Maintaining Institutional Strength: The Court, the Act of State, and the Rule of Law

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Protection of national security and respect for personal liberty and the rule of law are not always on speaking terms. In the Hong Kong context, the conflicts between them are exacerbated by the diametrically opposing social and political values between Hong Kong and China. While an enlightened legislature and vibrant civil society are important in maintaining balance between rights and security in devising the legislative framework and monitoring its implementation,[1] the courts' role is crucial for they are the ultimate safeguard for human rights and the rule of law in the enforcement of national security legislation. This role is of particular importance in the sensitive area of national security which, in the Hong Kong context, refers to the security interest of the sovereign. The Hong Kong courts have to balance legitimate national interests and over-zealous intervention by the Sovereign on the one hand and the integrity of the common law system and fundamental liberty on the other. This role may be seriously hampered by the vague concept of act of state under the Basic Law which restricts the jurisdiction of the courts. Unfortunately, the concept of act of state is equally elusive under the common law. The problem is further exacerbated by the power of final interpretation of the Basic Law being vested in a political organ of Mainland China, the inherently secret nature of national security, and the weak adherence to procedural and evidential safeguards in the Mainland legal system. This chapter will address the jurisdictional limits on the courts in handling national security matters, arguing for a narrow doctrine of act of state, fine-tuning the special advocate procedure, and strengthening the independence of the judiciary and the prosecuting authority.

1. Act of State and Fact of State

Under Article 19(3) of the Basic Law, the courts of the Hong Kong Special Administrative Region (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. These provisions are clearly intended to identify 'forbidden areas' beyond the reach of Hong Kong courts, but a few questions arise. What is the meaning of an 'act of state'?

[1] See also the contributions of Margaret Ng and Michael Davis in this collection.

Does it cover only defence and foreign affairs? Do matters of national security necessarily fall within the meaning of an 'act of state' so that they are outside the jurisdiction of the courts? 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; if so, what would it cover? And who should decide whether certain act is an 'act of state'?

As an archaic common law doctrine, 'act of state' is difficult to define and its scope is still evolving. Its origins lie in thirteenth-century powers to seize ships or cargoes at sea under letters of marque and reprisal issued on the authority of the Crown. By the eighteenth century, as a result of the expansion of British naval power, it became necessary to refine the concept so as to bring it in line with international 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.[2] The doctrine underwent further changes in the nineteenth century. In the celebrated decision of *Secretary of State in Council of India v Kamachee Boye Sahaba*,[3] Lord Kingsdown explained the doctrine as one of exercise of the sovereign power the effects of which '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. 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'.[4]

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, such as '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',[5] and 'the conduct of foreign

[2] *Mohammed v Ministry of Defence* [2017] 2 WLR 287 [101] (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.
[3] *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 7 Moo Ind App 476, 540.
[4] ibid.
[5] *Council of Civil Service Unions v Minister for the Civil Service* (CCSU) [1985] AC 374, 418 (Lord Roskill).

affairs…making peace and war, conquering or annexing territories',[6] and recognising of foreign states and diplomats.[7]

However, the fact that something is an exercise of prerogative power does not mean that it is automatically an act of state. The starting point, as recognised by the United Kingdom (UK) Supreme Court recently, is that 'English law does not recognise 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'.[8] 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.[9] Hence, a minister of the Crown could be found to be personally liable for contempt.[10]

The Crown Act of State

The modern doctrine of act of state comprises 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'.[11] Annexations and cessions of territory, or declarations 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'.[12]

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[6] *Mohammed v Ministry of Defence* (above n 2) [15] (Baroness Hale DPSC). An example of annexation of territories is *In re Wong Hon* [1959] HKLR 601, 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.

[7] *Carl Zeiss Stifung v Rayner & Keeler Ltd* [1967] 1 AC 853, 961. See also the *Congo* case (below n 25) 483.

[8] *Mohammed v Ministry of Defence* (above n 2) [4] (Baroness Hale DPSC), quoting H Street, *Governmental Liability: A Comparative Study* (Cambridge, Cambridge University Press, 1953) 50.

[9] *Johnstone v Pedlar* [1921] 2 AC 262, 271 (Viscount Finlay).

