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CHAPTER 10

THE JUDICIARY

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The judiciary plays a central role in the common law system. Indeed, it was through the establishment of the *curia regis* (King's courts) that the common law system has sprung, and almost 900 years later, the common law system continues to develop and revolve around the courts. This system embodies not only the institution of the judiciary but also its *modus operandi*, its ideological values, conventions and traditions, the most important of which is the independence of the judiciary.[1] Speaking on the provisions governing the judicial system in the Basic Law, Ribeiro PJ observed that "the purpose of the Basic Law provisions referred to is to establish the constitutional architecture of that system revolving around the courts of law, catering for the system's separation from that of the Mainland, its continuity with what went before and safeguarding the independence of the judiciary."[2] Thus, the two main themes that run through the section on the Judiciary in the Basic Law are, first, the preservation and continuity of the previous judicial system and second, the guarantees for the independence of the Judiciary. **10.001**

1. Preservation and Continuity of the Previous Judicial System

Article 81 of the Basic Law provides that "the judicial system previously practiced in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal of the Hong Kong Special Administrative Region". Article 80 then defines the judiciary as the courts of the HKSAR. Article 81 further elaborates the meaning of "courts" to cover the Court of Final Appeal, the High Court, District Courts, Magistrates' Courts and other special courts. The High Court shall comprise the Court of Appeal and the Court of First Instance. **10.002**

Before the Handover in 1997, the courts in Hong Kong included the Judicial Committee of the Privy Council, which served as the final appellate court of Hong Kong when it heard appeals from Hong Kong, the Supreme Court, the District Court, the Magistrates' Courts, the Juvenile Courts (which are part of the Magistrates' Courts), the Small Claims Tribunal, the Lands Tribunal, the Coroners' Court and the Labour Tribunal. Upon the Handover, the Judicial Committee of the Privy Council was replaced by the Court of Final Appeal as the final appellate court for Hong Kong. The Supreme Court before the Handover consisted of the Court of Appeal and the High Court. The title of the Supreme Court was considered inappropriate as a Court of Final Appeal was to be established. Hence, the Supreme Court was renamed the High Court, and the former High Court was renamed the Court of First Instance, with no intention however of changing their functions or jurisdictions. The new High Court now comprised the Court of Appeal and the Court of First Instance. The rest of the courts are preserved without any changes. **10.003**

2. Court of Final Appeal

To better understand the genesis of the Court of Final Appeal, a brief reference to the Judicial Committee of the Privy Council will be helpful. The origin of the jurisdiction of the Privy Council can be traced back to the time of the Norman Conquest. The system reflects the long **10.004**

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1 See *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234, [45] (Ribeiro PJ).

2 *Ibid.*

established practice of petitioning the Sovereign as the fountain of justice for protection of her subjects throughout his Dominion against unjust administration of the law. The appeal is allowed as an exercise of prerogative power. Hence it is also known as the "prerogative right of appeal"[3] or "appeal by act of grace".[4] In the United Kingdom, this appeal to the King in Parliament has formed the foundation of the appellate jurisdiction of the House of Lords, where in Her Majesty's Dominions beyond the seas the appeal to Her Majesty's prerogative became the basis of the jurisdiction of the Judicial Committee of the Privy Council.[5] In the heydays of the British Empire, the Privy Council stood at the apex of the court system of its dominion and the Commonwealth and the sphere of its jurisdiction embraced more than a quarter of the world, including Canada, India, Pakistan, Ceylon, South Africa, Australia, New Zealand, Malaysia, and a host of other territories such as Malta, Cyprus, Nigeria and much of East and West Africa, Mauritius, The Gambia, West Indies Islands such as Jamaica, Barbados, The Bahamas and Trinidad and Tobago, Bermuda, Gibraltar as well as the Isle of Man and the Channel Islands. Strictly speaking, the Privy Council is not a court, or at least not exclusively a judicial organ, but "a part of the apparatus of...imperial governance".[6] It was not until the enactment of the Judicial Committee Act 1833 that the Judicial Committee was established to hear all appeals to Her Majesty in Council from any court in the Dominions and other parts of the Commonwealth.[7] In form, the Judicial Committee does not decide on the appeal. Instead, it just renders its opinion and recommendation to Her Majesty, who by convention would always adopt the recommendation. However, in reality, the Judicial Committee is staffed by some of the most eminent judges in the common law world and operates for all practical purposes as an independent court.

10.005 Appeal to the Privy Council from Hong Kong was regulated by two Orders in Council dated, respectively, 10 August 1909 and 24 November 1982. There were two types of appeal, one as of right if the matter in dispute exceeded $500,000 and one by leave if the appeal involved an issue of great, general or public importance that ought to be submitted to Her Majesty in Council for decision. Leave could be granted by the Court of Appeal or failing that, by the Judicial Committee itself. It will be seen below that these procedures are preserved after the Handover.

10.006 Thanks to the eminence of the judges, the Judicial Committee of the Privy Council has once been one of the most influential courts in the common law world. However, since the twentieth century, the importance of the Privy Council gradually declined. Many of the former British colonies have replaced appeal to the Privy Council with their own final appellate courts, which is usually done for national reasons.[8] Not all dependent territories, however, severed the appeal to the Privy Council upon independence. Some countries decided to retain the

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3 *British Coal Corp v R* [1935] AC 500, 511.

4 *Cushing v Dupuy* (1879–80) LR 5 App Cas 409, 416.

5 See *Nadan v R* [1926] AC 482, 491.

6 Loren P Beth, "The Judicial Committee: Its Development, Organization and Procedure" (1975) Public Law 219, 233.

7 Many of its earliest appeals come from the West Indies. An interesting one was related to a dispute about a sugar plantation, and the papers revealed that the average value of a slave 200 years ago was about £70 to £75. In addition, the Privy Council also hears appeals from various professions such as doctors, dentists, opticians and vets, and appeals submitted for Her Majesty's approval by the Church Commissioners.

8 Discontinuance of appeals to the Privy Council was permitted by the Statute of Westminster 1931. Canada withdrew the appeal in criminal cases in 1875 and ceased constitutional and civil appeals shortly thereafter. India discontinued the appeal in 1949 after achieving independence, followed soon by Ceylon (1972), Africa and Australia (1986). Malaysia abolished the appeal in December 1984, and Singapore abolished the appeal in 1994.

link as they may not have had sufficient judicial personnel to serve on their highest courts.[9] Others retained the link as appeals to the Privy Council reinforced confidence in the judicial system of the newly independent countries which in some cases were still in a politically turbulent situation.[10] In Hong Kong, severance was entirely due to political considerations as appeals to the Privy Council were regarded as inconsistent with the resumption of Chinese sovereignty.[11] Thus, it was readily assumed that a court of final appeal would be established to replace the Privy Council. The challenge involved the question of how confidence in the independence and the quality of this court of final appeal could be attained given the rather rudimentary development of the rule of law in China (especially at the time just before the Handover).

10.007 The establishment of the Court of Final Appeal soon proved to be controversial, in terms of both the timing of its establishment and its composition. The British Government wished to set up the Court of Final Appeal well before the transition, no doubt partly because it would then be in control of its composition and jurisdiction. Indeed, discussions on the setting up of the Court of Final Appeal began at the Joint Liaison Group as early as 1987, but agreement was only reached in 1991. The two Governments agreed that the Court of Final Appeal should comprise the Chief Justice, three permanent judges and one *ad hoc* judge to be drawn from one of two lists, one comprising retired or serving local judges and the other comprising overseas judges from common law jurisdictions. This agreement, which was reached without any consultation, received strong opposition from the legal profession. In a joint statement of the Law Society and the Bar Association dated 13 October 1991, the professional bodies criticised the proposal for undermining the autonomy of the Court of Final Appeal to determine its own composition. It was also believed that there should be more overseas judges on the Court of Final Appeal to match its stature with the Privy Council, and that the presence of overseas judges would enhance confidence in the independence of the court. Eventually the agreement was rejected by the Legislative Council and the matter was shelved.[12]

10.008 Three years later, the Government revived the same proposal, urging for the early establishment of the Court of Final Appeal. The Bar was not moved, but it became a lone voice as the Law Society had by then decided to change its stance to support the proposal. The Government relied heavily on the argument that it was essential to have the Court in place before the Handover, or otherwise there would be a "legal vacuum". It said that it was "difficult to overestimate the contribution of a respected, efficient and impartial common law system to the overall success of Hong Kong as an international commercial, financial and service centre", and failure to set up the court in time would create a judicial vacuum that was "likely to upset the delicate balance which maintains business and investors' confidence in Hong Kong in the run-up to 1997 and

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9 New Zealand severed its appeal to the Privy Council only in 2003 when it established its own Supreme Court. Australia severed the appeal in 1986, long after its independence. Singapore is another example, although it abolished its appeal to the Privy Council for political reasons.

10 For example, Singapore, Malaysia and some African countries.

11 This is not necessarily the case as many independent countries continue to maintain their appeal to the Privy Council for a long time after independence.

12 See Johannes Chan, "The Legal System", in Cheng and Kwong (eds), *The Other Hong Kong Report 1992* (Chinese University Press, 1992) pp.15, 22–24.

beyond".[13] The Court of Final Appeal Bill was enacted into law in August 1995, but it would come into force only on 1 July 1997.[14]

10.009 Under arts.88 and 90 of the Basic Law, the judges of the Court of Final Appeal are appointed by the Chief Executive upon the recommendation of the Judicial Officers Recommendation Commission, which is chaired by the Chief Justice. In addition, their appointment has to be endorsed by the Legislative Council. For the appointment of the first Chief Justice, a special procedure was adopted. The members of the Judicial Officers Recommendation Commission were appointed by the Chief Executive designate, who also chaired the first session of the Commission to appoint the Chief Justice. Thereafter the Chief Justice took over the chair of the Commission to appoint the other judges. The appointments of the Chief Justice and the other judges of the Court of Final Appeal were then endorsed by the Provisional Legislative Council, which had come into operation since January 1997. The appointment was subsequently confirmed in the Ratification Ordinance.[15]

10.010 Mr Andrew Li QC, an eminent silk in private practice, was appointed the first Chief Justice. The first permanent judges were Mr Henry Litton QC, Mr Charles Ching QC and Mr Kemal Bokhary QC. If a permanent judge is unable to hear the appeal because of a previous involvement or conflict, or because he is otherwise unavailable, he may be replaced by a non-permanent judge from the panel of non-permanent judges (drawn from past members of the Court, past and serving members of the Court of Appeal, or legal practitioners of at least 10 years' experience in Hong Kong). There is a further panel of overseas judges who are drawn from serving or retired judges of courts of unlimited jurisdiction of either civil or criminal jurisdiction who have had no previous judicial appointment in Hong Kong and are non-residents of Hong Kong.[16] Hong Kong is fortunate to secure the services of many distinguished overseas judges. They include eminent judges of the House of Lords, the Australian High Court and the New Zealand Court of Appeal. The Chief Justice has at the outset decided to adopt a practice that there will be an overseas judge in every substantive hearing, and overseas judges will serve on the Court on a roster system. The overseas judges have played an important role in developing the jurisprudence of the Hong Kong courts. Their participation has enriched Hong Kong's local jurisprudence, and enhanced the reputation and independence of the Court.[17]

10.011 An appeal to the Court of Final Appeal is as of right in civil cases if the value of the subject matter exceeds HK$1 million.[18] The Court has adopted a restrictive approach regarding an

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13 Attorney General's Chambers, Introductory Paper on the Draft Hong Kong Court of Final Appeal (1994).

