

Maintaining Institutional Strength: The Court and the Rule of Law

Professor Johannes Chan

Protection of national security and respect for personal liberty and the rule of law are not always on speaking terms. While an enlightened legislature and a civil society are important in maintaining the proper balance in devising the legislative framework and monitoring its implementation, the courts play a crucial role in maintaining the balance, if not also the ultimate safeguard for human rights and the rule of law, in the enforcement of national security legislation. This chapter will explore the role of the courts in maintaining this delicate balance, with suggestions to strengthen their institutional resilience.

The Constitutional Framework and Constraints

While the courts of the Hong Kong Special Administrative Region (“HKSAR”) are vested with independent judicial power, they are subject to a number of constitutional constraints. First, the power of final interpretation of the Basic Law is vested in the Standing Committee of the National People’s Congress (“NPCSC”) and not in the courts. This power is a plenary power that can be exercised, as a matter of an exercise of sovereign power, at any time with or without any reference or request from the HKSAR.¹ While the courts enjoy the power of final adjudication and can interpret any provision of the Basic Law, the Court of Final Appeal is under an obligation to refer a question of interpretation of the Basic Law to the NPCSC for interpretation under the conditions as specified in Article 158(3).

Secondly, the courts have no jurisdiction over acts of state such as defence and foreign affairs.² They are also obliged to accept a certificate from the Chief Executive on questions of fact concerning acts of state as conclusive evidence of fact whenever such questions arise in the adjudication of cases.³ The fact of state doctrine is evidential in nature, whereas the act of state doctrine is jurisdictional in nature.

Thirdly, the common law system is maintained.⁴ The courts of the HKSAR have jurisdiction over all cases in the HKSAR, subject to the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong. In this regard, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to civil and criminal proceedings, including the

¹ *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300.

² BL19.

³ *Ibid.*

⁴ BL81, 84 & 85.

right to jury trial, the right to fair trial and the presumption of innocence, shall be maintained.⁵ Fundamental rights are protected by the Basic Law. At the same time, any common law principles which are in contravention of the Basic Law would not be maintained.⁶

Fourthly, independence of the judiciary shall be maintained.⁷ Judges shall be appointed on the recommendation of an independent commission composed of judges, persons from the legal profession and eminent persons from other sectors. They shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions.

These four aspects will be examined in turn in the context of national security.

(1) Interpretation of the Basic Law

The provision on the power to interpret the Basic Law has been subject to extensive debates and controversies in Hong Kong. In general, it was held that the power to interpret the Basic Law is vested in the NPCSC. This power is general and unqualified; it is applicable to all provisions of the Basic Law and is not confined to those provisions outside the scope of autonomy of the HKSAR. The argument that the NPCSC has delegated its power to interpret provisions within the autonomy of the HKSAR to the Hong Kong courts and would therefore not be able to exercise the power of interpretation over those provisions in the absence of a judicial referral pursuant to Article 158(3) of the Basic Law has been rejected.⁸

The NPCSC has exercised its power of interpretation on five occasions since the changeover in 1997. On the first and the third occasions, the interpretation was made upon the invitation of the HKSAR. The fourth occasion was the only occasion that the interpretation was given upon judicial referral. On the second and the fifth occasions, the NPCSC rendered the interpretation on its own motion. In terms of subject matter, on the first occasion, the issue was whether a certificate of entitlement scheme, under which children born in the Mainland to parents who were Hong Kong Permanent Residents were required to produce a certificate of entitlement in order to claim a right of abode in Hong Kong, was an unconstitutional restriction of the right of abode under Article 24 of the Basic Law, or whether it could be justified under Article 22(4) of the Basic Law as a pre-condition of approval for people from the Mainland coming to Hong Kong for settlement. The Court of Final Appeal held that the predominant issue was whether such children had a right of abode in Hong Kong; hence the predominant provision to be interpreted was Article 24, which was a provision within the autonomy of the HKSAR, and therefore no judicial referral was necessary. The subsequent reversal of this decision by the NPCSC suggested that this approach was wrong, but as the interpretation did not explain why this approach was wrong, the best one can conclude from the interpretation is that when the decision involves an interpretation of two different provisions of the Basic Law, one of which is within the autonomy and one outside the autonomy of the HKSAR, the

⁵ BL86 & 87. Art 39 further imports the restrictions on any violation of fundamental rights contrary to the ICCPR as applied to Hong Kong.

⁶ *Democratic Republic of Congo v FG Hemisphere Associates LLC (No 1)* (2011) 4 HKCFAR 95.

⁷ BL81, 83, 85, 88-93.

⁸ *Lau Kong Yung v Director of Immigration*, supra. See also *Chief Executive of the HKSAR v President of the Legislative Council* [2017] HKEC 1889 (1 Sept 2017)(CFA).

Court of Final Appeal would have to refer the question to the NPCSC for interpretation before rendering its final judgment.

The second interpretation dealt with the procedure to amend Annex II of the Basic Law regarding the composition of the Legislative Council. Arguably the amendment of Annex II, which deals with the pace of democratising the Legislative Council, is a matter entirely within the domestic autonomy of the HKSAR. This interpretation set out the so-called “five steps” that need to be complied with for any amendment to Annex II, and the process could only be invoked if the NPCSC agrees that there is a need to amend the Annex. This interpretation then triggered a series of decisions in subsequent years to determine if there is a need to amend Annex II. Apart from deciding that there was no need to amend Annex II, despite strong demands from the Hong Kong community, the NPCSC had also decided over the years that minor changes could be made, such as the total number of members of the Legislative Council, provided that the ratio between members returned by geographical constituencies and by functional constituencies would have to remain the same. The legal status of these decisions is unclear. They were made within the framework of the second interpretation, but they also went beyond the interpretation. There is no clear restriction on the scope of these decisions, let alone their legal effect, although it is likely to be politically and practically futile to challenge the legality of these decisions.

The third and the fifth interpretations are both unwarranted. The third interpretation dealt with the meaning of a term of office of the Chief Executive under Article 46 as to whether it included part of a term when Mr Donald Tsang succeeded Mr C H Tung as Chief Executive for the remainder of the term of Tung. There was no urgency to resolve the matter by the NPCSC, as it affected only Mr Donald Tsang five years later if he decided to run for the Chief Executive office for a third term. While there were different views in the community as to whether his first term should be counted as one term, this is a matter that is perfectly capable of being resolved by the Hong Kong court. It was sad that the HKSAR saw fit to seek an interpretation from the NPCSC when such interpretation was absolutely unnecessary.⁹

Likewise, the fifth interpretation, which is about the requirements of a valid oath and the consequence of declining or neglecting to take an oath of office under Article 104, dealt with a matter which, as the Secretary for Justice stated publicly, could aptly be resolved in Hong Kong. Of all the interpretations made by the NPCSC, the fifth interpretation has the most damaging effect on the legal system of the HKSAR. Unlike the first interpretation which was rendered after the judicial process in Hong Kong has been exhausted, the fifth interpretation was made at a time when the court was about to deliver a reserved judgment on the validity of the oath of office taken by two legislators elected. The interpretation was rushed through over a weekend and covered exactly the issues that the court was to decide, clearly with a view to influencing the decision of the court in that case, thereby undermining the independence of the judiciary. The Court of First Instance decided against the legislators elected on the basis of the Oaths and Declarations Ordinance without reliance

⁹ It is also sad that the interpretation was sought by the HKSAR Government, presumably on the insistence of the Chief Executive who would be the only person affected by the issue, and this was done after a person has taken out an application for leave to apply for judicial review to clarify this issue. The leave application was refused on the ground that it became academic after the NPCSC has given its interpretation.

on the NPCSC interpretation.¹⁰ On appeal, the Court of Appeal fully embraced the NPCSC interpretation.¹¹ This raised the question whether the NPCSC interpretation has retrospective operation. It held, relying on the judgment of the Court of Final Appeal in *Lau Kong Yung v Director of Immigration*, that the interpretation took effect as from 1 July 1997. In any event, whether the NPCSC interpretation would have retrospective effect was a matter of Chinese law. In the absence of expert evidence on Chinese law, the Court of Appeal would not be in a position to adjudicate on this question. Both points were open to doubt.

Retrospective Operation of the NPCSC Interpretation

First, in *Lau Kong Yung*, the Court of Final Appeal held:¹²

“The Interpretation, being an interpretation of the relevant provisions, dates from 1 July 1997 when the Basic Law came into effect. It declared what the law has always been. Compare the common law declaratory theory of judicial decisions, see *Kleinwort Benson Ltd v Lincoln City Council* [1998] 3 WLR 1095 at 1117-1119 and 1148.”

The analogy with the common law declaratory theory is most inappropriate. The declaratory theory assumes that the law is always there and the judge merely discovers the law. It follows that judge-made law is retrospective in nature as the judgment is not creating but discovering law that is always in existence. This declaratory theory is inapplicable to the interpretation of statute, which is a creation of the Legislature and is created at a particular moment of time. Even accepting that it is only an analogy in relation to the interpretation given by the court as it is a declaration of what the statute has always been since its creation, the declaratory theory assumes that the process of interpretation is merely a judicial exposition of what the law has always been. It is a judicial function of interpretation. In contrast, NPCSC interpretation is legislative in nature.¹³ It is not bound by the original intention of the legislature. The NPCSC can fill in a gap in the existing law, or expand or supplement or update the existing law. It is not confined by the language of the statute or the original intention of the legislature. The language only provides a springboard for the NPCSC to develop the law. The fifth interpretation itself provides an example of this. Article 104 refers only to a requirement to take oath. The NPCSC is able to develop, not only the requirements of a valid oath, but also the form and manner of taking oath as well as the consequences of failing to take the oath, from the general requirement of oath taking under the pretext of interpretation. The most astonishing aspect of the interpretation is that it applies not only to person taking the office as specified in Art 104, but also to persons who intend to run for those offices.¹⁴ The interpretation is no longer expounding the meaning of Art 104; the NPCSC is free to travel well beyond the boundary of Art 104.

¹⁰ *Chief Executive of the HKSAR v President of the Legislative Council* [2016] 6 HKC 417 (CFI).

¹¹ *Chief Executive of the HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460 (CA).

¹² (1999) 2 HKCFAR 300 at 326.

¹³ *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 ; *Sixtus Leung Chung Hang, Yau Wai Ching v Chief Executive of the HKSAR* [2017] HKCU 2189, para 36.

¹⁴ Para 1 of the 5th NPCSC interpretation provides that the taking of oath is “the legal requirements and preconditions for standing for election in respect of or taking up the public office specified in the Article.”

