

Chapter 3. The Form of Government under the Basic Law

§1. HONG KONG IN CHINA: 'ONE COUNTRY, TWO SYSTEMS'

40. When the British administration of Hong Kong drew to a close, Hong Kong came to be governed according to the Basic Law, Hong Kong's new constitution.⁴⁹ As explained in Chapter 2 of Part I, the Basic Law is founded on the concept of 'One Country, Two Systems', guaranteeing that the Chinese socialist system and policies would not be applied in Hong Kong.⁵⁰ The system of government that the Basic Law has introduced is virtually a continuation of the previous system of government, subject to a number of technical and substantive modifications.⁵¹ Hong Kong's government has been described as an Executive-led system of government, where the Executive initiates financial and other public policies for debate and approval by the Legislative Council and implements them. The executive branch of the Government consists of the Chief Executive, as its Head, the Executive Council, appointed by the Chief Executive to advise him, and the public service, consisting of and headed by principal officials who are political appointees since 2002 as distinguished from neutral career civil servants as before. In this set up, the Legislative Council is in many ways subordinate to the executive.

41. The Legislative Council cannot by itself initiate legislation which 'relate to public expenditure or political structure or the operation of the government', nor can a Bill relating to government policies be introduced in the Legislative Council without the written consent of the Chief Executive.⁵² Bills proposed by Members of the

49. Hong Kong judges especially in the Court of Final Appeal, more particularly Justice Bokhary, have repeatedly referred to the Basic Law as 'our constitution'. See for instance, *Ho Man Kong v Superintendent of Lai Chi Kok Reception Centre*, (2014) 17 HKCFAR 179, (CFA), [27], *Ghulam Rbani v Secretary for Justice* (2014) 17 HKCFAR 138, (CFA) [111], *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950, (CFA) [155], *W v Registrar of Marriages* (2013) 16 HKCFAR 112, (CFA), [209], [216], [224], [225], (all by Justice Bokhary); *A v Commissioner of Independent Commission Against Corruption* (2012) 15 HKCFAR 362, (CFA), [13] Bokhary and Chan F.I., *Fok Chun Wa v Hospital Authority* [2008] HKEC 2161, (CFI), [59] Jeremy Poon J.

50. One of the General Principles of the Basic Law is 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.' Article 5 of the Basic Law, in Chapter I 'General Principles'.

51. See generally Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*, (2nd edn. Hong Kong: Hong Kong University Press, 1999).

52. Article 74 provides as follows: 'Members of the Legislative Council of the Hong Kong Special Administrative Region may introduce bills in accordance with the provisions of [the Basic Law] and legal procedures. Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced.' This provision came up for close scrutiny in the case of *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387, (CFI), where the question was whether a member of the Legislative Council could introduce an amendment to a Bill having an effect on public revenue. In delivering the judgment of the Court of First Instance, Justice Hartmann observed that the stage of introducing a Bill in the Legislative Council was a 'preliminary and discrete process' that precedes the law enacting process in the Legislative Council. Article 74 relates to that preliminary stage and not to the legislative procedure on processing a Bill in the Council. Thus, while Art. 74

Legislative Council, and not initiated by the government, are commonly referred to as Private Members' Bills.⁵³ Of course, no Bill passed by the Legislative Council becomes law unless it receives the assent of the Chief Executive and is brought into effect by the Chief Executive.

42. The Legislative Council cannot remove the Chief Executive, although there are circumstances where a serious disagreement between the Chief Executive and the Legislative Council might lead to the resignation of the Chief Executive.⁵⁴ For its successful operation, Hong Kong's constitutional system relies on close cooperation between the legislative and executive branches. The judicial branch, on the other hand, exists and operates independently of the other two branches of government. The rest of this chapter outlines the relationship between the Chinese Central Authorities and the Hong Kong government, followed by an outline of Hong Kong's internal constitutional arrangements.

prohibits the introduction of a Private Member's Bill of the kind prescribed there, that Article does not apply to a situation where a member proposes an amendment to a Bill that has been presented to the Legislative Council having the effect of transgressing the limits of Art. 74. This however did not mean that the Legislative Council could not adopt a rule which prohibits the introduction of an amendment to a Bill having the effect for of being contrary to Art. 74. Rule 57(6) of the Rules of Procedure of the Legislative Council provides as follows: 'An amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by (a) the Chief Executive; or (b) a designated public officer; or (c) a Member, if the Chief Executive consents in writing to the proposal.' In upholding the constitutionality of that rule, which transposes Art. 74 into the Bill amendment stage, Justice Hartmann said at para. 87: 'In summary, in so far as r. 57(6) diminishes the ability of Hong Kong's legislators, it is a diminishment of long-standing, one inherited by our colonial legislature from Parliament and one, in some like manner, imposed upon legislators in other common law and civil law jurisdictions. It is, I am satisfied, a diminishment founded on the separation of powers, the particular constitutional principle being that no charge on public funds can be incurred except on the initiative of the executive and the administration. It is for those two organs of state to create and propose policies related to the collection and disbursement of public funds; it is for the Legislature to examine and, if thought fit, to approve such proposals.'

53. A Private Member's Bill must not be confused with the British idea of a 'private Bill' as distinguished from a 'public Bill'. A useful statutory definition of a private Bill may be found in the Private Bills Ordinance (Cap. 69), which describes a private Bill as a Bill which 'provides primarily for the particular interest or benefit of any individual, association or body corporate rather than the interest or benefit of the public; and (b) is not a Government measure'. The Private Bills Ordinance (Cap. 69) was enacted to provide for payment of fees by promoters of a private Bill. See also 'Legislative Procedure on Member's Bills' at <http://legco.govhk/general/english/bills/mem-bill.pdf> which sets out the procedure for introducing a private Bill as well as a public Bill. For the British parliamentary practice on private Bills, see A.W. Bradley & Ewing, *Constitutional and Administrative Law*, (12th edn., Harlow, England: Longman, 1997), 210-12.

54. Article 52(2) and (3) envisage two situations where the Chief Executive *must* resign: (a) when after the Legislative Council is dissolved because he or she twice refuses to sign a bill passed by it, the new Legislative Council again passes it by a two-thirds majority of all the Legislative Council members, but he or she still refuses to sign it; and (b) when after the Legislative Council is dissolved because it refuses to pass a budget or any other important bill, the new Legislative Council still refuses to pass the original bill in dispute.

§2. THE RELATIONSHIP BETWEEN THE CHINESE CENTRAL AUTHORITIES AND HONG KONG

43. Hong Kong, 'which has been part of the territory of China since ancient times'⁵⁵ is an inalienable part of China. The National People's Congress of China authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of the Basic Law.⁵⁶ Thus, Hong Kong is not an independent territory, but an integral part of China. If not for the enactment of the Basic Law itself, a national law enacted by Peoples Republic of China, Hong Kong will not have a separate constitutional governmental structure and virtual freedom from China. Just as Macau, the other Special Administrative Region of the Peoples Republic of China, Hong Kong Special Administrative Region was created by the Chinese Government under a specific provision of the Chinese Constitution, Article 31, which provides as follows: 'The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions.'

44. The Basic Law is unique among national laws of China, for the reason that the enactment of the Basic Law and its content had been agreed between the British Colonial government and the Chinese Government through the Sino-British Joint Declaration, or 'the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the question of Hong Kong'. It has therefore been argued that the People's Republic of China has a special international obligation to honour the proper implementation of the Basic Law.⁵⁷ It is true that the Basic Law is primarily concerned with how Hong Kong is governed by Hong Kong's legislature, executive and the judiciary, but it is also true that it sets out how the mainland Chinese authorities should act in relation to Hong Kong. For instance, where Hong Kong selects a Chief Executive, such person has to be appointed by the Chinese government.⁵⁸ Even if that obligation was not mandatory, it is inconceivable that the Chinese government would ignore the selection process and appoint someone else as the Chief Executive. The Basic Law may also be said to be part of the constitutional system of China as it prescribes the relationship between the Central Government authorities and the Hong Kong Special Administrative Region. For instance, while the National People's Congress has the power to amend the Basic Law, the Congress has to observe the amendment process that is set out in Article 159 of the Basic Law.

55. Basic Law, Art. 1 and the opening words of the Preamble.

56. Basic Law, Art. 2.

57. See for instance Roda Mushkat, *One Country, Two International Personalities: The Case of Hong Kong* (Hong Kong: Hong Kong University Press 1997).

58. 'The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and appointed by the Central People's Government': Basic Law Art. 45.

45. In relation to the application of Basic Law to the central-local relationship, the Court of Final Appeal has boldly asserted the supremacy of the Basic Law: 'What has been controversial is the jurisdiction of the courts of the Region to examine whether any legislative acts of the National People's Congress or its Standing Committee are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. In our view, the courts of the Region do have this jurisdiction and indeed the duty to declare invalidity if inconsistency is found. It is right that we should take this opportunity of stating it unequivocally.'⁵⁹ The power of the Central Government to extend its national laws to Hong Kong is circumscribed by Article 18 which provides as follows: 'National laws shall not be applied in the Hong Kong Special Administrative Region, except for those listed in Annex III of [the Basic] Law.' Laws listed in Annex III do not apply in Hong Kong *ex proprio vigore*: Such laws will have to be applied locally by way of promulgation or legislation 'by the Region' (Article 18, paragraph 2). Apart from this procedural limitation, there is also a substantive limitation: 'Laws listed in Annex III to [the Basic Law] shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by [the Basic Law].' (Article 18, paragraph 3). However, in emergency situations, such as war or turmoil in Hong Kong, where the Hong Kong Special Administrative Region is unable to contain threats to national unity or security, the Central Government has the power to extend the application of 'relevant national laws' to the Region (Article 18, paragraph 4).

46. The relationship between the central government in China and the regional government in Hong Kong is unique: It is much more sophisticated than the relationship between the central government and the local government authorities in a unitary state; but it is not equivalent to the relationships that typically exist between the central (federal) government and the state governments under a federal system of government, such as in India or the United States of America. The Basic Law demarcates the jurisdiction between the Chinese Central Government and Hong Kong's regional government. Some enumerated powers are primarily within the purview of the Central Government, for instance 'foreign affairs relating to the Hong Kong Special Administrative Region' (Article 13, paragraph 2). However, paragraph 3 of Article 13 goes on to say that 'the Central People's Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with [the Basic Law]'. Similarly, paragraph 1 of Article 14 provides that 'the Central People's Government shall be responsible for the defence of the Hong Kong Special Administrative Region' while paragraph 2 of that Article goes on to state that 'the government of the Hong Kong Special Administrative Region shall be responsible for the maintenance of public order in the Region'. Moreover, as stipulated in paragraph 3 of the same Article, 'military forces stationed by the Central People's government in the Hong Kong special Administrative Region for defence shall not interfere in the local affairs of the Region'. It is only at the request of the Region's government that the military forces stationed in Hong Kong will become active in Hong Kong for 'the maintenance of

59. *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, (CFA), [25]-[26].

public order and in disaster relief’ (Article 14 paragraph 3). Paragraph 4 of Article 14 highlights the importance of Chinese national laws and Hong Kong regional laws: ‘In addition to abiding by national laws, members of the garrison shall also abide by the laws of the Hong Kong Special Administrative Region.’

47. The Hong Kong Special Administrative Region enjoys legislative, executive and judicial power other than those specifically reserved for the Central government. Hong Kong’s legislative and the executive authorities cannot exercise powers in relation to defence and foreign affairs, except to the extent that the Basic Law provides for, as seen above. Similarly, the judiciary cannot exercise any power that is within the exclusive domain of the Central Chinese Government. For instance, Article 19 paragraph 3 provides as follows: ‘The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People’s Government.’ In the case of *Democratic Republic of the Congo v FG Hemisphere Associates LLC (NO 1)* (2011) 14 HKCFAR 95., the Court of Final Appeal requested the Standing Committee of the National People’s Congress to interpret the relevant Articles of the Basic Law and advise whether the courts of Hong Kong were free to continue to apply the pre-1997 common law practice relating to sovereign immunity. The Standing Committee determined that questions of sovereign immunity fell within the scope of ‘foreign affairs’ in Article 13 and the meaning of ‘acts of state’ in Article 22 and therefore it was not a matter which was within the competence of the courts of Hong Kong. The Standing Committee decided that the Hong Kong courts would be bound by an executive certificate issued under Article 19.⁶⁰

48. Where the Hong Kong Special Administrative Region has lawful authority to act, it may exercise such authority without any interference from any department of the Central People’s Government, any province, autonomous region, or municipality under the Central Government department.⁶¹

60. The second paragraph of Art. 19 provides as follows: ‘The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People’s Government.’ See for the interpretation issued by the Standing Committee which appears as Instrument 22 appended to the Basic Law: ‘Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China by the Standing Committee of the National People’s Congress’ (adopted by the Standing Committee of the Eleventh National People’s Congress at its 22nd Session on 26 August 2011).

61. Article 22 of the Basic Law. Article 22 goes on to provide that if there is a need for any central government department, province, autonomous region or municipality to set up offices in Hong Kong, they must obtain the consent of the Hong Kong government to do so. Any such office and its personnel must abide by the laws of the Region.

49. The interpretation and amendment of the Basic Law provides a classic example of power distribution and power sharing: Article 158 recognizes that, as under the Chinese Constitution, the power of interpreting the Basic Law is vested in the Standing Committee of the National People’s Congress. However, this power of interpretation has been delegated to the Hong Kong Special Administrative Region in relation to the provisions of the Basic Law ‘which are within the limits of the autonomy of the Region’. This delegated power of interpretation is limited to interpretation of the Basic Law by the courts: ‘The Standing Committee of the National People’s Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases ...’ The courts of Hong Kong may also interpret provisions other than those relating to the matters within the jurisdiction of the Hong Kong Special Administrative Region. However, if such an interpretation will affect the determination of a case, the highest Court of Appeal in the case must apply for a binding interpretation for the resolution of the question of interpretation.

§3. HONG KONG’S SYSTEM OF GOVERNMENT: THE EXECUTIVE BRANCH

50. Within the high degree of autonomy that the Hong Kong Special Administrative Region enjoys, executive power is of prime importance, because what Hong Kong has is an ‘Executive-led Government’. The head of the executive is the Chief Executive of Hong Kong who is accountable to both to the Central People’s Government and the Hong Kong Special Administrative Region, in accordance with the provisions of the Basic Law.⁶² As provided by Article 62 of the Basic Law, the Government of the Hong Kong Special Administrative Region exercises the following powers and functions:

- (1) to formulate and implement policies;
- (2) to conduct administrative affairs;
- (3) to conduct external affairs as authorized by the Central People’s Government under the Basic Law;
- (4) to draw up and introduce budgets and final accounts;
- (5) to draft and introduce bills, motions and subordinate legislation;
- (6) to designate officials to sit in on the meetings of the Legislative Council and to speak on behalf of the Government.

