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HONG KONG BASIC LAW HANDBOOK

THIRD EDITION

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and
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SWEET & MAXWELL

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residents are still subject to the restrictions imposed by law - they shall still abide by the law in exercising their fundamental rights and must exercise their rights in a lawful manner.”). See also *Secretary for Justice v Ocean Technology Ltd* [2010] 1 HKC 456, [9] (Hartmann J), *Chiu Luen Public Light Bus Co v Persons Unlawfully Occupying or Remaining on the Public Highway* (HCA 2086/2014, [2014] HKEC 1868), [138]–[139] (Au J).

Article 42 may be compared with similar provisions in art.32(3) of the PRC Constitution and reflects the Chinese approach to human rights that obligations are equally important: Chan and Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell, 2nd ed 2015) para.17.011. See also Wang Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (Law Press China and Joint Publishing (HK) Co Ltd, 2nd ed 2009) 254–258.

Meaning of “laws in force in the Hong Kong Special Administrative Region”

- 42.2 For the laws in force in the HKSAR, see art.18(1). The obligation under art.42 is confined to complying with the laws in force in the HKSAR, thereby excluding any national laws of the PRC except for those which are listed in Annex III of the Basic Law and thereby apply in the HKSAR: see art.18(2). For example, Hong Kong residents do not have the obligation to perform military service as the PRC Military Service Law is not listed in Annex III.

Drafting history

- 42.3 Article 42 is substantially the same as its December 1987 version (art.42 in 1987), save for the inclusion of the phrase “in force” in the article: “Hong Kong residents and other persons in Hong Kong shall have the obligation to abide by the laws of the Hong Kong SAR.”

Opposing views noted by the consultative committee included that the article “may be taken as a basis for depriving the law offenders of their rights” and “the intention of including such an article that stipulates an obligation acceptable to all is vague.” The committee further noted a concern that “the acceptance of this clause does not by itself impose any real obligation” another that the term “other persons” might not include legal persons and “there is no reason why a legal person should not receive constitutional protection and bear the corresponding obligations”: *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.379.

Chapter IV

POLITICAL STRUCTURE

SECTION 1: The Chief Executive

ARTICLE 43

The Chief Executive of the Hong Kong Special Administrative Region shall be the head of the Hong Kong Special Administrative Region and shall represent the Region.

The Chief Executive of the Hong Kong Special Administrative Region shall be accountable to the Central People’s Government and the Hong Kong Special Administrative Region in accordance with the provisions of this law.

COMMENTARY

Drafting history

There are no provisions in the Sino-British Joint Declaration that referred to the Chief Executive as the “head of the Hong Kong Special Administrative Region,” as in art.43(1). The Sino-British Joint Declaration had not mentioned the accountability of the Chief Executive either. It only provided that the “executive authorities shall abide by the law and shall be accountable to the legislature” in Annex I Section I para.3 of the Sino-British Joint Declaration. Article 43 was largely the same as the December 1987 version, save that the notion that the Chief Executive “shall represent the Region” was provided in a separate article (art.47 in 1987).

There was a view noted by the consultative committee that the Chief Executive should also be held accountable to the Legislature. One of the reasons was that “the Chief Executive should be accountable to the people. If the legislature is elected by the people, the Chief Executive should also be accountable to the legislature.” Another reason was that the phrase “the Chief Executive is accountable to the HKSAR is insufficient and too vague”: *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.402.

ARTICLE 44

The Chief Executive of the Hong Kong Special Administrative Region shall be a Chinese citizen of not less than 40 years of age who is a permanent resident of the Region with no right of abode in any foreign country and has ordinarily resided in Hong Kong for a continuous period of not less than 20 years.

COMMENTARY

Drafting history

44.1

The content of art.44 draws from Annex I Section I para.3 of the Sino-British Joint Declaration: "The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants."

There were several differences between the December 1987 draft (art.44 in 1987) and the final version regarding the eligibility requirements to be Chief Executive. The draft version referred to "a Chinese national" rather than "a Chinese citizen." The requirement of being "a permanent resident of the Region with no right of abode in any foreign country" was also not found in the December 1987 draft. There were also several minor differences such "no less than" rather than "not less than."

The April 1988 draft (art.44 in 1988) added "a permanent resident of the Region," though the further clarification of "with no right of abode in any foreign country" was not found until the final version. Moreover, in the April 1988 version, "20 years" replaced "20 years or more," which was then changed in the final version to "not less than 20 years" in the enacted version: "The Chief Executive of the Hong Kong Special Administrative Region shall be a Chinese national of no less than 40 years of age who is a permanent resident of the Region and had ordinarily resided in Hong Kong for a continuous period of 20 years."

The consultative committee noted views on several areas of the article, including: whether there should be age limit, age limit would restrict the development of youth; the length of residency in Hong Kong (20 years) does not necessarily mean a strong sense of belonging; and it should be permissible for the Chief Executive to hold dual nationality as long as he or she is able and can serve the people: *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.410-411.

ARTICLE 45

The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government.

The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.

The specific method for selecting the Chief Executive is prescribed in Annex I: Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region.

COMMENTARY

The Election of Chief Executive has not yet occurred under conditions of universal suffrage: history and context

The Basic Law provides for the gradual evolution of the selection methodology for the office of Chief Executive, describing "universal suffrage upon nomination by a broadly representative nominating committee" as the "ultimate aim." At the time of writing no election of the Chief Executive under such conditions has yet occurred though the method of selection has, however, changed since that specified in the original version of Annex I to the Basic Law (selection of the CE made by an 800-member Election Committee drawn from various "sectors" of Hong Kong society). The amendment procedure for Annex I exists outside of the amendment procedure that exists for the rest of the Basic Law: Annex I, para.7 ("If there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for approval"; in contrast see art.159 for general amendment requirements). Annex I has been successfully amended only once — in 2009 the size of the Election Committee was increased to 1200, with candidates requiring 150 votes from members of this Committee in order to stand for the final "election," which was then conducted by the same Committee: Amendment to Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic

45.1

of China Concerning the Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region (Cap.2111).

Part of the difficulty in amending the selection methodology stems from a 2004 NPCSC Interpretation that the “reporting” requirement means that though it is for the Region to amend the election procedure, the NPCSC retains a *substantive* power of final approval of any amendments to the methodology: “The CE of the Hong Kong Special Administrative Region shall make a report to the Standing Committee of the National People’s Congress as regards whether there is a need to make an amendment; and the Standing Committee of the National People’s Congress shall, in accordance with the provisions of Articles 45 and 68 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, make a determination in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The bills on the amendments to the method for selecting on bills and motions and the proposed amendments to such bills shall be introduced by the Government of the Hong Kong Special Administrative Region into the LegCo”: Interpretation by the Standing Committee of the National People’s Congress of art.7 of Annex I and art.III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Adopted at the Eighth Session of the Standing Committee of the Tenth National People’s Congress on 6 April 2004 (see Appendix 2).

Following numerous public consultations and after receiving reports from the HKSAR Government on the basis of this Interpretation, in 2007, the NPCSC issued a Decision that the earliest date by which the selection of the CE could occur under conditions of universal suffrage would be 2017: Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Methods for Selecting the CE of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage, Adopted at the Thirty First Session of the Standing Committee of the Tenth National People’s Congress on 29 December 2007. But while clarifying the possible timeline for the introduction of universal suffrage, this Decision did not specify precisely how an election of the CE conducted under such conditions would occur.

The possibility of universal suffrage being introduced for the 2017 CE election lead to further public consultations and debate. A lack of consensus on what “universal suffrage” entailed meant that much political dispute turned on the composition and power of the “nominating committee” contemplated by

art.45’s “ultimate aim.” Following submission of a “Report” by the HKSAR Government under the procedure laid out by the 2004 Interpretation, in 2015, the NPCSC proposed a nominating committee identical in composition to the 2012 Election Committee. This committee would be tasked with the power of nominating “two to three candidates,” who would then stand for election under conditions of universal suffrage; the winner would then have to be appointed by the CPG: Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016, Adopted at the Tenth Session of the Standing Committee of the Twelfth National People’s Congress on 31 August 2014.