When the interpretation is legislative in nature, there is no reason to assume that it will automatically apply with retrospective effect. This is particularly so when the interpretation is to apply to a common law system where there is a presumption against retroactivity. While the interpretation is a matter of Chinese law, the procedural effect of the interpretation that is to be applied in a common law system is arguably a matter to be governed by *lex loci*, that is, the common law principles. In accordance with the common law principles, the interpretation should be presumed not to operate retrospectively. This presumption could of course be rebutted, but that would require the strongest justifications and the clearest language to this effect, and whether the presumption has been rebutted would be decided in light of the context of each case. In this regard, *Lau Kong Yung* could be distinguished. The context of that case was that as a result of the decision of the Court of Final Appeal in *Ng Ka Ling*, it was said that about 1.68 million children would have a right of abode in Hong Kong, which was considered to cause an unbearable immigration pressure on the HKSAR. Thus the HKSAR Government invited the NPCSC to reverse the judgment in *Ng Ka Ling*, which the NPCSC did by its first interpretation of the NPCSC. *Lau Kong Yung* was dealing with the aftermath of this right of abode saga, and the issue in *Lau Kong Yung* was whether the NPCSC interpretation operated retrospectively so that the perceived immigration problem caused by the 1.68 million children who were said to be the potential beneficiaries of the judgment of the Court of Final Appeal could be contained. In that context, retrospective application would be reasonable, for otherwise the immigration problem would not have been resolved. On the other hand, there was no such pressure in the oath case. There were a handful of legislators elected who were criticized for not having properly taken the legislative oath. Judicial proceedings for disqualification were brought by the Secretary for Justice and the matter was already seized by the judiciary. The number of offenders was finite, and there was no social pressure or whatsoever that required retrospective operation of the law.

The presumption of non-retrospective operation of the NPCSC interpretation in the HKSAR is further buttressed by the arrangement of returning new legislation to the Legislature under Art 17 of the Basic Law. All laws enacted by the Legislative Council have to be reported to the NPCSC for the record. If the NPCSC considers that the law is inconsistent with the Basic Law, it may return the law in question to Hong Kong. Any such law shall immediately be invalidated, but such invalidation is expressly stated not to have retroactive effect, unless otherwise provided for in the laws of the HKSAR. The scheme is clearly designed to protect the integrity of the common law system and to minimize the effect of returning the law. The same consideration applies to the NPCSC interpretation, especially when the interpretation may render some past conduct unlawful or even criminal. It is a serious inroad into the common law system by imposing retrospectively criminal liability.

Finally, even as a matter of Chinese law, there is no conclusive view as to whether an NPCSC interpretation has retrospective effect.¹⁵ There are those who support retrospective effect on the basis that the interpretation reflects what the law has always been. There is also a respectable body of academic views that opposes retrospective application primarily on the ground of its inherent

¹⁵ Zhu Han and Albert Chen, "A Legal Analysis of the Election and Oath Taking Incident of the Hong Kong Legislative Council in 2016: A Historical and Comparative Law Perspective" (2017) 204(4) FXPL 24-37 (朱含, 陈弘毅: "2016 年香港立法会选举及宣誓风波法律评析: 历史和比较法的视角" (2017) 204(4) 法学评论 24-37)

unfairness. And there are also those who take a half-way house view that whether the interpretation would have retrospective effect would be a matter to be decided on a case by case basis, depending on the context and the nature of the issues involved – an approach which is indeed echoed by the common law system.

Thus, it is surprising when the Court of Final Appeal refused to grant leave to appeal in the Leung/ Yau case.¹⁶ Whether the NPCSC interpretation would have retrospective effect must itself be a question of great general and public importance. The Court of Final Appeal merely referred to its previous decisions and stated categorically that “there is no warrant for revisiting those propositions” and the attempt to question their correctness “are not reasonably arguable”.¹⁷ This is unfortunate as it may unjustifiably foreclose further deliberation on this important constitutional issue. It is the first time that the NPCSC interpretation was made during the process of a judicial hearing and its retrospective operation is widely perceived to be a deliberate interference with the independence of the judiciary and the rule of law. A decision to confine the NPCSC interpretation in its temporal effect would serve to protect the integrity of the common law system, and it is disappointing that the Court did not seize the opportunity to engage the arguments on such an important constitutional issue. At the very least, the Court could have left open these issues to the future on the ground that a decision on these issues would not have made any difference to the outcome, as the same decision would have been reached under the Oaths and Declarations Ordinance.

Scope of Interpretation

The fifth interpretation opens up another set of issues on the scope of the NPCSC interpretation. Article 104 sets out the requirement of taking an oath of allegiance to the HKSAR by a range of persons taking up public offices, including members of the judiciary, “in accordance with law”, which clearly refers to domestic law. The term of the oath and the consequences of declining or neglecting to take the oath are set out in the Oaths and Declarations Ordinance, the power of interpretation of which is vested exclusively in the Hong Kong courts. An ordinary and natural meaning of Article 104 is that the detailed requirements of a valid oath and the consequences of failing to take the oath would be a matter for the local law. It would be wrong for the NPCSC to interpret the Basic Law on matters which are expressly stated to be governed by the local law, as in so doing the NPCSC will effectively be dictating the content of the local law. Thus, the 5th interpretation, and particularly its reference to “decline or neglect” when these terms do not appear in Article 104 but in the Oaths and Declaration Ordinance, conveys a strong impression that the NPCSC is effectively interpreting the local ordinance under the pretext of interpreting the Basic Law. It is true that the NPCSC enjoys a wide power under Article 67 of the PRC Constitution, which includes both the power to clarify or supplement the law.¹⁸ However, this power is constrained by three factors. First, there is a clear distinction between interpreting the law and amending the law, both in Article 67 of the PRC

¹⁶ *Chief Executive of the HKSAR v President of the Legislative Council* [2017] HKEC 1889 (1 Sept 2017), para 36.

¹⁷ *Ibid*, at paras 36-37.

¹⁸ See also Art 45 of the Legislative Law of the PRC, which provides that the power of interpretation includes the power to clarify the law and the power to supplement the law when new situation has arisen after the enactment of the law.

Constitution and the Basic Law.¹⁹ The power of interpretation should not be invoked to effectively amend and extend the existing coverage of the Basic Law. Secondly, the NPCSC has no power to make law for Hong Kong. If it considers the existing law is inadequate to implement the Basic Law, this should be dealt with by the procedure under Article 17 or 160. The existence of those procedures means that the power of interpretation should not be exercised if it effectively amounts to an interpretation of the local law or a criticism of the inadequacies of local law. Thirdly, while national law could be extended to Hong Kong, the scope of such national law and the procedure for extending them to Hong Kong have been carefully defined in the Basic Law. It would defeat the design of the Basic Law if the NPCSC can make laws for Hong Kong via the interpretation route. If it has power to supplement the law, the case against retrospective operation is stronger. If it does not have the power to supplement the law, then arguably the NPCSC has gone beyond its power of interpretation in its fifth interpretation. In any event, the interpretation has undoubtedly gone beyond the scope of Article 104 in at least one aspect, namely its extension of the requirement of oath taking to any candidate who intends to stand for election to the public office. Article 104 clearly applies only to those persons who have been elected to the public office.

This brings us to a different issue, namely whether the NPCSC has the power to interpret national law that has been extended to Hong Kong and the effect of such interpretation in Hong Kong. Under Article 18, the NPCSC has extended a number of national laws to the HKSAR. These laws are confined to those relating to defence and foreign affairs and matters outside the limits of the autonomy of the HKSAR. They could apply to the HKSAR by way of promulgation or legislation by the HKSAR. There is no doubt that the NPCSC must have power to interpret national laws under Article 67 of the PRC Constitution. If the national law is applied to the HKSAR by way of promulgation, it is difficult to resist an argument that the interpretation of these national laws shall equally be applicable, even though there is no such expressed provision in the Basic Law. However, the position is less clear if the national law is applied to the HKSAR by way of local legislation. Once the national law is transformed into local legislation, the law that applies in the HKSAR is the local law, and no longer the national law. This is of particular significance when the national law in its entirety is considered to be unsuitable for direct application in light of the local circumstances so that its application is modified by local law. The position is similar to the construction of local legislation which is intended to give effect to an international treaty, or the interpretation of local law that has its origin in the English Acts before the changeover.²⁰ In interpreting the local law, regards must be given to the national law, and a fortiori, any relevant NPCSC interpretation on the national law, but such interpretation would not be binding on the local courts; it is only one of the factors, albeit a weighty one, to be taken into consideration in giving effect to the local law.

Principles to avoid arbitrary or irrational exercise of the power of interpretation

¹⁹ BL159. Article 67 of the PRC Constitution also draws a clear distinction between amending the law and interpreting the law.

²⁰ *Don the Beachcomber Ltd (No 1) v Pacific Island Shipbuilding Co Ltd* [1963] 1 HKLR 396 at 402 (“The wording of R.4 of O.25 is an exact reproduction of the wording of the equivalent section of the English Act so that any decisions under the interpretations of the English Act would be of the greatest persuasive force in the interpretation of r.4.”)

A few observations could be drawn. The NPCSC interpretation, which is a product of the Chinese legal system, presents one of the greatest challenges to the common law system. The power of interpretation is general, unqualified, and seems to be subject to no constraint. It can be exercised at any time, with or without any request from the HKSAR. It can be exercised without any judicial referral, or at any time before, during and after the completion of a judicial hearing in the HKSAR. It covers every provision in the Basic Law, and is not confined to those relating to foreign affairs, defence, or matters outside the limits of the autonomy of the HKSAR. It is binding on Hong Kong, and, as the Court of Final Appeal has decided, the interpretation takes effect from 1 July 1997. In short, it is an absolute and unrestricted power. At the same time, there is no restriction on when the HKSAR could request the NPCSC to give an interpretation in the absence of judicial referral.

