Hong Kong's Judiciary under 'One Country, Two Systems'

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Hong Kong, formerly a British colony and since 1997 a Special Administrative Region (HKSAR) of the People's Republic of China (PRC) under the constitutional formula of 'One Country, Two Systems', has a judicial system that is much more highly evaluated, trusted and respected internationally and locally than its counterpart in mainland China. The colonial judicial system in Hong Kong, though modelled on the common law system in England, did not always fully guarantee the litigant's right to a fair hearing before an independent and impartial tribunal,[1] but at least the normative ideals of the Rule of Law and judicial independence were implanted on Hong Kong soil during the colonial era. Such ideals have remained alive and well, and more cherished and vigorously defended than ever before, after Hong Kong was re-unified with China in 1997. Under the Hong Kong Basic Law – the HKSAR's constitutional instrument that was enacted by the PRC's National People's Congress in 1990 and came into effect in 1997 – Hong Kong enjoys a high degree of autonomy, and its pre-existing legal and judicial systems have largely remained intact, except, for instance, that a new Court of Final Appeal was established, which exercises the power of final adjudication in Hong Kong cases – a power formerly exercised by the Judicial Committee of the Privy Council in London.

This chapter provides an overview of the Hong Kong Judiciary, particularly those aspects of the judicial system that are relevant to the independence, impartiality and integrity of the courts and their judges. The chapter consists of the following sections: (1) the structure of the judicial system; (2) judicial features of 'One Country, Two Systems'; (3) appointment and conditions of service of judges; (4) rules of bias and recusal; (5) contempt of court by 'scandalising the court'; (6) judges and free speech; (7) judges and non-judicial functions. These sections will be followed by a concluding section.

The structure of the judicial system[2]

[1] In the words of Cottrell and Ghai: 'for most of Hong Kong's history, litigants had little guarantee of a "fair and public hearing by a competent, independent and impartial tribunal" [International Covenant on Civil and Political Rights, art. 14]. Judicial independence was not a hallmark of colonial rule': Jill Cottrell and Yash Ghai, 'Between two systems of law: The judiciary in Hong Kong', in Peter H Russell and David M O'Brien (eds), *Judicial Independence in the Age of Democracy* (University Press of Virginia 2001) 207-232. For a critical account of the deficiencies of colonial justice from an insider's perspective, see Marjorie Chui, *Justice Without Fear or Favour: Reflections of a Chinese Magistrate in Colonial Hong Kong* (Ming Pao Publications Ltd 1999). See also a book by a former judge, Benjamin T M Liu, How are We Judged? (City University of Hong Kong Press 2000).

[2] This section draws on the previous work of one of the co-authors, P Y Lo, 'Hong Kong: Common Law Courts in China' in Jiunn-rong Yeh and Wen-Chen Chang (eds), *Asian Courts in Context* (Cambridge UP 2015) chap 5.

Under the Basic Law, the HKSAR is vested with independent judicial power, including that of final adjudication.[3] Hong Kong courts exercise the judicial power of the HKSAR and adjudicate cases in accordance with the laws applicable in the HKSAR, which are the Basic Law, the laws previously in force in Hong Kong, the laws enacted by the legislature of the HKSAR,[4] and a number of national laws of the PRC made applicable to the HKSAR.[5] The power of final adjudication is vested in the Court of Final Appeal (CFA), which may as required invite judges from other common law jurisdictions to sit on the Court.[6] The HKSAR courts are authorised by the Standing Committee of the National People's Congress (NPCSC) 'to interpret on their own, in adjudicating cases, the provisions of [the Basic Law] which are within the limits of the autonomy of' the HKSAR, and to interpret other provisions of the Basic Law as well, subject to the procedure of judicial reference to the NPCSC with regard to the interpretation of certain provisions of the Basic Law.[7] Hong Kong courts may refer to precedents of other common law jurisdictions.[8] Judicial power shall be exercised by the HKSAR courts independently without any interference.[9]

Hong Kong's judicial system largely follows that of the common law tradition. There is a hierarchical system of courts with the CFA serving as the apex 'supreme court'. The Chief Justice of the CFA is designated as the head of the Judiciary of the HKSAR and is charged with the administration of the Judiciary.[10] Figure 1 shows the structure of the HKSAR courts and their hierarchical relationship by way of appeals.

[3] Basic Law of the HKSAR, Arts 2, 19, 82 and 85.

[4] Ibid, Art 8.

[5] Ibid, Art 18.

[6] Ibid, Art 82.

[7] Ibid, Art 158.

[8] Ibid, Art 84.

[9] Ibid, Art 85.

[10] See the Hong Kong Court of Final Appeal Ordinance (Cap 484 of the Laws of Hong Kong) s 6(1A).

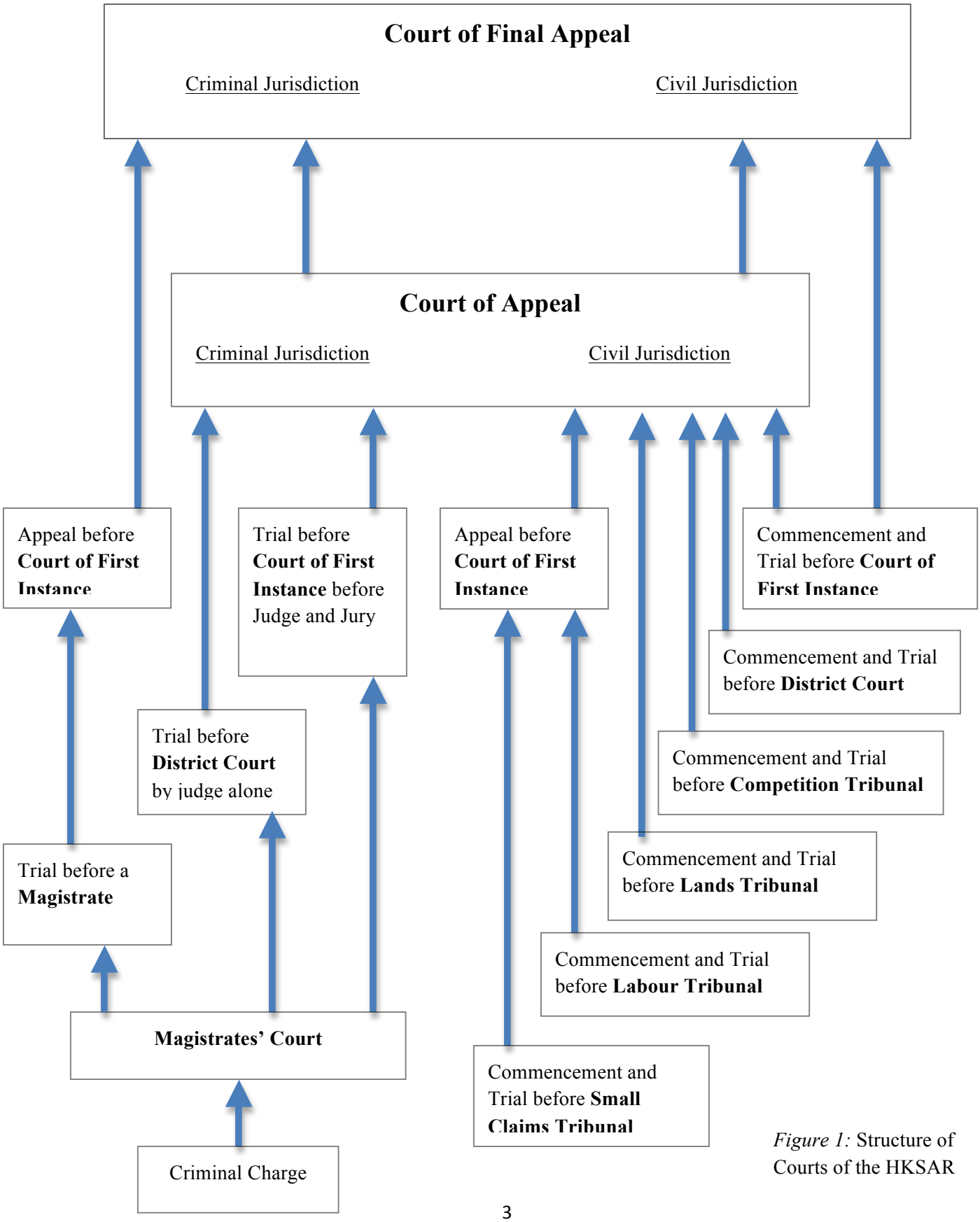

Figure 1: Structure of Courts of the HKSAR

Civil jurisdiction is exercised at first instance before a number of courts and tribunals, depending mainly on the monetary value of the claim and the nature of the claim. The Court of First Instance (CFI) of the High Court is a superior court of record of unlimited jurisdiction in civil causes and matters.[11] The District Court is a court of record of limited jurisdiction in civil causes and matters.[12] First instance hearings or trials in civil cases are normally heard by a court consisting of one judge (in the District Court or the CFI).[13]

Criminal proceedings begin in the magistrates' courts, which handle pre-trial proceedings, including whether the defendant should be granted bail or be detained. Criminal cases (excluding homicide) involving a defendant who is a juvenile below the age of 16 are tried by the juvenile court presided by a magistrate.[14] Trial in criminal cases may take place before a magistrate, in the District Court or CFI upon the application or choice of venue of the prosecution. Different levels of criminal courts have different sentencing powers, with the CFI having unlimited criminal jurisdiction, including the power to sentence a defendant to life imprisonment.[15]

Criminal trials are heard and determined by a magistrate or a District Judge sitting alone or a Judge of the CFI sitting with a jury,[16] depending on the level of court to which the criminal case is applied for, transferred or committed for trial.

Appeals from decisions of a magistrate are heard in the CFI.[17] Appeals from decisions of the District Court or the CFI are heard in the Court of Appeal (CA) of the High Court.[18] In the CA, appeals are generally heard by a bench of three judges.[19] Appeals from the judgments of the CA, and from the judgments of the CFI on magistracy appeals, are heard and determined by the CFA.

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[11] See the High Court Ordinance (Cap 4) s 3(2).

[12] The District Court incorporates the Family Court.

[13] See the High Court Ordinance (Cap 4) s 32(1) and the District Court Ordinance (Cap 336) s 6. Other provisions of the High Court Ordinance empower the CFI to hear first instance cases by a court consisting of a judge sitting with a jury or an assessor.

