

CHAPTER 1

FROM COLONY TO SPECIAL  
ADMINISTRATIVE REGION

*Johannes Chan*

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History is very often the result of a series of co-incidents, and Hong Kong's "story" is perhaps typical in this regard. Even at the time of writing it is already 14 years after the reunification with China, the "story" of Hong Kong has almost never failed to fascinate historians, political scientists, sociologists, legal scholars, and even locals and laymen who have some knowledge or attachment to the piece of territory. How did Hong Kong, a remote fishing village at the southern coast of China that was far away from the centre of political activities, step onto the international stage, and within a span of 150 years, become not just one of the major financial centres in the world but the centre piece of a major international drama towards the end of the last millennium?

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## 1. ESTABLISHMENT OF THE COLONY

It is sometimes said that it all started with the Opium War in the 1840s, but it is much more than opium trade that brought China and Britain into direct confrontation. Dr Steve Tsang, in his excellent account of the history of Hong Kong, attributed the collision to three factors.<sup>1</sup> First, the Industrial Revolution, with its great advancement in technologies and organisational capacities in Europe, had enabled Britain, the most advanced industrial state, to expand its power overseas. This in turn had led to an aggressive foreign policy, strengthened by war and imperial expansion. Secondly, China has long regarded itself as the central kingdom in the universe, and for many centuries it was the centre of civilisation, scientific advancements and communications. Yet the glory and success had also led to a lack of an incentive to innovate. When Britain and other foreign powers, backed up by advanced technologies as a result of the Industrial Revolution, knocked on the door of China in the 16th century, the Chinese Empire was unable to handle these new international relations. It adopted a contemptuous attitude and "responded mostly by basking in its old glory and failing to recognize the real significance of this new development".<sup>2</sup> Arrogance, coupled with mutual misunderstanding, inevitably led to conflict. China's insistence on the performance of the *kowtow* and the refusal to treat Britain as an equal intensified the acrimonious relations between the two countries. In 1834, Lord Napier was appointed the first British Chief Superintendent of the China trade. He tried to establish a formal relation with the Canton Viceroy, but the Viceroy insisted that any form of communication should be styled as a "petition" and made through the *cohongs*. Instead, in defence of his national dignity, Lord Napier sailed up to Canton in a naval ship and insisted on presenting his formal arrival by a letter to the Viceroy. This had caused considerable resentment on the part of the Viceroy. The tension lasted for almost two months, ended only by a less than glorified retreat due to the illness of Lord Napier, who shortly died in Macao.

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Thirdly, the desire to expand trade rather than an appetite for colonial expansion of territories constituted the immediate cause of the First Anglo-Chinese War. Britain had among all the European countries the largest volume of trade with China. For most of the 19th century, China was indeed the fourth largest trading partner of Britain. Tea and raw silk were imported from China. The import tax constituted an important source of revenue for the British Government. The import duty accounted for about 16 per cent of customs revenue in Britain in the four years preceding the First Anglo-Chinese War, and the sum was sufficient to pay for 83 per cent of the cost for maintaining the Royal Navy. In return, Britain, through East India Company, made

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<sup>1</sup> Steve Tsang, *A Modern History of Hong Kong* (Hong Kong University Press, 2004).

<sup>2</sup> *Ibid.*, p.4.

huge profit from the lucrative opium trade with China. This huge profit was badly needed by East India Company, as its profits from India had largely been absorbed by the cost of governing India. For China, apart from national health concern, there was also grave concern that the opium trade had resulted in huge outflow of silver. By the 1830s, the officialdom had had major debates on how to control and suppress this undesirable trade.

- 1.004 In 1836, Captain Charles Elliot took over as Chief Superintendent of Trade. Captain Elliot at first took a more conciliatory attitude, but this had taken him nowhere. Nor was his approach endorsed by London. In March 1839, Lin Zexu, a strong minded and uncorrupted official, took over as a Special Imperial Commissioner in Canton. He was determined to put a stop to the opium trade. Within eight days of his arrival in Canton, Lin ordered all foreigners to surrender all opium, and when the British merchants were hesitant to do so, Lin confined them in the factory or warehouse compound and cut off their supplies. Eventually, at the persuasion of Captain Elliot who promised to indemnify the merchants, an entire stock of 20,283 chests of opium was surrendered to Lin through Elliot, and once Lin received them, he burnt them in public. This led to a decision in London to seek compensation from the Chinese Government, by force if necessary, and set the scene for the First Anglo-Chinese War.
- 1.005 Elliot was instructed to lead an expeditionary force to go all the way to Beijing. The Chinese Court was shocked but was powerless to resist the more superior British naval force. Elliot secured a tentative agreement, known as the Chuenpi Convention. Under this agreement, the island of Hong Kong would be ceded in perpetuity to Britain. China was to pay an indemnity of six million silver taels to compensate the loss of Britain; trade was to be resumed immediately, and official relations between the two empires were to be conducted on an equal footing. This was contrary to the instruction of Lord Palmerston, the then British Foreign Minister, who wanted Elliot to occupy one of the Zhoushan islands off Zhejiang province in East China, close to the rich Yangtze River Basin. To Palmerston, Hong Kong was "a barren rock with hardly a house upon it", whereas Elliot considered the excellent harbour in Hong Kong would be a valuable base to support British trading activities in Canton.
- 1.006 On 26 January 1841, the British took possession of Hong Kong. They landed at the north-western shore of the Island where today the bustling Hong Kong-Macau Ferry Terminal is situated. Elliot proclaimed Hong Kong to be a free port and declared that "the natives of the island ... and all natives of China thereto resorting, shall be governed according to the laws and customs of China, every description of torture excepted." He also appointed his Deputy Superintendent of Trade, AR Johnston, to take charge of the daily operation. The first sale of land for 34 lots was held in June. British traders, led by Jardine Matheson, soon came and took advantage of British protection to promote their China trade, particularly in opium. Soon after construction of roads, buildings and other infrastructures followed, and a new town soon emerged, known as the City of Victoria, what is now "Central".
- 1.007 Ironically, the Chuenpi Convention was found to be unacceptable by both the Chinese and the British Empires, and the representatives of both sides were replaced. Elliot was replaced by the more aggressive and combative Sir Henry Pottinger.<sup>3</sup> A much larger expeditionary force

<sup>3</sup> The falling into disfavour of Captain Elliot by Lord Palmerston could be a reason why no street in Hong Kong is named after Elliot, whereas every governor and key personnel in the early days had a street named after them.

was sent, and on 29 August 1842, Pottinger secured the Treaty of Nanking, which was ratified on 26 June 1843. The Treaty of Nanking formally ceded Hong Kong to Britain in perpetuity, alongside the opening up of four coastal ports in addition to Canton.

It was noteworthy that neither the Treaty of Nanking nor the instructions given by Lord Palmerston to Captain Elliot demanded the legalisation of opium trade in China. British concern was to expand trade relations and to maximise its trade profits, and opium was just one of the profitable enterprises. As Lord Palmerston explained, the criteria for choosing a territorial base were that it "ought to be conveniently situated for commercial intercourse; not merely with Canton but other trading places on the Coast of China' and must' have good harbours, and to afford natural facilities for military defence, and should also be capable of being easily provisioned."<sup>4</sup> The British foremost consideration was to secure a base to promote trade with China, and particularly Canton, rather than to expand the colonial territories.

#### (a) Cessation of Kowloon peninsula

The Treaty of Nanking had not resulted in an increased volume of British trade. By 1854, the British were considering a revision of the Treaty, although the legal advice received was that there was no legal basis for doing so. The British seized an opportunity to do so in August 1856 when it was alleged that Chinese officials hauled down the British flag and arrested 12 Chinese crew on board *The Arrow*, despite the remonstrations of the British master. The ship was owned by a Chinese and registered in Hong Kong, but the registration had expired at the time by 11 days. It was controversial if the British flag had indeed been hauled, but this provided an excuse for the British to seek a full revision of the Treaty of Nanking by force. Elgin was appointed the Plenipotentiary in March 1857 with a view to securing a new treaty. Together with the French army, he first took Canton, and in the summer of 1860, occupied Beijing and burned the *Yuanminyuan* Summer Palace to ground until the Treaty of Tientsin was ratified and an additional peace treaty, the Convention of Peking, was signed. Under the Convention of Peking, Kowloon peninsula, the occupation of which was said to be necessary to enhance the security of the Colony, was ceded to Britain in perpetuity. By an Order in Council dated 4 February 1861, British jurisdiction was formally extended to what was today the land at the southern part of Boundary Street and Stonecutters Island.

