geographical and chronological boundaries', so that 'popes and kings vied to claim the exalted title of lawgiver'.[24] The ancient Roman civil law (*ius civile* in Latin) was reborn in Western Europe with the 'Latin renaissance' of the High Middle Ages, long after Roman law had ceased to be the living law of Rome.[25] Scholars of the 'universities of study' in places like Paris and Bologna, born in the eleventh to thirteenth centuries, set out to develop a law that would be autonomous from the canon law of the Church, yet superior in rationality to the patchwork of prevailing local custom. They took as the basis of their endeavours the rediscovered *Corpus Juris Civilis* (*Body of Civil Law*) commissioned in the sixth century by Eastern Roman Emperor Justinian the Great (r. 527–565). Medieval and early modern jurists on the Continent took literally such Roman legal maxims as that the prince is *legibus solutus* (absolved from the laws), and that *quod principi placuit legis habet vigorem* (what pleases the prince has the force of law) as justifying political authority. This interpretation was as welcome to the old feudal kingdoms as to the new 'Westphalian states' that were striving to recover from the traumatic Thirty Years War (1618–1648) and keen on 'unifying their territories and limiting the power of local lords and judges'.[26]

1.008 Civilian jurists aspire to 'scientific rigour' comparable to that of the natural sciences. In the course of expounding the civilian legacy, European jurists conceived the law as an abstract, sophisticated body of precepts entwined with the study of logic and philosophy.[27] Lawyers on the Continent think of the civilian law as 'clear, unambiguous, homogenous, and knowable', superior to the 'plurality of laws' and 'infinite number of ways in which they could be interpreted' that were deemed to typify law before 'the age of the great nineteenth-century codes'.[28] '[C]ompelled by the peculiar history and the rationalist dogmas of the French Revolution', they adopted 'a systematic, hierarchical theory' of sources of law, which in a 'very technical' manner recognises only statutes, regulations and custom as law in descending order of authority. 'A statute prevails over a contrary resolution'; 'a statute and a regulation prevail over an inconsistent custom' and 'the importance of custom as a source of law is slight and decreasing'.[29]

1.009 The nineteenth century featured ambitious programmes of codification in civilian law countries, which hardly touched England and Wales. The trend towards codification was 'a signal part' of the European Enlightenment, which was driven by a desire to clarify and rationalise the law within a legal system that is 'simple and manageable'.[30] France went so far as to decree that from the moment its new code entered into effect, every other source of law, even Roman and customary laws, would cease to exist concerning

[24] *Ibid.*

[25] AG Chloros, 'Common Law, Civil Law and Socialist Law: Three Leading Systems of the World, Three Kinds of Legal Thought' (1978) 9 *Cambrian Law Review* 11, 15.

[26] F Pirie, *The Rule of Laws: A 4,000-Year Quest to Order the World* (Basic Books, 2021) 335.

[27] R Zimmermann, 'Roman Law in the Modern World' in D Johnston (ed), *The Cambridge Companion to Roman Law* (Cambridge University Press, 2015) 452, 458–459.

[28] M Bellomo, *The Common Legal Past of Europe 1000–1800* (The Catholic University of America Press, 2nd ed 1995) 29.

[29] JH Merryman and R Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, 4th ed 2019) 24–26.

[30] PJ du Plessis, *Borkowski's Textbook on Roman Law* (Oxford University Press, 6th ed 2020) 379.

all matters covered by the new code.[31] It has been argued that sweeping codifications reflected 'massive intervention by the state authorities in framing the relationships between [legal] persons' so as 'to impose the monopoly of state legislation'.[32]

1.010 The civilian tradition, like its common law counterpart, spread to all corners of the world via colonialism and conquest. The study of Roman law and its refinement culminated in the magisterial codification, which was the Napoleonic Code of 1804.[33] It was carried across the Continent by Napoleon's invasions into Belgium, Italy, Luxembourg, the Low Countries and Rhenish provinces and Poland, and its influence was felt in Portugal, Spain and some cantons of Switzerland as well.[34] In the ensuing era of imperialist expansion, France disseminated her legal influence to the Near East, to North and sub-Saharan Africa, Indochina, Oceania and the French Caribbean Islands. The Russian Empire adopted and modified the French Civil Code as its own. The German Empire, building on Roman and French models, enacted the German Commercial Code in 1897, the influence of which radiated to Austria, China, Czechoslovakia, Greece, Hungary, Italy, Japan, Korea, Switzerland, Yugoslavia and certain constituent states of the former Soviet Union.

1.011 Case law is not a formal source of law in the civilian tradition. A 'code jurisdiction'[35] like Italy made such a strict separation of legislative and judicial powers as to justify rejection of court decisions as a source of law, for to recognise the doctrine of binding precedent would make legislators of judges. 'Lawmaking is one thing; interpretation and application of laws are quite another'.[36] The civilian tradition conceives the judges as career civil servants, not jurists in their own right, recognised for professional achievement. The 'career judiciary' in the typical civilian jurisdiction is a system in which judges make their entire careers, joining at a young age, even right out of law school; whereas in a 'recognition judiciary', judges are appointed to the bench later in life in recognition of independent careers in private or government practice.[37] Civilian jurisdictions typically erect judicial training institutes to indoctrinate fresh graduates who have elected to make a career in the judiciary. This reinforces the unique identity of judges as a civil service of their own. Common law jurisdictions do not have judicial training as such; thus, appointment to superior courts is not predicated on previous experience on inferior courts. John Henry Merryman and Rogelio Perez-Perdomo remarked on the popular image of judges in the civilian law world as that of 'operators of a machine designed and built by legislators', rather than that of 'cultural heroes or parental figures'.[38]

[31] A Padoa-Schioppa, *A History of Law in Europe: From the Early Middle Ages to the Twentieth Century* (Cambridge University Press, 2017) 477.

[32] JL Halpérin, 'The Age of Codification and Legal Modernization' in H Pihlajamäki, MD Dubber and M Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford University Press, 2018) 907, 912.

[33] C Anderson, *Roman Law* (Dundee University Press, 2009) 115.

[34] R La Porta, F Lopez-de-Silanes and A Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 *Journal of Economic Literature* 285, 289–291.

[35] MA Livingston, PG Monateri and F Parisi, *The Italian Legal System: An Introduction* (Stanford University Press, 2nd ed 2015) 192.

[36] *Ibid.*, 180.

[37] N Garoupa and T Ginsburg, 'Hybrid Judicial Career Structures: Reputation versus Legal Tradition' (2011) 3 *Journal of Legal Analysis* 411, 411–413.

[38] JH Merryman and R Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, 4th ed 2019) 36.

1.012 The inquisitorial model of litigation is predominant in the civilian tradition. This model originated in ancient Rome, was developed in medieval ecclesiastical courts and spread across Europe under the influence of canon law of the Catholic Church and of the rise of the modern state in the sixteenth century.[39] The objective of the inquisitorial trial is for the court to 'find out the truth about the facts of the case' through proactive investigation of evidence not limited to that adduced by the parties to the case.[40] The inquisitorial judge becomes 'an active participant in the preparation for trials', and he[41] 'may determine that further information will be required to resolve the dispute'.[42] Despite susceptibility to 'notorious abuses', the inquisitorial system did aspire to an ideal of justice as administered in accordance with professional learning and the common good.[43] In fact, the Romano-Germanic civilian law tradition received most of its criminal law principles and practices from medieval canon law; examples include concepts of guilt and the principle of *ne bis in idem* ('not twice about the same [crime]'), which prohibits multiple punishments for the same offence.[44]

1.013 The legal system of Macau — a mere 60 kilometres from Hong Kong — is a good illustration of important characteristics of the civilian tradition. Like Hong Kong, Macau is a former Western dependency with a multicultural identity,[45] now a Special Administrative Region of the People's Republic of China located on the northern end of the South China Sea, bordering Guangdong Province.[46] Administered by the Portuguese between the sixteenth and twentieth centuries, it is the only East Asian jurisdiction that was under colonial rule by a Continental European power.[47] Today it is home to the world's largest casinos.[48] The civilian tradition's fingerprints are all over the legal system of Macau,[49] whose legal culture and legislation are 'directly linked' to Germany's, France's, Portugal's and other Lusophone jurisdictions' such as Brazil.[50]

[39] *Ibid.*, 149.

[40] AHY Chen, *The Changing Legal Orders in Hong Kong and Mainland China* (City University of Hong Kong Press, 2021) 253.

[41] Interpretation and General Clauses Ordinance (Cap.1), s.7(1): 'Words and expressions importing the masculine gender include the feminine and neuter genders'.

[42] J Herring, *Legal Ethics* (Oxford University Press, 2nd ed 2017) 270.

[43] A Cassese and P Gaeta, *Cassese's International Criminal Law* (Oxford University Press, 3rd ed 2013) 330.

[44] P Landau, 'The Spirit of Canon Law' in A Winroth and JC Wei (eds), *The Cambridge History of Medieval Canon Law* (Cambridge University Press, 2022) 573, 580–581.

[45] See, CA Mendes, 'Macau in China's Relations with the Lusophone World' (2014) 57 *Brazilian Journal of International Politics* 225.

[46] See, AHY Chen and PY Lo, 'The Constitutional Orders of "One Country, Two Systems": A Comparative Study of the Visible and Invisible Bases of Constitutional Review and Proportionality Analysis in the Chinese Special Administrative Regions of Hong Kong and Macau' in R Dixon and A Stone (eds), *The Invisible Constitution in Comparative Perspective* (Cambridge University Press, 2018) 230.

[47] EC Ip, *Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special Administrative Regions* (Cambridge University Press, 2019) 27.

[48] SS Lo, 'Hong Kong' in WA Joseph (ed), *Politics in China: An Introduction* (Oxford University Press, 3rd ed 2019) 517, 520–521.

[49] IC Ferreira, 'The Macau SAR Legal System — Is the EU Law a Source of Inspiration for Macau Lawmakers?' in JAF Godinho (eds), *Studies on Macau, Civil, Commercial, Constitutional and Criminal Law* (LexisNexis, 2010) 39, 48.

[50] D de Castro Halis, '"Post-Colonial" Legal Interpretation in Macau, China: Between European and Chinese Influences' in S Miyazawa, W Ji, H Fukurai, KW Chan and M Vanhullebusch (eds), *East Asia's Renewed Respect for the Rule of Law in the 21st Century: The Future of Legal and Judicial Landscapes in East Asia* (Brill, 2015) 77.

1.014 Consider the meaning of 'law' in Macau. In the legal system of the Macao Special Administrative Region of the People's Republic of China,[51] 'law' is synonymous with 'written legislation' for most purposes. The *Lei Básica de Macau* (Macao Basic Law) of 1993,[52] in art.8, affirms only codified sources of law: the *Lei Básica* itself affirms, 'laws, decrees, administrative regulations and other normative acts'. Nowhere is case law or customary law mentioned. It has been said that art.8 'plainly reflects the different fonts of law between the common and civil law legal systems',[53] when compared with its identically numbered counterpart in the Hong Kong Basic Law,[54] which recognises 'the common law, rules of equity, ordinances, subordinate legislation and customary law' as sources of law.

1.015 Consider the codes of Macau. Codes in the civilian tradition are 'comprehensive statements of the law and replace all previous enactments', interpreted '[u]sing general abstract principles' 'according to their logical meaning, not past experience, jurisprudence, or doctrine'.[55] There are currently six major codes: the Civil Code, Civil Procedure Code, Criminal Code, Criminal Procedure Code, Commercial Code and Administrative Procedure Code. They contain abstract general rules and principles whence solutions to concrete cases are to be deduced. Most of the Codes strongly resemble those in force in Portugal, although some, like the Commercial Code, draw on the Italian Civil Code.[56] European Union law, which shares certain 'common values and legal roots' with Macau, has 'proved to be an important source of legal analyses and rationale' to Macau's Legislative Assembly both before and after the resumption of the exercise of Chinese sovereignty.[57] The Civil Code of Macau of 1999, which contains 2,161 clauses,[58] was inspired by the Civil Code of Portugal of 1966, which in turn took as its foundation the highly successful Civil Code of Germany (*Bürgerliches Gesetzbuch*).[59] In arts.2 and 3, respectively, the Code decreed that no custom is legally admissible without approval from legislation, and that no court may judge in accordance with equity unless it is permitted by a provision in legislation. Consequently, court

[51] AJ Moody, *Macau's Languages in Society and Education: Planning in a Multilingual Ecology* (Springer, 2021) 21: 'While both variants [of Macau's name: "Macau" and "Macao"] appear in English words, there may be a slight preference for the *-au* variants as an English spelling . . . [whereas] the *-ao* spelling is the one and only way to represent diphthong in the [People's Republic of China's] roman transcription system that is used with Putonghua, the pinyin transcription'.

[52] Lei Básica da Região Administrativa Especial de Macau da República Popular da China (Adopted by the 1st Session of the 8th National People's Congress on 31 March 1993).

[53] J Buhi, *Global Constitutional Narratives of Autonomous Regions: The Constitutional History of Macau* (Routledge, 2021) 180.

[54] See, EC Ip, 'Comparative Constitutional Politics in the Chinese Special Administrative Regions of Hong Kong and Macau' in M De Visser, EH Ballin, G van der Schyff and M Stremler (eds), *European Yearbook of Constitutional Law 2020* (Springer and TMC Asser Press, 2021) 101.

[55] T Herzog, *A Short History of European Law: The Last Two and a Half Millennia* (Harvard University Press, 2018) 221.

[56] JAF Godinho, *Macau Business Law and Legal System* (LexisNexis, 2007) 10.

[57] IC Ferreira, 'The Macau SAR Legal System — Is the EU Law a Source of Inspiration for Macau Lawmakers?' in JAF Godinho (eds), *Studies on Macau, Civil, Commercial, Constitutional and Criminal Law* (LexisNexis, 2010) 39, 66.

[58] JAF Godinho and P Cardinal, 'Macau's Court of Final Appeal' in SNM Young and Y Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press, 2014) 608, 609.

[59] LA DiMatteo, *International Business Law and the Legal Environment: A Transactional Approach* (Routledge, 2017) 294.

judgments and customary law are relatively unimportant in Macau; neither has the status of a formal source of law. In art.1, the Civil Code of Macau proclaims three principles:

(1) Legislations are an immediate source of law.

(2) All generic provisions enacted by competent organs of the territory of Macau, and of State organs within the limits of their legislative competence in relation to Macau, shall be considered as legislations.

(3) International agreements applicable in Macau shall prevail over ordinary legislations.

1.016 Macau has a system of courts made up of career judges. This refers to judges who are hired at a young age and spend the rest of their legal careers in the judicial bureaucratic hierarchy.[60] A Judicial Council, another civil law institution, is responsible for overseeing and disciplining judges under the chairmanship of the President of the *Tribunal de Última Instância*.[61] Judges and prosecutors in Macau must undergo a legally required, two-year training regimen offered by the Legal and Judicial Training Centre, an autonomous public institution.[62]

1.017 Judges of Macau have no legal obligation to follow rulings issued previously by any court in the judicial hierarchy. Judges tend to consider their decisions as nothing but products of an 'abstract and logical technical process'.[63] That said, Portuguese court decisions are invoked in Macau's courts, the transfer of sovereignty notwithstanding. Also, the *Tribunal de Última Instância* (Court of Final Appeal) may deploy a special procedure, 'fixation of jurisprudence', in certain situations to make the output of the entire legal system uniform on a given issue. Occasionally, the Macau courts may turn for assistance to academic jurists whose writings are collectively known as *doutrina* (doctrine).

1.018 Macau and Hong Kong diverge over their public prosecutors' relation to the executive branch of government. Typical of civilian jurisdictions, and unlike the common law practice of Hong Kong, where the Prosecutions Division of the Department of Justice makes part of the Executive Authorities, the *Ministério Público de Macau* or Office of the Public Prosecutor of Macau, headed by a Procurator General, forms an autonomous part of the judicial branch.

(c) The common law tradition

1.019 Consider next the common law tradition, to which Hong Kong belongs. The term 'common law' is used every day to refer to the case law that judges develop through

60 N Garoupa and T Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press, 2015) 43.

61 Macao Yearbook Editorial Committee, *Macao Yearbook 2021* (Government Information Bureau of the Macao Special Administrative Region, 2022) 152–153.

62 *Ibid.*, 159.