14 See Anne Cheung, "The Legal System: Falling Apart or Forging Ahead?", in Cheung and Sze (eds), *The Other Hong Kong Report 1995* (Chinese University Press, 1995) pp.13, 15–20; Johannes Chan, "To Change or Not to Change: The Crumpling Legal System", in Nyaw and Li (eds), *The Other Hong Kong Report 1996* (Chinese University Press, 1996) pp.13, 21–24; Johannes Chan, "Time is Running Out: The Endangered Legal System", in Cheng and Lo (eds), *From Colony to SAR: Hong Kong's Challenges Ahead* (Chinese University Press, 1995) pp.71, 83–89.

15 Instrument A601, Sch.2.

16 Hong Kong Court of Final Appeal Ordinance s.12(4).

17 In *Chen Li Hung v Ting Lei Miao* (2000) 3 HKCFAR 9, Lord Cooke NPJ felt that it was particular appropriate for the overseas judge to give a separate concurring judgment in light of the sensitive nature of that case, which raised the issue of whether Hong Kong court should recognise a bankruptcy judgment of a Taiwan court in Hong Kong when the Taiwanese Government was not recognised by the People's Republic of China. For a more detail evaluation, see Young and Ghai, *Hong Kong's Court of Final Appeal: Justice and the Development of the Law in China's Hong Kong* (Cambridge University Press, 2012).

18 Section 22(1)(a).

appeal as of right, and this will arise only if (1) on the evidence, the value of the claim is clearly quantifiable at a value of $1 million or more; and (2) the court is satisfied that the Court's order upon disposing of the proposed appeal would take effect by immediately conferring or imposing on the relevant parties a financial benefit or detriment in the quantified amount. It is not enough that one is able, plausibly, to say that such a financial impact is a likely eventual result of the appeal.[19] In all other cases leave is required, which can be obtained from the Court of Appeal and upon its refusal, from the Court of Final Appeal. Leave in a civil appeal will be granted if the appeal, by reason of its great, general or public importance or otherwise, ought to be determined by the Court,[20] whereas leave in a criminal appeal will be granted only if there is a point of law of great and general importance or if it is shown that substantial and grave injustice has been done.[21] These closely mirror the previous practice of leave applications to the Privy Council. In *Zeng Liang Xin v HKSAR*, the Court observed that its criminal appeal jurisdiction is primarily concerned with establishing general principles of criminal justice rather than serving as a general appeal court on criminal cases.[22] Leave applications are determined by an Appeal Committee of three permanent judges, which may dismiss an application on paper without an oral hearing if the application discloses no reasonable grounds for leave to appeal, or is frivolous, and an allegation that such summary procedure violates art.10 of the Hong Kong Bill of Rights has been rejected.[23]

10.012 As there were only a few appeal cases from Hong Kong to the Privy Council before 1997, there were concerns if there would be sufficient business for the Court of Final Appeal.[24] This concern was soon proved to be unnecessary as the volume of cases handled by the Court of Final Appeal escalated exponentially soon after its establishment.[25]

10.013 Despite earlier set-backs following *Ng Ka Ling v Director of Immigration*, the Court of Final Appeal has established a reputation as an independent and liberal appellate court.[26] It has assumed without query the constitutional jurisdiction of determining the compatibility of domestic legislation with the Basic Law, and is prepared to carve out innovative remedies to meet the demands of justice. It has rendered judgments which have become some of the leading authorities in the common law world.[27]

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19 *China Field Ltd v Appeal Tribunal (Buildings) (No 1)* (2009) 12 HKCFAR 68; *Richfine Development Ltd v Hugh Rupert Rivington* (unrep., CACV 257/2008, [2009] HKEC 998).

20 Section 22(1)(b).

21 Section 32.

22 (1997–98) 1 HKCFAR 12.

23 *Chow Shun Yung v Wei Pih* (2003) 6 HKCFAR 299.

24 See Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 2nd ed, 1999) p.327.

25 In 2006 and 2007, the Court dealt with 46 and 33 appeals and 128 and 121 applications for leave to appeal, respectively. In 1995 and 1996, the Privy Council dealt with 9 and 16 appeals and 11 and 28 petitions for leave to appeal, respectively. During the six months from 1 January to 30 June 1997, in order to clear all pending cases, the Privy Council dealt with 22 appeals and 18 petitions for leave to appeal. Part of the reasons for the significant increase in case load is the physical proximity of the Court of Final Appeal and the cost involved. An appellant had to fly to London to obtain leave to appeal to the Privy Council in the past if leave is not granted by the Court of Appeal, whereas the Court of Final Appeal is only 10 minutes' walk from the Court of Appeal.

26 For the *Ng Ka Ling v Director of Immigration* controversy, see Chan, Fu and Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press, 2000). See also Chapter 16.

27 For example, *Ng Siu Tung v Director of Immigration* (2002) 5 HKCFAR 1 on the doctrine of substantive legitimate expectation, and *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339 on malice in defamation. For an evaluation of the performance of the Court of Final Appeal in its first decade, see Young and Ghai (eds), *Hong Kong's Court of Final Appeal: Justice and the Development of Law in China's Hong Kong* (Cambridge University Press, 2012).

3. The High Court

10.014 The High Court comprises the Court of Appeal and the Court of First Instance and is headed by the Chief Judge of the High Court. The Court of Appeal exercises only appellate jurisdiction. Apart from hearing appeals from the High Court and the District Court, it also hears appeals from a number of statutory bodies as specified by law, such as the disciplinary bodies for the legal and medical profession. It sits in divisions of three members, presided either by the Chief Judge or one of its Vice-Presidents.

10.015 The Court of First Instance exercises both original and appellate jurisdictions. It is a superior court of record. Despite the resumption of sovereignty, the original jurisdiction of the Court of First Instance is defined by reference to the Chancery, Family and Queen's Bench Division of the High Court of Justice of England for civil jurisdiction and the Crown Court of England for criminal jurisdiction, in addition to any jurisdiction conferred upon it by any law,[28] including admiralty jurisdiction.[29] In civil matters, it has jurisdiction over claims exceeding $1 million, and its hearing is normally presided by a single judge.[30] In criminal trials, it sits with a jury, and the Court of First Instance is the only forum for criminal trials where there could be a jury. Some serious criminal offences such as murder or rape must be tried in the Court of First Instance. The Court also hears appeals from the Magistrates' Court. It has an inherent jurisdiction deriving from the prerogative of the Crown as *parens patriae* over wards and lunatics.[31] Another important aspect of the Court of First Instance is that it exercises supervisory jurisdiction over inferior tribunals and administrative bodies by way of judicial review, and has jurisdiction to grant prerogative remedies such as certiorari, mandamus and prohibition,[32] and the writ of habeas corpus.

4. District Court

10.016 The District Court occupies an intermediate level in the court system. It has only original jurisdiction. Its civil jurisdiction cover any contractual and tort claim for a sum between $50,000 and $1 million.[33] The increase of the upper limit of its jurisdiction in 2003 has resulted in a lot more cases falling within its jurisdiction. It also has jurisdiction to determine any action for the recovery of land where the annual rent or the ratable value does not exceed $240,000.[34] Section 37 of the District Court Ordinance further confers on the Court certain equitable jurisdiction, and in exercising such equitable jurisdiction, a District judge shall have the same powers and authorities as a judge of the Court of First Instance exercising that court's equitable

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28 High Court Ordinance (Cap.4) s.12(2).

29 Section 12A.

30 It is a convention to have a divisional bench of two judges if the case involves a review of a decision of an administrative tribunal which is presided by a judge: see, for a recent example, *Luk Ka Cheung v Market Misconduct Tribunal* [2009] 1 HKLRD 114. In *Secretary for Justice v Oriental Press Group* [1998] 2 HKLRD 123, as the case involved a media enterprise organising a paparazzi trail against a Court of Appeal judge in revenge for a decision against the media, the contempt proceedings against the press and others were conducted before a divisional bench of two judges.

31 *C v G* [1982] HKLR 523; *Re SC, an Infant (No 2)* [1962] HKLR 499, 508.

32 High Court Ordinance ss.21I, 21K and O.53 of the Rules of the High Court.

33 District Court Ordinance (Cap.336) s.32.

34 *Ibid.*, s.35.

jurisdiction. Its criminal jurisdiction is confined to cases transferred from the Magistrates' Court.[35] The District Court may impose a term of imprisonment of no more than seven years.[36]

5. Magistrates' Court

10.017 As the lowest level of criminal court, the Magistrates' Courts are the busiest courts handling a whole range of matters. It is the first port of call for all criminal prosecutions. It has jurisdiction to try all summary offences as well as some indictable offences that are triable summarily. It may transfer a case to the District Court for trial upon an application of the Secretary for Justice or if it considers that the case may attract a heavier sentence than that which can be imposed by a magistrate. It also holds committal proceedings for the more serious criminal offences with a view to committing the case for trial to the Court of First Instance. Its sentencing power is limited to a fine of not more than $100,000 and an imprisonment term normally not exceeding two years or three years in case of consecutive sentences of imprisonment.[37] Under certain circumstances it may award compensation to a victim for personal injury and/or loss or damage to property.[38] A magistrate may also make an order to bind over to keep the peace upon sureties or recognisance.[39] A magistrate has the power to review his determination either upon the application of either party or on his own motion.[40] This provides a simple procedure to correct any mistake without having to go through the appeal process. An appeal against a determination of a magistrate lies with the Court of First Instance.