#### (b) Lease of the New Territories

Since the 1880s there were repeated campaigns for expansion of the Colony to cover the entire Kowloon peninsula. The demands, notably made by Sir Paul Chater and several of the local Navy League's prominent members who were leading land developers or speculators, were made on the basis of a threat to security, although no real security threat had ever been posed. As Sir Claude MacDonald, the British Minister to China, observed in 1898, "many of the Colonists have been for years past buying up ground on the Kowloon promontory and adjacent islands as a speculation on the chance of our getting what we are now more

<sup>4</sup> HB Morse, *International Relations of the Chinese Empire* (Shanghai, 1910) 628 (Palmerston to George Elliot and Charles Elliot, dispatch 1, 20 February 1840), as quoted by Tsang, p.21.

or less on the point of getting.”<sup>5</sup> London was, however, against the alienation of any part of China, given that various foreign powers were building up their base in China. It was in the British interest to keep China as a whole open to free trade, and dividing it up would result in a similar situation as in Africa. This official thinking was increasingly under challenge when Japan, Russia, Germany, and France successively asked for leases of different ports of China. By 1898, Britain decided that it should join the game and demanded the lease of the New Territories. The negotiation took place between Sir Claude MacDonald and Li Hongzhang, and an agreement was reached within two months. Under the Second Convention of Peking, which was formally signed on 9 June 1898 and came into effect on 1 July 1898, the New Territories were to be leased to Britain for a period of 99 years.<sup>6</sup> As far as the British were concerned, a 99-year lease was almost equivalent to a cessation in disguise. The cavalier treatment of the distinction between a lease and a cessation was reflected in the New Territories Order in Council dated 20 October 1898, in which it was declared that the New Territories “shall be and are ... part and parcel of Her Majesty’s Colony of Hong Kong in like manner and for all intents and purposes as if they had originally formed part of the said Colony.”<sup>7</sup> Britain was prepared not to ask for a cessation in the fear that other foreign powers would follow suit and carve up China, which was not in the British interest. As far as China was concerned, with the rising force of nationalism, she did not want to be seen to be selling land to Britain. She insisted that the lease should be for a specified period only. She also reserved the jurisdiction in the Walled City “for the convenience of Chinese men-of-war, merchant and passenger vessels, which may come and go and lie there at their pleasure, and for the convenience of movement of the officials and people within the city”, and the right to use Mirs Bay and Deep Bay, which fell within the leased area, “for Chinese vessels of war, whether neutral or otherwise”. The first reservation had given rise to numerous problems relating to crimes committed in the Walled City in the many years to come,<sup>8</sup> whereas the second reservation made no military sense and was never in force. The agreement was negotiated in such a cavalier attitude that even the boundary of the New Territories had not been drawn up. The lease would expire on 30 June 1997, which seemed remote and unreal at that time. It entered no one’s mind that one day China will and is in a position to demand the termination of the lease, which in turn affects the fate of the ceded territories.

## 2. EARLY DAYS OF BRITISH ADMINISTRATION

1.011 As a Crown Colony, the constitutional structure of Hong Kong was prescribed by the Hong Kong Letters Patent of 5 April 1843, which, with its subsequent amendments and

<sup>5</sup> Wesley-Smith, *Unequal Treaty 1897-1997: China, Great Britain and Hong Kong’s New Territories* (Oxford University Press, 1980) p.17.

<sup>6</sup> By an Order in Council dated 20 October 1898, the New Territories were made “part and parcel of Her Majesty’s Colony of Hong Kong in like manner and for all intents and purposes as if they had originally formed part of the said Colony.” However, the British took possession of the New Territories only on 16 April 1899.

<sup>7</sup> Clause 1, New Territories Order in Council, 20 October 1898, reproduced in Byrnes and Chan (eds), *Public Law and Human Rights: A Hong Kong Sourcebook* (Butterworths, 1993) pp.14-15.

<sup>8</sup> By an Order in Council dated 27 December 1899, this reservation was unilaterally revoked by the British allegedly on defence reason so that Chinese officials within the City of Kowloon should cease to exercise jurisdiction therein. Although the Hong Kong Government has since exercised criminal jurisdiction and some civil jurisdiction over the Walled City, the area has to some extent been immune from the enforcement of many Hong Kong laws for many years until its demolition in 1992. The unilateral revocation of the Chinese reservation was regarded as an Act of State which was beyond the jurisdiction of the court: see *Re Wong Hon* [1959] HKLR 601.

modifications and its elaboration by the Hong Kong Royal Instructions to the Governor, formed the constitution of Hong Kong until 30 June 1997. Under the Hong Kong Letters Patent, Hong Kong was to be governed by a Governor, who was to be appointed at Her Majesty’s pleasure, and who would be assisted by a Legislative Council and an Executive Council. There was no intention to import the Westminster model to Hong Kong. Instead, the governance was typical of a colonial system. The Governor enjoyed wide executive and legislative powers, subject only to the veto power of London. He presided over the meetings of the Legislative Council and the Executive Council, and was the Head of Government as well as the Commander-in-Chief. With the advice and consent of the Legislative Council, he made laws for the peace, order and good government of the Colony. He appointed the members of the Legislative Council as well as the judiciary, exercised the prerogative of clemency, and enjoyed a power to dispose of land and other resources of the Colony. This “executive-led” system, which is very much favoured by the Chinese Government one and a half century later, is best illustrated by the Hong Kong Royal Instructions to the Governor that “no Law or Ordinance shall be made or enacted by the said [Legislative] Council unless the same shall have been previously proposed by yourself, and that no question shall be debated at the said Council unless the same shall first have been proposed for that purpose by you.”

The Legislative Council, which was established on 5 April 1843, comprised official and appointed members only, and in the early days, the appointed members were entirely European, despite the majority of the people of Hong Kong being Chinese. It was only in 1880 that the first Chinese, Ng Choy (alias Wu Tingfang), a Chinese barrister born in Singapore and educated in England who was comfortable in both cultures and languages, was appointed to the Legislative Council. Although more Chinese members have been appointed to the Legislative Council over the years, the basic composition of the Legislative Council remains unchanged. There was no plan to introduce a representative government until the early 1980s, apart from a brief and abortive attempt by Governor Young in the 1950s. The official language was, until 1974, English, and even then, the official language for law remained English until 1989 when bilingual legislation was brought into being.

1.013 Soon after he had taken possession of Hong Kong pursuant to the non-ratified Treaty of Chuenpi, Captain Elliot proclaimed a dual system of law under which the Chinese were to be governed by “law and customs of China (every description of torture excepted) and continued to enjoy free religious rites, ceremonies and social custom,” whereas non-Chinese were to be governed by the British law in Canton in exercise of British rights of extra-territoriality, as well as ‘the principles and practice of “British law”. This dual system of law was soon proved to be inconvenient, and the Supreme Court Ordinance 1844 (culminated in the 1866 Ordinance) simply imported wholesale English legislation that were in existence on 5 April 1843 and English common law to Hong Kong, subject to applicability and local modifications. No distinction was drawn between Chinese and non-Chinese, except for sentencing, as it was considered that the more lenient English law on sentencing would not receive the respect of the Chinese community! This exception was repealed in 1875. Otherwise, Chinese law shall apply only when it was not repealed or inconsistent with any applicable legislation or common law. In most cases Chinese law was applied to Chinese only in relation to civil and personal matters such as marriage and succession. Britain retained the power to make laws for Hong Kong either through Acts of Parliament or an exercise of prerogative power, and under s.2 of the Colonial Laws Validity Act 1865, any colonial law which is repugnant to any applicable Act of Parliament or any Order or Regulation made under such Act of Parliament shall be and remain, to the extent of repugnancy, absolutely void and inoperative.

- 1.014 This system remained largely unchanged for a century. As time passed, it had become increasingly difficult to ascertain the English law on 5 April 1843. In 1966, it was decided that a review should be carried out, which resulted in the enactment of the Application of English Law Ordinance (Cap.88). Section 3 provides that the common law and the rules of equity shall be in force in Hong Kong so far as they were applicable to the local circumstances and subject to any local modifications. Section 4 provides that English Acts should apply to Hong Kong only either on their own terms or by necessary implications, or by any Order in Council, or by incorporation by any local Ordinance. As to English statutes that were in force on 5 April 1843 and were applied to Hong Kong through the Supreme Court Ordinance 1846, only those statutes that were considered desirable to be retained were set out in a Schedule. There were about 70 such statutes in the Schedule in 1966, including the Habeas Corpus Act 1679, and the list was shrunk to about 30 shortly before the Handover.
- 1.015 Professor Peter Wesley-Smith has done an extensive analysis of the problems arising from the Application of English Law Ordinance.<sup>9</sup> It is not intended to repeat here what he has already done. Suffice to point out that one of the problems in the design of the Application of English Law Ordinance was its failure to consider the interaction between statutes and the common law. As a result, either some archaic common law principles continued to apply to Hong Kong despite their repeal by post-1843 English statutes (which did not apply to Hong Kong), or some English statutes which did not apply to Hong Kong could through their modification of the common law principles crept into the Hong Kong legal system through the backdoor.<sup>10</sup>
- 1.016 Returning to the early day administration, pursuant to the Hong Kong Letters Patent, Sir Henry Pottinger was appointed the first Governor. Three weeks later, Lieutenant Colonel Malcolm was appointed Colonial Secretary, and William Caine was appointed the Chief Magistrate. Members of the Executive Council and the Legislative Council were also appointed, and the governance structure was thus in shape.
- 1.017 However, the establishment of the judicial system proved to be more difficult. The positions of the Attorney-General and the Chief Justice were left vacant for some time. In the first place, there were only a few hundred Englishmen in Hong Kong, and very few, if any, had any legal qualification. As a small town situated at the far southern coast of China, there were not sufficient local talents as in Beijing or Shanghai that the administration could tap to. The cultural and racial superiority felt by most Englishmen far away from their home country resulted in behaviour which was less than civilised than was expected at home. Not surprisingly, the rule of law in the earlier days left much to be desired.
- 1.018 As the Chief Magistrate, William Cane was also at the same time the Police Commissioner and the Commissioner of Prison. He was also a member of the Executive Council and the Legislative Council. Coming from a military background, the law was very much the same as his discretion. He ruled with ruthlessness and was ready to impose heavy and discriminatory punishment such

<sup>9</sup> Wesley-Smith, *The Sources of Hong Kong Law* (Hong Kong University Press, 1994) Chapters 6-9; Peter Wesley-Smith, "The Effect of Pre-1843 Acts of Parliament in Hong Kong" (1984) 14 HKLJ 142; Peter Wesley-Smith, "The Reception of English Law in Hong Kong" (1988) 18 HKLJ 183.