[14] See the Juvenile Offenders Ordinance (Cap 226).

[15] See the High Court Ordinance (Cap 4) s 3(2).

[16] A jury sitting in criminal trials on indictment before the High Court consist of 7 jurors in ordinary cases. This can be expanded to 9 jurors in long cases. The jury system was introduced in Hong Kong in 1845. Provisions for juries are now set out in the Jury Ordinance (Cap 2).

[17] See the Magistrates Ordinance (Cap 227) ss 104, 113.

[18] See the High Court Ordinance (Cap 4) ss 13, 14, 14AA; the District Court Ordinance (Cap 336) ss 63, 83, 84; and the Criminal Procedure Ordinance (Cap 221) ss 81, 81A, 81D, 81E, 81F, 82.

[19] There are also provisions for a bench of two judges or a single Justice of Appeal handling interlocutory appeals in a civil matter, appeals against sentences in a criminal case and applications for leave to appeal. See the High Court Ordinance (Cap 4) ss 34, 34A, 34B, 35.

In the CFA, final appeals[20] are heard by a bench of five judges, consisting of the Chief Justice who presides (or, if he is not available, another Permanent Judge), two or three Permanent Judges and one or two of the Non-Permanent Judges (NPJ) drawn from one or both of two lists of NPJs – one consisting of NPJs from Hong Kong and the other from other common law jurisdictions.[21] NPJs appointed under the latter list have included serving or retired judges of the highest court in England, and retired judges of the highest courts in Australia and New Zealand. Although this is not required by law, Chief Justice Andrew Li, the first Chief Justice of the HKSAR, established a convention that the five-member CFA bench hearing an appeal would almost invariably (in over 90% of the cases) include one visiting NPJ from overseas.[22] Such NPJs participate actively in the CFA's work and in developing the CFA's jurisprudence;[23] they have written lead judgments on behalf of the court in approximately one quarter of all cases heard by it in 1997-2010.[24] The presence of these distinguished jurists from the common law world has served to enhance the CFA's international reputation and facilitated transnational judicial dialogue.[25] It also testifies to the vibrancy of judicial independence in Hong Kong, as these distinguished jurists would not have accepted appointment to the court if they had no confidence in judicial independence in Hong Kong or had doubt about the integrity and reputation of Hong Kong's judicial system.[26]

As regards the language in which the court system operates, the Basic Law provides that both Chinese and English are official languages.[27] Legislation in Hong Kong is bilingual, but the judgments of most of the cases cited before the courts are in English. The majority of judges and magistrates in Hong Kong are bilingual,[28] but there is still a significant minority of expatriate

[20] These should be distinguished from applications for leave to appeal, which are dealt with by the Appeal Committee of the CFA consisting of a panel of three judges (be it the Chief Justice and 2 Permanent Judges or 3 Permanent Judges).

[21] See the Hong Kong Court of Final Appeal Ordinance (Cap 484) s 16. NPJs from Hong Kong have included retired Permanent Judges of the CFA itself, and retired or serving judges of the CA. The appointment of a list of NPJs from another common law jurisdiction gives effect to Art 85 of the Basic Law and is an important feature of the system of courts of the HKSAR.

[22] Simon N M Young et al, 'Role of the Chief Justice' in Simon N M Young and Yash Ghai (eds), *Hong Kong's Court of Final Appeal* (Cambridge UP 2014) 225 at 231. It should be noted that the composition of the five-member bench in each case heard by the CFA (as well as the composition of the Appeal Committee of the CFA which hears applications for leave to appeal to the CFA) is determined by the Chief Justice (CJ) (ibid, 230). The CJ usually allocates the responsibility for writing the lead judgment of a CFA decision: Simon N M Young et al, 'The Judges' in Young and Ghai (ibid), 253 at 260.

[23] Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 192-3.

[24] This was revealed by a book-length study of the CFA during the term of office of CJ Andrew Li (1997-2010): Young and Ghai (n 22 above) 261, 263.

[25] See P Y Lo, 'The Impact of CFA Jurisprudence Beyond Hong Kong' (2010) (8) Hong Kong Lawyer 36-41.

[26] See William Waung (retired judge of the High Court of Hong Kong), 'Judicial Independence in Hong Kong', Standnews, 5 Aug 2015 <https://www.thestandnews.com/politics/judicial-independence-in-hong-kong/> accessed 27 Feb 2016; Michael Skapinker, 'Hong Kong Law: A Trial for Wig and Gown', Financial Times, 22 July 2015.

[27] Basic Law, Art 9.

[28] *Hong Kong Judiciary* (published by the Hong Kong Judiciary in 2008) 33.

judges. The majority of the trials in the magistrates' courts and tribunals are conducted in Chinese (Cantonese).[29] Most of the judgments of the higher courts have been written in English. In particular, all CFA judgments have been written in English, with official Chinese translations produced subsequently in respect of selected judgments.

Size of the courts[30]

At the time of writing, the CFA consists of the Chief Justice, 3 Permanent Judges, 4 NPJs from Hong Kong (who are retired judges of the CFA and the CA) and 10 NPJs who are serving or retired judges of the highest courts in the UK, Australia and New Zealand.

The High Court consists of the CA and the CFI. It is headed by the Chief Judge of the High Court. The CA has 12 Justices of Appeal, 3 of whom hold the title of Vice-President of the CA.[31] There are 25 Judges of the CFI. There are also 9 Recorders of the CFI, who are senior members of the Bar appointed for a fixed term on the condition that they will set aside a month or so every year to sit in the CFI as a judge.[32]

The District Court consists of the Chief District Judge, the Principal Family Court Judge and 35 District Judges.

There are 7 magistrates' courts in different localities of Hong Kong. Each magistrates' court is headed by a principal magistrate. There are 82 magistrates, including the Chief Magistrate, 8 Principal Magistrates, 60 Permanent Magistrates and 11 Special Magistrates.[33] Judicial officers of the magistrate rank staff the Coroner's Court, the Small Claims Tribunal, the Labour Tribunal and the Obscene Articles Tribunal.

Apart from the above judges and judicial officers of the permanent establishment, the Chief Justice has been empowered by statute[34] to appoint from time to time and as the needs of judicial work requires, deputy judges of the CFI, deputy judges of the District Court and deputy magistrates, as well as temporary members of the High Court and District Court registries, the Lands Tribunal, the Small Claims Tribunal and the Labour Tribunal, for a specified duration of time. Deputy judges or magistrates are usually appointed from retired or former members of the Judiciary, or from the lower ranks of Judiciary ('seconded' to serve on a higher court), or from

[29] Ibid 33.
[30] The figures below represent the position on 3 February 2016: see the list of judges and judicial officers, <http://www.judiciary.gov.hk/en/organization/judges.htm> accessed 13 Feb 2016.
[31] A judge of the Court of First Instance may, on the request of the Chief Justice, sit as an additional judge of the Court of Appeal: see High Court Ordinance, s 5(2).
[32] High Court Ordinance, s 6A. See also the section below on temporary, part-time or 'non-regular' judges.
[33] Special magistrates, who need not be qualified solicitors or barristers, are appointed as a separate rank in the Judiciary establishment. They have no power to sentence defendants to imprisonment, and are mainly deployed to handle minor offences such as traffic contraventions, hawking, and littering cases.
[34] High Court Ordinance, s 10; District Court Ordinance, s 7; Magistrates Ordinance, s 5A; Small Claims Tribunal Ordinance, s 4A; Labour Tribunal Ordinance, s 5A.

members of the legal profession in private practice. The issue of having such 'non-regular' judges as part of the Hong Kong judiciary will be discussed in another section of this chapter.

The Annual Reports of the Judiciary of the HKSAR since 1997[35] have appendices on the caseload and case disposal of all levels of courts and tribunals, as well as the average waiting times for a case to be tried or heard, referenced against target waiting times set by the Judiciary.

Judicial features of 'One Country, Two Systems'

The general perception in Hong Kong that the level of the Rule of Law, judicial independence and human rights protection in mainland China is considerably lower than in Hong Kong has given rise to what the co-authors of this chapter would call the 'Hong Kong syndrome of One Country Two Systems'. By this term we refer to the phenomenon that whenever any action is taken, or any statement, remark or comment is made, with regard to Hong Kong on the part of mainland authorities (or even scholars believed to reflect the views of the mainland authorities) that seems to pose a threat to, or to deviate from, the principles and values of Hong Kong's existing legal and judicial systems, public opinion and the mass media in Hong Kong (particularly the 'pan-democrats' among Hong Kong's politicians,[36] and professional bodies of the legal community such as the Hong Kong Bar Association) would react strongly against it, criticising it and thereby defending the cherished principles and values of Hong Kong's legal system. This syndrome is relevant to the understanding of the judicial features of 'One Country, Two Systems'.

The most controversial event in the legal and judicial history of the HKSAR so far was the reference by the Government to the NPCSC for interpretation of the Basic Law after the CFA rendered its decisions in early 1999 in the cases of *Ng Ka Ling*[37] and *Chan Kam Nga*[38] on the right of abode in and migration to Hong Kong of Mainland-born children of Hong Kong permanent residents.[39] The Government estimated that the CFA's interpretation of the relevant Basic Law provisions would result in 1.67 million Mainland residents being entitled to migrate to Hong Kong in the next ten years. Chief Executive Tung Chee-hwa requested the Central People's Government in Beijing to invite the NPCSC to exercise its power to interpret (or 're-interpret') the Basic Law, which the NPCSC did in June 1999, overruling the CFA's interpretation. Under article 158 of the Basic Law, the NPCSC's interpretation did not have the effect of reversing the CFA's judgments or orders in the *Ng* and *Chan* cases; it only means that

[35] <www.judiciary.gov.hk/en/publications/publications.htm> accessed 20 Mar 2016. See also the annual *Controlling Officer's Report: Head 80 – Judiciary*, which forms part of the expenditure analysis of the General Revenue Account of the Estimates in the Annual Government Budget, eg <www.budget.gov.hk/2015/eng/pdf/head080.pdf> accessed 20 Mar 2016.

[36] There are basically two camps in the political scene of the HKSAR – the 'pan-democrats' (sometimes called 'the opposition') and the 'pro-Establishment' or 'pro-China' camp.

[37] (1999) 2 HKCFAR 4.

[38] (1999) 2 HKCFAR 82.

[39] See generally Johannes Chan et al (eds), *Hong Kong's Constitutional Debate* (Hong Kong University Press 2000).

