For more see Stuart Hargreaves, "Grinding Down the Edges of the Free Expression Right in Hong Kong" Brooklyn Journal of International Law (forthcoming, 2019).

### Judicial application of Article 1

1.2 *Arbitral awards.* Article 1 initially produced the peculiar result that arbitral awards from the Mainland (Mainland awards) could no longer be enforced in Hong Kong, as they were no longer an award made in a state or territory outside of Hong Kong that was a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), for the purposes of Pt IV of the Arbitration Ordinance (Cap.341). Accordingly, with effect from February 2000, Pt IIIA of the Arbitration Ordinance was enacted to provide for the enforcement of Mainland awards: *Shandong Textiles Import and Export Corp v Da Hua Non-Ferrous Metals Co Ltd* [2002] 2 HKLRD 844, 855–858 (Ma J (as he then was) "Prior to the resumption of sovereignty over Hong Kong on 1 July 1997, the enforcement of awards from the Mainland was possible on the basis of such awards being Convention awards [the PRC being of course a party to the New York Convention]. The problem was that after 1 July 1997, Hong Kong became an inalienable part of the PRC: see art.1 of the Basic Law. The consequence of this was that the said definition of Convention awards did not fit in with this new state of affairs. Hong Kong, which prior to 1 July 1997 was a territory of the United Kingdom [also a party to the New York Convention], became, after that date, a part of the PRC.").

*Sovereign immunity.* Article 1 has also meant that sovereign immunity under public international law cannot be directly applied between Hong Kong and the CPG: *The Hua Tian Long (No 3)* [2010] 3 HKC 557, 558 (Stone J, that "the situation with which this court now is faced is the arrest of a vessel ultimately owned by the Central People's Government of the PRC, which after 1 July 1997 exercises sovereign power over the Special Administrative Region of Hong Kong, so that this case involves the purported impleading of Hong Kong's own sovereign under the 'one country, two systems' principle, and not that of a foreign state.").

*Immigration.* In relation to immigration matters, a distinction is to be maintained between Hong Kong and other places within the PRC, and the Immigration Ordinance (Cap.115) is to be construed accordingly: *HKSAR v Luo Shui Ji* [2007] HKCLRT 137, [27] (Cheung JA, "A fundamental axiom of statutory interpretation is that a statute cannot be interpreted in such a way as to render the statute absurd. If the principle of Hong Kong being an inalienable part of China is forced upon s.37D(1) of the Immigration Ordinance merely because Hong Kong is indeed an inalienable part of China, s.37D(1) will be given this absurd meaning: as Hong Kong is part of China, persons who have not been granted





approval by China for leaving China would still have not left China even if they arrived in the territory of Hong Kong. Such an interpretation would render s.37D(1) meaningless. Nor does Hong Kong need such a provision because it would not have any legal effect on those defendants who have assisted the entry into Hong Kong of unauthorized entrants from China.").

### Drafting history

1.3 Article 1 of the Basic Law corresponds with arts.1 and 2 of the Sino-British Joint Declaration, that the "Government of the People's Republic of China … has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997" and the "Government of the United Kingdom declares that it will restore Hong Kong to the People's Republic of China with effect from 1 July 1997." That said, the word "inalienable" does not appear in the Sino-British Joint Declaration. The December 1987 version of the Basic Law (Article 1 in 1987) used the word "inseparable" instead. One of the suggestions noted by the consultative committee, which was not adopted, was to amend the phrase "an inalienable part" to "an inalienable territory" on the basis that the word "territory" is much clearer, more positive and less ambiguous than the word "part." Another suggestion, with the aim of making the definition of the "HKSAR" clearer, was to include a map of Hong Kong as an annex to the Basic Law: *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.31–32. This suggestion was eventually adopted and a map of the HKSAR was included in the Appendix of the Basic Law: *Order of the State Council of the People's Republic of China* No. 221.

## ARTICLE 2

The National People's Congress authorises the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.

## COMMENTARY

### Meaning of "high degree of autonomy"

2.1 Alongside art.1, this provision has purposive and, thus, interpretative significance: *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 28–29 (Li CJ, "As to purpose, the purpose of the Basic Law is to establish the Hong Kong Special Administrative Region being an inalienable part of the People's

Republic of China under the principle of 'one country, two systems' with a high degree of autonomy in accordance with China's basic policies regarding Hong Kong as set out and elaborated in the Joint Declaration. The purpose of a particular provision may be ascertainable from its nature or other provisions of the Basic Law or relevant extrinsic materials including the Joint Declaration.").

The CPG restated in 2014 the nature of Hong Kong's autonomy to include a wide range of fields: 2014 White Paper, Chapter II, s.2, para.1 ("[a]fter the establishment of the HKSAR, the previous capitalist system and way of life remain unchanged in Hong Kong, and existing laws remain basically unchanged. Adhering to the law, the HKSAR protects the right of ownership of private property, maintains the status of Hong Kong as a free port and a separate customs territory, maintains independent finances, practices an independent taxation system, and formulates its own policies regarding trade, finance, education, science, culture, public health and sports. In accordance with the Basic Law of the HKSAR and the decision of the NPCSC on handling the laws previously practiced in Hong Kong, the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law are maintained, except for any that contravene the Basic Law and are subject to any amendment by the legislature of the HKSAR. On this basis, the HKSAR exercises a high degree of autonomy, and fully exercises its administrative, legislative and independent judicial power, including that of final adjudication.").

### Meaning of "independent judicial power"

2.2 Article 2 forms part of a scheme of provisions reflecting a purpose of the Basic Law to establish a judicial system: *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234, 254–255 (Ribeiro PJ, "It is therefore entirely clear that when, in such articles, the Basic Law refers to 'the courts' it is referring to the courts of judicature: the institutions which constitute the judicial system, entrusted with the exercise of the judicial power in the HKSAR…The purpose of the Basic Law provisions referred to is to establish the constitutional architecture of that system revolving around the courts of law, catering for the system's separation from that of the Mainland, its continuity with what went before and safeguarding the independence of the judiciary.").

See also arts.80–96 on the judicial system; art.19 on independent judicial power.

### Qualifications on "autonomy"

2.3 The autonomy stipulated by art.2 is qualified by other provisions in the Basic Law providing for Mainland functions in the HKSAR Government. See in





particular art.158: *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, 322–324 (Li CJ, "The Standing Committee of the National People's Congress shall authorise the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.").

### Drafting history

2.4 Article 2 begins with the NPC's authorisation for the HKSAR's existence and its associated "high degree of autonomy." These principles were first provided for in art.3 of the Sino-British Joint Declaration, Basic Policies Number 2, though with reference to the "Central People's Government of the People's Republic of China" (rather than the NPC) and the word "enjoy" (rather than "exercise"): ("The Hong Kong Special Administrative Region will be directly under the authority of the Central People's Government of the People's Republic of China. The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government.").

Some drafting committee members held the view that the Basic Law itself was legislation authorised by the NPC, and so suggested the deletion of reference to the NPC as the source of authorisation of the HKSAR and suggested the addition of the phrase "in accordance with the provisions of this Law" in art.2: *Opinions on the preamble and provisions of chs 2, 3, 7, 9 of the Basic Law expressed at the forth plenary session of the Drafting Committee for the Basic Law*, 中華人民共和國香港特別行政區基本法起草委員會第四次全體會議委員們對基本法序言和第二, 三, 七, 九章條件草稿的意見匯集, (1987 May), p.3 (Chinese version). The suggested deletion was never included in the drafts of Basic Law. The phrase "in accordance with the provisions of this Law" was eventually added to the Basic Law in the February 1989 version (Article 2 in 1989), despite not being included in the 1988 April version or other previous drafts of the Basic Law.

