v Hospital Authority* [2004] HKEC 1375, (CFI). Hartmann J said at [55]: 'even when [Art. 33 of the Basic Law, which guarantees freedom of choice of employment] is interpreted generously and purposively, it is not to be interpreted in an active sense, by which I

statute is to be ascertained by interpretation, it is necessary to read all of the relevant provisions together and in the context of the whole statute as a purposive unity in its appropriate legal and social setting.<sup>1117</sup> The court may look not only at the other provisions in the relevant statute but also similar provisions in other statutes. Bokhary PJ said: 'It is well-established that the context in which a statute is to be interpreted includes other statutes in *pari materia* i.e., other statutes dealing with comparable matters.'<sup>1118</sup> Where the scope of a statutory provision does not appear to be restricted or expanded by other provisions in the same statute, such section must be regarded as self-standing. In such a situation the principle set out in *Medical Council of Hong Kong v Chow Siu Shek* does not apply.<sup>1119</sup> Where the wide scope of a statutory provision would contravene a constitutional provision, whether its apparently wide scope is cut down by other provisions is a relevant question to ask.<sup>1120</sup> When the answer is in the negative, then the statutory provision will be unconstitutional.<sup>1121</sup>

615. Where courts find a legislative provision inconsistent with a constitutional provision it will try and give a remedial interpretation to the impugned legislative provision, instead of declaring it invalid. As Bokhary PJ explained in *HKSAR v Lam Kwong Wai*: 'The justification for engaging in remedial interpretation is that it enables the courts, in appropriate cases, to uphold the validity of legislation, albeit in an altered form, rather than strike it down. To this extent, the courts interfere less with the exercise of legislative power than they would if they could not engage in remedial interpretation.'<sup>1122</sup> However, courts will hesitate to place a remedial interpretation if the suggested change of language leads to a result wholly different from what the legislature intended, or where the proposed change requires careful consideration by the legislature.<sup>1123</sup> As Sir Anthony Mason NPJ observed in *HKSAR v Lam Kwong Wai*<sup>1124</sup> 'the implied powers of this Court include the obligation to adopt a remedial interpretation of a legislative provision which will, so far as it is

1117. (2000) 3 HKCFAR 144, (CFA), 151.

1118. *Ibid.*, 516.

1119. See *Leung Kwok Hung v Secretary for Justice* [2020] HKEC 533, (CA).

1120. *Ibid.*, [277].

1121. *Ibid.*, [279].

1122. *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, (CFA), [77].

1123. In *Wong Chi Fung v Secretary for Justice* [2016] 3 HKLRD 835, (CFI), it was unsuccessfully argued that the requirement that a person standing for election must have reached the age of 21 while an elector only needs to have reached the age of 18 was a disproportionate restriction. Thomas Au J said that assuming that the requirement was unconstitutional, the court would not be prepared to substitute 18 for 21 so that the same age requirement applies to both situation because 'What should be the proper choice of the minimum age of candidature is obviously a matter of political judgment for the legislature, but not one for the court to make in the name of remedial interpretation' [74], relying on *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* [2015] 5 HKLRD 881, (CA), [6].

1124. *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, (CFA).

possible, make it Basic Law-consistent. Only in the event that such an interpretation is not possible, will the Court proceed to make a declaration of contravention, entailing unconstitutionality and invalidity.<sup>1125</sup>

616. Remedial interpretation is guided by the following principles:

- (a) Subject to the limitations in (c) and (d) below, the court can exercise the power of remedial interpretation to depart from the unambiguous meaning of the legislative provision in order to give a Basic Law compliant effect to the same.
- (b) In adopting a remedial interpretation, the court can interpret language in a statutory provision restrictively or expansively. It can also read in words which change the meaning of the provision.
- (c) However, the court cannot adopt a meaning inconsistent with a fundamental feature of the legislative scheme or its essential principles. Whether an element in the statutory provision constitutes a fundamental feature or essential principle must be determined with regard to its place in the overall scheme of the legislation.
- (d) Remedial interpretation does not empower the courts to make decisions for which they are not equipped such as choosing between various options which requires legislative deliberation or adopting a meaning which has important practical repercussions which the court is in no position to evaluate'.<sup>1126</sup>

617. There are several instances where courts have adopted a remedial interpretation.<sup>1127</sup> The first technique is to read words in. A prominent example of this technique is the decision of the Court of Final Appeal in *W v Registrar of Marriages*. There, it was held that consistently with Article 37 of the Basic Law and Article 19(2) of the Hong Kong Bill of Rights (Freedom of marriage), section 20(1)(d) of the Matrimonial Clauses Ordinance and section 40 of the Marriage Ordinance must be read and given effect so as to include within the meaning of the words 'woman' and 'female' a post-operative male-to-female transsexual person whose gender has been certified by an appropriate medical authority to have changed as a result of sex reassignment surgery.<sup>1128</sup>

1125. *Ibid.*, [78]. In *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614, (CFA), [86], Sir Anthony Mason NPJ reconfirmed that the power to apply a remedial interpretation is an inherent or implied power of the courts.

1126. *Keen Lloyd Holdings Ltd v Commissioner of Customs and Excise* [2016] 2 HKLRD 1372, (CA), [97]. There the court held that there was no difference between domestic premises and non-domestic premises in considering whether the power of inspection without a judicial warrant was constitutional. The court interpreted the words 'domestic premises', in relation to which a warrant was required by statute, to read as simply 'premises' so that the requirement of prior authorization applied to both domestic and non-domestic premises.

1127. *HKSAR v Mohammed Khan Shamim* [2013] HKEC 469, (CA); *Keen Lloyd Holdings Ltd v Commissioner of Customs and Excise* [2016] 2 HKLRD 1372, (CA).

