view, citing conflict with the fundamental rights provisions of the Basic Law where the Basic Law is intended to be the supreme law in Hong Kong.[184] The courts have largely avoided this issue by often mentioning the Hong Kong Bill of Rights in the same breath as the ICCPR and the Basic Law's fundamental rights provisions virtually as if these were interchangeable.

3.116 Two prominent issues have had to do with democratic reform and the place of economic, social and cultural (ESC) rights. They deserve at least passing treatment.[185] In the case of democratic reform, the issue arises in the following way. If art.25 of the ICCPR is a part of the law of Hong Kong, that would then suggest a right to universal, equal suffrage. However, the Government's response to criticism from the Human Rights Committee (HRC) is that this is a domestic matter, it is subject to domestic law and that so far as domestic law is concerned, art.158 of the Basic Law authorises the NPCSC authoritatively to interpret the Basic Law.

3.117 The issue therefore raises a potential conflict between international and national law; not just on the international plane (where domestic law would not excuse an international violation) but also within the domestic legal order of Hong Kong. Assuming that the provisions of the ICCPR have been incorporated into Hong Kong law by virtue of art.39 of the Basic Law, they would possess constitutional status (i.e. the British colonial theory referred to above). However, this does not preclude the NPCSC rendering authoritative interpretations of the ICCPR qua constitutional law and would, on this view, lead to a situation where a domestic authority (in Beijing) is permitted to over-ride an international legal norm which itself is not only incorporated into domestic law but into domestic constitutional law. One possible explanation has been that there is a treaty reservation to art.25(b) which states to the effect that Hong Kong is not obliged to establish an elected "Executive or Legislative Council". The HRC's view however is that the reservation is valid only insofar as Hong Kong did not have, and by virtue of that reservation was not required to have, an elected legislature at the time the reservation was made.[186] But once Hong Kong chose to establish an elected legislature, the reservation is spent and Hong Kong is obligated by treaty to observe the requirements of a right to equal, universal suffrage.[187]

3.118 This debate has therefore also prompted questions about the precise way in which art.25 has been incorporated into the domestic law of Hong Kong. Is it incorporated *sans* the reservation to art.25(b)? If it is incorporated by way of the HKBORO, then the Ordinance expressly incorporates the reservation under s.13:[188]

> "Article 21 [incorporating Article 25 of the ICCPR] does not require the establishment of an elected Executive or Legislative Council in Hong Kong."

3.119 But if it is incorporated under art.39, then art.39 is itself silent on the reservation issue.

3.120 The matter does not end there. Even if one accepts that art.39 is silent, can that silence not amount to acceptance of, even deference to, the views of the HRC about the precise legal scope of the reservation? Compared with the view that the ICCPR was incorporated under

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[184] Andrew Byrnes, "And Some Have Bills of Rights Thrust Upon Them" in P. Alston (ed), *Promoting Human Rights Through Bills of Rights* (Oxford University Press, 2000), 318, 330–337.

[185] See further, Chapters 26 and 29.

[186] See e.g. UN Doc. CCPR/C/HKG/CO/2, 21 April 2006, para.18, reiterating its view in UN Doc. CCPR/C/79/Add.57, 9 November 1995, [19]. See also Chapter 29 of this book.

[187] *Ibid.*

[188] HKBORO s.13. Observe however that even here, the terms of s.13 remains susceptible to the HRC's analysis.

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HKBORO instead (as opposed to Basic Law art.39), the case for saying that the reservation to art.25 is subject to domestic constitutional interpretation and norms would be stronger.

3.121 One way out of these conundrums, from the Government's point of view, may be to suggest that the wording of art.39 itself refers to the incorporation of the ICCPR under the HKBORO. The language of art.39 is as follows:

> "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."

3.122 Another argument is that the Executive branch's reading of Hong Kong's treaty obligations should receive deference (e.g. the doctrine that the courts and the executive branch should speak with one voice). Critics may counter that it is precisely where an international legal rule is clear (e.g. where there is a HRC pronouncement on a specific country report) and a constitutional rule is involved (art.39), the courts should never defer to the executive branch.

3.123 Two judgments cast light on the Hong Kong Government's position, and that of the courts presently. In *Chan Yu Nam v Secretary for Justice*,[189] Cheung J held that at the time of the Basic Law's enactment, a fully elected LegCo had not been introduced by the colonial Government. Therefore the Basic Law's incorporation of the ICCPR by virtue of art.39 does not refer to the colonial Government's subsequent introduction of an elected LegCo in 1995 but to the ICCPR as it applied as of 1990. In *Ubamaka Edward Wilson v Secretary for Security*,[190] Stock V-P took the critical date to be that when Britain became party to the ICCPR in 1976. Citing both judgments, the Government's position could perhaps be read to suggest that art.39 refers directly to the law in Hong Kong as reflected in the reservation in 1976, or in any case, as at 1990.[191] But it is difficult to see how a treaty reservation could be evidence of Hong Kong law, or at any rate how the Basic Law refers to the UK Government's treaty reservation in art.39's reference to Hong Kong law as it applied at the time when the Basic Law was enacted. In any case, if art.39 referred directly to a treaty reservation, it is difficult to see how the proper construction of that reservation as a matter of international law therefore becomes irrelevant.[192] It would be equally difficult to see, and this is the more fundamental issue, how art.39 could excuse a violation of an international obligation. The better approach may be to examine the proper construction of the reservation, which states:[193]

> The Government of the United Kingdom reserves the right not to apply sub-paragraph (b) of article 25 in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong.

3.124 As such, the language of the reservation suggests quite plainly that once electoral arrangements are "established", be it for the Executive or the Legislative Council, the

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[189] [2010] 1 HKC 493.

[190] (CACV138/2009, [2011] HKEC 716).

[191] Third Report of the HKSAR of the PRC in the light of the ICCPR, paras.25.1–25.5.

[192] *Contra* Fok JA in *Ubamaka Edward Wilson v Secretary for Security*.

[193] Available from the UN Treaty Database at www.treaties.un.org.

are automatically a part of the common law in Hong Kong.[208] *FG Hemisphere Associates LLC v Democratic Republic of the Congo* confirms that view:[209]

> "... when customary international law changes, the common law incorporates those changes, save to the extent that the newly formulated customary international law conflicts with domestic law. Although the judgment of Lord Denning in *Trendtex* has been the subject of critical scrutiny in the course of this appeal, there is no argument with his proposition that:
>
> It is certain that international law does change ... and the courts have applied the changes without the aid of any Act of Parliament ... Seeing that the rules of international law have changed—and do change—and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court—as to what was the ruling of international law 50 or 60 years ago—is not binding on this court today. International law knows no rule *of stare decisis*. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change—and apply the change in our English law—without waiting for the House of Lords to do it."

3.129 For the moment, this proposition can be said to be the law in Hong Kong. Indeed, notwithstanding the CFA's ruling in *Democratic Republic of the Congo v FG Hemisphere Associates LLC*, recent Hong Kong case law generally continues to attest to the growing "internationalist" attitude of the territory's judiciary which arguably, more than the traditional monism-dualism dichotomy,[210] conditionally, but crucially, impinges on the relationship between international law and domestic law. Notably, the willingness of local judges to engage in arguments grounded in international law and international jurisprudence, embracing in particular international human rights rules and practices (at times venturing even further), increasingly and amply manifests itself in court deliberations and decisions.[211]

3.130 Prominent examples include a remarkable[212] recognition of the status of the principle of *non-refoulment* of refugees as a "universal norm of customary international law";[213] (and

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[208] See further, Mushkat, *One Country,* 167–171.

[209] [2010] 2 HKLRD 66, [55].

[210] The case for "revisiting" the monism-dualism dichotomy is highlighted in Magnus Killander, (ed), *International law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press, 2010) (in light of evidence that courts in many dualist countries in Africa use international law to a larger degree than explicitly monist countries such as those in Francophone Africa, where direct applicability of international law is opposed and little use is made of it in interpreting constitutional provisions).

[211] For an examination of relevant cases see Albert HY Chen, "International Human Rights Law and Domestic Constitutional Law: Internationalisation of Constitutional Law in Hong Kong" (2009) 4 National Taiwan University Law Review 237–333. For discussion of more recent cases see Michael Ramsden, "Using International Law in Hong Kong Courts", fn 180 above (observing an overall approach "consistent with orthodox constitutional and dualist principles" but suggesting that "a broader use of international law was warranted in the interpretation of Hong Kong's Basic Law", 269).

[212] A duty of *non-refoulment* based on customary international law is rarely asserted by courts. See James C. Hathaway, "Leveraging Asylum" (2009–2010) 45 Texas International Law Journal 503, 527. See also Oliver Jones, "Customary Non-Refoulement of Refugees and Automatic Incorporation into the Common Law: A Hong Kong Perspective" (2009) 58 ICLQ 443–468, 450 (noting that Hartmann J "became the first judge, at least at common law, to recognise customary *non-refoulement* of refugees").

[213] *C v Director of Immigration* [2008] 2 HKC 165 (following a comprehensive review of both relevant international instruments and a full range of scholarly positions), Hartmann J concluded that "[o]n balance ... it must be recognised that the principle of *non-refoulment* [as] it applies to refugees has grown beyond the confines of the Refugee Convention and has matured into a universal norm of customary international law." *Ibid.*, [113]. For an insightful analysis of the case see Oliver Jones, fn 188 above. See also Kelly Loper, "Human Rights, Non-refoulement and the Protection of Refugees in Hong Kong" (2010) 22 International Journal of Refugee Law 404–439.

a constitutional right in Hong Kong[214]), the affirmation of the prohibition of torture and other forms of inhuman or degrading treatment as peremptory norms of international law (*jus cogens*), barring any derogation/reservation;[215] the determination that the "general, automatic and indiscriminate restrictions" imposed by the Legislative Council Ordinance (Cap.542) on prisoners' right to vote in the LegCo elections amount to a breach of constitutional rights;[216] the holding of the Insider Dealing Tribunal to high international standards of procedural due process;[217] and the application of international legal criteria pertaining to the right to "fair and public hearing by a competent, independent and impartial tribunal" to disciplinary proceedings and legal relations between civil servants and the State as their employer.[218]

5. Conclusion

3.131 From this necessarily brief survey, we have observed the developments in the field of jurisdiction and immunities, wherein the line between the jurisdiction and authority of China and that of Hong Kong may not always be clear. In the years since the Handover, both judicial and Executive activity have gone some way to cast light on swiftly evolving legal principles. There will continue to be differences of opinion in relation to some larger questions, such as whether Executive behaviour in the intervening years has contracted rather than expanded the autonomy of Hong Kong. But these debates need not concern us unduly in this particular context.[219] Our major focus has been on the principles actually applied by the courts. As with any regime of foreign relations law, time has in some key aspects brought greater clarity to Hong Kong's external relations law and, despite the uncertainty that has recently surfaced, will hopefully continue to do so.

3.132 This inevitably remains in certain respects a fluid configuration, as evidenced by the closely scrutinised *Congo* saga; and, even if in a less multi-directional fashion, as reflected in certain aspects of diplomatic immunity and the ongoing discussion about the need for a comprehensive rendition agreement between the Central Government and Hong Kong. By the same token, Denning's view that custom is automatically a part of the common law has thus far not been jettisoned. There persist some ambiguities relating to treaty succession, particularly regarding the precise application of the major human rights treaty obligations under Hong Kong law. These and other pivotal issues in this evolving domain should command bureaucratic, public and scholarly attention in the coming years and ought to be carefully revisited in academic, judicial, and policy settings.

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[214] *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743.

[215] *Ubamaka Edward Wilson v Secretary for Security* [2009] 3 HKC 461 (citing decisions by the European Court of Human Rights and General Comments of the Human Rights Committee to hold inapplicable to art.7 of the ICCPR/art.3 of the Hong Kong Bill of Rights the reservation in relation to immigration legislation).

[216] *Chan Kin Sum v Secretary for Justice* [2009] 2 HKLRD 166. See further, Chapter 29. Interestingly, a total ban on voting by prisoners is applied in many US states, Japan, Singapore and Malaysia. *Ibid.*, [45].

[217] *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170 (relying on the case law of the European Court of Human Rights and the General Comments of the United Nations Human Rights Committee).

[218] *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237 (adopting latest progressive European case law, in preference to the less progressive Human Rights Committee Comments).

[219] See further Roda Mushkat, "Hong Kong's Exercise of External Autonomy: A Multifaceted Appraisal" (2006) 55 ICLQ 945–962.

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which controls them through appointment and removal, will not allow resignation.[47] Because the legislature is dominated by pro-government members, it is difficult if not impossible for it to pass a motion of no confidence to exert pressure on officials to resign. Without universal suffrage for the CE and LegCo elections, there are insufficient institutional incentives for political appointees to hold themselves to public account rather than answering to the CE and Beijing alone.[48] The prediction of POAS critics that in the absence of a democratic framework the adding of a political tier would not only fail to boost public accountability but would also serve to further concentrate political power in the hands of an unelected CE (and the unelected central government that controls him/her), has materialised.[49] The additional layer provides a channel for the Chinese government to control politics in Hong Kong via the CE. One may counter that there was little accountability under the previous system, and hence that the political appointment system is no worse. My response is that under the previous system, senior civil servants, who saw themselves as stewards of public interest,[50] functioned as an autonomous bulwark against the CE.[51] Somewhat ironically, that bulwark served as a check on abuses of power by the CE (although the bureaucratic system itself suffers from accountability problems, a point I will come to in the next section). Under the new system, the bulwark has been weakened.

10.017 The second criterion for evaluating the effectiveness of POAS is whether it has allowed the CE to command strong and responsive governance. The system fails on this criterion too, again for systemic reasons. Without democracy, there are insufficient institutional incentives for political appointees to heed public views. Their disconnect from the public explains their gross underestimation of public discontent with the extradition bill in 2019. Nor are political appointees always unified in vision. The statutory bar[52] against the CE belonging to any political party has handicapped the CE's ability to command a united team,[53] resulting in a system that has been described as resembling a "fragmented, multi-party presidential-based system".[54]

10.018 The final criterion is the maintenance of the professionalism and political neutrality of civil servants. In theory, reassigning political tasks from senior civil servants to political appointees could enhance the former's political neutrality. However, preservation of neutrality may depend, *inter alia*, on whether political appointees and civil servants have distinct career paths.[55] In Hong Kong, partly because of the underdevelopment of political parties, the civil service remains a key source of political talent from which the CE can draw when considering political appointments.[56] Senior administrators who wish to advance their political career have an incentive to demonstrate political loyalty at the cost of neutrality.[57] I revisit the issue of political neutrality in the following section on the civil service.