The second half of art.2, which specifies the executive, legislative and independent judicial power enjoyed by the HKSAR, was provided for in art.3 of the Sino-British Joint Declaration, Basic Policies Number 3 ("The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication…"). This phrasing was not originally included in the 1987 December version of the Basic Law. However, some drafting committee members commented that the phrase "high degree of autonomy" was too vague and suggested the addition of more specifics: *Opinions on the preamble and provisions of chs 2, 3, 7, 9 of the Basic Law expressed at the forth plenary session of the Drafting Committee for the Basic Law*, 中華人民共和國香港特別行政區基本法起草委員會第四

次全體會議委員們對基本法序言和第二, 三, 七, 九章條件草稿的意見匯集, (1987 May), p.3 (Chinese version).

## ARTICLE 3

The executive authorities and legislature of the Hong Kong Special Administrative Region shall be composed of permanent residents of Hong Kong in accordance with the relevant provisions of this Law.

### COMMENTARY

**Vesting executive and legislative power in permanent residents of the Region gives effect to a "high degree of autonomy"**

3.1 This provision is underpinned by Hong Kong's high degree of autonomy from the PRC, vesting executive and legislative power exclusively in permanent residents, thus limiting outside interference: Xiao Weiyun, *One Country, Two systems: An account of the drafting of the Hong Kong Basic Law* (Peking University Press, 2001) 103 ("in accordance with the principle of 'one country, two systems,' the HKSAR shall enjoy a high degree of autonomy. The local people shall manage their own affairs within the limits of the high degree of autonomy of the Region."); see also Deng Xiaoping, *Constructing Socialism with Chinese Characteristics* (People's Press, revised version 1987) 46 ("except for the military troops, the Central Government will not send officials to the government of the Hong Kong Special Administrative Region. This will also not change.").

**Meaning of "permanent residents"**

3.2 As to the concept of permanent residence, including the status of dual nationality, see art.24 and the authorities cited there.

**Drafting history**

3.3 Article 3 of the Basic Law is largely the same as the wording in Annex I Section III para.3 of the Sino-British Joint Declaration, save for the reference to the "executive authorities" instead of the "government" and the "permanent residents of Hong Kong" instead of "local habitants" ("The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants."). Further, the phrase "in accordance with the relevant provisions of the Law" was also added to art.3.





## ARTICLE 4

The Hong Kong Special Administrative Region shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with law.

### COMMENTARY

**Reinforcement of "fundamental rights" as critical to Basic Law**

4.1 On the surface, it appears that art.4 is unnecessary, given that Chapter III already provides specific guarantees of fundamental rights. However, its inclusion serves to reinforce the importance of such rights to the overall scheme of the Basic Law: Xiao Weiyun, *One Country, Two Systems: An account of the drafting of the Hong Kong Basic Law* (Peking University Press, 2001) 107 (noting that the inclusion of this Article as a general principle of the Basic Law would make "Hong Kong residents feel more assured that their fundamental rights after 1997 would be valued and safeguarded by the Basic Law.").

Article 4 is not a freestanding provision but falls to be interpreted in light of the other provisions in the Basic Law, including those which limit the rights of non-Hong Kong residents: *Comilang Milagros Tecson v Director of Immigration* [2018] 2 HKLRD 534, [92] (Poon JA, "BL art.4 is not a free-standing provision. Contained in Chapter I on General Principles, it is a general provision and must be read together with BL art.39 and BL art.41 in Chapter III, which prescribes the Government's duty to safeguard rights and freedoms of Hong Kong residents and non-Hong Kong residents in a more specific manner. For the reasons articulated by Ribeiro PJ in *Ubamaka*, by virtue of BL art.39, Section 11 [of the Hong Kong Bill of Rights Ordinance] operates at the constitutional level to qualify the scope and effect of BL art.41. Applying the same logic in those reasons, Section 11 must have the same qualifying effect on BL art.4, too.").

**Distinction drawn between "residents" and "other persons" is material**

4.2 The distinction between "residents" and "other persons" refers to the different legal protection afforded to these different categories under the Basic Law, with the former enjoying fundamental rights under Chapter III and the latter only receiving protection "in accordance with law": 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) 162 ("The words 'safeguard in accordance with law' are used because according

to the provisions of the Basic Law the rights and freedoms enjoyed by the permanent residents, non-permanent residents and the other persons in the Region are not quite the same, hence the need of these words."). In this respect, this provision should be read along with art.41, which extends the rights and freedoms prescribed by Chapter III to persons in the HKSAR "other than Hong Kong residents."

**Meaning of "residents"**

4.3 As to the meaning of residents of the HKSAR, whether permanent or non-permanent, see art.24.

**Meaning of "... in the Region"**

4.4 Any "other person" is not "in" the HKSAR, for the purposes of arts.4 or 41 until the person has passed through immigration clearance in Hong Kong: *Chu Woan Chyi v Director of Immigration* [2007] 3 HKC 168, 190–193 (Hartmann J, "Article 4 does not seek to have extra-territorial effect. It safeguards only the rights and freedoms of those persons who are 'in' the Special Administrative Region not those who are outside it but would like to enter. In this regard art.4 is a reflection of art.41...even on a purposive construction, I do not see that art.4 or art.41 are intended to apply to persons who are not in Hong Kong but who are merely seeking permission to enter. To use a simple analogy, such persons are only at the front door asking to come in. The fact that, in some physical sense, they have a foot on Hong Kong soil is no more than a practical consequence of modern travel. To employ the language of the Immigration Ordinance, they are however still seeking the 'right to land.'").

Although art.4 only applies to a person "in" the HKSAR, any such immigration decision would still be subject to judicial review based on classic administrative law principles: *Chu Woan Chyi v Director of Immigration* (CACV 119/2007, [2009] HKEC 1477), [85] (Ma CJHC, "if the Applicants were right in their contention that the reason for their being denied entry into Hong Kong was no more than the mere fact of their Falun Gong association or that no proper reason existed, they were entitled to succeed in the judicial review proceedings. Even if fundamental freedoms under the Basic Law or Bill of Rights were not engaged, the decision of the Respondent would be liable to be impugned on the basis of irrationality or perverseness. Correspondingly, if the Respondent's case that the Applicants posed security risks was made out, then even if rights under the Basic Law or Bill of Rights were applicable, [his] decision to exclude would have been a legitimate one.").