1128. *W v Registrar of Marriages* (2013) 16 HKCFAR 112, (CFA), [225], where Ma CJ said: 'I hold that the right to marry guaranteed by our constitution extends to the right of a post-operative transsexual to marry in the reassigned capacity. This means, without any need to rely on freedom from

people did on the assumption that such legislative provision and government action were valid becomes unauthorized or even illegal.<sup>1146</sup> A possible solution that courts may resort to is prospective overruling, whereby a court may declare that a legislative provision or a judicial precedent is invalid, but without retrospective effect.<sup>1147</sup>

628. There are two main forms of prospective overruling: (1) the judge declares that the declaration of invalidity will not have any retrospective effect: 'The ruling applies only to transactions or happenings occurring after the date of the court decision. All transactions entered into, or events occurring, before that date continue to be governed by the law as it was conceived to be before the court gave its ruling.' (2) The ruling may affect the parties to the litigation, and in that limited sense retrospective.<sup>1148</sup> 'The ruling in its operation may be prospective and, additionally, retrospective in its effect as between the parties to the case in which the ruling is given. Or the ruling may be prospective and, additionally, retrospective as between the parties in the case in which the ruling was given and also as between the parties in any other cases already pending before the courts.'<sup>1149</sup> Prospective overruling may be appropriate where a retrospective invalidation of legislation has the effect of invalidating a large number of similar past acts.<sup>1150</sup> Hong Kong courts have in several cases considered whether prospective overruling is appropriate. Even assuming that courts of Hong Kong have the power to employ prospective overruling, there has so far been no appropriate case where the courts could resort to this device.<sup>1151</sup>

1146. As was said in *In re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 680, (HL), [7]: 'People generally conduct their affairs on the basis of what they understand the law to be. This "retrospective" effect of a change in the law of this nature can therefore have disruptive and seemingly unfair consequences.'

1147. See generally, on prospective overruling, Mary Arden [Lady Justice Arden], *Human Rights and European Law: Building New Legal Orders* (Oxford University Press: 2015), Ch. 17 'Prospective Overruling'. This chapter was first published in (2004) 120 *Law Quarterly Review* 7–11.

1148. See, for instance, *Murphy v Attorney General* [1982] IR 241 (SC of Ireland).

1149. *In re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 680, (HL), [9]–[10].

1150. Sri Lanka provides a good illustration. In *Jailabdeen v Danina Umma* (1962) 64 Ceylon New Law Reports 419, the Supreme Court held that Quazi Courts exercised judicial power and its members had to be appointed by the Judicial Service Commission, just as other inferior judicial officers. Muslim Marriage and Divorce Act was held to be unconstitutional to the extent it enabled the Minister of Justice to appoint members of Quazi Courts. Since judicial decisions have retrospective effect, this meant that all decisions previously given by Quazi Courts concerning Muslim marriages and divorces were without any legal effect. Parliament had to step in and pass legislation declaring that any exercise of power or grant of any order by a Quazi was deemed not to be invalid by reason only of the fact that such Quazi had been appointed by the Minister. The Act, Quazis (Validation of Appointments) Act No 11 of 1965, was passed with a two-thirds majority, the majority required to pass constitutional amendments, since conferment of judicial power on an executive authority (namely the power of appointing judicial officers given to the minister) was contrary to the exclusive vesting of judicial power in the judiciary. Thereafter the Muslim Marriage and Divorce Act was amended so as to grant the power of appointing Quazis to the Judicial Service Commission, so for the future (prospectively) the legislation would be constitution compliant. See M J A (Anton) Cooray, 'Three Models of Constitutional Litigation: Lessons from Sri Lanka' (1992) 21 *Anglo-American Law Review* 430–448, at 436–438.

1151. See *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614, (CFA), *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, (CFA), where Sir Anthony Mason NPJ discusses prospective overruling in some fair detail, while Bokhary PJ opted to leave the question open.

### §3. A SELECT SURVEY OF HUMAN RIGHTS IN HONG KONG

#### I. The Right to Equality

629. The Basic Law, the Hong Kong Bill of Rights and the ICCPR recognize the importance of equality before the law. Article 25 of the Basic Law provides that all Hong Kong residents shall be equal before the law. Article 22 of the Bill of Rights, reproducing Article 26 of the ICCPR, provides: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

630. Article 1 of the Hong Kong Bill of Rights provides that 'the rights recognized in [the Bill of Rights] shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. It goes on to say that men and women shall have an equal right to the enjoyment of all civil and political rights set forth in the Bill of Rights. Article 1 might be described as a procedural guarantee that underpins all substantive fundamental rights, ensuring that rights such as access to free and independent courts are enjoyed by all persons without any discrimination. It may also be described as a substantive right in the sense that it requires all government agencies to act in such a manner as to respect the right to equality.

631. 'The constitutional right to equality is in essence the right not to be discriminated against. It guarantees protection from discrimination.'<sup>1152</sup> 'Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced.'<sup>1153</sup> Equality thus demands that similarly situated persons be similarly treated and that differently situated persons be differently treated. Discrimination may take the following forms: (i) direct discrimination where the complainant is receiving treatment which is unfavourable when compared with treatment given to persons in 'relevantly similar situations' [where like cases are not treated alike]; (ii) direct discrimination where the complainant disadvantageously receives the same treatment as persons in significantly different situations receive [where unlike cases are treated in the same way]; and (iii) indirect

1152. *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335, (CFA), [1], per Li CJ. The Court of Final Appeal held that s. 118F of the Crimes Ordinance (Cap. 200) which provided that 'a man who commits buggery with another man otherwise than in private shall be guilty of an offence' was discriminatory because heterosexuals were not subject to comparable criminal liability in relation to vaginal intercourse or buggery otherwise than in private. Section 118F was repealed by Crimes (amendment) Ordinance No. 18 of 2014. *Secretary for Justice v Yau Yuk Lung* is discussed in [632].

1153. *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, (HL), [9] per Lord Nicholls of Birkenhead, cited in *QT v Director of Immigration* (2018) 21 HKCFAR 324, (CFA), [28].

637. Where the ground for differential treatment is suspect, intense scrutiny of the reasons for departing from non-discrimination is in order.<sup>1166</sup> Discrimination on the grounds of sex, race, nationality, etc., which relate to an individual's personal characteristics are inherently suspect.<sup>1167</sup> On the other hand, where the legislature accords differential treatment to people in dealing with social problems, such as housing, courts would be reluctant to engage in such intense scrutiny because of traditional judicial deference to the judgment of the legislature.<sup>1168</sup> As was observed by four members of the Human Rights Committee in *Oulajin and Kaiss v Netherlands* (UN Doc CPR/C/46/D/406/1990): 'With regard to the application of Art. 26 of the [ICCPR] in the field of economic and social rights, it is evident that social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. It is for the legislature of each country, which best knows the socio-economic needs of the society concerned, to try to achieve social justice in the concrete context. Unless the distinctions made are manifestly discriminatory or arbitrary, it is not for the Committee to re-evaluate the complex socio-economic data and substitute its judgment for that of the legislatures of States parties.'<sup>1169</sup>

638. *Secretary for Justice v Yau Yuk Lung* is a case where sexual orientation was regarded as an obvious example of discrimination falling within any kind of distinction, ground or status not specifically referred to in Articles 1 and 22 of the Bill of Rights. The question was whether it was constitutional to criminalize buggery

1166. For the US origins of the doctrine, see Richard H Fallon, 'Strict Scrutiny' (2007) 54 UCLA L Rev 1267.

1167. In such cases of discrimination, such differential treatment may be justified if there are cogent reasons for such unequal treatment. See *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, (HL), [19] per Lord Nicholls.