51. The head of the executive branch of the Government, the Chief Executive, is appointed for a term of five years by the Chinese Central Government, after having been selected or elected through consultations held locally.⁶³ The main powers and functions of the Chief Executive include:

- to be responsible for the implementation of the Basic Law and other laws which apply in the Hong Kong Special Administrative Region;

62. Basic Law, Art. 43.

63. *Ibid.*, Arts 43, 45 and 59.

passed by the Hong Kong legislature must be reported to the Standing Committee of the National People's Congress for record, but that the reporting for record does not affect the entry into force of such laws. Article 17 goes on to say: 'If the Standing Committee ... considers that any law enacted by the legislature of the Region is not in conformity with the provisions of [the Basic Law] regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region the Standing Committee may return the law in question but shall not amend it. Any law returned by the Standing Committee of the national People's Congress shall immediately be invalidated. This invalidation shall not have retrospective effect, unless otherwise provided for in the laws of the Region.'

179. Before the handover in 1997, while legislative power in Hong Kong was to be exercised by the Governor and the Legislative Council, executive authorities did indeed exercise delegated legislative powers. It has been pointed out elsewhere that the emergency law-making power of the Governor had the flavour of primary legislation rather than delegated legislation. The legislative power of the Governor and the Legislative Council was not exclusive in the sense that the British Parliament and the Queen retained the power to legislate for Hong Kong. These features of the colonial government are present today, with necessary modifications. However, unlike the British Government previously, the Chinese Government does not have a free hand to legislate for Hong Kong.²⁶⁷

As before 1997, today the doctrine of separation of powers is more stringently applied in relation to the Judiciary.²⁶⁸ The Judiciary is independent of the legislative and executive branches of the Government. The Legislature or the executive is not expected to exercise judicial power. However, it is a common practice for administrative tribunals to perform adjudicatory functions, which have been traditionally within the jurisdiction of ordinary courts of law. The principle of open justice applies to such tribunals: *Ng Shek Wai v Medical Council of Hong Kong* where the Medical Council had refused to disclose the names of a disciplinary committee, the counsel for the Council and the medical practitioner against whom the inquiry in question had been conducted.²⁶⁹ The Court of First Instance held that the Council had failed to take a relevant consideration into account, namely the requirements of open justice, and remitted the matter to the Council. The court observed that common law regards open justice as a constitutional right. While there

267. As has already been explained above, the Chinese Government has no power to extend its laws to Hong Kong, except as provided in Annex III of the Basic Law or in emergency situations, for which see Art. 18 of the Basic Law.

268. As was said in *Lau Cheong & Another v Hong Kong Special Administrative Region*, (2002) 5 HKCFAR 415, at para. [101]: 'The Basic Law enshrines the principle that there must be a separation of powers as between the executive, the legislature and the judiciary. The legislature is constitutionally entitled to prescribe by legislation what conduct should constitute criminal offences and what punishment those found guilty by the courts should suffer: *Hinds v R* [1977] AC 195, (PC), at pp. 225G-226D. But in the exercise of their independent judicial power, the courts have the duty to decide whether legislation enacted is consistent with the Basic Law and the Bill of Rights. If found to be inconsistent, the duty of the courts is to hold that legislation invalid: *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4, (CFA), at p. 25G-I.'

269. *Ng Shek Wai v Medical Council of Hong Kong* [2015] 2 HKLRD 121, (CFI).

is no absolute right to access to information concerning a 'public judicial hearing', it does not lie entirely in the discretion of the tribunal whether or not comply with a request for information. Whether access was warranted in the circumstances of a particular case is ultimately for the court to decide. The court observed that the failure to disclose information was due to a misinterpretation of the data protection law and therefore instead of issuing an order of mandamus, it quashed the decision and remitted it to the Council to arrive at a decision in the light of the judgment. See paragraphs [88]-[89] of the decision. This case is also illustrative of judicial deference to administrative tribunals, whenever that is possible.

While executive powers are within the realm of the administration, the courts sometimes do exercise some powers that can be described as administrative powers rather than judicial powers. Judges perform administrative rather than judicial functions when they serve on commissions of inquiries and other advisory bodies. To that extent, the Executive and the Judiciary perform each other's functions. Judges exercise legislative powers when they make delegated legislation. Judges are also said to make law when they interpret the law or when they create new law for instance by developing the common law.

§2. CONSTITUTIONAL AUTHORITY

180. The Basic Law is the constitution of Hong Kong. Subject to the ultimate constitutional authority of the People's Republic of China, Hong Kong exercises a high degree of autonomy and enjoys executive, legislative and judicial power, in accordance with the provisions of the Basic Law.²⁷⁰ Thus, the exercise of all legislative, executive and judicial functions must conform to the Basic Law. The Basic Law also provides for the maintenance of laws previously in force in Hong Kong, namely the common law, rules of equity, ordinances, subordinate legislation and customary law, as long as they are not inconsistent with the Basic Law.²⁷¹ Article 160 of the Basic Law provides as follows: 'Upon establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region, except for those which the Standing Committee of the National People's Congress declares to be in contravention of [the Basic Law]. If any laws are later discovered to be in contravention of [the Basic Law], they shall be amended or cease to have force in accordance with the procedure as prescribed by [the Basic Law]'. Thus, all laws in existence in Hong Kong must conform to the Basic Law.

181. Basic Law being the paramount law, no law of Hong Kong may contravene it. The courts have the power to determine the constitutionality of any legislative or administrative action that is in conflict with the Basic Law. The next in the hierarchy of laws would be primary legislation followed by subordinate legislation.

270. Basic Law, Art. 2.

271. *Ibid.*, Art. 8.

Common law and customs are the other important sources of law. It must be noted that international treaties and other international legal principles play an important part in Hong Kong's legal system.²⁷²

182. Being an integral part of the People's Republic of China, Hong Kong is also subject to the Constitution of China. It must be noted, however, that the Chinese constitutional system operates in Hong Kong subject to the arrangements set out in the Basic Law. Thus, Hong Kong courts have held that they have the power to declare invalid any action taken by the Central Authorities that is inconsistent with the Basic Law.²⁷³ Laws of the People's Republic of China (commonly referred to as 'Chinese national laws') do not apply in Hong Kong unless expressly extended to the Region.

§3. THE COURTS

183. Under the Basic Law, the Court of Final Appeal is the highest court of law in Hong Kong, which replaced the Privy Council.²⁷⁴ Next in order is the High Court, consisting of the Court of Appeal and the Court of First Instance.²⁷⁵ At the next level are the District Court²⁷⁶ and Magistrates Courts.²⁷⁷ There are several other judicial and administrative tribunals, such as the Small Claims Courts²⁷⁸ and the Labour Tribunals.²⁷⁹ By local legislation, criminal and civil jurisdiction in an original and appellate capacity is distributed among these courts and tribunals.

184. In terms of constitutional jurisdiction, special mention may be made of the Court of Final Appeal and the Court of First Instance.²⁸⁰ In adjudicating cases, it is the Court of Final Appeal, as the highest Court of Appeal, that has the power to authoritatively interpret the provisions of the Basic Law relating to matters within Hong Kong's autonomous jurisdiction. However, this jurisdiction is subject to the free-standing jurisdiction of the Standing Committee of the National People's Congress.²⁸¹ The Court of First Instance, being the highest court of original jurisdiction, has an inherent supervisory jurisdiction over inferior courts and administrative authorities. In the exercise of that jurisdiction, the Court of First Instance exercises

272. See Part I, Ch. 1 'Treaties'.

273. See *Ng Ka Ling & Others v Director of Immigration* [1999] 1 HKLRD 315, at 337. (CFA).

274. See Hong Kong Court of Final Appeal Ordinance (Cap. 484).

275. See High Court Ordinance (Cap. 4).

276. See District Court Ordinance (Cap. 336).

277. See Magistrates Ordinance (Cap. 227).

278. See Small Claims Tribunal Ordinance (Cap. 338).

279. See Labour Tribunals Ordinance (Cap. 25).

280. The court system and constitutional jurisdiction of courts is dealt with in Ch. 5 'Judiciary' in Part II of this monograph.

281. See Part III, Ch. 1.

the power of judicial review over administrative authorities. Judicial review runs to the core of administrative law, which together with constitutional law constitutes public law.²⁸²

§4. JURISDICTIONAL CONFLICTS

185. Hong Kong does not have a domestic constitutional structure akin to a federal relationship as in Australia or the USA. In that sense, Hong Kong's is a unitary system of government, as far as the internal constitutional arrangements are concerned. There being no more than one system of courts, there is no room for jurisdictional conflicts between domestic courts of Hong Kong, as in Australia. Nor is there a constitutional relationship between China and Hong Kong of a federal nature. However, Hong Kong is an integral part of China, and Hong Kong's Basic Law operates within the wider parameters of the Chinese constitutional system. Legislative, executive and judicial conflicts could therefore arise between the Central Chinese authorities and the Hong Kong authorities. Two possible jurisdictional conflicts have so far surfaced. The first conflict is the demarcation of jurisdiction between the Standing Committee of the National People's Congress of the People's Republic of China and the Final Court of Appeal of Hong Kong regarding the power of interpreting the Basic Law. The second conflict relates to the power of the Hong Kong courts to question the legality of action taken by the Chinese Government which is inconsistent with the Basic Law.²⁸³

282. See Part IV, Ch. 4 'Judicial Control of Administrative Action'.

283. These issues are discussed in Ch. 1 and Ch. 2 of Part III.

it. The Executive Council is a consultative body whose advice the Chief Executive is not bound to follow. Government policies are not initiated in the Legislative Council but are presented and promoted by the Chief Executive. Many policies, for instance in relation to land-use planning, commerce and telecommunications, are made by various government departments and bureaux, who come under the leadership of the Chief Executive. The principal government officials may be public servants or political appointees. In 2001, the government introduced a ministerial system, under which some of the principal officials (Secretaries of Departments and Heads of bureaux) could be political appointees selected from the civil service or from outside the civil service.²⁸⁷ This ministerial accountability system has been refined over time. As of July 2016, there were twenty-one principal officials consisting of three Secretaries of Departments, thirteen Directors of Bureaux and five others including the Commissioner of Police and the Director of Audit. Some of the ministers are career civil servants and some are non-civil servants.

189. Legislative power may be said to be vested in the Legislative Council, in the sense that it has the exclusive power to pass primary legislation. Article 66 of the Basic Law provides that the Legislative Council of the Hong Kong Special Administrative Region shall be the legislature of the Region. Article 73 lists the powers of the Legislative Council including the power to enact, amend or repeal laws. While it is a common occurrence for administrative authorities to make delegated legislation, the exercise of such subordinate law-making power is subject to control by the Legislative Council.²⁸⁸ The Legislative Council's law-making power is not unrestrained. It is subject to the following limitations:

- (1) Legislative measures concerning government policies, or the political structure, or those having public revenue implications, have to be sponsored or supported by the Government.
- (2) The Chief Executive may refuse to assent to a Bill passed by the Legislative Council, in which event it will not become law.
- (3) The Legislative Council must act within the limitations imposed on its legislative competence, such as provisions relating to the protection of fundamental human rights.
- (4) The Standing Committee of the National People's Congress may invalidate certain types of legislation.

190. Judicial power is vested in the Judiciary. Article 80 of the Basic Law provides that the courts of Hong Kong Special Administrative Region at all levels shall be the judiciary of the Region exercising the judicial power of the Region. The Basic Law guarantees judicial independence, particularly by providing that judges will be appointed on the basis of judicial and professional qualities, that judicial

287. The Chief Executive proposed a quasi-ministerial system in his annual policy address in the Legislative Council on 10 October 2001. See 'Erring Officials Must Pay,' *South China Morning Post* Editorial, 28 October 2001.

288. For subordinate legislation, see *supra* Part I, Ch. 6 'Subordinate Rules and Regulations'.

appointments must be made on the recommendations of an independent commission, and that removal of judges must be for proved misbehaviour or inability to discharge judicial duties. Article 85 of the Basic Law provides that the courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference.

§2. POLITICAL PARTIES, LOBBIES AND INTEREST GROUPS

191. The Basic Law makes no specific reference to political parties and their participation in the Government. Political parties do not enjoy an important position in Hong Kong as they do in fully democratic societies. However, political parties are increasingly becoming the most important political force in Hong Kong, exercising powers of persuasion or public protest to demand policy changes. Political parties will become a decisive force when the Chief Executive and the Legislative Council become elected through universal franchise.

192. The Chief Executive Election Ordinance (Cap. 569), No. 21 of 2001, clearly spells out that the nomination paper of a candidate must be accompanied by a declaration that he stands for election in an individual capacity.²⁸⁹ It requires a person declared elected as the Chief Executive to make a public declaration to the effect that he is not a member of a political party and to give a written undertaking that he will not become a member of any political party or do any act that has the effect of subjecting himself to the discipline of any political party.²⁹⁰ For the purpose of the ordinance, a political party has been defined as:

- (1) a political party or organization (whether operating in Hong Kong or elsewhere) which purports to be a political party; or
- (2) a body or organization the principal function or main object of which is to promote or prepare a candidate for election as a member of the Legislative Council or any District Council.²⁹¹

193. The effect of these statutory provisions is to ensure that the Chief Executive will not belong to or be directly influenced by a political party.

194. In the Legislative Council, there is a limited but increasing role for political parties. Although the Legislative Council Ordinance does not provide specifically for the participation of political parties in the Legislative Council elections, there is active participation of political parties in the elections, especially in the geographical constituencies. When direct election of a limited number of Legislative Council members was introduced in 1991: 'the challenges and impacts it brought had finally made even its conservative opponents admit that consensus politics,

289. Chief Executive Election Ordinance (Cap. 569), s. 16(7)(a)(i).

290. *Ibid.*, s. 31(1).

291. *Ibid.*, s. 31(2).

which had long been practised in the Legislative Council, had come to an end. It had given way to party politics, a new mechanism characterised by conflict and confrontation'.²⁹²

195. The Executive Council is not an elective body and therefore political parties do not have a direct role in relation to its composition. The members of the Council are appointed by the Chief Executive 'from among the principal officials of the executive authorities, members of the Legislative Council and public figures'.²⁹³ The Basic Law recognizes that the members of the Executive Council are personal appointees of the Chief Executive when it provides that the term of office of members of the Executive Council shall not extend beyond the expiry of the term of office of the Chief Executive who appoints them. The Basic Law does not explicitly prohibit the appointment of members of political parties to the Executive Council. It does not, however, envisage an Executive Council that draws all its members from a single political party or an alliance of political parties. In contrast, in a Westminster model system the Cabinet of Ministers would be representative of a single political party or an alliance of political parties.