Although the Director of Immigration enjoys a wide margin of discretion in making immigration decisions, this is subject to some supervisory review by





the courts: *Epoch Group Ltd v Director of Immigration* (HCAL 43/2010, [2011] HKEC 331), [38] (Cheung J, "...[I]n making a decision, the Director [of Immigration] has to take into account all relevant considerations and disregard all those that are not relevant. His decision must not be unreasonable (in the public law sense), perverse, irrational, arbitrary or unlawful, nor can it be motivated by bad faith."); [39] ("Moreover, the decision-making process must be fair. In its classic formulation, unreasonableness in the public law sense, or *Wednesbury* unreasonableness, refers to a decision that is so unreasonable that no reasonable authority could ever come to it: *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 229–230. There have been recent attempts to reformulate the *Wednesbury* unreasonableness test which it is not necessary in this judgment to go into: see *de Smith's Judicial Review* (6th ed) paras.11-018 to 11-024 and in particular, para.11-024."); [40] ("There is no objection to a decision-maker, who is entrusted with wide discretions, to formulate and apply guidelines in relation to how he would exercise his discretions: *Wise Union Industries Ltd v Hong Kong Science and Technology Parks Corp* [2009] 5 HKLRD 620, [31]–[33] and the authorities cited therein. However, the decision-maker must not fetter his discretion. Describing the last point from a different perspective, when a decision-maker allows his guidelines to blind him from matters and circumstances which he ought to have regard to before deciding how to exercise his discretion, he fails to take into account all relevant considerations. Guidelines are what they are. They constitute 'guidance and not tramlines': *R v Wakefield Metropolitan District Council, ex p Pearl Assurance Plc* [1997] EWHC (Admin) 228, [9] (Jowitt J). They must not be allowed to preclude the decision-maker from departing from them or from taking into account relevant circumstances and merits of the case in question.").

**Scope of fundamental rights for those persons not formally "in the Region"**

4.5 It does not necessarily follow that a person who is in the HKSAR can freely be deported if doing so presents a real risk of violation of non-derogable rights. Once a person has entered Hong Kong, Chapter III of the Basic Law protects the person against removal from Hong Kong where doing so could result in extra-territorial violations by third parties: see for example, *Soering v United Kingdom* (1989) 11 EHRR 439, 466–468 (The Court, "The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State ... That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that 'no State Party shall ... extradite a person where there are

substantial grounds for believing that he would be in danger of being subjected to torture.'").

The *Soering* principle was affirmed in *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743, [160] (Ribeiro PJ, "...a sufficiently established threat of BOR art.3 being violated [the prohibition on torture or inhuman and degrading treatment] by the receiving country if the deportee should be sent there constitutes a ground for restraining the Hong Kong Government from proceeding with the deportation.").

### Drafting history

4.6 Article 4 of the Basic Law is largely the same as the wording found in Annex I Section XIII para.1 of the Sino-British Joint Declaration, save for the reference to "safeguard" instead of "protect" and "residents" instead of "inhabitants and other persons": ("The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law."). The term "protect" and "inhabitants and other persons" was originally used in the 1987 December version of the Basic Law (Article 5 in 1987) ("The HKSAR shall protect the rights and freedoms of the HKSAR inhabitants and other persons in accordance with law."). Some drafting committee members considered the scope of "other persons" in the 1987 version as too broad and held the view that "other persons" should be limited to those within the HKSAR: *Drafters' views of chs 4, 5, 6 and 10 and the collection of draft provisions at the sixth plenary session of the Drafting Committee for the Basic Law*, 中華人民共和國香港特別行政區基本法起草委員會第六次全體會議委員們對基本法第四、五、六、十章和條文草稿匯編的意見, (1987 December), p.45 (Chinese version).

## Article 5

The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.

## COMMENTARY

### Drafting history

5.1 Article 5 of the Basic Law is substantially the same as the wording in Annex I Section I para.1 of the Sino-British Joint Declaration ("The National People's





Congress of the People's Republic of China shall enact and promulgate a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ... in accordance with the Constitution of the People's Republic of China, stipulating that after the establishment of the Hong Kong Special Administrative Region the socialist system and socialist policies shall not be practised in the Hong Kong Special Administrative Region and that Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years."). The previous drafts of art.5 follow closely the wording in the Sino-British Joint Declaration, save for the 1988 April version that used the phrase "existing capitalist system" instead of "previous capitalist system" (Article 4 in 1988).

Concerns noted by the consultative committee include the difficulty of drawing a distinction between the socialist system and the capitalist system, especially when "the socialist system currently practised in China has tints of capitalism." Another reservation was the lack of any means for guaranteeing that Hong Kong's way of life would remain unchanged for 50 years. The consultative committee also noted the expression of fear by some people that Hong Kong will be converted to a communist system after 50 years: *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.42.

## Article 6

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

## COMMENTARY

### Property protections critical to "two-systems" formulation

6.1 The crux of the capitalist system is the recognition and protection of private property, enshrined in art.6: Xiao Weiyun, *One Country, Two systems: An account of the drafting of the Hong Kong Basic Law* (Peking University Press, 2001) 392–393 ("To guarantee the implementation of the principle of 'one country, two systems' and the maintenance of the previous capitalist system, the capitalist ownership of private property must really be seen to be protected. So regardless of repetition, arts.5, 6 and 105 provide concrete protection of private property rights."); Y Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 1997) 155 ("the framework for a market capitalist economy is constituted

by a number of provisions... A fundamental factor is the recognition of private property and the protection of rights in it, held by individuals or legal persons (arts.6 and 105).").

### Comparison with the PRC Constitution

6.2 In 2004, the PRC Constitution was amended to recognise private property ownership: Amendment to the Constitution of the People's Republic of China, Adopted at the Second Session of the Tenth National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on March 14, 2004 (Article 13: "The state protects the right of citizens to own lawfully earned income, savings, houses and other lawful property. The state protects according to law the right of citizens to inherit private property.").

### Whether Article 6 adds to Article 105

6.3 The current view is that art.6 adds nothing to the protection of the right to property by art.105: *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553, [13] (Stock JA, "Art.6, which adds nothing to the argument [that concerns Art.105 of the Basic Law], requires the Region to 'protect the right of private ownership in accordance with law.'") (application for leave to appeal refused (FAMV 20/2008, [2008] HKEC 1504)); see also *Man Yee Transport Bus Co Ltd v Transport Tribunal* (HCAL 122/2008, [2008] HKEC 1775), [15] (Cheung J, "In those circumstances, there is no deprivation within the meaning of art.105. Article 6 does not add anything to the applicant's argument.").

This arguably renders art.6 surplusage, though this is an interpretative step the courts should be slow to take. It may be, instead, that art.6 could fill lacunae in art.105: O Jones, "Out With the Owners: the Eurasian Sequels to *JA Pye (Oxford) Ltd v United Kingdom*" (2007) 27 Civil Justice Quarterly 260, 275 ("...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."). However, art.6 might have trouble performing this role in relation to a matter about which art.105 has been very detailed and specific, e.g. compensation, as this would allow a general provision to derogate from a specific provision, another step that the courts would be slow to take. See further *Good Faith Properties Ltd v Cibean Development Co Ltd* [2014] 5 HKLRD 534, [11] (Lam V-P, "The right of private ownership protected under Article 6 of the Basic Law (see Litton NPJ in *Sin Ho Yuen v Fineway Properties Ltd*, [24])) should not be overridden without justification. Even if the right of private ownership of





the minority owner were to be overridden when there is proper justification, there must be fair and reasonable compensation.").