Anger with this proposal (known colloquially as the “8/31 Decision”) led to the “Occupy Central” street protests that closed multiple major roads in Central for several months (also known as the “Umbrella Revolution”). Though the protests eventually died out, pan-democrats in the LegCo were able to defeat the proposed amendment to Annex I in mid-2015. The methodology for choosing the CE in 2017 therefore remained as it was in 2012 — nomination of candidates by a 1200-person Election Committee composed of representatives from a variety of “sectors,” and subsequent election between those candidates who receive at least 150 nominations by that same Committee. This means that from a total population of 7.2 million, only 0.017 per cent have the ability to directly vote in the selection of the Chief Executive. In the 2017 process, Carrie Lam won 777 votes from the Election Committee. She took office as Hong Kong’s first female Chief Executive on July 1.

For more see Stuart Hargreaves, “From the Fragrant Harbour to the Umbrella Revolution: Hong Kong’s Democratic Development & Rule of Law Discourse” (2015) 9(3) *Journal of Parliamentary and Political Law* 519.

Judicial review of public consultation element

Under the process described above, public consultations have always preceded the HKSAR Government’s Report to the NPCSC on the need for a change to the selection methodology. Request for judicial review of the most recent consultation process was denied on the grounds that it was merely “academic” in nature. The court concluded that regardless of the way in which the consultation was conducted, it was superseded by an unchallengeable decision of the NPCSC, thus rendering it “academic”: *Kwok Cheuk Kin v Chief Executive of the HKSAR* (HCAL 103/2014, [2015] HKEC 1220), [26] (Au J), “It is common ground that, before making the 8/31

45.1.1

Decision, the NPCSC was aware of the Alternative Report as the same was presented to the NPCSC by the pan-democratic members of the LegCo. This report at its paragraph 2 pointed out that the CE Report was biased and misleading, and contained the other views which the applicant says the CE Report had failed to include as a result of the process unfairness. At the same time, the fact is that the NPCSC still proceeded to make the 8/31 Decision when it was also clearly apprised of those other views contained in the Alternative Report and the complaint that the CE Report was biased and misleading. This underscores the clear academic nature of the proposed judicial review. The refusal to grant leave on this basis in accordance with well established principles involves no question of infringing the applicant's right to access to court."). See also *Leung Lai Kwok Yvonne v Chief Secretary for Administration* (HCAL 31/2015, [2015] HKEC 1034).

Procedure of Election Committee

- 45.2 See Chief Executive Election Ordinance (Cap.569).

Drafting history

- 45.3 Annex I Section I para.3 of the Sino-British Joint Declaration provides the corresponding backing for art.45: "The chief executive will be appointed by the Central People's Government on the basis of the results of elections or consultations to be held locally." The earlier version of this article, from December 1987 (art.45 in 1987), contained the details of the methods for selecting the Chief Executive, which was put in the Annex I to the April 1988 version and then in the enacted version.

The consultative committee noted that opinions were expressed on several areas of the article, including: whether the Chief Executive should be appointed by the Central People's Government; that consultation is not as democratic as direct or indirect elections; and that the clause "in accordance with the principle of gradual and orderly progress" is vague and difficult to define legally: *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.415-419.

ARTICLE 46

The term of office of the Chief Executive of the Hong Kong Special Administrative Region shall be five years. He or she may serve for not more than two consecutive terms.

COMMENTARY

Consequences of inability of Chief Executive to complete five-year term

See discussion at art.53.

46.1

Drafting history

No reference to the term of office of the Chief Executive was made in the Sino-British Joint Declaration. Article 46 is substantially the same as it was in the December 1987 draft (art.46), save for the reference to "two consecutive terms" rather than "no more than two terms."

46.2

Views noted by the consultative committee included that a five-year term for the Chief Executive was too long and there was no precedent for such a long term of office, which is more likely to result in abuse of power: *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.423-424.

ARTICLE 47

The Chief Executive of the Hong Kong Special Administrative Region must be a person of integrity, dedicated to his or her duties.

The Chief Executive, on assuming office, shall declare his or her assets to the Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region. This declaration shall be put on record.

COMMENTARY

Must the Chief Executive "love the country"?

47.1

Though not found in the text of art.47, the PRC State Council has claimed that "loving the country is the basic political requirement for Hong Kong's administrators": 2014 White Paper. Precisely how the necessary quality of "love" could be demonstrated (or who would determine its presence) was left unstated. The HKSAR Government later argued that the oath of office was a manifestation of the "love" requirement: <https://www.doj.gov.hk/eng/public/pdf/2014/pr20140709e.pdf>.

Drafting history

47.2

There is some difference between the enacted art.47(1) and the December 1987 version (art.48 in 1987): "the Chief Executive of the Hong Kong SAR should carry out his work dutifully." For art.47(2), a reference was made to "financial assets" in the December 1987 version rather than "assets" as in enacted version.

The consultative committee noted objection to the clause "shall be put on record in strict confidence." It is not conducive to the development of democracy if the declaration of assets is not made public. The chief executive should declare his or her assets and the declaration should be put in public record, which would facilitate public supervision. The consultative committee noted there was view that the phrase "a person of integrity, dedicated to his or her duties" was too subjective and "more concrete provisions should be set down." There was suggestion to delete the article, as "Articles 43, 52 and 53 also serve the same purpose": *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.428-429.

ARTICLE 48

The Chief Executive of the Hong Kong Special Administrative Region shall exercise the following powers and functions:

- (1) To lead the government of the Region,
- (2) To be responsible for the implementation of this Law and other laws which, in accordance with this Law, apply in the Hong Kong Special Administrative Region.
- (3) To sign bills passed by the Legislative Council and to promulgate laws,
- (4) To sign budgets passed by the Legislative Council and report the budgets and final accounts to the Central People's Government for the record,
- (5) To decide on government policies and to issue executive orders.
- (6) To nominate and to report to the Central People's Government for appointment the following principal officials: Secretaries and Deputy Secretaries of Departments, Directors of Bureaux, Commissioner Against Corruption, Director of Audit, Commissioner of Police, Director of Immigration and Commissioner of Customs and Excise, and to recommend to the Central People's Government the removal of the above-mentioned officials,

- (7) To appoint or remove judges of the courts at all levels in accordance with legal procedures,
- (8) To appoint or remove holders of public office in accordance with legal procedures,
- (9) To implement the directives issued by the Central People's Government in respect of the relevant matters provided for in this Law,
- (10) To conduct, on behalf of the Government of the Hong Kong Special Administrative Region, external affairs and other affairs as authorised by the Central Authorities,
- (11) To approve the introduction of motions regarding revenues or expenditure to the Legislative Council,
- (12) To decide, in the light of security and vital public interests, whether government officials or other personnel in charge of government affairs should testify or give evidence before the Legislative Council or its committees,
- (13) To pardon persons convicted of criminal offences or commute their penalties, and
- (14) To handle petitions and complaints.

COMMENTARY

The Chief Executive is under a duty to implement a duly enacted Ordinance

Article 48(1)(2) imposes a responsibility and duty on the Chief Executive to implement an Ordinance. That person must not, therefore, renounce, in substance, the existence of an Ordinance. However, the foregoing does not dictate an exercise of a discretionary power conferred by the Ordinance. It merely requires consideration of whether or not to do so. Any further question of legality relating to the exercise, or non-exercise, of the power is one of administrative law and statutory interpretation: (1) *Leung Kwok Hung v Chief Executive in Council* (CACV 197/2007, [2008] HKEC 780), (leave to appeal refused), [12] (Ma CJHC, "the discretion vested in the CEIC, wide though it is, is not absolute. It is not absolute in the sense that the CEIC cannot irrationally refuse to use it or to consider using it. It must be accepted that a decision-maker such as the CEIC cannot exercise a discretion so as to frustrate the policy and objects of a statute."); (2) *Chan Noi Heung v Chief Executive in Council* (FAMV 47/2008, [2009] HKEC 459), [5] (Li CJ, "In accordance with [the Basic Law], the CE and the HKSAR Government have a responsibility and duty respectively to

48.1

implement the Ordinance.”); [6] (“As the Court of Appeal held, it would not be permissible for the CE in Council to refuse to apply the machinery provided by the Ordinance in any circumstances, that is, effectively to renounce its existence.”).