<sup>10</sup> For example, in *Gensburger v Gensburger* [1968] HKLR 403, it was held that criminal conversion, which has been abolished by a post-1843 English statute, did not form part of Hong Kong law because it was no longer part of English common law. Criminal conversion is an archaic cause of action against an adulterer for damages arising from conversion (by adultery) of one's wife (who was treated as the property of the claimant).

as public flogging for minor offences. Nonetheless, he had a smooth career, and had served as Colonial Secretary, Auditor General, and even Acting Governor until his retirement.

On 4 March 1844, the criminal court was formally established. It was presided by Sir Henry Pottinger and Major General D'Aguiar. The first case was a murder trial against a Filipino crew on board. He had no legal representation and no interpreter. Before the trial began, Pottinger remarked that he wished the case could have been tried by a more qualified person.<sup>11</sup> When the trial went into the afternoon, it was presided by Pottinger alone. At the end, the defendant was found guilty and was sentenced to death.

In April 1844, Paul Sterling was appointed the Attorney-General at an annual salary of £1,500, which was considered very high at that time. However, even with an annual salary of £2,500, at least seven barristers had declined the appointment of being the Chief Justice. It was only when the annual salary was raised to £3,500 that it was possible to find a willing candidate, John Hulme, who was appointed the first Chief Justice. He arrived in Hong Kong on 7 May 1844, but it took him to 1 October 1844 before the Supreme Court was formally established as he had to draft the necessary trial procedure. On 30 November 1847, Hulme CJ was suspended from his duties by Governor Davies after a disciplinary hearing presided by the Governor himself with William Caine. The trial was so unfair that it was set aside by Lord Palmerston on 16 June 1848 and Hulme was reinstated.<sup>12</sup>

Despite these early setbacks, the rule of law and the independence of the Judiciary gradually took shape. On 15 January 1857, many foreigners suffered from food poisoning after taking breakfast. The bread, which was supplied by a local bakery known as *Esing*, was found to be poisoned by arsenic. Among the victims were Lady Bowring, the Governor's wife, and many senior Government officials. The incident shocked the expatriate community, which regarded the attempt as one to wipe out the expatriate community. On that very morning, Cheung Ah Lum, the proprietor of *Esing*, left for Macao with his family. Another staff also left Hong Kong that same morning. A few days later, Cheung was arrested in Macao and was returned to Hong Kong to stand trial, which took place on 2 February before the Supreme Court. He was prosecuted by the Attorney-General Chisholm Anstey himself, who initially preferred to deal with Cheung summarily but was overruled by the Governor, and the trial was presided by Hulme CJ. Cheung was represented by two British barristers who were instructed by two English firms. All members of the jury were Europeans. The Attorney-General pointed out that this case rested on circumstantial evidence only, but the circumstantial evidence was overwhelming. In defence, Cheung's lawyers pointed out that Cheung was on holiday with his family. He had the return tickets. Indeed, his daughter was also a victim of the poison bread as she took it on board. The Attorney-General replied that these were planted by Cheung and could not constitute reasonable doubt. In directing the jury, the Chief Justice stated that "while I and the Attorney-General strongly believe that the poisoner should be punished by the law as a matter of justice, hanging the wrong man will not further the ends of justice." Eventually, Cheung was acquitted by a majority verdict. Despite the fact that everyone in the court was a victim of the poisoned bread, the court insisted that the defendant should be entitled the benefit of the doubt. It laid a good foundation for the rule of law in the century to follow.

<sup>11</sup> Norton-Kyshe, *The History of the Laws and Courts of Hong Kong* (Vetch and Lee Ltd, 1971) Vol.1, p.38.

<sup>12</sup> For more details, see Chapter 10.

## CHAPTER 15

# BASIC LAW, HONG KONG BILL OF RIGHTS AND THE ICCPR

*Dinusha Panditaratne\**

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## 1. INTRODUCTION

In Hong Kong, there are three main instruments which determine the content of constitutional rights: the Basic Law,<sup>1</sup> the Hong Kong Bill of Rights Ordinance (Cap.383) (HKBORO or the Ordinance) and the International Covenant on Civil and Political Rights (ICCPR or the Covenant).<sup>2</sup> This chapter seeks to explain the respective roles of each of these instruments in protecting human rights in Hong Kong, and especially, in protecting civil and political rights. As might be expected, a tripartite framework presents certain analytical challenges which arise from the differences among the three instruments. This chapter will articulate those issues and assess how Hong Kong courts have navigated them. While courts have made many bold and rights-friendly judgments, they have yet to clarify the respective roles of each instrument. It is the premise of this chapter that such clarity is essential to the consistent safeguarding of rights in judicial decision-making.

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The chapter is arranged in five parts, beginning with this introduction. Part 2 relates how the ICCPR and the Hong Kong Bill of Rights became implanted into Hong Kong's constitutional law during colonial rule. As will be detailed that Part, the ICCPR was applied to Hong Kong by the United Kingdom in 1976, subject to certain reservations. The HKBORO was enacted in 1991 to implement the ICCPR into the domestic law of Hong Kong and thereby make its rights enforceable in local courts.<sup>3</sup> As will be noted, the Hong Kong Bill of Rights does not simply replicate the text of the Covenant. Rather, the Hong Kong Bill of Rights reflects the United Kingdom's reservations when it applied the ICCPR to Hong Kong and *moreover*, it departs from the Covenant even beyond these reservations.

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Part 3 explains the relationship between the Basic Law, the Hong Kong Bill of Rights and the ICCPR. The first section outlines the framework of rights under the Basic Law, which came into force in 1997. Despite the judicially recognised status of the Basic Law as the constitution of the Hong Kong Special Administrative Region (HKSAR)<sup>4</sup> and the broad range of human rights which it recognises, the Basic Law has not (yet) eclipsed the Hong Kong Bill of Rights and ICCPR to become the sole reference-point in local human rights jurisprudence. The Basic Law is therefore different to equivalent documents such as the Canadian Charter of Fundamental Rights and Freedoms and the Bill of Rights to the Constitution of the United States of America, which are each the singular textual source of human rights in their respective jurisdictions. By contrast, the Basic Law expressly incorporates *other* sources of rights. In particular, with regard to civil and political rights, art.39 provides:

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<sup>1</sup> Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Adopted at the 3rd Session of the 7th National People's Congress on 4 April 1990.

<sup>2</sup> International Covenant on Civil and Political Rights 1966, 999 UNTS 171. Although the jurisprudence of Hong Kong courts in human rights cases focuses heavily on these three sources, other documents—such as the International Covenant on Economic, Social and Cultural Rights 1966, 3 UNTS 3 and, especially, the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 222—also determine the content of justiciable human rights in Hong Kong. For a discussion of these additional sources, see the relevant commentary in Chapter 16 “General Principles”. The substantive content of the HKBORO is referred to herein as the “Hong Kong Bill of Rights”.

<sup>3</sup> As discussed in Part 2, there are some differences between the ICCPR and the Hong Kong Bill of Rights, almost all of which reflect the reservations and declarations made by the UK with respect to the application of the ICCPR in Hong Kong.

<sup>4</sup> *HKSAR v Ma Wai Kwan, David* [1997] HKLRD 761; *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4.

“The provisions of the International Covenant on Civil and Political Rights ... as applied to Hong Kong shall remain in force *and* shall be implemented through the laws of the Hong Kong Special Administrative Region.” (Emphasis added.)

