Sino-British Joint Declaration. Those "basic policies" were wide-ranging and laid out the vision of Hong Kong following the transfer of sovereignty in 1997 as an integral part of the PRC directly under the authority of the Central People's Government (CPG). However, "taking into account the history of Hong Kong and its realities", it would maintain its own legal and financial system, as well as independent executive, legislative and judicial power. A capitalist economy would continue, and the pre-existing laws would "remain basically unchanged". Most importantly, the Sino-British Joint Declaration established that this system would remain unchanged for 50 years (e.g. until 2047).

Judicial consideration of the Preamble

P.2 The Preamble acknowledges Hong Kong's unique history as a former British colony and current Special Administrative Region of the PRC, and this helps us understand the nature of the Basic Law: *Re Cheng Kai Nam Gary* [2002] 2 HKLRD 39, [16] (Hartmann J, "The preamble of the Basic Law makes specific reference to this history and to Hong Kong's other 'realities' such as its capitalist system of commerce and its system of law… Accordingly, as a work of constitutional architecture, the Basic Law is built upon the foundations of Hong Kong's special history.").

However, while the Preamble reflects upon Hong Kong's history, the Basic Law is fundamentally forward-looking: *Harvest Good Development Ltd v Secretary for Justice* [2007] 4 HKC 1, [67] (Hartmann J, "The Basic Law, it appears to me, while it recognizes history, seeks to set up a new order, one to take effect on the resumption of sovereignty on 1 July 1997. It is therefore a forward-looking document, not one that seeks to reach back in order to influence or alter what came before.").

Though the Preamble provides that "Hong Kong has been part of the territory of China since ancient times; it was occupied by Britain after the Opium War in 1840", this does not justify a claim that Hong Kong land has always been the property of the Chinese state: *Lee Bing Cheung v Secretary for Justice* (HCA 1092/2010, [2013] HKEC 255) [154] (Deputy Judge Ng, "…as to what came before 1 July 1997, under the local municipal law the British Crown and/or the BHKG in right of the British Crown were the only entities that exercised ultimate ownership rights over land in Hong Kong… The BL Preamble further provides that the resumption of the exercise of sovereignty over Hong Kong on 1 July 1997 took 'into account of [Hong Kong's] history and realities')…"); [155] ("I therefore do not agree that, insofar as Hong Kong municipal law is concerned, the Basic Law Preamble's own meaning must be that all land in Hong Kong has always been the property of the Chinese State. In fact, [it] recognises Hong Kong's

history and realities including its occupation by Britain after the Opium War in 1840.").

Perspectives on the constitutional principle of "one country, two systems"

Perhaps the most significant contribution of the Preamble is its direct incorporation of the "one country, two systems" principle. It is notable that this "basic policy" is specifically enumerated in the Preamble, whereas the rest are referred to by reference to the Sino-British Joint Declaration. This principle guides interpretation of the Basic Law (see further discussion at 158.1). P.3

The principle of "one country, two systems" is a mechanism by which the resumption of Chinese sovereignty over a region with a virtually incompatible way of life (at least at the time of negotiation) could be reconciled: *Deng Xiaoping on the Question of Hong Kong* (New Horizon Press, 1993) 6–9 ("the socialist system on the mainland, with its population of one billion, will not change, ever. But in view of the history of Hong Kong and Taiwan and of their present conditions, if the continuation of the capitalist system there is not guaranteed, prosperity and stability cannot be maintained, and peaceful reunification of the motherland will be out of the question. Therefore, with regard to Hong Kong, we propose first of all to guarantee that the current capitalist system and way of life will remain unchanged for 50 years after 1997.").

What of the relationship between the "two systems"? The regional courts have accepted the importance of the "one country" aspect to the formulation: *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442, 460, in which the Court of Final Appeal identified the Preamble's reference to the return of sovereignty over Hong Kong to the PRC as fulfilling a "long-cherished common aspiration" as a relevant consideration in determining whether laws against flag desecration served legitimate social interests. Though the one-country aspect has never been in dispute in the courts, the 2014 White Paper indicated that the State Council feared that growing numbers of Hong Kongers were choosing to ignore (or at least minimise) the first part of the formulation: "[T]he 'two systems' under the 'one country' are not on a par with each other. The fact that the mainland, the main body of the country, embraces socialism will not change. With that as the premise, and taking into account the history of Hong Kong and some other regions, capitalism is allowed to stay on a long-term basis. Therefore, a socialist system by the mainland is the prerequisite and guarantee for Hong Kong's practicing capitalism and maintaining its stability and prosperity. For Hong Kong to retain its capitalist system and enjoy a high degree of autonomy with 'Hong

edn, Law Press China and Joint Publishing (HK) Co Ltd, 2009), p.162 ("this principled provision, which is not only in conformity with the provisions of the Constitution regarding the land and natural resources but is also based on the past and present conditions of Hong Kong, is of major significance to the prosperity and development of the Region.").

The land in Hong Kong became property of the Chinese State on and after 1 July 1997

7.2 Article 7 only concerns land ownership after 1 July 1997 and not before this date: (1) *Lee Bing Cheung v Secretary for Justice* (HCA 1092/2010, [2013] HKEC 255), [153] (Deputy Judge Ng, "In my view, the language of the text of Article 7 does not support the contention that as a matter of local municipal law all land in Hong Kong is and has always been the property of the Chinese State, and it is not correct to say that Article 7 draws no distinction as to time. In fact, Article 7 states that the land and natural resources 'within the Hong Kong Special Administrative Region' shall be State property (香港特別行政區境內" 的土地和自然資源屬於國家所有). Since the HKSAR only came into existence on 1 July 1997, there is plainly no express reference in the text of Article 7 to land ownership in Hong Kong before that date, and no ambiguity that the provision only concerns land in Hong Kong on and after 1 July 1997"); (2) *Jade's Realm Ltd v Director of Lands* [2015] 1 HKLRD 867, [21] (Ng J, "It was only as from 1 July 1997, after the British Crown's leasehold interest in New Territories land had ceased, that the land reverted back to the Chinese Government who then has become entitled to possession of it as against *inter alia* squatters, past and present.").

Reference in the Basic Law's preamble to Hong Kong being part of the territory of China since "ancient times" does not alter the nature of ownership rights under art.7: *Lee Bing Cheung v Secretary for Justice* (HCA 1092/2010, [2013] HKEC 255), [154] (Deputy Judge Ng, "[A]s to what came before July 1997, under the local municipal law the British Crown and/or the BHKG in right of the British Crown were the only entities that exercised ultimate ownership rights over land in Hong Kong. Indeed, the Preamble recognises such history… The Preamble further provides that the resumption of the exercise of sovereignty over Hong Kong on 1 July 1997 took 'into account of [Hong Kong's] history and realities'."); [155] ("I therefore do not agree that, insofar as Hong Kong municipal law is concerned, the Preamble's own meaning must be that all land in Hong Kong has always been the property of the Chinese State. In fact, the Preamble recognises Hong Kong's history and realities including its occupation by Britain after the Opium War in 1840…"); [160] ("I hold that under Hong Kong municipal law it is by virtue of the enactment of the Basic Law (especially Article 7) and not as a result of

ancient rights that all land and natural resources in the HKSAR became State property on and after 1 July 1997.").

Continuation of same land ownership rights after 1 July 1997

7.3 All rights of ownership held by the British Crown and/or the colonial Hong Kong Government prior to 1 July 1997 are the same rights held by the Chinese State and/or the Government of the HKSAR on or after 1 July 1997: *Lee Bing Cheung v Secretary for Justice* (HCA 1092/2010, [2013] HKEC 255), [164] (Deputy Judge Ng, "The system of land tenure has not changed after 1 July 1997 save that all land in Hong Kong has become State property and is managed, used, developed and leased by the SARG… This means that all rights of 'ownership' held by the British Crown and/or the BHKG in right of the British Crown in respect of land in Hong Kong prior to 1 July 1997 are the same rights held by the Chinese State and/or the SARG in right of the Chinese State on or after 1 July 1997.").

