

The Judicial Construction of Hong Kong's Basic Law: Courts, Politics and Society after 1997

Lo Pui Yin



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Canada

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- Canada (Attorney General) v Hislop* [2007] 1 SCR 429, SCC: 482
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R v Marshall [1999] 3 SCR 533, SCC (17 November 1999): 350
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European Court of Human Rights

- Baumartin v France* (1994) 19 EHRR 485, ECtHR: 365
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European Court of Justice

- CILFIT v Ministry of Health* [1983] 1 CMLR 472, ECJ: 414, 432, 433
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Germany

- BVerfGE 1, 14(1951) (*The Southwest Case*), Bundesverfassungsgericht: 249
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Re Ratification of the Treaty of Lisbon [2010] 3 CMLR 13, Bundesverfassungsgericht: 451

Re Wunsche Handelsgesellschaft [1987] 3 CMLR 225 (*Solange II*), Bundesverfassungsgericht: 451

Hong Kong

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- Ming Pao Newspapers Ltd v Attorney General of Hong Kong* [1996] AC 907, PC: 283, 286
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Chiranjit Lal Chowdhuri v Union of India & Ors AIR 1951 SC 41, Ind SC: 284

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State of Madras v Row 1952 AIR 196, Ind SC: 304

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Taunoa v Attorney General [2008] 1 NZLR 429, NZ SC: 316

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Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (Nicro) 2005 (3) SA 280, SA CC: 484

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- Garland v British Rail Engineering Ltd* [1983] 2 AC 751, HL: 434
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United States v Eichman 496 US 310 (1990): 80

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- Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Twenty-Fourth Session of the Standing Committee of the Eighth National People's Congress on 23 February 1997): 104, 105, 200, 395
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Chapter 1

Concerns and Organization

Courts of the Hong Kong Special Administrative Region (HKSAR),¹ established under the Basic Law of the HKSAR,² face a number of unique challenges that stem from the nature of the Basic Law, a national law of the People's Republic of China (PRC) constituting the HKSAR.³ Like the two-faced Roman god Janus, the Basic Law has a duality in that it is law both in the jurisdiction that establishes it (China) and in the jurisdiction it establishes (Hong Kong).⁴ Because of this dual operability, it can be difficult to achieve common understanding in the two

¹ The Hong Kong Special Administrative Region was established, as of 1 July 1997, by the Decision of the National People's Congress on the Establishment of the Hong Kong Special Administrative Region (adopted at the Third Session of the Seventh National People's Congress on 4 April 1990) (see 29 ILM 1549 (1990)) in accordance with Article 31 of the Constitution of the People's Republic of China. This article empowers the state to establish special administrative regions when necessary, with the systems to be instituted therein to be prescribed by law enacted by the National People's Congress (NPC) in the light of specific conditions.

² ie the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (adopted at the Third Session of the Seventh National People's Congress on 4 April 1990; promulgated by Order No 26 of the President of the People's Republic of China on 4 April 1990), 29 ILM 1511–1548 (1990). Excerpts of the provisions of the Basic Law discussed in this book are collected in an appendix at the end of the book.

³ The NPC adopted at the time of its enactment of the Basic Law the Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (adopted at the Third Session of the Seventh National People's Congress on 4 April 1990) (see 29 ILM 1549 (1990)), which, upon making reference to Article 31 of the PRC Constitution, held that the Basic Law 'is constitutional as it is enacted in accordance with the Constitution of the People's Republic of China and in the light of the specific conditions of Hong Kong' and added that 'The systems, policies and laws to be instituted after the establishment of the Hong Kong Special Administrative Region shall be based on the Basic Law of the Hong Kong Special Administrative Region.'

⁴ Daniel Fung used the expression 'double life' to describe the duality; see Daniel Fung, 'The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China: Problems of Interpretation' (1988) 37 *International and Comparative Law Quarterly* 701–714 at 706.

jurisdictions, where the practitioners of law and politics differ in the way they understand and do things.

The challenges are concerned with adaptation.

Hong Kong received a common law legal system when it became a British colony in 1843. When Britain and the PRC negotiated the future of Hong Kong over a century later, one of the major issues discussed was the continuation of the pre-existing legal system. In the Sino-British Joint Declaration on the Question of Hong Kong 1984,⁵ the Government of the PRC declared that it would resume the exercise of sovereignty over Hong Kong on 1 July 1997 and that it would then apply to Hong Kong certain basic policies.⁶ These basic policies included the establishment of the HKSAR; the vesting of the HKSAR with executive, legislative and independent judicial power, including that of final adjudication; and the provision that the laws currently in force in Hong Kong would remain basically unchanged.⁷ These and other basic policies were intended to remain unchanged for fifty years and were later stipulated as part of the Basic Law,⁸ which became effective on 1 July 1997.

The Basic Law established the legal and judicial systems of the HKSAR. Under the Basic Law, the HKSAR is vested with independent judicial power, including that of final adjudication. The HKSAR courts exercise the judicial power of the HKSAR and adjudicate cases in accordance with the laws applicable in the HKSAR, which are the Basic Law, the laws previously in force in Hong Kong (which include the common law, rules of equity, ordinances, subordinate legislation and customary law), the laws enacted by the legislature of the HKSAR, and national laws listed in Annex III of the Basic Law. The power of final adjudication is vested in the Court of Final Appeal, which may as required invite judges from other common law jurisdictions to sit on the Court. The HKSAR courts are authorized by the Standing Committee of the National People's Congress (NPCSC) to interpret on their own, in adjudicating cases, the provisions of the Basic Law that are within the limits of the autonomy of the HKSAR. The HKSAR courts may refer to precedents of other common law jurisdictions. The HKSAR courts shall exercise judicial power independently, free from any interference.⁹

Judges and lawyers in Hong Kong, who have been trained in the common law, find themselves operating in a legal system still based in the common law. However, the HKSAR legal system is very much embedded within the legal system of Mainland China. The Mainland's legal system is based essentially on democratic centralism, socialist legality,¹⁰ and the Stalin Constitution,¹¹ but seems to be gradually re-adopting or re-connecting with the civil law tradition; it is a legal

⁵ ie Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (19/12/1984), 1399 UNTS 33, 23 ILM 1366–1381 (1984).

⁶ *ibid.*, paragraphs 1, 3.

⁷ *ibid.*, paragraph 3(1), (3), with elaboration in *ibid.*, Annex, sections I, II.

⁸ *ibid.*, paragraph 3(12).

⁹ Basic Law, Articles 2, 8, 18, 19, 80–93, 158.

¹⁰ See Georg Brunner, 'The Functions of Communist Constitutions: An Analysis of Recent Constitutional Developments' (1977) 3 *Review of Socialist Law* 121–153; and Yash Ghai, 'Constitutions and Governance in Africa: A Prolegomenon', in Sammy Adelman and

system of its own Chinese characteristics. The present common law legal system of the HKSAR is a new order, constituted and maintained by the Mainland legal system through a number of channels. But those who emphasize the HKSAR's 'seamless transition' with a high degree of autonomy do not usually mention this fact.¹²

Concurrently, while the common law legal system continues, its dynamics have changed. The Basic Law is a written instrument constituting the systems of the HKSAR, establishing separately distinct governmental institutions to exercise specified governmental powers and functions,¹³ and authorizing the HKSAR courts to interpret its provisions. The courts are empowered to make and fill a special role in the exercise of judicial power, namely the constitutional jurisdiction over executive decision making and legislative law making. This jurisdiction is comprehensive and coextensive with the broad coverage of the Basic Law. The exercise of this jurisdiction brings unfamiliar questions and public controversies before the HKSAR courts. It also raises expectations, often illusive, on the part of the public about the competence of the HKSAR courts to hold the executive and legislative branches accountable. Moreover, this jurisdiction entails agenda setting and lobbying by political minorities through litigation strategies. Mainland Chinese legal scholars have contested the legality and legitimacy of this jurisdiction, both at the time of its inception and thereafter. Such objections have been sustained and unabated for over a decade and may have gained intensity recently. The courts of the Macao Special Administrative Region, which adjudicate cases under a similarly worded Basic Law of the Macao Special Administrative Region but following a different legal tradition, behave differently from the HKSAR courts. This difference may serve to fuel distrust, discontent or disapproval of the HKSAR courts' authority to exercise its 'constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law', and to determine 'questions of inconsistency and invalidity when they arise'.¹⁴

Abdul Paliwala (eds), *Law and Crisis in the Third World* (London: Hans Zell Publishers, 1993) pp 51–75, at pp 56–60.

¹¹ See Sophia Woodman, 'Legislative Interpretation by China's National People's Congress Standing Committee: A Power with Roots in the Stalinist Conception of Law' (Chapter 11), in Hualing Fu, Lison Harris, and Simon Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan, 2008) pp 229–241.

¹² See *HKSAR v Ma Wai Kwan David & Ors* [1997] 2 HKC 315, [1997] HKLRD 761, CA; *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117, CFA; *RV v Director of Immigration & Anor* [2008] 4 HKLRD 529, CFI. On the other hand, Chan CJHC (now Chan PJ) did note, with considerable foresight, in *Ma Wai Kwan David* (above) a potential tension inherent in the Basic Law by reason of it being an instrument drafted by individuals practising in the Mainland legal system for a special administrative region, whose continuing legal system was rooted in the common law legal system.

¹³ Basic Law, Article 2 and Chapter IV, with section 1 (The Chief Executive), section 2 (The Executive Authorities), section 3 (The Legislature), section 4 (The Judiciary).

¹⁴ As the Court of Final Appeal stated in *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4 at 25F–26G of the 'constitutional jurisdiction' of the HKSAR courts.

This book will examine the exercise of independent judicial power under the Basic Law by the HKSAR courts. It will address three concerns:

- the rise of the judiciary as an institution of government in the HKSAR, particularly through the acquisition of the constitutional jurisdiction and the competence of the Court of Final Appeal to police its power of final adjudication;
- the legal and political constraints of judicial power and the express and implied limitations to its exercise; and
- the relations the HKSAR courts have to maintain with other institutions of government within the HKSAR, and with the Central Authorities, in response to the various forces (including the public and civil society) that seek to influence the exercise of judicial power.

The exercise of independent judicial power in the HKSAR necessarily involves negotiating along two sets of different, interlinked and interacting relationships: the intra-SAR institutional relationships and the Central-SAR relationship. The individual perception and agenda of the institutions at the ends of each of these relationships create tensions. In resolving such tensions, the outer limits of the autonomy of the HKSAR and its 'high degree' are being charted and fathomed. And where the HKSAR courts are steering the course, they will from time to time sail between the Scylla of 'one country' and the Charybdis of 'two systems', practising imperfectly the founding principle of 'one country, two systems' prescribed by the Central Authorities for the HKSAR.

The author's career and experiences as a practising barrister (which includes several appearances before the Court of Final Appeal)¹⁵ and as council member of the Hong Kong Bar Association representing the Bar Association in public affairs forums (which includes attending consultation sessions of the Government and the Legislative Council [LegCo] of the HKSAR)¹⁶ have combined to produce an outlook that, in addition to the theoretical and doctrinal appreciation of the subject matter by virtue of one's learning, involves the practical and tactical at the coalface of litigation. Thus, this study of the exercise of independent judicial power by the HKSAR courts, particularly the Court of Final Appeal, acknowledges the realities of constitutional adjudication. While questions of legality ought to be approached in a principled manner in accordance with a true understanding of the law, adjudication admits the self-conscious making of choices for consequential, prudential, pragmatic or strategic reasons.

¹⁵ The author has been in private practice as a barrister in Hong Kong since 1993. He has appeared before the Court of Final Appeal in *HKSAR v Ng Kung Siu & Anor* (1999) 2 HKCFAR 442, CFA; *Lau Cheong & Anor v HKSAR* (2002) 5 HKCFAR 415, CFA; *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248, CFA; and *Vallejos & Anor v Commissioner of Registration* [2013] 4 HKC 239, CFA.

¹⁶ The author has been a member of the Council of the Hong Kong Bar Association between 1995 and 1997, 2001 and 2005, and 2006 and 2012, and in 2013. He has served as the chairman of the Bar Association's special committee on constitutional affairs and human rights since 2008.

This book is organized into six parts. Part 1 introduces the concerns and scope of study of the book and sets the context of the analysis that follows by discussing the provisions of the Basic Law and the underlying but competing and contested principles of ‘one country, two systems’, ‘high degree of autonomy’, ‘executive-led government’ and ‘separation of powers’.

Part 2 traces the development of the constitutional jurisprudence of the HKSAR courts from the point of inception in 1997 to the recent turning points in early 2013. Cases across this sixteen-year time span are discussed in chronologically arranged chapters, each seeking to highlight the particular resonance the adjudications have with current events. The constant and continuing theme underlying the cases examined—of individuals seeking judicial review of administrative and legislative decision making—is highlighted as a matter of historical fact with a view to detailed elucidation in the parts that follow.

Part 3 considers the independent judicial power, including the power of final adjudication, granted to the HKSAR courts and looks at how the Court of Final Appeal has, in a succession of judgments, asserted jurisdiction to review all decision making for conformity with the Basic Law. The normative value of the supremacy of the Basic Law is thereby turned into the practical power of supremacy of the HKSAR courts. Although the assertion of ‘constitutional jurisdiction’ in *Ng Ka Ling & Ors v Director of Immigration*¹⁷ was not a complete success,¹⁸ the comparatively muted reaction of the co-ordinate institutions of the HKSAR and their subsequent acquiescence, co-operation and even collaboration have allowed further elaboration of the judicial power of the HKSAR courts. This elucidation of judicial power has included pronouncing on invalidity under the previous legal order,¹⁹ declaring on questions of constitutionality in the absence or on the assumption of decision-making,²⁰ and discovering the subset of implied judicial power with respect to remedies.²¹ The Court of Final Appeal has even successfully claimed *kompetenz-kompetenz*²² to police against ‘disproportionate’

¹⁷ *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA.

¹⁸ See *Ng Ka Ling & Ors v Director of Immigration (No 2)* (1999) 2 HKCFAR 141, where the Court of Final Appeal, in the light of the reaction of Mainland legal scholarship to its assertion of constitutional jurisdiction to examine whether legislative acts of the NPC or the NPCSC are inconsistent with the Basic Law and to declare them unconstitutional to the extent of any inconsistency, issued a judgment to clarify that it could not ‘question the authority of the Standing Committee to make an interpretation under Article 158 of the Basic Law’ and could not ‘question the authority of the National People’s Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedures therein’ (142D–E).

¹⁹ See *Solicitor v Law Society of Hong Kong (Secretary for Justice, intervener)* (2003) 6 HKCFAR 570, CFA; and *HKSAR v Lam Kwong Wai & Anor* (2006) 9 HKCFAR 574, CFA.

²⁰ See *Leung TC William Roy v Secretary for Justice* [2005] 3 HKC 77, [2005] 3 HKLRD 657, CFI (affirmed on appeal in *Leung v Secretary for Justice* [2006] 4 HKLRD 211, CA).

²¹ See *HKSAR v Lam Kwong Wai & Anor* (2006) 9 HKCFAR 574, CFA.

²² The concept of *kompetenz-kompetenz* was used by the German Federal Constitutional Court (*Bundesverfassungsgericht*) to describe the determination of whether a judicial

encroachment of its power of final adjudication.²³ Justifications for these expansive moves, largely based on the 'common law context'²⁴ and the Hong Kong legal tradition are examined against several factors. First, the theoretical or doctrinal possibilities of political and constitutional systems are analysed. Second, comparison is made to the practices of the courts of the Macao Special Administrative Region, which operate under a legal system in the continental civil law tradition on the basis of a similarly worded constitutional instrument, the Basic Law of the Macao Special Administrative Region.²⁵ Finally, Mainland Chinese scholarship is considered, especially the recent surge of comments concomitant with the increasingly attentive, if not interventionist, policy of the Central Authorities towards the HKSAR and its autonomous institutions,²⁶ disputing the legality and the legitimacy of judicial review of legislation in Hong Kong.

Part 4 addresses the intra-SAR relationships the HKSAR courts have with other institutions of government under the Basic Law. This part begins with a look at the record of institutional compliance with judicial declarations of invalidity, an exercise that underscores both the claim of the futility and illusiveness of duty of the HKSAR of enforcing the Basic Law and the necessity of co-operation of the executive and legislative institutions in making judicial enforcement a reality. A subtle mutual co-operation, co-ordination and regulation between the executive, legislative and judicial branches of government must exist for effective governance, though not necessarily in the sense promoted by the Central

authority has 'jurisdiction to give a binding ruling on the extent of one's jurisdiction', so that if it could make a binding decision (that no one else can legitimately challenge) on whether it has the authority to make a binding decision on a question before it, then it would be said to have *kompetenz-kompetenz*: Trevor Hartley, *Constitutional Problems of the European Union* (Oxford and Portland, OR: Hart Publishing, 1999) pp 152–153. This concept has also been applied in the context of international tribunals (where it has usually been described as *compétence de la compétence*); see Abdul Koroma, 'Assertion of Jurisdiction by the International Court of Justice' in Patrick Capps, Malcolm Evans, and Stratos Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Oxford and Portland, OR: Hart Publishing, 2003) pp 189–198 at p 192 and also in the context of arbitral tribunals (see *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763, UKSC). See also PY Lo, 'Master of One's Own Court' (2004) 34 *Hong Kong Law Journal* 47–65.

²³ *Solicitor v Law Society of Hong Kong (Secretary for Justice, intervener)* (2003) 6 HKCFAR 570, CFA; and *Mok Charles Peter v Tam Wai Ho & Anor (Secretary for Justice, intervener)* (2010) 13 HKCFAR 762, CFA.

²⁴ See Anthony Mason, 'The Role of the Common Law in Hong Kong', in Jessica Young and Rebecca Lee (eds), *The Common Law Lecture Series 2005* (Hong Kong: Faculty of Law, University of Hong Kong, 2006) pp 3, 5, 7.

²⁵ For an unofficial English translation of the Basic Law of the Macao Special Administrative Region of the People's Republic of China (adopted at the First Session of the Eighth National People's Congress on 31 March 1993; promulgated by Order No 3 of the President of the People's Republic of China on 31 March 1993), see http://bo.io.gov.mo/bo/i/1999/leibasica/index_uk.asp.

²⁶ See Cheng Jie, 'The Story of a New Policy', *Hong Kong Journal* (July 2009) at: http://www.hkjournal.org/archive/2009_fall/1.htm (last visited on 28 March 2011).

Authorities in the case of the Macao Special Administrative Region.²⁷ The courts' understanding of the burden accompanying a successfully asserted 'constitutional jurisdiction' is discussed in relation to the recognition and incorporation into the adjudicatory process of various limitations and reservations over the exercise of the power to declare a constitutional invalidity. There are four such approaches and each occupies a chapter:

- The first is the continuing and increasing relevance of the related doctrines of justiciability and the political question.²⁸ The continuing relevance of the common law doctrine of justiciability to a legal system that adopts constitutionalism or fundamental/human rights adjudication is questioned. However, certain provisions of the Basic Law that reserve competences in the specific subject matters of foreign affairs and defence to the Central Authorities²⁹ may have transformational implications; that is, turning the doctrine of justiciability into a necessary implication upon the true extent of the constitutional jurisdiction of the HKSAR courts. Similarly, by inquiring into the constitutional rationales for having a political question doctrine, the relevance of elements of that doctrine to the structure and institutional scheme envisaged under the Basic Law is pursued with a view to propose the incorporation of some but not all of such elements as a logical interpretive incident of the constitutional jurisdiction of the HKSAR courts.
- The second relates to the uses put before the HKSAR courts of the language of deference in a number of rulings on the constitutional validity of legislation,³⁰ which include fundamental or human rights adjudications³¹ as well

²⁷ See Ji Pengfei, 'Explanations on "The Basic Law of the Macao Special Administrative Region of the People's Republic of China (Draft)" and Its Related Documents (Addressing the First Session of the Eighth National People's Congress on 20 March 1993)' (1993) *Gazette of the Standing Committee of the National People's Congress* 229–235.

²⁸ For earlier discussions, see Albert Chen, 'The Concept of Justiciability and the Jurisdiction of the Hong Kong Courts' (1997) 27 *Hong Kong Law Journal* 387–390; Benny Tai, 'The Jurisdiction of the Courts of the Hong Kong Special Administrative Region', in Alice Lee (ed), *Law Lectures for Practitioners 1998* (Hong Kong: Hong Kong Law Journal, 1998) pp 65–117; Po-jen Yap, 'Interpreting the Basic Law and the Adjudication of Politically Sensitive Questions' (2007) 6 *Chinese Journal of International Law* 543–564.

²⁹ Basic Law, Articles 13, 14, 19. See further *FG Hemisphere Associates LLC v Democratic Republic of the Congo & Ors* [2010] 2 HKC 487, [2010] 2 HKLRD 66, CA; *Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC* [2011] 5 HKC 151, CFA; *C & Ors v Director of Immigration & Ors* [2013] 4 HKC 563, CFA.

³⁰ For recent discussions, see Cora Chan, 'Judicial Deference at Work: Some Reflections on *Chan Kin Sum* and *Kong Yun Ming*' (2010) 40 *Hong Kong Law Journal* 1–14; and Cora Chan, 'Deference and the Separation of Powers: An Assessment of the Court's Constitutional and Institutional Competences' (2011) 41 *Hong Kong Law Journal* 7–25.