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47 See Cora Chan, "Demise of 'One Country, Two Systems'? Reflections on the Hong Kong Rendition Saga" (2019) 49 HKLJ 447, 454.
48 Wong, "The Civil Service", fn 5 above, 99.
49 See Cheung, "The Quest for Good Governance," fn 32 above, 254.
50 Chor-Yung Cheung, "How Political Accountability Undermines Public Service Ethics" (2011) 20(70) *Journal of Contemporary China* 499, 500; John P Burns and Li Wei, "The Impact of External Change on Civil Service Values in Post-Colonial Hong Kong" (2015) *The China Quarterly* 522, 523; Wong, "The Civil Service", fn 5 above, 92.
51 That senior civil servants were an autonomous political force can be seen in Administrative Officers being dubbed the "AO Party": Wong, "The Civil Service", fn 5 above, 93.
52 Chief Executive Election Ordinance (Cap.569) s.31.
53 Thomas S Axworthy and Herman V Leonard, "The Long March in Hong Kong: Continuing Steps in the Transition from Colony to Democracy" (2007) 33(2) *William Mitchell Law Review* Article 10, 548.
54 Lee and Yeung, "The 'Principled Officials Accountability System'", fn 12 above, 123.
55 See *ibid.*, 123–124.
56 Lee and Yeung, "The 'Principled Officials Accountability System'", fn 12 above, 124; Wong, "The Civil Service", fn 5 above, 89.
57 See Cheung, "How political accountability undermines public service ethics", fn 50 above, 512–513.

3. The Civil Service

(a) Background

10.019 The civil service is, as the government puts it, the "backbone" of the government.[58] Although the power of senior civil servants was eroded by the introduction of POAS, civil servants continue to play a central role in policy formulation and implementation. The civil service constitutes the largest part of the executive by number of staff. As of 31 March 2020, the establishment of the civil service staff numbered 187, 698.[59] Under the Basic Law, civil servants must be permanent residents of Hong Kong, although this stipulation does not apply to foreign nationals appointed as advisers to government departments or overseas experts recruited to fill certain technical and professional posts, nor to certain junior ranks as prescribed by law.[60]

10.020 Inherited from the British system, the organisation of Hong Kong's civil service is based on bureaucracy, which is characterised by high degrees of formalisation (i.e. operates largely through written rules and regulations), centralisation (i.e. power concentrated at higher levels of the hierarchy) and complexity (i.e. large numbers of "subunits, levels and specializations").[61] There are two main layers of organisation: policymaking bureaux and executive departments that implement the policies the bureaux lay down. Most grades are specialised, but Administrative Officers—who constitute a generalist elite who occupy all major policymaking positions in a policy bureau (except for those held by political appointees)—are trained to be generalists rather than specialists to ensure a broader vision for policy formulation.[62]

10.021 Since being rid of corruption in the 1970s (see section 4 below), the civil service has been recognised as a symbol of integrity.[63] In the run-up to the handover, civil servants had also become a manifestation of local self-rule,[64] a core component of the "one country, two systems" framework. The significance that the drafters of the Basic Law attached to a smooth transition of the civil service can be seen in the devotion of a separate—and elaborate—section of the document to "public servants" (the majority of whom are civil servants) and its extensive provisions on the continuity of the civil service system: public servants serving in all Hong Kong government departments before the handover may all remain in employment and retain their seniority with terms no less favourable than before (art.100 of the Basic Law); the pension of retired staff shall remain payable (art.101 of the Basic Law); and the meritocratic system of appointment and promotion shall be maintained (art.103 of the Basic Law). For China, these guarantees of continuity were important for pragmatic purposes: without civil service support, a smooth transition in governance would not have been possible.

10.022 The civil service is managed by the Civil Service Bureau and governed by three main instruments. The Public Service (Administration) Order, issued under art.48(4) of the Basic Law, "sets out the Chief Executive's authority to appoint, dismiss and discipline

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58 Civil Service Code, [1.1].
59 Official website of the Civil Service Bureau of the HKSAR: https://www.csb.gov.hk/english/stat/quarterly/540.html
60 Basic Law arts.99 and 101.
61 Wong, "The Civil Service", fn 5 above, 96, which cited D Rosenbloom & R Kravchuk, *Public Administration: Understanding Management, Politics and Law in the Public Sector* (McGraw-Hill, 5th ed, 2002), Chapter 4 for features of bureaucracy.
62 Wong "The Civil Service", fn 5 above, 92, 96.
63 Anthony B.L. Cheung, "Transformation of the Civil Service System", in Ming K. Chan and Alvin Y. So (eds), *Crisis and Transformation in China's Hong Kong* (ME Sharpe, 2002), 166–167.
64 Cheung, "Transformation of the Civil Service System", *ibid.*, 166–167.

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public servants; to act on representations made by public servants; to make disciplinary regulations; and to delegate certain powers and duties under the Order".[65] It was adapted from provisions in the Letters Patent and Colonial Regulations. The Public Service (Disciplinary) Regulation enacted pursuant to the aforementioned order governs the disciplinary procedures that lead to the removal of civil servants. Finally, the Civil Service Regulations are administrative regulations made by the CE or with his or her authority that regulate the daily management of the civil service. They are complemented by and detailed in internal circulars and circular memoranda.[66]

(b) New public management reforms[67]

10.023 The guarantees of continuity in Hong Kong were put to test by the introduction of New Public Management (NPM) reforms. There are two types of such reforms. The civil service reform introduced in 1999 and the mid-2000s sought to bring the management system used in the private sector into the public sector. The public sector reform that began in the 1980s sought to downsize the government and enlarge the role of market in resource allocation in society.[68]

10.024 Civil service reform was introduced in Hong Kong more as "a reaction to the political and economic difficulties which the government has encountered than [an] attemp[t] to converge with what the more enthusiastic advocates of new public management consider to be a world-wide revolution".[69] As a result of the Asian Financial Crisis in 1997 and the economic consequences of the SARS outbreak in 2003, the government experienced six consecutive years of budget deficits and was pressurised to reduce the cost of the civil service.[70] Meanwhile, the government also faced serious legitimacy crises: public disgust with policy blunders, grievances against the economic downturn and calls for cuts in public salaries to match those in the private sector, to name a few. The proposed civil service reforms included, *inter alia*, pay cuts for civil servants, systems linking pay to performance and the use of more contract staff. The first of these became a subject of litigation, with the legislation passed by the government to cut the salaries of civil servants challenged in a judicial review for violating the guarantee of "no less favourable" employment terms in art.100 of the Basic Law, and the government's decision not to conduct a pay trend survey before enacting the legislation for violating the guarantee of the previous system of pay in art.103 of the Basic Law. On the art.100 argument, the Court of Final Appeal (CFA) held that the provision guaranteed only that the actual amount of pay did not fall below that prior to 1 July 1997; it did not guarantee that there would be no pay cuts. Even before the handover, the government had the power to vary the contract terms of civil servants via legislation. Hence, the enactment of said legislation did not introduce a new (less favourable) term to their

[65] Official website of the Civil Service Bureau of the HKSAR, accessed via https://www.csb.gov.hk/english/admin/overview/22.html (Overview)

[66] *Ibid.* See also *Association of Expatriate Civil Servants of Hong Kong v Chief Executive of Hong Kong* [1998] 1 HKLRD 615 which upheld the procedures laid down in the CE's Executive Order as falling within the meaning of "in accordance with legal procedure" for the purpose of Basic Law art.48(7) ([14]). *Cf Leung Kwok Hung v Chief Executive of HKSAR* (HCAL 107/2005, [2006] HKEC 239) (CFI); (CACV 73, 87/2006, [2006] HKEC 816) (CA), [31]–[38]; *Kong Yunming v The Director of Social Welfare* (2013) 16 HKCFAR 950, [24]–[28].

[67] See generally Ian Scott, *The Public Sector in Hong Kong* (HKU Press, 2010), chs.5 and 6.

[68] Wong, "The Civil Service", fn 5 above, 100. See generally Cheung, "Transformation of the Civil Service System", fn 63 above, 168–177. There is a wide range of non-government public sector organisations. See Scott, *The Public Sector in Hong Kong*, fn 67 above, ch.6.

[69] Scott, *The Public Sector in Hong Kong*, *ibid.*, 95.

[70] *Ibid.*, 87–89.

employment contracts.[71] On the art.103 argument, the same court held that preservation of the system of pay adjustment required only that the system be preserved; it did not require preservation of all elements therein. Under the previous system, the government had the discretion, but was not bound, to consider fair comparison with salaries in the private sector, and thus the decision not to conduct a pay trend survey could not be said to deviate from the previous system.[72]

10.025 On the whole, the civil service reform had little long-term effect. Owing to resistance from civil servants and the improved economic environment by the late 2000s, some of the original proposals, e.g. linking performance to pay, were never fully implemented.[73] In contrast, the public sector reform—which comprised decentralisation, contracting-out and privatisation[74]—has had long-lasting effects. The government has had to strike a balance between efficiency on the one hand and equity and accountability on the other.[75] Even if allowing the market to play a greater role in the delivery of services would increase efficiency, it still might not be justified in the public interest. The soaring rents for retail stalls in public housing estates that resulted from the Housing Authority's divestment of certain retail and car-parking facilities to Link Real Estate Investment Trust, a unit trust listed on the stock exchange,[76] constitutes an example of "how private gain can be maximized at the expense of public interest".[77] Moreover, the government has had to grapple with the accountability problems that arose as a result of decentralisation and privatisation.[78]

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(c) Political neutrality

10.026 Amongst the values that civil servants are mandated to uphold,[79] that of political neutrality has been the most contested. The Civil Service Code requires that civil servants "serve the CE and the Government of the day with total loyalty and to the best of their ability, no matter what their own political beliefs are" and "not allow their own personal party political affiliation or party political beliefs to determine or influence the discharge of their official duties and responsibilities, including the advice they give and the decisions or actions they take."[80] This requirement raises various issues, two of which are discussed here.

(i) *Neutrality and political rights*

10.027 The first concerns the search for the appropriate balance between protecting neutrality and civil servants' enjoyment of civil and political rights, including the freedom to express political views and the rights to vote, stand for election and strike, an issue that has been much litigated in other jurisdictions.[81] Civil servants are subject to restrictions on their rights stipulated in regulations and circulars, the content of which has been incorporated

[71] *Secretary for Justice v Lau Kwok Fai Bernard* (2005) 8 HKCFAR 304, [35]–[58].

[72] *Ibid.*, [64]–[81].

[73] Scott, *The Public Sector in Hong Kong*, fn 67 above, 109, 117.

[74] Johannes Chan and Vivian Wong, "The Politics of the Ombudsman: the Hong Kong experience" in Marc Hertogh and Richard Kirkham (eds), *Research Handbook on the Ombudsman* (Edward Elgar, 2018), 91, 96–97

[75] See Wong, "The Civil Service", fn 5 above, 102; also Scott, *The Public Sector in Hong Kong*, fn 67 above, 136–145.

[76] The attempt to divest was unsuccessfully challenged by judicial review: *Lo Siu Lan v Hong Kong Housing Authority* (2005) 8 HKCFAR 363.

[77] Wong, "The Civil Service", fn 5 above, 103.

[78] See Chan and Wong, "The Politics of the Ombudsman", fn 74 above, 96–97.

[79] Civil Service Code, s.3.

[80] *Ibid.*, [3.7].

[81] See e.g. Kenneth Kernaghan, "Political rights and political neutrality: finding the balance point" (1986) 29(4) *Canadian Public Administration* 639.

into their terms of employment. As a general rule, civil servants are barred from engaging in party political activities or using public resources for party political purposes in their official capacity.[82] They may, however, join such activities in their private capacity, subject to them complying with the relevant rules, refraining from "political party activities that might lead to any actual, perceived or potential conflict of interest or bias with their official positions or with the discharge of their duties and responsibilities" and ensuring that their activities "would not compromise, or might not reasonably be seen to compromise, their impartiality… in their official capacity; or cause any embarrassment to the government."[83] Civil servants are prohibited from standing for CE, LegCo and District Council elections, although except for the "restricted group", civil servants may in their private capacities stand for, *inter alia*, election to the Election Committee for the CE.[84] The restricted group comprises four groups of civil servants that are categorically barred from all political activities in the context of Hong Kong. They are directorate grade officers, Administrative Officers, Information Officers and the disciplined officers of the police force.[85] The justification given for this absolute bar is that these are officers in senior level or in positions whose nature of work renders them more prone to allegations of bias.[86] Shortly before the handover, there was an unsuccessful attempt to challenge by judicial review the ban on all directorate grades from taking part in the selection of the first CE.[87]

10.028 The 2019–2020 anti-extradition movement threw into relief the controversy over the scope of the right to demonstrate enjoyable by civil servants. During the movement, a civil servants rally was held,[88] and some civil servants have even been arrested for alleged participation in unlawful protest activities.[89] The government strongly condemned these acts. A civil servant who co-organised the aforementioned rally was reported to have been demoted,[90] raising concerns of political retaliation and promotion based on political patronage rather than merit. Controversies over civil servants' freedom of expression and political rights will likely amplify in the era of the NSL, which, *inter alia*, requires public officers to declare to "uphold the Basic Law" and "swear allegiance to the Hong Kong Special Administrative Region"[91] and disqualifies individuals who have been convicted under the NSL from holding any public office.[92] Prevailing restrictions on civil servants' right to demonstrate may be judicially challenged at some point. Space precludes an in-depth analysis of the relevant legal issues. I highlight only two points.

10.029 First, whether the restrictions are sufficiently precise to satisfy the "prescribed by law" requirement have to be considered in light of the variety of documents setting them out, with potential overlap in scope. Is the relationship between those documents clear? Might, say, more lenient requirements in circulars and codes, be subject to, say, more restrictive requirements in the Civil Service Regulations?

[82] Civil Service Code, [3.7].
[83] *Ibid.*, [3.8].
[84] https://www.csb.gov.hk/english/info/files/Panel20080218_Election_electioneering_e.pdf, [6].
[85] *Ibid.*, [7].
[86] https://www.csb.gov.hk/english/admin/conduct/141.html.
[87] *Senior Non-Expatriate Officers' Association v Secretary for the Civil Service* (1996) 7 HKPLR 91. See Johannes Chan SC, "Basic Law and Constitutional Review: The First Decade" (2007) HKLJ 407, 436.
[88] See e.g. https://www.scmp.com/news/hong-kong/politics/article/3021276/hong-kong-civil-servants-embarrass-government-protest.
[89] See e.g. https://www.scmp.com/news/hong-kong/law-and-crime/article/3027954/second-hong-kong-customs-officer-arrested-over-protest.
[90] https://www.scmp.com/news/hong-kong/politics/article/3088682/hong-kong-protests-union-leader-behind-civil-servant-rally.
[91] NSL art.6.
[92] *Ibid.*, art.35.