The CE’s duty to implement the Basic Law includes bringing actions in courts to ensure both it and subsidiary legislation are complied with

- 48.2 In 2016 the Chief Executive and Chief Justice were plaintiffs in action to bar “localist” candidates who had won Legislative Council seats from taking office, on the ground they had misspoken their oath of office (required under art.104 and implemented by the Oaths and Declarations Ordinance (Cap.11)). In this action, the CFI approved of their role: *Chief Executive of the HKSAR v President of the Legislative Council* [2016] 6 HKC 417, [104]–[105] (Au J, “Under Art.48(2), the Chief Executive has a constitutional role and duty to implement the Basic Law and other laws of the Hong Kong Special Administrative Region... the Chief Executive has a proper locus to bring these proceedings to implement Art.104 and the relevant provisions of the Oaths & Declarations Ordinance and to ensure that they are complied with.”). For more context see discussion regarding art.104.

Certain powers within Article 48 are not delegable

- 48.3 The powers in art.48(1)(3) related to signing legislation passed by the LegCo and reporting the budgets and final accounts to the CPG for the record are likely non-delegable: *Wong Kei Wong v Principal Assistant Secretary for Civil Service* (HCAL 49/2007, [2008] HKEC 276) (affirmed on other grounds, [2009] 2 HKLRD 476), [51] (Saunders J, “while I accept that it is inconceivable that the Chief Executive could delegate powers such as... that of signing bills passed by the Legislative Council or that of signing a budget passed by the Legislative Council, it is perfectly conceivable that the Chief Executive should not have to be personally concerned in the appointment or removal of the holders of public office in a civil service containing thousands of officers.”).

Article 48(1)(3) obligation to promulgate laws is not relevant where the Chief Executive is granted discretion by Ordinance to bring it into effect

- 48.4 Article 48(1)(3) is not relevant to the question of whether or not the Chief Executive should exercise a discretion conferred by an Ordinance to bring the

Ordinance into effect: *Leung Kwok Hung v Chief Executive of HKSAR*, (CACV 73, 87/2006, [2006] HKEC 879), [27].

Executive orders are not legislation, but they may still provide for legal rights and obligations

While Executive orders are not legislation, they may provide for legal rights and obligations, at least in certain matters, such as the disciplining of civil servants: *Rowse v Secretary for Civil Service* [2008] 5 HKLRD 217, 224 (Hartmann J noting that regulations made under an administrative order were valid and applicable to the applicant, “the Administration Order, in terms of which the disciplinary proceedings were conducted against the applicant, is an executive order. It is not legislation. It is an order made by the Chief Executive pursuant to his ‘powers and functions’ under Art.48 of the Basic Law... Regulations have been made under the Administrative Order.”).

48.5

An Executive order may have retrospective effect

Executive orders may have retrospective effect: *Association of Expatriate Civil Servants v Chief Executive* [1998] 1 HKLRD 615, 623 (Keith J, “both the executive order and the regulation were retrospective in operation. The argument that their retrospectivity renders them unlawful is that the Basic Law does not permit executive orders made by the Chief Executive under Art.48(4) to have retrospective effect. Alternatively, if the executive order and the regulation are properly to be regarded as subordinate legislation, their retrospectivity still renders them unlawful because subordinate legislation cannot be retrospective in operation unless the enabling legislation authorises it. I reject these arguments. There is no legal principle which prevents subordinate legislation or administrative action from being valid merely because of its retrospectivity. Retrospective subordinate legislation may be struck down as *ultra vires* the enabling legislation if the enabling legislation expressly or impliedly prevents the subordinate legislation from having retrospective effect... But the fact is that there is nothing in the Basic Law — or in the relevant provision in the Reunification Ordinance... which even impliedly prevents the Chief Executive’s executive orders taking effect retrospectively.”).

48.6

Limitations on reach of Executive orders

However, Executive orders cannot alone be classed as “legal procedures” in the context of justifying state intrusion into the freedom and privacy of communication otherwise protected by art.30: *Leung Kwok Hung v Chief*

48.7

Executive of HKSAR (HCAL 107/2005, [2006] HKEC 239) (affirmed on other grounds, [2006] HKEC 816), [150] (Hartmann J, “the use of the phrase ‘in accordance with legal procedures’ in Art.30 means procedures which are laid down by law in the sense that they form part of substantive law, invariably, in order to comply with the requirements of legal certainty, within legislation, primary and/or secondary.”); [151] (“That being the case, having found that the Executive Order does not purport to be legislation of any kind or to have the effect of legislation, I am further satisfied that the Executive Order, while it is entirely legitimate and of value as an administrative tool in regulating the internal conduct of law enforcement agencies, is not capable of constituting a set of ‘legal procedures’ for the purposes of Art.30.”).

“In accordance with legal procedures” is not synonymous with “prescribed by law”

48.8 “In accordance with legal procedures” is not synonymous with “prescribed by law” and, whether due to the difference between the two phrases or the amplitude of the latter phrase, does not necessitate legislative action — Executive orders can suffice: *Association of Expatriate Civil Servants v Chief Executive* [1998] 1 HKLRD 615, 622 (Keith J, “when the Basic Law contemplates that a particular course of action has to be prescribed by law, the Basic Law says so. The fact that Art.48(1)(7) speaks of ‘legal’ procedures, rather than of procedures ‘prescribed by law,’ is some indication that a meaning other than ‘prescribed by law’ was intended. I should add that even if a course of action must be prescribed by law, that does not mean that it has to be sanctioned by legislation.”).

Further, “in accordance with legal procedures” in art.48(1)(8), when read in the light of art.103, has been construed to mean “in accordance with such procedures as are lawfully established to maintain Hong Kong’s previous system of recruitment and discipline for the public service”: *Association of Expatriate Civil Servants v Chief Executive*, in which an executive order maintaining such matters was held to meet the requirements of art.48(1)(8).

Hong Kong’s Government is dominated by the executive branch

48.9 Read in conjunction with art.62, art.48(1)(10) illustrates the interaction between the Chief Executive and the Legislative Council in governing Hong Kong: *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387, 401 (Hartmann J, “Hong Kong has an Executive-led Government. It is the function of the Chief Executive to lead the Government, to decide on Government policies and to approve the introduction of motions regarding revenues or expenditure to the Legislative Council: Art.48. It is the function of the Government; that is, the Executive authorities [led by the Chief Executive]

to formulate and implement policies, to conduct administrative affairs and to draw up and introduce [into LegCo] budgets and final accounts: Art.62. LegCo does not exercise executive or administrative functions of the kind I have just described. To put it plainly, it does not run any ‘mirror’ Ministry of Finance. It is instead the function of LegCo to enact, amend or repeal laws, to examine and approve budgets introduced by the Executive authorities and to ‘approve’ (not create or decide upon) taxation and public expenditure.”).

See also art.59.

Function of Article 48(11)

Though art.48(11) grants the Chief Executive the power to decide when Government officials should testify before LegCo and its committees, this operates as a veto over a broad expectation of compliance rather than isolated decisions to allow testimony. It operates to expand the power of veto conferred by s.14(2) of the Legislative Council (Powers and Privileges) Ordinance (Cap.382): *Cheng Kar Shun v Hon Li Fung Ying* [2009] 4 HKC 204, 241–245 (Cheung J, “Quite plainly, leaving aside for the time being the so-called drafting history of this provision, Art.48(11) proceeds on the assumption that subject to the Chief Executive’s veto, government officials and those in charge of government affairs are required to testify or to give evidence before the Legislative Council or its committees... In my view, almost as a matter of definition, all government officials must obey the instructions of the Chief Executive in all official matters, including whether to appear before the Legislative Council or its committees to testify or to give evidence on matters relating to their official jobs and responsibilities. It would hardly require the specific provision of a right of veto in the Basic Law to say what is a matter of course. It is almost unthinkable that a government official would still volunteer to appear before the Legislative Council or its committees to testify or to give evidence on a matter relating to his official duty if that course is opposed to by his superior or the Chief Executive. That is precisely why... the article proceeds on the underlying premise that absent the Chief Executive’s veto, government officials are compellable before the Legislative Council or its committees to testify or to give evidence.”).