Hong Kong courts in future cases must follow the NPCSC's interpretation instead of the CFA's interpretation of the relevant Basic Law provisions. In *Lau Kong Yung*,[40] the CFA considered the effect of the NPCSC interpretation and recognised its binding force. Sir Anthony Mason, former Chief Justice of Australia and a NPJ of the CFA, was a member of the CFA bench hearing this case; he commented in his concurring judgment as follows:

> 'As is the case with constitutional divisions of power, a link between the courts of the [HKSAR] and the institutions of the People's Republic of China is required. In a nation-wide common law system, the link would normally be between the regional courts and the national constitutional court or the national supreme court. … In the context of "one country, two systems", Article 158 of the Basic Law provides a very different link. … The Standing Committee's power to interpret laws is necessarily exercised from time to time otherwise than in the adjudication of cases.'[41]

Hundreds of members of Hong Kong's legal community participated in a 'silent march' in protest against the NPCSC's interpretation of the Basic Law in June 1999. Subsequently, the NPCSC has exercised this power on three other occasions: in 2004, acting on its own initiative (instead of at the request of the Chief Executive of the HKSAR), to interpret the Basic Law provisions relating to electoral reform; in 2005, upon the request of the Acting Chief Executive of the HKSAR, to clarify the term of office of a Chief Executive who succeeds one who resigns before completing his term of office; and in 2011, upon a reference by the CFA itself in the *Congo* case[42] to the NPCSC of Basic Law provisions relating to foreign affairs, which concerned whether the applicable law of foreign sovereign immunity in the HKSAR was the same as that in the Mainland. Among all four NPCSC interpretations, only the last interpretation was less controversial in Hong Kong.

The discourse in Hong Kong on the NPCSC's power to interpret the Basic Law generally tends to treat it as a threat to judicial independence in Hong Kong.[43] The better view is that this is

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[40] (1999) 2 HKCFAR 300.

[41] Ibid at 344-5.

[42] (2011) 14 HKCFAR 95, 395. See generally 'Focus: The Congo Case' (2011) 41 HKLJ 369-430.

[43] In an article entitled 'Hong Kong's judicial independence is here to stay – as long as "one country" and "two systems" are both fully recognised' (South China Morning Post, 25 Sept 2015), former Chief Justice Andrew Li wrote as follows: 'The right of abode episode [of 1999] was very controversial. I believe that it provided a salutary experience in the formative years of the new order. The episode has led to a consensus in Hong Kong and, I believe, also in Beijing that apart from an interpretation of an excluded provision made on a judicial reference by the court, the Standing Committee's power to interpret should only be exercised in the most exceptional circumstances. In any event, as I have publicly stated, the Standing Committee should refrain from exercising its power to override a court judgment in Hong Kong, especially one of the Court of Final Appeal. Although it would be legally valid and binding, such an interpretation would have an adverse effect on judicial independence in Hong Kong.' On the other hand, Professor Peter Wesley-Smith of the University of Hong Kong wrote that '[t]he argument that judicial independence is severely compromised by reference [in 1999] to the Standing Committee is not an easy one to establish. The decisions of the CFA stand and the rights of parties are not taken away; judges are accustomed to being overruled, and even if the CFA has no judicial overlord it would respect any *statutory* change to the law it

a question of judicial authority and judicial autonomy rather than judicial independence, because even if, as in the case of the 1999 Interpretation (but not the three subsequent interpretations), the NPCSC's interpretation has the effect of overruling (but not reversing) a judicial decision, this is comparable to a higher court overruling a judicial precedent of a lower court in an earlier case, or the legislature amending the law which the court has interpreted, the amendment in effect overruling the court's interpretation. There is no doubt that in these two latter situations, no question of a threat to judicial independence arises. On the other hand, it is true that if the NPCSC were to lose its self-restraint (which it has adhered to so far) and to exercise its power to interpret the Basic Law frequently during relevant judicial proceedings or after the Hong Kong courts have decided relevant cases, the authority of the Hong Kong courts would be eroded, and so will be public confidence in the Rule of Law in Hong Kong as a system of legal rules administered impartially by respected courts of law.[44]

Apart from the question of NPCSC interpretations, the following widely publicised statements on the part of PRC officials or scholars in recent years have also touched the nerves of the Hong Kong legal community and provoked verbal reactions from various commentators and, in one case, another 'silent march'. The statements were widely discussed in the media in Hong Kong. The counter-statements of the Hong Kong Bar Association mentioned in the table below may be said to reflect the sentiments of a significant number of people in Hong Kong who are concerned about issues of the Rule of Law and judicial independence.

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pronounced.' ('Judicial autonomy under Hong Kong's Basic Law', in Robert Ash et al (eds), *Hong Kong in Transition: One Country, Two Systems* (RoutledgeCurzon 2003) 161-174 at 170; emphasis in original.)

[44] As pointed out by Sir Anthony Mason ('The Rule of Law in the Shadow of the Giant: The Hong Kong Experience' (2011) 33 Sydney Law Review 623 at 625, 643), 'Where the power of final interpretation is exercised by a body other than the courts, conformity with the rule of law will depend upon the scope of the power, the character of the body and the frequency with which and the way in which it exercises the power. … On the basis of the Hong Kong experience so far, there is little reason to think that these values [of the Rule of Law] are at risk. … For the future much may depend upon the frequency, the subject matter and content of Standing Committee interpretations and the circumstances in which they are sought.'

July 2008	PRC Vice-President Xi Jinping (as he then was) spoke in Hong Kong on the desirability of 'mutual understanding and support' and 'cooperation and coordination' among the Executive, Legislature and Judiciary	Hong Kong Bar Association (HKBA) issued statement on judicial independence
Nov 2009	HK and Macau Affairs Office Deputy Director Zhang Xiaoming (as he then was) spoke in Macau of the desirability of coordination among the Executive, Legislature and Judiciary in the SARs of Macau and HK	HKBA issued another statement on judicial independence
Oct 2012	NPCSC Hong Kong Basic Law Committee Vice-Director Elsie Leung (formerly Secretary for Justice, HKSAR Government) commented that Hong Kong judges lacked sufficient understanding of 'One Country, Two Systems' and the relationship between the Central Authorities and the HKSAR	HKBA issued statement in response to Elsie Leung's remarks
Nov 2012	Tsinghua University law professor Cheng Jie, speaking at a seminar in Hong Kong, questioned the existing practice of appointing foreign citizens (in addition to locals) to be Hong Kong judges	HKBA issued statement on the judiciary of the HKSAR defending the existing practice of judicial appointments
June 2014	PRC State Council Information Office published White Paper on One Country Two Systems[45] which, inter alia, suggests that members of the HKSAR's Executive, Legislature and Judiciary should all be 'patriots'	HKBA issued statement in response to the White Paper. Dennis Kwok, Legislative Councillor elected from the functional constituency of lawyers, organised a 'silent march' in protest; more than 1000 member of the legal community joined the march
Sept 2015	Zhang Xiaoming, Director of the Liaison Office of the Central Government in the HKSAR, at a seminar to commemorate the 25th anniversary of the promulgation of the Basic Law, spoke about the constitutional status of the Chief Executive of the HKSAR, suggesting that his status is above the Executive, Legislature and Judiciary	HKBA issued statement in response to the speech[46]

[45] *The Practice of the 'One Country, Two Systems' Policy in the Hong Kong Special Administrative Region*, <http://english.gov.cn/archive/white_paper/2014/08/23/content_281474982986578.htm> accessed 21 Feb 2016.

[46] The HKBA's statements mentioned in this table are all available at <http://hkba.org/whatsnew/press-release/index.html> accessed 27 Feb 2016). For the latest statement on judicial independence and public criticisms of judicial decisions, see 'Statement of the Hong Kong Bar Association in Response to Certain Recent Statements made in relation to Judicial Decisions', published on this website on 25 Feb 2016.

Appointment and conditions of service of judges[47]

Judges and judicial officers in Hong Kong must be professionally qualified lawyers. Generally, in order to be eligible for appointment, a person must be qualified to practise as a barrister or solicitor[48] and has, since becoming so qualified, been in private practice or been a lawyer employed by the Government for at least a specified period of time, which is at least 10 years in the case of a judge of the High Court[49] and at least 5 years in the case of District Judge and other judicial officers.[50] The high offices of Chief Justice and permanent judges of the Court of Final Appeal are in practice appointed from judges of the High Court, particularly its Court of Appeal, although barristers who have practised as a barrister or solicitor in Hong Kong for a period of at least 10 years are also eligible.[51]

Article 88 of the Basic Law of the HKSAR provides that judges of the HKSAR shall be appointed by the Chief Executive of the HKSAR on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors. Article 92 of the Basic Law provides that judges shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions. Further, appointments of the Chief Justice, other judges of the Court of Final Appeal and the Chief Judge of the High Court require the endorsement of the Legislative Council[52] and reporting of the appointment to the NPCSC for the record, pursuant to Article 90 of the Basic Law.

These constitutional guarantees are implemented by the establishment of the Judicial

[47] This section draws on the previous work of one of the co-authors, P Y Lo (n 2 above).

[48] Hong Kong's legal profession is a divided profession consisting of barristers and solicitors in the English tradition. Barristers are advocates specialising in litigation; they have general rights of audience before all Hong Kong courts. Solicitors are lawyers qualified to provide legal advice and legal services to clients, including representation of clients in litigation, but their rights of audience before the courts are limited to the District Court, the magistrates' courts and selected proceedings before the High Court (though legislative amendments were enacted in 2010 to enable them to undertake advocacy work in the High Court and the CFA after passing an assessment). Barristers are members of the Hong Kong Bar Association. Solicitors are members of the Law Society of Hong Kong. The Bar Association and the Law Society together constitute the mainstream voice of the legal profession.

[49] See the High Court Ordinance (Cap 4) s 9(1). The period of at least 10 years may include a period of time of service as a District Judge or other judicial officer.

[50] See the District Court Ordinance (Cap 336) s 5; the Magistrates Ordinance (Cap 227) ss 5AA, 5AB; the Coroners Ordinance (Cap 504) s 3AA; the Labour Tribunal Ordinance (Cap 25) s 4A; and the Small Claims Tribunal Ordinance (Cap 338) s 4AA.

[51] See the Hong Kong Court of Final Appeal Ordinance (Cap 484) s 12(1), (1A). For NPJs, see s 12(3), (4), and the above section of this chapter on the structure of the judicial system.