63 D de Castro Halis, '"Post-Colonial" Legal Interpretation in Macau, China: Between European and Chinese Influences' in S Miyazawa, W Ji, H Fukurai, KW Chan and M Vanhullebusch (eds), *East Asia's Renewed Respect for the Rule of Law in the 21st Century: The Future of Legal and Judicial Landscapes in East Asia* (Brill, 2015) 68, 78.

adjudication. Common law systems typically feature the requirement of oral proceedings, the use of juries, the doctrine of binding precedent and the difficulty for appellate courts to re-establish the facts.[64] For Antonio Padoa-Schioppa, the 'fundamental differences' of the common law tradition from its Romano-Germanic civilian law counterpart include the absence of extensive codification of law, the lack of a clear distinction between public and private laws and between substantive and procedural laws, the eminence of senior judges and the use of the adversarial or accusatorial model of litigation.[65]

1.020 The common law tradition is more than case law. Traditionally, the common law has been understood as the uncodified law 'derived from the customs, traditions and expectations of the community, as reflected primarily in previous judgments', which had gradually evolved over a period of almost 1,000 years,[66] originally in England and then on every inhabited continent.[67] It lays claim to ancient prescription, ongoing adaptability, correct principle and reason and conformability to society and social consent; it is rational and principled and descended from time immemorial.[68] There is now considerable diversity in the common law world.[69] It is nowadays widely recognised that, whilst all common law systems sprang directly or indirectly from England, the common law is no longer monolithic and may differ from one jurisdiction to another.[70] The 'main exception' to the development of the common law outside the British Commonwealth is the United States — 'being the only colony to have had a less than amicable breach with Great Britain, resulting in a complete, formal severance of its legal system from that of England'.[71]

1.021 The term 'common law' may mean different things in different contexts. The term is usually employed in three ways (see Table 1).[72] More fundamentally, the common law tradition can be taken as a distinct set of unwritten 'attitudes, methods, procedures, general principles'[73] (or *lex non scripta* in Latin)[74] that originated from '[t]he traditional unwritten law of England based on custom and usage',[75] versus all other legal traditions. In Hong Kong, according to Sir Anthony Mason, formerly Chief Justice of Australia who served as a non-permanent judge of the Court of Final Appeal from 1997 to 2015, the common law 'stands for a set of concepts, interests, and values which it has protected during the course of its long history [which] include the rule

64 M Siems, *Comparative Law* (Cambridge University Press, 3rd ed 2022) 58.

65 A Padoa-Schioppa, *A History of Law in Europe: From the Early Middle Ages to the Twentieth Century* (Cambridge University Press, 2017) 212.

66 DLA Barker, *Law Made Simple* (Routledge, 14th ed 2020) 5.

67 S Hall, *Ho & Hall's Hong Kong Contract Law* (LexisNexis, 4th ed 2017) 50.

68 BZ Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, 2006) 32.

69 See, Michael Arnheim, *Anglo-American Law: A Comparison* (Talbot Publishing, 2019).

70 See, *Kensland Realty Ltd v Tai Tang and Chong* (2008) 11 HKCFAR 237, 295 (McHugh NPJ).

71 LA DiMatteo and M Hogg, 'Introduction: British and American Perspectives' in LA DiMatteo and M Hogg (eds), *Comparative Contract Law: British and American Perspectives* (Oxford University Press, 2016) 2.

72 S Gallagher, *Equity and Trusts in Hong Kong: Doctrines, Remedies and Institutions* (Sweet & Maxwell, 2nd ed 2020) 7.

73 P Wesley-Smith, 'The Reception of English Law in Hong Kong' (1988) 18 HKLJ 183, 216.

74 See, MD Walters, 'The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law' (2001) 51 *The University of Toronto Law Journal* 91.

75 S Gallagher, *Equity and Trusts in Hong Kong: Doctrines, Remedies and Institutions* (Sweet & Maxwell, 2nd ed 2020) 771.

Table 1 The Common Law in Three Senses

The Common Law System versus the Civilian Law System
A type of legal system originating from English common law as opposed to other types of legal system (eg the French civilian law tradition)
The Common Law as Case Law versus Legislation
Legal principles emanating from judgments delivered by the superior courts of record based on the rules of common law and of equity, as opposed to legislation enacted by the legislature
The Common Law as Law versus Equity
A branch of case law principles known as the 'rules of the common law' or simply 'law', as opposed to another branch of case law principles known as the 'rules of equity'

of law, judicial independence, access to the courts, the separation of powers, and the liberty of the individual, freedom of expression, freedom of association, no detention or imprisonment without lawful authority and natural justice, to mention but a few of them'.[76] It sees rights, for instance, as inherent in the person, not derived from the Sovereign, and law as an inherent limitation on sovereignty itself.[77]

1.022 The common law tradition embodies the fundamental principles of reason, fairness and the presumption of liberty as respected by the community. These three principles are means by which a constitutional balance is struck between the rule of law and state power.[78] Without reason or fairness, 'the law would be arbitrary, capricious and unjust'; without the presumption of liberty, 'the power of the state would then be arbitrary, and tyranny is always — nearly always — the consequence of arbitrary power'.[79] This legal tradition is therefore not merely a list of dos and don'ts but a way of life under which '[t]he people's sense of law and justice . . . precedes the political constitution'.[80] Its paradigmatic source is not the Sovereign's command but the reason of the community; it exalts assent over authority, the community over the state and moral force over material coercion.[81] It is a commonplace that the common law should be 'the surest sanctuary that a man can take, and the strongest fortress to protect the weakest of all',[82] and that judges should 'construe the law as liberally as possible in favour of liberty'.[83] Consider the landmark decision of Lord Mansfield CJ in *Somerset*

[76] A Mason, 'The Role of the Common Law in Hong Kong' in J Young and R Lee (eds), *The Common Law Lecture Series 2005* (University of Hong Kong, 2006), 1.

[77] PC Magalhães, 'Explaining the Constitutionalization of Social Rights: Portuguese Hypotheses and a Cross-National Test' in DJ Galligan and M Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013) 432, 444.

[78] J Laws, *The Constitutional Balance* (Hart Publishing, 2021) 66.

[79] J Laws, 'The Rule of Law: The Presumption of Liberty and Justice' (2017) 22 *Judicial Review* 365, 368–369.

[80] DJ Galligan, 'Ally or Enemy, Friend or Foe' in DJ Galligan (ed), *The Courts and the People: Friend or Foe?* (Hart Publishing, 2021) 223, 238.

[81] JR Stoner, *Common-Law Liberty: Rethinking American Constitutionalism* (University Press of Kansas, 2003) 5.

[82] W Penn, *The Excellent Privilege of Liberty and Property: Being a Reprint and Facsmile of the First American Edition of Magna Charta* (The Lawbook Exchange, 2005 [1686]) 64; ML Barr, *Romanticism and the Rule of Law: Coleridge, Blake, and the Autonomous Reader* (Springer, 2021) 3.

[83] *Opinion on The Writ of Habeas Corpus* (1758) Wilmot 77, 121–2 (Sir John Eardley Wilmot CJCP).

v Stewart,[84] which abolished slavery at common law in England and Wales four years before the independence of the United States:

> The state of slavery is of such a nature, that it is incapable of being now introduced by Courts of Justice upon mere reasoning or inferences from any principles, natural or political; it must take its life from positive law; the origin of it can in no country or age be traced back to any other source: immemorial usage preserves the memory of positive law long after all traces of the occasion, reason, authority and time of its introduction are lost; and in a case so odious as the condition of slaves must be taken strictly, the power claimed by the return was never in use here; no master was ever allowed to take a slave by force to be sold abroad because he had deserted from his service, or for any other reason whatever? We cannot say the cause set forth by the return is allowed or approved by the laws of this Kingdom, therefore the man must be discharged.

1.023 Consider the place of legislation within the common law tradition. The common law 'provides the foundation of law in every jurisdiction in which it applies'.[85] The very rule that statute supersedes inconsistent case law is in itself a rule of common law which, moreover, only emerged in the seventeenth century.[86] Statutes are to be drafted and interpreted consistently with deep-rooted common law principles.[87] There was no general attempt to codify law into sweeping statutory codes. Lord Burrows, Justice of the Supreme Court of the United Kingdom, observed as follows, while still a legal academic:

> Statutes [in the common law tradition] are seen as supplementing or removing the common law but it is the common law that provides the residual gapless law where there is no statute. . . . This contrasts with civilian systems where a statutory code is seen as providing the basic gapless law.[88]

1.024 'Case law' and 'common law' are not entirely synonymous concepts. The interchangeableness of the terms 'case law' and 'common law' is largely due to the high-profile activity of courts in common law systems to declare and modify the meaning of the common law. Sir William Blackstone, a former Justice of the Court of King's Bench and the first Vinerian Professor of English Law at the University of Oxford, in his seminal *Commentaries on the Laws of England*, wrote that 'the [common] law, and the opinion of the judge, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law'.[89] '[T]he decisions

[84] (1772) Lofft 1, 98 ER 499, 509.

[85] S Hall, *Foundations of International Law* (LexisNexis, 3rd ed 2016) 180.

[86] See, E Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Hart Publishing, 2006).

[87] TRS Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1995) 115 *Law Quarterly Review* 221, 241–242.

[88] A Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, 2018) 45.

[89] W Blackstone, *Commentaries on the Laws of England Volume 1* (Clarendon Press, 1765) 71.

of courts of justice' are not the common law itself but, more accurately, 'the evidence of what is common law'.[90] Indeed, if all judicial opinions were identical to the common law itself, then the common law would easily become internally inconsistent, as two incoherent judgments would become equally valid law at the same time.[91] The common law is not just 'judge-made law', but it is 'that body of a community's customary practices which the courts recognise as furnishing norms for the resolution of legal disputes, supplemented where necessary by a process of practical reasoning drawing heavily on analogy and universally recognised general principles of law'.[92]

1.025 Consider the distinct emphases of the common law method. Case law, originally developed by royal judges in England, embody the rules of the common law and equity. In *R v Bembridge*,[93] the great jurist Lord Mansfield CJ likewise opined: 'The law does not consist of particular cases but of general principles, which are illustrated and explained by these cases'. Contrary to the civilian law tradition, judicial reasoning in a common law jurisdiction is said to take a 'bottom up'[94] or 'democratic' approach, under which judges begin with 'generally acknowledged actual instances of the thing referred to'[95] and deliver decisions that emerge from legal arguments 'tested openly in a participatory process'.[96] Legal principles are ascertained, clarified and developed through the medium of cumulative case law precedents and traditions that should never be uncritically received by judges. The common law method has four main emphases:

(1) Evolution — rules of the common law evolve through the doctrine of precedent.

(2) Experiment — working hypotheses discarded if they are not robust.

(3) History — emphasis on continuity with the past.

(4) Distillation — the modification and adjustment of the common law to meet new conditions.[97]

1.026 Through these four emphases, the common law continues to self-correct itself, digesting societal change and adapting its principles accordingly.[98] This legal tradition has 'deep historical dimensions and is not the product of a conscious revolutionary attempt to make or to restate the applicable law at a moment in history'.[99] It is 'not a museum

[90] *Ibid.* Judges are obligated to apply common law principles in the unpredictable and complex conditions of daily life. However, judges, in all sincerity, may issue contrasting, even contradictory, decisions on the same matter.
[91] B Zamulinski, 'Rehabilitating the Declaratory Theory of the Common Law' (2014) 2 *Journal of Law and Court* 171, 179.
[92] S Hall, *Foundations of International Law* (LexisNexis, 3rd ed 2016) 180.
[93] (1783) 3 Doug KB 327, 332.
[94] P Darbyshire, *Darbyshire on the English Legal System* (Sweet & Maxwell, 13th ed 2020) 15.
[95] AJ Connolly, 'Philosophical and Judicial Thinking about Moral Concepts: Cane's Critique of Philosophical Method 20 Years On' in J Goudkamp, M Lunney and L McDonald (eds), *Taking Law Seriously: Essays in Honour of Peter Cane* (Hart Publishing, 2022) 305, 320.
[96] M McConville and L Marsh, *The Myth of Judicial Independence* (Oxford University Press, 2020) 179.
[97] J Laws, *The Constitutional Balance* (Hart Publishing, 2021) 58.
[98] *Ibid.*, 65.
[99] JH Merryman and R Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, 4th ed 2019) 26.

of antiquities, but a living and active law'.[100] It adapts itself to changes of society, yet always within limits and without obliterating the past.[101] The common law 'is not and cannot be the creature of a single moment'; it 'reflects and moderates the temper of the people as age succeeds age'; it 'builds on the experience of ordinary struggles' and it 'stands for no grand theory of anything, but it is endlessly creative'.[102] Concretely put, the common law doctrine of precedent enables us to keep the law up to date while maintaining an appropriate measure of certainty and continuity.[103]

1.027 Adversarial or accusatorial trial at common law entails the adversaries to the case to confront each other with witnesses, evidence and arguments, laid largely unaided before a passive judge-umpire. The adversarial model had origins in ancient Greece and Rome, and came of age in England. It conceptualises litigation as 'a contest between the parties (whether prosecutor and accused or plaintiff and defendant), who themselves or through their lawyers provide to the court the evidence that supports their case and define the legal issues to be argued before the court. The court's function is no more than that of an umpire for the purpose of deciding which side wins and which side loses in the case'.[104] There is moreover a strong assumption in adversarial or accusatorial litigation that 'providing live oral evidence is the best way of arriving at the facts'.[105] In *Jones v National Coal Board*,[106] Denning LJ expounded the key characteristics and underlying rationale of adversarial proceedings:

> In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries . . . If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: 'Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal'.

1.028 The quality of a legal system that prioritises the adversarial model of litigation thus depends not just on the quality of trial judges but also on the integrity and ability of counsel who are expected to present their cases fearlessly and independently before the courts.[107] In *Re Simpson QC*,[108] the Court of First Instance (Poon ACJHC) noticed:

> In our adversarial system, our courts rely on the Bar's independence in presenting the case and advancing arguments with impartiality and honesty, and with force and vigour. Our judges act in the confidence that when barristers press a point,

[100] F Pollock, *The Genius of the Common Law* (Columbia University Press, 1912) 110.
[101] DA Strauss, *The Living Constitution* (Oxford University Press, 2010) 3.
[102] J Laws, *The Common Law Constitution* (Cambridge University Press, 2014) xv.
[103] K Bokhary, *The Constitutional Crocodile* (Sweet & Maxwell, 2021) 47.
[104] AHY Chen, *The Changing Legal Orders in Hong Kong and Mainland China* (City University of Hong Kong Press, 2021) 254.
[105] A Gillespie and S Weare, *The English Legal System* (Oxford University Press, 8th ed 2021) 16.
[106] [1957] 2 QB 55, 63–65.
[107] M McConville and L Marsh, *The Myth of Judicial Independence* (Oxford University Press, 2020) 178.
[108] [2019] 5 HKLRD 441, 450.

either criminal or civil judgments'.[46] On 28 June 2016, the Supreme People's Court ruled:

> In a judgment, the Constitution, the guiding documents and minutes of meeting of the people's courts at various levels, the reply opinions of all tribunals as well as the documents jointly issued by the people's courts and the relevant departments may not be cited as the basis for rendering a judgment.[47]

3.012 The Constitution's lack of justiciability in the Region is nothing but a consequence of its lack of justiciability in any part of China. The Basic Law established the courts of the Region as common law courts, not civilian law courts;[48] 'capitalist'[49] courts, not socialist courts. The Basic Law grants no permission to the courts of the Region to interpret the Constitution.[50] It follows that the 'capitalist' common law courts of Hong Kong have neither jurisdiction to authoritatively expound the Chinese Constitution nor competence to enforce a socialist law document enacted by and for a 'people's democratic dictatorship' within a Special Administrative Region wherein Shigong Jiang, from Peking University, commented that '[i]n principle of law, Hong Kongers are Chinese citizens, but in actuality they neither enjoy the rights nor perform the duties specified in the [Chinese] Constitution'.[51]

(ii) *The Separation of Legal Systems*

3.013 The two systems, though located within one national constitutional order, should be kept separate and distinct. Litton NPJ, on behalf of the majority in the Court of Final Appeal, opined in *ML v YJ*:[52]

> The separation of Hong Kong's legal system from that of the Mainland, as entrenched in art.2 of the Basic Law, is fundamental to the concept of 'one country, two systems', as referred to in the Preamble to the Basic Law.

3.014 The separation of legal systems entails the following principles guaranteed by the Basic Law:

(1) *Hong Kong territory ought to be governed by the law of the Region:* 'The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region'.[53]

46 AHY Chen, *An Introduction to the Legal System of the People's Republic of China* (LexisNexis, 5th ed 2019) 55.
47 Notice of the Supreme People's Court on Issuing the Specifications for Preparing Civil Judgments by the People's Courts and the Style of Civil Litigation Documents No 221 [2016] of the Supreme People's Court.
48 Hong Kong Basic Law, art.81(2).
49 *Ibid.*, art.5.
50 MA Loureiro Manero de Lemos, 'The Basic Laws of Hong Kong and Macau as Internationally Shaped Constitutions of China and the Fall off of One Country, Two Systems' (2019) 27 *Tulane Journal of International and Comparative Law* 277, 310.
51 S Jiang, *China's Hong Kong: A Political and Cultural Perspective* (Springer, 2017) 113, 138.
52 (2010) 13 HKCFAR 794, 829.
53 Hong Kong Basic Law, art.18(1).

(2) *Subject to very narrow exceptions, national laws of China ought to be generally excluded from the legal system of the Region:* 'National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region'.[54]

(3) *Subject to narrow exceptions, the courts of Hong Kong ought to have jurisdiction over all cases arising from Hong Kong:* 'The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained'.[55]

(4) *The judicial power of the Region ought to be exercised by the courts of Hong Kong, not the courts of Mainland China:* 'The courts of the Hong Kong Special Administrative Region at all levels shall be the judiciary of the Region exercising the judicial power of the Region'.[56]

3.015 The Court of Final Appeal has recognised that, since Hong Kong and the Mainland are distinct jurisdictions, a judgment of the Supreme People's Court is to be treated for all practical purposes as a foreign judgment, enforceable in Hong Kong only if it meets a series of stringent conditions imposed by the Special Administrative Region's private international law over foreign judgments.[57] The Court of First Instance (Harris J) observed in *Nuoxi Capital Ltd v Peking University Founder Group Co Ltd*[58] that '[t]he Mainland and Hong Kong have materially different legal systems and different economic models'. And in *Kwok Cheuk Kin v Secretary for Justice*,[59] the Court of Appeal (Poon CJHC, Lam V-P and Barma JA) opined:

> The 'one country, two systems' principle is underpinned by the imperative that the Mainland system and the Hong Kong system, though kept separate and distinct under the Basic Law, are within one country and one national constitutional order. There are interfaces where the two systems meet and interact within the constitutional framework set by the Constitution and the Basic Law. Accordingly, there are mechanisms in the Constitution and the Basic Law to regulate their interactions and to ensure that any subject matter lying at the interface conforms with both systems.

