

# CONTENTS

<i>Preface by the Editor-in-Chief</i>	v
<i>Preface by the General Editors</i>	vii
<i>Table of Cases</i>	xliii
<i>Table of Legislation</i>	lxvii
<i>Table of International Laws, Conventions, Treaties and General Comments</i>	lxxv

## PREAMBLE

P.1	Structure of the Preamble	1
P.2	Judicial consideration of the Preamble	2
P.3	Perspectives on the constitutional principle of “one country, two systems”	3

## CHAPTER I GENERAL PRINCIPLES

Article 1	Inalienability of HKSAR	
	1.1 Inalienable part of the People’s Republic of China	5
	1.2 Judicial application of Article 1	5
	1.3 Drafting history	6
Article 2	Authorisation of Powers of HKSAR	
	2.1 Meaning of “high degree of autonomy”	7
	2.2 Meaning of “independent judicial power”	8
	2.3 Qualifications on “autonomy”	8
	2.4 Drafting history	8
Article 3	Composition of Executive Authorities and Legislature	
	3.1 Vesting executive and legislative power in permanent residents of the Region gives effect to a “high degree of autonomy”	10
	3.2 Meaning of “permanent residents”	10
	3.3 Drafting history	10
Article 4	Duties of HKSAR to Residents	
	4.1 Reinforcement of “fundamental rights” as critical to Basic Law	11

4.2	Distinction drawn between “residents” and “other persons” is material	11
4.3	Meaning of “residents”	11
4.4	Meaning of “... in the Region”	11
4.5	Scope of fundamental rights for those persons not formally “in the Region”	13
4.6	Drafting history	13
Article 5	Guarantee of Protection of Capitalist System and Existing Way of Life	
5.1	Drafting history	14
Article 6	Protection of Private Property	
6.1	Property protections critical to “two-systems” formulation	15
6.2	Comparison with the PRC Constitution	15
6.3	Whether Article 6 adds to Article 105	15
6.4	Drafting history	16
Article 7	State Ownership of Land and Natural Resources	
7.1	Comparison with the PRC Constitution	17
7.2	The land in Hong Kong became property of the Chinese State on and after 1 July 1997	18
7.3	Continuation of same land ownership rights after 1 July 1997	19
7.4	Government exercising its power in relation to leases of land in Hong Kong	19
7.5	Government leases land in private capacity	19
7.6	Drafting history	21
Article 8	Continuity of Laws	
8.1	Continuity integral to Basic Law	22
8.2	Article 8 overlaps with Articles 18 and 160	23
8.3	Pre-Handover decisions by Privy Council on appeal from Hong Kong remain binding on lower courts	23
8.3.1	Where Privy Council decisions overruled	24
8.4	Meaning of “common law”, “rules of equity”	24
8.4.1	“Common law” and the doctrine of incorporation	25
8.4.2	Custom and <i>Chung Chi Cheung</i> consistency	25
8.4.3	Application of the incorporation doctrine	25
8.4.4	Meaning of “equity”	27

8.5	Post-Handover courts under duty to develop common law and equity to meet changing needs of society	27
8.6	Scope of reference to common law and equity by Article 8	28
8.7	Continuity of Ordinances post-Handover	30
8.8	Meaning of “Chinese customary law”	32
8.8.1	Chinese custom in Ordinances	33
8.8.2	Well-established practice of receiving expert evidence on Chinese custom	33
8.9	Whether Basic Law retroactive	34
8.10	Drafting history	36
Article 9	Official Languages	
9.1	Article 9 only has vertical application	36
9.2	English “may also be used”	37
9.3	Resolving discrepancies between Chinese and English versions of legal instruments	37
9.4	“Chinese language” might refer to Cantonese	38
9.4.1	There is not a right to be understood in Cantonese by the courts	38
9.5	Non-official languages	40
9.6	Drafting history	40
Article 10	Official Flag and Emblem	
10.1	PRC Constitution	41
10.2	Statutory protection of national and regional flags	41
10.3	Drafting history	42
Article 11	Consistency of Other Laws with Basic Law	
11.1	Hong Kong courts are required to scrutinise legislation for compatibility with the Basic Law	42
11.2	Drafting history	43
<b>CHAPTER II RELATIONSHIP BETWEEN THE CENTRAL AUTHORITIES AND HKSAR</b>		
Article 12	HKSAR as Local Administrative Region with High Degree of Autonomy	
12.1	The HKSAR is an “administrative region” established under the authority of the CPG	45