[52] See the section below on 'The Legislative Council and the judiciary'.

Officers Recommendation Commission (JORC).[53] The JORC consists of the Chief Justice (who shall be the Chairman), the Secretary for Justice[54], 7 members appointed by the Chief Executive (CE), including 2 judges, 1 barrister, 1 solicitor, and 3 lay persons. The CE is obliged to consult the Hong Kong Bar Association and the Law Society of Hong Kong – the professional bodies of barristers and solicitors in Hong Kong respectively -- on the appointment of a barrister and a solicitor to the JORC, but he is not obliged to appoint the persons recommended by these professional bodies.[55] In practice so far, the CE has always accepted such recommendations. He has also accepted all the recommendations of the JORC on matters of appointment, extension of appointment and renewal of contracts of judges and judicial officers.[56]

Given the voting rules of the JORC requiring a dominant majority of the members present for a resolution to be effective,[57] Government appointees consisting of the Secretary for Justice and the 3 lay persons may not dominate the decision-making. On the other hand, as the JORC cannot pass any resolution if there are more than two dissenting votes, these Government appointees have the power to veto any appointment favoured by a majority of JORC members. In practice, the JORC seems to have worked well. Permanent Judge Patrick Chan said on the occasion of his retirement from the CFA in 2013 as follows:

> 'There is one thing I have wanted to say for a long time to those who still perceive any doubt about the independence of our Judiciary. Since 1995, I have been involved in the selection of judges, either as a member of the Judicial Service Commission or the Judicial Officers Recommendation Commission or the Judiciary's internal selection committee. I can bear witness to the fact that there has never been any interference from any quarter or any person in the appointment of judges. All my colleagues were appointed on their own merits.' [58]

It should be noted in this regard that not all matters of judicial appointment and extension of appointments are within the purview of the JORC. In particular, the following matters are outside

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[53] Judicial Officers Recommendation Commission Ordinance (Cap 92). The predecessor of the JORC was the Judicial Service Commission established in 1976. For the annual reports of the JORC, see <http://www.judiciary.gov.hk/en/publications/publications.htm>.

[54] The nature and functions of the office of the Secretary for Justice (SJ) are largely identical to those of the Attorney-General in colonial Hong Kong. The SJ is one of the most senior principal officials of the HKSAR Government, the head of its Department of Justice, the chief legal advisor to the Government, and the top decision-maker in matters of criminal prosecution. Both in colonial times and after the HKSAR was established, concerns had occasionally been expressed regarding whether it was appropriate for the Attorney-General or the SJ to be a member of the Judicial Service Commission or JORC, as this could be a source of the influence of the executive branch of government on judicial appointments. See, eg, Legislative Council Administration of Justice and Legal Services Panel report (2010/11), paras 32-35 <http://www.legco.gov.hk/yr10-11/english/panels/ajls/reports/aj0713cb2-2328-e.pdf> accessed 27 Feb 2016. For the Government's views (Feb 2011, see <http://www.legco.gov.hk/yr10-11/english/panels/ajls/papers/aj0228cb2-1129-2-e.pdf>

[55] Judicial Officers Recommendation Commission Ordinance (JORC Ordinance), s 3(1)(1A), (1B).

[56] For a list of judicial offices filled by the CE upon the recommendation of the JORC, see Schedule 1 of the JORC Ordinance.

[57] JORC Ordinance, s 3(3A).

[58] *Farewell Sitting for the Honourable Mr Justice Chan PJ* (18 October 2013) (2013) 16 HKCFAR 1012 at 1019.

its jurisdiction but within the scope of the power and responsibility of the Chief Justice (CJ): (1) The appointment of deputy judges of the High Court and the District Court and of deputy magistrates, and the termination of their appointment: These matters are within the exclusive power of the CJ.[59] (2) The extension beyond retirement age (which is 65) of the appointment of any Permanent Judge of the CFA: The CE, acting in accordance with the CJ's recommendation, may grant such an extension for not more than two periods each of three years.[60] (3) The appointment of a qualified person above the age of 65 as a Permanent Judge of the CFA for a three-year term, and its extension for not more than one three-year term: The CE, acting in accordance with the CJ's recommendation, may make such an appointment or grant such extension.[61] (4) The renewal of the appointment of any NPJ of the CFA: NPJs (whether from Hong Kong or from overseas) are appointed for a three-year term and are not subject to any retirement age. The CE, acting in accordance with the CJ's recommendation, may renew the appointment of any NPJ.[62] Each renewal is for a three-year term, and there is no limit on the number of renewals.

Recruitment of judges

Vacancies of judicial positions at all levels of Hong Kong courts, except the CA and the CFA, are openly advertised during recruitment exercises.[63] Sometimes the Judiciary would be proactive in encouraging particular individuals to apply. Applicants are required to disclose details of their professional practice or employment and the income received therefrom. Those who have held temporary judicial appointments or other judicial experience are also asked to enclose items of their judicial work. Applications are shortlisted by selection panels consisting of judges and judicial officers relevant to the level of court concerned. The shortlisted candidates are then interviewed by the selection panel, which will then forward its selections to the JORC.[64]

Given the significant difference between the high income of successful senior lawyers in Hong Kong and the salary levels of judges, it has not been easy to recruit High Court judges,[65]

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[59] See n 34 above.

[60] Hong Kong Court of Final Appeal Ordinance, s 14(2)(a). In practice, some Permanent Judges have been granted such extension. Permanent Judge Bokhary and Permanent Judge Chan retired in 2012 and 2013 respectively upon reaching the retirement age of 65.

[61] Ibid, s 14(2)(b).

[62] Ibid, s 14(4).

[63] Young et al, 'Role of the Chief Justice' (n 22 above) 234-5.

[64] Ibid, 235. The selection panels may include some members of the JORC, particularly those members who are judges (ibid).

[65] See, eg, the LegCo paper on judicial manpower <http://www.legco.gov.hk/yr14-15/english/panels/ajls/papers/ajls20150518cb4-964-3-e.pdf> accessed 27 Feb 2016. Chief Justice Ma stated at the Opening of the Legal Year on 12 Jan 2015 that 'it is better to leave positions vacant than to have appointments of persons not of the required standard': <http://www.info.gov.hk/gia/general/201501/12/P201501120481.htm> accessed 27 Feb 2016.

who are usually recruited from Senior Counsel,[66] apart from by promotion from the District Court.

Training of judges

As in other common law jurisdictions, Hong Kong judges and judicial officers are not trained to be such from fresh law graduates who passed an entrance examination for intending judges. Unlike the case in some civil law jurisdictions, there is in Hong Kong no training college for newly recruited judges or judicial officers. Rather, the Hong Kong Judicial Institute (formerly the Judicial Studies Board)[67] under the Judiciary organises occasional lectures, conferences, and workshops for judges and judicial officers on skills requisite for effective judging, including, for example, judgment writing in Chinese and mediation.

Appraisal of judges

The principle of judicial independence needs to be accompanied by judicial accountability, otherwise there is the risk of abuse of judicial power. In Hong Kong, the 'court leaders' of courts at various levels (i.e. the CJ, the Chief Judge of the High Court, the Chief District Judge and the Chief Magistrate) are responsible for monitoring the performance of judges or magistrates serving in their respective courts.[68] Annual appraisal reports are compiled by the relevant court leaders for individual judges and magistrates. After considering an appeal from the decision of a particular judge or magistrate, the relevant judge in the superior court may, if it is considered necessary, fill in a form of assessment of the decision concerned. [69]

Code of conduct for judges

In 2004, the Hong Kong Judiciary produced and published a Guide to Judicial Conduct, providing norms of behaviour for judges and judicial officers in work and in other relevant contexts.[70] The code of conduct was drafted after taking into account similar codes in common

[66] Senior Counsel is a title conferred upon the most reputable senior members of the Bar by the Chief Justice in consultation with the Bar Council and the Law Society under s 31A of the Legal Practitioners Ordinance (Cap 159). It is the equivalent of Queen's Counsel in colonial Hong Kong and in the UK. It has been pointed out that 'no solicitor has ever been appointed directly to the High Court (apart from those promoted from the lower courts)': Johannes Chan, 'The Judiciary' in Johannes Chan and C.L. Lim (eds), *Law of the Hong Kong Constitution* (2nd edn, Sweet & Maxwell 2015) 361 at 383.

[67] The Hong Kong Judicial Institute was established in early 2013. Its predecessor, the Judicial Studies Board, was established in 1988.

[68] Peter Wesley-Smith, 'Individual and Institutional Independence of the Judiciary' in Steve Tsang (ed), *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong University Press 2011) 99 at 121.

[69] Young et al, 'Role of the Chief Justice' (n 22 above) 236.

[70] <http://www.judiciary.gov.hk/en/publications/gjc_e.pdf> accessed 28 Feb 2016.

law jurisdictions such as Australia, New Zealand and Canada.[71] One of the subjects covered by the Guide is the limit on judges' participation in political organisations and activities.[72] Subsequently, there was some public concern about the participation in political parties of 'part-time' judges who are also practising lawyers.[73] In response, the Judiciary introduced a set of guidelines for part-time judges which limit their participation in political parties.[74]

To avoid potential conflict of interests, judges appointed as regular judges (with security of tenure until retirement) in the High Court and District Court are required to undertake[75] not to practise as a barrister or solicitor after retiring from or leaving judicial office, except with the consent of the Chief Executive.[76] Judges of the CFA are expressly prohibited by statute from returning to private legal practice after retirement from the court.[77]

Complaints against judges

The Hong Kong Judiciary has published a leaflet[78] describing how members of the public may lodge complaints relating to the Judiciary and how such complaints would be handled. Basically, no complaints against judicial decisions will be entertained, as the proper channel is appeal to a higher court. Complaints against the conduct of individual judges may be lodged, and will be dealt with by the relevant court leader (the Chief Justice, the Chief Judge of the High

[71] In October 2004 – the same month as the publication of Hong Kong's Guide to Judicial Conduct -- a Guide to Judicial Conduct for the English Judiciary was also published for the first time. See <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/judicial_conduct_2013.pdf> accessed 17 Feb 2016). This was followed by the publication in 2009 of the UK Supreme Court's Guide to Judicial Conduct.

[72] See paras 75-77 of the Guide. For example, 'Judges should refrain from membership in or association with political organizations or activities' (para 76).

