FACV Nos. 2, 3 & 4 of 2021
[2021] HKCFA 38

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NOS. 2, 3 AND 4 OF 2021 (CIVIL)
(ON APPEAL FROM CACV NOS. 234, 317 AND 319 OF 2019 (HEARD TOGETHER))

BETWEEN

KWOK CHEUK KIN	**1st Applicant (Appellant)**
and	
DIRECTOR OF LANDS	**1st Respondent**
CHIEF EXECUTIVE IN COUNCIL	**2nd Respondent**
SECRETARY FOR JUSTICE	**3rd Respondent**
and	
HEUNG YEE KUK	**Interested Party**

Before:	Chief Justice Cheung, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Chan NPJ and Lord Sumption NPJ
Dates of Hearing:	11-12 October 2021
Date of Judgment:	5 November 2021

JUDGMENT

The Court:

Introduction

1. All major political transformations are haunted by the ghosts of the previous regime. There are few matters on which traditional habits are more persistent than the system of land tenure, which has a profound effect on the customs and usages of any settled community. This appeal is concerned with the impact of successive political transformations in the New Territories on its system of land tenure.

2. The Small House Policy is a non-statutory administrative policy operated by the Lands Department which authorises grants of land and building licences to the indigenous male population of certain villages in the New Territories on more favourable terms than those available generally. It was formalised in substantially its present terms by a decision of the Executive Council on 14 November 1972, which also gave it its current name. But it has existed in one form or another since the beginning of the 20th century, when the New Territories were being incorporated into Hong Kong as an extension to the British colony. The question at issue on this appeal is whether it is constitutional under the Basic Law which governed the transition from colonial rule when the People's Republic of China[1] resumed the exercise of sovereignty over Hong Kong in 1997. The Appellant contends that it is invalidated by the anti-discrimination provisions of the Basic Law and the Hong Kong Bill of Rights[2]. It

[1] The "PRC".
[2] The "BOR".

is common ground that it is *prima facie* discriminatory on grounds of both sex and social origin. But the Respondents and the Interested Party say that it is validated by a provision of the Basic Law, Article 40,[3] protecting the lawful traditional rights and interests of the indigenous population of the New Territories.

The Small House Policy

3. It is common ground that the Small House Policy as currently applied is accurately described in a pamphlet entitled "How to Apply for a Small House Grant" published by the Lands Department in December 2014. For present purposes, the following summary is sufficient. The beneficiaries of the Policy are "indigenous villagers" of the New Territories. This means adult males descended through the male line from a resident in 1898 of a recognised village. Recognised villages are villages included in a list approved by the Director of Lands. There are currently 642 recognised villages. The Policy relates to land in the village or its immediate environs which are not affected by any impending development or future planning or development proposals. Its object is to enable an eligible villager to build, once in his lifetime, a small house in his own village for his own occupation. It allows him to apply for three kinds of grant: (i) a free building licence, which is a licence to build on private land at a nil premium in the case of pre-1898 villages or a full premium in the case of villages recognised since that date; (ii) a private treaty grant of government land at a reduced premium; and (iii) an exchange, involving the surrender of an existing title in exchange for the grant of a new title at a nil premium so far as it was private land and a reduced premium so far as it was government land. In any of the three cases there must be no "substantiated" local objection to the proposal. Typical objections include objections based on the indigenous villager status of the

[3] "BL40".

applicant, as well as those based on environmental or technical issues, or politically sensitive issues such as village boundary disputes or *feng shui*. Over the years, benefits under the Policy have come to be known as "*Ding* rights".

Historical background

4. As is well-known, the British colony of Hong Kong comprised three blocks of territory occupied at different times. The island of Hong Kong was ceded to Great Britain by the Treaty of Nanking[4] in 1842 and the southern part of the Kowloon peninsula by the Convention of Peking[5] in 1860. Under the Second Convention of Peking, in 1898, the *Qing* Government leased part of the administrative district of San On to Great Britain for 99 years with effect from 1 July 1898, and the district thereafter became known as the New Territories.

5. Shortly after the cession of Hong Kong Island, the colonial administration introduced a new system of land tenure which has subsisted in its essential respects to this day. All land became the property of the Crown, which granted only leasehold interests to others. In principle, leases were granted at a premium reflecting the market value of the land, subject to strict contractual and statutory controls over development. Conversion of agricultural or garden land to building use, where it was available, was granted at a premium reflecting the enhancement of the market value. The same system was applied to southern Kowloon after its cession in 1860. In the case of the New Territories, an Order in Council of 20 October 1898 (the so-called First Proclamation) provided that with limited exceptions all laws and ordinances in force in the colony of Hong Kong were to take effect in the New Territories until amended or repealed. Accordingly, the New Territories (Land Court) Ordinance[6] provided by section 15 that "all land

[4] Nanjing.
[5] Beijing.
[6] No. 18 of 1900.

in the New Territories is hereby declared to be the property of the Crown" during the term of the New Territories lease from the *Qing* Government. All persons in occupation of land were to be deemed trespassers as against the Crown unless their occupation was authorised by grant from the Crown, by title allowed by the Land Court, or by licence from the Crown.

6. At the time of their cession to Great Britain, Hong Kong Island and southern Kowloon had been thinly populated and undeveloped. The New Territories were very different. They comprised an extensive area of about 356 square miles on the mainland (including northern, or "New" Kowloon) and surrounding islands, with a population of about 90,000 people living in a large number of villages. The colonial authorities were therefore faced for the first time with the application of a land settlement originally devised for an almost empty territory to one which was already extensively settled by a substantial population with existing rights over land. Some adaptation of the new land system was therefore necessary if it was to accommodate existing entitlements and avoid significant social disruption. Upon taking possession of the New Territories in April 1899 the Governor, Sir Henry Blake, declared that the government's policy would be to protect the existing commercial and landed interests and the usages and good customs of the inhabitants.