196. There is no constitutional or legislative provision for lobbies or interest groups. However, there is an important part for them to play in Hong Kong:

The changes in the political environment since the Sino-British negotiations had a double-edged effect on the development of pressure group politics. On the one hand, pressure groups were transformed firstly into political groups and later came to form political parties. On the other hand, grassroots organisations and community-based pressure groups withdrew from electoral politics and looked for new niches for survival. Meanwhile, new pressure groups, like environmental groups and women's groups, emerged to articulate issues that had not been adequately addressed by politicians and political parties in the establishment. It is true to say that the politicisation of the political environment has not facilitated a transformation of pressure groups. Indeed, the boundary between party politics and pressure group politics is now clearly marked. Pressure groups will play a rather limited role in the post-1997 political development in the sense that major political issues like democratisation are firmly in the grasp of political parties. However, in the domains of local interests and broader social causes like gender equality and environmental protection, pressure groups are still actively articulating their demands.²⁹⁴

292. I.C. Choy, 'Political Parties and Political Participation in Hong Kong', in Joseph Y.S. Cheng (ed.) *Political Participation in Hong Kong: Theoretical Issues and Historical Legacy* (Hong Kong: City University of Hong Kong Press, 1999) 121-147, at 128. See also Richard Cullen, 'Regulating Political Parties in Hong Kong', (February 2005), LC Paper No. CB(2)911/04-05(01), (2006). <http://www.legco.govhk/yr04-05/english/panels/ca/papers/ca0226cb2-911-1e.pdf>.

293. Basic Law, Art. 55.

294. T. Lui, 'Pressure Group Politics in Hong Kong,' in Joseph Y.S. Cheng (ed.) *Political Participation in Hong Kong: Theoretical Issues and Historical Legacy* (Hong Kong: City University of Hong Kong Press, 1999). 149-174, at 169-70.

§3. MISCELLANEOUS (REFERENDUM, POPULAR INITIATIVE)

197. Hong Kong has not, and never had, any constitutional provisions requiring referenda or other popular initiatives. The absence of constitutional provisions does not, however, rule out the possibility that the Government might consider that a particular decision needs to be approved by the people directly at a referendum. What can safely be stated is that, as the Basic Law stands, the referendum is not a recognized means of law-making.

Chapter 2. Head of State

§1. THE ORGAN OF STATE (DESIGNATION)

198. Hong Kong continues the previous system of government, which is an executive-led system. The Head of State of the Hong Kong Special Administrative Region is the Chief Executive. He is appointed by the Chinese Central Government and is accountable to it and to Hong Kong, in accordance with the Basic Law.²⁹⁵ In the absence of an express provision enabling the Chinese Government to remove the Chief Executive from office, such a power may be implied as long as such a removal is not inconsistent with the Basic Law or the Chinese Constitution.²⁹⁶ Although the powers and functions of the Chief Executive are quite similar to those held by his predecessor, the Governor under the British colonial administration, his constitutional position is rather different. Whereas the Governor was appointed by the Queen as her personal representative in Hong Kong, the Chief Executive is appointed by the Chinese Central Government, not as a local representative of the Chinese President, but as the head of the Hong Kong Special Administrative Region 'who shall represent the Region'.²⁹⁷

199. The Chief Executive of Hong Kong is selected or elected by the people of Hong Kong, and not nominated by the Chinese Government: In contrast, the Governors of Hong Kong were chosen by the British Government, meaning that the Queen made the appointment on Prime Ministerial advice. The Chief Executive is accountable to Hong Kong, as he is accountable to the Chinese Government.²⁹⁸ This accountability is meaningful because the Legislative Council may force him to resign from office.²⁹⁹ The Governor before 1997 was not accountable to Hong Kong in that sense, in the absence of any provision enabling the Legislative Council to dismiss him or force him to resign.

200. In line with the understanding that Hong Kong must be governed by Hong Kong people, the Basic Law requires the Chief Executive of the Hong Kong Special Administrative Region to be a Chinese citizen of not less than 40 years of age, who must be a Hong Kong permanent resident with no right of abode in any foreign country. The Chief Executive must have been ordinarily resident in Hong Kong for a continuous period of not less than twenty years.³⁰⁰ He must be a person of integrity, dedicated to his duties.³⁰¹

295. Basic Law, Art. 43.

296. Section 4 of the Chief Executive Election Ordinance, No. 21 of 2001 (Cap 569), expressly recognizes the possibility that the Chinese Central Government may remove him.

297. Basic Law, Art. 43.

298. Basic Law, Art. 43.

299. See Part II 'Form of Government', Ch. 3 'Legislature', VI 'Terms of Office and Vacancies'.

300. Basic Law, Art. 44.

301. *Ibid.*, Art. 47.

§2. THE SELECTION AND APPOINTMENT OF THE CHIEF EXECUTIVE

201. Article 46 of the Basic Law provides that the Chief Executive is elected for a term of five years and may serve not more than two consecutive terms. The Chief Executive is selected by election or through consultations held locally and appointed by the Central Chinese Government. When assuming office, the Chief Executive must take the oath of allegiance.³⁰² The method of selecting the Chief Executive must be specified in the light of the actual situation in Hong Kong and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.³⁰³

202. The method for electing the first Chief Executive in 1997 for a five-year term from 1997 to 2002 was set out in the decision of the National People's Congress on the method of formation of the first government and the first Legislative Council of the Hong Kong Special Administrative Region.³⁰⁴ That decision declared that the National People's Congress should in 1996 establish a Preparatory Committee for the Hong Kong Special Administrative Region, which shall be responsible for preparing the establishment of the Hong Kong Special Administrative Region and shall prescribe the specific method for the formation of the first Government and the first Legislative Council. The Preparatory Committee was to consist of mainland members and of Hong Kong members who shall constitute not less than 50% of its membership. Its chairman and members were to be appointed by the Standing Committee of the National People's Congress.

203. The Preparatory Committee for the Hong Kong Special Administrative Region was to be responsible for preparing the establishment of the Selection Committee for the First Government of the Hong Kong Special Administrative Region (hereinafter: the 'Selection Committee'). The Selection Committee was to be a broadly representative body composed entirely of permanent residents of Hong Kong. It included Hong Kong deputies to the National People's Congress, representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference, persons with practical experience who had served in Hong Kong's executive, legislative and advisory organs prior to the establishment of the Hong Kong Special Administrative Region, and persons representative of various strata and sectors of society. The decision set out the composition

302. Basic Law, art 104. See *Kwok Cheuk Kin v Leung Chun Ying* [2017] HKEC 926, (CFI) where an unsuccessful attempt was made to question the validity of the oath of allegiance taken by the Chief Executive in 2012, when he inadvertently did not read out one word of the oath. The court also considered that it could not condone the long delay in instituting the judicial review application.

303. Basic Law, Art. 45.

304. 'Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region (adopted at the Third Session of the Seventh National People's Congress on 4 April 1990).' This appears as Instrument 12 appended to the Basic Law.

of the Selection Committee as follows: One hundred members each from the following four categories of representatives: (i) industrial, commercial and financial sectors; (ii) the professions; (iii) labour, grass-roots, religious and other sectors; (iv) former political figures, Hong Kong deputies to the National People's Congress and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference. The selection committee was required to recommend a candidate for the first Chief Executive through local consultations or through nomination and election after consultation and report the recommended candidate to the Chinese Central Government for appointment. Mr Tung Chee Hwa was elected by the Election Committee as the first Chief Executive of Hong Kong (1997-2002).

204. The selection of the second Chief Executive, who assumed office in 2002 for a five-year term was by a selection committee of 800 members, which was established according to Annex 1 of the Basic Law. The four groups of persons from which 200 members each were to be chosen were not dissimilar to the four groups of members of the Selection Committee for the 1997 selection of the Chief Executive: (i) Industrial, commercial and financial sectors; (ii) the professions; (iii) labour, social services, religious and other sectors; (iv) Members of the Legislative Council, representatives of district-based organizations, Hong Kong deputies to the National People's Congress and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference.

205. Hong Kong enacted the Chief Executive Election Ordinance, No. 21 of 2001, to provide for the finer details of the election process.³⁰⁵ The Ordinance was intended to delimitate the various sectors, the organizations in each sector eligible to return election committee members and the number of such members returned by each of these organizations in accordance with principles of democracy and openness.³⁰⁶ Candidates for the office of the Chief Executive could be nominated jointly by not less than 100 members. The election committee was required to elect a Chief Executive designate from among such candidates by secret ballot on the basis of one-person-one-vote. The specific method of election was left to be prescribed by legislation.³⁰⁷ Mr Tung Chee Hwa was elected by the Election Committee to serve a second term as Chief Executive of Hong Kong (2002-2007). He resigned from office in 2005 and his successor Mr Donald Tsang (who at that time was the Chief Secretary of Hong Kong Special Administrative Region) held office for the remaining two years of the term of office of the outgoing Chief Executive.

206. Annex 1 of the Basic Law provides that if there is a need to amend the method for selecting the Chief Executive for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of

305. Such as the system of voting providing for the conduct of more than one round of voting until one candidate obtains more than half of the total number of valid votes cast. See Part V of the Ordinance.

306. Basic Law, Annex I, s. 3.

307. Basic Law, Annex I, ss 4 and 5.

all the members of the Legislative Council and the consent of the Chief Executive. The amendment must be reported to the Standing Committee of the National People's Congress for approval.

207. The Standing Committee of the National People's Congress decided on 26 April 2004 that the election of the Chief Executive for the third term in 2007 would not be by universal suffrage but by an election committee as before.³⁰⁸ Mr Donald Tsang who held office as a succeeding Chief Executive from 2005 to 2007, was elected by the Election Committee for a term of five years in 2007.

208. The Standing Committee of the National People's Congress decided on 29 December 2007 that the election of the Chief Executive for the fourth term in the year 2012 shall not be implemented by the method of universal suffrage. The composition of the Election Committee was expanded so as to consist of 1,200 members with 300 members from each of the four sectors, consisting of representatives as in the previous election. Mr Leung Chunying was elected by the Election Committee as the Chief Executive in 2012.

209. The decision of the Standing Committee of the National People's Congress of 29 December 2007 went on to provide that the election of the Chief Executive in 2017 may be implemented by the method of universal suffrage. It went on to provide that at an appropriate time prior to the selection of the Chief Executive by universal suffrage, the Standing Committee would make a determination after receiving a report from the Chief Executive on the issue of amending the method for selecting the Chief Executive.³⁰⁹ The decision also stated that if the Legislative Council failed to pass the necessary legislation by a two-thirds majority to give effect to such determination, the Chief Executive shall continue to be selected in accordance with the procedure used for the preceding term.³¹⁰

210. As envisaged by the Decision of 29 December 2007, the Chief Executive of Hong Kong Special Administrative Region submitted a report to the Standing Committee 15 July 2014 on the question of introducing election of the Chief Executive by universal suffrage in 2017. The Standing Committee of the National People's Congress considered the report and came to a decision on 31 August 2014.³¹¹ While it reaffirmed its intention to introduce universal suffrage as the means of electing the Chief Executive in 2017, the Standing Committee also emphasized how important it was that the Chief Executive should be someone 'who loves the country and loves Hong Kong'. It went on to say: '[the Chief executive being a person who loves both China and Hong Kong] is a basic requirement of the policy of "one

308. This decision appears as Instrument 19 appended to the Basic Law.

309. The Chief Executive made a report as required on 15 July 2014, which was considered by the Standing Committee. See the next paragraph for the decision of the Standing Committee.

310. This decision appears as Instrument 21 appended to the Basic Law.

311. This decision appears as Instrument 23 appended to the Basic Law.

country, two systems". It is determined by the legal status as well as important functions and duties of the Chief Executive and is called for by the actual need to maintain long-term prosperity and stability of Hong Kong and uphold the sovereignty, security and development interests of the country. The method for selecting the Chief Executive by universal suffrage must provide corresponding institutional safeguards for this purpose'. The Standing Committee therefore laid down the ground rules for the election of the Chief Executive in 2017 as follows:

- (1) A broadly representative nominating committee shall be formed. The provisions for the number of members, composition and formation method of the nominating committee shall be made in accordance with the number of members, composition and formation method of the Election Committee for the Fourth Chief Executive.
- (2) The nominating committee shall nominate two to three candidates for the office of Chief Executive in accordance with democratic procedures. Each candidate must have the endorsement of more than half of all the members of the nominating committee.
- (3) All eligible electors of the Hong Kong Special Administrative Region have the right to vote in the election of the Chief Executive and elect one of the candidates for the office of Chief Executive in accordance with law.
- (4) The Chief Executive-elect, after being selected through universal suffrage, will have to be appointed by the Central People's Government.

211. The Standing Committee went on to stipulate that the Hong Kong legislature needed to specify the specific method of universal suffrage for selecting the Chief Executive as an amendment to Annex I of the Basic Law, to be approved by not less than a two-thirds of all the members of the Legislative Council and consented to by the Chief Executive. The decision stipulates that if the specific method of universal suffrage for selecting the Chief Executive is not adopted in accordance with legal procedures, the method used for selecting the Chief Executive for the preceding term shall continue to apply.

212. There was considerable agitation in Hong Kong against the limitations that the Standing Committee had imposed on the right of Hong Kong people to directly elect their Chief Executive, especially the continuation of the Election Committee which was required to nominate two or three candidates for the post of Chief Executive. On 18 June 2015, the Legislative Council rejected the Government's electoral reform proposal for the 2017 elections by twenty-eight to eight votes.

213. Hong Kong having failed to come up with a proposal for direct election of the Chief Executive in line with the Decision of the Standing Committee, the selecting method of the 2017 Chief Executive will remain unchanged: He will be selected in accordance with the system that operated in 2012, election by the 1,200-member Election Committee.

214. The term of office of the Chief Executive is five years, and he may not serve more than two consecutive terms.³¹² The Chief Executive must resign under any of the following circumstances:

- (1) when he loses the ability to discharge his duties as a result of serious illness or other reasons;
- (2) when, after the Legislative Council is dissolved because he twice refused to sign a bill passed by it, the new Legislative Council again passes by a two-thirds majority of all the members the original bill in dispute, but he still refuses to sign it; and
- (3) when, after the Legislative Council is dissolved because it refuses to pass a budget or any other important bill, the new Legislative Council still refuses to pass the original bill in dispute.³¹³

215. The Legislative Council may impeach the Chief Executive. Article 73(9) provides as follows:

if a motion initiated jointly by one-fourth of all the members of the Legislative Council charges the Chief Executive with serious breach of law or dereliction of duty and if he or she refuses to resign, the Council may, after passing a motion for investigation, give a mandate to the Chief Justice of the Court of Final Appeal to form and chair an independent investigation committee. The Committee shall be responsible for carrying out the investigation and reporting its findings to the Council. If the Committee considers the evidence sufficient to substantiate such charges, the Council may pass a motion of impeachment by a two-thirds majority of its members and report to the Central People's Government for decision.

216. According to this provision, if a motion is signed by one-fourth of all the Legislative Council members, the Chief Executive may decide to resign. If the Chief Executive does not resign, a judicial investigation followed by a two-thirds majority vote in the Legislative Council will be needed to take the matter further. The Legislative Council's censure does not automatically result in the removal of the Chief Executive, though. It can only report its decision to the central Government, which has the authority to remove the Chief Executive.

217. The office of the Chief Executive will become vacant:

- (1) on the expiry of the term of office of the Chief Executive;
- (2) if the Chief Executive dies; or
- (3) if the Chinese Central Government removes the Chief Executive from office in accordance with the Basic Law.³¹⁴

312. Basic Law, Art. 46.

313. Basic Law, Art. 52.

314. Chief Executive Election Ordinance (Cap. 569), s. 4.

Training,⁷⁴⁸ Antiquities Advisory Board,⁷⁴⁹ and non-statutory bodies such as the Aviation Advisory Board and Advisory Committee on Agriculture and Fisheries.