10.018 An offender below the age of 16 (other than someone charged with homicide) is tried at the Juvenile Court, which forms part of the Magistrates' Court. The procedure at the Juvenile Court is less adversarial,[41] and rehabilitation rather than punishment is the guiding principle in dealing with a juvenile offender.[42] A Juvenile Court has all the powers of the Magistrates' Court and is presided by a permanent magistrate.[43]

10.019 There is a Duty Lawyer Office in each Magistrates' Court. Duty lawyers under the Duty Lawyer Scheme provide free legal representation at the Magistrates' Courts and the Juvenile Courts.[44]

6. Other Special Courts

10.020 Apart from the above courts, art.81 of the Basic Law also refers to "other special courts" without defining them. Under the previous judicial system, which is preserved by art.81, these special courts would at least include the Lands Tribunal, the Small Claims Tribunal and the Labour Tribunal. The Lands Tribunal is a court of record which has jurisdiction to determine, *inter alia*,

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35 Magistrates Ordinance (Cap.227) s.88.
36 District Court Ordinance s.82(2)(a).
37 Magistrates Ordinance ss.57, 92 and 97.
38 *Ibid.*, s.98.
39 *Ibid.*, s.61.
40 *Ibid.*, s.104.
41 Juvenile Offenders Ordinance (Cap.226) ss.3D, 8.
42 *Ibid.*, s.11.
43 *Ibid.*, s.3A.
44 The Duty Lawyer Scheme is jointly run by the Law Society of Hong Kong and the Hong Kong Bar Association. See Legal Aid Services Council, *Legal Aid in Hong Kong* (Legal Aid Services Council, 2006) for an excellent overview of legal aid in Hong Kong.

compensation for the resumption of land or reclamation of foreshore and seabed. The President is a High Court judge and all District Court judges are adjudicating officers.[45] Given the huge financial interests at stake in proceedings before the Lands Tribunal, its hearing is formal and adversarial, and parties before the Tribunal are usually represented by experienced counsel.

10.021 In contrast, the Small Claims Tribunal is the lowest civil court. It has exclusive jurisdiction over civil claims not exceeding $50,000. In view of the relatively small amount of claims, lawyers do not have a right of audience before the Tribunal. It is an inferior court of record, and the adjudicators are legally qualified practitioners of at least five years' experience in practice.[46] The procedure is inquisitorial in nature. The Labour Tribunal is another inferior court of record.[47] Similar to the Small Claims Tribunal, all the presiding officers of the Labour Tribunal are legally qualified practitioners with at least five years' experience in practice.[48] Its jurisdiction is to determine labour disputes and its proceedings are characterised by its informality and inquisitorial nature.[49]

10.022 Professor Yash Ghai has queried whether these Tribunals would meet the requirements of being a "court" within the meaning of the Basic Law. In particular, he has argued that the procedures before these tribunals and the absence of tenure of the adjudicators fail to meet with the tests of a court for the purposes of exercising judicial power.[50] In response, first, these tribunals are expressly regarded as courts of record in their parent Ordinances. Their structure, constitution, powers and functions are prescribed by law. Secondly, art.81 preserves the previous judicial system, and these tribunals formed part of the previous judicial system. Thirdly, these tribunals are intended to be included within the meaning of "other special courts" under art.81 of the Basic Law. They were expressly referred to during the drafting process and their inclusion does not seem to be controversial. Continuity is the main theme.[51] Fourthly, the criticism is largely directed at the informal process before these tribunals and is premised largely on an adversarial model of a court. These tribunals adopt an inquisitorial approach, which is eminently suitable in light of the nature of the subject matter before them. Fifthly, being inferior tribunals, not all requirements of an independent and impartial tribunal have to be satisfied so long as they are subject to a subsequent judicial control that satisfies such requirements.[52] Appeals against the determination of all these tribunals lie with the Court of Appeal. Sixthly, their appointment is made on the recommendation of the Judicial Officers Recommendation Commission. Seventhly, while there is the valid concern of the absence of tenure on the part of the adjudicating officers of these tribunals, this concern is largely addressed by the enactment of the Judicial Officers (Tenure of Office) Ordinance.[53] This Ordinance applies to judicial officers other than judges

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45 Lands Tribunal Ordinance (Cap.25) s.4.

46 Small Claims Tribunal Ordinance (Cap.38) ss.3, 4AA.

47 Labour Tribunal Ordinance (Cap.25) s.3.

48 *Ibid.*, s.4A.

49 *Ibid.*, ss.7, 20.

50 Judicial Officers (Tenure of Office) Ordinance (Cap.433). See also Ghai, *Hong Kong's New Constitutional Order* (Hong Kong University Press, 2nd ed, 1999) pp.311–314. Peter Wesley-Smith expressed a similar concern: see Peter Wesley-Smith, "Judges and Judicial Power under the Hong Kong Basic Law" (2004) 34 HKLJ 83.

51 *Luk Ka Cheung v Market Misconduct Tribunal* [2009] 1 HKLRD 114; *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234; *Lee Yee Shing Jacky v Inland Revenue Board* (unrep., HCAL 40/2008, [2011] HKEC 261).

52 *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237, 274–275. See Chapter 19.

53 Yash Ghai was wrong in suggesting that the presiding officers of the Lands Tribunal are not protected by tenure: above, p.313. As pointed out above, the President of the Lands Tribunal is a High Court judge, and all District Court judges are presiding officers.

at the District Court or above who are employed on terms of agreement after three years of employment. They can only be dismissed during the term of the agreement on similar grounds as the judges, and the dismissal has to follow a statutory process as set out in the Ordinance.[54] Finally, their status as part of the judicial system has received the blessings of the court.[55] The budgets of these tribunals come under the budget of the Judiciary.

7. Judicial Power and Administrative Tribunals

10.023 While the Lands Tribunal, the Small Claims Tribunal and the Labour Tribunal are clearly recognised as part of the previous judicial system and should therefore continue to be recognised as such after the changeover, the position is less clear in relation to a plethora of tribunals in Hong Kong. Article 80 of the Basic Law states that the courts at all levels shall be the Judiciary, exercising the judicial power of the Region. A particular problem with this article is the meaning of "judicial power", which is an extremely difficult concept. In the first place, art.80 does suggest that the courts should not exercise non-judicial power, and in this way reinforces the doctrine of separation of powers, at least between the Judiciary on the one hand and the Legislature and the Executive on the other. In this regard it is important to draw a distinction between a judge and the Judiciary. Some judges are appointed to various statutory bodies, and some statutory bodies even require a judge to serve in certain positions. Thus, for instance, Mr Justice B. Fung was appointed to chair the Electoral Affairs Commission, and Mr Justice K. H. Woo was appointed as the Commissioner for Interception of Communications and Surveillance to handle applications to permit covert surveillance and interception. While it is understandable that, given the sensitive nature and importance of these positions, the participation of a judge will enhance public confidence in the work of the statutory bodies.[56] However, it is important to note that the participation of a judge is not the same as the participation of the Judiciary. The appointment of a judge is no different from an appointment of a member of the Bar to chair these positions. The appointee is valued for his expertise and personal quality, but just as a barrister will not represent the Bar in these circumstances, a judge will not represent the Judiciary either in these other capacities.

10.024 The Obscene Articles Tribunal may present a particular problem. It has an exclusive jurisdiction to determine whether an article is obscene or indecent so that whenever this issue arises in any court, the trial court has to refer the issue to the Tribunal for determination. In so doing the Tribunal forms part of the judicial process. At the same time, it has an administrative jurisdiction to classify articles submitted to it so as to provide guidance to the community on what publications are regarded as obscene (Class III), and therefore cannot be published, or indecent (Class II), and therefore cannot be published to a minor. It is most undesirable that the same body should exercise both a judicial and an administrative jurisdiction. The Tribunal has different powers in performing its administrative and judicial functions, and different procedures and rules of evidence apply in the discharge of these different functions.

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[54] Section 10. Presumably their employment can be terminated by not renewing the contract of employment upon its expiry: see below.

[55] See *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234; *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237, and Chapter 19.

[56] For the judicial attitude towards appointment of a judge to a public office, see Andrew Li CJ, Speech at the Ceremonial Opening of the Legal Year 2009 (12 January 2009) (available at http://www.info.gov.hk/gia/general/200901/12/P200901120166.htm).

The exercise of an administrative jurisdiction may also undermine the fundamental principle of judicial independence. Thus, in response to a consultation on the review of the Control of Obscene and Indecent Articles Ordinance, the Judiciary expressed great dissatisfaction with the above arrangements and proposed the removal of the Tribunal's administrative jurisdiction.[57]

10.025 Secondly, while it is for the courts to exercise the judicial power of the State, it does not mean that other bodies cannot exercise some form of judicial power. In *Yau Kwong Man v Secretary for Security*,[58] Hartmann J (as he then was) held that the power to pass sentence for criminal offences is a judicial power of the State which cannot be placed in the hands of the Executive, and therefore s.67C of the Criminal Procedure Ordinance which bestows the power to determine the sentence of prisoners formerly held at Her Majesty's pleasure was inconsistent with art.80 of the Basic Law. His Lordship pointed out that "It has not been disputed that the Basic Law is founded on what is commonly called the Westminster model. As such, the powers of the legislature, the executive and the judiciary are separate. In terms of art.80, judicial power is vested in those appointed to hold judicial office. That being so, what the legislature cannot do, consistent with the separation of powers, is to place judicial power in the hands of the executive."[59] At the same time, his Lordship also noted that it could sometimes be difficult to decide whether a decision is an exercise of judicial or administrative power. It has to be recognised 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 a legislative or administrative function.[60]

10.026 In the last few decades, Hong Kong has witnessed a dramatic growth of administrative and regulatory bodies. At the same time, with the developments in Hong Kong's administrative law, the law requires those responsible for the exercise of administrative powers to act fairly and, in many instances, with judicial fairness and detachment. In most cases, the decision maker has to ascertain the relevant facts, assess the evidence available, and give the parties affected an opportunity to be heard before he gives consideration to how a policy, discretion or a statutory or non-statutory power should be exercised. The process may be akin to a judicial process, but as Lam J pointed out in *Lee Yee Shing Jacky v Inland Revenue Board*,[61] "the mere resemblance of a process to the judicial process to ensure fairness cannot be the acid test for deciding whether the decision maker was exercising the judicial power of the state. Ultimately, one has to examine the nature, function and character of the decision in question in order to determine whether it involves the exercise of the judicial power of the state which by law reserves exclusively for the judiciary."

10.027 It is not a novel concept that a decision making body conducting a process seemingly akin to a judicial process (and which therefore can be described loosely as acting judicially or performing a judicial function) need not be performing the function of a court in the exercise of

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[57] Judiciary, The Review of the Control of Obscene and Indecent Articles Ordinance (Cap.390): The Judiciary's Response (November 2008) (available at http://www.judiciary.gov.hk/en/publications/coia_judiciary-response.pdf). See also *Three Weekly Ltd v Obscene Articles Tribunal* [2007] 3 HKLRD 673.

[58] [2002] 3 HKC 457.

[59] *Ibid.*, [38].

[60] *Lau Kwok Fai v Secretary for Justice* (unrep., HCAL 177 and 180/2002, [2003] HKEC 711).