3.016 The drafters of the Basic Law wrote into that document the principle that the distinctiveness of the Hong Kong and Mainland Chinese systems is to be entrenched and unalterable for no less than 50 years. Deng Xiaoping admonished the drafters:

> Our policy on Hong Kong will not change for 50 years after it is reunited with the motherland in 1997. That policy, along with the Basic Law you are now drafting,

54 *Ibid.*, art.18(2).
55 *Ibid.*, art.19(2).
56 *Ibid.*, art.80.
57 *First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd* (2012) 15 HKCFAR 569; see, A Gibb, R Morris and KF Tsang, *An Introduction to the Conflict of Laws in Hong Kong* (LexisNexis, 2017) 86.
58 [2021] HKCFI 3817, [65].
59 [2021] 3 HKLRD 140, 170.

> will remain in force for at least 50 years. And I want to add that there will be even less need to change them after the 50-year period. Hong Kong's status will not change, nor will our policy towards Hong Kong or Macao.[60]

3.017 Socialism, according to Deng, should no more be imposed on Hong Kong than 'bourgeois liberalisation' on Mainland China. Deng believed that the long-running separation of the systems before and after 1997 is essential to the stability and prosperity of both sides:[61]

> [T]he socialist country allows certain special regions to retain the capitalist system-not for just a short period of time, but for decades or even a century. The other is that the main part of the country continues under the socialist system. Otherwise, how could we say there are 'two systems'? It would only be 'one system'. People who advocate bourgeois liberalisation hope that the mainland will become capitalist or 'totally Westernised'. Our thinking on this question should not be one-sided. If we don't attach equal importance to both aspects, it will be impossible to keep the policy 'One China, Two Systems' unchanged for several decades.

3.018 Hence, a 'patriot' from Hong Kong is not required to 'be in favour of China's socialist system' and might as well 'believe in capitalism or feudalism or even slavery';[62] that 'after 1997 [the Chinese government] shall still allow people in Hong Kong to attack the Chinese Communist Party and China verbally'.[63] 'One Country, Two Systems' purportedly 'embodies a very important tenet [of Chinese culture]', namely, 'seeking broad common ground while setting aside major differences'; indeed, '[a]t no time should we focus only on one aspect to the neglect of the other'.[64]

3.019 There is a very real tension between the divergent values underlying the two systems. What prompted the Standing Committee of the National People's Congress to impose limits on popular aspirations for Chief Executive and Legislative Council elections based on universal suffrage, inspired by arts.45(2) and 68(2) of the Basic Law, respectively, are their concerns for China's national sovereignty and security.[65] Conversely, the public anxiety in the Region towards the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019, which erupted into the political turmoil of 2019–2020, was driven by a widespread perception that the proposed legislation would violate the separation of the Hong Kong and Mainland Chinese legal systems.[66] Hualing Fu observed:

> The [Special Administrative Region] was created by a Constitution that is committed to its elimination; Hong Kong's rule of law is an essential part of the

[60] X Deng, *Deng Xiaoping on 'One Country, Two Systems'* (Joint Publishing, 2004) 68.
[61] X Deng, *Collected Works of Deng Xiaoping* (Foreign Language Press, 1983) 73–74.
[62] *Ibid.*, 17.
[63] *Ibid.*, 77.
[64] J Xi, *The Governance of China II* (Foreign Languages Press, 2017) 474–475.
[65] X Fan, 'The 2019 Rendition Saga in Hong Kong: A Perspective on the Tensions Inherent in "One Country, Two Systems"' (2022) 52 HKLJ 9, 39.
[66] *Ibid.*, 13.

> reform objectives of the mainland but the liberal values that sustain Hong Kong's rule of law, inherent in the Hong Kong system and universally held, also appear incompatible with the authoritarian regime that purports to promote the reform. Hong Kong's dynamism has played an indispensable role in supporting the Chinese reform process, but its aspirations for freedom, liberty and democratic governance challenge China's political system and are perceived to be a political liability.[67]

3.020 The 'Greater Bay Area' project marked an unprecedentedly high level of integration effort. On 1 July 2017, the twentieth anniversary of the establishment of the Hong Kong Special Administrative Region, the governments of Hong Kong, Macau and Guangdong, together with the National Development and Reform Commission, as witnessed by President Xi Jinping, signed a 'Framework Agreement on Deepening Guangdong-Hong Kong-Macao Cooperation in the Development of the Greater Bay Area'.[68] This eventually led to the Outline Development Plan for the Guangdong–Hong Kong–Macao Greater Bay Area published by the Party centre and State Council on 28 February 2019. The Preamble of the Plan states as follows:

> As one of the most open and economically vibrant regions in China, the Greater Bay Area plays a significant strategic role in the overall development of the country. The development of the Greater Bay Area is not only a new attempt to break new ground in pursuing opening up on all fronts in a new era, but also a further step in taking forward the practice of 'one country, two systems'.[69]

3.021 In *JQ v CLH (Divorce: Jurisdiction)*,[70] the Court of Appeal (Barma and Anderson Chow JJA) observed 'the increasing integration of Hong Kong within the Greater Bay Area'. In an effort to further legal integration, the State Council on 22 October 2020 rolled out a pilot scheme that permitted Hong Kong lawyers who passed a qualifying examination to handle civil and commercial legal matters in nine Mainland Chinese cities within the Greater Bay Area, namely Guangzhou, Shenzhen, Zhuhai, Foshan, Zhongshan, Dongguan, Huizhou, Jiangmen and Zhaoqing. Nevertheless, divergences in border controls, currencies, legal traditions, taxation systems and rules of investment between Hong Kong, Macau and those parts of the Guangdong Province lying within

[67] H Fu, 'China's Imperatives for National Security Legislation' in C Chan and F de Londras (eds), *China's National Security: Endangering Hong Kong's Rule of Law?* (Hart Publishing, 2020) 41, 52.
[68] National Development and Reform Commission; People's Government of Guangdong Province; Government of the Hong Kong Special Administrative Region and Government of the Macao Special Administrative Region Framework Agreement on Deepening Guangdong-Hong Kong-Macao Cooperation in the Development of the Bay Area (1 July 2017). Preamble, Chinese Communist Party Central Committee and State Council, *Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area* (18 February 2019): 'The Guangdong-Hong Kong-Macao Greater Bay Area (Greater Bay Area) consists of the Hong Kong Special Administrative Region (HKSAR), the Macao Special Administrative Region (Macao SAR) as well as the municipalities of Guangzhou, Shenzhen, Zhuhai, Foshan, Huizhou, Dongguan, Zhongshan, Jiangmen and Zhaoqing in Guangdong Province (hereinafter referred to as 'the nine Pearl River Delta (PRD) municipalities'), covering a total area of 56,000 square kilometres with a combined population of approximately 70 million at the end of 2017'.
[69] Chinese Communist Party Central Committee and State Council, Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area (18 February 2019).
[70] [2022] 2 HKLRD 632, 648.

the ambit of Greater Bay Area present substantial challenges to the viability of the project.[71] Whilst the institutional and governance structures of Shenzhen, for example, are part and parcel of Mainland China's socialist legal and political frameworks, Hong Kong's continue to be steep in the 'capitalist' common law tradition.[72]

(b) Standing Committee Interpretations of the Basic Law

3.022 Interpretations of the Basic Law are neither a separate source of law in their own right nor a form of case law, according to art.18 of the Basic Law. That the power of the interpretation of the Basic Law is vested in the Standing Committee of the National People's Congress[73] does not make the Standing Committee the apex court of the Hong Kong judiciary. That status belongs solely to the Court of Final Appeal. The power conferred is incommensurable with the judicial power of the courts to interpret the Basic Law in the course of adjudication. The Standing Committee's power to interpret the Basic Law is:

(1) 'plenary' and exercisable 'in the absence of litigation';[74]

(2) 'in the nature of supplementary legislation' and 'may extend beyond ascertaining the meaning of the legislative text'; and[75]

(3) unable retrospectively to affect 'judgments previously rendered', unlike a ruling of the Court of Final Appeal.[76]

3.023 The Standing Committee's power to adopt Interpretations is neither unprecedented in the common law tradition nor necessarily inconsistent with the rule of law. Parliament (or to be precise, the High Court of Parliament) in England, and later the United Kingdom, has always had power to enact 'declaratory' and 'supplementary' Acts that 'either confirm and declare the existing law [or] add to the general stock of legal precepts'.[77] They bind the common law courts and nothing requires that they may only be prospective. The Standing Committee's competence to enact 'declaratory' and 'supplementary' legislation is qualified by the Basic Law itself: all Interpretations need to be consistent with the Basic Law and the 'established basic policies of the People's Republic of China regarding Hong Kong'.[78] This is, of course, 'fundamentally different' from uncontrolled parliamentary sovereignty.[79] The Standing Committee is not popularly elected. The selection of its 170 members is controlled by the Communist Party.[80] Its Chairman is a member *ex officio* of the ultra-elite Standing Committee of

[71] See, P Sabine, 'Can China's Greater Bay Area Initiative Really Work?' *South China Morning Post* (28 May 2018).
[72] N Sharif and K Chandra, 'A Comparative Analysis of Innovation Policies in Hong Kong and Shenzhen within the Greater Bay Area Initiative' (2022) 49 *Science and Public Policy* 54, 56.
[73] Hong Kong Basic Law, art.158(1).
[74] *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, 345 (Sir Anthony Mason NPJ).
[75] A Mason, 'The Rule of Law in the Shadow of a Giant: The Hong Kong Experience' (2011) 33 *Sydney Law Review* 623, 630.
[76] Hong Kong Basic Law, art.158(4).
[77] P Wesley-Smith, 'The Content of the Common Law in Hong Kong' in R Wacks (ed), *The New Legal Order in Hong Kong* (Hong Kong University Press, 1999) 9, 30.
[78] Hong Kong Basic Law, art.159(4).
[79] *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 27 (Li CJ).
[80] KJ O'Brien, *Reform without Liberalization: China's National People's Congress and the Politics of Institutional Change* (Cambridge University Press, 1990) 62.

the Politburo of the Party. Its Interpretations in effect confirm decisions already made higher up in the Party.[81]

3.024 Consider the legal basis for Standing Committee Interpretations. It might be supposed that this power of the Standing Committee to exercise the power of adopting Interpretations of the Basic Law within the Hong Kong legal system is founded solely on art.67(4) of the Constitution of the People's Republic of China.[82] This is, however, a misleading view. Recall that, under the socialist law tradition, the Constitution needs to be implemented by legislation adopted by the National People's Congress or its Standing Committee . For art.67(4), this was the Standing Committee's Resolution on Strengthening the Work of Interpretation of Laws of 1981, which has now been superseded by art.42 of the Law on Legislation of 2015, which provides that '[t]he power to interpret a national law shall vest in the Standing Committee of the National People's Congress'.

3.025 The Standing Committee of the National People's Congress is to give an interpretation to a national law in such circumstances as when:

(1) the specific meaning of a provision of such legislation requires further clarification; or

(2) a new situation arises after enactment of such legislation, thereby requiring clarification of the basis of its application.

3.026 The Law on Legislation, which could not have been added to Annex III of the Basic Law, forms no part of the law of Hong Kong pursuant to art.18(1) of the Basic Law. The only conceivable implementing legislation regarding Hong Kong matters for art.67(4) of the Constitution would be art.158 of the Basic Law. The procedure for enacting Interpretations of the Basic Law pursuant to art.158 is radically different from that provided in the Law on Legislation. In contrast to the Basic Law, nothing in the Law on Legislation:

(1) requires the Standing Committee to 'consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law';[83]

(2) circumscribes the retrospective effect of any Interpretation on 'judgments previously rendered';[84] and

(3) obliges the Standing Committee to respond to referrals of the Hong Kong courts when they have to render 'final judgments which are not appealable' in cases materially affected by provisions of the Basic Law 'concerning affairs which are the responsibility of the Central People's Government, or

[81] Y Ghai, 'Autonomy and the Court of Final Appeal: The Constitutional Framework' in SNM Young and Y Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press, 2014) 33, 65.
[82] 'The Standing Committee of the National People's Congress shall exercise the following functions and powers . . . to interpret laws'.
[83] *Ibid.*
[84] *Ibid.*, art.158(3).

3.033 Consider the implications of the domestication of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, commonly known as the 'Hong Kong National Security Law', on the Region's legal system. The Hong Kong National Security Law[102] was enacted on 30 June 2020 by the Standing Committee in the midst of the COVID-19 pandemic and heightened tensions between China and the United States and was promulgated in the aftermath of the Region's 2019 turmoil in order to interdict 'anti-China forces seeking to disrupt Hong Kong',[103] by 'preventing, suppressing and imposing punishment for the offences of secession, subversion, organisation and perpetration of terrorist activities, and collusion with a foreign country or with external elements to endanger national security in relation to the Hong Kong Special Administrative Region'.[104] The Law, which, according to Siu-kai Lau, has 'dealt a devastating blow to Hong Kong's opposition, thus greatly diminishing their space for survival and development',[105] has myriad implications on the Region's legal and political future, which are beyond the scope of this book.

3.034 In principle, the Hong Kong National Security Law does not repeal One Country, Two Systems. A National Security Law[106] has been in force in Mainland China since 2015; its express aim is to 'safeguard the regime of people's democratic dictatorship and the socialist system with Chinese characteristics'.[107] It is telling that the National People's Congress chose to adopt a second National Security Law specifically for the Region, rather than to insert the 2015 Law into Annex III of the Basic Law. Whatever the particulars of the Hong Kong National Security Law, it spared the Region from the effects that the Mainland National Security Law might have had on its capitalist and common law systems. Although the Hong Kong National Security Law asserts supremacy over all Hong Kong laws inconsistent with itself,[108] it also considers itself to be 'enacted in accordance with . . . the Basic Law . . . for the purpose of ensuring the resolute, full and faithful implementation of the policy of One Country, Two Systems under which the people of Hong Kong administer Hong Kong with a high degree of autonomy'.[109] All these phrases are general principles of the Basic Law; terms such as 'people's democratic dictatorship' and 'socialism' are not found in the Hong Kong National Security Law.

3.035 In principle, the Hong Kong National Security Law does not override the Basic Law. The Law derives its authority in the Region from being included into Annex III.[110]

[102] The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (Adopted at the 20th Session of the Standing Committee of the 13th National People's Congress of the People's Republic of China on 30 June 2020) ('Hong Kong National Security Law').

[103] *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33, 43.

[104] Hong Kong National Security Law, art.1.

[105] Siu-kai Lau, 'The National Security Law: Political and Social Effects on the Governance of the Hong Kong Special Administrative Region' (2021) 24 *Public Administration and Policy* 234, 236.

[106] National Security Law of the People's Republic of China (Adopted at the 15th session of the Standing Committee of the 12th National People's Congress on 1 July 2015).

[107] *Ibid.*, art.1.

[108] Hong Kong National Security Law, art.62.

[109] Ibid., art.1.

[110] Michael Davis argued that 'the new national security law is effectively an amendment to the Hong Kong Basic Law', because 'both [are] national laws of the [People's Republic of China]', and 'a national law that is enacted later in time and that is more specific in content is superior to an earlier, more general national law': MC Davis, *Making Hong Kong China: The Rollback of Human Rights and the Rule of Law* (Columbia University Press, 2020) 5. By contrast, Johannes Chan SC (Hon) suggests that it is possible to reconcile the Hong Kong National Security Law with the Basic Law along the following lines: '[The Hong Kong National Security Law] was enacted with full knowledge of the Basic Law. The most likely conflicts between the [the Hong Kong National Security Law] and the Basic Law lie in the human rights provisions in the Basic Law. By enacting arts 4 and 5 of the [the Hong Kong National Security Law] which expressly provide for the respect and protection of human rights and the rule of law, the clear legislative intent is that there is no question of irreconcilable inconsistency between these two articles and other provisions of the [the Hong Kong National Security Law]. It follows that there is no room to question the constitutionality of the [the Hong Kong National Security Law] with the Basic Law': J Chan, 'Judicial Responses to the National Security Law: *HKSAR v Lai Chee Ying*' (2021) 51 HKLJ 1, 5–6.