48.10

Power of clemency

48.11

Judicial review of clemency decisions

The procedure by which the CE makes a decision regarding clemency is subject to judicial review, even if the decision itself is not: *Ch’ng Poh v Chief*

48.11.1

Executive of HKSAR (HCAL 182/2002, [2003] HKEC 1441), [38] (Hartmann J), “while the merits of any decision made by the Chief Executive pursuant to Art.48(1)(12) are not subject to the review of the courts, the lawfulness of the process by which such a decision is made is open to review.”).

Power of clemency not exercisable by judicial branch

- 48.11.2 The power of clemency is limited to the Chief Executive: *HKSAR v Kwok Kin Ming* (CACC 115/2012, [2014] HKEC 1145), [18] (Lunn V-P, “the Basic Law provides that the Chief Executive has ‘the power and function to commute the penalties of prisoners convicted of criminal offences.’ Whilst the court has sympathy for the applicant for his medical condition the consequences of the applicant’s ill-health, such as they might be, are not a matter for this Court. Rather, if relevant, they are a matter for executive clemency.”).

The Chief Executive has a duty to handle petitions and complaints, but that duty may be delegated

- 48.12 The obligation created under art.48(1)(13) is seemingly available in relation to any public decision. The function of the Chief Executive under art.48(1)(13) appears to be delegable to the relevant policy secretaries, e.g. the Secretary for Security. The exercise of art.48(1)(13) by the Chief Executive or relevant delegate may be judicially reviewable, including for procedural fairness: *Kaur v Director of Immigration* [2001] 1 HKC 666, 669–670 (Keith J, art.48(1)(13) “is the modern equivalent of Reg. 168 of the Colonial Regulations which required the Governor ‘to consider and act upon’ any ‘representations’ made to him ‘on matters of a public or private nature.’ The power of the Chief Executive to handle petitions obviously includes a duty to consider them, but his duty to consider them can, so it is said, be delegated to the Chief Secretary and to the relevant policy secretaries, including the Secretary for Security.”). As to the status of the similar Colonial Regulations, see *Lam Yuk Ming v Attorney General* [1980] HKLR 815, 824 (Roberts CJ, they were “(a) ‘Instructions’ within the meaning of Article XVI; (b) they are subordinate legislation; (c) they bind the Governor; (d) they do not, per se, form part of the contract of service of public officers; (e) the only remedy open to a public officer, if there is a breach of them, is by way of declaration or injunction.”).

When handling a petition or complaint, Chief Executive acting in an administrative or executive capacity, not a judicial capacity

- 48.12.1 Under the Colonial Regulations, the Governor was required to respond according to what “public expediency or justice to the individual may

appear to require.” Similarly, art.48(1)(13) is elaborated upon by s.64(4) of the Interpretation and General Clauses Ordinance (Cap.1), which stipulates that the Chief Executive, when exercising the function: “shall act in an administrative or executive capacity and not in a judicial or quasi-judicial capacity,” and “shall be entitled to consider and take into account any evidence, material, information or advice in his absolute discretion.”

It follows that art.48(1)(13) is, in essence, a function of merits review of any public decision in Hong Kong. Under the provision, the Chief Executive “attempts to find what is the most expedient and desirable solution in the public interest ...”: by analogy, *PCCW Media Ltd v Broadcasting Authority* (HCAL 97/2005, [2006] HKEC 185), [19]. See also *FB v Director of Immigration* [2009] 2 HKLRD 346, in which Saunders J held that where an applicant’s claim had been rejected by the Director of Immigration, they could nonetheless petition the CE under art.48(1)(13) for redress.

Overlap between Article 48(1)(13) and other review

- Article 48(1)(13) overlaps with similar functions of merits review conferred on the Chief Executive by Ordinance; see for instance *Kaur v Director of Immigration* [2001] 1 HKC 666 and s.53 of the Immigration Ordinance (Cap.115). See also, generally, *PCCW Media Ltd v Broadcasting Authority* (HCAL 97/2005, [2006] HKEC 185). 48.12.2

Article 48(1)(13) is available even where the Chief Executive has a similar function by Ordinance. However, where it is unclear which function is being invoked, the courts appear slow to conclude that art.48(1)(13) is in operation; see *Kaur v Director of Immigration* [2001] 1 HKC 666.

Drafting history

The Sino-British Joint Declaration did not provide detailed corresponding provisions concerning the powers listed in this article. However, this article can be regarded as consistent with Annex I Section I paras.2 and 3 of the Sino-British Joint Declaration which provided that “the Hong Kong Special Administrative Region shall be vested with executive, legislative and independent judicial power” and that “the executive authorities shall abide by the law and shall be accountable to the legislature.” 48.13

The following is the drafting history of each power and function (where available):

Article 48 Provision 1: According to the explanatory note of December 1987 draft (art.47 in 1987), the committee members considered that there should be a common understanding of the meaning of the term

Chapter V

ECONOMY

SECTION 1: PUBLIC FINANCE, MONETARY AFFAIRS, TRADE, INDUSTRY AND COMMERCE

ARTICLE 105

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.

COMMENTARY

Article 105 is to be construed generously and in context

Article 105, although not appearing in Chapter III, is to be construed generously and in context: (1) *Harvest Good Development v Secretary for Justice* [2007] 4 HKC 1, [138]–[139] (Hartmann J, “The protective guarantees concerning private property rights are not contained in Ch III. Article 6 appears in Ch I, headed ‘general principles,’ while art.105 appears in Ch V, headed ‘economy.’ But, in the Basic Law, private property rights are rights of real importance just as they are deeply rooted rights in the common law. While therefore they may not be seen through the prism of universality, such as the right of equality before the law or freedom of conscience, nevertheless, bearing in mind that the Basic Law entrenches Hong Kong’s capitalist system, they are rights, in my view, which warrant a generous interpretation.”); (2) *Longrun Tea Group Co Ltd v Stock Exchange of Hong Kong Ltd* [2021] HKCFI 1883, [103] (Coleman J),

105.1

"The term 'property' is not a term of art with immutable meaning, but takes its meaning from its context...[O]ne central theme underpinning the Basic Law — and a theme which is integral to an understanding of its structure — is the continuity of the social, economic and legal institutions and systems prior to the resumption of Chinese sovereignty on 1 July 1997, including the capitalist economic system..."). See also *Interush Ltd v Commissioner of Police* [2019] 1 HKLRD 892.

Private property is a fundamental right; proportionality test therefore implicated

105.1.1

The fundamental purpose of art.105 is the protection of private property rights. The phrase "in accordance with law" does not diminish this protection, but rather enhances it. That the right does not appear alongside other rights in the Basic Law is not relevant. In determining any justifiable limitations, a proportionality analysis must be applied: *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, [29], [33], [44] (Ribeiro PJ "overturning the Court of Appeal's argument that the phrase 'in accordance with law' did not always implicate a proportionality analysis — CACV 232-233/2012, [2014] HKEC 1869, [70]-[77] Lam V.P."). Ribeiro PJ also took this opportunity to refine the proportionality test used when determining the constitutionality of limitations on Basic Law rights. Drawing upon jurisprudence from various jurisdictions including the United Kingdom (*Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39), Canada (*RJR-Macdonald Inc v Attorney General of Canada* [1995] 3 SCR 199), and Strasbourg (*James v United Kingdom* [1986] ECHR 8), he added in a fourth step, asking whether the salutary impacts of the impugned measure outweighed the impact of the rights infringement (*Hysan Development Co Ltd v Town Planning Board*, [64]-[80]). The fourth step operates as a kind of safeguard to protect fundamental rights even where the first three steps are made out: *Hysan Development Co Ltd v Town Planning Board*, [78] (Ribeiro PJ, "a four-step analysis should, in my view, be explicitly adopted in Hong Kong. Without its inclusion, the proportionality assessment would be confined to gauging the incursion in relation to its aim. The balancing of societal and individual interests against each other which lies at the heart of any system for the protection of human rights would not be addressed. This requires the Court to make a value judgment as to whether the impugned law or governmental decision, despite having satisfied the first three requirements, operates on particular individuals with such oppressive unfairness that it cannot be regarded as a proportionate means of achieving the legitimate aim in question. But that should not cause the

Court to shy away from the fourth question since such a value judgment is inherent in the proportionality analysis.").