³¹ Illustrative examples include *HKSAR v Ng Kung Siu & Anor* (1999) 2 HKCFAR 442, CFA; *Lau Cheong & Anor v HKSAR* (2002) 5 HKCFAR 415, CFA; *Leung TC William Roy v Secretary for Justice* [2005] 3 HKC 77, [2005] 3 HKLRD 657, CFI (affirmed on appeal in *Leung v Secretary for Justice* [2006] 4 HKLRD 211, CA); *Dr Kwok Hay Kwong v Medical Council of Hong Kong* [2008] 1 HKC 338, [2008] 3 HKLRD 524, CA; and *Fok Chun Wa & Anor v Hospital Authority & Anor* [2012] 2 HKC 413, CFA.

as judicial scrutiny of legislative restrictions of the courts' powers,³² providing justifications (if any) for the HKSAR courts to accept, defer or give due weight to legislative, and sometimes, executive, judgment while exercising their jurisdiction under the Basic Law.

- The third takes on the development and tactical deployment of constitutional remedies and remedial techniques in several adjudications,³³ whereby the plea of individual rights has led not to the protection of those rights but the pursuance of public or assumed common interests deemed more worthy of protection.
- The fourth involves adjustments and exposition of the courts' own procedural powers to facilitate the filtering away or deterring of controversies from the courts' door.³⁴

Part 5 of this book deals with the Central-SAR relationship regarding the HKSAR courts, with attention paid principally to the interpretation of the Basic Law. Two provisions of the Basic Law appear to restrain the exercise of independent judicial power of the HKSAR in express terms. Article 19 of the Basic Law declares that the HKSAR courts 'shall have no jurisdiction over acts of state such as defence and foreign affairs', which the HKSAR courts have interpreted to bear upon the Central-SAR relationship.³⁵ Article 158 of the Basic Law provides for the power of interpretation of the Basic Law and its distribution between the NPCSC and the Court of Final Appeal, incorporating a mechanism of reference by the Court of Final Appeal of a provision of the Basic Law to the NPCSC for interpretation, thereby seeking to maintain uniformity or consistency in the interpretation of certain categories of provisions of the Basic Law.³⁶

³² Illustrative examples include *A Solicitor v Law Society of Hong Kong (Secretary for Justice, intervener)* (2003) 6 HKCFAR 570, CFA; and *Mok Charles Peter v Tam Wai Ho & Anor (Secretary for Justice, intervener)* (2010) 13 HKCFAR 762, CFA.

³³ See *Leung Kwok Hung & Ors v HKSAR* (2005) 8 HKCFAR 229, CFA; *Koo Sze Yiu & Anor v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441, CFA. See also *Chan Kin Sum & Ors v Secretary for Justice & Anor* [2008] 6 HKC 486, [2009] 2 HKLRD 166, CFI; and *Koon Wing Yee & Anor v Insider Dealing Tribunal & Anor* (2008) 11 HKCFAR 170, CFA. For a general view, see Kevin Zervos, 'Constitutional Remedies under the Basic Law' (2010) 40 *Hong Kong Law Journal* 687–718.

³⁴ See *Chan Po Fun Peter v Cheung CW Winnie & Anor* [2007] 5 HKC 145, (2007) 10 HKCFAR 676, CFA; *Chu Hoi Dick & Anor v Secretary for Home Affairs (No 2)* [2007] 4 HKC 428, CFI; and *Re Leung Kwok Hung & Anor* (unreported, 28 September 2012, HCAL 83, 84/2012), CFI. See generally, Karen Kong, 'Public Interest Litigation in Hong Kong: A New Hope for Social Transformation?' (2009) 28 *Civil Justice Quarterly* 327–343.

³⁵ The author once made an attempt to interpret Article 19 of the Basic Law in a judicial capacity; see *HKSAR v Xiang Jiangjun & Ors* (unreported, 13 November 2000, WSCC 8109, 8110/2000), Deputy Magistrate Lo Pui-yin. The most authoritative attempt to interpret this article is that of the Court of Final Appeal in *Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC* [2011] 5 HKC 151. For an earlier exposition, see Benny Tai, 'The Jurisdiction of the Courts of the Hong Kong Special Administrative Region', in Alice Lee (ed), *Law Lectures for Practitioners 1998* (Hong Kong: Hong Kong Law Journal, 1998) pp 65–117.

³⁶ For wide-ranging discussion of issues relating to Article 158 of the Basic Law and its interpretation, see Johannes Chan, Hualing Fu and Yash Ghai (eds), *Hong Kong's Constitutional*

Interpretation by the HKSAR courts of these two provisions of the Basic Law involves the determination by the courts of their competence. In highlighting the Court of Final Appeal's track record in interpreting Articles 19 and 158 of the Basic Law and in declining to refer a provision of the Basic Law for interpretation by the NPCSC under Article 158 of the Basic Law, two prevalent perceptions in Hong Kong are revealed. First, there is a deep-rooted common law lawyer's misgiving about the constitutional arrangement divorcing final interpretation of the provisions of the Basic Law from final adjudication applying those provisions and vesting the power of final interpretation with the permanent body of the NPC, the highest organ of state power which legislates the Basic Law. Second, the Court of Final Appeal is deeply concerned about conceding autonomy to the Central Authorities. The Court of Final Appeal's 'second-best' approach of putting barricades at the gateway in an effort to limit the effect of measures from the Mainland system is contrasted with the preliminary reference mechanism of the European Court of Justice under the Treaty of the European Union, which was applied by that court to facilitate European integration. The interaction of the Court of Final Appeal with the Chief Executive's acquired competing power of making a report to the Central People's Government (CPG) as a preliminary move towards interpretation of the Basic Law is considered in terms of 'system effect'. Alternative approaches, such as the doctrines of *acte clair* and *acte éclairé* and the strategy of engagement, are also discussed with a view to formulate and appreciate strategic behaviour on the part of the HKSAR courts, particularly the Court of Final Appeal, in resolving the national law element with respect to these provisions vital to the exercise of judicial power of the HKSAR.

Another dimension of the Central-SAR relationship lies in the interpretation of national laws made applicable to the HKSAR, as listed in Annex III of the Basic Law, where, it seems, there is no mechanism in place to ensure consistent and uniform interpretation. This is a matter of some importance, given the subject matter of these national laws, namely defence, foreign affairs and other matters outside the limits of autonomy of the HKSAR, as specified by the Basic Law.

The Central Authorities and the HKSAR courts appear to have achieved some ground rules of long-term benefit to the rule of law, to which the principle of subsidiarity might apply. The 'Congo' case, which the Court of Final Appeal decided between June and September 2011 with an interpretation of the NPCSC in between,³⁷ probably heralded, not unavoidably,³⁸ an additional dimension

Debate: Conflicts over Interpretation (Hong Kong: Hong Kong University Press, 2000); Hualing Fu, Lison Harris and Simon Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (New York and Basingstoke: Palgrave Macmillan, 2008), particularly Chapter 8, PY Lo, 'Rethinking Judicial Reference: Barricades at the Gateway?' at pp 157–181.

³⁷ See *Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC* [2011] 5 HKC 151 (8 June 2011); Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress (adopted by the Standing Committee of the Eleventh National People's Congress at its Twenty-Second Session on 26 August 2011) (LN 136/2011); and *Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC (No 2)* [2011] 5 HKC 395 (8 September 2011).

³⁸ See PY Lo, 'The Gateway Opens Wide' (2011) 41 *Hong Kong Law Journal* 385–391.

of overt interaction between the Central Authorities and the Court of Final Appeal, though it remains to be seen whether, as practised, this additional, direct approach will become the dominant discourse. The Foreign Domestic Helper cases, which the Court of Final Appeal decided in March 2013, may on the other hand have delayed the undermining of the ground rules hitherto understood merely by one case.³⁹

There exists a theoretical possibility of the HKSAR courts' serving as the last bastion defending against the amending erosion of the founding basic policies of the HKSAR. The building of this last redoubt may require the judicial elucidation and expansion of the principles and objectives underlying the separate and autonomous systems of the HKSAR for the purpose of safeguarding them. These are posited at the end.

The concluding Part 6 of this book highlights the 'second founding' of the systems of the HKSAR by the HKSAR courts through their construction of the Basic Law, and questions the institutional agenda of the courts as promoters of the HKSAR's autonomy, in the way they exhibit a cosmopolitan jurisprudence connected with the advanced common law and Western jurisdictions. Will the 'second founding' be followed by the 'second resumption of the exercise of sovereignty'? By reference to cases discussed in previous chapters, the question is asked: Is *Ng Ka Ling & Ors v Director of Immigration*⁴⁰ being diluted, if not stealthily overruled? Accompanying this warning are cautious notes against the undermining of the avowed common law approach of interpreting the Basic Law.⁴¹ The HKSAR courts are indeed at a crossroads.

The findings of the study are presented here to guide readers through this book.

The HKSAR courts have exercised independent judicial power—including the power of final adjudication, as well as the power of interpretation of the Basic Law, both authorized to them under the Basic Law—to *construct* the Basic Law. The HKSAR courts do so notwithstanding that the Basic Law is a legal instrument drafted by a committee dominated by Mainland Chinese legal scholars of the socialist legal order and adopted as a national law to implement the basic policies of the PRC regarding Hong Kong. The HKSAR courts do so to fashion the Basic Law into a written constitutional instrument of binding force within the HKSAR's common law based legal system, with the courts assuming the role of a constitutional check on the other institutions of government of the HKSAR, including the executive authorities and the legislature, to ensure that they act in accordance with the Basic Law. The HKSAR courts give effect to such binding force by *construing* the Basic Law and determining questions of inconsistency and invalidity of legislation or executive decisions. This role is known as the 'constitutional jurisdiction'.

The constitutional jurisdiction is judicially constructed; it is a role that the Court of Final Appeal has created and filled for the HKSAR courts. In the course

³⁹ See *Vallejos & Anor v Commissioner of Registration* [2013] 4 HKC 239, CFA.

⁴⁰ *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA.

⁴¹ As pronounced in *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, CFA.

of time, constitutional adjudication conducted by the HKSAR courts, as shown in the discussion in Chapters 21 and 22, has resulted in the accretion, if not accumulation, of powers and competences of the courts over decision making by the executive authorities and the legislature of the HKSAR. These robust achievements have carried with them responsibilities and consequences that the HKSAR courts, particularly the Court of Final Appeal, must bear and manage.

The constitutional jurisdiction is vulnerable. It is under-theorized and has been challenged in Mainland legal scholarship. The constitutional jurisdiction, it can be said, continues at the sufferance of the pragmatic approach of the Central Authorities and the recognition and support of the HKSAR executive authorities for the vital role the HKSAR courts play in the maintenance of the rule of law in the international financial centre of Hong Kong. The HKSAR courts, as part of the political system of the HKSAR, are concerned with the 'effective governance' of the region, suggesting that a subtle sense of 'comity' or mutual understanding in this regard exists between the governmental institutions of the region. Part 4 shows the ways in which the HKSAR courts have tended to 'second guess' the political departments in constitutional adjudication, at the phases of interpretation of provisions of the Basic Law, determination of consistency with the Basic Law, and the according of remedies consequential to a determination of inconsistency with the Basic Law. As Chapter 23 shows, in response to the phenomenon of individuals and groups seeking judicial remedies for political and social causes, the HKSAR courts have also tightened the procedural requirements for judicial review, illustrating how seriously the judges have taken the potential of politicization of constitutional adjudication.

This judicial sensitivity has been more pronounced in the manner in which the Court of Final Appeal has responded to requests for making references of provisions of the Basic Law for interpretation by the NPCSC. This is illustrated in Part 5. The Court of Final Appeal has adopted or may adopt various strategies in response to these requests but the core value it has steadfastly sought to preserve is the judicial autonomy that is part of the HKSAR's high degree of autonomy. This can alternatively be put as a preference for subsidiarity in the judicial disposition of cases, that is, in favour of the lower institutional level as much as and as far as possible. The Court of Final Appeal has done this to stay out of the 'game' of reference under Article 158 of the Basic Law. Once the Court of Final Appeal has decided to enter this 'game', the self-restraint of the Central Authorities in accordance with this principle of subsidiarity will have to be nurtured and maintained, with the Court applying an appropriate strategy of engagement.

Can this 'second founding' of the Basic Law by the HKSAR courts be sustained? The *Ng Ka Ling* principles that founded the constitutional jurisdiction in obligatory terms may have weathered in the light of the adjustments discussed in Parts 4 and 5 after years of constitutional adjudication. Chapter 32 examines both the risks of Mainland Chinese influences that the application of indigenous resources in jurisprudence—such as the use of historical materials associated with the drafting of the Basic Law, the stress of original intent and the reliance of the meaning of the authentic Chinese text—pose to the vitality of constitutional adjudication in Hong Kong, as well as the theoretical hope for the HKSAR courts

to actively engage Mainland Chinese influences and interventions by recognizing and developing constitutional principles and values of the HKSAR system, to establish the HKSAR's autochthonous constitutional identity as a common law based legal system within the PRC.

There is another corrosive and perhaps more disturbing force. Litigants inside, and election-minded politicians outside, the courtroom, demand the revision or recanting of established decisions on matters of constitutional interpretation, either on the pretext of 'changed' socioeconomic circumstances or, worse, upon the premise, by reference to sparsely reasoned Mainland jurisprudence, that the courts had been wrong in the first place. These demands may be summed up as popular, or people's constitutionalism. The potential of executive and legislative interventions in senior judicial appointments has been raised. The best defences are always vulnerable from within.

The HKSAR's constitutional identity must remain internationalist, connecting through the open door of Article 84 of the Basic Law with common law jurisdictions of the outside world. Cosmopolitanism, even in a half-baked form, is a better way for the Hong Kong Judiciary to address and handle evolving demands and challenges of the modern society and the international financial, trading and shipping centre of Hong Kong than non-progressive indigenization of jurisprudence.

In addressing internal demands for accountability, the Judiciary may point out that reasoned judgments—the product of an open and public process of adjudication, where the relevant evidence and arguments are carefully examined on their legal merits, underlying values and practical implications—are the primary form of accountability. It is a matter for the Judiciary as a whole to consider acknowledging openly that constitutional interpretation and adjudication intrude into government policy and involve the courts partaking a role with the political branches of government in the governance of Hong Kong. However, judges must necessarily, for their own sake, understand thoroughly the considerations of the policy and decision-makers, as opposed to working on assumptions and educated guesses. The confidence of the public in the judicial process and the rule of law is to be gained through explanation and example, illuminating what is at stake, and not following the crowd.

The chapters that follow present a study of the HKSAR courts through their interpretation of the Basic Law in the adjudication of cases. This book thus attempts to outline in the next two chapters the approach of the HKSAR courts to the Basic Law and the systems it stipulates, as well as to identify and clarify the concepts and ideas involved.

Chapter 3

The Background of Concepts

3.1 One Country, Two Systems

The Court of Final Appeal has pointed out that the Basic Law of the HKSAR, which stipulates and implements the PRC's basic policies regarding Hong Kong, is based upon the principle of 'one country, two systems'¹ and emphasized the 'fundamental importance' of implementing this principle in the same breath as the 'reinforcement of national unity and territorial integrity'.² Yet the Court has scarcely expounded its grasp of this principle, preferring to highlight aspects of the Basic Law that it considers to be in accordance with the principle instead. Thus, subsequent judgments of the Court of Final Appeal have stressed that the following are consistent with the principle of 'one country, two systems': the establishment of the HKSAR with a legal system separate from that of Mainland China;³ the vesting of the power of final adjudication in the HKSAR and not in Mainland China;⁴ and the 'conjunction of [the HKSAR's] common law system under a national law within a larger framework of Chinese constitutional law', with Article 158 of the Basic Law providing the link between the HKSAR courts and the Central Authorities.⁵ On the basis of these cases, it may be said that the principle of 'one country, two systems' has been understood, if not enlisted, to support the HKSAR's legal system administered by its courts. The issue in the 'Congo' case, however, requires the Court of Final Appeal to consider the principle of 'one country, two systems' seriously, with the majority of the Court stating:

The rule of law in the [HKSAR] is founded on the Basic Law which provides the architecture for implementing the principle of "one country two systems". Many of its Articles are devoted to establishing the separate system whereby

¹ *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA at 28C–D.

² *HKSAR v Ng Kung Siu & Anor* (1999) 2 HKCFAR 442, CFA at 461D–E.

³ See *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd & Ors* (2006) 9 HKCFAR 234, CFA at [42]; *ML v YJ* [2011] 1 HKC 447, CFA at [114].

⁴ See *Solicitor v Law Society of Hong Kong (Secretary for Justice, intervener)* (2003) 6 HKCFAR 570, CFA at [25].

⁵ See *Lau Kong Yung & Ors v Director of Immigration* (1999) 2 HKCFAR 300, CFA at 344C–H.

the executive, legislative and judicial branches of government in the Region exercise a high degree of autonomy, safeguarding the fundamental rights and freedoms and way of life of residents and other present here. Other provisions of the Basic Law establish the identity and status of Hong Kong as an inalienable part of China, the 'one country' element of the 'one country two systems' principle. In this case, it falls to the Court to consider provisions in the latter category, in particular, provisions concerning the management and conduct of foreign affairs. This is an area involving powers which have always been reserved to the Central People's Government, falling outside the limits of the Region's autonomy.⁶

In fact, the original standpoint and premise of the principle of 'one country, two systems' has little to do with the legal system of Hong Kong. Deng Xiaoping made use of the expression on 11 January 1982 to sum up the nine principles for the return of Taiwan to the Motherland and the peaceful reunification of China raised by Ye Jianying, the Chairman of the NPCSC. In a statement dated 30 September 1981, Ye affirmed, inter alia that 'after the country is reunified, Taiwan can enjoy a high degree of autonomy as a special administrative region'. Deng indicated that:

Two systems can be permitted. That is, they should not try to undermine the system of the mainland and we shall not try to undermine theirs. By and large, these principles may be applied not just to the Taiwan question, but to the Hong Kong question, too.⁷

⁶ *Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC* [2011] 5 HKC 151, CFA at [181] (per Chan and Ribeiro PJJ and Sir Anthony Mason NPJ). On the other hand, Bokhary PJ expressed in his dissent at [123]–[124] that 'On the "one country, two systems" principle the whole of Hong Kong's post-handover constitutional order rests. That this principle would work was once doubted by many and is still doubted by some. It has worked. The part of state immunity which involves recognition is a matter of "country". And the part which involves whether immunity is absolute or restrictive is a matter of "systems". Under Hong Kong's system, it is for the judiciary to decide independently, without consulting the executive, whether the immunity available in the courts of Hong Kong is absolute or restrictive. It is never a contest between "one country" and "two systems". The principle does not admit of such a contest. At all times and in all matters, the principle operates as a whole. . . . The Court's direct concern is of course only with the principle's application in Hong Kong. But I should at least indicate my awareness of its full and wider importance, as attested by Mr Ji Peng Fei's statement, in the speech . . . that: "One Country, two systems' is the fundamental policy of the Chinese Government for bringing about the country's reunification".'

⁷ See Wang Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (2nd edn) (Beijing and Hong Kong: Law Press China and Joint Publishing (HK) Co Ltd, 2009) p 3 and State Council, Taiwan Affairs Office and Information Office, *White Paper on the Taiwan Question and Reunification of China* (August 1993) (available at: http://news.xinhuanet.com/employment/2002-11/18/content_633183.htm) (last visited on 28 March 2011).

Later, Deng enlarged on the principle of 'one country, two systems' to visiting delegations from Hong Kong in June 1984. The principle, more specifically, meant that within the PRC, the Mainland would maintain the socialist system, while Hong Kong and Taiwan would continue under the capitalist system. The implementation of two systems in one country is the solution for the peaceful reunification of China in accordance with China's realities.⁸

During a meeting with British Foreign Secretary Sir Geoffrey Howe in July 1984, Deng introduced the concept of 'one country, two systems' in these terms:

The idea was first presented as a means of settling the Taiwan and Hong Kong questions. The socialist system on the Mainland, with its population of one billion, will not change, ever. But in view of the history of Hong Kong and Taiwan and of their present conditions, if the continuation of the capitalist system there is not guaranteed, prosperity and stability cannot be maintained, and peaceful reunification of the Motherland will be out of the question. Therefore, with regard to Hong Kong, we propose first of all to guarantee that the current capitalist system and way of life will remain unchanged for 50 years after 1997.⁹

Huan Xiang, a deputy director of the Chinese Academy of Social Sciences, the first chargé d'affaires of the PRC to the United Kingdom and an international relations expert, wrote in the *Renmin Ribao* (*People's Daily*) in December 1984 that the relationship between the special administrative region in Hong Kong and the Central Authorities would be 'based on leadership of the centre and "spontaneity-progressiveness" of the region. The concept of "one country, two systems" did not envisage "two sovereign states within one country" or "two competing political entities within one country".¹⁰

Deng Xiaoping drove home the premise of 'one country, two systems' when meeting members of the Basic Law Drafting Committee on 16 April 1987:

Try to imagine what would happen to Hong Kong if China changed its socialist system, the socialist system with Chinese characteristics under the leadership of the Communist Party. That would be the end of prosperity and stability for Hong Kong. To make sure the policy remains unchanged for 50 years and beyond, we must keep the socialist system on the Mainland unchanged. . . . There are also two aspects to the policy of 'one country, two systems'. *One is that the socialist country allows certain special regions to retain the capitalist system*—not just for a short period of time, but for decades or even

⁸ See *Deng Xiaoping on the Question of Hong Kong* (Hong Kong: New Horizon Press, 1993) pp 6–9.

⁹ See *ibid*, p 12. Deng Xiaoping made similar points when he met British Prime Minister Margaret Thatcher on 19 December 1984; see *ibid*, p 45.