12.2	The HKSAR shall enjoy a high degree of autonomy and come directly under the CPG	46
12.3	Drafting history	47
Article 13	Responsibilities Regarding Foreign and External Affairs	
13.1	Distinction between "foreign affairs" and "external affairs"	48
13.2	Hong Kong cannot adhere to a doctrine of state immunity distinct from that of the CPG	48
13.4	Drafting history	49
Article 14	Responsibilities Regarding Defence and Public Order	
14.1	The People's Liberation Army maintains a Garrison in Hong Kong	50
14.2	Public order is to ordinarily be maintained by a Hong Kong-controlled civilian police force	50
14.3	Drafting history	51
Article 15	Appointment of Chief Executive and Principal Officials	
15.1	Extent of CPG power under Article 15	52
15.2	Drafting history	52
Article 16	Executive Power of HKSAR	
16.1	Drafting history	53
Article 17	Legislative Power of HKSAR	
17.1	No invalidation yet under Article 17(3)	54
17.2	Drafting history	54
Article 18	Application of National Laws to HKSAR	
18.1	Article 18 gives effect to the Sino-British Joint Declaration regarding Hong Kong's separate legal system	55
18.2	The Region has some leeway in how it applies national laws	56
18.3	Modification of laws listed in Annex III	56
18.4	Drafting history	57
Article 19	Independent Judicial Power of HKSAR	
19.1	The Courts of Hong Kong have independent judicial power, including that of final adjudication	58
19.2	The right of independent adjudication does not detract from the overarching authority of the NPCSC under Article 158	58
19.3	Article 19 does not apply to administrative tribunals	59

19.4	The jurisdiction of the courts of Hong Kong is limited by traditional common law principles	60
19.5	The Courts of Hong Kong have no jurisdiction over acts of state such as defence or foreign affairs	61
19.5.1	Meaning of "acts of state"	61
19.5.2	The doctrine of state immunity is an "act of state"	61
19.5.3	Powers of local courts re: acts of state	62
19.6	Certificate from the Chief Executive is required only where there is doubt or controversy over facts	62
19.7	Drafting history	63
Article 20	Other Powers May be Granted	
20.1	Usage	64
20.2	Drafting history	64
Article 21	Right of HKSAR Residents to Participate in State Affairs	
21.1	People's Deputies of Hong Kong to National People's Congress	65
21.2	Drafting history	65
Article 22	Operation of CPG Departments within HKSAR	
22.1	Article 22 and its connection to the "right of abode"	66
22.2	Drafting history	67
Article 23	Obligation to Create Anti-Sedition/National Security Laws	
23.1	No laws yet enacted in Hong Kong to give effect to Article 23	68
23.2	Drafting history	68

### CHAPTER III FUNDAMENTAL RIGHTS AND DUTIES OF RESIDENTS

Article 24	Rights of Residency	
24.1	Meaning of "Chinese nationality"	72
24.2	Meaning of "right of abode"	73
24.3	The "right of abode" should be construed generously	74
24.4	Meaning of "Chinese citizens born in Hong Kong"	74
24.5	Meaning of "Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2)"	75
24.6	"Right of abode" controversies and the relationship between the CFA and the NPCSC	76

24.7	Article 24(2)(3) applies to natural, not adopted, children	76
24.8	Application by non-Chinese citizens for permanent residence status	76
24.8.1	Meaning of "ordinarily resident"	77
24.8.1.1	"Ordinarily resident" and immigration status	77
24.8.1.2	The above does not apply to those who reside in Hong Kong on the strength of a "foreign domestic helper" visa	78
24.8.1.3	"Ordinary residence" and a visitor's visa	78
24.8.2	The seven-year period	79
24.8.2.1	Operation of the seven-year requirement	79
24.8.2.2	Calculating the seven-year period	80
24.8.3	The requirement to demonstrate "permanence"	81
24.8.3.1	Satisfaction of requirements of permanent residency	82
24.8.3.2	Permanence requirement can be satisfied when applicant still subject to limit of stay	83
24.8.3.3	Acquisition of permanent status and limits of stay	83
24.8.4	Eligibility of a child to permanent residency in the absence of parent applicant(s)	83
24.8.4.1	Constitutionality of treatment of children under Immigration Ordinance in context of applying for abode	84
24.8.4.2	Special considerations for children of foreign domestic helpers	85
24.9	Drafting history	86
Article 25	Equality Before the Law	
25.1	Relationship of Article 25 with Hong Kong Bill of Rights	87
25.2	Article 25 to be given generous interpretation	87
25.3	The nature of the right to equality	88
25.4	Legislation	88
25.5	Nature of the "justification test" for restrictions on the Right to Equality	88
25.5.1	The Government's burden of justification	89