[73] See the section below on temporary, part-time and 'non-regular' judges.

[74] 'Guideline in relation to part-time Judges and participation in political activities' (first published in 2006) <http://www.judiciary.gov.hk/en/crt_services/pphlt/pdf/guideline_part_time_judge.pdf > accessed 28 Feb 2016. The following provisions are noteworthy. 'Part-time Judges sit only limited periods and are in full-time practice in the legal profession.' A part-time judge may be a member of a political party but 'active participation in the activities of a political party' is considered unacceptable. The guidelines provide examples of such 'active participation'. It is also stated that '[j]udicial review cases are not listed before part-time Judges'.

[75] See *Hong Kong Judiciary* (n 28 above) 36; Albert H Y Chen, 'The Determination and Revision of Judicial Remuneration: Report of a Consultancy Study' (Sept 2004), in Standing Committee on Judicial Salaries and Conditions of Service, *Report on the Study on the Appropriate Institutional Structure, Mechanism and Methodology for the Determination of Judicial Remuneration in Hong Kong* (Nov 2005) <http://www.jsscs.gov.hk/reports/en/jscs_08/index.htm> accessed 28 Feb 2016, Annex E, para 8.17.

[76] There has been no known case of such consent having been sought: Chan (n 66 above) 383.

[77] Hong Kong Court of Final Appeal Ordinance, s 13.

[78] *Complaints Against a Judge's Conduct* (Nov 2010) <http://www.judiciary.gov.hk/en/crt_services/pphlt/pdf/complaintsjjoleaflet.pdf> accessed 28 Feb 2016. For the Judiciary's paper dated March 2016 on the review of the mechanism for handling complaints against judicial conduct and improvement measures that would take effect as from April 2016, see <http://www.legco.gov.hk/yr15-16/english/panels/ajls/papers/ajls20160321cb4-717-3-e.pdf> assessed 22 Mar 2016.

Court, the Chief District Judge and the Chief Magistrate). The court leader may investigate the matter and reply to the complainant. If necessary, the matter may be brought to the attention of the CJ or JORC. Where appropriate, advice would be given to the judge or judicial officer concerned.

In the budget for the Judiciary submitted to the Legislative Council in 2015, it was proposed to establish a new secretariat to provide administrative support to the CJ and court leaders in handling complaints.[79] In the year 2014, there were 40 complaints against judicial conduct, in addition to 160 complaints relating to the administration of the Judiciary. The relevant numbers in 2015 were 14 and 143 respectively.[80]

Tenure of judges

Article 89 of the Basic Law secures the tenure of 'judges'[81] of the HKSAR courts by providing that they may only be removed by the CE on the ground of inability to discharge their duties or for misbehaviour, on the recommendation of a tribunal appointed by the CJ and consisting of no fewer than 3 local judges.[82]

Judges of the CFA and the Chief Judge of the High Court may only be removed by the CE following the recommendation of the tribunal and the Legislative Council's endorsement of the proposed removal; also, the removal must be reported to the NPCSC for the record.[83] In the case of the CJ, the investigation into the cause for removal would be carried out by a tribunal appointed by the CE and consisting of no fewer than 5 local judges.[84]

The security of tenure or procedural protection against removal afforded by Article 89 of the Basic Law is similar to the arrangement in colonial Hong Kong under the Letters Patent 1917-1991, Article XVIA, which was applicable to the judges of the Supreme Court (equivalent to the High Court in the post-1997 era) and the District Court. In Hong Kong's colonial history, apart from the temporary suspension of the Chief Justice by the Governor in 1846, and the

[79] 'The Judiciary Administrator's Speaking Notes at the Special Finance Committee Meeting on 27 March 2015' <http://www.legco.gov.hk/yr14-15/english/fc/fc/sp_note/session2-ja-e.pdf> accessed 28 Feb 2016, para 9.
[80] See the Hong Kong Judiciary Annual Reports <http://www.judiciary.gov.hk/en/publications/publications.htm>.
[81] There is no definition of 'judges' in the Basic Law. Art 91 of the Basic Law refers to 'members of the judiciary other than judges'. Arts 92 and 93 refer to 'judges and other members of the judiciary'. 'Judges' in the context of art 89 should include judges of the CFA, High Court and District Court (whose appointments last until they reach the retirement age specified in the relevant law), and probably does not include magistrates and other judicial officers below the rank of District Court judges, as they did not enjoy security of tenure in the colonial legal system, and the Basic Law 'maintain[s] the existing system of appointment and removal of members of the judiciary other than judges' (art 91).
[82] This mechanism for removal to some extent follows the previous arrangement under the Letters Patent 1917-1991, Art XVIA, which was applicable to the judges of the Supreme Court (equivalent to the High Court in the post-1997 era) and the District Court.
[83] Basic Law, Art 90.
[84] Ibid, Art 89.

removal of a Chief Justice by the London government in 1912, there were no cases of removal of judges in accordance with the formal legal procedure for investigation and removal. However, it is believed that in the 1980s, three (expatriate) judges were pressured to resign because of misbehaviour.[85]

The Basic Law maintains in Article 91 the previous system of removal of 'members of the judiciary other than judges',[86] which is provided for in the Judicial Officers (Tenure of Office) Ordinance.[87] The Ordinance provides for the establishment of a tribunal of investigation consisting of two High Court judges and one public officer, which would report its findings to the JORC; the latter would consider the report and make a recommendation to the CE on the matter. The procedure in this Ordinance is applicable to those magistrates and judicial officers of similar rank who continue to be employed after completing their first three-year contracts.[88] In practice, newly employed magistrates and judicial officer are granted a three-year contract, after which they may seek renewal of the contract or apply to transfer to 'permanent and pensionable terms'.[89]

Security of tenure for judges lasts until retirement, and it may be relevant here to mention the procedure for extension of judicial office beyond retirement age, which, like security of tenure, may be relevant to judicial independence. The possible extension beyond retirement age of the appointment of a Permanent Judge of the CFA by the CE upon the recommendation of the CJ has been mentioned above.[90] In the case of the CJ himself, the CE may, upon the recommendation of the JORC, extend the appointment of the CJ for not more than two periods each of three years.[91] As regards High Court judges who reach retirement age, their appointment may also be extended by the CE in accordance with the recommendation of the JORC for a specified period or periods not exceeding five years in the aggregate.[92] As discussed below, judges who have retired may still have the opportunity to serve as deputy judges for limited periods if so appointed by the CJ.

Temporary, part-time or 'non-regular' judges

The Hong Kong judiciary is to a considerable extent staffed at various levels of the court system by recorders (of the High Court), deputy High Court judges, deputy District Judges and

[85] Gittings (n 23 above) 165; Chan (n 39 above) 386.
[86] See note 81 above.
[87] Cap 433, Laws of Hong Kong.
[88] Ibid, s 10.
[89] Wesley-Smith (n 68 above) 109.
[90] See n 60 above.
[91] Hong Kong Court of Final Appeal Ordinance, s 14(2)(a).
[92] High Court Ordinance, s 11A. A similar provision applies to District Judges appointed before 1 Jan 1987, whose statutory retirement age is 60. District Judges appointed after this date retire at the age of 65, and there is no provision for extension beyond retirement age. The statutory retirement age for High Court and CFA judges is also 65.

deputy magistrates.[93] A scholar has used the term 'non-regular judges' to refer to these temporary or part-time judges.[94] Recorders are usually Senior Counsel appointed for a three-year term, during which they serve as a judge of the CFI for a continuous period of several weeks per year. They are appointed by the CE upon the recommendation of the JORC.[95] Other 'non-regular' judges include (1) retired judges (such as judges who have retired from the High Court, and are subsequently appointed to serve as deputy judges in the same court for a fixed period), (2) 'part-time' judges, who are practising lawyers appointed to serve as deputy judges or deputy magistrates for a fixed period of, for instance, several months, and (3) 'temporary' or 'acting' judges of a court seconded from the court below to serve as deputy judges in the higher court for a fixed period. As mentioned above,[96] the Chief Justice alone (without the need to refer the matter to the JORC or the CE) may appoint and terminate the appointment of all these 'non-regular' judges (other than recorders) and magistrates, decide on the length of the period of appointment, and renew the appointment from time to time.

There are various pragmatic considerations that arguably justify the practice of having 'non-regular judges', despite the possible conflict between this practice and the theory of judicial independence as mentioned below. The difficulty of recruiting suitable candidates to the High Court bench as mentioned above might justify the appointment of some retired High Court judges as deputy High Court judges,[97] as well as the appointment of senior members of the Bar as 'part-time' judges. The experience of serving as deputy judges or recorders might encourage some of these Senior Counsel to apply to become full-time 'regular' High Court judges. Similarly, lawyers who serve as deputy magistrates might decide to apply to become full-time magistrates. From the perspective of the Judiciary, appointments to 'non-regular' judicial positions enable potential candidates for the Judiciary to be 'tried out'.[98] This consideration is not only applicable to practising lawyers appointed to serve as recorders, deputy judges or deputy magistrates, but equally applicable to judges from lower courts appointed to 'act up' in a higher court.

As of the end of 2014, the numbers of deputy judges sitting in the CFI and District Court respectively were 13 and 6, while the numbers of judges (excluding deputy judges) sitting in the

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[93] See generally Wesley-Smith (n 68 above); Berry F C Hsu, 'Judicial Independence Under the Basic Law' (2004) 34 HKLJ 279; Zhang Shudian, 'Empirical Observations on the Operation of the System of Recorders and Deputy Judges in the HKSAR' [2015] 4 *Gangao yanjiu* (Hong Kong and Macau Studies) 3 -14 (in Chinese).

[94] Wesley-Smith (n 68 above) 101.

[95] See note 32 above.

[96] See note 34 above and the accompanying text.

[97] In this regard appointment as deputy judges for a period (of say several months) which may be renewed may be a more flexible human resources management tool than formal extension beyond retirement age.

[98] However, some statements of international standards of judicial independence discourage such 'probationary' arrangements for judges: International Bar Association Minimum Standards of Judicial Independence (adopted in 1982), art 23; Universal Declaration on the Independence of Justice ('Montreal Declaration') (1983) <http://www.jiwp.org/#!montreal-declaration/c1bue> accessed 28 Feb 2016, art 2.20. Both documents are referred to in Hsu (n 93 above) 296.

