

then, again drawing heavily on provisions of the International Covenant on Civil and Political Rights, lays down a succession of stringent tests which must be satisfied before any restriction can be imposed, so ensuring that any restrictions on rights are kept to a minimum.

Since 1 July 1997, the Hong Kong courts have generally adopted a rigorous approach in applying these tests in defence of the fundamental freedoms protected under the Hong Kong Basic Law. But, as is explained in Chapter 8, there have been isolated exceptions such as the Court of Final Appeal's December 1999 decision in the politically sensitive case of *HKSAR v Ng Kung Siu*,⁵ which involved a law protecting China's national flag and was decided at a time when the court was still in its period of judicial retreat.

The Hong Kong Basic Law is often referred to as spanning a period of 50 years from 1997, with the implication that everything it says about Hong Kong's separate system and current way of life will suddenly come to an end on 30 June 2047. But, as is explained in the conclusion to this book, Chapter 9 on "What Will Happen After 2047?", the Hong Kong Basic Law does not explicitly mention this date, except in the context of a now outdated provision about renewing some land leases before 30 June 1997.

Nor, despite occasional suggestions by some scholars to the contrary, is there anything in the Hong Kong Basic Law to suggest that its provisions will automatically expire come 30 June 2047. What does become possible after that date are fundamental changes to the Hong Kong Basic Law which are, at least in theory, forbidden before that date.

To some, that is an opportunity for Hong Kong to rid itself of any provisions which have become outdated by that date. Already there have been suggestions that the advent of 30 June 2047 could be used to help solve the problems posed by a provision in the Hong Kong Basic Law protecting the special rights enjoyed by indigenous inhabitants of the New Territories.

But, as we will see in Chapter 9, the issue of how much change to push for in the run-up to 30 June 2047 presents a delicate balancing act. While some changes may be considered desirable, once you start fiddling with the current structure of the Hong Kong Basic Law it raises the risk of providing an opportunity for anyone on the mainland resentful of Hong Kong's privileges to press for other changes (such as curtailing rights and freedoms) which would certainly not be considered desirable in Hong Kong. It is this delicate balancing act which may well prove to be one of the most important issues Hong Kong will have to grapple with in the coming decades.

5. (1999) 2 HKCFAR 442.

Chapter 2

Birth of the Hong Kong Basic Law

History is sometimes described as a series of accidents of timing, some fortuitous, others not. In Hong Kong's case, few would dispute that, while the path was often a rocky one, those accidents of history ultimately had a fortuitous outcome. That fortuitous outcome is a remarkable arrangement, known as "one country, two systems", under which Hong Kong is allowed to differ far more radically from the rest of the country of which it is a part—and, in some crucial respects, function almost like an independent nation—than almost anywhere else in the world that is not a country in its own right. It is an arrangement enshrined in an equally remarkable document, the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China—or Hong Kong Basic Law, as it will be called in this book.

The Hong Kong Basic Law was the product of a brief window of opportunity as China began to emerge from decades of isolation during the early 1980s. Although promulgated by China in 1990, its contents were effectively decided six years earlier in 1984, when Britain and China concluded the Joint Declaration on the Question of Hong Kong. In return for reluctantly promising to return all of Hong Kong to China on 1 July 1997, that 1984 agreement saw Britain persuade an equally reluctant China to make extremely detailed promises about the nature of the "one country, two systems" arrangement that Hong Kong would be permitted to enjoy for at least 50 years beyond that date, together with a commitment to write these promises into a document that would be known as the Hong Kong Basic Law.

It would have been inconceivable for China to have made those promises at any time up until a few years earlier. From shortly after the Communists took power in 1949 through to the end of the Cultural Revolution in 1976, China had been plagued by decades of Maoist-inspired political campaigns aimed at eradicating any trace in the rest of the country of the capitalist system practised in Hong Kong. While Communist rulers tacitly tolerated Hong Kong's continued existence as a separate entity under British rule, any Chinese leader who might have been foolish enough, during those periods of leftist turmoil, to formally advocate enshrining the continued existence of a capitalist system in Hong Kong would have been signing their own arrest warrant.

Only with Deng Xiaoping's rise to power in the late 1970s, and the advent of more pragmatic policies emphasizing economic development, in which Hong Kong was expected to play a major role, did a brief window of opportunity to strike a deal securing the city's future emerge. Just how brief that window of opportunity would be is only

evident with the benefit of hindsight. For instance, from today's perspective, it seems almost inconceivable that Chinese leaders would have agreed to such an extraordinary arrangement for Hong Kong had the same negotiations taken place now, when China has already emerged as an economic power in its own right and Hong Kong no longer plays such a critical role as a conduit for foreign investment.

2.1 The 1997 Deadline

That Hong Kong's future should have fallen to be determined by a deadline of 1 July 1997 was the product of another accident of history almost a century earlier. Britain had begun its conquest of Hong Kong by bombarding Qing dynasty China into signing treaties ceding parts of the colony in perpetuity: first Hong Kong Island under the Treaty of Nanking in 1842 concluding Britain's first Opium War with China in 1842, and then the southern tip of Kowloon under the Convention of Peking in 1860 concluding a second Opium War.

By the time it came to the last major extension of Hong Kong's boundaries in 1898, to add the New Territories including all of Kowloon north of the present Boundary Street in Mongkok, the Qing authorities refused to cede any further territory to Britain in perpetuity, for fear of setting a precedent which would be seized upon by other foreign powers. Instead, they offered a 99-year lease, which Britain readily accepted and was written into the Convention for the Extension of Hong Kong Territory as starting from 1 July 1898—with little attention apparently being paid to the fact that this started the clock ticking on a 30 June 1997 deadline for British rule over most of Hong Kong.