In the context of urban planning, the question of whether a "reasonable balance" has been struck is ultimately a "value judgment" for the court to make, and the courts have little trouble finding that societal interests may validly restrict the ability of a developer to make complete use of a site as he or she sees fit: *Tung Chun Co Ltd v Town Planning Board* [2018] 3 HKLRD 466, [111]-[115].

See further discussion of the proportionality test at 39.10.

Meaning of "property"

Article 105 embraces choses in possession, as well as real property: *Man Yee Transport Bus Co Ltd v Transport Tribunal* [2008] HKEC 1775, [14] (Cheung J, "Likewise, in the present case, although without a vehicle licence the applicant cannot use the bus on the roads in Hong Kong, this does not mean that [the applicant] has lost all meaningful or economically viable use of the vehicle. First, it could be sold for good value as a second-hand bus. There is no suggestion in the evidence to the contrary. Moreover, unlike a piece of land, the bus may also be used elsewhere by the applicant subject to the applicant's fulfilling the relevant importation and licensing requirements of the place where it intends to use the bus").

Given this, it is logical for art.105 to extend to choses in action. This category could, in light of European jurisprudence, be broad, covering anything from intellectual property and good will through to social security and statutory licences: T Allen, *Property and the Human Rights Act 1998* (Hart Publishing, 2005) 41-46, AR Coban, *Protection of Property Rights Within the European Convention on Human Rights* (Aldershot, Ashgate, 2004) 149-160. This would be consistent with the broad definition of property in s.3 of the Interpretation and General Clauses Ordinance (Cap.1).

See also Commonwealth constitutional law, such as s.51(xxxi) of the Constitution of the Commonwealth of Australia, considered generally in T Allen, *Right to Property in Commonwealth Constitutions* (Cambridge University Press, 2000).

Article 105 could recognise legitimate expectations of property rights

Further, in light of European jurisprudence, art.105 could also be interpreted as to recognise legitimate expectations of property rights, which "protect a person facing the diminution or denial of a proprietary interest, where he or she has been led, on the basis of a specific legal act or current and settled national law, to rely on its continued and sufficient recognition": O Jones,

105.2

105.3

"Out With the Owners: the Eurasian Sequels to *JA Pye (Oxford) Ltd v United Kingdom*" (2008) 27 *Civil Justice Quarterly* 260, 265–266 ("Article 1 is ultimately bound by its ordinary meaning, i.e. things which a person holds, according to the circumstances in which they were acquired. Thus, Art.1 merely confers a right to retain property in manner in which it has come to be held. The provision cannot be used to broaden the original scope of ownership... It may be added that the above criticism is not undermined by the principle of legitimate expectation, to which the Grand Chamber referred. In essence, the principle has Art.1 protect a person facing the diminution or denial of a proprietary interest, where he or she has been led, on the basis of a specific legal act or current and settled national law, to rely on its continued and sufficient recognition... It has never been proposed that the principle of legitimate expectation should be broadened to assist persons who are unequivocally subject to, but dissatisfied with, their terms of ownership.")

Meaning of "acquisition, use, disposal and inheritance of property"

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Litigation under art.105 has so far focused on deprivation, which is discussed below. However, while they might not lead to compensation, limitations on the acquisition, use, disposal and inheritance of property could, subject to a justification or proportionality test, arguably also lead to invalidity under art.105. Alternatively, such a role could be performed by art.6. See, generally, O Jones, "Out with the owners: the Eurasian sequels to *JA Pye (Oxford) Ltd v United Kingdom*" (2008) 27 *Civil Justice Quarterly* 260, [275] ("...[the Basic Law] is, as a mini-Constitution, comprehensively concerned with Hong Kong as a legal, political and socio-economic entity. It is, therefore, entirely fitting for art.6 to require any limits on the scope to acquire property to satisfy the 'fair balance test.' This understanding of art.6 raises the tantalising possibility of the general withholding of private freehold, or the designation of more than 40 per cent of Hong Kong as parkland, being amenable to judicial review. Either way, the suggested interpretation provides the support for Hartmann J's judgment so lacking in the Grand Chamber and his Lordship's analysis of the Resumption Ordinance. Like Art.1 [of the First Protocol to the European Convention of Human Rights], art.105 could not protect the owner because it relevantly upheld rights according to the manner in which they arose, thus including adverse possession. However, art.6 required adverse possession, as a limit on the scope for the owner to acquire full title, to satisfy the 'fair balance' test. In the end, therefore, Hartmann J was right to scrutinise the doctrine as his Lordship did."). Nonetheless, in the only case potentially raising this issue to date, the Court of Appeal, having found that a limitation on use did not constitute deprivation, dismissed the claim: *Fine Tower Associates Ltd v Town*

Planning Board [2008] 1 HKLRD 553. See also *Kaisilk Development Ltd v Urban Renewal* [2002] HKEC 305.

The Court of First Instance has held that the protections afforded by art.105 against interference with use are a barrier against protests on private property: *HKSAR v Au Kwok Kuen* [2010] 3 HKLRD 371, [74] (Cheung J, "In my view, in Hong Kong, notwithstanding the acknowledged importance of the right of peaceful assembly and the right to freedom of expression, neither the provisions in the Basic Law nor those in the Hong Kong Bill of Rights bestow any freedom of forum for the exercise of those rights. None of the relevant provisions require the automatic creation of rights of entry to private residential property... Articles 6, 29 and 105 of the Basic Law and Article 14 of the Hong Kong Bill of Rights would, in my view, require the government (including the police) to take reasonable and appropriate measures to protect Hong Kong residents' homes and other premises against intrusion and their privacy at home against interference, provided that the measures, if they are to be taken within private premises, must be taken with the permission of their owner or occupier. It would be a very strange result if all the police is entitled to do is to prevent demonstrators from entering private premises whilst they are still in a public place; but once the demonstrators have managed to intrude into private premises without the consent of their owner, the police can do nothing to restrain the demonstrators even though it is permitted to enter or is indeed asked to enter to repel or restrain the unwelcome demonstrators.")

Meaning of "deprivation"

Deprivation, in relation to real or personal property, may occur by an overt taking. Alternatively, it may arise where an interference with the use of the property is rises to a significant level such that all viable uses are removed: *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553, [17] (Stock JA, "[I]t is well established that action adversely affecting use of property, despite falling short of formal expropriation, may in certain circumstances nonetheless properly be described as deprivation, in which case there is a right to compensation..."); [24] ("The theme thus sounded in the jurisprudence of the United States and by the European Court, that de facto deprivation for the purpose of establishing a right to compensation, contemplates the removal of any meaningful use, of all economically viable use, has been echoed by the Court of Appeal in England in *Regina (Trailer and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs* as well as by the Privy Council in *La Compagnie Sucriere de Bel Ombre Ltd v Government of Mauritius and in Grape Bay*"); application for leave to appeal refused (FAMV 20/2008, [2008] HKEC 1504).

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As one would expect, the burden of establishing deprivation on this account lays with the party claiming the violation of art.105: *Man Yee Transport Bus Co Ltd v Transport Tribunal* [2008] HKEC 1775, [13] (Cheung J, "The burden of establishing removal of all meaningful or economically viable use resides with the party asserting a violation of art.105. The Court, in [*Fine Tower Associates*], rejected the landowner's challenges based on art.105 because the landowner could not establish that it had lost all economically viable use of the land. Amongst other reasons given by the Court, the landowner could always sell the land for value [para.26].").

Deprivation is a question of fact and degree to be answered by looking at the reality rather than to the form: *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553, [17] (Stock JA, "...To ascertain whether there has been a deprivation, the court looks to the substance of the matter rather than to the form... Absent a formal expropriation, the question whether there has been a de facto deprivation of property is perforce case specific, a question of fact and degree."). This was echoed by Ribeiro PJ in brief comments denying leave to appeal in the same case (FAMV 20/2008, [2008] HKEC 1504), [1]: "Whether there has been a deprivation of property within the meaning of Article 105 of the Basic Law is a question of fact and degree to be answered by looking at the reality rather than to the form."

