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(1) 从《宪法》和《基本法》认识权利与义务

(1) Understanding Rights and Duties through the Constitution and the Basic Law

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今日分享的课题是「从中国的《宪法》与《中华人民共和国香港特别行政区基本法》（《基本法》）的角度看香港居民的基本权利和义务」。基本上，这个题目亦可以表述为「基本权利和义务与国际人权公约在香港的适用」。

Today’s topic is “The Basic Rights and Duties of Hong Kong Residents from the Perspective of the *Constitution of the People’s Republic of China* (the *Constitution*) and the *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (the *Basic Law*)”. In essence, this topic can also be understood as “Basic Rights and Duties and the Application of International Human Rights Conventions in Hong Kong.”

首先是介绍《宪法》的基本概念，包括中国《宪法》对于公民的权利与义务的规定。内容会涉及基本权利，及与其相关的人权这两个法律概念。然后，会进一步了解中国《宪法》第二章内关于中国公民的基本权利与义务的规定。接着，再看《中华人民共和国香港特别行政区基本法》内关于香港居民的权利与义务的规定，以及相关的法治原则，包括在香港特别行政区实行的「普通法制度」如何理解「法治」这个观念。此外，亦会提及与人权有关的国际条约或公约在香港特别行政区的实施，包括一些国际性的人权公约和国际性的劳工公约，亦包括《消除对妇女一切形式歧视公约》、《消除一切形式种族歧视国际公约》、《残疾人权利公约》，以及《儿童权利公约》。其中会集中论述《消除对妇女一切形式歧视公约》和《儿童权利公约》两项公约，从而让大家了解这类国际性的、与人权相关的公约如何适用于香港和在香港实施。

First, the basic concepts of the *Constitution* will be introduced, including the provisions of the *Constitution* on the rights and obligations of citizens. The content will cover basic rights and the related legal concept of human rights. Then, we will understand the provisions in Chapter 2 of the *Constitution* regarding the basic rights and obligations of Chinese citizens. Next, we will look at the provisions in the *Basic Law* regarding the rights and duties of Hong Kong residents, as well as relevant principles of the “rule of law”, including understanding the concept of “rule of law” in the context of the “common law system” implemented in the Hong Kong Special Administrative Region. Besides, the implementation of international treaties or conventions related to human rights in the Hong Kong Special Administrative Region will be mentioned, including some international human rights conventions and international labour conventions, as well as the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), the *Convention on the Rights of Persons with Disabilities*, and the *Convention on the Rights of the Child*. Among these conventions, we shall focus on discussing CEDAW and the *Convention on the Rights of the Child* in order to help everyone understand how such international human rights-related conventions are applicable and implemented in Hong Kong.

公法和私法

Public Law and Private Law

首先介绍「宪法」的概念。「宪法」是整个法律体系中，不同部份的其中一环。要了解「宪法」，需要先了解什么是「法律」。不同国家都有属于自己的法律制度，通常由该国的立法机关负责制定，然后由行政机关（即其政府）负责执行。由司法机关（即法院）负责审理案件或处理法律上的争议。提到「法律」，它又可以区分为「公法」和「私法」。

The first to be introduced is the concept of “constitution”. The “constitution” is one part of the entire legal system. To understand the “constitution”, it is necessary to first understand the concept of “law”. Different countries have their own legal systems, which are usually formulated by their legislative bodies and enforced by their executive branches, that is, their governments. The judicial branches, that is, their courts, are responsible for adjudicating cases or resolving legal disputes. When it comes to “law”, it can be further divided into “public law” and “private law”.

「公法」是有关政府权力，以及政府与人民关系的法律；「私法」就是对社会各种活动进行规范的法律，例如「合同法」、「财产法」等。「公法」最核心、最基础的部份就是「宪法」。除了「宪法」之外，「公法」亦包括「行政法」。

例如在香港，我们常常听到有人对于政府的措施提出司法复核，即是要求法院去审查政府的措施是否合法，还是属于越权。

“Public law” is the law related to government power and the relationship between the government and the people; while “private law” regulates various social activities, such as the “contract law”, the “property law”, etc. The core and fundamental part of “public law” is the “constitution”. In addition to the “constitution”, “public law” includes administrative law. For example, in Hong Kong, we often hear about people filing judicial review against government measures, seeking the court’s examination of whether the government’s measures are lawful or constitute an abuse of power.

刑法和民商法

Criminal Law and Civil and Commercial Law

另外，「刑法」也是法律的重要部份。法庭审判的案件，通常可以区分为「刑事案件」和「民事案件」。「刑事案件」就是政府或律政司向有关涉嫌犯法的人士提出检控，然后交由法院审理，判决该被告人是否有罪。如果被告人被判有罪，法院会对其施以某些惩罚。

In addition, “criminal law” is an important part of the law. The court cases are usually classified as “criminal cases” and “civil cases”. “Criminal cases” refer to cases in which the government or the prosecutor’s office brings charges against individuals suspected of violating the law, and then submits them to the court for trial, to determine whether the accused is guilty or not. If the accused is found guilty, the court will impose certain punishments.

除了「刑法」之外，另一个重要的法律部份就是「民商法」。刚才提到的「合同法」、「财产法」等，都是「民商法」的范围。香港是一个国际金融贸易中心，「民商法」对香港的经济运作特别重要，如「公司法」、「银行法」、一些规范证券市场（关于股票交易、公司上市）的法律等，均属于「民商法」的范畴。

In addition to “criminal law”, another important part of the law is “civil and commercial law”. The “contract law” and “property law” mentioned earlier fall within the scope of “civil and commercial law”. Hong Kong is an international financial and trading centre. “Civil and commercial law” is especially important to Hong Kong’s economic operation. Laws such as the “companies ordinance”, the “banking ordinance”, and regulations governing the securities market, such as stock trading and company listings, are all within the scope of “civil and commercial law”.

宪法的功能

Functions of the constitution

「宪法」作为一个特别的法律部份，它有什么功能或意义呢？「宪法」通常是一个国家的法律制度里最基础、最核心的法律。现今世界上有 190 多个国家，绝大部分国家都有自己本国的成文宪法。「成文宪法」是一部法律文件，称为该国家的「宪法」。全球只有极少数国家没有成文宪法，例如英国并没有一部法律文件把其宪法完整地写出来。但世界上很多其他国家都有成文宪法，如美国有《美国宪法》、我国有《中华人民共和国宪法》、法国有《法国宪法》、日本有《日本宪法》等。宪法的内容规范了一个国家的政治体制，以及这个国家公民的基本权利。有些国家的宪法亦会规定其公民的基本义务；而有些国家的宪法则会谈及其建国目标和社会、经济等各方面的政策。例如中国《宪法》便提及到中国的政治体制、中国公民的基本权利与义务、中华人民共和国建国的目标，以及一些基本的国策和社会、经济等各方面的政策。上面提到一个国家的政治体制，这涉及到其行政、立法和司法机关如何产生、有什么权力、相互关系如何，以及各机关如何运作等。

As a special part of the law, what are the functions or significance of the “constitution”? The “constitution” is usually the most fundamental and core part of a country’s legal system. Today, there are over 190 countries in the world, and the vast majority of them have their own written constitutions. A “written constitution” is a legal document called the “constitution” of the country concerned. Only a few countries in the world do not have a written constitution. For example, the United Kingdom does not have a single legal document that fully codifies its constitution. However, many other countries in the world have written constitutions, such as the United States has the *U.S. Constitution*, China has the *Constitution of the People’s Republic of China*, France has the *French Constitution*, Japan has the *Japanese Constitution*, and so on. The content of a constitution regulates a country’s political system, and the basic rights of its citizens. In some countries, the constitution also specifies the basic duties of its citizens. While in other countries, the constitution may address the founding goals of the country and various policies related to society, the economy, and other aspects. For example, the *Constitution* of China mentions the political system of China, the basic rights and obligations of Chinese citizens, the founding goals of the People’s Republic of China, and some basic national policies related to society, the economy, and other aspects. As for the political system of a country, it involves how its executive, legislative and judicial branches are formed, what powers they have, their interrelationships, and how they operate.

宪法与公民

Constitution and Citizens

「宪法」是一个国家的最高法律，而「国家」是由这个国家的「公民」组成的，「公民」和「宪法」这两个概念有着相当密切的关系。一个国家好比一个超级大型的社团。例如一个工会就是一个社团，负责承办或者管理学校的是一个社团，公司亦是一个社团。每个社团都有其成员。譬如公司作为一个社团，其成员便是公司的股东。又譬如学校学生会是一个社团，其成员便是学校的学生。每个社团都有其管理架构，例如一个社团可能有理事会、执行委员会，或者干事会。国家作为一个大型的「社团」亦有其管理架构，政府便是负责管理国家这个大型社团的机构或组织。至于国家的成员，就称为国家的公民。而「宪法」则可以理解为这个国家与其成员之间的社会契约，相当于一个合同，它厘定国家的政府具备什么功能、国家根据什么条款和原则组成、公民与公民之间的关系、公民与政府之间的关系、政府的权力有多大、政府如何运作，以及公民有什么权利和义务等。这些都是宪法会规范的基本内容。宪法对于公民的重要性，可以从个人由一个国家移民到另一个国家时反映出来。如果某人移居到另一国家，当入籍成为该国公民时，该国通常会要求申请入籍的人士要认识该国的宪法，甚至要求他宣誓效忠该国的宪法。

A “constitution” is the supreme law of a country, and the “nation” (or the “State”) is composed of the “citizens” of the country. The concepts of “citizens” and “constitution” are closely related. A country is like a super-large social organisation. For example, a trade union is an organisation; the entity responsible for running or managing a school is an organisation; and a company is also an organization. Each organisation has its members. For example, as an organisation, a company’s members are its shareholders. Similarly, in the case of a student union, its members are the students of the school. Each organisation has its management structure, such as a board of directors, an executive committee, or a council. As a large-scale organisation, a country also has its management structure. The government is the institution or organisation responsible for governing a country. As for the members of a country, they are called citizens of the country. A “constitution” can be understood as the social contract between the members of the country; it is equivalent to a contract. It establishes what functions the government of the country has, and the terms and principles on the basis of which the country is formed, the relationship between citizens, the relationships between citizens and the government, how much power the government has, how the government operates, and the rights and obligations of citizens, etc. These are the basic contents regulated by a constitution. The importance of a constitution to citizens can be reflected when individuals migrate from one country to another. When someone becomes a citizen of another country through migration, the receiving country usually requires the applicant to have an understanding of the country’s constitution and even requires the applicant to pledge allegiance to the country’s constitution.

中国《宪法》的历史

The History of China's "Constitution"

「宪法」是现代的产物，在古代，无论西方或者中国，都没有「宪法」（英文称为 *Constitution*）这类文件。及至清末，当时的西方国家已经各自制订属于自己的宪法，而中国则有一场「立宪运动」。但这场「立宪运动」并没有成功，因为清政府于 1911 年被推翻，中华民国成立。民国时期曾有几部《中华民国宪法》相继制定，惟碍于政局，譬如北洋政府时期，军阀混战，最终没有一部《宪法》得到有效的实施，一直到抗战胜利之后，国民政府于 1946 年在南京制定了一部《中华民国宪法》。然而，这部宪法因国民政府在立宪后不久便迁往台湾，并没有在中国大陆实施。

“Constitution” is a modern product. In ancient times, whether in the West or in China, there were no documents called a “constitution”. Towards the end of the Qing Dynasty, Western countries had already established their constitutions, while China experienced a constitutional movement. However, this constitutional movement was not successful because the Qing government was overthrown in 1911, leading to the establishment of the Republic of China. During the Republic of China era, several “*Constitutions of the Republic of China*” were enacted. However, due to political instability, such as during the Beiyang government period marked by warlord conflicts, none of these constitutions were effectively implemented. It was not until after the victory in the War of Resistance against Japanese Aggression that the Nationalist Government, in 1946, adopted the “*Constitution of the Republic of China*” in Nanjing. However, shortly after the promulgation of the constitution, the People’s Republic of China (PRC) was established. This constitution was not implemented on the mainland of China.