[61] (unrep., HCAL 40/2008, [2011] HKEC 261), [68].

the judicial power of the state.[62] That distinction was accepted by Ribeiro PJ in *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* where he concluded that the common law has adopted the concept of a "court" as a body "exercising the judicial power of the state" in the context of contempt, which, as it happens, is the same concept adopted by the Basic Law. He further observed, after referring to arts.19 and 80–85, that "The purpose of the Basic Law provisions referred to is to establish the constitutional architecture of that system revolving around the courts of law, catering for the system's separation from that of China, its continuity with what went before and safeguarding the independence of the judiciary."[63]

10.028 Also, in *Lee Yee Shing Jacky v Inland Revenue Board*,[64] the issue in that case was whether an appeal from the decision of the Inland Revenue Board by way of case stated to the Court of Appeal without affording the respondent an opportunity to challenge the finding of fact was a violation of the right of access to court under art.35 of the Basic Law. Lam J held that the judicial power of the State can be exercised in two different capacities—original and supervisory, and a more limited right of access to court is justifiable if the supervisory power of the court is engaged.[65] As to what constitutes judicial power, Lam J warned against a mechanical adoption of overseas jurisprudence and resisted the temptation to search for an all-embracing definition.[66] Quoting from the judgment of the Privy Council in *Shell v Federal Commissioner of Taxation*, Lam J referred to what is not "a court":[67]

> "A tribunal is not necessarily a Court in this strict sense because it gives a final decision. Nor because it hears witnesses on oath. Nor because two or more contending parties appear before it between whom it has to decide. Nor because it gives decisions which affect the rights of subjects. Nor because there is an appeal to a Court. Nor because it is a body to which a matter is referred by another body."

10.029 In *Luk Ka Cheung v Market Misconduct Tribunal*, the court rejected the submission that the Market Conduct Tribunal has usurped judicial power and the criminal jurisdiction of the

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[62] See *Royal Aquarium & Summer & Winter Garden Society v Parkinson* [1892] 1 QB 431; *Attorney-General v British Broadcasting Corp* [1981] AC 303 and *General Medical Council v British Broadcasting Corp* [1998] 1 WLR 1573, 1580, where Robert Walker LJ (as he then was) said the following in respect of the Professional Conduct Committee of the General Medical Council:

> "Mr Henderson was correct in submitting that the PCC is exercising a sort of judicial power but in our judgment it is not the judicial power of the state which is being exercised. In *Attorney-General v British Broadcasting Corp,* the valuation court was part of the state's machinery of government, but an administrative part, and that explains the emphasis which the House of Lords placed on the distinction between judicial and administrative functions or purposes. In this case, by contrast, the PCC is a statutory committee of a professional body specially incorporated by statute. It exercises a function which is recognisably a judicial function, and does so in the public interest. It acts in accordance with detailed procedural rules which have close similarities to those followed in courts of law. Nevertheless, it is not part of the judicial system of the state. Instead it is exercising (albeit with statutory sanction) the self-regulatory power and duty of the medical profession to monitor and maintain standards of professional conduct."

[63] [45].

[64] (unrep., HCAL 40/2008, [2011] HKEC 261), [68].

[65] *Ibid.*, [79].

[66] In *Precision Data Holdings v Wills* (1991) 173 CLR 167, 188–189, the court observed that "The acknowledged difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive arises from the circumstance that many positive features which are essential to the exercise of the power are not by themselves conclusive of it. Thus, although the finding of facts and the making of value judgments, even the formation of an opinion as to the legal rights and obligations of parties, are common ingredients in the exercise of judicial power, they may also be elements in the exercise of administrative and legislative power."

[67] [1931] AC 275, 297.

courts of Hong Kong,[68] after considering (1) the novelty of the subject matter; (2) the fact that the Tribunal did not decide criminal guilt; (3) that the Tribunal does not decide civil liability; (4) the nature of the function of the Tribunal; (5) the registration of the Tribunal's orders; (6) the Tribunal's powers and (7) the relevant policy intention. After referring to the doctrine of separation of powers as the cornerstone of the Basic Law, the court cautioned that there were different forms of separation of powers in different common law jurisdictions and Hong Kong should apply this principle in light of the special circumstances of Hong Kong. In particular, the court highlighted the theme of continuity and rejected an idealistic approach:

> "It is plain that in a modern society like Hong Kong, administrative tribunals and bodies have an important role to play. This is not a new phenomenon. It was already the case before the Basic Law was promulgated. Given the theme of continuity, it would be very surprising if the effect of the Basic Law, upon its proper interpretation, were to outlaw these administrative tribunals and bodies for ousting the jurisdiction or usurping the judicial functions of the courts of judicature of the HKSAR. Or put in another way, 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, as opposed to an idealistic, 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 purposes."

10.030 This case also contains a helpful discussion on the role of tribunals in Hong Kong. They provide speedier, cheaper and more accessible justice, as well as the required expertise in specialised areas. They are usually set up for a specialised purpose, and serve as an important supplement to the formal court system. Some of the tribunals may deal with large-sum awards such as in industrial injuries, or highly complicated areas of law such as telecommunication or insider dealing, or even personal liberty, such as the Mental Health Tribunal. They evaluate evidence, find facts and apply legal rules to them. Although they do not apply the strict rules of evidence, they have a duty to act fairly. In this sense these tribunals are judicial rather than administrative in nature. They are "administrative bodies" only because they form part of the administrative system and they are preferred to courts for administrative reasons. Other factors are that some tribunals would have to work within the framework of executive policy, and their members are normally appointed for a period of time only. However, most of these tribunals act independently even when there is no tenure protection for its members. They make their decisions without interference from the executive government, and it would indeed be improper for the Government to influence a tribunal's decision as much as it would be to do so in the case of a court of law. They play an important role in modern society and are intended to be preserved by the Basic Law.

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[68] [2009] 1 HKLRD 114.

8. PRINCIPLE OF *STARE DECISIS*

10.031 Article 84 of the Basic Law provides that the courts of the HKSAR may refer to precedents in common law jurisdictions. As Hong Kong is a relatively small jurisdiction, this power is of great benefit to the Hong Kong courts that it can learn from the experience of other jurisdictions in seeking the appropriate solution for the problems that come before them. This provision is permissive in nature so that it does not preclude the courts from referring to precedents of civil law jurisdictions or international law, which the Hong Kong courts do.[69] At the same time, as continuity of the previous judicial system is the cornerstone of the judicial system under the Basic Law, it was for some time unclear how far English precedents continued to be binding on Hong Kong. Before the Handover, it was held that Privy Council decisions, whether on appeal from Hong Kong or not, were binding on Hong Kong courts.[70] This is hardly convincing, as Privy Council hearings an appeal from another jurisdiction serve as the final appellate court of that jurisdiction, and the explanation that it was the same court in hearing an appeal from Hong Kong could at best be a justification on the ground of expediency rather than on any sound principle. This was accepted by the Privy Council in *De Lasala v De Lasala*,[71] which held that while the decisions of the Privy Council on non-Hong Kong appeals were not binding on Hong Kong Courts, they would still be of great persuasive authority, such that the Hong Kong courts should normally be expected to follow them. The Judicial Committee further held that in view of the common membership of the Privy Council and the House of Lords, the Privy Council was unlikely to come to a different conclusion when its members sat in a different capacity in the House of Lords, and therefore the decisions of the House of Lords were also so persuasive that they were practically binding on Hong Kong courts. In *Tai Hing Cotton Mill v Liu Chong Hing Bank*,[72] the Judicial Committee provided a further justification that since the House of Lords was the final arbiter of English law, the Privy Council would defer to the House of Lords if the matter involved was to be decided by English law, and accordingly, decisions of the House of Lords in such matters would be binding on Hong Kong. This reasoning is based on the definition of "common law" in the Interpretation and General Clauses Ordinance (Cap.1) as meaning "the common law of England". This is hardly satisfactory as the common law has been received only subject to applicability to local circumstances and local modifications.[73] While common law from all jurisdictions share a common origin, it is now well recognised that the common law is no longer monolithic and can evolve differently in different common law jurisdictions.[74] After the Handover, Hong Kong courts have been determined to chart their own development of the common law, particularly in the area of public law, and this development is facilitated by an amendment to the Interpretation and General Clauses Ordinance where the "common law" is now defined as "the common law in force in Hong Kong".[75]

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[69] See Chapter 16.

[70] *Chan Hing Cheung v R* [1974] HKLR 196. See also *R v Lee Yuk Wah* [1985] HKLR 193, which was expressly overruled by the Court of Final Appeal in *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117. See also Wesley-Smith, *The Sources of Hong Kong Law* (Hong Kong University Press, 1994) Chapters 6–11.

[71] [1980] AC 546.

[72] [1987] HKLR 1041, 1053.

[73] Section 3 of the Application of English Law Ordinance (Cap.88).

[74] *China Field Ltd v Appeal Tribunal (Buildings) (No 2)* (2009) 12 HKCFAR 342, [78] (Lord Millett NPJ); see also *HKSAR v Hung Chan Wah* (2006) 9 HKCFAR 614, [28], where the Chief Justice expressly stated that the power to issue a prospective overruling may develop differently in different parts of the common law world.

[75] Interpretation and General Clauses Ordinance s.3.

10.032 In *Solicitor (24/07) v Law Society of Hong Kong*, the Court of Final Appeal had an opportunity to clarify authoritatively the doctrine of precedent in Hong Kong.[76] In short, as the final appellate court, the Court of Final Appeal is not bound by decisions of the Privy Council on appeal from Hong Kong or its own previous decisions. It has the power to correct itself, as any final appellate court must have, although this power will only be exercised sparingly and with great circumspection. The Chief Justice observed that:[77]

> "The doctrine of precedent is a fundamental feature of our legal system based on the common law. It gives the necessary degree of certainty to the law and provides reasonable predictability and consistency to its application. Such certainty, predictability and consistency provide the foundation for the conduct of activities and the conclusion of business and commercial transactions. But at the same time, a rigid and inflexible adherence by this Court to the previous precedents of Privy Council decisions on appeal from Hong Kong and its own decisions may unduly inhibit the proper development of the law and may cause injustice in individual cases. The great strength of the common law lies in its capacity to develop to meet the changing needs and circumstances of the society in which it functions."

10.033 The Court also confirmed that decisions of the Privy Council on non-Hong Kong appeals were not binding in Hong Kong, both before or after the Handover. They are of persuasive value, but the weight would depend on all the relevant circumstances, including the nature of the issues involved and the extent of similarity of any relevant statutory instrument. While Hong Kong has to decide for itself what is most appropriate for its own jurisdictions, it is nonetheless of the greatest importance that the courts of Hong Kong should derive assistance from overseas jurisprudence, particularly from the final appellate courts of other common law jurisdictions.

10.034 On the other hand, decisions of the Privy Council on appeal from Hong Kong before 1 July 1997 remain binding on other courts of Hong Kong.[78] This accords with the principle of continuity of the legal system enshrined in art.8 of the Basic Law. Likewise, the decisions of the Court of Final Appeal are binding on all lower courts.