Government exercising its power in relation to leases of land in Hong Kong

7.4 Article 7 establishes that virtually all freehold title to land in Hong Kong is exercised by the SARG: *China Field Ltd v Building Appeal Tribunal (No 2)* (2009) 12 HKCFAR 342, 360 (Lord Millett NPJ, "With the sole exception of the Anglican Cathedral, all land in Hong Kong is either owned by or ultimately held under a lease granted by a single landlord. Before 1997 this was the Crown; since 1997 it is the HKSAR Government exercising its power in relation to leases of land conferred by Articles 7 and 120 to 123 of the Basic Law.").

Government leases land in private capacity

7.5 While art.7 confers on the Government the right to lease land, the exercise of that right remains within its private capacity and is not, by virtue of art.7, rendered amenable to judicial review: *Rank Profit Industries Ltd v Director of Lands (No 2)* [2008] 4 HKC 84, 93 (Tang V-P, "The government's right to lease land is derived from art.7. This is not different from, say, the vesting of land in the New Territories in the government by the New Territories Ordinance. That would not make the grant or modification of leases reviewable.") [Leave to appeal refused, with extensive reasons and precedents rejecting two propositions in *Rank Profit Industries Ltd v Director of Lands* (FAMV 7/2009, [2009] HKEC) 1021. See also *Anderson Asphalt v Secretary for Justice* [2009] 3 HKLRD 215, 251 (Cheung J, "… It is for the Government, not the Court, to decide how land, as always a scarce resource in Hong Kong, should best be put to use. Article 7 of the Basic Law specifically tasks the Government of the HKSAR, not the courts, with the management, use and development

(Bokhary PJ, "The practice of the Hong Kong courts to receive expert evidence on the content of Chinese law and custom, while perhaps anomalous, is pragmatic and well established.") As to such content, see generally P Wesley-Smith, *Sources of Hong Kong Law* (Hong Kong University Press, 1994) Chapter 12.

Whether Basic Law retroactive

8.9 It has been held at first instance that the provisions of the Basic Law, especially those concerning fundamental rights, are non-retroactive. That is, the relevant provisions cannot operate upon facts that arose before the Handover: *Harvest Good Development Ltd v Secretary for Justice* [2007] 4 HKC 1, 19–25 (Hartmann J, "As to retrospectivity, I start by saying that, reading the Basic Law in the context of its purpose, I can find no provision to the effect that, concerning rights of private property, the Law shall operate retrospectively. There is certainly no clear language that it shall have such effect. Nor, in my view, on a reading of the Law or relevant extraneous materials, does such a construction arise by necessary implication. The Basic Law, it appears to me, while it recognises history, seeks to set up a new order, one to take effect on the resumption of sovereignty on 1 July 1997. It is therefore a forward-looking document, not one that seeks to reach back in order to influence or alter what came before…While couched in broad language, it seems to me that art.8 leans more towards acknowledging the common law presumption against retrospective operation of legislative instruments rather than implying that its provisions may be employed retrospectively. The article speaks of maintaining Hong Kong's previous laws unimpaired. Put another way, it speaks of preserving them. Article 8, therefore, as with the Basic Law itself, looks to continuity and stability. It looks to preserving all previous laws except those which — with the coming into effect of the Basic Law, and at no earlier date — are found to contravene that law… In looking to arts 6 and 105, we are not talking of rights classified by the Basic Law as fundamental rights which must prevail in favour of the individual over the interests of society. We are talking about rights which, as society evolves, are quite properly qualified by considerations of public policy. These rights, it seems to me, ought to be established by reference to the law as it was at the time. At that time those who occupied and utilised land in adverse possession knew the risks they faced and the possible rewards. Equally, leaseholders knew the risk they faced if they themselves did not ensure possession and utilisation of their land. For these reasons, I do not see how it can be said that, on the principle of fairness, the drafters of the Basic Law must have intended that arts.6 and 105 would operate retrospectively...").

One might have thought it follows from *Harvest Good Development v Secretary for Justice* that where pre-Handover law of any kind is *prima facie* embraced by art.8, but is held to contravene a provision of the Basic Law, the resulting non-maintenance of the law under art.8 can only operate prospectively. For to allow non-maintenance to go any further, ie expunge pre-Handover law as if it had never existed, would necessarily render the Basic Law retroactive.

However, the CFA had earlier regarded prospective non-maintenance at the hands of the judiciary under art.8 of the Basic Law to be an "extraordinary result" that should not be allowed "in the absence of clear words": *HKSAR v Hung Chan Wa*, [11] (Li CJ, Bokhary, Chan and Ribeiro PJJ, Sir Anthony Mason NPJ agreeing). This dovetailed with the Court's concerns about a power of prospective overruling, see *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614, [14] (Li CJ, "Thus, both limbs in 'shall be amended or cease to have force' indicate that the procedure giving rise to these consequences is the enactment of legislation through the legislative procedure. Legislation enacted is prospective, at any rate in the absence of express provision to the contrary. The enactment of legislation with retrospective effect is of course most exceptional, assuming such a course is constitutionally valid, having regard to its subject matter..."); [33] ("[I]t must be emphasised again that even if the power to engage in prospective overruling is held to exist in any situation, it is an extraordinary power. And the courts must approach its exercise with the greatest circumspection.").

Ultimately, *HKSAR v Hung Chan Wa* left these questions open: *HKSAR v Hung Chan Wa*, [18] (Li CJ, "In view of the conclusion below that the present circumstances do not justify the exercise of the power [to engage in prospective overruling] even if it exists, it is not necessary to decide the fundamental question whether and to what extent the courts in Hong Kong have the power. Nor is it necessary to consider the appropriateness of the terms of the proposed order.").

See also *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, 604–606 (Sir Anthony Mason NPJ, "The argument based on ss.3 and 4 is that, while these provisions were not adopted as laws of the HKSAR, the effect of art.160 of the Basic Law was not to erase them as if they had never existed but simply to discontinue their application, so as to leave their previous operation untouched. In this respect, art.160(1) speaks to the present and the future, except in so far as it refers to laws previously in force in Hong Kong; it makes no prescription as to the operation of laws in Hong Kong before 1 July 1997. Indeed, there was no reason for art.160(1) to do so. In the light of this understanding of the operation of art.160(1), the argument

law. National laws shall not be applied in the HKSAR except for those listed in Annex III which 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."). It must follow from this that national laws can only apply in Hong Kong in accordance with art.18, subject to any amendment of the Basic Law.

The Region has some leeway in *how* it applies national laws

18.2 While Hong Kong is obliged to apply national laws that are or come to be listed in Annex III to the Basic Law, it has a choice of means for so doing: promulgation or legislation. The latter is appropriate where, in order to give full effect to the content of the relevant national law, some adaptation for the purpose of such effect in Hong Kong is required: *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442. However, it cannot be that, through the device of implementing legislation, Hong Kong could depart from the national law so as to deprive that law of full force and effect locally.

Modification of laws listed in Annex III

18.3 Annex III has been utilised by the NPCSC to add to the national laws applicable in Hong Kong on three occasions.

Immediately following promulgation of the Basic Law, five national laws were added to Annex III (Law of the People's Republic of China on the National Flag, Regulations of the People's Republic of China concerning Consular Privileges and Immunities, Law of the People's Republic of China on the National Emblem, Law of the People's Republic of China on the Territorial Sea and Contiguous Zone, and Law of the People's Republic of China on the Garrisoning of the Hong Kong Special Administrative Region) and one was deleted (Order on the National Emblem of the People's Republic of China Proclaimed by the Central People's Government) (Decision of the Standing Committee of the National People's Congress on the Addition to or Deletion from the List of National Laws in Annex III to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Instrument 5, Adopted at the Twenty Sixth Session of the Standing Committee of the Eighth National People's Congress on 1 July 1997).

In 1998, the NPCSC added the Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf to Annex III (Decision of the Standing Committee of the National People's Congress on the Addition to the List of National Laws in Annex III to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Instrument 6, Adopted on 4 November 1998).