中华人民共和国于 1949 年成立，当时有一部临时宪法，即《中国人民政治协商会议共同纲领》。1954 年，全国人民代表大会制定中华人民共和国第一部《宪法》。至此以后，中华人民共和国宪法史上，还有另外三部《宪法》，包括 1975 年所谓「文革时期」的一部《宪法》；1978 年「文革」结束后，又制定一部新的《宪法》；然后到 1982 年邓小平「改革开放」路线在中华人民共和国开始全面实施后，亦制定了一部新的《宪法》。

The People’s Republic of China was established in 1949, and at that time, there was a provisional constitution known as the *Common Programme of the Chinese People’s Political Consultative Conference*. In 1954, the first *Constitution of the People’s Republic of China* was enacted by the National People’s Congress. Since then, there have been three other versions of the *Constitution* in the history of the *Constitution of the People’s Republic of China*, including the version in the so-called “Cultural

Revolution period” in 1975; another version in 1978 after the end of the “Cultural Revolution”; and a new version of the *Constitution* in 1982 after Deng Xiaoping’s “Reform and Opening-up” policy began to be fully implemented in the People’s Republic of China.

1982 年 12 月 4 日通过的《宪法》，即是现行《宪法》。这部《宪法》经历过五次修订，分别是 1988 年、1993 年、1999 年、2004 年及 2018 年。由于这部《宪法》于 1982 年 12 月 4 日通过，所以现时 12 月 4 日定为「国家宪法日」。香港在「国家宪法日」会有相关活动推广《宪法》的内容，以及庆祝《宪法》的制定。香港根据《基本法》实行「一国两制」，而「一国两制」的宪制基础，则来自这部 1982 年的《宪法》，当中《宪法》第三十一条规定：「国家在必要时得设立特别行政区。在特别行政区内实行的制度按照具体情况由全国人民代表大会以法律规定」。「香港特别行政区」是根据《宪法》第三十一条而设立，「香港特别行政区」的宪制基础及法理基础，是由《宪法》和《基本法》共同构成。

The current *Constitution* is the one that was adopted on 4 December, 1982. The *Constitution* has undergone five revisions, in 1988, 1993, 1999, 2004 and 2018. As the *Constitution* was adopted on 4 December, 1982, the date is now designated as “Constitution Day”. On “Constitution Day” every year, there are activities in Hong Kong to promote the content of the *Constitution* and to celebrate its enactment. Hong Kong implements “one country, two systems” under the *Basic Law*, and the constitutional basis of “one country, two systems” comes from the *Constitution* (adopted in 1982). Article 31 of the *Constitution* stipulates that “the state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s Congress in the light of the specific conditions”. The “Hong Kong Special Administrative Region” was established in accordance with Article 31 of the *Constitution*. The constitutional and legal foundation of the “Hong Kong Special Administrative Region” is constituted by both the *Constitution* and the *Basic Law*.

香港特别行政区的宪制或法理基础

The Constitutional or Legal basis of the Hong Kong Special Administrative Region

正因为《宪法》和《基本法》两者共同构成香港特别行政区宪制或法理基础，我们不能只看《基本法》而不看《宪法》。中国《宪法》的〈序言〉，是《宪法》的一个重要部分：这部序言是关于中国近代史、中华人民共和国建国过程和目标，以及当前国家的根本任务、一些基本的价值取向和指导思想等。

Because both the *Constitution* and the *Basic Law* jointly constitute the constitutional or legal basis of the Hong Kong Special Administrative Region, we

cannot only focus on the *Basic Law* without making reference to the *Constitution*. The “Preamble” of the *Constitution* is an important part of the *Constitution*. The Preamble is about modern Chinese history, the process and goals of the founding of the People’s Republic of China, the fundamental tasks of the country, its basic orientations, and guiding ideology, etc.

《宪法》的〈序言〉之后，是第一章〈总纲〉，讲述一些基本制度、基本原则、基本国策等。第二章是〈公民的基本权利和义务〉。第三章是〈国家机构〉，内容包括中国的权力机关（立法机关）、行政机关、司法机关等，以及全国人民代表大会或地方人民代表大会如何产生，又具有什么权力。最后，《宪法》第四章比较简短，内容是关于中国的国旗、国歌、国徽和首都。

After the “Preamble” of the *Constitution*, Chapter One “General Principles” discusses some basic systems, principles, and national policies. Chapter Two is “Fundamental Rights and Obligations of Citizens”. Chapter Three “State Institutions” includes China’s power organ (legislative organ), executive, and judicial organs, etc., and how the National People’s Congress or local People’s Congresses are formed and their powers and functions. Finally, Chapter Four of the *Constitution* is relatively brief. Its content is about China’s national flag, national anthem, national emblem, and the capital.

「人权」概念的兴起

The Rise of the Concept of “Human Rights”

为什么世界各地的宪法都会规定公民的基本权利与义务呢？这是由于「人权」概念的兴起，其实《宪法》内提及的「公民权利」包括公民的人权。要了解关于基本权利的规定，首先要追溯人权思想的兴起。人权思想是现代的产物，在古代西方或者中国都没有人权这个概念。人权概念的出现，可以追溯到 18 世纪。美国在独立之前，是十三个位于北美洲的英属殖民地，它们宣告脱离英国独立，发表了《美国独立宣言》，里面提到「人人生而平等，造物主赋予他们若干不可剥夺的权利，其中包括生命权、自由权和追求幸福的权利」。这些「天赋权力」就是现代的「人权」概念。《美国独立宣言》亦提到政府成立的目的，在于保障这些权利，这个是一个很重要的概念：国家或政府的成立的目标或使命，就是要保障公民的权利。另一边厢的欧洲，法国于 1789 年法国大革命，制定了《人权和公民权利宣言》，提到人权「是自然的和不可动摇的权利」。人权的概念大致上可以追溯到这两份文件。

Why do constitutions around the world all stipulate the basic rights and duties of citizens? This is due to the rise of the concept of human rights. In fact, the “rights of citizens” mentioned in the *Constitution* include to human rights. To understand the

provisions regarding basic rights, we need to trace the emergence of the concept of human rights. “Human rights” is a modern concept. There was no such concept in ancient Western or Chinese societies. The concept of human rights can be traced back to the 18th century. Before its independence, the United States was made up of thirteen British colonies in North America. They declared their independence from Britain and issued the “Declaration of Independence” which states that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.” These “unalienable rights” form the basis of the modern concept of “human rights”. The “Declaration of Independence” also mentions that the purpose of establishing government is to safeguard these rights. This is a very important concept: the purpose or mission for the establishment of a state or government is to protect the rights of citizens. On the other side, in Europe, France formulated the “Declaration of the Rights of Man and of the Citizen” during the French Revolution in 1789, which states that human rights are “natural and imprescriptible rights”. The concept of human rights can be largely traced back to these two documents.

在 19 世纪，除了没有成文宪法的英国之外，其他欧洲国家相继制定宪法，而且在宪法之中，承诺政府会保障国家公民的人权。当今世界各国的宪法都有关于公民权利的一些规定，很多国家的宪法同时规定公民的义务，至于没有规定公民义务的国家，不表示公民没有义务，只不过这些义务并没有在宪法里面规定，而是透过法律去规定。

In the 19th century, apart from Britain which did not have a written constitution, other European countries began enacting constitutions that promised to safeguard the human rights of their citizens. In today’s world, the constitutions of almost all countries have provisions regarding the rights of citizens. Many countries have included provisions regarding the obligations of citizens. In countries where obligations of citizens are not stipulated in the constitution, this does not mean that citizens have no obligations. It simply means that these obligations are not stipulated in the constitution but are instead regulated through laws.

第二次世界大战之后，基于对战时暴行的反省，世界各国形成了尊重与保障人权的共识。自此，人权的保障不单出现于各国宪法的层次，而且被提升至国际法的层次。国际社会订立了一些关于人权保障的文件，这些文件的雏形便是 1945 年的《联合国宪章》。

After the Second World War, reflecting upon the atrocities committed during the war, countries around the world formed a consensus on respecting and safeguarding human rights. Since then, the protection of human rights has not only been incorporated into national constitutions but has been elevated to the level of international law. The

international community has established some documents on the protection of human rights, and the prototype of these documents is the *United Nations Charter* of 1945.

今天，联合国成员国共 190 多个国家，按照国际法都有义务遵守《联合国宪章》。《联合国宪章》于 1945 年制定的时候，提到需要保障及尊重基本人权、人格尊严和价值，各国应该促进全体人类之人权及基本自由之普遍尊重与遵守。由此可见，人权概念是基于对人格尊严和价值的尊重和重视，由于每个人都有自己的人格尊严和无上的价值，每个人都享有这些基本人权。人权与自由有着非常密切的关系，不少人权包含着自由的权利，而某些自由的权利也包含着人权。

Today, there are more than 190 member states of the United Nations. According to international law, they all have the obligation to abide by the *United Nations Charter*. When the *United Nations Charter* was established in 1945, it mentioned the need to protect and respect basic human rights, human dignity, and values, and that all countries should promote the universal respect and observance of human rights and fundamental freedoms for all. From this, it is evident that the concept of human rights is based on respect for human beings with emphasis placed on human dignity and human values. Since all individuals have their own human dignity and supreme value, they are all entitled to these basic human rights. Human rights are closely related to freedom (or liberty), as the rights to freedom are included in many human rights, and human rights are also included in many rights to freedom.

「人权」概念的演进

The Evolution of the Concept of “Human Rights”

1948 年，联合国通过《世界人权宣言》，它比《联合国宪章》更详细列出哪些是我们需要尊重和需要承认的人权，即人权包括什么，或人权的内容。从 1948 年起至今，人权思想经历了一个演进的过程。

In 1948, the United Nations adopted the *Universal Declaration of Human Rights*. Compared with the *United Nations Charter*, it provides a more detailed list of the human rights that we need to respect and recognize, including what human rights are and their content. Since 1948, the concept of human rights has undergone an evolutionary process.

「第一代人权」在 18 世纪法国大革命、美国独立的时候已经予以承认。现在称为「第一代人权」，例如人身自由、不受酷刑对待、言论自由、参政权和选举权等。这些所谓「第一代人权」，亦即是现今的公民权利和政治权利。稍后会在《公民和政治权利的国际公约》详细论述。

The “first generation of human rights” were recognised during the French Revolution and the American Independence in the 18th century. They are now called the “first generation of human rights”, including freedom of the person, freedom from torture, freedom of speech, the right to participate in politics, and the right to vote. These so-called “first generation human rights” are called civil and political rights today. They will be elaborated in the part of this talk on the *International Covenant on Civil and Political Rights*.

「第二代人权」是社会主义国家兴起之后较受重视和强调的。「第二代人权」,主要是经济、社会和文化方面的权利。《经济、社会与文化权利国际公约》就是关于所谓「第二代人权」,包括工作的权利、享有合理工资的权利、组织工会的权利,以及享有医疗、教育和社会保障的权利等。「第二代人权」的特点就是要求政府向公民提供服务,例如政府向公民提供社会保障,或者向没有能力负担有关费用的公民提供医疗或者教育方面的服务和机会。

The “second generation of human rights” received more attention and emphasis after the rise of socialist countries. The “second generation of human rights” mainly include economic, social, and cultural rights. The *International Covenant on Economic, Social and Cultural Rights* belongs to the “second generation of human rights”, which includes the right to work, the right to receive a reasonable wage for work, the right to form trade unions, and the right to enjoy healthcare, education, and social security. The characteristic of the “second generation of human rights” is the demand for the government to provide services to citizens, such as the provision of social security, or the provision of healthcare and education services and opportunities to citizens who are unable to afford them.