Logically speaking, it cannot be superior to the Basic Law, its source of authority in the legal system of the Region.[111] Being enacted by the Standing Committee rather than the National People's Congress, the Hong Kong National Security Law does not possess the status of a 'basic law' under the Chinese Constitution, and therefore, 'does not have the same status as the Basic Law in constituting — together with the [People's Republic of China] Constitution — the constitutional foundation of the [Hong Kong Special Administrative Region', according to Albert Chen.[112] He further noticed that '[t]here is nothing in the [Hong Kong National Security Law] or in the [National People's Congress] Decision that suggests that the [Hong Kong National Security Law] may override the Basic Law'.[113]

3.036 The Court of Final Appeal has ruled that it has no jurisdiction to review the Hong Kong National Security Law for compatibility with the Basic Law. In *HKSAR v Lai Chee Ying*,[114] the Court of Final Appeal (Cheung CJ, Ribeiro and Fok PJJ, Chan and Stock NPJJ) asserted that there can be no authentic inconsistency between the Basic Law and the Hong Kong National Security Law[115] and declared:

> We have decided that there is no power to hold any provision of the [National Security Law] to be unconstitutional or invalid as incompatible with the Basic Law and Bill of Rights. However, that is not at all to say that human rights and freedoms and rule of law values are inapplicable. On the contrary, [art.4] and [art.5 of the National Security Law] expressly stipulate that those rights, freedoms and values are to be protected and adhered to in applying the [National Security Law].

3.037 The courts should use the common law approach to construe the Hong Kong National Security Law, like all localised Annex III national laws. The Court of Appeal (Poon CJHC, Yeung and Lam V-PP) confirmed in *Tong Ying Kit v Secretary for Justice*[116] that '[w]hat the Court of Final Appeal adopted in interpreting [the National Security Law] is evidently the well-established common law technique of purposive and contextual construction'. Indeed, the courts should use the common law approach to harmonise a localised Annex III national law with the Basic Law. The same Court decided that the National Security Law 'has to be read together' with the Basic Law and the Bill of Rights 'to ensure that the defendant's constitutional right to a fair trial as embodied

[111] C Chan, 'Can Hong Kong Remain a Liberal Enclave within China? Analysis of the Hong Kong National Security Law' (2021) *Public Law* 271, 276.

[112] AHY Chen, 'Constitutional Controversies in the Aftermath of the Anti-Extradition Movement of 2019' (2020) 50 HKLJ 609, 629.

[113] *Ibid.*

[114] (2021) 24 HKCFAR 33, 52.

[115] *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33, 53.

[116] [2021] 3 HKLRD 350.

in those provisions is not compromised'.[117] Because 'there can be no inconsistency or incompatibility' between the National Security Law and the Basic Law, the Court added, the two Laws need to be read 'as a coherent whole'.[118]

(d) Ordinances

(i) *Classifying Ordinances*

3.038 An Ordinance is a piece of primary legislation enacted locally in Hong Kong. It may introduce new legal rules in the form of a Principal Ordinance, such as the Sex Discrimination Ordinance (Cap.480), or change existing one in the form of an Amending Ordinance, such as the Sex Discrimination (Amendment) Ordinance 2021 (No. 3 of 2021), which amends the Sex Discrimination Ordinance 'to render it unlawful for a person to harass a breastfeeding woman' (Long Title). A Principal Ordinance is assigned a Chapter or Capitula number. It is published in the Loose-leaf Edition of the collection of Principal Ordinances known as the Laws of Hong Kong, in hard copy, pursuant to the Laws (Loose-leaf Publication) Ordinance (Cap.643). An Amendment Ordinance is not assigned a Chapter number; instead, any amendments to or repeals of Principal Ordinances are printed on loose-leaf papers that replace the amended portions of Principal Ordinances in the Laws of Hong Kong.[119]

3.039 Ordinances are classified as 'primary legislation' made by the Legislature, as distinct to the 'secondary legislation' delegated to extra-parliamentary bodies. An Ordinance is thus equivalent to an 'Act of Parliament' in other common law jurisdictions like Bermuda, Canada and the United Kingdom. The name 'Ordinance' is a legacy of English legal history: the earliest Ordinances on record were made by the Sovereign together with his baronial council, the precursor of the House of Lords.[120]

3.040 Every bill requires the mutual agreement of the Legislative Council and the Chief Executive in order to become a binding Ordinance. A Hong Kong Ordinance is a Bill enacted by the Legislative Council,[121] which the Chief Executive has officially assented to.[122] Once this legislative process is complete, a new Ordinance becomes part of the laws of the Hong Kong Special Administrative Region.

(ii) *The priority of primary legislation*

3.041 As long as constitutional matters regulated by the Basic Law or matters governed by the Hong Kong National Security Law are not at stake, Ordinances enjoy priority over all other sources of law in Hong Kong. According to Sir Anthony Mason, the courts have adhered unswervingly to a 'doctrine of legislative supremacy . . . whether it is a common law rule or one deriving from the Basic Law'; it 'entails that the courts of the Region will respect the Ordinances of the Legislative Council enacted in conformity

[117] *Ibid.*, 365.
[118] *Ibid.*, 366.
[119] Interpretation and General Clauses Ordinance (Cap.1), s.3.
[120] SB Chrimes, *English Constitutional Ideas in the Fifteenth Century* (Cambridge University Press, 1936) 275.
[121] Hong Kong Basic Law, art.73(1).
[122] *Ibid.*, art.76.

with the Basic Law as well as the laws enacted by the National People's Congress'.[123] 'As a corollary of the common law doctrine of [legislative] supremacy', an Ordinance 'takes precedence over and displaced inconsistent rules to be found in other sources of law'.[124] However, in a legal system respectful of inherent human dignity, it is 'widely understood that legislative supremacy must be exercised consistently with basic rights'.[125]

Article 8 of the Basic Law provides that Ordinances may amend or repeal pre-existing Ordinances, subsidiary legislation, case law and Chinese customary law, but not vice versa. This provision reinforces three common law maxims that constitute the primacy of primary legislation: 3.042

(1) An earlier Legislative Council cannot bind a future Legislative Council; a newer Ordinance prevails over an older Ordinance in case of inconsistency.

(2) Subsidiary legislation made by the Chief Executive or by the Chief Executive in Council is subordinate to Ordinances.

(3) Ordinances supersede any case law principles to the contrary; courts must give effect to Ordinances upon a proper interpretation of their legislative intent in the context of the common law tradition.[126]

'Legislative supremacy' holds insofar as an Ordinance is constitutional. The Supreme Court's decision in *R v To Lam Sin*[127] reconciled early on the apparent conflict between legislative and Letters Patent supremacy. According to Howe CJ, '[T]he legislature of Hong Kong is supreme (subject to its constitution) in its own area'; that is, it is not a 'mere delegate' but 'supreme . . . within the powers conferred by the Letters Patent'. In *Winfat Enterprises (HK) Co Ltd v Attorney-General*,[128] the Court of Appeal (Roberts CJ) held that the formula 'peace, order, and good government' in art.VII of the Letters Patent, the only constitutional restriction on the scope of Ordinances, was 'so broad . . . that it has no boundaries save those which are imposed upon it by the constitutional instruments of the territory itself'. On appeal, in *Winfat Enterprises (HK) Co Ltd v Attorney-General*,[129] the Privy Council (Lord Diplock) affirmed that the legislature's power to make laws for 'the peace, order and good government . . . connote, in British constitutional language, the widest law-making powers appropriate to a Sovereign'. 3.043

The Basic Law recognises the plenary legislative powers enjoyed by the Legislative Council. The Basic Law has merely substituted for 'peace, order, and good government' the equally vague formulation 'overall interests of the Region'.[130] The Basic Law then enumerates (non-exhaustively) the subjects of legislation: external affairs[131] and public 3.044

[123] A Mason, 'The Role of the Common Law in Hong Kong' in J Young and R Lee (eds), *The Common Law Lecture Series 2005* (University of Hong Kong, 2006) 1, 14–16.
[124] S Hall, *Foundations of International Law* (LexisNexis, 4th ed 2016) 224.
[125] TRS Allan, 'Interpretation, Injustice, and Integrity' (2016) 36 *Oxford Journal of Legal Studies* 58, 62.
[126] JR Stoner, *Common Law Liberty: Rethinking American Constitutionalism* (University Press of Kansas, 2003) 11.
[127] (1952) 36 HKLR 1, 14.
[128] [1984] HKLR 32, 48.
[129] [1988] 1 HKLR 5, 10.
[130] Hong Kong Basic Law, art.49.
[131] *Ibid.*, Ch.VII.

for Justice v Persons Unlawfully and Wilfully Conducting Etc (1847/2020),[171] amongst certain quarters of the community, to view judicial decisions as choices 'between 'blue' and 'yellow'' without first consulting the published reasons of those decisions. The learned judge proposed the following alternative approach to understanding court judgments in a politically charged context:

> If I might alter Hanlon's Razor, never attribute to political viewpoints that which can be adequately explained by something else. As stated, Judges and Judicial Officers are not engaged in the political process, they do not express political views and they do not make political decisions. The explanation for the decisions — the 'something else' — is to be found in their reasoning, which is ordinarily publicly stated and/or publicly available.[172]

6.071 Criticisms of the courts must be made prudently without malice. In July 2018, the Law Society and the Bar Association issued a joint statement stating:

> Disparaging and abusive comments on [a] judge and her family which have nothing whatsoever to do with the correctness of the judgment or the appropriateness of the sentence serve no useful purpose but divert attention away from the real issues which should be addressed in any public discourse. The effect of the comments is to erode public confidence in the judiciary and the due process of the law. They may even constitute contempt of court. While there are restrictions on commenting about ongoing cases, we strongly support the freedom and rights of members of the public to discuss and express their opinions, or even criticisms, concerning judicial decisions and rulings once issued. However, abusive comments or criticisms amounting to personal attacks on the judge are entirely inappropriate and unacceptable.[173]

6.072 An authoritative statement of the Judiciary's stance towards criticisms can be found in *Wong Yeung Ng v Secretary for Justice*.[174] The Court of Appeal (Mortimer V-P) opined:

> *Bona fide*, balanced and justified criticism is susceptible to reasoned answer or even acceptance. Sustained scurrilous, abusive attacks made in bad faith, or conduct which challenges the authority of the court, are not susceptible to reasoned answer. If they continue unchecked they will almost certainly lead to interference with the administration of justice as a continuing process.

4. Judges of the Superior Courts

6.073 District judges and magistrates, amongst other judicial officers such as members of special courts do not fall under the statutory definition of 'judge' in s.3 of the

[171] [2020] 5 HKLRD 638, 640.
[172] *Ibid.*, 650–651.
[173] Law Society of Hong Kong and Hong Kong Bar Association, 'Joint Statement of the Law Society of Hong Kong and the Hong Kong Bar Association in Response to Personal Attacks on a Judge' (4 July 2018).
[174] [1999] 2 HKLRD 293, 312–313.

Interpretation and General Clauses Ordinance (Cap.1). The provision restricts the ambit of the term to the superior courts: 'the Chief Justice, a judge of the Court of Final Appeal, the Chief Judge, a Justice of Appeal, a judge of the Court of First Instance, a recorder of the Court of First Instance, and a deputy judge of the Court of First Instance'. The Legislative Council has attached high importance to superior court judges and the role they play in the legal system and the community. This coheres with the established common law doctrine that only superior court judges, empowered to develop case law principles, enjoy full immunity,[175] whereas district judges and magistrates enjoy only certain formal protections.[176]

6.074 The resumption of Chinese sovereignty has not changed how superior court judges are to be addressed in Hong Kong courts: as 'My Lord'/'My Lady' or 'Your Lordship/Your Ladyship'. Most are styled 'The Honourable Mr Justice' or 'The Honourable Madam Justice', regardless of actual title, for example, permanent judge; the Chief Justice is styled 'The Honourable Chief Justice'. Judges who have been knighted are styled 'The Honourable Sir [full name]' or 'The Honourable Dame [full name]'. Members of the Privy Council are entitled to use the honorific title 'The Right Honourable'. Members of the House of Lords and/or the Supreme Court of the United Kingdom are styled 'The Right Honourable The Lord [surname]' or 'The Right Honourable The Lady [surname]'.

(a) Chief Justice of Hong Kong

6.075 The office of Chief Justice (CJ) is the oldest superior judgeship in Hong Kong. John Hulme became the first Chief Justice in 1844, when the Supreme Court was established to exercise the jurisdiction of the royal courts in the young Crown Colony. The Chief Justice sat as the only judge of that court until 1873 when he was joined by an additional judge. Several decades later, an appellate court, known as the Full Court at that time, was set up pursuant to the Full Court Ordinance 1912. It comprised three Supreme Court judges and heard appeals from the Supreme Court.[177] The Chief Justice was *ex officio* President of the Full Court.[178] The Chief Justice has been a widely respected office from the earliest days of Hong Kong's history. In his 1877 memorandum, former Attorney-General Sir Julian Pauncefote recounted:

> [T]he slightest appearance of interference with the Chief Justice [of Hong Kong] in the way of pressure in the discharge of his functions is the signal for violent attacks by the public press, indignation meetings, petitions and demonstrations

[175] 'Full immunity' refers to full immunity of superior court judges from civil suits against acts that they perform in the course of exercising their judicial functions. Superior court judges, for instance, cannot be sued for negligence or defamation whilst discharging their judicial duty, even with bad faith. Inferior court judges, though generally immune from civil suits in the course of performing their duties, remain susceptible to civil lawsuits against judicial acts done maliciously and without reasonable and probable cause (eg in bad faith), see, Magistrates Ordinance (Cap.227), s.125 and District Court Ordinance (Cap.336), s.71(2).
[176] BFC Hsu, 'Judicial Independence under the Basic Law' (2004) 34 HKLJ 280, 300.
[177] P Wesley-Smith, *Constitutional and Administrative Law in Hong Kong Volume 1* (China and Hong Kong Law Studies, 1987) 205.
[178] J Rear, 'The Law of the Constitution' in K Hopkins (ed), *Hong Kong: The Industrial Colony* (Oxford University Press, 1971) 339, 339.

of every kind. The community look to the Chief Justice as their protector against any attempt by the Governor to trample on their liberties.[179]

6.076 The Supreme Court Ordinance (Cap.4), enacted in 1976, aligned the local court structure with that of England and Wales. The Full Court was renamed the Court of Appeal and was endowed with permanent members called Justices of Appeal after the Lord Justices of Appeal in England and Wales. The Supreme Court, the oldest superior court in Hong Kong, was renamed the High Court of Justice and its judges were called High Court judges. To symbolise continuity, both Courts were organised under an umbrella body called the Supreme Court of Hong Kong and the Chief Justice retained the Presidency of both until the Handover.

6.077 On 1 July 1997, Andrew Li QC became the 22nd Chief Justice of Hong Kong, and the first President of the Court of Final Appeal. To avoid confusion of status with the Court of Final Appeal, the Supreme Court was rebranded the High Court of the Hong Kong Special Administrative Region, while the High Court of Justice (the original Supreme Court of 1844) became the Court of First Instance of the High Court and the ex-Court of Appeal the Court of Appeal of the High Court.

6.078 The Chief Justice is one of Hong Kong's most influential figures. He is second only to the Chief Executive in ceremonial precedence.[180] He is empowered by the Basic Law framework to:

(1) put on record an incoming Chief Executive's declaration of assets;[181]

(2) form and chair an independent investigation committee in the event that a Chief Executive declines to resign after the Legislative Council has passed a motion to investigate him on a charge of serious breach of the law or a dereliction of duty;[182]

(3) recommend to the Chief Executive candidates for appointment to tribunals established to investigate allegations against sitting judges before they can be dismissed;[183] and

(4) join with the Chief Executive and the President of the Legislative Council to nominate candidates for appointment by the Standing Committee of the National People's Congress as the Hong Kong members of its Basic Law Committee.[184]

[179] Cited in D Clark, *Gunboat Justice: British and American Law Courts in China and Japan (1842–1843) Volume 1: White Man, White Law, White Gun (1842–1990)* (Earnshaw Books, 2015) 190.
[180] Protocol Division of the Government Secretariat, *HKSAR Precedence List* (June 2022), available at https://www.protocol.gov.hk/files/Precedence_List_en.pdf (accessed on 20 June 2022).
[181] Hong Kong Basic Law, art.47(2).
[182] *Ibid.*, art.73(9).
[183] *Ibid.*, art.89(1).
[184] Decision of the National People's Congress Approving the Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress (Adopted at the 3rd Session of the 7th National People's Congress on 4 April 1990).