¹⁰ Huan Xiang, *People's Daily* (28, 29 December 1984) quoted in John Young, 'Socialism Versus Capitalism: Towards a Hong Kong Strategy for Absorption without Integration' in Jao, Leung, Wesley-Smith and Wong (eds), *Hong Kong and 1997: Strategies for the Future* (Hong Kong: Centre for Asian Studies, The University of Hong Kong, 1985) pp 101–117 at p 103.

a century. *The other is that the main part of the country continues under the socialist system.* Otherwise, how could we say there were ‘two systems’? It would only be ‘one system’. People who advocate bourgeois liberalization hope that the Mainland will become capitalist or ‘totally Westernized’. Our thinking on this question should not be one-sided. *If we don't attach equal importance to both aspects, it will be impossible to keep the policy of ‘one country, two systems’ unchanged for several decades.*¹¹ (emphasis supplied)

Zhang Youyu, a Mainland member of the Basic Law Drafting Committee, put the matter plainly: ‘It is neither “one country with one system”, nor is it “two countries with two systems”. More importantly, although Hong Kong will enjoy a high degree of autonomy, it will remain under the direct jurisdiction of the CPG. It will not be an independent entity, nor will it be an “independent kingdom”.’¹²

Xiao Weiyun wrote that Chapter I of the Basic Law sets out the ‘one country, two systems’ principle and the policies of the People’s Republic of China that gave substance to the principle. Articles 1 to 6 and 8 in Chapter I of the Basic Law embody the core of the ‘one country, two systems’ principle and the basic policies of the state towards Hong Kong. According to Xiao, the first four articles illustrate the substance of the principle from the political perspective and Articles 5 and 6 from the economic perspective.¹³ On the other hand, Yash Ghai viewed the doctrine of ‘one country, two systems’ as ‘the product of considerable pragmatism’ with ‘its primary purpose the conservative one of perpetrating a substantive system rather than promoting institutional autonomy which might threaten that system’.¹⁴

Xiao Weiyun exhorted that ‘Only with sound understanding of this “one country, two systems” principle can the Basic Law be implemented correctly.’¹⁵ The underscoring by the HKSAR courts of the separate legal and judicial systems of the HKSAR as implementation of the ‘one country, two systems’ principle did not appear to grasp the principle, which, as Robert Morris has explained, was a product of ‘Marxist dialectical and historical materialism’ and must continue to be viewed and studied from that perspective; the Basic Law, as it was conceived

¹¹ See *Deng Xiaoping on the Question of Hong Kong* (Hong Kong: New Horizon Press, 1993) pp 49–54. See further Wang Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (2nd edn) (Law Press China and Joint Publishing (HK) Co Ltd, 2009) pp 103–107.

¹² Zhang Youyu, ‘The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and Its Essential Contents and Modes of Expression’ (1988) 2 *Journal of Chinese Law* 5–19.

¹³ See Xiao Weiyun, *One Country, Two Systems: An Account of the Drafting of the Hong Kong Basic Law* (Beijing: Peking University Press, 2001) pp 88–90, 109.

¹⁴ See Yash Ghai, *Hong Kong's New Constitutional Order* (2nd edn) (Hong Kong: Hong Kong University Press, 1999) p 55.

¹⁵ See Xiao Weiyun, *One Country, Two Systems: An Account of the Drafting of the Hong Kong Basic Law* (Beijing: Peking University Press, 2001) p 1.

and has been maintained, ‘operates dialectically. It is part of the dialectic’.¹⁶ Huan Xiang underlined the theoretical base for the design of ‘one country, two systems’ back in 1984, noting that at the historical stage, ‘there is a process in which the capitalist system and the socialist system co-exist’.¹⁷ And, like the Mainland analysis that David Clark quoted more than a decade ago,¹⁸ Morris found the goal of the dialectic to be the ‘inevitable’ assimilation of Hong Kong and perfect re-unification with the PRC under the leadership of the Chinese Communist Party.¹⁹ The Basic Law was intended to bring the system in the HKSAR closer to the system of the PRC and the thinking of judges and lawyers should ‘go beyond their common law thinking’ and grasp, if not follow, this intent.²⁰

The Central Authorities have maintained efforts to clarify misunderstandings and to propagate what they see as the correct understanding of ‘one country, two systems’. Professor Xia Yong, then Director of the Institute of Law, China Academy of Social Sciences and member of the Committee for the Basic Law under the NPCSC, published an article on 22 February 2004 entitled “‘One Country’ Is Premise and Basis of “Two Systems”” through the official channel of the Xinhua News Agency. Xia emphasized that the principle of ‘one country, two systems’ should be understood in a correct and all-round way. The relationship between ‘one country’ and ‘two systems’ is a relationship of dialectic unification. The two aspects of the principle must be integrated: ‘one country’ maintains the sovereignty, unity and territorial integrity of China, while ‘two systems’ means that some regions may practise capitalism under the authorization of the central government while the main body of China practises socialism. Without ‘one country’, there would be no ‘two systems’. If one only talks about ‘two systems’ while neglecting ‘one country’, the high degree of autonomy would be like water

¹⁶ See Robert Morris, ‘Forcing the Dance: Interpreting the Hong Kong Basic Law Dialectically’ (Chapter 5), in Hualing Fu, Lison Harris and Simon Young (eds), *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* (New York and Basingstoke: Palgrave Macmillan, 2008) pp 97–111 at p 98.

¹⁷ Huan Xiang made the statement in a forum discussion published in *Wen Wei Po* in Hong Kong on 29 and 30 September 1984. This was discussed in Joseph Cheng, ‘The Constitutional Relationship Between the Central Government and the Future Hong Kong Special Administrative Region Government’ (1988) 20 *Case Western Journal of International Law* 65–97 at 69–70.

¹⁸ See David Clark, ‘A High Degree of Autonomy under the Basic Law: An Analysis’, in Kathleen Cheek-Milby and Miron Mushkat (eds), *Hong Kong: The Challenge of Transformation* (Hong Kong: Centre of Asian Studies, University of Hong Kong, 1989) pp 153–188 at p 169.

¹⁹ See Robert Morris, ‘Forcing the Dance: Interpreting the Hong Kong Basic Law Dialectically’ (Chapter 5), in Hualing Fu, Lison Harris and Simon Young (eds), *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* (New York and Basingstoke: Palgrave Macmillan, 2008) pp 97–111 at p 100.

²⁰ See *ibid.*, at p 106.

without a source.²¹ This theme was subsequently adopted in official speeches of the leadership of the Central Authorities.²²

The Chairman of the NPC, Wu Bangguo, emphasized in 2007 that the 'one country, two systems' principle was the spirit running through all of the provisions of the Basic Law. To have a correct grasp of the spirit and substance of

²¹ Professor Xia's article is accessible in English at: http://news.xinhuanet.com/english/2004-02/22/content_1325854.htm; and in Chinese at: <http://big5.fmprc.gov.cn/gate/big5/www.fmoprc.gov.hk/chn/yglz/zyjh/t67297.htm> (last visited on 28 March 2011). See also Xia Yong, *Zhaoxi Wendao: A Collection of Political and Legal Writing* (Shanghai: Shanghai Joint Publishing Co, 2004) pp 173–176. It is clear that Professor Xia's exposition was based upon the orthodox position of the PRC being a unitary state. Zhu Guobin, having reviewed the operation of the different regimes of autonomy in the PRC, suggested that a 'composite state' would be a more realistic understanding of the present structure of the PRC state; see Zhu Guobin, 'The Composite State of China under "One Country, Multiple Systems": Theoretical Construction and Methodological Considerations' (2012) 10 *International Journal of Constitutional Law* 272–297.

²² In a recent academic exposition along this theme, Rao Geping, Professor of Law at Peking University and member of the Committee for the Basic Law of the HKSAR under the NPCSC, wrote that 'one country, two systems' could be understood as a guiding principle adopted by the state (through its central authority) to exercise state sovereignty in administering Hong Kong and Macao upon their return to the motherland. Rao underlined that the two parts of the principle are not with equal importance because 'one country' is at dominating position and highlighting the state sovereignty and its unified power of governing. Thus 'one country' and 'two systems' in essence will be a relationship of dominating and being dominated, determining and being determined, also a reflection of relationship between central authority exercising governing power on behalf of the state and local regions. Rao called for the accurate and comprehensive realization of this relationship; this is the key to the implementation of the guiding principle of 'one country, two systems'. Thus the state's power to govern Hong Kong is part of the state's holistic power to govern its territory, which is also a concrete reflection of the exercise of state sovereignty. The HKSAR is obliged to the rule of the Central Authorities under the PRC's centralist constitutionalism. The Central Authorities' constitutional power to govern Hong Kong includes an ongoing power expressed either in explicit words or implicitly. The HKSAR has no inherent power and its autonomy has been strictly restrained by specific provisions in the Basic Law. If there exist some powers that would be relevant to the local administration but has not been explicitly sanctioned by the Basic Law, those powers in principle should be reserved to the central government. From the perspective of the source of power and its nature, the high degree of autonomy enjoyed by the HKSAR is not an inherent power, but a conferred power. State authorization does not mean that the state itself has given up its powers, nor has it been deprived of them. Rather it is a specific means to exercise state power, a reflection of the will of the sovereign through authorization. According to Rao, a high degree of autonomy enjoyed by Hong Kong is a manner that the state exercises its dominion over Hong Kong. A high degree of autonomy therefore does not mean autonomy free from 'one country' but a gradual integration into 'one country'. It is not autonomy of treading one's own path, but autonomy restricted by the Central Authorities; see Rao Geping, 'One Country Two Systems and Dominion over Hong Kong and Macao' (2012) *China Law*, Issue 1, 11–15 (Chinese original), 69–73 (English translation).

the Basic Law is to understand the ‘one country, two systems’ principle correctly and comprehensively. Wu made the following points: The fundamental basis of the ‘one country, two systems’ principle and of the Basic Law is safeguarding state sovereignty; the high degree of autonomy of the HKSAR is granted by the Central Authorities. The necessary content of the ‘one country, two systems’ principle and of the Basic Law is the implementation of a high degree of autonomy, through Hong Kong people governing Hong Kong. The object for implementing ‘one country, two systems’ and giving full effect to the Basic Law is to protect prosperity and stability. It must be borne in mind that only with social stability can economic prosperity and development be protected and that only with economic prosperity and development can society realize long-term stability.²³

The President of the PRC, Hu Jintao, stated in his speech at the swearing-in of the third-term government of the Hong Kong Special Administrative Region on 1 July 2007, *inter alia*, that:

‘One country, two systems’ is an integral concept. ‘One country’ is the prerequisite of ‘two systems’. Without ‘one country’ there will be no ‘two systems’. ‘One country’ and ‘two systems’ cannot be separated from each other. Still less should they be set against each other. ‘One country’ means that we must uphold the power vested by law in the Central Authorities and China’s sovereignty, unity and security. ‘Two systems’ means that we should ensure the high degree of autonomy enjoyed by the HKSAR and support the Chief Executive and the Government of the HKSAR in exercising government power as mandated by law.²⁴

On 1 July 2012, President Hu, after swearing in the fourth-term government of the Hong Kong Special Administrative Region, spoke of the correct

²³ Chairman Wu’s speech is accessible in Chinese at: http://www.npc.gov.cn/npc/xinwen/2007-06/06/content_1538429.htm (last visited on 28 March 2011). Denis Chang SC wrote on what Wu had not said and emphasized, particularly the binding force of the Basic Law of the HKSAR ‘also on the Central Authorities’, with the implication that ‘although the mandated high degree of autonomy takes the form of an authorization, there is at the same time limitation or self-limitation of power, as the case may be, of the relevant Central Authority. The autonomy, once conferred in accordance with the established basic policies, is effectively entrenched and cannot be withdrawn or curtailed at will’. Chang further underlined the necessity for ‘self-restraint in the exercise of power on the part of the Central Authorities’ so that the HKSAR would enjoy ‘the full measure of autonomy promised in the Joint Declaration and mandated under the Basic Law’; see Denis Chang, ‘What Wu Bangguo Has Not Said’ (27 June 2007) (originally available at: <http://www.a45.hk>, copy now with the author).

²⁴ President Hu’s speech is accessible in Chinese at: http://www.locpg.hk/big5/gjldrnxg/hujingtao/200707/t20070709_2601.asp (last visited on 28 March 2011). The Vice-President of the PRC, Xi Jinping, whose portfolio included leadership over Hong Kong affairs, made similar points to NPC delegates from the HKSAR on 7 March 2010; see ‘Xi Jinping Participated in Examinations of Hong Kong and Macao Delegations Separately’ (8 March 2010) (available at: http://www.npc.gov.cn/npc/xinwen/2010-03/08/content_1554503.htm) (last visited on 28 March 2011).

understanding and implementation of the ‘one country, two systems’ principle. The Central Authorities’ principles and policies towards Hong Kong have been based on safeguarding national sovereignty, security and interests in development and maintaining the long-term prosperity and stability of Hong Kong. These are the core requirements and basic objectives in implementing ‘one country, two systems’ in Hong Kong. In the course of its implementation, one must not only act strictly in accordance with the Basic Law but also integrate organically the following four dialectics: upholding the ‘one country’ principle and respecting the differences of two systems; safeguarding Central powers and protecting the high degree of autonomy of the SAR; safeguarding the overall interests of the state and protecting the interests of all sectors of Hong Kong society; and supporting Hong Kong in actively expanding external relations but opposing external forces interfering in Hong Kong affairs.²⁵

On 8 November 2012, President Hu, in his capacity as General Secretary of the Central Committee of the Communist Party of China, addressed the topic of ‘enriching the practice of “one country, two systems”’ in his report to the Eighteenth National Congress of the Communist Party of China:

The underlying goal of the principles and policies adopted by the central government concerning Hong Kong and Macao is to uphold China’s sovereignty, security and development interests and maintain long-term prosperity and stability of the two regions. We must fully and faithfully implement the principle of ‘one country, two systems’, under which the people of Hong Kong govern Hong Kong and the people of Macao govern Macao and both regions enjoy a high degree of autonomy. We must both adhere to the one-China principle and respect the differences of the two systems, both uphold the power of the central government and ensure a high degree of autonomy in the special administrative regions, both give play to the role of the mainland as the staunch supporter of Hong Kong and Macao and increase their competitiveness. At no time should we focus only on one side to the neglect of the other.²⁶

²⁵ President Hu’s speech is accessible in Chinese at: http://www.locpg.hk/shouyexinwen/201207/t20120701_6102.asp (last visited on 16 November 2012).

²⁶ The relevant portion of General Secretary Hu’s report is accessible in Chinese at: http://www.locpg.hk/big5/zhuantilanmu/18d/18dzyxw/201211/t20121123_6619_10.asp; and in English at: http://news.xinhuanet.com/english/special/18cpcnc/2012-11/17/c_131981259_11.htm (last visited on 5 April 2013). Thereafter, Peng Qinghua, the Director of the Liaison Office of the Central People’s Government in the HKSAR, explained this portion of the General Secretary’s report, underlining that ‘one country, two systems’ is an integrated concept—‘one country’ means the authority of the central government must be upheld so as to protect the nation’s sovereignty, security and development interests, while ‘two systems’ guarantee a high degree of autonomy for the HKSAR and support for the Chief Executive and the Government of the HKSAR to perform their duties in accordance with law. Peng also highlighted ‘three fundamental relationships’ which ought to be appropriately handled to implement ‘one country, two systems’, ‘Hong Kong people ruling Hong Kong’ and ‘a high degree of autonomy’ comprehensively and correctly, namely sticking to the ‘one country’ principle while respecting the differences in the ‘two systems’, safeguarding

Chief Justice Andrew Li, in his address at his farewell sitting on 16 July 2010, acknowledged that ‘the foundation of the new order is “one country, two systems” with each being part of the principle’.²⁷

Robert Morris has chided Hong Kong lawyers and legal academics trained in the common law for not realizing the dialectic set up by the principle of ‘one country, two systems’ and treating the resultant ‘multiplicity of *Weltanschauungen*’ seriously, as opposed to simply applying common law thinking to the Basic Law, the means of enforcement of the dialectic.²⁸ It was Denis Chang SC who saw through the narrow ‘party’ dialectic and indicated that the ‘one country, two systems’ principle should be taken as a ‘principle of action’, guiding solutions to perceived problems or the making of policies that neither undermine sovereignty

the authority of the central government while guaranteeing the SAR’s high degree of autonomy; and relying on the Mainland’s strong support for Hong Kong while enhancing the SAR’s own competitiveness (accessible in Chinese at: http://www.locpg.hk/big5/zhuantilanmu/18d/18dzyxw/201211/t20121123_6575.asp and in English at: <http://www.chinadailyapac.com/article/3-fundamental-relations> (last visited on 5 April 2013). Zhang Xiaoming, Deputy Director of the Hong Kong and Macao Affairs Office of the State Council, further expounded this portion of the Report in study materials; see Zhang Xiaoming, ‘Enriching the Practice of “One Country, Two Systems”’, in *The Eighteenth CPC National Congress Report: Study Materials* (Beijing: People’s Publishing House, 2012) pp 339–347. ‘Development interests’, in this context, do not refer to general or certain partial economic interests; they are the core and substantial interests relating to the whole picture of national development. The ‘three fundamental relationships’ were elaborated in concrete terms with specific references to obligations and concerns. The Report’s overall requirements for Hong Kong and Macao related work were stipulated: (a) Work strictly in accordance with the Basic Law; (b) Improve the systems and mechanisms associated with the implementation of the Basic Law; (c) Support steadfastly the Chief Executives and governments of the SARs in governing according to law; (d) Deepening the economic relations between the Mainland and Hong Kong/Macao and pushing forward exchanges and co-operation in all areas; (e) Enhancing the unity of Hong Kong and Macao compatriots under the banners of Loving the Country, Loving Hong Kong/Macao; and (f) Safeguarding and combating against external powers from interfering with Hong Kong/Macao affairs. Zhang later assumed the office of Director of the Liaison Office of the CPG in the HKSAR on 18 December 2012 in place of Peng.

²⁷ Andrew Li, *Farewell Sitting for the Honourable Mr Justice Andrew Li CJ* (2010) 13 HKCFAR 128–132 at 130G–I. The former Chief Justice, addressing the Dedication Ceremony of the new building of the Faculty of Law of the University of Hong Kong on 8 November 2012, spoke in the similar terms that ‘one country’ and ‘two systems’ should be fully recognized as ‘essential and integral parts of the formula’; see Andrew Li, ‘Speech by the Hon Andrew Li Kwok Nang, Honorary Professor of the Faculty of Law, The University of Hong Kong and Former Chief Justice’ (8 November 2012) (available at: http://www.cpaohku.hk/media/121108_LiSpeech_E.pdf) (last visited on 16 November 2012).

²⁸ See Robert Morris, ‘Forcing the Dance: Interpreting the Hong Kong Basic Law Dialectically’ (Chapter 5), in Hualing Fu, Lison Harris and Simon Young (eds), *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* (New York and Basingstoke: Palgrave Macmillan, 2008) pp 97–111 at p 99. Morris’s understanding had been substantiated by Rao Geping’s expression above that the HKSAR’s autonomy is for a gradual integration with ‘one country’.

nor concede on autonomy. Chang urged a transcendence in thinking and advised against pitting ‘one country’ against ‘two systems’ as if the two were contradictory. The concern that the two ‘systems’ operate asymmetrically need not matter. Instead, one should guard against people playing up the themes associated with ‘one country’, such as sovereignty, unity and security, to undermine the natural and necessary features of the separate system in Hong Kong. The true contradiction should be ‘one country’ against ‘not one country’. It is possible ‘in principle and in practice’:

. . . to love Hong Kong and love China and uphold national unity and territorial integrity whilst insisting on the maintenance of Hong Kong’s different and ‘separate’ capitalist system and lifestyle and the high degree of autonomy, including the principle of Hong Kong people ruling Hong Kong as an inalienable part of one China.²⁹

3.2 High Degree of Autonomy

Article 2 of the Basic Law provides that the NPC authorizes the HKSAR ‘to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law’. The Court of Final Appeal considered in *Ng Ka Ling & Ors v Director of Immigration* that under the Basic Law, the HKSAR courts ‘have independent judicial power within the high degree of autonomy conferred on the Region’. To the Court of Final Appeal, it seemed to follow naturally that ‘[it] is for the courts of the Region to determine questions of inconsistency and invalidity when they arise’.³⁰ Again, it seemed natural to consider the language of the NPCSC authorization under Article 158(2) of the Basic Law to the HKSAR courts to interpret ‘on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region’ as words that emphasize the high degree of autonomy of the HKSAR and the independence of its courts.³¹ This authority of the HKSAR courts to interpret provisions of the Basic Law that are within the limits of the HKSAR’s autonomy was thus stressed as ‘an essential part of the high degree of autonomy granted to the Region’.³² Accordingly, the Court of Final Appeal, in adopting a ‘predominant provision test’ for determining whether the classification condition was satisfied for making a reference of a provision of the Basic Law for interpretation by the NPCSC under Article 158(3) of the Basic Law, abhorred a proposed test that would entail the Court of Final Appeal making a reference for NPCSC interpretation that:

²⁹ Denis Chang, ‘The Imperatives of One Country, Two Systems: One Country Before Two Systems?’ (2007) 37 *Hong Kong Law Journal* 351–362. See also Denis Chang, ‘Towards a Jurisprudence of a Third Kind—“One Country, Two Systems”’ (1988) 20 *Case Western Journal of International Law* 99–125.

³⁰ *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA at 26D–E.

