

Article 23

The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

第二十三條

香港特別行政區應自行立法禁止任何叛國、分裂國家、煽動叛亂、顛覆中央人民政府及竊取國家機密的行為，禁止外國的政治性組織或團體在香港特別行政區進行政治活動，禁止香港特別行政區的政治性組織或團體與外國的政治性組織或團體建立聯繫。

[23.01] PRC Constitution

The Constitution of the People's Republic of China provides in Art 28 that the State, inter alia, maintains public order and suppresses treasonable and other criminal activities that endanger state security. Article 52 provides that it is the duty of citizens of the People's Republic of China to safeguard the unification of the country and the unity of all its nationalities. Article 53 provides, inter alia, that citizens of the People's Republic of China must keep state secrets. Article 54 provides that it is the duty of citizens of the People's Republic of China to safeguard the security, honour and interests of the motherland; they must not commit acts detrimental to the security, honour and interests of the motherland.

Wang Shuwen noted that since among the HKSAR residents there are not only Chinese citizens but also persons not of Chinese nationality, it was considered not appropriate to reproduce in the Basic Law of the HKSAR the above duties of Chinese citizens, making them fundamental duties of HKSAR residents.¹

The National People's Congress and its Standing Committee have enacted the following laws to safeguard national security:

- (1) Criminal Law of the People's Republic of China (Part Two, Chapter I, Crimes of Endangering National Security);
- (2) State Security Law of the People's Republic of China; and
- (3) Law of the People's Republic of China on Guarding State Secrets.²

¹ Wang, Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (2nd Edn, Law Press China and Joint Publishing (HK) Co Ltd, 2009) p 255.

² For a study of the national security law of the People's Republic of China, see Fu, Hualing, 'Counter-revolutionaries, Subversives, and Terrorists: China's Evolving National Security Law', in Fu, Hualing, Peterson Carole, and Young, Simon (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny* (Hong Kong University Press, 2005) pp 63–92.

[23.02] BLMSAR

Article 23 of the Basic Law of the Macao Special Administrative Region states:

'The Macao Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.'

The legislature of the Macao Special Administrative Region enacted Law No 2/2009 (*Lei relativa a defesa da segurança do Estado*) to prohibit crimes endangering national security in accordance with Art 23 of the Basic Law of the Macao Special Administrative Region.¹ The Law prescribes the crimes of treason, secession, subversion of the Central People's Government, sedition, theft of state secrets, foreign political organization or body engaging in Macao acts endangering national security and Macanese political organization or body establishing relationship with foreign political organization or body to engage in acts endangering national security. It should be noted that in relation to the crime of theft of state secrets, provision is made for the judicial organ to obtain a certifying document from the Chief Executive or, through the Chief Executive, the Central People's Government on the issue of whether a document, information or thing has been confirmed as state secret.² It should also be noted that the scope of the crimes relating to the activities of foreign political organizations or bodies³ and the activities of Macanese political organizations or bodies⁴ appear to be narrower than the terms of the prohibition stated in Art 23 of the Basic Law (ie conducting political activities and establishing ties respectively).

¹ The Chinese text of Law No 2/2009 is available at http://bo.io.gov.mo/bo/i/2009/09/lei02_cn.asp.

² Law No 2/2009, Art 5(5).

³ Ibid, Art 6.

⁴ Ibid, Art 7.

[23.03] Hong Kong Special Administrative Region

For the meaning of 'Hong Kong Special Administrative Region', see [P.06] above.

[23.04] Enact laws on its own

Xiao Weiyun indicated that in enacting Art 23 of the Basic Law of the HKSAR, the Central Authorities delegated legislative powers to the HKSAR for the enactment of legislation to prohibit treason etc, bearing in mind that the HKSAR is obliged to safeguard the security and unity of the People's Republic of China as an inalienable part and local administrative region thereof and that it enjoys a high degree of autonomy with Mainland criminal law not applicable thereto.¹ Wang Zhenmin referred to constitutional provisions in a number of capitalist foreign states to show

that the safeguarding of national unity and state sovereignty is a basic obligation of a regional government of any state. Article 23 in conferring the responsibility of safeguarding unity and sovereignty on the HKSAR is not only an authorization to enact legislation on its own in respect of the HKSAR's high degree of autonomy but also a requirement on the HKSAR to provide the necessary guarantee to 'one country' at an appropriate timing, so as to be responsible to the Central People's Government, to the Chinese people, and to the HKSAR's residents and its social stability and prosperity.²