25.5.2	Where differential treatment is justified	89
25.5.3	Meaning of "differential treatment"	90
25.5.4	Test for "differential treatment"	90
25.5.5	Comparators	91
25.6	Unconstitutional infringements of Article 25 rights	92
25.7	Constitutionally justified restrictions on Article 25 rights	93
25.8	Drafting history	96
Article 26	Electoral Rights	
26.1	Article 26 is to be interpreted purposively	96
26.2	Article 26 should be read in conjunction with the Hong Kong Bill of Rights Ordinance	97
26.3	Comparative jurisprudence is relevant to interpretation of Article 26	97
26.4	Right to vote "in accordance with law"	98
26.5	Legislation	98
26.6	Scope of the right to vote	98
26.6.1	Right to vote is subject to restrictions	99
26.7	Constitutionality of functional constituencies	100
26.7.1	Alternative view of the functional constituencies	101
26.8	Unconstitutional infringements of Article 26 rights	101
26.9	Duty of Courts	102
26.10	The right to stand for election is not absolute	103
26.10.1	Right of convicted persons to stand for election	103
26.10.2	Justified restrictions on the right to stand for election	104
26.11	Drafting history	105
Article 27	Expression, Press, Association, Assembly, Procession, Demonstration, Union Rights	
27.1	Interpreting Article 27	105
27.1.1	Article 27 to be given generous interpretation and any restrictions should be understood narrowly	106
27.2	Freedom of speech	106
27.2.1	Freedom of speech and defamation	107
27.2.2	Restricting freedom of speech	108
27.2.3	The degree to which freedom of speech will be protected depends on the importance of the interest that the speech represents	109

27.2.4	Freedom of speech and the right to hold demonstration must be exercised peacefully	109
27.2.5	Compelled speech and freedom of expression	109
27.2.6	Unconstitutional infringements of free speech rights	110
27.2.7	Constitutionally justified restrictions on free speech rights	110
27.3	Freedom of association	112
27.3.1	Relation to freedom of expression	112
27.3.2	Freedom of association and the proportionality test	112
27.3.3	Constitutionally justified restrictions on freedom of association rights	113
27.4	Freedom of assembly	113
27.4.1	Freedom of assembly and the proportionality test	114
27.4.2	The "rights and freedoms of others" exception to Article 17 of the Hong Kong Bill of Rights and the right to assembly	115
27.4.3	Freedom of assembly is also subject to limitations for the protection of private property of others	115
27.4.4	Constitutionally justified restrictions on freedom of assembly rights	116
27.4.4.1	Freedom of assembly and the offence of obstruction	117
27.4.5	Freedom of assembly and trade unions	118
27.5	Drafting history	118
Article 28	Personal Rights Regarding Search and Seizure, Arrest, Detention, Imprisonment Torture	
28.1	Overlap with Hong Kong Bill of Rights Article 5(1)	118
28.2	Meaning of "arbitrary"	118
28.3	Meaning of "unlawful arrest"	119
28.4	Meaning of "reasonable suspicion"	120
28.5	Meaning of "imprisonment"	121
28.6	Constitutionality of mandatory life sentence for murder	121
28.7	Restrictions on standing for election	122
28.8	Article 28 and immigration detentions	122