7. Chow J (as he then was)[7] heard expert evidence about the system of land tenure in force before the cession, which these arrangements replaced.[8] He found that in theory land tenure before 1898 was governed by the *Qing* Code.[9] Under the Code, all land was nominally the property of the Emperor and its occupation by others was permissible only by grant of the Imperial authorities in

[7] [2019] HKCFI 867; [2020] 1 HKLRD 988 ("CFI Judgment").
[8] CFI Judgment, at [60]-[66].
[9] The "Code".

return for the payment of land tax. By the late 19th century, however, land tax was rarely collected, the Code had fallen into desuetude and a system of customary tenure had taken its place. The basic features of this system were that plots were treated as belonging to the owner of the subsoil, whose title was derived from leases from the Emperor and whose obligation was to pay the land tax. But the exclusive right of use and occupation belonged to the owner of the topsoil, whose title derived from leases granted by the subsoil owner. Both the subsoil leases and the topsoil leases created interests in the land which were perpetual, heritable and partible. This left the topsoil owner with an unlimited dominion over the land subject to payment to the subsoil owner of a rentcharge. There was also no legal restriction on building.

8. The effect of the new system of land tenure was that customary titles under the pre-colonial system were abolished and replaced by a system of Crown leases for a limited term not exceeding 99 years, subject to various covenants and statutory provisions restricting development. Between 1899 and 1903, land in the New Territories was surveyed, cadastral plans were drawn up, and a system of registration of title was established. All claims to land were required to be presented to a Land Court created in 1900, whose function was to receive the claims and determine those which were disputed. The New Territories were divided into blocks, in respect of each of which a Block Crown Lease was issued for a term of 99 years less 3 days[10] corresponding to the term of the lease from the *Qing* Government. Each Block Crown Lease contained a Schedule listing lots comprised within the Block. It recorded title to each lot, where title had been established, described its current use, and contained covenants against building without government consent. Existing title to 354,277 lots was established under

[10] That is, 75 years plus an option to renew for 24 years less 3 days.

this procedure. A Crown rent was fixed for each of them. These lots were commonly referred to as “Old Schedule lots”.

9. The Land Court fixed a terminal date for presenting claims in each district. Land unclaimed by the terminal date was deemed to be Crown land available to be sold. At some time between 1901 and 1904, the colonial government began to grant leases of Crown land. Lots disposed of by the Crown in this way after 1901 were referred to as “New Grant lots”.

Free building licences

10. By two Gazette notices of 1906, Nos. 191/1906 and 192/1906, the Governor authorised Assistant Land Officers to grant building licences in respect of agricultural or garden land in the New Territories and to approve buildings erected pursuant to the licences. The introduction of a regime of building controls created potential difficulties in relation to Old Schedule lots. They were addressed in a memorandum in January 1906 by Mr. Cecil Clementi (then a judge of the Land Court) to the Colonial Secretary.[11] Mr. Clementi pointed out that before 1898 there had been no restrictions on use and no distinction between agricultural and building land. Landowners had been entitled to build on their land, subject only to a theoretical obligation (in practice never enforced) to report the change of use to the officers of the Imperial government so that an increased land tax could be charged reflecting its enhanced value. For this reason, it became the practice of Land Officers to grant “free” licenses to build village-type houses on Old Schedule lots. These licences were granted at an increased Crown rent but without premium. By comparison, a full market premium was charged for building licences issued in respect of New Grant lots.

[11] Contained in CSO No 807/06.

11. The application of the free building licence policy was straightforward enough when the relevant proprietor was the original owner of an Old Schedule lot recorded in the relevant Schedule, or his descendant. After about 1920, however, outsiders steadily bought up Old Schedule agricultural land. A number of these purchasers applied for free building licences to build large luxury villas. From time to time the law officers pointed out that the original policy of 1906 had not distinguished between inheritors and purchasers of Old Schedule lots, and suggested it should make no difference who the owner of a lot was. In general, however, District Land Officers did not act on that view. They treated free building licences as a concession available only to villagers and their successors in title by descent. They generally refused to grant free building licenses to outsiders and even to indigenous villagers who acquired Old Schedule lots by purchase. Moreover, they strictly enforced the limitation of free building licences to village-type houses ("native cottages") on lots in or close to recognised villages. Some of them applied this limitation to Old Schedule lots wherever located.

12. Differences between the practices of different Land Officers regarding free building licences ultimately led in 1957 to the standardisation of the Policy regarding free building licences. This was achieved by the Executive Council approving the policy as described in a memorandum dated 2 April 1957.[12] The effect of the 1957 Memorandum was to lay down that for Old Schedule lots:

> "A bona fide villager will in general be permitted, subject to planning and fung-shui considerations, to build a village-type house for his own occupation, and such permission (by building licence) will be free of premium."[13]

[12] Memorandum for Executive Council on Land Conversion in the New Territories XCC 27 for discussion on 9 April 1957 (the "1957 Memorandum").
[13] The 1957 Memorandum, at [9].

13. For this purpose, the 1957 Memorandum abolished the distinction between villagers deriving their title from inheritance and those deriving it from purchase:

> "It is not proposed to make a distinction in applying these conditions between applicants who have inherited Old Schedule lots and those who have purchased them. While it would be theoretically correct to make such a distinction, it is not thought that it would be practicable and that if the advantages of the concessionary terms proposed for the owners of Old Schedule lots were restricted to those who had acquired them by inheritance the way would be open for other applicants to seek the same benefits by fraud or mis-representation."[14]

The restriction to applicants descended in the male line from a resident in 1898 continued.

14. In 1960, the system of free building licences was further modified so as to deal with the increase in the population of the New Territories, which had led to the geographical expansion of many villages. Free building licences were made available for New Grant lots in respect of which grants had been made before the Second World War. The reason for the limitation to pre-war grants was that these were thought less likely to have been made to outsiders.