Yash Ghai, on the other hand, made reference to the fact that Art 23 was an addition in the drafting process subsequent to the June 4th Incident and considered that it requires the HKSAR to impose a number of restrictions on rights and freedoms of its residents in order to prevent challenges to the Mainland system. Restrictions of rights and freedoms are not merely permitted, they are required to be in place. Ghai thus warned of the temptation to implement Art 23 in a way that contravenes guarantees in Chapter III of the Basic Law below and the International Covenant on Civil and Political Rights.³

The HKSAR Government released a Consultation Document on Proposals to implement Article 23 of the Basic Law in September 2002. The Consultation Document underlined that the HKSAR has both practical and legal obligations to implement Art 23, whose intent is to prohibit by law any acts that would undermine the sovereignty, territorial integrity, unity and national security of the People's Republic of China. The Consultation Document then outlined guiding principles. The continuity of the common law system of the HKSAR means that the implementation of Art 23 should be effected through making use of existing legislation as far as possible. The requirements of the Basic Law, which include not only Art 23 but also the guarantees of fundamental rights and freedoms through Arts 27 and 39 in Chapter III, must be met fully. The State's essential interests, namely sovereignty, territorial integrity, unity and national security, must be adequately protected. All offences encompassed by local legislation to implement Art 23 should be as clearly and tightly defined as appropriate, so as to avoid uncertainty and the infringement of fundamental rights and freedoms guaranteed by the Basic Law. The Consultation Document then discussed the current law relating to each category of enactment to be made under Art 23 and put forward proposals.⁴

Having considered the views received in the course of the consultation process, the HKSAR Government gazetted the National Security (Legislative Provisions) Bill on 14 February 2003.⁵ There followed a strenuous and highly publicized legislative process in the course of which the public became increasingly concerned of the implications of the Bill to their continued enjoyment of rights and freedoms guaranteed under the Basic Law and the ICCPR, culminating in a public procession on 1 July 2003 that up to 500,000 people had joined to protest against the Bill. Although the HKSAR Government responded to the mass protest by introducing several substantively concessionary additional committee stage amendments, the change of position on the part of the Liberal Party led to the Chief Executive in Council deciding to defer the resumption of the second reading of the Bill on 7 July 2003. The Secretary for Security, who was responsible for

promoting the Bill in the Legislative Council and to the wider public, announced her resignation on 16 July 2003. The Bill was eventually withdrawn.⁶