[10] *Re M* [1994] 1 AC 377.

[11] *Mohammed v Ministry of Defence* (above n 2) [7] (Baroness Hale DJSC).

[12] ibid. See also *Burton v Denman* (1848) 2 Exch 167; *Attorney General v Nissan* [1970] AC 179.

These two aspects were best summarised by Lord Wilberforce in *Attorney General v Nissan*:[13]

> 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 …
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> 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 is 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 between the UK and the United States of America, in the second case. The Ministry of Defence pleaded the Crown act of state as defence, which was upheld by Baroness Hale DPSC, joined by Lord Wilson and Lord Hughes JJSC. They held that the act of state doctrine was a very narrow doctrine and 'cannot give *carte blanc* to the authorities to authorise or ratify any class of tortious acts committed abroad in the conduct of the foreign relations of the state'.[14] 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 authorised or ratified by the Crown. Thus, stationing a troop pursuant to an agreement with a foreign state would be an inherently governmental act, but

[13] ibid.
[14] *Mohammed v Ministry of Defence* (above n 2) [33].

the appropriation of a hotel was not a necessary act of implementation or an inherently governmental act;[15] (2) the act should be done outside the UK; (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.[16] The acts in question must be closely connected to and be necessary in pursuing the foreign policy.[17] 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 outside military operations and whether the doctrine could ever be pleaded against British citizens. [18] Her Lady 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 (CA) 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.[19]

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.[20] 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

[15] *Attorney General v Nissan* (above n 12) 216–217 (Lord Morris) and 227 (Lord Pearce); see also *Mohammed v Ministry of Defence* (above n 2) [92]–[93] (Lord Sumption JSC).

[16] *Mohammed v Ministry of Defence* (above n 2) [37].

[17] 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: ibid [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 [92].

[18] Lord Sumption JSC agreed and was, somewhat tentatively, prepared to restrict the defence to the situation where the tort was committed against a person not owing allegiance to the Crown: ibid [81]. Lord Mance JSC likewise agreed: ibid [72].

[19] ibid [35], but see Lord Sumption JSC, ibid [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.

[20] ibid [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: ibid [69]–[70].

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'.[21]

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:[22]

> 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. (emphasis added)

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'.[23] The law has conferred on the Crown the power to conduct the UK'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.

[21] ibid [57]. In this regard Lord Sumption JSC agreed that the two rules of Lord Wilberforce in *Nissan* have merged into one.
[22] ibid [79]–[80]. Lord Mance JSC disagreed: ibid [48].
[23] ibid [88].

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 justifications for the doctrine, the court was unanimous in holding that the Crown act of state is a narrow doctrine. Accordingly, it ought to be of limited use in excluding Chinese national security operations in Hong Kong from the jurisdiction of Hong Kong courts. For example, as it would be against public policy to arbitrarily deprive a person of his liberty, an abduction of a Swedish citizen in Thailand by the security force of China could not come within the doctrine of an act of state. Nor could the abduction of a Chinese citizen in Hong Kong to the Mainland be an act of state, as the doctrine is not available to the subjects of the sovereign or to acts done within the sovereign state. Enforcement of domestic law (such as theft of state secrets or even secession or treason), which is a matter of law and order rather than an exercise of foreign affairs, should likewise be considered as falling outside the scope of an act of state and therefore within the jurisdiction of the domestic courts.

Foreign Act of State

While Crown act of state deals with the liability of the Sovereign and its agents for conduct that took place on 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.[24] 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,[25] 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 People's Republic of China (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

[24] *I Congresso del Partido* [1983] 1 AC 244, 262. See also, *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888; *Belhaj v Straw* [2015] 2 WLR 1105. See also, *Mohammed v Ministry of Defence* (above n 2) [51] (Lord Mance JSC) and [89] (Lord Sumption JSC).
[25] *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95.

sovereign state could claim absolute immunity or only restricted immunity in matters other than purely commercial transactions. Following a complex set of decisions at first instance and in the CA, the case came before the Court of Final Appeal (CFA) where it took an interesting turn. Under Article 158(3), the CFA is under a duty to refer a question of interpretation of a provision of the Basic Law to the Standing Committee of the National People's Congress (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 CFA should make a judicial referral. By a narrow majority, the CFA held that (1) the extent of state immunity 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.[26]