### Drafting history

The content of art.6 of the Basic Law was first provided for in art.3 of the Sino-British Joint Declaration, Basic Policies Number 5 ("...Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law."). 6.4

The previous drafted versions of art.6 in 1987 December and 1988 April followed closely the wording in Annex I Section VI para.1 of the Sino-British Joint Declaration, which contained elaborations on the right of private ownership of property ("Rights concerning the ownership of property, including those relating to acquisition, use, disposal, inheritance and compensation for lawful deprivation (corresponding to the real value of the property concerned, freely convertible and paid without undue delay) shall continue to be protected by law."). These are now included in art.105 of the Basic Law instead. The phrase "right of property ownership," which was included in the 1988 April version, was removed entirely from the Basic Law. The consultative committee chose to replace the term "rights of property" with "rights of private ownership" so as to distinguish these rights from ownership of state property: *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.58.

## ARTICLE 7

The land and natural resources within the Hong Kong Special Administrative Region shall be State property. The Government of the Hong Kong Special Administrative Region shall be responsible for their management, use and development and for their lease or grant to individuals, legal persons or organisations for use or development. The revenues derived therefrom shall be exclusively at the disposal of the Government of the Region.

## COMMENTARY

### Comparison with the PRC Constitution

Article 7 of the Basic Law conforms with the general constitutional position within the PRC that property belongs to the state: PRC Constitution, art.9 ("All mineral resources, waters, forests, mountains, 7.1

of the applicants, 「生育」 means 「生長，養育」 (p.1136). In my view, none of them applies to the maintenance by an adult child of his or her parent as a matter of Chinese usage."); [54] ("More importantly, it has been pointed out that 「自願生育的權利」 in art.37 is specifically guaranteed under the Basic Law in order to exempt residents of Hong Kong from the one child policy practised on the Mainland. In this regard, one should note that art.49 of the Constitution of the People's Republic of China reads in Chinese (and in English translation) as follows:…"); [55] ("Article 49(2) stipulates that a couple has 'the duty to practise family planning' or 「有實行計劃生育的義務」 in the Chinese original. The term 「計劃生育」 in art.49(2) of the Constitution of the People's Republic of China provides the clearest contrast to the term 「自願生育」 used in art.37 of the Basic Law. See *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (2nd ed., 2009) pp.310–311."); [56] ("Furthermore, when it comes to adult children taking care of their parents, art.49(3) of the Constitution, in accordance with ordinary Chinese usage, uses the term 「贍養扶助」 (to support and assist)."); [57] ("Incidentally, it is interesting to note that art.38 in Chapter III (Fundamental Rights and Duties of the Residents) of the Basic Law of the Macau Special Administrative Region provides: 澳門居民的婚姻自由、成立家庭和自願生育的權利受法律保護。. A clear distinction is drawn between 「成立家庭」 and 「自願生育」, which again is in full accord with ordinary Chinese usage."); [58] ("In my view, the English version of art.37 of the Basic Law is consistent with the Chinese meaning. The 'right to raise a family freely' sits comfortably well with the interpretation, based on the Chinese version, that it is a right to procreate and to foster children, and has nothing to do with the maintenance or taking care of a parent by an adult child, or the formation or maintenance of a family comprising such a parent and adult child. In particular, 'to raise' means, in the context, to '[r]ear, bring up, (a person or animal),' according to the *Shorter Oxford English Dictionary on Historical Principles* (6th edn., 2007) p.2454."); affirmed in *Fung Chi Man v Director of Immigration* [2011] HKEC 81 (Hartmann J). The limited ambit of art.37 as described above was also affirmed by the Court of Appeal in *Comilang Milagros Tecson v Director of Immigration* [2018] 2 HKLRD 534, [62]–[64], [66], [68], [70], [94], [135] (Poon JA).

The "right to raise a family freely" has nothing to do with spousal relationship: *Li Nim Han v Director of Immigration* [2012] 2 HKC 299, [34] (Lam J, "So construed, it is impossible for the 1st applicant to contend that her right under art.37 would be infringed by the execution of the removal order. She is at liberty to raise her child in Hong Kong freely. It is clear from the Chinese text that this limb of art.37 has nothing to do with spousal relationship. Nor is it about the right of a child to paternal support. Therefore, art.37 is not about a general right to family life to anchor her contention that the Director





must give proportionate consideration to grant permission under s.13 of the Immigration Ordinance to the 2nd applicant to remain in Hong Kong. As pointed out in correspondence, the 2nd applicant can apply to join the family lawfully through the One Way Permit system or to visit the family regularly through the Two Way Permit system. Alternatively, the 1st applicant could go to the Mainland with the child…").

### Socio-Economic Benefits and Article 37

**37.5** An interpretation on Article 37 that it only recognizes heterosexual marriages has been used to support a restriction on spousal tax benefits to only those in such marriages: *Leung Chun Kwong v Secretary for Civil Service* [2018] 3 HKLRD 84, [110] (Lam V-P, "In my view, when one looks at the policy pertaining to Spousal Benefits, it is of paramount importance to bear in mind that the Government is not just an ordinary employer in the private sector. Like any other government in a modern civilized society, the Government endeavours to govern as a responsible and responsive administration. In performing its functions of governance, formulating and implementing its policies, and conducting its business and affairs, it strives its best to reflect and uphold the prevailing socio-moral values of the community at large. In this sense, the Government is the custodian of Hong Kong's prevailing socio-moral values. (That said, the Government must of course be sensitive to any material change in the community's socio-moral values and act accordingly when necessary.) Hence, in formulating its policy on Spousal Benefits, which concerns all civil servants, the Government is perfectly entitled to take into account and follow the prevailing socio-moral values on marriage held by the community at large. And since day one, the Government, acting consistently on the prevailing view of the community on marriage, has always adopted marital status as the benchmark for entitlement to Spousal Benefits. In the circumstances, it is certainly arguable that, through such long and uninterrupted practice and usage, which has all along been based on and reflective of the community's prevailing socio-moral values on marriage, Spousal Benefits have been accepted and perceived by Hong Kong society at large to be unique to marriage. Thus if Spousal Benefits were not reserved for married couples only and were to be extended to homosexual partners of civil servants under same-sex marriage contracted overseas where the socio-moral values are markedly different, it would fundamentally or substantially undermine, or perceived by society at large as so undermining, the status of marriage in the social context of Hong Kong when the prevailing socio-moral views still regard heterosexual marriage as the only acceptable form of marriage. By granting same-sex married couples, who are unmarried both under Hong Kong laws and according to prevailing socio-moral values, access to Spousal Benefits, which are unique to marriage, the very status

of marriage would diminish significantly in the eyes of the public at large. Indeed, the public at large might well think that it is a recognition of same-sex marriage by the back door.").

### Drafting history

37.6 The freedom to marry was first provided in Annex I Section XIII para.1, Sino-British Joint Declaration. Article 37 is substantially the same as the December 1987 version of Basic Law (Article 36 in 1987), save for the reference to "the freedom of marriage of Hong Kong residents" rather than "the freedom of Hong Kong residents to marry."

A drafting committee member observed that the Basic Law "should provide that residents of HKSAR should not be compelled to practice family planning or abortion": *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.96. The consultative committee also noted there was reservation that the right to raise a family may mean that each family may only bring up one child: *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.329.

## Article 38

Hong Kong residents shall enjoy the other rights and freedoms safeguarded by the laws of the Hong Kong Special Administrative Region.