10.035 The Court of Final Appeal has also decided that there should be greater flexibility for the Court of Appeal to depart from its own decisions as many cases do not go beyond the Court of Appeal for a variety of reasons. The former *per incuriam* rule in *Young v Bristol Aeroplane Co Ltd*[79] was regarded as too restrictive. Instead, the Court of Appeal may now depart from its own previous decisions if they are "plainly wrong". In considering whether a previous decision is plainly wrong, the court is not confined to a consideration of the matters as they stood at the time of the decision, but it can take into account subsequent development. On the other hand, the reasoning of the previous decision has to be so seriously flawed before it can be considered plainly wrong. Even when the court is satisfied that its previous decision is plainly wrong, the

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[76] (2008) 11 HKCFAR 117, [18]–[58]. See also *China Field Ltd v Appeal Tribunal (Buildings) (No 2)* [78]–[79] (Lord Millett NPJ)).

[77] *Ibid.*, [19].

[78] See also *Bahadur v Secretary for Security* [2000] 2 HKLRD 113.

[79] [1944] KB 718. The other two exceptions were not regarded as real exceptions as in those cases, either there is no binding precedent because there are two conflicting decisions of the Court of Appeal, or the previous decision of the Court of Appeal must be regarded as having impliedly been reversed if it cannot stand with a subsequent binding decision of the House of Lords: see Li CJ in *Solicitor (24/07) v Law Society of Hong Kong*, [39]–[40].

court should still take all the circumstances into account, before deciding whether to depart from it. Such circumstances include the nature of the issue involved, the length of time for which the previous decision has stood, the extent of its application, whether the issue is likely to be before the Court of Final Appeal or the Legislature, whether the matter is best left to the court or the Legislature, and whether and the extent to which failure to depart from it would occasion injustice in the case in question and similar cases. Given the importance of certainty, the plainly wrong test sets a high hurdle so that a departure from a previous decision should be wholly exceptional and should not be an everyday occurrence.

9. INDEPENDENCE

10.036 An independent judiciary is a vital pillar of a community that aspires to the rule of law. It is also the singular characteristic of the Hong Kong legal system which distinguishes it from the PRC legal system. Independence of the judiciary means that the judiciary exercises its judicial power and discharges its judicial function independently, free from any internal or external interference. In the PRC legal system, while the Judiciary is said to be operating independently from the Government, there is a judicial committee within the Judiciary which is headed by the Party Secretary, and this body may interfere with the trial of a particular case and may determine the promotion or otherwise of individual judges. In Hong Kong, judicial independence is not simply independent of the other branches of the Government but also independent of fellow judges. Judicial decision making is the sole responsibility of an individual judge, subject only to appeal. Even the Chief Justice cannot interfere with the decision of an individual judge. This principle applies equally to each judge sitting in a collegiate appellate court, who has to come to his own decision. Thus, a dissenting judgment is a well-accepted feature in the appellate court.[80]

10.037 While it may be controversial whether the Basic Law has adopted the system of separation of powers, there is a broad consensus in the community that at least the Judiciary is independent of the other two branches of the Government. An independent judiciary provides an impartial forum for resolving disputes in accordance with the law without fear or favour to either party of the disputes. This is particularly important when one of the parties to the dispute is the State. The judiciary stands between the State and the people, ensuring that the State operates within the bounds of law, and adjudicating impartially on the rights and obligations of the people. It has a vital constitutional role to uphold the rule of law and the liberty and freedoms of the people. In discharging its duties, it is inevitable that some of its judgments, particularly those in constitutional and public law, would be controversial. As the former Chief Justice observed, "judges are, as they must be, fearless in applying the law, irrespective of popular or media acclaim or criticism. Their judgments are, as they should be, subjected to public scrutiny. The right to criticise the judgments of the courts is a constitutional right which should be responsibly and vigorously exercised in a free society."[81] At the same time, the Judiciary should stay away from any social or political controversy.[82] Its role is to adjudicate on law, and not to express

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[80] It was not until 1966 that a dissenting opinion of the Judicial Committee of the Privy Council was allowed to be published. Until then it was considered that, as a requirement of secrecy of the deliberation of the Privy Council, no dissenting opinion should be published. Indeed, by convention, even a separate concurring judgment of a member of the Board who concurred with the majority in the result by a different route of reasoning was not allowed.

[81] Speech of Chief Justice Li at the Ceremonial Opening of the Legal Year 1998, 12 January 1998 (available at http://www.judiciary.gov.hk/en/other_info/speeches/legal_yr_cj.htm).

[82] *Ng King Luen v Rita Fan* [1997] HKLRD 757.

any view or preference on social or political issues, let alone attempt to resolve them.[83] Indeed, it is a convention that judges do not express their views on contemporary social or political issues, or until recently, on anything at all, outside the courts.[84] Nor can a judge be a member of the Legislature or Executive Government, or a political party. In an adversarial system, the judge sits as an impartial umpire ensuring that there is a fair hearing. It is wrong for a judge to "descend into the arena",[85] as to do so would cloud his judgment and threaten the independence of the Judiciary. In criminal prosecutions, a judge cannot tell the prosecution what to prosecute or when to prosecute.[86] The only power of the Judiciary is to stay a prosecution if there is an abuse of prosecutorial power. As the Judiciary is not the Executive Government, it is inappropriate to apply the *Carltona* principle to the Chief Justice in exercising his power of appointment of magistrates as the personification of the Governor.[87]

10.038 How do we guarantee the independence of the judiciary, apart from relying on the personal integrity of the judges? There are many factors contributing to the upholding of this fundamental principle, including:

- an independent system governing appointment, promotion and removal;
- security of tenure of judges and guarantees against the removal of judges;
- judicial immunity;
- protection of judicial salaries and the judicial budget;
- open and public trials;
- an independent legal profession;
- a free media;
- high social status and a decent remuneration;
- ethics, tradition and convention.

(a) Appointment of judges

10.039 Judicial independence can hardly be achieved if judges are appointed, promoted and dismissed at the pleasure of the Executive Government. Thus, an independent system that could minimise the influence of the Executive Government on the appointment, promotion and removal of judges are of critical importance to maintaining the independence of the Judiciary. Article 88 of the Basic Law provides that judges shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors. The Judicial Officers Recommendation Commission, which succeeded the Judicial Services Commission prior to the changeover, is responsible for

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[83] See speech of Chief Justice Ma at the Ceremonial Opening of the Legal Year 2011, 10 January 2011 (available at http://www.info.gov.hk/gia/general/201101/10/P201101100201.htm).

[84] It used to be the case that any judge who intends to give a public lecture has to clear this with the Chief Justice first. This is known as the Kilmuir Rule: see (1983) PL 383, pp.384–386.

[85] *Yuill v Yuill* [1945] P 15, 20.

[86] *Re Chu Wai Ha* [2005] 2 HKC 36.

[87] *Attorney-General v Chiu Tat Cheong David* [1992] 2 HKLR 84.

the appointment and promotion of judges.[88] It is chaired by the Chief Justice and comprises the Secretary for Justice, and seven other members appointed by the Chief Executive, being two judges, one barrister, one solicitor and three lay members. The Chief Executive has to consult the Council of the Law Society and the Bar Council regarding appointments from these respective branches of the profession. While the recommendation of the Law Society and the Bar Association is not binding on the Chief Executive, it is invariably accepted. Likewise, while the Judicial Officers Recommendation Commission may only make recommendations, it is by convention that its recommendation is always accepted by the Chief Executive. In addition, the appointment of the Chief Justice and the Chief Judge of the High Court shall be endorsed by the Legislative Council, and their appointment has to be reported to the Standing Committee of the National People's Congress for the record.

10.040 A resolution to fill a judicial vacancy by appointment or promotion is carried if there are less than two dissenting votes or abstentions.[89] It used to be the rule that any resolution on appointment or promotion requires unanimity, but this was replaced by the current rule in 1988.[90] While the current rule removes the veto power of any single member, it does allow an appointment or promotion to be vetoed by the three lay members who are appointed by the Chief Executive, even when the appointment or promotion is supported by all the members of the legal community. This situation fortunately never happens. Another controversial aspect is the membership of the Secretary for Justice, who wears multiple hats, including being a member of the Executive Council advising the Chief Executive, a chief legal advisor to the Government who heads the Department of Justice, a legal representative who represents the Government in all civil matters and an independent official who is responsible for all criminal prosecutions. In reply, he is the only member on the Commission who may provide inputs from the Government perspective, and it is not unfair that the Government is entitled to its view on any judicial appointment, so long as its role is not overwhelming.

10.041 Under art.92, judges and other members of the Judiciary shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions. Apart from the Chief Justice and the Chief Judge of the High Court, who must be Chinese citizens who are permanent residents of Hong Kong with no right of abode in any foreign country,[91] there is no nationality requirement for the other judges. Nor is it necessary for a judge to be conversant in the local language. This is important as it enables the courts to continue to recruit the best legal talent to serve on the Judiciary. The minimum qualification for the appointment of judges is set out in the respective Ordinances. In reality, the experience of the appointees, particularly for the higher court, far exceeds that stipulated in the statutes.[92] Unlike the civil law system where judges are recruited and trained by special institutions, judges in the common law system are appointed from among experienced legal practitioners. It is considered a natural progression of one's career in the legal profession and a matter of great prestige when one is elevated to the bench. While judges at District Court or above enjoy security of tenure until

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[88] "Judges" include judges at all level, including the Court of Final Appeal, High Court, District Court, Magistrates' Court, Small Claims Tribunal, Lands Tribunal and Labour Tribunal: s.6 and Sch.1 of the Judicial Officers Recommendation Ordinance (Cap.92).

[89] *Ibid.*, s.3A.

[90] See Albert Chen, "The Future of the Judicial Services Commission" (1988) 18 HKLJ 364.

[91] Article 90.

[92] Sir Anthony Mason, System for the Determination of Judicial Remuneration (February 2003) (available at http://www.judiciary.gov.hk/en/publications/consultancy_report_e.pdf), para.2.29.

their retirement, they have to give an undertaking to the Chief Executive not to return to private practice as solicitors or barristers in Hong Kong without his consent upon their retirement or leaving the Judiciary. In practice, consent has never been sought. In addition, the judges at the Court of Final Appeal are prohibited by statute from returning to practice. While solicitors who are in private practice for at least 10 years have been eligible for appointment to the High Court since 1995, no solicitor has ever been appointed directly to the High Court (apart from those promoted from the lower courts). It is also unusual to appoint a legal practitioner directly to the Court of Appeal.[93] Academic appointments, which are more common elsewhere, are a rare occurrence.[94]

10.042 Upon the Handover, all judges and other members of the Judiciary remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before. They continue to receive all pensions, gratuities, allowances and benefits due to them upon their retirement on terms no less favourable than before, irrespective of their nationality or place of residence.[95]

10.043 The Basic Law draws a distinction between judges and other judicial officers without defining who the other members of the Judiciary are.[96] As art.81 refers to the Court of Final Appeal, the High Court, District Courts, Magistrates' Court and other special courts, and since the Basic Law preserves the previous judicial system, a likely reading is that the expression "judges" refers to judges at the District Court or above, and the expression "other members of the judiciary" refers to the magistrates and adjudicators of various tribunals that form part of the judicial system.[97] Article 91 provides that the previous system of appointment and removal of members of the Judiciary other than judges shall be maintained. Indeed, their appointment process is the same as that of judges, and has to go through the Judicial Officers Recommendation Commission.