15. The 1957 Memorandum referred to a note prepared by the District Commissioner for the New Territories, which was annexed to it. This identified five policy considerations underlying the revised policy. They included "the need to honour our undertakings towards the country people",[15] along with ordinary considerations of town planning, development control and government revenue. Expanding on this point, the District Commissioner observed:

> "We have said many times that the grantees of old schedule lots and their descendants are not required to pay premium for conversion of their agricultural land to build traditional village houses for their own occupation; and although in town layout areas

[14] *Ibid*., at [10].
[15] *Ibid*., Enclosure 2, at [1].

> this 'right' (which derives simply from the fact that the Chinese government, who provided no services, also charged no premia for grants of land, only a land tax; and did not exercise any control on buildings beyond charging increased land tax) has become modified, and in New Kowloon it has never been recognised at all, elsewhere it has been treated for so long as 'entrenched' that it would now be dangerous to deny it."[16]

16. This is one of a substantial number of internal documents of the colonial authorities recording the government's view that it was honour bound to respect the building rights which had formerly been enjoyed by those holding Old Schedule lots in 1898. This was never the only consideration, however. Other factors included development control, improving building standards, dealing with the squatter problem, catering for the larger needs of an expanding population, and maintaining government revenue. A desire to reflect at least some of the advantages enjoyed by the village population before the lease to Great Britain was one consistent strand of official thinking on this subject before the Policy was formalised in 1972. But although the historical origins of the Policy were never forgotten, it is clear that in due course it acquired a life of its own, to some extent independent of the considerations which had led to its adoption in the first place. It created entrenched vested interests and expectations which would have been politically difficult to displace.

Sale of Crown land on concessionary terms

17. The availability of Crown land for sale to indigenous villagers has always been an essential adjunct to the Small House Policy. As the population increased, more villagers found themselves without land on which to build a house, or without land of a size, shape or location suitable for building.

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[16] *Ibid*., at [2].

18. Various methods of sale of Crown land have been employed at different times, but all of them encountered a common problem when the land was located in a village area. The villagers arranged matters so that they did not compete against each other for the land. The existence of an effective market for village land therefore depended on applications by outsiders. They, however, were commonly frozen out by existing villagers. Those outsiders who did succeed in buying Crown land in village areas were habitually prevented from building on it by threats to the builders. It is not clear how long this problem subsisted, but the evidence shows that it was still a significant issue at the time when the Small House Policy was formalised in 1972.

19. Until 1909, New Grant lots were sold by public auction. In December 1908 the Governor, Sir Frederick Lugard, submitted a proposal to the Secretary of State that small lots in the New Territories (apart from New Kowloon and the shores of Junk Bay) should in future be sold by private treaty unless there was a likelihood of significant development in the area. This was because there was never any competition at auctions, as a result of which the premium rarely exceeded the upset price (reserve) and any profit was almost always swallowed up by advertising costs. In their joint report, the experts who gave evidence before the Judge agreed that "the villagers had shown themselves quite capable of ensuring that only one bidder would appear at an auction."[17] The Secretary of State, Lord Crewe, accepted the proposal with modifications. As a result, from 1909 until shortly after the Second World War, sales were conducted by private treaty, generally at what would have been the upset price at an auction. Although there was no formal restriction to male indigenous villagers, in practice grants were made only to them.

[17] Joint Expert Report of Eric John Davison and Patrick Hugh Hase, at [20].

20. Auction sales were reintroduced shortly after the Second World War. Initially, they were open auctions, but a practice quickly developed by which in practice they became “restricted” or “closed” village auctions. The auction was limited to indigenous villagers or non-indigenous villagers who had (or whose fathers had) lived in the village before the Japanese occupation. This was achieved by various administrative devices, such as restricting the publication of notice of the sale or holding the auction in the village. There would usually be only one bidder, put forward by agreement between the villagers, and the lot would be knocked down at the upset price. Lots were withdrawn if an outsider was seen to be bidding. These auctions can fairly be called a charade. But the evidence suggests that they reflected a realistic appreciation of the villagers’ ability to control the market for village land.

21. When the Policy was formalised by the Executive Council in 1972, private treaty sales were restored. But they were restored at a fixed premium of two-thirds of the market value, which corresponded to the upset price previously set for village auctions.

“Exchanges”

22. Exchanges do not call for separate consideration. A villager who owned a plot of land which was not suitable for building on would commonly apply to surrender his plot in exchange for the grant of a plot, usually comprising all or part of his original plot plus some adjoining Crown land. Similar principles applied in these cases. The regrant was at a nil premium in the case of land which had been private and at a reduced premium in the case of Crown land.

Exclusion of women

23. Grants of Crown land under the Small House Policy and its predecessors have always been available only to men. Whatever the method of disposal, female purchasers were excluded even if they were indigenous villagers. This was achieved by arrangement with the village elders, who invariably objected to sales to women unless they were buying to build houses for their infant sons. The reasons for the exclusion of women are explained in the expert evidence. The villages had generally originated in family settlements, and their inhabitants retained the character of clans. Before 1898 women had not been entitled to inherit land.[18] Traditional relationships within villages would have been seriously disrupted if a woman had been able to inherit land, because this would have enabled her and her children after her death to hold land in a village to which she no longer belonged and her children had never belonged.[19] The same consequences would have followed if a woman had been able to apply for a grant under the Small House Policy. In a report on the incorporation of the New Territories into the colony, laid before the Legislative Council by the Governor in 1912, it is stated:

> "A Chinese community like that of the New Territories is by its structure and its long habit of decentralised government very easy to administer. But its old established customs and institutions must not be lightly changed or affronted, and necessary innovations have to be introduced with the greatest delicacy. In the New Territories as elsewhere continuous descent in the male line is the paramount object in the life of the Chinese, and the necessity for this is the foundation for many of their habits and customs."[20]

[18] CFI Judgment, at [62]; CA Judgment, at [41].
[19] Expert Report of Patrick Hugh Hase, at [101].
[20] Report on the New Territories 1899-1912 laid before the Legislative Council by command of the Governor on 22 August 1912, at [92].