## COMMENTARY

### Drafting history

38.1 This article reflects art.3 of the Sino-British Joint Declaration, Basic Policies no.5 ("Rights and freedoms…will be ensured by law in the Hong Kong Special Administrative Region."). Article 38 had similar wording to its December 1987 version (Article 37), save for the use of word "enjoy" instead of "have," and "safeguarded" instead of "protect."

The consultative committee noted that art.38 "implied that rights and freedoms not safeguarded by law may not be enjoyed. Such wording obviously contravenes the capitalist concept of natural rights and the theory of social contract." It also noted a suggested amendment to specify that Hong Kong residents also enjoy the rights and freedoms safeguarded by the common law: *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.333.





## Article 39

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

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

## COMMENTARY

### Interpretation

39.1 The entrenchment of the ICCPR through art.39 offers critical protection to the basic rights in Hong Kong: (1) *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 14G–H (Li CJ, noting that "Article 39 in this chapter is an important provision for the constitutional protection of individual rights."); (2) *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743, [6] (Chan PJ, "[t]his Ordinance was enacted for the purpose of implementing a treaty obligation by incorporating into the domestic law of Hong Kong the provisions of the ICCPR as applied to Hong Kong and is aimed at providing for the protection of these fundamental human rights, which are now entrenched by BL art.39.").

### Relationship to other constitutional rights

39.2 Article 39 creates three categories of rights: *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, [26] (Li CJ, "A right may be provided for (i) in both the Basic Law and the Bill; or (ii) only in the Basic Law and not in the Bill; or (iii) only in the Bill but not in the Basic Law. An example of (i) is the freedom of speech or the freedom of expression. It is to be found both in the Basic Law (art.27) and in the Bill (art.16). Here, one is concerned with the right to travel and the right to enter conferred on non-permanent residents. These rights are an example of (ii) above. They are not provided for and are additional to those in the Bill. They are created by the Basic Law and are only provided for therein.").

Further, art.39 should also be read alongside art.11, which states "No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law."

**Interpreting restrictions on the three categories of rights**

39.3 In the case of rights found in both Hong Kong Bill of Rights Ordinance and the Basic Law, any restriction is subject to the justification test derived from international and comparative jurisprudence. However, permissible restrictions rights found exclusively in the Basic Law will depend on the nature and subject matter of the rights in issue: *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, [28] (Li CJ, "But where as in the present case, one is concerned with rights conferred by the Basic Law, which are not found in and are additional to those provided for by the ICCPR as applied to Hong Kong, art.39(2) does not imply that such rights may be freely qualified or limited simply by restrictions which are prescribed by law. In the context of rights contained only in the Basic Law, the second requirement in art.39(2), which any purported restriction must satisfy, has no application because the rights in question are conferred by the Basic Law and not by the ICCPR as applied to Hong Kong. But it does not follow that rights found only in the Basic Law can be restricted without limitation provided the restrictions are prescribed by law. The question of whether rights found only in the Basic Law can be restricted and if so the test for judging permissible restrictions would depend on the nature and subject matter of the rights in issue. This would turn on the proper interpretation of the Basic Law and is ultimately a matter for the courts.").

**39.4 A "generous" interpretation should be given to the rights in Article 39**

***Nature of generous approach***

39.4.1 Chapter III rights are fundamental rights, and a generous approach, in their appropriate context, should be adopted to the interpretation of those rights whilst restrictions to them should be narrowly interpreted: (1) *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 28I–29A (Li CJ, "Chapter III of the Basic Law [contains] the constitutional guarantees for the freedoms that lie at the heart of Hong Kong's separate system. The courts should give a generous interpretation to the provisions in Chapter III that contain these constitutional guarantees in order to give to Hong Kong residents the full measure of fundamental rights and freedoms so constitutionally guaranteed."); (2) *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442, 457B (Li CJ, "In considering the extent of a restriction, it is well settled that any restriction on the right to freedom of expression must be narrowly interpreted."); (3) *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, 223–224 (Li CJ, "The exercise of interpretation requires the courts to identify the meaning borne by the language when considered in the light of its context and purpose. This is an objective





exercise. Whilst the courts must avoid a literal, technical, narrow or rigid approach, they cannot give the language a meaning which the language cannot bear. As was observed in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 at p.329E, a case on constitutional interpretation: 'Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language.' As the Court held in *Ng Ka Ling* (at p.29A-C), the courts should give a generous interpretation to the provisions in Chapter III that contain constitutional guarantees of freedoms that lie at the heart of Hong Kong's separate system."); (4) *Comilang Milagros Tecson v Director of Immigration* [2018] 2 HKLRD 534, [66] (Poon JA, "It is now firmly established that in construing the BL, the court adopts, under the common law, a purposive approach. In particular, for the provisions in Chapter III concerning fundamental rights and freedoms, the court gives them a generous interpretation. However, it does not mean that the court will construe the BL provisions in vacuum: *Santosh Thewe v Director of Immigration* [2000] 1 HKLRD 717, *per* Stock J (as Stock NPJ then was) at p.721D-G, quoting *Secretary for Justice v Oriental Press Group Ltd* [1998] 2 HKLRD 123, *per* Chan CJHC and Keith J (as their Lordships were) at pp.164J–165B. In adopting the purposive approach, the court must have regard to the language of the text in the light of the relevant context and purpose with, where necessary, the assistance of internal and external aids to interpretation.").

However, a generous interpretation cannot be unbridled from the plain text, context and drafting history: *Comilang Milagros Tecson v Director of Immigration* [2018] 2 HKLRD 534, [66]–[67] (Poon JA, "As Li CJ explained in his seminal judgment on the common law approach to interpretation of the BL in *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 at pp.223–225: (1) Subject to any binding interpretation by the National People's Congress Standing Committee, in interpreting a particular provision of the BL, the court construes the language of the text to ascertain the legislative intent as expressed in the language objectively; (2) The court does not construe the language in isolation. It considers the language used in the text in the light of its context and purpose. Put another way, the court ascertains the meaning borne by the language when considered in light of its context and purpose; (3) Whilst in interpreting the provisions in question, the court must avoid a literal, technical, narrow or rigid approach, it cannot give the language a meaning which the language cannot bear; (4) There are two kinds of aids to interpretation: internal and external aids. As its name suggest, the internal aids are derived from what is found within the BL, including provisions in the BL other than the one in question and the Preamble. External aids are external materials which throw light on the context or purpose of the BL or its particular provisions.

Such external materials, generally speaking, include the Joint Declaration, the Explanations on the BL (draft) given at the National People's Congress on 28 March 1990 shortly before its adoption on 4 April 1990, the state of domestic legislation at that time and the time of the Joint Declaration, materials brought into existence prior to or contemporaneous with the enactment of the BL, although it only came into effect on 1 July 1997. (The list of external materials is of course not exhaustive.)…It is further well settled that the context and purpose are to be identified and considered in the first instance and are not merely at some later stage when ambiguity may be thought to arise after a 'natural and ordinary meaning' of the text has been identified: *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45, *per* Ma CJ at [77], quoting Sir Anthony Mason NPJ in *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, [63].").