28.9	Meaning of "unlawful deprivation of life"	123
28.10	Article 28 entails both substantive and procedural obligations	123
28.11	Torture	124
28.12	Non-refoulement obligation and "high standard of fairness"	124
28.13	Drafting history	125
Article 29	Property Rights Regarding Search and Seizure	
29.1	Intrusion	125
29.2	Land resumption	126
29.3	Meaning of "homes"	127
29.4	Eviction from public housing	128
29.5	Drafting history	130
Article 30	Freedom and Privacy of Communication	
30.1	Scope of Article 30	130
30.2	Admissibility of evidence	131
30.3	Unconstitutional infringements of Article 30 rights	133
30.4	Constitutionally justified restrictions on Article 30 rights	133
30.5	Drafting history	133
Article 31	Freedom of Movement	
31.1	Interpreting Article 31	134
31.2	Freedom of movement not absolute	134
31.2.1	Restricting Article 31	134
31.2.2	Unconstitutional limitations on Article 31	135
31.2.3	Constitutionally justified restrictions of Article 31	137
31.3	Drafting history	137
Article 32	Freedom of Conscience and Religious Belief	
32.1	Interpreting Article 32	138
32.2	Meaning of "religion"	138
32.2.1	Indicia of a "religion"	138
32.2.2	In-group belief as to status as religion not determinative	139
32.3	Scope of religious freedom	140
32.4	Constitutional restrictions on Article 32 rights	140
32.5	Drafting history	141

Article 33	Freedom of Choice of Occupation	
33.1	Interpretation	141
33.2	Scope of Article 33	142
33.3	Amenability to judicial review	143
33.4	Constitutionally justified restrictions on Article 33 rights	144
33.5	Drafting history	144
Article 34	Freedom to Engage in Academic Research and Artistic Creation	
34.1	The values represented by Article 34 have wide application	145
34.2	Drafting history	145
Article 35	Legal Process Rights	
35.1	Differences between Article 35 and Hong Kong Bill of Rights Article 10	146
35.2	Meaning of "courts"	147
35.3	Meaning of "access to the courts"	147
35.4	Meaning of "choice of lawyers"	148
35.5	Right to fair hearing under Hong Kong Bill of Rights Article 10	149
35.6	Meaning of "judicial remedies"	149
35.7	Judicial review of Executive acts and decisions	150
35.8	Legal professional privilege	151
35.8.1	Scope of privilege	151
35.8.2	Privilege entrenched for all persons in Hong Kong	152
35.8.3	Legal privilege at common law	153
35.8.4	Privilege belongs to the client	153
35.8.5	To attract legal professional privilege, client must consult with legal professional	154
35.8.6	Privilege absolute but subject to exceptions	155
35.9	Distinction between legal advice privilege and litigation privilege	157
35.9.1	Litigation privilege: must be a real prospect of litigation	157
35.10	Normative value of protection of legal privilege	158
35.11	Drafting history	158
Article 36	Social Welfare Rights	
36.1	Relationship between Article 36 and Article 145	159

36.2	Right to social welfare	159
36.3	Meaning of "social welfare"	160
36.4	Right to social welfare is right "in accordance with law"	161
36.5	Modification of social welfare in accordance with Article 145	162
36.6	Encroachment on right to social welfare subject to proportionality test and intensity of review	163
36.7	Applicability of the right to social welfare to non-residents	164
36.8	Welfare benefits and retirement security of labour force	165
36.9	Drafting history	165
Article 37	Family and Marriage Rights	
37.1	Relationship with other legal instruments	166
37.2	Family life and immigration	167
37.3	The right to marry	169
37.3.1	Relevance of procreation	169
37.3.2	Physical characteristics at birth are not conclusive of a person's gender identity	170
37.3.3	Same-sex marriage	170
37.4	The right to raise a family	171
37.5	Drafting history	172
Article 38	Other Rights	
38.1	Drafting history	173
Article 39	Incorporation of ICCPR and ICESCR	
39.1	Interpretation	173
39.2	Relationship to other constitutional rights	174
39.3	Interpreting restrictions on the three categories of rights	174
39.4	A "generous" interpretation should be given to the rights in Article 39	175
39.4.1	Nature of generous approach	175
39.4.2	Basic Law as a "living instrument" and irrelevance of "societal consensus"	175
39.5	Uses of comparative jurisprudence	176
39.6	Application of International Instruments	177
39.6.1	Constitutional entrenchment of the ICCPR "as applied to Hong Kong"	177