Even then, the significance of that deadline might have been reduced if Britain had drawn a distinction between those parts of Hong Kong ceded in perpetuity under the two earlier treaties, and the land leased under this third treaty. But, with questionable legality¹ and little thought for the future, Britain almost immediately cast aside this distinction. An Order in Council, made by the British government in the name of the Queen on 20 October 1898, declared the New Territories and those parts of Kowloon leased with it integrated into the rest of Hong Kong and to be treated until 30 June 1997 "for all intents and purposes as if they had originally formed part of the said colony".² Before long, Boundary Street, the notional border between the ceded and leased parts of Hong Kong had become simply another street in the urban sprawl of Kowloon.

1. Wesley-Smith draws an interesting analogy between Britain's rights over the leased territory and a tenant's rights over property owned by another landlord. See Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (Longman Asia, 2nd edition, 1994) at 27. [Note: Unless otherwise stated, all references following cited source(s) in footnotes are to page number(s) in those source(s).]

2. Clause 1 of The New Territories Order in Council, reprinted in Peter Wesley-Smith, *Unequal Treaty 1898–1997: China, Great Britain and Hong Kong's New Territories* (Oxford University Press, Revised edition, 1998) at 321–322.

That action removed any doubt that when 30 June 1997 arrived, the issue of Hong Kong would have to be dealt with as a whole. But it was not an issue that successive Chinese governments were in any rush to address. From at least the 1920s onwards, those in power in Beijing, first the Kuomintang and then the Communists, refused to recognize the three treaties as granting Britain any legal authority to rule Hong Kong. They argued that these were "unequal treaties", which had been forced upon China against its will and so were invalid, a position which finds some support in modern international law.³

Whatever their formal position, those in power in Beijing were careful not to disrupt the status quo. When the People's Liberation Army conquered Guangdong for the Communists in October 1949, they stopped 25 miles north of the border with Hong Kong. Even at the height of the Cultural Revolution in 1967, Chinese Premier Zhou Enlai reportedly intervened to halt plans drawn up by a local army commander to invade Hong Kong.⁴

Whether it was as a conduit for smuggling goods into China in the 1950s, in breach of the international embargo imposed during the Korean War, or as a means of attracting foreign investment after China began to open up its economy in the late 1970s, Hong Kong under British rule served a useful purpose for many decades as China's window on the outside world. That was reflected in China's repeatedly stated official position that, while Britain had no legal right to be in Hong Kong, the status quo should be maintained until some undefined time in the future when "conditions are ripe" for a change.⁵

Deng Xiaoping's rise to power in the late 1970s brought with it a new enthusiasm for forging more cordial ties with the Western world. However, that did not initially arouse any interest in Beijing in addressing the issue of Hong Kong's future. Taiwan was seen as a more immediate priority, especially after the US cut official ties with the island in 1979 in order to open full diplomatic relations with Beijing. Hoping to make the isolated island more receptive towards overtures for reunification, China quickly came up with an early version of a policy—which would later become known as "one country, two systems"—designed to woo Taiwan down this path. First mentioned in general terms in 1979 by the National People's Congress Standing Committee, by 1981 it had taken on the shape of a nine-point plan.

Many of these nine points, such as allowing Taiwan a high degree of autonomy and the right to retain its socio-economic system as well as existing way of life, would eventually be applied to Hong Kong. But that was not the intention at this stage. As far as China

3. Article 52 of the Vienna Convention on the Law of Treaties 1969, 1155 United Nations Treaty Series 331, states that: "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." However, the Vienna Convention is not retrospective and so does not apply to pre-1969 treaties. See further Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 2nd edition, 1999) at 11–12.

4. "PLA invasion averted twice", *South China Morning Post*, 23 June 2007.

5. See, for instance, the editorial on this point which appeared in the *People's Daily*, the official newspaper of China's ruling Communist Party, on 8 March 1963.

was concerned, Hong Kong should be satisfied with a few general reassurances. That was most vividly demonstrated in March 1979, during the first official visit to Beijing by a Hong Kong Governor, Sir Murray MacLehose. Deng brushed aside MacLehose's attempt to raise the most pressing problem concerning the 1997 deadline with a vague statement that investors in Hong Kong should "put their hearts at ease".

Such vague reassurances could not solve the problem of the expiry of government land leases in the New Territories and, in practice, throughout the rest of Hong Kong. Fittingly for a city which had built so much of its prosperity upon soaring property prices, it was the issue of land rights which provided the immediate impetus for resolving Hong Kong's future. Apart from one site in Central,⁶ all land in Hong Kong was ultimately owned by the British Crown, and sold to its users by the Hong Kong Government, not in perpetuity but on long leases of 75 years, or sometimes even 999 years. That system was a great way of filling the government's coffers, and does much to explain why Hong Kong's taxation rates are among the lowest in the developed world. But it suffered from the drawback that it was generally assumed that leases granted under British rule could only last for as long as Britain had the legal authority to rule Hong Kong.⁷ As a result, all land leases in the fast-expanding New Territories were set to expire before 30 June 1997.

Britain cited the land lease issue as its ostensible reason for pushing so hard during the late 1970s and early 1980s to resolve the issue of Hong Kong's future,⁸ despite China's lack of interest in discussing the issue and its evident willingness to allow British rule to continue unchallenged for the immediate future. British officials involved in the discussions at the time claim business confidence in Hong Kong was being undermined by the inability to issue leases lasting beyond 30 June 1997, so shortening the timeframe in which any new investment in the New Territories would have to be recouped.⁹ Others are more sceptical, noting that there was little public sign of such a lack of confidence, with the Hang Seng Index soaring to new heights in 1978 and 1979, while property prices actually rose faster in the New Territories than Kowloon.¹⁰

In practice, while the uncertainty over land leases played a part, it seems more likely that the main reason why London pushed the issue so hard at this point was a desire to take advantage of what was described as "a window of opportunity"¹¹ to settle Hong Kong's future, before developments in China slammed the window shut again. It is

6. St. John's Cathedral on Garden Road.

7. See, however, Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (see note 1) at 59–61 for a brief discussion of the various options that were canvassed as providing a possible legal basis for extending land leases beyond this period.