- 15.004 In interpreting and applying art.39(1), courts have considered the HKBORO to be the law implementing the ICCPR as applied to Hong Kong. Yet, as noted in Part 2, the text of the Hong Kong Bill of Rights is not identical to the “ICCPR as applied to Hong Kong” (that is to the ICCPR subject to reservations applied to Hong Kong). The application of constitutional rights in Hong Kong thus requires a more thorough understanding of the differences between the (a) Basic Law; (b) the Hong Kong Bill of Rights and (c) the ICCPR as applied to Hong Kong.
- 15.005 While Part 2 highlights the differences between the Hong Kong Bill of Rights and the ICCPR as applied to Hong Kong, the second section of Part 3 elaborates the differences between the Basic Law and the Hong Kong Bill of Rights. In respect of their content, the Basic Law recognises a wider range of human rights—including economic, social and cultural rights—than the Hong Kong Bill of Rights.<sup>5</sup> Most of these are stated in Chapter III on the “Fundamental Rights and Duties of the Residents”, although a few appear in other chapters.<sup>6</sup> The Basic Law does not, however, specify some civil and political rights which are guaranteed by the Hong Kong Bill of Rights (and vice versa, the Hong Kong Bill of Rights does not mention a few civil and political rights which appear in the text of the Basic Law).<sup>7</sup> Furthermore, while the Basic Law guarantees many of the same civil and political rights recognised in the Hong Kong Bill of Rights, these “corresponding” rights are often differently expressed in the two instruments. Last, but by no means least, the rights in the Basic Law are generally phrased in absolute terms, whereas the same rights in the Hong Kong Bill of Rights are expressly subject to permissible restrictions. Most of these permissible restrictions in the Hong Kong Bill of Rights mirror those contained in the ICCPR, but others stem from the United Kingdom’s reservations at the time it ratified the ICCPR with respect to Hong Kong.
- 15.006 The third and final section of Part 3 explores certain analytical issues arising from the differences between the Basic Law, the Hong Kong Bill of Rights and the ICCPR as applied to Hong Kong, with reference to relevant judicial *dicta*. These issues converge on two fundamental questions: (a) to what extent do each of the Basic Law, ICCPR and the Hong Kong Bill of Rights constitute a judicially enforceable *source* of rights; and (b) what is the role that each instrument plays in *restricting* rights? It will be argued that the Basic Law and the Hong Kong Bill of Rights constitute sources of rights that are enforceable in Hong Kong courts. By contrast, the reference to the ICCPR “as applied to” Hong Kong in art.39(1) of the Basic Law mandates the continued

<sup>5</sup> For example, art.24 specifies the right of abode in Hong Kong, art.33 guarantees freedom of choice of occupation, art.34 specifies certain cultural rights, art.36 provides for the right to social welfare in accordance with law.

<sup>6</sup> The most notable of these among the civil and political rights is art.87 in Chapter IV of the Basic Law on “Political Structure”, which provides: “Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs.”

<sup>7</sup> Civil and political rights which are guaranteed in the Basic Law but do not appear in the text of the Hong Kong Bill of Rights or the ICCPR include the right against unlawful or arbitrary imprisonment (art.28) and the right to travel (art.31). Rights specified in s.8 of the HKBORO but not in the Basic Law include the right against cruel, inhuman or degrading treatment or punishment (art.3 of the Hong Kong Bill of Rights), the prohibition of slavery and forced labour (art.4 of the Hong Kong Bill of Rights), the right not to be imprisoned for breach of contract (art.7 of the Hong Kong Bill of Rights), and the rights of minorities to their culture, religion and language (art.23 of the Hong Kong Bill of Rights).

application of the ICCPR to Hong Kong at the level of international law; it does not make the ICCPR a stand-alone source of rights that can be enforced in domestic courts.

As will be explained, the primary significance of the ICCPR in Hong Kong’s constitutional law is that it—together with the Hong Kong Bill of Rights—determines the extent to which laws can be *restricted*, pursuant to art.39(2) of the Basic Law which states that “restrictions shall not contravene” the ICCPR as applied to Hong Kong and as implemented in the laws of Hong Kong. In recent years, the constitutionally required focus on the ICCPR and the Hong Kong Bill of Rights has been increasingly overshadowed by the use of a general test of proportionality to determine permissible restrictions on rights. This shift away from the spirit and details of the ICCPR and the Hong Kong Bill of Rights to a more nebulous standard of “proportional” restrictions neglects the requirements of art.39(2) and carries greater risks for the protection of rights. 15.007

Part 4 briefly highlights one further aspect of the role of the ICCPR in Hong Kong’s constitutional law; namely, the reporting obligations of the Government under the ICCPR as a means to advance the constitutional protection of human rights. 15.008

## 2. APPLICATION OF THE ICCPR TO HONG KONG AND THE BILL OF RIGHTS REGIME

### (a) Ratification of the ICCPR

For most of Hong Kong’s constitutional history, the protection of human rights depended exclusively on the common law, which had developed within the constraints of the English doctrine of parliamentary sovereignty. Although a written constitution existed in the form of the Hong Kong Letters Patent and Hong Kong Royal Instructions,<sup>8</sup> courts in Hong Kong did not exercise the power of constitutional review over legislation.<sup>9</sup> This only changed near the end of colonial rule, following the enactment of the HKBORO in 1991 to incorporate the ICCPR and a corresponding amendment of the Hong Kong Letters Patent to prevent the passing of laws inconsistent with the ICCPR as applied to Hong Kong.<sup>10</sup> 15.009

The paradigmatic shift towards the legal recognition of universal human rights in Hong Kong began in the late 1960s and 1970s, when the United Kingdom successively ratified several international human rights treaties with respect to Hong Kong. The first such treaty to be applied to Hong Kong was the International Convention on the Elimination of All Forms 15.010

<sup>8</sup> See the Letters Patent (The Hong Kong Charter) 1843 and the Hong Kong Royal Instructions 1843; reprinted in Steve Tsang, *Government and Politics* (Hong Kong University Press, 1995) pp.19–30. See also the Hong Kong Letters Patent passed under the Great Seal of the United Kingdom, constituting the Office of Governor and Commander-in-Chief of the Colony of Hong Kong and its Dependencies 1917; the Instructions passed under the Royal Sign Manual and Signet to the Governor and Commander-in-Chief of the Colony of Hong Kong and its Dependencies, 1917; available at <http://sunzi1.lib.hku.hk/hkgro/view/g1917/51124.pdf>.

<sup>9</sup> See Albert Chen, “Constitutional Adjudication in Post-1997 Hong Kong” (2006) 15 *Pacific Rim Law & Policy Journal* 627, 653, observing that: “Hong Kong’s pre-1997 constitution was contained in the Hong Kong Letters Patent issued by the British Crown. Before the 1991 amendment of the Hong Kong Letters Patent, the Hong Kong courts in theory enjoyed the power to review the constitutionality of legislation, but in practice never had the opportunity to exercise that power.”

<sup>10</sup> See the discussion below under “Enactment of the HKBORO”.

of Racial Discrimination,<sup>11</sup> which the United Kingdom ratified with respect to itself and to Hong Kong in 1969. More significantly, in 1976, the United Kingdom ratified with respect to itself and to Hong Kong the two foundational treaties in the international human rights regime, the ICCPR and the International Covenant on Economic, Social and Cultural Rights<sup>12</sup> (ICESCR).<sup>13</sup>

#### (i) Reservations

15.011 The United Kingdom ratified these treaties subject to certain limitations. In applying the ICCPR to Hong Kong, the United Kingdom entered reservations or declarations with respect to the following provisions: the right to self-determination in art.1 of the Covenant; the rights of deported aliens in art.13 to the extent they entail a right of review of a decision to deport and a right to be represented for this purpose; and the right to vote at elections by universal and equal suffrage under art.25(b) insofar as it requires the establishment of an elected Executive or Legislative Council in Hong Kong.<sup>14</sup> In addition, the United Kingdom declared that it interprets the prohibition of propaganda for war and "hate speech" in art.20 consistently with the rights to freedom of expression and assembly in arts.19 and 21 of the Covenant.<sup>15</sup> Finally, the United Kingdom also entered general reservations<sup>16</sup> to continue applying the following types of laws: immigration legislation governing entry into, stay in and departure from Hong Kong irrespective of the right to enter one's country specified in art.12(4) and irrespective of all other provisions of the Covenant; and similarly, nationality legislation irrespective of a child's right to a nationality in art.24(3) and irrespective of all other provisions of the Covenant.<sup>17</sup>

15.012 All the above reservations and declarations were applied to "Hong Kong" or to the "dependent territories" of the United Kingdom.<sup>18</sup> Two further reservations made by the United Kingdom were *not expressly* extended to Hong Kong. These include a reservation to the obligation to separate accused or convicted juveniles from adults in art.10(2) and 10(3); and a general reservation to continue to apply laws and procedures governing the armed forces of the Crown and persons detained in penal establishments for the preservation of service and custodial discipline.

<sup>11</sup> International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195.

<sup>12</sup> ICESCR, fn 3 above.

<sup>13</sup> Dinusha Panditaratne, "Reporting on Hong Kong to UN Human Rights Treaty Bodies: For Better or Worse Since 1997?" (2008) 8(2) Human Rights Law Review 295, 298. The other three of the six principal human rights treaties were ratified only near the end of Hong Kong's colonial history: the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment 1984, 1465 UNTS 85 was extended to Hong Kong in 1992; the Convention on the Rights of the Child 1989, 1577 UNTS 3 was extended to Hong Kong in 1994; and the Convention on the Elimination of All Forms of Discrimination Against Women 1979, 1249 UNTS 513 was extended to the territory in late 1996.

<sup>14</sup> See the declarations and reservations by states parties to the ICCPR (Reservations to the ICCPR) at: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IV-4&chapter=4&lang=en).

<sup>15</sup> *Ibid.*

<sup>16</sup> The entering of "widely formulated" reservations was subsequently criticised by the Human Rights Committee in its "General Comment No 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant" CCPR/C/21/Rev.1/Add.6 (1994), paras.12, 19, at: <http://www.unhcr.ch/tbs/doc.nsf/0/69c55b086f72957ec12563ed004ecf7a?OpenDocument>. The General Comment No 24 is discussed by Johannes Chan, "Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence" (1998) 47 International & Comparative Law Quarterly 306, 324.