Whether deprivation must be accompanied by state acquisition

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There is a conflict of authority over whether a successful action for deprivation must involve acquisition by the state for public purposes, or whether it can instead be constituted by a transfer of rights between private persons. One line of authority says that state involvement is not required: *Ying Ho Co Ltd v Secretary for Justice* (2004) 7 HKCFAR 333, 348 (Bokhary PJ, "[The] constitutional guarantee [of art.105] is not confined to instances in which the deprivation suffered by the owner is accompanied by a corresponding acquisition by the state. In addition to being entrenched, art.105 is in that sense, too, more protective of property rights than the common law as spoken of by Wright J in *France Fenwick & Co Ltd v The King* [1927] 1 KB 458, 467 where he said that '[a] mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not... merely because it is obeyed, carry with it at common law any right to compensation.' Public law considerations would arise if the Government were ever to resort to a DDH clause in order to avoid paying compensation under the Hong Kong Airport (Control of Obstructions) Ordinance (Cap.301). But there is nothing to suggest that the Government's conduct in this case was dictated, or even influenced, by a desire to avoid paying compensation....").

The absence of state acquisition did not appear relevant to the art.105 discussion in *C v B* [2019] 2 HKC 475 which considered the application of the best interests test under the Mental Health Ordinance, allowing for a third party to oversee the financial affairs (including disposition of property) of a mentally incapacitated person [45].

However, a lower court decision seemingly ignored *Ying Ho Co Ltd v Secretary for Justice* and interpreted the meaning of deprivation in a much narrower fashion on the basis of the ambit of the Chinese version of the term (徵用, romanised as *zhengyong*): *Harvest Good Development v Secretary for Justice* [2007] 4 HKC 1, [138] (Hartmann J, "There is a clear difference in meaning between the English and Chinese texts, the Chinese text requiring a more specific, and thereby limited, interpretation. In the event of such a discrepancy, the position is clear: the Chinese text must prevail..."); [139] ("Accordingly, in my view, I am bound to read the English text of article 105 to mean that the Hong Kong Special Administrative Region shall in accordance with law, protect the right of individuals to compensation for the expropriation of their property by the Government or a Government agency.").

See also A Chen, "The Basic Law and the Protection of Property Rights" (1993) 23 HKLJ 31, 60; Chen subsequently revisited this issue in A Chen, "Constitutional Protection of Property Rights in Hong Kong" (2007) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1367587.

Inapplicability to Government property

Article 105 is not engaged in the context of Government property, although the Government does retain other proprietary rights, including imposing restrictions upon access (subject to the proportionality test): *Cheung Tak Wing v Director of Administration* [2020] HKCA 124.

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General situations which will not ordinarily constitute deprivation

There are also general situations which will not ordinarily constitute deprivation:

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- (1) "[L]egislation is of a general regulatory nature, authorising deprivation in the public interest so as to regulate the rights and duties of society." This "may not constitute a deprivation for which compensation must be made." This is subject to the justification or proportionality test: *Harvest Good Development v Secretary for Justice* [2007] 4 HKC 1, [143] (Hartmann J, "How is it then to be determined when compensation is or is not payable for deprivation of property? It seems to me that

one method of approach must be to look to the character of the legislation authorising the deprivation. To repeat Lord Hoffmann's dictum in *Grape Bay Ltd v Attorney-General of Bermuda*: "It is well settled that restrictions on the use of property imposed in the public interest by general regulatory laws do not constitute a deprivation of property for which compensation should be paid. If therefore the legislation is of a general regulatory nature, authorising deprivation in the public interest so as to regulate the rights and duties of society then a deprivation of property under that legislation may not constitute a deprivation for which compensation must be made."; [185] ("The real issue, it seems to me, is whether a fair balance has been struck between the aims of the statutory scheme and the hardship visited upon those whose possessory title is extinguished."); [191] ("In all the circumstances, it has not been an easy decision to reach. In my view, the mechanism of adverse possession can bear harshly. But, being obliged to give a wide margin of appreciation on the basis that the policy of adverse possession is founded on economic and social imperatives, I am satisfied that, if arts 6 and 105 are engaged, the statutory scheme of adverse possession is nevertheless consistent with the protections contained in those articles."). See also *Hong Kong Kam Lan Koon Ltd v Realray Investments* (HCA 15824/1999, [2004] HKEC 748); *Securities and Futures Commission v C* (HCMP 727/2008, [2008] HKEC 1853).

- (2) Taxation: *Weson Investment Ltd v Commissioner of Inland Revenue* [2005] 3 HKLRD 643, 655E–656D (Deputy Judge Gill, "Does art.105 of the Basic Law require compensation at real value; that is, with commercial interest included? The answer lies in s.75(1) of IRO, which states that tax due and payable under the IRO shall be recoverable as a civil debt due to the Government. It goes on to deal with the right to sue to recover. Specifically is included, as can be seen at s.71(2), tax that is the subject of an objection or appeal. Thus the 'property' being the tax assessed becomes the Government's, and until payment is a debt due to it. So, art.105 has no application."). This principle was affirmed on appeal [2007] 2 HKLRD 567, [18] (Rogers V-P, "In my view Article 105 of the Basic Law has no application to legitimate taxation."); see also *Commissioner of Inland Revenue v Ngai Lik Electronics Co Ltd* (DCTC 6110/2007, [2008] HKEC 2157), [8] (Judge Chow, "Article 105 deals with the protection 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.' It is a provision dealing with the protection of individuals. I cannot see how it can be related to tax matters. It does not contain any provision dealing with time limitation.").

Dismissal of claims of deprivation

In the following cases, claims of deprivation have been dismissed, including by application of a justification or proportionality test:

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- (1) Adverse possession *Harvest Good Development v Secretary for Justice* [2007] 4 HKC 1 and Hong Kong authorities cited therein, *Hong Kong Kam Lan Koon Ltd v Realray Investments* (HCA 15824/1999, [2004] HKEC 748).
- (2) Passenger vehicle licences: *Man Yee Transport Bus Co Ltd v Transport Tribunal* [2008] HKEC 1775.
- (3) Compulsory sale for redevelopment: *Intelligent House Ltd v Chan Tung Shing* (LDCS 11000/2006, [2008] HKEC 1059).
- (4) Planning laws and other controls of use of property: *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553, *Kaisilk Development Ltd v Urban Renewal Authority* [2002] HKEC 305, *Kowloon Poultry Laan Merchants Association v Department of Justice* (CACV 1521/2001, [2002] HKEC 926), *Secretary for Justice v To Kan Chi* (2000) 3 HKCFAR 481.
- (5) Use of public facilities: *Yook Tong Electric Co Ltd v Commissioner for Transport* (HCAL 94/2002, [2003] HKEC 170), [57] (Hartmann J, "It seems to me that art.105, while it affords protection to the applicant to use its property, does not extend to the use by the applicant of public facilities. As Mr Chow, for the Commissioner, expressed it: the applicant is not entitled to a guaranteed use of a public street to suit its business operations. If it was otherwise, it would mean that, if a business, for the enhancement of its operations, placed itself close to public facilities, it would thereby assume a constitutional right protected by art.105, in respect of those facilities. In my view, it would be misconceived to suggest that art.105 had any such purpose. Read with art.6, art.105 provides protection for the 'acquisition, use disposal and inheritance' of private property not property in the public domain.").
- (6) The use of unauthorized or illegal building structures: *Wong Tin Chor v The Appeal Tribunal (Buildings Ordinance)* [2020] HKCFI 1562, [25].
- (7) The detention of a vessel under a UN Security Council Resolution: *Win More Shipping v Director of Marine* [2019] HKCU 1661 [50].
- (8) Disclosure requirements under anti-money laundering regulations: *Interush Ltd v Commissioner of Police* [2019] HKCA 70, [6.50].