In 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 to Annex III (Decision of the Standing Committee of the National People's Congress on the Addition to the List of National Laws in Annex III to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Instrument 7, Adopted on 27 October 2005).

Drafting history

18.4 The substance of art.12 was provided for in art.3 of the Sino-British Joint Declaration, Basic Policies Number 3 ("The laws currently in force in Hong Kong will remain basically unchanged") and Annex I Section II para.3 of the Sino-British Joint Declaration ("The laws of the Hong Kong Special Administrative Region shall be the Basic Law, and the laws previously in force in Hong Kong and laws enacted by the Hong Kong Special Administrative Region legislature as above.").

While art.18(1) and 18(2) are substantially the same as the 1987 December version (Article 17 in 1987), the content of art.18(3) and 18(4) were not initially provided for in the draft. The 1988 April version (Article 17 in 1988) of art.18(3) was not confined only to defence and foreign affairs, but also "other laws which give expression to national unity and territorial integrity".

The consultative committee noted both support and criticism of the draft article. Criticism included that the phrase "other laws which give expression to national unity and territorial integrity" as in previous versions of art.18 would exceed the scope provided by the Sino-British Joint Declaration: *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft): Consultation Report* (1988 October) Vol.5, p.131.

Article 19

The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication.

The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.

The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions

The distinction between those who have right of abode (i.e. permanent residents) and those who do not, has much wider implication. The status of permanent residents is fundamental to the exercise of rights and duties under the Basic Law. Although rights under the Basic Law are granted to all residents, the right to vote, the right to stand for election and the employment of key public offices are restricted to permanent residents. Article 24 defines who could obtain the right of abode in Hong Kong and thus become a permanent resident. Broadly, there are two categories of persons who could obtain right of abode: Chinese nationals (art.24(2)(1)–(2)(3)) and others (art.24(2)(4)–(2)(6)).

The "right of abode" should be construed generously

24.3 The right of abode in a place is an essential right without which the full array of fundamental rights available in that place cannot be accessed, thus a generous approach to judicial interpretation of the right should be taken: (1) *Chan Kam Nga v Director of Immigration* (1999) 2 HKCFAR 82, [87] (Bokhary PJ, "It is natural that art.24 is the first article in that chapter of our constitution, the Basic Law, which contains our fundamental rights and duties. For it is the article which says who has the right of abode in Hong Kong. And the right of abode in a place is the fundamental right without which the full array of fundamental rights available in that place cannot be accessed. This is because the right of abode in a place is the right, in the eyes of its law, to call that place home: coming and going at will; staying as long as you like."); (2) *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, [33] (Li CJ, "[I]n adjudicating this case, as a matter of substance, the predominant provision which we are interpreting is art.24, which provides for the right of abode of a permanent resident, and the content of that right. That article is the very source of the right which is sought to be enforced by the applicants in these appeals. That being so, the Court, in our view, does not have to make a reference [to the NPCSC for an interpretation], although art.22(4) is arguably relevant to the interpretation of art.24.").

Meaning of "Chinese citizens born in Hong Kong"

24.4 Article 24(2)(1) includes, without qualification, Chinese citizens born in Hong Kong to parents who do not have the right of abode in Hong Kong but are present there temporarily or even unlawfully: *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, 230F–233H (Li CJ, "Article 24(2)(1) means what it says, that is, Chinese citizens born in Hong Kong before or after 1 July 1997, no more, no less… Article 24(2) defines the persons who are permanent residents of the HKSAR and art.24(3) confers on them the

right of abode. So the purpose of art.24(2) taken together with art.24(3) is to confer the right of abode on the persons defined to be the permanent residents of the HKSAR…When the language of art.24(2)(1) is considered in the light of its context and purpose, its clear meaning is that Chinese citizens born in Hong Kong before or after 1 July 1997 have the status of permanent residents.").

Meaning of "Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2)"

24.5 Article 24(2)(3) has generated much political and judicial controversy in the past. In *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, the CFA held that persons who could obtain the right of abode in Hong Kong under art.24(2)(3) do not require exit approval to leave the Mainland for the purpose of exercising that right. The decision of the CFA caused the HKSAR Government to request the NPCSC for an Interpretation of art.22(4) and 24(2)(3). On 26 June 1999, the NPCSC made an interpretation of the two Articles. Pursuant to the Interpretation, exit approval is required for persons falling under the ambit of art.24(2)(3). The interpretation of the NPCSC becomes Appendix III of the Basic Law. See also *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, 324–327.

As a matter of common law interpretation, the right of abode conferred on persons as described in art.24(2)(3) includes a right to enter Hong Kong, with the result that art.24(2)(3) is not qualified by art.22(2): *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 34–35 (Li CJ, "Article 24(3) provides that permanent residents 'shall have the right of abode' in the Region. The Immigration Ordinance (Cap.115) (s.2A) defines that right enjoyed by a permanent resident as the right to land, not to have any condition of stay imposed and not to have any deportation or removal order made against him. The right of abode as statutorily defined is similar to the concept of the right of abode in the common law which has been described as 'the right… to enter [the jurisdiction concerned] without let or hindrance when he pleased and to remain … as long as he [wished]'…In our view, full effect can be given to art.22(4), according to its true interpretation, without any encroachment on the right of abode in art.24. Article 22(4) does not apply to permanent residents of the Region. What it does apply to is the overwhelming part of the population on the Mainland who have no right of abode in the Region. They cannot enter the Region without approval notwithstanding they live in the country of which the Region forms part. It has been assumed, correctly in our view, that approval refers to approval of the Mainland authorities.").

(as to whether a *jimu* is a "surviving … mother" for intestacy purposes: Yuen JA, "I can see no ground for the submission that the class of *jimu* has been discriminated against in favour of the class of natural mother… In my view a natural mother and a *jimu* are not 'like cases'. Obviously there is a fundamental difference between the two: the ties of birth between a person and his natural mother are obvious; by comparison, a *jimu* is someone who a person's father has chosen to marry. They are not comparable situations. Nor is a *jimu* like an adoptive mother. The latter status derives from a conscious acceptance of a legal status vis-à-vis a child by which the child's ties with his natural parents are severed, whereas the status of a *jimu* is a consequence of a male partner's decision to *fuzheng* a concubine."); (2) *Royal Skandia Life Assurance Ltd v Sparkle Consultants (Hong Kong) Ltd* [2006] HKEC 1787, [14] (litigation commenced in the District Court not comparable to that in the High Court: Cheung JA, "The 3rd defendant also argued that the requirement of leave to appeal for a litigant in a District Court action is in breach of the equality provision of the Hong Kong Bill of Rights (Article 22) by which Basic Law is also engaged. Litigants in the Court of First Instance of the High Court is not met with the same requirement. In our view the fact that equality before the law is guaranteed by the Bill of Rights and the position for litigants is different in the High Court does not mean the equality provision is breached. If a matter falls within the jurisdiction of the District Court then the District Court will be the proper forum for the determination of that matter. The leave requirement imposed by the District Court Ordinance applies to litigants that invoked the District Court jurisdiction. The 3rd defendant being one of those litigants would have to observe the same procedure as the other litigants who invoked the District Court jurisdiction. Equality is observed. A comparison with the High Court is not appropriate."); (3) *Chan Yu Nam v Secretary for Justice* [2010] HKEC, [111] (whether the creation of a corporate body should then entitle it to a vote in a functional constituency: Stock V-P, "The problem with this argument is that it proceeds on a false premise. The qualification for voting, or empowering an authorised representative to vote on behalf of a body, is not wealth or the ability to form a company at a given point in time, but rather the recognition as a key player or stakeholder within certain sectors of society. The mere formation of a corporate body does not of itself come anywhere near qualifying that corporate body for membership of an umbrella organisation or for specification as a functional constituency elector."). See also *Ng Shek Wai v Medical Council of Hong Kong* [2015] 2 HKLRD 121, [92] (Lam J).