Professor Rao Geping recently suggested that the exercise of the power of interpretation by the NPCSC, including its mechanism, principle, procedures, the legal effect and the relationship with the courts in Hong Kong, shall be set out and formalized.²¹ This is desirable so that the power could be exercised in a rational and principled manner. It is submitted that the following principles should be adopted in light of the experience of the five interpretations that have been made in the last two decades. First, it is accepted that the power of interpretation is vested in the NPCSC, but this power should only be exercised in exceptional circumstances. Secondly, this power should generally not be exercised if the issue involved is one that could be addressed or resolved in the HKSAR, or one that falls within the autonomy of the HKSAR, or in the absence of any request from the HKSAR. NPCSC interpretation should be the last resort. Thirdly, the NPCSC should decline to exercise this power if there is no pressing urgency or general importance to interpret the Basic Law, such as when the interpretation affects only one person as in the third interpretation. Fourthly, the NPCSC should refrain from exercising its power of interpretation when there is a pending court case so as not to give an impression of interfering with the judicial process. Judicial independence is of crucial importance in maintaining the credibility and integrity of One Country, Two Systems, and is the singularly important element that distinguishes the common law system. It should be carefully protected and upheld, as there will no longer be “two systems” if judicial independence is no longer maintained. If it is felt that the view of the Central Government has to be known in the course of litigation, the appropriate manner would be to express those views through the Secretary of Justice, either as a party or as an intervener, as it happened in the *Congo* case.²² Fifthly, the power to interpret the Basic Law pursuant to Art 67(4) of the PRC Constitution should be exercised in a manner to clarify the meaning of an existing provision of the Basic Law. The clarification is constrained by the language of the Basic Law; the purpose of the interpretation is not to fill a gap and plug a loophole that cannot be justified by the language of the existing provisions of the Basic Law. The power of interpretation should not be invoked to interpret matters that are covered in the local legislation. Sixthly, while the question of whether an NPCSC interpretation would have retrospective effect in the Mainland is a matter to be governed by Chinese law, the retrospective

²¹ 饒戈平：完善與基本法實施相配套的制度和機制 (Rao Geping, “To Perfect the System and the Mechanism in support of the Implementation of the Basic Law” *Bauhinia Monthly Magazine*, April 2017, which was reproduced in *Think Hong Kong*, April 2017 (<http://www.thinkhk.com/article/2017-04/26/21178.html>)). See also “Beijing needs mechanism for interpreting Hong Kong’s mini-constitution, Chinese Legal Expert Says”, *South China Morning Post*, 28 April 2017 (<http://www.scmp.com/news/hong-kong/politics/article/2091480/beijing-needs-mechanism-interpretation-hong-kongs-mini>).

²² *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95.

effect of an NPCSC interpretation in the HKSAR should be governed by the local law. Accordingly, whether an interpretation of the NPCSC shall have retrospective effect in the HKSAR is to be determined in light of the context of each case in accordance with the common law principles, after giving full effect to the presumption against retrospective operation of any legislative instrument. Seventhly, in order to avoid undue interference with the common law system, any NPCSC interpretation on national law that is applicable to the HKSAR shall be of persuasive value only. Such interpretation will be particularly weighty if the national law is applied to the HKSAR by way of promulgation. Eighthly, the scope of any decision that derives its authority from an interpretation shall be expressly stated in the interpretation and shall be limited by the interpretation and the relevant provisions in the Basic Law. Such decision shall not serve to enlarge the scope of an interpretation. Finally, in the absence of judicial referral, the HKSAR shall not request an interpretation of the Basic Law unless there is overwhelming and demonstrable public interest to do so. In general, the HKSAR shall not request the NPCSC to make an interpretation without the endorsement of the Legislature.

2. Act of State and Fact of State

Under Article 19(3) of the Basic Law, the courts of the HKSAR shall have no jurisdiction over “acts of state such as defence and foreign affairs”. Articles 13 and 14 further provide that foreign affairs and defence of the HKSAR shall be the responsibility of the Central Government. A few questions arise: what is the meaning of an “act of state”? Does it cover only defence and foreign affairs? The phrase “such as”, which exists in both the English and the Chinese versions, suggests that an “act of state” may be wider than defence and foreign affairs, but if so, what would it cover? And then, who should decide whether certain act is an “act of state”?

The act of state is an archaic common law doctrine which is very difficult to define and its scope is still evolving.²³ It has its origin, dating back to the 13th century, in the right to seize ships or cargoes at sea under letters of marque and reprisal issued on the authority of the Crown, without incurring liability under English law. By the 18th century, as a result of the expansion of British sea power, it became necessary to better define the concept so as to bring it in line with international law and municipal law. Sir William Murray, later Lord Mansfield, the law officer of the Crown, opined in 1753 that the seizure of the property on behalf of the Crown gave rise to no right to damages or possession at the suit of the former owner.²⁴ The doctrine underwent further changes in the 19th century. In the celebrated decision of *Secretary of State in Council of India v Kamachee Boye Sahaba*,²⁵ Lord Kingsdown explained the doctrine as one of exercise of the sovereign power. The seizure of the late Rajah’s property by the East India Company, in the exercise of the sovereign power, “may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordship cannot enter.

²³ *Mohammed v Ministry of Defence* [2017] 2 WLR 287 at 325, para 101, per Lord Neuberger PSC: “any attempt to define the precise nature and extent of the principle of Crown act of state is doomed to failure.” Unfortunately, there were only a handful of cases on this doctrine in the last two centuries.

²⁴ A succinct summary of the origin of the doctrine of an act of state was given by Lord Sumption JSC in *Mohammed v Ministry of Defence*, *ibid*, at paras 82-87.

²⁵ (1859) 7 Moo Ind App 476, at 540.

It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of Justice can afford a remedy.”²⁶

Since then, it has been the position under the common law that the court has no jurisdiction over certain sovereign acts that were performed in the field of international affairs in the course of its relationship with another state or its subject. Most of these acts are prerogative in nature. As Lord Roskill stated,²⁷

“Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amendable to the judicial process.”

Added to this list would be “the conduct of foreign affairs, making treaties, making peace and war, conquering or annexing territories”,²⁸ and recognition of foreign states and diplomats.²⁹ Indeed, at one stage the prerogative nature of these powers was regarded as the basis of an act of state. This is no longer the case when the House of Lords held in the leading case of *CCSU* that the exercise of executive power, whatever its source, would be subject to judicial review and would be excluded only because the nature of its subject matter was not subject to judicial assessment. Thus, the starting point, as recognized by the UK Supreme Court recently, is that “English law does not recognize that there is an indefinite class of acts concerning matters of high policy or public security which may be left to the uncontrolled discretion of the Government and which are outside the jurisdiction of the courts.”³⁰ Accordingly, the mere fact that a wrongdoing is an act done at the command of the sovereign is no defence. The enactment of the Crown Proceedings Act 1947, which abolished the general immunity of the Sovereign from tort liability, caused further erosion to the immunity. The act of the Crown and its agents are always in principle subject to the jurisdiction of the courts. Finally, while the Crown can do no wrong, and the Sovereign cannot be sued in tort, the person who did the wrongful act is liable in damages, as any private person would be.³¹ Hence, a minister of the Crown could be found to be personally liable for contempt.³²

The Crown Act of State

²⁶ *Ibid.*

²⁷ *Council of Civil Service Unions v Minister for the Civil Service* (“*CCSU*”) [1985] AC 374 at 418.

²⁸ *Mohammed v Ministry of Defence* [2017] 2 WLR 287 at 298, para 15, per Baroness Hale DPSC. An example of annexation of territories is *In re Wong Hon*, where the Full Court held that the New Territories Order in Council 1898 and the Kowloon City Order in Council 1899 declaring the extent of the jurisdiction acquired by the Crown under the second Peking Convention, which jurisdiction was extended to the Walled City, was an act of state binding on the court.

²⁹ *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 at 961. See also the *Congo Case*, below, at 483.

³⁰ *Mohammed v Ministry of Defence* [2017] 2 WLR 287 at 295, para 4, per Baroness Hale DPSC, quoting Harry Street, *Governmental Liability, A Comparative Study* (1953), p 50.

³¹ *Johnstone v Pedlar* [1921] 2 AC 262 at 271, per Viscount Finlay.

³² *In re M* [1994] 1 AC 377.

The modern doctrine of an act of state comprises of two distinct aspects: the Crown Act of State and the Foreign Act of State. The Crown Act of State in turn comprises two aspects. The first is a principle of non-justiciability under which “certain acts committed by a sovereign state are, by their very nature, not susceptible to adjudication in courts.”³³ Annexations and cessions of territory, or declaration of war and peace, are obvious examples. The second principle is a defence to an action in tort, under which “a foreigner cannot sue the Government, or its servants or agents, in the courts of this country in respect of certain acts committed abroad pursuant to deliberate UK policy in the conduct of its foreign affairs.”³⁴ In *Burton v Denman*,³⁵ Commander Denman landed on an island in Gallinas, West Africa. He drove out the Spanish slavers, entered into a treaty with the local chiefs to outlaw slavery, liberated the slaves, and burned down the barracoons. He was subsequently sued by Burton, a slaver, in trespass against him and for damages for loss of his chattels, including the slaves. Slave ownership was lawful under the law of Gallinas. The action of Commander Denman was not carried out in the high seas in accordance with a Treaty between Britain and Spain against slave trade. His action, both under the local law and English law, was unlawful, except that the action was subsequently ratified by the Crown. The court held that he had a defence of an act of state against the tort claim.

The position was best summarized by Lord Wilberforce in *Attorney General v Nissan*:³⁶

“The first rule is one which provides a defendant, normally a servant of the Crown, with a defence to an act otherwise tortious or criminal, committed abroad, provided that the act was authorized or subsequently ratified by the Crown. It is established that this defence may be pleaded against an alien, if done abroad, but not against a friendly alien if the act was done in Her Majesty’s Dominions....

“The second rule is one of justiciability: it prevents British municipal courts from taking cognizance of certain acts. The class of acts so protected has not been accurately defined: one formulation is ‘those acts of the Crown which are done under the prerogative in the sphere of foreign affairs (Wade & Phillips’s *Constitutional Law*, 7th ed, (1956), p 263). As regards such acts it is certainly the law that the injured person, if an alien, cannot sue in a British court and can only have resort to diplomatic protest. How far this rule goes and how far it prevents resort to the courts by British subjects is not a matter on which clear authority exists.”

In the recent case of *Mohammed v Ministry of Defence*, the UK Supreme Court could not agree on whether the Crown Act of State comprised of one or two rules. The issue in that case was whether the British armed forces, acting as part of a multi-national force, established by a United Nations Security Council resolution and under NATO command, to maintain security in Afghanistan, was liable in tort for the arrest and detention for some months of the applicant, an Afghanistan citizen, in the first case, and the transfer of the claimants, who were citizens of Pakistan and Iraq and detained in Iraq by the British armed forces, to the United States armed forces pursuant to an agreement

³³ *Mohammed v Ministry of Defence* [2017] 2 WLR 287 at 298, para 7, per Baroness Hale DJSC.

³⁴ *Ibid.*

³⁵ (1848) 2 Exch 167.