(b) Removal of judges and security of tenure

10.044 The independence of the Judiciary will be threatened if judges can be removed at will by the Government. In the long history of the English common law there has been no shortage of examples of judges who were removed for failing to carry out the will of the Government. Sir Edward Coke was dismissed by King James I in 1616, and King Charles I dismissed two Chief Justices and the Chief Baron of the Exchequer from office. King James II removed no less than 13 judges from office during his four-year reign. In recent times, the Lord President and another five judges of the Supreme Court of Malaysia were removed at the instigation of the then Prime Minister, Mahathir Mohamed, for being too vigorous in the judicial review of Executive action.[98] Under the Hong Kong Letters Patent, a judge at the Supreme Court or the

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93 Mr Justice Litton and the late Mr Justice Charles Ching are so far the only two barristers who were appointed directly to the Court of Appeal. Both were leading silks at the time of their appointment, and both were elevated to the Court of Final Appeal following the Handover.

94 For instance, Lady Baroness Hale of the House of Lords was an academic who was appointed directly to the bench. In Hong Kong, Professor Ted Tyler was the only academic who has been appointed directly to the District Court. He left the Judiciary after a few years to return to academia.

95 Article 93.

96 For example, arts.92 and 93 which apply to both judges and other members of the Judiciary. Articles 88 and 89 apply to judges only, whereas art.91 applies only to other members of the Judiciary.

97 A qualification would be the President and adjudicating officers of the Lands Tribunal, who are, respectively, a High Court judge and District Court judges.

98 See A J Harding, "The 1988 Constitutional Crisis in Malaysia" (1990) 29 ICLQ 57.

District Court enjoys security of tenure until he reaches the retirement age. This is preserved by art.88 of the Basic Law, which provides that a judge may only be removed for inability to discharge his or her duties, or for misbehaviour.[99] The Chief Justice shall appoint a tribunal consisting of not less than three local judges to investigate the matter, and the Chief Executive shall only remove the judge upon the recommendation of the tribunal. A more stringent procedure is adopted for the removal of the Chief Justice. He could only be investigated for inability to discharge his or her duties or for misbehaviour. The Chief Executive shall appoint a tribunal consisting of not less than five local judges and could only remove the Chief Justice upon the recommendation of the tribunal. The removal has to be endorsed by the Legislative Council. It was considered unnecessary to involve any overseas judge in removing a local judge.

10.045 Under the previous system, a judge (at District Court or above) may only be removed upon the recommendation of a tribunal which shall consist of not less than three judges to be selected by the Governor from among judges who hold or had held office as a judge of a court having unlimited jurisdiction in any part of the Commonwealth, or a court having jurisdiction in appeals from any such court.[100] The recommendation had to be further supported by the Privy Council before a judge could be removed.

10.046 Given that the removal of a Chief Justice would be a matter of utmost gravity, if not also politically charged, it would be desirable to have some overseas judges on the tribunal,[101] but this suggestion was not adopted in the Basic Law. Instead, it was agreed that the removal should receive the endorsement of the Legislative Council.[102]

10.047 The removal of other judges of the Court of Final Appeal and the Chief Judge of the High Court follows a similar procedure.[103] Their removal also requires the endorsement of the Legislative Council. Such endorsement is not required for other judges. Hence, for such judges at District Court or above, they have since lost the protection of a second-tier review by the Privy Council and do not enjoy the additional protection of endorsement by the Legislative Council in return.

10.048 The removal of judicial officers other than a judge of the Court of Final Appeal, the High Court or the District Court is governed by the Judicial Officers (Tenure of Office) Ordinance. A judicial officer may only be dismissed during the term of his employment agreement in accordance with the terms of this Ordinance and on grounds similar to that applicable to the removal of a judge. If an allegation that a judicial officer is unable to discharge his duties or has misbehaved is made to the Chief Justice, he shall afford the officer concerned an opportunity to explain or justify his or her actions. If the officer fails to provide a satisfactory explanation, the Chief Justice shall appoint a tribunal consisting of two judges of the High Court and a public officer to investigate the matter. On completion of the investigation, the tribunal shall furnish a report to the Judicial Officers Recommendation Commission setting out its findings and its conclusion as to whether the allegations are substantiated. If the officer has been convicted of a criminal offence, the conviction and a record of the criminal proceedings should also be placed

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[99] Instead of appointing a judge on pensionable term, a judge may choose to be on contract term, usually for a period of three years. In the case of contract, it will be automatically renewed at the expiry until the judge reaches retirement age. The only difference is that a judge on contract term will be entitled to a gratuity at the end of the contract, but will not receive any pensionable benefits.

[100] Hong Kong Letters Patent art.XVIA.

[101] As was the case with the Malaysian example, cited earlier.

[102] Articles 89, 90.

[103] Articles 88, 89 and 90.

before the Judicial Officers Recommendation Commission. After considering the report, the Commission may recommend a range of actions, including dismissal, compulsory retirement with or without pensions and other benefits, demotion, reduction of salary,[104] a reprimand or that no further action is required. The Chief Executive, after considering the recommendation, may take appropriate action.

10.049 One criticism is that lower court judges are appointed on contract terms and this could threaten the independence of the Judiciary. The Judicial Officers (Tenure of Office) Ordinance fills the gap here and affords protection to these judges against arbitrary removal. However, this Ordinance only applies to judicial officers employed on agreement terms after three years of employment. This means that a judicial officer can be removed in accordance with the terms of the employment during the first three years. After that, he or she may still be "removed" by not renewing his or her contract upon its expiry. If so, this is a major weakness that may threaten the independence of the Judiciary.

10.050 The charge of inability to discharge his or her function, or of misbehaviour has to be so serious that the continued employment of a judge or a judicial officer would undermine public confidence in the Judiciary before such a judge could be removed. Fortunately, not many judges have been removed throughout the history of Hong Kong. In 1846, John Hulme, the first Chief Justice of Hong Kong, was suspended from office after he had refused to accede to a request of Governor Davies to uphold a summary conviction of a British merchant Charles Compton whose conduct had brought unnecessary tension between Britain and China at that time.[105] The Chief Justice was charged with a complaint that he was a habitual drunkard who was unable to discharge his duties. The hearing, which took place on 4 March 1844, bore every hallmark of an unfair hearing. It was presided by Governor Davies, who was the complainant, sitting with the infamous William Caine, the then Home Affairs Secretary, and Major General D'Aguilar, both of whom were witnesses. Major General D'Aguilar considered the complaint frivolous and strongly objected to the prosecution. Indeed, none of the evidence came to proof after three days' hearing. Despite the strong objection of Major General D'Aguilar, the Chief Justice was found guilty. On 30 November 1847, Davies ordered the suspension of the Chief Justice of all duties. Charles Campbell, the prosecutor, was appointed as the Acting Chief Justice.

10.051 The conviction attracted strong protest from the community and the legal profession. On 16 June 1848, Lord Palmerston, the Foreign Secretary, found that the charges were unsubstantiated and cleared the Chief Justice of all charges. He was reinstated and returned to Hong Kong. By then, Davies had left Hong Kong and was succeeded by Sir Samuel George Bonham.

10.052 This early incident highlights the importance of the independence of the Judiciary. It also shows how fragile the Judiciary and the rule of law are. In 1912, Sir Francis Piggott CJ was removed summarily from his office by the Secretary of State when he refused to retire.[106] Since then, no judge has ever been removed. In the early 1980s, Mr Justice Jackson Lipkin was alleged to have fabricated his war record and his integrity had been thrown into doubt. He was in England at the time when the fabrication was revealed by the local media. The then Chief Justice, Sir Denys Roberts, met him in London, and on his return, Mr Justice Lipkin tendered his resignation

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[104] It is doubtful if reduction of salary will be constitutional: see *Meymott v Piddington* (1887) Knox 306, 312–313 (Martin CJ), 315 (Faucett J).

[105] Norton-Kyshe, *The History of the Laws and Courts of Hong Kong* (Vetch and Lee Ltd, 1971), Vol. 1, pp.115–119, 155–158, 196–200.

[106] Peter Wesley-Smith (1982) 12 HKLJ 260, 278–282.

from the Judiciary. He stayed in Hong Kong, and was sadly convicted in 2007 of a charge of defrauding the Director of Social Welfare when he had received public assistance in the amount of about $100,000 between 2003 and 2005 without full disclosure of his financial assets.

(c) Determination of judicial remuneration and judicial budget

10.053 An indirect way of interfering with judicial independence by the Executive or the Legislature would be by way of reduction or erosion of the judicial budget or judicial remuneration.[107] Article 93 of the Basic Law provides that all previous judges and other members of the Judiciary may retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before. In another context, it was held that the expression "no less favourable than before" means that the terms of service immediately before the Handover should serve as the baseline.[108] The terms of service could be varied after the Handover so long as they are no less favourable than before, and in deciding whether the terms of service are less favourable than before, the court should adopt a broad overall view and consider the package as a whole rather than focusing on minute individual items. Beyond art.93, there is no protection against reduction of Judiciary remuneration. Unlike many other jurisdictions,[109] there is no standing appropriation from the general revenue for judicial remuneration, which is included within the annual appropriation for the total expenditure of the Judiciary.

10.054 Matters pertaining to the terms and conditions of judicial service are considered by a Standing Committee on Judicial Salaries and Conditions of Service, an advisory body which was established in 1987 to review the pay and conditions of service of the Judiciary and to conduct an overall review if necessary, and to advise the Chief Executive accordingly on these matters. Final decisions have to be approved by the Executive Council, and if additional expenditure is involved, it would require the endorsement of the Finance Committee of the Legislative Council. Before 2002, there was a close relationship between judicial remuneration and civil service remuneration. While there was a separate Judicial Service Pay Scale, the pay levels of judicial officers have equivalents in the Civil Service Directorate Pay Scale, and their annual adjustments are normally the same. When the Government introduced the new Accountability System with appointments of new Principal Officials who are political appointees with a much higher remuneration package in 2002, and in view of the then controversial salary reduction of the civil service which did not apply to the Judiciary, the Chief Justice appointed Sir Anthony Mason to conduct a comprehensive review on the system of determining remuneration and terms of service of the Judiciary, taking into account, *inter alia*, the need "to safeguard the fundamental constitutional principle of judicial independence which directly affects such matters as judicial remuneration, the mode of determining judicial remuneration and reduction of judicial remuneration".[110] The review was timely as similar reviews had been carried out in Australia and the United Kingdom.

