

Chapter 1

Concerns and Organization

Courts of the Hong Kong Special Administrative Region (HKSAR),¹ established under the Basic Law of the HKSAR,² face a number of unique challenges that stem from the nature of the Basic Law, a national law of the People's Republic of China (PRC) constituting the HKSAR.³ Like the two-faced Roman god Janus, the Basic Law has a duality in that it is law both in the jurisdiction that establishes it (China) and in the jurisdiction it establishes (Hong Kong).⁴ Because of this dual operability, it can be difficult to achieve common understanding in the two

¹ The Hong Kong Special Administrative Region was established, as of 1 July 1997, by the Decision of the National People's Congress on the Establishment of the Hong Kong Special Administrative Region (adopted at the Third Session of the Seventh National People's Congress on 4 April 1990) (see 29 ILM 1549 (1990)) in accordance with Article 31 of the Constitution of the People's Republic of China. This article empowers the state to establish special administrative regions when necessary, with the systems to be instituted therein to be prescribed by law enacted by the National People's Congress (NPC) in the light of specific conditions.

² ie the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (adopted at the Third Session of the Seventh National People's Congress on 4 April 1990; promulgated by Order No 26 of the President of the People's Republic of China on 4 April 1990), 29 ILM 1511–1548 (1990). Excerpts of the provisions of the Basic Law discussed in this book are collected in an appendix at the end of the book.

³ The NPC adopted at the time of its enactment of the Basic Law the Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (adopted at the Third Session of the Seventh National People's Congress on 4 April 1990) (see 29 ILM 1549 (1990)), which, upon making reference to Article 31 of the PRC Constitution, held that the Basic Law 'is constitutional as it is enacted in accordance with the Constitution of the People's Republic of China and in the light of the specific conditions of Hong Kong' and added that 'The systems, policies and laws to be instituted after the establishment of the Hong Kong Special Administrative Region shall be based on the Basic Law of the Hong Kong Special Administrative Region.'

⁴ Daniel Fung used the expression 'double life' to describe the duality; see Daniel Fung, 'The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China: Problems of Interpretation' (1988) 37 *International and Comparative Law Quarterly* 701–714 at 706.

jurisdictions, where the practitioners of law and politics differ in the way they understand and do things.

The challenges are concerned with adaptation.

Hong Kong received a common law legal system when it became a British colony in 1843. When Britain and the PRC negotiated the future of Hong Kong over a century later, one of the major issues discussed was the continuation of the pre-existing legal system. In the Sino-British Joint Declaration on the Question of Hong Kong 1984,⁵ the Government of the PRC declared that it would resume the exercise of sovereignty over Hong Kong on 1 July 1997 and that it would then apply to Hong Kong certain basic policies.⁶ These basic policies included the establishment of the HKSAR; the vesting of the HKSAR with executive, legislative and independent judicial power, including that of final adjudication; and the provision that the laws currently in force in Hong Kong would remain basically unchanged.⁷ These and other basic policies were intended to remain unchanged for fifty years and were later stipulated as part of the Basic Law,⁸ which became effective on 1 July 1997.

The Basic Law established the legal and judicial systems of the HKSAR. Under the Basic Law, the HKSAR is vested with independent judicial power, including that of final adjudication. The HKSAR courts exercise the judicial power of the HKSAR and adjudicate cases in accordance with the laws applicable in the HKSAR, which are the Basic Law, the laws previously in force in Hong Kong (which include the common law, rules of equity, ordinances, subordinate legislation and customary law), the laws enacted by the legislature of the HKSAR, and national laws listed in Annex III of the Basic Law. The power of final adjudication is vested in the Court of Final Appeal, which may as required invite judges from other common law jurisdictions to sit on the Court. The HKSAR courts are authorized by the Standing Committee of the National People's Congress (NPCSC) to interpret on their own, in adjudicating cases, the provisions of the Basic Law that are within the limits of the autonomy of the HKSAR. The HKSAR courts may refer to precedents of other common law jurisdictions. The HKSAR courts shall exercise judicial power independently, free from any interference.⁹

Judges and lawyers in Hong Kong, who have been trained in the common law, find themselves operating in a legal system still based in the common law. However, the HKSAR legal system is very much embedded within the legal system of Mainland China. The Mainland's legal system is based essentially on democratic centralism, socialist legality,¹⁰ and the Stalin Constitution,¹¹ but seems to be gradually re-adopting or re-connecting with the civil law tradition; it is a legal

⁵ ie Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (19/12/1984), 1399 UNTS 33, 23 ILM 1366–1381 (1984).