Unconstitutional infringements of Article 25 rights

25.6 Differing minimum age requirements for homosexual and heterosexual sex violates right to equality: *Leung v Secretary for Justice* [2006] 4 HKLRD 211, [51] (Ma CJHC, "… No evidence has been placed before us to explain why

the minimum age requirement for buggery is 21 whereas as far as sexual intercourse between a man and a woman is concerned, the age of consent is only 16. There is, for example, no medical reason for this and none was suggested in the course of argument… In my view, the respondent has not discharged the burden of justifying the infringement of the applicant's fundamental rights. I cannot see any justification for either the age limit of 21 or, in particular, for the different treatment of male homosexuals compared with heterosexuals."). See also *Cho Man Kit v Broadcasting Authority* (HCAL s69/2007, [2008] HKEC 783), involving a challenge to a restriction on the broadcast of a television programme called "Gay Lovers".

A criminal prohibition on consensual sex between two men "otherwise than in private" (Crimes Ordinance (Cap.200), s.118F(1)) violates the right to equality: *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335, [48] (Bokhary PJ, "It was argued by [the appellant] that the content of this law was obviously justifiable as a criminal offence. Indeed it is, but this does not answer the question why only male homosexuals are targeted… Then it is said that in fact male homosexuals are not targeted because the common law offence of outraging public decency (which would cover buggery committed in public whether between men or as between a man and a woman) applied to both sexes. And so it does but again no justification is shown as to why male homosexuals alone are targeted in s.118F… There is simply no material before us even to accord the Legislature a margin of appreciation. In matters involving infringements of basic rights, there is no room for the courts simply to take things on trust without more.").

Constitutionally justified restrictions on Article 25 rights

Sexual offences specific to male perpetrators (Crimes Ordinance (Cap.200), s.124) have been found a justified restriction on equality rights: *So Wai Lun v HKSAR* (2006) 9 HKCFAR 530, 539–554, (Bokhary and Chan PJJ, "The complaint of inequality leveled against s.124 is, as we have said, that for the act of both, the section criminalises the conduct of the male to the exclusion of the female…Various considerations were canvassed. These included: the problem of teenage pregnancies; not criminalising the female's conduct because that might deter her from reporting the matter; the legislature's role in resolving issues engaging society's code of sexual morality; and the extent to which it was for the legislature to form a view on issues such as whether the initiative in these matters is generally taken by the male, often older than the female, sometimes very considerably so. Considerations of that kind are ones which the legislature are entitled to take into account and weigh. In our view, the legislation under challenge, while it departs from identical treatment, is justified by reference to genuine need, rationality and proportionality. It does not violate the equality guarantees of the constitution...") 25.7

elements of that offence. There must also be objectively reasonable grounds for that suspicion: *Yeung May Wan v HKSAR* (2005) 8 HKCFAR 137, 162–170 (Li CJ, "The need for there to be some acceptable objective justification for an arrest, as reflected in a requirement of reasonable suspicion of guilt, is essential if residents are to be safeguarded from arbitrary arrest. As the European Court of Human Rights (ECHR) stated (in connection with art.5(1) of the European Convention on Human Rights) in *Fox v United Kingdom* (12244/86), (12245/86), (12383/86) (1991) 13 EHRR 157 at para.32: The 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in art.5(1)(c). The Court agrees with the Commission and the Government that having a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence…[It is] well-established in relation to powers of arrest which are exercisable on reasonable suspicion of guilt, that the arresting officer must have both a genuine suspicion that the offence in question has been committed and reasonable grounds for that suspicion…Woolf LJ in *Castorina v Chief Constable of Surrey* (1988) 138 NLJ Rep 180 identified the relevant questions as follows: (1) Did the arresting officer suspect that the person who was arrested was guilty of the offence? The answer to this question depends entirely on the findings of fact as to the officer's state of mind. (2) Assuming the officer had the necessary suspicion, was there reasonable cause for that suspicion? This is a purely objective requirement to be determined by the judge if necessary on facts found by a jury"… "For the arresting officer to meet the statutory requirements of the Police Force Ordinance (Cap.232) s.50 the facts reasonably suspected by him to exist must be such that, if true, they would constitute the necessary elements of the offence for which the power of arrest is sought to be exercised… It is not of course to be expected that a police constable in the heat of an emergency, or while in hot pursuit of a suspected criminal, should always have in mind specific statutory provisions, or that he should mentally identify specific offences with technicality or precision. He must, in my judgment, reasonably suspect the existence of facts amounting to an arrestable offence of a kind which he has in mind. The requirement is therefore one of substance and not of technicality.").

Meaning of "reasonable suspicion"

28.4 Reasonable ruspicion is not the same as showing a *prima facie* case: *Yeung May Wan v HKSAR* (2005) 8 HKCFAR 137, [83] (Li CJ, "In *Hussien v Chong Fook Kam* [1970] AC 942, 948 (PC), Lord Devlin emphasised that proving a reasonable suspicion is not the same as showing a *prima facie* case, describing

the latter as importing 'a much stiffer test;. His Lordship continued: Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. (at p.948) Lord Devlin (at p.949) also pointed out that prima facie proof consists of admissible evidence whereas suspicion can take into account matters that could not be put in evidence at all.").

Meaning of "imprisonment"

28.5 Unlike art.5(1) of the Hong Kong Bill of Rights, art.28 of the Basic Law expressly provides a constitutional guarantee against arbitrary "imprisonment" rather than just against arbitrary "arrest or detention." It therefore extends its protection to offenders lawfully imprisoned after conviction by a court, and is also capable of invalidating, on the grounds of arbitrariness, substantive criminal laws founding a conviction and consequent imprisonment: *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415, 435B–C, 436H, 450H–451A.

Constitutionality of mandatory life sentence for murder

28.6 Mandatory sentences for murder do not contravene art.28 given the uniquely serious nature of the offence: *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415, [102] (Li CJ and Ribeiro PJ, "It is also established that when deciding constitutional issues, the context in which such issues arise may make it appropriate for the courts to give particular weight to the views and policies adopted by the legislature…"); [106] ("In prescribing punishments for criminal offences, the legislature usually prescribes the maximum penalties that may be imposed by the courts. However, the punishment for murder stands in a special position. Continuing the position at common law, the legislature in Hong Kong has always provided for a mandatory sentence in respect of adult murderers. When it passed the Crimes (Amendment) (No 3) Bill in 1993, it decided that mandatory life imprisonment should be the penalty for murder…"); [108] ("The legislative history also makes it clear that the legislature's intention was to mark out murder as a uniquely serious offence by attaching only to that offence the mandatory life sentence…"); [118] ("Murder, with such a focused definition, is regarded by the legislature as a crime apart, involving the infliction of death—the most serious harm that one human being can cause to another—with a mental element carrying a very high degree of moral blameworthiness. The legislature has accordingly prescribed the uniquely serious punishment of a mandatory life sentence which is reserved for the crime of murder and

Pinnock principles on proportionality should apply in Hong Kong regarding public rental housing decisions must require further careful consideration at the next appropriate occasion after hearing full arguments.").

Drafting history

29.5 The inviolability of the home in art.29 was provided in Annex I Section XIII para.1 of the Sino-British Joint Declaration ("The Hong Kong Special Administrative Region Government shall maintain … inviolability of the home, …"). The enacted version is largely the same as the 1987 December version of art.29 (Article 28 in 1987) save for the inclusion of the word "arbitrary." There were discussions similar to that on art.28 on the inclusion of the word "arbitrary" by the drafting committee and consultative committee: *The Basic Law of the Hong Kong Special Administrative Region (Draft) (Consolidated Text)* (December 1987), p.15; *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft): Consultation Report* (1988 October) Vol.5, pp.284–285.

Article 30

The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences.