24. Although women are now entitled, as a result of changes in the law, to acquire land by will or upon an intestacy, the evidence is that in practice this rarely happens in the case of village land.[21]

The statutory framework

25. On 19 December 1984 the governments of the PRC and the United Kingdom jointly declared that the PRC would resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997 and that Hong Kong would become a Special Administrative Region[22] of the PRC. The Joint Declaration set out the "basic policies" of the PRC with regard to Hong Kong. The fundamental principle underlying the Joint Declaration was continuity. Paragraph 3(3) of the Joint Declaration provided that:

> "the laws currently in force in Hong Kong will remain basically unchanged".

Paragraph 3(5) provided:

> "The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region. Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law."

26. The Joint Declaration stated that the "basic policies", together with the elaboration of them in Annex I, would be embodied in a Basic Law. Its preparation was entrusted to a drafting committee comprising members from the Mainland and Hong Kong. In its final form, the Basic Law was adopted as a law of the PRC at the Third Session of the Seventh National People's Congress on 4

[21] Expert Report of Patrick Hugh Hase, at [103].
[22] "SAR".

April 1990 and promulgated by the President of the PRC on the same day. It laid down the "systems to be practised" in the Hong Kong SAR with effect from the handover on 1 July 1997.

27. The Basic Law provides, so far as relevant:

> "**Article 25**[23]
>
> All Hong Kong residents shall be equal before the law.
>
> **Article 39**[24]
>
> The provisions of the International Covenant on Civil and Political Rights… as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
>
> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.
>
> **Article 40**
>
> The lawful traditional rights and interests of the indigenous inhabitants of the 'New Territories' shall be protected by the Hong Kong Special Administrative Region.
>
> **Article 120**[25]
>
> All leases of land granted, decided upon or renewed before the establishment of the Hong Kong Special Administrative Region which extend beyond 30 June 1997, and all rights in relation to such leases, shall continue to be recognized and protected under the law of the Region.

[23] "BL25".
[24] "BL39".
[25] "BL120".

Article 122[26]

> In the case of old schedule lots, village lots, small houses and similar rural holdings, where the property was on 30 June 1984 held by, or, in the case of small houses granted after that date, where the property is granted to, a lessee descended through the male line from a person who was in 1898 a resident of an established village in Hong Kong, the previous rent shall remain unchanged so long as the property is held by that lessee or by one of his lawful successors in the male line."

28. After the promulgation of the Basic Law but before its coming into effect, the Hong Kong Bill of Rights Ordinance[27] and the Sex Discrimination Ordinance[28], were enacted in 1991 and 1996 respectively. Both remain in force.

29. The HKBORO gives statutory effect to the International Covenant on Civil and Political Rights[29]. Article 22 of the BOR[30], which gives effect to Article 26 of the ICCPR, provides:

> "**Article 22**
>
> **Equality before and equal protection of law**
>
> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

30. The SDO also gave effect, although only in part, to the 1979 Convention on the Elimination of All Forms of Discrimination Against Women.[31]

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[26] "BL122".
[27] Cap. 383 (the "HKBORO").
[28] Cap. 480 (the "SDO").
[29] The "ICCPR".
[30] "BOR22".
[31] The "CEDAW".

The SDO outlawed certain kinds of sex discrimination. Section 21 of the SDO prohibited discrimination by the government in the exercise of its powers, but was subject to a general exception in Schedule 5, Part 2, for:

> "that policy of the Government (a) known as the small house policy; and (b) pursuant to which benefits relating to land in the New Territories are granted to indigenous villagers who are men."

31. Since both the United Kingdom and the PRC were parties to the CEDAW, this necessitated a reservation by both governments, on 14 October 1996 in the case of the United Kingdom and on 10 June 1997 in the case of the PRC. Both were in similar terms, providing that:

> "Laws applicable in the New Territories which enable male indigenous villagers to exercise certain rights in respect of property and which provide for rent concessions in respect of land or property held by indigenous persons or their lawful successors through the male line will continue to be applied."

The judgments below

32. Chow J held as follows:

(1) The *Ding* rights could properly be regarded as "rights or interests" capable of being protected by BL40. On that footing, the critical questions were whether they were (i) lawful, and (ii) traditional.[32]

(2) The word "lawful" was purely descriptive of those traditional rights which the indigenous inhabitants of the New Territories had enjoyed before 1 July 1997. All of the *Ding* rights were therefore lawful.[33]

(3) "Traditional" rights were rights "traceable" to those which the indigenous villagers had enjoyed before the inception of the lease

[32] CFI Judgment, at [38]-[40].
[33] CFI Judgment, at [129].

of 1898. The right to a free building licence for Old Schedule lots could be so described. The practice of granting such licences was therefore constitutional.[34]

(4) But the practice of granting government land by private treaty sale at a concessionary premium to indigenous males only, and the practice of exchanging private land for government land at a reduced or nil premium with indigenous males only, were not traceable to rights existing before 1898 and were therefore unconstitutional.[35]

(5) The exception of the Small House Policy from the SDO in Schedule 5, Part 2, was unconstitutional as being inconsistent with the Basic Law.

33. All parties appealed. The Court of Appeal[36] agreed with the Judge that *Ding* rights were relevant "rights and interests", but held that the relevant date for determining both the lawfulness and the traditional character of the rights protected by BL40 was April 1990 when the Basic Law was promulgated.[37] On that footing, they held that the Small House Policy was constitutional in its entirety. They also considered that even if "traditional" rights were confined to those derived from rights enjoyed by indigenous inhabitants before 1898, all three forms of grant made under the Small House Policy satisfied that test.