10.055 As a result of the review, the terms of reference of the Standing Committee on Judicial Salaries and Conditions of Service was modified in 2008. While the United Kingdom, the

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[107] Sir Anthony Mason, System for the Determination of Judicial Remuneration (February 2003) (available at http://www.judiciary.gov.hk/en/publications/consultancy_report_e.pdf), paras.3.3–3.5.

[108] *Secretary for Justice v Lau Kwok Fai* (2005) 8 HKCFAR 304.

[109] See the comparative survey by Sir Anthony Mason, *ibid.*, Chapter 3.

[110] Sir Anthony Mason, System for the Determination of Judicial Remuneration (February 2003) (available at http://www.judiciary.gov.hk/en/publications/consultancy_report_e.pdf), para.1.7.

United States, Australia and New Zealand have a constitutional or legislative prohibition against reductions in the remuneration of the judiciary, the Administration rejected a proposal for enacting similar legislation in Hong Kong. It, however, did accept the proposal to provide for a standing appropriation to meet the payment of judicial salaries. It is unseemly for the Judiciary to negotiate with the Government or the Legislature on judicial remuneration.[111] Hence it was agreed that judicial remuneration should continue to be fixed by the Executive Authorities after considering recommendations by the Standing Committee on Judicial Salaries and Conditions of Service, but the role of the Standing Committee is confined to judicial remuneration. The Administration also prefers to entrust the task to the Standing Committee rather than setting up a new statutory body as Sir Anthony has proposed. The membership was, however, expanded to comprise seven non-official members, including one practicing solicitor and one practicing barrister. No serving or retired judges or cross-membership with other public bodies should be allowed. It also accepted that performance pay and productivity bonuses, which do not sit well with judicial independence, should not form part of judicial remuneration. In advising on judicial remuneration, the Standing Committee should take into consideration a variety of factors, including the independence of the Judiciary, the nature and the workload of judicial office, recruitment and retention in the Judiciary, comparisons with private and public sector remuneration, relativities between different judicial officers, external economic factors, the Government's budgetary constraints, and the prohibition against a return to private practice in Hong Kong, which is a significant constraint that does not exist elsewhere. It is further accepted that a decent remuneration commensurate with the prestige and status of the Judiciary is necessary to attract candidates of the right calibre to join the Judiciary. While these changes will enhance judicial independence and the transparency of the Standing Committee, it is unfortunate that the Standing Committee has not been made a statutory body, which would have provided a better guarantee of its independence.

(d) Judicial immunity

10.056 No legal action can be taken against any judicial officer for any act or things done or said in the exercise of their judicial function. This immunity is grounded upon the public interest that a judge may be free in thought and independent in judgment if he does not have to turn each page of his judgment with trembling hands.[112] This immunity is affirmed by art.85 of the Basic Law, which provides that members of the Judiciary shall be immune from legal action in the performance of their judicial function. This formulation seems to be wider than that in the common law, which draws a distinction between superior and inferior courts. For a District Court judge or below, if he acts within jurisdiction, he shall not be liable unless the complainant can prove malice or without reasonable and probable cause. However, if he acts outside jurisdiction, it is unnecessary to allege malice or without reasonable and probable cause, although this could be raised as a defence by the judge.[113] In *Sirros v Moore*, this distinction was vigorously queried. Lord Denning said:[114]

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[111] *Provincial Court Judges Assn (Manitoba) v Manitoba* [1997] 3 SCR 3, (1997) 150 DLR (4th) 577, 673 (Lamer CJC).

[112] *Sirros v Moore* [1975] QB 118.

[113] See District Court Ordinance s.71; ss.125 and 126 of the Magistrates Ordinance.

[114] *Re McC (A Minor)* [1985] AC 528.

> "As a matter of principle the judges of the superior courts have no greater claim to immunity than the judges of the lower courts. Every judge of the court of this land—from the highest to the lowest—should be protected to the same degree. If the reason underlying this immunity is to ensure 'that they may be free in thought and independent in judgment', it applies to every judge, whatever his rank."

(e) Open and public trial and a free media

10.057 The requirement of a public hearing is one of the most fundamental principles of the common law system. As Lord Atkinson put it, "the hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to the parties and the witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means for winning for it public confidence and respect."[115] Likewise, in *R v Mohamed Hashim Shamsudin*,[116] Roberts CJ, quoting from Lord Widgery in *R v Socialist Worker Printers and Publishers Ltd*,[117] stated:

> "The great virtue of having the public in our courts is that discipline which the presence of the public imposes upon the court itself. When the court is full of interested members of the public, as indeed one can say it is today, it is bound to have the effect that everybody is more careful about what they do, everyone tries just that little bit harder and there is a disciplinary effect on the court which would be totally lacking if there were no critical members of the public or press present."

(f) An independent legal profession

10.058 As judges are recruited from the legal profession, it has been said that an independent legal profession is essential to maintaining the independence of the Judiciary, and that "an independent judiciary without an independent Bar would be akin to having a frame without a picture".[118] Apart from nurturing the value of independence at the Bar, an independent profession, together with a free press, serves as a powerful watchdog for judicial independence.

(g) Code of conduct, ethics, tradition and convention

10.059 If the Judiciary enjoys great public respect and confidence, the corollary is that the public is entitled to expect the highest standard of professional competence and ethical conduct. In this regard, the Judiciary has promulgated an elaborate Judicial Code of Conduct the guiding principle of which is that a judge must be independent, impartial, and display integrity and propriety in all matters of conduct, both in and out of court. It covers matters such as conflicts

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[115] *Scott v Scott* [1913] AC 417, 463.
[116] [1987] HKLR 254.
[117] [1975] QB 637.
[118] *LaBelle v Law Society of Upper Canada* (2001) 52 OR (3d) 398, 408 (McKinnon J), approved by Hartmann J in *Pang Yiu Hung v Commissioner of Police* [2003] 2 HKLRD 125, [36].

of interest, conduct in court and even activities outside court.[119] Justice must not only be done, but must manifestly be seen to be done. Under this principle, judges must not put themselves into a position of conflict of interest, and must manifestly be seen to be impartial. Accordingly, a judge should not have any interest in the outcome of a particular case, and his judgment is liable to be set aside even when he was clearly not affected by his interest.[120] A barrister should avoid appearing before a judge who is his spouse or close relative, although given a small jurisdiction like Hong Kong, this may not always be possible. It is improper for a judge to talk to one party before him in the absence of the other party. This principle is extended to out of court activities. Thus, a judge shall avoid direct contact with an advocate even on social occasions if the advocate has appeared or is going to appear before that judge. The Code even provides guidance on commercial activities, use of judicial stationery, and visits to casinos or social establishments of a dubious reputation. As noted above, a judge should refrain from membership in any political organisation, or from political activities. He should also refrain from expressing any view on social and political issues, as well as on any controversial legal issue that may come before him.

(h) Judicial accountability

10.060 So much for judicial independence, but what about judicial accountability? Short of misbehaviour that warrants the dismissal of a judge, there could be a full range of conduct which would not instill public respect and confidence in the Judiciary. If a judge is pompous or rude, frivolous or boastful, stubborn or defiant, unjustifiably controversial and argumentative, patently lazy, impatient or inattentive, then even if his judgment is correct, the public may still legitimately feel that justice has not been done, or the perception that justice has not been done, and there should be means to enable an aggrieved litigant to air his complaint against a judge. If a judge falls asleep during a hearing, or if he reads a novel while counsel is making legal submissions, a litigant would have good cause to complain. Lord Pannick QC, in his interesting book on *Judges*, advocated a Judicial Performance Board to deter injudicious conduct, to provide a means by which judges can be disciplined in appropriate cases, to vindicate by an independent report a judge who has been unfairly criticised, and to enable aggrieved litigants or others to air their complaints. This was supported by a subcommittee of the Bar Association, but the proposal was not taken up. Instead, the Judiciary has introduced a procedure for handling complaints against any judge. The complaint would be handled by the designated court leaders at different levels of courts, who, after investigation, may take appropriate action against the judge concerned, including referring the matter to the Chief Justice and giving appropriate advice to the judge concerned.[121]

10. National People's Congress Standing Committee

10.061 The relationship between the Court of Final Appeal and the National People's Congress Standing Committee (NPCSC) is tricky. Under art.82, the power of final adjudication shall be vested in the Court of Final Appeal. Yet the power of final adjudication does not include the power of final interpretation of the Basic Law, which power, under art.158, is vested in the NPCSC. Under

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[119] Guides to Judicial Conduct (October 2004), available at http://www.judiciary.gov.hk/en/publications/gjc_e.pdf.

[120] *Dr Bentley's case* (*R v The Chancellor, Masters and Scholars of Cambridge* (1723) 1 Str 557, 93 ER 698).

[121] Judiciary, Complaints against a Judge's Conduct (November 2010), available at http://www.judiciary.gov.hk/en/crt_services/pphlt/pdf/complaintsjjoleaflet.pdf.

art.158, broadly speaking, all courts below the Court of Final Appeal enjoy the power to interpret the Basic Law if this question arises in the course of adjudication. This power is extended to all provisions of the Basic Law. When the case reaches the Court of Final Appeal, its power of interpretation of the Basic Law is limited. The Court has a duty to seek an interpretation from the NPCSC of a provision of the Basic Law if (1) the provisions concern affairs which are the responsibility of the Central People's Government or the relationship between the Central Authorities and Hong Kong (classification condition); and (2) it is necessary to interpret the provisions which interpretation will affect the judgments on the case (necessity condition). In *Ng Ka Ling v Director of Immigration*,[122] in determining whether the classification condition is satisfied, the Court of Final Appeal adopted a substantive test by asking what predominantly was the provision that had to be interpreted. In that case, two provisions were involved. The first was art.24, under which the issue was whether the requirement of a certificate of entitlement was an encroachment of the right of abode of a Hong Kong permanent resident. The second was art.22(4), under which people from other parts of China who wish to enter into Hong Kong must apply for approval. The Court of Final Appeal held that the predominant provision to be interpreted was art.24, and that being so, the Court did not have to make a reference to the NPCSC even though art.22(4) was arguably relevant to the interpretation of art.24. This part of the decision was reversed by the subsequent interpretation of the NPCSC, which criticised the Court for not seeking an interpretation pursuant to art.158 of the Basic Law. What is unclear from the interpretation is whether the predominant provision test was unacceptable or whether the Court's application of the test was unacceptable. In any event, the Court accepted in *Lau Kong Yung v Director of Immigration* that it would have to re-consider the test.[123] This opportunity arose in the recent case of *FG Hemisphere Associates LLC v Democratic Republic of Congo* where the plaintiff sought to enforce in Hong Kong two arbitral awards against the Congo Government against fees payable by a consortium of China State-owned enterprises to the Congo Government under a joint venture agreement to develop the infrastructure of the Democratic Republic of the Congo. The Congo Government pleaded absolute state immunity, which was rejected by the Court of Appeal.[124] Instead, it held that the common law only recognised restrictive state immunity, under which no state immunity would apply in relation to commercial transactions. The Chinese Government claimed that absolute state immunity has always been the foreign policy of China, and it was not for Hong Kong to depart from China's established foreign policy. On appeal to the Court of Final Appeal,[125] the Congo Government argued that the Court should seek an interpretation from the NPCSC that this case concerned foreign affairs which are outside the jurisdiction of the Court. On 8 June 2011, the Court, by a majority of 3:2, decided to make a reference to the NPCSC for an interpretation of the Basic Law on four questions of law involving arts.13 and 19 of the Basic Law. The majority considers that state immunity falls within an area which is always the exclusive responsibility of the Central Government and Hong Kong courts cannot, as a matter of legal and constitutional principle, adopt a position on state immunity that is different from that adopted by the central government. Accordingly, it is duty-bound to seek an interpretation from the NPCSC under

[122] (1999) 2 HKCFAR 4. For a detail discussion of this case, see Chapter 20 and Chan, Fu and Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press, 2000).