***Basic Law as a "living instrument" and irrelevance of "societal consensus"***

39.4.2 Interpretation of rights should be done so as to meet the needs of Hong Kong society: (1) *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 29 (Li CJ, "As is usual for constitutional instruments, it uses ample and general language. It is a living instrument intended to meet changing needs and circumstances."); (2) *ZN v Secretary for Justice* [2018] 3 HKLRD 778, [75] (Cheung CJHC, "Constitutional and human rights protection must move with the times to stay relevant to contemporary problems and needs. Very often, other possible ways of dealing with the contemporary situation, such as amending the constitutional or human rights instrument concerned, or making a supplemental or even new instrument, may prove to be too slow, too difficult or even impossible. In those circumstances, construing the instrument as a living one, giving its provisions meanings beyond what was originally intended, may be the only feasible solution. Therefore, within reasonable bounds, this approach to the interpretation of constitutional and human rights instruments as a living instrument should be embraced. I say 'within reasonable bounds' because it must be firmly borne in mind that what is involved is interpretation, not 'divination': *Matadeen v Pointu* [1999] 1 AC 98, 108 F/G, *per* Lord Hoffmann, quoting from Kentridge AJ in *State v Zuma* 1995 (4) BCLR 401, 412. A provision, even a provision in a living instrument, simply cannot be given a meaning that its language cannot bear. When that is the case, nothing short of an amendment of the instrument may do (apart from making a supplemental instrument or even a new one).").

It is possible that a "living interpretation" method comprises two aspects, looking both to the contemporary needs of Hong Kong society alongside international developments: *ZN v Secretary for Justice* [2018] 3 HKLRD 778,





[76] (Cheung CJHC, "This brings me to this immediate point. Construing an instrument beyond its original intended meaning in the way described above is justified primarily by one consideration, that is, the contemporary situation, problem or issue. If possible, an instrument should be construed so as to preserve its relevance to the present day world. Giving a provision in a living instrument a generous interpretation in order to adequately meet the contemporary situation and needs of society provides both the justification for and limitation to the approach under discussion. In other words, it is a relevance-driven exercise, subject to the boundaries set by the language used which I have just described. Relevance, in this context, may be gauged primarily at two levels, that is, the contemporary need of society; and the relevant international developments...").

A long-held position in interpreting the Basic Law would seem to require special reasons to depart from it: *Leung Sze Ho Albert v Bar Council of Hong Kong Bar Association* [2016] 5 HKLRD 542, [61] (Poon JA, "When in a particular case the court is asked to depart from a long-held position in interpreting the Basic Law, such as the concept of marriage in *W v Registrar of Marriages*, the court will approach the matter with extreme caution to ensure that such departure is truly warranted so as to reflect the underpinning societal changes and realities. Otherwise, the court will act beyond its constitutional role by writing new, or rewriting existing, social policy in the guise of constitutional interpretation. Introducing changes to social policy is the exclusive function of the executive branch of the government or the legislature which the court cannot usurp.").

However, there will be a limit to which the views of society will be taken into account in the construction of a right. In *W v Registrar of Marriages* [2010] 6 HKC 359, [188]–[191], Cheung J argued that the right to marry should be defined in accordance with "societal consensus," drawing on the "margin of appreciation" doctrine used by the ECtHR. This approach to rights interpretation was subsequently disavowed by the CFA—see *W v Registrar of Marriages* (2013) 16 HKCFAR 112, [114] (Ma CJ and Ribero PJ, "[E]ven assuming that such consensus can somehow be gauged. In the first place, we do not consider that the practice of the ECtHR in seeking a European consensus when considering the margin of appreciation has any bearing on the Court's role in interpreting the HKSAR's constitution in a case like the present."); [115] ("There is, moreover, a more fundamental objection to the consensus argument…[W]e of course accept that the Basic Law and the Hong Kong Bill of Rights are living instruments intended to meet changing needs and circumstances. However, it is one thing to have regard to such changes as a basis for accepting a more generous interpretation of a fundamental right and quite another to point to the absence of a majority consensus as

a reason for denying recognition of minority rights."); [116] ("Reliance on the absence of a majority consensus as a reason for rejecting a minority's claim is inimical in principle to fundamental rights."). See also Bokhary NPJ at [219] ("The Registrar of Marriages also raises the question of societal consensus in Hong Kong, saying that there is no evidence before the Court of any such consensus in favour of a post-operative transsexual marrying in the reassigned capacity. That is so, but nor is there any evidence of any such consensus against such a course. On a matter like this, it is doubtful that gathering and presenting reliable evidence of any societal consensus one way or the other would be at all easy."); [220] ("Moreover, it is to be borne in mind that the present exercise is not to be confused with developing the law to meet new expectations. What is involved is a constitutionally guaranteed human right. One of the functions-perhaps by far the most important one-of constitutionally guaranteed human rights is to protect minorities. Why is there any need to guarantee a right to marry? After all, no society is likely to put impediments in the way of the majority entering into marriages as they like. The greatest and most urgent need for constitutional protection is apt to be found among those who form a minority, especially a misunderstood minority.").

### Uses of comparative jurisprudence

**39.5** Since art.39 entrenches the Hong Kong Bill of Rights Ordinance and a number of international instruments, courts may take into account established principles of international jurisprudence, as well as decisions of national and international courts and tribunals on substantially similar provisions in international treaties and domestic constitutions: (1) *China Field Ltd v Building Appeal Tribunal (No 2)* (2009) 12 HKCFAR 342, [79] (Millett NPJ, "The status of English and other common law decisions as binding precedents in Hong Kong was authoritatively set out by [...] CJ in this Court in *Solicitor (24/07) v Law Society of Hong Kong*. The effect of that case may be shortly stated. Decisions of the Privy Council on Hong Kong appeals before the 1 July 1997 remain binding on the courts of Hong Kong. This accords with the principle of continuity of the legal system enshrined in Article 8 of the Basic Law... It is of the greatest importance that the courts of Hong Kong should derive assistance from overseas jurisprudence, particularly from the final appellate courts of other common law jurisdictions. This is recognised by Article 84 of the Basic Law."); (2) *HKSAR v Tsui Ping Wing* [2000] 3 HKC 247 (Burrell J, "The court may seek guidance when interpreting the Bill of Rights from decisions in other common law jurisdictions... [T]wo caveats should be added. Firstly, the actual language of the provisions under scrutiny in other countries will invariably differ from jurisdiction to jurisdiction. Secondly, the countries





themselves differ and their decisions should be viewed against their own backgrounds, histories and cultures. In other words, when considering the many learned judgments from the highest courts in the USA, Canada, the UK, Australia and so on, one must not lose sight of the issue placed in its Hong Kong context.").