- (2) Those bodies which stimulate action by businesses and other interests in directions which the government considers desirable. They include the Hong Kong Productivity Council and Hong Kong Trade Development Council.
- (3) Those bodies that have been set up to take politically embarrassing decisions for which the government prefers to avoid direct responsibility. A good example is the Standing Commission on Civil Service Salaries and Conditions of Service, established in 1979.
- (4) Those bodies that have been set up with a view to improving services provided by various government agencies and authorities. They include the Aviation Advisory Board, the Port Operations Committee and the Transport Advisory Committee.
- (5) Those bodies that ensure cooperation of voluntary agencies which provide services on the government's behalf. They include the Social Welfare Advisory Committee and the Education Commission.
- (6) The government may appoint a committee to inquire into certain matters and advise the government on appropriate measures to be taken. A recent example is the Commission of Inquiry into Excess Lead Found in Drinking Water with the following terms of reference: (a) to ascertain the causes of excess lead found in drinking water in public rental housing developments; (b) to review and evaluate the adequacy of the present regulatory and monitoring system in respect of drinking water in Hong Kong; and (c) to make recommendations with regard to the safety of drinking water in Hong Kong. The commission submitted its report to the Chief Executive in Council in May 2016. The enabling legislation is the Commissions of Inquiry Ordinance, Cap. 86.

410. There are a number of statutory bodies that perform important public functions. The Town Planning Board, which consists of official and unofficial members appointed by the Chief Executive, makes land-use plans and grants planning permission. While the government formulates land-use planning policies, the Town Planning Board adopts any plans proposed by the Planning Department and conducts public consultation before they are passed on to the Chief Executive for approval. No statutory plans may be introduced without the Board's approval. Similarly, no land-use developments that require planning permission may be undertaken without the Board's approval. The other statutory bodies of this type are the Film Censorship Authority set up under the Film Censorship Ordinance (Cap. 392), Consumer Council set up under the Consumer Council Ordinance (Cap. 216), Country and Marine Parks Board set up under the Country Parks Ordinance (Cap. 208), and Antiquities Advisory Board set up under the Antiquities and Monuments Ordinance (Cap. 53).

748. Set up under the Legal Practitioners Ordinance (Cap. 159), s. 74A.

749. Set up under the Antiquities and Monuments Ordinance (Cap. 53) s. 17.

411. The Equal Opportunities Commission, set up by the Sex Discrimination Ordinance (Cap. 480) is an important statutory body in the context of the protection of fundamental rights. The aims of the Commission are to promote equality and work towards elimination of discrimination. The Commission is tasked with the implementation of the Sex Discrimination Ordinance (Cap. 480), the Disability Discrimination Ordinance (Cap. 487), the Family Status Discrimination Ordinance (Cap. 527) and the Race Discrimination Ordinance (Cap. 602). The Commission seeks to achieve these aims through legislative reform, education and research. The Commission receives complaints from aggrieved persons, whom it assists by giving advice or by facilitating conciliation or judicial proceedings. It also coordinates and communicates with government and non-government organizations on issues of equal opportunities. It issues codes of practice and guidelines on elimination of discrimination and promotion of equal opportunities.

412. There are a number of statutory tribunals that assist in the smooth operation of government. They include appeal boards that entertain appeals against decisions taken by statutory bodies. The Town Planning Appeal Board, set up under the Town Planning Ordinance (Cap. 131) is an independent statutory body to which any applicant for planning permission who is aggrieved by a decision of the Town Planning Board may appeal. The Environmental Impact Assessment Appeal Board, set up under the Environmental Impact Assessment Ordinance (Cap. 499) entertains appeals against decisions made under the Ordinance. Appeal Boards have been set up under numerous other ordinances such as the Amusement Game Centres Ordinance (Cap. 435), the Clubs (Safety of Premises) Ordinance (Cap. 376) and the Consumer Goods Safety Ordinance (Cap. 456).

413. The most important of the tribunals is the Administrative Appeals Board, which may entertain appeals against statutory decisions taken under a number of ordinances specified in the Administrative Appeals Board Ordinance (Cap. 442). The Administrative Appeals Board Ordinance was enacted in 1994 in order to provide an independent Tribunal that would hear appeals that previously were heard by the Governor in Council. It was intended that by creating the new tribunal, the Governor in Council (now, the Chief Executive in Council) would be relieved of appellate responsibility in respect of statutory decisions of minor importance. Decisions against which an appeal may be made to the Board are set out in the Schedule to the Ordinance and include refusal to issue or renew or revoke a licence under a number of Ordinances. The Administrative Appeals Board has no power to award compensation, but it may refer a case back to the authority against whose decision the appeal was made, where it considers that the appellant deserves to be compensated. It may award costs of the appeal. The Tribunal's hearings are held in public and its decision is final, subject to judicial review.⁷⁵⁰

750. See for instance *Li Wai Hung Cesario v Administrative Appeals Board* [2016] HKEC 1325, CA and *Cheung Moon Hoi Jeff v Administrative Appeals Board* [2016] HKEC 1241, CA.

§2. NON-GOVERNMENTAL ORGANIZATIONS

414. Hong Kong has a number of Quangos (quasi-autonomous, non-government organizations), and they perform a particularly important function in the social organization. These, such as the Society for the Prevention of Cruelty to Animals, being private bodies, are not generally subject to public law. Where, however, there is a public interest in granting a public law remedy, they may be subject to judicial review proceedings.

415. The Basic Law contains several provisions that promote civil society. Article 144 provides as follows:

The Government of the Hong Kong Special Administrative Region shall maintain the policy previously practised in Hong Kong in respect of subventions for non-governmental organizations in fields such as education, medicine and health, culture, art, recreation, sports, social welfare, and social work. Staff members previously serving in subvented organizations in Hong Kong may remain in their employment in accordance with the previous system.

416. Article 146 provides that voluntary organizations providing social services in Hong Kong may, on their own, decide their forms of service. Article 148 provides that the relationship between non-governmental organizations in fields such as education, science, technology, culture, art, sports, the professions, medicine and health, labour, social welfare and social work, as well as religious organizations in Hong Kong, will be based on the principles of non-subordination, non-interference and mutual respect. Such non-governmental organizations may maintain and develop relations with their counterparts in foreign countries and regions and with relevant international organizations.⁷⁵¹

417. The Basic Law provides that while the government may formulate policies in areas such as education,⁷⁵² professional qualifications,⁷⁵³ sports,⁷⁵⁴ and social welfare,⁷⁵⁵ non-governmental organizations may run educational institutions,⁷⁵⁶ non-governmental professional organizations may assess and confer professional qualifications,⁷⁵⁷ non-governmental sports organizations may continue to exist and

751. Basic Law, Art. 149. However, the Hong Kong Government is under a duty under Art. 23 of the Basic Law to enact legislation to prohibit foreign political organizations or bodies from conducting political activities in Hong Kong, and to prohibit political organizations or bodies of Hong Kong from establishing ties with foreign political organizations or bodies. No law has so far been made in pursuance of Art. 23.

752. Basic Law, Art. 136.

753. *Ibid.*, Art. 142.

754. *Ibid.*, Art. 143.

755. *Ibid.*, Art. 145.

756. *Ibid.*, Art. 136.

757. *Ibid.*, Art. 142.

develop,⁷⁵⁸ and voluntary organizations providing social services in Hong Kong may decide on their forms of service.⁷⁵⁹ An important provision is Article 141 of the Basic Law, which protects religious freedom. It provides that religious organizations may, according to their previous practice, continue to run seminaries and other schools, hospitals, and welfare institutions and to provide other social services. Such organizations and believers may maintain and develop their relations with religious organizations and believers elsewhere.

418. Clubs are a form of social organization. They cover not only sports or recreational clubs, but also would include trade unions and professional associations, which are important public movements. While clubs derive their power from a contract between members and are therefore governed by private law, there may be appropriate circumstances when public law remedies may be applicable.⁷⁶⁰

758. *Ibid.*, Art. 143.

759. *Ibid.*, Art. 146.

760. See *Ho Man-fat (No. 2) v The Royal Hong Kong Jockey Club* (1976) HKLR 452, (HC), where in a private action the court inquired into whether there had been a breach of rules of natural Justice. In *Divisional Commissioner v The Jockey Club exp. Aga Khan* [1993] 1 WLR 909, (CA), where public law remedies were held to be inapplicable. See also *Hong Kong Rifle Association v Hong Kong Shooting Association (No 2)* [2013] HKEC 980, (CA), where the Court of Appeal held that the refusal by the Hong Kong Shooting Association (HKSA) to renew the rifle association's membership in it was not susceptible to judicial review. The Court of Appeal reasoned that the power to decide whether to admit or reinstate a member was derived from its memorandum and articles of association and was consensual and contractual in nature. It could not be said that in making the decision, the HKSA was exercising a public law function or its decision had public law consequences.

are to be proposed by the Standing Committee of the National People's Congress or by more than one-fifth of the deputies to the National People's Congress and adopted by a vote of more than two-thirds of all the deputies to the National People's Congress.

428. The National People's Congress has the power to enact 'basic laws,' such as the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, while its Standing Committee has the power to pass other statutes, which rank below basic laws, such as the Anti-Terrorism Law of January 2016. As Article 67 provides the Standing Committee has the power to 'enact and amend statutes with the exception of those which should be enacted by the National People's Congress'. The Standing Committee also has the power to interpret the Constitution and supervise its enforcement. It exercises the power of interpreting statutes and a legislative gap-filling function: As provided in Article 67, it has the power: (1) to interpret statutes; (2) to partially supplement and amend, when the National People's Congress is not in session, laws enacted by the National People's Congress, provided that the basic principles of these laws are not contravened; and (3) to annul administrative rules and regulations, decisions or orders of the State Council that contravene the Constitution or the statutes.

429. While legislative power is vested in the National People's Congress and its Standing Committee, administrative power is vested in the State Council, which operates under the supervision of the National People's Congress. The State Council, that is, the Central Peoples Government, is the executive body of the highest organ of state power and the highest organ of state administration (Article 85). As stated in Article 89 the State Council has the power to do the following:

- (1) to adopt administrative measures, enact administrative rules and regulations and issue decisions and orders in accordance with the Constitution and the statutes;
- (2) to submit proposals to the National People's Congress or its Standing Committee;
- (3) to lay down the tasks and responsibilities of the ministries and commissions of the State Council, to exercise unified leadership over the work of the ministries and commissions and to direct all other administrative work of a national character that does not fall within the jurisdiction of the ministries and commissions;
- (4) to exercise unified leadership over the work of local organs of state administration at different levels throughout the country, and to lay down the detailed division of functions and powers between the Central Government and the organs of state administration of provinces, autonomous regions and municipalities directly under the Central Government;
- (5) to draw up and implement the plan for national economic and social development and the state budget;
- (6) to direct and administer economic work and urban and rural development;
- (7) to direct and administer the work concerning education, science, culture, public health, physical culture and family planning;

- (8) to direct and administer the work concerning civil affairs, public security, judicial administration, supervision and other related matters;
- (9) to conduct foreign affairs and conclude treaties and agreements with foreign states;
- (10) to direct and administer the building of national defence;
- (11) to direct and administer affairs concerning the nationalities and to safeguard the equal rights of minority nationalities and the right of autonomy of the national autonomous areas;
- (12) to protect the legitimate rights and interests of Chinese nationals residing abroad and protect the lawful rights and interests of returned overseas Chinese and of the family members of Chinese nationals residing abroad;
- (13) to alter or annul inappropriate orders, directives and regulations issued by the ministries or commissions;
- (14) to alter or annul inappropriate decisions and orders issued by local organs of state administration at different levels;
- (15) to approve the geographic division of provinces, autonomous regions and municipalities directly under the Central Government, and to approve the establishment and geographic division of autonomous prefectures, counties, autonomous counties and cities;
- (16) in accordance with the provisions of the law, to decide on entering into the state of emergency in parts of provinces, autonomous regions and municipalities directly under the Central Government;
- (17) to examine and decide on the size of administrative organs and, in accordance with the law, to appoint, remove and train administrative officers, appraise their work and reward or punish them; and
- (18) to exercise such other functions and powers as the National People's Congress or its Standing Committee may assign it.

430. In this scheme of things, the role of the Chinese judiciary is fairly muted. The people's courts of the People's Republic of China are the judicial organs of the State (Article 123). People's courts exercise judicial power, in accordance with the law, independently and are not subject to interference by administrative organs, public organizations or individuals (Article 126). The highest judicial organ is the Supreme People's Court, which supervises people's courts at various local levels, while allowing people's courts at higher levels to supervise people's courts at lower levels (Article 127). The Supreme People's Court is responsible to the National People's Congress and its Standing Committee while local people's courts at various levels are responsible to the organs of state power which created them (Article 128). While administration of justice is in the hands of the judiciary, it has not been given power to interpret the constitution or to invalidate legislative or administrative actions taken by the National People's Congress or the State Council on account of unconstitutionality.

431. It is important to keep in mind that just as much as Hong Kong would like to emphasize the 'two systems' part of the 'one country, two systems' formula, China emphasizes the primacy of the 'one country' part. As the recent whitepaper

entitled 'The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region' (issued in June 2014 by the Information Office of the State Council of the PRC) asserted:

As prescribed in the Constitution of the People's Republic of China and the Basic Law of the Hong Kong Special Administrative Region, the organs of power by which the central leadership directly exercises jurisdiction over the Hong Kong Special Administrative Region are the National People's Congress and its Standing Committee, the President of the state, the Central People's Government and the Central Military Commission. The National People's Congress decided on the establishment of the Hong Kong Special Administrative Region, formulated the Basic Law of the Hong Kong Special Administrative Region to prescribe the system to be instituted in the Hong Kong Special Administrative Region and has the power of amendment to the Basic Law. The National People's Congress Standing Committee has the power of interpretation regarding the Basic Law of the Hong Kong Special Administrative Region, the power of decision on revising the selection methods of the Chief Executive and the Legislative Council of the Hong Kong Special Administrative Region, the power of supervision over the laws formulated by the legislative organs of the Hong Kong Special Administrative Region, the power of decision on the Hong Kong Special Administrative Region entering a state of emergency and the power of making new authorization for the Hong Kong Special Administrative Region. The Hong Kong Special Administrative Region comes directly under the Central People's Government and its Chief Executive is accountable to the Central People's Government. The Central People's Government appoints the Chief Executive and the principal officials, is responsible for foreign affairs relating to the Hong Kong Special Administrative Region in accordance with the law and issues directives to the Chief Executive. The Central Military Commission is the leading body of the Hong Kong garrison, and performs defence and other duties. The central authorities perform overall jurisdiction and constitutional duties as prescribed in the Constitution of the People's Republic of China and in the Basic Law of the Hong Kong Special Administrative Region, and exercise effective administration over the Hong Kong Special Administrative Region.