³¹ *ibid*, 29F–G, 30H–I.

³² *ibid*, 32H–I.

. . . would withdraw from the jurisdiction of the Court the interpretation of a provision . . . of the Basic Law which is within the limits of the autonomy of the Region. In our view, this would be a substantial derogation from the Region's autonomy and cannot be right.³³

The *Ng Ka Ling* case was the most extensive exposition by the HKSAR courts on the 'high degree of autonomy' of the HKSAR.³⁴ As events turned out, the Central Authorities did not agree with the Court of Final Appeal's interpretation. The true substance of the grant of a 'high degree of autonomy' is yet to be fully stated.

As early as on 26 June 1983, Deng Xiaoping indicated that in relation to an idea for the peaceful reunification of Mainland China and Taiwan:

There must be limits to autonomy, and where there are limits, nothing can be complete. 'Complete autonomy' means two Chinas, not one. Different systems may be practised, but it must be the People's Republic of China alone that represents China internationally. We recognize that the local government of Taiwan may have its own separate set of policies for domestic affairs. And although, as a special administrative region, Taiwan will have a local government, it will differ from local governments of other provinces, municipalities and autonomous regions. Provided the national interests are not impaired, it will enjoy certain powers of its own that the others do not possess.³⁵

Later, addressing members of the Basic Law Drafting Committee on 16 April 1987, Deng Xiaoping expressed the view that it is to the advantage of Hong Kong for the Central Authorities to retain some power there: 'There will always be things you would find hard to settle without the help of the Central Government.'³⁶

Wang Shuwen, a Mainland legal scholar and member of the Basic Law Drafting Committee, considered in his work on the Basic Law that the power of autonomy of the HKSAR consists in the authorization under Article 2 for it to exercise a high degree of autonomy, under Article 13 to conduct relevant external affairs, and

³³ *ibid.*, 33A–C.

³⁴ See now the exposition by the majority of the Court of Final Appeal (Chan and Ribeiro PJJ and Sir Anthony Mason NPJ) of the HKSAR's 'high degree of autonomy' in *Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC* [2011] 5 HKC 151, CFA at [316]–[331], concluding that the HKSAR's high degree of autonomy 'does not encompass the conduct of foreign affairs or defence'. Bokhary PJ, albeit dissenting with the majority's principal reasoning and disposition of the final appeal, must have agreed with this general proposition; see *ibid.*, at [84].

³⁵ See Deng Xiaoping, *The Selected Works of Deng Xiaoping (Single Volume Version)* (Beijing and Hong Kong: People's Publishing House and Joint Publishing (HK) Co Ltd, 1996) pp 251–253. The English translation is available in Deng Xiaoping, *The Selected Works of Deng Xiaoping* (Beijing: Foreign Languages Press, 1994) Vol 3.

³⁶ See *Deng Xiaoping on the Question of Hong Kong* (New Horizon Press, 1993) p 57. See also Xiao Weiyun, *One Country, Two Systems: An Account of the Drafting of the Hong Kong Basic Law* (Beijing: Peking University Press, 2001) p 101. This saying may have become particularly prescient in relation to Central-SAR relationship; see Part 5 of this book.

under Article 20 to enjoy other powers.³⁷ Both Wang Shuwen and Xiao Weiyun underscored that the power of autonomy enjoyed by the HKSAR is higher in degree and more extensive than that enjoyed by the organs of self-government of the national autonomous areas in Mainland China.³⁸

Cheng Jie, an associate professor of the Faculty of Law of Tsinghua University, has written on the power of the Central Authorities to govern and the high degree of autonomy of the HKSAR in response to views that the HKSAR's high degree of autonomy entailed the region having the power to counter the Central Authorities³⁹ and that the high degree of autonomy was in nature akin to the right of self-determination⁴⁰ within the meaning of Article 1 of the International Covenant on Civil and Political Rights (ICCPR).⁴¹ Cheng believed that these views conflated the nature of the authorization of a high degree of autonomy with the protection of a high degree of autonomy. A 'high degree of autonomy' indicated that while the autonomy may be broad, there is still a limit. Article 2 of the Basic Law indicates that the source of the HKSAR's high degree of autonomy is authorization from the Central Authorities. Thus the limit is based upon the Central Authorities' authorization under the Basic Law. Cheng therefore outlined three types of authorization that form the high degree of autonomy under the Basic Law: general authorization (referring to powers that the HKSAR may exercise directly pursuant to the provisions of the Basic Law); in-principle authorization (referring to powers that the HKSAR may exercise upon acquiring the Central Authorities' authorization in specific cases, such as the negotiation

³⁷ See Wang Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (2nd edn) (Beijing and Hong Kong: Law Press China and Joint Publishing (HK) Co Ltd, 2009) p 70.

³⁸ See Wang Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (2nd edn) (Beijing and Hong Kong: Law Press China and Joint Publishing (HK) Co Ltd, 2009) pp 70–77; Xiao Weiyun, *One Country, Two Systems: An Account of the Drafting of the Hong Kong Basic Law* (Beijing: Peking University Press, 2001) pp 96–97.

³⁹ Cheng Jie did not specify the source of this view. On the other hand, Martin Lee SC had advocated a similar understanding about 'one country, two systems' meaning that the HKSAR could say 'no' to the Central Authorities on 'internal matters' within the limits of autonomy; see Martin Lee, 'Beijing People Ruling Hong Kong' (2011) *Next Magazine* (3 February), Book A, 120.

⁴⁰ Cheng Jie did mention the reliance of the right of self-determination by 'certain political groups' in Hong Kong. This is understood by the author to be a reference to the Civic Party's expressions. As Yash Ghai narrated, the talk about Hong Kong having the right of self-determination, be it in the comprehensive form or only the internal form, began at an early stage of the transition period to 1997 and culminated in a recommendation of a mission of the International Commission of Jurists to Hong Kong in 1992; see Yash Ghai, *Hong Kong's New Constitutional Order* (2nd edn) (Hong Kong: Hong Kong University Press, 1999) p 42. It is not a matter of coincidence that many members of the Civic Party had been members of the Hong Kong Branch of the International Commission of Jurists.

⁴¹ International Covenant on Civil and Political Rights (adopted by the United Nations General Assembly on 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171.

and conclusion of air services agreements under Articles 133 and 134 of the Basic Law); and additional authorization (referring to the power of the Central Authorities under Article 20). At the same time, the Basic Law specifies limits to the authorization to the HKSAR. Certain provisions stipulate clearly that certain powers are exercised by the Central Authorities, so that the HKSAR does not enjoy those powers. Foreign affairs and defence powers are examples. There are also provisions stipulating that certain powers may be exercised by the Central Authorities and also by the HKSAR, with the Central Authorities having the final decisional power, citing the power of interpretation of the Basic Law as an example. Other limits are procedural.⁴²

Having reviewed the drafting process of the Basic Law and the clear authorizations and delimitations constituting the high degree of autonomy above, Cheng indicated that the HKSAR's authorized high degree of autonomy means that there is no question of a division of powers or residual powers, or of a right of self-determination. The authorization of the Central Authorities is a devolution of powers by the Central Authorities exercising sovereignty over the HKSAR in its full and complete form, so that the result of devolution is not the Central Authorities' losing any powers, or accepting the power of the region to separate or counteract.⁴³ Cheng further pointed out that the 'reality condition' for implementing a high degree of autonomy is the distinctiveness of Hong Kong society; it was accepted that, objectively, the actual conditions of the Hong Kong society were such that the usual or normal means of governance (ie the socialist system) would not be applicable, necessitating the use of a special way to govern the distinct society (ie a capitalist system reflected in the HKSAR's economic system, social structure, education and culture). Respect for the distinctiveness of the

⁴² See Cheng Jie, 'The Central Authorities' Governing Power and Special Administrative Region's High Degree of Autonomy—Using the Delegation Relationship under the Basic Law as the Framework' (2007) *Legal Science*, Issue 8, 61–68 at 62–63. See also Rao Geping, 'One Country Two Systems and Dominion over Hong Kong and Macao' (2012) *China Law*, Issue 1, 11–15 (Chinese), 69–73 (English) (discussed in the previous section of this chapter). The statement of Chief Executive Leung Chun-ying in his address to the Legislative Council on 17 October 2012 that 'The relevant provisions in the Basic Law illustrate that the "autonomy" enjoyed by Hong Kong under "one country, two systems" is a high degree of autonomy as expressed defined in the Basic Law, not autonomy of a different form or content' echoes this part of Cheng's article; see 'CE Addresses Legislative Council' (17 October 2012) (available at: <http://www.info.gov.hk/gia/general/201210/17/P201210170520.htm>) (last visited on 16 November 2012).

⁴³ Wang Yu, having studied the various forms of authorization in law, outlined several basic principles of authorization and considered that the authorizations to SARs were transfers of the exercise of powers to the SARs and not the division of inherent powers of the Central Authorities to the SARs; that the Central Authorities must reserve powers necessary for the safeguarding of the exercise of sovereignty; that the high degree of autonomy of the SARs must be delimited according to the provisions of the Basic Laws and there was no question of there being residual powers as in a federal system; and that the Central Authorities may exercise supervision over the high degree of autonomy of SARs; see Wang Yu, 'An Analysis of the Concept of Authorization in the Basic Laws of Hong Kong and Macao' (2012) *Political Science and Law*, Issue 9, 77–89 at 84.

HKSAR must go hand in hand with acceptance of the legality of the Mainland system. This was illustrated by Deng Xiaoping's statement that different social systems or ideologies 'would not swallow one or the other' and Jiang Zemin's description of 'well water not intruding on river water'. According to Cheng, given that the substance of 'one country, two systems' describes 'how the state should govern Hong Kong' and that authorizing a high degree of autonomy to the HKSAR is policy adapted to the specific conditions of the HKSAR, certain powers have not been devolved due to the inherent need of national unity as well as for the purpose of indicating the responsibilities of the Central Authorities for the development of the HKSAR. The understanding of the HKSAR's high degree of autonomy must integrate with the theory of authorization of a unitary state and not the theory of division of power of a federal state. The HKSAR's high degree of autonomy is due to devolution of powers from the Central Authorities and is in this sense no different from the autonomy of other local administrative regions. The difference lies in the scope of the autonomy.⁴⁴

Lastly, Cheng Jie turned to the legal protection of the HKSAR's high degree of autonomy. The devolution of powers from the Central Authorities to constitute the high degree of autonomy of the HKSAR in accordance with the Basic Law means that both the Central Authorities and the HKSAR must comply with the Basic Law and respect the spirit and scope of the devolution of powers thereunder. Given that the high degree of autonomy of the HKSAR is not inherent, there is no power to counteract the Central Authorities. Rather, the HKSAR must accept supervision and restriction from the Central Authorities, which include the power to decide on the degree of autonomy, the power to supervise laws enacted by the legislature of the HKSAR, the power of appointment of the Chief Executive and the principal officials, and the power to interpret the Basic Law. The foundation of legal protection is the social consensus and economic development in the HKSAR, matters on which the Central Authorities have sought to enhance through co-ordination in national affairs. The continuous development of the HKSAR is not only the sufficient condition of the HKSAR's high degree of autonomy but also the necessary condition of the HKSAR's high degree of autonomy.⁴⁵

Yash Ghai would not have had the opportunity to consider Cheng Jie's points, which were put forward in Chinese in 2007. However, Ghai earlier identified an economic perspective for examining the HKSAR's autonomy. The autonomy of the HKSAR, he argues,

. . . has to be found principally within the interstices of the economic system established for it. . . . Autonomy is the imperative of the economic system—in that sense the basis of HKSAR's autonomy is different from many other examples where it is founded in the accommodation of social, cultural or ethnic diversity. If the logic of the Basic Law circumscribes the autonomy of

⁴⁴ See Cheng Jie, 'The Central Authorities' Governing Power and Special Administrative Region's High Degree of Autonomy—Using the Delegation Relationship under the Basic Law as the Framework' (2007) *Legal Science*, Issue 8, 61–68 at 63–66.

⁴⁵ *ibid.*, 67–68.

the HKSAR in the cause of the preservation of an economic system, it also limits the authority of the Central Authorities in the HKSAR for the same purpose and to the same effect. Thus it is not surprising that the separateness of the systems has sometimes been mistaken for autonomy. This is not to deny that there may indeed be considerable scope for autonomy within the economic order.⁴⁶

Ghai studied the terms of the Sino-British Joint Declaration on the Question of Hong Kong and observed that the notion of ‘autonomy’ was changed in the course of transforming the words of the Joint Declaration into the provisions of the Basic Law; ‘the neat division of powers between the PRC (“defence and foreign affairs”) and the HKSAR (all internal affairs) became blurred’. Ghai was concerned that the usual way of delineating clearly and comprehensively arrangements for autonomy in various countries—namely providing lists of powers of the centre or the region or just of the region or the centre, with unspecified matters belonging to the other—was not adopted; a proposal to list the executive powers of the HKSAR in the drafting process of the Basic Law was abandoned. Some provisions of the Basic Law created Central-SAR relationships with the allocation of powers unspecified. In the circumstances Ghai provided two conceptualizations of autonomy under the Basic Law. The powers of the HKSAR could be seen as having been derived from the integrity of the ‘Hong Kong’ system, in which capitalism plays a key but not exclusive role. It could thereby be suggested that powers not expressly granted to the HKSAR but ancillary to the operation of the market economic system or the administration of Hong Kong could be deemed to have been vested in the HKSAR, since under Article 5 of the Basic Law, the previous capitalist system and way of life shall remain unchanged for fifty years. Another conceptualization of autonomy is to claim that the recognition of Hong Kong’s separate systems prescribes operational limitations on Chinese sovereignty.⁴⁷

Having observed for a number of years how the systems under the Basic Law worked, Ghai held that autonomy was not the ‘defining characteristic’ of the Basic Law. A number of general principles and specific provisions in the Basic Law had circumscribed autonomy. Institutions established in the HKSAR, while vested with powers greater than any federal or autonomy system, leaving precious little for the Central Authorities, were ‘severely limited’ in their autonomy. ‘Indeed it was possible for China to formally vest these extensive “powers and functions” in Hong Kong precisely because it retained control over institutions and the decision-making process. China therefore regarded the institutional question as more critical than the devolution of powers.’ Ghai had to confess in sorrow that: ‘The Basic Law has many virtues but it is also a deeply flawed instrument. It shows an amazing distrust of the people. It is also incredibly rigid.’⁴⁸

⁴⁶ See Yash Ghai, *Hong Kong’s New Constitutional Order* (2nd edn) (Hong Kong: Hong Kong University Press, 1999) p 140.

⁴⁷ See *ibid.*, pp 144–151.

⁴⁸ See Yash Ghai, ‘Putting the Cat among the Pigeons: The Politics of the Referendum’ (2004) 34 *Hong Kong Law Journal* 433–449. See also Yash Ghai, ‘The Imperatives of

Qiao Xiaoyang, the Deputy Secretary General of the NPCSC with responsibility for Hong Kong and Macao affairs, integrated 'a high degree of autonomy' into the main narrative on the administration of the PRC state in a speech to senior civil servants in Macao on 13 July 2010. The system of the special administrative regions (SARs), he said, is a component of the system of the administration of the state; it has its own special character and must comply with principles of universal meaning in the system of the administration of the state. One such universal principle of the system of the administration of the state is the principle of the unitary system of the state, which Articles 1, 2, 12 and 45 of the Basic Law of the HKSAR and the Basic Law of the Macao Special Administrative Region implement. The enactment by the NPC of the Basic Laws stipulating the practice of the capitalist system in the special administrative regions pursuant to Article 31 of the PRC Constitution was the special characteristic allowed under the system of the administration of the state.

Qiao Xiaoyang then stressed that the system and structure for the administration of the SARs stipulated under the Basic Laws have common characteristics as well as special characteristics. The system and structure for the administration of the SARs involve the Central Authorities reserving powers necessary for upholding national sovereignty and authorizing a high degree of autonomy to the SARs regarding internal affairs, implementing local people ruling the region. Under 'one country, two systems', the system and structure whereby the state exercises power with respect to the SARs is the political system and structure of the state prescribed under the PRC Constitution and national laws, and thus represents the common characteristics in the administration of the state. The Basic Laws specifically designed a political system and structure for the SARs to exercise a high degree of autonomy, representing the special characteristic. The national political system and structure and the SAR political system and structure are not divided; they are inherently linked. This is reflected not only in the NPC's deciding to establish the SARs and their systems and the CPG's being responsible for administering defence and foreign affairs relating to the SARs, but also in the relationships of power between the Central Authorities and the political institutions of the SARs. Thus Qiao concluded that any discussion of the administration of the SARs must involve discussing the authority of a high degree of autonomy of the SAR as well as the powers of the Central Authorities; and must involve discussing the political system and structure of the SAR as well as the national political system and structure. These two aspects form an organic whole. It is only through the Central Authorities and the political institutions of the SAR carrying out their duties and functions according to law under the framework stipulated by the Constitution and the Basic Law that the provisions of the Basic Law can be truly implemented.⁴⁹

Autonomy: The Contradictions of the Basic Law', in Johannes Chan and Lison Harris (eds), *Hong Kong's Constitutional Debates* (Hong Kong: Hong Kong Law Journal, 2005) pp 29–44.

⁴⁹ Qiao Xiaoyang, 'Studying the Basic Law, Upgrading the Quality of Civil Servants: A Speech at the Graduation Ceremony of the "Advanced Course of the Basic Law of MSAR"' (2010) 6 *Academic Journal of One Country Two Systems* 1–4 at 2–3.

Again, it was Denis Chang SC who warned of the elasticity of ‘heuristic notions’. Propositions like ‘a high degree of autonomy’ are each ‘indeterminate and open to manipulation; each is capable of becoming more determinate and is currently being manipulated. Each proposition provides clues and points the way to a realization of goals and is a challenge to human ingenuity. In short, they make excellent slogans and also possess the characteristics of heuristic notions employed in science, mathematics and education’.⁵⁰ Chang was then writing in 1988 in an American legal journal over the drafting debate that one side applied ‘one country’ together with the concept of ‘sovereignty’ to ensure the power of the Central Authorities, with the other side using ‘two systems’ in coupling with ‘a high degree of autonomy’ and ‘Hong Kong people ruling Hong Kong’ in efforts ‘to prevent the future Hong Kong SAR system from being completely absorbed by the PRC socialist body politic’. The struggle goes on today, with one significant aspect being the political system, of which the judiciary is part, albeit positioned at a distance from the other components of the system.

3.3 Executive-Led Government

In the course of the implementation of the Basic Law since 1997, a major theme of public discourse has been the characterization of the political system of the HKSAR provided under the Basic Law. The contributions of the HKSAR courts have been few, as there have been few cases turning on related issues, but the comments provided, incidentally all by Hartmann J, appear to be curious. Hartmann J first stated in *Yau Kwong Man v Secretary for Security*,⁵¹ which dealt with the validity of vesting with the Chief Executive by legislation a power of sentencing, that ‘[the] Basic Law, as a document of constitution, follows the Westminster model’. Then in *Lau Kwok Fai Bernard & Ors v Secretary for Justice*,⁵² which concerned legislative alteration of contracts of civil servants to effect a pay reduction, Hartmann J repeated this observation. Later in *Leung Kwok Hung v President of the Legislative Council & Anor*,⁵³ which put in question the consistency of certain rules of procedure of the Legislative Council (LegCo) of the HKSAR with the Basic Law, Hartmann J said that ‘Hong Kong has an executive-led government. It is the function of the Chief Executive to lead the government, to decide on government policies and to approve the introduction of motions regarding revenues or expenditure to the Legislative Council’. He also stated that ‘[it] may be said that the Basic Law, in its fundamentals, is fashioned on the “Westminster model”.’

Hartmann J did not explain his understanding of the ‘Westminster model’, taking it for granted that this model of government or political system or structure was well understood. Not many texts on constitutional, administrative or

⁵⁰ Denis Chang, ‘Towards a Jurisprudence of a Third Kind—“One Country, Two Systems”’ (1988) 20 *Case Western Journal of International Law* 99–125 at 105.

⁵¹ *Yau Kwong Man v Secretary for Security* [2002] 3 HKC 457, CFI.