8. Her Majesty's Government, *White Paper on a Draft Agreement Between the Government of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong* (26 Sept 1984) at 2.

9. See, for instance, Robin McLaren, *Britain's Record in Hong Kong* (Royal Institute of International Affairs, 1997) at 12.

10. Robert Cottrell, *The End of Hong Kong: The Secret Diplomacy of Imperial Retreat* (John Murray, 1993) at 41–44.

11. McLaren, *Britain's Record in Hong Kong* (see note 9) at 13.

not that Britain was clairvoyant enough to see how China's economy would grow to a point where Hong Kong's role as a gateway for foreign investment (and, with it, perhaps some of the rationale for allowing "one country, two systems" in Hong Kong) would become relatively less important. Rather, in the words of Sir Percy Cradock, one of the major architects of British policy towards Hong Kong, it was simply a matter of moving quickly to take advantage of the fact that, after decades of instability, China finally had a pragmatic leader in the form of Deng Xiaoping: "We could not be sure how long this situation would last. We would be wise to exploit it while we could."¹²

It was not easy to persuade China to make the issue of Hong Kong's future a priority. A British proposal to solve the land lease problem by extending individual leases in the New Territories beyond 30 June 1997 was rejected by Deng Xiaoping during his 1979 meeting with Governor MacLehose, possibly without even understanding what was actually being proposed.¹³ Rebuffed on this specific proposal, Britain continued to press the issue of Hong Kong's future, provoking some annoyance from China. "They are forcing the issue. But we will not be forced," Liao Chengzhi, then China's top official on Hong Kong affairs, was quoted as complaining during this period.¹⁴

The persistent British pressure paid off. According to Ching (2010), in December 1981 a meeting of the Politburo of China's ruling Communist Party took the historic decision that was to make possible the Sino-British Joint Declaration and the Hong Kong Basic Law.¹⁵ With Taiwan showing no interest in responding to overtures for reunification, and Britain continually pushing the issue of Hong Kong, China decided to deal with Hong Kong first, rather than Taiwan. The "one country, two systems" formula that had been devised for Taiwan was adapted to apply instead to Hong Kong first, and hopefully set such a good example that Taiwan would become more enthusiastic about embracing the same arrangement at a later date.

2.2 Sino-British Joint Declaration

This change of policy finally made possible negotiations between China and Britain over Hong Kong's future. But it did not make them easy. For all its enthusiasm to begin such negotiations, Britain never expected the outcome would be its departure from Hong Kong. From London's perspective, the 19th-century treaties granting Hong Kong to Britain were just as valid as any other international treaties. While the lease on the

12. Percy Cradock, *Experiences of China* (John Murray, 1999) at 165.

13. Deng appears to have believed, possibly due to a mistake by his translator, that Governor MacLehose was proposing extending Britain's lease over the New Territories as a whole, as opposed to simply the granting of individual leases within the New Territories. See Cottrell, *The End of Hong Kong* (see note 10) at 55.

14. During a breakfast meeting with top Hong Kong financier Fung King Hey. Quoted in Cottrell, *The End of Hong Kong* (see note 10) at 63.

15. See Frank Ching, "Looking Back: How London and Beijing Decided the Fate of Hong Kong" (April 2010) 18 *Hong Kong Journal*.

Chapter 6

Role of the Courts

The Hong Kong Basic Law says relatively little about the role of the courts. Wesley-Smith (2004) describes it as “almost impenetrably obscure in relation to the courts and judiciary”.¹

The courts are described only in general terms as the “the judiciary of the Region” (Article 80), exercising “independent judicial power, including that of final adjudication” (Article 19(1)). The Hong Kong Basic Law grants to those courts jurisdiction over—or the right to try—“all cases in the Region”² (Article 19(2)), subject only to a small number of exceptions.³

The structure of the courts is outlined in only very general terms. Brief reference is made to the existence of a Court of Final Appeal, Court of Appeal and Court of First Instance (these last two courts being collectively known as the High Court), district courts, magistrates’ courts and other special courts⁴ (Article 81(1)). But it is left to local Hong Kong laws, instead of the Hong Kong Basic Law, to fill in the details about the structure, powers and functions of these courts (Article 83).⁵

That reflects the emphasis on continuity rather than detail in the Hong Kong Basic Law. The judicial system that existed in Hong Kong under British rule was often cited as one of the ingredients of Hong Kong’s success,⁶ so it was always clear that one of the goals of “one country, two systems” would be to try to ensure its survival largely

1. Peter Wesley-Smith, “Judges and Judicial Power Under the Hong Kong Basic Law” (2004) 34 *HKLJ* 83–84.
2. The Chinese text of Article 19(2) is ambiguous and might better be translated as “all cases of the Region” (emphasis added) since some statutory provisions, such as Section 4(1) of the Prevention of Bribery Ordinance (Cap. 201), allow the Hong Kong courts to exercise jurisdiction over certain crimes committed outside Hong Kong. See further Benny Tai, “The Jurisdiction of the Courts of the Hong Kong Special Administrative Region” in Alice Lee (ed.), *Law Lectures for Practitioners 1998* (Hong Kong Law Journal Ltd., 1998) at 74–75.
3. For more on these restrictions, see further “6.5: Limits on Courts” later in this chapter.
4. Special courts refer to the Coroners’ Court, which investigates certain categories of deaths, and tribunals under the purview of the judiciary, such as the Lands and Labour Tribunals.
5. The main laws on the structure, powers and functions of the Hong Kong courts include the Magistrates Ordinance (Cap. 227), Coroners Ordinance (Cap. 504), District Court Ordinance (Cap. 336), High Court Ordinance (Cap. 4) and Hong Kong Court of Final Appeal Ordinance (Cap. 484).
6. For two examples of this, see M.J. Enright, E.E. Scott and D. Dodwell, *The Hong Kong Advantage* (Oxford University Press, 1997) at 108–109, and Wang Shuwen, *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (Law Press, 2nd English edition, 2009) at 492.