6.079 The Chief Justice of the Court of Final Appeal is Head of the Judiciary. He is charged with administering the courts system as a whole.[185] He is empowered at any time to appoint and dismiss deputy High Court judges,[186] deputy district judges,[187] deputy magistrates and deputy special magistrates[188] and to request a High Court judge of the Court of First Instance to sit as an additional judge on the Court of Appeal.[189] He is spokesman for the Judiciary[190] and the defender of judicial independence vis-à-vis the Government and Legislative Council.[191] He is assisted administratively by the heads of courts below him — the Chief Judge of the High Court, the Chief District Judge and the Chief Magistrate — as well as the head of Judiciary Administration. He also oversees the Judicial Institute, an administrative body whose history can be traced back to 1988, to organise conferences for and provide training to judges. On the occasion of Chief Justice Ma's retirement, Lord Neuberger of Abbotsbury, non-permanent judge of the Court of Final Appeal, former President of the Supreme Court of the United Kingdom, reflected on the qualities that make a good Chief Justice:

> The role of a Chief Justice is an important one in any jurisdiction: they play a pivotal and leading role in establishing, supporting and justifying the rule of law, which is fundamental to any civilised society. A Chief Justice must not only preside in court and give judgments in important cases, but they must also lead and administer the judiciary, understand the needs of government, and explain the law and court procedures to the public — and indeed, on occasion, to the government. The role therefore requires many qualities — intelligence, articulacy, integrity, bravery, authority, diplomacy and sensitivity. . . . Outside court, perhaps the most fundamentally important function of a Chief Justice is to support and explain the rule of law and in particular to uphold and defend the independence of the judiciary. This is a particularly demanding and important task in Hong Kong, where there has been much political change over the past twenty-five years and where many sections of the media and some public figures on both sides of the debate do not hold back from criticising the judiciary in very blunt terms.[192]

6.080 The Chief Justice is the President of the Court of Final Appeal. As President of the Court of Final Appeal,[193] the Chief Justice is responsible for conducting the court's business,[194] for example, by selecting which local and/or overseas non-permanent judges will sit in each case.[195] The Chief Executive may appoint the most senior permanent judge of the Court of Final Appeal to be the Acting Chief Justice in the event the Chief Justice is ill or absent for any cause, who is competent to exercise all

[185] Hong Kong Court of Final Appeal Ordinance (Cap.484), s.6(2).
[186] High Court Ordinance (Cap.4), s.10(1) and 10(4).
[187] District Court Ordinance, s.7(1) and 7(4).
[188] Magistrates Ordinance, s.5A(1) and 5A(3).
[189] High Court Ordinance, s.5(2).
[190] SNM Young, Y Ghai and AM Da Roza, 'Role of the Chief Justice' in SNM Young and Y Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press, 2014) 225, 225–252.
[191] *Farewell Sitting for the Honourable Mr Justice Andrew Li CJ* (2010) 13 HKCFAR 128, 128–129.
[192] *Farewell Sitting for the Honourable Mr Justice Geoffrey Ma CJ* (2021) 24 HKCFAR 1, 2–3
[193] Hong Kong Court of Final Appeal Ordinance, s.16(2).
[194] *Ibid.*, s.47.
[195] *Ibid.*, s.16(1)(c).

the powers and functions of the Chief Justice.[196] The Chief Justice is also empowered to make subsidiary legislation under a plethora of statutes and issue practice directions to the rest of the Judiciary.[197]

6.081 Chief Justices tend to possess experiences and qualifications far exceeding the minimum statutory requirements. To be appointed Chief Justice, a candidate must be a permanent resident eligible for a passport of the Hong Kong Special Administrative Region with no right of abode in any foreign state[198] and be either a superior court judge or a barrister who has practised as a barrister or solicitor in Hong Kong for a period of no less than 10 years.[199] Prior to his appointment to the Court of Final Appeal, Chief Justice Ma held at various times the positions of Chief Judge of the High Court, Justice of Appeal and High Court judge. As the former Geoffrey Ma QC SC, he was a leading silk. The career path of Chief Justice Cheung differed from his two most recent predecessors. The first graduate of a Hong Kong law school[200] and holder of a master's degree from a law school in the United States[201] to hold office as the Head of the Hong Kong Judiciary, Cheung was in private practice between 1985 and 2001, after which he was appointed a district judge and deputy High Court judge in 2001, and a High Court judge in 2003, during which he served as a probate judge and later the judge in charge of constitutional and administrative law cases. In June 2011, he succeeded Ma as the Chief Judge of the High Court, and in January 2021, he succeeded Ma again, this time as Chief Justice of the Court of Final Appeal.

(b) Permanent judge of the Court of Final Appeal

6.082 A permanent judge (PJ) is a full-time judge of the Court of Final Appeal. There are three permanent judges on the Court at any one time. The qualifications required of an appointee to a permanent judgeship are identical to those of an appointee to the Chief Justiceship,[202] except that one may hold a right of abode in a foreign state. As a matter of constitutional convention, permanent judges are appointed from amongst the judges of the Court of Appeal.

6.083 Unlike justices of the Supreme Court of the United States, who are appointed for life, the permanent judges of the Court of Final Appeal hold office until their statutory retirement age. The ordinary retirement age of the Chief Justice, a permanent judge, a Justice of Appeal and a High Court judge is 70 years.[203] With the Chief Executive's approval, a permanent judge may extend his time in office for up to two periods of three years (six years, total) beyond the age of 70 years.[204] There was some controversy

196 *Ibid.*, s.5(6).

197 Examples of these statutes include the Bankruptcy Ordinance (Cap.6), the Probate and Administration Ordinance (Cap.7), the Labour Tribunal Ordinance (Cap.25), the Trustee Ordinance (Cap.29), the Mental Health Ordinance (Cap.155), the Legal Practitioners Ordinance (Cap.159) and the Domestic and Cohabitation Relationships Violence Ordinance (Cap.189); see, PY Lo, *The Hong Kong Basic Law* (LexisNexis, 2011) 507.

198 Hong Kong Basic Law, art.90.

199 Hong Kong Court of Final Appeal Ordinance, s.12(1).

200 Bachelor of Laws (LLB), The University of Hong Kong.

201 Master of Laws (LLM), Harvard Law School.

202 *Ibid.*, s.12(1)(1A).

203 Pension Benefits (Judicial Officers) Ordinance (Cap.401), s.6.

204 Hong Kong Court of Final Appeal Ordinance, s.14(2)(a).

in 2012 when Mr Justice Bokhary was denied permission to extend his tenure as permanent judge but then was replaced by an even older judge, Mr Justice Tang.[205]

(c) Non-permanent judge of the Court of Final Appeal

6.084 A non-permanent judge (NPJ) is a part-time judge of the Court of Final Appeal. There are two types of non-permanent judges: 'non-permanent Hong Kong judges'[206] and 'Judges from other common law jurisdictions'.[207]

6.085 As a matter of convention, all non-permanent Hong Kong judges ever appointed have previously attained high judicial office, the lowest of which was nothing less than membership of the Court of Appeal. One is eligible for appointment by the Chief Executive upon the recommendation of the Judicial Officers Recommendation Commission as a non-permanent Hong Kong judge of the Court of Final Appeal if one is a retired judge of the Court of Final Appeal or the Court of Appeal, an incumbent Justice of Appeal or a barrister who has practised as a barrister or solicitor in Hong Kong for a period of no less than 10 years.[208]

6.086 The Basic Law provides that overseas common law judges are to be appointed to the Court of Final Appeal. Article 82 of the Basic Law was adopted to effectuate a continuity of common law expertise of the highest calibre after the resumption of Chinese sovereignty, shoring up the confidence of residents and international business in Hong Kong's legal system, hence also its investment climate.[209] The Court operates as a 'collegiate institution', in the sense that overseas judges have plenty of opportunities to have any dimension of Hong Kong culture explained to them by their local colleagues.[210] According to Mr Justice Fok, non-permanent judges from overseas common law jurisdictions are neither representatives of their countries nor foreign judges who owe no allegiance to the Hong Kong Special Administrative Region when they discharge their duties as judges of the Court of Final Appeal. On the contrary:

> the judgment of an overseas non-permanent judge is but one voice out of five as far as the determination of an appeal is concerned. That they are Hong Kong judges is also reinforced by the fact that, upon taking up appointment, in practice on the first occasion on which the overseas non-permanent judge comes to Hong Kong to sit, he or she will attend before the Chief Executive to take the same judicial oath taken by all Hong Kong judges 'to uphold the Basic Law', to 'bear allegiance to the Hong Kong Special Administrative Region' and to serve it 'conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit'. . . . So it bears emphasising that the non-permanent judge, although he or she has acquired that status because of their pre-eminence in

205 D Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press, 2nd ed 2016) 164.

206 Hong Kong Court of Final Appeal Ordinance, s.8.

207 *Ibid.*, s.9.

208 *Ibid.*, s.12(3).

209 SNM Young and A Da Roza, 'The Judges' in SNM Young and Y Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press, 2014) 253, 263.

210 S Hargreaves, 'Canaries or Colonials? The Reduced Prominence of the "Overseas Judges" on Hong Kong's Court of Final Appeal' (2021) 16 *Asian Journal of Comparative Law* 187, 195.

another common law jurisdiction, is appointed to be a Hong Kong judge and to discharge a constitutional function as such.[211]

6.087 There are clearly defined statutory prerequisites that must be fulfilled prior to an appointment to an overseas non-permanent judgeship. Section 12(4) of the Hong Kong Court of Final Appeal Ordinance (Cap.484) provides that to be eligible for appointment as an overseas non-permanent judge, one must be an incumbent or retired judge of a court of unlimited civil and criminal jurisdiction, not ordinarily resident in Hong Kong and has never sat on a Hong Kong court.

6.088 There is no retiring age for either category of non-permanent judges. Sir Anthony Mason was 90 years old when he retired from the Court of Final Appeal bench in 2015. They may serve an unlimited number of three-year terms, so long as they continue to be appointed by the Chief Executive upon the recommendation of the Chief Justice and with the endorsement of the Legislative Council.[212] The maximum number of non-permanent judges at any one time may not exceed 30.[213]

6.089 There is a rule against judges of the Court of Final Appeal resuming legal practice after retirement. All former judges of the Court of Final Appeal (the Chief Justice, the permanent judges and the non-permanent judges) are not entitled to return to legal practice as a barrister or solicitor in Hong Kong.[214] This rule avoids potential conflicts of interest and promotes the independent image of the highest court of the land.

6.090 As at June 2022, the list of overseas non-permanent judges included (*inter alios*):

(1) Former Justices of the High Court of Australia:[215] Mr Justice Robert French, Mr Justice Murray Gleeson and Mr Justice William Gummow (French and Gleeson are also former Chief Justices of Australia).

(2) Former Chief Justice of Canada: Madam Justice Beverley McLachlin.

(3) Former Law Lords or Justices of the Supreme Court of the United Kingdom: Lord Collins of Mapesbury; Lord Hoffmann; Lord Neuberger of Abbotsbury; Lord Phillips of Worth Matravers; Lord Sumption and Lord Walker of Gestingthorpe (Phillips and Neuberger are also former Presidents of the Supreme Court of the United Kingdom).

6.091 Eminent overseas jurists who served on the Court of Final Appeal as non-permanent judges include: Lord Cooke of Thorndon (1997–2006), the first New Zealand judge to be made a Law Lord of the United Kingdom; Sir Anthony Mason (1997–2015), the ninth Chief Justice of Australia; Sir Gerard Brennan (2000–2012), the 10th Chief Justice of Australia; Lord Woolf of Barnes (2003–2012), the 93rd Lord Chief Justice

[211] J Fok, 'Foreign Judges on Domestic Courts Keynote Address — Judges from Other Common Law Jurisdictions in the Hong Kong Court of Final Appeal' (3 May 2021).

[212] SNM Young and A Da Roza, 'The Judges' in SNM Young and Y Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press, 2014) 253, 256–257.

[213] Hong Kong Court of Final Appeal Ordinance, s.10.

[214] *Ibid.*, s.13.

[215] The High Court of Australia, despite its name, is the highest court of that jurisdiction, vested with the power of final adjudication.

of England and Wales; Baroness Hale of Richmond (2018–2021), the third President of the Supreme Court of the United Kingdom and the first woman to hold that office; Lord Reed of Allermuir, the fourth President of the Supreme Court of the United Kingdom and Lord Hodge, fifth Deputy President of the Supreme Court of the United Kingdom.

6.092 Judges appointed to the Court from such jurisdictions are of the highest international standing. The overseas non-permanent judges fly in to Hong Kong to sit on the Court's five-judge panel as scheduled in one-month stints.[216] Their appointments have played an important part in establishing the excellent reputation of the Court. They have contributed significantly to the Court's jurisprudence in policy domains such as corporate governance, finance, property, rates and valuations, taxation and trade.[217] The presence of overseas non-permanent judges reflects the confidence placed in Hong Kong's judicial system by other major common law jurisdictions. These have been important factors in preserving confidence in the independence of the judiciary in Hong Kong.[218] In *Chen Li Kung v Ting Lei Miao*,[219] Lord Cooke of Thorndon NPJ remarked:

> Having regard to those provisions and to the purposes of the Basic Law as a whole, I think that it may be inferred that, in appropriate cases, a function of a judge from other common law jurisdictions is to give particular consideration to whether a proposed decision of this Court is in accord with generally accepted principles of the common law.

6.093 On the occasion of his retirement from the bench, Ma CJ offered his own defence of the continued appointment of overseas non-permanent judges:

> Their presence on Hong Kong's highest court reflects the fact, as stipulated by the Basic Law, that Hong Kong is a common law jurisdiction and, more important, a jurisdiction that is founded on the rule of law and the independence of the judiciary. The contribution of the Non-Permanent Judges to Hong Kong has been continuously applauded by all those involved in the law, and supported by the actions and words of the executive and the legislature. Quite simply, their continued presence in Hong Kong is beneficial to the community.[220]

6.094 Less than a year before he was elected the Chief Executive, Chief Secretary John Lee explained to the Legislative Council the Government's understanding of the importance of overseas non-permanent judges to the Region:

> [Incumbent non-permanent judges from other common law jurisdictions] are all judges of the most eminent standing in the entire common law community,

[216] See, SNM Young and A Da Roza, 'The Judges' in SNM Young and Y Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press, 2014) 253.

[217] H Litton, *Reflections on Democracies, Autocracies and other Fallacies* (Kin Kwok Printing Press, 2022) 42.

[218] JMM Chan, 'Civil Liberties, Rule of Law, and Human Rights: The Hong Kong Special Administrative Region in Its First Four Years' in S Lau (ed), *The First Tung Chee Hwa Administration: The First Five Years of the Hong Kong Special Administrative Region* (The Chinese University Press, 2002) 89, 94.

[219] (2000) 3 HKCFAR 9, 23.

[220] (2021) 24 HKCFAR 1, 8.

to consider an *ad hoc* admission where no local counsel or only a nominal local counsel is briefed together with overseas counsel: *Re Perry QC* [2016] 2 HKLRD 647, per McWalters JA at [24(xv)].

8.035 In *Re Robertson QC*,[73] the Court of First Instance (Barma JA) dismissed an application from Geoffrey Robertson QC, 'an eminent Queen's Counsel of very high standing, with considerable expertise in public law, criminal law and human rights law'[74] for *ad hoc* admission for the purpose of representing a barrister in disciplinary proceedings against him in the Barristers Disciplinary Tribunal. Barma JA set out the factors that he took into account:

> In essence, the overarching question is whether it is in the public interest to admit overseas counsel in the particular case under consideration, and in coming to a conclusion on this question, the court will take into account (1) the public interest, which has different facets (such as the need to develop and maintain a strong local bar, the need for litigants so far as possible to have the right to representation of their choice, and the need for the courts to have adequate assistance from the lawyers appearing before them) which may sometimes conflict with one another; (2) the level of court in which overseas counsel would appear; (3) the importance of the legal issues to Hong Kong's jurisprudence; (4) the complexity and difficulty of the case; (5) the availability of suitable local counsel and (6) the suitability of the overseas counsel seeking admission.[75]

8.036 Solicitors handle the gamut of legal matters from conveyancing, probate and matrimony to corporate finance, contracts and intellectual property. It is 'difficult to generalise about life in this branch of the profession', because 'the range of work that might be undertaken by a practicing solicitor is very disparate'.[76] Solicitors generally spend less time in advocacy than barristers, in preference to advising clients, writing letters and preparing legal documents, wherein they are assisted by paralegals[77] and legal executives.[78] Whilst having rights of audience (the right to advocate for a client in a court or tribunal)[79] in the Magistrates' Courts and in the District Court, and in 'chambers hearings' in the Court of First Instance and the Court of Appeal, solicitors are debarred from pleading in open court before the Court of First Instance, the Court of Appeal and the Court of Final Appeal. Note that solicitors are not bound by the

[73] [2021] 5 HKLRD 602

[74] *Ibid.*, 606.

[75] *Ibid.*, 605.

[76] ATH Smith, *Glanville Williams: Learning the Law* (Sweet & Maxwell, 17th ed 2020) 227.

[77] A Gillespie and S Weare, *The English Legal System* (Oxford University Press, 8th ed 2021) 368: there is 'no single definition' for a paralegal, whose work ranges from 'photocopy[ing] documents and prepar[ing] extremely basic documentation' to 'assist[ing] in the execution of legal work'; not a few paralegals consider their positions as 'a stepping stone' to a more permanent position as a legal practitioner.

[78] Practice Direction — 14.1, s.2(j): a legal executive, who has completed an accredited diploma, such as the Professional Diploma of Legal Executive Studies from the Chartered Institute of Legal Executives, enjoys limited rights of audience, for instance, before a master in chambers on an uncontested application or in a three-minute hearing.