1168. *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, (HL), [18]–[19] per Lord Nicholls of Birkenhead. See also *Raza v Chief Executive in Council* [2005] 3 HKLRD 561, (CFI). In *Yong Yuening v Director of Social Welfare* (2013) 16 HKCFAR 950, (CFA), Ribeiro PJ explained the applicable principles as follows, at [43]: 'As the Chief Justice noted in *Fok Chun Wah v Hospital Authority* (2012) 15 HKCFAR 409, (CFA), [66] "... it would not usually be within the province of the courts to adjudicate on the merits or demerits of government socio-economic policies". Where the disputed measure involves implementation of the Government's socio-economic policy choices regarding the allocation of limited public funds without impinging upon fundamental rights or involving possible discrimination on inherently suspect grounds, the Court has held that it has a duty to intervene only where the impugned measure is "manifestly without reasonable justification:" *Fok Chun Wah v Hospital Authority* (2012) 15 HKCFAR 409, (CFA), [71] and [76]. That is a test initially applied by the European Court of Human Rights while according a broad margin of appreciation to member States in setting and implementing their socio-economic policies. As the Chief Justice points out, the margin of appreciation principle has previously been adapted to apply in the context of our domestic law. It is appropriate similarly to apply the "manifestly without reasonable foundation" test in our domestic context.'

1169. Cited in *Raza v Chief Executive in Council* [2005] 3 HKLRD 561, (CFI), where Hartmann J upheld a levy imposed on employers of domestic helpers on the ground that sensible and fair-minded people would recognize the genuine need for a difference in treatment between employers of higher-skilled workers (for whom there was a pressing economic need) and those who wished to take advantage of a labour importation scheme to bring in lower-skilled workers, including foreign domestic helpers, when Hong Kong had a surfeit of lower-skilled workers who themselves, unless given new skills, faced an uncertain future. He held that the difference in treatment by not imposing the levy on the former group of employers but imposing it on the latter group was both rational and proportionate.

between men when buggery between heterosexuals was not equally criminalized. Chief Justice Li said: 'Homosexuals constitute a minority in the community. The provision has the effect of targeting them and is constitutionally invalid. The courts have the duty of enforcing the constitutional guarantee of equality before the law and of ensuring protection against discriminatory law.'<sup>1170</sup>

639. Similarly, it would be discrimination on the ground of sexual orientation for the Director of Immigration to apply a policy of limiting eligibility for dependant visa to a spouse who is a party to a monogamous marriage between a man and a woman, thus excluding partners of a same-sex marriage. Such policy could not be said to be objectively justifiable as furthering the policy of restricting the number of persons permitted to work in Hong Kong while attracting talented persons to join the Hong Kong workforce 'by giving them the choice of bringing their dependants to live with them'. The restrictive policy was not rationally connected with the legitimate objective of strict immigration control.<sup>1171</sup> However, it would not be unlawful for the Commissioner of Registration to refuse an application by a female-to-male transgender person to change the gender entry stated in the Hong Kong identity card from female to male, provided that the criteria that he applies in considering such an application are legitimate. Balancing private rights and public interest is an important aspect in decision-making which may appear at first sight to be discriminatory.<sup>1172</sup>

640. In *So Wai Lun v Hong Kong Special Administrative Region*, a man had been prosecuted for having unlawful sexual intercourse with a girl below the age of 16. It was argued on his behalf that section 124 of the Crimes Ordinance was discriminatory because it criminalized the conduct of the male to the exclusion of the

1170. *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335, (CFA), [29].

1171. *QT v Director of Immigration* [2018] 21 HKCFAR 324, (CFA). The unanimous judgment of the court explained at [101]: 'The usual standard of review in proportionality analyses (applicable to the justification exercise in equality cases) is that of reasonable necessity: the challenged policy or measure (assuming it to be rationally linked to the promotion of a legitimate aim) may be permitted to encroach upon the protected right only to an extent that is no more than reasonably necessary. It is the usual standard since, as pointed out in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, (CFA), at [131] "... it reflects the essential purpose of the exercise: the Court's endeavour to accommodate acceptable limitations of constitutional rights in the pursuit of a legitimate societal interest while preserving to the maximum extent the guarantees laid down in the constitution.'

1172. *Q v Commissioner of Registration* [2019] 1 HKLRD 1244, (CFI), where Thomas Au J said at [25]: 'The approval for the change of gender entry of an ID card therefore does not only concern with the card holder's private right, but also public interests. As a result, in deciding whether to approve a transgender person's application for a change of the gender entry on the ID card, the Commissioner has to engage in a balancing exercise against the said private and public interest. There was held to be no sex discrimination. The appeal against the decision of the Court of First Instance was dismissed. *Q v Commissioner of Registration* [2022] 1 HKLRD 803 (CA). As Hartmann J said in *Democratic Party v Secretary for Justice* [2007] 2 HKLRD 804, (CFI), at [59], "respect for an individual's privacy will be narrower when it is brought in context with public life or is in conflict with other protected interests".'

deprivation is lawful provided that: (i) the grounds for deprivation of liberty and the procedure of effecting such deprivation is 'established by law'; and (ii) such legal procedures meet the minimal requirements of fairness implied in the ICCPR.<sup>1198</sup> As regards the procedure, Article 5(2) protects the right of a person who is arrested to be informed of the reasons for arrest and to be informed of any charges against him; Article 5(3) protects the right of a person arrested or detained on a criminal charge to be brought before a judge and be tried within a reasonable time or be released; Article 5(4) enables a person who has been arrested or detained to challenge the lawfulness of his detention and be released if the deprivation of liberty is not lawful. Where a person has been arrested without giving him reasons, such arrest may become lawful if reasons are given later.<sup>1199</sup>

651. Under the common law, a person may be arrested or detained where he has committed a breach of the peace<sup>1200</sup> or where the arrestor reasonably believes that a breach of peace is imminent.<sup>1201</sup> The Court of Final Appeal has interpreted the words of section 50 of the Police Force Ordinance (Cap. 232) that a police officer may arrest a person 'who he reasonably believes will be charged' to mean 'who he

(CA), [34]. In *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415, (CFA), [47]–[48] this was considered by the Court of Final Appeal to be 'a useful formulation'.