⁵² *Lau Kwok Fai Bernard & Ors v Secretary for Justice* (unreported, 10 June 2003, HCAL 177, 180/2003), CFI,

⁵³ *Leung Kwok Hung v President of the Legislative Council & Anor*, [2007] 1 HKLRD 387, CFI (leave to appeal out of time refused in [2008] 2 HKLRD 18).

public law in the English common law tradition contain a description or discussion of the 'Westminster model'. Andrew Le Sueur wrote of the 'Westminster model' as one of the three main narratives explaining the British constitutional settlement, the other two being the Crown model and the model of fragmented and multilevel governance. The 'Westminster model' emphasizes the role of the Parliament at Westminster in the government of Britain. The government is parliamentary in character, as ministers of government derive their legitimacy to govern from their being members of parliament and are accountable to parliament for the conduct of government. The government remains in power so long as it enjoys the confidence of the House of Commons.⁵⁴ Peter Boyce, in a different vein, considered the 'export' of the Westminster-derived system of government to different parts of the British Commonwealth, combining with other elements, such as the non-resident monarch, as a 'Westminster model'. Boyce, having referred to the systems of government in Australia, Canada and New Zealand, was describing a system of parliamentary democracy with a clear distinction between the head of state and head of government, and carrying on the British tradition of a cabinet government responsible to parliament.⁵⁵

Hartmann J's description of Hong Kong's system as following the 'Westminster model' cannot be regarded as a reference to the typical understanding of that system of government. This is clear when the roles of the Chief Executive and members of LegCo are considered. The Chief Executive is both the head of the HKSAR and the head of the Government of the HKSAR under the Basic Law.⁵⁶ While LegCo members may be appointed to the Executive Council to assist the Chief Executive in the formulating of policies,⁵⁷ the HKSAR Government is a distinct and separated entity consisting of the Chief Executive, the principal officials and civil servants. A LegCo member is no longer qualified to hold his or her office upon acceptance of a government appointment and becoming a public servant.⁵⁸ It seems that Hartmann J's concern was to attribute the HKSAR's system of government with the contested judicial claim associating the 'Westminster model' with the separation of executive, legislative and judicial powers,⁵⁹ a matter to be clarified in the next section of this chapter. Hartmann J's use of the 'Westminster model' also cannot possibly square with the expression of 'executive-led government', which he seemed to have used as a tag-line in *Leung Kwok Hung v President of the Legislative Council & Anor*. The appropriateness of this expression in describing the political system of the HKSAR had whipped up a storm of controversy. The investigation below seeks to illustrate the sensitivity of the debate, including alleged changes in Mainland scholastic emphasis and

⁵⁴ Andrew Le Sueur, 'Constitutional Fundamentals', in David Feldman (ed), *English Public Law* (2nd edn) (Oxford: Oxford University Press, 2009) Ch 1, paragraph 1.96.

⁵⁵ Peter Boyce, *The Queen's Other Realms: The Crown and Its Legacy in Australia, Canada and New Zealand* (Leichhardt: The Federation Press, 2008).

⁵⁶ See Basic Law, Articles 43, 60.

⁵⁷ See *ibid*, Articles 54, 55.

⁵⁸ See *ibid*, Article 79(4).

⁵⁹ See *Yau Kwong Man v Secretary for Security* [2002] 3 HKC 457, CFI at [38].

the shifts in the approach of the HKSAR Government over the course of time and according to exigencies.

Deng Xiaoping addressed members of the Basic Law Drafting Committee on 16 April 1987 on the political system of the HKSAR in these terms:

Hong Kong's system of government should not be completely Westernized; no Western system can be copied *in toto*. For a century and a half Hong Kong has been operating under a system different from those of Great Britain and the United States. I am afraid it would not be appropriate for its system to be a total copy of theirs with, for example, the separation of the three powers and a British or American parliamentary system. Nor would it be appropriate for people to judge whether Hong Kong's system is democratic on the basis of whether it has those features. I hope you will sit down together to study this question. So far as democracy is concerned, on the Mainland we have socialist democracy, which is different in concept from bourgeois democracy. Western democracy includes, among other features, the separation of the three powers and multiparty elections. We have no objection to the Western countries doing it that way, but we on the Chinese Mainland do not have such elections, nor do we separate the three powers or have a bicameral legislature. We have a unicameral legislature, the National People's Congress, which best conforms to China's realities. As long as it keeps to the right policies and direction, such a legislative body helps greatly to make the country prosper and to avoid much wrangling. Of course, if the policies are wrong, any kind of legislative body is useless. . . . The truth is, not everything that can be done in one country can be done in another. We must be realistic and determine our system and our methods of administration in light of our own specific conditions.⁶⁰

In a 1988 article, Xiao Weiyun, who co-chaired the sub-group on the political system of the Basic Law Drafting Committee, discussed a number of principles that informed the drafting of the provisions of the Basic Law on the political system. Xiao pointed out that safeguarding the unity of the country and the integrity of the territories should serve as prerequisites to implementing a high degree of autonomy in the HKSAR, but not at the expense of the autonomy of the political system of the HKSAR, lest the policy of 'one country, two systems' could not be realized. The design of the political system of the HKSAR must be conducive to the economic prosperity and social stability of Hong Kong. The starting point must be the actual conditions of Hong Kong. The system would retain the meritorious parts of the current political structure that were favourable to economic development, and discard anything that was the product of colonialism or contrary to the spirit of the Sino-British Joint Declaration on the Question of Hong Kong. Neither the People's Congress system, which was primarily suited to the conditions of Mainland China, nor the political structures of other countries were to be adopted. Democratic participation would be increased to put into practice the policy of 'Hong Kong people administering Hong Kong'.

⁶⁰ *Deng Xiaoping on the Question of Hong Kong* (Hong Kong: New Horizon Press, 1993) pp 55–56.

Turning to the proposals of the sub-group on the political system, Xiao explained that the Chief Executive and LegCo each would act as a check on one another's powers, an arrangement that would help prevent the Chief Executive from doing things against the advice of others and be conducive to co-operation between LegCo and the Chief Executive. Commenting on the proposed elaboration of the manner in which the executive authorities would be accountable to the legislature, Xiao considered that the provision would provide for the separation of duties and for a restrictive relationship between the executive and legislative branches, contemplating a proper separation of responsibilities and powers. Xiao thought that:

[this] type of restrictive relationship between the executive and legislative branches is derived from the actual circumstances of the Hong Kong SAR. It ensures that the government organs of the Hong Kong SAR will be able to work more smoothly and effectively and guarantees the stability and prosperity of Hong Kong. . . . Although the Basic Law establishes a restrictive relationship between the executive and legislature, it also stresses their mutual cooperation. . . . It is not appropriate to slight either the restrictive or the cooperative component in the relationship between the executive and legislative branches. Stressing only the restrictive component will not facilitate the work of the Hong Kong SAR, nor will it be conducive to its economic prosperity and social stability; rather it will cause frequent impasses and continuous disputes in the work of the Hong Kong SAR executive and legislative branches. Therefore the relationship between the executive branch and the legislature is not a matter of which is superior and which is inferior, the leader and the led, the stronger and the weaker, the dominator or the dominated, but is a matter of the two mutually cooperating for the benefit of the prosperity and stability of Hong Kong.⁶¹

Upon the conclusion of the drafting of the Basic Law, Ji Pengfei, the Chairman of the Basic Law Drafting Committee, explained to the Third Session of the Seventh National People's Congress on 28 March 1990 the design of the provisions of the Basic Law (Draft) on the political structure of the HKSAR:

The political structure of the Hong Kong Special Administrative Region should accord with the principle of 'one country, two systems' and aim to maintain stability and prosperity in Hong Kong in line with its legal status and actual situation. To this end, consideration must be given to the interests of the different sectors of society and the structure must facilitate the development of the capitalist economy in the Region. While the part of the existing political structure proven to be effective will be maintained, a democratic system that suits Hong Kong's reality should gradually be introduced.

Turning to the relationship between the executive authorities and the legislature, Ji considered that '[the] executive authorities and the legislature should regulate each other as well as co-ordinate their activities [既互相制衡又互相配

⁶¹ Xiao Weiyun, 'A Study of the Political System of the Hong Kong Special Administrative Region under the Basic Law' (1988) 2 *Journal of Chinese Law* 95–113.

合]’.⁶² The correspondence between Xiao Weiyun’s reasoning and Ji Pengfei’s explanation in respect to the relationship between the executive authorities and the legislature underlying the Basic Law’s political system seems obvious. Research into the drafting history of the Basic Law by Professor Joseph Chan has confirmed that the expression that the executive authorities and the legislature should regulate/check each other as well as co-ordinate their activities was a consensus of the sub-group on the political system of the Basic Law Drafting Committee as early as in 1986. Chan found that the sub-group on the political system also reached consensus on ‘the separation of the three powers (*sanquan fenli*)’⁶³ as a model that the political system of the HKSAR should adopt as a matter of principle.

While references to ‘the separation of the three powers’ seem to have disappeared by the end of the drafting process of the Basic Law, the Mainland legal scholars who participated in the drafting maintained in their published texts and accounts released shortly after the promulgation of the Basic Law the consensus of the sub-group on the political system of the Basic Law Drafting Committee that: ‘The judiciary shall remain independent, while the executive authorities and the legislature shall check and balance each other while working in mutual co-operation’.⁶⁴ In explanation, Xiao Weiyun said that:

Check and balance and mutual co-operation are two sides of the same coin; one cannot do without the other. Should only check and balance between the executive authorities and the legislature be emphasized, and mutual co-operation neglected, the result may be non-co-operation or non-co-ordination between the two and this would do no good to the operation of the two institutions nor benefit Hong Kong’s stability and prosperity. Similarly, if mutual co-operation is stressed and check and balance neglected, the result might be insufficiency in appropriations of funds and inadequate supervision of certain institutions, thereby adversely affecting the work of the HKSAR. So the purpose of introducing such a relationship of check and balance and mutual co-operation is to facilitate the executive authorities and the legislature in helping each other to move forward, to perform their respective functions and to let each of them have a role to play. This is a positive means to facilitate improvement of their work and raising their efficiency. It is not our intention to introduce a relationship in which the executive authorities and the legislature act separately and defiantly, or to oppose each other as equal

⁶² In *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, the Court of Final Appeal accepted the Explanation of the Basic Law (Draft) as extrinsic material that can be considered in aid of the interpretation of the Basic Law.

⁶³ See Joseph Chan, ‘Interpretation of the Basic Law: Change of Tone by Guardians of the Basic Law, Executive-led Not Original Intention of Basic Law’, *Ming Pao* (28 June 2004) (available at: <http://www.article23.org.hk/newsupdate/jun04/0628c2.htm>) (last visited on 28 March 2011).

⁶⁴ See Xiao Weiyun, *One Country, Two Systems: An Account of the Drafting of the Hong Kong Basic Law* (Beijing: Peking University Press, 2001) p 245. This English text is the translation of Xiao’s account of the drafting of the Basic Law of the HKSAR originally published in 1993.

powers, nor do we mean that the relationship between them is one between a superior and a subordinate, or between the upper and lower ranks. Rather, we should properly handle the relationship between them by enabling each to perform its respective functions, with orderly co-ordination in the development of their work. On the one hand there is division of power, check and balance of each other; on the other attention is paid to mutual co-operation.⁶⁵

The team of authors led by Wang Shuwen, a former drafter of the Basic Law, published under the auspices of the Chinese Academy of Social Sciences in 1990 an introductory text to the Basic Law. It described the relationship among the legislature, the executive and the judiciary under the political structure established by the Basic Law as 'one of mutual check and balance and mutual coordination between the executive authorities and the legislature, the judiciary being independent'. In addition, 'it is unscientific to explain the political system of the Hong Kong SAR in the future as "executive-dominant" or "legislative-dominant". . . . The executive authorities and the legislature are two departments independent of each other. As between them, the question is not which subordinates the other and there is no question of which overrides the other'.⁶⁶

It was the last British Governor, Chris Patten, who, in his 1995 Policy Address, described the Hong Kong system as one of 'an executive-led administration accountable to an increasingly-elected legislature', where administrative leadership meant that the government had the responsibility of policy formulation but was accountable to the public through the scrutiny of the government's proposals by the legislature.⁶⁷ The Chief Secretary, Anson Chan, made explicit the principle of 'executive-led government' on 13 March 1996 in an answer to LegCo in these terms:

The political system of Hong Kong is built on the principle of 'separation of powers' with an executive-led government. The executive, legislature and judiciary have different and independent roles, which check, balance and support each other. Under our executive-led system of government, the executive is responsible for formulating and implementing policies and providing various services to the community. In line with this, it is the Administration's role to put its legislative and expenditure proposals to the Legislative Council for consideration. In short, the Administration proposes and the legislature disposes. . . . The Governor's statement in his 1995 policy address was no more than a recognition of the constitutional position. The Governor also emphasized that the Administration is committed to working together with Members of this Council on behalf of the community we all serve. The principle of 'executive-led' government does not mean that the executive can do whatever it wants. In the Hong Kong system, the legislature and the executive perform distinct roles and provide checks and balances to each other.

⁶⁵ *ibid*, at pp 254–255.

⁶⁶ See Wang Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (Beijing: Party School of the Central Committee of the CPC Press, 1990).

⁶⁷ See Chris Patten, *Hong Kong Our Work Together: The 1995 Policy Address* (11 October 1995) (available at: http://www.legco.gov.hk/yr95-96/english/lc_sitg/hansard/han1110.htm) (last visited on 28 March 2011).

Thus the Administration's legislative and financial proposals all have to be approved by the Legislative Council, in which we have no votes.⁶⁸

For the resumption of exercise of Chinese sovereignty over Hong Kong, the introductory text edited by Wang Shuwen was revised in 1997 to essentially its present version. Although the text maintained that generally the political structure established by the Basic Law is 'one of mutual check and balance and mutual coordination between the executive authorities and the legislature, the judiciary being independent', a revision was made to state that:

Judged from the relevant provisions of the Basic Law, the political structure of the HKSAR is also one in which 'the executive is dominant'. According to the provisions in the Basic Law, the Chief Executive is the head of the HKSAR and represents the Region; and he is accountable to the Central People's Government and the Region. Therefore, in the relationship between the Region and the Central People's Government, the Chief Executive plays an important role, through whom the Central People's Government establishes a relationship with the Region. First of all, this is manifested [in Art 48(2), (3), (5), (8) and (9) of the Basic Law in interacting with the Central Authorities]. Secondly, the Chief Executive, being the head of the government, [exercises the functions under Art 48(1), (4), (7) and (10)]. Thirdly, the Chief Executive plays an important role in legislative procedure . . . And finally, the Chief Executive also plays an important role in judicature . . . From the above we can see that the political structure of the HKSAR is also one in which 'the executive is dominant'. Although the political structure of the HKSAR is characterized by 'domination by the executive', it is different from the system of governor in which the Governor overrides the Executive and Legislative Councils. There is still the relationship of mutual restriction and mutual coordination between the executive authorities and the legislature. The executive authorities and the legislature are two departments that are independent of each other, and there is no question of one overriding the other. Their difference only lies in the division of functions, where none is subordinate to the other in legal status. From the relevant provisions of the Basic Law, we can see that there are check and balance as well as coordination in their relationship. Here, check and balance and coordination are mutual: On one hand, there are mutual check and balance and, on the other hand, there may be mutual coordination, or they are even blended with each other. An important characteristic of the political structure of the HKSAR is the independent judicial power. . . . Independent judicial power chiefly means that the courts adjudicate cases independently. . . . For the HKSAR, independent judicial power has another meaning, that is, the HKSAR practises an independent judicial system and has its own Court of Final Appeal whose ruling shall be final.⁶⁹

⁶⁸ See 'Reports of the Meetings of the Legislative Council of Hong Kong (Session 1995/1996)' (available at: http://www.legco.gov.hk/yr95-96/english/lc_sitg/hansard/960313fe.doc) (13 March 1996) (last visited on 28 March 2011) pp 14–15.

⁶⁹ Wang Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (2nd edn) (Beijing and Hong Kong: Law Press China and Joint Publishing (HK) Co Ltd, 2009) pp 345–350.

Xiao Weiyun also began in talks published in 1996 to contend that the consensus reached by the sub-group on political system of the Basic Law Drafting Committee 'preserved the pre-existing principle of judicial independence and the effect of executive-dominance and pointed out that the executive authorities and the legislature should mutually check each other and mutually co-ordinate with each other, with the emphasis on mutual co-ordination'. Xiao sought to clarify the preservation of the pre-existing executive-dominance of the governor with reference to three aspects: (1) the legal status and powers and functions of the Chief Executive; (2) the mutual relationship of the executive authorities and the legislature, with particular mention of the power to dissolve the legislature; and (3) the establishment of the Executive Council.⁷⁰ Xiao developed and consolidated these thoughts and in 1998 defined the political structure of the HKSAR as a new and unprecedented system not copied from other places, calling it 'the Chief Executive system'. Xiao claimed that, although the Basic Law did not expressly stipulate that the political structure be executive-led, the principle of executive dominance or leadership (*xingzhengzhudao*) was present throughout the political structure of the Basic Law and it was only by thoroughly understanding this principle may one truly grasp the substance of the political structure of the HKSAR. Xiao understood executive dominance or leadership to mean that in the relationship between the executive authorities and the legislature, the legal status of the Chief Executive was higher than that of the legislature and the powers and functions of the Chief Executive were broader and greater than those of the legislature; thus the Chief Executive played the principal part in the political life of the HKSAR. Xiao illustrated his understanding by reference to the dual identities of the Chief Executive, pointing out that the Chief Executive's identity as head of the HKSAR gave the Chief Executive a legal status above that of the executive authorities, the legislature and the judiciary, and distinguished the Chief Executive system from the American system of 'separation of the three powers' with the executive, legislative and judicial branches being co-ordinate branches of government.⁷¹

Although Yash Ghai did not subscribe to Xiao Weiyun's deduced 'Chief Executive system', he recognized that careful thought had been given to the

⁷⁰ Xiao Weiyun, *On the Hong Kong Basic Law* (Beijing: Peking University Press, 2003) pp 640–644.

⁷¹ Xiao Weiyun, 'On the Executive-Dominated Political Structure of the Hong Kong Special Administrative Region', in Priscilla Leung and Zhu Guobin (eds), *The Basic Law of the HKSAR: From Theory to Practice* (Hong Kong: Butterworths, 1998) pp 103–107. See also Xu Chongde, 'The Political Structure under the "One Country, Two Systems" Principle', *ibid*, pp 99–102; Albert Chen, "Executive-Led Government", Strong and Weak Government and "Consensus Democracy", in Johannes Chan and Lison Harris (eds), *Hong Kong's Constitutional Debates* (Hong Kong: Hong Kong Law Journal, 2005) pp 9–13; Albert Chen, 'Introduction to "One Country, Two Systems" and the Basic Law of the Hong Kong Special Administrative Region', in Albert Chen, *Exploration on Rule of Law in Hong Kong under 'One Country, Two Systems'* (Hong Kong: Chung Hwa Book Co, 2010) pp 2–57 (particularly 23–25).

design of the political system to achieve certain objectives, including ensuring overall Chinese control over policy and politics in Hong Kong, the dominance of the business and professional classes and the slowing down of political and democratic mobilization. He observed the main institutional forms for implementing these objectives to be the Chief Executive and LegCo, which would represent, to some extent, different interests. Ghai also observed:

The office of the Chief Executive is intended to be very powerful, dominating over the legislature. This is evident in the vesting of executive powers in one individual . . . It is also evident in the asymmetry in the relationship between the Chief Executive and the legislature. . . . The extent of accountability of the executive to the legislature is severely limited.⁷²

Things came to a head when the HKSAR Government began to adopt ‘executive-led government’ as a principle behind its understanding of the political structure of the HKSAR in 2004, when the debate about the political system of the HKSAR was intense. On 15 March 2004, the Chief Executive outlined a list of principles relating to HKSAR’s political development. He elaborated:

Our historical experience has shown us that ‘executive-led’ administration is the cornerstone of our success and is an important principle under the design of the Basic Law. The Chief Executive is accountable to the Central Government and is responsible for the implementation of the Basic Law. Only by adopting the ‘executive-led’ principle can we effectively comply with the Basic Law.⁷³

This position was further supported by the Second Report of the Constitutional Development Task Force of the HKSAR Government under the leadership of the Chief Executive:

‘Executive-led’ is an important principle underlying the design of the political structure in the HKSAR, and is a crucial feature for giving effect to State sovereignty. Any proposed amendments [to the Basic Law’s political system] must aim at consolidating the executive-led system headed by the Chief Executive and must not deviate from this principle of design. At present, the executive authorities and the legislature do not co-ordinate fully with each other, thus affecting the executive-led system and administrative efficiency. Therefore, any proposed amendments should aim at perfecting the executive-led system, and should not lead to a deterioration of the co-ordination

⁷² See Yash Ghai, *Hong Kong’s New Constitutional Order* (2nd edn) (Hong Kong: Hong Kong University Press, 1999) pp 287–292. Indeed Ghai made reference to the occasion in 1991 when Mainland officials sought to argue against reforming the standing committee system in LegCo, reasoning that this would ‘usurp the power of the government, transform the “executive-led” nature of the political system to “legislative-led”, and bring confrontation between the executive and the legislature’.

⁷³ Tung Chee-hwa, ‘Speech at a Seminar in Commemoration of the 14th Anniversary of the Promulgation of the Basic Law’ (15 March 2004) (available at: <http://www.info.gov.hk/gia/general/200403/15/0315229.htm>) (last visited on 28 March 2011).

problem of the current relationship between the executive authorities and the legislature.⁷⁴

At this point, Joseph Chan released an article on the concept of 'executive-led'. Having compared the writings of Xiao Weiyun, Wang Shuwen and Xu Chongde immediately after the adoption and promulgation of the Basic Law and at or immediately before the resumption of exercise of sovereignty by the People's Republic of China over Hong Kong, Chan contended that there was a change in tone in the writings, which now raised and consolidated the matter of executive-dominance into a principle of executive dominance: this was adopted by the HKSAR Government as the principle of 'executive-led government, underlying the design of the political structure in the HKSAR'. Chan suggested that the change in tone probably followed from the Central Authorities' objection to Governor Patten's political reforms and concerns over the developments of the pan-democrats in LegCo after 1997. He warned against adhering to 'executive-led' as a principle underlying the design of the political structure of the Basic Law, as that seemed to have been put forward to suit political expediency.⁷⁵

With a view to exploring Mainland Chinese understanding of 'parliamentary system' and 'separation of the three powers' (including the sayings of Deng Xiaoping), Joseph Chan produced supplementary articles which first clarified these concepts in a study of political systems. 'Parliamentary system' refers to a system of government where the legislature or parliament has the power to form and dismiss governments. 'Separation of powers', as distinct from the parliamentary system, emphasizes separation of the executive and the legislature, each having its own method of formation. The presidential system is a specific model of government based on the notion of separation of powers, where the president (chief executive) is returned by universal suffrage, would not be dismissed by loss of confidence of the parliament, and has the power to appoint ministers without

⁷⁴ Constitutional Development Task Force, *The Second Report of the Constitutional Report Task Force: Issues of Principle in the Basic Law Relating to Constitutional Development* (April 2004) (available at: <http://www.cmab.gov.hk/cd/eng/report2/pdf/secondreport-e.pdf>) (last visited on 28 March 2011), paragraphs 3.05, 3.25, 5.11 (note 6), 5.12.