39.6.2	Extent of application of ICESCR	179
39.6.3	Hong Kong Bill of Rights Ordinance and reservation to the ICCPR in context of immigration	180
39.7	Constitutional significance of the ICESCR	181
39.7.1	ICESCR's legal character: from aspirational to substantive	181
39.7.2	Reservations to ICESCR	183
39.7.3	Incorporation requirement of ICESCR	183
39.7.4	Sector-specific legislation.	185
39.7.5	Uses of the ICESCR	186
39.7.6	Judicial consideration of ICESCR provisions	187
39.8	Constitutional significance of International Labour Conventions	188
39.9	CESCR findings on Hong Kong	190
39.10	Justifying restrictions on Article 39 entrenched rights	190
39.10.1	Meaning of "prescribed by law"	191
39.10.2	Application of the legal certainty principle in Hong Kong courts	193
39.10.3	Breaches of the principle of legal certainty in Hong Kong courts	196
39.11	Due deference	197
39.11.1	Deference not abdication	197
39.11.2	Variable standard of review	198
39.11.3	Separation of powers	199
39.12	Rights: right to a fair hearing	201
39.12.1	Application of test for fair hearing	204
39.12.2	Importance of interpretation facilities	205
39.13	Rights: right to privacy	205
39.13.1	Limiting the right to privacy	209
39.14	Rights: participation in public affairs	213
39.15	Rights: freedom from torture and inhuman and degrading treatment	215
39.15.1	Minimum level of severity	215
39.15.2	Non-refoulement	216
39.16	Drafting history	217

Article 40	Traditional Rights and Interests of Indigenous Inhabitants of New Territories	
40.1	Meaning of "indigenous inhabitants"	218
40.2	Legislation that specifically considers "indigenous inhabitants"	219
40.3	Lawful traditional rights and interests	219
40.4	Government rents and rates	220
40.5	Small House Policy	221
40.6	Political rights	222
40.7	Disposal of land subject to <i>tso, t'ong</i> , etc.	223
40.8	Drafting history	223
Article 41	Application of Rights to non-Residents	
41.1	Requirement to be "in" the HKSAR	224
41.2	Object of Article 41 is to extend constitutional guarantees to non-residents	225
41.3	Range of rights to non-residents depends on the context	225
41.4	Meaning of "in accordance with law"	226
41.5	Article 41 must be read subject to Hong Kong Bill of Rights Ordinance Section 11 and Article 39	226
41.5.1	Article 41 cannot be used to challenge a detention for breach of condition of stay of non-residents	228
41.6	Drafting history	228
Article 42	Obligation to Abide by Laws	
42.1	General	228
42.2	Meaning of "laws in force in the Hong Kong Special Administrative Region"	229
42.3	Drafting history	229
<b>CHAPTER IV POLITICAL STRUCTURE</b>		
<b>SECTION 1: THE CHIEF EXECUTIVE</b>		
Article 43	Role of Chief Executive	
43.1	Drafting history	231
Article 44	Eligibility of Chief Executive	
44.1	Drafting history	232

Article 45	Selection of Chief Executive	
45.1	The Election of Chief Executive has not yet occurred under conditions of universal suffrage: history and context	233
45.1.1	Judicial review of public consultation element	235
45.2	Procedure of Election Committee	236
45.3	Drafting history	236
Article 46	Term of Chief Executive	
46.1	Consequences of inability of Chief Executive to complete five-year term	236
46.2	Drafting history	237
Article 47	Obligations of Chief Executive	
47.1	Must the Chief Executive “love the country”?	237
47.2	Drafting history	237
Article 48	Powers and Functions of Chief Executive	
48.1	The Chief Executive is under a duty to implement a duly enacted Ordinance	239
48.2	Certain powers within Article 48 are not delegable	239
48.3	Article 48(1)(3) obligation to promulgate laws is not relevant where the Chief Executive is granted discretion by Ordinance to bring it into effect	240
48.4	Executive orders are not legislation, but they may still provide for legal rights and obligations	240
48.5	An executive order may have retrospective effect	240
48.6	Limitations on reach of executive orders	241
48.7	“In accordance with legal procedures” is not synonymous with “prescribed by law”	241
48.8	Hong Kong’s government is dominated by the executive branch	242
48.9	Function of Article 48(11)	242
48.10	Power of clemency	243
48.10.1	Judicial review of clemency decisions	243
48.10.2	Power of clemency not exercisable by judicial branch	243
48.11	The Chief Executive has a duty to handle petitions and complaints, but that duty may be delegated	243
48.11.1	When handling a petition or complaint, Chief Executive acting in an administrative or executive capacity, not a judicial capacity	244