1198. In *HKSAR v Coady* [2000] 2 HKLRD 195, (CA), 205, Keith JA said: 'the expression "in accordance with such procedure as are established by law" in Art. 5(1) [of the Bill of Rights] means such legal procedures as meet the minimal requirements of fairness impliedly agreed to by the signatories to the International Covenant on Civil and Political Rights.' See *Wong Tze Yam v Commissioner of Police (No 2)* [2011] 3 HKLRD 369, (CA), where during an anti-crime raid of a night club the police prevented the applicant from leaving the premises for half an hour until they finished inspecting the premises. While the police had restricted the applicant's freedom, such restriction was proportionate to the purpose of preventing and detecting crimes, based on reasonable suspicion and thus not a violation of Art. 28 of the Basic Law or Art. 5(1) of the Hong Kong Bill of Rights. See also *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752, (CA), where the Court of Appeal held that the power of detention under s. 32 of the Immigration Ordinance did not comply with Art. 5(1) of the Bill of Rights and therefore unconstitutional because s. 32 was silent on the circumstances under which the power to detain pending removal could be exercised. It has been held that requiring a Hong Kong resident returning from abroad to be quarantined under the Compulsory Quarantine of Persons Arriving at Hong Kong from Foreign Places Regulation (Cap. 599) was a valid restriction on personal liberty which satisfied the proportionality test. See *Syed Agha Raza Shah v The Director of Health* [2020] HKEC 802, (CFI), and *Horsfield Leslie Grant v Chief Executive of HKSAR* [2020] HKEC 971, (CFI). See para. 187 above for further discussion of these two cases.

1199. See, e.g., *Leung Kwok Hung v Secretary for Justice* [2010] 5 HKLRD 170, (CA), where the detainee had been given reasons six hours later. Lam J said at [6]: 'Arrest is a continuing act. It starts from the moment when the person concerned is taken into custody and continues up to the moment when he is released. In this process, even if at the moment when the plaintiff was taken into custody he was not aware of the charge against him, but if at a later time he was informed of the reasons for his arrest and had the opportunity to make an explanation, then from that moment onwards the arrest was lawful, see: *Lewis v Chief Constable of the South Wales Constabulary* [1991] 1 All ER 206, (CA).'

1200. *Albert v Lavin* [1982] AC 546, (HL).

1201. *R v Howell* [1982] QB 416, (CA), 426. See on powers of arrest where a breach of the peace has been committed or is imminent *Chan Hau Man Christina v Commissioner of Police* [2009] 4 HKLRD 797 (CFI), where both *Albert v Lavin* and *R v Howell* were cited.

reasonably believes will be charged on the basis of a reasonable suspicion that the arrested person is guilty of an offence to be charged'.<sup>1202</sup>

652. A person may be deprived of his liberty by the police, for instances: (a) when proof of his identity is checked; (b) when stopped, searched and detained; and (c) when arrested by the police. The Immigration Ordinance<sup>1203</sup> provides that a person must produce his identity card for inspection when requested by a police officer or other authorized person. Failure to do so, without reasonable excuse, is an offence.<sup>1204</sup>

653. Under the Police Force Ordinance, a person can only be stopped, searched and detained where he acts suspiciously or where he is reasonably suspected to have committed an offence, or being about to commit an offence, or intending to commit an offence.<sup>1205</sup>

654. Under the Police Force Ordinance, a person can only be arrested with a warrant,<sup>1206</sup> (there are procedural requirements for arresting a person with a warrant),<sup>1207</sup> or without a warrant (where the person to be arrested is reasonably believed to be charged with or reasonably suspected to be guilty of an offence for which the sentence is fixed by law or for which a person may be imprisoned on a

1202. *Yeung May Wan v HKSAR* (2005) 8 HKCFAR 137, (CFA), [66].

1203. Police Force Ordinance (Cap. 115), s. 17(c). The argument that the power of the police under this section breached the Bill of Rights was rejected in *Lo Hon-hin v R* [1993] HKEC 467, (CFI). For recent convictions for the offence, see *HKSAR v Yung Wai Leong* [2018] HKEC 1359, (DC) and *HKSAR v Chow Hei Choy* [2018] HKEC 1281, (DC).

1204. In *R v Fung Chi-Wood* [1991] 1 HKLR 654, (HC), where a Hong Kong resident was convicted of this offence, the High Court rejected the argument that s. 17(c) of the Immigration Ordinance was enacted to stem the influx of illegal immigrants and therefore should not be used except for the purposes of immigration control.

1205. Police Force Ordinance s. 54. See *HKSAR v Lam Chiu Yin* [2018] HKEC 847, (DC), where the District Court held to be valid an arrest by a police officer of a person under s. 54(2) which provides that if a police officer finds any person in any street whom he reasonably suspects of having committed or of being about to commit or of intending to commit any offence, it shall be lawful for the police officer:

- (a) to stop the person for the purpose of demanding that he produces proof of his identity for inspection by the police officer;
- (b) to detain the person for a reasonable period while the police officer enquires whether or not the person is suspected of having committed any offence at any time;
- (c) to search the person for anything that is likely to be of value to the investigation of any offence that the person has committed, or is reasonably suspected of having committed or of being about to commit or of intending to commit; and
- (d) to detain the person during such period as is reasonably required for the purpose of such a search.

1206. The Magistrates Ordinance (Cap. 227) provides that whenever an information or complaint in writing is laid before a magistrate alleging the commission of an indictable offence and the accused is not in custody, a magistrate may issue a warrant for the apprehension of the accused. The warrant must, among other things, order the accused to be brought before a magistrate to answer to the complaint or information, and to be further dealt with according to law.