³⁶ [1970] AC 179 at 231.

between the United Kingdom and the United States of America, in the second case. The Ministry of Defence pleaded the Crown Act of State as defence, and the claimant disputed the existence of such a defence. Baroness Hale DPSC, joined by Lord Wilson and Lord Hughes JJSC, upheld the rule of defence of an Act of State. They held that the Act of State doctrine “cannot give carte blanc to the authorities to authorize or ratify any class of tortious acts committed abroad in the conduct of the foreign relations of the state.”³⁷ The Act of State is a very narrow doctrine. Its essential elements are: (1) the act should be an exercise of sovereign power, inherently governmental in nature. This is to be determined by the character of the act, and the nature of the act has to be an inherently governmental act that is capable of being authorized or ratified by the Crown. Thus, stationing a troop pursuant to an agreement with a foreign state would be an inherently governmental act, but the appropriation of a hotel was not a necessary act of implementation or an inherently governmental act;³⁸ (2) the act should be done outside the United Kingdom; (3) it was done with the prior authority or subsequent ratification of the Crown; and (4) it was done in the conduct of the Crown’s relations with other states or their subjects.³⁹ The acts in question had to be closely connected to and be necessary in pursuing the foreign policy.⁴⁰ They would be extended to cover the conduct of military operations which are themselves lawful in international law, but Baroness Hale DPSC expressly left open whether the defence could be extended to other situations and whether the doctrine could ever be pleaded against British citizens. Lord Sumption JSC agreed and was prepared to restrict the defence to the situation where the tort was committed against a person not owing allegiance to the Crown.⁴¹ Baroness Hale DPSC was attracted by the explanation of public policy as the basis of this aspect of an Act of State: it would be contrary to public policy to apply in an English court the tort law of the foreign state where the events took place. The attraction of public policy, as adopted by the Court of Appeal and explained by Baroness Hale DPSC, was that it would enable the court to consider the matter on a case by case basis. Therefore, while the deployment of armed forces in the conduct of international relations, and associated with it the inherent destruction or damage of property or the killing or detention or transfer of the prisoners would be an inherently governmental act, torture or maltreatment of these prisoners would be against English public policy and therefore not an inherently governmental act for the purpose of the Act of State doctrine.⁴²

³⁷ Ibid, at 304, para 33.

³⁸ *Attorney General v Nissan, supra*, at 216-217 (Lord Morris) and 227 (Lord Pearce); see also Lord Sumption JSC, in *Mohammed v Ministry of Defence, supra*, at paras 92-93.

³⁹ Ibid, at 305-306, para 37.

⁴⁰ Lord Sumption JSC cautioned that the policy might not have to be “high policy” but may be extended to actions taken by the Crown’s agents in the execution of those decisions, and these actions may be far below the level of policy-making, whereas decisions unauthorised but were ratified after the event would unlikely be taken in accordance with any high policy of the Crown: at 322, para 91. His Lordship further warned that the court should avoid engaging in an assessment of political or tactical alternatives in considering whether the action was necessary: *ibid*, para 92.

⁴¹ Ibid, at 319, para 81, in a tentative manner. Lord Mance JSC likewise agreed: at 316, para 72.

⁴² Ibid, at 305, para 35, but see Lord Sumption JSC, at 324, para 96, who had reservation that it would not be an inherently governmental act, but agreed that it would be contrary to English public policy and hence not a lawful exercise of the royal prerogative and therefore it could not be an act of state.

Lord Mance JSC considered that there was only one single doctrine of non-justiciability or, as his Lordship preferred, a principle of abstention or restraint.⁴³ Non-justiciability is not based on an absence of judicial or manageable standards, but on the basis that the nature and the subject matter are such that the appropriate forum for its control is Parliament (as in the case of the Royal prerogative of making war and peace or treaties) or that “representation and redress in respect of activities involving foreign states and their citizens may be more appropriately pursued at a traditional state-to-state level, rather than by domestic litigation brought by individuals.”⁴⁴

Lord Sumption JSC regarded non-justiciability as a “treacherous word” that is capable of causing confusion. While his Lordship also referred to an issue which is inherently unsuitable for judicial determination by reason of its subject matter or its determination not falling within the constitutional competence of the court as, for example, it would trespass on parliamentary privilege, Lord Sumption JSC preferred to justify the doctrine on the nature of the rights involved rather than the subject matter:⁴⁵

“The court is not disabled from adjudicating on a Crown act of state by virtue of its subject matter. The acts of the Crown and its agents are always in principle subject to the adjudicative power of the courts. They unquestionably have both jurisdiction and competence to determine the legal effects of a Crown act of state on the rights of those adversely affected by it. The real question is what are those rights. The rule of law relating to Crown acts of state defines the limits which as a matter of policy, the law acts upon certain categories of rights and liabilities, on the ground that they would otherwise be inconsistent with the exercise by the executive of the proper functions of the state. In principle an agent of the Crown is liable as a matter of English law for injury or detention of persons or goods without lawful authority. But that liability does not extend to a limited class of acts constituting Crown acts of state. It follows that the agent has a defence if his acts fall within that class.”

Thus, as Lord Sumption JSC reasoned, “the reason why the liabilities of the Crown in municipal law do not extend to sovereign acts done in the course of military operation outside the United Kingdom is essentially a principle of consistency.”⁴⁶ The law has conferred on the Crown the power to conduct the United Kingdom’s international relations, including the deployment of armed force in support of its objectives. Thus, it would be inconsistent, if not also illogical, that the Crown has such power which is beyond the competence of the judiciary and yet the inherent consequences of an exercise of that power would be regarded as civil wrongs.

Notwithstanding the disagreement among members of the Supreme Court on whether the Crown Act of State comprises one rule with different aspects or two different rules, and the different

⁴³ Ibid, at 309, para 47. His Lordship considered *Buron v Denman* as an example of non-justiciability, and Lord Wilberforce’s statement in *Nissan* was not intended to create a bifurcation of the doctrine and was not so regarded by other members of the House: at 315-316, paras 69-70.

⁴⁴ At 312, para 57. In this regard Lord Sumption JSC agreed that the two rules of Lord Wilberforce in *Nissan* have merged into one.

⁴⁵ At 318, paras 79-80. Lord Mance JSC disagreed: at 309, para 48.

⁴⁶ At 321, para 88.

justifications for the doctrine, the court was unanimous in holding that the Crown Act of State is a narrow doctrine and that it is a rule of the substantive law rather than a procedural bar. It defines the circumstances in which there may be liability for a particular type of activity, and therefore, once the defence is successfully raised, the right to fair hearing under Article 6 of the European Convention on Human Rights would not apply.⁴⁷

Foreign Act of State

While Crown Act of State deals with the liability of the Sovereign and its agents for conduct that took place in foreign soil as a matter of state policy, Foreign Act of State deals with the position of a foreign sovereign in a municipal court, under which the sovereign or governmental acts of one state are not matters upon which the courts of another state will adjudicate.⁴⁸ The doctrine operates purely as a rule of non-justiciability and is based on the international comity of equality among sovereign States. The difficulty is again what act would constitute a Foreign Act of State. This issue was raised in two local cases.

In the *Congo* case,⁴⁹ the issue was whether the Democratic Republic of Congo could claim immunity in an application of the applicant company before a Hong Kong court to enforce an arbitral award against Congo, pursuant to the New York Convention on Enforcement of Arbitral Awards to which Hong Kong is a party, by seeking an order to direct a PRC state-owned enterprise to satisfy the arbitral award by fees that the state-owned enterprise was obliged to pay the Congo Government under a separate mining agreement. The Congo Government claimed sovereign immunity. The focus of the litigation was whether, under the law of Hong Kong, a sovereign state could claim absolute immunity or only restricted immunity in matters other than purely commercial transactions. At first instance, Reyes J avoided this issue by holding that the transaction in question was not commercial in nature and hence the Congo Government would be entitled to immunity whichever view of immunity was taken. On appeal, the Court of Appeal reversed his decision on both grounds: the transaction in question was commercial in nature, and the Congo Government would not be entitled to immunity as sovereign immunity was only a restricted one under the common law. The litigation took an interesting turn at the Court of Final Appeal. Under Article 158(3), the Court of Final Appeal is under a duty to refer a question of interpretation of a provision of the Basic Law to the NPCSC if the provision concerns affairs which are the responsibility of the Central People's Government and its interpretation is necessary for the resolution of the appeal. The focus of the litigation was thus shifted to the issue of whether the Court of Final Appeal should make a judicial referral. By a narrow majority, the Court of Final Appeal held that (1) the extent of state immunity

⁴⁷ See, for example, at 308, para 45. A similar conclusion was reached by the European Court of Human Rights in *Al-Adsani v United Kingdom* (2002) 34 EHRR 11, which held that restrictions based on generally recognized rules of public international law could not be regarded as disproportionate restriction on the right of access to court. See also *Fogarty v United Kingdom* (2002) 34 EHRR 12 (p 302) and *McElhinney v Ireland* (2002) 34 EHRR 13 (p 322). See also *Jones v Minister of Interior of Kingdom of Saudi Arabia* [2007] 1 AC 270 where Lord Bingham (at 283, para 14) and Lord Hoffmann (at 298, para 64) expressed some doubt as to the applicability of Article 6 to state immunity claims.

⁴⁸ *Congresso del Partido* [1983] 1 AC 244 at 262. See, also *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888 and *Belhaj v Straw* [2015] 2 WLR 1105. See also Lord Mance JSC, at para 51 and Lord Sumption JSC, at para 89, in *Mohammed v Ministry of Defence*, supra.

⁴⁹ *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95.

was a question of act of state under Article 19(3); (2) in light of the constitutional change, the common law principle on state immunity in Hong Kong was now an absolute immunity; (3) the Congo Government had not, by taking part in the arbitration proceedings, waived its immunity; and (4) it was necessary to interpret Articles 13 and 19 of the Basic Law for the resolution of the appeal, and therefore it should make a judicial referral. Four questions were drafted for the interpretation of the NPCSC, and not surprisingly, the NPCSC affirmed that the common law in Hong Kong was now one of absolute immunity.⁵⁰

There is an element of contradiction in the decision of the majority of the Court of Final Appeal. If the extent of state immunity was an act of state under Article 19(3), it would be outside the jurisdiction of the Hong Kong court. It follows that it would not be for the Hong Kong court to determine whether the law in Hong Kong is absolute or restricted. Nor would it be relevant to decide whether state immunity was waived. The decisions of the majority on these issues would be relevant only if the extent of state immunity is not an act of state. Thus, of the four questions referred to the NPCSC for interpretation, three were probably misconceived. The fourth question on whether the common law on restricted state immunity previously in force in Hong Kong was inconsistent with the change of sovereignty and therefore should be modified or adapted was a wrong question. The common law to be changed is not whether state immunity is absolute or restricted, but whether the extent of state immunity is within the meaning of an act of state so that it is outside the jurisdiction of the Hong Kong courts. This is indeed the third question, which is the only relevant question. The second question whether the Hong Kong court is at liberty to apply the rule on restricted state immunity is irrelevant; it is only relevant if the extent of state immunity is not an act of state, but in that situation the extent of state immunity would be a matter of common law for Hong Kong and no referral on this question would be necessary. The first question on whether the Central People's Government has the power to determine the rule or policy of the PRC on state immunity is redundant. The answer must be yes. The question is whether such rule of policy shall apply to Hong Kong. If it is a matter of an act of state, which is the third question, then the matter would necessarily be a matter of foreign affairs and hence within the scope of Art 13.