⁶ *ibid*, paragraphs 1, 3.

⁷ *ibid*, paragraph 3(1), (3), with elaboration in *ibid*, Annex, sections I, II.

⁸ *ibid*, paragraph 3(12).

⁹ Basic Law, Articles 2, 8, 18, 19, 80–93, 158.

¹⁰ See Georg Brunner, 'The Functions of Communist Constitutions: An Analysis of Recent Constitutional Developments' (1977) 3 *Review of Socialist Law* 121–153; and Yash Ghai, 'Constitutions and Governance in Africa: A Prolegomenon', in Sammy Adelman and

system of its own Chinese characteristics. The present common law legal system of the HKSAR is a new order, constituted and maintained by the Mainland legal system through a number of channels. But those who emphasize the HKSAR's 'seamless transition' with a high degree of autonomy do not usually mention this fact.¹²

Concurrently, while the common law legal system continues, its dynamics have changed. The Basic Law is a written instrument constituting the systems of the HKSAR, establishing separately distinct governmental institutions to exercise specified governmental powers and functions,¹³ and authorizing the HKSAR courts to interpret its provisions. The courts are empowered to make and fill a special role in the exercise of judicial power, namely the constitutional jurisdiction over executive decision making and legislative law making. This jurisdiction is comprehensive and coextensive with the broad coverage of the Basic Law. The exercise of this jurisdiction brings unfamiliar questions and public controversies before the HKSAR courts. It also raises expectations, often illusive, on the part of the public about the competence of the HKSAR courts to hold the executive and legislative branches accountable. Moreover, this jurisdiction entails agenda setting and lobbying by political minorities through litigation strategies. Mainland Chinese legal scholars have contested the legality and legitimacy of this jurisdiction, both at the time of its inception and thereafter. Such objections have been sustained and unabated for over a decade and may have gained intensity recently. The courts of the Macao Special Administrative Region, which adjudicate cases under a similarly worded Basic Law of the Macao Special Administrative Region but following a different legal tradition, behave differently from the HKSAR courts. This difference may serve to fuel distrust, discontent or disapproval of the HKSAR courts' authority to exercise its 'constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law', and to determine 'questions of inconsistency and invalidity when they arise'.¹⁴

Abdul Paliwala (eds), *Law and Crisis in the Third World* (London: Hans Zell Publishers, 1993) pp 51–75, at pp 56–60.

¹¹ See Sophia Woodman, 'Legislative Interpretation by China's National People's Congress Standing Committee: A Power with Roots in the Stalinist Conception of Law' (Chapter 11), in Hualing Fu, Lison Harris, and Simon Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan, 2008) pp 229–241.

¹² See *HKSAR v Ma Wai Kwan David & Ors* [1997] 2 HKC 315, [1997] HKLRD 761, CA; *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117, CFA; *RV v Director of Immigration & Anor* [2008] 4 HKLRD 529, CFI. On the other hand, Chan CJHC (now Chan PJ) did note, with considerable foresight, in *Ma Wai Kwan David* (above) a potential tension inherent in the Basic Law by reason of it being an instrument drafted by individuals practising in the Mainland legal system for a special administrative region, whose continuing legal system was rooted in the common law legal system.

¹³ Basic Law, Article 2 and Chapter IV, with section 1 (The Chief Executive), section 2 (The Executive Authorities), section 3 (The Legislature), section 4 (The Judiciary).

¹⁴ As the Court of Final Appeal stated in *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4 at 25F–26G of the 'constitutional jurisdiction' of the HKSAR courts.

This book will examine the exercise of independent judicial power under the Basic Law by the HKSAR courts. It will address three concerns:

- the rise of the judiciary as an institution of government in the HKSAR, particularly through the acquisition of the constitutional jurisdiction and the competence of the Court of Final Appeal to police its power of final adjudication;
- the legal and political constraints of judicial power and the express and implied limitations to its exercise; and
- the relations the HKSAR courts have to maintain with other institutions of government within the HKSAR, and with the Central Authorities, in response to the various forces (including the public and civil society) that seek to influence the exercise of judicial power.