⁷⁵ Joseph Chan, 'Interpretation of the Basic Law: Change of Tone by Guardians of the Basic Law, Executive-led Not Original Intention of Basic Law', *Ming Pao* (28 June 2004) (available at: <http://www.article23.org.hk/newsupdate/jun04/0628c2.htm>) (last visited on 28 March 2011). Johannes Chan SC supported Joseph Chan in a subsequent article. The Central Authorities' preference for 'executive-led government' as 'the principal philosophy of governance' was due to their concern for stability and prosperity. It was thought that the former could be achieved by strong local government and weak political opposition and that the latter could be maintained through consolidating the pre-existing capitalist system with its privileged business sector. A legislature fragmented by squabbles of many political parties conformed better with 'executive-led government'; see Johannes Chan, 'Asymmetry in the Face of Heavily Disproportionate Power Relations: Hong Kong', in Marc Weller and Katherine Nobbs (eds), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts* (Philadelphia and Oxford: University of Pennsylvania Press, 2010) pp 121–147 at pp 134–135.

the consent of parliament. Chan followed this with an analysis of the provisions of the Basic Law on the political structure of the HKSAR, particularly the relationship between the executive and the legislature, leading to the observation that the political structure of the HKSAR is clearly inclined towards the presidential system based on the separation of powers. This is because the Chief Executive (and the principal officials) and LegCo are selected or formed through mutually independent means, with mutual checks and balances in matters of shared or overlapping competence. The Chief Executive's dual capacities as head of the HKSAR and the head of the executive authorities of the HKSAR are no different from those of most presidents in a presidential system based on the separation of powers.⁷⁶

This drew a strong response in August 2004 from Xiao Weiyun, who defended his ground of making the point about 'executive-dominance' well before the resumption of exercise of Chinese sovereignty over Hong Kong, relying on an article he wrote in the *People's Daily (Overseas Edition)* of 9 April 1992 and talks on the Basic Law he gave in 1996. Xiao argued that the Basic Law contained more than twenty provisions giving effect to 'executive-dominance', and he cited nine of them. Xiao maintained that the purpose and original legislative intention in the drafting process of the Basic Law had been to promote 'executive-dominance'; 'it was not the case that there was no such content before 1997 and I added it after return of Hong Kong in 1997'.⁷⁷

⁷⁶ Joseph Chan, 'Hong Kong's Political Structure of Separation of Powers: Governance Efficiency Difficult to Improve with No Universal Suffrage and Refusal to Promote Partisan Politics', *Ming Pao* (29 June 2004) (available at: <http://www.article23.org.hk/newsupdate/jun04/0628c2.htm>) (last visited on 28 March 2011). Joseph Chan answered the reliance of various provisions of the Basic Law by the HKSAR Government in support of its adoption of 'executive-led'. The provision that members of LegCo may be members of the Executive Council does not deviate substantially from the concept of separation of powers since the Executive Council is a body assisting the Chief Executive in his policy making, principal officials may not be members of LegCo and those members of LegCo who are members of the Executive Council are appointed without portfolios and do not exercise executive powers. As to the specific powers of the Chief Executive in the introduction of public bills and in restriction private member's bills in the legislative process in Article 74 of the Basic Law, this is a negative mechanism to strengthen the governance of the Chief Executive, in contrast to the positive mechanism of including members of LegCo in the Executive Council. But these mechanisms do not alter the basic model of separation of powers and mutual check and balance. Rather, due to the separation of powers, with members of LegCo of persuasions different from that of the Chief Executive and his team returned, the executive authorities would have difficulties in fully developing the effect of executive-led or executive-dominant government. This necessitates lobbying and consensus building on policy initiatives with members of LegCo.

⁷⁷ Xiao Weiyun, 'Executive-dominance Is an Important Legislative Intent of the Political System of the Basic Law—In Answer to Mr Chan Cho Wai', *Ming Pao* (11 August 2004) p A33; Xiao Weiyun, 'Twenty Odd Places in Basic Law Reflects Executive Dominance', *Ming Pao* (12 August 2004) p 31.

However, Xiao Weiyun did not use the expression 'executive-dominance' in his 1992 article.⁷⁸ The article, which addressed the British-inspired political reforms in 1992, emphasized convergence with the political structure under the Basic Law. It referred to the consensus reached by the sub-group on political structure in 1986—that 'the judiciary shall remain independent, while the executive authorities and the legislature shall check and balance each other while working in mutual co-operation'—as the principle for drafting the provisions of the Basic Law on the mutual relationships between the executive authorities, the legislature and the judiciary. The article also made the point that the mutual relationships were in accordance with the spirit of the Sino-British Joint Declaration on the Question of Hong Kong, reflected the characteristics of the HKSAR and were adopted after making reference to some systems abroad. Xiao added:

As to the powers and functions of the executive authorities, the legislature and the judiciary, they were confirmed in accordance with the spirit of the Sino-British Joint Declaration, the particular nature of each of the institutions and making reference to the existing political structure of Hong Kong. An effort was made for each of the three institutions to have its appropriate functions and powers, to have reasonable division of labour, to implement check and balance and mutual co-operation, to be able to run efficiently and smoothly, without giving one of the three institutions excessive power.

Legal scholars associated with the University of Hong Kong sustained the debate over the purported emergence of 'executive-led' as a principle of design underlying the political system of the Basic Law. Peter Wesley-Smith, Johannes Chan and Lison Harris viewed the wide powers of the Chief Executive to be mainly those that a chief executive in most political systems would be expected to enjoy. However, those powers do not necessarily support the conclusion that the system is 'executive-led'. The relationship between the Chief Executive and LegCo consists of a complex of relations through an elaborate set of provisions designed to create a system of checks and balances. Such a relationship 'cannot easily be reduced to a simple descriptive slogan'. Echoing the Chief Secretary's 1996 statement, Wesley-Smith, Chan and Harris considered that while the executive authorities were empowered to formulate and implement policies—and to this extent the system expected the executive to lead—this did not and could not mean the executive authorities prevailed over the legislature. Rather, the balance that the mechanisms of the Basic Law had achieved, reinforced by the different selection processes for the Chief Executive and LegCo and the concomitant possibility of lack of determination to co-operate in the interests of good governance, suggested that 'executive-led' would not be an apt expression.⁷⁹

⁷⁸ Reprinted in Xiao Weiyun, *On the Hong Kong Basic Law* (Beijing: Peking University Press, 2003) pp 209–211.

⁷⁹ See Peter Wesley-Smith, 'The Hong Kong Constitutional System: The Separation of Powers, Executive-Led Government and Political Accountability', in Johannes Chan and Lison Harris (eds), *Hong Kong's Constitutional Debates* (Hong Kong: Hong Kong

The Hong Kong academic analyses were apparently not accepted. The NPCSC, in its Decision of 26 April 2004 on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in the Year 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008,⁸⁰ stated that changes to the political system of the HKSAR 'shall conform to principles such as . . . being conducive to the effective operation of the executive-led system . . .'. The HKSAR Government followed suit, reiterating in its July 2007 Green Paper on Constitutional Development that the principle of implementing an executive-led system was a principle underlying the political structure of the HKSAR.⁸¹ Giving an explanation on the draft Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage at the Thirty-first Session of the Standing Committee of the Tenth NPC on 26 December 2007, Qiao Xiaoyang, the Deputy Secretary-General of the NPCSC, stated that:

The Hong Kong Basic Law provides an executive-led political structure for the Hong Kong Special Administrative Region. By implementing universal suffrage for the Chief Executive first, this will be conducive to preservation of the executive-led system and the better management of executive-legislative relations.⁸²

It was only later on that individual Mainland legal academics attempted to underscore certain subtleties in the political system under the Basic Law. Hu Jinguang and Zhu Shihai pointed out that a political system with 'executive-led' features

Law Journal, 2005) pp 3–7; and Johannes Chan and Lison Harris, 'The Constitutional Journey: The Way Forward', in *ibid*, pp 143–169.

⁸⁰ Decision of the Standing Committee of National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in the Year 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008 (adopted by the Standing Committee of the Tenth National People's Congress at its Ninth Session on 26 April 2004) (Special Supplement No 5 to Gazette Extraordinary No 8/2004), E5–E11 (available at: <http://www.cmab.gov.hk/cd/eng/basic/pdf/es5200408081.pdf>) (last visited on 28 March 2011).

⁸¹ See *Green Paper on Constitutional Development* (July 2007) (available at: <http://www.cmab.gov.hk/doc/issues/GPCD-e.pdf>) (last visited on 28 March 2011) at note 55.

⁸² See Qiao Xiaoyang, The Explanations on the Draft Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage (at the Thirty-first Session of the Standing Committee of the Tenth National People's Congress on 26 December 2007) (available at: <http://www.cmab.gov.hk/cd/eng/basic/pdf/explanation.pdf>) (last visited on 28 March 2011).

was not anathema to 'separation of powers' involving division and checking of powers. Both 'executive-led' and 'separation of powers' are but incomplete descriptions of the political system of the HKSAR. A more appropriate description was that the political system of the HKSAR was an 'executive-led' system on the foundation of 'separation of powers'. It was a misunderstanding to say that the Chief Executive's powers were superior to those of the Legislature and the Judiciary. The powers of the Chief Executive and the powers of LegCo were both conferred by the Central Authorities and there was no hierarchical order between them; they are mutually independent departments. The powers of the Chief Executive are not superior to the powers of the Judiciary. Rather, the design of the system for judicial appointments and removals took account of the classic American 'separation of powers' approach.⁸³

The Central Authorities made known their attitude and preference for the way the political system in the HKSAR should be run again. On 7 July 2008, Vice President Xi Jinping, whose portfolio included the administration of Hong Kong and Macao affairs, addressed a meeting of the principal leaders of the executive authorities, the legislature and the judiciary, urging that there should be solidarity and sincere co-operation within the governance team [團結，管治團隊要精誠合作] and that there should be mutual understanding and support among the Executive, the Legislature and the Judiciary [行政、立法、司法機構互相理解，互相支持].⁸⁴ The Hong Kong Bar Association reacted with a press statement making two points: (1) The Judiciary in Hong Kong should not be regarded as part of the governance team; and (2) The Judiciary in Hong Kong has always been, and under the Basic Law shall remain, separate and independent from the Executive and the Legislature. It must be truly independent in order to fulfil its role of ensuring that the Government is acting in accordance with the law and discharge its function of ensuring that legislation passed by the Legislature is consistent with the Basic Law and the international obligations of the HKSAR.⁸⁵

Since then, the Central Authorities have adopted the slightly oblique approach of praising aspects of the administration of the political system of the Macao Special Administrative Region, including the implementation of the executive-led system according to law and the correct handling of the relationships between the Executive, Legislature and the Judiciary, while safeguarding

⁸³ See Hu Jinguang and Zhu Shihai, 'Separation of powers or the executive-led system—On the characteristics of the Hong Kong SAR polity' (2010) *Journal of the Henan Administrative Institute of Politics and Law*, Issue 2, 38–42.

⁸⁴ See the Xinhua News Agency report, 'Xi Jinping Attended HKSAR Government Welcome Banquet and Gave Address' (7 July 2008) (available at: http://www.gov.cn/ldhd/2008-07/07/content_1038383.htm) (last visited on 28 March 2011); and the more specific *Ming Pao* report, 'Xi Jinping urged Tsang to Understand the Situation and Appeal to Reason for High Efficiency in Administration' (7 July 2008) (available at: <http://news.sina.com/hk/mingpao/103-101-101-101/2008-07-07/15183047873.html>) (last visited on 28 March 2011).

⁸⁵ See 'Press Statement of the Hong Kong Bar Association' (9 July 2008) (available at: <http://www.hkba.org/whatsnew/press-release/20080709.pdf>) (last visited on 28 March 2011).

the authority of the Chief Executive.⁸⁶ Such comments have prompted serious questioning in LegCo over, for example, ‘whether [the HKSAR Government] has plans to cause the executive authorities, the legislature and the judiciary of Hong Kong to move towards the direction of understanding, supporting and complementing one another’ and whether ‘it is prepared to maintain the system of checks and balances among the executive authorities, the legislature and the judiciary’. The HKSAR government’s reply has been a mantra-like recitation that ‘under the Basic Law, the relationship between the executive authorities and the legislature is one of mutual regulation and coordination, the courts of Hong Kong exercise judicial power independently, free from any interference’.⁸⁷

The inter-connected political system of the Macao Special Administrative Region has deep roots. When Ji Pengfei, chairman of the drafting committee of the Basic Law of the Macao Special Administrative Region, addressed the First Session of the Eighth National People’s Congress on 20 March 1993 on the Basic Law of the Macao SAR (Draft), he stated that the principle the committee adopted was that ‘the executive authorities, the legislature and the judiciary should co-ordinate their activities as well as regulate each other [行政機關、立法機關和司法機關之間既互相配合又互相制衡的原則]’.⁸⁸ Professor Lian Xisheng, a legal expert who had assisted in the drafting of the Basic Law of the HKSAR, suggested in March 2010 that the order of ‘co-ordination’ and ‘regulation’ in Ji’s address on the Basic Law of the Macao SAR (Draft), which was different from the way Ji used those expressions in a similar but earlier address in relation to the Basic Law of the HKSAR (Draft), may mean that one should stress ‘co-ordination’ first and ‘regulation’ second in understanding the relationship between the executive authorities and the legislature, so that ‘regulation’ is not the goal and the practice of ‘regulation’ is to ensure the effective operation of the ‘executive-led’ system and realize its values. Lian thus considered that this subtle change contributed to subsequent Mainland academic opinion favouring mutual co-ordination.⁸⁹

Qiao Xiaoyang provided the following justification for the ‘executive-led’ political system of the Macao Special Administrative Region in July 2010:

⁸⁶ See Wu Bangguo, ‘Speech at the Seminar Commemorating the Tenth Anniversary of the Implementation of the Basic Law of the Macao Special Administrative Region of the People’s Republic of China’ (4 December 2009) (available at: http://www.npc.gov.cn/npc/wbgwyz/jhwz/2009-12/04/content_1528950.htm) (last visited on 28 March 2011).

⁸⁷ See ‘LCQ2: The Relationship among the Executive Authorities, the Legislature and the Judiciary’ (27 January 2010) (available at: <http://www.info.gov.hk/gia/general/201001/27/P201001270155.htm>) (last visited on 28 March 2011).

⁸⁸ Ji Pengfei, ‘Explanations on “The Basic Law of the Macao Special Administrative Region of the People’s Republic of China (Draft)” and Its Related Documents (Addressing the First Session of the Eighth National People’s Congress on March 20, 1993)’ (1993) *Gazette of the Standing Committee of the National People’s Congress* 229–235.

⁸⁹ See Lian Xisheng, ‘Cool Thoughts on “Executive-led”’ (31 March 2010) (available at: http://www.basiclaw.org.mo/content.php?artical_id=808) (last visited on 28 March 2011).

Because the high degree of autonomy in Macao was authorized by the Central Authorities, there should be an institution in the political system of the special administrative region that is in a position to be accountable to the Central Authorities for the implementation of the Basic Law and the exercise of the high degree of autonomy. As the judiciary implements judicial independence, it cannot be accountable to the Central Authorities. As the legislature is formed by members from different sectors and strata of society and represents different interests, it too cannot be accountable to the Central Authorities. Accordingly, the institution that is to be accountable to the Central Authorities can only be the Chief Executive. Since the Chief Executive is to be accountable to the Central Authorities, he must be authorized with substantive power, as illustrated in the provisions of the Basic Law on the functions and powers of the Chief Executive.

Regarding the handling of the relationship between the institutions of power, Qiao referred to Ji Pengfei's principle of mutual co-ordination and mutual regulation that infused the provisions of the Basic Law specifying the functions and powers of the Chief Executive, the executive authorities, the legislature and the judiciary. Qiao therefore stressed that the correct approach to understand the relationship of the Executive, Legislature and the Judiciary was to proceed from the provisions of the Basic Law, and not simply to start from the concept of 'separation of the three powers'. Qiao took care to indicate that the mention of co-ordination is not to negate judicial independence. The maintenance of judicial independence under the Basic Law, according to Qiao, never implies that there cannot be co-ordination. 'When we speak of coordination, we must also speak of regulation, practising regulation according to the Basic Law. Coordination is implementation of the Basic Law, regulation is also implementation of the Basic Law. Both are equally important'.⁹⁰

Although Chief Justice Andrew Li has made clear that '[the] arrangement of each jurisdiction reflects its own history and its own circumstances. The arrangement for one jurisdiction may not be appropriate for another',⁹¹ the similarity in the wording of the text of the Basic Law of the HKSAR to that of the Basic Law of the Macao Special Administrative Region is liable to lead to greater coalescence in thinking on the part of the Central Authorities, as Qiao Xiaoyang's speech in Macao in July 2010 demonstrated.

Sir Anthony Mason has recognized that the 'text and structure' of the Basic Law of the HKSAR's system of government necessarily indicates a departure from the 'Westminster model', a matter that prevails over the preservation of the

⁹⁰ Qiao Xiaoyang, 'Studying the Basic Law, Upgrading the Quality of Civil Servants: A Speech at the Graduation Ceremony of the "Advanced Course of the Basic Law of the MSAR"' (2010) 6 *Academic Journal of One Country Two Systems* 1–4 at 4. See also Zhang Xiaoming, 'Why One Says Macao Is Not a Political System Implementing "Separation of the Three Powers": A Speech at the Graduation Ceremony of the "Advanced Course of the Basic Law of the MSAR"' (2011) 10 *Academic Journal of One Country Two Systems* 1–5.

⁹¹ Andrew Li, 'CJ's speech at Ceremonial Opening of the Legal Year 2010' (11 January 2010) (available at: <http://www.info.gov.hk/gia/general/201001/11/P201001110174.htm>) (last visited on 28 March 2011).

common law.⁹² The critical question is to identify those ‘clear dispositions made by the text and structure’ of the Basic Law and then resist re-constructing them according to the common law. It may therefore be surmised that Hartmann J, when he was speaking of Hong Kong’s ‘Westminster model’ alongside its ‘executive-led government’, might be referring to the dependence of a democratic society on a free and independent judiciary.⁹³ Before an examination of the content of ‘independent judicial power’ generally and under the Basic Law, the related and sustaining concept of ‘separation of powers’, the ways it has troubled constitutional and public law scholars, and the contexts in which these three words have been understood by judges and are applicable to proper understanding of the Basic Law are now looked into.

3.4 Separation of Powers

The position taken in Hong Kong of the political system of the HKSAR under the Basic Law has all along been the incorporation or implication of the notion of ‘separation of powers’. Yash Ghai has stated that ‘[the] design of the institutions and the relationship among them is based on the principle of the separation of powers’:

There is a clear and sharp separation between the executive authorities and the legislature . . . The separation (which owes more to the presidential than the parliamentary system) is reflected in the method for their appointment or election, in their personnel, and in their relationship; it is qualified by the possibility of some members of the legislature being appointed to the Executive Council . . . Moreover, different interests are likely to be pre-dominant in the executive and the legislature, with somewhat untidy rules for the coordination of these interests or the resolution of conflicts that appear to be endemic (so that the separation of powers may be even more evident in practice than in the provisions of the Basic Law and despite attempts to establish the dominance of the executive). The separation of the judiciary from the executive and the legislature (and its independence) is secured through various devices . . . The doctrine of separation of powers can accommodate many configurations of the relationship between the institutions. *Therefore the interesting question is not whether there is a separation of powers, but the balance and the relationship between the institutions.* The separation of powers is supplemented by what is sometimes seen as its negation—checks and balances. These are particularly evident in Hong Kong, resulting in somewhat contradictory provisions; while a key function of the legislature is to supervise the executive, the Chief Executive has power to dissolve the legislature, and, in the legislative area, the basic responsibility for the initiation of legislation lies with the executive although its enactment requires the consent

⁹² Anthony Mason, ‘The Role of the Common Law in Hong Kong’, in Jessica Young and Rebecca Lee (eds), *The Common Law Lecture Series 2005* (Hong Kong: Faculty of Law, University of Hong Kong, 2006) pp 1–25 at p 25.

⁹³ See Harry Woolf, *The Pursuit of Justice* (Oxford: Oxford University Press, 2008) p 150.

of the Legislative Council with a veto in the Chief Executive.⁹⁴ (emphasis supplied)

The Court of Final Appeal has pronounced that the Basic Law enshrines the principle that there must be a separation of powers among the Executive, the Legislature and the Judiciary.⁹⁵ The more probing question concerns the appropriate conception of 'separation of powers' that is being practised.

The principle of 'separation of powers' has been said to be 'notoriously difficult to define with any precision'.⁹⁶ English scholars have not found this principle fundamental in explaining the English constitutional set-up, bearing in mind that the embedding of government ministers in the majority party or party-coalition in parliament and other features of the monarchical state, such as the principle of parliamentary sovereignty,⁹⁷ the Lord Chancellor⁹⁸ and the judicial business of the House of Lords,⁹⁹ have made it difficult to maintain the claim that there were separate institutions of separate personnel exercising separated functions and powers of state.¹⁰⁰ Nevertheless, given the English

⁹⁴ See Yash Ghai, *Hong Kong's New Constitutional Order* (2nd edn) (Hong Kong: Hong Kong University Press, 1999) pp 262–264.