This analysis leads to another issue: who should decide whether an act falls within the meaning of an act of state? The common law position is clear: it is the court. But whether the court decides that a matter falls within or outside the meaning of "act of state such as defence and foreign affairs" under Article 19(3), its interpretation on Article 19(3) would necessarily fall within the scope of Article 158(3) and hence the Court of Final Appeal will be obliged to refer the question to the NPCSC. The net effect is that the court will no longer have a final say of what constitutes an act of state.

This takes us back to the central issue: is the extent of state immunity an act of state? The common law position is again pretty clear: it has always been the courts that decide the extent of state immunity. In the course of such decision, the court may take cognizance of or even defer to the views of the executive, but the final decision is always one of the court. Like the position of any common law principle, it can be changed or modified by the Legislature, and the Legislature in a number of jurisdictions has spoken. UK Parliament enacted the Sovereign Immunity Act in 1978,

⁵⁰ *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 2)* (2011) 14 HKCFAR 395 at 428 where the Interpretation was annexed.

which was extended to Hong Kong by the State Immunity (Overseas Territories) Order 1979, but this does not detract from the general principle that it is the court that decides the extent of state immunity unless Parliament intervenes. The prerogative order lapsed on 30 June 1997. There was no PRC law or any other applicable local statute on state immunity. Thus, the position, as argued by the minority, is that the extent of state immunity would remain a matter of common law for the court.

The majority did not really disagree with this position. What it decided was that this common law position should be modified in light of the changing constitutional environment. It is perfectly legitimate for the majority to take into consideration the policy and practice of the new sovereign, which adopts the principle of absolute immunity, and consider, whether as a matter of common law, the principle of state immunity should be changed or modified. If the Court decided that, which it did and held that the common law principle should be modified to one of absolute immunity, and stopped at that, the Central People's Government's concern would have been addressed. There would then be no need for an interpretation and the matter would be contained within the common law system. It is unnecessary for the court to go further to decide that the extent of state immunity is an act of state, which would result in a contradictory position of deciding on the content of state immunity and holding at the same time that it had no jurisdiction over the matter, and be led to the treacherous path of judicial referral which unnecessarily mean giving up the common law position of the court having an ultimate say on what constitutes an act of state. This led Bokhary PJ, one of the two dissenting judges, to observe, in his extra-judicial writing, that "what belongs to two systems has been instead assigned by the court to one country and that it is difficult to see how the loss can ever be recovered."⁵¹ It may be argued that the NPCSC would proceed to an interpretation if the minority prevailed, but this consequence is by no means inevitable if the majority decided that, in light of the changing constitutional framework, the common law principle is modified to one of absolute immunity and hence it is unnecessary to decide if the extent of sovereign immunity is an act of state. The Court did have an opportunity to preserve the common law system and avoid an interpretation.

The consequence of the NPCSC interpretation is that no sovereign state would be subject to the jurisdiction of Hong Kong courts even when the sovereign state is engaged in purely commercial transactions. Whether an entity is a sovereign state is of course a matter of an act of state, as it is a matter of foreign relation that is beyond judicial assessment.

Fact of State

Another unsatisfactory aspect of the *Congo* case is the way evidence was presented to the Court. Three letters from the Ministry of Foreign Affairs were presented to the court through the Secretary for Justice at various stages of the litigation. The first letter, which was placed before Reyes J, stated that the doctrine adopted by the PRC was a doctrine of absolute immunity. The second letter, which was placed before the Court of Appeal, replied to Reyes J's query on the position of the PRC when she had signed the UN Convention on Jurisdictional Immunities of States and their Property 2004, which adopted the position of a restrictive state immunity. The third letter, which was drafted in

⁵¹ Bokhary, *Recollections* (Sweet & Maxwell, 2013), at 580.

rather strong language, explained how the adoption of a divergent position by the Hong Kong court on state immunity would prejudice China's sovereignty and hamper its conduct of foreign affairs. The Secretary for Justice fairly pointed out that these letters were not intended to bind the court; they only served to provide evidence on what the foreign policy of China was. Under Article 19(3) of the Basic Law, the court is obliged to obtain a certificate from the Chief Executive "on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases." The certificate, which must be based on "a certifying document from the Central People's Government", is binding on the courts. No such certificate has been obtained.

The Court avoided this problem by construing the phrase "whenever such questions arise in the adjudication of cases" to mean "whenever there is controversy or doubt about such questions which need to be resolved in adjudicating a case."⁵² It found that the relevant facts "have been authoritatively established and are not in dispute",⁵³ and therefore it could not have been intended that "the Chief Executive should be troubled."⁵⁴ This position is highly unsatisfactory and factually wrong. One of the issues before the Court was whether it would cause any embarrassment to the PRC if the Hong Kong courts adopted a different doctrine of state immunity from the Central Government.⁵⁵ The applicant company argued that a doctrine of restrictive state immunity would cause no prejudice to the State's sovereignty, and the Court held this argument was refuted by the third letter. Likewise, the second letter was a response to a query made by Reyes J. It would be most unsatisfactory that matters of such importance were to be left to be addressed by a letter. The purpose underlying the procedure in Article 19(3) is that important factual issues pertaining to questions of an act of state, which would have the effect of removing the jurisdiction of the courts, shall be certified in the most formal and serious manner by the State. It is not a matter to be addressed by consent, and the approach of the court will leave unsatisfactory questions of who could provide such evidence and when such evidence would be considered sufficient in the absence of a formal certificate from the Chief Executive. The dispensation, which was done purely on ground of inconvenience, was highly satisfactory, and the difficulty was graphically illustrated in the case of *Hua Tin Long (No 2)*.⁵⁶

In *Hua Tin Long (No 2)*, a vessel, being the largest floating derrick crane-barge based in Asia, was arrested for an alleged breach of contract. The vessel was eventually released upon the payment of a substantial bond, and then the owner of the vessel, the Guangdong Savage Bureau (GZS), claimed sovereign immunity and alternatively Crown immunity before the Hong Kong courts on the basis that it was an entity of the Central People's Government. The factual basis for the claim for immunity was to be established by assertions, including hearsay evidence, made by an employee of GZS in successive affirmations, with conflicting expert evidence before the court. The court expressed dissatisfaction at such an approach and urged that a procedure for a certificate of the Chief Executive should be adopted in an important constitutional area involving the assertion of Crown immunity.

⁵² At 221, para 362.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ See paras 287-290.

⁵⁶ [2010] 3 HKLRD 611.

Crown Immunity

Hua Tin Long (No 2) gave rise to another serious issue. The Court of First Instance has no difficulty in rejecting the claim for sovereign immunity, which is based on equality among sovereign states and has no application between different provinces within the same state. In contrast, Crown immunity has always been part of the common law. Notwithstanding the enactment of the Crown Proceedings Ordinance in 1957 which enabled the Hong Kong Government to be sued, the general position of the British Crown remained unaltered. Upon the change of sovereignty, it was held that the PRC in turn enjoyed similar “Crown immunity” hitherto accorded to the British Crown. The claim eventually failed on the narrow ground that GZS has waived its immunity by taking part in the litigation.

This is a startling, if not also worrying, decision. *Hua Tin Long* was originally owned by a state-owned enterprise that was established in October 1989. Consequent upon a 2003 reform, it was owned by the Guangzhou Salvage Bureau of the Ministry of Communication of the PRC.⁵⁷ The dispute involved a failure to make available the vessel, contrary to an agreement between the plaintiff, a commercial enterprise, and GZS, for two offshore oil development projects, and the reason for the failure was allegedly because the vessel was chartered to another commercial entity which refused to release the vessel for the plaintiff’s use. There was conflicting evidence on the status, the nature and the organizational structure of GZS,⁵⁸ and yet the court made a far-reaching finding that a government bureau affiliated to and under the control of a Ministry of the Central Government would step into the shoe of the sovereign and became the *personam* of the sovereign. This requires a leap jump and would effectively means any government entity of the PRC, even down to the provincial level, would be able to claim immunity from the jurisdiction of the Hong Kong courts in undisguisedly commercial activities. This position is difficult to reconcile with Article 22 of the Basic Law, which provides that all offices set up by departments of the Central Government, provinces, autonomous regions or municipalities directly under the Central Government and their personnel shall abide by the laws of the HKSAR. Besides, and more fundamentally, the court has failed to distinguish between the Crown as the monarch and the Crown as executive, and therefore erroneously assumed that the British Crown means the British Government. Crown immunity stems from the Royal prerogative that the Sovereign can do no wrong. Since the Case of *Proclamation*, the courts have jealously guarded their jurisdiction to define the ambit of the Crown, and the absolute privilege of the monarch has been severely curtailed over the time, notably as a rise of parliamentary supremacy. The monarch cannot be sued in her own courts, but her servants and agents could. Prerogatives have been abrogated, curtailed, and subject to judicial review,⁵⁹ and ministers could be made personally liable for contempt of court.⁶⁰ The position is best summarized by Lord Templeman in *Re M*:⁶¹

⁵⁷ See para 30.

⁵⁸ See paras 98-126.

⁵⁹ *CCSU* case, *supra*. For a more detailed discussion, see J Chan, “Prospect for the Due Process under Chinese Sovereignty”, in Steve Tsang (ed), *Judicial Independence and the Rule of Law in Hong Kong* (Palgrave, 2001), Ch 6, at pp 132-156.

⁶⁰ *In re M* [1994] 1 AC 377.

⁶¹ *Ibid*, at 395. See also *R v Home Secretary and Criminal Injuries Compensation Board, ex parte P* [1995] 1 All ER 870.

“The expression ‘the Crown’ has two meanings, namely the monarch and the executive. In the 17th century Parliament established the supremacy over the Crown as monarch, over the executive and over the judiciary.... Parliamentary supremacy over the judiciary is only exercisable by statute. The judiciary enforces the law against individuals, against institutions and against the executive. The judges cannot enforce the law against the Crown as monarch because the Crown as monarch can do no wrong but judges enforce the law against the Crown as executive and against the individual who from time to time represent the Crown.”