CFI and District Court were 24 and 20 respectively.[99] Our study of the 'daily cause lists' for eleven days in September and October 2015[100] reveals that the average numbers of 'regular' judges and deputy judges sitting in court every day were 11.7 and 9 respectively for the CFI of the High Court, and 11.1 and 7.2 respectively for the District Court (excluding the family court). According to data supplied to the Legislative Council in 2015,[101] there were as of April 2015, 13 deputy judges in the High Court, including 10 appointed from within the Judiciary and 3 appointed from outside (i.e. from the legal profession). In the period 2011-2015, the numbers of deputy judges and magistrates appointed from outside were as follows:[102]

Appointments from outside the Judiciary	1 March 2011	1 March 2012	1 March 2013	1 March 2014	1 March 2015
Deputy Judge of the CFI	2	4	7	5	2
Deputy District Judge	1	1	1	0	0
Deputy Magistrate	16	25	10	24	12
Deputy Special Magistrate[103]	8	8	5	9	5
Total	27	38	23	38	19

The following data relating to recorders and deputy judges of the High Court and deputy District Judges was published in 2015, and was based on a study of the HKSAR Government Gazettes in 2000-2014 and other sources.[104]

No. of recorders in office during a particular year	The number was in the range of 8-16.
No. of deputy High Court judges in office during a particular year	The number was in the range of 15-35.

[99] See the LegCo document <http://www.legco.gov.hk/yr15-16/english/panels/ajls/papers/ajls20151015cb4-386-1-e.pdf> accessed 28 Feb 2016.

[100] The dates concerned were 17, 18, 21-25 and 29 Sept 2015 and 2, 5 and 6 Oct 2015. In addition to the data on deputy judges set out in the text above, it may also be noted that the numbers of recorders sitting in the CFI on these 11 days were 2 on one day, 1 on 6 days, and zero on 4 days.

[101] <http://www.legco.gov.hk/yr14-15/english/fc/fc/sup_w/s-ja-e.pdf> accessed 28 Feb 2016.

[102] <http://www.legco.gov.hk/yr14-15/english/fc/fc/w_q/ja-e.pdf> accessed 28 Feb 2016.

[103] For special magistrates, see n 33 above.

[104] Zhang (n 93 above) 5.

No. of deputy District Judges in office during a particular year	The number was in the range of 17-43.

Other figures revealed by the same study include the following. In 1997-2014, a total of 29 Senior Counsel from the legal profession were appointed recorders at various points in time. Nine among these 29 persons were subsequently appointed (full-time regular) judges of the CFI.[105] In 2000-2013, there were a total of 86 appointments to deputy judgeship in the CFI.[106] Among them, 35 were District Judges, and 33 were Senior Counsel from the legal profession.[107] Their appointments as deputy CFI judges of 12 District Judges were terminated upon their appointment as (full-time regular) judges of the CFI.[108] There were 25 deputy judges in office in the CFI during 2013. Among them, 7 were from the Bar, 7 were District Judges and 11 were retired judges.[109] In 2000-2013, there were a total of 145 appointments to deputy judgeship in the District Court. The appointments of 17 deputy District Judges were terminated upon their appointment as (full-time regular) District Judges.[110] The study also revealed that most High Court judges had served as deputy judges of the CFI or recorders before they were appointed as High Court judges, and most District Judges had served as deputy District Judges or deputy judges of the CFI.[111]

The existing system of 'non-regular judges' in Hong Kong has been criticised by local academics as involving a potential breach of the Basic Law and of international standards regarding safeguards for judicial independence.[112] Justice William Waung, a retired judge of Hong Kong's High Court, wrote forcefully in 2015 as follows:

> 'The system of regular deployment of large number of temporary judges … is a serious erosion of the principle of judicial independence, as temporary judges are serving, without independent appointment, without permanent tenure and without security and they serve at the pleasure of … the Chief Justice … In some ways, it can be said that all the judicial independence safeguard put in place for the regularly appointed Judges is undermined by the practice of using on a regular basis large number of temporary judges.'[113]

Judicial remuneration

Like security of tenure, financial security is also an important institutional guarantee of

[105] Ibid, 6.
[106] Ibid, 6.
[107] Ibid, 10.
[108] Ibid, 6.
[109] Ibid, 10.
[110] Ibid, 6-7.
[111] Ibid, 7.
[112] Hsu (n 93 above); Wesley-Smith (n 68 above).
[113] Waung (n 26 above).

judicial independence.[114] In Hong Kong, the Standing Committee on Judicial Salaries and Conditions of Service (SCJS), first established in 1987, advises the Government on the determination of judicial salaries and related matters. The Basic Law provides protection against reduction of salaries of civil servants and judges below the relevant levels at the time of the establishment of the HKSAR in 1997.[115] To cope with an economic downturn and severe budget deficits, the Government introduced legislation in 2002 and 2003 to enact a series of pay cuts for civil servants (which did not however reduce their salaries below the 1997 level).[116] Although these pay cuts were not applicable to the Judiciary, the latter commissioned a consultancy study on the system for the determination of judicial remuneration in Hong Kong. The consultancy report, authored by Sir Anthony Mason, was published in 2003, recommending, inter alia, that legislation should be enacted in Hong Kong prohibiting the reduction of judicial remuneration in any circumstance.[117] After considering the SCJS's 'Report on the Study on the Appropriate Institutional Structure, Mechanism and Methodology for the Determination of Judicial Remuneration in Hong Kong',[118] the Government decided in 2008[119] to introduce an improved mechanism for the determination of judicial remuneration that takes into account a basket of specified factors and is more transparent in its operation.[120] The SCJS was expanded to become an independent body of 7 non-official members (i.e. members of the community who are not government officials), including one barrister and one solicitor, but no serving or retired judges. The Government also decided that it was not necessary to introduce legislation prohibiting judicial pay cuts, but noted that any such cut cannot be introduced administratively and may only be enacted by legislation.

Judicial administration

The administration of the HKSAR courts is the responsibility of the Judiciary itself. The CJ, as head of the Judiciary, has overall control of the administration of Hong Kong's judicial system. In this regard he is assisted by the Judiciary Administrator and the respective 'court leaders' of the High Court, District Court and the magistracy, all of whom are accountable to the

[114] *Valente v The Queen* [1985] 2 SCR 673. See the discussion in Wesley-Smith (n 68 above) 99-101.
[115] Basic Law, Arts 100, 93.
[116] Public Officers Pay Adjustment Ordinance 2002; Public Officers Pay Adjustments (2004/2005) Ordinance 2003. The constitutionality of these laws were challenged but upheld by the CFA in *Secretary for Justice v Lau Kwok Fai* (2005) 8 HKCFAR 304.
[117] Sir Anthony Mason, 'Consultancy Report: System for the Determination of Judicial Remuneration' (Feb 2003) <http://www.judiciary.gov.hk/en/publications/consultancy_report_e.pdf> accessed 28 Feb 2016.
[118] See note 75 above.
[119] Press release (20 May 2008) on 'New System for the Determination of Judicial Remuneration' <http://www.info.gov.hk/gia/general/200805/20/P200805200183.htm> accessed 28 Feb 2016; Standing Committee on Judicial Salaries and Conditions of Service, Report on Judicial Remuneration Review 2009 <http://www.jsscs.gov.hk/reports/en/jscs_09.pdf> accessed 28 Feb 2016.
[120] For the existing salaries of Hong Kong judges and judicial officers, see the LegCo paper <http://www.legco.gov.hk/yr14-15/english/fc/fc/w_q/ja-e.pdf> accessed 28 Feb 2016, Question Serial No 2173.

CJ in administrative matters.[121] The Judiciary Administrator is the head of the staff of the Judiciary Administration, which is responsible for the maintenance of the running of the courts, the registries and the court buildings, and provides the following support services: case reporting and transcription, interpretation and translation, bailiff services (for execution of judgments and service of summonses), operating the resource centre for unrepresented litigants, and library services. The Judiciary Administration also handles the Judiciary's public relations, and 'is responsible for liaising with and communicating on behalf of the Judiciary with the executive and legislative branches of Government, court users and the public.'[122]

The Legislative Council and the Judiciary

The budget of the Judiciary in Hong Kong forms part of the Government's budget, which is considered annually by the Legislative Council, which controls public finance in Hong Kong through its approval of the budget and public expenditure in the annual Appropriation Bill proposed by the Government, in accordance with Article 73(2) and (3) of the Basic Law and the Public Finance Ordinance.[123] The estimated expenditure of the Judiciary forms part of the General Revenue Account and is analysed as a Head of Expenditure in the Estimates accompanying the budget proposed by the Government.[124] The preparation of the Judiciary's budget is coordinated by the Judiciary Administrator, who liaises with the CJ and the 'court leaders' in drafting the budget, and then proposes it to the Financial Secretary of the Government.[125] When the Government's budget proposal is considered by the Finance Committee of the Legislative Council (LegCo), the Judiciary Administrator is the relevant 'controlling officer' who appears before the Committee to explain and defend that part of the budget which relates to the Judiciary.[126]

As mentioned above, the appointment of the CJ, other judges of the CFA and the Chief Judge of the High Court is subject to LegCo's endorsement. In handling this matter, LegCo has not required the judicial candidates to appear before it to answer questions, as in the case of the US Senate Judiciary Committee holding hearings on appointments to the Supreme Court. The current procedure, first introduced in 2003,[127] is that information on the recommended candidates will be supplied to the House Committee of LegCo, which may decide to establish a

[121] *Hong Kong Judiciary* (n 28 above) 15, 45.
[122] Ibid, 45.
[123] Cap 2, Laws of Hong Kong.
[124] See, eg, *Controlling Officer's Report: Head 80 – Judiciary* (February 2016) <www.budget.gov.hk/2016/eng/pdf/head080.pdf> accessed 28 Feb 2016.
[125] Wesley-Smith (n 68 above) 121.
[126] See note 79 above.
[127] See LegCo papers <http://www.legco.gov.hk/yr09-10/english/panels/ajls/papers/aj1123cb2-308-4-e.pdf> and <http://www.legco.gov.hk/yr01-02/english/panels/ajls/papers/ajcb2-paj-e.pdf> accessed 28 Feb 2016.

subcommittee to consider the matter in greater detail.[128] Finally, the motion to endorse the proposed appointment will be moved and voted on in LegCo.