	48.11.2	Overlap between Article 48(1)(13) and other review	244
	48.12	Drafting history	244
Article 49	Refusal of Chief Executive to Sign Bill		
	49.2	Drafting history	247
Article 50	Refusal of Chief Executive to Sign Bill after Procedure of Article 49		
	50.1	Drafting history	248
Article 51	Refusal of LegCo to Pass Budget		
	51.1	Drafting history	249
Article 52	Forced Resignation of Chief Executive		
	52.1	Drafting history	250
Article 53	Inability of CE to Discharge Duties		
	53.1	Where the CE is unable to complete a full five-year term	251
	53.2	Drafting history	251
Article 54	Role of Executive Council		
	54.1	Drafting history	252
Article 55	Composition of Executive Council		
	55.1	Drafting history	253
Article 56	Operation of Executive Council		
	56.1	Drafting history	254
Article 57	Establishment of Commission Against Corruption		
	57.1	Legislation	255
	57.2	Drafting history	255
Article 58	Establishment of Commission of Audit		
	58.1	Limits of Commission of Audit’s Independence	256
	58.2	Drafting history	256
<b>SECTION 2: THE EXECUTIVE AUTHORITIES</b>			
Article 59	Government of HKSAR shall be the Executive Authorities		
	59.1	Role of executive authorities	257
	59.2	Judicial review	258
	59.3	Drafting history	258

Article 60	Head of Government is the Chief Executive; Establishment of Departments	
60.1	Role and power of Chief Executive	259
60.2	Finance and Justice	259
60.3	Drafting history	259
Article 61	Principal Officials	
61.1	Meaning of “principal officials”	260
61.2	Eligibility to be principal officials	260
61.3	Accountability of principal officials	261
61.4	Drafting history	261
Article 62	Powers and Functions of the Government	
62.1	Power of the HKSAR Government to conduct external affairs	262
62.2	Eligibility to be a “principal official”	262
62.3	Power to draft and introduce bills, motions and subordinate legislation	263
62.4	Power to designate officials to sit in on the meetings of the Legislative Council	263
62.5	Due deference accorded by courts to the Executive	263
62.5.1	“Fundamental concepts” review	264
62.5.2	Examples	264
62.6	Drafting history	265
Article 63	Independence of Department of Justice to Prosecute	
63.1	Importance of prosecutorial independence	265
63.2	Scope of independence	266
63.3	Scope of judicial review	266
63.4	Abuse of process	267
63.5	Appointment of overseas counsel	267
63.6	Trial venue	268
63.7	Drafting history	268
Article 64	Obligations of Government	
64.1	Role of Executive authorities	269
64.2	Accountability to LegCo	269
64.3	Requirement to obtain approval from LegCo for taxation and public expenditure	269

64.4	Meaning of “taxation”	269
64.5	Drafting history	270
Article 65	Previous Advisory Bodies Maintained	
65.1	System of establishing advisory bodies	271
65.2	Right to participate in public affairs	271
65.3	Drafting history	272
SECTION 3: THE LEGISLATURE		
Article 66	LegCo is the Legislature	
66.1	Drafting history	272
Article 67	Eligibility of LegCo Members	
67.1	Requirements	273
67.2	Drafting history	273
Article 68	Selection of LegCo Members	
68.1	Method for forming LegCo	273
68.2	Provisional LegCo	274
68.3	Drafting history	274
Article 69	Term of Office of LegCo Members	
69.1	Drafting history	275
Article 70	Upon Dissolution of LegCo by Chief Executive	
70.1	Drafting history	276
Article 71	President of LegCo	
71.1	Drafting history	277
Article 72	Powers and Functions of the President of LegCo	
72.1	LegCo President has the power to limit and terminate debates	278
72.2	Drafting history	278
Article 73	Powers and Functions of the LegCo	
73.1	Amenability of LegCo internal workings to judicial review	280
73.1.1	Possible grounds for review of LegCo processes	281
73.2	Compliance with the Rules is not essential to the validity of an enactment	281