1207. See, e.g., ss 73–74 of the Magistrates Ordinance (Cap. 227).

ascertain the truth and to ensure that justice is done. Further, his duty may include rendering some assistance to the accused by asking a few relevant questions. There is no duty on the part of the magistrate to conduct the defence as such or take over the cross-examination from the accused.<sup>1256</sup>

A defendant may argue that he did not receive a fair hearing because of negligence or incompetence of his legal representative.<sup>1257</sup>

671. The common law rights of a defendant are supplemented by rights guaranteed by the Bill of Rights.<sup>1258</sup> Under the Bill of Rights, a defendant is entitled, for example, to 'be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him'.<sup>1259</sup> Thus, where an important prosecution document, for example, a summons, is in a language that the defendant does not understand, the trial judge ought to explain it to him and adjourn the trial.<sup>1260</sup>

672. The defendant must have 'adequate time and facilities for the preparation of his defence'.<sup>1261</sup> It follows that the failure of the prosecution to provide important materials to the accused may constitute unfairness. This may enable the defendant to stay the criminal proceedings.<sup>1262</sup>

673. Of particular importance is the constitutional right 'to be tried without undue delay'.<sup>1263</sup> Undue delay in itself is insufficient: The accused must have, as a result of the undue delay, suffered prejudice (a point that is not easy to prove). Where the delay is substantial, prejudice will be presumed and it is up to the prosecution to rebut that presumption. The prejudice that he has suffered must be balanced with the public interest in having justice done.<sup>1264</sup>

1256. As Li J said in *Chan Leung v R* [1979] HKLR 98, (HC), 105: 'generally the trial magistrate's duty in assisting an unrepresented accused does not go beyond advising him of his legal rights in matters of procedure and in law. In appropriate circumstances it may be desirable for the magistrate or the trial judge to ask witnesses questions not so much to assist the accused but as to ascertain the truth and to ensure that justice is done. Further his duty may include some assistance to the accused by asking a few pertinent questions if such questions were apparently necessary. There is no duty on the part of the magistrate to conduct the defence as such or take over the cross-examination from the accused.' Followed in *R v Tam Kin Wing* [1997] HKLRD 333, (HC). See also *R v Tong Kwok Yip* [1985] 2 HKC 216 (HC).

1257. *HKSAR v Cheng Kan* [1998] HKEC 1143, (CFI).

1258. Bill of Rights Ordinance, see Art. 11(2)(d) (on the right to defend oneself, etc.) and Art. 11(2)(e) (on the right to examine witnesses).

1259. *Ibid.*, Art. 11(2)(a).

1260. *Attorney General of Hong Kong v Tang Yuen-Lin* (1995) 5 HKPLR 631; [1995] 2 HKCLR 157, (CA).

1261. Article 11(2)(b) of the Bill of Rights.

1262. See *R v Flickinger* (1993) 3 HKPLR 677, (DC), and *R v Chu Kam-to* (1994) 4 HKPLR 472; [1994] HKEC 53, (SC). See *HKSAR v Lee Ming Tee and SFC (Intervener)* [2004] 1 HKLRD 513; (2003) 6 HKCFAR 336, (CFA).

1263. Article 11(2)(c) of the Bill of Rights. See Michael Wilkinson & Johannes Chan 'Abuse of the Criminal Process', in *Modern Trends in Litigation*, ed. Gary Heilbronn (Hong Kong: Hong Kong Law Journal Ltd, 1995), 59-78.

1264. *In re George Tan* [1991] 2 HKLR 400, (HC), *R v William Hung* [1994] 1 HKCLR 47, (CA), and *R v Deacon Chiu* (1993) HKEC 163, (SC). The Court of Final Appeal observed in *Ong Siu Sin*

674. The Bill of Rights reinforces the common law rule against double jeopardy when it provides that 'no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of Hong Kong'.<sup>1265</sup> A person who has been subjected to a disciplinary proceeding cannot be said to have been 'convicted or acquitted in accordance with the law and penal procedure' in order to attract the protection against double jeopardy.<sup>1266</sup>

675. The Criminal Procedure Ordinance provides that a person convicted of an offence may appeal on the ground that there has been a 'miscarriage of justice', in the sense that there has been an 'unsafe or unsatisfactory' conviction, a legally erroneous judgment or a 'material irregularity' in the trial.<sup>1267</sup> The Bill of Rights provides that everyone convicted of a crime has the right to have his conviction and sentence reviewed by a higher tribunal.<sup>1268</sup>

*Kevin v HKSAR* [2011] HKEC 986, (CFA), [14]-[15], that 'to establish undue delay within [Article 11(2)(c) of the Bill Rights] to merit a remedy, the applicant must demonstrate something more, such as a serious unjust effect upon his trial or upon him personally. Examples are that his defence has been prejudiced, or the fairness of his trial has been compromised, or that the delay has been oppressive. Such a list, of course, cannot be exhaustive. Everything depends upon the individual circumstances in which the court is called upon to exercise its discretion.'

1265. Article 11(6) of the Bill of Rights.

1266. See *HKSAR v Fu Man Kit* (2021) 24 HKCFAR 253, (CFA), [25]: 'The discretion to stay proceedings on double jeopardy grounds has generally only been exercised where the earlier proceedings, based on the same or substantially the same facts, were tried by a court of competent jurisdiction'. This case concerned two prisoners who had been convicted and punished for assaulting another prisoner after a disciplinary hearing. Subsequently when a criminal prosecution was brought against them in a Magistrate's Court in respect of the same assault, one of them asked for a stay of proceedings on the ground that it would be an abuse of process to try them twice for the same conduct putting him in double jeopardy. The plea was rejected and, on appeal on the question of law, the Court of Final Appeal agreed with the Magistrate's ruling and observed at [31]: 'It is accordingly clear that the appellant's application to stay the criminal prosecution for the assault offence on the basis that he had previously been subjected to prison disciplinary proceedings was rightly rejected by the Courts below. It is true that the criminal proceedings were based on the same or substantially the same facts but the Acting Superintendent who conducted the disciplinary proceedings and awarded the penalties was plainly not a court of competent jurisdiction.'

1267. Section 83(1) of the Criminal Procedure Ordinance (Cap. 221). As Lord Dunedin put it succinctly in *Robins v National Trust Co Ltd* [1927] AC 515, (PC) 518-519:

'miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. There is, however, also another way of preventing the application of the rule. If it can be shown that the finding of one of the Courts is so based on an erroneous proposition of law that if that proposition be corrected the finding disappears, then in that case there is no finding at all.' As Bokhary PJ observed in *Tang Siu Man v HKSAR (No 2)* (1997-98) 1 HKCFAR 107, (CFA), 147: 'To allow an appeal just because something has gone wrong at the trial even though it has not resulted in a miscarriage of justice would not be doing justice.'