432. The above description of the background to the creation of Hong Kong Special Administrative Region and the constitutional system of the People's Republic of China provides the backdrop against which the relationship between central authorities of the People's Republic of China and Hong Kong Special Administrative Region may be properly understood. At the outset, it must be kept in mind the fact that Hong Kong is not merely a local authority operating under the overarching central control of the Chinese government. The Hong Kong Special Administrative Region is different from provinces, municipalities and ethnic autonomous regions of China. It operates under a specially created constitutional arrangement which guarantees that to a significant extent Hong Kong operates on its own in the exercise of its unique high degree of autonomy.

433. Upon the reversion of sovereignty of Hong Kong to China, Hong Kong exercises a high degree of autonomy not under a constitution which binds China and Hong Kong equally: Hong Kong enjoys such autonomy because 'the National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy'.⁷⁶² It is not that the People's Republic of China has surrendered some of its powers to Hong Kong, as the UK did when it granted independence to its former colonies: It is a grant of power which China would be able to take back, although it might be argued that the Joint Declaration is binding on China legally not to resile from its pledges articulated in it, and that it will not be in the political interests of China to do so. In any event, the promises in the Basic Law are not meant to operate in perpetuity but for a period of fifty years.⁷⁶³ The 'One country, Two systems' policy guarantees that the socialist system that prevails all over China will not be practised in Hong Kong.⁷⁶⁴

434. The significance of the 'One Country, Two Systems' formula has been recognized by courts of Hong Kong. In the flag desecration case, *HKSAR v Ng Kung Siu*,⁷⁶⁵ Chief Justice Li emphasized that Hong Kong was an inalienable part of the People's Republic of China and that Hong Kong's constitutional arrangement is founded on the unique concept of 'One Country, Two Systems'. Li CJ said: 'As to the time, place and circumstances with which we are concerned, Hong Kong has a new constitutional order. On 1 July 1997, the People's Republic of China resumed the exercise of sovereignty over Hong Kong being an inalienable part of the People's Republic of China and established the Hong Kong Special Administrative Region under the principle of "One country, Two systems". The resumption of the exercise of sovereignty is recited in the Preamble of the Basic Law, as "fulfilling the long-cherished common aspiration of the Chinese people for the recovery of Hong Kong".' Relating that to the importance of respecting the national and regional flags, Li CJ continued to observe as follows: 'In these circumstances, the legitimate societal interests in protecting the national flag and the legitimate community interests in the protection of the regional flag are interests which are within the concept of public order (*ordre public*). ... [T]he national flag is the unique symbol of the Hong Kong Special Administrative Region and the regional flag is the unique symbol of the Hong Kong Special Administrative Region as an inalienable part of the People's Republic of China under the principle of "one country, two systems".'⁷⁶⁶

762. *Ibid.*, Art. 2 in 'Chapter I: General Principles'.

763. Clause 3(12) of the Sino-British Joint Declaration states: 'The above-stated basic policies of the People's Republic of China regarding Hong Kong and the elaboration of them in Annex 1 to this Joint Declaration will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, by the National People's Congress of the People's Republic of China, and they will remain unchanged for 50 years.'

764. For a useful introduction to Chinese constitutional law, see Lin Feng, *Constitutional Law in China* (Hong Kong: Sweet & Maxwell Asia, 2000).

765. *HKSAR v Ng Kung Siu and Another* (1999) 2 HKCFAR 442, (CFA).

766. *Ibid.*, 460.

435. In *Leung Kwok Hung v Legislative Council Secretariat*⁷⁶⁷ and *Chief Executive of HKSAR v President of Legislative Council*,⁷⁶⁸ the Court of First Instance upheld the sanctity of the oath of office the Chief Executive, members of the Legislative Council, judges and other senior public officers must swear or affirm when assuming office. In doing so, the court observed that oath takers are required to swear allegiance to Hong Kong Special Administrative Region which, according to the Basic Law, is an integral part of, and not independent of, the People's Republic of China. The oath taking is mandated by Article 104 of the Basic Law which provides as follows: 'When assuming office, the Chief Executive, principal officials, members of the Executive Council and of the Legislative Council, judges of the courts at all levels and other members of the judiciary in the Hong Kong Special Administrative Region must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China.' In *Leung Kwok Hung v Legislative Council Secretariat* and *Chief Executive of HKSAR v President of Legislative Council*, the court emphasized that the oath must be taken sincerely and solemnly. *Chief Executive of HKSAR v President of Legislative Council* came before the Court of First Instance when two members of the newly elected Legislative Council, following the general election in September 2016, took the oath at the first meeting of the Council on 12 October 2016 in such a way that it did not amount to taking the oath as required by Article 104 or in a solemn and sincere manner as required by the Oaths and Declarations Ordinance (Cap. 11).⁷⁶⁹ They had either changed the wording of the oath to emphasize that they were advocating self-governance for Hong Kong and thus undermining the supremacy of the People's Republic of China or pronounced in Cantonese the words 'China' and 'People's Republic of China' in a contemptuous way.

436. The Clerk to the Legislative Council refused to accept the validity of the oath, and six days later, the President of the Legislative Council offered them an opportunity to take the oath afresh, if they made a written request, which they did the same day. However, before a new oath taking could be arranged, the Secretary for Justice, representing the Chief Executive, successfully moved the court for a declaration that the oath taken by the two new members at the first sitting of the Council was invalid and that the President had no authority to offer them a second chance because they had failed or declined to take the oath when assuming office. The Court of First Instance upheld the judicial review application on 15 November

767. *Leung Kwok Hung v Legislative Council Secretariat* [2004] HKEC 1203, (CFI).

768. *Chief Executive of HKSAR v President of Legislative Council* [2016] HKEC 2487, (CFI).

769. Schedule 2 of the Oaths and Declarations Ordinance (Cap. 11) requires newly elected Legislative Council member to swear that he will uphold the Basic Law, bear allegiance to the Hong Kong Special Administrative Region and to the People's Republic of China, 'conscientiously, dutifully, in accordance with the law, honestly and with integrity'. Thomas Au J in *Chief Executive of HKSAR v President of Legislative Council* observed that the oath must be taken solemnly and sincerely is an undisputed requirement of the common law.

2016 and declared that the two newly elected members of the Legislative Council were disqualified from holding office as members of the Council and that the office each of them was elected to was vacant.

437. Meanwhile, the Central Chinese Government took this incident seriously and issued an interpretation of Article 104 of the Basic Law on 7 November 2016, clarifying that: (1) an oath taker must take the oath 'sincerely and solemnly' and must accurately, completely and solemnly read out the oath prescribed by law; (2) an oath taker who intentionally reads out words which do not accord with the wording of an oath prescribed by law, or takes the oath in a manner which is not sincere or not solemn, shall be treated as declining to take the oath; and (3) if the administrator of the oath refuses to accept the oath as having been read out in the prescribed manner, such purported oath is invalid and no arrangements must be made for retaking the oath.

438. Thomas Au J having held that an interpretation issued by the Standing Committee of the National People's Congress is binding on courts of Hong Kong, proceeded to determine the case in accordance with the interpretation of Article 104 pronounced by the Standing Committee on 7 November 2016. The judge, however, agreeing with the government's submission, held that his decision would be the same even in the absence of guidance from the interpretation of Article 104.

439. The desecration of flag case and the two oath of office cases lend support in two specific contexts to the supremacy of the People's Republic of China and the nature of the degree of autonomy that Hong Kong enjoys, emphasizing the special relationship created by the Basic Law between Chinese Central authorities and Hong Kong's regional authorities.

440. Being intended to set out the constitutional arrangements for Hong Kong, the Basic Law does not make a strict demarcation of constitutional power between the central and regional authorities, and impliedly leaves room for any powers that are not specifically referred to in the Basic Law to be left in the competence of the People's Republic of China.⁷⁷⁰ Not engaging in the ongoing political debate on the competence or propriety of the Central Government to control affairs in Hong Kong, what we propose to do is to examine the provisions of the Basic Law which are aimed at upholding Hong Kong's high degree of autonomy.

441. Two articles of the Basic Law reflect the special position of Hong Kong. Article 2 of the Basic Law provides that 'the National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law'. Article 12 of the Basic Law provides that 'the Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall

770. In Federal systems, it is common to have a federal list and state list of competencies, with residual powers left either with the federal authorities or with state authorities.

Kong Special Administrative Region v Lam Kwong Wai, the Court of Final Appeal suggested that wherever possible a reverse legal burden of proof must be read down as an evidential burden.¹⁰⁵⁵

V. The Rights of Defendants in a Criminal Trial

611. The common law has put in place many safeguards to protect the interests of defendants facing criminal trial. There is a presumption of innocence in the defendant's favour¹⁰⁵⁶ and the law requires the case against him to be proved beyond reasonable doubt.¹⁰⁵⁷ A defendant has a right to remain silent to protect himself from self-incrimination.¹⁰⁵⁸ He has the right to a fair trial,¹⁰⁵⁹ to be tried in the presence of a jury in relation to serious offences.¹⁰⁶⁰ He has a right to 'discover' the

1055. *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, (CFA), (CFA). See *HKSAR v Ng Po On* [2008] 11 HKCFAR 91, (CFA), where *Lam Kwong Wai* principle was applied. See also *Fu Kor Kuen Patrick v HKSAR* (2012) 15 HKCFAR 524, (CFA), *Secretary for Justice v Chan Chi Wan Stephen* (2017) 20 HKCFAR 98, (CFA) and *HKSAR v Choi Wai Lun* (2018) 21 HKCFAR 167, (CFA).

1056. See above [599] to [603].

1057. The right to be presumed innocent is the basis of the cardinal rule that the prosecution has the burden of proving beyond reasonable doubt that the defendant is guilty of the offence charged: *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, (CFA), at [23].

1058. Privilege against self-incrimination is a well-established common law rule, which however, may be taken away by legislation: *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133, (CFA), 156. Hong Kong Bill of Rights, art 11(2)(g), provides that 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... not to be compelled to testify against himself or to confess guilt'. Article 11(2)(g) 'only applies to persons who face a criminal charge and the immunity then conferred is only a testimonial immunity, namely, the right "not to be compelled to testify against himself or to confess guilt". It is therefore of a much narrower scope than the common law privilege against self-incrimination': *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133, (CFA), 171.

1059. See for reference to the common law right to a fair trial, *Ramachandran Subramanian v The General Medical Council* [2002] UKPC 3, (PC), referred to in *Securities and Futures Commission v Wong Yuen Yee* [2017] 1 HKLRD 788, (CFI). 'In Hong Kong the right to a fair trial is an essential principle of the judicial system. It is guaranteed by two provisions of our constitution the Basic Law. They are: (i) art.39 which entrenches art.10 of the Hong Kong Bill of Rights (where there is an express reference to the right to a fair hearing); and (ii) art.87 which preserves the principles previously applied in proceedings and the rights previously enjoyed by parties to proceedings': *Chan Tak Ming v HKSAR* (2010) 13 HKCFAR 745, (CFA), [12].

1060. Article 86 of the Basic Law provides: 'The principle of trial by jury previously practised in Hong Kong shall be maintained'. It has been judicially observed that art 86 'is clear and unambiguous. All that it is saying is that whatever principle applied in relation to jury trials prior to the Basic Law coming into effect would continue to apply thereafter. ... The principle of trial by jury that applied prior to the Basic Law coming into effect was clear: an indictable offence was triable either by judge and jury, in the High Court, or by judge alone, in the District Court, at the discretion of the Attorney General': *Chiang Lily v Secretary for Justice* [2009] HKEC 254, (CFI), [16] and [19]. Trial by jury evolved from the common law and became part of Hong Kong law when s5 of the Supreme Court Ordinance (Cap 5) extended the application of English law to Hong Kong: *R v Wong King Chau* [1964] HKDCLR 94, (DC).

evidence of the prosecution before the trial and to cross-examine witnesses.¹⁰⁶¹ Exceptionally, he has a right to stay criminal proceedings.¹⁰⁶²

612. Under the common law, a confession made by a defendant is admissible evidence against him only if it has been made voluntarily 'in the sense that it has not been obtained from the accused either by fear of prejudice or hope of advantage excited or held out by a person in authority or by oppression'.¹⁰⁶³ The Bill of Rights has given statutory recognition to this well-established rule of common law.¹⁰⁶⁴

613. Entrapment is not a defence to a criminal offence: The court, however, may stay a criminal proceeding if the police officers had brought about an 'artificial state-created crime'. The burden is on the applicant to show that this had taken place and the standard of proof is an extremely high one.¹⁰⁶⁵ However, if a defendant is encouraged to commit an offence which he would not otherwise have committed, the court would likely treat that as a mitigating factor and entrapment may be considered as an abuse of court process resulting in exclusion of evidence by court.¹⁰⁶⁶ It has been held that a trial judge has jurisdiction to stay proceedings in a criminal trial on the basis that a defendant was subjected to entrapment. This was so even if the trial of the defendant could be conducted fairly. Before exercising his discretion to stay on the basis of entrapment, a trial judge would have to be satisfied that if the trial were to continue it would be an abuse of process, amounting to an affront to the public conscience with severe consequences for public confidence in the administration of justice. A stay on the basis of entrapment should only be granted in exceptional circumstances.¹⁰⁶⁷

614. Under the common law, the trial judge may abort a criminal trial where a prosecution witness whose evidence is important is missing so as to ensure justice

1061. For the common law duty of disclosure and lawful limitation of it by legislation see *HKSAR v Yu Lik Wai William* [2019] HKEC 315, (CA). For the common law right to cross-examine witnesses see *Oei Hengky Wiryo v HKSAR (No 2)* (2007) 10 HKCFAR 49, (CFA).

1062. *HKSAR v Ng Chuen To Raymond* [2013] HKEC 1190, CA; *HKSAR v Lee Ming Tee & anor* (2001) 4 HKCFAR 133, (CFA), 148, where Ribeiro PJ explained the exceptional situations where a stay of proceedings may be granted.

1063. *Secretary for Justice v Lam Tat Ming* [2000] 2 HKLRD 431 at 439; (2000) 3 HKCFAR 168, 177, (CFA).

1064. *R v Yu Yem-kin* [1994] HKEC 52, (SC), and *R v Cheung Ka Fai* [1995] 3 HKC 214; [1995] 2 HKCLR 184, (CA).

1065. *HKSAR v Yu Cheuk San* [2004] HKEC 651, (CA), citing *R v Looseley* [2001] 4 All ER 897, (HL). Among several failed attempts to establish this requirement is *HKSAR v Fung Hin Wah Edward* [2012] 1 HKLRD 374, (CA).

1066. *HKSAR v Yu Lik Wai William* [2015] HKEC 1286, [172], (DC).

1067. *HKSAR v Wong Kwok Hung* [2007] 2 HKLRD 621, (CA). As Lord Steyn said in *R Latif* [1996] 1 WLR 104, 112, HL: 'If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime.' Cited in *HKSAR v Fung Hin Wah Edward* [2012] 1 HKLRD 374, [54], (CA).

to the accused.¹⁰⁶⁸ Where a defendant is unrepresented, the trial judge must take appropriate measures to ensure that the defendant is not prejudiced by the lack of legal representation.