<sup>17</sup> Reservations to the ICCPR, fn 16 above.

<sup>18</sup> With the exception of the declaration made with respect to art.1 on the right to self-determination, which implicitly applied to the UK's relationship with its dependent territories.

#### (ii) Significance of ratification

15.013 Aside from the above-mentioned reservations and declarations (in this chapter, collectively referred to as "reservations"), the United Kingdom accepted in international law with respect to Hong Kong all other provisions of the ICCPR, including the obligation to respect the numerous rights specified therein. These include the rights to life, equality and non-discrimination; the right to be presumed innocent and other due process rights; the rights to freedom of movement, expression, association, assembly and religion, privacy and family life; and the particular rights of children and minorities. They further include the rights *against* torture or cruel, inhuman or degrading treatment or punishment, slavery or forced labour, arbitrary arrest or detention, or imprisonment merely for breach of contract.

15.014 The most immediate effect of the United Kingdom's ratification of the ICCPR was that it was mandated to submit periodic reports to the Human Rights Committee (HRC or the Committee) pursuant to art.40 of the Covenant detailing the realisation of civil and political rights in Hong Kong. Between 1976 and the end of colonial rule on 1 July 1997, four such reports were submitted to the Committee.<sup>19</sup> Beyond this reporting exercise, however, the ratification of the ICCPR did not have any immediate effect in the territory. In particular, it did not establish any legal avenues of redress for individuals in Hong Kong whose rights under the ICCPR may have been infringed.

15.015 There were two main barriers to such individual redress of Hong Kong residents: one at the level of international law and other in the sphere of domestic law. At the international level, the United Kingdom chose not to ratify the Optional Protocol to the ICCPR<sup>20</sup> which would have permitted the HRC to receive communications directly from individuals in Hong Kong claiming that their rights had been infringed by the Colonial Government.<sup>21</sup> At the domestic level, the ratification of the ICCPR with respect to Hong Kong did not establish any justiciable rights in local courts. This was because of the common law doctrine of transformation that applied in Hong Kong, pursuant to which treaties cannot be enforced in domestic courts unless (and only to the extent that) they are incorporated into local legislation.<sup>22</sup>

#### (b) Enactment of the HKBORO

15.016 The necessary incorporation of the ICCPR eventually took place with the enactment of the HKBORO in 1991. Section 8 of the HKBORO enumerates 23 articles as Hong Kong's "Bill of Rights", which replicate rights contained in the ICCPR in near-identical language to the ICCPR.<sup>23</sup>

<sup>19</sup> The last such report was in 1995 (which was supplemented by two special follow-up reports in 1996 and 1997, respectively); Panditaratne, fn 15 above, p.299.

<sup>20</sup> Optional Protocol to the International Covenant on Civil and Political Rights 1966, 999 UNTS 302 (Optional Protocol). The UK's decision not to ratify this Optional Protocol appears at least partly attributable to the fact that residents of the UK could submit communications claiming infringement of rights to the then-existing European Commission of Human Rights; this facility was of course not open to residents of Hong Kong.

<sup>21</sup> Optional Protocol, *ibid.*, arts.1-5.

<sup>22</sup> See Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 2nd ed., 1999) pp.7-8, 404, 478.

<sup>23</sup> Article 2 (entitlement to rights without distinction) and art.3 of the ICCPR (equality of men and women in enjoying rights) are condensed into art.1 of the Hong Kong Bill of Rights. Article 4 of the ICCPR, which permits derogations in a state of public emergency, is replicated in s.5 (not s.8) of the HKBORO. Article 5 of the ICCPR is replicated in s.2(4)-2(5) of the HKBORO.

15.017 As many have observed, the passing of the HKBORO and the corresponding amendment to the Hong Kong Letters Patent were motivated by the harrowing acts of the Government of the People's Republic of China (PRC) in Tiananmen Square on 4 June 1989 and the consequent fears for human rights in Hong Kong after 1 July 1997.<sup>24</sup> In addition, it has been noted that the ICCPR was incorporated into local legislation so as to be "consistent with the future constitutional arrangements of the territory" under the Basic Law (which had been promulgated in 1990, before the Hong Kong Bill of Rights came into force).<sup>25</sup> As art.39 of the Basic Law provides that the ICCPR "as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region" (Emphasis added),<sup>26</sup> the Hong Kong Bill of Rights was regarded as effecting the required "implementation" of the ICCPR as it applied to Hong Kong.<sup>27</sup> Moreover, the phrase "shall remain in force"—although not quite clear in its import—propelled those who were concerned about the future of human rights in Hong Kong to entrench the ICCPR in Hong Kong's legal framework before the change of sovereignty, so that the Covenant would "remain in force" as a constraint on legislative and executive powers after 1 July 1997.<sup>28</sup>

(i) Differences between the ICCPR and Hong Kong Bill of Rights

15.018 There are a number of differences between the substantive provisions of the ICCPR and the Hong Kong Bill of Rights. Most of these differences track the reservations entered by the United Kingdom to the application of the ICCPR in Hong Kong and are therefore consistent with the notion of the Hong Kong Bill of Rights implementing the ICCPR "as applied to Hong Kong". For example, the Hong Kong Bill of Rights does not provide for the right to self-determination contained in art.1 of the ICCPR, and does not prohibit propaganda for war and hate speech as required by art.20 of the ICCPR. Likewise, ss.9 through 13 of the HKBORO contain several "Exceptions and Savings" to effect other reservations to rights in the ICCPR. Hence, s.11 maintains the lawfulness of immigration legislation as regards persons not having the right to enter and remain in Hong Kong and s.13 states that the political rights contained in art.25 of the ICCPR (which are replicated in art.21 of the Hong Kong Bill of Rights) do not require the establishment of an elected Executive or Legislative Council in Hong Kong.

15.019 The reservations made by the United Kingdom when it ratified the ICCPR are not, however, always identically replicated in the Hong Kong Bill of Rights. Section 9 of the HKBORO, for example, maintains the lawfulness of certain restrictions on rights applying to the "armed forces

<sup>24</sup> See, for example, Chen, fn 11 above, observing that: "In 1991, in an attempt to restore confidence in Hong Kong's future which had been deeply shaken by the Tiananmen incident, the Hong Kong Government enacted the Bill of Rights Ordinance..."

<sup>25</sup> See Richard Swede, "One Territory - Three Systems? The Hong Kong Bill of Rights" (1995) 44 *International & Comparative Law Quarterly* 358, 373-374. Two successive drafts of the Basic Law had been published in 1988 and 1989, respectively (see the Basic Law Drafting History Online: Textual History, at <http://sunzi1.lib.hku.hk/bldho/textualHistoryBrowse.action>) and the final version was promulgated by the National People's Congress (NPC) on 4 April 1990.

<sup>26</sup> Article 39 of the Basic Law.

<sup>27</sup> Swede, fn 27 above, at 374; Philip Dykes, "The Hong Kong Bill of Rights 1991: Its Origin, Content and Impact" in Johannes Chan and Yash Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths, 1993) pp 39-50.

<sup>28</sup> Swede, *ibid.*

of the government", whereas the United Kingdom's reservation was directed at "armed forces of the Crown".<sup>29</sup>

(ii) Differences between the ICCPR "as applied to Hong Kong" and Hong Kong Bill of Rights

There are two notable differences between the text of the ICCPR and that of Hong Kong Bill of Rights which are unrelated to the United Kingdom's reservations: one expands a right in the ICCPR and the other appears to limit the ICCPR. First, the political rights of "citizens" to take part in public affairs, to vote, and to have access to public service in art.25 of the ICCPR are more expansively afforded to "permanent residents" of Hong Kong in the corresponding art.21 of the Hong Kong Bill of Rights.<sup>30</sup> Second, s.7 of the HKBORO declares that the Ordinance binds only the "Government and all public authorities" including any person acting on their behalf.<sup>31</sup> This is a significant limitation to the enforceability of the ICCPR in Hong Kong. Nowhere in the ICCPR are rights declared to bind only the Government or public bodies.<sup>32</sup> Nor does the limitation appear, either explicitly or implicitly, in any of the United Kingdom's reservations or declarations to the ICCPR.<sup>33</sup>

Given these aspects of the Ordinance differ from the text of the ICCPR and are unrelated to the United Kingdom's reservations, the Hong Kong Bill of Rights cannot be regarded as entirely a replica of the ICCPR "as applied to Hong Kong".

(iii) Procedural aspects of the HKBORO

Certain procedural provisions appear in the HKBORO to help realise the substantive rights enumerated in s.8. Thus s.6(1) enables a court or tribunal to grant remedies for actual or threatened violations which "it has the power to make and as it considers just and appropriate...", while s.6(2) allows all courts and tribunals regardless of seniority to have jurisdiction over proceedings that relate to the Hong Kong Bill of Rights.

<sup>29</sup> For a discussion of the differences between this reservation at the international level and as it appears in s.9 of the HKBORO, see Dennis Morris, "Interpreting Hong Kong's Bill of Rights: Some Basic Questions - Part III" (1995) 16(3) *Statute Law Review* 200-205.

<sup>30</sup> See art.21 of the Hong Kong Bill of Rights.