1268. Article 11(4) of the Bill of Rights. See, for instance, *HKSAR v Yeung Kwai Kuen* [2002] 3 HKLRD 91, (CA).

684. Right to privacy is not an absolute right. It may be subjected to restrictions which are proportionate. *Junior Police Officers' Association of Hong Kong Police Force v Electoral Affairs Commission*<sup>1291</sup> is an example of a proportionate restriction. There, the applicants argued that since the names and addresses of all those who are on the electoral list are public information, police officers who are on the electoral list run the risk of their personal information being readily available to the protestors who would use it to attack them. The court rejected the judicial review application and upheld the validity of the electoral arrangements set out in legislation aimed at ensuring transparency in the electoral process. It was held in *Sham Wing Kan v Commissioner of Police*<sup>1292</sup> that while a person has privacy rights in the digital contents of his mobile phone, a police officer could search such contents of a mobile phone found on an arrested person, subject to measures to prevent undue interference with the right to privacy.<sup>1293</sup> The recent case of *Q v Commissioner of Registration*<sup>1294</sup> has reaffirmed that the right to privacy is not an absolute right. There, the two applicants were biological females at birth and were female-to-male transgender persons. They had undergone mastectomies and hormonal treatment but had not completed the relevant sex reassignment surgery. They both lived as males. They applied to the Commissioner for Registration to change the sex entry on their Hong Kong identity cards from female to male. Their applications were rejected by the Commissioner, because according to the policy adopted by the Commissioner a change of the sex entry would be accepted only if the applicant had undergone sex-assignment surgery. The applicants argued unsuccessfully in their judicial review application that policy infringed their right to privacy, the right not to be subjected to cruel, inhuman or degrading treatment under Article 3 of the Bill of Rights Ordinance, right not to be discriminated as protected by the Sex Discrimination Ordinance. As regards the right to privacy it was held that the Commissioner's policy engaged the applicant's right to privacy, in respect of: (i) gender identity, in the present context, their right to state their acquired gender on their identity card and (ii) physical integrity. The Commissioner's policy, however, was held to be a justifiable restriction on their right to privacy, as the policy served the legitimate aim of providing a fair, clear, consistent, certain and objective administrative guidelines to: (i) inform applicant what condition they should satisfy to have their sex entry in their identity documents changed and (ii) the registration officer to be satisfied that

the right or rights concerned (iii) appears unlikely to encourage any future breaches of that, those or other rights.' See also *Ho Man Kong v Superintendent of Lai Chi Kok Reception Centre* (2014) 17 HKCFAR 179, (CFA).

1291. [2020] 2 HKLRD 631, (CFI).

1292. [2020] 2 HKLRD 529, (CA).

1293. See also *HKSAR v Yu Lik Wai William* [2019] 1 HKLRD 1149, (CA), [283]–[284], where telecommunications interceptions and covert surveillance by law enforcement authorities, subject to protective measures, were upheld as a legitimate limitation on the right to privacy. As regards the proportionality analysis, there was justification for the use of executive authorizations and unsworn statements in writing, given the opportunistic and fluid nature of covert surveillance. The appropriate standard to apply was 'manifestly without reasonable foundation' given the wide margin of discretion appropriate for this operational efficiency justification. Given that executive authorization permitted only covert surveillance with low levels of intrusion into privacy rights, it could not be said that the regime was without reasonable foundation.

1294. [2022] 1 HKLRD 803 (CA).

an applicant had provided the required information so that a replacement identity document could be issued with the new sex entry. The policy was therefore rationally connected to achieving its legitimate aim. As regards the standard of scrutiny, it was held that the court must adopt the more stringent standard of 'no more than necessary'. The Commissioner's policy met that standard as the criteria adopted by the Commissioner provided clear, definite, consistent and objective criteria to determine whether the applicants had achieved clear resemblance to the new sex in terms of biological appearance and characteristics. It was necessary for the policy to strike a right balance between the need to ensure that any person's sex is correctly identified in identity documents and that the applicant's rights must not be unduly interfered with. The court is required to strike the right balance between the rights of transgender persons and the public interest.<sup>1295</sup>

### VIII. Freedom of Thought, Conscience, and Religion

685. Article 15 of the Bill of Rights guarantees the freedom of thought, conscience and religion. They are not absolute rights: they 'may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.<sup>1296</sup> In *Lau Wong Fat v Attorney General*,<sup>1297</sup> the Court of Appeal did not consider the abolition of the Chinese customary rule that gives males the sole right of succession to land to be an infringement of the freedom of thought, conscience and religion.

686. The Basic Law protects religious organizations in respect of their property rights, their freedom to run religious and educational activities and schools, as well as their liberty to maintain normal relationships with religious organizations outside Hong Kong. However, governmental measures justly intended to ensure proper management of schools managed by religious bodies is not a breach of religious freedom.<sup>1298</sup>

### IX. Freedom of Expression

687. The Bill of Rights provides as follows:

1295. It was further held that the policy of the Commissioner on registration for transgender persons to change sex entry in their identity cards was not merely a matter of administrative convenience and the Judge was correct in taking into account the significant and wide impact on public interests engaged by the Policy. See [83]–[93].

1296. Article 15(3). Judicially recognized, for instance, in *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743, (CFA).

1297. *Lau Wong Fat v Attorney General* [1997] HKLRD 533, (CA).

1298. Article 141. See *Catholic Diocese of Hong Kong v Secretary for Justice* [2010] HKEC 163, (CA), affirmed by the Court of Final Appeal (2011) 14 HKCFAR 754, (CFA).