COMMENTARY

Scope of Article 30

30.1 Article 30 is to be read with Hong Kong Bill of Rights art.14(1): *Democratic Party v Secretary for Justice* [2007] 2 HKLRD 807, 819 (Hartmann J, "It will be seen that art.30 of the Basic Law does not seek to protect privacy simpliciter. It is more narrow in its scope. Article.30 protects only the right of Hong Kong residents freely and in private to communicate with others whether by the spoken word, in writing or by telecommunication. It includes therefore the right of persons who wish to associate together to attain a common goal to communicate with each other freely and in private. To that extent, it may be said that the right to freely associate must include the right to communicate, the one right being an essential part of the other... Article 14 of the Bill

of Rights, taken in exact terms from art.17 of the ICCPR, is drawn more widely…"). See also *HKSAR v Mo Yuk Ping* (DCCC 367, 1334, 1360/2004, 636/2005, [2005] HKEC 1318), [61–63] (Wright J).

Article 30 protects privacy of communication rather than privacy of venue: *HKSAR v Li Man Tak* (DCCC 689/2004, [2005] HKEC 1308), [16] (Judge Sweeney, "…[P]rosecuting counsel has submitted that the two restaurants in question were public places and therefore not protected by Article 30… I must reject that submission here and now. This law was clearly designed to protect privacy of communication rather than privacy of venue.").

Covert surveillance not prohibited by art.30 but is subject to procedural control: *Koo Sze Yiu v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441, 448–450 (Bokhary PJ, "By its nature covert surveillance involving the interception of communications impacts upon the privacy of the communications which are intercepted. And the knock-on effect of that is an impact upon freedom of communication, too. For it is only natural that even law-abiding persons will sometimes feel inhibited in communicating at all if they cannot do so with privacy. Nevertheless covert surveillance is an important tool in the detection and prevention of crime and threats to public security ie the safety that the public is entitled to enjoy in a free and well-ordered society. The position reached upon a proper balance of the rival considerations is that covert surveillance is not to be prohibited but is to be controlled. Such control must sufficiently protect—and enjoy public confidence that it sufficiently protects—fundamental rights and freedoms, particularly freedom and privacy of communication. The 'legal procedures' requirement contained in art.30 of the Basic Law exists to ensure such protection.").

Admissibility of evidence

30.2 Article 30 does not impact on the admissibility of evidence: *Ho Man Kong v Superintendent of Lai Chi Kok Reception Centre* (2014) 17 HKCFAR 179, [8] (Ribeiro PJ, "The question whether certain evidence—including evidence obtained in breach of a constitutionally protected right—is admissible in court proceedings involves a different balance founded on a different right, namely, the right of the defendant to a fair trial. The well-established balance here is between the public interest in the Court having access to relevant and probative evidence on the one hand, and the exclusion of evidence with a prejudicial effect which is out of proportion with its probative value on the other. The Court might also be asked to consider whether the conduct of the prosecution in securing such evidence constitutes an abuse of the process on a stay application. It determining the admissibility of evidence

expressed, it were correct to say that a purely administrative system does not provide 'social welfare in accordance with law', it would be difficult to see what rights are conferred by art.36…"); [27] ("A system of social welfare catering for a wide range of clients in a wide range of different circumstances may well be better served by the operation of transparent and predictable administrative criteria rather than by having to have each benefit spelt out through a legislative process…"); [28] ("The evidence also shows that there was in fact very considerable interaction between members of the Administration on the one hand, and the Legislative Council... The funding of the social welfare system as a whole is subject to approval by the Legislative Council's Finance Committee.").

The right to social welfare is only found in the Basic Law, but not in the Hong Kong Bill of Rights. Thus, the proper approach to any purported restriction depends on the nature and subject matter of the right in issue: *Kong Yun Ming v Director of Social Welfare* [2009] 4 HKLRD 382, [45] (Cheung J.).

Article 36 itself does not expressly say that the right to social welfare can be restricted, or the type of restrictions that can be imposed if it can be done at all. Article 36 does not set out the type of social welfare that one may enjoy, or the level of benefits. However, the right to social welfare is not an abstract right, it is a right "in accordance with law": *Kong Yun Ming v Director of Social Welfare* (CFI), [46] (Cheung J, "In my view, as the Court of Final Appeal said in *Gurung Kesh Bahadur v Director of Immigration*, ultimately it is a question of interpretation of the Basic Law. Article 36 itself does not expressly say that the right to social welfare can be restricted, or the type of restrictions that can be imposed if it can be done at all. On the other hand, a right to social welfare is not an abstract right, it is a right to social welfare 'in accordance with law'. Article 36 does not set out the type of social welfare that one may enjoy, or the level of benefits.").

Modification of social welfare in accordance with Article 145

36.5 An effective social welfare system must evolve with the times, to meet changing circumstances: *Fok Chun Wa v Hospital Authority* (HCAL 94/2007, [2008] HKEC 2161), [101] (Poon J, "An effective social welfare system must evolve with the times. As far as resources permit, the system must be able to react to the changing social, economic conditions and public needs and meet adequately the challenges and pressures exerted on the system. The system must be developed and improved accordingly. Article 145 plainly anticipates changes and hence mandates the Government to formulate the policies on the development and improvement of the system in light of the economic conditions and social needs.").

Failure to act and change when necessary would be tantamount to allowing old policies to lock social welfare into a "reliquary": *Lau Kwok Fai v Secretary for Justice* (HCAL 177, 180/2002, [2003] HKEC 711), [68] (Hartmann J, "But, of course, prior to the transfer of sovereignty, the public service was in a constant state of adaption. That is a characteristic of all large organizations charged with maintaining operative capability. That ability [and requirement] to adapt was an integral part of Hong Kong's 'previous system' of public service and, in terms of art.103 [of the Basic Law], has been maintained. Article 103 does not attempt as at 30 June 1997 to lock the public service into a reliquary. Article 103 cannot therefore be interpreted in such a narrow way as to inhibit all introduction of new measures for the good governance of the public service and thereby for the good governance of Hong Kong, the public service being the constitutionally recognised servant of Hong Kong.").

The right to social welfare is subject to modification pursuant to policies generated by the Government in accordance with art.145, this provision not addressing or freezing the eligibility conditions or the level of any particular benefits: *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950, [37] (Ribeiro PJ, "[Article 145] does not address, let alone freeze, the eligibility conditions or the level of any particular benefits. What it does is to make it clear that the Government may formulate policies 'on the development and improvement of [the previous] *system*'…[It] does not preclude the elimination or reduction of particular welfare benefits if that proves necessary to develop, improve or maintain the sustainability of the welfare system as a whole.").

Encroachment on right to social welfare subject to proportionality test and intensity of review

36.6 The right to social welfare is not an absolute one and the court applies the proportionality test to see if any restriction is justified: *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950, [39] (Ribeiro PJ, "The starting-point is the identification of the constitutional right engaged—art.36 in the present case. The next step is to identify the legal or administrative measure said to infringe or restrict that right...The Court then asks whether that restriction pursues a legitimate societal aim and, having identified that aim, it asks whether the impugned restriction is rationally connected with the accomplishment of that end. If such rational connection is established, the next question is whether the means employed are proportionate or whether, on the contrary, they make excessive inroads into the protected right."). See also *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574.

The right to social welfare is not a "fundamental concept" but one that is inextricably bound with socio-economic considerations: *Fok Chun Wa v*

qualify as measures duly 'prescribed by law' for art.39 purposes…"); [79] ("In *Unruh v Seeberger*, this Court noted that these offences are traceable in English law back to at least the 13th century. It was pointed out that their core definitions, applicable equally to maintenance and champerty as crimes, as torts and as the basis for rendering contracts unenforceable as against public policy, have remained essentially unchanged throughout this time."); [84] ("Doctrinal issues undoubtedly remain to be addressed and clarified. Questions may, for instance, arise as to the extent to which the elements of maintenance and champerty as criminal offences might differ from their elements in the civil context. It was held, for example, in *Neville v London Express Newspaper Ltd* that special damage must be proved as an element of the tort of maintenance. Is there a similar requirement in the criminal offence? That question does not require to be decided in the present case. But if and when it falls to be resolved by the courts, that would provide another illustration of the common law at work. The existence of such debatable issues surrounding a settled core does not make the offence legally uncertain. In my view, the appellant's legal uncertainty argument must fail.").