10.030 Secondly, in assessing the first and fourth limbs of the proportionality test, the importance of the aims of limiting civil servants' right to demonstrate must be evaluated. Two such aims are: (1) to ensure that implementation of public policy will not be affected by partisan considerations; and (2) to ensure that the public will be confident that this is the case.[93] Whilst (1) may be a legitimate aim, its importance varies with the ability of the government to by-and-large deliver legitimate decisions on the common good. Political neutrality is not an end in itself, but a means to ensure that there will be stable implementation of legitimate decisions on the common good.[94] Its value in democratic jurisdictions is premised upon the assumptions that there are reasonable disagreements about what the common good requires, and that democratic procedure is a legitimate way of resolving such disagreements. Granted such assumptions, civil service neutrality ensures that there will be a machinery to implement legitimate decisions on the common good, regardless of what they happen to be and which political party happens to be in power. The concept of political neutrality could be applicable to non-democratic jurisdictions in which decisions taken are by-and-large legitimate. As for (2), it may also be considered a legitimate aim because, *inter alia*, if the public thinks that implementation of public policy may be affected by partisan considerations, it may have an incentive to not always organize conduct in accordance with such policy. Ensuring of public confidence would be a legitimate aim when the utility of the existence of such confidence outweighs that of the absence of such confidence. Whether it so outweighs and by how much, in turn depend, *inter alia*, on the overall legitimacy of the policies of the regime in question. The foregoing analysis shows that the value of political neutrality varies greatly according to political and social context. The upshot is that one should not blindly use restrictions on civil servants' rights found in other (say, democratic) jurisdictions to justify similar restrictions for Hong Kong.

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(ii) *Neutrality and political patronage*

10.031 The second issue raised by the requirement of political neutrality revolves the extent to which it will be compromised in an environment in which political patronage is apparently increasingly demanded of at least some civil service positions. When the central government makes clear its will in, say, national infrastructure projects, national education, political reform, and national security, it is difficult for any entity within the Hong Kong government to resist it, given the power imbalance between the two.[95] Civil servants may come under increasing pressure to execute orders even if doing so conflicts with their professionalism. The Secretary for Civil Service's remarks in June 2020 that civil servants have "dual identities" as servants not just Hong Kong but of China as well,[96] served to aggravate rather than quell worries that civil service professionalism may be compromised by political pressure.

10.032 The disqualification of pro-independence election candidates by returning officers (who are civil servants) in the aftermath of the Standing Committee of the National People's Congress's 2016 interpretation of art.104 of the Basic Law has raised concerns over how resilient civil service neutrality and professionalism can be in an environment in which interference by a politically powerful Chinese regime in Hong Kong governance is increasingly normalised.[97] Such concerns will only be exacerbated in the era of the NSL, which, *inter alia*, gives the Chinese government indirect influence (e.g. via

[93] See Kernaghan, "Political rights and political neutrality", fn 81 above, 642–646.
[94] *Cf* Cheung, "Public Service Neutrality in Hong Kong," fn 8 above.
[95] See Lee and Yeung, "The 'Principled Officials Accountability System'", fn 12 above, 131.
[96] https://news.rthk.hk/rthk/en/component/k2/1530702-20200607.htm
[97] See Lee and Yeung, "The 'Principled Officials Accountability System'", fn 12 above, 131–132.

the Beijing-appointed CE and Secretary for Justice) over the designation of personnel handling national security cases,[98] and establishes the NSC (comprising a Beijing advisor) responsible for policy-formulation and assessing national security situation.[99] The irony, then, is as civil servants who participate in protests are being criticised for compromising neutrality, the demands on at least some civil service positions appear to undermine this very principle as well. The principle has come under increasing pressure in the fraught political environment of Hong Kong.

4. Independent Commission Against Corruption

(a) Background[100]

10.033 Before the establishment of the ICAC in 1974, corruption was tackled by a specialised unit of the police force, a set-up that failed to stamp out the problem of serious corruption that Hong Kong society then faced, not least because the police themselves were often corrupt. For decades, the colonial government had delayed establishing an independent anti-graft agency. It was not until the late 1960s, when public discontent with the problem became too serious to ignore,[101] and the government's legitimacy had been severely diminished by the 1966 and 1967 riots, that the colonial government took more resolute steps. In 1971, it enacted the Prevention of Bribery Ordinance (POBO), a comprehensive piece of legislation that remains to this day a major legal tool against corruption. The escape in 1973 of Police Chief Superintendent Peter Godber to the United Kingdom (UK) while he was being investigated for corruption sparked a huge public outcry, and provided the ultimate impetus for the establishment of the ICAC. Godber's escape prompted Sir Murray MacLehose, the then governor of Hong Kong, to commission an independent inquiry led by a senior judge, Sir Alastair Blair-Kerr. The inquiry report recommended, *inter alia*, that the power to investigate corruption be detached from the police. In 1974, the Independent Commission Against Corruption Ordinance (ICACO) was enacted, thereby establishing the ICAC. The new commission's bold moves to purge corruption in the police force led to severe tension between the two organisations, culminating in a near mutiny by the police in 1977. As a compromise, Governor MacLehose agreed to a partial amnesty, generally exempting bribery offences committed by the police before 1 January 1977.

(b) Independence

10.034 The ICAC's powers are underpinned by the ICACO, the POBO and the Elections (Corrupt and Illegal Conduct) Ordinance.[102] An oft-mentioned feature of the ICAC is its independence, which was key to its success in turning Hong Kong from a corruption-afflicted society into one of the cleanest jurisdictions in the world. The low level of corruption in Hong

[98] NSL arts.16–18, 44.
[99] *Ibid.*, arts.12–15.
[100] Information in this section is drawn from Ian McWalters and Anne Carver, "Independent Commission Against Corruption", in M.S. Gaylord, D Gittings and H Traver, *Introduction to Crime, Law and Justice in Hong Kong* (HKU Press, 2009), 91–93; Anthony Neoh, "An Impartial and Uncorrupted Civil Service: Hong Kong's Fight Against Corruption in the Past 34 Years" in Christopher Forsyth, Mark Elliott, Swati Jhaveri, Anne Scully-Hill, and Michael Ramsden (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP, 2010), 216–230; Ian McWalters SC and Andrew Bruce SC, *Bribery and Corruption Law in Hong Kong*, (LexisNexis, 4th ed, 2019), Chs.1–2. See also Ian Scott, "The challenge of preserving Hong Kong's successful anti-corruption system" (2017) 6(3) *Asian Education and Development Studies* 227; Ray Yep, "The crusade against corruption in Hong Kong in the 1970s: Governor MacLehose as a zealous reformer or reluctant hero?" (2013) 27(2) *China Information* 197; H.J. Lethbridge, *Hard Graft in Hong Kong: Scandal, Corruption and the ICAC* (OUP, 1985).
[101] See e.g. McWalters and Carver, "Independent Commission Against Corruption", *ibid.*, 91–92
[102] See McWalters and Carver, "Independent Commission Against Corruption", *ibid.*, 101.

Kong is a key feature of the city's lifestyle and systems, and one that distinguishes it from the mainland. The Basic Law recognises that fact by enshrining ICAC's independence: "A Commission Against Corruption shall be established.... It shall function independently and be accountable to the Chief Executive" (art.57 of the Basic Law). The Court of Appeal (CA), in *HKSAR v Lew Mon Hung*,[103] explained that the purpose of this provision is to "affirm that the establishment, existence and function of the ICAC shall be protected by the Basic Law and not be arbitrarily changed by local legislation or other means" and to "confer the ICAC with independence".[104]

10.035 The ICACO stipulates that the head of the ICAC, the Commissioner Against Corruption, who is "subject to the orders and control of the Chief Executive, shall be responsible for the direction and administration of the Commission"[105] and "shall not be subject to the direction or control of any person other than the Chief Executive".[106] ICAC's budget is drawn from general revenue[107] and is approved by the CE, subject to audit by the Director of Audit.[108]

(c) Structure and powers[109]

10.036 As of March 2020, the ICAC had over 1,500 staff and a budget of $1,245.1 million for the 2020–21 financial year.[110] It comprises the Commissioner's office, as well as three departments corresponding to the organisation's three-prong approach to tackling corruption. Operations, which investigates corruption; Corruption Prevention, which gives advice on measures that can be taken to prevent corruption; and Community Relations, which educates the public on the importance of "cleanliness". Investigating officers have enormous investigative powers,[111] including the power to arrest without warrant any person whom they reasonably suspect to be guilty of offences under the above-mentioned ordinances[112] and of other offences revealed during the investigation of the suspected offence under the POBO or Elections (Corrupt and Illegal Conduct) Ordinance, which they reasonably suspect are connected with or facilitated by that offence.[113] The ICAC officers also possess special powers of investigation, including the power to inspect documents if the Commissioner has reasonable cause to believe that an offence under the POBO may have been committed and that the documents in question are likely to be relevant to the investigation.[114] Despite the ICAC's vast investigative powers under the POBO, the Secretary for Justice's consent is still needed for the prosecution of offences thereunder.[115] If the Commissioner has reason to suspect that the CE may have committed an offence under that ordinance, he or she may refer the case to the Secretary for Justice, who may then decide whether to forward the matter to LegCo for consideration of whether to take the steps under art.73(9) of the

[103] [2019] 2 HKLRD 1004.
[104] *Ibid.*, [105]. See McWalters and Bruce, *Bribery and Corruption Law in Hong Kong*, fn 100 above, 135–137.
[105] ICACO s.5(1).
[106] *Ibid.*, s.5(2).
[107] *Ibid.*, s.4.
[108] *Ibid.*, ss.14–16.
[109] See generally McWalters and Bruce, *Bribery and Corruption Law in Hong Kong,* fn 100 above, Chs.2–4; McWalters and Carver, "Independent Commission Against Corruption", fn 100 above.
[110] https://www.budget.gov.hk/2020/eng/pdf/head072.pdf
[111] See generally "Independent Commission Against Corruption", fn 100 above, 95, 105–106; Michael I. Jackson, "Anti-Corruption Law and Enforcement in Hong Kong: Keeping it Clean" in Jiaxing Hu et al. (eds), *Finance, Rule of Law and Development in Asia: Perspectives from Singapore*, Hong Kong and Mainland China (Brill, 2016), 499–506.
[112] ICACO s.10(1).
[113] *Ibid.*, s.10(2), 10(5).
[114] POBO s.13(1). But see s.13(1A).
[115] *Ibid.*, s.31.

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the exercise of State power, but it is unclear how far the same approach would be adopted in future once the courts move beyond the realm of criminal law and freedom of expression.

4. A Generous and Purposive Approach

17.035 The courts have in general adopted a liberal approach towards the interpretation of fundamental rights. In the first, and highly celebrated, Hong Kong Bill of Rights case which reached the Court of Appeal, the court set a liberal and enthusiastic tone embracing the dawn of a "new constitutional era".[120] It acknowledged the need for a new jurisprudential approach and warmly embraced the assistance of international and comparative materials. At issue was whether certain statutory "reverse onus" provisions were consistent with the right to the presumption of innocence. In a colourful passage, Silke V-P held that:[121]

> "In my judgment, the glass through which we view the interpretation of the Hong Kong Bill is a glass provided by the Covenant. We are no longer guided by the ordinary cannons of construction of statutes nor with the dicta of the common law inherent in our training. We must look, in our interpretation of the Hong Kong Bill, at the aims of the Covenant and give "full recognition and effect" to the statement which commences that Covenant. From this stems the entirely new jurisprudential approach to which I have already referred".

17.036 And on the approach towards determining the constitutionality of restrictions on fundamental rights:[122]

> "The onus is on the Crown to justify. It is to be discharged on the preponderance of probability. The evidence of the Crown needs to be cogent and persuasive. The interests of the individual must be balanced against the interests of society generally but, in the light of the contents of the Covenant and its aim and objects, with a bias towards the interests of the individual".

17.037 Accordingly, the court in that case looked for evidence to substantiate, *inter alia*, a rational link between the proved fact of possession of a key to a container or premises, and the claim that a reversed burden of proof is a proportionate means to curb the cancerous trade of drug trafficking. This enlightened approach guided the Hong Kong courts in their interpretation of the Hong Kong Bill of Rights in the first two years, until the Privy Council set a more cautious tone in *Attorney-General v Lee Kwong Kut* in 1993:[123]

> "While the Hong Kong judiciary should be zealous in upholding an individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public. In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the Legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime. It must be remembered that questions of policy remain primarily the responsibility of the Legislature".

120 *R v Sin Yau Ming* (1991) 1 HKPLR 88, 107 (Silke V-P).
121 *Ibid.*, 107.
122 *Ibid.*, 113.
123 [1993] 2 HKCLR 186 (Lord Woolf).

17.038 Instead of adopting the more structured approach of determining the "rationality" and "proportionality" of the impugned measure when viewed against the social mischief which it is intended to remedy (i.e. a legitimate objective), the Privy Council took the view that the courts would in the majority of cases be able to determine whether a reversed onus provision violated the presumption of innocence by examining the substance of the impugned measure without having to go through this somewhat complex approach. Instead of necessarily having to resort to the structured approach, the test is whether "it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed". The less significant the departure from the normal principle, the simpler it will be to justify an exception to the right.

17.039 On 1 July 1997, the Privy Council was replaced by the CFA as the final appellate court for Hong Kong. Unlike the Hong Kong Bill of Rights which was thrust on the judiciary, the CFA warmly embraced its new constitutional role under the new, albeit unprecedented constitution of "one country, two systems". It is obvious that the court has been conscious of its role as the guardian of human rights and the common law, and that it is keen to establish its reputation in the common law world. In its first case on the Basic Law, the court set the tone of its general approach towards the interpretation of the Basic Law.[124] The purpose of the Basic Law is to establish Hong Kong as a Special Administrative Region and an inalienable part of China under the principle of "one country, two systems", under which Hong Kong will enjoy a high degree of autonomy. In interpreting a particular provision, its purpose may be ascertained from the nature of that provision, or other provisions of the Basic Law as well as other relevant extrinsic material (including the Sino-British Joint Declaration). The CFA held that Chapter III of the Basic Law should be given a broad and generous interpretation "in order to give Hong Kong residents the full measure of fundamental rights and freedoms so constitutionally guaranteed".[125]

17.040 In *Leung Kwok Hung v HKSAR*, the CFA restored the *Sin Yau Ming* approach and re-affirmed unequivocally the generous and purposive approach to be taken towards interpreting the Basic Law, at least at the level of principle. The Chief Justice held that:[126]

> "It is well established in our jurisprudence that the courts must give such a fundamental right [to freedom of peaceful assembly] a generous interpretation so as to give individuals its full measure. On the other hand, restrictions on such a fundamental right must be narrowly interpreted. Plainly, the burden is on the Government to justify any restriction. This approach to constitutional review involving fundamental rights, which has been adopted by the Court, is consistent with that followed in many jurisdictions. Needless to say, in a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed on them".