The burden – and it is a substantial one – must lie on those who seek a court order which offends what I perceive to be the fundamental rule: that criminal trials must be conducted publicly, and should be reported fully and fairly ... I think that these same principles apply to a partial restriction on reporting as they do to a sitting in camera or to a ban on all reporting.<sup>1310</sup>

691. An important area where curtailment of the freedom of expression occurs is public media. It is common for the government to regulate television and telecommunication agencies.<sup>1311</sup> In relation to the power of the Telecommunications Authority to take criminal proceedings against an unlicensed broadcaster, the Court of First Instance in *Secretary for Justice v Ocean Technology Ltd* held licensing of radio broadcasting to be a permissible fetter on the freedom of expression in view of the fact that unrestricted access to the radio frequency spectrum in Hong Kong would run the risk of interfering with vital emergency services, operations of the Civil Aviation Department and listeners' right to receive transmission by existing radio stations. Stock JA said that a societal justification for a licensing regime should be obvious from a moment's contemplation of the chaos and interference with the rights of others that would result absent such a regime.<sup>1312</sup> The Court of Final Appeal in *HKSAR v Wong Yuk Man* refrained from examining the constitutionality of offences relating to unauthorized broadcasts since the convictions could be quashed on the grounds that what the suspects had done did not constitute the *actus reus* of the offence in question.<sup>1313</sup>

692. Apart from the above statutory regulatory framework, the law of defamation is also a major source of law controlling the Hong Kong media. In light of the

1310. *R v Shamsudin* [1987] HKLR 254, (HC). (This is a case decided before the Bill of Rights came into effect, but the principle that restrictions may be placed on open justice still holds true.) See *HKSAR v Wu Wing Kit (No 1)* [2016] 3 HKLRD 386, (CA), where *Shamsudin* was referred to, the Court of Appeal held that it was permissible under the common law and the Bill of Rights to impose restrictions on open justice. The Court also referred to *TCWF v LKKS* [2013] HKEC 1197, (CA), where a request to hold a hearing in private was rejected. *Asia Television Ltd v Communications Authority* [2013] 2 HKLRD 354, (CA), is a case where the court refused to hold a judicial review hearing in private. The principle that emerges from these cases is that any restriction on open justice must be justified as tending to ensure a fair trial and that the right to privacy in itself is not a sufficient justification. An important aspect of open justice is the reporting in public media of judicial proceedings, and it is only in exceptional circumstances that the court prohibits public reporting of ongoing proceedings. See *HKSAR v Wu Wing Kit (No 1)* [2016] 3 HKLRD 386, (CA).

1311. See the Broadcasting Ordinance (Cap. 562) and the Telecommunications Ordinance (Cap. 106).

1312. *Secretary for Justice v Ocean Technology Ltd* [2009] 3 HKEC 2114, (CFI), [66], [68] and [92]. The Court of Final Appeal refused leave to appeal: *Secretary for Justice v Ocean Technology Ltd* [2009] HKEC 806, (CFA).

1313. *HKSAR v Wong Yuk Man* (2012) 15 HKCFAR 712, (CFA).

constitutional right to free speech, the defence of fair comment in the tort of defamation has been given a liberal interpretation in order to favour the defendant.<sup>1314</sup> Public authorities, as opposed to government bodies,<sup>1315</sup> may sue for defamation.<sup>1316</sup>

693. In 1999–2000, the Law Reform Commission of the Hong Kong Special Administrative Region Government recommended the following proposals: setting up of a statutory Press Council to handle complaints concerning media infringement of privacy, establishment of a new cause of action for media infringement of privacy and criminalization of stalking.<sup>1317</sup> It has been argued that implementation of these reforms will stifle freedom of the press. As an industry response to the Law Commission report, perhaps to avoid the setting up of a statutory Press Council, after months of consultation and discussion, eleven newspapers and two journalists' associations, namely the Hong Kong News Executives' Association and the Hong Kong Federation of Journalists formed a Hong Kong Press Council in 2000, which receives and handles public complaints in accordance with its constitution and rules of procedures.

694. Concerns have been expressed that the offence of sedition,<sup>1318</sup> would stifle criticism of the state is inconsistent with freedom of expression.<sup>1319</sup> There is, at present, a law forbidding unauthorized prejudicial disclosure of certain classes of state secrets (e.g., those relating to defence and foreign affairs) by civil servants in particular.<sup>1320</sup> There is no defence of public interest. Like sedition, this law has also been criticized by Hong Kong academics.<sup>1321</sup> Section 30 of the Prevention of Bribery Ordinance (Cap. 201) makes it an offence for anyone knowing or suspecting that an investigation into a bribery offence is taking place to disclose that fact to the person subject to the investigation or to anyone else or to the public. The now repealed section 30(1A) provided that the prohibition on disclosure ended when the suspect

1314. *Eastern Express Publishers Ltd v Man Ching* (1999) 2 HKCFAR 264, (CFA) and *Cheng v & another v Tse Wai Chun* (2000) 3 HKCFAR 339, (CFA).

1315. *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, (HL).

1316. *Hong Kong Polytechnic University v Next Magazine Publishing Ltd* [1997] HKLRD 514, (CA). See Jill Cottrell, 'Courts, Freedom of Speech and Defamation', (1999) 7 *Asia Pacific Law Review* 205.

1317. See Sub-Committee on Privacy, the Law Reform Commission of Hong Kong, *Consultation Paper on the Regulation of Media Intrusion* (Hong Kong: The Law Reform Commission of Hong Kong, 1999), Sub-Committee on Privacy, the Law Reform Commission of Hong Kong, *Consultation Paper on Civil Liability for Invasion of Privacy* (Hong Kong: The Law Reform Commission of Hong Kong, 1999) and the Law Reform Commission of Hong Kong, *Stalking* (Hong Kong: The Law Reform Commission of Hong Kong, 2000).

1318. See ss 9–10 of the Crimes Ordinance (Cap. 200).

1319. D. Clark, 'Sedition and Article 23', in P Wesley-Smith (ed.), *Hong Kong's Basic Law: Problems & Prospects* (Hong Kong: Faculty of Law, University of Hong Kong, 1990). In *Fei Yi Ming v R* (1952) 36 HKLR 133, (Appellate Jurisdiction) a case decided in the colonial era, a proprietor of a pro-China newspaper was punished for this offence for referring to anti-British propaganda from a mainland Chinese source.