第二次世界大战后,随着一些西方国家在亚洲和非洲的殖民地相继独立,出现了「第三代人权」的思想,例如「民族自决权」。「民族自决权」是指一些以往的殖民地有权脱离殖民统治,而建立自己的国家。二次大战前,近乎全非洲都是西方国家的殖民地;即使亚洲亦大部分如是,例如印尼曾是荷兰的殖民地,现在的中南半岛曾是法国的殖民地,还有现在的马来西亚和新加坡曾是英国的殖民地等。

After the Second World War, with the successive independence of colonies of Western countries in Asia and Africa, the concept of the “third generation of human rights” emerged, such as the “right to self-determination”. The “right to self-determination” refers to the right of former colonies to break away from colonial rule and establish their own nations. Before the Second World War, almost the entire Africa was colonized by Western countries; and the same was true for parts of Asia. For instance, Indonesia was once a Dutch colony, the Indochinese Peninsula was once a

French colony, and Malaysia and Singapore were once British colonies.

除了「民族自决权」外,「第三代人权」亦包括「经济发展权」与「和平权」,以及比较新的「享有环境保护」的权利等。众所周知,世界各国可以分为较富裕、工业化发达国家,以及比较贫穷、发展中国家。对于发展中国家来说,经济发展权作为「第三代人权」是比较重要的。

In addition to the right to self-determination, the “third generation of human rights” also include the “right to economic development”, the “right to peace”, and the relatively new “right to environmental protection”. It is widely recognised that countries around the world can be divided into relatively wealthy, industrialised developed countries, as well as relatively poor, developing countries. For developing countries, the right to economic development as one of the “third generation of human rights” is relatively important.

中国《宪法》的公民的基本权利和义务

The Basic Rights and Obligations of Citizens in the Chinese *Constitution*

中国《宪法》第二章是有关保障公民的基本权利和义务。1954 年制定的第一部《宪法》,把公民的基本权利和义务放在第三章,当时第二章是关于国家的机关。1982 年全面修宪时,当时的学者和参与修宪人士提议,将公民的基本权利和义务放于第二章,即是在国家机关之前的一章。因为他们认为公民基本权利和义务在国家里处于一个核心的地位,政府成立和政府存在的目的,在一定程度上是为了保障公民的基本权利,以及保证公民履行他们的义务,正因为公民的基本权利和义务是非常重要,所以把它从第三章提前放在第二章。第二章的第一条,即《宪法》第三十三条指出:「凡具有中华人民共和国国籍的人都是中华人民共和国公民。中华人民共和国公民在法律面前一律平等。国家尊重和保障人权。任何公民享有宪法和法律规定的权利,同时必须履行宪法和法律规定的义务。」

Chapter 2 of the *Constitution* is about safeguarding the basic rights and obligations of citizens. The first *Constitution* enacted in 1954 placed the basic rights and obligations of citizens in Chapter 3, with Chapter 2 being about the state's organs. When the *Constitution* was comprehensively revised in 1982, scholars and people participating in the amendment of the *Constitution* suggested that the basic rights and obligations of citizens be placed in Chapter 2, before the chapter on the state's organs. This was suggested because they believed that the basic rights and obligations of citizens have a central position within the state. The purposes of the establishment and existence of the government, to a certain extent, are to safeguard the basic rights of citizens and ensure that citizens fulfil their obligations. Due to the importance of citizens' basic rights and obligations, their respective contents were moved from Chapter 3 to Chapter 2. The

first article of Chapter 2, that is, Article 33 of the *Constitution*, states that “all persons holding the nationality of the People’s Republic of China are citizens of the People’s Republic of China. All citizens of the People’s Republic of China are equal before the law. The state shall respect and protect human rights. Every citizen shall enjoy the rights prescribed by the Constitution and the law and must fulfill the obligations prescribed by the Constitution and the law.”

《宪法》第三十三条可算是第二章中最重要的的一条，因为它定义了中国公民：「凡具有中华人民共和国国籍的人都是中华人民共和国公民」。就香港来说，《基本法》并没有规定谁是中国公民，因为中国公民的身份是按照《中华人民共和国国籍法》来决定，并非按照《基本法》决定。《基本法》只是规定谁是香港特别行政区永久性居民。香港特别行政区永久性居民其实分为两种，一种是具有中国国籍的永久性居民，另外一种就是具有外国国籍的永久性居民。

Article 33 of the *Constitution* can be considered the most important article in Chapter 2, as it defines Chinese citizens: “All persons holding the nationality of the People’s Republic of China are citizens of the People’s Republic of China”. With respect to Hong Kong, the *Basic Law* does not define who is a Chinese citizen, as Chinese citizenship is determined according to the *Nationality Law of the People’s Republic of China*, rather than the *Basic Law*. The *Basic Law* only defines who is a permanent resident of the Hong Kong Special Administrative Region (HKSAR). Permanent residents of the HKSAR fall into two categories: those who hold Chinese nationality and those who hold foreign nationality.

例如一些在香港工作的外籍人士（《入境条例》第 2(4)条提及的家庭佣工和若干其他职业类别外籍佣工除外），当他们在香港居住和工作满 7 年之后，就可以申请成为香港特别行政区永久性居民，但他们仍然保留他们的外国国籍。根据《中华人民共和国国籍法》，在香港出生的华裔人士都是中国公民。无论他在回归之前或之后出生，他都是中国公民，这些中国公民绝大部分亦是香港特别行政区永久性居民。

For example, some foreign nationals working in Hong Kong (excluding domestic helpers and certain other categories of foreign workers provided for in Section 2(4) of the Immigration Ordinance) can apply to become permanent residents of the HKSAR after residing and working in Hong Kong for seven years. However, they still retain their foreign nationality. According to the Nationality Law of the People’s Republic of China, persons of Chinese ethnicity born in Hong Kong are Chinese citizens. Regardless of whether they were born before or after the handover, they are Chinese citizens, and the majority of these Chinese citizens are also permanent residents of the HKSAR.

除了基本人权外,《宪法》第三十三条亦同时规定权利与义务的相应性原则,即是不能只着重公民的权利,亦要留意公民相应的义务。他们的义务主要是履行《宪法》和法律规定的义务。在权利与义务相应的原则下,相关的第二章第五十一条指出:「中华人民共和国公民在行使自由和权利的时候,不得损害国家的、社会的、集体的利益和其他公民的合法的自由和权利」。故此,我们有个人的自由与权利,同时亦要顾及国家社会和集体的利益,及其他公民合法的自由与权利,这些都需要达到一个平衡。

In addition to providing for fundamental human rights, Article 33 of the *Constitution* also sets out the principle of the correspondence of the rights and the duties of citizens. This means that the focus should not only be on the rights of citizens, but also on their corresponding obligations. Their obligations primarily involve fulfilling the obligations of the *Constitution* and laws. Under the principle of corresponding rights and duties, Article 51 of Chapter 2 states that “when exercising their freedoms and rights, citizens of the People’s Republic of China shall not undermine the interests of the state, society or collectives, or infringe upon the lawful freedoms and rights of other citizens”. Therefore, while we have personal freedoms and rights, we must also consider the interests of the state, society, and collectives, as well as the lawful freedoms and rights of other citizens, in order to achieve a balance.

《宪法》列出多种公民义务,其中《宪法》第五十二条和五十四条与香港特别行政区有比较密切的关系。中国是一个多民族的国家,有五十六个民族。第五十二条指出:「中华人民共和国公民有维护国家统一和全国民族团结的义务」。《宪法》第五十四条指出:「中华人民共和国公民有维护祖国的安全、荣誉和利益的义务,不得有危害祖国的安全、荣誉和利益的行为」。现行的《香港国安法》,便是体现了《宪法》第五十二条和五十四条的公民义务。

The *Constitution* lists various civic obligations, among which Articles 52 and 54 of the *Constitution* have a closer relationship with the HKSAR. China is a multi-ethnic country with 56 ethnic groups. Article 52 states: “Citizens of the Republic of China shall have the obligation to safeguard national unity and the solidarity of all the country’s ethnic groups”. Article 54 of the *Constitution* states: “Citizens of the People’s Republic of China shall have the obligation to safeguard the security, honor and interests of the motherland; they must not behave in any way that endangers the motherland’s security, honor and interests”. The *Hong Kong National Security Law* embodies the civic obligations outlined in Articles 52 and 54 of the *Constitution*.

中国公民的基本权利有哪些种类?中国公民「在法律面前一律平等」的权利,可见于第三十三条;政治权利与自由,包括选举权、言论集会结社等权利,可见

于第三十四和第三十五条。第三十七条确立「人身自由」，即不可以随便剥夺个人的人身自由，例如要拘捕或逮捕某人，是需要经过法定的程序。第三十六条规定了宗教信仰的自由；文化和教育方面的权利，可见于第四十六和第四十七条。关于社会和经济方面的权利，可见于第四十二、第四十三、第四十四和第四十五条。对于政府的「监督权」，以及对政府提出申诉的权利，包括诉讼权利，载于第四十一条；另外，妇女或者儿童作为特定主体，他们的权利亦于《宪法》第四十八、第四十九和第五十条有所规定。值得注意的是，当我们谈及「权利」时，这些「权利」并不是绝对或无限的。

What are the types of basic rights for Chinese citizens? The “right to equality before the law” for Chinese citizens can be seen in Article 33. Political rights and freedoms, including the right to vote, freedom of speech, assembly and association, can be found in Articles 34 and 35. Article 37 establishes “freedom of the person”, which means that freedom of the person cannot be arbitrarily deprived of. For example, the arrest or detention of an individual must be carried out according to legal procedures. Article 36 provides for the freedom of religious belief. Rights related to culture and education can be found in Articles 46 and 47. Social and economic rights can be found in Articles 42, 43, 44 and 45. The right of citizens to supervise the government, as well as the right to file complaints, including the right to make charges, are provided in Article 41. In addition, the rights of women or children as specific subjects are also stipulated in Articles 48, 49 and 50 of the *Constitution*. It should be noted that when we talk about “rights”, these “rights” are not absolute or unlimited.

一般来说，根据「国际法」和「国内法」，都可以根据某些大家都承认的目的，去限制有关的基本权利。这些可以用以限制权利的目的，包括维护社会秩序、保障国家安全，以及维护公共利益。以下我们以《公民权利和政治权利国际公约》作为例子，世界各国都承认这一条国际公约，它亦于香港实施。

Generally speaking, according to “international law” and “domestic law”, basic rights can be limited according to certain recognised purposes. These purposes include maintaining social order, safeguarding national security, and maintaining public interests. Taking the *International Covenant on Civil and Political Rights* as an example, this covenant is recognised by countries all over the world and is also implemented in Hong Kong.

《公民权利和政治权利国际公约》第十九条是关于言论自由。第十九第一款：「人人有保持意见不受干预之权利」及第二款：「人人有发表自由之权利」，这些权利并不是没有限制的，正如第三款指出：「本条第二项所载权利之行使，附有特别责任及义务，故得予以某种限制，但此种限制以经法律规定……为限」。第一，要尊重他人的权利或名誉，例如不可以对他人进行诽谤，因为会损害到他人的名

誉；第二，要保障国家安全、公共秩序、公共卫生或风化。所以如果有些言论被认为对国家安全、公共秩序、公共卫生或风化有所危害，都可以对有关权利设定一些限制。

Article 19 of the *International Covenant on Civil and Political Rights* pertains to freedom of speech. The rights mentioned in Paragraph 1 of Article 19 (“Everyone shall have the right to hold opinions without interference”) and Paragraph 2 (“Everyone shall have the right to freedom of expression”) are not unlimited. As Paragraph 3 states, “the exercise of the rights provided for in Paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions”. First, it is necessary to respect the rights and reputation of others, such as not making defamatory remarks about others, which would damage their reputation. Second, it is necessary to safeguard national security, public order, public health, or morals. If certain expressions are deemed to be harmful to national security, public order, public health, or morals, limitations can be imposed on these rights.