There has been a tendency for the Hong Kong courts to look to jurisprudence from the European Court of Human Rights in the construction of rights under the Basic Law and the Hong Kong Bill of Rights Ordinance. Occasionally, the courts have preferred interpretations of the ECtHR over the Human Rights Committee, even though the latter bears responsibility for interpreting the ICCPR (being the instrument that art.39 enshrines and which is incorporated in the Hong Kong Bill of Rights Ordinance): *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237, [90] (Ribeiro PJ, noting a preference for the ECtHR approach in the construction of a particular right given that the "HRC has evidently fallen behind the European court in developments in this area"). However, another approach (in the minority) has been to focus on HRC interpretations in the construction of Basic Law and the Hong Kong Bill of Rights: *ZN v Secretary for Justice* [2018] 3 HKLRD 778, [100] (Cheung CJHC, as to whether human trafficking was prohibited under art.4 of the Hong Kong Bill of Rights, "The present case, in my view, is a prime example where this court must approach the relevant jurisprudence from the European Court of Human Rights with great caution. Whilst the European Court in *Rantsev* emphasised that human trafficking is a global phenomenon calling for measures to combat it and that the European Convention has to be construed as a living instrument accordingly, understandably, it looked at matters from the European prospective."); [101] ("In Hong Kong, however, the relevant domestic as well as international settings are quite different... What we have is a provision based on the ICCPR, of which the UN Human Rights Committee is the body set up specifically to monitor implementation by its state members. As will be elaborated on, thus far, there has not been any clear, let alone detailed, analysis of the position regarding the true scope of application of art.8 of the ICCPR, in terms of human trafficking (or modern slavery), or human trafficking for forced labour, from the UN Human Rights Committee. Nor have we been cited any cases from jurisdictions where the ICCPR is applicable, which give art.8 of the ICCPR an expansive interpretation...By asking us to adopt the expansive interpretation, Mr Husain is in effect inviting us to make law not only in relation to art.4 of our Hong Kong Bill of Rights, but also art.8 of the ICCPR.").

See also art.84. For consideration of the use of comparative law in Hong Kong, see Sir Anthony Mason, "The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong" (2007) 37 HKLJ 299.

## 39.6 Application of International Instruments

### *Constitutional entrenchment of the ICCPR "as applied to Hong Kong"*

39.6.1 Article 39 constitutionally entrenches legislation that implements the ICCPR "as applied to Hong Kong," being the Hong Kong Bill of Rights Ordinance. Thus, though art.39 does not directly refer to the Hong Kong Bill of Rights Ordinance, it in effect entrenches it: (1) *Swire Properties Ltd v Secretary for Justice* (2003) 6 HKCFAR 236, [53] (Bokhary PJ, that "[the] Bill of Rights is entrenched by art.39 of our constitution the Basic Law."); (2) *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381, [53] (Sir Anthony Mason NPJ, that "[the] Hong Kong Bill of Rights Ordinance provides for the incorporation into the laws of Hong Kong of the provisions of the ICCPR as applied to Hong Kong. The incorporated provisions are contained in the Hong Kong Bill of Rights (the Bill) which is set out in Part II of the Ordinance. Articles 5(1), 11(1), 12 and 22 of the Bill incorporate the provisions of arts.9.1, 14.2, 15.1 and 26 of the ICCPR in the same terms. Accordingly, the provisions of the Bill are the embodiment of the ICCPR as applied to Hong Kong…").

See also S Young, "Restricting Basic Law Rights in Hong Kong" (2004) 34 HKLJ 109, [110] ("[r]ather than becoming the exclusive source of constitutional rights, the Basic Law engrafts the rights and freedoms in the ICCPR as applied to Hong Kong onto itself according to the terms of Article 39."); M Ramsden, "Reviewing the United Kingdom's ICCPR Immigration Reservation in Hong Kong Courts" (2014) 63(3) ICLQ 635 ("where the ICCPR is implemented into domestic law, pursuant to article 39(2) such legislation is…endowed with a special legal status, treated as a 'constitutional statute,' entrenched for the purpose of monitoring restrictions on the ICCPR arising from legislative or government acts.").

The words "as applied to Hong Kong" refer to the applicable human rights treaties not as they are written, but to their specific application and history in Hong Kong. This includes reservations made to the ICCPR and the other relevant international treaties incorporated under Article 39: (1) *Santosh Thewe v Director of Immigration* [2000] 1 HKLRD 717, 721I–722B (Stock J, "The words 'as applied to Hong Kong' are crucial. There has been a reservation in respect of Hong Kong to the following effect: The Government of the United Kingdom reserve the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may deem necessary from time to time…"); (2) *GA v Director of Immigration* (2014) 17 HKCFAR 60, [29] (Ma CJ, "(2) … As a matter of international law, the Reservation evidenced the terms that the United Kingdom Government were prepared to enter into the ICCPR: the Covenant only applied subject to the Reservation. When in 1976, the





United Kingdom Government acceded to the terms of the ICCPR, it also did so for its then dependent territories, including Hong Kong. Thus, as far as Hong Kong was concerned, the ICCPR could only ever apply subject to the Reservation. Further, whatever might have been the reason for the United Kingdom itself to enter the Reservation, as far as Hong Kong was concerned, the significance of the Reservation was to enable the Hong Kong Government to deal with immigration matters, specifically to have in place legislation 'which the Government may deem necessary to enact to govern entry into, stay in and departure by persons who do not have the right to enter and remain in Hong Kong.' It was against this background that the HKBORO was enacted. After the resumption of the exercise of sovereignty on 1 July 1997, when the Basic Law came into effect, Article 39(1) made it clear that the ICCPR was effective only 'as applied' to Hong Kong. The ICCPR therefore only applies in Hong Kong subject to the Reservation…").

"As applied to Hong Kong" does not mean "as lawfully applied to Hong Kong," with "lawfully" to be adjudged according to international law or any other international bodies: *Ubamaka v Secretary for Security* [2011] 1 HKLRD 359, [3] (Stock V-P, "In this case, various other suggestions have been made, with which Fok J deals in detail, including one that would have us read it as saying 'as lawfully applied to Hong Kong,' with 'lawfully' to be adjudged according to international law. An implication of that argument, or perhaps a variation on the theme, is that 'applied to Hong Kong' means as applied by international law or, possibly, as determined by the Human Rights Committee of the United Nations to apply to Hong Kong."); [4] ("It means none of those things. It means, rather, the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong by the Government of the United Kingdom in 1976, and as intended to remain in force in relation to Hong Kong after 1 July 1997 by reason of the PRC's Communication of 20 June 1997 to the Secretary General of the United Nations.") and at [136] (Fok J, "In any event, it is not necessary here to address and resolve the question of whether that distinction in international law is valid, since no such argument can arise at the domestic level, with which this judgment is concerned, since the courts of Hong Kong are required to apply art.39 of the Basic Law and s.11 of the Hong Kong Bill of Rights Ordinance.").

### *Extent of application of ICESCR*

39.6.2 The extent to which art.39(1) applies the provisions of the ICESCR to Hong Kong depends on the UK Government's subjective intention and understanding rather than an objective question of international law: *MA v Director of Immigration* (HCAL 10, 73, 75, 81 and 83/2010, [2011] HKEC 28), [50] (Cheung J, "What matters is the extent to which article 39(1) applies the provisions of the ICESCR to Hong Kong under our Basic Law.

Section 21 of the Oaths and Declarations Ordinance should therefore apply and operate to disqualify [the candidates] from continuing to be a LegCo member, and the court should proceed to declare as such.").