unchanged after 1 July 1997. As a result, the section in the Hong Kong Basic Law on the judiciary⁷ lays great stress on the need for continuity, going much further in this respect than the equivalent sections on other parts of Hong Kong's political structure.⁸

All the judges and other members of the judiciary who sat in Hong Kong's courts before 1 July 1997 were specifically guaranteed the right to keep their jobs (Article 93(1)). They are also subject to much milder Chinese nationality restrictions on who can hold the top posts than apply to the other branches of the political structure under the Hong Kong Basic Law. While all principal official posts in the Hong Kong SAR Government and 80% of the seats in the Legislative Council must be filled by Chinese nationals with no right of abode overseas,⁹ in apparent recognition of the large number of expatriate judges at the time of the 1997 handover only two posts in the judiciary are subject to the same nationality requirement. These are the heads of Hong Kong's two highest courts, the Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court.¹⁰ In contrast to the requirement that most new civil servants must be Hong Kong permanent residents,¹¹ Article 92 of the Hong Kong Basic Law specifically provides for the continued recruitment of judges from common law jurisdictions elsewhere in the world.

The courts too were left largely unchanged by the Hong Kong Basic Law. With the exception of the Court of Final Appeal, all the other courts listed in Article 81(1) are simply continuations of those that existed in Hong Kong under British rule.¹² They are given jurisdiction over exactly the same types of cases as before (Article 19(2))—a point that has proved of great significance in exercising certain powers of judicial review¹³—and required to apply the same principles in both civil and criminal cases as they did under British rule (Article 87(1)).

This all adds up to a picture of a judicial system that was subject to far less change under the Hong Kong Basic Law than other branches of Hong Kong's political structure.

7. Section 4 of Chapter IV of the Hong Kong Basic Law.

8. The Chief Executive, Executive Authorities and Legislative Councils, which are the subjects of Sections 1–3 of Chapter IV of the Hong Kong Basic Law.

9. Articles 101(1) and 67.

10. Article 90(1). However some Chinese legal scholars have suggested that the nationality requirement should be extended to all judges on the Court of Final Appeal. See Colleen Lee, "Appeal court judges should all be Chinese nationals, scholars say", *South China Morning Post*, 5 Nov 2012.

11. Article 99(1).

12. Although, in some cases, these courts are given different names under the Hong Kong Basic Law. The term Supreme Court, which under British rule was used to describe both the Court of First Instance and the Court of Appeal, could not continue to be used because of the potential for confusion with the Supreme People's Court in Beijing. See Wang, *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (see note 6) at 502. As a result, the former Supreme Court was renamed as the High Court, consisting of a Court of First Instance and a Court of Appeal under Section 8(1) of the Hong Kong Reunification Ordinance 1997 (No. 110 of 1997).

13. See the case of *HKSAR v Ma Wai Kwan David* [1997] HKLRD 761, which is explained further in notes 142–146 later in this chapter and the accompanying text.

On 3 July 1997, the first working day after the handover, the same courts continued sitting,¹⁴ with the same judges to hear the same cases that had begun before the handover.¹⁵ The only exception was in the one area where it was impossible to avoid change. Under British rule, Hong Kong's court of final appeal was the Judicial Committee of the Privy Council in London.¹⁶ Since China was unwilling to see this continue after the end of British rule, it agreed to the creation of a Court of Final Appeal in Hong Kong in the Sino-British Joint Declaration.¹⁷

This was the one area of Hong Kong's previous judicial system where major changes became necessary under the Hong Kong Basic Law.¹⁸ As a result, perhaps the biggest challenge for Hong Kong's judicial system after 1 July 1997 was the successful establishment of this court.¹⁹

6.1 Judicial Independence

Although the Hong Kong Basic Law says relatively little about the role of the judiciary, it does expressly provide that the courts exercise "independent" judicial power. This point is considered sufficiently important that it is reiterated in three separate provisions.²⁰ Hsu (2004) describes it as a "cardinal feature" of the Hong Kong Basic Law.²¹ Article 85 of the Hong Kong Basic Law, one of these three provisions, adds that such power is exercised by the courts "free from any interference".

The meaning of independent judicial power, more commonly known as "judicial independence", is not defined in the Hong Kong Basic Law. However, in an important Canadian court case on the subject, *Valente v The Queen*,²² the Supreme Court of

14. Although in some cases under different names. See further note 12 above.

15. Section 10 of the Hong Kong Reunification Ordinance (No. 110 of 1997), which was passed by the Provisional Legislative Council in the early hours of 1 July 1997, specifically guaranteed that "the continuity of legal proceedings, the criminal justice system, the administration of justice and the course of public justice shall not be affected by the resumption of the exercise of sovereignty over Hong Kong by the People's Republic of China".

16. The Judicial Committee of the Privy Council hears appeals from British colonies and some members of the British Commonwealth. Until 2009, such appeals were usually heard by Law Lords from the House of Lords, which was then the highest court in Britain for most domestic appeals. Since the establishment of a Supreme Court of the United Kingdom in 2009, appeals are usually heard by justices from that court.