The exercise of independent judicial power in the HKSAR necessarily involves negotiating along two sets of different, interlinked and interacting relationships: the intra-SAR institutional relationships and the Central-SAR relationship. The individual perception and agenda of the institutions at the ends of each of these relationships create tensions. In resolving such tensions, the outer limits of the autonomy of the HKSAR and its 'high degree' are being charted and fathomed. And where the HKSAR courts are steering the course, they will from time to time sail between the Scylla of 'one country' and the Charybdis of 'two systems', practising imperfectly the founding principle of 'one country, two systems' prescribed by the Central Authorities for the HKSAR.

The author's career and experiences as a practising barrister (which includes several appearances before the Court of Final Appeal)¹⁵ and as council member of the Hong Kong Bar Association representing the Bar Association in public affairs forums (which includes attending consultation sessions of the Government and the Legislative Council [LegCo] of the HKSAR)¹⁶ have combined to produce an outlook that, in addition to the theoretical and doctrinal appreciation of the subject matter by virtue of one's learning, involves the practical and tactical at the coalface of litigation. Thus, this study of the exercise of independent judicial power by the HKSAR courts, particularly the Court of Final Appeal, acknowledges the realities of constitutional adjudication. While questions of legality ought to be approached in a principled manner in accordance with a true understanding of the law, adjudication admits the self-conscious making of choices for consequential, prudential, pragmatic or strategic reasons.

¹⁵ The author has been in private practice as a barrister in Hong Kong since 1993. He has appeared before the Court of Final Appeal in *HKSAR v Ng Kung Siu & Anor* (1999) 2 HKCFAR 442, CFA; *Lau Cheong & Anor v HKSAR* (2002) 5 HKCFAR 415, CFA; *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248, CFA; and *Vallejos & Anor v Commissioner of Registration* [2013] 4 HKC 239, CFA.

¹⁶ The author has been a member of the Council of the Hong Kong Bar Association between 1995 and 1997, 2001 and 2005, and 2006 and 2012, and in 2013. He has served as the chairman of the Bar Association's special committee on constitutional affairs and human rights since 2008.

This book is organized into six parts. Part 1 introduces the concerns and scope of study of the book and sets the context of the analysis that follows by discussing the provisions of the Basic Law and the underlying but competing and contested principles of ‘one country, two systems’, ‘high degree of autonomy’, ‘executive-led government’ and ‘separation of powers’.

Part 2 traces the development of the constitutional jurisprudence of the HKSAR courts from the point of inception in 1997 to the recent turning points in early 2013. Cases across this sixteen-year time span are discussed in chronologically arranged chapters, each seeking to highlight the particular resonance the adjudications have with current events. The constant and continuing theme underlying the cases examined—of individuals seeking judicial review of administrative and legislative decision making—is highlighted as a matter of historical fact with a view to detailed elucidation in the parts that follow.

Part 3 considers the independent judicial power, including the power of final adjudication, granted to the HKSAR courts and looks at how the Court of Final Appeal has, in a succession of judgments, asserted jurisdiction to review all decision making for conformity with the Basic Law. The normative value of the supremacy of the Basic Law is thereby turned into the practical power of supremacy of the HKSAR courts. Although the assertion of ‘constitutional jurisdiction’ in *Ng Ka Ling & Ors v Director of Immigration*¹⁷ was not a complete success,¹⁸ the comparatively muted reaction of the co-ordinate institutions of the HKSAR and their subsequent acquiescence, co-operation and even collaboration have allowed further elaboration of the judicial power of the HKSAR courts. This elucidation of judicial power has included pronouncing on invalidity under the previous legal order,¹⁹ declaring on questions of constitutionality in the absence or on the assumption of decision-making,²⁰ and discovering the subset of implied judicial power with respect to remedies.²¹ The Court of Final Appeal has even successfully claimed *kompetenz-kompetenz*²² to police against ‘disproportionate’

¹⁷ *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA.

¹⁸ See *Ng Ka Ling & Ors v Director of Immigration (No 2)* (1999) 2 HKCFAR 141, where the Court of Final Appeal, in the light of the reaction of Mainland legal scholarship to its assertion of constitutional jurisdiction to examine whether legislative acts of the NPC or the NPCSC are inconsistent with the Basic Law and to declare them unconstitutional to the extent of any inconsistency, issued a judgment to clarify that it could not ‘question the authority of the Standing Committee to make an interpretation under Article 158 of the Basic Law’ and could not ‘question the authority of the National People’s Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedures therein’ (142D–E).

¹⁹ See *Solicitor v Law Society of Hong Kong (Secretary for Justice, intervener)* (2003) 6 HKCFAR 570, CFA; and *HKSAR v Lam Kwong Wai & Anor* (2006) 9 HKCFAR 574, CFA.