中国公民有哪些基本义务？根据内地学者对《宪法》第二章的分析，可以列出以下的公民的基本义务，例如维护国家统一与民族团结的义务（第五十二条）、遵守宪法与法律的义务（第五十三条）、维护祖国安全、荣誉和利益的义务（第五十四条）、依法服兵役的义务（第五十五条）、依法纳税的义务（第五十六条）等。至于其他的公民义务，在第二章或其他章节有作出规定，例如劳动的义务、受教育的义务、夫妻双方实行计划生育的义务、父母抚养教育未成年子女的义务，以及成年子女有赡养扶助父母的义务等。

What are the basic obligations of Chinese citizens? According to the analysis of Chapter 2 of the *Constitution* by Mainland scholars, the following basic obligations of citizens are listed, such as the obligation to safeguard national unity and the solidarity of all the country’s ethnic groups (Article 52), the obligation to abide by the *Constitution* and the law (Article 53), the obligation to safeguard the security, honour, and interests of the motherland (Article 54), the obligation to perform military service in accordance with law (Article 55), and the obligation to pay taxes in accordance with law (Article 56), etc. As for other civic obligations, they are stipulated in Chapter 2 or other chapters, for example, the obligation to work, the obligation to receive education, the obligation of both husband and wife to practise family planning, the obligation of parents to raise and educate their minor children, and the obligation of adult children to support and assist their parents, etc.

《基本法》的立法背景和整体内容

The Legislative Background and Overall Content of the Basic Law

《中华人民共和国香港特别行政区基本法》在 1990 年由全国人民代表大会通过，在此之前，中英两国签订了《中华人民共和国政府和大不列颠及北爱尔兰联合王国政府关于香港问题的联合声明》。中华人民共和国政府于一九九七年七月一日对香港恢复行使主权，而《基本法》乃基于《宪法》第三十一条而制定。

The *Basic Law of the Hong Kong Special Administrative Region of the PRC* was passed by the National People's Congress in 1990. Before that, China and the U.K. signed the *Joint Declaration of the Government of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong*. On 1 July 1997, the Government of the People's Republic of China resumed the exercise of sovereignty over Hong Kong. The *Basic Law* was enacted on the basis of Article 31 of the *Constitution*.

香港居民的权利和义务

Rights and Duties of Hong Kong Residents

《基本法》包含序言、九章，以及三个附件。《基本法》如何保障香港居民的权利以及规定他们的义务呢？《基本法》规定的一些基本权利包括：言论、集会、结社等的权利和自由（第二十七条）、人身自由不受侵犯（第二十八条）、住宅不受侵犯（第二十九条）、通讯自由和通讯秘密受法律的保护（第三十条）、迁徙的自由（第三十一条）、宗教信仰的自由（第三十二条）、选择职业的自由（第三十三条）、进行学术研究自由（第三十四条）、向法院提起诉讼的权利（第三十五条）、依法享有社会福利的权利（第三十六条）、婚姻自由和自愿生育的权利（第三十七条）、香港特别行政区永久性居民依法享有选举权和被选举权（第二十六条）等。另外，通过在香港产生的全国人大代表，香港居民亦有参与国家事务管理的权利。

The *Basic Law* consists of a preamble, nine chapters, and three annexes. How does the *Basic Law* protect the rights of Hong Kong residents and define their duties? Some of the basic rights stipulated by the *Basic Law* include: freedom of speech, of assembly, and of association (Article 27), the freedom of the person of Hong Kong residents shall be inviolable (Article 28), their homes shall be inviolable (Article 29), the freedom and privacy of communication shall be protected by the law (Article 30), freedom of movement (Article 31), freedom of religious belief (Article 32), freedom of choice of occupation (Article 33), freedom to engage in academic research (Article 34), the right to confidential legal advice (Article 35) and the right to social welfare in accordance with law (Article 36), the freedom of marriage and their right to raise a family freely (Article 37), and permanent residents of the HKSAR shall have the right to vote and the right to stand for election in accordance with law (Article 26), etc. Furthermore, Hong Kong residents have the right to participate in the management of national affairs

through Hong Kong deputies to the National People's Congress.

另外，《基本法》第四十一条规定：「在香港特别行政区境内的香港居民以外的其他人，依法享有本章规定的香港居民的权利和自由」。《基本法》中还有一条是很重要的，就是第三十九条。《基本法》第三十九条提到两条国际人权公约：《公民权利和政治权利国际公约》和《经济、社会与文化权利的国际公约》。这两条国际公约，以及国际劳工公约，在 1997 年之前已适用于香港，《基本法》第三十九条规定它们继续有效，并通过香港特别行政区的法律予以实施。而且《基本法》第三十九条第二款提到香港居民享有的权利与自由，除依法规定外不得限制，此种限制不得与本条第一款规定抵触。1991 年，香港立法局制定了《香港人权法案条例》，将《公民权利和政治权利国际公约》适用于香港的条文，纳入香港本地法律。

In addition, Article 41 of the *Basic Law* stipulates: “Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter”. There is another important article in the *Basic Law*, which is Article 39. Article 39 of the *Basic Law* refers to two international human rights covenants: the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. These two international covenants and international labour conventions were applicable to Hong Kong before 1997. Article 39 of the *Basic Law* stipulates that they shall remain in force and shall be implemented through the laws of the HKSAR. Moreover, Paragraph 2 of Article 39 of the *Basic Law* states that 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. In 1991, the Hong Kong Legislative Council enacted the *Hong Kong Bill of Rights Ordinance*, which incorporated the relevant provisions of the *International Covenant on Civil and Political Rights* into the local law of Hong Kong.

「普通法」制度及其法治原则

Common Law System and Its Rule of Law

香港作为「一国两制」之下的一个法律管辖区，其实行的「普通法制度」，与中国内地的社会主义法律制度有所不同。「普通法」在回归之前已于香港实施，《基本法》第八条和第十八条都保障了「普通法」在 1997 年后继续适用。2022 年香港回归 25 周年，习近平主席在香港参与回归庆典的讲话里提到香港「普通法制度」对于「一国两制」的重要性，认为「一国两制」可以长期坚持。

Hong Kong, as a legal jurisdiction under “one country, two systems”, implements

a “common law” system, which is different from the socialist legal system on the mainland of China. The “common law” system has been implemented in Hong Kong before its return to the motherland. Article 8 and Article 18 of the *Basic Law* guarantee that the “common law” system will continue to apply after 1997. In 2022, when President Xi Jinping participated in the celebration of the 25th anniversary of the establishment of the HKSAR, he emphasised the significance of the “common law” system in “one country, two systems”. He expressed the view that “one country, two systems” can be upheld in the long term.

《基本法》第四章第四节是关于司法机关和司法制度的规定，其中亦包括不少「普通法」的元素，例如终审法院可根据需要邀请其他普通法适用地区的法官参加审判（第八十二条）、任何人被合法拘捕后，享有尽早接受司法机关公正审判的权利、未经司法机构判罪之前均假定无罪（第八十七条第二款），以及原本香港实行的陪审制度予以保留（第八十六条）。

Chapter 4, Section 4 of the *Basic Law* includes provisions on the judiciary and the judicial system, including many elements of “common law”. For example, the Court of Final Appeal may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal (Article 82). Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs (Paragraph 2 of Article 87). And The principle of trial by jury previously practised in Hong Kong shall be maintained (Article 86).

「普通法」制度里面其中一个核心概念就是法治的概念。在此简单综合法治概念的一些主要元素。虽然不同学者对法治的论述未必是完全相同，但以下的要点，都是法治概念的重要部分，应该没有太大争议。

One of the core concepts in the “common law” system is the concept of the rule of law. Here is a brief summary of the key elements of the concept of the rule of law. While different scholars may have different interpretations of the rule of law, the following points are important aspects of the concept of the rule of law, which are not subject to significant controversy.

首先是法律究竟是从何而来？社会为什么需要法律？法律的目的又在哪里呢？法律是由立法机关制定，目的在于维护社会成员的共同利益，从而令社会各成员得以在社会秩序之中共同生活。

First of all, where does the law come from? Why does society need laws? And what is the purpose of laws? The law is formulated by the legislative body with the aim of safeguarding the common interests of members of society, and enabling them to live

together within a social order.

法律面前，人人平等

Equality Before the Law

法律一方面保障社会成员的个人权利，另一方面亦保障社会的公众利益。当法律制定之后，所有人（包括市民、政府和公务人员）都必须尊重及遵守法律。法律面前，人人平等，换句话说，在执行法律时，不应作出差别对待。例如处理案件时，无论被告人富有或者贫穷，他都得到平等的对待，亦不会因为被告人的性别、种族、宗教、语言、社会地位等等，而产生差别的对待，这就是法律面前，人人平等。

On one hand, the law safeguards the rights of individual members of society, and on the other hand, it also safeguards the public interest of society. Once the law is made, everyone, including citizens, government, and civil servants, must respect and abide by the law. Before the law, everyone is equal, which means that no one should be treated differently when enforcing the law. For example, when handling a case, regardless of whether the defendant is wealthy or poor, they should receive equal treatment. They should not be treated differently simply because of their gender, race, religion, language, social status, and so on. This is what we call equality before the law.

至于政府以及其公务人员，如果他们要作出任何影响到人民权益的行为，都必须事先得到法律授权。政府去做某些行为，必须有法律授权才可以做。政府所有的权力，都是来自法律的授权。从市民角度来看，除非有法律规定某些特定的言行是违法的，否则人民的言行是不会受到法律追究的，这个原则是对于人民自由的一个重要保障。只要他们的言行在法律上并非违法，他们作出的言行便不会受到法律的追究。当然，这些言行会否不道德呢？会否违反社会上大家都接受的道德伦理标准，则是另外一回事。

As for the government and its officials, when taking any action that affects people's rights and interests, they must have prior authorisation from the law. Any kind of government actions must be authorised by the law. All the powers of the government come from the authorisation of the law. From the perspective of citizens, unless a specific kind of speech or behaviour is defined as illegal by the law, people will not be subject to legal sanctions for their speech or behaviour. This is an important guarantee of people's freedom. As long as their speech or behaviour is not illegal according to the law, they will not be subject to legal sanctions. However, whether such speech or behaviour is immoral or violates the moral and ethical standards accepted by society is another matter.

法律的条文必须清晰明确

The Law must be Clear and Explicit

另外，法律的条文必须清晰明确，让人民可以预见他们言行的法律后果。如果法律条文写得太模糊，令人民无所适从，这就不符合法治的原则。

In addition, the provisions of the law must be clear and explicit, allowing people to foresee the legal consequences of their words and actions. If the provisions of the law are too vague, making it difficult for people to understand and comply with, this does not meet the requirement of the rule of law.

司法独立

Judicial Independence

「司法独立」亦是法治的核心概念之一，法院在审理案件的时候必须大公无私，公正地、独立地审判并依法作出判决。法院的审理案件和判决过程不受任何人或其他机关或势力的干预。

“Judicial independence” is also one of the core concepts of the rule of law. When the court is hearing a case, it must apply the relevant laws to the facts of the case impartially, fairly, and independently, and decide the case according to the law. The court’s trial of cases and the process of making judgments are not subject to any interference from individuals, other organisations, or forces.