17. Annex I(III) of the Joint Declaration. See further "2.2: Sino-British Joint Declaration" in Chapter 2.

18. This is explicitly recognized in Article 81(2) of the Hong Kong Basic Law which, in seeking to preserve the "judicial system previously practised in Hong Kong", makes an exception "for those changes consequent upon the establishment of the Court of Final Appeal of the Hong Kong Special Administrative Region".

19. See further "6.4: Constitutional Role of the Court of Final Appeal" for more on the challenges that the court faced in the years immediately after its establishment.

20. Articles 2, 19(1) and 85.

21. Berry F.C. Hsu, "Judicial Independence under the Basic Law" (2004) 34 *HKLJ* 279, 280.

22. *Valente v The Queen* [1985] 2 Supreme Court Reports 673.

Canada offered some guidance. It described judicial independence as “not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees”.²³ That last point is particularly important in ensuring that the courts can function independently, given the executive branch’s extensive involvement in the legal process. In most countries, the executive prosecutes virtually every criminal case and is a party to many of the most important cases in the civil arena. Without such guarantees of judicial independence it is unlikely, for instance, that Hong Kong would have experienced such explosive growth in the number of judicial review cases brought against the government and other public bodies in recent years.²⁴

Freedom from interference by the executive is not something the courts in Hong Kong always necessarily enjoyed in the past. Cottrell and Ghai (2001) note that “[j]udicial independence was not a hallmark of colonial rule”, citing the frequency with which judges were appointed from within the executive branch of the government under British rule.²⁵ Barnes (1976) argues that during earlier decades in colonial Hong Kong, those judicial officers who ruled against the executive branch too frequently put their promotion prospects at risk.²⁶

Only since 1 July 1997 has judicial independence been constitutionally protected under the Hong Kong Basic Law. Even now, despite the importance it places upon this cardinal principle, the Hong Kong Basic Law only provides for some (but far from all) of the specific protections often considered essential elements of judicial independence in other common law jurisdictions.²⁷

Judicial independence is also an important part of the system of separation of powers laid down in the Hong Kong Basic Law.²⁸ This is a system in which each of the three branches of the political structure—the executive, legislature and judiciary—function largely independently of each other, and act as checks and balances on any abuse of powers by the other branches of the political structure. In the case of the judiciary, such checks and balances are exercised especially through the process of judicial review, under which the courts rule on the validity of the acts, decisions and omissions of the executive and legislature, as well as other public bodies.²⁹

23. Ibid. at 685. For more on this case, and its relevance to Hong Kong, see 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, 2001) at 99–101.

24. See further “6.2: Judicial Review” later in this chapter.

25. Jill Cottrell and Yash Ghai, “Between Two Systems of Law: The Judiciary in Hong Kong” in P.H. Russell and D.M. O’Brien (eds.), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University Press of Virginia, 2001) at 208.

26. E.E. Barnes, “The Independence of the Judiciary in Hong Kong” (1976) 6 *HKLJ* 7, 19.

27. See further notes 98–102 later in this chapter and the accompanying text, for an example of an omission from the Hong Kong Basic Law concerning the protection of judicial independence, in relation to the financial security of judges.

28. See further “5.2: Separation of Powers” in Chapter 5.

29. See further “6.2: Judicial Review” later in this chapter.

Under this system of separation of powers, no branch of the political structure is allowed to interfere in the powers granted to the other branches under the Hong Kong Basic Law. That means, for instance, the judiciary has no business making policy, a matter which is reserved for the executive under the Hong Kong Basic Law.³⁰ The courts must also be careful not to usurp the primary role in law making given to the legislature under the Hong Kong Basic Law.³¹ Equally it means that neither the executive nor the legislature is permitted to interfere in the exercise of “judicial power”, a power which under Article 80 of the Hong Kong Basic Law is granted to the courts alone.

Although the Hong Kong Basic Law does not expressly define judicial power,³² it does make clear this includes the power to adjudicate (or decide) court cases.³³ Since part of adjudicating court cases is deciding what remedy or punishment, such as a prison sentence, should be imposed, that too is a power which only can be exercised by the courts.³⁴ Any attempt by the executive or legislature to interfere in the exercise of these powers is a breach of the Hong Kong Basic Law. That was demonstrated in *Yau Kwong Man v Secretary for Security*,³⁵ where the Court of First Instance declared a statutory provision³⁶ giving the Chief Executive the power to specify minimum sentences for a limited category of child prisoners³⁷ inconsistent with the exclusive granting of judicial power to the courts under Article 80 of the Hong Kong Basic Law.

This separation of powers under the Hong Kong Basic Law is somewhat undermined by the frequency with which judges are appointed to positions by the executive branch of government. This is a relatively common practice in Hong Kong since, given their high reputation in the community, judges are often seen as the most appropriate figures to head government inquiries or other bodies where an impartial figure is needed.³⁸ But it risks undermining the judiciary’s independence from the executive, especially when judges are called upon to take up sensitive appointments relating to the investigation of

30. Articles 48(4) and 62(1). See further “5.1: Chief Executive” in Chapter 5.

31. Article 73(1).

32. For more on the difficulties of defining the exact meaning of judicial power, see further note 174 in Chapter 4 and Hsu, “Judicial Independence under the Basic Law” (see note 21) at 285.

33. See the Chinese text of Article 80 of the Hong Kong Basic Law which is described further in note 175 in Chapter 4 and the accompanying text.

34. For a comprehensive description of the different aspects of the power to adjudicate, see Tai “The Jurisdiction of the Courts of the Hong Kong Special Administrative Region” (see note 2) at 69–73.