34. There were issues in both courts below about the Appellant's standing and as to his delay in bringing the proceedings, to which we will return at the conclusion of this judgment.

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[34] CFI Judgment, at [115]-[116].
[35] CFI Judgment, at [117], [125].
[36] Poon CJHC, Lam VP and Au JA: [2021] HKCA 54; [2021] 1 HKLRD 737 ("CA Judgment").
[37] CA Judgment, at [93].

Construction: the legal context

35. Before embarking on a detailed analysis of the language of BL40, it is necessary to ask what can be deduced about its purpose from the historical background and the circumstances in which it was enacted. As the Court of Appeal held, the relevant date for this exercise is April 1990, when the Basic Law was promulgated. In *Director of Immigration v Chong Fung Yuen*,[38] this court held that extrinsic material which threw light on the context or purpose of the Basic Law was available to construe it. This included the state of domestic legislation at the time of its promulgation in April 1990:

> "Because the context and purpose of the Basic Law were established at the time of its enactment in 1990, the extrinsic materials relevant to its interpretation are, generally speaking, pre-enactment materials, that is, materials brought into existence prior to or contemporaneous with the enactment of the Basic Law, although it only came into effect on 1 July 1997."

36. Given that the Basic Law maintains in effect so far as consistent with its terms the existing laws of Hong Kong (Article 8), the existing rights and freedoms of residents (BL39) and the existing rights of leaseholders (BL120), BL40 must be addressed to rights and interests of the indigenous inhabitants of the New Territories which are (i) special to those inhabitants and not common to the generality of residents, and (ii) potentially open to challenge in the absence of a protective provision like BL40. One obvious basis for such a challenge was the anti-discrimination provisions of the ICCPR. The incorporation of the ICCPR into the domestic law of Hong Kong had not occurred in June 1990 but was required by BL39.

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[38] (2001) 4 HKCFAR 211, 224.

37. Shortly after the Joint Declaration, the Heung Yee Kuk,[39] the representative body of the New Territories villages, identified eight existing privileges of their constituents. In the course of the drafting process, discussions of the traditional rights or interests of indigenous villagers were conducted by reference to this list. The eight privileges were (i) the right to be represented to the Hong Kong government by the Kuk, a statutory body, and by the chairmen of rural committees; (ii) the right to build a small house in accordance with the Small House Policy formalised in 1972; (iii) a rent freeze while the property remained in the hands of a person descended in the male line from a pre-1898 resident, which was proposed in Annex III of the Joint Declaration and ultimately embodied in BL122; (iv) the right to a grant of alternative land when villages were compulsorily expropriated for industrial development or public housing; (v) exemption from rates for village houses; (vi) the right to bury deceased family members at the hillside near the village, instead of at the public cemetery, and to be compensated for the demolition of graves; (vii) the right to have a deceased estate distributed according to Chinese custom to the deceased's male offspring or to have land (*tso/t'ong* land) held in a customary family trust for descendants in the male line; and (viii) the equal right of residence and entitlement to ancestral estates enjoyed by indigenous villagers living overseas if they return. Two points should be noted about these privileges. The first is that only (i), (iii), (v) and (vii) had a statutory basis. The others were benefits under non-statutory policies applied as a matter of administrative discretion. The second is that only (vi) and (vii), and arguably (ii), could be said to originate in some right enjoyed in pre-colonial times.

38. In a society where building land was scarce and expensive, the Small House Policy was by far the most important of the privileges identified by the

[39] The "Kuk".

Kuk, and by the same token much the most controversial. There were persistent demands before the promulgation of the Basic Law that it should come to an end along with the colonial government which had devised it. BL40 marked the rejection of these demands.

"Rights and interests"

39. The starting point is to identify the nature of the "right" or "interest" which an applicant under the Small House Policy may be said to have. The existence of the Policy is implicitly acknowledged in a number of Ordinances, as well as the Basic Law itself. They included notably the Buildings Ordinance,[40] which applied to the New Territories since 1961 in the manner provided by the Buildings Ordinance (Application to the New Territories) Ordinance,[41] and exempted certain categories of houses there, including those which did not exceed the dimensions specified for the purpose of the Small House Policy; the provision for rating exemption in section 36(1)(c) of the Rating Ordinance;[42] and the provision for a rent freeze in BL122. But the Policy itself has never had a statutory basis. It is applied as a matter of administrative discretion. In those circumstances, it cannot give rise to a legal right in the ordinary sense of the word. The actual grant of a building licence or a lease gives rise to a right which is good against the world, but an application for such a right or interest does not. The relevant right is founded entirely on public law. We would define it as a right to have one's application dealt with in accordance with the criteria laid down in the government's statements of current policy, subject to the lawfully exercised discretion of the Lands Department. That discretion is not unlimited. It is governed by law. "Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will

[40] Cap. 123.
[41] Cap. 121, formerly the Buildings Ordinance (Application to the New Territories) Regulations (Cap. 322).
[42] Cap. 116.

require the promise or practice to be honoured unless there is good reason not to do so": *R (Nadarajah) v Secretary of State for the Home Department*;[43] c.f. *Ng Siu Tung v Director of Immigration*,[44] and *Mandalia v Secretary of State for the Home Department*.[45] This is therefore an inherently imperfect right. It depends on the availability of judicial review, a jurisdiction with highly flexible remedies. Moreover, unless BL40 makes the Small House Policy immutable (a question which we do not decide), it may change. But while the Policy remains in force in its current terms, it creates something which is clearly a "right" in the sense meant by BL40. Otherwise BL40 applies to very little.