(6) The offence of "serious professional misconduct." It is not unconstitutional that persons are held to the customary ethics of their profession. Thus, the Medical Council of Hong Kong are the best judges of whether there has been a "falling short of standards" since what was expected of a doctor in the given circumstances was something which the doctors of the Council would know from their own professional experience: *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248, [82] (Bokhary PJ, "Having regard to the realities of the circumstances, the finding that what Dr Chan did constituted misconduct in a professional respect is not unfair, contrary to natural justice, incompatible with free speech or with legal certainty. After all, the sort of professional misconduct alleged against Dr Chan can only be established if the governing body of her profession is satisfied, after a full and fair hearing, that what she did was contrary to a consensus within her profession on what the ethics of that profession demand. And there is a right of appeal to the judiciary. It is not unconstitutional that, under the safeguards of a fair system of adjudication and appeal, persons are held to the customary ethics of their profession unless the particular rule of ethics involved is irrational. This one is by no means irrational.").

Breaches of the principle of legal certainty in Hong Kong courts

39.10.3 A binding-over order requiring the object of the order to "keep the peace" or to "be of good behavior" is not sufficnetly precise: *Lau Wai Wo v HKSAR* (2003) 6 HKCFAR 624, [36] (Lord Scott of Foscote NPJ, "A court order,

breach of which may lead to either pecuniary or loss of liberty consequences or to both, must, for the same reasons, have the same quality of precision. A bind-over order requiring the object of the order to 'keep the peace' or to 'be of good behaviour', without any additional description of what it is that the individual must refrain from doing in order to avoid being in breach raises obvious questions about legal certainty"). See also *Morter v HKSAR* (2004) 7 HKCFAR 53. See also overseas precedents on the legal certainty of bind-over orders: *Steel v United Kingdom* (1998) 5 BHRC 339, *Hashman v United Kingdom* (1999) 8 BHRC 104.

Due Deference 39.11

Deference not abdication

39.11.1 The doctrine of deference recognises that constitutionally and institutionally, the courts are not always best-placed and equipped to adjudicate on certain matters concerning economic and social policy. Constitutionally, those matters are entrusted to the executive and the legislature and not the court. For an overview of the constitutional and institutional limitations, see B V Harris, "Judicial Review, Justiciability and the Prerogative of Mercy" (2003) 62 (3) *Cambridge Law Journal* 631. Institutionally, the court is not equipped to deal with them, the executive and the legislature, because of its direct knowledge of the society and its needs, is in principle much better equipped than the court to appreciate what is in the public interest on economic or social grounds: *Stec v United Kingdom* (2006) 43 EHRR 47, [52]. Where the courts are called upon to decide such matters, it may therefore be appropriate for the courts to give particular weight to the views and policies adopted by the executive or legislature: *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326. Often the courts will use other terms to describe the concept of deference, such as "margin of appreciation" or "discretionary area of judgment": see generally, *R (Pro-Life Alliance) v BBC* [2004] 1 AC 185, [75] (Lord Hoffmann), *R v Director of Public Prosecutions, ex p Kebilene*, *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415, *Brown v Stott* [2001] 2 WLR 817.

However, deference does not mean abdication. While the court will accord, in appropriate circumstances, deference to the decision-maker's views, the court still has the ultimate responsibility to determine whether constitutionally guaranteed rights have been infringed, to which they should not abdicate their duty: *Kwok Hay Kwongv Medical Council of Hong Kong* [2008] 3 HKLRD 524, [25] (CA) (Ma CJHC, "Lastly, on the aspect of margin of appreciation, Mr Pannick drew our particular attention to *RJR-MacDonald Inc v A-G of Canada* [1995] 3 SCR 199, a decision of the Supreme Court of Canada. There, the Supreme Court was concerned with the constitutionality

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).''). In light of the equality protection under art.22 of the Hong Kong Bill of Rights, any difference in treatment between a resident and a non-resident must be rationally connected to a legitimate aim and be no more than necessary to accomplish that aim: *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335, *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409.

For a comparative precedent, see *Mathews v Diaz* 426 US 67, 78–80 (1976). Consideration should also be given to the protection offered under the Hong Kong Bill of Rights Ordinance, which does not generally make a distinction between residents and non-residents except art.21 which confines the right to participate in public life to permanent residents (see also art.26 of the Basic Law).

Meaning of "in accordance with law"

41.4 The expression "in accordance with law" means that the availability to non-residents of the protection of the rights contained in the Hong Kong Bill of Rights Ordinance is subject to any contrary legal provisions in force in Hong Kong: *Gurung Ganga Devi v Director of Immigration* (HCAL 131/2008, [2009] HKEC 1573), including immigration provisions: *Re Pasa Danaville Dizon* (HCAL 97/2009, [2009] HKEC 1576), *Santosh Thewe v Director of Immigration* [2000] 1 HKLRD 717. In the immigration context, there is a general difference of position between a resident and a non-resident as regards fundamental rights and freedoms under the Basic Law: *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, [41]–[42], *Marilyn G Aringo v Director of Immigration* (HCAL 96/2004, [2005] HKEC 1509) (Hartmann J).

Article 41 must be read subject to Hong Kong Bill of Rights Ordinance Section 11 and Article 39

41.5 Section 11 of the Hong Kong Bill of Rights Ordinance may preclude a non-resident from relying on art.41 as it is given constitutional status by virtue of art.39 of the Basic Law. It incorporates the reservation to the ICCPR with respect to immigration legislation as regards persons not having the right to enter and remain: (1) *Ghulam Rbani v Secretary for Justice*, (2014) 17 HKCFAR 138, [94] (Ribeiro PJ, "The reason why s.11 results in excluding the appellant's reliance on BL art.41 is that, by virtue of BL art.39, s.11 operates at the constitutional level and qualifies the scope and effect of BL

art.41."); (2) *MA v Director of Immigration* (CACV44-48/2011, [2012] HKEC 1624), [144] (Fok JA, "The appellants argue that BL41 limits the restrictions that can be imposed on non-residents' rights since these can only be such as are 'in accordance with law'. As to this, the conclusions I have reached as to the proper construction of HKBORO s.11 and the UK reservation to ICESCR mean that the ICCPR and ICESCR rights as applied to Hong Kong are restricted as regards non-residents. The Court of Final Appeal has recognised that there is a difference as regards the fundamental rights and freedoms enjoyed by residents on the one hand and non-residents on the other and also whether such rights can be restricted by law: see *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, [28]–[29] and [42].''); [145] ("Furthermore, the phrase 'in accordance with law' in BL41 means law including the IO so that the provisions of that ordinance would be relevant in considering the extent of the right under BL33 for a non-resident…").

Any statement in previous authorities which suggested that the availability to non-residents of the protection of the rights contained in the Hong Kong Bill of Rights Ordinance (Cap.383) is subject to any contrary legal provisions in force in Hong Kong (see for example: *Gurung Ganga Devi v Director of Immigration* (HCAL 131/2008, [2009] HKEC 1573), [27]) should be viewed with caution. One obvious example which falls within the exception in s.11 is the Immigration Ordinance (Cap.115) insofar as it regulates the entering into, staying in and departure from Hong Kong of non-residents: *Gurung Deu Kumari v Director of Immigration* [2010] 5 HKLRD 219, *Re Pasa Danaville Dizon* (HCAL 97/2009, [2009] HKEC 1576), *Santosh Thewe v Director of Immigration* [2000] 1 HKLRD 717. As such in the immigration context, there is a general difference of position between a resident and a non-resident as regards fundamental rights and freedoms under the Basic Law: *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, [41]–[42], *Marilyn G Aringo v Director of Immigration* (HCAL 96/2004, [2005] HKEC 1509) (Hartmann J), *Chu Woan Chyi v Director of Immigration* [2007] 3 HKC 168. Although Ribeiro PJ in *Ghulam Rbani v Secretary for Justice* (2014) 17 HKCFAR 138, [99] noted that it is unclear to what extent, if at all, the expression "in accordance with law" are capable of taking effect to exclude Chapter III rights in situations other than those which fall within s.11 of the Hong Kong Bill of Rights Ordinance, one other possible exception is art.21 Hong Kong Bill of Rights which confines the right to participate in public life to permanent residents (see also art.26 of the Basic Law). This restriction on the right to vote and the right to stand for election also seems to be the reason behind the insertion of the expression "in accordance with law" in art.41: see Collection of Documents of the 4th Plenary Session of the Basic Law Drafting Committee of the PRC, 13 April 1987, p.30 (on the then art.18).

no doubt but that it is to these principles that the reference to 'control' in conjunction with the requirement that that control be free from interference, is there directed.").