35. [2002] 3 HKC 457.

36. Section 67C of the Criminal Procedure Ordinance (Cap. 221).

37. These were prisoners detained at “executive discretion”. This was a term originally known as “at Her Majesty’s Pleasure” and used for children under 18 convicted of murder before 1993, when the law was changed to provide for mandatory life sentences for all murderers, whatever their age.

38. As of 2009, judges held 12 statutory and a further 12 non-statutory appointments outside the judiciary. Most are similar to judicial work (e.g., Chairman of the Insider Dealing Tribunal). However, a few involve unrelated work (e.g., Chairman of the Advisory Committee on Post-service Employment of Civil Servants). See Hong Kong SAR Government, *Statutory and Non-statutory Appointments of Judges to Offices Outside the Judiciary* (13 Jan 2009).

a “mode” (or method) of expressing an opinion, rather than an opinion in itself.²²⁹ In most circumstances, the opinion being expressed through flag desecration is opposition to the country or government which those flags are taken to represent.²³⁰ From newspaper articles to waving banners at public protests, there are many other methods through which that opposition can be expressed. So the court found that a restriction on the freedom to desecrate flags does not affect the “substance” of any views which protesters’ may wish to express. It simply imposes the narrow restriction of requiring them to use another “mode” of expressing those same views.²³¹ As noted by Justice Bokhary, the judge most hesitant about upholding the flag desecration laws: “They place no restriction at all on what people may express. ... No idea would be suppressed by the restriction. Neither political outspokenness nor any other form of outspokenness would be inhibited.”²³²

That application of the proportionality test goes a long way to ease concerns about the wide interpretation of *ordre public* adopted by the Court of Final Appeal in *Ng Kung Siu*. Although, as a result of that case, it is now relatively easy to use *ordre public* as a legitimate purpose to justify a wide range of restrictions on rights, this is still subject to the safeguard that it will often be much more difficult to show any such restriction goes no further than is absolutely necessary to achieve this legitimate purpose.

It also demonstrates how the various tests used by the courts to judge which restrictions on rights are permissible are best viewed as different aspects of a combined package. Some restrictions may fail the “prescribed by law” test, because they are not sufficiently precise. Others may, occasionally, fail because it is impossible to identify a legitimate purpose for that restriction.²³³ Still more may fail at the final, and perhaps most difficult, hurdle of the proportionality test that acts as a particularly valuable protection against wide restrictions on fundamental rights. The combined effect of these tests, which must all be satisfied if any restriction is to be upheld by the courts, adds up to a generally rigorous approach to considering the legality of any attempt to restrict fundamental rights in Hong Kong. This goes a long way towards ensuring that the generous rights conferred by both the Hong Kong Basic Law and ICCPR/Bill of Rights continue to exist as an important feature of Hong Kong’s way of life.

229. Ibid. at 456.

230. Ibid. Note, however, the intriguing suggestion by the court “that scrawling words of praise on the flags” might also breach those same provisions in Hong Kong’s flag desecration laws. For the wording of these provisions, see further note 194 earlier in this chapter.

231. Ibid. See also Justice Bokhary’s separate concurring judgment (at 463–465) for a clear explanation of the importance of the distinction between restrictions on the “mode” and “substance” of rights.

232. Ibid. at 468.

233. This is likely to be rare, given the breadth of many of the legitimate purposes listed in the ICCPR. See further note 186 earlier in this chapter and the accompanying text. One exception might be the power often used in the past by the Hong Kong Government (until it was abolished by the Film Censorship (Amendment) Ordinance (No. 63 of 1993)) to ban the broadcast of films in Hong Kong which might anger China. See Chan and Lim, “Interpreting Constitutional Rights and Permissible Restrictions” (see note 3) at 492.

Chapter 9

What Will Happen After 2047?¹

As we saw at the beginning of this book, the Joint Declaration, the 1984 agreement on Hong Kong’s future setting out China’s “basic policies” on “one country, two systems”, seeks to guarantee that these will “remain unchanged for 50 years”.² Like the other promises in the Joint Declaration, that promise was then written into the Hong Kong Basic Law, Article 5 of which states that:

The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.

Although Article 5 does not mention any dates, since the Hong Kong Basic Law came into effect on 1 July 1997, the clear implication is that this 50-year period ends on 30 June 2047. But neither document addresses the issue of what will happen after that date, an issue which—although still far in the future—has already begun to attract some concern.

Some are pessimistic about Hong Kong’s future. Kenneth Chan (2004) argues that, “‘one country, two systems’ should be seen as a transitory arrangement with an expiry date of 30 June 2047”.³ On this view, the special treatment that Hong Kong enjoys for those 50 years is a temporary measure to ease the territory’s reintegration back into China, and once that process is complete there will be no need for the city to be treated differently from any other part of the country. That argument is put forward most emphatically by Morris (2005), who argues that the Hong Kong Basic Law “by its own terms is to have a lifespan of 50 years from 1997 to 2047”.⁴

Others adopt a more nuanced view. Johannes Chan (2002) notes the ambiguity over what will happen to Hong Kong in the long term: “It is unclear whether the ultimate goal

1. This chapter is updated and rewritten from an article originally published by the author as “What Will Happen to Hong Kong After 2047?” (2011) 42 *California Western International Law Journal* 37–60.
2. Paragraph 3(12). See further “2.2: Sino-British Joint Declaration” in Chapter 2.
3. Kenneth Ka-lok Chan, “Taking Stock of ‘One Country, Two Systems’” in Yiu-chung Wong (ed.), “*One Country, Two Systems*” in *Crisis* (Lexington Books, 2004) at 54.
4. Robert J. Morris, “The ‘Replacement’ Chief Executive’s Two-Year Term: A Pure and Unambiguous Common Law Analysis” (2005) 35 *HKLJ* 17, 22 and 24, which also refers to “the 2047 end-date of the Basic Law itself”.

is to retain two equally thriving but different systems, or whether it is to assimilate Hong Kong into the mainland politically, legally, culturally and ideologically.”⁵

That raises the question of whether the two systems will necessarily remain so different over the long term. Already the differences between the capitalist system practised in Hong Kong and the socialist system as now practised in China have narrowed greatly in the decades since the Joint Declaration.⁶ If that trend continues, it is entirely possible that such differences may have narrowed even further by the time 30 June 2047 arrives.