⁹⁵ *Lau Cheong & Anor v HKSAR* (2002) 5 HKCFAR 415, CFA at [101].

⁹⁶ Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge: Cambridge University Press, 2011) p 3. John Allison made the stronger point in his review of the English Constitution that the traditional English view rejected the utility of the principle of 'separation of powers'; see John Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge: Cambridge University Press, 2007) p 83.

⁹⁷ Parliamentary sovereignty carries with it the ability of the legislature changing the distinct and separate institutions of government by law.

⁹⁸ The Lord Chancellor had for a considerable period of British history been a member of the Executive cabinet, the Speaker of the Legislative House of Lords, and the head of the Judiciary.

⁹⁹ Before the establishment and coming into operation of the United Kingdom Supreme Court in 2009, the final court of appeal of the United Kingdom could be described as a committee of the second chamber of the United Kingdom legislature. This point has been utilized from time to time to chide Hong Kong common law trained lawyers with respect to their objections of the NPCSC's power of interpretation of the Basic Law; see Wang Zhenmin, *Central and SAR Relationship: An Analysis of the Structure of the Rule of Law* (Beijing: Tsinghua University Press, 2002) p 347; Wang Zhenmin, 'From the Judicial Committee of the British Privy Council to the Standing Committee of the Chinese National People's Congress—An Evaluation of the Legal Interpretative System after the Handover' (2007) 37 *Hong Kong Law Journal* 605–618 at 610.

¹⁰⁰ Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge: Cambridge University Press, 2011) p 4; Andrew Le Sueur, 'Constitutional Fundamentals', in David Feldman (ed), *English Public Law* (2nd edn) (Oxford: Oxford University Press, 2009) Ch 1, paragraph 1.13. Masterman also surveyed the more recent literature, noting the 'casual' approach of commentators of the principle as a theoretical underpinning of the British system of government; see Masterman (above) at pp 9–10.

heritage of the HKSAR's common law based legal system, it is useful to explore this principle as used in the English context.

Although the principle of 'separation of powers' has been of disputed relevance in British academia,¹⁰¹ British judges have constantly been heralding the principle of separation of powers as a foundational principle of the British constitution at least in exported form. In *Hinds v R*,¹⁰² Lord Diplock, writing for the majority, stressed 'the basic principle of separation of legislative, executive and judicial powers that is implicit in a constitution on the Westminster model' so as to apply the principle to prohibit the exercise of legislative power by the Jamaican Parliament to transfer sentencing power from the courts to an executive body.¹⁰³ *Hinds v R* was cited before Hartmann J in *Yau Kwong Man v Secretary for Security* and quoted at length in his judgment, supporting his view that the Basic Law also espouses a principle of separation of executive, legislative and judicial powers.¹⁰⁴ *Hinds v R* was cited before the Court of Final Appeal in the final adjudication of *Lau Cheong* as to what the legislature is constitutionally entitled to do in the making of laws under the Basic Law, with its enshrined principle of 'separation of powers'.¹⁰⁵ The analysis in *Hinds v R* was examined in *Director of Public Prosecutions of Jamaica v Mollison* by the Privy Council, which, in an unanimous opinion delivered by Lord Bingham of Cornhill, affirmed that this case of then twenty-five years' vintage gave effect to the 'very important and salutary principle [of] the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other . . . Such separation, based on the rule of law, was recently described by Lord Steyn as "a characteristic feature of democracies"'.¹⁰⁶ Later, Lord Steyn gave his own confirmation of the principle in *State of Mauritius v Khoiratty* in these terms:

The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the

¹⁰¹ Both Roger Masterman and John Allison have referred to leading texts on the English constitution and the leading academic commentators on the subject, reaching the view that 'separation of powers' was an 'ambiguous presence or absence'; see Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge: Cambridge University Press, 2011) pp 9–20; John Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge: Cambridge University Press, 2007) pp 78–87, 100–101.

¹⁰² *Hinds v R* [1977] AC 195, PC. In earlier cases dealing with the Constitution of Ceylon, the Privy Council had sought from constitutional design to maintain a division between the Executive and the Judiciary to secure the independence of the judges and their exercise of judicial power; see *Bribery Commissioner v Ranasinghe* [1965] AC 172, PC; and *Liyana v R* [1967] AC 259, PC.

¹⁰³ *Hinds v R* [1977] AC 195, PC, 225G–226D. The minority in the Privy Council, Viscount Dilhorne and Lord Fraser of Tullybelton, acknowledged at 238H that the written terms of the Jamaican Constitution gave effect to the principle that 'there should be a separation of powers between the three organs of government'.

¹⁰⁴ See *Yau Kwong Man v Secretary for Security* [2002] 3 HKC 457, CFI at [38].

¹⁰⁵ See *Lau Cheong & Anor v HKSAR* (2002) 5 HKCFAR 415, CFA at [101].

¹⁰⁶ See *Director of Public Prosecutions of Jamaica v Mollison* [2003] 2 AC 411, PC at [13].

principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive and the judiciary is necessary.¹⁰⁷

British judges have continued to highlight the principle of 'separation of powers' as part of the foundation of the British system of government. Lord Scarman sought to put a stop to a controversial construction of a statute by warning that 'the constitution's separation of powers, or more accurately functions, must be observed if judicial independence is not to be put at risk. For, if people and Parliament come to think that the judicial power is to be confined by nothing other than the judge's sense of what is right . . . confidence in the judicial system will be replaced by the fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of the judges'.¹⁰⁸ Sir John Donaldson MR referred to the 'constitutional convention of the highest importance that the legislature and the judicature are separate and independent of one another', so that there would not be trespassing by one on the province of the other.¹⁰⁹ Lord Steyn relied on, *inter alia*, *Hinds v R* to indicate that the exercise by the Secretary of State of the Home Department of a statutory power to determine the minimum term of a life prisoner was 'carrying out, contrary to the constitutional principle of separation of powers, a classic judicial function'.¹¹⁰ Lord Hoffmann applied the 'separation of powers' in his explanation for the courts deferring to decision making by the executive or the legislature.¹¹¹ A comprehensive description was given by Lord Templeman: 'Parliament makes the law, the executive carry the law into effect and the judiciary enforce the law'.¹¹²

Yet, there had been powerful dissents. Lord Wilberforce, with whom Lord Cooke of Thorndon agreed, spoke after his retirement from the Appellate Committee of the House of Lords on the reform of the House, urging the Royal Commission concerned with the topic 'not to be confused or led astray by references to the Separation of Powers (SOP). I am sure that they appreciate that SOP is not a legal norm, nor a constitutional principle which governs

¹⁰⁷ See *State of Mauritius v Khoiratty* [2007] 1 AC 80, PC at [12] (endorsed by Lord Rodger of Earlsferry and Lord Mance in their concurring opinions in [29] and [36] respectively). See also Lord Steyn's observations of the Constitution of Mauritius in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, PC at [14].

¹⁰⁸ See *Dupont Steels Ltd v Sirs* [1980] 1 WLR 142, HL at 169C–D. Hartmann J, similarly, stated the principle of 'separation of powers' to be that 'the primary functions of law-making, law-executing and law-adjudging are to be distinguished from each other'; see *Lau Kwok Fai Bernard & Ors v Secretary for Justice* (unreported, 10 June 2003, HCAL 177, 180/2003), CFI at [17].

¹⁰⁹ See *R v Her Majesty's Treasury ex p Smedley* [1985] 1 All ER 589, CA (Eng) at 593B–C.

¹¹⁰ See *R v Secretary of State of the Home Department ex p Venables* [1998] AC 407, HL at 526C–G.

¹¹¹ See *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185, HL at [75]–[76].

¹¹² See *M v Home Office* [1994] 1 AC 377, HL at 395B–C.

the way in which we should conduct our affairs. It has never been a governing principle in [England]'.¹¹³

Since the establishment of the HKSAR, its courts have recognized and enforced a principle of 'separation of powers'. This enforcement addressed concerns that had mainly been judicial. First and foremost, the Court of Final Appeal held that it followed from the doctrine of separation of powers that the interpretation of laws is a matter for the courts. And that is said to be a basic principle of the common law that is preserved and maintained in Hong Kong by the Basic Law.¹¹⁴ Hartmann J accepted the proposition that the principle of 'separation of powers' would be directly offended if the judiciary, having embarked upon the hearing and determination of a case, had its jurisdiction over the related matter undermined or effectively removed, say by legislation, so that the court was prevented from making a determination of a matter before it according to the law applicable at the time the cause arose.¹¹⁵ Hartmann J effectively enforced this proposition subsequently, holding that legislation granting the Chief Executive the power to set minimum terms to be served by prisoners detained at 'executive discretion' was invalid; the legislature cannot place judicial power in the hands of the executive.¹¹⁶ The Court of Final Appeal has twice declared to be invalid legislative provisions prescribing a lower court judgment to be final as disproportionate restrictions of access to its constitutional power of final adjudication.¹¹⁷

Conscious of the roles that judges have not been appointed to perform, the Court of Final Appeal has indicated its awareness that, to conform with the doctrine of separation of powers, it would mould the doctrine of legitimate expectation to avoid any dislocation of the constitutional arrangements by which executive policy is left to the executive and decision making is left to the officers in whom it is reposed by statute.¹¹⁸ The Court of Appeal has accepted that judicial interference with the prosecutorial decision-making process is generally restricted out of respect of the principles of the separation of powers and the rule of law.¹¹⁹ Hartmann J made the point simply that:

¹¹³ Quoted in Robin Cooke, 'The Law Lords: An Endangered Heritage' (2003) 119 *Law Quarterly Review* 49–67 at 58.

¹¹⁴ *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, CFA at 223F–H. See also *Leung TC William Roy v Secretary for Justice* [2005] 3 HKC 77, [2005] 3 HKLRD 657, CFI.

¹¹⁵ *Lau Kwok Fai Bernard & Ors v Secretary for Justice* (unreported, 10 June 2003, HCAL 177, 180/2003), CFI at [120].

¹¹⁶ *Yau Kwong Man v Secretary for Security* [2002] 3 HKC 457, CFI (following *Hinds v R* [1977] AC 195, PC).

¹¹⁷ *Solicitor v Law Society of Hong Kong (Secretary for Justice, intervenor)* (2003) 6 HKCFAR 570, CFA; *Mok Charles Peter v Tam Wai Ho & Anor (Secretary for Justice, intervenor)* (2010) 13 HKCFAR 762, CFA.

¹¹⁸ *Ng Siu Tung & Ors v Director of Immigration* (2002) 5 HKCFAR 1, CFA.

¹¹⁹ *Re C (a bankrupt)* [2006] 4 HKC 582, CA. See also *RV v Director of Immigration & Anor* [2008] 2 HKC 209, [2008] 4 HKLRD 529, CFI.

[judges] are not appointed to administer Hong Kong. . . . Boundaries, therefore, exists between the executive, the legislature and the judiciary and it is . . . imperative that in cases of this kind which excite public interest the courts must be careful not to overstep those boundaries.¹²⁰

Judges have respected the legislature's control over its own affairs; alleged irregularities in the conduct of parliamentary business are a matter for the legislature, rather than the courts, the occasion of judicial intervention being one where the interpretation of the Basic Law is called for.¹²¹ On the other hand, the courts can rule on the extent of legislative power.¹²²

The above jurisprudence appears to be sustained by academic doctrine enunciated locally on the principle of 'separation of powers'. Peter Wesley-Smith explained that:

[this] means that no person or agency in the government system may legitimately exercise more than one of the three functions (legislative, executive, and judicial) of government. Thus, administrators cannot make primary legislation or act as judges, legislators cannot exercise executive or judicial powers, and judges cannot legislate or serve the executive branch. There are exceptions: for example, administrators routinely make subsidiary legislation, under powers delegated by the Legislative Council. But any serious mixing of functions or personnel between the branches of government is improper unless clearly authorized by the Basic Law. . . . Before 1997 [separation of powers] meant little more than the independence of the judiciary; now it entails the independence of each agency of government except to the extent carefully delineated in the codified constitution which is the Basic Law.¹²³

Such a conception of the principle of 'separation of powers' appears 'strict'.¹²⁴ Its problems with the realities of government business are, however, readily

¹²⁰ *Society for Protection of the Harbour Ltd v Chief Executive in Council & Ors* [2003] 4 HKC 1, [2004] 2 HKLRD 902, CFI. See also *Raza & Ors v Chief Executive in Council & Ors* [2005] 3 HKLRD 561, CFI.

¹²¹ *Cheng Kar Shun & Anor v The Honourable Li Fung Ying & Ors (Secretary for Justice, Interested Party)* [2009] 4 HKC 204, CFI; *Leung Kwok Hung v President of the Legislative Council & Anor* [2007] 1 HKLRD 387, CFI (leave to appeal out of time refused in [2008] 2 HKLRD 18); *Cheung Tak Wing v Legislative Council* (unreported, 26 May 2010, CACV 61/2010), CA; *Leung Kwok Hung v President of the Legislative Council of the HKSAR* [2012] 4 HKC 83, CFI.

¹²² See *Secretary for Justice v Lau Kwok Fai Bernard & Anor* (2005) 8 HKCFAR 304, where the Court of Final Appeal opined that the separation of the legislative from the executive power, effected by the Basic Law, would militate against any suggested basis for implying a contractual term in civil service contracts against introducing legislation to reduce pay.

¹²³ See Peter Wesley-Smith, 'The Hong Kong Constitutional System: The Separation of Powers, Executive-led Government and Political Accountability', in Johannes Chan and Lison Harris (eds), *Hong Kong's Constitutional Debates* (Hong Kong: Hong Kong Law Journal, 2005) pp 3-7.

¹²⁴ cf Maurice Vile, *Constitutionalism and the Separation of Powers* (2nd edn) (Indianapolis: Liberty Fund, 1998) p 14, proposing a 'pure doctrine' of separation of powers, with

perceived. The ‘strict conception’ seems to suppose institutions with distinct and non-overlapping governmental functions, a matter easily thought aloud than being put into implementation. This supposition also tends to negate institutional checking. A more nuanced approach seems appropriate to meet the practical needs of government set by the contours of the Basic Law.

Some jurisdictions have taken ‘separation of powers’ seriously in constitutional adjudication. Peter Wesley-Smith, who hailed from Australia, commended that the logic of ‘separation of powers’ that has appealed to American and Australian judges may well prove attractive to their counterparts in the HKSAR. Constitutional law is ‘a fertile field of surprises’; ‘those who consult our putative constitution without an appreciation of the “precedents of other common law jurisdictions”, to which SAR courts are expressly permitted to refer . . . may yet be surprised by what the judges make of the Basic Law’.¹²⁵ For example, in Australia, Chief Justice Dixon expressed the proposition that:

. . . a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution, been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental functions unless such powers are properly incidental to the performance of it of its own appropriate functions.¹²⁶

Later on, Wesley-Smith sounded slightly more reserved:

[the] Basic Law establishes the categories of legislative, executive, and judicial, and the courts must make something of them, but [the Australian, Irish and United States judges] have not found or invented foolproof definitions which significantly reduce the role of their own personal preferences. The ends may largely determine the means.¹²⁷

Some have sought to apply the strict logic of ‘separation of powers’, particularly the proposition that judicial power ought to be exercised by courts of judicature,¹²⁸ with a view to invalidate statutory tribunals and boards, many of which

each branch of government ‘confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches’ and the personnel of each of branches kept separate and distinct.

¹²⁵ See Peter Wesley-Smith, ‘The Separation of Powers’, in Peter Wesley-Smith (ed), *Hong Kong’s Basic Law: Problems and Prospects* (Hong Kong: Faculty of Law, University of Hong Kong, 1990) pp 71–84.

¹²⁶ See *R v Kirby ex p Boilermaker’s Society of Australia* (1956) 94 CLR 254, HC Aust at 279 (which Hartmann J endorsed in *Lau Kwok Fai Bernard & Ors v Secretary for Justice* (unreported, 10 June 2003, HCAL 177, 180/2003), CFI at [19] as what followed from the principle of ‘separation of powers’),

¹²⁷ Peter Wesley-Smith, ‘Executive Orders and the Basic Law’, in Alice Lee (ed), *Law Lectures for Practitioners 1998* (Hong Kong: Hong Kong Law Journal, 1998) pp 187–209.

¹²⁸ For the relevant doctrinal discussions, see Peter Wesley-Smith, ‘Judges and Judicial Power under the Hong Kong Basic Law’ (2004) 34 *Hong Kong Law Journal* 83–107; Berry Hsu, ‘Judicial Independence under the Basic Law’ (2004) 34 *Hong Kong Law Journal* 279–302. See also Peter Wesley-Smith, ‘Individual and Institutional Independence of

have been pre-existing, that determined appeals or civil sanctions in specified areas of regulation. In *Luk Ka Cheung v Market Misconduct Tribunal & Anor*,¹²⁹ Hartmann JA and Andrew Cheung J, sitting in division, held that while the judicial power of the HKSAR was exclusively vested in the judiciary, the Market Misconduct Tribunal, established to perform a regulatory and protective role in Hong Kong's financial markets, did not exercise the judicial power of the HKSAR, did not oust the jurisdiction of the criminal courts in Hong Kong and did not usurp their function. Rather, taking heed of a warning of Sir Anthony Mason NPJ to take great care in importing judicial decisions on the separation of powers,¹³⁰ and giving due weight to the long history in Hong Kong of using administrative bodies and tribunals for regulatory, protective and disciplinary functions, the court interpreted the Basic Law so as to enable, 'so far as violence is not done to the principle of separation of powers as understood in the tradition of English common law, the continued existence and development of administrative tribunals and bodies'.

The HKSAR courts have not heeded the siren song of a 'constitutionally driven' doctrine of 'separation of powers'.¹³¹ What the courts seem to be maintaining is the recognition of the incorporation in the Basic Law 'a separation of powers', construed in the light of the preservation of the essentially English common law in the HKSAR's legal system and the theme of continuity of the pre-existing system of administration. This doctrine of 'separation of powers', which is essentially judge-made, has been practised by the courts in a flexible and realistic manner in the exercise of their independent judicial power, which is essentially judicially-construed. First and foremost, the principle refers to 'the principle that the Judges are independent of the Executive'.¹³² Indeed

the Judiciary', in Steve Tsang (ed), *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong: Hong Kong University Press, 2001) pp 99–131. Reliance was placed on Australian cases like *Huddart, Parker & Co Pty Ltd & Anor v Moorehead* (1908) 8 CLR 330, HC Aust; *British Imperial Oil Co v Federal Commissioner of Taxation* (1925) 35 CLR 422, HC Aust; *Shell Company of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275, PC; *R v Quinn ex p Consolidated Foods Corp* (1977) 138 CLR 1, HC Aust; *Brandy v Human Rights and Equal Opportunities Commission* (1995) 183 CLR 245, HC Aust; and *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, HC Aust.

¹²⁹ *Luk Ka Cheung v Market Misconduct Tribunal & Anor* [2009] 1 HKC 1, [2009] 1 HKLRD 114, CFI. See also *Lee Yee Shing Jacky & Anor v Board of Review (Inland Revenue Ordinance) & Anor* [2011] 6 HKC 307, CFI (affirmed on appeal in [2012] 2 HKLRD 981, CA).

¹³⁰ See Anthony Mason, 'The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong' (2007) 37 *Hong Kong Law Journal* 299–317. See also Anthony Mason, 'The Role of the Common Law in Hong Kong', in Jessica Young and Rebecca Lee (eds), *The Common Law Lecture Series 2005* (Hong Kong: Faculty of Law, University of Hong Kong, 2006) pp 1–25 at pp 21–25.

¹³¹ See Anthony Mason, 'The Role of the Common Law in Hong Kong', in Jessica Young and Rebecca Lee (eds), *The Common Law Lecture Series 2005* (Hong Kong: Faculty of Law, University of Hong Kong, 2006) pp 1–25 at p 21.

¹³² See Gordon Hewart, *The New Despotism* (London: Ernest Benn Ltd, 1929) p 41. While Lord Chief Justice Hewart raised the principle of 'separation of powers' as part of his

judicial independence was what Sir David Williams believed Lord Diplock had in mind in the case of *Dupont Steels Ltd v Sirs*.¹³³ The centrality of the independence of the judges has recently been stated in these terms by Lord Bingham of Cornhill:

Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so.¹³⁴

Separation of powers began as a proposition in political theory, albeit based upon a misreading of the British polity by Baron Montesquieu that William Blackstone ‘copied’ in his Commentaries,¹³⁵ addressing as ‘one main preservative of the public liberty’ the ‘distinct and separate existence of the judicial power’, administering ‘common justice . . . in some degree separated both from the legislative and also from the executive power’.¹³⁶ The American Founding Fathers, many of whom were avid readers of Montesquieu and Blackstone, took it as a political maxim that ‘the legislative, executive and judiciary departments ought to be separate and distinct’; this is security against concentration of powers, the next step to tyranny.¹³⁷ Articles 2, 3, 16, 17, 19 and the provisions in Chapter IV of the Basic Law do impress upon Western and Anglo-Commonwealth common law eyes as reflecting an institutional and functional separation of powers. There is in design and practical terms a distinct Executive, Legislature and Judiciary under the Basic Law, each with functions expressly prescribed in specific provisions of the Basic Law. Qiao Xiaoyang did accept in his July 2010 speech in Macao that there is division of power under the system prescribed under the Basic Law. His concern was that it was erroneous to start from the concept of ‘separation of the

case for the abolition of administrative tribunals, those were the days when supervisory jurisdiction of the courts in judicial review had not been well developed. See now *R (Cart) v Upper Tribunal & Anor* [2011] 2 WLR 36, [2010] 4 All ER 714, Eng CA (affirmed on different grounds in [2012] 1 AC 663, UK SC); *Lee Yee Shing Jacky & Anor v Board of Review (Inland Revenue Ordinance) & Anor* [2011] 6 HKC 307, CFI.