17.041 Accordingly, any restriction of fundamental rights must satisfy the test of legality, namely, that any restriction on fundamental rights must be prescribed by law, which is

124 *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4.
125 *Ibid.*, 29 (Li CJ). See also *Shove Sherpa v Director of Immigration* [2018] HKCFI 1168, [75]; [2019] HKCA 947, [37] where the Court of Appeal affirmed that the proper approach is to consider the ordinary meaning of the language with regard to its context, purpose and the relevant legislative materials.
126 (2005) 8 HKCFAR 229, [16], footnotes omitted. See also *Yeung May Wan v HKSAR* (2005) 8 HKCFAR 137, [1]–[3] and *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 28–29.

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enable the exercise or the enjoyment of the right.[136] The concept of "positive obligation" has not been fully explored in Hong Kong. It will cover the failure of the Government to provide protection in some circumstances and thus extend the reach of the Hong Kong Bill of Rights and the Basic Law to cover infringements of fundamental rights by private citizens. For instance, the obligation to protect privacy under art.14 of the Hong Kong Bill of Rights requires the Government to take steps to protect against interference with privacy by private individuals.[137] In the context of adverse possession, the court has taken the view that compensation for lawful deprivation of private property under art.105 of the Basic Law applies only to expropriation of property by the Government and not by private individuals.[138] On the other hand, a positive right may not necessarily include a negative right. For instance, the right to associate does not necessarily guarantee a right not to associate, especially in the context of a "closed shop" system. Likewise, the right to free speech suggests that the court has no power to impose an apology as a remedy.[139] In each of these cases the court will have to balance the rights and the justifications for the restrictions in question. At the same time, the Basic Law should be construed as a living instrument that evolves and responds to social changes, and thus a literal, technical, narrow or rigid approach towards its construction is to be avoided.[140] The role of the courts is to construe the Basic Law and to ascertain the particular legislative intent as expressed through the language of the statutory text, not the intent of the lawmaker as a category standing on its own.[141] Hence, a mechanical adherence to the 'intent' of the Basic Law at the time of its adoption is unwarranted. It is a living tree that is capable of growth and development, and historical relics should not stunt its growth.[142] As Justice Bertha Wilson of the Canadian Supreme Court nicely put it, "a constitution is always unfinished and is always evolving". It is like a "chain novel where generations of judges produce their respective chapters. Each judge is constrained to a degree by what has gone on before, but at the same time is obliged to make the novel the best that it can be".[143]

5. Principle of Legality

17.045 The principle of legality has been used in two different scenarios. The first is where it is a principle of statutory interpretation under the common law, according to which fundamental rights are not presumed to be taken away or restricted in the absence of clear wording or necessary implication. In this regard it is a principle of statutory interpretation. The second

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[136] *Cheung Tak Wing v Director of Administration* [2020] 1 HKLRD 906; *ZN v Secretary for Justice* (2020) 23 HKCFAR 15; *Leung Kwok Hung v Secretary for Justice* [2020] HKCA 192; *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229, [22]–[24]; *MDB v Betty Kwan* (HCAL 18/2012, [2014] HKEC 497); *Wong Wai Hing Christopher v Director of Lands* (HCAL 95, 97–99/2010, [2010] HKEC 1485); *HKSAR v Au Kwok Kuen* [2010] 3 HKLRD 371; *Plattform v Austria* (1991) 13 EHRR 204. See further below on social, economic and cultural rights. It is an uncomfortable fact that the Government's positive obligation to ensure the right of peaceful assembly became a justification for requiring, in the view of the majority in *Leung Kwok Hung v HKSAR*, the prior notification scheme imposed by statute; and thereby led the majority to its conclusion that there was no violation of the right to the freedom of peaceful assembly in penalising non-notification.

[137] General Comment No 16: "The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (art.17)": 04/08/1988, [1]. See further Ch.22 of this volume.

[138] *Harvest Good Development Co Ltd v Secretary for Justice* [2007] 4 HKC 1. See also Chs.13 and 31 of this volume.

[139] *Ma Bik Yung v Ko Chuen* (2006) 9 HKCFAR 888.

[140] *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, [28]; *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, 223; *Cheng Kar Shun v Hon Li Fung Ying* [2011] 2 HKLRD 555, [89]–[91], [198].

[141] *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211.

[142] *W v Registrar of Marriage* (2013) 16 HKCFAR 112, [84]. Also William, *Leung TC Roy v Secretary for Justice* (CACV 317/2005, 17 March 2006); *Boyce v R* [2004] 3 WLR 786, 795; *Edwards v Attorney-General of Canada* [1930] AC 124.

[143] B. Wilson, "The Making of a Constitution: Approaches to Judicial Interpretation" (1988) PL 370, 372. The famous chain novel analogy comes from Professor Ronald Dworkin, see Ronald Dworkin, *Law's Empire* (Belknap, 1986).

is derived from human rights jurisprudence, where it embodies the first meaning but takes it further to impose requirements not only in respect of the existence of a legal basis for restricting fundamental rights, but also concerning the quality of the legal enactment.

(a) The principle of legality as a principle of statutory interpretation

17.046 Originally a cannon of construction, the principle of legality has been invoked in many human rights cases as part of a constitutional test for determining the legal basis of a governmental act or decision.[144] However, recent developments have suggested that this common law principle of legality has also acquired a constitutional life of its own.

17.047 The starting point is a well-known passage by Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms*, where His Lordship, after accepting that Parliament is supreme, wrote:[145]

> "But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the Courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way, *the Courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document*." (Emphasis Added.)

17.048 The same approach was adopted in *R (Unison) v Lord Chancellor*.[146] The issue was whether the introduction of a new and substantial fee to commence a labour claim under the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 was *ultra vires* the power of the Lord Chancellor under s.42(1) of the Tribunals, Courts and Enforcement Act 2007. The Supreme Courst emphasised that in construing s.42, the court must take into account the constitutional principles which underlie the text, and the principles of statutory interpretation must give effect to those principles. As the fee order would impede or hinder the exercise of the right of access to court, it would only be lawful if it was "clearly authorized by primary legislation". Such clear wording was found to be absent.

17.049 The same constitutional approach was seen in the more recent *Miller* cases arising out of Brexit. In *Miller v The Secretary of State for Exiting the European Union (Miller No 1)*, the Supreme Court held that the principle of legality imposed limits on the ministerial prerogative to conduct foreign affairs in such a way that it would remove from domestic law a source of law and fundamental rights.[147] In *Miller (No 2) v Prime Minister*, the Supreme Court held that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justifications, the ability of Parliament to carry out its constitutional functions as a legislature, and as a body responsible for the supervision of

[144] For example, see *A v Commissioner of Independent Commission Against Corruption* (2012) 15 HKCFAR 362, [67]–[72]; *Chan Sze Ting v HKSAR* (1997–98) 1 HKCFAR 46, 50.

[145] [2000] 2 AC 115, 131. See also *Coco v The Queen* (1993) 179 CLR 427, 437. Both cases were cited with approval by the CFA in *A v Commissioner of ICAC* (2012) 15 HKCFAR 362, [68]–[69].

[146] [2017] 3 WLR 409, [65], [68].

[147] [2018] AC 61, [87].

discretionary power must give an adequate indication of the scope of the discretion, though the degree of precision required will depend on the subject matter itself. The celebrated passage in *Sunday Times v United Kingdom* was adopted:[160]

> "First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unsustainable. Again, while certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice".

17.053 Thus, in *Leung Kwok Hung v Chief Executive of HKSAR*, it was held that a provision in the Public Order Ordinance (Cap.245) conferring a discretionary power on the Commissioner of Police to object to a public procession on the ground of maintaining "public order (*ordre public*)" was too vague to be able to satisfy the test of legal certainty.[161] Likewise, in *Chee Fei Ming v Director of Food and Environmental Hygiene (No 2)*, the court considered if s.104A(1)(b) of the Public Health and Municipal Services Ordinance (Cap.132) satisfied the test of legal certainty. The section provides that no bill or poster shall be displayed on any Government land, except with the written permission of the relevant Government authority. A person who fails to obtain such permission commits an offence under s.104A(2).[162] Since s.104A(1)(b) is "wholly silent as to the basis on which approval may be granted or withheld"[163] and thus contains "an unbridled power" for the Government authority,[164] it was held that the section failed to satisfy the test. It is also in this context that the common law principle of legality is prayed in aid from time to time, thus sometimes contributing to confusion in using the term "principle of legality". In *A v Commissioner of Independent Commission Against Corruption*, it was said that "human rights and fundamental principles of law, even where derogable, cannot be overridden except by express words or necessary implication".[165] In that case, it was held that notices issued under s.14 of the Prevention of Bribery Ordinance seeking information in connection with an ongoing investigation into suspected corruption did unequivocally abrogate any common law privilege against self-incrimination.

17.054 At the same time, legal certainty should not bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. The level of precision required of domestic law depends to a considerable degree on the content of the instrument in question, the field it is designed to cover, and the number and status of those to whom it is addressed.[166] Therefore, the courts are prepared to accept a wide discretionary power so long as the criteria for the exercise of that discretion are themselves accessible. This is so even when the criteria are set out in non-statutory documents such as in the form

[160] (1979–1980) 2 EHRR 245, [49], cited with approval at (2002) 5 HKCFAR 381, [62] (Sir Anthony Mason NPJ).
[161] (CACV 73, 87/2006, [2006] HKEC 816).
[162] *Chee Fee Ming v Director of Food and Environmental Hygiene (No 2)* [2018] 4 HKLRD 517, [10]–[13].
[163] *Ibid.*, [81].
[164] *Ibid.*, [90].
[165] (2012) 15 HKCFAR 362, [24] (Bokhary and Chan PJJ), [68]–[70] (Ribeiro PJ).
[166] *Hashman v United Kingdom* (2000) 30 EHRR 241, [31] (conduct *bonos contra mores* too imprecise).

of standing orders or administrative guidelines, or when such criteria can be discovered through established practice, as long as such documents or practices are accessible to the persons affected.[167] In contrast, the court will be more vigilant in dealing with secret measures such as covert surveillance, in which case the scope of discretion must be indicated with sufficient clarity.[168]

17.055 However, the court will be slow to strike down common law, notwithstanding the fact that common law principles may not be easily ascertainable. This may be due to the fact that common law is judge-made and the court would always be able to fill the gap or to clarify the omission. In *Shum Kwok Sher v HKSAR*, the CFA held that the common law offence of misconduct in public office, which has not been invoked for centuries, is nonetheless a well-established offence in the common law and can be formulated with reasonable precision despite its archaic origins.[169]

17.056 In summary, there are two dimensions to the principle of legality, one relating to form (the existence of law) and the other relating to content (the quality of law). The requirement of form is important as it provides a safeguard against arbitrary actions. It requires the existence of a legal basis for restricting fundamental rights.[170] This, in turn, means that the restriction will have been debated in the (democratic) process of legislation, or will have gone through a rational process of law-making in the case of common law. The formal requirement of law also means that the restriction, once adopted, cannot be easily changed so that it provides some degree of certainty for persons affected by it; people can regulate their conduct accordingly and the ensuing transparency and accessibility reduces the scope for arbitrary decisions. Hence, an Executive order which can be easily changed by the Executive Government is not law even though it may contain detailed procedural requirements, such as in the exercise of a power to restrict the freedom of travel of a civil servant who is under interdiction[171] or to authorise covert surveillance.[172] The requirement on content guards against the conferral of broad and untrammeled power on the Executive Government.

17.057 The meaning of "law" was thrown in doubt by the decision of the CFA in *Kong Yunming v Director of Social Welfare.*[173] It was accepted in that case that an increase in the eligibility requirement from one year's residence to seven years' residence for Comprehensive Social Service Assistance (CSSA) constituted a restriction on the applicant's right to social welfare. One of the issues was whether such restriction would be "in accordance with law" under art.36 of the Basic Law. The social welfare system in Hong Kong operates entirely on an administrative scheme run by the Director of Social Welfare without any legal underpinning.

[167] *Silver v United Kingdom* (1983) 5 EHRR 347, [33]; *Goodwin v United Kingdom* (1996) 22 EHRR 123, [33].
[168] *Leung Kwok Hung v Chief Executive of the HKSAR* (CACV 73 and 87/2006, [2006] HKEC 816).
[169] (2002) 5 HKCFAR 381. See also *SW v United Kingdom* (1996) 21 EHRR 363 (retrospective operation of the offence of marital rape); *Steel v United Kingdom* (1999) 28 EHRR 603 (breach of the peace), but contrast *Hashman v United Kingdom* (2000) 30 EHRR 241 (good behavior).
[170] *Cheung Tak Wing v Director of Administration* [2020] 1 HKLRD 906, [47].
[171] *Association of Expatriate Civil Servants of Hong Kong v Chief Executive of the HKSAR* [1998] 1 HKLRD 615.
[172] *Leung Kwok Hung v Chief Executive of the HKSAR* (CACV 73 and 87/2006, [2006] HKEC 816). The case went on appeal to the CFA on the narrow ground of the power of the court to order a stay of unconstitutionality: *Koo Sze Yiu v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441.
[173] [2009] 4 HKLRD 382 (CFI); [2012] 4 HKC 180 (CA); (2013) 16 HKCFAR 950 (CFA) For criticism, see Simon Young, "Does it Matter if Restrictions on the Right to Social Welfare in Hong Kong are Prescribed by Law or Policy?" (2014) 44 *HKLJ* 25. For a contrary view supporting the decision of the CFA on the meaning of "law", see Ch.26 of this volume.

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20.047 While this very informative General Comment was adopted three months after the ECtHR decision in *Eskelinen v Finland*, it appears that the HRC does not have an opportunity to consider this latest ECtHR decision before its adoption of this General Comment. Hence, the reference to the exclusion of disciplinary proceedings against a civil servant or a member of the armed forces is highly doubtful, and such distinction was rejected in Hong Kong.

(d) The Hong Kong approach

20.048 The scope of art.10 of the Hong Kong Bill of Rights was authoritatively considered by the CFA in *Lam Siu Po v Commissioner of Police*.[103] While differences appear in the English texts of art.6 of the ECHR and art.14.1 of the ICCPR, their French text of "civil rights and obligations" (*droits et obligations de caractère civil*) was the same. Their English text was originally the same, both following "rights and obligations in a suit at law", but the English text of art.6 was changed at the last moment to refer instead to "civil rights and obligations" in order to align the English text more closely with the language of the French text with no intention to change the meaning of the phrase.[104] Besides, by adopting a purposive construction, the CFA came to the conclusion that the phrase "rights and obligations in a suit at law" in art.10 of the Hong Kong Bill of Rights/art.14.1 of the ICCPR bears the same meaning as the expression "civil rights and obligations" in art.6 of the ECHR,[105] and, as a result, the jurisprudence of the ECtHR is of immediate relevance to an understanding of art.10 of the Hong Kong Bill of Rights.