国际法

International Law

在这部分，我会介绍国际条约如何适用于香港，尤其是与人权相关的国际条约。什么是国际条约？国际条约与「国际法」有密切的关系，之前提到《宪法》以及法律的不同部门：例如公法、私法、民商法、刑法等，都是指一个国家的国内法。不同国家的国内法都有所不同，例如中国的法律与美国的法律有明显的分别。而当代世界，还有一种法律称为「国际法」，是国际社会普遍承认为具有法律效力的一些规范，这些「国际法」主要是规范各国政府的行为。「国际法」与国内法不同，国内法主要针对一个国家里面的公民、团体、公司，以及政府的行为。而「国际法」主要针对世界各国政府需要遵守的一些行为规范。「国际法」与国内法可以称为当代法律的两大体系。

In this part, I shall introduce how international treaties apply to Hong Kong, especially those related to human rights. What are international treaties? International treaties are closely related to “international law”. Previously, I mentioned that the *Constitution* and different branches of law, such as public law, private law, civil and

commercial law, criminal law, etc., comprise the domestic laws of a country. Different countries have different domestic laws. For example, there are significant differences between the laws of China and the laws of the United States. In the contemporary world, there is also a kind of law known as “international law”, which refers to norms that are generally recognised and have legal effect in the international community. These “international laws” mainly regulate the behaviour of governments of various countries. “International law” is different from domestic law which mainly focuses on behaviour of citizens, organisations, companies, and the government within a country. “International law” mainly focuses on the norms of behaviour that governments of all countries need to comply with. “International law” and domestic law can be considered as the two major systems of contemporary law.

「国际法」从何而来？「国际法」的规范又是如何？「国际法」主要包括国际条约和国际习惯法两方面，国际条约是国与国之间订立的合同。条约其实是一种合同。公司与公司之间、公司与个人之间、或个人与个人之间都可以订立合同，例如雇佣关系是由雇佣合约所规范；在国际社会里，国与国之间的合同称为条约，或称国际协议。条约可分为两类：第一种是双边条约，即两个国家之间签订一项条约，譬如中国与美国可以签订一项条约；另一种是多边条约，由很多不同国家一起签订，例如《公民权利和政治权利国际公约》、《经济、社会与文化权利国际公约》、国际劳工公约等。这些条约都是由很多国家、可能多达一百几十个国家共同签订，因此称为「国际公约」。

Where does “international law” come from? How are its norms established? “International law” mainly consists of two sources: international treaties and customary international law. International treaties are contracts concluded between countries. In fact, treaties are a type of contract. Contracts can be concluded between companies, between companies and individuals, or between individuals. For example, employment relationship is governed by an employment contract. In the international community, contracts between countries are called treaties, or international agreements. There are two types of treaties. The first type is bilateral treaty, which is signed between two countries, such as, a treaty signed between China and the United States. The other type is a multilateral treaty, which is signed by many different countries together, such as, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, some international labour conventions, etc. These treaties are signed by numerous countries, possibly more than a hundred countries, and are therefore called “international conventions”.

「国际法」的主要渊源就是国际公约或其他国际条约；而另外一个渊源就是国际习惯法。有些国际法规范并不是写在条约里，而是通过各国的做法和行为建

立惯例，而各国政府都认为这些惯例是有法律效力，以及必须遵守，这些就称为国际习惯法。无论是国际条约或者国际习惯法，都构成国际法的一些有效规范。所有国家的政府都有法律上的义务遵守这些规范。如果某些国家不遵守这些规范，可能会受到其他国家的制裁。

The main source of “international law” is international conventions or other international treaties; the other source is customary international law. Some international legal norms are not written in treaties but are established as customs through the practices and behaviours of various countries. Governments of different countries consider these customs to have legal effect and must be complied with, and these are called customary international law. Whether it is an international treaty or customary international law, they constitute some effective norms of international law. The governments of all countries have a legal obligation to comply with these norms. If some countries do not comply with these norms, they may be subject to sanctions from other countries.

现代世界最常用的制裁方式就是经济制裁，当然在少数的情况下，违反「国际法」的国家可能被告上荷兰海牙的国际法院。如果某个国家接受了国际法院的管辖权，与另外一个接受国际法院管辖权的国家发生纠纷的时候，则可以由国际法院对他们之间的纠纷作出一个裁决。有些多边条约，即是由多个国家签订的条约，亦有一些解决纷争的机制，例如世界贸易组织（世贸）有一百多个成员，香港作为中国的一个特别行政区，也是世贸其中一个成员。2020 年《香港国安法》通过后，美国对香港作出一些制裁。香港特区政府就认为这些制裁违反了世贸有关的规范，于是向世贸提出诉讼，由世贸的纠纷解决的机构去处理和作出裁决。

The most common form of sanctions used in the modern world is economic sanctions. In rare cases, countries that violate international law may be taken to the International Court of Justice in The Hague, Netherlands. If a country accepts the jurisdiction of the International Court of Justice and a dispute arises between it and another country that also accepts the jurisdiction of the Court, the Court can make a ruling on the dispute between them. Some multilateral treaties, which are treaties signed by multiple countries, also have mechanisms for resolving disputes. For example, the World Trade Organization (WTO) has over a hundred members. Hong Kong, as a special administrative region of China, is also a member of the WTO. After the enactment of the *Hong Kong National Security Law* in 2020, the United States imposed some sanctions on Hong Kong. The Hong Kong Special Administrative Region (HKSAR) government believes that these sanctions violate the norms of the WTO. Therefore, it filed a lawsuit with WTO. The WTO institution for dispute settlement will handle and make a ruling on the matter.

这些国际法，尤其是国际条约，怎样适用于香港特别行政区呢？根据《基本法》，条约的签订是属于外交事务，而外交事务属于中央管辖权的范围。《基本法》第十三条规定，中央人民政府负责管理与香港特别行政区有关的外交事务，同时中央人民政府授权香港特别行政区依照《基本法》自行处理有关的「对外事务」。至于哪些「对外事务」属于香港特别行政区被授权处理的范围，便要看一看《基本法》第七章。当中有很多条文界定香港特别行政区可以自行处理哪些对外事务。例如第一百五十三条提到：「中华人民共和国缔结的国际协议，中央人民政府可根据香港特别行政区的情况和需要，在征询香港特别行政区政府的意见后，决定是否适用于香港特别行政区」；另外，「中华人民共和国尚未参加但已适用于香港的国际协议仍可继续适用，中央人民政府根据需要授权或协助香港特别行政区政府作出适当安排，使其他有关国际协议适用于香港特别行政区」。例如，如果这些协议要求香港特别行政区履行某一些义务，或者就这些义务的履行向有关的国际机构提交报告，中央人民政府会授权及协助香港特别行政区政府处理。以《公民权利和政治权利国际公约》为例，这公约要求缔约成员向根据公约成立的人权委员会提交报告，中央人民政府亦授权香港特别行政区就这条公约在香港特别行政区的实施，向人权委员会提交报告。其他与人权相关的国际公约，都有要求香港特别行政区提交关于如何实施这类公约的报告，这亦需得到中央人民政府授权。不同的国际公约在香港特别行政区实施的报告，可以在特区政府的网页找到。另外，如果国际协议是属于经济、贸易、金融、航运、通讯、旅游、文化以及体育领域，根据《基本法》香港特别行政区得到中央人民政府的授权，以「中国香港」的名义与世界各国、各地区及有关国际组织保持及发展关系、签订和履行有关的国际协议。

How do these international laws, particularly international treaties, apply to the HKSAR? According to the *Basic Law*, the signing of treaties is a matter of foreign affairs and fall within the scope of the central government's jurisdiction. Article 13 of the *Basic Law* stipulates that the Central People's Government is responsible for managing foreign affairs related to the HKSAR; it also authorises the HKSAR to manage certain "external affairs". As for which external affairs are within the authorised scope of the HKSAR, it is necessary to refer to Chapter VII of the *Basic Law*. There are many articles in Chapter VII that define what external affairs the HKSAR is authorised to conduct on its own. For example, Article 153 states: "The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region". In addition, "International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, authorize

or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements”. For example, if these agreements require the HKSAR to fulfil certain obligations or submit reports to relevant international organisations on the fulfilment of these obligations, the Central People’s Government will authorise and assist the HKSAR government to fulfil related obligations. Taking the *International Covenant on Civil and Political Rights* as an example, this covenant requires contracting parties to submit reports to the Human Rights Committee established under the Covenant. The Central People’s Government also authorises the HKSAR to submit reports to the United Nations Human Rights Committee on the implementation of this covenant in the HKSAR. Other international covenants related to human rights also require the HKSAR to submit reports on the implementation of these covenants, which also require authorisation from the Central People’s Government. Reports on the implementation of different international conventions in the HKSAR can be found on the website of the HKSAR government. In addition, if the international agreement belongs to the fields of economy, trade, finance, shipping, communication, tourism, culture, and sports, the HKSAR is authorised by the Central People’s Government to maintain and develop relations with all foreign states and regions and relevant international organisations in the name of “Hong Kong, China” and conclude and implement relevant international agreements.

至于《公民权利和政治权利国际公约》及国际劳工公约在香港的适用，已经在《基本法》第三十九条作出明确规定。现在举出两条公约作为例子，说明国际公约是如何保障相关的人权。第一条就是《消除对妇女一切形式歧视公约》，第二条就是《儿童权利公约》。《儿童权利公约》适用于 18 岁以下的未成年人，对于中学或者小学来说应该是特别重要，因为学生全部是《儿童权利公约》定义下的「儿童」。至于《消除对妇女一切形式歧视公约》亦有其重要性，因为人权包括「平等权」，当「平等权」实施的时候，其中一个最重要的领域就是「男女平等」。当然亦有其他平等的范畴，例如不同种族人士的平等、反对对于残疾人士的歧视等都与「平等权」有关。

As for the application of the *International Covenant on Civil and Political Rights* and international labour conventions in Hong Kong, it has been clearly stipulated in Article 39 of the *Basic Law*. Two examples are now provided to show how international covenants safeguard relevant human rights. The first is the *Convention on the Elimination of All Forms of Discrimination against Women*, and the second is the *Convention on the Rights of the Child*. The *Convention on the Rights of the Child* applies to minors under the age of 18. It should be particularly important for secondary school or primary school students, as all students fall under the definition of “children” as defined by the *Convention on the Rights of the Child*. The *Convention on the*

Elimination of All Forms of Discrimination against Women is also important as human rights include the “right to equality”. When implementing the “right to equality”, one of the most important areas is “gender equality”. Of course, there are also other areas of equality, such as equality for people of different races, prohibition of discrimination against people with disabilities, etc., which are also related to the “right to equality”.

《消除对妇女一切形式歧视公约》

The Convention on the Elimination of All Forms of Discrimination against Women

《消除对妇女一切形式歧视公约》分为〈序言〉和具体条文。《公约》的条文共有 30 条，现介绍一些具有代表性、或者比较值得留意的条文。首先，《公约》的〈序言〉对于了解该公约甚为重要，因为〈序言〉将该公约的基本精神、宗旨，以及所反映的基本价值信念写出来，所以要研究《公约》，首先要研读该公约的〈序言〉。《公约》的〈序言〉指出，《世界人权宣言》于 1948 年制定，「申明不容歧视的原则，并宣布人人生而自由，在尊严和权利上一律平等，且人人都有资格享受《世界人权宣言》所载的一切权利和自由，不得有任何区别，包括男女的区别。」所以男女都应该同等享有《世界人权宣言》规定的权利和自由，不应该因为性别而受到歧视。「有关人权的各项国际公约的缔约国有义务去保证男女平等」，所以「男女平等」是《消除对妇女一切形式歧视公约》的最基本原则。

The Convention on the Elimination of All Forms of Discrimination against Women consists of the Preamble and specific articles. There are a total of 30 articles in the *Convention*, and now some representative or noteworthy articles will be introduced. Firstly, the Preamble is important for understanding the *Convention*. The Preamble outlines the fundamental principles, objectives, and core values reflected in the *Convention*. Therefore, to study the *Convention*, it is necessary to study its preamble first. The Preamble of the *Convention* points out that the *Universal Declaration of Human Rights*, adopted in 1948, already “affirmed the principle of inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex”. So men and women should equally enjoy all the rights and freedoms set forth in the *Universal Declaration of Human Rights* and should not be discriminated against on the basis of their gender. “The States Parties to the *International Covenant on Human Rights* have the obligation to ensure the equal rights of men and women”. Therefore, “gender equality” is the basic principle of the *Convention on the Elimination of All Forms of Discrimination against Women*.