40. In those circumstances the concept of an "interest" does not call for separate consideration, but it is clearly at least as broad as the concept of a "right".

"Lawful"

41. In April 1990, when the Basic Law was promulgated, there were no relevant statutory rules against discrimination in Hong Kong. Neither the HKBORO nor the SDO had been enacted, although BL39 expressly envisaged that effect would in due course be given by domestic legislation to the ICCPR "as applied to Hong Kong", i.e. not necessarily in its entirety. At common law, it has been said that "treating like cases alike and unlike cases differently is a general axiom of rational behaviour": *Matadeen v Pointu*.[46] As Lord Hoffmann went on to point out, this was "frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational."[47] However, the test of irrationality in this context is not the same as the test for unjustified statutory discrimination, and Mr Martin Lee SC[48] for the Appellant

[43] [2005] EWCA Civ. 1363, at [68] (Laws LJ).
[44] (2002) 5 HKCFAR 1, at [92].
[45] [2015] 1 WLR 4546, at [29].
[46] [1999] 1 AC 98, 109 (Lord Hoffmann).
[47] *Ibid*.
[48] Leading Mr Jeffrey Tam and Ms Isabel Tam.

confirmed that the only basis of public law challenge to the Small House Policy that could then have been advanced was irrationality. It is difficult, however, if not impossible, to assess at this stage, on the hypothetical basis that this argument is now suggested, what prospect of success this challenge might have had.

42. Once the Basic Law came into force in 1997, the law of Hong Kong contained two relevant anti-discrimination provisions, BL25 and BOR22. BL25 is of course part of the same instrument as BL40, and must be read together with it. BOR22, although enacted separately by domestic legislation, also falls to be construed together with BL40. This is because by virtue of BL39, in particular its second paragraph, the BOR is incorporated into the Basic Law and given constitutional effect under it: see *Comilang Milagros Tecson v Director of Immigration*.[49]

43. The present argument turns on the relationship between BL40 on the one hand and the two anti-discrimination provisions on the other. The substance of the Appellant's case is that consistency with the anti-discrimination provisions is a condition for the application of BL40. Otherwise, the Policy cannot be lawful and is not protected. In other words, the anti-discrimination provisions qualify and limit the scope of BL40. The substance of the Respondents' and the Interested Party's case is that BL40 is the dominant provision. It qualifies and limits the application of the anti-discrimination provisions, not the other way round.

44. In our judgment, the latter analysis is correct, for the following reasons:

(1) The Basic Law is founded on the principle of continuity, with specific exceptions where this was inconsistent with the PRC's

[49] (2019) 22 HKCFAR 59, at [24]-[35].

basic policies for Hong Kong. Indeed, Article 5 of the Basic Law stated that "the previous capitalist system and way of life shall remain unchanged for 50 years." One starts, therefore, with the expectation that a significant element in what paragraph 3(5) of the Joint Declaration calls "current social and economic systems" will remain unchanged. On the face of it, BL40 is a saving provision seeking to give effect to that principle by protecting an existing entitlement of a particular class of persons.

(2) It is a principle of statutory construction that the specific prevails over the general. This is simply one aspect of the more general principle that legislative instruments must be read as a coherent whole:

"The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply": *Pretty v Solly*.[50]

The same principle applies to constitutional interpretation. BL25 and BL39 and BOR22 are general provisions. BL40 is a specific provision dealing with the special position of the indigenous inhabitants of the New Territories.

(3) Absent BL40, all the various advantages enjoyed by the indigenous inhabitants of the New Territories [51] would be inherently discriminatory unless they can be objectively justified as being necessary in pursuit of a legitimate aim: see *Secretary for Justice v Yau Yuk Lung*. [52] If consistency with the anti-discrimination provisions is treated as a condition of their being protected by BL40 (as the Appellant proposes), then either (i) the discrimination is justified, in which case BL40 is unnecessary; or (ii) it is unjustified, in which case BL40 applies to nothing. Yet BL40 was plainly intended to have some effect.

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[50] (1859) 26 Beav. 606, 610 (Sir John Romilly MR).
[51] See [37] above.
[52] (2007) 10 HKCFAR 335, at [20]-[22].

(4) BL122, which deals with the level of rent payable on "old schedule lots, village lots, small houses and similar rural holdings", assumes that grants will continue to be made under the Small House Policy to descendants in the male line of pre-1898 village residents, notwithstanding the discriminatory features of the Policy which are specifically referred to in that Article. It is fair to say that the assumptions of the legislator are not necessarily the same as his enactments. But this assumption casts a good deal of light on what the drafters of the Basic Law must have believed that they had provided for in BL40.

45. Both courts below described the word "lawful" as "descriptive".[53] Mr Lee fairly submits that on that footing it is redundant and without legal effect. In our judgment, the word is neither purely descriptive nor redundant. It goes to the lawfulness of the way that the discretion is exercised as a matter of public law. We have defined the relevant right or interest of an applicant under the Small House Policy as a right to have his application dealt with in accordance with the criteria laid down in the government's public statements of the current Policy, subject to a lawfully exercised administrative discretion of the Lands Department. That right or interest is lawful if the discretion to make a grant under the Policy is lawfully exercised as a matter of public law. It would not be lawful if, for example, the discretion was exercised in a manner contrary to some enforceable legitimate expectation of the applicant or was vitiated by corruption or bias. "Lawful" is not intended to refer to the absence of discriminatory features forbidden by BL25 or BL39, whose application in the special context of indigenous rights is addressed by BL40 and excluded.

[53] CFI Judgment, at [129]; CA Judgment, at [126].