615. Generally, the trial magistrate's duty in assisting an unrepresented accused does not go beyond advising him of his legal rights in matters of procedure and in law. In appropriate circumstances, it may be desirable for the magistrate or the trial judge to ask witnesses questions not so much to assist the accused but as to ascertain the truth and to ensure that justice is done. Further, his duty may include rendering some assistance to the accused by asking a few relevant questions. There is no duty on the part of the magistrate to conduct the defence as such or take over the cross-examination from the accused.¹⁰⁶⁹

A defendant may argue that he did not receive a fair hearing because of negligence or incompetence of his legal representative.¹⁰⁷⁰

616. The common law rights of a defendant are supplemented by rights guaranteed by the Bill of Rights.¹⁰⁷¹ Under the Bill of Rights, a defendant is entitled, for example, to 'be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him'.¹⁰⁷² Thus, where an important prosecution document, for example, a summons, is in a language that the defendant does not understand, the trial judge ought to explain it to him and adjourn the trial.¹⁰⁷³

617. The defendant must have 'adequate time and facilities for the preparation of his defence'.¹⁰⁷⁴ It follows that the failure of the prosecution to provide important materials to the accused may constitute unfairness. This may enable the defendant to stay the criminal proceedings.¹⁰⁷⁵

1068. In *R v Yeung Chi chiu* (1994) 4 HKLY 195, (DC), a stay of proceeding was granted, because it would be unfair and contrary to art 11 of the Bill of Rights (right to a fair trial) to proceed in the absence of some material witnesses.

1069. *Li J in Chan Leung v R* [1979] HKLR 98, (HC),¹⁰⁵ where the High Court said: '... generally the trial magistrate's duty in assisting an unrepresented accused does not go beyond advising him of his legal rights in matters of procedure and in law. In appropriate circumstances it may be desirable for the magistrate or the trial judge to ask witnesses questions not so much to assist the accused but as to ascertain the truth and to ensure that justice is done. Further his duty may include some assistance to the accused by asking a few pertinent questions if such questions were apparently necessary. There is no duty on the part of the magistrate to conduct the defence as such or take over the cross-examination from the accused.' Followed in *R v Tam Kin Wing* [1997] 3 HKC 285; [1997] HKLRD 333, (HC).

1070. *HKSAR v Cheng Kan* [1998] 2 HKC 709; [1998] HKEC 1143, (CFI).

1071. Bill of Rights Ordinance, See Art. 11(2)(d) (on the right to defend oneself etc) and Art. 11(2)(e) (on the right to examine witnesses).

1072. *Ibid.*, Art. 11(2)(a).

1073. *Attorney General of Hong Kong v Tang Yuen-Lin* (1995) 5 HKPLR 631; [1995] 2 HKCLR 157, (CA).

1074. Article 11(2)(b).

1075. See *R v Flickinger* (1993) 3 HKPLR 677, (DC), and *R v Chu Kam-to* (1994) 4 HKPLR 472; 1994 HKEC 53, (SC). See *HKSAR v Lee Ming Tee and SFC (Intervener)* [2004] 1 HKLRD 513; (2003) 6 HKCFAR 336, (CFA).

618. A defendant has the right 'to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it'.¹⁰⁷⁶ It appears that this right operates even where he is not entitled to legal aid under the legal aid scheme.¹⁰⁷⁷ In *R v Mirchandani*,¹⁰⁷⁸ the Court of Appeal held that Article 11(2)(d) of the Bill of Rights did not confer any absolute right to legal aid. Two conditions had to be satisfied: (i) the interests of justice involved in a particular case must require that legal aid be granted and (ii) the person concerned must not have sufficient means to pay for it. The Court of Appeal observed that there was nothing objectionable in principle with a person applying for legal aid under the Legal Aid in Criminal Cases Rules (Cap. 221) being subject to a means test to determine whether they had sufficient means to pay for legal advice. The Rules regulated the grant of legal aid in a manner wholly consistent with Article 11(2)(d).¹⁰⁷⁹

619. Of particular importance is the constitutional right 'to be tried without undue delay'.¹⁰⁸⁰ Undue delay in itself is insufficient: The accused must have, as a result of the undue delay, suffered prejudice (a point that is not easy to prove). The prejudice that he has suffered must be balanced with the public interest in having justice done.¹⁰⁸¹

620. The Bill of Rights reinforces the common law rule against double jeopardy when it provides that 'no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of Hong Kong'.¹⁰⁸²

1076. Article 11(2)(d).

1077. *R v Wong Cheung-bun* [1992] 1 HKCLR 240 (HC). Where a defendant has not been advised of his right to legal assistance, proceedings may be liable to invalidation: *Hall v Commissioner of Correctional Services* [2015] 2 HKLRD 917, (CFI).

1078. *R v Mirchandani* (1992) 2 HKPLR 196; [1992] 2 HKCLR 174, (CA).

1079. It appears from the decision that the court has decided that there will no longer be provision of legal aid apart from that provided under the current legal aid scheme. M. Wilkinson & J. Chan, 'Abuse of the Criminal Process', in G. Heilbronn (ed.) *Modern Trends in Litigation* (Hong Kong: Hong Kong Law Journal Ltd, 1995) 58-59, relying on *R v Mirchandani* (1992) 2 HKPLR 196; [1992] 2 HKCLR 174, (CA).

1080. Article 11(2)(c). See M. Wilkinson & J. Chan 'Abuse of the Criminal Process', in *Modern Trends in Litigation*, ed. G. Heilbronn (Hong Kong: Hong Kong Law Journal Ltd, 1995), 59-78.

1081. *In re George Tan* [1991] 2 HKLR 400, (HC), *R v William Hung* [1994] 1 HKCLR 47, (CA), and *R v Deacon Chiu* (1993) HKEC 163, (SC). The Court of Final Appeal observed in *Ong Siu Sin Kevin v HKSAR* [2011] HKEC 986, (CFA), [14] that 'to establish undue delay within the article to merit a remedy, the applicant must demonstrate something more, such as a serious unjust effect upon his trial or upon him personally. Examples are that his defence has been prejudiced, or the fairness of his trial has been compromised, or that the delay has been oppressive'.

1082. Article 11(6). This right is narrower than the common law right, under which a previous conviction for a similar offence by a non-local court too could be taken into account. See *Yeung Chun Pong v Secretary for Justice* [2006] HKEC 1517, (CA). The Court of Final Appeal observed in *Secretary for Justice v Wong Chi Fung* (2018) 21 HKCFAR 35, (CFA), [51] that 'whilst an increase of sentence is not incompatible with the concept of double jeopardy, as a matter of practice the Court of Appeal customarily makes allowance for the concept when increasing a sentence on review by applying a discount to the increased sentence: see *Secretary for Justice v Lo King Fat* [2016] 2 HKC 230; [2015] HKEC 2688, (CA), at [109]-[116]'.

621. The Criminal Procedure Ordinance provides that a person convicted of an offence may appeal on the ground that there has been a 'miscarriage of justice', in the sense that there has been an 'unsafe or unsatisfactory' conviction, a legally erroneous judgment or a 'material irregularity' in the trial.¹⁰⁸³ The Bill of Rights provides that everyone convicted of a crime has the right to have his conviction and sentence reviewed by a higher tribunal.¹⁰⁸⁴

622. Another essential procedural safeguard is the rule against retrospective laws.¹⁰⁸⁵ Although this is a right in a criminal trial, the Court of Final Appeal has relied on it to invalidate a provision of the Immigration Ordinance that purported to deprive the right of abode of the children of the Hong Kong residents who had entered Hong Kong unlawfully or had overstayed their lawful stay in Hong Kong before the commencement of the relevant provisions of the Ordinance. The reason is that had this provision been allowed to stand, they would be potentially liable for immigration offences which were not offences at the time of their Commission.¹⁰⁸⁶ The Bill of Rights provides that:

a heavier penalty [shall not] be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.¹⁰⁸⁷

In practice, whether the accused is entitled to this specific right depends on the circumstances of his case.¹⁰⁸⁸

VI. The Right to Private Property

623. Article 6 of the Basic Law provides as follows: 'The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.' Article 105 provides that:

1083. Section 83(1) of the Criminal Procedure Ordinance, Cap. 221 of the Laws of Hong Kong. Where there has been a serious miscarriage of justice the defendant would be deprived of the constitutional protection of a fair trial and due process: See Lord Steyn in *Boodram v Trinidad and Tobago* [2002] 1 Cr App R 103, 119, (PC).

1084. Article 11(4), referred to in *Chong Ching Yuen v HKSAR* [2004] 2 HKLRD 681; (2004) 7 HKCFAR 126, (CFA).

1085. Article 12(1). 'Retrospective criminal laws are odious to most developed legal systems.' Lord Mustill in *Chan Chi-hung v R* [1996] AC 442, (PC), 446 on appeal from Hong Kong. There, the Privy Council held that where the definition of a statutory offence is reformulated after the commission of an offence by a person but before he was sentenced, the sentence that can be imposed on him should not exceed the punishment that was lawful under the previously existing law.

1086. *Ng Ka ling Others v Director of Immigration* (1999) 2 HKCFAR 4, (CFA).

1087. Article 12(1).

1088. *R v Chan Chi-Hung* [1993] 2 HKCLR 212, (CA), affirmed by the Privy Council: [1995] 2 HKCLR 50, (PC).

The Hong Kong Special Administrative Region shall, in accordance with the law, protect the right of individuals and legal persons ... to compensation for lawful deprivation of their property. Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.

624. 'Deprivation' in this context means not only physical taking but also 'regulatory taking'. Physical taking includes not only compulsory acquisition but it also includes lesser degrees of physical deprivation such as extinguishment of easements and causing disturbances. Reasonable regulatory restrictions on the use of land imposed in the public interest, such as town planning requirements, are not within the meaning of deprivation of property. However, more restive planning controls cannot be disregarded as mere incidents of land ownership which do not engage property rights protected by arts 6 and 105 of the Basic Law.¹⁰⁸⁹ Regulatory deprivation (or regulatory taking) refers to situations where a lawful government action affects the use and enjoyment of land to such an extent that it could be said that the landowner has been deprived of the beneficial or productive use of the land, although his legal title remains intact.¹⁰⁹⁰

625. It has been argued that certain statutory or administrative arrangements relating to town planning, building control, government leases and resumption of government land may be subject to judicial review either because of their questionable status or inadequate provision of compensation.¹⁰⁹¹ Where compensation is payable, the award must correspond to the 'real value' of the land or property right affected. The concept of 'real value' is said to correspond to market value supplemented by other relevant valuation principles that were in place when the Basic Law came into effect.¹⁰⁹² There has been much litigation on whether town planning restrictions on land use, such as building height, layout and set back restrictions may amount to deprivation of property rights prohibited by Articles 105 and whether any restrictions on land-use has to satisfy the proportionality test. Courts have recognized that all land in Hong Kong belong to the government, and that there are no freeholder rights (subject to some insignificant exceptions) and that where the administrative authorities have acted within the powers conferred by legislation, there is little room to succeed in Article 105 challenges.¹⁰⁹³ A significant change in the approach to the nature of the property rights protected by Articles 6 and 105 was

1089. *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, (CFA), [37]. See also [40] and [41].

1090. *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553, (CA) [17]-[25].

1091. A. Chen, 'The Basic Law and the Protection of Property Rights', (1993) 23 *Hong Kong Law Journal* 23: 31 and A. Law, 'Judicial Review of Government Leases in the Hong Kong Special Administrative Region', (1999) 29 *Hong Kong Law Journal* 240.

1092. See Lord Millett in *Director of Lands v Yin Shuen Enterprises Ltd* (2000) 6 HKCFAR 1, (CFA)[56]. See Gordon N Crudden, *Land Compensation and Valuation Law in Hong Kong* (3rd edn., 2009: LexisNexis) 641-644.

1093. For a comprehensive review of the legal issues involved, see *Hysan Development Co Ltd v Town Planning Board* [2014] HKEC 1869, (CA).

Attorney General,¹¹⁰⁸ the Court of Appeal did not consider the abolition of the Chinese customary rule that gives males the sole right of succession to land to be an infringement of the freedom of thought, conscience and religion.

631. The Basic Law protects religious organizations in respect of their property rights, their freedom to run religious and educational activities and schools, as well as their liberty to maintain normal relationships with religious organizations outside Hong Kong. However, governmental measures justly intended to ensure proper management of schools managed by religious bodies is not a breach of religious freedom.¹¹⁰⁹

IX. Freedom of Expression

632. The Bill of Rights provides as follows:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of Article, or through any other media of his choice. The exercise of [this right] [...] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary [...] for respect of the rights or reputations of others; or [...] for the protection of national security or of public order (ordre public), or of public health or morals.¹¹¹⁰

The Basic Law has a similar provision.¹¹¹¹

633. The freedom to seek, receive and impart information must be jealously guarded against governmental intervention.¹¹¹² As Chief Justice Li explained in *HKSAR v Ng Kung Siu*:

Freedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong's system and way of life. The courts must give a generous interpretation to its constitutional guarantee. This freedom includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticize governmental institutions and the conduct of public officials.¹¹¹³

1108. *Lau Wong Fat v Attorney General* [1997] HKLRD 533, (CA).

1109. Article 141. See *Catholic Diocese of Hong Kong v Secretary for Justice* [2010] HKEC 163, (CA), affirmed by the Court of Final Appeal (2011) 14 HKCFAR 754, (CFA).

1110. Article 16.

1111. Article 27.

1112. See e.g., *Chim Shing Chung v Commissioner of Correctional Services* (1995) 5 HKPLR 570, (HC). This decision was set aside by the Court of Appeal: (1996) 6 HKPLR 313, CA.

1113. *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442, (CFA), 455. See also *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229, (CFA), [2]. In *Kwok Hay Kwong v Medical Council of Hong*

634. Freedom of expression is not an absolute right, and courts are prepared to accept reasonable restrictions on the right. Flag desecration cases provide a good illustration. *HKSAR v Ng Kung Siu* concerned desecrating the national flag and the regional flag by publicly and wilfully defiling them. It was held that freedom of expression could in these circumstances be restricted in the interest of public order. In the context of the 'one country, two systems' arrangement, the legitimate societal interests in protecting the national flag, and the legitimate community interests in the protection of the regional flag, were interests which were within the concept of public order.¹¹¹⁴

635. For instance, scandalous attacks on judges have been considered as falling outside the freedom of expression on the ground of protecting public order.¹¹¹⁵ On the other hand, it has been held that the right of the media to report criminal proceedings should not be lightly interfered with although the courts are minded to protect the interests of the accused. As Robert CJ said in *R v Shamsudin*, where the court refused an application by the Attorney-General to impose restrictions on media reporting of a judicial proceeding:

The burden – and it is a substantial one – must lie on those who seek a court order which offends what I perceive to be the fundamental rule: that criminal trials must be conducted publicly, and should be reported fully and fairly [...] I think that these same principles apply to a partial restriction on reporting as they do to a sitting in camera or to a ban on all reporting.¹¹¹⁶

Kong [2008] HKEC 137, (CA), it was held that a complete ban on advertising by medical practitioners was unconstitutional. The Court of Appeal held that any restriction on freedom of speech must be justifiable and proportionate.