- 1 Xiao, Weiyun, *One Country, Two Systems: An Account of the Drafting of the Hong Kong Basic Law* (Peking University Press, 2001) p 159.
 - 2 Wang, Zhenmin, *Central and SAR Relationship: An Analysis of the Structure of Rule of Law* (Tsinghua University Press, 2002) pp 205–207. See also Wang, Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (2nd Edn, Law Press China and Joint Publishing (HK) Co Ltd, 2009) p 245.
 - 3 Ghai, Yash, *Hong Kong's New Constitutional Order* (2nd Edn, Hong Kong University Press, 1999) pp 403, 451–453. See also Fu, Hualing, Cullen, Richard and Choy, Pinky, 'Curbing the Enemies of the State: What does Article 23 Require?' (2001–2002) 5 *Journal of Chinese and Comparative Law* 45; and Fu, Hualing and Cullen, Richard, 'National Security Law in Hong Kong: Quo Vadis: A study of Article 23 of the Basic Law of Hong Kong' (2002) 19 *UCLA Pacific Basin Law Journal* 185.
 - 4 A copy of the Consultation Document can be downloaded at: www.basiclaw23.gov.hk/english/download/reporte.pdf.
 - 5 A copy of the Bill can be downloaded at: www.basiclaw23.gov.hk/english/download/s3200-07077.pdf.
 - 6 All information and resources relating to the aborted 2003 legislative process are archived in the following website: www.basiclaw23.gov.hk/english/index.htm. See also other resources: www.legco.gov.hk/yr02-03/english/bc/bc55/general/bc55.htm (Legislative Council Bills Committee) and www.article23.org.hk/english/main.htm (Article 23 Concern Group). For scholarly papers of the legislative and political processes involved in this failed attempt to implement Art 23, see Petersen, Carole, 'Hong Kong's Spring of Discontent: The Rise and Fall of the National Security Bill in 2003' in Fu, Hualing, Peterson, Carole and Young, Simon (eds) *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny* (Hong Kong University Press, 2005) pp 13–62; Chen, Albert, 'The Consultation Document and the Bill: An Overview' in Fu, Hualing, Peterson, Carole and Young, Simon (eds) *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny* (Hong Kong University Press, 2005) pp 93–118; Roach, Kent, 'Old and New Visions of Security: Article 23 Compared to Post-September 11 Security Laws' in Fu, Hualing, Peterson, Carole and Young, Simon (eds) *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny* (Hong Kong University Press, 2005) pp 119–147; Weisenhaus, Doreen, 'Article 23 and Freedom of the Press: A Journalistic Perspective' in Fu, Hualing, Peterson, Carole and Young, Simon (eds) *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny* (Hong Kong University Press, 2005) pp 277–302; Lin, Feng, 'The Appeal Mechanism under the National Security Bill: A Proper Balance between Fundamental Human Rights and National Security?' in Fu, Hualing, Peterson, Carole and Young, Simon (eds) *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny* (Hong Kong University Press, 2005) pp 331–362; Leung, Priscilla, *The Hong Kong Basic Law: Hybrid of Common Law and Chinese Law* (LexisNexis, 2006) pp 218–237.
- For articles on alternative ways in which Art 23 could have been implemented, see Tai, Benny, 'The Principle of Minimum Legislation for Implementing Article 23 of the Basic Law' (2002) 32 *HKLJ* 579; Lo, P Y, *One Living Tree* (Ming Pao, 2005) pp 100–108.
- For the British influence, see Roach, Kent, 'The Post-9/11 Migration of Britain's Terrorism Act 2000' in Choudhry, Sujit (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) pp 374–402. See also the 'Johannesburg Principles on National Security, Freedom of Expression and Access to Information' (1 October 1995) para 27.03. For the South African experience, see Ellmann, Stephen, *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (Oxford University Press, 1992); Dyzenhaus, David, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (2nd Edn, Oxford University Press, 2010). For the Canadian discussion, see Roach, Kent, *September 11: Consequences for Canada* (McGill-Queen's University Press, 2003); Roach, Kent, 'A Comparison of Australian and Canadian Anti-Terrorism Laws' (2007) 30 *University of New South Wales Law Journal* 53; Roach, Kent, 'A Comparison

of South African and Canadian Anti-Terrorism Legislation' (2005) 18(2) *South African Journal of Criminal Justice* 127; and Roach, Kent, 'Canada's New Anti-Terrorism Legislation' (2002) *Singapore Journal of Legal Studies* 122. For the Australian dimension, see Lee, H P, 'Salus Populi Suprema Lex Esto: Constitutional Fidelity in Troubled Times' in Lee, H P and Gerangelos, Peter (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009), pp 53–78. For overview, see Ramraj, Victor, Hor, Michael and Roach, Kent (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2005); Roach, Kent, 'Militant Democracy and Anti-Terrorism Legislation: Some Eastern and Western Comparisons' in Sajo, Andras (ed), *Militant Democracy* (Eleven International Publishing, 2004) pp 171–207.

[23.05] Treason

For the current offence of treason in Hong Kong, see the Crimes Ordinance (Cap 200) ss 2 and 5 which has remained in language catering for the circumstances of a monarchical state.¹

¹ For a discussion of the offence, see Choy, Dick-wan and Cullen, Richard, 'Treason and Subversion in Hong Kong' in Fu, Hualing, Peterson, Carole and Young, Simon (eds) *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny* (Hong Kong University Press, 2005) pp 151–188.