Some Observations

A core feature of the rule of law is that the executive is not above the law. The exception of an act of state is to an extent an anti-thesis of the rule of law and should hence be narrowly circumscribed. It is ultimately a doctrine based on public policy to delineate the boundary when the judiciary should decline to rule on the lawfulness of an act of the sovereign on the ground that any challenge to the act should be left to the executive, at least normally where the act is an exercise of Royal prerogative. It is ironic that this doctrine, which has its origin in the exercise of Royal prerogative power and which relies, to some extent, on the doctrine of separation of powers, which has repeatedly been rejected by the Central Government, should find its way in the Basic Law. The explicit reference to this doctrine in Article 19(3) seems to be unnecessarily elevating the importance of this very narrow doctrine, and is probably redundant, as it forms part of the previous restrictions on the jurisdiction of the courts before the changeover under Article 19(2). Properly understood, this doctrine excludes from the jurisdiction of the court certain acts of the sovereign that was done abroad, and provided immunity of a foreign state in the domestic court. Foreign Act of State is less relevant in the context of national security, whereas the Crown Act of State is likely to be raised when the liability of an agent of the Central Government is in question. The Crown Act of State doctrine could not be invoked against a subject; nor could it be relied upon to justify an act which is not lawful internationally, as it would not be an inherently governmental act to defy international law. Thus, an abduction of Hong Kong Permanent Residents in a foreign country to the Mainland could not be defended as an act of state. Nor would the defence be available when a Hong Kong Permanent Resident in Hong Kong is abducted to the Mainland by security force of the Mainland.

While most of the acts of foreign affairs and defence would come within the scope of an act of state, not all acts of foreign affairs and defence would qualify. It is still an evolving doctrine under the common law, and hence, the words “such as” in Article 19 should be so understood, rather than providing a springboard to enlarge the doctrine as one sees fit. The act of state doctrine also touches on sensitive issues between the Central Government and the HKSAR. The challenge of the court is to maintain a delicate balance between the interests of the sovereign and the integrity of the common law system. In *Congo*, the Court seems to have been too ready to give up common law principles, whereas in *Hua Tin Long*, the court is too ready to equate the new master with the old sovereign. Both cases involved commercial interest. The balance may be even more difficult and sensitive when personal liberty is at stake, which is more likely the case when national security is in issue.

3. The Secretary for Justice and the Right to Fair Hearing

Most advocates for the enactment of national security law pursuant to Article 23 seem to give an impression that national security could not have been safeguarded in the absence of such enactment. Nothing is of course further from the truth. The existing law of Hong Kong already prohibits treason, sedition, seditious libel, theft of state secrets, and proscription of local political organizations or bodies from establishing ties with foreign political organizations or bodies.⁶² The existing law on treason is wide enough to cover any act of secession and subversion against the Central People's Government. These laws were enacted before the changeover, and upon the change of sovereignty, they were adapted and adopted to become the laws of the HKSAR. Thus, contrary to what has been repeatedly claimed, there is no dereliction of responsibility on the part of the HKSAR for not enacting national security law. That duty has already been discharged on 1 July 1997 when these previously colonial laws were adapted to apply to the Central People's Government. The real issue is whether the existing law is inadequate, and if so, in what way is it inadequate, or if it is too draconian so that they have to be revised to be compatible with the protection of fundamental rights in the Basic Law.⁶³

The content of these laws has been adequately discussed elsewhere already.⁶⁴ It suffices to make two points here. The first observation concerns the office of the Secretary for Justice; the second is about the procedure of special advocate.

Secretary for Justice: Conflict of Roles

Upon the change of sovereignty, the post of Attorney General was renamed as Secretary for Justice, and the Attorney General's chambers as the Department of Justice. It is widely accepted that the change in nomenclature was not intended to involve any change in the nature of the office. However, in 2002, in an attempt to enhance political accountability of the Government and to foster political neutrality of the civil service, the Government introduced the Principal Officials Accountability System ("POAS"), under which former heads of policy bureaux, who used to be civil servants, would be replaced by political appointees serving as ministers. As a result, the Secretary for Justice, alongside the Chief Secretary, the Financial Secretary, and another 11 ministers, became political appointees who would shoulder political responsibility and be politically accountable.

The office of the Attorney General, which has a history of over 700 years, is an anomaly of the British constitutional history. The Attorney General, or the current Secretary for Justice, is a politician, a minister, a member of the Government, a professional lawyer, and the guardian of public interest.

⁶² See Crimes Ordinance, Cap 200, Parts 1 (Treason) and 2 (Other Offences against the Crown, including seditious libel, mutiny, incitement to disaffection); Official Secrets Ordinance, Cap 521, Part 2 (Espionage) and Part 3 (Unlawful Disclosure); and Societies Ordinance, Cap 151, s 8(1) (proscription of society from establishing ties with foreign or Taiwan political organizations or bodies). The reference to Her Majesty, the Crown, the British Government has been modified to mean a reference to the Central People's Government: Interpretation and General Clauses Ordinance, Cap 1, Schedule 8, para 1.

⁶³ Indeed, it appears that the real issue is whether advocacy for independence without any action or without any advocacy for the use of force should be prohibited and punished by law in Hong Kong. This question has nothing to do with the constitutional responsibility of the HKSAR under Article 23. It is simply a question how far Hong Kong is prepared to curtail freedom of speech.

⁶⁴ See, for example, Fu Hualing, Carole Petersen and Simon Young (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (Hong Kong University Press, 2005) and other papers in this volume.

He is the principal legal advisor to the Government and Government departments, providing legal advice on a confidential manner. He oversees all criminal prosecution, and represents the Government in all civil matters. Depending on personality, the Secretary for Justice may appear as an advocate for the Government in civil or criminal litigation. He is a member of the Executive Council, and participates in all major policy decisions of the HKSAR. As the most senior legal officer of the Government, he is involved in all discussions on legal matters with the Mainland Government. In this regard, he may also have to represent the Mainland Government interests should the occasion arise, such as to intervene in the proceedings in the *Congo* case.⁶⁵ At the same time, he is also the guardian of public interest. He has the duty to protect the due administration of justice, and if necessary to take out contempt proceedings or relator proceedings. He has by convention a duty to defend the judiciary when it is attacked, as it is improper for the judiciary to engage in public debates. He used to be the titular head of the Bar, but when Mr Jerome Matthews, a solicitor, was appointed as Attorney General in 1988, the Hong Kong Bar Association decided to sever this link so as to maintain the independence of the Bar. The multiplicity of functions make this post a curious anomaly, and the basic problem is that the Secretary for Justice has to be a politician and a minister holding political responsibility and accountability on the one hand, and the guardian of public interest acting impartially and objectively under the law upholding the public interest on the other.⁶⁶ The conflict of interests, or at least the perception of a conflict of interests, is apparent. As Lord Woolf pointed out as early as in 1990, in politically sensitive cases involving the Government or controversial criminal prosecution, it would be impossible for the public or the media to distinguish between the role of the Secretary for Justice as a politician and his role as the guardian of public interest.⁶⁷ Thus, when the first Secretary for Justice Ms Elsie Leung decided not to prosecute the newspaper proprietor Sally Aw Sian (whereas her subordinates in the newspaper were prosecuted for conspiracy to defraud the public/advertisers by fraudulently exaggerating the sales volumes of the newspaper) on the ground that the prosecution would not be in the public interest as it would bring down the newspaper resulting in a lot of unemployment, the public was bewildered. The current Secretary for Justice was a member of a 3-person committee to review the nomination process of the Chief Executive. The review was constrained by political consideration of the Central People's Government. The process ended up with a controversial decision of the NPCSC on 31 August 2014 ("the 831 Decision"). The Secretary for Justice was then responsible for promoting a legislative proposal embodying the 831 Decision, which was eventually vetoed by the Legislative Council. The 831 Decision has led to the Occupy Central Movement, and many protesters were arrested subsequently. Dissatisfaction of the young protesters led to the emergence of localism and advocacy of self-determination, which was severely condemned by the Mainland authorities. A number of candidates who have expressed support for self-determination or localism (without supporting self-determination) were elected to the Legislative Council in 2016. They expressed in various manner their political belief when they took the oath upon assuming the office. When the Secretary for Justice decided to take out disqualification proceedings against six of them (including

⁶⁵ In the *Congo* case, *supra*, the Secretary for Justice, who intervened in the litigation, was known to be in regular contact with, if not also taking instructions from, the Ministry of Foreign Affairs in Hong Kong in the process of litigation.

⁶⁶ Samuels described the office of Attorney General as "long standing and honourable but undeniably and irredeemably anomalous": Alec Samuel, "Abolish the Office of Attorney General" [2014] PL 609.

⁶⁷ Sir Harry Woolf, Hamlyn Lectures 1990; Johan Steyn, "The Weakest and the Least Dangerous Department of Government" [1997] PL 84 at 91-92 and A W Bradley, "Justice, Good Government and Public Interest Immunity" [1992] PL 514 at 517.

four who had not expressed support for self-determination) for failing to take a proper oath of allegiance, and when he decided to review the lenient sentences imposed on three student leaders in a protest against the controversial 831 Decision, he was widely attacked for doing so out of political motivation, if not also bowing to political pressure. The Secretary for Justice of course denied such accusations, and there was no evidence to suggest otherwise, but perception is almost as important as reality. Justice must be done and must manifestly be seen to be done.

Independence of the Secretary of Justice should not be dependent only on the hope and expectation of the integrity of the office holder. Public confidence in the rule of law is essential in a democratic society, but how could the public have confidence in the Secretary for Justice for being able to separate and compartmentalize his different roles as a minister with his own political responsibilities, an adviser to the Government and other politically appointed ministers, and an independent guardian of public interest in such highly political decisions, particularly in times of political excitement?

There is a strong case for separating these separate and conflicting roles. Article 63 of the Basic Law provides that the Department of Justice, as opposed to the Secretary for Justice, shall control criminal prosecutions, free from any interference. The rationale behind Article 63 is that decisions governing liberties of the persons should not be left to politics. The article was drafted against a strong tradition of the independence of the Attorney General. This tradition was eroded when the POAS was introduced, under which the Secretary for Justice was appointed primarily on political consideration as effectively a cabinet member of the Chief Executive and to bear political accountability for his decisions. This is not intended to be a criticism of the personal integrity of successive holders of the post of Secretary for Justice, but simply to point out that the nature of the office has been changed. Article 63 does not require prosecution decisions to be made by the Secretary for Justice, and there is nothing to be lost to vest the prosecution decisions in the hands of the Director of Public Prosecutions. Indeed, none of the successive Secretary for Justice since 1997 specialized in criminal practice, and yet the Secretary for Justice has the power to override the advice of the Director of Public Prosecutions who would invariably be an experienced and senior criminal practitioner. The same consideration applies to the taking out of civil proceedings. The Secretary for Justice has decided not to take over or even participate in the application of taxi associations and mini-bus associations for an injunction to end the occupation of the protesters in the Occupy Central movement on the ground that the Government would remain neutral, and yet he decided to assist the enforcement of the court order by deploying over 5000 policemen to clear the occupation site. These decisions are at best puzzling to many observers. Indeed, Sir Harry Woolf (as he then was) perceptively noted in his famous Hamlyn Lecture in 1990, the public would not be able to differentiate the different roles of the Attorney General in controversial cases; nor would they be convinced that the Attorney General would be able to separate his different and conflicting roles. Sir Harry advocated for the creation of an independent Director of Civil Proceedings, an advice which is even more apt for Hong Kong today than for England twenty years ago. There is no reason why a politically appointed Secretary for Justice should oversee civil and criminal proceedings. He could remain a political and legal advisor to the Government, and entrust the power to enforce the law by civil and criminal proceedings to the Director of Public Prosecution and a Director of Civil Proceedings, whose political neutrality is fostered by the POAS and whose independence could be further enhanced.