"Traditional"

46. This was the point on which the courts below differed. The Judge considered that to be "traditional", a right or interest of the indigenous villagers had to be "traceable" to a right or interest which his ancestors had enjoyed before the lease of the New Territories in 1898. By "traceable" he meant based on, or capturing the essence of, the earlier right. In his view, the grant of a free building licence satisfied that test because there had been no building controls before the New Territories were incorporated into the colony of Hong Kong. By comparison, he thought that the right to a grant or exchange of Crown land had no equivalent under *Qing* rule. The Appellant's case was substantially an adoption of that view, although he contended that not even free building licenses were "traceable" to a pre-1898 right or interest. The Court of Appeal, by comparison, considered that "whether a right or interest is traditional for the purpose of BL40 is to be determined by reference to the state of affairs in April 1990."[54] "Traditional" rights were those which was recognised as traditional at that point. In our judgment, the Court of Appeal were right about this.

47. There is nothing in BL40 which requires a protected right or interest to be traceable to the period before 1898. BL40 does not say so in terms. Is there any ground on which such a principle might be implied? In our opinion there is not. The principle of traceability is not implicit in the concept of tradition as a matter of language. It is not necessary for the efficacy of BL40. And it is not consistent with the purpose of BL40. In view of the importance which has always been attached to purposive construction in interpreting the Basic Law, this last point calls for some expansion.

[54] CA Judgment, at [90].

48. In the first place, it is clear from the history that we have summarised above that the Small House Policy did not replicate the essence of the old pre-1898 system. It was introduced by the colonial authorities in order to soften the transition from customary tenure, which conferred on the topsoil owner practically complete dominion over the land, to an utterly different system of intensively administered time-limited Crown leases and tightly controlled development. It was because the two systems were so completely different that managing the transition in this way was conceived to be politically necessary.

49. Secondly, the limitation of eligibility to those whose ancestors had held Old Schedule lots in the same village before 1898 ensured that families whose forebears had known the old system were the sole beneficiaries of the new one. But the connection inevitably became looser and more remote as time went on. Pre-1898 residents died off, to be succeeded by their sons, grandsons, and great-grandsons who had never known the old system. The Policy was extended to eligible purchasers on the same basis as it had applied to heirs. Once the restrictions on alienation had expired, the land was marketable. For this and other reasons, village land often found its way into the hands of outsiders. At the same time, some areas were designated for development, which transformed the landscape and way of life of villagers. The Small House Policy itself underwent substantial changes in the course of the 20th century. As we have already observed, the Small House Policy has acquired a life of its own. The reality is that the rights arising under it were new rights originally conferred by the colonial administration in the first decade after the inception of the New Territories lease of 1898, and maintained in various iterations and with some modifications thereafter. They were derived from the Policy itself. By 1990, they had become a tradition of the colonial administration. They were traditional in 1990 not because they were traceable to any rights or interests which had existed before 1898, but because the beneficiaries were confined to members of long-standing and

relatively immobile village communities which had been treated as a separate category throughout the period of colonial government, and because they had by then passed through the male line in the same families for nearly nine decades.

50. Thirdly, it is right to remember that on the Mainland too, political, social and economic systems had fundamentally changed between 1898 and 1990. The Basic Law was addressed to the problem of continuity between the colonial regime and the system which would follow it. The problem of continuity between the *Qing* dynasty and the colonial regime was of no subsisting relevance by 1990. There was therefore no rational reason why the PRC, whose basic policies regarding Hong Kong were embodied in the Basic Law, should wish to make the preservation of indigenous rights which they would inherit from the colonial regime dependant on their similarity to rights which had existed before 1898. The fact that only descendants of pre-1898 villagers were eligible for small house grants and that the Small House Policy had been devised for an earlier transfer of power was part of the description of the system which the SAR inherited and which BL40 protected. But it was not an indication that between 1997 and 2047 the survival of those rights should depend on disputable antiquarian research into land rights which had been extinguished nearly a century before.

The SDO

51. In this analysis, we have not referred to the SDO because of the express exclusion of the Small House Policy from its ambit by Schedule 5, Part 2. The Judge held that the exclusion was unconstitutional because it was inconsistent with BL25 and BL39. Once one concludes, as we have done, that BL40 takes the Small House Policy out of the ambit of BL25 and BL39, this issue falls away.

Delay and standing

52. Our conclusions on the substance of the issues make it unnecessary to deal with the two procedural objections to the Appellant's claim for relief. We do so because of their implications for public law generally and because we differ from the Court of Appeal.

Delay

53. The present proceedings were begun by an application dated 28 December 2015, which was substantially amended in September 2016 and April 2019. In its amended form the decisions challenged were (i) the decision of the Director of Lands to "implement on and after 8 June 1991… the [Small House Policy], and his subsequent decisions to continue to implement the [Small House Policy]", and (ii) the exemption of the Small House Policy from the SDO by Schedule 5, Part 2 of that Ordinance. Realistically, the relevant date would not have been 1991, but 1997. If the Appellant's case had been accepted, that is the date from which the Small House Policy would have become unconstitutional. That was some eighteen years before the commencement of these proceedings.

54. Applications for judicial review vary greatly in their nature and their potential consequences. For this reason, the rule that they must be brought promptly has never been absolute. Section 21K(6) of the High Court Ordinance[55] provides that the Court may refuse leave to apply for judicial review or refuse to grant relief on the ground of delay "if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration." Hardship or prejudice to individuals and disruption of good administration are

[55] Cap. 4 ("HCO").

more likely in cases where the relief would operate retrospectively to undo transactions on whose validity people will have relied. Where the object of the proceedings is to obtain the decision of the court on some general issue of legal or constitutional principle, these consequences are less likely and the public importance of having the issue resolved is greater. Delay is therefore likely to be a less significant factor. If a policy of the executive is unconstitutional or otherwise beyond its powers, it is in the public interest that the courts should say so. It cannot be right to allow the executive to continue to act unlawfully, simply because no one challenged it at the outset. The observations along these lines of Ma CJHC (as Chief Justice Ma then was) in *Leung v Secretary for Justice*[56] have considerable force as applied to cases like this one.