²⁰ See *Leung TC William Roy v Secretary for Justice* [2005] 3 HKC 77, [2005] 3 HKLRD 657, CFI (affirmed on appeal in *Leung v Secretary for Justice* [2006] 4 HKLRD 211, CA).

²¹ See *HKSAR v Lam Kwong Wai & Anor* (2006) 9 HKCFAR 574, CFA.

²² The concept of *kompetenz-kompetenz* was used by the German Federal Constitutional Court (*Bundesverfassungsgericht*) to describe the determination of whether a judicial

encroachment of its power of final adjudication.²³ Justifications for these expansive moves, largely based on the 'common law context'²⁴ and the Hong Kong legal tradition are examined against several factors. First, the theoretical or doctrinal possibilities of political and constitutional systems are analysed. Second, comparison is made to the practices of the courts of the Macao Special Administrative Region, which operate under a legal system in the continental civil law tradition on the basis of a similarly worded constitutional instrument, the Basic Law of the Macao Special Administrative Region.²⁵ Finally, Mainland Chinese scholarship is considered, especially the recent surge of comments concomitant with the increasingly attentive, if not interventionist, policy of the Central Authorities towards the HKSAR and its autonomous institutions,²⁶ disputing the legality and the legitimacy of judicial review of legislation in Hong Kong.

Part 4 addresses the intra-SAR relationships the HKSAR courts have with other institutions of government under the Basic Law. This part begins with a look at the record of institutional compliance with judicial declarations of invalidity, an exercise that underscores both the claim of the futility and illusiveness of duty of the HKSAR of enforcing the Basic Law and the necessity of co-operation of the executive and legislative institutions in making judicial enforcement a reality. A subtle mutual co-operation, co-ordination and regulation between the executive, legislative and judicial branches of government must exist for effective governance, though not necessarily in the sense promoted by the Central

authority has 'jurisdiction to give a binding ruling on the extent of one's jurisdiction', so that if it could make a binding decision (that no one else can legitimately challenge) on whether it has the authority to make a binding decision on a question before it, then it would be said to have *kompetenz-kompetenz*: Trevor Hartley, *Constitutional Problems of the European Union* (Oxford and Portland, OR: Hart Publishing, 1999) pp 152–153. This concept has also been applied in the context of international tribunals (where it has usually been described as *compétence de la compétence*); see Abdul Koroma, 'Assertion of Jurisdiction by the International Court of Justice' in Patrick Capps, Malcolm Evans, and Stratos Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Oxford and Portland, OR: Hart Publishing, 2003) pp 189–198 at p 192 and also in the context of arbitral tribunals (see *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763, UKSC). See also PY Lo, 'Master of One's Own Court' (2004) 34 *Hong Kong Law Journal* 47–65.

²³ *Solicitor v Law Society of Hong Kong (Secretary for Justice, intervener)* (2003) 6 HKCFAR 570, CFA; and *Mok Charles Peter v Tam Wai Ho & Anor (Secretary for Justice, intervener)* (2010) 13 HKCFAR 762, CFA.

²⁴ See Anthony Mason, 'The Role of the Common Law in Hong Kong', in Jessica Young and Rebecca Lee (eds), *The Common Law Lecture Series 2005* (Hong Kong: Faculty of Law, University of Hong Kong, 2006) pp 3, 5, 7.

²⁵ For an unofficial English translation of the Basic Law of the Macao Special Administrative Region of the People's Republic of China (adopted at the First Session of the Eighth National People's Congress on 31 March 1993; promulgated by Order No 3 of the President of the People's Republic of China on 31 March 1993), see http://bo.io.gov.mo/bo/i/1999/leibasica/index_uk.asp.

²⁶ See Cheng Jie, 'The Story of a New Policy', *Hong Kong Journal* (July 2009) at: http://www.hkjournal.org/archive/2009_fall/1.htm (last visited on 28 March 2011).