[79] M Zander, *Cases and Materials on the English Legal System* (Cambridge University Press, 10th ed 2007) 784.

cab-rank rule that dispose of the right to pick and choose their clients, subject to several ethical requirements.[80]

8.037 Solicitors enter into contract with their clients and may be sued for professional negligence. The Solicitors' (Professional Indemnity) Rules (Cap.159M, Sub.Leg.) compel them to maintain insurance to indemnify civil liability arising from their work in private practice. In *Rondel v Worsley*,[81] Lord Denning MR explained the differences between solicitors and barristers in this regard:

> The position of a solicitor is quite distinguishable from that of a barrister. He is not bound to act for anyone who asks him. He can pick and choose. He can sue for his fees. He can, and does, make a contract with every client who employs him. He is under a contractual duty to use care: and this extends to his conduct of a cause as well as an advocate as anything else. If he is negligent he can be sued. The action lies in contract, not in tort — see *Groom v Crocker*. So damage need not be proved. But, even so, the cases against solicitors do not encourage the extension of them to barristers. One is *Hatch v Lewis*. The other is *Scudder v Prothero & Prothero* in March, 1966. Those cases serve as warnings to be heeded rather than as precedents to be followed. In each of them a man, who had been convicted and sentenced, turned round on his solicitor and blamed him for not calling witnesses. In each the case developed into a retrial of the criminal case. In each case the solicitor was technically at fault: because the witnesses should have been called. But in each case the man was only awarded nominal damages, because he was in fact guilty of the offence and had not suffered any damage by being convicted. So the solicitors were involved in the great expense of defending themselves at the suit of a guilty man — and a great deal of time taken up in retrying the case — all to the public disadvantage. Such cases may be unavoidable in the present state of the law when the solicitor makes a contract and is under a legal obligation to his client. But they should not be extended to a barrister who makes no contract and is not under a legal obligation.

8.038 Consider major principles of professional ethics for solicitors. *The Hong Kong Solicitor's Guide to Professional Conduct*, among other things, demands solicitors and registered foreign lawyers as follows:

> (1) 'A solicitor shall not, in the course of practising as a solicitor, do or permit to be done on his behalf anything which compromises or impairs or is likely to compromise or impair —
>
> (a) his independence or integrity;
>
> (b) the freedom of any person to instruct a solicitor of his choice;
>
> (c) his duty to act in the best interests of his client;

[80] See, *The Hong Kong Solicitors' Guide to Professional Conduct* (The Law Society of Hong Kong, 3rd ed 2013) Volume 1, para.5.01.

[81] [1967] 1 QB 443, 504–505.

(d) his own reputation or the reputation of the profession;

(e) a proper standard of work; or

(f) his duty to the court'.[82]

(2) 'A solicitor must be both honest and candid when advising a client and give objective advice'.[83]

(3) 'A solicitor who has accepted instructions on behalf of a client is bound to carry out those instructions with diligence and must exercise reasonable care and skill'.[84]

8.039 Solicitors are allowed to form general partnerships pursuant to the Partnership Ordinance (Cap.38). Each partner is jointly and severally liable with other partners for all debts, liabilities and obligations of partnership incurred while serving as partner. On 1 March 2016, the Legal Practitioners (Amendment) Ordinance 2012 (No. 22 of 2012) introduced a new partnership arrangement for eligible law firms: limited liability partnerships (LLPs), as a special type of partnership available for law firms in Hong Kong.[85] Unlike general partnerships, LLP shields innocent partners from personal liability for any liability arising from the provision of professional services by the LLP law firm due to default by a partner, employee, agent or representative of that firm.

8.040 Law firms in Hong Kong may be loosely classified into four categories:

(1) International firms include the Magic Circle firms of London, other English firms, and firms from the United States.

(2) Foreign firms from jurisdictions like the Cayman Islands and Australia.

(3) The big home-grown Hong Kong firms.

(4) Boutique firms specialising in niche areas and still smaller local firms.[86]

8.041 As at May 2022, there were 939 local law firms and 83 registered foreign law firms.[87] Competition at every level in the legal services market is intense; the upshot is that senior solicitors, especially partners, invest considerable time in client care and business development,[88] the latter of which refers to the promotion and marketing of the firm to local, regional, national and international businesses.[89] Smaller firms and sole practitioners tend to undertake a wide array of work such as administering estates, conveyancing, drafting wills and the offering of legal advice on employment matters,

[82] *The Hong Kong Solicitors' Guide to Professional Conduct* (The Law Society of Hong Kong, 3rd ed 2013) Volume 1, para.1.01.

[83] *Ibid.*, para.5.18.

[84] *Ibid.*, para.5.12.

[85] See, H Chu, 'From the Secretariat' (2016) 3 *Hong Kong Lawyer* 10.

[86] *Ibid.*

[87] HKTDC Research, 'Legal Services Industry in Hong Kong' (9 June 2022), available at https://research.hktdc.com/en/article/MzEzODc5NTk5 (accessed on 1 July 2022).

[88] ATH Smith, *Glanville Williams: Learning the Law* (Sweet & Maxwell, 17th ed 2020) 228.

[89] S Wilson, H Rutherford, T Storey and N Wortley, *English Legal System* (Oxford University Press, 4th ed 2020) 333.

and claims arising from the purchase of faulty products or services, with the main income streams will being drawn from fees in relation to conveyancing and litigation, particularly criminal litigation.[90]

8.042 To qualify as a solicitor or barrister in Hong Kong, a prospect normally must pass through three stages of training: academic, vocational and on-the-job. One requires a qualifying law degree, for example, a Bachelor of Laws (LLB) or a Juris Doctor (JD) from a Hong Kong or approved Commonwealth University, having passed certain specified subjects, then earns a Postgraduate Certificate in Laws (PCLL) from a Hong Kong law school. Subject to conditions and requirements in the Legal Practitioners Ordinance and relevant subsidiary legislation,[91] those from overseas common law jurisdictions are permitted to qualify as barristers or solicitors by sitting and passing the Barristers Qualification Examination or the Overseas Lawyers Qualifications Examination, respectively. The Law Society has since 2012 advocated the introduction of a 'Common Entrance Examination' to be set and marked by the Society, and taken by those who already completed the PCLL as an additional requirement for admission to the solicitors' branch of the profession.[92] This proposal was met with strong opposition by many stakeholders, including the Bar Association.[93] On 9 February 2022, the Law Society announced that it was 'in the process of formulating the details of the proposals on the examinations required, set or approved under rule 7(a) of the Trainee Solicitors Rules Cap. 159J to qualify for admission as a solicitor of the High Court', the implementation of which 'will not be earlier than the academic year 2024/25'.[94]

8.043 All prospective barristers must serve a one-year pupillage attached to practicing barristers known as 'pupil masters'. After completing the first six months of his pupillage, a prospect may apply to the Court of First Instance for admission as a barrister and then obtain a limited practicing certificate. On completion of pupillage, a barrister may apply to the Bar Council for a certificate granting unrestricted rights of audience at all levels of court.

8.044 Prospective solicitors must serve a two-year traineeship attached to practising solicitors called 'principals'. Unlike pupil barristers, trainee solicitors are paid a monthly salary, and upon completion of traineeship may apply to the Court of First Instance for admission. Then, they may apply to the Law Society for a practicing certificate, which must be renewed annually.

8.045 Lawyers from foreign jurisdictions, employed by foreign law firms in Hong Kong, are required to register with the Law Society every year to practise law in their qualifying jurisdiction. As at May 2022, there were 1,449 registered foreign lawyers in Hong Kong.[95] Registered foreign lawyers are also regulated by the Law Society

[90] *Ibid.*

[91] See, Barristers (Qualification for Admission and Pupillage) Rules (Cap.159AC, Sub.Leg.) and Overseas Lawyers (Qualification for Admission) Rules (Cap.159Q, Sub.Leg.).

[92] JMM Chan, 'The Law Society's Power to Introduce a Common Entrance Examination' (2018) 48 HKLJ 1, 1–2.

[93] *Ibid.*

[94] Law Society of Hong Kong, 'Statement by The Law Society of Hong Kong on Proposals for the Law Society Examination and the Common Entrance Examination under rule 7(a) of the Trainee Solicitors Rules Cap. 159J' (9 February 2022).

[95] HKTDC Research, 'Legal Services Industry in Hong Kong' (9 June 2022), available at https://research.hktdc.com/en/article/MzEzODc5NTk5 (accessed on 1 July 2022)..

of dishonesty, bankruptcy, or death;[108] establish the rules of professional conduct and provide for the training as well as continuing education of solicitors.[109]

8.051 The Solicitors' Disciplinary Tribunal is an administrative tribunal responsible for maintaining the discipline of solicitors and registered foreign lawyers. In *Keung Kin Wah v Law Society of Hong Kong*,[110] the Court of First Instance (Anderson Chow JA) neatly summed up the composition of the Tribunal:

> Under s.9(1), the Chief Justice shall appoint a Solicitors Disciplinary Tribunal Panel consisting of not more than 120 practising solicitors of at least 10 years' standing, not more than 10 foreign lawyers and not more than 60 lay persons who are not connected in any way with the practice of law. Under s.9(4), the Chief Justice shall appoint a solicitor as the Tribunal Convenor.

8.052 Section 10 of the Legal Practitioners Ordinance sets out the powers of the Tribunal. It has power to inquire into and investigate the conduct of any person in respect of which it was appointed and make orders at the conclusion of an inquiry which include striking the name of the solicitor from the roll of solicitors, suspending him from practice, imposing a fine and so on. Section 11 deals with the 'ancillary powers' of the Tribunal. An excellent summation of the Tribunal's powers and functions is found in the judgment of the Court of Appeal (Le Pichon JA) in *Tse Wai Chun v Solicitors Disciplinary Tribunal*:[111]

> The Tribunal Convenor is required to appoint members from the Panel and constitute a 'Solicitors Disciplinary Tribunal' to inquire into and investigate a submission made to it in two situations. It is not a matter of discretion. First, under s.8A(1), if the Council of the Law Society (the Council) considers that a solicitor or foreign lawyer may be unfit to practise, it may appoint a person as an inspector to inquire into and report on the matter. After considering the report and representations on behalf of the solicitor or foreign lawyer involved, if the Council considers that he is unfit to practise, the Council is obligated (under sub-s.(3)) to submit the matter to the Tribunal Convenor. Second, under s.9A(1), where the Council considers that the conduct of a solicitor or foreign lawyer or their employees should be inquired into or investigated as a result of a complaint being made to it or otherwise, the Council must also submit the matter to the Tribunal Convenor.

(d) Fusion of the branches of the legal profession

8.053 Recent developments have in some ways blurred the distinction between barristers and solicitors. Nowadays many solicitors specialise, whereas some barristers choose general practice and eschew advocacy.[112] What is more, barristers may now take

[108] *Ibid.*, ss.26A, 26B, 26C and 26D.
[109] *Ibid.*, s.73.
[110] [2021] 5 HKLRD 413, 426.
[111] [2002] 3 HKLRD 712, 720–721.
[112] MJ Fisher, *The Legal System of Hong Kong* (Blue Dragon, 2010) 150.

instructions directly from professionals or work as in-house counsel. In fact, the legal profession is unified in a number of leading common law jurisdictions, such as Canada, the United States and Singapore. Moreover, even in Hong Kong, any legal officer has 'all the rights of barristers and solicitors' in relation to 'any matter in which the Government is interested'.[113]

8.054 Barristers' and solicitors' attitudes to fusion have reversed. In 1993, the Law Society had put forth a proposal to merge the separate branches by permitting barristers direct access to lay clients and solicitors the rights of audience in the superior courts.[114] The Society justified its proposal with these reasons:[115]

(1) *Reduction of fees*: the total fees chargeable to the client will be reduced if all legal practitioners have unlimited rights of audience and work hand in hand in fully integrated teams.

(2) *Greater pool of advocates:* clients will have more choice of advocates to represent them if solicitors have rights of audience in the superior courts.

(3) *Improved continuity in handling cases:* legal services will no longer be segregated into paperwork and advocacy; the same lawyer(s) can represent a client from beginning to end. The improved continuity in handling cases will reduce the miscommunications and duplication of work that bedevil a split profession. Indeed, intuitively, legal costs will be reduced if fewer lawyers are required for each case.[116]

8.055 The Bar's position, articulated in 1994 and still current, was that a professional merger would lead to the following losses:

(1) *Independence of the bar:* barristers as self-employed legal practitioners do not normally maintain long-standing relationships with lay clients as do many solicitors who often depend on regular clientele for conveyancing or commercial work. On this view, barristers should be freer from conflicts of interest. Few would disagree that the Bar has played a fiercely independent role in safeguarding judicial independence and the rule of law.[117]

(2) *The cab-rank rule:* barristers are obligated to provide legal services even to unpopular defendants.

(3) *Informed choice of advocates:* professional division encourages solicitors to make informed and conscientious choices of the right barrister on behalf of clients as the solicitor is barred from selecting himself or his colleagues

[113] Legal Officers Ordinance (Cap.87), s.3(1).
[114] JD Ho, 'The Legal System: Are the Changes Too Little, Too Late?' in DH Mc Millen and S Man (eds), *The Other Hong Kong Report 1994* (The Chinese University Press, 1994) 9, 17.
[115] RFH Wong, 'Right of Audience' (16 September 1994).
[116] S Wilson, H Rutherford, T Storey and N Wortley, *English Legal System* (Oxford University Press, 4th ed 2020) 344.
[117] W Tam, *Legal Mobilization under Authoritarianism: The Case of Post-Colonial Hong Kong* (Cambridge University Press, 2013) 47.

from the same firm, without due regard to relevant factors like experience of advocacy.

(4) *Independent assessment of competence:* the ability of barristers to actually appear before the superior courts depends in large part on the assessment of solicitors, which serves as a competitive vetting mechanism that ensures that the vetted actually deserve higher rights of audience.[118]

8.056 The Judiciary nonetheless explored other options for promoting greater fusion of the separate branches of the legal profession. The Chief Justice established, on 24 June 2004, a Working Committee, chaired by Mr Justice Bokhary, '[t]o consider whether solicitors' existing rights of audience should be extended and, if so, the mechanism for dealing with the grant of extended rights of audience to solicitors'. This led to the enactment of the Legal Practitioners (Amendment) Ordinance (No 2 of 2010) six years later, on 28 January 2010, to amend the Legal Practitioners Ordinance with effect from 1 July 2010, vesting in qualified solicitors higher rights of audience 'before the High Court and the Court of Final Appeal, whether in civil proceedings, criminal proceedings, or both'.[119] This step, importing the solicitor advocate qualification from the United Kingdom, is seen by some as 'the first step towards the fusion of the two professions'.[120] The Court of Appeal (Kwan V-P) disagreed:

> [T]he legislature did not discuss or decide that the professions of barristers and solicitor advocates should be fused. . . . The sustainability and the continued viability of a separate referral Bar was clearly recognised in the process of legislating for change. The introduction of solicitor advocates was only to remove the monopoly of barristers in respect of the rights of audience in the higher courts. The Bar remains a referral profession.[121]

8.057 The establishment of the solicitor advocate qualification has enabled a small number of qualified solicitors to argue cases before the superior courts like their counterparts at the Bar. A prospective solicitor advocate must have practised law for at least five years in a common law jurisdiction, including at least two years in Hong Kong.[122] In the three years immediately before application, he must have acquired sufficient litigation experience and suitability for the qualification.[123] Such applications are made to the Higher Rights Assessment Board, consisting of three superior court judges, three litigation solicitors, three Senior Counsel, a Department of Justice official and a lay person.[124] The Higher Rights of Audience Rules (Cap.159AK, Sub. Leg.), drawn up by the Board, entered into force on 22 June 2012. On 16 March 2019, the Chief Justice approved the Solicitor Advocates (Higher Rights of Audience Certificate) Rules (Cap.159AM, Sub.Leg.) made by the Council of the Law Society.

[118] RFH Wong, 'Right of Audience' (16 September 1994).
[119] Legal Practitioners Ordinance, s.39H(3).
[120] P Kaur, 'Legal Developments in Hong Kong in 2009–2010: Something for Everyone' (2011) 2 *City University of Hong Kong Law Review* 369, 378.
[121] *Re Simpson QC* [2021] 1 HKLRD 715, 729 (Kwan V-P).
[122] Legal Practitioners Ordinance, s.39I.
[123] *Ibid.*, s.39L(1)(b).
[124] *Ibid.*, s.39E.

As at June 2022, there were 90 solicitor advocates, 84 of whom had higher rights of audience in civil cases, six in criminal cases, whereas none in both civil and criminal cases.[125] Solicitor advocates are bound by a Code of Advocacy for Solicitor Advocates independent of and in addition to *The Hong Kong Solicitors' Guide to Professional Conduct*.[126] According to the Court of First Instance, as at July 2019, there were only four instances in which a solicitor advocate has exercised higher rights of audience to appear at trial, and 101 in which a solicitor advocate has been listed as appearing in any case.[127] Poon ACJHC thus inferred:

> [S]olicitor advocates as a whole in Hong Kong still do not frequently exercise the higher rights of audience and in any event very rarely in the context of trials in the High Court. We are still at a stage of the development where the role and number of solicitor advocates in Hong Kong is still relatively nascent.[128]

8.058 Considerable differences exist between solicitor advocates and barristers. In *Re Simpson QC*,[129] Lam V-P detailed the differences between solicitor advocates and barristers:

> Notwithstanding the legislative change in 2012, there are still important distinctions in the practice of a solicitor advocate and that of a barrister. Relevantly for present purposes, the Bar remains a referral profession and a barrister is expected to be uncompromisingly independent whilst solicitor advocate would usually practise in a solicitor firm which, in most cases, also acts as the instructing solicitor. Even though there are instances where a solicitor advocate is instructed by another firm of solicitors, in Hong Kong they are rare and special occasions. Thus, the availability of the service of a solicitor advocate to the general public is not the same as that of a barrister. Further, a solicitor advocate will not be deprived of the opportunity to work together with the overseas leader in cases where his firm is the instructing solicitor.