1114. *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442, (CFA). It was held that the restriction was a limited restriction: 'It bans one mode of expressing whatever the message the person concerned may wish to express, that is the mode of desecrating the flags. It does not interfere with the person's freedom to express the same message by other modes,' at 921. It was a justifiable and a necessary restriction on freedom of speech. In *HKSAR v Koo Sze Yiu* (2014) 17 HKCFAR 811, (CFA), leave to appeal was refused against the decision of the Court of Appeal which had rejected the argument that the prohibition of flag desecration was unconstitutional as a restriction of the right to hold opinions.

1115. *Wong Yeung Ng v Secretary for Justice* [1999] 2 HKC 24 (CA); [1999] 3 HKC 143 (CFA).

1116. *R v Shamsudin* [1987] HKLR 254 (HC). (This is a case decided before the Bill of Rights came into effect, but the principle that restrictions may be placed on open justice still holds true). See *HKSAR v Wu Wing Kit (No 1)* [2016] 3 HKLRD 386, (CA), where *Shamsudin* was referred to. The Court of Appeal held that it was possible both under the common law and the Bill of Rights to impose restrictions on open justice. The Court also referred to *TCWF v LKKS* [2013] HKEC 1197, (CA), where a request to hold the hearing in private was rejected. *Asia Television Ltd v Communications Authority* [2013] 2 HKLRD 354, (CA), is a case where the court refused to hold a judicial review hearing in private. The principle that emerges from these cases is that any restriction on open justice must be justified as tending to ensure a fair trial and that the right to privacy in itself is not a sufficient justification. An important aspect of open justice is the reporting in public media of judicial proceedings, and it is only in exceptional circumstances that the court prohibits public reporting of ongoing proceedings. See *HKSAR v Wu Wing Kit (No 1)* [2016] 3 HKLRD 386, (CA).

the public to observe proceedings within the Chamber as an open legislative process.¹¹⁵⁶ Properly construed in light of its context and purpose, the prohibitions were aimed at displays which entailed the risk of disorder in public galleries and which might disturb Legislative Council sittings and the rights of others observing the proceedings. While access to a government premises (the forecourt of the Central Government Offices which also served as an access to the Legislative Council premises) may be restricted to the public for meetings and demonstrations, it would be unjustifiable to restrict such access only to Sundays and public holidays, without reserving discretion to permit public access for such purposes when the intended use would not be expected to affect the normal working of the adjacent government departments.¹¹⁵⁷

646. The Societies Ordinance requires all societies that are established in Hong Kong to be registered by the Societies Officer, who may exempt a society or a branch from registration if he is satisfied that the society or the branch is established solely for religious, charitable, social or recreational purposes, or as a rural committee or a federation or other association of rural committees.¹¹⁵⁸ Office-bearers may be criminally liable for failure to register their societies¹¹⁵⁹ that are not exempted from the requirement of registration.¹¹⁶⁰ The Societies Officer may disapprove the registration application, cancel the registration or prohibit the operation of a society.¹¹⁶¹ The Societies Officer may, after consultation with the Secretary for Security, cancel the registration or exemption from registration of a society or a branch (a) if he reasonably believes that the cancellation is necessary in the interests of national security or public safety, public order, or the protection of the rights and freedoms of others; or (b) if the society or the branch is a political body that has a connection with a foreign political organization or a political organization of Taiwan.¹¹⁶² The Basic Law provides that:

The Hong Kong Special Administrative Region shall enact laws ... to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.¹¹⁶³

1156. *HKSAR v Fong Kwok Shan Christine* (2017) 20 HKCFAR 425, (CFA).

1157. *Cheung Tak Wing v Director of Administration* [2018] 5 HKLRD 740, (CFI). Thomas Au J reminded at [71] that Ribeiro PJ in *Fong Kwok Shan Christine* (2017) 20 HKCFAR 425, (CFA), [42] and [44], emphasised that it is necessary to weigh up the manner, form and impact of each of the demonstrations at the sites concerned to decide whether a challenged restriction satisfies the proportionality test. This is so since the rights to freedom of expression and assembly extend to the manner in which the protestors wish to express their views and to the location where they wish to express and exchange their views.

1158. The Societies Ordinance, Cap. 151 of the Laws of Hong Kong, ss 5 and 5A.

1159. Sections 5C and 5F.

1160. Section 5A(2).

1161. Sections 5A(3), 5D and 8.

1162. Sections 8 and 2.

1163. Hong Kong Basic Law, art 23.

647. The Societies Ordinance has been criticized on the ground that the term 'society' is ill-defined in the ordinance.¹¹⁶⁴ The Societies Ordinance, which was designed to deal with triads or organized criminal groups, may stifle activities of societies that are set up for legitimate purposes.¹¹⁶⁵

XI. The Right to Participate in Public Life

648. According to the Bill of Rights:

every permanent resident shall have the right and the opportunity, [...] without unreasonable restrictions to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.¹¹⁶⁶

The Basic Law has a similar clause.¹¹⁶⁷

649. For examples of successful invocation of the right to participate in public life to challenge legislation, see *Lau San Ching v Liu, Apollonia*¹¹⁶⁸ and *Secretary for Justice v Chan Wah*.¹¹⁶⁹ In *Lau San Ching* case the returning officer had rejected the nomination paper of a candidate for the District Board election on the ground that he had not been ordinarily resident in Hong Kong in the preceding ten-year period, as required by the Electoral Provisions Ordinance (which was not adopted when Hong Kong became a Special Administrative Region in 1997). It was held that the ten-year requirement was inconsistent with Article 21 of the Bill of Rights. The High Court held that while there was a legitimate purpose in imposing a residential requirement, there was no rational basis for imposing a ten-year residential requirement, and that the requirement was disproportionate to the legitimate aim of the statute). In *Chan Wah* case the Court of Final Appeal held that the requirement that only indigenous inhabitants could be candidates at the election of a rural village representative elections was unconstitutional. Li CJ observed at p. 474 that 'bearing in mind that the village representative by statute is to and in fact does represent the village as a whole (comprising both the indigenous and the non-indigenous villagers) and further has a role to play beyond the village level, the restriction on the

1164. R. Mushkat, 'Freedom of Association and Assembly', in R. Wacks (ed.) *Civil Liberties in Hong Kong* (Hong Kong: OUP, 1988), 172.

1165. *Ibid.*, 156.

1166. Hong Kong Bill of Rights, art 21.

1167. Hong Kong Basic Law art 26.

1168. *Lau San Ching v Liu, Apollonia* (1995) 5 HKPLR 23, (HC).

1169. *Secretary for Justice v Chan Wah* [2000] 4 HKC 428; [2001] HKEC 1508, (CFA). See also *Lai Tak Shing v Secretary for Home Affairs & Another* [2007] HKEC 1950, (CFA). See also the cases relating to the failure of Legislative Council members or persons nominated as contestants at Legislative Council elections to subscribe fully and correctly the oath of allegiance, discussed elsewhere in this work.

ground of not being indigenous cannot be considered a reasonable restriction' on the right to participate in public life). For unsuccessful challenges, see e.g., *Senior Non-expatriate Officers' Association v Secretary for the Civil Service*¹¹⁷⁰ (on denial of the senior civil servants' right to participate in the elections of the selection committee for the formation of the first government of Hong Kong) and *Chau Tsun Kiu v Secretary for Justice* (right to send letters to electors free of postage).¹¹⁷¹

650. There has been much controversy surrounding the electoral arrangements in Hong Kong.¹¹⁷² In *Lee Miu Ling v Attorney General* (No. 2) [1995] 5 HKPLR 585, the functional constituencies election system was unsuccessfully challenged.¹¹⁷³ The functional constituencies system was adopted under the Basic Law and its legality has been upheld.¹¹⁷⁴

651. The Bill of Rights guarantees the right 'to have access, on general terms of equality, to public service in Hong Kong'.¹¹⁷⁵ Expatriate civil servants unsuccessfully challenged the civil service localization programme of the Hong Kong government on the ground that localization granted more rights to local officers and thereby discriminated against non-locals, although certain aspects of the scheme such as the prohibition of non-local officers on contract terms transferring to permanent positions were held to be in breach of the Bill of Rights: *Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service*.¹¹⁷⁶ Since the handover, the new civil service reform package proposing a reduction of remuneration and fringe benefits has, again, provoked a constitutional crisis.¹¹⁷⁷

1170. *Senior Non-expatriate Officers' Association v Secretary for the Civil Service* (1997) 7 HKPLR 91, (HC).

1171. *Chau Tsun Kiu v Secretary for Justice* [2014] 5 HKLRD 414, (CFI).

1172. On the right to vote in Hong Kong, see generally S. Young, 'The Meaning of the Right to Vote in Hong Kong', (1997) 42 *McGill Law Journal* 649. The arrangements for Legislative Council and Chief Executive elections are noted elsewhere in this monograph.

1173. See A. Chen, 'The Legal Foundation of the Legislative Council Election 1995' in H. Kuan, S. Lau, K. Louie & T. Wong (eds) *The 1995 Legislative Council Elections in Hong Kong*, (Hong Kong: Hong Kong Institute of Asia-Pacific Studies, The Chinese University of Hong Kong, 1996); and G. Li, 'The Right to Vote and to Be Elected: Through the Looking-Glass' in G. Edwards & J. Chan (eds) *Hong Kong's Bill of Rights: Two Years Before 1997* (Hong Kong: Faculty of Law, University of Hong Kong, 1995).

1174. See *Chan Yu Nam v Secretary for Justice* [2010] HKEC 1893, (CA), which gives a succinct account of the development of the system. Affirmed by the Court of Final Appeal [2012] HKEC 94.

1175. The Bill of Rights, art 21.

1176. *Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service* (1996) 6 HKPLR 333, (CA).

1177. A. Cooray, 'Public Sector Reform in Hong Kong: Some Legal Aspects' (1999) 8 *Public Administration and Policy* 23.

XII. The Right to Social Welfare

652. The Basic Law provides that 'Hong Kong residents shall have the right to social welfare in accordance with the law. The welfare benefits and retirement security of the labour force shall be protected by law.'¹¹⁷⁸ However, the reality in Hong Kong is that 'the [social security] system [is] a patchwork of laws and administrative practices; the benefits that it conferred were more in the nature of [grace] than right ... The right or benefit to housing is not ... provided for in legislation'.¹¹⁷⁹ Article 145 of the Basic Law provides that on the basis of the previous welfare system, the Government of Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of the welfare system in the light of economic conditions and social needs. In *Kong Yunming v Director of Social Welfare* a Mainland woman who arrived in Hong Kong to join her husband, who died the next day, was denied comprehensive social security assistance on the ground that she did not meet the residence requirement of seven years. At the time the Basic Law was promulgated, the residence requirement was only one year, which was increased to seven years in 2004. The Court of Final Appeal held that the one-year requirement was part of the previously existing law, protected by Article 36, continued to be operative under the Basic Law. Social welfare rights protected by Article 36 were subject to modification in accordance with Article 145, which did not preclude the elimination or reduction of particular welfare benefits if that proved necessary to develop, improve or maintain the sustainability of the welfare system as a whole. However, any restriction had to be rationally connected with the accomplishment of a legitimate social aim and the means employed proportionate. As the right to social welfare was not a fundamental right but a right which intrinsically involved the Government setting rules determining eligibility and benefit levels, the residence requirement would only be held to be disproportionate if it was manifestly without reasonable foundation. The court held that the seven-year rule did not satisfy the requirements of the proportionality analysis, rejecting the government's argument that the restriction was adopted to ensure the sustainability of the social security system. It refrained from determining whether the one-year residence requirement too was unconstitutional, in the absence of any argument in that behalf.¹¹⁸⁰

§4. LIMITATIONS ON HUMAN RIGHTS

653. Many rights that are enumerated in the Bill of Rights may be restricted so long as the restrictions are 'provided by law'¹¹⁸¹ or 'imposed in conformity with the

1178. Hong Kong Basic Law, art 36.

1179. Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*, (2nd edn., Hong Kong: Hong Kong University Press, 1999), 437-438 (footnotes excluded).

1180. *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950, (CFA).

1181. Bill of Rights, art 16.

what is a religion. In relation to the law of trusts, it has been held that ancestral worship prevalent among the Chinese cannot be funded under a charitable trust because the beneficiaries of ancestral worship are the members of the family rather than the general public.¹¹⁹³

657. Article 141 of the Basic Law provides that religious organizations have the right, in accordance with law, to acquire, use, dispose of, and inherit property, and the right to receive financial assistance. Religious organizations may, according to their previous practice, continue to run seminaries and other schools, hospitals, and welfare institutions and to provide social services. It also provides that religious organizations and believers in the Region may also maintain and develop their relations with religious organizations and believers elsewhere. It was held in *Catholic Diocese of Hong Kong v Secretary for Justice*¹¹⁹⁴ that the fact that religious organizations are permitted to operate according to the 'previous practice' – namely the practice before 1997 – did not mean that the Government was barred from making gradual changes to the existing educational, social and welfare policies as long as those policies were formulated in accordance with the Basic Law.

§2. FAMILY LAW

658. Matrimonial law is an area where there might arguably be some infringement of minority rights. According to section 40 of the Marriage Ordinance, a marriage means 'a voluntary union for life of one man and one woman to the exclusion of others'. Adopting a remedial interpretation, the Court of Final Appeal held in *W v Registrar of Marriages*, that a post-operative male-to-female transsexual whose gender has been certified by an appropriate medical authority to have changed as a result of sex reassignment surgery falls within the meaning of woman for the purpose of this provision, thereby avoiding the need to declare section 40 invalid.¹¹⁹⁵ Marriages can be celebrated in any of the licensed places of worship.¹¹⁹⁶ Accordingly, as long as the administrative procedures are complied with, persons belonging to any religious community may celebrate their marriage in their place of religious worship.

1193. Anton Cooray, 'Customary Rights of the New Territories Inhabitants, Equality of Sexes and the Basic Law', paper presented at the University of Hong Kong, Hong Kong Bill of Rights: The Final Year Seminar, 8 June 1996, referring to the then Legislator Christine Loh's argument for the abolition of the custom. See also Anton Cooray, 'The Non-recognition of Chinese Ancestral Worship Trusts as Charitable Trusts in Hong Kong: With Some South Asian Comparisons', (2002) 8:1 Third Sector Review 153-172.

1194. *Catholic Diocese of Hong Kong v Secretary for Justice* [2007] 4 HKLRD 483, (CFI). Affirmed by the Court of Appeal [2010] HKEC 163, (CA), and Court of Final Appeal (2011) 14 HKCFAR 754, [2011] HKEC 1350, (CFA).

1195. *W v Registrar of Marriages* (2013) 16 HKCFAR 112, (CFA).