73.3	Lawmaking	282
73.3.1	Article 73(1) pertains to LegCo powers and not rights of legislative councilors	282
73.3.2	Article 73(1) does not confer a right to filibuster	282
73.4	Parliamentary privilege	283
73.5	Article 73(10) may be exercised by select committee	283
73.6	Conduct of inquiries by LegCo	284
73.7	LegCo can exercise powers freely and without fear that something might be said that may prejudice reputations	284
73.8	Drafting history	284
Article 74	Introduction of Members' Bills into LegCo	
74.1	Article 74 concerns the introduction of bills rather than their enactment	286
74.2	Drafting history	286
Article 75	Procedural Rules of LegCo	
75.1	LegCo can make its own rules of procedure	287
75.2	Drafting history	287
Article 76	Requirement of Signature and Promulgation by Chief Executive	
76.1	Drafting history	287
Article 77	Legal Immunity of Members in Relation to Statements	
77.1	Immunities	288
77.2	Drafting history	288
Article 78	Legal Immunity of Members Attending or Travelling to Meeting	
78.1	Drafting history	289
Article 79	Disqualification of Members of LegCo	
79.1	Decisions by President might be amenable to judicial review	290
79.2	Meaning of "convicted and sentenced to imprisonment"	290
79.3	Article 79(6) does not include a suspended sentence	291
79.4	Drafting history	291

## SECTION 4: THE JUDICIARY

Article 80	The Courts are the Judiciary	
80.1	Judicial power exclusively vested in judiciary	292

80.2	Meaning of "judicial power"	293
80.2.1	Judicial power carries with it all powers that are necessary to effectively exercise it	293
80.2.2	Judicial power includes power to make remedial interpretations	293
80.3	Changing indeterminate sentences is a judicial rather than executive power	294
80.3.1	Mandatory minimum sentences	295
80.4	Drafting history	295
Article 81	Establishment of the Courts	
81.1	Systemic continuity pre and post July 1 1997	296
81.2	Common law remains the foundation of the Hong Kong legal system	297
81.3	Drafting history	297
Article 82	Power of Final Adjudication Vested in Court of Final Appeal	
82.1	Routes of appeal	298
82.2	Limits on right to appeal subject to proportionality test	298
82.3	Qualifications of judges from other common law jurisdictions	299
82.4	Appellate jurisdiction	300
82.5	Drafting history	300
Article 83	Structure, Powers, and Functions of Courts Prescribed by Law	
83.1	The operation of the judiciary must be "prescribed by law"	300
83.2	Drafting history	301
Article 84	Adjudication of Cases	
84.1	Doctrine of precedent	301
84.1.1	The CFA may on occasion depart from precedent	302
84.1.2	Relevance of overseas precedent	302
84.2	The CFA sits at the apex of judicial system	303
84.3	The common law in Hong Kong	303
84.4	Drafting history	304
Article 85	Independent Judicial Power	
85.1	The courts of Hong Kong exercise independent judicial power	305

85.2	Characteristics of an independent judiciary	305
85.2.1	Judicial adoption of prosecution's opening statement	306
85.3	Drafting history	306
Article 86	Trial by Jury Maintained	
86.1	Trial by jury	307
86.1.1	Person accused of indictable offence liable to be tried on indictment	307
86.2	Role of jury vs role of Judge	308
86.3	Drafting history	308
Article 87	Principles and Rights Previously Applied Maintained; Right to a Fair Trial	
87.1	Article 87 assists in ensuring predictability in the courts following the resumption of Chinese sovereignty	309
87.2	Article 87 guarantees the right to a fair trial	309
87.2.1	Not all aspects of the right to a fair trial are absolute	310
87.2.2	Extent of prosecution's duty of disclosure in order to ensure fair trial	311
87.2.3	Prosecution under duty to disclose relevant material	311
87.2.4	Both admissible and non-admissible evidence must be disclosed	312
87.3	Presumption of innocence	312
87.4	Reverse onus provisions	314
87.4.1	Reverse onus must be reasonable and proportionate response to real need and consistent with presumption of innocence	314
87.4.2	Reverse onus provision: use of remedial interpretation to impose evidential onus only	315
87.4.3	Evidentiary onus	316
87.5	Prosecution must prove <i>mens rea</i>	316
87.6	Privilege against self-incrimination	317
87.6.1	Privilege against self-incrimination is not absolute	317
87.6.2	Examples where privilege cannot be relied upon	318
87.7	Criminal penalties	319
87.7.1	Mandatory life sentences	319