8.059 Like solicitors in general, solicitor advocates bear 'no positive duty . . . to accept any instructions',[130] though they are also required not to decline instructions on grounds specified in para.2.4.2(a)–2.4.2(d) of the Code of Advocacy for Solicitor Advocates, such as 'grounds relating to the race, colour, ethnic or national origins, creed, gender or sexual orientation of the client'. Kwan V-P added:

> Unlike barristers, solicitor advocates may form partnerships or be employed by solicitors' firms. They cannot represent different interests in the same matter if they are in the same firm with someone already advising another party on the

[125] Law Society of Hong Kong, 'List of Solicitor Advocates (Pursuant to Section 39Q of the Legal Practitioners Ordinance Cap.159, Laws of Hong Kong)' available at https://www.hklawsoc.org.hk/en/Serve-the-Public/List-of-Legal-Service-Providers/Solicitor-Advocates (accessed on 30 June 2022).
[126] Legal Practitioners Ordinance, s.39R.
[127] *Re Simpson QC* [2019] 5 HKLRD 441, 455.
[128] *Ibid.*
[129] [2021] 1 HKLRD 715, 718 (Lam V-P).
[130] *Ibid.*, 730.

Law Society of Hong Kong[140] and *Secretary for Justice v Florence Tsang Chiu Wing*.[141] However, in *A v Commissioner of Police*,[142] the Court of First Instance (Alex Lee J) noted:

> [P]rivilege does not attach to communications between lawyer and client if the purpose of the client in seeking legal advice is to facilitate criminal or fraudulent conduct: *R v Cox and Railton*. Therefore, if a client applies to a legal adviser for advice intended to facilitate or to guide the client in the commission of a crime or fraud, the legal adviser being ignorant of the purpose to which his advice is wanted, the communication between the two would not be privileged: *Citic Pacific Ltd v Secretary for Justice*. The Court may exercise its power to order disclosure if there is a *prima facie* case that the fraud or crime existed and that the documents concerned came into existence as part of the fraud or crime: see *Citic Pacific Ltd v Secretary for Justice*, citing *R v Gibbins*.

3. Funding Legal Services

(a) Overview

8.065 Funding legal services is an unignorable facet of the rule of law. It is one thing to have legal rights and another entirely to have the resources to vindicate them through the legal services provided by barristers and solicitors,[143] for '[m]oney shapes one's ability to access justice'.[144] This issue is especially acute given that litigation costs in Hong Kong are 'admittedly on the relatively expensive side', and that at least one party in over 30 per cent of civil trials before the Court of First Instance and roughly half of all civil trials in the District Court are unrepresented.[145] The greater use of the Chinese language in the legal system cannot compensate for the limited legal knowledge and linguistic shortcomings of unrepresented litigants.[146] A Resource Centre for Unrepresented Litigants operated by the Judiciary from the High Court Building exists to provide procedural assistance, but not legal advice, to unrepresented litigants who are about to commence or are already parties to civil proceedings in the High Court or the District Court.

8.066 This section reviews the various ways in which legal services can be funded. It begins with the abortive proposal to introduce conditional fees into Hong Kong, and the survival of the offences and torts of maintenance and champerty. It then explains sundry legal aid and legal advice schemes provided by public bodies. It closes with a

[140] (2006) 9 HKCFAR 175.
[141] (2014) 17 HKCFAR 739.
[142] [2021] 3 HKLRD 300, 309.
[143] S Slorach, J Embley, P Goodchild and C Shephard, *Legal Systems and Skills* (Oxford University Press, 4th ed 2020) 170.
[144] J Yam, 'Political Crowdfunding of Rights' (2020) 50 HKLJ 395, 412.
[145] PY Lo, 'Hong Kong: Common Law Courts in China' in JR Yeh and WC Chang (eds), *Asian Courts in Context* (Cambridge University Press, 2015) 205–206.
[146] MWL Yeung and JHC Leung, 'Litigating without Speaking Legalese: The Case of Unrepresented Litigants in Hong Kong' (2020) 26 *The International Journal of Speech, Language and the Law* 231, 251.

summary of the debate surrounding the proposal to establish an independent legal aid authority independent of the Government.

(b) The conditional fees debate

8.067 A lawyer under a 'no win-no fee' arrangement may take on a case in which money compensation may be awarded for no fee, on condition that if he wins, he will receive his fees. In many ways, this is a desirable arrangement for claimants, especially in personal injury cases, as it gives access to justice to those otherwise unable to afford it.[147] Prospective litigants have 'nothing to lose by bringing the case'.[148] But conditional fee contracts also shift the costs of losing a case from the client to the lawyer, so as to discourage proceeding in weaker yet possibly meritorious cases.[149] And, prospective litigants can be easily 'persuaded to bring an action even if it has little merit',[150] potentially leading to a more litigious society.

8.068 Unlike Hong Kong, the United Kingdom did establish a conditional fee system in s.58 of the Courts and Legal Services Act 1990. In the 20 years since enactment, 'no win-no fee' arrangements have won the enthusiastic support of quasi-insurance bodies known as 'claim management companies' which seek easy-to-handle personal injury claims, thereby propagating the rise of a so-called compensation culture.[151] According to the Association of British Insurers, British consumers pay out £2.7 million, or HK$40 million (US$5.16 million), per day to no win-no fee firms through insurance premiums.[152] In *Callery v Gray*,[153] Lord Bingham identified and criticised a number of abuses of conditional fee contracts in the English legal system:

> One possible abuse was that lawyers would be willing to act for claimants on a conditional fee basis but would charge excessive fees for their basic costs, knowing that their own client would not have to pay them and that the burden would in all probability fall on the defendant or his liability insurers. With this expectation the claimant's lawyers would have no incentive to moderate their charges. Another possible abuse was that lawyers would be willing to act for claimants on a conditional fee basis but would contract for a success uplift grossly disproportionate to any fair assessment of the risks of failure in the litigation, again knowing that the burden of paying this uplifted fee would never fall on their client but would be borne by the defendant or his insurers. A third possible abuse was that claimants, although able to obtain after the event insurance, would be able to do so only at an unreasonably high price, the after the event insurers having no incentive to moderate a premium which would be paid by the defendant or his insurers and which might be grossly disproportionate to the risk which the insurer was underwriting.

[147] G Rivlin, *First Steps in the Law* (Oxford University Press, 7th ed 2015) 105.
[148] J Herring, *Legal Ethics* (Oxford University Press, 2nd ed 2017) 215.
[149] RA Posner, *Economic Analysis of Law* (Wolters Kluwer, 9th ed 2014) 802.
[150] J Herring, *Legal Ethics* (Oxford University Press, 2nd ed 2017) 215.
[151] A Gillespie and S Weare, *The English Legal System* (Oxford University Press, 8th ed 2021) 178.
[152] P Moy and S Lau, 'Why "No Win, No Fee" is No Go for Hong Kong Lawyers' *South China Morning Post* (7 April 2014).
[153] [2002] 1 WLR 2000, 2003–2004.

s.16B(f), upon being issued a legal aid certificate, the legally aided person's liability for costs shall be determined in accordance with s.16C.

8.082 The Legal Aid Department is a government agency under the superintendence of the Chief Secretary. The Director, the Deputy Directors and the Assistant Directors of Legal Aid, as well as the several Legal Aid Officers are civil servants appointed by the Chief Executive.[177]

8.083 In *Sun Po v Director of Legal Aid*,[178] Court of First Instance (Anderson Chow J) described the legal regime in relation to the exclusion of a solicitor from the legal aid panel for solicitors:

> Section 4(1) [of the Legal Aid Ordinance] provides that the Director shall prepare and maintain separate panels of counsel and solicitors enrolled on the rolls of barristers or solicitors maintained in accordance with the provisions of the Legal Practitioners Ordinance (Cap.159) who are willing to investigate, report and give an opinion upon applications for the grant of legal aid and to act for aided persons.
>
> Section 4(3), which empowers the Director to make the Decision complained of in this application, states as follows:
>
> > Any counsel and solicitor shall be entitled to have his name included on the panel unless the Director is satisfied that there is good reason for excluding him by reason of his conduct when acting or assigned to act for persons receiving legal aid or of his professional conduct generally.
>
> It can be seen that s.4(3) gives the Director a discretion to exclude a solicitor from the Panel if the Director is satisfied that there is 'good reason' for excluding him by reason of his conduct when acting or assigned to act for an aided person or of his professional conduct generally. The criterion for exclusion, namely, 'good reason', is not further defined or explained in the statute.
>
> The Director has issued a Manual for Legal Aid Practitioners (the Manual) to brief legal aid practitioners on, *inter alia*, assignment, selection and performance evaluation and to guide their performance in handling legal aid assignments. Chapter 4 of the Manual (Chapter 4), titled 'Performance Evaluation System', sets out the Director's practice or policy relating to the exercise of his discretion to exclude a solicitor from the Panel on the ground of unsatisfactory performance or conduct.[179]

8.084 Hong Kong has three Legal Aid Schemes: Ordinary Legal Aid, Supplementary Legal Aid and Criminal Legal Aid. A solicitor owes a professional duty, under *The*

[177] Legal Aid Ordinance (Cap.91), s.3.

[178] [2021] 2 HKLRD 1016, 1019–1020.

[179] Following changes instituted in December 2021, the Legal Aid Department will not assign more than five judicial review cases to an individual solicitor, and three to an individual barrister every year, down from 35 and 20, respectively. Legal Aid Department, 'Selection of Counsel and Solicitors for Legal Aid Assignments' available at: https://www.lad.gov.hk/eng/lap/pf.html (accessed on 30 June 2022). The overhaul was reportedly urged by those who were dissatisfied with the fact that the same group of lawyers frequently acted on behalf of opposition activists who were given legal aid. See, C Lau, 'Overhaul of Hong Kong's Legal Aid System could be Implemented by Year's End, Despite Lawyers' Concerns' *South China Morning Post* (26 October 2021).

Hong Kong Solicitors' Guide to Professional Conduct, to take steps to 'give his client the best information he can under the circumstances about the likely costs of the matter . . . discuss with the client how the costs and disbursements are to be met [and] consider whether the client . . . may be eligible and should apply for legal aid (including legal advice and assistance) or the assistance of the Duty Lawyer Service'.[180]

8.085 Legal aid is recognised as a fundamental right in the context of criminal justice. Article 11(2)(d) of the Hong Kong Bill of Rights provides:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality . . . to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and 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.

8.086 The Schemes do not aid eligible litigants unconditionally. In *HKSAR v Wong Chi Kwong*,[181] the Court of First Instance (McMahon J) observed:

> It is true that there is no absolute right to legal representation, and that even in the case of impecunious defendants, or defendants who claim to be such, reasonable limits may be set upon the provision of financially assisted legal representation in that reasonable constraints can be placed by the relevant authority upon the provision of legal services in terms of financial means . . . The same principle must logically apply to the provision of representation by the Duty Lawyer Service.

8.087 In relation to the scarcity of legal aid resources, in *Liu Mei Huei v Government of the HKSAR*,[182] the Court of First Instance (Chu JA) admonished:

> [D]ue to limited government resources and the duty the Legal Aid Department has towards public funds, abuse of the use of the legal aid services has to be avoided. Therefore, the Director of Legal Aid also has the statutory duty to examine the means and the merits of the case of the applicants. If in the discharge of this statutory duty, the Director of Legal Aid at the same time owes an applicant for legal aid a duty of care, it will obviously affect the proper discharge of the statutory duty by the Director.

(ii) *Ordinary Legal Aid Scheme*

8.088 The Ordinary Legal Aid Scheme aids eligible litigants in the District Court, the Court of First Instance, the Court of Appeal, the Court of Final Appeal and, for certain matters, the Lands Tribunal, the Coroner's Court and the Mental Health

[180] *The Hong Kong Solicitors' Guide to Professional Conduct* (The Law Society of Hong Kong, 3rd ed 2013) Volume 1, para.4.01.

[181] [2011] 1 HKLRD 843, 850.

[182] [2016] 2 HKLRD 249, 274.

of England and Wales between 2013 and 2017, denounced as 'fallacious' the notion that 'the justice system does no more than provide a dispute resolution service'.[7] He wrote in no uncertain terms:

> The civil justice system ensures that [the institutions of government], just as much as the state's citizens, act within the law. A consumer service merely resolving disputes cannot play such a role. Mediation, for all its rightly recognized virtues, cannot do so. Nor can arbitration, nor any ombudsman.[8]

9.004 The courts have nonetheless played an active role in promoting the use of alternative dispute resolution. The Department of Justice's Task Force on Vision 2030 noted:

> Hong Kong courts have encouraged the use of alternative dispute resolution, including mediation, to facilitate the resolution of disputes rather than litigation so as to shorten the resolution process. They also demonstrate that over the past few years, court-directed mediations in Hong Kong have resulted in amicable settlement in approximately 60% of the mediations, amounting to a reduction of around 600 court cases annually. Whilst the data would show the extent to which mediation has effectively alleviated the burden on the courts' operation.[9]

9.005 This chapter examines the various facets of the civil justice system. By the end of this chapter, the readers should be able to:

(1) understand the basic concepts of civil litigation and the changes to the traditional adversarial model introduced by the Civil Justice Reform;

(2) make sense of how a civil case normally progresses through the Court of First Instance;

(3) appreciate the choice of language in civil trials, plus the debate about the introduction of class action;

(4) understand the concept of alternative dispute resolution;[10] and

Alternative dispute resolution may not be suitable for every civil dispute. The use of alternative dispute resolution in constitutional or administrative conflicts between public authorities and citizens entails the diversion of such disputes towards a private mechanism invisible to the public eye, if not also immune from public scrutiny. This may be problematic, insofar as 'there are some matters that are so important that public knowledge of the case, judicial oversight of the actions of government, and a judgment requiring the executive or other public body to act within the law are integral to the rule of law'; '[t]hese cases need to be judged in the ordinary courts by the judiciary, rather than be the subject of a deal brokered behind closed doors'. L Webley and H Samuels, *Complete Public Law* (Oxford University Press, 5th ed 2021) 111.

7 J Thomas, 'The Centrality of Justice: Its Contribution to Society and Its Delivery' in J Cooper (ed), *Being a Judge in the Modern World: A Collection of Lectures from Some of the Most Eminent Judges and Legal Commentators in the UK and Beyond* (Oxford University Press, 2017) 149, 151.

8 *Ibid.*, 152.

9 Task Force on Vision 2030 for Rule of Law, *Report* (Department of Justice, 2022) 55.

10 'Alternative dispute resolution' is an umbrella term which encompasses a wide variety of dispute resolution methods including arbitration, med-arb, rent-a-judge, conciliation, mediation, dispute resolution boards, early neutral evaluation, and expert determination; see, C To, 'Alternative Dispute Resolution' in DK Srivastava (ed), *Business Law in Hong Kong* (Sweet & Maxwell, 6th ed 2020) 777, 778. It is beyond the scope of this book to cover each of these, though it is interesting to point out that 'med-arb is an integral part of the arbitration process and is still widely used [in Mainland China]', wherein '[t]he arbitral tribunal may attempt mediation before proceeding to arbitration, and med-arb has the strength of transforming a settlement agreement into a binding arbitral award': Y Zhao, *Mediation and Alternative Dispute Resolution in Modern China* (Springer, 2022) 20.

(5) appreciate Hong Kong's internationalised arbitration regime, as well as the state of mediation of financial disputes in light of the Special Administrative Region's status as an international financial centre.

2. Civil Litigation

(a) Fundamentals of civil litigation

(i) *Civil wrongs*

9.006 A civil lawsuit is brought when a plaintiff alleges an injury suffered owing to a wrongdoing of a defendant. Examples of civil wrongs include:[11]

(1) *Breach of contract:* when a party fails to perform a contractual obligation, performs it defectively or refuses to fulfil the obligation.[12]

(2) *Tort:* failure to live up to a reasonable standard expected of a member of the community by way of infringing interests such as 'a person's physical safety; personal freedom; business interests; property interests, including possession and enjoyment of property; reputation; and intellectual and industrial property'.[13] Examples of torts include negligence, defamation, nuisance and sexual harassment.[14] In contrast to criminal law, '[t]law is more concerned with compensating the victim rather than punishing the wrongdoer'.[15]

(3) *Breach of trust:* failure of a trustee to fulfil his duties to the trust; this may be caused by acting beyond the scope of powers conferred by the trust instrument on the trustee, the common law, or legislation, not adhering to the instructions contained in the trust instrument or not discharging his duty of care properly.[16]

9.007 An alleged civil wrong may form the basis of a 'cause of action'. A cause of action refers to a good claim in law. Whether the claim is good depends on the sufficiency

11 A restitutionary obligation is a civil obligation which may give rise to lawsuits even though it does not require the existence of a wrongful act, but only a situation involving unjust enrichment or agency without authority; see, P Stone, 'The Rome II Proposal on the Law Applicable to Non-contractual Obligations' (2004) 4 *The European Legal Forum* 213, 214. Under the law of restitution, a plaintiff can generally recover money mistakenly paid to a defendant (on the mistaken belief that it was owed to the defendant), even though the latter is not liable to the former in contract; see, ATH Smith, *Glanville Williams: Learning the Law* (Sweet & Maxwell, 17th ed 2020) 7.