But even if, in the most optimistic scenario, by that date China has become a liberal democracy, practising the rule of law and respect for human rights, the issue of the future of Hong Kong’s special privileges would remain. Take, for instance, the existence of a Court of Final Appeal with the power of final adjudication in Hong Kong. As we saw earlier in this book, such a power is very unusual in autonomous areas elsewhere in the world.⁷

Some, such as Kenneth Chan (2004), argue these special privileges will automatically end together with all aspects of one country, two systems after the 50-year period expires on 30 June 2047.⁸ But, as we will see, that is not what the Hong Kong Basic Law says. As Tai (2007) points out, “it is legally possible for the constitutional game of Hong Kong to continue to operate under the Basic Law after 2047”.⁹

9.1 Future of Property Rights

As we saw at the beginning of this book, concern over the future of land leases in Hong Kong beyond 30 June 1997 was often portrayed as a major driving force behind the Joint Declaration. Britain repeatedly cited its lack of any legal right to issue government land leases over most parts of Hong Kong that expired after that date as one of the main reasons for needing to reach an agreement with China on Hong Kong’s future.¹⁰ Annex III of the Joint Declaration resolved that problem by giving Britain the legal authority to

5. Johannes Chan, “Civil Liberties, Rule of Law and Human Rights: The Hong Kong Special Administrative Region in Its First Four Years” in Lau Siu-kai (ed.), *The First Tung Chee-hwa Administration: The First Five Years of the Hong Kong Special Administrative Region* (The Chinese University Press, 2002) at 116.
6. See, for instance, the changes to the PRC Constitution 1982. At the time of the 1984 agreement on Hong Kong’s future this prohibited any form of private land-use rights. Since then, Article 10 of the constitution has been amended to permit private land-use rights, and Article 13 to strengthen private property rights. See further note 20 later in this chapter.
7. See further notes 191–193 in Chapter 4 and the accompanying text.
8. Chan, “Taking Stock of ‘One Country, Two Systems’” (see note 3) at 54.
9. Benny Y.T. Tai, “Basic Law, Basic Politics: The Constitutional Game of Hong Kong” (2007) 37 *HKLJ* 503, 577
10. For more detail on this point, including discussion of how far this was really the main factor behind Britain’s drive to reach an agreement with China on Hong Kong’s future, see further notes 8–12 in Chapter 2 and the accompanying text.

issue and renew land leases beyond 30 June 1997—providing that their expiry date was no later than 30 June 2047.¹¹

Given that historical background, it is scarcely surprising that similar concerns are now being raised about what will happen to land leases in Hong Kong after 30 June 2047. This is especially so because, ever since Britain’s departure on 30 June 1997, the Hong Kong SAR Government has no longer considered it necessary to apply a 30 June 2047 expiry date to the issuance and renewal of land leases.¹² Instead, most land leases are now issued or renewed for a period of 50 years, which means that large numbers of leases extend beyond 30 June 2047.¹³ In one well-known example, involving the land used to construct the Hong Kong Disneyland theme park, this includes a right to renew the lease for a second 50-year period, a right which (if exercised) would allow this lease to continue until 2100.¹⁴

Some have expressed doubts about the legality of this practice. Citing the 50-year limit in the Joint Declaration and the Hong Kong Basic Law on the guarantees against fundamental changes, Ng (2007) has questioned the legal basis for the Hong Kong SAR Government granting leases that extend beyond 2047.¹⁵ Lee (1998) warns it “does not take long for developers and property owners to realize that the validity of government leases is not absolutely certain”.¹⁶

Such concerns are perhaps understandable, given the historical background. But they overlook some very important differences between the land lease problems that arose during the final decades of British rule and the situation that exists in Hong Kong today. Prior to 1 July 1997, land leases were being issued under the authority of British rule which was, itself, subject to a 30 June 1997 time limit on the lease granted to Britain over most parts of Hong Kong. Now, however, there is no equivalent time limit since Hong Kong has reverted to Chinese sovereignty and all land and natural resources in the territory belong to the Chinese state in perpetuity.¹⁷

The power to manage, use and develop that land, including granting land leases, is currently delegated to the Hong Kong SAR Government by the Chinese state.¹⁸ But even in the most extreme scenario of Hong Kong being abolished as a separate entity after 30 June 2047, and the disappearance of Hong Kong SAR Government that granted those

11. See Annex III(2)–III(3). Under Annex III(4), the issue of new land leases was subject to a 50-hectare annual limit. However this limit could be, and frequently was, increased with China’s consent through a bilateral body known as the Sino-British Land Commission.
12. See Hong Kong SAR Government, “HKSARG land policy and first Land Disposal Programme announced”, 15 July 1997.
13. See the Hong Kong SAR Government’s justification of this practice in *Granting of Leases After 30 June 1997 With Term Extending Beyond 30 June 2047* (12 Dec 2006).
14. See Hong Kong SAR Government, “Land Lease Term for Disneyland Project”, 4 Nov 1999.
15. Margaret Ng, “The land we stand on”, *South China Morning Post*, 1 June 2007.
16. Alice Lee, “Leases Beyond 2047?” in Lee (ed.), *Law Lectures for Practitioners 1998* (Hong Kong Law Journal Ltd., 1998) 177, 184.
17. Hong Kong Basic Law, Article 7.
18. *Ibid.*

leases, the rights granted under those land leases would not necessarily disappear. Chen (2009) notes that responsibility for any unexpired portion of those land leases would simply pass to the body under whose delegated authority they were originally issued by the Hong Kong SAR Government, namely the Central People's Government.¹⁹