20.049 In *Lam Siu Po v Commissioner for Police*, the issue was whether art.10 of the Hong Kong Bill of Rights applied to police disciplinary proceedings. The CFA was faced with two conflicting lines of authorities respectively from the HRC and the ECtHR, neither of which is binding on the court. Eventually, it preferred the ECtHR jurisprudence as being more principled, despite that the jurisprudence of the HRC may be said to be more directly relevant given the close link between the Hong Kong Bill of Rights and the ICCPR. Therefore, insofar as the relationship between civil servants (including law enforcement agencies) and the State is concerned, there will be a presumption that art.10 will apply unless the Government can demonstrate that there are objective grounds related to the effective functioning of the State or some other public necessity which justify removal of the art.10 right. As Ribeiro PJ put it, "to recognize, as General Comment No 32 does, an entitlement to protection where the employment is terminated for other than disciplinary reasons appears to me to acknowledge that entitlement where it is least needed and to refuse protection where (in disciplinary proceedings) it is most likely to be important."

20.050 While the decision of the CFA is to be welcomed, it also leaves open the meaning of "rights and obligations in a suit at law". As a result of *Lam Siu Po v Commissioner for Police,* art.10 applies to all forms of disciplinary and administrative proceedings when civil rights and obligations are determined.[106] In general, in determining whether art.10

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[103] (2009) 12 HKCFAR 237.

[104] *Feldbrugge v The Netherlands* (1986) 8 ERR 425, 444–445, [20]–[22], adopted in *Lam Siu Po v Commissioner for Police* (2009) 12 HKCFAR 237, [64]. See also O'Boyle, Harris and Warbrick, *European Convention on Human Rights* (Oxford University Press, 2nd ed, 2009), 210–223.

[105] *Lam Siu Po v Commissioner for Police* (2009) 12 HKCFAR 237, [62]–[65], affirming the approach in *Ma Wan Farming Ltd v Chief Executive in Council* [1998] 1 HKLRD 514, 518; *Lee Yee Shing Jacky v Board of Review* [2011] 6 HKC 307, [54]. The earlier approach which focuses on the nature of the proceedings in *Kwan Kong Company v Town Planning Board* [1996] 2 HKLR 363 ("suit at law" covers more than formal legal proceedings but is not wide enough to cover administrative proceedings) should be regarded as having been overruled.

[106] *Lam Siu Po v Commissioner for Police* (2009) 12 HKCFAR 237, [76]; *Ng Man Yin v Registration of Persons Tribunal* [2014] 1 HKLRD 1188 [36]; *Chan Hoi Ling Helen v Medical Council of Hong Kong* [2009] 4 HKLRD 174.

of the Hong Kong Bill of Rights is engaged, the most important factor is the character or nature of the rights. It is an autonomous concept, and may cover rights which are not strictly classified as such under domestic law, so long as the rights can be said, at least on arguable grounds, to be recognised under domestic law.[107] It cannot be exhaustively defined and can only be ascertained by an inductive approach. The status of the parties, the nature of the legislation, and the identity of the authority by which the right or obligation is to be decided have little relevance.[108] For the purpose of art.10, "rights and obligations in a suit at law" has been held to include the right to development,[109] ownership of land or right to property,[110] the making of a closure order,[111] liberty of movement,[112] right of abode,[113] right to employment,[114] and the right to continue one's professional practice,[115] but not assessment of profit tax,[116] a legislative process,[117] or an application for the issue of summons for private prosecution.[118] It cannot include a right which cannot on any arguable ground be said to exist in domestic law; nor does it include any unlawful activity.[119] A pure policy decision is not by itself immune from the requirement of art.10.[120]

20.051 The phrase "rights and obligations in a suit at law" may also include proceedings that are not regarded as "criminal". Thus, in *Wong Hon Sun v HKSAR*,[121] the forfeiture proceedings under s.28 of the Import and Export Ordinance were characterised as civil proceedings. In *Koon Wing Yee v Insider Dealing Tribunal,*[122] the issue was whether the proceedings under the now repealed Security (Insider Dealing) Ordinance was a determination of a "criminal charge" that called for a standard of proof beyond reasonable doubt. In view of the gravity of the misconduct and the nature and severity of the penalty, the CFA found that it was a determination of a criminal charge. Yet in an ingenious move to salvage the report of the Security and Futures Commission, the court decided to strike down the penalty provision, without which there was no basis for classifying the proceedings as criminal in nature and hence a civil burden of balance of probabilities was sufficient to establish a finding of misconduct. In *Television Broadcasts Ltd v Communications Authority*, an adverse finding of the Communications Authority against the TVB for engaging in anti-competitive conduct contrary to ss.13 and 14 of the Broadcasting Ordinance (Cap.562) was held to be

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[107] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, [148].

[108] *Ma Wan Farming Ltd v Chief Executive in Council* [1998] 1 HKLRD 514; *Commissioner of Inland Revenue v Lee Lai Ping* (1993) 3 HKPLR 141; *Auburntown Ltd v Town Planning Board* [1994] 2 HKLR 272; *R v Town Planning Board, ex p Real Estate Developers Association* [1996] 2 HKLR 267.

[109] *Auburntown Ltd v Town Planning Board* [1994] 2 HKLR 272 293.

[110] *R v Town Planning Board, ex p Real Estate Developers Association* [1996] 2 HKLR 267, 287; *Ma Wan Farming Ltd v Chief Executive in Council* [1998] 1 HKLRD 514.

[111] *Business Rights Ltd v Building Authority* (1993) 3 HKPLR 609 (DC), [1994] 2 HKLR 341 (CA).

[112] *Commissioner of Inland Revenue v Lee Lai Ping* (1993) 3 HKPLR 141, 155.

[113] *Ng Man Yin v Registration of Persons Tribunal* [2014] 1 HKLRD 1188, [48].

[114] *Lam Siu Po v Commissioner for Police* (2009) 12 HKCFAR 237.

[115] *Dr Q v Health Committee of the Medical Council of Hong Kong* [2012] 3 HKLRD 206.

[116] *Chan Hei Ling Helen v Medical Council of Hong Kong* [2009] 4 HKLRD 174; *Lee Yee Shing Jacky v Board of Review* [2011] 6 HKC 307, [51]–[55]; *affirming Commissioner of Inland Revenue v Lee Lai Ping* (1993) 3 HKPLR 141, 152; but compare *Editions Periscope v France* (1992) 14 EHRR 597. See also *Danix Ltd v Collector of Stamp Revenue* [2018] 1 HKLRD 910, [17]–[19].

[117] *Auburntown Ltd v Town Planning Board* [1994] 2 HKLR 272.

[118] *HKSAR v Cheung Kin Chung* [2018] 2 HKLRD 597, [35].

[119] *Business Rights Ltd v Building Authority (DC)*, [1994] 2 HKLR 341, 344 (CA).

[120] *Ma Wan Farming Ltd v Chief Executive in Council* [1998] 1 HKLRD 514, 522; *Lam Siu Po v Commissioner for Police* (2009) 12 HKCFAR 237; *Bryan v United Kingdom* (1996) 21 EHRR 342.

[121] (2009) 12 HKCFAR 877, [72].

[122] (2008) 11 HKCFAR 170.

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a determination of rights and obligations in a suit at law.[123] The court emphasised that the anti-competitive provisions in the Broadcasting Ordinance was regulatory in nature and applied only to a small number of licensees in a highly specialised industry. In contrast, the Competition Tribunal held that the determination of the Competition Commission under s.6 of the Competition Ordinance was criminal in nature, in light of the general application of the Competition Ordinance and the nature and severity of the penalty.[124]

20.052 As noted above, the initial concern of the ECtHR and the HRC is to prevent a state party from getting round the protection of the right to fair hearing by reclassifying private law proceedings.[125] Therefore, it is insisted that domestic classification of the proceedings concerned is not conclusive and the concept of "rights and obligations in a suit at law" is an autonomous concept. At the same time, the relations between States and the individuals have changed quite dramatically in many spheres in the last 60-years, with States regulation increasingly intervening in private law relations. Many decisions affecting private individuals are determined by administrative bodies, and there emerge a large number of administrative and regulatory bodies. The European Court and the HRC are eager to bring these administrative bodies under the purview of the relevant articles so that the persons affected by their decisions will have the protection of the right to fair hearing. As a result, the concept of "rights and obligations in a suit at law" has been expanded, probably beyond the contemplation of the original framers of the treaties, into many areas of public law.[126] This process has posed considerable challenges to the civil law system where there is a more rigid distinction between public law and private law. Various attempts have been made to provide a rational basis for the extension. As a result of this expansion, many administrative proceedings which are not designed as judicial proceedings have been brought under the purview of art.14.1 of the ICCPR/art.6 of the ECHR, and it was soon found that the guarantees that are typical of judicial proceedings cannot be applied with the same rigour to administrative proceedings. In contrast, while this development has posed less challenge to the common law system where there is no such rigid distinction between private law and public law, it echoes a similar search in the common law for a rational basis for determining bodies that are required to observe the rules of natural justice. The common law eventually found a solution in a flexible standard of procedural fairness under a general duty to act fairly, with the standard of fairness being determined by the character of the decision-making body, the kind of decision it has to make, the statutory or other framework it has to operate, the nature of the power and the circumstances of the case.[127] While the common law system does not have the problem of a rigid classification of private law and public law, the requirement of an independent and impartial tribunal has posed considerable challenges to the adequacy of judicial review as a remedy. The danger of this approach is that it may give rise to a trend to judicialise administrative proceedings. In this regard, the jurisprudence developed under art.14(1) of the ICCPR/art.6 of the European Convention in both civil law and common law jurisdictions is largely a history of the courts trying to balance the guarantee of a fair

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[123] *Television Broadcasts Ltd v Communications Authority* [2016] 2 HKLRD 41, [62]–[89], [94]–[97].

[124] *Competition Commission v W Hing Construction Co Ltd* [2019] 3 HKLRD 46, [38]; *Competition Commission v Nutanix Hong Kong Ltd* [2019] HKCT 2, [50].

[125] *Campbell v United Kingdom* (1981) 3 EHRR 531, [68]–[69].

[126] *Runa Begum v London Borough of Tower Hamlets* [2003] 2 AC 430, [28]–[31] (Lord Hoffmann); *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, [77]–[88]; *Television Broadcasts Ltd v Communications Authority* [2016] 2 HKLRD 41, [93].

[127] *Llody v McMahon* [1987] AC 625, 702 (Lord Bridge); *Re Pergamon Press Ltd* [1971] Ch 388, 399; *R v Home Secretary ex parte Santillo* [1981] 1 QB 778; *R v Home Secretary ex parte Doody* [1994] 1 AC 531. The common law courts have long struggled with a distinction between purely administrative act on the one hand and judicial and quasi-judicial acts on the other: See H W R Wade and CF Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014), 374–377, 408–411, 414–423.

hearing, which underlines the rule of law, on the one hand, and the need to avoid over-judicialisation of administrative proceedings, which are now an indispensable and desirable part of any modern society. In general, the courts have adopted a pragmatic approach to determining what constitutes an independent and impartial tribunal, what is required as a matter of fairness in administrative proceedings, taking into account the character and nature of such proceedings, and what constitutes a court of full jurisdiction for the purpose of the curative principle, thus mitigating the impact on administrative proceedings by the adoption of an expansive approach in considering whether the right to fair hearing in art.14(1) of the ICCPR/art.6 of the European Convention is engaged. The same consideration applies in Hong Kong.

8. Right to a Fair Hearing by an Independent and Impartial Tribunal

(a) An overview

20.053 The principles set out by the CFA in *Lam Siu Po v Commissioner of Police* are succinctly summarised by Mr Justice Jeremy Poon in *Ng Man Yin v Registration of Persons* Tribunal as follows:[128]

(1) Article 10 gives effect to the rule of law. It guarantees a right to a fair and public hearing by a competent, independent and impartial tribunal established by law whenever one's civil rights and obligations are determined by a governmental or public authority.

(2) Its protections are not confined to a court of law but may be extended to administrative tribunals having judicial characteristics.

(3) Since the engagement of art.10 depends on whether an individual's civil rights and obligations are to be determined, art.10 may be engaged only in relation to some, but not all, the matters dealt with by a particular administrative authority or administrative tribunal.

(4) Article 10 does not operate to destroy or radically alter the entire administrative system by requiring all decisions to be taken publicly by independent and impartial tribunals imported into the administrative structure for that purpose. It does not require every element of the protections to be satisfied at all stages of an administrative process, but only such protections should be effective when the determination is viewed as an entire process, including any appeal process or judicial review as may be available.

(5) Article 10 may be satisfied if an administrative decision is subject to control by "a court of full jurisdiction".

(6) A court of full jurisdiction means a court that has "full jurisdiction to deal with the case as the nature of the decision requires." Full jurisdiction does not necessarily mean full decision-making power or the jurisdiction to re-examine the merits of the case.

(7) A court of full jurisdiction may deal with the case in the manner required in at least two different ways. It may either supply the protection mandated by art.10 that is missing, or by exercising its supervisory jurisdiction so as to correct or

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[128] [2014] 1 HKLRD 1188, [33]–[44].

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power, whereas these are also pertinent questions which the Authority has to ascertain by objective evidence in performing its adjudicative role. An objective observer would have a legitimate doubt whether the Authority, in performing its adjudicative role, could decide solely on their legal and factual merits with the detachment and objectivity required by art.10, uninfluenced by any policy considerations and views that it has formed in performing its advisory function.[161]

20.061 Unlike art.6 of the European Convention, art.10 further requires the tribunal to be "competent". This requirement does not add much to the requirements of an independent and impartial tribunal or the right to a fair hearing. Mere presence of lay members on a tribunal would normally not render the tribunal incompetent.[162]

(f) Curative effect

20.062 An inherent difficulty of applying art.10 to the administrative process is the need to balance the requirement of fairness and the legitimate demands for flexibility and efficiency in administrative proceedings. The courts have been sensitive to these conflicting demands, and have held that in determining whether art.10 has been complied with, the court should consider the entire process of determination, including any appeal process and the availability of judicial review, and not confine itself to a particular stage of the proceeding. Article 10 does not require that every stage of the proceeding which determines civil rights and obligations shall meet the requirements of this article (except formal court proceedings). It is enough either the jurisdictional organs themselves comply with the requirements of art.10, or that if they do not so comply, they are subject to subsequent control by a judicial body that has full jurisdiction to decide on both merits and procedures and does provide the guarantees of art.10.[163] This is sometimes known as the "curative principle". It means that decisions which do not comply fully with procedural fairness requirements can be cured; if the person affected has recourse to a further hearing or appeal which itself provides fairness.[164]

20.063 Accordingly, although s.27 of the Buildings Ordinance (Cap.123) on the making of a closure order does not permit the court to inquire into the merits of an application for a closure order and hear representations or evidence from those who will be adversely affected by the order, it is necessary to take into consideration that s.27 is the final stage in a series of stages in the legislative machinery for dealing with contraventions of the Buildings Ordinance, and the scheme as a whole provides ample safeguards which satisfy the requirements of art.10.[165]

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[161] *Ibid.*, [111]–[121].