Authorities in the case of the Macao Special Administrative Region.²⁷ The courts' understanding of the burden accompanying a successfully asserted 'constitutional jurisdiction' is discussed in relation to the recognition and incorporation into the adjudicatory process of various limitations and reservations over the exercise of the power to declare a constitutional invalidity. There are four such approaches and each occupies a chapter:

- The first is the continuing and increasing relevance of the related doctrines of justiciability and the political question.²⁸ The continuing relevance of the common law doctrine of justiciability to a legal system that adopts constitutionalism or fundamental/human rights adjudication is questioned. However, certain provisions of the Basic Law that reserve competences in the specific subject matters of foreign affairs and defence to the Central Authorities²⁹ may have transformational implications; that is, turning the doctrine of justiciability into a necessary implication upon the true extent of the constitutional jurisdiction of the HKSAR courts. Similarly, by inquiring into the constitutional rationales for having a political question doctrine, the relevance of elements of that doctrine to the structure and institutional scheme envisaged under the Basic Law is pursued with a view to propose the incorporation of some but not all of such elements as a logical interpretive incident of the constitutional jurisdiction of the HKSAR courts.
- The second relates to the uses put before the HKSAR courts of the language of deference in a number of rulings on the constitutional validity of legislation,³⁰ which include fundamental or human rights adjudications³¹ as well

²⁷ See Ji Pengfei, 'Explanations on "The Basic Law of the Macao Special Administrative Region of the People's Republic of China (Draft)" and Its Related Documents (Addressing the First Session of the Eighth National People's Congress on 20 March 1993)' (1993) *Gazette of the Standing Committee of the National People's Congress* 229–235.

²⁸ For earlier discussions, see Albert Chen, 'The Concept of Justiciability and the Jurisdiction of the Hong Kong Courts' (1997) 27 *Hong Kong Law Journal* 387–390; Benny Tai, 'The Jurisdiction of the Courts of the Hong Kong Special Administrative Region', in Alice Lee (ed), *Law Lectures for Practitioners 1998* (Hong Kong: Hong Kong Law Journal, 1998) pp 65–117; Po-jen Yap, 'Interpreting the Basic Law and the Adjudication of Politically Sensitive Questions' (2007) 6 *Chinese Journal of International Law* 543–564.

²⁹ Basic Law, Articles 13, 14, 19. See further *FG Hemisphere Associates LLC v Democratic Republic of the Congo & Ors* [2010] 2 HKC 487, [2010] 2 HKLRD 66, CA; *Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC* [2011] 5 HKC 151, CFA; *C & Ors v Director of Immigration & Ors* [2013] 4 HKC 563, CFA.

³⁰ For recent discussions, see Cora Chan, 'Judicial Deference at Work: Some Reflections on *Chan Kin Sum* and *Kong Yun Ming*' (2010) 40 *Hong Kong Law Journal* 1–14; and Cora Chan, 'Deference and the Separation of Powers: An Assessment of the Court's Constitutional and Institutional Competences' (2011) 41 *Hong Kong Law Journal* 7–25.

³¹ Illustrative examples include *HKSAR v Ng Kung Siu & Anor* (1999) 2 HKCFAR 442, CFA; *Lau Cheong & Anor v HKSAR* (2002) 5 HKCFAR 415, CFA; *Leung TC William Roy v Secretary for Justice* [2005] 3 HKC 77, [2005] 3 HKLRD 657, CFI (affirmed on appeal in *Leung v Secretary for Justice* [2006] 4 HKLRD 211, CA); *Dr Kwok Hay Kwong v Medical Council of Hong Kong* [2008] 1 HKC 338, [2008] 3 HKLRD 524, CA; and *Fok Chun Wa & Anor v Hospital Authority & Anor* [2012] 2 HKC 413, CFA.

as judicial scrutiny of legislative restrictions of the courts' powers,³² providing justifications (if any) for the HKSAR courts to accept, defer or give due weight to legislative, and sometimes, executive, judgment while exercising their jurisdiction under the Basic Law.

- The third takes on the development and tactical deployment of constitutional remedies and remedial techniques in several adjudications,³³ whereby the plea of individual rights has led not to the protection of those rights but the pursuance of public or assumed common interests deemed more worthy of protection.
- The fourth involves adjustments and exposition of the courts' own procedural powers to facilitate the filtering away or deterring of controversies from the courts' door.³⁴

Part 5 of this book deals with the Central-SAR relationship regarding the HKSAR courts, with attention paid principally to the interpretation of the Basic Law. Two provisions of the Basic Law appear to restrain the exercise of independent judicial power of the HKSAR in express terms. Article 19 of the Basic Law declares that the HKSAR courts 'shall have no jurisdiction over acts of state such as defence and foreign affairs', which the HKSAR courts have interpreted to bear upon the Central-SAR relationship.³⁵ Article 158 of the Basic Law provides for the power of interpretation of the Basic Law and its distribution between the NPCSC and the Court of Final Appeal, incorporating a mechanism of reference by the Court of Final Appeal of a provision of the Basic Law to the NPCSC for interpretation, thereby seeking to maintain uniformity or consistency in the interpretation of certain categories of provisions of the Basic Law.³⁶

³² Illustrative examples include *A Solicitor v Law Society of Hong Kong (Secretary for Justice, intervener)* (2003) 6 HKCFAR 570, CFA; and *Mok Charles Peter v Tam Wai Ho & Anor (Secretary for Justice, intervener)* (2010) 13 HKCFAR 762, CFA.