The Court of Appeal concurred, finding that art.104 imposes a constitutional requirement on putative legislative councillors, that the Interpretation makes it clear that disqualification for failure to take the oath is automatic, and that it was clear the candidates had failed to take the oath as required: *Chief Executive of the HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460, [27]–[28] (Cheung CJHC, "When taking an oath, no less a promissory oath such as the LegCo Oath, both the form and the substance matter greatly. The requirement under article 104 is plainly designed to secure the genuine, solemn and sincere declaration and pledge by the holders of the important offices mentioned in that article to do their utmost, in accordance with the Basic Law, to discharge the high responsibilities entrusted to them in running the Special Administrative Region in their respective roles assigned under the Basic Law. Article 104 clearly lays down a constitutional requirement that an oath must be taken in accordance with what is required under that article. Moreover, it says 'when assuming office,' the oath must be taken. It must mean that taking the oath is a prerequisite and precondition to the assumption of office. All of this is now put beyond doubt by the Interpretation."); [29] ("The Interpretation gives the true meaning of article 104. Paragraph 2(3) of the Interpretation specifically sets out the consequence of an oath taker's declining to take the relevant oath – automatic disqualification, as part of the true meaning of article 104."); [41]–[42] ("On the facts, there can be no dispute that both Leung and Yau have declined respectively to take the LegCo Oath. They have put forward no argument to dispute this. Nor can they. There can be no innocent explanation for what they uttered and did on 12 October 2016. What has been done was done deliberately and intentionally. This conclusion, reached by the judge after careful consideration, is unassailable. As a matter of law and fact, Leung and Yau have failed the constitutional requirement. They are caught by paragraph 2(3) of the Interpretation as well as section 21 of the Ordinance which gives effect to the constitutional requirement. Under the former, they were automatically disqualified forthwith from assuming their offices. Under the latter, they 'shall ... vacate [their respective offices].' There is therefore no question of allowing them to retake the LegCo Oath.").

In denying further leave to appeal, the Appeals Committee of the Court of Final Appeal found the Interpretation to be dispositive of the issue: *Yau Wai Ching v Chief Executive of HKSAR* (2017) 20 HKCFAR 390, [36] (The Appeal Committee, "we are satisfied that the Interpretation is clear in its scope and effect, that disqualification of [the candidates] is the automatic consequence





of their declining or neglecting to take the Legco oath, and that it is binding on the courts of the Hong Kong Special Administrative Region as regards the true construction of Art.104 at the material time when [the candidates] purported to take their oaths.").

The Government subsequently successfully obtained the removal of four more candidates on the same ground: *Chief Executive of the HKSAR v Nathan Law Kwun Chung* (HCAL 224/2016), *Chief Executive of the HKSAR v Leung Kwok Hung* (HCAL 225/2016), *Chief Executive of the HKSAR v Lau Siu Lai* (HCAL 226/2016), *Chief Executive of the HKSAR v Yiu Chung Yim* (HCMP 3378/2016), all heard together before Au J in *Chief Executive of HKSAR v President of Legislative Council* [2017] 4 HKLRD 115, [96] (Au J, "Both as a matter of express requirement set out in the Interpretation, and as a matter of common law, it is a legal requirement in Hong Kong that the oath taker must take the oath prescribed under Art.104 and the relevant provisions of the Oaths and Declarations Ordinance both in form and in substance, and that the oath taker must faithfully and sincerely believe in and commit himself to the obligations provided in the oath at the time when taking it.").

For academic commentary see J Chan, "A Storm of Unprecedented Ferocity: The Shrinking Space of the Right to Political Participation, Peaceful Demonstration, and Judicial Independence in Hong Kong" 2018 16(2) International Journal of Constitutional Law 373; S Hargreaves, "Grinding Down the Edges of the Political Speech Right in Hong Kong" Brooklyn Journal of International Law (forthcoming, 2019); PY Lo, "Enforcing an Unfortunate, Unnecessary, and 'Unquestionably Binding' NPCSC Interpretation: The Hong Kong Judiciary's Deconstruction of its Construction of the Basic Law" (2018) 48 HKLJ 399.

See also discussion at 158.4.

### Legislation

See also Oaths and Declarations Ordinance (Cap.11). **104.3**

### Drafting history

Article 104 has no corresponding provision in the Sino-British Joint Declaration. Similar provisions requiring all the posts mentioned in art.104 to pledge allegiance did not appear in the drafts of Basic Law until the 1988 April version (Article 103 in 1988), which stated "The Chief Executive, principal officials, members of the Executive Council and of the Legislative Council, judges of the courts at all levels and other members of the judiciary in the Hong Kong Special Administrative Region must be sworn in according to law when assuming office." The consultative committee had **104.4**

***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"**

**105.2** 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 Constitution of the Commonwealth of Australia, s.51(xxxi), considered generally in T Allen, *Right to Property in Commonwealth Constitutions* (CUP, 2000).

**Article 105 could recognise legitimate expectations of property rights**

**105.3** 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, "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"

105.4 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"

105.5 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).

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,

## COMMENTARY

### Legislation

140.1 Copyright Ordinance (Cap.528).

### Treaties

140.2 Hong Kong joined the WIPO Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) on 15 October 1992; as of 1 July 1997 China's membership also applies to Hong Kong, per art.153. Likewise, after China acceded to the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty on 9 June 2007, the Government of the People's Republic of China decided that the WIPO Copyright Treaty would apply to Hong Kong with effect from 1 October 2008, in accordance with art.153.

Hong Kong's membership in the WTO also requires compliance with the Agreement on Trade Related Aspects of Intellectual Property Rights.

### Drafting history

140.3 Following the first draft, the consultative committee noted a suggestion that a new prerequisite of "on the basis of emphasizing national integrity and ethnic morals" should be added. In addition, there was suggestion that other than authors, art.140 should protect other artists that engages in the creation and performance as well. There was also suggestion to require the explicit protection of copyright and other intellectual property rights in the article, rather than leaving them to the realm of policymaking: *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.242–243 (Chinese version).

# ARTICLE 141

The Government of the Hong Kong Special Administrative Region shall not restrict the freedom of religious belief, interfere in the internal affairs of religious organisations or restrict religious activities which do not contravene the laws of the Region.

Religious organisations shall, in accordance with law, enjoy the rights to acquire, use, dispose of and inherit property and the right to receive





financial assistance. Their previous property rights and interests shall be maintained and protected.

Religious organisations may, according to their previous practice, continue to run seminaries and other schools, hospitals and welfare institutions and to provide other social services.

Religious organisations and believers in the Hong Kong Special Administrative Region may maintain and develop their relations with religious organisations and believers elsewhere.

## COMMENTARY

### Meaning of "according to previous practice"

141.1 Article 141 draws no distinction between religions. Nor does it differentiate on the basis of organisational size or distinguish between seminaries, schools, hospitals, welfare institutions and social services. Article 141 equally protects the freedom to believe in no god, to practice no religion; the freedom of atheism: *Catholic Diocese of Hong Kong v Secretary for Justice* (2011) 14 HKCFAR 754, [101] (Bokhary PJ, concurring, "Freedom of religion is a freedom to follow any faith or none. Neither belief of any kind nor unbelief is officially imposed or promoted.").

### What is a religion?

141.2 For indicia of "a religion," see: *Church of the New Faith v Commissioner of Pay-Roll* (1982) 154 CLR 120, [174] (Wilson and Deane JJ, "One of the more important indicia of 'a religion' is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has 'a religion.' Another is that the ideas relate to man's nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth, and perhaps more controversial, indicium… is that the adherents themselves see the collection of ideas and/or practices as constituting a religion."); adopted in *Chu Woan Chyi v Director of Immigration* (HCAL 32/2003, [2007] HKEC 553). See also *Kan Hung Cheung v Director of Immigration* (HCAL 74/2007, [2008] HKEC 244). See also 32.2.1.