¹³³ See David Williams, ‘Statute Law and Administrative Law’ [1984] *Statute Law Review* 157–168 at 158–159.

¹³⁴ *Director of Public Prosecutions of Jamaica v Molison* [2003] 2 AC 411, PC at [13].

¹³⁵ Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003) p 24.

¹³⁶ William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769* (Chicago: University of Chicago Press, 1979) Vol 1 p 319. Blackstone continued: ‘Were it joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an over balance for the legislative.’

¹³⁷ James Madison, ‘Federalist Paper No 51: *The Separation of Powers: I*’, in Alexander Hamilton, James Madison and John Jay, *The Federalist* (Cambridge, MA and London: Harvard University Press, 2009) pp 315–324.

three powers' instead of the provisions of the Basic Law,¹³⁸ which presumably ought to be read continuously as 'a socialist document' with a political system of 'executive-dominance'. This seems a palpable hit, addressing the line of thinking that judges and lawyers in Hong Kong often engaged in their exposition of the legal system of the HKSAR by reference to many of the expressions already elucidated above, such as 'Westminster model' and 'separation of powers', as well as their expressed views, both in judgment and writings, of the relations among the executive authorities, the legislature and the judiciary, usually on occasions of the courts' exercising their 'independent judicial power' in 'judicial review' to make 'separation of powers' real through operating a judicial 'constitutional check'.¹³⁹ This might be what Deng Xiaoping meant in part when he indicated on 16 April 1987 that 'separation of the three powers' was not to be copied.¹⁴⁰ The discussion immediately thereafter and in Part 3 below will indicate that while some of these observations and views stem from foundational learning of the common law of English heritage, a more significant part, including that which has led to acts of normative effect, have been more readily identifiable as not of English certificate of origin.¹⁴¹

3.5 Independent Judicial Power and Judicial Review

Article 2 of the Basic Law provides that the NPC authorizes the HKSAR 'to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law'. Thus 'independent judicial power' is part of the high degree of autonomy the NPC has authorized the HKSAR to exercise under the Basic Law. Article 19 of the Basic Law reiterates that the HKSAR is vested with 'independent judicial power' and stipulates the jurisdictions of the HKSAR courts. Article 80 of the Basic Law provides that the HKSAR courts at all levels 'shall be the judiciary of the Region, exercising the judicial power of the Region'.

The Court of Final Appeal considered in *Ng Ka Ling & Ors v Director of Immigration* that the courts exercise 'their judicial power conferred by the Basic

¹³⁸ Qiao Xiaoyang, 'Studying the Basic Law, Upgrading the Quality of Civil Servants: A Speech at the Graduation Ceremony of the "Advanced Course of the Basic Law of MSAR"' (2010) 6 *Academic Journal of One Country Two Systems* 1–4 at 4.

¹³⁹ See *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA at 25I–J.

¹⁴⁰ See *Deng Xiaoping on the Question of Hong Kong* (Hong Kong: New Horizon Press, 1993) p 55.

¹⁴¹ It was the changes introduced by the Constitutional Reform Act 2005 [Eng], particularly the reform of the office of the Lord Chancellor and the establishment of the Supreme Court of the United Kingdom, that separated the English judges as a separate institution with distinct functions. And Lord Phillips of Worth Matravers had these changes in mind when he acknowledged in 2011 that: 'The principle of the separation of powers has progressively become part of the, largely unwritten, constitution of the United Kingdom'; see *Fuller v Attorney General of Belize* [2011] UKPC 23 (9 August 2011), PC at [38].

Law [of the HKSAR]', having 'a duty to enforce and interpret that law'.¹⁴² The Court of Final Appeal then in *Director of Immigration v Chong Fung Yuen* indicated that it followed from the grant of 'independent judicial power' to the HKSAR courts that the interpretation of laws is a matter for the courts.¹⁴³ The Court of Final Appeal held thereafter in *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd & Ors* that Articles 2, 19, 80 and 81 of the Basic Law established the constitutional architecture of the judicial system, with the institutions constituting that system being the courts of judicature (or courts of law), catering for the system's separation from that of Mainland China, its continuity with what went before and safeguarding the independence of the judiciary.¹⁴⁴

The Court of Final Appeal has effortlessly deduced from the grant of 'independent judicial power' to the HKSAR that the HKSAR courts, ie courts of judicature forming the HKSAR's judiciary, exercise the 'independent judicial power' of the HKSAR; that the courts interpret the laws, including the Basic Law; and that the courts are the institutions constituting the HKSAR's judicial system, separated from that of Mainland China, and enjoying judicial independence.

These matters are not obvious from the text of the Basic Law. In Article 2 (and in Article 19), the corresponding Chinese text for 'independent judicial power' is '獨立的司法權', whereas in Article 80, the corresponding Chinese text for 'judicial power' is '審判權'. The latter Chinese expression admits also the English translation of 'adjudicative power'. In one sense, the difference is uncontroversial as it can simply be said that the latter Chinese expression directs against the rendering of advisory opinions. In another sense, the difference might suggest that the courts' role is limited to quell the controversy and not to assume review of legislation and to declare inconsistencies with the Basic Law for invalidation.¹⁴⁵ Wang Shuwen et al indeed noted that '[the] main functions and duties of the courts are to adjudicate cases of various types'.¹⁴⁶

It is therefore probable that 'independent judicial power' has a more particular meaning. The first effort in this direction was made by Yash Ghai, who suggested that judicial power may be 'more autonomous' from the distinction between executive and legislative powers on the one hand and independent judicial power. The intention may have been to make the courts independent from other HKSAR institutions and that the Central Authorities have no role

¹⁴² See *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA at 25G–H.

¹⁴³ See *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, CFA at 223F–H.

¹⁴⁴ See *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd & Ors* (2006) 9 HKCFAR 234 at [45] (per Ribeiro PJ).

¹⁴⁵ That appears to be what Zhou Wei meant when he commented that judgments of the HKSAR courts resided at the lowest of legal norms in the hierarchy; see Zhou Wei, 'The Sources of Law in the SAR', in Peter Wesley-Smith (ed), *Hong Kong's Transition: Problems and Prospects* (Hong Kong: Faculty of Law, University of Hong Kong, 1993) pp 79–90.

¹⁴⁶ See Wang Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (2nd edn) (Beijing and Hong Kong: Law Press China and Joint Publishing (HK) Co Ltd, 2009) p 499.

in the appointment or dismissal of judges¹⁴⁷ or in the conduct of their duties, though Ghai noted cautiously that the PRC Constitution also provides in Article 126 that the people's courts exercise judicial power 'independently' in accordance with the provisions of the law, which has not turned out to be much of a guarantee.¹⁴⁸ Cheng Jie has been more straightforward in her exposition. Cheng acknowledged that '[in] terms of devolution, Beijing has reserved powers over both the executive and legislative institutions of Hong Kong. Only judicial power is thoroughly devolved.' Even with the 'new paradigm in the Beijing-Hong Kong relationship' since the 2003 popular rejection of the National Security (Legislative Provisions) Bill stressing on direct involvement and the final control of the Central Authorities, Cheng continued: 'Through the Basic Law, the central government authorizes the legislative, executive and complete judicial powers.'¹⁴⁹

If the true meaning of 'independent judicial power' in the Basic Law lies simply in the absence of reserved powers of correction and supervision of the HKSAR courts and their judgments, then many of the statements of the Court of Final Appeal above are judicial encrustations to these three words for the purposes of the administration of justice.

The meaning of 'judicial power' has not been of much concern to judicial business. On a number of occasions, the issue was dealt with when determining whether a matter had been impermissibly assigned to an authority other than the HKSAR courts without the need to provide an exhaustive definition ever arising.¹⁵⁰ This may be due to the difficulties in framing an exhaustive definition of judicial power.¹⁵¹ In *Lau Kwok Fai Bernard & Anor v Secretary for Justice*,

¹⁴⁷ The only stipulation is in Article 90 of the Basic Law that appointments and removals of the Chief Justice of the Court of Final Appeal, judges of the Court of Final Appeal and the Chief Judge of the High Court are reported to the NPCSC for the record.

¹⁴⁸ See Yash Ghai, *Hong Kong's New Constitutional Order* (2nd edn) (Hong Kong: Hong Kong University Press, 1999) pp 146, 314.

¹⁴⁹ See Cheng Jie, 'The Story of a New Policy', in *Hong Kong Journal* (July 2009) (available at: http://www.hkjournal.org/archive/2009_fall/1.htm) (last visited on 28 March 2011).

¹⁵⁰ See *Yau Kwong Man v Secretary for Security* [2002] 3 HKC 457, CFI, where Hartmann J held that section 67C(2), (4) and (6) of the Criminal Procedure Ordinance (Cap 221), which provided for the Chief Executive to determine the minimum term of imprisonment of a prisoner after taking into the recommendation of the Chief Justice and any representations from the prisoner, was inconsistent with Article 80 of the Basic Law (which reserved judicial power to the judiciary of the HKSAR) and was thereby invalid.

¹⁵¹ See *R v Trade Practices Tribunal & Ors ex p Tasmanian Breweries Pty Ltd* (1971) 123 CLR 361 at 373, HC Aust (per Kitto J) (endorsed by Hartmann J in *Yau Kwong Man v Secretary for Security* [2002] 3 HKC 457, CFI). Nonetheless, Kitto J indicated that an exercise of the judicial function determines a dispute inter partes as to the existence of a right or obligation in law and in applying the law to the facts as determined. James Stellios, reading the later High Court decision in *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, observed the complication of the multi-faceted concept of judicial power; 'it has been defined by subject matter, process, purpose of exercise and consequences'; see James Stellios, *The Federal Judicature: Chapter III*

Hartmann J accepted that when looking at the relationship between what is plainly the function of the judiciary contrasted with the functions of the legislature and the administration, it should be recognized that there ‘is an infinite series of gradations, with a large area of overlap’ between what is plainly the function of the judiciary and what is plainly legislation or administration.¹⁵² Then in *Lee Yee Shing Jacky & Anor v Board of Review (Inland Revenue Ordinance) & Anor*, Lam J elucidated that the judicial power of the state in the HKSAR’s legal system ‘can be exercised in two different capacities: (1) original; and (2) supervisory. In the exercise of its original jurisdiction, the courts (meaning the courts of law) adjudicate upon disputes between parties and such disputes can be disputes of facts or laws. In the exercise of its supervisory jurisdiction, the High Court through the mechanism of judicial review ensures all administrative bodies and inferior tribunals observe the rule of law. Legality, rationality and fairness are the touchstones of this jurisdiction’.¹⁵³

Peter Wesley-Smith found the Basic Law ‘almost impenetrably obscure in relation to courts and judiciary’, with important questions under the principle of ‘separation of powers’ unanswered, such as whether tribunals were to be regarded as courts and thus must be staffed by judges with security of tenure and exercising only judicial power. The ‘strict’ doctrine of separation of powers that Wesley-Smith subscribed meant that judicial power may be exercised only by courts, and courts may exercise only judicial power. Wesley-Smith suggested that the issue might be resolved unattractively ‘by denying the operation of the separation of powers doctrine and giving an unrestricted meaning to judicial power’.¹⁵⁴

The amorphous nature of judicial power has also permitted the Court of Final Appeal to explain that the grant of judicial power and, for that matter, the investing of jurisdiction in a court, carry with them all those powers that are necessary to make effective the exercise of judicial power and jurisdiction so granted to hold that the concept of judicial power in the context of the Basic Law ‘necessarily includes the making of remedial interpretations’. Article 83 of the Basic Law, which provides that the powers and functions of the courts ‘shall be prescribed by law’, does not exclude the implication of powers and functions from the Basic

of the Constitution (Chatswood, New South Wales: LexisNexis Butterworths, 2010) paragraph 4.1. On the other hand, Benny Tai had sought to analyse the content of judicial power as the power to adjudicate by reference to Lon Fuller’s work on the concept of adjudication (see Lon Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Review* 353–409); Benny Tai, ‘The Jurisdiction of the Courts of the Hong Kong Special Administrative Region’, in Alice Lee (ed), *Law Lectures for Practitioners 1998* (Hong Kong: Hong Kong Law Journal, 1998) pp 65–117.

¹⁵² *Lau Kwok Fai Bernard & Ors v Secretary for Justice* (unreported, 10 June 2003, HCAL 177, 180/2003), CFI at [20], borrowing the observations of William Wade in *Administrative Law* (7th edn) (Oxford: Oxford University Press, 1995) p 860.

¹⁵³ *Lee Yee Shing Jacky & Anor v Board of Review (Inland Revenue Ordinance) & Anor* [2011] 6 HKC 307, CFI at [73], [74] (per Lam J).

¹⁵⁴ Peter Wesley-Smith, ‘Judges and Judicial Power under the Hong Kong Basic Law’ (2004) 34 *Hong Kong Law Journal* 83–107.

Law itself. The implied powers of the HKSAR courts thus include the obligation to adopt a remedial interpretation of a legislative provision, which will, so far as it is possible, make it consistent with the Basic Law.¹⁵⁵

Attempts to require the HKSAR courts to enforce the institutional separation of the Judicial from the Executive, so as to dismantle the regulatory machinery of administrative tribunals on the basis that they purport to exercise the judicial power of the HKSAR, failed. The Court of First Instance held that the Market Misconduct Tribunal did not usurp judicial power and the criminal jurisdiction of the HKSAR courts, emphasizing instead the theme of continuity behind the Basic Law to validate the continued use of administrative tribunals and bodies to perform regulatory and protective functions. The Court of First Instance explained:

The Basic Law should be interpreted in such a way as to enable, so far as violence is not done to the principle of separation of powers as understood in the tradition of English common law, the continued existence and development of administrative tribunals and bodies. This calls for a flexible and realistic approach to the doctrine of separation of powers and a purposive and contextualized interpretation of the scope and meaning of 'judicial power' in the Basic Law, rather than following indiscriminately the strict interpretation adopted by the Australian courts towards their own Constitution, which was written under very different circumstances in order to serve its own unique purposes.¹⁵⁶

'Judicial review' is a slippery concept. Richard Rawlings has demonstrated the shifts in England of the expression from the exercise of the superior court's supervisory jurisdiction, based upon the prerogative writs, over administrative decision making¹⁵⁷ and the liberty of the subject¹⁵⁸ to the reviewing of the legislation on European law and European human rights grounds, as well as the variety of statutory review by courts or tribunals.¹⁵⁹

In Hong Kong, 'judicial review' has been more defined. The Rules of the High Court¹⁶⁰ gives an inclusive definition in Order 53 rule 1A, stipulating that 'application for judicial review' includes an application in accordance with this Order for a review of the lawfulness of an enactment or a decision, action or failure to act in relation to the exercise of a public function. Case law has developed to encompass within the rubric of the procedure of judicial review 'constitutional

¹⁵⁵ *HKSAR v Lam Kwong Wai & Anor* (2006) 9 HKCFAR 574, CFA at [68], [69], [70], [71], [78] (per Sir Anthony Mason NPJ).

¹⁵⁶ *Luk Ka Cheung v Market Misconduct Tribunal & Anor* [2009] 1 HKC 1, [2009] 1 HKLRD 114, CFI at [36] (per Hartmann JA and Andrew Cheung J). A similar conclusion was reached with respect to the Board of Review (Inland Revenue Ordinance); see *Lee Yee Shing Jacky & Anor v Board of Review (Inland Revenue Ordinance) & Anor* [2011] 6 HKC 307, CFI at [90] (per Lam J).

¹⁵⁷ ie through the writ of certiorari, the writ of mandamus, and the writ of prohibition.

¹⁵⁸ ie through the writ of *habeas corpus ad subjiciendum*.

¹⁵⁹ Richard Rawlings, 'Modelling Judicial Review' (2008) 61 *Current Legal Problems* 95–123 at 95–96.

¹⁶⁰ ie Chapter 4 sub. leg. A, Laws of Hong Kong.

challenges' in the sense of proceedings commenced for a declaration that a statute or statutory provision is unconstitutional or, to be more precise, inconsistent with the Basic Law, notwithstanding that there was no judgment, order, decision or other proceedings relating to the applicant, so long as the sufficient interest of the applicant can be demonstrated.¹⁶¹ Practice Direction 26.1 of the Chief Justice assigns to the Constitutional and Administrative Law List five classes of cases: (a) applications for judicial review; (b) applications for habeas corpus; (c) election petitions; (d) appeals from decisions of the Obscene Articles Tribunals; and (e) such other civil cases which raise an issue under the Basic Law or the Hong Kong Bill of Rights Ordinance¹⁶² for determination and which a judge of the Court of First Instance or a judge of the District Court certifies as suitable for transfer to the List.

'Judicial review' has been described as 'a principal engine of the rule of law'.¹⁶³ Its operation by the judges has become a topic of concern and controversy. Chief Justices in Hong Kong have repeatedly sought to inform the public of the 'proper role of the courts on judicial review' and asked for their understanding in looking to the political process for an appropriate resolution of the economic, social and political problems that have increasingly featured in the background of applications for judicial review.¹⁶⁴ What the definitions have perhaps obscured or not pronounced has been the power, real or perceived, of the HKSAR courts to 'invalidate' legislative or other measures¹⁶⁵ in authoritative terms in 'judicial review' under the Basic Law, the Americanism for 'constitutional challenges/adjudication',¹⁶⁶ that incidentally coincides with the unified procedure originally for the invocation of the prerogative writs and has become conflated therewith. People have turned to judicial review to gain access to the High Court's exercise

¹⁶¹ *Leung v Secretary for Justice* [2006] 4 HKLRD 211, CA.

¹⁶² ie Chapter 383, Laws of Hong Kong.

¹⁶³ *R (Cart) v Upper Tribunal & Anor* [2010] 1 All ER 908, [2010] 2 WLR 1012, Eng Div Ct at [34] (per Laws LJ).

¹⁶⁴ See, for example, Andrew Li, 'Foreword', in Forsyth, Elliott, Jhaveri, Scully-Hill and Ramsden (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford: Oxford University Press, 2010) p xxxv (which distilled similar statements Chief Justice Andrew Li had made since 2005). Chief Justice Geoffrey Ma, who succeeded Chief Justice Andrew Li, intones in simple terms that courts are 'neither qualified nor constitutionally able' to solve political, social or economic issues; see Geoffrey Ma, 'CJ's Speech at Ceremonial Opening of the Legal Year 2011' (10 January 2011) (available at: <http://www.info.gov.hk/gia/general/201101/10/P201101100201.htm>) (last visited on 28 March 2011).

¹⁶⁵ 'Other measures' in this context include executive orders issued by the Chief Executive under Article 48(4) of the Basic Law and subsidiary legislation made by the Chief Executive in Council or other persons designated with delegated law-making authority. Whether the reach of the power of the HKSAR courts to declare invalidity on the ground of inconsistency with the Basic Law extends to NPC and NPCSC measures and national laws said to be applicable to the HKSAR seems to have remained an open question, a matter to be discussed in Part 5 below.

¹⁶⁶ See Richard Fallon, *The Dynamic Constitution: An Introduction to American Constitutional Law* (Cambridge: Cambridge University Press, 2004) p 6.

of its supervisory jurisdiction and more than often its 'constitutional jurisdiction', which, as with the substantive principles and procedures of judicial review, is a matter of law and thus made by judges. They have been made 'to meet the need to preserve the integrity of the rule of law despite changes in the social structure, methods of government and the extent to which the activities of private citizens are controlled by governmental authorities'.¹⁶⁷ The judges will 'decide whether the statutory provisions for the administration of justice adequately protect the rule of law and, by judicial review, to supplement these should it be necessary'.¹⁶⁸

The Court of Final Appeal and the HKSAR courts have since 1997 exercised the independent judicial power (including the power of final adjudication) vested with the HKSAR as part of its high degree of autonomy under the Basic Law in the implementation of the principle of 'one country, two systems'. The expressions used in the preceding sentence are not mere descriptions. As the discussion above has attempted to outline, they are concepts and principles contested between Mainland Chinese legal scholarship and the Central Authorities on the one hand and HKSAR scholarship and the HKSAR courts on the other.

Part 2 of this book will illustrate how the HKSAR courts have served Hong Kong in the adjudication of cases, highlighting on the way the material circumstances affecting the exercise of independent judicial power. Then, in Part 3, the Court of Final Appeal's case for having constitutionalized the Basic Law and investing itself with being the HKSAR's constitutional check is tested.

¹⁶⁷ *R (Cart) v Upper Tribunal & Anor* [2010] 4 All ER 714, [2011] 2 WLR 36, Eng CA at [28] (per Sedley LJ). Lam J endorsed this statement of the supervisory jurisdiction of the High Court in *Lee Yee Shing Jacky & Anor v Board of Review (Inland Revenue Ordinance) & Anor* [2011] 6 HKC 307, CFI at [79].

¹⁶⁸ *R (Cart) v Upper Tribunal* [2012] 1 AC 663, UK SC at [89] (per Lord Phillips of Worth Matravers).

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