[162] See HRC, *General Comment No 32*, UN Doc CCPR/C/GC/32 (2007); *Medical Council of Hong Kong v Helen Chan* (2101) 13 HKCFAR 248, [59].

[163] *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237, 277–279; *Ma Wan Farming Ltd v Chief Executive in Council* (CA) [1998] 1 HKLRD 514, 522; *R v Lift Contractors' Disciplinary Board, ex p Otis Elevator Co (HK) Ltd* (1995) 5 HKPLR 78; *Albert v Belgium* (1983) 5 EHRR 533; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, [152]; *Runa Begum v London Borough of Tower Hamlets* [2003] 2 AC 430, [100]. The curative effect argument may not apply to a formal court. Thus, it may not be open to a Magistrates' Court not to comply with the requirements of art.10 on the ground that the appellate court would be able to cure whatever defects there are before the Magistrates' Court: *Starrs v Ruxton* [2000] SLT 42.

[164] *Wong Tak Wai v Commissioner of Correctional Services* [2010] 4 HKLRD 409, [67] (Kwan JA).

[165] *Business Rights Ltd v Building Authority (DC)*, [1994] 2 HKLR 341, 344 (CA). See also *R v Lift Contractors' Disciplinary Board, ex parte Otis Elevator Company (HK) Limited* (1994) 4 HKPLR 168 where the court held that an appeal by way of re-hearing was sufficient to satisfy the requirement of art.10 of the Hong Kong Bill of Rights. This holding was not disturbed on appeal. See also *Dr Q v Health Committee of the Medical Council of Hong Kong* [2012] 3 HKLRD 206, [80]–[92].

20.064 However, if the jurisdictional organ does not comply with the requirements of art.10, the subsequent judicial organ is only able to cure the defect if it has full jurisdiction to do so.[166] This does not necessarily mean that the court should have jurisdiction to deal with every aspect of the appeal or review. What amounts to "full jurisdiction" varies according to the nature of the decision being challenged, the manner in which the decision was arrived at, its content and the proposed grounds of challenge.[167] It suffices if it is able to supply one or more of the protections mandated by art.10 which were missing at the tribunal below or to correct or quash some non-compliant aspects of the determination by the authority or tribunal below,[168] such as an appeal by way of re-hearing. The acid test is whether the court is armed with full jurisdiction to deal with the case as the nature of the challenged decision required.[169]

20.065 As the court has only limited jurisdiction to review the merits of a dispute in judicial review, it has been held that judicial review would not satisfy the requirement of "a court of full jurisdiction".[170] This poses a great challenge to the effectiveness of judicial review as a remedy in the common law system. Thus, the court has repeatedly stated that the curative principle cannot be defined rigidly or applied mechanically.[171] Whether judicial review satisfies the requirements of art.10 depends on the circumstances of each case. In general, the existence of judicial review is sufficient to meet the requirements of art.10, especially when the subject matter involves executive decisions of high policy content, such as that relating to town planning or approval of major road works.[172] It has also been

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[166] *Commissioner of Inland Revenue v Lee Lai Ping* (1993) 3 HKPLR 141, 155; *Weeks v United Kingdom* (1988) 10 EHRR 293. *A qualification is that it may still depend on the grounds of challenge of the decision and whether such challenges are within the purview of judicial review. If the grounds of challenge are matters that could be adequately addressed by the court in judicial review, the mere fact that the court may not review the merits of the decision does not prevent the court from being a "court of full jurisdiction".*

[167] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, [116] (Lord Hoffmann); *Byran v United Kingdom* (1996) 21 EHRR 342. The reference to the grounds of the challenge as a factor to determine whether judicial review is a sufficient remedy for the purpose of the curative principle may pose some practical difficulties to the legal representative of an applicant. As a matter of professional duty, a lawyer should not put forward any ground that is plainly unarguable. A challenge against the merits of a decision is in general untenable in classic judicial review. However, a failure to challenge the merits of a decision could be a reason to reject an art.10 challenge because all the other grounds of challenge could be entertained by the court in judicial review. Thus, if an art.10 challenge is to be mounted, it is important to set out in Form 86 that the finding of facts is not accepted for the purpose of the curative principle even though there is no ground to challenge such finding of facts on the classic principle of *Wednesbury* irrationality.

[168] *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237 [118]; *Ng Man Yin v Registration of Persons Tribunal* [2014] 1 HKLRD 1188 [41]; *Koon Wing Yee v Insider Dealing Tribunal* (2010) 13 HKCFAR 133, [8]; *Dr Q v Health Committee of the Medical Council of Hong Kong* [2012] 3 HKLRD 206, [80]–[92] where a number of previous cases were examined.

[169] *Dr Q v Health Committee of the Medical Council of Hong Kong* [2012] 3 HKLRD 206, [80]–[92]; *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237 [118]; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, [152]; *Runa Begum v London Borough of Tower Hamlets* [2003] 2 AC 430, [100].

[170] *Commissioner of Inland Revenue v Lee Lai Ping* (1993) 3 HKPLR 141, 155; *Weeks v United Kingdom* (1988) 10 EHRR 293. *A qualification is that it may still depend on the grounds of challenge of the decision and whether such challenges are within the purview of judicial review. If the grounds of challenge are matters that could be adequately addressed by the court in judicial review, the mere fact that the court may not review the merits of the decision does not prevent the court from being a "court of full jurisdiction".* See fn 166 above.

[171] *Television Broadcasts Ltd v Communications Authority* [2016] 2 HKLRD 41, [147]–[150].

[172] *Lam Siu Po v Commissioner for Police* (2009) 12 HKCFAR 237, 282–287; *Ma Wan Farming Ltd v Chief Executive in Council* (CA) [1998] 1 HKLRD 514, 524–525; *R v Town Planning Board, ex p Real Estate Developers Association* [1996] 2 HKLR 267, 291; *Lee Yee Shing Jacky v Board of Review* [2011] 6 HKC 307, [102]; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, [152]. The reference to a decision with a high policy content was first made by the ECtHR in *Bryan v United Kingdom* (1996) 21 EHRR 342, it has been held that in the context of planning decisions which involved heavy policy consideration, a limited form of review which did not allow the court to substitute the decision of a planning inspector was sufficient to satisfy the requirements of art.6 of the European Convention. This case has since been cited on numerous occasions.

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4. Contempt of Court

21.012 Traditionally, the common law has recognised two general categories of contempt of court. Back in 1900, Lord Russell observed in *R v Gray* the following:

> "Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court."[19]

21.013 The former class belongs to the contempt category generally characterised as scandalising a court or judge and the latter category of contempt includes (a) conduct that disrupts the court process itself, e.g. contempt in the face of court, or (b) acts that risk prejudicing or interfering with current/pending legal proceedings (sub judice contempt) or (c) disobedience of court orders as well as breach of undertakings given to the court.

21.014 It is this contempt by scandalising the judiciary that raises the greatest free speech concerns. Unlike the latter category where the defendant's conduct directly impacts the administration of justice by affecting the *outcome* or *resolution* of specific (current or pending) legal disputes, scandalising contempt is viewed as a public wrong merely because this conduct undermines the general public confidence in the administration of justice.

21.015 In *Wong Yeung Ng v Secretary for Justice*, the Court of Appeal confirmed that in deciding whether contempt by scandalising the judiciary was criminally actionable, the government must show that:

> "the statement (or conduct) was calculated to interfere with the administration of justice in its widest sense, that it involved a 'real risk' that the due administration of justice would be interfered with and (the mental element) that there was an intention to interfere with the administration of justice, or recklessness by appreciating this possible consequence and ignoring it."[20]

21.016 In deciding whether there was a real risk, direct proof of such a risk would rarely be possible; hence the court may consider several relevant factors in making this determination i.e. whether the statements were published, timing of publication, size of the audience and the likely nature, impact and duration of their influence.[21]

21.017 On the facts, the editor of the *Oriental Daily News*, a highly popular daily newspaper in Hong Kong with 2.3 million readers, was convicted on two counts of contempt of court and was sentenced to four months of imprisonment. The daily's parent company, Oriental Press Group was also convicted and fined HK$5 million. The charges stemmed from a series of abusive and scurrilous attacks made by *Oriental Daily* in 1997 over the course of three months against the Obscene Articles Tribunal (OAT), several named justices and the Judiciary at large. The attacks ultimately culminated in a round-the-clock pursuit of a judge over three days.

21.018 Two interesting observations may be made of this decision. First, under the common law, English courts have traditionally not required the Government to prove that the accused had the intention to interfere with the administration of justice; the *mens rea* element of the

[19] [1900] 2 QB 36, 40.
[20] [1999] 2 HKLRD 293, 312.
[21] *Ibid.*, 329.

offence was satisfied if the accused had the intention to publish the impugned statements.[22] This development to require specific *mens rea* in Hong Kong should nonetheless be lauded as contempt proceedings for scandalising the court have been judicially recognised as "virtually obsolescent"[23] in England and there has been an increasing recognition by common law courts around the world of the need to be sensitive to the right of citizens in a democracy to criticise public institutions, including the administration of justice.[24]

21.019 Second, whilst the lower Divisional Court found that there was a real risk that the administration of justice would be interfered with, it seemingly contradicted itself by adding that there was *no risk* that the administration of justice would be *actually* affected but some of the readership might think it was a possibility that if tolerated, the conduct would give rise to the misconception that such conduct by a losing party to litigation was permissible.[25] In that case, the court probably meant that a precondition for a contempt charge was that there was a real risk that the administration of justice would be *perceived* to be interfered with.

21.020 Third, it is an open question in Hong Kong as to whether there are special defences that a defendant may avail against a charge for scandalising the court. It is submitted that, analogous to the tort of defamation, truth and fair comment should be a defence open to the defendant.[26]

21.021 One must however bear in mind that the contempt committed in this instance was highly exceptional and egregious and by no means is *Wong Yeung Ng v Secretary for Justice* indicative that the Judiciary would use criminal contempt and imprisonment as a legal tool to silence its critics.

21.022 After all, in the words of Hoffmann LJ in *R v Central Independent Television Plc* and affirmed by Mortimer V-P in *Wong Yeung Ng v Secretary for Justice*:

> "Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom."[27]

21.023 Since *Wong Yeung Ng v Secretary for Justice*, there have however been troubling signs that the Hong Kong judiciary has become somewhat uncomfortable with the *mens rea* requirement established by Mortimer V-P.[28] In two subsequent Court of First Instance

[22] See *R v Editor of New Statesman, ex p DPP* (1928) 44 TLR 301. See also Johannes Chan, "Freedom of the Press: The First Ten Years in the Hong Kong Special Administrative Region" (2007) 15 Asia Pacific Law Review 163.
[23] *Secretary of State for Defence v Guardian Newspapers* [1985] AC 339 (Lord Diplock).
[24] See *Arlidge, Eady & Smith on Contempt* (Sweet & Maxwell, 2005) 394, 403–408.
[25] *Wong Yeung Ng v Secretary for Justice* [1999] 2 HKLRD 293, 306.
[26] See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 38–39 where Brennan J observed: "Thus it has been said that it is no contempt of court to criticise court decisions when the criticism is fair and not distorted by malice and the basis of the criticism is accurately stated. To the contrary, a public comment fairly made on judicial conduct that is truly disreputable (in the sense that it would impair the confidence of the public in the competence or integrity of the court) is for the public benefit. It is not necessary, even if it be possible, to chart the limits of contempt scandalising the court. It is sufficient to say that the revelation of truth—at all events when its revelation is for the public benefit—and the making of a fair criticism based on fact do not amount to a contempt of court though the truth revealed or the criticism made is such as to deprive the court or judge of public confidence".
[27] [1994] Fam 192, 202. Cited with approval by Mortimer V-P in *Wong Yeung Ng v Secretary for Justice* [1999] 2 HKLRD 293, 308.
[28] Mortimer V-P observed that "this requisite mental element will almost always be implicit in the statement or conduct itself" and agreed with the Divisional Court below that on the facts, the "necessary acts had been done with the requisite intention". *Wong Yeung Ng v Secretary for Justice* [1999] 2 HKLRD 293, 312, 315.

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decisions, the judges expressly stated that the offence of contempt by scandalising the court "does not require proof of an actual intention to undermine public confidence in the administration of justice"[29] and merely that the "publication was intentional".[30] While this reversion to traditional orthodoxy may seem worrying, one must note that, on the facts, the scurrilous attacks against the judiciary were either made in court or made in connection with a pending or current legal proceeding. Therefore, unlike the facts in *Wong Yeung Ng v Secretary for Justice* where there was no attempt made to influence the outcome of particular proceedings either pending or in progress, the later conduct in question may be better viewed as acts done calculated to obstruct or interfere with the due course of justice or the lawful process of the courts, the second type of contempt observed by Lord Russell in *R v Gray*, as discussed above.

21.024 The Court of Appeal in *Secretary for Justice v Wong Ho Ming*[31] ruled that for acts that interfere with the due administration of justice by obstructing a court officer's discharge of his duty, no specific intent to interfere with the administration of justice is required for criminal contempt to be proved. The defendant merely needs to intend to perform acts which constituted the *actus reus* of the contempt, and it will be sufficient for his acts to be inherently likely to interfere with the due administration of justice.[32]

5. Defamation

21.025 The landmark decision on defamation in Hong Kong arose from a dispute between two celebrities in *Cheng v Tse Wai Chun*.[33] The plaintiff, Tse Wai Chun, a solicitor alleged that the defendants, Albert Cheng and Lam Yuk Wah, two radio talk-show hosts defamed him on the airwaves. The defendants *inter alia* relied on the defence of fair comment but the plaintiff argued that the defence was defeated by the defendants' malice. Prior to this decision, it was generally accepted that the defendant would be regarded as having been actuated by malice if he had some improper or ulterior motive when making the defamatory statement.[34] Lord Nicholls NPJ, on behalf of the CFA in the groundbreaking case, however held that:

> "A comment which falls within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view he expressed. Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not of itself defeat the defence."[35]

21.026 Given that the defendant has to prove that his comments must be one which could have been made by an honest person[36] to avail himself of the defence in the first place, it would appear that he would only lose the defence if the plaintiff can later prove that the defendant

[29] *Secretary for Justice v Choy Bing Wing* (HCMP 4694/2003, [2005] HKEC 1971), [48].
[30] *Ibid.*, [2011] 2 HKC 342, [37].
[31] [2018] HKCA 173.
[32] *Ibid.*, [96].
[33] (2000) 3 HKCFAR 339. For an interesting discussion of this decision, see Jill Cottrell, "Fair Comment, Judges and Politics in Hong Kong" (2003) 27 Melbourne University Law Review 33.
[34] See *Gatley on Libel and Slander* (9th ed, 1998), para.16.2.
[35] *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339, 360.
[36] *Ibid.*, 347.

is subjectively dishonest i.e. the defendant knows his comments are untrue, or is recklessly indifferent to the truth or falsity of his comments.[37]

21.027 The rationale for the liberalisation of the "fair comment" defence stems from the fact that the politicians and social reformers inevitably will have an ulterior motive or agenda in making comments of public interest and it will make no sense if "a motive relating to the very feature which causes the matter to be one of public interest is regarded as defeating the defence."[38]

21.028 FA Trindade in an illuminating article has, however, raised a few unresolved problems following this decision.[39] First, he asks whether a defendant, in reply to an allegation of malice, to avail himself of the defence of fair comment, must show an honest belief in the actual words published or whether he must go further and show an honest belief in the imputations which the plaintiff argues, and the jury finds, are conveyed by the actual words published; if the defendant must embark on the latter course then he might be faced with the dilemma of having to show an honest belief in an imputation which he denies is conveyed by the actual words published. This first concern may be misplaced as it is the plaintiff who has the onus of proving that the defendant lacks the requisite honest belief and it is not for the defendant to otherwise prove his honesty. The second concern is more problematic. Trindade queries whether the newspapers or publishers can rely on the defence of fair comment if the original author of the article, e.g. a columnist, is tainted with malice. It is submitted that the defence of fair comment should still be available to the newspapers/ publishers unless the plaintiff proves that thee publishers/newspapers do not genuinely believe that the original author holds such views.