12 L Mason, *Contract Law in Hong Kong* (Sweet & Maxwell, 2011) 327.

13 DK Srivastava, 'Tort Law' in DK Srivastava (ed) *Business Law in Hong Kong* (Sweet & Maxwell, 6th ed 2020) 543, 547–548.

14 S Wilson, H Rutherford, T Storey, N Wortley, B Kotecha, *English Legal System* (Oxford University Press, 4th ed 2020) 567.

15 *Ibid.*

16 S Gallagher, *Equity and Trusts in Hong Kong: Doctrines, Remedies and Institutions* (Sweet & Maxwell, 2nd ed 2020) 605.

is an administrative tribunal, not a court, competent to impose civil penalties.[29] The Magistrates' Courts, whose jurisdiction is predominantly criminal by nature, are empowered nonetheless to enforce civil debts.[30]

9.013 The functions of the Judiciary are not confined to deciding substantive outcomes. In *Chong Yu On v Kwan SH Susan*,[31] the Court of Appeal (Lam V-P) reiterated its observation nearly two decades ago in *Ma Kwai Chun v Queeny KY Au-Yeung*[32] as follows:

> Judicial functions are not limited to deciding cases. In view of society's demands and expectations of the judicial system, most of the time, judges and other judicial officers have to conduct hearings on case management and to make decisions on related arrangements, so as to ensure the fair disposal of cases quickly and effectively. The hearings and decisions made on procedural matters by members of the judiciary are actually part of the process of the court in the enforcement of judgments which are inseparable.

9.014 Some civil cases can be dealt with by either the High Court or the District Court. A plaintiff pursuing a claim of less than HK$3 million (US$382,689.7) may choose to pursue it in the District Court (an inferior court) or in the Court of First Instance (a superior court). Pursuing a claim in the Court of First Instance has advantages and drawbacks.[33] On the one hand, the conspicuousness of a claim for debt collection in this Court may alert the defendant's creditors of the defendant's financial creditability and pressure him to settle out of court. On the other hand, civil trials in the Court of First Instance tend to entail excessive expenditures of time and money that risk outweighing the benefits of winning. In *Re Estate of Chow Nai Chee*,[34] the Court of First Instance (Lam J) commented on the choice between starting a civil case in the High Court or the District Court in the light of the goals of the Civil Justice Reform:

> After the implementation of Civil Justice Reform, the court and the parties together with their lawyers should be more proactive in case management and more sensitive to cost effectiveness. It is necessary to have regard to the underlying objectives under O.1A in choosing the forum. In my experience, there are civil cases in the High Court that can be justly and efficiently dealt with in the District Court. In many cases, a transfer to the District Court would bring about more expeditious and more cost-effective disposal of the case. To invoke s.44, the parties have to consent. That means a case cannot be transferred to the District Court if one or more parties object. However, a refusal to consent may be taken into account when the court considers the question of costs, particularly when the court has indicated that the case can properly be tried in the District Court and one party has agreed to such a course.

[29] *Securities and Futures Commission v Tiger Asia Management LLC* (2013) 16 HKCFAR 324, 330 (Lord Hoffmann NPJ).
[30] Magistrates Ordinance (Cap.227) s.67.
[31] [2020] 2 HKLRD 407, 412–413.
[32] HCA 771/2002, [2002] CHKEC 4914, 12 July 2002.
[33] A McInnis and S Chan, 'Legal System of Hong Kong' in DK Srivastava (ed) *Business Law in Hong Kong* (Sweet & Maxwell, 6th ed 2020) 1, 37.
[34] [2010] 5 HKLRD 640, 651.

9.015 The rules of civil procedure are scattered in the various sources of law examined in Chapter 3. They may be found in primary legislation — the High Court Ordinance (Cap.4) or the District Court Ordinance (Cap.336); subsidiary legislation — the Rules of the High Court (Cap.4A, Sub.Leg.) or the Rules of the District Court (Cap.336H, Sub.Leg.) — Practice Directions; case law; even in practice books such as *Hong Kong Civil Procedure* (commonly known as the 'White Book').[35] Practice Directions are the official statements of interpretive guidance of the Chief Justice or a specialist judge for his specialist list,[36] which tell parties and lawyers what the court expects of them in legal proceedings.

(iv) *Civil Justice Reform*

9.016 In Hong Kong, the traditional model of both civil and criminal litigation is that of the adversarial trial. The essentials of adversarialism in civil proceedings are summarised in the following words of two non-permanent judges of the Court of Final Appeal sitting earlier as Justices of the High Court of Australia (that jurisdiction's final appellate court). In *Whitehorn v The Queen*,[37] Dawson J remarked on the nature of an adversarial trial:

> The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. When a party's case is deficient, the ordinary consequence is that it does not succeed.

9.017 Adversarialism prides itself on its emphasis on visible judicial neutrality in court proceedings. In *Crampton v The Queen*,[38] Gleeson CJ underscored the advantages of the adversarial system:

> One of the objects of a system which leaves it to the parties to define the issues, and to select the evidence and arguments upon which they will rely, is to preserve the neutrality of the decision-making tribunal. Courts are hesitant to compromise features of the adversarial system which have implications fundamental to the administration of justice.

9.018 The function of the civil court is to weigh up the relative strength of the parties' arguments and evidence against the law. The adversarial trial, as traditionally understood, is a competitive process to encourage lawyers seeking to discover evidence to seek thoroughly, and to identify the flaws in the other side's evidence more aggressively than would be at all likely in a system where the judge is the principal

[35] D Lau, *Civil Procedure in Hong Kong: A Guide to the Main Principles* (Sweet & Maxwell, 4th ed 2017) 3–4.
[36] Rules of the High Court (Cap.4A, Sub.Leg.), O.1 r.4.
[37] (1983) 152 CLR 657, 682.
[38] (2000) 206 CLR 161, 173.

discoverer.[39] In *Choi Yuk Ying v Ng Ngok Chuen*,[40] the Court of Appeal (Yuen JA) warned against judges from 'wholesale copying of one side's submissions was bound to raise doubts in the mind of the other side' and insisted that judges should bring an independent mind to their judicial functions and adequately consider the points made by the other side.

9.019 Adversarialism, in its purest form, is not without disadvantages. It promotes a 'zero-sum' mentality: 'One party's gain is the only party's loss'.[41] It incentivises the opposing lawyers to act as zealous partisans, presenting their cases in a way that has engendered a tradition of tactical manipulation and a proprietorship of witnesses.[42] Cases are often won or lost depending on the quality of legal representation.[43] The non-interventionism of judges allows the system to be abused by lawyers with excessive, unnecessary interlocutory applications and appeals, causing undue delay and high legal costs.[44] This in turn effectively denies access to justice to poorer litigants, stultifies the principle of the equality of the wealthy with everyone else[45] and wastes disproportionate sums of cash and man-hours that could have been spent on more social, productive activity.[46]

9.020 The Judiciary was already aware of these disadvantages during the earliest years of the resumption of the exercise of Chinese sovereignty. In his address to the Ceremonial Opening of the Legal Year 2000, Chief Justice Li declared the need to reform Hong Kong's rules of civil procedure in light of the following fact:

> In a society governed by the rule of law, the legal system must ensure that the citizen has access to justice at reasonable cost and speed. To meet community expectations, the court system must be able to resolve disputes whether between citizen and citizen or between citizen and State, not only fairly but also economically and expeditiously. Justice which is not affordable or delayed will amount to a denial of justice.[47]

9.021 The Civil Justice Reform was launched to address these shortcomings without abolishing the adversarial system as a whole. In February 2000, the Chief Justice appointed a Working Party on Civil Justice Reform chaired by Mr Justice Patrick Chan, then permanent judge of the Court of Final Appeal and former Chief Judge of the High Court,[48] tasked to examine and propose ways to reform the current civil justice system. Following nine years of consultation, discussion and drafting, many of the existing provisions of the Rules of the High Court and the District Court were

39 RA Posner, *Economic Analysis of Law* (Wolters Kluwer, 9th ed 2014) 841.
40 [2019] 2 HKLRD F2.
41 S Slorach, J Embley, P Goodchild and C Shephard, *Legal Systems and Skills* (Oxford University Press, 4th ed 2020) 370.
42 EA Farnsworth, *An Introduction to the Legal System of the United States* (Oxford University Press, 4th ed 2010) 109.
43 P Darbyshire, *Darbyshire on the English Legal System* (Sweet & Maxwell, 13th ed 2020) 157.
44 W Gu, 'Civil Justice Reform in Hong Kong: Challenges and Opportunities for Development of Alternative Dispute Resolution' (2010) 40 HKLJ 43, 54.
45 A Zuckerman, 'The Challenge of Civil Justice Reform: Effective Court Management of Litigation' (2009) 1 *City University of Hong Kong Law Review* 49, 50.
46 M Partington, *Introduction to the English Legal System 2018–2019* (Oxford University Press, 2018) 210.
47 AKN Li, 'Speech by the Chief Justice at the Opening of the Legal Year' (17 January 2000).
48 Mr Justice Chan is now a non-permanent judge of the Court of Final Appeal.

modified or rewritten. The Reform entered into effect on 2 April 2009. It differed from the Woolf Reforms in England and Wales in that it did not result in a completely new code of civil procedure replacing the old rules;[49] rather it cherry-picked those Woolf reform strategies which proved effective and abandoned those perceived ineffective.[50]

9.022 The Civil Justice Reform sought to strike the appropriate balance between justice and efficiency. It expects judges to play a more active role, legal practitioners to sharpen their professional skills and disputing parties to develop a stronger understanding of alternative dispute resolution mechanisms.[51] In *Wing Fai Construction Co Ltd v Yip Kwong Robert*,[52] Ma CJ discussed the purpose of the Civil Justice Reform from a judicial perspective:

> [T]he main purpose of the [Civil Justice Reform] was the intention to bring about a change in litigation culture. Broadly speaking . . . the principal themes of the [Civil Justice Reform] are:
>
> To ensure that parties to litigation are brought as expeditiously as possible to a resolution of their disputes, whether by way of adjudication or by settlement.
>
> To ensure that parties to litigation are brought as expeditiously as possible to a resolution of their disputes, whether by way of adjudication or by settlement.
>
> To increase the cost effectiveness of the system of the civil procedure and to try to eliminate delays in litigation.
>
> To promote active case management by the courts and in doing so, not only facilitating the expeditious resolution of disputes, but also bearing in mind the position of other litigants and the courts' own resources.
>
> To inculcate a culture among litigants and their legal representatives that there exists a duty to assist the court in furthering the principal themes of the [Civil Justice Reform].
>
> To reduce, if not eliminate, those steps in proceedings, particularly interlocutory applications, which serve little purpose other than to prolong or render more costly civil proceedings.

9.023 The goals of the Civil Justice Reform have been codified into subsidiary legislation in no uncertain terms. Order 1A r.1 of the Rules of the High Court provides for the underlying objectives of the new post-civil justice rules as follows:

> (1) To increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court.

49 D Lau, *Civil Procedure in Hong Kong: A Guide to the Main Principles* (Sweet & Maxwell, 4th ed 2017) 11.
50 PCH Chan, 'Three Years of Civil Justice Reform: Constructing a Cost-Effective and Efficient Civil Procedure in Hong Kong' (2011) 2011 *Acta Universitatis Lucian Blaga* 181, 183.
51 Y Zhao, *Mediation and Alternative Dispute Resolution in Modern China* (Springer, 2022) 155.
52 (2011) 14 HKCFAR 935, 956–957.

Hing Hung (No 2),[56] the Court of First Instance (Bharwaney J) illustrated the potential of the Reform to curtail the excesses of traditional adversarialism:

> Since the enactment of Civil Justice Reform, the courts have taken a far more proactive role in the conduct and management of cases, particularly personal injury cases. The essential purpose of taking a proactive role is to facilitate the parties to bring their case to court for the expeditious and proportionate resolution of the real issues raised, and not to permit them to obtain a perceived tactical advantage by maintaining positions which are unsustainable.

9.029 A committee exists to monitor the success of the Civil Justice Reform. A Civil Justice Reform Monitoring Committee, chaired by the Chief Judge of the High Court, was established in 2009 to monitor the implementation of the Reform in six broad areas: delay, settlement, mediation, costs, litigants in person and how specific changes work out in practice. As at 2018, members of the Committee included a Justice of Appeal, two High Court judges, the Registrars of the High Court and of the District Court, the Chief District Judge, a Master of the High Court and representatives from the Department of Justice, the Legal Aid Department, the Hong Kong Bar Association, the Law Society of Hong Kong and the Hong Kong Mediation Accreditation Association Limited and the Judiciary Administrator.[57]

9.030 The Civil Justice Reform has so far achieved moderate success. In March 2018, the Judiciary Administration reported that, since the Civil Justice Reform, judges have 'taken up their case management roles more seriously to prevent abuses and excesses'; parties and their legal representatives have adopted 'a more cost-conscious, efficiency-conscious and sensible approach in litigation, as compared with the Pre-[Civil Justice Reform] Period'[58] and 'are also more attuned to the needs and expectations of the court, such as taking early preparatory actions before trials, and putting forward more realistic and practicable case management timetable/actions, as well as submitting few applications for changes in milestone dates and adjournment of trials' and 'trimming down the volume of case bundles and reducing the number of interlocutory applications'.[59] In 2018–2019, the Civil Justice Reform-related caseload of the Court of First Instance stood at 5,230, compared to 5,431 cases in 2008–2009, right before the implementation of the Reform.[60] In 2018–2019, there were 6,104 interlocutory applications in the Court of First Instance; as with the previous decade, the number of interlocutory applications per year exceeded 2,786 applications filed in 2008–2009.[61] And there was no significant change to the number of case-management conferences in Civil Justice Reform-related cases, whether before or after the implementation of

[56] [2013] 1 HKLRD 843, 844–845.

[57] The Judiciary, 'Membership List of the Civil Justice Reform Monitoring Committee', *Hong Kong Judiciary Annual Report 2020*, available at: https://www.judiciary.hk/en/publications/annu_rept_2020r/eng/monitoring_committee.html (accessed on 30 June 2022).

[58] Judiciary Administration, 'Statistics on Ten Years' Implementation of the Civil Justice Reform from 2 April 2009 to 31 March 2019' (March 2019), available at: https://www.civiljustice.hk/eng/implement/CJR_Ten_Year_Implementation.pdf (accessed on 30 June 2022) 6.

[59] *Ibid.*, 6–7.

[60] *Ibid.*, 32.

[61] *Ibid.*, 8.

the Reform; the number in 2018–2019 stood at 755, compared to 799 in 2008–2009.[62] There was some improvement in relation to the reduction of delays though: '[d]espite a general increase in civil caseload since 2010 (from 16,483 in 2010 to 18,506 in 2018), the average court waiting time improved to 193 days in 2014 and remained below the target of 180 days since 2015'; '[i]t was 168 days in 2018'.[63]

9.031 Without in-depth empirical research by civil justice experts into the realities behind these statistics, it is unwise to conclusively declare the Reform to be either an unqualified success or an unqualified failure on the basis of such crude figures. This was why, in October 2020, Chief Justice Ma 'qualified [his] applause for the success of the [Civil Justice Reform] in Hong Kong by saying that we still have some way to go':

> One of the reasons for this is that it remains the case even now that the pace of court proceedings is still to a not insignificant extent in the hands of the lawyers, even though admittedly there have been substantial improvements compared with the position prior to the reforms. That this is so is an inevitable by-product of the legal system in which most of us practice, namely an adversarial system in which it is left mainly to the parties to place relevant matters and materials before the court to enable it to adjudicate on the relevant dispute. . . .
>
> [T]he number of interlocutory applications has not decreased compared with the pre-[Civil Justice Reform] period. It will be recalled that one of the driving forces for a change in civil justice was the proliferation of interlocutory applications, this being among the more serious causes of the delay and expense of litigation. Yet the experience in Hong Kong has been, if anything, an increase in interlocutory activity, although this has been somewhat mollified by there being fewer interlocutory appeals.[64]

(v) *Case-management summons and conference*

9.032 Consider the civil procedures on case-management summons and conference. Within 28 days from the closing of pleadings, each party must serve and file a Timetabling Questionnaire demanding detailed answers about his case.[65] Afterwards, if the parties have reached an agreement on the case-management directions they wish the Court to make, or a timetable, they must have a consent summons issued for an order to implement it;[66] or if agreement is not possible, the plaintiff must issue a case-management summons within 14 days to let the Court know that it may give its own directions as to case management.[67] Having received and considered the Questionnaires, the Court issues directions on the management of the case and fixes a timetable for each step in the process. A case-management conference may be timetabled if desirable

[62] *Ibid.*, 10.

[63] *Ibid.*, 15–16.

[64] GT Ma, 'Hong Kong Review of the Civil Justice Reforms and the Future Landscape of Dispute Resolution: Speech at the International Academy of Mediators — The Hong Kong Mediation Council Symposium' (27 October 2020).

[65] Rules of the High Court, O.25 r.1(1).

[66] *Ibid.*, O.25 r.1(1A).

[67] *Ibid.*, O.25 r.1(1B).