55. The present proceedings seek the decision of the court on a controversial constitutional issue of considerable public importance. The relief sought in the present proceedings is entirely declaratory. There is no claim to quash past decisions made pursuant to the Small House Policy. In any event, it is exceedingly unlikely that the courts would have been persuaded to quash past grants in favour of persons acting in good faith on the strength of the Lands Department's publicly stated policies, even if they had accepted the Appellant's case in principle. The Appellant having obtained leave to bring the proceedings, delay could only have operated as a ground for refusing to make the declarations sought, even if the court was satisfied that they were justified in principle. This would have been a surprising course for the Judge to have taken. It would have meant that the executive was unlawfully discriminating on the basis of sex and social origin from day to day, but the court, although seized of the issue, was disabled from intervening by the conduct of the particular individual who had brought the matter to its attention. We consider that the Judge's decision to grant

[56] [2006] 4 HKLRD 211, at [39].

relief (on the view that he took of the merits) cannot be faulted in principle and was within his discretion. The Judge having decided the procedural issue, it would have been extraordinary for the objection to be taken by an appellate court charged with deciding whether he was right on the substantive issue.

Standing

56. Section 21K(3) of the HCO and Order 53, rule 3(7) of the Rules of the High Court[57] both provide that the Court shall not grant leave "unless it considers that the applicant has a sufficient interest in the matter to which the application relates." The rule is identical to that laid down for judicial review in the High Court in England by section 31(3) of the Senior Courts Act 1981.

57. Mr Kwok is a self-appointed public guardian with a long record of public law litigation. The objection on the ground of lack of standing is that he has no greater interest in the constitutionality of the Small House Policy than any other member of the public. He is not eligible or potentially eligible for a grant under the Policy. He does not own or occupy or intend to own or occupy land in any area affected by the Policy. Lord Pannick QC[58] submits that he is, in the time-honoured phrase, a "mere busybody". The Judge disagreed. He held that Mr Kwok qualified because he was a permanent resident of Hong Kong and the case related to the use of land resources and revenue in the public interest. The question is whether that is a sufficient interest.

58. Where the decision of a public authority is challenged on account of its impact on some particular person or group of persons personally and directly affected by it, someone else who seeks to complain by way of judicial review may well lack standing. But the position is more complicated when the object of

[57] Cap. 4A.
[58] Appearing with Mr Jat Sew-Tong SC, Mr Jin Pao SC and Mr Danny Tang, for the Interested Party.

the process is not to redress some particular injustice but to vindicate the rule of law by raising a general legal or constitutional issue. An issue of that kind may be said to affect everyone equally. There is no general principle that it must affect the applicant more than others. What then is the general principle?

59. In *Kwok Cheuk Kin v Commissioner of Police*,[59] Chow J held that claims to act as a representative of the public interest called for careful scrutiny of the applicant's good faith, but that the court should adopt:

> "a holistic approach by taking into account a host of relevant considerations including the merits of the application, the importance of vindicating the rule of law, the importance of the issue raised, the existence and absence of any other challengers who have a greater interest in the matter, and the nature of the breach of duty against which relief is sought."

60. In *AXA General Insurance v H.M. Advocate*,[60] Lord Reed (with whom the rest of the Supreme Court of the United Kingdom agreed) observed:

> "A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say "might", because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context,

[59] [2017] HKCFI 1852 at [31]-[34].
[60] [2012] 1 AC 868 at [170].

> and in particular upon what will best serve the purposes of judicial review in that context."

61. Both of these statements of principle were adopted by the Court of Appeal in *Kwok Cheuk Kin v President of Legislative Council*.[61] We consider that they represent the normal principle to be applied in this jurisdiction.

62. The critical question in a public interest case is accordingly whether the purpose of judicial review, and in particular the rule of law, will be best served by allowing the applicant to proceed. In our judgment the Judge was right, on essentially this ground, to accept that the Appellant had standing. The decisive consideration is that the only people who can be said to have a manifestly greater interest in the constitutionality of the Small House Policy than the generality of the public are those who have obtained or hope to obtain grants under the Policy. They are actual or potential beneficiaries of the Policy with no interest in challenging it. Wider categories of applicants may have a direct personal interest in other aspects of the Policy, for example its planning or environmental consequences for neighbours, but not in its constitutionality. The reality is that the Policy will in practice be beyond challenge even if unconstitutional. Given the significance and controversial character of the issue, that state of affairs would do no service to the rule of law.

Disposition

63. The appeal is dismissed. We make an order *nisi* that there be no order as to costs as between the Appellant and the Respondents, and as between the Appellant and the Interested Party. We further direct that any submissions that the parties may wish to make as to costs be submitted in writing within 14 days

[61] [2021] HKCA 169; [2021] 1 HKLRD 1247, at [24]-[28].

of the date of the handing down of this judgment and that, in default of such submissions, the order *nisi* stand as an order absolute without further directions.

(Andrew Cheung)
Chief Justice

(R A V Ribeiro)
Permanent Judge

(Joseph Fok)
Permanent Judge

(Patrick Chan)
Non-Permanent Judge

(Lord Sumption)
Non-Permanent Judge

Mr Martin Lee SC, Mr Jeffrey Tam and Ms Isabel Tam, instructed by Ho Tse Wai & Partners, assigned by the Director of Legal Aid, for the 1st Applicant (Appellant)

Mr Benjamin Yu SC and Mr Anthony Chan, instructed by the Department of Justice, for the 1st, 2nd and 3rd Respondents

Lord Pannick QC, Mr Jat Sew-Tong SC, Mr Jin Pao SC and Mr Danny Tang, instructed by T.K. Tsui & Co., for the Interested Party