21.029 The defence of "qualified privilege" for the media in reporting matters of public interest was considered in the Court of First Instance decision in *Yaqoob v Asia Times Online*.[40] In that case, the defendants alleged on their news website that the plaintiffs were involved in money laundering, terrorist financing and drug trafficking, and they were thus sued for defamation. In turn, the defendants relied on the English *Reynolds v Times Newspapers*[41] "qualified privilege" defence, which afforded the media a defence if they had engaged in responsible journalism.

21.030 In deciding whether the journalist had acted responsibly, Reyes J examined the 10 non-exhaustive factors identified by Lord Nicholls in *Reynolds v Times Newspapers* as relevant:

(1) The seriousness of the allegations being made;
(2) The nature of the information and the extent to which the subject matter of a publication is a matter of public concern;
(3) The reliability and motivation of the sources of the information used in a publication;
(4) The steps taken to verify the information;
(5) The status of the information;
(6) The urgency of the matter;

[37] *Ibid.*, 351.
[38] *Ibid.*, 352.
[39] "Malice and the Defence of Fair Comment" (2001) 117 LQR 169.
[40] [2008] 4 HKLRD 911. This defence was also examined by the Court of First Instance in *Pui Kwan Kay v Ming Pao Holdings* (HCA 854/2010, [2013] HKEC 1409), but it was not established on the facts.
[41] [2001] 2 AC 127.

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of behaviour in relation to professional conduct situations.[59] What is interesting about this case is that the Court of Appeal appeared to justify the constitutional clarity of the Principle by reading it alongside the charge that the solicitor had brought the profession into dispute. In particular, Woo V-P held that "the way that the complaints were framed had the effect of limiting the scope of the inappropriate conduct being alleged to be in breach of Principle 1.02" and this fairly and adequately informed the solicitor of the true nature of the complaint against him.[60] With respect, it is not evidently clear why the framing of the complaints by the Law Society would have the constitutional effect of saving an otherwise constitutionally vague and thus impermissible term. However, one could possibly read this decision as stating that the Court of Appeal was henceforth interpreting "inappropriate conduct" as "conduct likely to bring the profession into disrepute" and since the courts and professional disciplinary bodies had traditionally dealt with the latter concept without any difficulties, the Principle is therefore certain and clear.

21.038 The Court of Appeal in *Kwok Hay Kwong v Medical Council of Hong Kong* [61] invalidated four restrictions in the Professional Code and Conduct for the Guidance of Registered Medical Practitioners (the Code) for violating the freedom of expression. Specifically, the Code (a) prohibited doctors from advertising in newspapers, magazines and other print media; (b) restricted doctors to informing the public of no more than five medical services they provide; (c) forbade doctors from referring to their experience, skills or practice in a manner which could be considered as promotional when giving public lectures; and (d) imposed strict liability on the doctors for the advertising violations committed by the organisations they are professionally or financially associated with. The Court of Appeal recognised that constraints on advertising and practice promotion were essential to limit commercialism and prevent the manipulation of the sick and vulnerable[62] but the four restrictions were considered to be disproportionate responses to meeting these legitimate concerns of protecting public health, especially since the public has a countervailing interest in receiving full and comprehensive information before making an informed medical choice.[63]

21.039 In *Dr Lau Yuk Kong v Medical Council of Hong Kong*,[64] the Court of First Instance held that, where the applicant was merely challenging the Medical Council's refusal to include his qualification as a Fellow of American College of Cardiology in the List of Quotable Qualifications the Council maintained, the "right to freedom of expression is not really engaged."[65] On the facts, the Medical Council's decision was nevertheless quashed on the basis that it was *Wednesbury* unreasonable.

21.040 In contrast, the Court of First Instance in *Chan Sze Lai v Dental Council of Hong Kong*,[66] held that a registered dentist's right to free speech and expression had to be taken into consideration by the Dental Council when it was making decisions pursuant to the Dentists Registration Ordinance (Cap.156) and/or the related Regulations, even if the legality of the legislation/ regulations was not being challenged and the constitutional rights were

[59] *Ibid.*, [73].
[60] *Ibid.*, [58].
[61] [2008] 3 HKLRD 524.
[62] *Ibid.*, 545.
[63] *Ibid.*, 555. Following this decision, the Hong Kong Bar Association also relaxed its rules on practice promotions. See http://www.hkba.org/the-bar/code-of-conduct/code_of_conduct10.htm.
[64] [2011] 5 HKC 218.
[65] *Ibid.*, [56].
[66] [2014] 1 HKLRD 77.

not expressly identified in the said legal instruments.[67] On the facts, the applicant dentist had challenged the Dental Council's denial of her request to enter her Master of Science in Implant Dentistry degree on the General Register of Dentists. In particular, the court affirmed that while it is "entirely conceivable that the Guidelines, the Code and the scheme of Quotation Qualification albeit constituting restrictions on dentists' freedom of expression in general, are justifiable on public interest grounds and therefore lawful",[68] it was also entirely conceivable that an individual decision by the Council to disapprove a particular qualification might be an unjustified restriction of the dentist's freedom of expression. With respect, the approach taken by the court in *Chan Sze Lai v Dental Council of Hong Kong* is to be preferred.

21.041 On the facts, the court accepted that it was in the "public interest to forbid a dentist from publishing his possession of a qualification which would confuse or mislead the public and impair a consumer's informed choice of dental treatment",[69] but the learned judge eventually quashed the Council's decision on the ground that there was no evidential basis for finding that her qualification was not pitched at a degree level and thus there was no question of the public being misled by such publicity.[70]

21.042 In *Medical Council of Hong Kong v Helen Chan*,[71] the CFA restored the Medical Council's finding that the doctor in question had breached a long established rule of the medical profession that prohibited doctors from the public endorsement or promotion of the commercial brands of health-related products. The doctor in question had argued, *inter alia*, that this rule was an unconstitutional violation of her freedom of expression as it was never fully articulated and thus the restriction was not "prescribed by law" to be constitutionally certain, and this rule was in any case a disproportionate restriction on free speech. Bokhary PJ on behalf of the CFA, agreed that "free speech is a constitutional freedom even when it is only commercial speech",[72] but free political speech is of "even greater importance".[73] Nonetheless, he concurred with the Court of Appeal's conclusion that this restriction on free speech was sufficiently precise and proportionate. Specifically, Le Pichon JA in the Court of Appeal decision[74] had held that the court should refrain from second-guessing the Council as to the precise professional standards that medical practitioners should abide by as the Council was best placed to determine the boundaries of medical professional conduct. With regard to whether this restriction was proportionate, Le Pichon JA also held that "where commercial gain is involved, less justification was required for restrictions than would otherwise be the case where more serious aspects of the freedom of expression were at stake."[75] On the facts, there would not appear to be any discernible advantage to the public in receiving advertising material about a brand from a doctor when each brand may encompass a wide range of products of different nature and advantages; and furthermore, the restriction does not impinge on the patient's ability to obtain specific advice from a doctor as to the suitability of a particular brand, having regard to his condition.

[67] *Ibid.*, [71]–[72].
[68] *Ibid.*, [80].
[69] *Ibid.*, [87].
[70] *Ibid.*, [89].
[71] (2010) 13 HKCFAR 248.
[72] *Ibid.*, [75].
[73] *Ibid.*
[74] *Chan Hei Ling Helen v Medical Council of Hong Kong* [2009] 4 HKLRD 174.
[75] *Ibid.*, [57].

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United Kingdom,[7] the United States of America[8] (United States), Australia and Canada[9] to fully understand the expanse, boundaries and limits of these rights.

24.002 This chapter examines the scope and limits of the protections offered by the freedom of thought, conscience and religion as enshrined in the Basic Law of the Hong Kong Special Administrative Region (HKSAR) through a review of domestic jurisprudence. To provide a comprehensive overview of the full expanse of the right, in addition to examining Hong Kong case law and legislative developments, the chapter draws on international jurisprudence to sketch the boundaries of the right and explore the direction that Hong Kong courts could take given its international obligations since Hong Kong courts have not as yet presided over the full range of substantive issues relating to this right.

2. Freedom of Thought, Conscience and Religion: Scheme of Protection

24.003 Hong Kong does not have the equivalent of a state religion. 43 per cent of Hong Kong's population subscribes to a religious or spiritual belief system, predominantly Taoism and Buddhism, followed by Christianity, Islam, Hinduism, Sikhism and Judaism. Although Confucianism is fairly prevalent, it is not practiced as a religion. Rather, its tenets are often incorporated into Buddhist and Taoist teachings. Falun Gong is also practiced in Hong Kong, although the official numbers have dwindled since the crackdown against this group on the Mainland in 1999.[10] At the same time, this has not meant a strict anti-establishment approach that is taken in some countries, most notably the United States in light of the First Amendment to the United States's Constitution.[11] Religious sensibilities have had a considerable bearing on the outcomes of particular debates within the community in light of this. Although the courts and legislature have endeavoured to ensure that there is no unequal treatment between religious groups, in considering some

[7] The Human Rights Act 1998 (HRA) represents the enactment of the United Kingdom's human rights obligations into domestic law pursuant to the ECHR. Schedule 1 of the HRA sets out the ECHR rights protected. Article 9 of Sch.1 replicates art.9 of the ECHR, which guarantees the right to freedom of religion.

[8] The US Constitution provides protection against state interference in matters of conscience and religion through the First Amendment which requires state neutrality in all matters respecting religion and is often referred to as the "Anti-Establishment Clause".

[9] The Canadian Charter for Human Rights and Fundamental Freedoms is entrenched in Sch.B of Pt I of the Constitution Act, 1982 and came into force on 17 April 1982. Section 1 of the Charter provides that human rights may be subject to limitations where they are justifiable in a free and democratic society. Article 2(a) expressly protects freedom of conscience and religion, whilst art.2(b) protects other thoughts and beliefs. One unique provision in the Charter not found in other bills of rights is s.33, which enables the government to enact a law that may infringe on Charter rights if it is shown that the minister proposing the law was aware that the Charter rights might be infringed under the new enactment. This is known as the "notwithstanding clause" in Canadian jurisprudence.

[10] Information Services Department of the Hong Kong Government, Hong Kong Yearbook 2010, Hong Kong Logistics Department, HKSAR Government: 2010, available at http://www.yearbook.gov.hk/2010/en/pdf/Credits.pdf. See also, United States Department of State, 2009 Report on International Religious Freedom-China (Hong Kong SAR), 26 October 2009, available at: http://www.unhcr.org/refworld/docid/4ae8614fc.html [accessed 26 July 2011]; and Gary D. Bouma and Andrew Singleton, "A Comparative Study of the Successful Management of Religious Diversity: Melbourne and Hong Kong" (2004) Journal of International Sociology 19(1) 5–24, 7–9.

[11] For an interesting discussion on the range of conflicting traditions in the practice of state and religion relations, see Cole Durham, "Perspectives on Religious Liberty: A Comparative Framework" in Johan van der Vyver and Witte (eds), *Religious Human Rights in Global Perspective* (1996), 15–25, where he describes the church-state relationship as part of a spectrum ranging from endorsed churches, cooperationist regimes, accommodationist regimes to separationist regimes and hostility or persecution.

of the issues, the lack of a nuanced analysis of the impact of general laws on particular religious groups and, at times, non-believers, has perpetuated indirect discrimination. This is as regards both, non-dominant organised religious establishments and non-dominant belief systems which do not appear to be as compelling as the more established religions due to their non-conformity with orthodox approaches to religion, their small or informal following or amateur status when compared with organised religion.[12] The same applies as regards belief systems or philosophies of life which appear to lack the structure and coherence of established religions and religious doctrines.

24.004 The Basic Law protects the liberty of conscience and freedom of religion of all Hong Kong residents pursuant to art.32.

> "Article 32
>
> Hong Kong residents shall have freedom of conscience. Hong Kong residents shall have freedom of religious belief and freedom to preach and to conduct and participate in religious activities in public."[13]

24.005 The right to freedom of religion, its content and the extent to which it may be limited is fully captured in art.18 of the ICCPR, which provides as follows:

> "Article 18, ICCPR
>
> (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental freedoms of others.[14]
>
> (4) The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."[15]

[12] For example, see the discussion of *Leung Kwok Hung v Legislative Council Secretariat* (HCAL 112/2004, [2004] HKEC 1203) and related jurisprudence below at fnn 78–106 and accompanying text.

[13] Although Chapter III of the Basic Law confers the rights encapsulated therein to all Hong Kong residents, art.41 of the Basic Law extends these rights to all persons in Hong Kong, including non-residents.

[14] It is useful to note that this provision is virtually identical to art.9 of the ECHR, save that in art.9(2), in determining whether the limitations imposed on these rights are justified in the interests of public safety, order, etc., the limitations must, in addition to being prescribed by law, also be necessary *in a democratic society*. The words in italics are absent in art.18 of the ICCPR and its equivalent in HKSAR, art.15 of the Hong Kong Bill of Rights. Section 2(3) of the Hong Kong Bill of Rights Ordinance used to provide that any legislation that was found to contravene the articles of the Hong Kong Bill of Rights would be automatically repealed to the extent of the inconsistency. This provision was repealed pursuant to art.160 of the Basic Law as a result of a decision issued by the Standing Committee of the National People's Congress of the People's Republic of China. Whilst it might once have seemed that the Hong Kong Bill of Rights became toothless as a result of the repeal of s.2(3), it continues to be successfully relied on in cases challenging violations of human rights in Hong Kong. See Johannes Chan, "The Status of the Bill of Rights in the Hong Kong Special Administrative Region" (1998) 28 HKLJ 152–155, where the prediction that the repeal of ss.2(3), 3 and 4 would be inconsequential appears to have been borne out by subsequent jurisprudence.