<sup>31</sup> See s.7 of the HKBORO. Section 3 of the Interpretation and General Clauses Ordinances (Cap.1) defines "Government" as the Government of the HKSAR. It might therefore be argued that although courts have reviewed acts of the NPC and the Standing Committee of the NPC (NPCSC) for compatibility with rights in the Basic Law (*Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4), they could not review acts of the NPC or NPCSC for compatibility with the rights in the HKBORO unless such acts were also promulgated or legislated by Hong Kong (as in *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442).

<sup>32</sup> Article 1 of the Optional Protocol (fn 22 above), however, permits the HRC to receive only communications regarding violations of rights by a "State Party." The extent to which international human rights bind non-government actors is controversial, but it is clear that at least some human rights norms can be infringed (and routinely are infringed) by individuals, corporations and other non-government actors. These include the rights against slavery, forced labour, and cruel, inhuman or degrading treatment. See Steven Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 *Yale Law Journal* 443, especially at pp.511-513.

<sup>33</sup> Furthermore, it may be increasingly difficult to argue that constitutional or human rights are, as a matter of international practice, enforceable only against the government or public bodies. See, in particular, s.8(2) of the Constitution of the Republic of South Africa 1996, which appears in Chapter II of that Constitution containing the Bill of Rights, providing that: "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." Among the rights in the Hong Kong Bill of Rights which in their "nature" would bind natural and juristic persons are the right against servitude and the right against forced or compulsory labour (which are protected in art.4 of the Hong Kong Bill of Rights).

CHAPTER 30

RIGHT TO PROPERTY

*Oliver Jones*

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## 1. INTRODUCTION

This chapter concerns the right to personal property. The protection by the Basic Law of rights to real property has already been dealt with in Chapter 12. That said, the provisions of the Basic Law relevant to personal property overlap with those so discussed: art.6 and art.105. In relation to personal property, they raise several issues. What is personal property? When is it protected “in accordance with law”? In what circumstances is a person deprived of such property, triggering the entitlement to compensation in art.105? What is compensation? What are we to make of the other, oft ignored, limbs of art.105, including the right to “acquisition, use, disposal and inheritance” of personal property? Lastly, does the similarly downplayed, but seemingly more general, right of private ownership in art.6 add anything to our analysis?

30.001

## 2. ARTICLES 6 AND 105 OF THE BASIC LAW

These provisions read as follows:

30.002

### “Article 6

The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.

### Article 105

(1) 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.

(2) 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.

(3) The ownership of enterprises and the investments from outside the Region shall be protected by law.”

The former appears in Chapter I of the Basic Law, entitled “General Principles”, while the latter leads Chapter V, “Economy”. The motive for their inclusion in the Basic Law needs no investigation. They are central to one of its main objects: the continuation of Hong Kong’s capitalist way of life.<sup>1</sup> Predictably, art.105(1) has been heavily litigated since the resumption of sovereignty in relation to land. However, arts.6 and 105 have only occasionally been invoked solely with respect to personal property.<sup>2</sup> It is thus helpful, and in harmony with the Basic Law,<sup>3</sup> to look overseas for authority.

30.003

<sup>1</sup> Sino-British Joint Declaration art.3(5) “The current ... economic system[] in Hong Kong will remain unchanged”; Basic Law, Preamble, “the socialist system and policies will not be practised in Hong Kong”. On the status of the Sino-British Joint Declaration as pre-enactment extrinsic material relevant to the interpretation of the Basic Law, see *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, 223-224 (Li CJ).

<sup>2</sup> See, for example, *Man Yee Transport Bus Co Ltd v Transport Tribunal* (unrep., HCAL 122/2008, [2008] HKEC 1775).

<sup>3</sup> Basic Law art.84.

30.004 In particular, it has become “often appropriate”<sup>4</sup> for Hong Kong courts, when interpreting the Basic Law, to take “due account”<sup>5</sup> of decisions concerning the Convention on Human Rights and Fundamental Freedoms<sup>6</sup> (European Convention). This may even occur where there are “certain differences in wording”<sup>7</sup> between the two. Adherence by Hong Kong courts to such decisions cannot, of course, be assumed.<sup>8</sup> However, if “enlightening”<sup>9</sup> in a certain context, they “should be given substantial weight in deciding the scope and effect”<sup>10</sup> of the relevant provisions of the Basic Law.

30.005 For arts.6 and 105, there is a wealth of instructive jurisprudence regarding the application of art.1 of the First Protocol to the European Convention<sup>11</sup> to personal property. That provision reads:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”<sup>12</sup>

<sup>4</sup> *Chow Shun Yung v Wei Pih* (2003) 6 HKCFAR 299, 314 (Li CJ, Ribeiro and Chan PJJ), amplifying *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381, 402 (Sir Anthony Mason NPJ) (Li CJ, Bokhary, Chan and Ribeiro PJJ agreeing). *Chow Shun Yung v Wei Pih* is a decision of the Appeal Committee refusing an application for leave to appeal. It may not, strictly speaking, be a source of binding precedent: It would, however, be “highly persuasive”: see *HKSAR v Ma Zhujiang* [2007] 4 HKLRD 285, 296 (Ma CJHC, Stock JA and McMahon J). See also, by analogy, A. Mason, “The Use and Abuse of Precedent” in Lindell (ed.), *The Mason Papers* (Federation Press, 2007) pp.30–32, followed, together with other authority to similar effect, in *Algama v Minister for Immigration and Multicultural Affairs* (2001) 115 FCR 253, [62] (Whitlam and Katz JJ) (French J agreeing). Compare *Chiu Hoi Po v Commissioner of Police* [2008] 4 HKLRD 67, [56] (Yuen JA) (Johnson Lam and Andrew Cheung JJ agreeing).

<sup>5</sup> *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, 597 (Sir Anthony Mason NPJ) (Li CJ, Bokhary, Chan and Ribeiro PJJ agreeing).

<sup>6</sup> (1953) 213 UNTS No 2889, pp.221–261.

<sup>7</sup> *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237, [62] (Ribeiro PJ) (Li CJ, Chan PJ and Lord Woolf NPJ agreeing).

<sup>8</sup> See, by analogy, the remarks of the Privy Council, in relation to the Hong Kong Bill of Rights Ordinance (Cap.383): “it must not be forgotten that decisions in other jurisdictions are persuasive and not binding authority and that the situation in those jurisdictions may not necessarily be identical to that in Hong Kong”: *Attorney-General v Lee Kwong Kut* [1993] 2 HKCLR 186, 194 (Lord Woolf). As to the precedential status of *Attorney-General v Lee Kwong Kut*, see *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117.

<sup>9</sup> *Chow Shun Yung v Wei Pih*.

<sup>10</sup> *Ibid.*

<sup>11</sup> (1953) 213 UNTS No 2889, pp.262–270.

<sup>12</sup> The above practice of Hong Kong courts is not confined to decisions regarding the European Convention. Rather, it extends to “the decisions of other international and national tribunals regarding international and constitutional instruments having substantially similar provisions [to the Basic Law]”: *Chow Shun Yung v Wei Pih*, following *Shum Kwok Sher v HKSAR*. This may introduce, at the very least, decisions on: American Convention on Human Rights art.21; Constitution of the Commonwealth of Australia s 51(xxxi); United States Constitution 5th Amendment; Constitution of the Republic of South Africa 1996 s 25. Each of these instruments has previously been considered by Hong Kong courts when interpreting the Basic Law: see, for example, *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442, 458 (Li CJ) (Litton and Ching PJJ and Sir Anthony Mason NPJ agreeing); *Luk Ka Cheung v Market Misconduct Tribunal* [2009] 1 HKLRD 114, 130–134 (A Cheung J) (Hartmann JA agreeing); *Secretary for Justice v Commission of Inquiry Re Hong Kong Institute of Education* [2009] 4 HKLRD 11 [54] (Hartmann JA and Jeremy Poon J). Of course, many Commonwealth Constitutions may be relevant. Their protection of property rights is extensively analysed by Allen, *Right to Property in Commonwealth Constitutions* (Cambridge University Press, 2000). Note that decisions under the International Covenant on Civil and Political Rights (ICCPR) and the Canadian Constitution may be disregarded, as those instruments do not protect the right to property. See further *Kétanguéré Ackla v Togo* (Human Rights Committee, Communication 505/1992, Decision on Admissibility, 10 April 1996, UN Doc No. CCPR/C/56/D/505/1992) para.6.3 “the right to property [is] not protected by the Covenant”; *Authorson v Canada* [2003] 2 SCR 40, [15] (Major J): “The governmental expropriation of property without compensation ... is allowed when Parliament uses clear and unambiguous language to do so”. See also *ibid.*, [51]–[53].

It is immediately apparent that art.1 of the First Protocol uses the term possessions, while arts.6 and 105 of the Basic Law use the term property. This would be a case of “certain differences in wording”<sup>13</sup> not preventing the general relevance of European human rights law to Hong Kong. Particular occasions where this gap might be significant are noted below.