³³ See *Leung Kwok Hung & Ors v HKSAR* (2005) 8 HKCFAR 229, CFA; *Koo Sze Yiu & Anor v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441, CFA. See also *Chan Kin Sum & Ors v Secretary for Justice & Anor* [2008] 6 HKC 486, [2009] 2 HKLRD 166, CFI; and *Koon Wing Yee & Anor v Insider Dealing Tribunal & Anor* (2008) 11 HKCFAR 170, CFA. For a general view, see Kevin Zervos, 'Constitutional Remedies under the Basic Law' (2010) 40 *Hong Kong Law Journal* 687–718.

³⁴ See *Chan Po Fun Peter v Cheung CW Winnie & Anor* [2007] 5 HKC 145, (2007) 10 HKCFAR 676, CFA; *Chu Hoi Dick & Anor v Secretary for Home Affairs (No 2)* [2007] 4 HKC 428, CFI; and *Re Leung Kwok Hung & Anor* (unreported, 28 September 2012, HCAL 83, 84/2012), CFI. See generally, Karen Kong, 'Public Interest Litigation in Hong Kong: A New Hope for Social Transformation?' (2009) 28 *Civil Justice Quarterly* 327–343.

³⁵ The author once made an attempt to interpret Article 19 of the Basic Law in a judicial capacity; see *HKSAR v Xiang Jiangjun & Ors* (unreported, 13 November 2000, WSCC 8109, 8110/2000), Deputy Magistrate Lo Pui-yin. The most authoritative attempt to interpret this article is that of the Court of Final Appeal in *Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC* [2011] 5 HKC 151. For an earlier exposition, see Benny Tai, 'The Jurisdiction of the Courts of the Hong Kong Special Administrative Region', in Alice Lee (ed), *Law Lectures for Practitioners 1998* (Hong Kong: Hong Kong Law Journal, 1998) pp 65–117.

³⁶ For wide-ranging discussion of issues relating to Article 158 of the Basic Law and its interpretation, see Johannes Chan, Hualing Fu and Yash Ghai (eds), *Hong Kong's Constitutional*

Interpretation by the HKSAR courts of these two provisions of the Basic Law involves the determination by the courts of their competence. In highlighting the Court of Final Appeal's track record in interpreting Articles 19 and 158 of the Basic Law and in declining to refer a provision of the Basic Law for interpretation by the NPCSC under Article 158 of the Basic Law, two prevalent perceptions in Hong Kong are revealed. First, there is a deep-rooted common law lawyer's misgiving about the constitutional arrangement divorcing final interpretation of the provisions of the Basic Law from final adjudication applying those provisions and vesting the power of final interpretation with the permanent body of the NPC, the highest organ of state power which legislates the Basic Law. Second, the Court of Final Appeal is deeply concerned about conceding autonomy to the Central Authorities. The Court of Final Appeal's 'second-best' approach of putting barricades at the gateway in an effort to limit the effect of measures from the Mainland system is contrasted with the preliminary reference mechanism of the European Court of Justice under the Treaty of the European Union, which was applied by that court to facilitate European integration. The interaction of the Court of Final Appeal with the Chief Executive's acquired competing power of making a report to the Central People's Government (CPG) as a preliminary move towards interpretation of the Basic Law is considered in terms of 'system effect'. Alternative approaches, such as the doctrines of *acte clair* and *acte éclairé* and the strategy of engagement, are also discussed with a view to formulate and appreciate strategic behaviour on the part of the HKSAR courts, particularly the Court of Final Appeal, in resolving the national law element with respect to these provisions vital to the exercise of judicial power of the HKSAR.

Another dimension of the Central-SAR relationship lies in the interpretation of national laws made applicable to the HKSAR, as listed in Annex III of the Basic Law, where, it seems, there is no mechanism in place to ensure consistent and uniform interpretation. This is a matter of some importance, given the subject matter of these national laws, namely defence, foreign affairs and other matters outside the limits of autonomy of the HKSAR, as specified by the Basic Law.