[15] Article 18 of the ICCPR is almost identical in terms to art.18 of the UDHR.

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24.006 The rights enumerated in art.18(1) may not be restricted save to the extent that art.18(3) permits certain limitations on the freedom to manifest one's religion or belief[16] but only if such limitations are prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental freedoms of others.[17]

24.007 To understand the full import of the art.32 provision in the Basic Law, it is helpful to look at related provisions within the Basic Law and other legislation that touch on this right. Article 39 of the Basic Law incorporates international standards of human rights protection directly into the territory's constitution by entrenching the provisions of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), giving them constitutional status. This means that in Hong Kong, the freedom of thought, conscience and religion is protected to the extent provided for under art.18 of the ICCPR. The guarantees of equal protection and non-discrimination on grounds of thought, conscience and religion in both International Covenants further the objectives of comprehensive protection for believers and non-believers alike.[18] Article 2(1) of the ICCPR prohibits discrimination or unequal treatment on grounds of, *inter alia*, religion.[19] Similarly, art.25 of the Basic Law guarantees equal protection and prohibits discrimination on grounds of religion or opinion. The general proviso in art.4 of the ICCPR provides that these rights may not be restricted even in the event of emergencies, rendering them non-derogable. The ICCPR specifically obliges state parties to prohibit advocacy of religious hatred that causes incitement to discrimination, hostility or violence.[20] The Hong Kong Bill of Rights replicates this exact scheme of protection in art.15. In tune with the Basic Law and International Covenants, it prohibits discrimination on grounds of religion or other opinion[21] and obliges the Government to guarantee equal treatment before the law.[22]

24.008 Article 39(2) of the Basic Law closely follows art.18(3) of the ICCPR, permitting only such restrictions on these rights as are prescribed by law and not inconsistent with the provisions in the ICCPR or ICESCR themselves.[23] In this manner, art.39 of the

[16] Note Evans's discussion on the lack of clarity as to the distinction between thought or belief and a "practice" or "act" motivated by such belief as a manifestation of the belief. Carolyn Evans, "Historical Background" in Carolyn Evans (ed), *Freedom of Religion Under the European Convention on Human Rights*, Oxford University Press (2001) (Hereinafter, "Carolyn Evans, *Freedom of Religion Under the European Convention of Human Rights*"), 45. This issue is discussed in greater depth in Johannes Chan and C. L. Lim (eds.), 2nd ed, at fnn 14–15 and accompanying text and 24.035ff below. See also, G. Moens, "The Action-belief Dichotomy and Freedom of Religion", Sydney Law Review, 12 (1989–1990), 195–217.

[17] This is generally referred to as the "justification test" and applies the principles of proportionality in the assessment of whether the infringing legislation is rationally connected to a legitimate purpose and whether the means deployed to achieve that purpose are no more than necessary. The test for determining the rational nexus to a legitimate purpose and the necessity test are discussed in s.5 below.

[18] The relevant articles are arts.2(1), 18 and 20 of the ICCPR and arts.2(2) and 13(3) of the ICESCR.

[19] See arts.2(1), 26 of the ICCPR and art.2(2) of the ICESCR.

[20] Article 20(2) of the ICCPR. This article has been the subject of extensive discussion to the extent that it seeks to limit the boundaries of free speech. Numerous cases have arisen in the American and European contexts concerning the limits of the right to freedom of expression, guaranteed under art.19 of the ICCPR and art.10 of the ECHR where its exercise interferes with the right to freedom of religious belief or the right to manifest one's religion. For an extensive comparative consideration of American, Australian, European, German and other international jurisprudence on these issues, see Puja Kapai and Anne S.Y. Cheung, "Hanging in a Balance: Freedom of Expression and Religion" (2009) 15 Buffalo Human Rights Law Review, 41–79.

[21] Hong Kong Bill of Rights art.1.

[22] *Ibid.*, art.22. Article 5 of the Hong Kong Bill of Rights also prohibits restriction of the right to freedom of religion in the circumstances of an emergency, particularly as a basis for discriminatory treatment.

[23] Basic Law art.39(2).

Basic Law co-opts into the constitution, the "justification test"[24] prescribed in the International Covenants to guard against undue limitations of the covenant rights.

24.009 A simple comparison of the terms and phrases in the various provisions makes it apparent that the formulation and extent of the protected rights under art.32 of the Basic Law, art.15 of the Hong Kong Bill of Rights and art.18 of the ICCPR are not exactly the same. This leaves much scope for the development of the content of the constitutional provision by reference to these other provisions but at the same time, the breadth of art.32 offers flexibility to rethink the distinctions drawn between thought or belief and acts motivated by such beliefs, as encapsulated in existing international provisions. However, this raises the question as to which provision prevails where there are three different versions of the right as represented in the Basic Law, the Hong Kong Bill of Rights and the ICCPR (as entrenched in the Basic Law). Of course, much would depend on how the case is pleaded, which and whether all three of these provisions are relied on. It is likely that the ICCPR and the Hong Kong Bill of Rights versions will be construed as aids to the statutory interpretation of art.32 of the Basic Law rather than serve as a basis for narrowing the rights already protected under the Hong Kong Bill of Rights, in effect prior to the establishment of the HKSAR. The question of the interrelationship between these provisions to delimit the precise contours of the right to freedom of conscience and religion has not arisen before the courts as yet.

24.010 The significance of the direct importation of the International Covenants into art.39 of the Basic Law is threefold. First, to the extent that art.32 of the Basic Law is read as limiting the full expanse of the right, the scope of the right can be "buttressed" by pleading art.18 of the ICCPR as well as art.15 of the Hong Kong Bill of Rights. These provisions enable access to a more extensive and comprehensive scheme of protections which includes aspects that are not elucidated in art.32 of the Basic Law, which is framed broadly. Moreover, the provisions should be construed generously with a view to deriving a purposive reading of art.32 in light of its context and purpose.[25]

24.011 Significantly, given the somewhat broad framing of the right in art.32 of the Basic Law compared to art. 15 of the Hong Kong Bill of Rights and art.18 of the ICCPR, a prospective claim may fare better if all three versions of the protected right are pleaded given the advantages of the entrenched ICCPR and the ICESCR rights under art.39 of the Basic Law. This would best ensure that a comprehensive scheme of rights relating to the free exercise of conscience and religion is made available to claimants.[26] The perils of relying singularly on the enumerated rights under Chapter III of the Basic Law were made clear in *Lam Chi Pan v Commissioner of Police*.[27] In claiming that his right to a fair trial and due process had been infringed in the context of an internal disciplinary proceeding where he was denied the right to legal representation, the applicant relied on the Basic Law right without more and failed in his claim. However, the applicant in *Lam Siu Po v Commissioner of Police*,[28]

[24] This test has been applied in Hong Kong in numerous cases involving challenges to government restrictions on fundamental rights. See, for example, *Secretary for Justice v Yau Yuk Lung* [2006] 4 HKLRD 196, [45], and *Leung v Secretary for Justice* [2006] 4 HKLRD 211, [43].

[25] *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 28–29 and *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, 223.

[26] On this basis, for example, for an applicant seeking to assert his right to change his religious belief, he could seek protection under art.32 of the Basic Law and art.15 of the Hong Kong Bill of Rights and additionally, art.18(2) of the ICCPR as imported through art.39 of the Basic Law, which specifically protects this right.

[27] [2010] 1 HKC 120.

[28] (2009) 12 HKCFAR 237.

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24.017 Bearing these difficulties in mind, the drafters of art.18 of the ICCPR opted for the broader range of words "thought, conscience and belief" to encapsulate different belief systems[42] including those of non-theistic origins. This provision is deliberately broad and to be construed as such.[43] It aims to protect "freedom of thought on all matters, personal conviction and the commitment to religion or belief"[44] and "theistic, non-theistic and atheistic beliefs" in addition to the right not to profess any such religious or other beliefs.[45] This guarantee is aimed at ensuring that all belief systems are adequately protected and that newly established or minority religions are not discriminated against.[46] This, however, has not meant that every professed belief is protected. Bearing these objectives in mind, a generally liberal approach is to be adopted in the interpretation of the right.

24.018 The courts have considered the definition of "religion" in *Chu Woan Chyi v Director of Immigration*.[47] The applicants, a group of four Falun Gong practitioners from Taiwan, applied for judicial review of the Director of Immigration's (the Director) decision to refuse them entry into Hong Kong. They argued that insofar as the Director's decision was based on considerations relating to their religious beliefs and affiliation with particular religious entities, it was *ultra vires* as it amounted to discrimination on grounds of religion which is prohibited under the Basic Law, the ICCPR and the Hong Kong Bill of Rights.

24.019 In arriving at its decision, the court examined the status of the Falun Gong to determine whether it was a religion and could therefore fall within the scope of the provisions.[48]

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[42] K.J. Partsch, "Freedom of Conscience and Expression and Political Freedoms" in L. Henkin (ed), *The International Bill of Human Rights: The Covenant on Civil and Political Rights* (Columbia University Press, 1981), 209, 211.

[43] General Comment No 22, fn 47, paras.1 and 2.

[44] *Ibid.*, [1].

[45] *Ibid.* See also, *Kokkinakis v Greece* 26- ECtHR (ser. A) (1993), [31].

[46] For the purpose of discussion in this chapter, the definition of religion is taken to be any "theistic convictions involving a transcendental view of the universe and a normative code of behavior, as well as atheistic, agnostic, rationalistic, and other views in which both elements are absent," which is a generally accepted definition within the human rights discourse. See Nathan Lerner, *Religion, Beliefs, and International Human Rights* 119–20 (2000).

[47] [2007] 3 HKC 168.

[48] It should be noted, however, that counsel in the case did not make any submissions on the question of whether the Falun Gong movement should be recognised as a religion or religious belief system, nor did counsel for the Director of Immigration concede this point. Justice Hartmann considered the issue to be too important to be bypassed and sought to address it in any case. See *Chu Woan Chyi v Director of Immigration* [2007] 3 HKC 168, [49]–[51]. The Falun Gong is an outlawed group in the People's Republic of China and has been labelled an "evil cult". It is interesting to note this development in light of China's constitutional provision protecting the freedom of religion. Article 36 of the Constitution of the People's Republic of China reads: "*Citizens of the People's Republic of China enjoy freedom of religious belief.* No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion. The state protects normal religious activities. No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state. Religious bodies and religious affairs are not subject to any foreign domination."
The Chinese Government has generally denied that the Falun Gong is a religious movement. It categorises the group as dangerous and perilous to the safety of individuals and society. Indeed, four of the movement's leaders were convicted of various offences and a number of them have been detained and subject to state reeducation. See Abdelfatah Amor, Special Rapporteur of the Commissioner on Human Rights, Elimination of All Forms of Religious Intolerance, UNGAOR, 56th Session, UN Doc. A/56/253 (2001), Annex, [9]. This sheds some light on the reasons for the Chinese Government's approach towards the Falun Gong movement and the Dalai Lama. The tendency for governments to label groups which it perceives to be a threat to the governing authority or more importantly, the political ideology of the country, as "sects" or "cults" is not novel. Some European governments, most notably Germany, have been known to use restrictive legislation to minimise the impact of groups it has branded "cults" and "sects". Despite a court ruling issued from the ECtHR in *Jehovah's Witnesses of Moscow v Russia* (2011) 53 EHRR 4, Germany continues to discriminate against Jehovah's Witnesses and the Church of Scientology through restrictive legislation, including the non-recognition of the groups' corporation status. The German Government contended that the groups' ideologies were a threat to Germany's democratic constitutional order. For further details, see also *Scientology Kirche Deutschland e.V v Germany* App. No. 34614/97, (Commission Decision, 7 April 1997) and *X v Germany* (1981) 24 DR 137. See also Carolyn Evans, "Chinese Law and the International Protection of Religious Freedom" (2002) 44 J. of Church and State 749 for an extensive discussion of the issue of cults under Chinese law in the context of international obligations to protect religious freedom. Despite this position, however, it is noteworthy that the court has reflected its independence by taking a broad approach to the interpretation of the right of freedom of religion in Hong Kong, and independently of the Chinese Government's characterisation of the group.

The court held that in order to ensure that the full measure of freedoms contained within the phrases "religious belief" and "religious activities" as enshrined in art.32 of the Basic Law were protected, they were to be given a generous interpretation and that the court should avoid a technical, narrow or rigid approach.[49] In its consideration of the question of what constitutes "religion" for the purposes of the article, the court adopted the guidelines set out in the Australian authority of *Church of the New Faith v Commissioner of Pay-Roll*,[50] which stipulated the following criteria as indicia of "religion":

> "(1) that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that really extends beyond that which is capable of perception by the senses…
>
> (2) …that the ideas relate to man's nature and place in the universe and his relation to things supernatural…
>
> (3) …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…
>
> (4) …that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups."[51]

24.020 In applying these criteria to the facts, the court held that the Falun Gong satisfied all of these, and was therefore, a "religion" and entitled to protection under the Basic Law. Although the court did not specifically identify what characteristics indicated "belief in the supernatural", it did specify that there was no requirement that there be belief in a particular deity. Moreover, it held that the group's emphasis on meditative practices and other exercises revealed a belief in a transcendental existence beyond the physical with which they sought to harmonise the human spirit. Finally, the court held that the Falun Gong adhered to a moral code which guided the lives of practitioners in ensuring a life of spiritual purpose. The court further held that the status did not depend on the subjective view of the religious believers on whether or not it constituted a religion. The test was an objective one and to be applied in light of the enumerated criteria.[52]

24.021 The status of the Falun Gong has been considered in various courts around the world. For example, Ontario's Human Rights Tribunal considered whether it constitutes a "creed" for the purposes of protection under its Human Rights Code.[53] In *Ontario Human Rights Commission v Daiming Huang*,[54] the court applied an objective test based on the Ontario Human Rights Commission's internal document which defines a creed to mean "religious creed" or "religion" and where belief in a supreme being or deity is not necessary. It includes non-deistic faith-bearing groups and a subjective test of sincerely held personal beliefs about one's own spirituality.[55]

24.022 The Singapore High Court, however, applied the subjective element of the test against the religious group seeking a review of their conviction for participating in an assembly without a permit on grounds that this amounted to an infringement of their freedom of

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[49] Citing *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 28–29.

[50] (1982–1983) 154 CLR 120.

[51] *Ibid.*, 174 (Wilson and Deane JJ).

[52] *Chu Woan Chyi v Director of Immigration* [2007] 3 HKC 168, [57]–[58].

[53] RSO 1990, Chapter 19.

[54] (2006 HRTO 1), HR-0887-04, Decision dated 18 January 2006.

[55] *Ibid.*, [68]–[72]. The subjective element of the test was applied in *Syndicat Northcrest v Amselem* [2004] 2 SCR 551, [46].

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