### 3. PROTECTED PERSONAL PROPERTY

It is a complex exercise to delineate the personal property attracting arts.6 and 105 of the Basic Law. Even before one looks to Strasbourg, it must be recalled that a Hong Kong court will interpret the Basic Law according to common law methodology. This means, among other things,<sup>14</sup> that the Basic Law is to be interpreted in light of the common law and equity,<sup>15</sup> much as ordinary statutes are understood in light of their wider legal setting.<sup>16</sup> As a result, the extent to which arts.6 and 105 of the Basic Law embrace personal property is informed by the ambit of the latter at common law and by equity.

In “an introductory but by no means a rudimentary, text”<sup>17</sup> on the subject, Professor Michael Bridge indicates that personal property at common law may first be defined as anything capable of ownership, other than rights over land.<sup>18</sup> Beyond this, the common law divides personal property into two categories: choses in possession and choses in action. The scope of choses in possession is fairly clear: they are essentially any tangible object a person may legally own.<sup>19</sup> This has come, broadly speaking, to include money.<sup>20</sup> In modern times, controversy has arisen over the extent to which body parts and genetic information amount to choses in possession.<sup>21</sup> This is likely to continue.<sup>22</sup>

Choses in action have always been more nebulous. They refer to intangible property, from the classic debt or other right of action<sup>23</sup> to the somewhat more recent company shares and intellectual property. Choses in action are further subdivided into the legal and the equitable and pure versus documentary intangibles.<sup>24</sup> The latter distinction basically lies in the extent to which an intangible right has become connected with a particular instrument. The goodwill

<sup>13</sup> See fn 7 above.

<sup>14</sup> *Director of Immigration v Chong Fung Yuen*, 223 (Li CJ).

<sup>15</sup> *Ibid.*, 221. See also *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 28 (Li CJ) “Assistance can also be gained from any traditions and usages that may have given meaning to the language used”.

<sup>16</sup> *Medical Council of Hong Kong v Chow Siu Shek* (2000) 3 HKCFAR 144, 153 (Bokhary PJ) (Li CJ, Litton and Ching PJJ and Sir Anthony Mason NPJ).

<sup>17</sup> Bridge, *Personal Property Law* (Oxford University Press, 3rd edn 2002) Preface.

<sup>18</sup> *Ibid.*, 1. This includes “chattels real” that are relevantly connected with the land: *ibid.*, 3; Tyler and Palmer, *Crossley Vaines' Personal Property* (Butterworths, 1973) pp.8–11.

<sup>19</sup> Bridge, fn 17 above, pp.3–4.

<sup>20</sup> *Ibid.*, pp.9–10; Proctor (ed.), *Mann on the Legal Aspect of Money* (Oxford University Press, 6th ed., 2005). See also Fox, *Property Rights in Money* (Oxford University Press, 2008).

<sup>21</sup> See, for example, *A v Leeds Teaching Hospital NHS Trust* [2005] QB 506.

<sup>22</sup> See, generally, Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Hart Publishing, 2007).

<sup>23</sup> Note, for example, that Reyes J assumed that a cause of action attracted art.105(1) of the Basic Law in *Kong Sau Ching v Kong Pak Yan* [2004] 1 HKC 119, 148. Contracts of employment held by civil servants and, indeed, any other contracts with the Government, are, despite their status as property, considered inherently amenable to legislative change: see, generally, *Secretary for Justice v Lau Kwok Fai* (2005) 8 HKCFAR 304, 322–323 (Sir Anthony Mason NPJ) (Li CJ, Bokhary, Chan and Ribeiro PJJ agreeing). This is discussed further below.

<sup>24</sup> Bridge, fn 17 above, pp.4–9; Tyler and Palmer, fn 18 above, pp.11–13.

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of a business, for example, may lack such a connection. On the other hand, a bill of lading, which entitles any lawful holder to delivery to the exclusion of all others, including the original consigner or consignee, constitutes a documentary intangible. To an even greater degree than choses in possession, what constitutes choses in action will continue to evolve.<sup>25</sup>

**30.010** There is little doubt that the above understanding of property by the common law, as it exists from time to time, attracts the protection of arts.6 and 105 of the Basic Law. Equity, by its nature, recognises a range of interests in circumstances where the common law does not. There is equally no reason to doubt that such interests typically attract arts.6 and 105 of the Basic Law, in all their variety, ranging from equitable priorities to interests under trusts.<sup>26</sup>

**30.011** Despite the role played by judge made law in ascertaining the reach of arts.6 and 105 of the Basic Law, it would be a mistake to allow that law to restrict the provisions. In the first place, the common law and equity have only survived the resumption of sovereignty under art.8 of the Basic Law to the extent that they do not “contravene”<sup>27</sup> the instrument. This is not directly relevant, as such contravention requires a collision between a rule of the common law or a principle of equity and a provision of the Basic Law, which would not arise if ambiguity in the provision were resolved by restriction to judge made law. However, art.8 broadly supports the notion that, while the meaning of the Basic Law may be informed by the common law and equity, the terms of the former are ultimately independent from, rather than beholden to, the latter.

**30.012** Further, it is “well established and beyond question”<sup>28</sup> that the fundamental rights set out in Chapter III of the Basic Law are to be construed generously.<sup>29</sup> It was suggested by Hartmann JA, when a judge of the Court of First Instance, that this approach be extended to art.105 of the Basic Law and, presumably, art.6.<sup>30</sup> This arguably fails to appreciate that generosity is the interpretative consequence of designating certain rights, other than those to property, as “fundamental”. The alternative would be to interpret arts.6 and 105 by “simply consider[ing] the language in the light of any ascertainable purpose and the context”.<sup>31</sup> Still, whether due to the need for breadth in construing constitutional rights or some notion of “context”, one is driven to look beyond Hong Kong judge made law for other possible notions of property under arts.6 and 105.

**30.013** It is here that Strasbourg enters the fray. European bodies charged with the enforcement of art.1 of the First Protocol have held that the provision, particularly its term “possessions”, has an “autonomous meaning”.<sup>32</sup> This has meant that, while bodies such as the European Court of Human Rights have readily classified individual entitlements under national law as possessions, they have also allowed the term to embrace situations where national law withholds that status.<sup>33</sup> This relationship between art.1 of the First Protocol and the national law of member states reflects the approach suggested above for the Basic Law, namely that the judge made law supplies, but does not exhaust, notions of property under arts.6 and 105.

<sup>25</sup> Bridge, fn 17 above, pp.6–9.

<sup>26</sup> See, generally, Ma, *Equity and Trusts Law in Hong Kong* (LexisNexis, 2009).

<sup>27</sup> Basic Law art.8.

<sup>28</sup> *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234, 256 (Ribeiro PJ) (Bokhary and Chan PJJ and Sir Noel Power and Lord Woolf NPJJ agreeing).

<sup>29</sup> *Ng Ka Ling v Director of Immigration*, 28.

<sup>30</sup> *Harvest Good Development v Secretary for Justice* [2007] 4 HKC 1, 34 (Hartmann J).

<sup>31</sup> *Director of Immigration v Chong Fung Yuen*, 223 (Li CJ).

<sup>32</sup> *Anheuser-Busch v Portugal* (2007) 45 EHRR 36 [63].

<sup>33</sup> Allen, *Property and the Human Rights Act 1998* (Hart Publishing, 2005) pp.41–46.

It might be thought that an autonomous approach flows more readily from the term “possessions” in art.1 of the First Protocol, as it clearly has a factual dimension. The same perhaps cannot be said so easily of the term “property” under arts.6 and 105 of the Basic Law. However, as explained above, the common law is beholden to the Basic Law, rather than vice versa. Further, it would go against the status of arts.6 and 105 of the Basic Law as a constitutional guarantee to interpret “property” in a way that could simply be rewritten within the wider legal system. It follows that, much like art.1 of the First Protocol, property in arts.6 and 105 of the Basic Law is not confined to its meaning at common law. **30.014**

Caution is needed in any further use of the European jurisprudence. It seems wrong to use the European jurisprudence to supply property for the purposes of arts.6 and 105 of the Basic Law where the requirement of possessions under art.1 of the First Protocol has been fulfilled essentially because such a status has been accorded by the specific laws of a member state.<sup>34</sup> This encroaches on the role already performed by the common law of Hong Kong. Further, it allows the reach of arts.6 and 105 to be governed by the idiosyncrasies of a European national legal system. However, the European jurisprudence will be highly relevant where a Strasbourg institution has used the autonomous meaning of the term possessions to overcome reticence in national law. **30.015**

The Grand Chamber of the European Court of Human Rights (European Court) has outlined its approach in such cases. The “issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by [art.1 of the First Protocol]”.<sup>35</sup> A possession has been further described as an “asset” and something that is existing, rather than conditional or dependent on a future uncertain event.<sup>36</sup> However, the test is so general that, in seeking guidance for Hong Kong, it is better to concentrate on specific applications of the test. **30.016**

The Strasbourg institutions have regularly considered how far causes of action should attract art.1 of the First Protocol, which could conceivably be used to extend arts.6 and 105 of the Basic Law beyond the common law and equity.<sup>37</sup> The European Court has recognised that art.1 of the First Protocol extends to intellectual property rights.<sup>38</sup> Commentators have suggested that the application of an autonomous meaning in the context of intellectual property, in light of international law and practice, could supplement deficiencies in national legislation.<sup>39</sup> To the extent that it would be fruitful to do so, this suggestion could also be pursued in Hong Kong. **30.017**

Perhaps most important are cases arising in two areas: statutory benefits and legitimate expectations. The statutory benefits considered in relation to art.1 of the First Protocol have tended to comprise social security and licences. With respect to social security, Strasbourg has been cautious. Article 1 of the First Protocol has only been held to apply to benefits for which the claimant is, short of discrimination, already entitled under national law. Article 1 of the First Protocol, having omitted the right to acquire possessions, cannot compel the initial provision **30.018**

<sup>34</sup> See, for example, *Anheuser-Busch v Portugal*, [78].