Special Advocate Procedure: An Inroad to Fairness?

A golden thread of the adversarial system is that a party to litigation is entitled to know the full case against him and to confront the evidence against him.⁶⁸ This principle of elementary fairness, which is further buttressed by the principle of open justice, is of particular importance in criminal cases, where the enormous weight of a state is brought to bear on an individual whose liberty is put at stake. However, in recent years there emerged a trend to adopt a special procedure of appointing a special advocate in closed materials proceedings when secret materials involving national security are relied upon in both civil and criminal proceedings. The secret nature of such evidence poses a challenge to the right to fair hearing and the due administration of justice.

In *Chahal v United Kingdom*,⁶⁹ the applicant challenged his detention pending deportation for being a violation of his right to fair hearing contrary to Article 5(4) of the European Convention on Human Rights on the ground that he was unable to challenge the evidential basis that justified his deportation. He had a right to appeal against the deportation order before a panel which was advisory to the Home Secretary. In the judicial review proceedings against the deportation order, the Home Secretary invoked national security grounds as consideration for his detention and deportation. The European Court held that there was a violation. While the Court accepted that the use of confidential information was inevitable when national security was at stake, it did not mean that national authorities would be free from effective supervision of the court whenever national security or terrorism was asserted. It, however, did accept, without referring to the special advocate procedure, that special procedure could be designed to address the legitimate security concern and yet afford the individual better procedural protection. As a result, the UK Government introduced a special advocate procedure, initially to immigration and deportation cases before the Special Immigration Appeals Commission,⁷⁰ and after 9-11, extended to cover cases that involved a range of counter-terrorism measures such as proscription of terrorist organizations, control orders, terrorism prevention, investigation measures and asset-freezing orders.⁷¹ In 2013, by an amendment to the Justice and Security Act, the special advocate procedure (or now known as “closed material proceedings”) was extended generally to all types of civil litigation when disclosure of sensitive material might be “damaging to the interests of national security” and when adoption of such procedure is “in the interests of the fair and effective administration of justice”.⁷² This procedure has also been exported to other common law jurisdictions, including Canada, New Zealand and Hong Kong.⁷³

⁶⁸ *Re K (Infants)* [1963] Ch 381 at 405, per Upjohn LJ; *Al Rawi v Security Service* [2012] WLR 531 at 572, per Lord Dyson JSC; *Enrich Future Ltd v Deloitte Touche Tohmatsu* [2016] 3 HKLRD 827 at paras 13-14, per Mimmie Chan J.

⁶⁹ (1997) 23 EHRR 413, at para 131.

⁷⁰ Special Immigration Appeals Commission Act 1997.

⁷¹ See Terrorism Act 2000, Sch 3; Terrorism Prevention and Investigation Measures Act 2011; Counter-Terrorism Act 2008, s 68 and Terrorist Asset-Freezing Act 2010.

⁷² Justice and Security Act 2013, s 6. The closed material proceeding was said to borrow from the Canadian idea of the use of security-cleared counsel in immigration cases, but as critics pointed out, it was expanded in the UK to all civil and criminal proceedings: For an excellent account, see John Jackson, “The role of special advocate: advocacy, due process and the adversarial tradition” [2016] *International Journal of Evidence and Proof* 343.

⁷³ See John Jackson, *ibid*, at 344.

The only case in Hong Kong in which this procedure has been invoked is *PV v Director of Immigration*.⁷⁴ In that case, the applicant, who was a Sri Lankan national, applied for leave to apply for judicial review against a removal order made against him, and upon leave being granted, applied for bail pending hearing. The removal order was made on the basis that the Director of Immigration considered him to be a “threat to the peace, order and security of Hong Kong”. The Director challenged the court’s jurisdiction to grant bail, which was rejected, and opposed bail on the ground that the applicant “had the intention to endanger life and property in Hong Kong” and had “the training, capacity and experience” to carry out that intention. The Director further claimed public interest immunity of all the documents containing information upon which the Director had acted to detain the applicant. This claim was upheld by the court after having read the documents. This put the applicant’s counsel in an invidious position as it would be difficult to advance the applicant’s case for bail without knowing the reason or the evidence against his client. Upon consultation and consent of both parties, Hartmann J adopted the special advocate procedure on the ground that it was in the interest of justice to do so. As described by Lord Bingham in *R v H*,⁷⁵ “the procedure is to appoint a person, usually called a ‘special advocate’, who may not disclose to the subject of the proceedings the secret material disclosed to him, and is not in the ordinary sense professionally responsible to that party, but who, subject to those constraints, is charged to represent that party’s interests.” The procedure is as follows. The special advocate has to be acceptable to both the Director and the applicant. The Secretary for Justice is responsible for appointing the special advocate and for meeting the necessary costs. In this regard, the court expressly stated that the Secretary for Justice is acting in his role as a guardian of public interest and not as a minister of the Crown or a minister having overall responsibility for criminal prosecution. The special advocate is likely to be security cleared. In that case, the Secretary for Justice approved a number of special advocates so that the applicant would be entitled to a choice. Once the special advocate is appointed, he would take instructions of a general nature from the applicant before he is shown the confidential materials that are subject to public interest immunity. He would not be permitted to further communicate with the applicant once he has seen the confidential material to avoid any confidential information being disclosed inadvertently. The special advocate and the Director would then appear before the court in camera and made submissions to the court. Neither the applicant nor his counsel would be present at that stage of the proceedings. After hearing the submissions, the court adjourned back into open court to allow the applicant, through his counsel, to make final submissions. The court eventually ruled that bail should be granted. As the reasons of his decision arose from the confidential material, he would not be able to disclose them, although his written ruling concerning the merits was made available to the Director and the special advocate, but was otherwise secured so as to be seen only by another court appraised of the matter.⁷⁶

While Hartmann J should be applauded with the adoption of such a novel procedure in that case, this procedure, as acknowledged by Lord Bingham, has its own ethical and practical problems:⁷⁷

⁷⁴ [2004] 3 HKC 637.

⁷⁵ [2004] 2 WLR 335 at 344, para 21, adopted by Hartmann J in *PV v Director of Immigration*, *ibid*, at 643, para 15.

⁷⁶ At 649, paras 47-49.

⁷⁷ *R v H* [2004] 2 WLR 335 at 345.

“Such an appointment does however raise ethical problems, since a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship with the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession.”

The peculiarity of the special advocate system is that there is a severance of lawyer-client relationship in the case of a special advocate and a prohibition of communications with his client. While there are precedents where an advocate is appointed by the court to represent a minor or a mentally ill person who is unable to represent himself, they are not comparable as, first, the advocate or the guardian ad litem still owes a duty to their client, and secondly, the clients are unable to give instructions because of disability such as young age or illness, whereas a special advocate is severed of the lawyer-client relationship because this is the only basis that the Government would accept his appointment. One of the consequences is that the special advocate would not be able to communicate with or take further instructions from his client once he has seen the confidential information. This would necessarily hamper the special advocate to discharge his duty. Thus, for example, if the confidential material alleged that the applicant is closely associated with X, a known terrorist, it would be difficult for the special advocate to refute the claim without instructions from the applicant, which instructions would necessarily entail his disclosure of the identity of X. Likewise, if the confidential information is based on a source who may have a grudge with the applicant, the special advocate would not be able to discover the grudge without disclosing the identity of the source to the applicant.⁷⁸ The problem lies not in the novelty of the procedure; instead it goes to the root of fundamental fairness and the due process.

In *Al Rawi v Security Service*,⁷⁹ the UK Supreme Court, by a majority, refused to extend the power to order closed material proceeding in ordinary civil proceedings in the absence of statutory power and consent of the parties. Lord Dyson JSC pointed out that “the closed material procedure excludes a party from the closed part of the trial. He cannot see the witnesses who speak in that part of the trial; nor can he see closed documents; he cannot hear or read the closed evidence or the submissions made in the closed hearing; and finally he cannot see the judge delivering the closed judgment nor can he read it.... in many cases, the special advocate will be hampered by not being able to take instructions from his client on the closed material. A further problem is that it may not always be possible for the judge (even with the benefit of assistance from the special advocate) to decide whether the special advocate will be hampered in this way.”⁸⁰

In this regard, a distinction may have to be drawn in disclosure cases and in representation cases. As there is an increasing demand for disclosure of information from the prosecution, not only in relation to inculpatory evidence but also exculpatory information, the prosecution has increasingly resorted to public interest immunity on the ground of protection of the safety of the informers and sometimes potential witnesses. Such a claim is invariably made in ex parte proceedings. While the Government is in general willing to disclose such information to the court, it is vehement not to

⁷⁸ These are examples cited by John Jackson: see Jackson, *supra*, at 354.

⁷⁹ [2012] 1 AC 531.

⁸⁰ *Ibid*, at paras 35-36.

disclose the same to the defendants. Since the celebrated decision of *Conway v Rimmer*,⁸¹ the court has insisted that it has to balance between a claim for public interest immunity and the due administration of justice, and that a claim for public interest immunity operated only as an exclusionary rule of evidence which could be overridden by other equally compelling public interest. In order to provide assistance to the court, independent counsel has been appointed to assist the court on the relevance of the undisclosed materials, the strength of the claim for public interest immunity, how helpful the materials might be to the defendant, and the risk of judicial error or bias. Jackson argued that the independent counsel is different from special advocates as the independent counsel is more akin to an amicus who is there, not to represent the defendant, but to represent the public interest in the due administration of justice.⁸² The purpose of ex parte public interest immunity application is fundamentally different from the closed materials procedure. In the public interest immunity procedure, if documents are disclosed as a result of the process, they are available to both parties and to the court. If they are not disclosed, they are available neither to the other parties nor to the court. Both parties are entitled to full participation in all aspects of the litigation. There is no unfairness or inequality of arms. In contrast, the effect of a closed material procedure is that closed documents are only available to the party which possesses them, the other side's special advocate and the court. As Lord Dyson JSC described, the closed material procedure cuts across the fundamental principle of fairness and the right to fair trial in the common law system, and is the very antithesis of a public interest immunity procedure.⁸³

Notwithstanding this reservation, Parliament has intervened in the United Kingdom, and the European Court of Human Rights has given its blessing to the special advocate procedure, at least when the applicant has been provided with sufficient information to give effective instructions to the special advocate. In *A v United Kingdom*,⁸⁴ another detention of suspected terrorist case, the European Court accepted that there was a strong public interest in obtaining information about Al' Qaeda and maintaining the confidentiality of the sources of such information. However, while the special advocate procedure can counterbalance the lack of disclosure of information to the detainee, the procedural requirements under Article 5(4) of the European Convention would be satisfied only when the special advocate is able to discharge his function when the detainee is given sufficient information to enable him to give effective instructions to the special advocate.