"Real value" of the property concerned

"Real value" generally refers to open market value, to the exclusion of speculative pricing that exceeds the true value of the property: *Director of Lands v Yin Shuen Enterprises Ltd* (2003) 6 HKCFAR 1, [55] (Lord Millett

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Chapter VI

EDUCATION, SCIENCE, CULTURE, SPORTS, RELIGION, LABOUR AND SOCIAL SERVICES

ARTICLE 136

On the basis of the previous educational system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of education, including policies regarding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational qualifications.

Community organisations and individuals may, in accordance with law, run educational undertakings of various kinds in the Hong Kong Special Administrative Region.

COMMENTARY

Meaning of “abandoning the previous system”

The proper interpretation of art.136 was at issue in a long running case regarding the constitutionality of a series of amendments made in 2004 to the Education Ordinance (Cap.279): *Catholic Diocese of Hong Kong v Secretary for Justice* (CACV 18/2007, [2010] HKEC 163), [84]. The amendments required, *inter alia*, school sponsoring bodies (such as the appellant) to adopt constitutions with particular management structures and submit them to the Permanent Secretary for Education for approval. The appellant claimed these new structures prevented the Catholic Diocese from exercising the previous level of “absolute control” they had enjoyed over all Diocesan

schools in Hong Kong in a manner contrary to art.136(1). The appellant argued that art.136(1) constitutionally limited the kinds of education policies the Government was free to adopt; in other words, the 2004 amendments were effectively a policy sufficiently different such that it could no longer be said to be based on the “previous educational system”: *Catholic Diocese of Hong Kong v Secretary for Justice* (2011) 14 HKCFAR 754, [45].

The Court of Final Appeal rejected this argument, finding that Hong Kong’s educational policy had long given the government the power to require schools to adopt binding constitutions and to appoint particular individuals to management committees should it be necessary in order to ensure proper management of a school: *Catholic Diocese of Hong Kong v Secretary for Justice* (2011) 14 HKCFAR 754, [58] (Ma CJ and Ribeiro PJ), “before 1st July 1997, the educational system included powers given to the Director by Ordinance and by the Codes of Aid to require binding constitutions to be drawn up and to appoint managers to management committees if he was of the opinion that the composition of such committees made it unlikely that the relevant schools would be managed satisfactorily. The powers in the 2004 amendments objected to by the appellant are in the same vein and do not in principle break any new ground.”).

However, the Court went on to find that even if such a historical connection could not be demonstrated, this was immaterial. Instead, an analogy could be drawn to the Court’s approach to art.103, which provides for a similar continuity for the operation and management of the public service pre and post 1 July 1997. Thus, only a material change that results in abandonment of the previous system would violate the continuity required art.136(1): *Catholic Diocese of Hong Kong v Secretary for Justice* (2011) 14 HKCFAR 754, [61]–[62], citing with approval the approach to art.103 taken in *Secretary for Justice v Lau Kuo Fai* (2005) 8 HKCFAR 304. Though not quoted directly with approval by the CFA on appeal, the Court of First Instance had interpreted art.136 in a similar way, allowing for the gradual evolution of educational policy in Hong Kong: *Catholic Diocese of Hong Kong v Secretary for Justice* [2007] 4 HKLRD 483, [119] (Cheung J), “Education, and thus educational policies and educational system, are matters that cannot remain static in any society, particularly in the fast-changing modern world. They must develop and improve with the times...”; [120] (“Thus unlike other provisions in the Basic Law which strive for the preservation and continuity of the previous system, art.136(1) specifically provides for development and change. However, important safeguards are stipulated in art.136(1). As mentioned above, first, the responsibility, and therefore right to, formulate policies on development and improvement of education, including the educational system, rest with the Government of the Hong Kong SAR and no-one else. In other words, for instance, the

Central Government on the Mainland cannot formulate policies on education or the educational system for the Hong Kong SAR.”); [121] (“Second, the formulated policies must be based on the previous educational system. It therefore guarantees continuity with the previous system existing prior to the establishment of the Hong Kong SAR. It also means that there cannot be a wholesale or even partial transplantation of the Mainland educational system, which is very different from the local system, or indeed any other different foreign educational system, to Hong Kong. Any change must be based on the previous system. In other words, speaking very generally, any change must be incremental and gradual, founded on the previous system either directly or indirectly...”); [122] (“Third, the newly formulated policy must be on the ‘development and improvement’ of education. Any changes brought about by the policy must be in respect of the development and improvement of education. This safeguard goes to the content and merits of the changes. Any change that is not a development and improvement of education based on the existing educational system is liable to be struck down. The changes must be changes for the better and not otherwise.”).

Drafting history.

The content of art.136 was originally found in two separate Articles in the 1987 draft — 141 and 142. The articles were merged following a suggestion of a drafting committee member that they referred to “educational system” and “policies on education” respectively, and that they could be merged and summarised if there was no substantive difference between the two terms: *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.135.

The 1987 December version of art.136 (arts.141 and 142) required that the educational system previously practiced in Hong Kong be maintained by the HKSAR. This was loosened to “On the basis of the previous educational system...” in the enacted version of this article. Some consultative committee members noted the suggestion to delete reference to the previous education system was in order to allow a higher flexibility to the HKSAR Government to formulate long-term developmental planning in terms of the general education system of Hong Kong: *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.237 (Chinese version).

The consultative committee also noted (but did not adopt) suggested amendments including “encouraging the use of Putonghua and state-standardised simplified Chinese characters in teaching,” “maintaining

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the 9-year free education system after 1997,” “the suggested language of instruction should gradually be replaced by Putonghua instead of Cantonese,” etc. to name but a few: *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.238 (Chinese version).

ARTICLE 137

Educational institutions of all kinds may retain their autonomy and enjoy academic freedom. They may continue to recruit staff and use teaching materials from outside the Hong Kong Special Administrative Region. Schools run by religious organisations may continue to provide religious education, including courses in religion.

Students shall enjoy freedom of choice of educational institutions and freedom to pursue their education outside the Hong Kong Special Administrative Region.

COMMENTARY

Meaning of “educational institutions of all kinds”

- 137.1 The term “educational institutions of all kinds” refers to institutions of higher learning, universities and the like where, in all open and democratic societies, autonomy and academic freedom are essential to their functioning. *Secretary for Justice v Commission of Inquiry Re Hong Kong Institute of Education* [2009] 4 HKLRD 11.

The autonomy of educational institutions is not absolute

- 137.2 Autonomy carries with it the requirement of accountability. The Government, which provides major funding to aided schools, has a right to regulate the management of aided schools for the purpose of accountability: *Catholic Diocese of Hong Kong v Secretary for Justice* (2011) 14 HKCFAR 754, [55] (Ma CJ and Ribeiro PJ, “It had been the government’s hope that the reforms would be voluntarily undertaken. However, the take-up rate was low and it was decided to proceed by way of legislation. The policies underlying the Amendment Bill were explained in a Legislative Council Brief dated 20 November 2002 as involving greater autonomy for schools to manage their own operation and resources to meet the particular needs of their students

(hence ‘school-based management’) and, as a quid pro quo for such autonomy, greater transparency and accountability to the community for the schools’ performance and the proper use of funds. The means of achieving those objectives involved registration of management committees as incorporated bodies with constitutions providing for the participation of stakeholders in the school’s management and providing procedures for the appointment of the principal who would be accountable to the management committee for the school’s day-to-day operation.”).

Though not directly cited with approval by the Court of Final Appeal, this theme of accountability in exchange for broad rather than absolute authority was originally raised in the courts below: *Catholic Diocese of Hong Kong v Secretary for Justice* [2007] 4 HKLRD 483, [247] (Cheung J, “The privilege of autonomy carries with it the requirement of accountability. That must mean that the Government, which provides huge funding to aided schools, has a right to regulate the management of aided schools for the purpose of accountability. Autonomy cannot therefore be an absolute right.”); [248] (“That has always been the case prior to July 1997 given that aided schools were under the control of the Education Ordinance and the applicable codes of aid. The Government and the Legislature have always possessed the right to enforce changes regarding the management of aided schools. Article 137(1) only guarantees the right to ‘retain’ institutional autonomy... it does not confer a new or improved right of autonomy on educational institutions. It does not require a greater degree of independency to be conferred upon them.”).