<sup>35</sup> *Ibid.*, [63].

<sup>36</sup> See, for example, *Bata v Czech Republic* (2008) 47 EHRR SE17, [70]. For an example of something conditional not qualifying as possession, see fn 45 below.

<sup>37</sup> See, generally, Allen, fn 33 above, pp.46–57. See also *Murungaru v Secretary of State for Home Department* [2008] EWCA Civ 1015. As to the common law, see, for example, *Unruh v Seeberger* (2007) 10 HKCFAR 31. See also the inchoate rights of action said to be preserved by arts.6, 105 and 120: *Kong Sau Ching v Kong Pak Yan*, [99].

<sup>38</sup> See, for example, *Balan v Moldova* [2009] ECDR 6, [34].

<sup>39</sup> Coban, *Protection of Property Rights Within the European Convention on Human Rights* (Ashgate, 2004) pp.149–150.

of benefits through the enactment of legislation or the exercise of administrative discretions.<sup>40</sup> A benefit may attract art.1 of the First Protocol even though it does not involve contributions by the claimant.<sup>41</sup>

- 30.019 The foregoing issues may be less acute for Hong Kong, which has traditionally downplayed state provision. Still, to the extent that the territory provides social security, doing so could give current recipients the protection of arts.6 and 105 of the Basic Law. The Mandatory Provident Fund, given its plainly contributory character, would be an obvious example. However, benefits not involving direct contributions, such as public housing and health care, may also be vulnerable. It should be added that the concern in Strasbourg with discrimination in eligibility for social security is referable to the prohibition on discrimination in the enjoyment of rights such as art.1 of the First Protocol by art.14 of the European Convention. Under the Basic Law, this concern is addressed through a different lens.<sup>42</sup>
- 30.020 Hong Kong is, of course, more active with licensing, especially for the conduct of economic activities. The European jurisprudence is nuanced in this context. A statutory licence to carry on a business will not ordinarily be a possession *per se* under art.1 of the First Protocol. Rather, the subsequent goodwill of the business is the relevant possession. Thus, once goodwill has arisen, the withdrawal of the licence, even in accordance with enabling legislation, might violate art.1 of the First Protocol.<sup>43</sup> There is an exception to the foregoing. If the licence has a proprietary character, especially in the sense that it can be assigned, it might represent a free-standing possession under art.1 of the First Protocol.<sup>44</sup>
- 30.021 It is unclear whether withdrawal of a proprietary licence would lead to a violation of art.1 of the First Protocol where this occurs in accordance with the legal terms on which it was granted.<sup>45</sup> One might think it would not, as the provision protects existing possessions according to their terms, rather than the right to have acquired those possessions on broader terms. However, in Strasbourg, this logic is not always applied. There is said to be authority from Strasbourg to the effect that art.1 of the First Protocol does not apply “where the licence itself contains provisions for its variation, if the licence is varied in accordance with those provisions”.<sup>46</sup> On the other hand, the Grand Chamber of the European Court recently held the provision to apply in relation to limitations on the ownership of land in force as part of the general law from the very moment at which ownership was acquired.<sup>47</sup>

<sup>40</sup> See, for example, *Munoz Diaz v Spain* (2010) 50 EHRR 49, [44] and *Carson v United Kingdom* (2010) 51 EHRR 13, [64]–[65].

<sup>41</sup> *R (M) v Secretary of State for Work and Pensions* [2009] 1 AC 311, [24]–[34].

<sup>42</sup> *Fok Chun Wa v Hospital Authority* (unrep., HCAL 94/2007, [2008] HKEC 2161); *Kong Yun Ming v Director of Social Welfare* [2009] 4 HKLRD 382.

<sup>43</sup> *Van Marle v Netherlands* (1986) 8 EHRR 483; *Tre Traktörer AB v Sweden* (1991) 13 EHRR 309. This approach is broadly reflected, apparently without citation of Strasbourg cases, in the submissions of counsel in *Man Yee Transport Bus Co Ltd v Transport Tribunal*. Note that artificial goodwill, simply arising from the “scarcity value” of licences issued by a public body may not suffice: *R (Royden) v Wirral MBC* [2002] EWHC 2484, [144] (Deputy Judge Sir Christopher Bellamy QC). Nor will the prospect of income from a business without established goodwill: *R (Malik) v Waltham Forest Primary Care Trust* [2007] 1 WLR 2092.

<sup>44</sup> See, by analogy, *Bentham v Netherlands* (1986) 8 EHRR 1, [36].

<sup>45</sup> Coban, fn 39 above, pp.160–161.

<sup>46</sup> See *R (Data Broadcasting International Ltd) v Office of Communications* [2010] EWHC 1243 (Admin) [96] (Cranston J) and authority cited there. See also *Austin v Southwark LBC* [2009] EWCA Civ 66, [46]–[48], *Moskal v Poland* (2010) 50 EHRR 22, [40].

<sup>47</sup> See O Jones, “Out With the Owners: the Eurasian Sequels to *JA Pye (Oxford) Ltd v United Kingdom*” (2008) 27 CJQ 260, 265–266.

In Hong Kong, the European cases’ designation of goodwill as a possession under art.1 of the First Protocol is pre-empted by the common law, under which goodwill constitutes a chose in action and thus property under arts.6 and 105 of the Basic Law. However, the European jurisprudence could have more influence for proprietary licences. Hong Kong courts can be taken to have recognised such licences as property for the purposes of legislation criminalising theft. Even so, those courts have denied the same recognition as choses in action at large.<sup>48</sup> Strasbourg could help meet this shortfall. How Hong Kong courts will overcome the issue of legal limits on proprietary licences applicable *ab initio* depends on the scope of the right to acquire which, unlike art.1 of the First Protocol, is included in art.105 of the Basic Law. This is discussed below.

This leaves legitimate expectations. Stated in general terms, the principle allows art.1 of the First Protocol to “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”.<sup>49</sup> Much as with social security benefits and licences, the European jurisprudence does not recognise the expectation itself as a possession attracting art.1 of the First Protocol. Rather, it is the interest to which the expectation relates that falls within the provision. Legitimate expectations have been considered by Strasbourg in relation to goods,<sup>50</sup> intellectual property rights<sup>51</sup> and licences to carry on a business, although the latter arguably adds little to the goodwill approach discussed above.<sup>52</sup> The principle has also been used in the context of rights to land.<sup>53</sup> In all its forms, the doctrine is a vital part of the autonomous operation of art.1 of the First Protocol, as it enables recognition of that which has come to be undermined or denied by national law.

The European jurisprudence is fairly flexible on the public conduct necessary to ground a legitimate expectation. In particular, it seems unproblematic if, in grounding the expectation, the body acts *ultra vires*.<sup>54</sup> The foregoing could be adopted in Hong Kong for arts.6 and 105 of the Basic Law. In this respect, there is no real difficulty with the fact that arts.6 and 105 of the Basic Law use the term property, in contrast with art.1 of the First Protocol. For, as explained, the latter, in protecting legitimate expectations, recognises a proprietary interest, falling short of a right, flowing from the expectation. This can easily fall within the Basic Law notion of property. Of course, the result might be to broaden the protection of substantive legitimate expectations by Hong Kong administrative law, especially on the issue of *vires*. However, English courts appear already to have accepted this result.<sup>55</sup> Further, as indicated, there is nothing remiss in the Basic Law going beyond the common law and equity.

In applying the European concept of legitimate expectation to arts.6 and 105 of the Basic Law, a key question would be its impact on government contracts. The European Court has been content to allow such contracts to ground a legitimate expectation, even where they are *ultra*

<sup>48</sup> *Attorney-General v Nai Keung* [1987] 1 WLR 1339, 1342 (Lord Bridge of Harwich).

<sup>49</sup> Jones, fn 47 above, at 266, citing *Kopecky v Slovakia* (2005) 41 EHRR 43, [45]–[54]; *Anheuser-Busch v Portugal*, [62]–[65]; *R (Royden) v Wirral MBC*, [134]–[137] (Deputy Judge Sir Christopher Bellamy QC). See also, for example, *Driza v Albania* (2009) 49 EHRR 31, [102].

<sup>50</sup> *Kopecky v Slovakia*.

<sup>51</sup> *Anheuser-Busch v Portugal*.

<sup>52</sup> See, for example, *Gudmundsson v Iceland* (1996) 21 EHRR 89 (Commission Decision).

<sup>53</sup> See, for example, *Pine Valley Developments v Ireland* (1993) 16 EHRR 379; *Stretch v United Kingdom* (2004) 38 EHRR 12.

<sup>54</sup> See, generally, Allen, fn 33 above, pp.67–70.

<sup>55</sup> *Rowland v Environment Agency* [2005] Ch 1.