87.7.2	Effect of provision for lighter penalty coming into force subsequent to commission of offence	319
87.8	Power of Post-Release Supervision Board	319
87.9	Drafting history	320
Article 88	Appointment of Judges	
88.1	Judicial Officers Recommendation Commission	321
88.2	Drafting history	321
Article 89	Removal of Judges	
89.1	Independence of the Judiciary	323
89.2	Drafting history	323
Article 90	The Chief Justice	
90.1	Drafting history	324
Article 91	Appointment and Removal of Other Members of Judiciary	
91.1	Judicial appointments	325
91.2	Drafting history	326
Article 92	Recruitment of Foreign Judges	
92.1	Judges from other common law jurisdictions	326
92.2	Drafting history	326
Article 93	Employment Security of Judges	
93.1	Meaning of "no less favourable than before"	327
93.2	Pension benefits governed by legislation	328
93.3	Drafting history	328
Article 94	Foreign Lawyers	
94.1	Legislation	329
94.2	Drafting history	329
Article 95	Judicial Relationships with Other Parts of China	
95.1	Agreements and legislation	329
95.2	No duty	330
95.3	Drafting history	330
Article 96	Judicial Assistance with Foreign States	
96.1	Meaning of "appropriate arrangements"	331
96.2	Drafting history	331

## SECTION 5: DISTRICT ORGANIZATIONS

Article 97	Establishment of District Organizations	
97.1	The Government has the power but not obligation to create District Organisations	332
97.2	Legislation	333
97.3	Drafting history	333

Article 98	Powers and Functions of District Organizations Prescribed by Law	
98.1	Meaning of "prescribed by law"	333
98.2	Drafting history	334

## SECTION 6: PUBLIC SERVANTS

Article 99	Eligibility to be Public Servant and Obligations	
99.1	Drafting history	334

Article 100	Employment Security of Public Servants	
100.1	Meaning of "no less favourable than before"	336
100.2	Constitutionality of bilingualism requirement for civil servants	336
100.3	Drafting history	336

Article 101	Foreign Public Servants	
101.1	Drafting history	338

Article 102	Retirement of Public Servants	
102.1	Drafting history	340

Article 103	Meritocratic System for Public Servants	
103.1	Meaning of "Hong Kong's previous system of recruitment... shall be maintained"	340
103.2	Legislation	341
103.3	Drafting history	341

Article 104	Obligation to Uphold Basic Law and Swear Allegiance to HKSAR	
104.1	Meaning of "in accordance with law"	342
104.2	Legislation	343
104.3	Drafting history	343

## CHAPTER V ECONOMY

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

Article 105	Private Property Rights and Compensation for Deprivation	
105.1	Article 105 is to be construed generously	345
105.1.1	Proportionality test not implicated	346
105.2	Meaning of "property"	346
105.3	Article 105 could recognise legitimate expectations of property rights	347
105.4	Meaning of "acquisition, use, disposal and inheritance of property"	348
105.5	Meaning of "deprivation"	349
105.5.1	Whether deprivation must be accompanied by state acquisition	350
105.5.2	General situations which will not ordinarily constitute deprivation	351
105.5.3	Dismissal of claims of deprivation	352
105.5.4	"Real value" of the property concerned	352
105.5.5	Compensation for deprivation of property	353
105.6	Ownership of external enterprises and investments	353
105.7	Drafting history	354

Article 106	Financial Independence of HKSAR	
106.1	The Government of the Region is its own sovereign in terms of financial matters	355
106.2	Drafting history	355

Article 107	Core Budgetary Principles	
107.1	Drafting history	356

Article 108	Independent Taxation System	
108.1	Drafting history	358

Article 109	Maintenance of HKSAR as International Financial Centre	
109.1	Hong Kong as "an international financial centre"	359
109.2	Drafting history	359