[123] (1999) 2 HKCFAR 300.

[124] *FG Hemisphere Associates LLC v Democratic Republic of Congo* [2010] 2 HKLRD 66. *Cf.* C.L. Lim, "State Immunity in Post-Handover Hong Kong", (2011) 127 LQR 159.

[125] *Democratic Republic of Congo LLC v FG Hemisphere Associates LLC* (unrep., FACV 5, 6 and 7/2010, [2011] HKEC 747).

art.158 before it delivers its final judgment. The minority accepts that recognition of a State is a matter for the Central Government, but the consequences, namely whether a State should enjoy immunity, is a matter of common law which should be decided by the Hong Kong courts. Under the principle of "one country, two systems", while the courts would give utmost consideration to the State's foreign policy, it is possible that, in adhering to a legal analysis, the courts may reach a conclusion that is not the same as that adopted by the Central People's Government, and this consequence should be permitted under "two systems". The four questions for interpretation by the NPCSC are: (1) whether the Central People's Government has the power to determine the rule or policy of China on state immunity under art.13; (2) whether Hong Kong courts are bound to apply or give effect to the rule or policy on state immunity as determined by the Central People's Government under art.13 or whether they have the liberty to depart from such rule or policy; (3) whether the determination by the Central People's Government as to the rule or policy on state immunity falls within the meaning of "acts of state such as defence and foreign affairs" in art.19; and (4) whether the common law on state immunity prior to the Handover has to be modified or adapted so that it is consistent with the rule or policy on state immunity as determined by the Central People's Government. The Secretary for Justice was asked to refer these questions through the Office of the Commissioner of the Ministry of Foreign Affairs to the NPCSC with a copy of the judgments of the Court of Final Appeal, the Court of Appeal and the Court of First Instance in this case.

10.062 In the course of the arguments, three letters from the Office of the Ministry of Foreign Affairs were placed through the Secretary for Justice before the Court of Final Appeal. The first letter, which was placed before the trial judge, stated that absolute immunity is the consistent and principled position of China. The second letter, which was placed before the Court of Appeal, sought to answer the First Instance Judge's comment that in signing the United Nations Convention on Jurisdiction and Immunities of States and their Property 2004, which recognises the theory of restrictive immunity, the Chinese Government was not entirely consistent in its approach. Both letters explained the foreign policy of China and were legitimately put before the courts. The third letter, which was placed before the Court of Final Appeal, sought to address the view expressed by the Court of Appeal that application of restrictive immunity did not have a bearing on the sovereignty of the China.[126] Unlike the first two letters which explained China's position on absolute immunity, the third letter was directed at Hong Kong. It was couched in strong and directive language that if Hong Kong courts were to apply the doctrine of restrictive immunity, it would have a serious and adverse effect on China's foreign relations and sovereignty. Some commentators close to Beijing were reported to have said that if the Court of Final Appeal were to decide on restrictive immunity, the NPCSC would be prepared to make an interpretation to overrule the judgment of the Court. The third letter gave rise to a legitimate concern about the independence of the Judiciary as it appeared that Beijing was to put pressure on the Court to decide in its favour.

10.063 The majority of the Court placed great weight on these letters as evidencing China's foreign policy. It noted that "it is not for the Court to express its opinion about the appropriateness of the Central People's Government's policy of absolute as opposed to restrictive immunity. The municipal courts are simply not equipped to take such a judgment, lacking relevant information and being ill-placed to gauge the full implications of adopting any specific policy on state immunity".[127] Mortimer NPJ, one of the dissenting judges, was quick to point out that these

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[126] The three letters are reproduced in [461]–[463] of the judgment of Mortimer NPJ.

[127] *Ibid.*, [281].

letters were not binding on the Court. While he was prepared to accept the facts stated in the letters without reservation, he noted that they demonstrated with considerable force a difference between the "two systems". The learned judge then added, "They do not suggest the existence of any Mainland law, still less any Mainland law applicable to Hong Kong, on state immunity. It is accepted that there is none".[128] Bokhary PJ is more explicit on the question of the independence of the Judiciary. His few paragraphs on this point, which will no doubt echo loud and long in the great hall of justice, deserve a quote *in extenso*:[129]

> "124. It has been suggested that it would threaten Chinese sovereignty, embarrass China and result in prejudice to China if the Court were to pronounce in favour of restrictive immunity in the courts of Hong Kong. Not for one moment does the Court take any of these concerns lightly. But judicial independence and the rule of law are also to be taken seriously. The law never threatens, rather does it always serve, Chinese sovereignty. And if some embarrassment or even some prejudice be seen as one side of it, the other side would be a clear and valuable demonstration of the vitality of the "one country, two systems" principle. It is a principle in which China, both the Mainland and Hong Kong, can take pride. 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 referred to earlier, that: 'One country, two systems' is the fundamental policy of the Chinese Government for bringing about the country's reunification.
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> 125. In the course of his address, Lord Pannick made the point that the judiciary cannot decline to decide a case in accordance with law even if so deciding it would embarrass the executive when dealing with foreign countries....
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> 126. Initially, I saw that as a forensic flourish. But its substance soon appeared. When Mr McCoy came to reply—doing so with the force that never deserts him even though no counsel's heart is fated always to be in the same place as his instructions—he spoke of the judiciary's inability to assess the extent of the executive's embarrassment in the country's relationship with foreign states. So it became important to ask Mr Yu, when he came to make his reply, whether he accepted that the courts must decide cases according to law even if doing so would cause the executive embarrassment in the country's relationship with foreign states. Mr Yu said that he accepted that. It is the fit response to give on behalf of the Secretary for Justice.
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> 129. .... There is only one more observation to make before leaving this part of the case, and it is this. None of the counsel who have addressed the Court has suggested that any state would or should fail to respect China's actions in applying the 'one country, two systems' principle to a part of Chinese territory and providing, as art.19(1) does, that it 'shall be vested with independent judicial power, including that of final adjudication'."

10.064 The first interpretation of the NPCSC reversing the judgment of the Court of Final Appeal in *Ng Ka Ling v Director of Immigration* has given rise to serious concern about the independence of the Judiciary. It has taken the Judiciary and the community a long time to recover, if ever, from this incident. *Democratic Republic of Congo LLC v FG Hemisphere Associates LLC* is the first time that the Court of Final Appeal has sought an interpretation of the Basic Law from the

[128] *Ibid.*, [466].
[129] *Ibid.*, [124]–[126].

NPCSC pursuant to art.158 of the Basic Law. While the difference between the majority and the minority in that case highlights the tension between "one country" and "two systems", and while the reasoning of the dissenting view is powerful and weighty, the majority cannot be faulted in deciding that this is an area that the court should seek a reference from the NPCSC before it renders its final judgment.[130] The independence of the judiciary means that the judiciary, in upholding the law, may inevitably decide cases that may cause administrative inconvenience or even political embarrassment to the executive government. The common law system is resilient enough to allow this situation to happen. In this regard, the tone of the third letter is probably unfortunate. Whatever be the interpretation of the NPCSC, it will be done at the cost of the independence of the Judiciary. Further, the request to the NPCSC to interpret the scope of "acts of state" may further restrict the jurisdiction of Hong Kong courts. Under the common law, it is for the court to decide whether a plea for an act of state is successful.[131] Once the plea is successful, the court has no jurisdiction to determine the matter. By relinquishing that power the jurisdiction of the court may now be left at the pleasure of the NPCSC.[132]

10.065 The reference gives rise to another unresolved issue. As this is a judicial reference made during the course of an appeal, the process of interpretation by the NPCSC should naturally be regarded as part of the judicial process. This is different from the situation where the NPCSC makes an interpretation in the absence of judicial proceedings, where the Court of Final Appeal has held in *Chong Fung Yuen v Director of Immigration* that the NPCSC interpretation is legislative in nature.[133] On this occasion, the NPCSC is asked to decide, *inter alia*, whether the common law principle of restrictive state immunity should give way to the policy position adopted by the Central Government under the Basic Law. This could involve complex legal arguments and it seems wrong in principle and contrary to fair hearing that the parties to the appeal would not have an opportunity to be heard by the NPCSC. At the very least, it appears that the parties should be given an opportunity to make written submissions to the NPCSC, or at least to the Basic Law Committee which has a duty to advise the NPCSC before it renders its interpretation.[134] On the last few occasions when the NPCSC made an interpretation of the Basic Law, the Basic Law Committee has played an insignificant role. Perhaps this could be an occasion to strengthen the role of the Basic Law Committee in the interpretation process.

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[130] In fact, the Court may have a way out of this controversy by holding that, assuming without deciding that absolute state immunity applies, the Congo Government has nevertheless waived its immunity claim. There are two obstacles to this argument. The first is that according to the House of Lords decision in *Duff Development v Kelantan* [1924] AC 797, a waiver of state immunity can only be made before the court. There seems to be no reason why a waiver can only be made in one particular form. It is a rather dated decision and Hong Kong court is free to depart from it. The second obstacle is that a waiver of immunity by submission to arbitration does not constitute a waiver of immunity from enforcement. It seems to be an absurd position that a state could agree to arbitration but then defeat an unfavourable outcome by refusing to waive its immunity from enforcement. This is in any event a developing area which the Hong Kong court could have taken a leading position, as Bokhary PJ did: see [149]–[179]. See also Mortimer NPJ, [526]–[531]. For further discussion, see Chapter 3.

[131] *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888, 931 (Fletcher Moulton LJ). See also Ghai, *Hong Kong's New Constitutional Order* (Hong Kong University Press, 2nd ed 1999) pp.318–320.

[132] In any event, Hong Kong courts now suffer from the disability to adjudicate on any case involving a foreign state even when the dispute concerns a pure commercial transaction.

[133] (2001) 4 HKCFAR 211. See also Johannes Chan, Basic Law and Constitutional Review (2007) 37 HKLJ 407, 415–419 for an analysis of art.158.

[134] The Basic Law Committee comprises six members from Hong Kong and six members from China. Most, but not all, of the members are legal professionals or law academics. See chapter 2.