1320. The Official Secrets Ordinance (Cap. 521).

1321. Yash Ghai, 'Official Information: Government Secrets or Public Assets?' (1991) 21 *Hong Kong Law Journal* 78.

every permanent resident shall have the right and the opportunity, ... without unreasonable restrictions to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.<sup>1356</sup>

There have been several successful judicial challenges of legislation on the ground that they imposed unjustifiable restrictions on the right to participate in public life.<sup>1357</sup> In *Lau San Ching v Liu, Apollonia*,<sup>1358</sup> the returning officer had rejected the nomination paper of a candidate for the District Board (now renamed 'District Council') election on the ground that he had not been ordinarily resident in Hong Kong in the preceding ten-year period, as required by the Electoral Provisions Ordinance (which was not adopted when Hong Kong became a Special Administrative Region in 1997). It was held that the ten-year requirement was inconsistent with Article 21 of the Bill of Rights. The High Court held that while there was a legitimate purpose in imposing a residential requirement, there was no rational basis for imposing a ten-year residential requirement, and that the requirement was disproportionate to the legitimate aim of the statute. In *Secretary for Justice v Chan Wah*,<sup>1359</sup> the Court of Final Appeal held that the requirement that only indigenous inhabitants could be candidates at the election of a rural village representative elections was unconstitutional. Li CJ observed at p. 474 that 'bearing in mind that the village representative by statute is to and in fact does represent the village as a whole (comprising both the indigenous and the non-indigenous villagers) and further has a role to play beyond the village level, the restriction on the ground of not being indigenous cannot be considered a reasonable restriction' on the right to participate in public life. The requirement that the returning officer must be satisfied that the Legislative Council election candidate has genuinely and truthfully pledged allegiance to the HKSAR at the time of submitting nomination papers has come up for discussion. It has been held that before the returning officer can decide whether the oath was genuine he had to afford an opportunity to the candidate to address any concerns that the officer had, and that the failure to do so resulted in invalidity of his decision.<sup>1360</sup> *Senior Non-expatriate Officers' Association v Secretary for the*

1356. Hong Kong Bill of Rights, Art. 21.

1357. *Lau San Ching v Liu, Apollonia* (1995) 5 HKPLR 23, (HC) and *Secretary for Justice v Chan Wah* (2000) 3 HKCFAR 459, (CFA). See also *Lai Tak Shing v Secretary for Home Affairs* (2007) 10 HKCFAR 655, (CFA). See also the cases relating to the failure of Legislative Council members or persons nominated as contestants at Legislative Council elections to subscribe fully and correctly the oath of allegiance, discussed elsewhere in this work.

1358. (1995) 5 HKPLR 23, (HC).

1359. [2007] HKEC 1950, (CFA).

1360. *Chow Ting v Teng Yu Yan Anne (Returning Officer)* [2019] 4 HKLRD 459, (CA), affirmed by the Court of Final Appeal in *Au Nok Hin v Teng Yu Yan Anne* (2019) 22 HKCFAR 524, (CFA). See also *Lau Wing Hong v Chan Yuen Man Amy (Returning Officer) (No 2)* [2019] 5 HKLRD 1, (CFI); and *Lau Siu Lai v Kwok Wai Fun Franco (Returning Officer)* [2020] HKEC 931, (CFI), affirmed by the Court of Final Appeal, refusing leave to appeal: (2020) 23 HKCFAR 338 (CFA). The requirement to give the candidate an adequate opportunity to present their case was held to have been satisfied in *Chan Ho Tin v Lo Ying Ki Alan* [2018] 2 HKLRD 7, (CFI). See also *Wong Tai*

*Civil Service*<sup>1361</sup> (on denial of the senior civil servants' right to participate in the elections of the selection committee for the formation of the first government of Hong Kong) and *Chau Tsun Kiu v Secretary for Justice* (the right of candidates at Legislative Council elections to send letters to electors free of postage) are examples of unsuccessful challenges.<sup>1362</sup>

In *Lee Miu Ling v Attorney General*, the use of functional constituencies in Legislative Council elections was unsuccessfully challenged.<sup>1363</sup> The argument that corporate voting in functional constituencies is unconstitutional has been rejected.<sup>1364</sup>

704. The Bill of Rights guarantees the right 'to have access, on general terms of equality, to public service in Hong Kong'.<sup>1365</sup> Expatriate civil servants unsuccessfully challenged the civil service localization programme of the Hong Kong Government on the ground that localization granted more rights to local officers and thereby discriminated against non-locals, although certain aspects of the scheme such as the prohibition of non-local officers on contract terms transferring to permanent positions were held to be in breach of the Bill of Rights: *Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service*.<sup>1366</sup> Since the handover, the new civil service reform package proposing a reduction of remuneration and fringe benefits has, again, provoked a constitutional crisis.<sup>1367</sup>

## XII. The Right to Social Welfare

705. The Basic Law provides that 'Hong Kong residents shall have the right to social welfare in accordance with the law. The welfare benefits and retirement security of the labour force shall be protected by law'.<sup>1368</sup> However, the reality in Hong Kong is that 'the [social security] system [is] a patchwork of laws and administrative practices; the benefits that it conferred were more in the nature of [grace] than

*Hoi v Au Nok Hin* [2018] 2 HKLRD 789, (CFI), where an elector brought an application for judicial review praying that the candidate who won a seat at the Legislative Council election was disqualified because he had not genuinely taken his oath of allegiance. The application was rejected on the technical ground that the proper procedure was to bring an election petition.

1361. *Senior Non-expatriate Officers' Association v Secretary for the Civil Service* (1997) 7 HKPLR 91, (HC).

1362. *Chau Tsun Kiu v Secretary for Justice* [2014] 5 HKLRD 414, (CFI).

1363. *Lee Miu Ling v Attorney General* [1995] 5 HKLY 196, (CA). See Albert Chen, 'The Legal Foundation of the Legislative Council Election 1995' in H. Kuan, S. Lau, K. Louie & T. Wong (eds) *The 1995 Legislative Council Elections in Hong Kong*, (Hong Kong: Hong Kong Institute of Asia-Pacific Studies, The Chinese University of Hong Kong, 1996).

1364. The Court of Appeal upheld corporate voting particularly in the light of the development of the electoral system in Hong Kong: *Chan Yu Nam v Secretary for Justice* [2010] HKEC 1893, (CA). Stock V-P gave an excellent account of the development of the electoral system. Leave to appeal was refused by the Court of Final Appeal *Chan Yu Nam v Secretary for Justice* [2012] HKEC 94.

1365. Bill of Rights, Art. 21.

1366. *Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service* (1996) 6 HKPLR 333, (CA).

1367. Anton Cooray, 'Public Sector Reform in Hong Kong: Some Legal Aspects' (1999) 8 *Public Administration and Policy* 23.

1368. Hong Kong Basic Law, Art. 36.