Chief Justice Andrew Li spoke of this LegCo procedure in his last annual address at the Opening of the Legal Year (2010):

> 'It is essential to judicial independence that the process of judicial appointment should never be politicised. In our jurisdiction, it has not been politicised and I trust that it will never be. This includes the endorsement process in the Legislative Council for the most senior judicial appointments. I am glad to see that the Legislative Council has adopted a procedure for dealing with endorsement which ensures that whilst enabling it to discharge its duty, the process is not politicised. I am confident that the Council will continue to deal with the process of endorsement without politicising it.'[129]

Finally, it is noteworthy that the Rules of Procedure of LegCo contain several rules restricting questions or speech relating to the Judiciary. 'A question shall not reflect on the decision of a court of law or be so drafted as to be likely to prejudice a case pending in a court of law.'[130] Speeches made in LegCo may not refer to a pending case in such a way as might prejudice that case, nor may such speeches raise issues of the conduct of judges or other persons performing judicial functions.[131]

Rules of bias and recusal

The law of the rule against bias and judicial recusal in Hong Kong is largely identical to that in common law jurisdictions such as England and Australia. The Guide to Judicial Conduct mentioned above provides for disqualification of judges in circumstances of 'actual bias', 'presumed bias' and 'apparent bias'.[132] Legislation expressly provides that no judge shall sit in the CA on the hearing of any appeal from his own judicial decision.[133] The leading cases on bias and recusal include *Deacons v White & Case*[134] and *Falcon*[135]. The CFA and the CA held respectively in these cases that the test for apparent bias for the purpose of recusal is that of 'reasonable apprehension of bias': would a 'reasonable, fair-minded and well-informed observer' believe that, given the circumstances, there is a reasonable possibility that the judge would be biased and closed to persuasion by counsel? Applications for recusal are made to the judge

[128] For example, the proposed appointments of a new Chief Justice and 3 NPJs of the CFA were considered by a Subcommitee on Proposed Senior Judicial Appointments: see LegCo paper <http://www.legco.gov.hk/yr10-11/english/panels/ajls/papers/aj0627cb2-2201-3-e.pdf> accessed 28 Feb 2016.
[129] <http://www.info.gov.hk/gia/general/201001/11/P201001110174.htm> accessed 28 Feb 2016.
[130] Rule 25(1)(g) of the LegCo Rules of Procedure.
[131] Ibid, rule 41(2) and (8).
[132] See part D (paras 38-70) of the Guide, which consists of a total of 98 paragraphs.
[133] High Court Ordinance, s 34(3), which also disqualifies the judge from determining 'any application in proceedings incidental or preliminary to' an appeal from his own decision.
[134] [2004] 1 HKLRD 291.
[135] [2014] 3 HKLRD 375.

hearing the case who is alleged to be subject to actual or apparent bias, and the judge's decision on the application may be appealed to a higher court.[136]

Contempt of court by 'scandalising the court'

Hong Kong law has inherited the common law of contempt of court. One way in which contempt may be committed is 'scandalising the court', which is a legal rule restricting the freedom of speech relating to the Judiciary. The leading case in this regard is *Wong Yeung Ng v Secretary for Justice*.[137] Wong, the chief editor of *Oriental Daily*, a popular newspaper in Hong Kong, was convicted on two counts of contempt of court and sentenced to four months' imprisonment.[138] He appealed to the CA and challenged the law of contempt of court on the ground that it violated the constitutionally protected freedom of expression and freedom of press. The two counts of contempt of court relate respectively to a series of articles published in the newspaper vehemently attacking the Judiciary in abusive and scurrilous language (for alleged biased decisions against and political persecution of the *Oriental Daily* newspaper) and a 24-hour 'paparazzi' type pursuit and surveillance of a High Court judge conducted by reporters and of the newspaper for three consecutive days (purportedly to 'educate' the judge on the meaning of 'paparazzi' which the judge had allegedly referred to in his judgment on a case involving the *Oriental Daily* and to 'punish' him for the judgment).

Wong's appeal was dismissed by the CA in 1999. The court pointed out that the constitutionally protected freedom of expression may be restricted on the ground of, inter alia, 'public order (*ordre public*)'. It was held that this covers the due administration of justice and the maintenance of the authority of the Judiciary. The court held that the restrictions on freedom of expression imposed by the law of contempt of court – in particular, those branches of this law relevant to this case that prohibit 'scandalising the court' and interference with the administration of justice as a continuing process – are justified. The court followed New Zealand case law (rather than the different Canadian case law) in holding that contempt is committed when the publication or action entails a 'real risk' (as distinguished from 'real, substantial and immediate danger' as suggested by the Canadian case law) that public confidence in the administration of justice will be undermined or the administration of justice will be interfered with. The court stressed that in determining what constitutes contempt of court and how to choose between varying interpretations thereof in overseas case law, the local circumstances of Hong Kong should be taken into account. In this regard the court referred to 'the relatively small size of Hong Kong's legal system', the ease of 'communication with a very substantial proportion of the population', the 'special importance' in Hong Kong of 'confidence in our legal system, the maintenance of the rule of law and the authority of the court', the 'frequent, if misconceived, expressions of anxiety in this respect', and the fact that

[136] See, eg, *Patel v Au* [2016] 1 HKLRD 328; *ZN v Secretary for Justice* [2016] 1 HKLRD 174; *Lai Yi v Tsui Kin Chung*, LDPD 1406/2015, 5 Oct 2015.
[137] [1999] 2 HKLRD 293.
[138] *Secretary for Justice v Oriental Press Group Ltd* [1998] 2 HKLRD 123.

'the ordinary citizen in Hong Kong regards the court as his ultimate and sure refuge from injustice and oppression'.[139]

Judges and free speech

Following the practice in other common law jurisdictions, the Guide to Judicial Conduct in Hong Kong provides that '[a] judge should avoid expressing views on controversial legal issues which are likely to come before the courts in a way which may impair the judge's ability to sit'.[140] This formulation is relatively narrow and does not state generally that judges should refrain from commenting publicly in an extrajudicial capacity on social, political or policy issues. The Guide also provides that '[t]here is no objection to judges contributing to legal and professional education such as by delivering lectures, teaching, participating in conferences and seminars … contributing to legal texts. … such professional activities by judges are in the public interest and are to be encouraged.'[141]

At the annual ceremonial Opening of the Legal Year, the Chief Justice makes a speech which provides an opportunity for him as head of the Judiciary to comment on current issues relevant to the Judiciary and the Rule of Law in Hong Kong. For example, both Chief Justice Li, the first CJ of the HKSAR, and Chief Justice Ma, the second CJ, have stated in their Opening of the Legal Year addresses that in exercising the power of judicial review, Hong Kong courts only adjudicate in accordance with the law, and the courts are not the proper forum for resolving controversial political and policy issues.[142] Apart from the Chief Justice speaking in this capacity, there were a few rare instances where judges or retired judges in Hong Kong have made public comments on controversial legal issues. For example, a High Court judge wrote to a newspaper in 1999 criticising the Government for referring the 'right of abode' issue to the NPCSC for interpretation.[143] Justice Bokhary, on the occasion of his retirement as Permanent Judge of the CFA, made a widely publicised comment on a possible storm coming in Hong Kong's legal

[139] [1999] 2 HKLRD 293 at 313. For more recent cases on contempt by scandalising the court, see, eg, *Secretary for Justice v Choy Bing Wing*, HCMP 4694/2003, 25 Oct 2005, 7 Dec 2005, and HCMP 1313/2010, 7 Jan 2011, 11 Feb 2011.

[140] Guide to Judicial Conduct (n 70 above) para 74.

[141] Ibid, para 72.

[142] See the speeches at <http://www.hkcfa.hk/en/documents/publications/speeches_articles/index.html> accessed 20 Mar 2016. For example, in his speech on 11 Jan 2016, Chief Justice Ma pointed out that 'judicial reviews are all about legality and not the merits or demerits of a political, economic or social argument.' In his last Opening of the Legal Year address (11 Jan 2010), Chief Justice Li stated that 'the court's role on judicial review is only to define the limits of legality, … the solution to political, social and economic problems cannot be found through the legal process and can only be found through the political process.' In both speeches, the principle of judicial independence was emphasised.

[143] This incident is referred to in Cottrell and Ghai (n 1 above) 227.

system.[144] Justice Litton, retired judge of the CFA, criticised litigants' abuse of the process of judicial review in politicised matters.[145]

Judges and non-judicial functions

Various statutes in Hong Kong enable the executive to appoint judges to various offices outside the Judiciary. The policies or rationales behind these statutory provisions vary from utilising judges' expertise[146] to making use of their reputation or skills of independence and fairness.[147] On many occasions, judges were appointed to chair or sit alone in commissions of inquiry even though it is not necessary under the relevant Ordinance for a judge to be appointed.[148] At other times, a judge would be appointed to chair a non-statutory panel to inquire into a matter of public concern.[149] While commissions or panels of inquiry are fact-finding, deliberative and at arms-length from the Administration, other appointments are adjudicative, determinative or more integrated with the machinery of administration of an area of government policy. Chief Justice Li felt obliged to address the issue in his Opening of the Legal Year speech on 12 January 2009. He indicated that the usual position is that if the Judiciary was asked to provide judges to undertake work outside the court system, extra resources would be made

[144] He said that 'For the rule of law I see – much as I wish that I did not see – storm clouds on the horizon. The storm which they threaten is a storm of unprecedented ferocity': (2012) 15 HKCFA 861 at 866-7.

[145] Allen Au-yeung and Julie Chu, 'Hong Kong's legal system sleepwalking to 2047, says former top judge Henry Litton', South China Morning Post, 3 Dec 2015.

[146] Examples include the Higher Rights Assessment Board under s 39E of the Legal Practitioners Ordinance (Cap 159), and the Long-Term Prison Sentences Review Board under s 6 of the Long-Term Prison Sentences Review Ordinance (Cap 524).

[147] Examples include the Chairman of the Electoral Affairs Commission under s 3 of the Electoral Affairs Commission Ordinance (Cap 541), and the Returning Officer in a Chief Executive election under s 41 of the Chief Executive Election Ordinance (Cap 569).