See also Sino-British Joint Declaration Part III, Annex I, ("A prosecuting authority of the Hong Kong Special Administrative Region shall control criminal prosecutions free from any interference.").

Scope of independence

63.2 Article 63 is directed not only at protecting the Director of Public Prosecution from objectionable political interference in his decision to institute, take over and discontinue criminal proceedings. The protection also extends to preclude judicial interference, subject only to issues of abuse of the court's process, and judicial review in exceptional circumstances: *Ma Pui Tung v Department of Justice* (CACV 64/2008, [2008] HKEC 1590), [10] (Rogers V-P, "It is, no doubt, in extremely rare cases and only where the evidence points unquestionably to the desirability of there being a prosecution that a court should interfere with a decision of the prosecuting authority not to prosecute. There are instances where an application for judicial review in respect of a refusal to prosecute has been allowed… It is, perhaps, all the more important that a court should exercise extreme caution if consideration is given to questioning a decision not to prosecute."). However, this comment was made without a full review of all relevant authorities and on appeal the CA was of the view that there was no ground to question the decision not to prosecute.

Scope of judicial review

63.3 Before 1997, there was clear authority from the CA that the decision whether or not to prosecute in any particular case is not subject to judicial review as it is a constitutional imperative that the courts do not attempt to interfere with the Attorney General's discretion to prosecute: *Keung Siu Wah v Attorney General* [1990] 2 HKLR 238. However, this changed toward the end of the first decade of restored Chinese sovereignty over the territory, with a court finding that under the new constitutional order a decision to prosecute or not would be amendable to judicial review in exceptional cases. Such cases would include situations where the Secretary for Justice had acted outside his or her constitutional limits: *R V v Director of Immigration* [2008] 4 HKLRD 529, 544–545 (Hartmann J, "Clearly, the Secretary would act outside of his powers if it could be demonstrated that he has done so not on an independent assessment of the merits but in obedience to a political instruction. Article 63 specifically forbids such interference with the exercise of his powers. Equally plain, in my view, is the conclusion that the Secretary would act outside of his powers if he acted in bad faith, for example, if one

of his offices instituted a prosecution in return for payment of a bribe. I am also of the view that a rigid fettering of his discretion would fall outside of the Secretary's constitutional powers; for example, a refusal to prosecute a specific class of offences detailed in a statute lawfully brought into law. Such an action would undermine the constitutional functioning of other organs of state: the Executive and the Legislature. It is not possible, of course, to foresee and classify every circumstance in which this Court can hold, without impermissible encroachment, that the Secretary has acted outside of his constitutional powers. There may be exceptional circumstances that arise. But this proviso is not to be read as somehow acting to reduce the role of the Secretary to that of an ordinary administrator. The prosecutorial independence of the Secretary is a linchpin of the rule of law. That is the way it has been prior to the Basic Law and the way it now remains. The exceptional circumstances of which I speak must be truly exceptional and must demonstrate that the Secretary has acted outside of his very broad powers, powers that… he exercises free of direction by his ministerial colleagues and free also of the control and supervision of the courts."). See also *L v Director of Public Prosecutions* [2015] 4 HKLRD 62, leave granted to review the Director's decision not to prosecute.

Abuse of process

63.4 The court may, exceptionally, stay criminal proceedings as an abuse of process: (1) *Shahid v Secretary for Justice* [2009] 5 HKC 393, 402H–403C (Wright J, "It is well established that whilst that power vests in the respondent, proceedings may be stayed if the prosecution amounts to an abuse of process."); (2) *Re C (A Bankrupt)* [2006] 4 HKC 582, [20] (Stock JA "... But the rule that ensures the Secretary's independence in his prosecutorial function necessarily extends to preclude judicial interference, subject only to issues of abuse of the court's process and, possibly, judicial review of decisions taken in bad faith… This is not to say that the courts are powerless to prevent an abuse of the process, but the exercise of such a judicial power, even though it may have the effect of bringing proceedings to a halt, arises after the proceedings and, as the phrase 'abuse of process' itself illustrates, is a power directed at the preservation of the integrity of the judicial process."). Such an abuse does not necessarily arise where a prosecution is brought contrary to a prosecution policy, with the latter being more obviously relevant to sentencing: *Shahid v Secretary for Justice*. *See further Re Chu Wai Ha* (HCB 19401/2003, [2005] HKEC 9, [403D–403G]).

Appointment of overseas counsel

63.5 While it is for the Court to decide whether it is in the public interest for overseas counsel to be admitted in Hong Kong on an *ad hoc* basis, in

the Hong Kong Special Administrative Region courts shall be appointed by the chief executive of the Hong Kong Special Administrative Region acting in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons.").

A drafting committee member has pointed out that "it was not desirable to have too many members in the independent commission and that its recommendations should be made with unanimity": *The Draft Basic Law (for solicitation of opinions): with introduction and summary* (Trans), 中華人民共和國香港特別行政區基本法(草案)徵求意見稿: 附引言及簡介, (1988 October), p.617.

There was also a view noted by the consultative committee that "to ensure judicial independence, judges of courts at all levels should be appointed or removed by the legislature, not by the Chief Executive": *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft): Consultation Report* (1988 October) Vol.5, p.439. There was also a view that an independent commission composed of judges from the Court of Final Appeal of the HKSAR would be an appropriate method for deciding upon further appointment of judges of the courts of the HKSAR. The reason was to balance the extensive powers of the Chief Executive: *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft): Consultation Report* (1988 October) Vol.5, pp.617–618. Other suggested amendments noted by the consultative committee, which were not adopted, include judges of the courts of the HKSAR shall be recommended unanimously as well as requiring the independent commission to be of no fewer than 12 members. There was a further suggestion, which was not adopted, that all recommendations be made "among those Chinese nationals who are permanent residents of the HKSAR", on the ground that it would "be a violation of state sovereignty and national dignity to have foreign judges sit on the bench for the trial of Chinese nationals …" Another suggested amendment was that "there must be people in Hong Kong who are capable of performing the duties of judges of the Court of Final Appeal and other courts". *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft): Consultation Report* (1988 October) Vol.5, pp.634–636.

ARTICLE 89

A judge of court of the Hong Kong Special Administrative Region may only be removed for inability to discharge his or her duties, or for misbehaviour, by the Chief Executive on the recommendation of a tribunal

appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges.

The Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region may be investigated only for inability to discharge his or her duties, or for misbehaviour, by a tribunal appointed by the Chief Executive and consisting of not fewer than five local judges and may be removed by the Chief Executive on the recommendation of the tribunal and in accordance with the procedures prescribed in this Law.

COMMENTARY

Independence of the Judiciary

Article 89, in prescribing the circumstances when a judge can be removed from office, supports the independence of the Judiciary from the Executive branch. See [85.1] for discussion on nature of judicial independence. **89.1**

See also P Wesley-Smith "Judges and Judicial Power Under the Hong Kong Basic Law" (2004) HKLJ 83.