In light of the global concern for terrorism, it is difficult to turn the clock back and to reject the special advocate procedure. The fact that a special advocate is able to scrutinize the confidential materials and to test their internal reliability will still serve an important role when concern for secrecy dominates proceedings involving national security. The challenges are to fine tune the procedure. In the first place, while Hartmann J held that the court has an inherent jurisdiction to adopt the special advocate procedure without any statutory basis, it is better to have a statutory basis for the exercise of such a power. As Lord Dyson JSC pointed out, "to allow a closed procedure in circumstances which are not clearly defined could easily be the thin end of a wedge."⁸⁵ The history of how the special advocate procedure has developed from an exceptional procedure in

⁸¹ [1968] AC 910. See also *Makanjola v Commissioner of Police* [1992] 3 All ER 617.

⁸² Jackson, *supra*, at 355.

⁸³ At paras 41 & 45.

⁸⁴ (2009) 49 ECHR 29.

⁸⁵ At para 44.

immigration cases to become a general and widely used procedure in national security cases is itself a vivid illustration. A statutory scheme would have to cater for the possible withdrawal of the special advocate from the proceedings when the special advocate has reached a position that he finds that he could no longer discharge his duties, and for the court to make appropriate order when no effective instructions could be given to the special advocate to an extent that this has hampered his ability to discharge his duties. Secondly, consideration should be given to permit the special advocate, upon application to the court, to converse with the counsel for the applicant, if necessary, upon an express undertaking of both counsel to the court that any sensitive information is to be kept confidential between counsel. It is important that public confidence be maintained in the due administration of justice, and it may be difficult to maintain such confidence if the special advocate is to be completely cut off from communicating with the defendant once the special advocate has been given sight of the confidential materials. If the special advocate system is to be accepted as a compromise between the need to maintain secrecy in the public interest and the protection of a fair hearing, there should be some element of trust in the counsel involved. In this regard, the Bar Association should be involved in further developing the practice and regulation of special advocate.⁸⁶ Thirdly, while the court is under great constraints to give reasons in its judgment regarding the closed material proceedings, the approach of Hartmann J in *PV v Director of Immigration* that written judgment should be made available to the Government and the special advocate is to be commended.

4. The Judiciary

What has been discussed about is mostly about external threats to the judiciary. This section will look at some internal problems of the judiciary. Only a few observations would be made. First, the legitimacy of the judiciary rests heavily on its open process, its fair procedure, the impartiality and independence of the judges in discharging their duties, and its reasoned judgment. If a person is sufficiently aggrieved by a decision of a public authority that he is prepared to take out an application for judicial review, the public is entitled to know the reason if the court refuses to grant leave to apply for judicial review or if his application is unsuccessful. In recent years there have been criticisms that the court has spent too much time in giving lengthy judgments in plainly unmeritorious applications for judicial review.⁸⁷ While there is room for the court to be more succinct in writing judgments, fairness and efficiency do not always sit well with one another. When it comes to questions of justice and public confidence in the judiciary, fairness may prevail over efficiency. The right to a reasoned judgment is an essential element of the right to fair hearing, and summary disposal of an application for judicial review should only be adopted only in very clear cases. It is not just being fair to the litigants; a reasoned judgment also goes a long way to maintain public confidence in the judiciary.

Secondly, open justice means that judgments are open to public scrutiny. Judges are not infallible, and it is right that judgments should be subject to public criticism. The appeal system provides a

⁸⁶ See also Jackson, *supra*, at 360.

⁸⁷ "Hong Kong courts accomplices to abuses of judicial review", speech by the Hon Henry Litton, as reported in *South China Morning Post*, 17 Dec 2015: <http://www.scmp.com/news/hong-kong/law-crime/article/1892247/hong-kong-courts-accomplices-abuse-judicial-reviews-says>.

means to correct judicial errors. At the same time, the strength of a judgment rests on its reasoning. Likewise should the criticism against a judgment be. A judgment is not to be assessed by the popularity or acceptability of the judgment according to one's political beliefs, and even less by attributing the judgment to unsound and speculative political inclination of individual judges. It is sad that this has happened in recent years. When the Court of Appeal held that the offence of desecration of national flag was inconsistent with the right to freedom of expression in *HKSAR v Ng Kung Siu*,⁸⁸ the three expatriate judges in that case were criticized on the ground of their race. More recently, there were sayings in the aftermath of Occupy Central that "police arrest and judges acquit". When Judge Dufton sentenced seven police officers to two years' custodial sentence for assaulting an activist in the Occupy Central movement, the judge was criticized, without any foundation, for being politically motivated, when few of the critics had read his 100-page judgment that carefully analysed the evidence and the arguments put forward before him.⁸⁹ Likewise, when the Court of Appeal substituted a jail sentence against three student demonstrators upon an application of review of sentences by the Secretary for Justice, the court was likewise criticized that its decision was politically motivated, again without any foundation, though the criticism now came from the opposite camp. As the former Chief Justice Andrew Li commented, such allegations are irresponsible and could have the effect of undermining public confidence in the judiciary.⁹⁰ The independence of the judiciary has to be carefully protected. Once it is gone, there will be nothing left to maintain the two systems in the One Country, Two Systems model.

Thirdly, an important guarantee of independence of the judiciary lies in the process of appointment. Under Article 88 of the Basic Law, judges are appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors. By convention, the recommendation of the Judicial Officers Recommendation Commission ("JORC") is always accepted by the Chief Executive. The JORC is chaired by the Chief Justice, and comprises two High Court judges, the Secretary for Justice, two representatives nominated respectively by the Hong Kong Bar Association and the Law Society of Hong Kong, and three lay persons appointed by the Chief Executive. Any recommendation of the JORC on appointment or promotion of a District Judge or above must not receive more than two dissenting votes. In other words, the three lay persons could join hand to veto a recommendation for judicial appointment or promotion even when the recommendation is unanimously supported by all members of the legal sector. While the voting procedure can be seen to be giving the public a real say in the appointment or promotion of judges, there is no criteria for the selection and appointment of the lay members on the JORC. It is unclear whether the lay members are recommended by the Government or whether the Chief Justice is consulted on the appointment. In the absence of clear criteria and procedure for the appointment of the lay members, it may be preferable to reduce the number of lay members to two, so that if a recommendation is not to be supported, the decision would require the endorsement of at least one member of the legal sector.

⁸⁸ [1999]2 HKC 10. The judgment of the Court of Appeal was reversed by the Court of Final Appeal: [2000] 1 HKC 117.

⁸⁹ *HKSAR v Wong Cho Sing*, DCCC No 980/2015, [2017] HKEC 255 (14 Feb 2017).

⁹⁰ As reported in *South China Morning Post*, 27 Aug 2017: <http://www.scmp.com/week-asia/politics/article/2108346/hong-kongs-rule-law-really-under-threat>.

Fourthly, there is a serious problem of shortage of judges in recent years. As Professor Reyes pointed out, there were a large number of deputy judges on any day, and the percentage could sometimes be as high as 60%. While this is not a problem if it is just a transient feature, it appears that it has become a structural problem.⁹¹ There are different reasons for the shortage of judges, though financial reward does not appear to be a major obstacle, as those members of the legal profession who are eligible for higher court appointment would unlikely regard financial reward as their major consideration. Article 92 of the Basic Law provides that judges shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions. Hong Kong has a small legal profession. The pool of people for potential judicial appointment is hence limited, and not every successful lawyer would have the temperament that is suitable for judicial appointment. While Article 92 expressly refers to the possibility of overseas appointment, it appears that there is little effort to recruit from overseas in recent years (apart from non-permanent judges at the Court of Final Appeal). The reason for this is unclear. An associated problem is the lack of diversity on the bench. There is not a single lady judge, including all the non-permanent judges, on the Court of Final Appeal, and three out of four permanent judges of the Court of Final Appeal come from the same set of chambers, which have also produced a number of judges on the High Court. While diversity should never be achieved at the expense of quality, the rather narrow and similar background of judges may hamper the ability of judges to be able to fully appreciate the variety of the different fabrics which make up our community.

Conclusion

One Country, Two Systems is a highly asymmetrical model, the success of which rests entirely on the self-restraint on the part of the sovereign power. The model was conceived at a time when Hong Kong has relatively strong economic but weak political power vis-à-vis the Mainland. Twenty years down the road, the Mainland is in the upper hand both economically and politically. In the first decade after the changeover, the policy of China towards Hong Kong was marked by its decision to leave Hong Kong by and large on its own. With the emergence of China as a major global power in the last decade, she has adopted an increasingly intrusive approach to the internal affairs of Hong Kong. The non-compromising approach towards the nomination of the Chief Executive, the blatant interference with local election, the adoption of the fifth interpretation of the NPCSC, the stern approach towards discourse on localism and self-determination, the strengthening of stronger national education, and more recently, the adoption in the 19th Party Congress of the general principle of closely grasping the power of governance over Hong Kong, a vague principle that is open to any interpretation as the Central People's Government sees fit, are just some of the examples. There is no reason to doubt the sincerity of the Chinese leaders in maintaining One Country, Two Systems, but it is equally clear that there is a shift towards One Country in the demarcation of two systems. There is very little the HKSAR can do in this shift, save to adhere to the core values of Hong Kong and to strengthen its institutional strength. The two systems are distinguished by their core values, their institutional strengths, and their legal systems. This paper has highlighted a few areas that could make Hong Kong institutionally more resilient. The reason to maintain two systems is

⁹¹ A Reyes, "The Future of the Judiciary: Reflections on Challenges to the Administration of Justice in Hong Kong" (2014) 44 HKLJ 429-446

that the co-existence of a capitalist system with its own distinct values, life style, institutions and legal system is beneficial, not only to Hong Kong, but also to the development of China. The imposition of the Mainland's ideology, values and ways of doing things would inevitably erode the boundary of the two systems. It should be realised that the contribution of Hong Kong to China lies in its very differences in the social, economic, political and legal systems, which have earned the trust of the international community over the years. Hong Kong will be devaluating itself if it becomes just another Mainland city. In that sense, retaining the differences and upholding the core values of Hong Kong are indeed the best contribution that Hong Kong can make to the social, economic and political development of China.