[23.06] Secession

There is currently no offence of secession in Hong Kong.

In Mainland China, the Anti-Secession Law was adopted by the National People's Congress in 2005 to set out State policy on reunification with Taiwan, including the circumstances where non-peaceful means and other measures would be employed to protect China's sovereignty and territorial integrity. The Anti-Secession Law has not been made applicable to Hong Kong and it is not likely that this Law fulfils the criteria set out in Art 18 above for inclusion in Annex III below.¹

¹ For a discussion on the offence of secession, see Loper, Kelly, 'A Secession Offence in Hong Kong and the 'One Country, Two Systems' Dilemma' in Fu, Hualing, Peterson, Carole and Young, Simon (eds) *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny* (Hong Kong University Press, 2005) pp 189–216.

[23.07] Seditious

For the current offences of seditious in Hong Kong, see the Crimes Ordinance (Cap 200) s 3 (treasonable offences), s 6 (incitement to mutiny), s 7 (incitement to disaffection) and ss 9 and 10 (acting with seditious intention).¹

¹ For a discussion of the offences, see Fu, Hualing, 'Past and Future Offences of Seditious in Hong Kong' in Fu, Hualing, Peterson, Carole and Young, Simon (eds) *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny* (Hong Kong University Press, 2005) pp 215–250.

[23.08] Subversion against the Central People's Government

There is currently no offence of subversion against the Central People's Government in Hong Kong.¹

For the meaning of 'Central People's Government', see [12.08] above.

¹ For a discussion of the offence of subversion, see Choy, Dick-wan and Cullen, Richard, 'Treason and Subversion in Hong Kong' in Fu, Hualing, Peterson, Carole and Young, Simon (eds) *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny* (Hong Kong University Press, 2005) pp 151–188.

[23.09] Theft of state secrets

The Official Secrets Ordinance (Cap 521) currently criminalizes:

- in ss 3 and 5 activities of spying for a purpose prejudicial to the safety or interests of the People's Republic of China or Hong Kong;
- in s 4 the harbouring of spies;
- in s 6(1)(a) the unauthorized retention of an official document;
- in s 6(1)(b) the mishandling of any secret official code word or password;
- in s 13 the unlawful disclosure of security or intelligence information by a member of the security and intelligence services or a notified person;
- in s 14 the unlawful and damaging disclosure of security or intelligence information by a public servant or government contractor;
- in s 15 the unlawful and damaging disclosure of defence information by a public servant or government contractor;
- in s 16 the unlawful and damaging disclosure of information related to international relations by a public servant or government contractor;
- in s 17 the unlawful disclosure of information that results in the commission of offences, facilitates the escape from legal custody or the doing of any other act prejudicial to the safekeeping of persons in legal custody or impedes the prevention or detention of offences or the apprehension or prosecution of suspected offenders;
- in s 18 the unlawful and knowing disclosure of protected information coming into possession of a person through unauthorized disclosure or confidential entrusting by a public servant or government contractor;
- in s 19 the unlawful and knowing disclosure of information coming into possession of a person as a result of spying activities;
- in s 20 the unlawful and damaging disclosure of security, intelligence, defence or international relations information communicated in confidence by or on behalf of the Government of the People's Republic of China or Hong Kong to a foreign territory or State or an international organization and coming into the possession of a person due to unauthorized disclosure; and
- in s 22 the retention of protected information by a public servant or government contractor and his failure to take such care to prevent the unauthorized disclosure of such information.¹

Article 83

The structure, powers and functions of the courts of the Hong Kong Special Administrative Region at all levels shall be prescribed by law.

第八十三條

香港特別行政區各級法院的組織和職權由法律規定。

[83.01] BLMSAR

Article 84 of the Basic Law of the Macao Special Administrative Region states, inter alia:

‘The structure, powers and functions as well as operation of the courts of the Macao Special Administrative Region shall be prescribed by law.’