「一国的充分和完全的发展，世界人民的福利以及和平的事业，需要妇女和男子平等充分参与所有各方面的工作。」《消除对妇女一切形式歧视公约》特别提到「妇女对家庭的福利及社会的发展所作出的巨大贡献」。《公约》又指出「父母在家庭和在养育子女方面」负有义务。「妇女不应因为生育而受到歧视，因为养育子女是男女及整个社会的共同责任」，而不是妇女单方面的责任。为了充分实现「男女平等」，《公约》的〈序言〉指出：很多国家有「需要同时改变男子和妇女在社会上及家庭中的传统任务」，即有些国家传统上对于男、女两性在社会上和家庭上的角色的理解，并不完全符合现代「男女平等」的原则，所以需要作出一些改变。

“The full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields.”. The *Convention on the Elimination of All Forms of Discrimination against Women* specifically mentions the “great contribution of women to the welfare of the family and to the development of society”. The *Convention* also refers to “the role of both parents in the family and in the upbringing of children”, and mentions that “the role of women in procreation should not be a basis for discrimination”, and “the upbringing of children requires a sharing of responsibility between men and women and society as a whole”. Hence the upbringing of children is not just the responsibility of women. In order to fully achieve “equality between men and women”, the Preamble of the *Convention* points out that “a change in the traditional role of men as well as the role of women in society and in the family is needed” in many countries. This means that in some countries, the traditional understanding of the roles of men and women in society and in the family does not fully conform to the principle of “equality between men and women”. Therefore, some changes are necessary.

《消除对妇女一切形式歧视公约》的具体条文比较多，以下是一些例子。首先，《公约》指出各国应该采取一切适当措施消除对妇女的歧视，保证妇女得到充分发展和进步，确保她们在与男子平等的基础上，行使和享有人权和基本自由。所以此处强调反对对妇女的歧视，提倡男女应该平等。在家庭层面来说，《公约》的条文提到要「保证家庭教育应包括正确了解母性的社会功能和确认教养子女是父母的共同责任，当然在任何情况下都应首先考虑子女的利益」。举例来说，在父母离婚之后，他们未成年子女的抚养权应给予男方还是女方呢？在处理这方面问题时，法庭案例都不断强调需要优先考虑子女的利益，而不是父母双方的利益或者意愿。

There are many articles in the *Convention on the Elimination of All Forms of Discrimination against Women*. The following are some examples. First, the *Convention* states that State Parties shall take all appropriate measures to eliminate

discrimination against women, ensure their full development and progress, and guarantee their exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. Therefore, it emphasises opposition to discrimination against women and promotes gender equality. At the family level, the *Convention* mentions the need “to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases”. For example, should the custody of a minor be given to the father or the mother after the parents’ divorce? When dealing with this kind of problems, court cases consistently emphasise the need to give priority to the consideration of the interests of the children rather than the interests or wishes of the parents.

在教育方面，《消除对妇女一切形式歧视公约》规定缔约国需要保证妇女享有与男子平等的权利。另外《公约》亦对于运动或体育有特别规定，缔约国要在「男女平等」的基础上，保证男女积极参加运动和体育的机会相同。至于就业方面，缔约国有责任采取适当的措施消除在就业方面对于妇女的歧视，保证妇女在「男女平等」的基础之上享有相同的权利。在工作各方面，包括「同工同酬」，以及评定工作表现等，男女都应该享有平等待遇的权利。缔约国需要禁止以怀孕或者产假为理由去解雇女性雇员，亦禁止以婚姻状态为理由予以解雇的歧视。另外《公约》鼓励各缔约国提供必要的辅助性社会服务，特别是通过促进建立和发展托儿设施和系统，使父母得以兼顾家庭义务和工作责任，并参与公共事务。

In the field of education, the *Convention on the Elimination of All Forms of Discrimination against Women* stipulates that States Parties shall ensure women enjoy equal rights as men. In addition, the *Convention* has provisions for sports and physical education, requiring States Parties to ensure that men and women have equal opportunities to participate in sports and physical education. As for employment, States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, that women enjoy the same rights. In all aspects of work, including “equal pay for equal work” and evaluation of work performance, men and women should have equal rights to treatment. States Parties shall prohibit the dismissal of female employees due to pregnancy or maternity leave, as well as on the basis of marital status. In addition, the *Convention* encourages States Parties to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities, in particular through promoting the establishment and development of a network of child-care facilities.

在保健方面，《消除对妇女一切形式歧视公约》规定各缔约国需要采取适当措施去消除在保健方面对于妇女的歧视，保证她们在「男女平等」基础上，取得各种保健服务包括有关计划生育的保健服务。

In the field of healthcare, the *Convention on the Elimination of All Forms of Discrimination against Women* stipulates that State Parties shall take measures to eliminate discrimination against women in the field of health care in order to ensure, on the basis of “equality between men and women”, women’s access to health care services, including those related to family planning.

在娱乐方面，《消除对妇女一切形式歧视公约》规定男女有参与娱乐生活、运动，以及文化生活的相同权利。此外，法律之前应该人人平等，男女都应该在法律面前享有平等的地位。

In terms of entertainment, the *Convention on the Elimination of All Forms of Discrimination against Women* states that men and women have the same rights to participate in recreational activities, sports, and all aspects of cultural life. Besides, everyone should be equal before the law. Both men and women shall enjoy equal status under the law.

在婚姻范畴，《消除对妇女一切形式歧视公约》规定，男女双方都应该享有自由选择配偶的权利。若要缔结婚姻，必须基于双方自由意愿，表示他们想缔结这段婚姻，以及完全同意这段婚姻。以往在传统上有许多由父母安排的婚姻，这就不符合现代关于妇女权利的原则。男女双方在结婚之后均有相同的权利自由去决定子女的人数和生育的间隔。如果子女需要监护或者看管或者收养的安排，男女双方均有相同的权利和义务处理，并需要考虑到子女的利益。此外，夫妇双方就财产方面的各种权利都应该相同。有些地方的法律制度，会将婚后夫妇财产权完全归于丈夫一方，这样亦不符合《公约》的要求。

In terms of marriage, the *Convention on the Elimination of All Forms of Discrimination against Women* stipulates that both men and women shall have the right to freely choose their spouse. If they want to enter into marriage, it must be based on the free will of both parties and their consent to the marriage. Traditionally, in the past, there were many arranged marriages by parents, which do not conform to modern principles of women’s rights. Both men and women have the same rights and freedoms to decide on the number and spacing of birth of children after marriage. If there is a need for custody or adoption of children, both men and women have the same rights and obligations to handle it and there is a need to consider the interests of the children. In addition, both parties in a marriage should have the same rights in property ownership. In some legal systems, all the property rights of the married couple are assigned to the husband, which does not meet the requirements of the *Convention*.

平等机会委员会及四部反歧视法例

The Equal Opportunities Commission and Four Anti-discrimination Ordinances

香港在回归之前已经实施《消除对妇女一切形式歧视公约》。自 90 年代以来，香港的立法机关制定了一系列反歧视的法例。国际公约在国际法的层次，对于有关国家政府有约束力。在签署国际公约之后，政府是有义务在本地法或者国内法的层次去制定相关法例以实施国际公约。香港亦有立法以实施《消除对妇女一切形式歧视公约》、《消除一切形式种族歧视国际公约》、《残疾人权利公约》等。与这些公约相关的法例，大部分都是 90 年代制定的，例如《性别歧视条例》。香港政府设立了平等机会委员会（平机会），负责执行和推广《性别歧视条例》。平机会是香港人权领域中一个非常重要的组织，另外还有个人资料私隐专员公署，因为私隐权亦是一项重要的人权。

Hong Kong had already implemented the *Convention on the Elimination of All Forms of Discrimination against Women* before its return to China. Since the 1990s, the legislative body in Hong Kong has enacted a series of anti-discrimination ordinances. International conventions have binding force on governments at the international law level. After signing the international conventions, governments have an obligation to enact relevant laws at the local or domestic level to implement the international conventions. Hong Kong has also enacted legislation to implement the *Convention on the Elimination of All Forms of Discrimination against Women*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, and the *Convention on the Rights of Persons with Disabilities*, etc. Most of the legislation related to the conventions was enacted in the 1990s, such as the *Sex Discrimination Ordinance*. The Hong Kong government has established the Equal Opportunities Commission (EOC) to enforce and promote the *Sex Discrimination Ordinance*. The EOC is a very important organisation in the field of human rights in Hong Kong. In addition, there is also the Office of the Privacy Commissioner for Personal Data, as privacy rights are also an important human right.

在《性别歧视条例》制定后，香港立法机关又制定了以下三项反歧视法例。第一，《残疾歧视条例》，保障不会对残疾人士作出歧视。第二，《家庭岗位歧视条例》，保障有关人士不会因为他们的家庭岗位，例如已婚或未婚、有否养育子女等理由受到歧视。第三，《种族歧视条例》保障香港少数族裔人士不会受到歧视。至于如何保障他们不会受到歧视，可以浏览平机会网页。

After the enactment of the *Sex Discrimination Ordinance*, the legislature in Hong Kong also enacted the following three anti-discrimination ordinances. First, the *Disability Discrimination Ordinance* protects people with disabilities from

discrimination. Second, the *Family Status Discrimination Ordinance* protects relevant persons from discrimination based on their family status, such as being married or unmarried or having or not having children. Third, the *Race Discrimination Ordinance* protects ethnic minorities in Hong Kong from discrimination. To know more about how people are protected from discrimination, you can visit the EOC website.

有关《性别歧视条例》的主要内容，以下是一些例子。例如，在招聘员工时，雇主不可以使用带有性别歧视的工种名称，例如航空公司不应以「空姐」作招聘，应该改为招聘「空中服务员」。「空中服务员」的工作不一定必须要由女性担任，男性也都可以担任。另外，《性别歧视条例》亦禁止任何招聘广告明示或暗示必须由某性别的人士担任有关职位，除非该职位基于「真正的职业资格」，必须要某一个性别的雇员出任。例如，演艺事业需要招聘一个女性演员担任女性角色演出，在这个情况下，就可把性别视为真正的职业资格，因此雇主在招聘广告列明招聘女性，便不受到《性别歧视条例》的约束。反之，如果雇主招聘一名秘书或护士，其实男女都可以胜任这个岗位，此情况便受到《性别歧视条例》的约束。《性别歧视条例》的规定，不单只保障女性，同时亦保障男性。

Regarding the main contents of the *Sex Discrimination Ordinance*, the following are some examples. For example, during the recruitment of employees, employers are not allowed to use job titles with gender discrimination. For example, an airline company should not use “air stewardess” in its recruitment advertisement, but rather use “cabin crew”. The job of a “cabin crew” does not necessarily have to be filled by a woman; men can also fulfil the job requirements. In addition, the *Sex Discrimination Ordinance* prohibits any recruitment advertisement from indicating or implying that only a particular gender can fill a particular position, unless a person’s sex is a “genuine occupational qualification” for the job. For example, a company in the performing arts industry is going to recruit an actress to perform a female role. In this case, sex is considered a genuine occupational qualification, and the employer is not prohibited by the *Sex Discrimination Ordinance* to state in the recruitment advertisement that they are recruiting a female employee. However, if an employer is recruiting a secretary or a nurse whose job duties can be performed by either a female or male employee, the recruitment advertisement is bound by the above rule in the *Sex Discrimination Ordinance*. These provisions of the *Sex Discrimination Ordinance* not only protect women but also men.