Some might justifiably object to seeing responsibility for land leases granted by Hong Kong authorities pass into the more uncertain hands of Chinese national authorities. However, this is no longer unthinkable in the way it was the last time that fears arose over the future of land leases, during British rule in the early 1980s. At that time, the Chinese constitution still prohibited any form of land leases.²⁰ Now, by contrast, private property rights are explicitly protected under the Chinese constitution,²¹ and there is a long-established legal framework for granting land-use rights in other parts of China.²²

Nor can it be argued that the Hong Kong SAR Government has exceeded its legal authority in issuing land leases that extend beyond 30 June 2047. Article 123 of the Hong Kong Basic Law, which grants the Hong Kong SAR Government broad authority to renew land leases "in accordance with laws and policies formulated by the Region on its own", makes no mention of a 30 June 2047 time limit. That omission is of particular significance because Article 121 of the Hong Kong Basic Law on the renewal of land leases in Hong Kong by British authorities *before* 1 July 1997 does refer to a 30 June 2047 time limit on those land leases that were renewed during the period when Hong Kong was still under British rule.

As the Hong Kong SAR Government has argued, in defence of its practice of issuing and renewing land leases beyond this date: "It also seems illogical to assume that the SAR government could only grant leases for an excessively short period as we approach 30 June 2047."²³ Wang Shuwen, a prominent mainland legal scholar who played an important role in the drafting of the Hong Kong Basic Law, has put it more bluntly. Pointing to the omission of any time limit in Article 123 of the Hong Kong Basic Law, he has dismissed as "groundless and unreasonable"²⁴ any concern that the Hong Kong SAR Government lacks the legal authority to issue land leases extending beyond 30 June 2047.

19. Professor Albert Chen, Chair Professor in Constitutional Law at the University of Hong Kong. Interviewed on "Backchat", *RTHK Radio 3*, 8 Dec 2009, a radio panel discussion on the legal implications of 2047 co-hosted by the author.

20. See Article 10 of the PRC Constitution 1982. Despite this constitutional prohibition, there were many experiments with land-use rights in China during the 1980s, and Article 10 was finally amended in 1988 to recognize this. It now states that: "The right to the use of land may be transferred in accordance with law."

21. Article 13, as amended in 2004.

22. This dates back to the PRC General Principles of the Civil Law, enacted by the NPC in 1986, and now includes the PRC Property Rights Law enacted in 2007.

23. *Granting of Leases After 30 June 1997* (see note 13) at para. 2.

24. Wang Shuwen, *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (Law Press, 2nd English edition, 2009) at 614–615.

However, there have been some expressions of concern that Article 123 of the Hong Kong Basic Law does not grant an automatic right to renew land leases, instead leaving it at the discretion of the Hong Kong SAR Government whether or not to allow renewals in each case. Some scholars have suggested this could cause concern in the run up to 30 June 2047, perhaps making banks reluctant to grant mortgages which extend beyond that date.²⁵

9.2 What Does 50 Years Mean?

Apart from these specific provisions on the renewal of land leases while Hong Kong was still under British rule, there is no explicit mention of the date 30 June 2047 in either the Joint Declaration or the Hong Kong Basic Law. That is not necessarily surprising, given that the primary focus of all parties at that time was on providing reassurance about continuity beyond 1997. With considerable doubts then being expressed about whether Hong Kong would survive as a separate entity beyond 30 June 1997, little attention seems to have been paid to what would happen half a century beyond that.²⁶

In the absence of any further direct references to 30 June 2047 in either the Joint Declaration or the Hong Kong Basic Law, the significance of this date must instead be inferred from the provisions in both documents guaranteeing no fundamental change for a period of 50 years beyond 30 June 1997.

Article 5 of the Hong Kong Basic Law, which repeats identical wording used in Annex I(I) of the Joint Declaration, is cited by those who believe that one country, two systems will automatically come to an end on 30 June 2047 and that the socialist system (if it still exists in the rest of China at that date) will be applied to Hong Kong after that date. Morris (2007), for instance, argues that: "The destination is indeed 'to assimilate Hong Kong into the mainland politically, legally, culturally and ideologically,' using force if necessary, at whatever place may exist there in 2047."²⁷

But it is open to question whether this is the correct interpretation of Article 5. Wang (2009), when discussing this provision, refers to a time period of "50 years and beyond".²⁸ Note, in particular, the comma separating Article 5 into two separate clauses in the English text of the Hong Kong Basic Law (the exact wording is shown at the start of this chapter). The second clause, promising that the "previous capitalist system and

25. See Olga Wong and Gary Cheung, "2047 is not all that far away", *South China Morning Post*, 29 June 2012, citing Professor Chau Kwong Wing as warning that the "current practice of discretionary renewal ... has given the public a false impression" and such lease renewals are "not guaranteed to continue after the 50-year term".

26. For one of the earliest discussions of this issue, C.K. Lau, "Why 2047 matters even now", *South China Morning Post*, 18 July 1997.

27. Robert J. Morris, "Forcing the Dance: Interpreting the Hong Kong Basic Law" in Hualing Fu, Lison Harris and Simon N.M. Young (eds.), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan, 2007) at 100.

28. Wang, *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (see note 24) at 102.