[83.02] Structure, powers and functions of the courts of the Hong Kong Special Administrative Region at all levels

Article 81 of the Basic Law of the HKSAR established the courts of the HKSAR at all levels. For the meaning of ‘courts of the Hong Kong Special Administrative Region’, see [80.03] above.

The Hong Kong Court of Final Appeal Ordinance (Cap 484) prescribes the structure, powers and functions of the Court of Final Appeal, implementing Art 82 of the Basic Law that vests the power of final adjudication of the HKSAR with the Court of Final Appeal. The High Court Ordinance (Cap 4) prescribes the structure, powers and functions of the High Court, composed of the Court of Appeal and the Court of First Instance. The District Court Ordinance (Cap 336) prescribes the structure, powers and functions of the District Court. The Magistrates Ordinance (Cap 227) prescribes the powers and functions of magistrates. The Juvenile Offenders Ordinance (Cap 226) prescribes the powers and functions of the juvenile court. The Lands Tribunal Ordinance (Cap 17) prescribes the structure, powers and functions of the Lands Tribunal. The Labour Tribunal Ordinance (Cap 25) prescribes the structure, powers and functions of the Labour Tribunal. The Small Claims Tribunal Ordinance (Cap 338) prescribes the structure, powers and functions of the Small Claims Tribunal. The Coroners Ordinance (Cap 504) prescribes the powers and functions of coroners.

The Obscene Articles Tribunal was established under the Control of Obscene and Indecent Articles Ordinance (Cap 390) to make a classification of articles submitted to it by anyone concerned with the design, production or publication of an article, the Secretary for Justice or an authorized public officer; and to determine, in relation to any article or matter publicly displayed, referred to it by a court or magistrate, whether the article is obscene or indecent, the matter is indecent or the ground of defence of public good is proved in respect of the publication of an article or the public display of any matter. The Judiciary has maintained that this statutory institutional setup of the Obscene Articles Tribunal

was highly unsatisfactory, as the tribunal was required by law to perform both administrative and judicial functions—in effect operating as two different bodies with different powers and subject to different procedures and rules of evidence. The Judiciary considered that:

- the exercise of an administrative function by the tribunal, a judicial body, may undermine the fundamental principle of judicial independence;
- the administrative classification function of the tribunal may transgress its judicial determination function;
- the existing procedures for the tribunal performing the classification function as an administrative tribunal generated grave problems; and
- the problems of perception generated by the existing statutory setup of the tribunal were matters of grave concern.

The Judiciary thus proposed the removal of the administrative classification function from the purview of the tribunal.¹ The Judiciary made these points after passing the opportunity to examine similar issues judicially in *Three Weekly Ltd v Obscene Articles Tribunal & Anor*.²

For the meaning of ‘Hong Kong Special Administrative Region’, see [P.06] above.

1 See Judiciary Administration, *The Review of the Control of Obscene and Indecent Articles Ordinance (Cap. 390): The Judiciary's Response* (November 2008) (available at: www.judiciary.gov.hk/en/publications/coia_judiciary_response.pdf).

2 [2008] HKCU 89 (unreported, 16 January 2008, FAMV 48, 49/2007) (CFA).

[83.03] Shall be prescribed by law

The Court of Final Appeal held in *HKSAR v Lam Kwong Wai & Anor*¹ that Art 83 of the Basic Law of the HKSAR, which provides that the powers and functions of the courts ‘shall be prescribed by law’ does not exclude the implication of powers and functions from the Basic Law itself. The implied powers of the Court thus include the obligation to adopt a remedial interpretation of a legislative provision which will, so far as it is possible, make it consistent with the Basic Law. Only in the event that such an interpretation is not possible will the Court proceed to make a declaration of contravention, entailing unconstitutionality and invalidity.²

In *Solicitor v Law Society of Hong Kong (Secretary for Justice, intervener)*³ it had been argued a finality provision prescribed the ‘structure, powers and functions’ of the Court of Final Appeal in accordance with Art 83 of the Basic Law, though in doing so it limited access to the exercise of the power of final adjudication of the HKSAR vested with the Court of Final Appeal.⁴

1 (2006) 9 HKCFAR 574.