另外，雇员入职后，《性别歧视条例》规定男女同工同酬，以及禁止性骚扰的行为。《性别歧视条例》不单止适用于雇佣范畴，亦适用于教育、商业、商品买卖及服务、物业出租，以及其他的社会活动。所以，所有教育活动或者商业活动，甚至物业租赁均不可以性别理由去歧视某一方，不可以因为对方是男或女而

作出区别对待。

Moreover, the *Sex Discrimination Ordinance* stipulates equal pay for equal work, and prohibits sexual harassment. The *Sex Discrimination Ordinance* does not only apply to the employment sector, but also to education, commerce, the buying and selling of goods and services, property leasing, and other social activities. Therefore, in all educational or commercial activities, including property leasing, it is unlawful to discriminate against any party on the basis of their sex.

以教育为例，曾有一个案例，是由香港平机会提出诉讼，被告为教育当局。鉴于小学毕业时，女生一般考试成绩都比男生好，当时的教育局为了平衡中学班级的男女生比例，为保证多数人想入读的中学和著名的中学的男女生比例不会过于失衡，教育当局对学生升中的分数按性别作出调整，令男生即使分数稍为差于女生，都同样有机会入到心仪的中学。经过平机会提出诉讼，法院裁定这个做法是违反《性别歧视条例》的。由此可见，《性别歧视条例》适用于教育领域，以保障男女平等和享有平等的权利。

Taking education as an example, there was a case in which the EOC of Hong Kong filed a lawsuit against the education authorities. At the time of primary school graduation, girls generally performed better than boys and had better examination results. In order to balance the male-female ratio in secondary school classes and ensure that the male-female ratio in the most popular and famous secondary schools would not be too imbalanced, the education authorities at that time made adjustments to the score requirements for admission to secondary schools based on the sex of students, so that even if boys scored slightly lower than girls, they would still have the same opportunity to enter a preferred secondary school. After the EOC filed the lawsuit, the court ruled that this practice was in violation of the *Sex Discrimination Ordinance*. This shows that the *Sex Discrimination Ordinance* applies to the field of education in order to ensure equality between men and women and the enjoyment of equal rights for both sexes.

除了《性别歧视条例》外，《残疾歧视条例》亦作出类似的保障。例如雇主招聘员工的时候，不可以歧视残疾人士，如果有些工作残疾人士都可以胜任，就不可以在广告内列明残疾人士不可以申请。但亦有例外，例如航空业，飞机师一定要视力健全，视力有问题的残疾人士当然不适合做这份工作。另外，如果残疾人士的身体状况不影响他们的工作表现，是不可以因为残疾而在薪酬或待遇方面对他们作出歧视，亦不可因此影响他们升迁和受训的机会。《家庭岗位歧视条例》都有类似的保障，规定有家庭责任的人士不受歧视，即雇主不可以因为雇员已婚，或者需要照顾子女，而对他们有所歧视。

In addition to the *Sex Discrimination Ordinance*, the *Disability Discrimination Ordinance* also provides similar protection. For example, employers are not allowed to

discriminate against persons with disabilities in recruitment process. If persons with disabilities are capable of doing the job, the hiring advertisement cannot specify that persons with disabilities are ineligible to apply. However, there are exceptions. For example, in the aviation industry, pilots must have good eyesight. People with a visual impairment are hence not suitable for the job. Moreover, if the physical conditions of people with physical disabilities do not affect their job performance, it is prohibited to discriminate against them in terms of salary or remuneration package, or promotion and training opportunities. The *Family Status Discrimination Ordinance* provides similar protection for persons with family responsibilities. Employers shall not discriminate against employees because they are married or need to take care of children.

《残疾歧视条例》和《家庭岗位歧视条例》不单适用于工作和雇佣，亦适用于教育、商业、物业租赁等范畴。老师向学生介绍平等机会以及相关的反歧视法例时，应该说明反对对妇女歧视、种族歧视、保障儿童权益、对于残疾人士权利的保障等，已在香港本地立法的层面得到实施。

The *Disability Discrimination Ordinance* and the *Family Status Discrimination Ordinance* are not applicable only to work and employment, but also to education, commerce, property leasing, etc. Teachers may introduce the EOC and relevant anti-discrimination ordinances to their students. They should explain that legislation to prohibit discrimination against women and racial discrimination, and to protect children's rights and rights of persons with disabilities has been introduced in Hong Kong.

《儿童权利公约》

The Convention on the Rights of the Child

18 岁以下的未成年人都是儿童，他们均受到《儿童权利公约》的保障。《儿童权利公约》的〈序言〉展示它的基本精神及包含的价值观。〈序言〉一开首指出《联合国宪章》所宣布的原则：「对人类家庭所有成员的固有尊严及其平等和不移的权利的承认，乃是世界自由、正义与和平的基础」。《儿童权利公约》特别提到《世界人权宣言》中有一个规定，就是儿童有权享受特别照顾和协助。家庭作为社会的基本单元，需要为家庭所有成员，特别是儿童的成长，提供必要的保护和协助。为了充分而和谐地发展儿童的个性，应该让儿童在家庭环境里，在幸福、亲爱和谅解的气氛之中成长，亦应该充分培养儿童可以在社会上独立生活，并在《联合国宪章》宣布的理想的精神下，特别是在和平、尊严、宽容、自由、平等和团结的精神下，抚养他们成长。

Children under the age of 18 are considered as minors and they are protected by the provisions of the *Convention on the Rights of the Child*. The Preamble of the

Convention on the Rights of the Child demonstrates its fundamental spirit and embedded values. The Preamble begins by pointing out that the principles proclaimed in the *United Nations Charter* include: “Recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world”. The *Convention on the Rights of the Child* specifically mentions a provision in the *Universal Declaration of Human Rights*, which provides that children are entitled to special care and assistance. As the fundamental group of society, the family should be afforded the necessary protection and assistance for its members, especially children’s growth. For the full and harmonious development of his or her personality, a child should grow up in a family environment, in an atmosphere of happiness, love and understanding. The child should also be fully prepared to live an independent life in society, and brought up in the spirit of the ideals proclaimed in the *Charter of the United Nations*, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.

《儿童权利公约》的〈序言〉列出如何对待儿童，以及教育和培养他们的一些基本原则。《儿童权利公约》的条文，内容相当丰富，总共有 54 条。其中一些特别值得大家注意。《儿童权利公约》指出，缔约国应该采取措施确保儿童得到保护，以及不应因为儿童父母的身份或信仰，而对儿童作出歧视。缔约国要确保儿童享有其幸福所必须的保护和照顾，所以对儿童的保护和照顾是《儿童权利公约》的核心概念。

The Preamble of the *Convention on the Rights of the Child* sets forth some basic principles on how children should be treated and educated. The *Convention on the Rights of the Child*, with a total of 54 articles, is quite comprehensive. Here are some noteworthy provisions. The *Convention on the Rights of the Child* states that States Parties shall take measures to ensure that children are protected and not discriminated against on the basis of their parents’ status or their beliefs. Protecting and caring for children is the core concept of the *Convention on the Rights of the Child*.

《儿童权利公约》第六条指出：「缔约国确认每个儿童均有固有的生命权。缔约国应最大限度地确保儿童的存活与发展」。第九条指出：「缔约国应确保不违背儿童和父母的意愿而使儿童与父母分离」。当然，在父母离异的情况下，儿童可能需要与他的父亲或母亲分离。而法院在处理这种情况，是需要考虑什么安排最符合儿童的最大利益。如果有些父母被发现虐待子女，政府可能需要采取措施去干预，令该名儿童不再与父母居住，这就是第九条第一款最后一句的情况：由于父母的虐待、疏忽或因父母分居而必须决定儿童居所的特定情况下，可能需要由法院作出一个裁决。

Article 6 of the *Convention on the Rights of the Child* points out: “States Parties recognize that every child has the inherent right to life. States Parties shall ensure to the maximum extent possible the survival and development of the child”. Article 9 states: “States Parties must ensure that a child shall not be separated from his or her parents against their will”. However, in case of parental divorce, a child may be separated from his father or mother. Here the court is required to consider the best interests of the child. If parents are found to have abused their child, the government may need to intervene and take measures to ensure that the child will no longer live with the parents. This is the situation described in the last sentence of Paragraph 1 of Article 9: “Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence”.

儿童和成年人均享有一些基本自由，包括言论自由、结社、和平集会自由，以及保障私隐权等。《儿童权利公约》亦对儿童的自由作出一些限制，例如《公约》第十三条第二款指出：自由发表言论的权利「可受某些限制约束，但这些限制仅限于法律所规定并为以下目的所必需：(a)尊重他人的权利和名誉；(b)保护国家安全或公共秩序或公共卫生或道德」。同样地，《公约》规定可以为了保护公共安全、秩序、卫生、或者道德、或者其他人的基本权利和自由，而对宗教信仰自由作出某些限制。儿童享有结社自由和集会自由，但亦可以根据国家安全、公共安全、公共秩序、公共卫生、道德等等，对他们的自由作出限制。儿童的私隐权、家庭、住宅或通讯都不应受到任意或者非法干预，儿童的荣誉和名誉不应受到非法攻击；网上对于儿童的欺凌行为是违反了儿童权利。另外，《公约》亦规定了大众传媒的作用，儿童可以从传媒之中获得相关资讯。

Children and adults both enjoy certain basic freedoms, including freedom of speech, association, assembly, and privacy. The *Convention on the Rights of the Child* also imposes some limitations on children’s freedom. For example, Paragraph 2 of Article 13 states that the exercise of the right to freedom of expression “may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order (*ordre public*), or of public health or morals”. Similarly, the *Convention* imposes certain limitations on the freedom of religion or beliefs in order to protect public safety, public order, public health, or morals, or rights and freedoms of others. Children have the freedom of association and freedom of peaceful assembly. In the interests of national security, public safety, public order, the protection of public health or morals, restrictions may be placed on the exercise of these rights. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour

and reputation. Online bullying of children is a violation of their rights. Besides, the *Convention* also defines the function of the mass media, which can provide children with relevant information.