The Central Authorities and the HKSAR courts appear to have achieved some ground rules of long-term benefit to the rule of law, to which the principle of subsidiarity might apply. The 'Congo' case, which the Court of Final Appeal decided between June and September 2011 with an interpretation of the NPCSC in between,³⁷ probably heralded, not unavoidably,³⁸ an additional dimension

Debate: Conflicts over Interpretation (Hong Kong: Hong Kong University Press, 2000); Hualing Fu, Lison Harris and Simon Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (New York and Basingstoke: Palgrave Macmillan, 2008), particularly Chapter 8, PY Lo, 'Rethinking Judicial Reference: Barricades at the Gateway?' at pp 157–181.

³⁷ See *Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC* [2011] 5 HKC 151 (8 June 2011); Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress (adopted by the Standing Committee of the Eleventh National People's Congress at its Twenty-Second Session on 26 August 2011) (LN 136/2011); and *Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC* (No 2) [2011] 5 HKC 395 (8 September 2011).

³⁸ See PY Lo, 'The Gateway Opens Wide' (2011) 41 *Hong Kong Law Journal* 385–391.

of overt interaction between the Central Authorities and the Court of Final Appeal, though it remains to be seen whether, as practised, this additional, direct approach will become the dominant discourse. The Foreign Domestic Helper cases, which the Court of Final Appeal decided in March 2013, may on the other hand have delayed the undermining of the ground rules hitherto understood merely by one case.³⁹

There exists a theoretical possibility of the HKSAR courts' serving as the last bastion defending against the amending erosion of the founding basic policies of the HKSAR. The building of this last redoubt may require the judicial elucidation and expansion of the principles and objectives underlying the separate and autonomous systems of the HKSAR for the purpose of safeguarding them. These are posited at the end.

The concluding Part 6 of this book highlights the 'second founding' of the systems of the HKSAR by the HKSAR courts through their construction of the Basic Law, and questions the institutional agenda of the courts as promoters of the HKSAR's autonomy, in the way they exhibit a cosmopolitan jurisprudence connected with the advanced common law and Western jurisdictions. Will the 'second founding' be followed by the 'second resumption of the exercise of sovereignty'? By reference to cases discussed in previous chapters, the question is asked: Is *Ng Ka Ling & Ors v Director of Immigration*⁴⁰ being diluted, if not stealthily overruled? Accompanying this warning are cautious notes against the undermining of the avowed common law approach of interpreting the Basic Law.⁴¹ The HKSAR courts are indeed at a crossroads.

The findings of the study are presented here to guide readers through this book.

The HKSAR courts have exercised independent judicial power—including the power of final adjudication, as well as the power of interpretation of the Basic Law, both authorized to them under the Basic Law—to *construct* the Basic Law. The HKSAR courts do so notwithstanding that the Basic Law is a legal instrument drafted by a committee dominated by Mainland Chinese legal scholars of the socialist legal order and adopted as a national law to implement the basic policies of the PRC regarding Hong Kong. The HKSAR courts do so to fashion the Basic Law into a written constitutional instrument of binding force within the HKSAR's common law based legal system, with the courts assuming the role of a constitutional check on the other institutions of government of the HKSAR, including the executive authorities and the legislature, to ensure that they act in accordance with the Basic Law. The HKSAR courts give effect to such binding force by *construing* the Basic Law and determining questions of inconsistency and invalidity of legislation or executive decisions. This role is known as the 'constitutional jurisdiction'.

The constitutional jurisdiction is judicially constructed; it is a role that the Court of Final Appeal has created and filled for the HKSAR courts. In the course

³⁹ See *Vallejos & Anor v Commissioner of Registration* [2013] 4 HKC 239, CFA.

⁴⁰ *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA.

⁴¹ As pronounced in *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, CFA.

of time, constitutional adjudication conducted by the HKSAR courts, as shown in the discussion in Chapters 21 and 22, has resulted in the accretion, if not accumulation, of powers and competences of the courts over decision making by the executive authorities and the legislature of the HKSAR. These robust achievements have carried with them responsibilities and consequences that the HKSAR courts, particularly the Court of Final Appeal, must bear and manage.