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

3 (2003) 6 HKCFAR 570 (CFA).

4 See Lo, P Y, ‘Master of One’s Own Court’ (2004) 34 HKLJ 47.

Article 84

The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions.

第八十四條

香港特別行政區法院依照本法第十八條所規定的適用於香港特別行政區的法律審判案件，其他普通法適用地區的司法判例可作參考。

[84.01] JD

See **JD Ref 62** below.

[84.02] BLMSAR

Article 89 of the Basic Law of the Macao Special Administrative Region states, *inter alia*:

‘The judges of the Macao Special Administrative Region shall exercise judicial power according to law, instead of according to any order or instruction, except in the situation as prescribed in paragraph 3 of Article 19 of this Law.’

The drafting of Art 89 of the Basic Law of the Macao Special Administrative Region suggests that in relation to the Chief Executive’s certificate under Art 19(3) on questions of fact concerning acts of state such as defence and foreign affairs, which is binding on the courts on the matters of fact therein, the courts receive the certificate as if it were an order or instruction.

[84.03] Courts of the Hong Kong Special Administrative Region

For the meaning of ‘courts of the Hong Kong Special Administrative Region’, see **[80.03]** above. For the meaning of ‘Hong Kong Special Administrative Region’, see **[P.06]** above.

[84.04] Adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law

As to the adjudication of cases by the courts of the HKSAR and their exercise of judicial power of the HKSAR, see **[80.05]** above. In *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd & Ors*,¹ Art 84 of the Basic Law of HKSAR was noted as indicative of the Basic Law’s aim to provide for continuity between the pre-existing and the present courts and judicial systems.

Article 18(1) of the Basic Law of the HKSAR provides that the laws in force in the HKSAR are the Basic Law, the laws previously in force in Hong Kong as provided for in Art 8 of the Basic Law, and the laws enacted by the legislature of the HKSAR.

1 (2006) 9 HKCFAR 234 (CFA).

[84.05] May refer to precedents of other common law jurisdictions

Chief Justice Andrew Li underlined in *Solicitor (24/07) v Law Society of Hong Kong*¹ the importance that courts of the HKSAR should, after 1 July 1997:

‘[Continue] to derive assistance from overseas jurisprudence. This includes the decisions of final appellate courts in various common law jurisdictions as well as decisions of supra-national courts, such as the European Court of Human Rights. Compared to many common law jurisdictions, Hong Kong is a relatively small jurisdiction. It is of great benefit to the Hong Kong courts to examine comparative jurisprudence in seeking the appropriate solution for the problems which come before them. This is underlined in the Basic Law itself. Article 84 expressly provides that the courts in Hong Kong may refer to precedents of other common law jurisdictions’.²

On the other hand, Xiao Weiyun stressed on the wording of making reference to precedents of other common law jurisdictions, this being the embodiment of the principle of sovereignty.³ Wang Shuwen et al made the point that the courts of the HKSAR had no obligation to follow the precedents of other common law jurisdictions, taking care that adopting the principle and theory underlying the precedent did not mean adopting it as a precedent. The latter would be using jurisprudence or transforming jurisprudence into opinions of judges of the courts of the HKSAR and there would be no need to state the fact of the reference in the judgment, still less to quote the precedent. Yet quoting the precedent to substantiate the reasons of the judge of the court of the HKSAR would not pose any problems. It is up to the judges of the courts of the HKSAR to decide on their own whether to refer to a precedent and which jurisdiction to refer to.⁴ Yash Ghai observed that the drafters of the Basic Law may have intended that Hong Kong should have an independent basis for its common law.⁵

1 (2008) 11 HKCFAR 117 (CFA).

2 See **[8.04]** above. See also *Bank of East Asia Ltd v Tsien Wui Marble Factory Ltd & Ors* (1999) 2 HKCFAR 349 (CFA) at 386H–J.

3 See Xiao, Weiyun, *One Country, Two Systems: An Account of the Drafting of the Hong Kong Basic Law* (Peking University Press, 2001) p 352.