[148] The Governor was empowered by statute since 1886 to appoint commissioners to conduct inquiries, with the commissioners so appointed having the powers, rights and privileges of a court or vested in any judge. A total of 16 commissions of inquiry have been appointed since 1966, either under the Commissioners Powers Ordinance (Cap 86, 1964 Ed) or the Commissions of Inquiry Ordinance (Cap 86). A majority of them were chaired by a judge. They included the Commission of Inquiry into Kowloon Disturbances 1966 (chaired by Hogan CJ), the Commission of Inquiry into the Rainstorm Disasters 1972 (chaired by District Judge T L Yang), the Commission of Inquiry into the Case of Peter Fitzroy Godber (conducted by Blair-Kerr J, 1973), the Commission of Inquiry into Inspector MacLennan's Case (conducted by Yang J, 1980), the Commission of Inquiry into Witness Protection (conducted by Kempster VP, 1993), the Commission of Inquiry into the Garley Building Fire (conducted by Woo J, 1996), the Commission of Inquiry into Airport Opening (chaired by Woo J, 1998), the Commission of Inquiry on Allegations relating to the Hong Kong Institute of Education (chaired by Yeung JA, 2007), Commission of Inquiry into the Collision of Vessels near Lamma Island on 1 October 2012 (chaired by Lunn JA), and the Commission of Inquiry into Excess Lead Found in Drinking Water (chaired by Andrew Chan J, 2015-16).

[149] A board of inquiry consisting of Puisne Judge Paul Cressall was established in 1941 to investigate into allegations of corruption and abuse within the Air Raid Precaution Department; see Kwong Chi Man and Tsoi Yiu Lun, *Eastern Fortress: A Military History of Hong Kong, 1840-1970* (Hong Kong University Press, 2014) 157. Recent examples include the inquiry into the Lan Kwai Fong Disaster (conducted by Bokhary J, 1993), the inquiry on the Sai Wan Ho Development (chaired by Mortimer NPJ, 2005), and the Independent Expert Panel on the Hong Kong Section of the Guangzhou-Shenzhen-Hong Kong Express Rail Link (chaired by Hartmann NPJ, 2014).

available to the Judiciary to create more judicial posts or employ more deputy judges. He also stated the following policy:

> 'First, the Judiciary has not sought such work for itself. But where the Administration, reflecting community consensus, proposes legislation prescribing the appointment of a serving judge to a particular office, provided the Judiciary is satisfied that there is no objection in principle, it would be prepared to make a judge available upon enactment of the legislation by the Legislature. … Secondly, for all offices outside the Judiciary … where the relevant statute provides for serving judges and other categories of persons to be eligible for appointment, … the Judiciary's approach in recent years has been to request the Administration to look for a suitable person who is not a serving judge and to agree to make a serving judge available only where no other suitable person is available.'[150]

This statement does not however address several anomalies or incompatibilities from the perspective of separation of powers. The first concerns the mixed functions of the Obscene Articles Tribunal, a tribunal under the Judiciary. Publishers, distributors, importers, copyright owners, the Secretary for Justice and law enforcement agencies may access the tribunal at any time to obtain a classification of the nature of an article (as regards whether it is obscene or indecent) either to assist the subsequent publication of the article or to provide reference to any contemplated prosecution.[151] In a submission to the Government during its consultation exercise on the review of the tribunal, the Judiciary pointed out that the tribunal's administrative classification function and its function of judicial determination[152] (the latter of which forms part of criminal or civil proceedings raising an issue on the obscenity or indecency of the article) are 'distinct functions', and it is 'inappropriate and unsatisfactory' for them to be performed by the same body.[153] However, the Government has not proposed any changes to the tribunal to date.[154]

The second anomaly relates to the Market Misconduct Tribunal, a statutory tribunal consisting of a chairman (who must be a judge or former judge of the High Court) and two members established to inquire into, determine and provide sanctions for misconduct in the financial markets.[155] The tribunal hears allegations of market misconduct presented on behalf of the Securities and Futures Commission; sanctions that the tribunal may impose include disqualification orders, 'cold shoulder' orders, prohibition orders and disgorgement of profit

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[150] Chief Justice's Speech at the Opening of the Legal Year 2009 (12 January 2009) <http://www.info.gov.hk/gia/general/200901/12/P200901120166.htm> accessed 20 Mar 2016.
[151] See Control of Obscene and Indecent Articles Ordinance (Cap 390) Pt III.
[152] See, ibid, Pt IV.
[153] See 'The Review of the Control of Obscene and Indecent Articles Ordinance (Cap 390) – The Judiciary's Response' (November 2008) <http://www.judiciary.gov.hk/en/publications/coia_judiciary_response.pdf> accessed 20 Mar 2016.
[154] See Lo Pui Yin, *The Judicial Construction of Hong Kong's Basic Law: Courts, Politics and Society after 1997* (Hong Kong University Press, 2014) 246.
[155] See the Securities and Futures Ordinance (Cap 571) Pt XIII.

orders.[156] It had been argued that the tribunal was a court in all but name, exercising judicial power without being subject to the constraints placed upon a court that protect defendants' procedural rights. This argument, citing extensively Australian jurisprudence, was rejected by the Court of First Instance, which held that the tribunal was established to perform a regulatory and protective role in Hong Kong's financial markets and did not oust the jurisdiction of the criminal courts in Hong Kong or usurp their function.[157]

The third anomaly concerns the appointment of 'panel judges' (who are all judges of the CFI) under the Interception of Communications and Surveillance Ordinance to authorize interception of telecommunications or mail or surveillance.[158] There are similar regimes overseas, and judges' authorisations in the context of interception of communications and surveillance may be compared with magistrates issuing search warrants.[159] On the other hand, it has been argued that the employment of selected judges to perform in private a non-judicial function, while having the same power, protection and immunities of a judge in relation to judicial proceedings,[160] creates questions of consistency with the separation of power principle, as well as those on the capacity and integrity of the panel judges to continue to perform their judicial functions.[161] The lingering concern involves the borrowing of the Judiciary's reputation 'by the political Branches to cloak their work in the neutral colours of judicial action'.[162]

Conclusion

The Rule of Law in Hong Kong has been highly evaluated internationally,[163] and this includes international and local recognition that there is an independent and well-functioning judiciary in Hong Kong that is free from corruption and enjoys the confidence of the community. The legal system of colonial Hong Kong was far from perfect, but the values of the Rule of Law,

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[156] See, ibid, ss 257, 258.

[157] *Luk Ka Cheung v Market Misconduct Tribunal & Anor* [2009] 1 HKLRD 114, CFI, relying on the words of Sir Anthony Mason NPJ to avoid the application of the strict logic of separation of powers in Australia. See also Anthony Mason, 'The Place of Comparative Law in Development the Jurisprudence on the Rule of Law and Human Rights in Hong Kong' (2007) 37 Hong Kong Law Journal 299.

[158] Interception of Communications and Surveillance Ordinance (Cap 589), Pt 3, Div 2.

[159] See the Telecommunications (interception and Access) Act 1979 (Aust Cth) and the Surveillance Devices Act 2004 (Aust Cth).

[160] See the Interception of Communications and Surveillance Ordinance, s 6(4).

[161] See Hong Kong Bar Association, 'Interception of Communications and Surveillance Bill' (March 2006) <http://www.hkba.org/whatsnew/submission-position-papers/2006/20060324.pdf> accessed 20 Mar 2016, citing *Grollo v Palmer* (1995) 184 CLR 348 (HC Aust).

[162] See *Mistretta v United States* 488 US 361 (1989) at 407 (per Blackmun J).

[163] According to the World Justice Project's 'WJP Rule of Law Index 2015' <http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf> accessed 20 Mar 2016, Hong Kong (HKSAR) ranked 17th among 102 countries, with a score of 0.76. For comparison, it may be noted that the UK ranked 12th (score of 0.78), and the US 19th (score of 0.73). According to the World Bank's 'Worldwide Governance Indicators' <http://databank.worldbank.org/data/databases/governance-effectiveness> accessed 20 Mar 2016, in 2014, the score for 'Rule of Law: percentile rank' for Hong Kong was 93.8, while the corresponding scores for the UK, the US and China were respectively 94.2, 89.9 and 42.8.

judicial independence and judicial integrity have been successfully implanted on Hong Kong soil. Such values continue to be cherished and defended after the handover in 1997. As discussed in this chapter in the context of the 'syndrome of One Country Two Systems', the legal and political communities and members of the public in Hong Kong have been vigilant in ensuring that the cherished values of legality and judicial independence would not be subject to erosion or interference by Beijing or other mainland authorities.

This chapter has identified some features of Hong Kong's judicial system that may be considered significant from a comparative perspective. (1) Under the peculiar legal arrangement of 'One Country Two Systems', the Court of Final Appeal (CFA) enjoys the power of final adjudication, but the NPCSC of the PRC reserves the overriding power to issue legislative interpretations of the Basic Law of the HKSAR. (2) The CFA is partly staffed by overseas judges from the UK, Australia and New Zealand, who play a significant role in the CFA's work. (3) Hong Kong operates a bilingual legal and judicial system which is staffed by both Chinese-speaking and non-Chinese speaking expatriate judges at various levels of the court system. (4) Most judicial appointments are made by the Chief Executive acting on the recommendations of an independent Judicial Officers Recommendation Commission. The legislature has the power to endorse the most senior judicial appointments. This system of judicial appointments has worked well so far and no politicisation has occurred. (5) Judges enjoy security of tenure and financial security, and there exists a well-functioning mechanism for the determination of judicial remuneration. (6) A Guide to Judicial Conduct has been promulgated on the basis of similar guides in other common law jurisdictions. (7) 'Non-regular' judges, including temporary or part-time judges, play a significant role in Hong Kong's judicial system. (8) The Chief Justice is the most important office of, and plays a pivotal role in, Hong Kong's judicial system, given his overall responsibility for the administration of the judiciary, and various powers he has, for example, regarding the management of the CFA and the appointment of 'non-regular' judges at various levels of the court system. (9) The law and practice in Hong Kong regarding rules of bias and recusal, contempt of court and judges' speech are similar to their counterparts in other common law jurisdictions. (10) As in other common law jurisdictions, Hong Kong judges have been appointed to perform significant non-judicial functions.

Reflecting on the research we did in the course of the writing of this chapter, we feel that the Rule of Law, particularly those components of it that relate to the judiciary, is ultimately not only a matter of institutions and rules, but also a matter of persons, personalities and personal character. The judicial system of the HKSAR has been fortunately blessed by having Chief Justices and judges of integrity, who understand the values of the Rule of Law and judicial independence, and the challenges faced by them in the peculiar context of 'One Country Two Systems'. It is to be hoped that their successors will continue their good work, so that the Rule of Law and judicial independence will continue to flourish in this HKSAR of the PRC.