Drafting history

Article 89(1) is substantially the same as the wording in Annex I Section III para.3 of the Sino-British Joint Declaration, save for phrase "on the recommendation" instead of "in accordance with". **89.2**

The April 1988 version of art.89(1) (Article 88 in 1988) did not contain the word "only" and thus was potentially non-exhaustive of the grounds on which a judge may be removed. A consultative committee member held the view that "only for inability to discharge the functions of his/her office or for misbehaviour should the Chief Executive remove a judge of a court": *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft): Consultation Report* (1988 October) Vol.1, p.119. This view is reflected in the inclusion of the word "only" in art.89(1).

Suggestions for art.89(1) from the consultative committee, which were not adopted, included the addition of the following provisions: "This tribunal shall decide its own rules and procedures in accordance with the principle of impartiality"; "All magistrates shall be appointed by the Chief Justice and removed when there is sufficient reason for such removal". Another suggestion not adopted was that a judicial arbitration committee should be established in order to prevent the reoccurrence of another Carrian affair: *The Basic Law of the Hong Kong Special Administrative*

ARTICLE 108

The Hong Kong Special Administrative Region shall practise an independent taxation system.

The Hong Kong Special Administrative Region shall, taking the low tax policy previously pursued in Hong Kong as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation.

COMMENTARY

Drafting history

108.1 Although the phrase "independent taxation system" in art.108(1) is not expressly found in the Sino-British Joint Declaration, its principle draws from art.3 of the Sino-British Joint Declaration, Basic Policies Number 8, which stated that the HKSAR will have independent finances. The wording in the enacted form of art.108(1) did not change from the 1987 December version (Article 105 in 1987).

Comparing Annex I Section V para.2 of the Sino-British Joint Declaration and art.108(2), an important difference is that art.108(2) expressly requires "the low tax policy" as a starting point. The 1987 December version of art.108(2) (Article 106 in 1987) was in a more binding form, which required "the Hong Kong SAR shall continue to practice a low tax policy". There were suggestions of amendment from the drafting committee, which were not adopted, including that "the HKSAR shall endeavour to practice a low tax policy" and that "the HKSAR shall continue to practise a tax policy that is attractive to investors". While some drafting committee members considered such policy was conducive to attracting foreign investment, others argued that the concept of "low tax" was not clear. They further argued that this would restrict the government's ability to implement adjustment to the taxation policy and possibly give rise to legal dispute. They commented that it might be a problem during economic downturn if Hong Kong could not make budget deficit funding nor raise taxes as a result of its constitution: *Drafters' views of chs 4, 5, 6 and 10 and the collection of draft provisions at the sixth plenary session of the Drafting Committee for the Basic Law*, (1987) p.28 (Chinese version). The consultative committee also noted a comment that the use of the word "reference" might "permit the Government of the HKSAR to state that times and circumstances have changed and, therefore, that the previous low tax policy is no longer suitable to Hong Kong's new conditions". There

was also concern that the less restrictive wording would mean "the HKSAR Government can enact higher taxes, which it can spend because the growth in revenues is no longer firmly capped by the growth rate in GDP.": *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft): Consultation Report (2)* (1989 November), p.259.

ARTICLE 109

The Government of the Hong Kong Special Administrative Region shall provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial centre.

COMMENTARY

Hong Kong as "an international financial centre"

109.1 The reference to "economic and legal environment" is a clear recognition at the constitutional level that the rule of law is vital to what virtually defines Hong Kong economically, its status as an international financial centre: Mr Justice Bokhary PJ, "The Economic and Legal Environment Provided by the Rule of Law in Hong Kong", TQR, Vol. 5, Issue 1, 2007, p.10.

Drafting history

109.2 Annex I Section VII para.1 of the Sino-British Joint Declaration notes that the HKSAR "shall retain the status of an international financial centre". In comparison, art.109 imposes a positive obligation on the part of the HKSAR government to ensure this. Article 109 is substantially the same as the wording in the December 1987 version (Article 108), save for the phrase "provide an appropriate economic and legal environment" rather than "provide the necessary conditions and adopt appropriate measure" ("The Hong Kong SAR Government shall provide the necessary conditions and adopt appropriate measures to retain the status of the Hong Kong SAR as an international financial centre."). Suggestions from the drafting committee include the deletion of the words "necessary" and "appropriate": *Drafters' views of chs 4, 5, 6 and 10 and the collection of draft provisions at the sixth plenary session of the Drafting Committee for the Basic Law* (1987), p.29 (Chinese version).

A drafting committee member had pointed out whether retaining the HKSAR's status as an international financial centre is in the control of the HKSAR government. Also, there was suggestion to include art.109 in Chapter I of the Basic Law instead: *Opinions on the preamble and provisions of chs 1, 2, 3, 4,*

Sentenced Persons] Ordinance. The purpose of that provision is therefore a purpose expressly permitted by art.153 of the Basic Law. The provision itself is therefore constitutional under the Basic Law, and is maintained by art.8 thereof. It follows from the foregoing that the detention for which the provision caters is not arbitrary, unlawful or for the purpose of enforcing a foreign penal law. It is detention for a Hong Kong purpose expressly permitted by the Basic Law. In my judgment, s.10(1) of the [Transfer of Sentenced Persons] Ordinance was constitutional when enacted prior to the handover and remains constitutional now.").

Drafting history

153.6 The wording in art.153(1) and 153(2) is similar to that in Annex I Section XI para.2 of the Sino-British Joint Declaration ("The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Hong Kong Special Administrative Region, and after seeking the views of the Hong Kong Special Administrative Region Government. International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may remain implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, authorise or assist the Hong Kong Special Administrative Region Government to make appropriate arrangements for the application to the Hong Kong Special Administrative Region of other relevant international agreements.").

The consultative committee noted suggestions that the HKSAR should have the power to decide which international agreements it becomes a party to, rather than the Central People's Government. This tied to another suggestion noted but not adopted which was for any decision of the Central People's Government on the application of international agreements to be subject to approval by a majority in LegCo. This was seen as necessary to uphold the HKSAR's high degree of autonomy: *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft): Consultation Report (3)* (Trans) 中華人民共和國香港特別行政區基本法(草案)諮詢報告(3), (1989 November), p.258 (Chinese version).

Article 154

The Central People's Government shall authorise the Government of the Hong Kong Special Administrative Region to issue, in accordance with law, passports of the Hong Kong Special Administrative Region of the

People's Republic of China to all Chinese citizens who hold permanent identity cards of the Region, and travel documents of the Hong Kong Special Administrative Region of the People's Republic of China to all other persons lawfully residing in the Region. The above passports and documents shall be valid for all states and regions and shall record the holder's right to return to the Region.

The Government of the Hong Kong Special Administrative Region may apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions.

COMMENTARY

Passports 154.1

Purpose

154.1.1 The purpose of a passport is, fundamentally, travel: *Butt v Director of Immigration* [2009] 2 HKLRD 1, [18] (Hartmann J, "Expressed in the simplest of terms, a passport, while it is a document of identity recognised internationally as such, is a document issued in most cases by the holder's country of nationality which seeks to enable the holder to travel freely, that is, to travel without let or hindrance, and which - on the basis of the document alone - enables the holder to seek help from the diplomatic or consular offices of his country if he comes into difficulties while travelling."); [17] ("The nature of a passport today is fairly well accepted. It is a document which is internationally recognised as proof of the holder's identity, but it is also a document which serves as a basis for a number of important decisions affecting the holder. As I have said earlier, most passports in one way or another, based on the comity of nations, seek permission for the holder of the passport to travel freely. In addition, although a passport does not of itself confer nationality but creates a presumption only of nationality, it does confer on the holder, according to international usage and without any further examination, a claim to the protection of the diplomatic and consular representatives of his country.").

Legislation

154.1.2 The issuance of passports is subject to legislation: Hong Kong Special Administrative Region Passports Ordinance (Cap.539).

"Right" to an HKSAR passport

154.1.3 Pursuant to s.3 of the Hong Kong Special Administrative Region Passports Ordinance (Cap.539), a person who is (i) a Chinese National; (ii) Permanent