Autonomy of religious organisations narrower under Article 137 than Article 141

In the context of the autonomy of religious schools to operate education institutions, that conferred by art.137(1) is narrower than that in art.141(3): *Catholic Diocese of Hong Kong v Secretary for Justice* (2011) 14 HKCFAR 754, [88] (Ma CJ and Ribeiro PJ, “First, Article 137(1) is confined to conferring protection in relation to the running of schools, while Article 141(3) protects the right of religious organizations to continue to run not merely schools, but also hospitals and welfare institutions. The previous practice involved in running such other institutions is very likely also to have a religious dimension, which, [also] receives protection.”); [89] (“Secondly, we do not accept that the relevant sentence in Article 137(1) protects both religious lessons and morning prayers. What it protects is the provision of religious education, including courses in religion. That is a formulation apt to cover religious lessons, but not morning prayers. Religious freedom may be exercised and manifested in numerous ways that do not amount to the provision of religious education or the giving of religious instruction. Catholic religious organizations, for

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instance, in accordance with previous practice, might arrange for masses to be said on certain days; or for confessions to be heard; or for saints' feast days to be celebrated; or for crucifixes to be displayed, and so forth, in the course of running their schools. Such activities would not be characterised as 'giving religious instruction' and would not receive protection under Article 137(1)."

Meaning of "academic freedom"

- 137.3 The term "academic freedom" is understood to mean the unimpeded freedom to teach, to study, and to research without any external control either of the teaching staff or the curriculum of the tertiary institution: *Secretary for Justice v Commission of Inquiry on Allegations Re Hong Kong Institute of Education* [2009] 4 HKLRD 11; *Clark v University of Melbourne* [1978] VR 457.

Academic freedom vested in institutions

- 137.3.1 The courts have interpreted academic freedom as understood in art.137 as a right vested not primarily in individuals but in Hong Kong's educational institutions. However, the right ensures not only administrative independence for those institutions, but also that *members* have the freedom to pursue the search for knowledge without fear of external sanction or undue influence from the government: *Secretary for Justice v Commission of Inquiry on Allegations Re Hong Kong Institute of Education* [2009] 4 HKLRD 11, [55] (Hartmann J), "As we have indicated, we are of the view that art.137 of the Basic Law recognises academic freedom as a self-contained freedom, one that is vested in Hong Kong's educational institutions, enabling them to determine for themselves on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."; [56] ("But that being said, the academic community of an educational institution is in many ways the embodiment of the institution itself. In our view, academic freedom vested in an educational institution must therefore extend not simply to the administration of that institution but to the faculty of academics too, giving it freedom to pursue the search for knowledge without fear of external sanction.").

Though art.137 therefore protects the "faculty of academics" in an institution, it is the general right to freedom of expression that protects their individual ability to publish research: *Secretary for Justice v Commission of Inquiry on Allegations Re Hong Kong Institute of Education* [2009] 4 HKLRD 11, [58] (Hartmann J), "In our view, however, if an academic chooses to publish the result of his research, he is, as an individual, in no better position than any other Hong Kong resident who chooses to disseminate his opinions in the public domain..."; [59] ("Academic work that is published is protected by art.30 of the Basic Law, protecting freedom of communication and art.16(2)

of the Hong Kong Bill of Rights..."); [60] ("Freedom of expression is a freedom enjoyed by all Hong Kong residents.").

Violations of academic freedom

There is no violation of academic freedom when a University decides to review and revise the assessment of students originally determined by a member of the teaching staff. Indeed, art.137 is not even engaged by such a decision so long as it was not brought about by external pressure on the University itself: *Yu Hung Hsua Julie v Chinese University of Hong Kong* [2016] 5 HKLRD 393.

The "institutional" focus of the right also means academic freedom is not threatened — at least constitutionally speaking — where a senior government official privately confronts an academic to criticise their published opinions on any particular matter, even to the extent of arguing that the academic should change their views: *Secretary for Justice v Commission of Inquiry on Allegations Re Hong Kong Institute of Education* [2009] 4 HKLRD 11, [75] (Hartmann J), "To misunderstand the Commission [which came to its findings within the context of very particular facts] and to suggest that senior public administrators and academics should never be able to privately engage in robust debate over matters of opinion and policy, the one criticising the other, is, in our view, not only artificial and stultifying, it has no basis in law. We do not see that it would be improper for a senior official to privately engage an academic in order to state Government's views, even to the extent of arguing that the academic should in the result change his or her views. That is all part of the ebb and flow of free debate.").

Likewise, though a confrontational approach by a public official may have a chilling effect on academia, absent a threat of sanction it is insufficient to constitute an unlawful restriction of academic freedom in the constitutional sense or on an individual's freedom of expression: *Secretary for Justice v Commission of Inquiry on Allegations Re Hong Kong Institute of Education* [2009] 4 HKLRD 11, [73] (Hartmann J), "Invariably, it is government which holds the purse strings. Invariably, therefore academia finds itself in a position of some vulnerability when it is in conflict with senior public administrators. On that basis, it may be said that any confrontational approach made by a senior member of government directly to an academic in order to criticise that academic's published opinions would have a chilling effect, the more senior the government member the more chilling the effect. But that alone is insufficient. In our judgment, what is required, on an objective assessment, is that it must be implicit in the whole manner of the approach and its circumstances that it contains a threat of sanction against the institution of

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which the academic is a faculty member or the academic himself and that it is a threat from a person who is in a position of authority, with the power, actual or ostensible, to bring about the imposition of that sanction.”).

The result of this judicial consideration is, then, that though the Basic Law explicitly protects academic freedom, courts may nonetheless tolerate academics being “chilled” into conformity so long as there is no overt threat of sanction. This may have serious consequences for free and open discourse in Hong Kong and the reputation of its institutions of higher education.

Autonomy in the legal profession and universities

- 137.3.3 In relation to academic freedom and the legal profession, see C J Peterson, “Preserving Institutions of Autonomy in Hong Kong: The Impact of 1997 on Academia and Legal Profession” (1998) 22 Southern Illinois University Law Journal Winter 337.

Drafting history

- 137.4 The first sentence of art.137(1) of the Basic Law reflects the rights and freedoms of academic research and of religious belief noted in art.3 of the Sino-British Joint Declaration, Basic Policies Number 5 (“The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region.”). The rest of art.137(1) and 137(2) was provided in almost exact wording in Annex I Section X para.1 of the Sino-British Joint Declaration (“Institutions of all kinds, including those run by religious and community organizations, may retain their autonomy. They may continue to recruit staff and use teaching materials from outside the Hong Kong Special Administrative Region. Students shall enjoy freedom of choice of education and freedom to pursue their education outside the Hong Kong Special Administrative Region.”).

The December 1987 version (art.143 in 1987) of the Basic Law was substantially the same as the enacted version. However, compared to the first draft, the following changes in the Basic Law were noticed. The December 1987 draft didn’t use the verb “enjoy” in front of “academic freedom.” And “schools run by religious bodies” were changed to “schools run by religious organizations.” Besides, the “courses in religion” were referred to in the December 1987 draft as “running courses on religious education.”

The consultative committee noted the suggestion of deleting art.137(2) because it overlapped with the freedom to enter or leave the HKSAR. There was also a suggestion to provide a more detailed definition of “academic freedom” and the legal requirements to form religious organisations: *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), pp.234, 239–240 (Chinese version).

ARTICLE 138

The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies to develop Western and traditional Chinese medicine and to improve medical and health services. Community organisations and individuals may provide various medical and health services in accordance with law.

COMMENTARY

Legislation

Medical and health services are provided for by legislation. See:

138.1

- (1) Medical Registration Ordinance (Cap.161)
- (2) Chinese Medicine Ordinance (Cap.549)
- (3) Public Health and Municipal Services Ordinance (Cap.132)

Drafting history

The December 1987 draft of art.138 sought to “encourage the provision of medical and health services by community organizations and individuals,” while the 1988 draft provided “encourage community organizations and individuals to provide medical and health services of all kinds.”

138.2

The consultative committee noted there was view that it was inappropriate for the HKSAR Government to formulate policies in this area on its own, and there should be a requirement of consultation with the medical profession: *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), pp.240–241 (Chinese version).