4 See Wang Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (2nd Edn, Law Press China and Joint Publishing (HK) Co Ltd, 2009) pp 539–540.

5 See Ghai, Yash, *Hong Kong’s New Constitutional Order* (2nd Edn, Hong Kong University Press, 1999) p 368.

Article 85

The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.

第八十五條

香港特別行政區法院獨立進行審判，不受任何干涉，司法人員履行審判職責的行為不受法律追究。

[85.01] JD

See **JD Ref 9**, 60, 61 below.

[85.02] BLMSAR

Article 83 of the Basic Law of the Macao Special Administrative Region states:

‘The courts of the Macao Special Administrative Region shall exercise judicial power independently. They shall be subordinated to nothing but law and shall not be subject to any interference.’

Article 89 states, *inter alia*:

‘Judges shall be immune from legal action for discharging his or her judicial functions. During the term of his or her office, a judge shall not concurrently assume other public or private posts, nor shall he or she assume any post in organizations of a political nature.’

The drafting of Arts 83 and 89 of the Basic Law of the Macao Special Administrative Region differs from their counterparts in the Basic Law of the HKSAR in that in Art 83 there is the additional provision stating the apparently obvious proposition that the courts of the Macao Special Administrative Region shall abide only by the law; and that in Art 89, there is the additional ethical provision prohibiting judges, during the time of holding of office, from taking up concurrently another public or private position and assuming an office in a political organization.

[85.03] TWCGJ

Article 80 of the Constitution of the Republic of China provides for the independent adjudication of judges according to law, free from any interference. The relevant interpretations of Art 80 on the aspect of judicial autonomy in administration are in Judicial Yuan Interpretation Nos 530 and 539. The relevant interpretation of Art 80 on the aspect of protection in judicial compensation is in Judicial Yuan Interpretation No 601. See generally **[Ch3.03]** above.

[85.04] Courts of the Hong Kong Special Administrative Region

For the meaning of ‘courts of the Hong Kong Special Administrative Region’, see **[80.03]** above. For the meaning of ‘Hong Kong Special Administrative Region’, see **[P.06]** above.

[85.05] Exercise judicial power independently

As to the exercise of judicial power of the HKSAR by the courts of the HKSAR, see **[80.05]** above. In *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd & Ors*¹ Art 85 of the Basic Law of HKSAR was noted as indicative of the Basic Law’s evident purpose to entrench the independence of the judiciary which operate the courts of the HKSAR. The principle of independence is an integral element of the exercising of the prerogatives of a judge.²

¹ (2006) 9 HKCFAR 234 (CFA).

² See Decision No 2010-10 QPC of 2 July 2010 (*Parties C et al*) (French Constitutional Council).

[85.06] Free from any interference

Wang Shuwen et al indicated that ‘free from interference’ meant that judicial work was not only free from interference by the executive authorities (including the Chief Executive of the HKSAR) and the legislature, but also free from any interference by and influence of social forces.¹ Contrast this with the **PRC Constitution**, where Art 126 provides that the people’s courts exercise judicial power independently, in accordance with the provisions of the law (ie ‘人民法院依照法律規定獨立行使審判權’), and are not subject to interference by any administrative organ, public organization or individual.

¹ See Wang Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (2nd Edn, Law Press China and Joint Publishing (HK) Co Ltd, 2009) p 520. See also Xiao, Weiyun, *One Country, Two Systems: An Account of the Drafting of the Hong Kong Basic Law* (Peking University Press, 2001) p 352.

[85.07] Members of the judiciary

The scope of protection of Art 85 of the Basic Law of the HKSAR extends to the Registrar of the High Court, the masters of the High Court and adjudicators of the Small Claims Tribunal.¹ Peter Wesley-Smith, however, questioned whether courts within the meaning of the Basic Law of the HKSAR consist solely of judges, or of judges and officers such as registrars and masters. He made the point that if courts, properly understood under the Basic Law, consist only of judges, the exercise of judicial power by judicial officers or officers of the court such as registrars and masters, unless subject to appeal by rehearing of all matters, would be invalid.²