1196. Marriage Ordinance (Cap. 181), s. 19. Marriages may be celebrated by civil celebrants or in places of worship.

659. Hong Kong law recognizes monogamous marriages only.¹¹⁹⁷ Any person who, being married, marries any other person during the life of the former husband or wife commits bigamy.¹¹⁹⁸ The second marriage will be void. Hence, a Muslim cannot marry more than one wife in Hong Kong, although polygamous Muslim law marriages are recognized in some other jurisdictions. Under the common law, a domestic court will determine the validity of a marriage in accordance with the law of the country where the parties have their domicile at the time of their marriage.¹¹⁹⁹

660. Minorities may face other personal status problems. For instance, Hong Kong courts cannot entertain a petition for divorce, in respect of a polygamous marriage.¹²⁰⁰ However, Hong Kong courts do recognize a divorce obtained in the country where the parties are domiciled, as long as the divorce is lawful in that country.¹²⁰¹

§3. RACIAL DISCRIMINATION

661. Hong Kong is a party to the International Covenant on the Elimination of All Forms of Racial Discrimination. In 1997, the Hong Kong Government conducted a study to see whether there was evidence of racial discrimination in Hong Kong, by examining the position of the non-Chinese people in areas such as education, employment, health and social welfare, and law and order. The study concluded that in the situations where there was differential treatment of Chinese and non-Chinese, the problem was basically caused by reasons other than racial discrimination. Moreover, it was found that there was no serious tension between racial groups in Hong Kong.¹²⁰² In 2004, the Hong Kong government issued another consultation paper 'Legislating against Racial Discrimination: A Consultation Paper'. In pursuance of this Hong Kong passed a Race Discrimination Ordinance in July 2008, which came into effect on 10 July 2009, to protect people against discrimination, harassment and vilification on the ground of their race, particularly in the areas of employment, education and social interaction.¹²⁰³

§4. NATIONALITY LAW

662. Under the British administration, any person who had the right of permanent residence (equivalent to the current 'right of abode') in Hong Kong was

1197. Marriage Reform Ordinance (Cap. 178), s. 4.

1198. Offences Against the Person Ordinance (Cap. 212), s. 45.

1199. *Ali v Ali* [1966] 1 All ER 664, (DC) and *Hussain v Hussain* [1982] 3 All ER 369, (CA).

1200. Matrimonial Causes Ordinance (Cap. 179), s. 9.

1201. Matrimonial Causes Ordinance (Cap. 179), s. 59.

1202. Home Affairs Branch of the Government Secretariat, *Equal Opportunities: A Study of Discrimination on the Ground of Race: A Consultation Paper* (Hong Kong: Hong Kong Government, 1997).

1203. Race Discrimination Ordinance Cap. 602 of Laws of Hong Kong.

and 72 in 2012, 182 and 67 in 2013, 168 and 84 in 2014, 259 and 67 in 2015, 228 and 26 in 2016 and 1146 and 16 in 2017.¹²²¹

673. The jurisdiction of the ordinary courts of law over the administration must be viewed in the context of administrative tribunals that have been set up to settle disputes between administrative agencies and citizens, or disputes arising in a profession, such as the Town Planning Appeal Board (Town Planning Ordinance Cap. 131), Building Appeal Tribunal (Buildings Ordinance Cap. 123, Part 6), Immigration Appeal Tribunal (the Immigration Ordinance Cap. 115, section 2AD), Telecommunications Appeal Board (Telecommunications Ordinance, Cap. 106) and the Market Misconduct Tribunal (Securities and Futures Ordinance Cap. 571, Part XIII). A particularly important tribunal is the Administrative Appeals Board, which deals with appeals against decisions taken by certain specified administrative agencies, such as licensing decisions made under the Employment Ordinance (Cap. 57, the Dangerous Goods Ordinance (Cap. 295), the Wild Animals Protection Ordinance (Cap. 170) or the Marine Fish Culture Ordinance (Cap. 353). The members of the Administrative Appeals Board must be persons who are qualified for appointment as District judges.¹²²² Decisions of administrative tribunals are subject to judicial review.¹²²³

674. Administrative Tribunals perform an important function in settling disputes in an efficient and cost effective way, thereby reducing the workload of the courts. They are, however, not courts of law which exercise the judicial power of the Region, as envisaged in Article 80 of the Basic Law. As Justice Lam explained in *Lee Yee Shing Jacky v Inland Revenue Board of Review*: 'the mere resemblance of a process to the judicial process to ensure fairness cannot be the acid test for deciding whether the decision-maker was exercising the judicial power of the state. Ultimately, one has to examine the nature, function and character of the decision in question in order to determine whether it involves the exercise of the judicial power of the state which by law reserves exclusively for the judiciary'.¹²²⁴

1221. Information provided by the Hong Kong government. http://gia.info.gov.hk/general/201802/28/P2018022800345_278993_1_1519793382371.pdf

1222. The Administrative Appeals Board Ordinance (Cap. 442), s. 6.

1223. See for instance *Town Planning Board v Town Planning Appeal Board* [2015] HKEC 1151, (CA), *Sky Ace Enterprises Ltd v Appeal Tribunal (Buildings)* [2016] HKEC 1318, (CA), *Li Wai Hung Cesario v Administrative Appeals Board* [2015] HKEC 2080, (CFI), and *Hong Kong Telecommunications (HKT) Ltd v Communications Authority* [2015] HKEC 1590, (CA).

1224. *Lee Yee Shing Jacky v Inland Revenue Board of Review* [2011] HKEC 261, (CFI). [68]. The Board of Inland Revenue was held to be an administrative, and a judicial, body, and Lam J said at [79]: '... if the primary decision is an administrative one, the constitutional right of access to the courts manifests itself in the form of the exercise by the court of its supervisory jurisdiction through judicial review. It is then for the court to decide on the facts and circumstances in each case the extent to which the court could intervene (including intervention on the basis of errors of material facts)'. The decision of the Court of first Instance was affirmed by the Court of Appeal: [2012] 2 HKLRD 981, (CA). See *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd & Others* (2006) 9 HKCFAR 234, (CFA), [46], [62] and [63]. Where it was held that when art 35 of the Basic Law referred to 'the courts' it meant the judiciary and nothing else. Article 35 applied to courts of law, that is the courts entrusted with the exercise of independent judicial power in the HKSAR. The Disciplinary Committee of the Stock Exchange was not a court of law.

675. An important development in ensuring administrative justice is the introduction of the Ombudsman. The Ombudsman has power to investigate into complaints of maladministration. The Ombudsman Ordinance also enables the Ombudsman to conduct an investigation of his own motion, called direct investigations, for instance when he receives anonymous complaints or when a matter of unfairness in government administration becomes common knowledge.¹²²⁵ The Ombudsman has no powers of enforcement but may order *ex gratia* payments against public authorities and make non-binding recommendations to improve public administration. His recommendations are generally heeded to by public authorities.¹²²⁶

§2. ADMINISTRATIVE AGENCIES ARE SUBJECT TO JUDICIAL REVIEW

676. Judicial review of administrative action is concerned with the actions of the administration. In a strict sense, administration refers to the constitutive parts of the government such as ministers of government and government departments. However, in view of the developments which have led to the creation of many non-governmental bodies to perform functions which were previously performed by the government, judicial review has been extended to cover such bodies too. It is common to class any agencies that are amenable to judicial review as public authorities or public bodies. However, in this chapter we categorize the agencies which are amenable to judicial review as (1) Public bodies; and (2) bodies analogous to public bodies, in view of the restrictive interpretation of 'public body' in Interpretation and General Clauses Ordinance (Cap. 1), as meaning the government and its constitutive parts. This will also overcome any difficulty in categorizing self-regulatory bodies created by contract rather than by legislation which have been held to be amenable to judicial review.

See also *Luk Ka Cheung v Market Misconduct Tribunal* [2009] 1 HKLRD 114, (CFI) where it was held that the Market Misconduct Tribunal did not exercise judicial power: 'It does not oust the jurisdiction of the criminal courts in Hong Kong, nor does it usurp their function. It is established to perform a regulatory and protective role in Hong Kong's financial markets. It is there to ensure that those engaged in market misconduct do not profit from their wrongs. In a fairly general sense, it performs a function that protects and benefits the interests of society as a whole. But it does not determine criminal guilt nor impose penal sanction. Certainly, it wields extensive powers and indeed it must act judicially. But one thing it does not do is to exercise the judicial power of the HKSAR' (at p 142).

1225. See generally, Anton Cooray, 'Ombudsman in Asia: A Case-Study of Hong Kong and Sri Lanka' in Roy Gregory & Phillip Giddings (eds) *Righting Wrongs: The Ombudsman in Six Continents* (Netherlands: IOS Press, 2000) 75-91 and 'Hong Kong's Ombudsman: The First Decade', (1999) 3 *The International Ombudsman Year Book* 71.

1226. Anton Cooray, 'Some Reflections on the Legislative Context of the Hong Kong Ombudsman', (2009) 17:1 *Asia Pacific Law Review* 53-72.

I. Public Bodies

677. The main focus of judicial review is on the government, be they the central government or local government authorities. According to the Interpretation and General Clauses Ordinance (Cap. 1) 'public body' includes the Executive Council, the Legislative Council, any District Council, any department of the government and any undertaking by or of the government. Any of these public bodies are amenable to judicial review. Even acts of the Chief Executive in Council may be reviewed by the courts. All decisions of the Chief Executive (whether in the Executive Council or not) other than 'acts of state such as defence and foreign affairs',¹²²⁷ are subject to judicial review: see, for example, *Hong Kong Television Network Ltd v Chief Executive in Council*¹²²⁸ (refusal to grant a television programme service licence), *Yau Ka Po v Chief Executive in Council*¹²²⁹ (decision to approve a draft outline zoning plan) and *Lister Assets Ltd v Chief Executive in Council*¹²³⁰ (decision to approve a railway scheme). Similarly, the Secretary for Justice is not above the law. However, except where abuse of process occurs, his prosecutorial decisions are not amenable to judicial review.¹²³¹

678. As seen in the chapter on 'District Administration', there is only one local government authority: the District Council, which was formerly known as the District Board. Until 2000, there were two other local government authorities: The Urban Council and the Regional Council. The Urban Council and the Regional Council exercised administrative powers¹²³² and were subject to judicial review.¹²³³

1227. Hong Kong Basic Law, art 19 of the Basic Law.

1228. *Hong Kong Television Network Ltd v Chief Executive in Council* [2016] 2 HKLRD 1005, (CA).

1229. *Yau Ka Po v Chief Executive in Council* [2016] HKEC 239, (CFI).

1230. *Lister Assets Ltd v Chief Executive in Council* [2012] HKEC 1043, (CFI), affirmed by the Court of Appeal [2013] HKEC 605.

1231. See *RV v Director of Immigration* [2008] 4 HKLRD 529, (CFI), where it was held that Art. 63 of the Basic Law, which provides '[t]he Department of Justice ... shall control criminal prosecutions, free from any interference', enshrined the Secretary for Justice's independence to control criminal proceedings as he thought best and in the exercise of that power, the Secretary for Justice was free of both political interference and 'judicial encroachment' (following *Re C (Bankrupt)* [2006] 4 HKC 582, (CA)) but that this was a power that had to be exercised within constitutional limits. On a true construction of the Basic Law, the courts had jurisdiction to judicially review the Secretary for Justice's power to control criminal prosecutions and to determine whether he had or had not acted within the limits of his constitutional power. Hartmann J went on to observe that the Secretary for Justice's prosecutorial independence was a linchpin of the rule of law. Only in truly exceptional circumstances could the court hold that the Secretary for Justice had acted outside of his very broad constitutional powers. Such very limited cases might include where the Secretary for Justice acted on political instruction, in bad faith or fettered his discretion by a rigid policy. In *D v Director of Public Prosecutions* [2015] 4 HKLRD 62, (CFI), the Court of First Instance held that the Director of Prosecutions' decision not to prosecute a person for indecently assaulting his domestic helper was amenable to judicial review. Granting leave to pursue a judicial review application, the court held that it was reasonably arguable whether the decisions came within exceptional circumstances, such as dishonesty and bad faith, or had exceeded the constitutional limits. See also *Wong Yuk Kwan v Secretary for Justice* [2016] HKEC 1392, (CFI).

1232. P. Wesley-Smith, *Constitutional and Administrative Law*, (2nd edn., Hong Kong: Longman Asia Ltd, 1994), 131-134.

1233. See e.g., *Ng Enterprises Ltd v Urban Council* [1996] 2 HKLR 437, (PC).

679. Hong Kong being an integral part of China, the Central People's Government may exercise administrative powers over Hong Kong. It is highly controversial whether the decisions of the Central Chinese Government are subject to the supervisory jurisdiction of the Hong Kong courts.¹²³⁴ In *Ng Ka Ling & Ng Tan v Director of Immigration*¹²³⁵ Andrew Li CJ ruled that the Hong Kong Special Administrative Region courts were competent to challenge any administrative acts of the Sovereign, other than Acts of State, in accordance with the provisions of the Basic Law.¹²³⁶

II. Bodies Analogous to Public Bodies

680. An important feature of the British system of government is the creation of administrative agencies to support the work of government departments. This practice has been followed in Hong Kong too. Unlike government departments, such agencies may not be directly accountable to the Legislative Council, but the investiture of public duties in them makes them subject to judicial review.¹²³⁷ While it is easy to state such a broad principle, in practice it is not easy to determine whether a given body of persons is or is not a public body for the purpose of judicial review jurisdiction.

681. Where a government department or public body is privatized or partially privatized (e.g., by listing their shares in the stock market), it is not clear whether it will be still amenable to judicial control.¹²³⁸ Such is the case of the Mass Transit Railway Corporation originally established in 1975 as a statutory corporation by the Mass Transit Railway Corporation Ordinance (Cap. 270).¹²³⁹ Since 2000, it is a public limited company incorporated under the Companies Ordinance, and not a public body.¹²⁴⁰

682. Statutory authorities, meaning bodies created by statute, are generally regarded as being amenable to judicial review.¹²⁴¹ Examples are the Hong Kong

1234. See generally L. Feng, 'The Constitutional Crisis in Hong Kong - Is it Over?' (2000) 9:2 *Pacific Rim Law & Policy Journal* 281, for the different views of the Chinese Government and the Hong Kong Special Administrative Region courts.

1235. *Ng Ka Ling v Director of Immigration* [1999] 1 HKC 291; (1999) 2 HKCFAR 4, (CFA).

1236. For an analysis of the approach of the Court of Final Appeal in this case, see J. Chan et al. (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong: Hong Kong University Press, 2000) and B. Ling, 'Can Hong Kong Courts Review and Nullify Acts of the National People's Congress?' (1999) 29 *Hong Kong Law Journal* 8.

1237. H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 11th edn (Oxford: Oxford University Press, 2014), Ch. 5.

1238. Lord Woolf, 'The Importance of the Principles of Judicial Review', in *Law Lectures for Practitioners* 1996 (Hong Kong: Hong Kong Law Journal, 1996), 69-71.

1239. Cap. 270 of the Laws of Hong Kong, repealed by Mass Transit Railway Corporation Ordinance No. 13 of 2000 (Cap. 556).

1240. Mass Transit Railway Corporation Ordinance (Cap. 556), s. 60.

1241. See *Secretary for Justice v Commission of Inquiry Re Hong Kong Institute of Education* [2009] HKEC 411, (CFI), where a commission of inquiry appointed under statutory authority was held to be amenable to judicial review.