父母双方对于儿童的养育和发展负有共同责任。《儿童权利公约》第十九条非常重要：「缔约国应采取一切适当的立法、行政、社会和教育措施，保护儿童在受父母、法定监护人或其他任何负责照管儿童的人的照料时，不致受到任何形式的身心摧残、伤害或凌辱，忽视或照料不周，虐待或剥削，包括性侵犯」，这条文在香港或者其他地方有着实质的作用，对于法制亦有提出一些要求。这个重要的原则，因为现实社会中，的确有一些儿童受到父母或法定监护人的不当对待，例如儿童院舍里照顾者对儿童作出恐吓、虐待、忽视、照顾不周、伤害、凌辱等行为。香港和其他地方曾经发生过这些不幸情况，因此《儿童权利公约》特别就这些情况有所规定。《儿童权利公约》第十九条第2款亦提到：政府应该「采取有效程序以建立社会方案，向儿童和负责照管儿童的人提供必要的支助，采取其他预防形式，查明、报告、查询、调查、处理和追究前述的虐待儿童事件，以及在适当时进行司法干预」。第二十条提到：如有「暂时或永久脱离家庭环境的儿童，或为其最大利益不得在这种环境中继续生活的儿童，应有权得到国家的特别保护和协助」。第二十三条第二款指出：「缔约国确认残疾儿童有接受特别照顾的权利，应鼓励并确保在现有资源范围内，依据申请斟酌儿童的情况和儿童的父母或其他照料人的情况，对合格儿童及负责照料该儿童的人提供援助」。第二十四条指出「缔约国确认儿童有权享有可达到的最高标准的健康，并享有医疗和康复设施，缔约国应努力确保没有任何儿童被剥夺获得这种保健服务的权利」。第二十六条要求：「缔约国应确认每个儿童有权受益于社会保障，包括社会保险，并应根据其国内法律采取必要措施充分实现这一权利」。第二十七条要求：「缔约国确认每个儿童均有权享有足以促进其生理、心理、精神、道德和社会发展的生活水平」。第二十八条指出：「缔约国确认儿童有受教育的权利，为在机会均等的基础上逐步实现此项权利，缔约国尤应实现全面的免费义务小学教育；鼓励发展不同形式的中学教育、包括普通和职业教育，使所有儿童均能享有和接受这种教育」。

Both parents have a shared responsibility for the upbringing and development of children. Article 19 of the *Convention on the Rights of the Child* is very important: "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse". This provision has substantial legal implications in Hong Kong and other places. It also imposes some requirements on the legal system. This is an important principle because in reality, some children are indeed subjected to improper treatment by their parents or legal guardians. For example, caregivers in children's homes may

engage in behaviours such as intimidation, abuse, neglect, inadequate care, harm, or humiliation of children. Such unfortunate situations had occurred in Hong Kong and elsewhere in the past, so the *Convention on the Rights of the Child* specifically addresses these situations. Paragraph 2 of Article 19 of the *Convention* also states that the government should take “effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement”. Article 20 states: “A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State”. Paragraph 2 of Article 23 states: “States Parties recognise the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child’s condition and to the circumstances of the parents or others caring for the child”. Article 24 states: “States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services”. Article 26 requires that “States Parties shall recognise for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realisation of this right in accordance with their national law”. Article 27 requires that “States Parties recognise the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development”. Article 28 states: “States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular, make primary education compulsory and available free to all”.

《儿童权利公约》第二十九条亦是非常重要的，它涉及儿童教育的目的，所有学校的老师都应该留意这一条：「缔约国一致认为教育儿童的目的应是：(a)最充分地发展儿童的个性、才智和身心能力；(b)培养对人权和基本自由以及《联合国宪章》所载各项原则的尊重；(c)培养对儿童父母、儿童自身的文化认同、语言 and 价值观、儿童所居住国家的民族价值观、其原籍国以及不同于其本国的文明的尊重；(d)培养儿童本着各国人民、族裔、民族和宗教群体以及原为土著居民的人之间谅解、和平、宽容、男女平等和友好的精神，在自由社会里过有责任感的生活；(e)培养对自然环境的尊重」。国民教育的推行，正好符合第二十九条第(c)款，

有关培养对于儿童所居住国家的民族价值观，或者培养儿童的文化认同。

Article 29 of the *Convention on the Rights of the Child* is very important as it is about the purposes of children's education, which all teachers in schools should pay attention to. It states: "States Parties agree that the education of the child shall be directed to: (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the *Charter of the United Nations*; (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; and (e) The development of respect for the natural environment". The implementation of national education is exactly in line with Paragraph (c) of Article 29, which is about the development of national values of the country in which the child is living, or the development of cultural identity.

《儿童权利公约》第三十二条具有现实意义，就是「缔约国确认儿童有权受到保护，以免受经济剥削和从事任何可能妨碍或影响儿童教育或有害儿童健康或身体、心理、精神、道德或社会发展的工作」。现实来说，儿童未必适合从事某些类别的工作。19 世纪工业革命时代有很多童工，这是完全不符合现代的儿童权利观念，当时英国很多童工担任采矿的工作，后世认为完全违反儿童权利。《儿童权利公约》规定各国都需要通过法律规定受雇的最低年龄，不能雇用低于某一年龄的儿童做任何工作。即使儿童符合年龄可以做工作，对于他们的工作时间和条件，亦需要有特别的保障。香港的《雇佣条例》也体现了这些要求。《儿童权利公约》第三十三条涉及到毒品的问题，在香港，有儿童因为被人利用贩毒而受到检控以及判刑，毒品问题不容忽视。《儿童权利公约》要「保护儿童不致非法使用有关国际条约中界定的麻醉药品和精神药物，并防止利用儿童从事非法生产和贩卖此类药物」。

Article 32 of the *Convention on the Rights of the Child* has practical significance. It states: "States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development". It is recognised that children may not be suitable for certain types of work. During the Industrial Revolution in the 19th century, there were many child labours, which is completely inconsistent with the contemporary view on children's rights. At that time, many child labourers in Britain. were employed

in mining, which was considered by later generations to be a violation of children's rights. The *Convention on the Rights of the Child* requires that countries should provide for a minimum age for employment through legislation and prohibit the employment of children below a certain age for any work. Even if children are of age to work, special safeguards are needed for their working hours and conditions. These requirements are reflected in Hong Kong's *Employment Ordinance*. Article 33 of the *Convention on the Rights of the Child* concerns drug issues. In Hong Kong, some children have been prosecuted and sentenced for drug trafficking. The drug problem cannot be ignored. The *Convention* aims to "protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances".

在网络时代下,《儿童权利公约》第三十四条显得非常重要:「缔约国承担保护儿童免遭一切形式的色情剥削和性侵犯之害,为此目的,缔约国尤应采取一切适当的国家、双边和多边措施,以防止:(a)引诱或强迫儿童从事任何非法的性活动;(b)利用儿童卖淫或从事其他非法的性行为;(c)利用儿童进行淫秽性表演和充当淫秽题材」。对于网上色情,包括:第一,利用儿童拍摄色情影片,在香港绝对是犯法;第二,有人指出,如果让儿童观看网上色情影片,亦是妨碍儿童的身心发展,政府应该就这些方面作出规范。

In the Internet era, Article 34 of the *Convention on the Rights of the Child* is particularly important. It states: "States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; (c) the exploitative use of children in pornographic performances and materials". Regarding online pornography, it includes: first, using children to film pornographic videos is illegal in Hong Kong; second, some people have pointed out that allowing children to watch online pornography also hinders their physical and mental development, and the government should establish regulations in this area.

《儿童权利公约》第三十五条指出:「缔约国应采取一切适当的国家、双边及多边措施,以防止为任何目的或以任何形式诱拐、买卖或贩运儿童」。这些情况在香港并不普遍,但在其他地方仍有诱拐、买卖及贩运儿童的刑事活动。《儿童权利公约》第三十七条指出:「缔约国应确保所有儿童不受到酷刑或其他形式残忍、不人道或有辱人格的待遇或处罚」。就此而言,儿童享有这方面的权利与成年人是一样的。对于儿童的逮捕或者拘禁,《儿童权利公约》亦有作出规定,对于被剥夺自由的儿童,是应该受到人道的待遇。这些被剥夺自由的儿童,他的

人格尊严应该受到尊重，是有权获得法律上的援助。

Article 35 of the *Convention on the Rights of the Child* states: “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form”. These situations are not common in Hong Kong, but the criminal activities of abduction, sale and trafficking of children still occur in other places. Article 37 of the *Convention on the Rights of the Child* states: “States Parties shall ensure that children will not be subjected to torture or other cruel, inhuman or degrading treatment or punishment”. In this regard, children enjoy the same rights as adults. With regard to the arrest or detention of children, the *Convention on the Rights of the Child* stipulates that children who are deprived of their liberty should be treated with humanity. The dignity of these children should be respected, and they have the right to legal assistance.

《儿童权利公约》第三十九条就儿童受到任何形式的虐待之后，政府要协助他们康复。如果儿童犯法被判刑呢？《儿童权利公约》第四十条指出：在他们服刑后，政府应该促进他们重返社会；被指控犯法的儿童亦应该受到各种刑事程序的保障，例如无罪推定、依法得到公正审讯、不可以强迫他作口供或者认罪等。

Article 39 of the *Convention on the Rights of the Child* requires that the government shall take all appropriate measures to promote the recovery of children victims of any form of abuse. What about children who commit crimes and are sentenced to imprisonment? Article 40 of the *Convention on the Rights of the Child* states that the government should promote their reintegration into society after serving their sentences. Children who are accused of crimes should also receive various safeguards in criminal procedures, such as the presumption of innocence, fair trial, and not to be compelled to give testimony or to confess guilt, etc.

最后，我想列举一个例子说明《儿童权利公约》如何在本地实施作结。香港法例中，《侵害人身罪条例》的第二十六条：「遗弃儿童以致生命受危害」，以及第二十七条：「对所看管儿童或少年人虐待或忽略」是反映《儿童权利公约》的实施的明显的例子。《侵害人身罪条例》第二十六条指出：「任何人非法抛弃或遗弃不足 2 岁的儿童，以致该儿童的生命受危害，或以致该儿童的健康蒙受或相当可能蒙受永久损害，即属犯罪」，可判处监禁 10 年。而《侵害人身罪条例》第二十七条：「任何超过 16 岁而对不足该年岁的任何儿童或少年人负有管养、看管或照顾责任的人，如故意袭击、虐待、忽略、抛弃或遗弃该儿童或少年人，或导致、促致该儿童或少年人受袭击、虐待、忽略、抛弃或遗弃，其方式相当可能导致该儿童或少年人受到不必要的苦楚或健康损害（包括视力、听觉的损害或丧失，肢体、身体器官的伤损残缺，或精神错乱）……循公诉程序定罪后，可处监禁 10 年。」此外，「凡超过 16 岁而对不足该年岁的任何儿童或少年人负有管养、看管

或照顾责任的父母或其他人，如没有为该儿童或少年人提供足够的食物、衣物或住宿，或如本身不能以其他方式提供该等食物、衣物或住宿，却明知及故意不采取步骤，向负责提供衣食住予有需要的儿童或少年人的主管当局、社团或机构取得此等供给，即当作忽略该儿童或少年人而其方式相当可能导致该儿童或少年人的健康受损害」，这些行为都是触犯了《侵害人身罪条例》第二十七条。

Finally, I would like to give an example of local legislation to illustrate how the *Convention on the Rights of the Child* is implemented. In Hong Kong legislation, Section 26 of the *Offences against the Person Ordinance*: “Exposing child whereby life is endangered” and Section 27 of the *Crimes Ordinance*: “Ill-treatment or neglect by those in charge of child or young person” provide obvious examples of the implementation of the *Convention on the Rights of the Child*. Section 26 states: “Any person who unlawfully abandons or exposes any child, being under the age 2 years, whereby the life of such child is endangered, or the health of such child is or is likely to be permanently injured, shall be guilty of an offence and shall be liable to imprisonment for 10 years”. Article 27 of the *Offences against the Person Ordinance* states: “If any person who is over the age of 16 years who has the custody, charge or care of any child or young person under that age wilfully assaults, ill-treats, neglects, abandons or exposes such child or young person or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause such child or young person unnecessary suffering or injury to his health (including injury to or loss of sight, or hearing, or limb, or organ of the body, or any mental derangement)...., are punishable on conviction on indictment to imprisonment for 10 years”. Furthermore, “a parent or other person over the age of 16 having the custody, charge or care of a child or young person under that age shall be deemed to have neglected him in a manner likely to cause injury to his health if he fails to provide adequate food, clothing or lodging for the child or young person, or if, being unable otherwise to provide such food, clothing or lodging, he knowingly and wilfully fails to take steps to procure the same to be provided by some authority, society or institution which undertakes to make such provision for necessitous children or young persons”. These acts violate Article 27 of the *Offences against the Person Ordinance*.