The constitutional jurisdiction is vulnerable. It is under-theorized and has been challenged in Mainland legal scholarship. The constitutional jurisdiction, it can be said, continues at the sufferance of the pragmatic approach of the Central Authorities and the recognition and support of the HKSAR executive authorities for the vital role the HKSAR courts play in the maintenance of the rule of law in the international financial centre of Hong Kong. The HKSAR courts, as part of the political system of the HKSAR, are concerned with the ‘effective governance’ of the region, suggesting that a subtle sense of ‘comity’ or mutual understanding in this regard exists between the governmental institutions of the region. Part 4 shows the ways in which the HKSAR courts have tended to ‘second guess’ the political departments in constitutional adjudication, at the phases of interpretation of provisions of the Basic Law, determination of consistency with the Basic Law, and the according of remedies consequential to a determination of inconsistency with the Basic Law. As Chapter 23 shows, in response to the phenomenon of individuals and groups seeking judicial remedies for political and social causes, the HKSAR courts have also tightened the procedural requirements for judicial review, illustrating how seriously the judges have taken the potential of politicization of constitutional adjudication.

This judicial sensitivity has been more pronounced in the manner in which the Court of Final Appeal has responded to requests for making references of provisions of the Basic Law for interpretation by the NPCSC. This is illustrated in Part 5. The Court of Final Appeal has adopted or may adopt various strategies in response to these requests but the core value it has steadfastly sought to preserve is the judicial autonomy that is part of the HKSAR’s high degree of autonomy. This can alternatively be put as a preference for subsidiarity in the judicial disposition of cases, that is, in favour of the lower institutional level as much as and as far as possible. The Court of Final Appeal has done this to stay out of the ‘game’ of reference under Article 158 of the Basic Law. Once the Court of Final Appeal has decided to enter this ‘game’, the self-restraint of the Central Authorities in accordance with this principle of subsidiarity will have to be nurtured and maintained, with the Court applying an appropriate strategy of engagement.

Can this ‘second founding’ of the Basic Law by the HKSAR courts be sustained? The *Ng Ka Ling* principles that founded the constitutional jurisdiction in obligatory terms may have weathered in the light of the adjustments discussed in Parts 4 and 5 after years of constitutional adjudication. Chapter 32 examines both the risks of Mainland Chinese influences that the application of indigenous resources in jurisprudence—such as the use of historical materials associated with the drafting of the Basic Law, the stress of original intent and the reliance of the meaning of the authentic Chinese text—pose to the vitality of constitutional adjudication in Hong Kong, as well as the theoretical hope for the HKSAR courts

to actively engage Mainland Chinese influences and interventions by recognizing and developing constitutional principles and values of the HKSAR system, to establish the HKSAR's autochthonous constitutional identity as a common law based legal system within the PRC.

There is another corrosive and perhaps more disturbing force. Litigants inside, and election-minded politicians outside, the courtroom, demand the revision or recanting of established decisions on matters of constitutional interpretation, either on the pretext of 'changed' socioeconomic circumstances or, worse, upon the premise, by reference to sparsely reasoned Mainland jurisprudence, that the courts had been wrong in the first place. These demands may be summed up as popular, or people's constitutionalism. The potential of executive and legislative interventions in senior judicial appointments has been raised. The best defences are always vulnerable from within.

The HKSAR's constitutional identity must remain internationalist, connecting through the open door of Article 84 of the Basic Law with common law jurisdictions of the outside world. Cosmopolitanism, even in a half-baked form, is a better way for the Hong Kong Judiciary to address and handle evolving demands and challenges of the modern society and the international financial, trading and shipping centre of Hong Kong than non-progressive indigenization of jurisprudence.

In addressing internal demands for accountability, the Judiciary may point out that reasoned judgments—the product of an open and public process of adjudication, where the relevant evidence and arguments are carefully examined on their legal merits, underlying values and practical implications—are the primary form of accountability. It is a matter for the Judiciary as a whole to consider acknowledging openly that constitutional interpretation and adjudication intrude into government policy and involve the courts partaking a role with the political branches of government in the governance of Hong Kong. However, judges must necessarily, for their own sake, understand thoroughly the considerations of the policy and decision-makers, as opposed to working on assumptions and educated guesses. The confidence of the public in the judicial process and the rule of law is to be gained through explanation and example, illuminating what is at stake, and not following the crowd.

The chapters that follow present a study of the HKSAR courts through their interpretation of the Basic Law in the adjudication of cases. This book thus attempts to outline in the next two chapters the approach of the HKSAR courts to the Basic Law and the systems it stipulates, as well as to identify and clarify the concepts and ideas involved.