There is an element of contradiction in the decision of the majority of the CFA. 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

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

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? If the determination of whether a matter falls within the meaning of 'act of state such as defence and foreign affairs' under Article 19(3) is necessarily a matter of defence and foreign affairs, the CFA will be obliged to refer the question to the NPCSC under Article 158(3) of the Basic Law. The net effect is that the court will no longer have a final say on 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 pretty clear: Whether an entity is a sovereign state is a matter of an act of state, as it is a matter of foreign relation that is beyond judicial assessment, but the determination of the extent of state immunity enjoyed by a sovereign state is always a matter for the courts. In the course of such determination, 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, 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 means unnecessarily giving up the common law position that the court has the 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'.[27] 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 from the NPCSC.

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. This may result in unintended consequences in private law. For example, a landlord who rents a premises to a state for use as its consular general's office or accommodation for its consular staff would have no judicial remedy for repossession or otherwise upon default of payment of rent. This highlights the risk of the NPCSC making final interpretation of the Basic Law for Hong Kong, as even with the best of intention, such interpretation made in the tradition of one legal system without the benefit of full arguments on the interpretation could have unfortunate and unintended consequences in another legal system, let alone that it may unjustifiably carve out the jurisdiction of an independent court of Hong Kong on matters of national security by an over-zealous Central Government adopting a broad meaning of act of state when it is precisely in such sensitive area that scrutiny of the court is most important in ensuring a proper balance of individual rights and legitimate state interest.

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

[27] K Bokhary, *Recollections* (Hong Kong, Sweet & Maxwell, 2013) 580.

that the doctrine adopted by the PRC was a doctrine of absolute immunity. The second letter, which was placed before the CA, replied to Reyes J's query on the position of the PRC when she had signed the United Nations 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 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 evidential 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'.[28] It found that the relevant facts 'have been authoritatively established and are not in dispute',[29] and therefore it could not have been intended that 'the Chief Executive should be troubled'.[30] This position is highly unsatisfactorily 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.[31] 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

[28] *Congo* case (above n 25) [362].
[29] ibid.
[30] ibid.
[31] ibid [287]–[290].

of inconvenience, was highly satisfactory, and the difficulty was graphically illustrated in the case of *Hua Tin Long (No 2)*.[32]

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 sought 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. It is more than a mere formality, as the evidential rule is to protect the right to fair trial and enables the parties to know and challenge what can or cannot be admissible in courts. The *Congo* and the *Hua Tian Long* cases highlighted the relatively under-developed understanding of procedural safeguards and evidential rules in the Mainland. Given the inherent sensitivity and secrecy of national security, over which the courts have limited power of scrutiny, it is of singular importance that the Hong Kong courts should be vigilant in enforcing procedural and evidential requirements.

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.

[32] *Hua Tin Long (No 2)* [2010] 3 HKLRD 611.

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.[33] 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 organisational structure of GZS,[34] 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 mean 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 plainly 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.[35] 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,[36] and ministers could be made personally liable for contempt of court.[37]

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[33] ibid [30].
[34] ibid [98]–[126].
[35] As Lord Templeman pointed out in *Re M* (above n 10), at 395: '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.'
[36] *CCSU* case (above n 5). 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* (Basingstoke, Palgrave, 2001), ch 6, pp 132–156.
[37] *Re M* (above n 10). See also *R v Home Secretary and Criminal Injuries Compensation Board, ex parte P* [1995] 1 All ER 870.

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 have unnecessarily elevated the importance of this very narrow doctrine; it is also 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 and are arguably wrongly decided. The balance

may be even more difficult and sensitive when personal liberty is at stake, which is more likely to be the case when national security is in issue.

2. 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 suggest 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 organisations or bodies from establishing ties with foreign political organisations or bodies.[38] 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 were adapted and adopted to become the laws of the HKSAR.[39] Thus, contrary to what has been repeatedly claimed, there is no dereliction of constitutional 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, *or* whether the existing law is too draconian so that revision is required in order for it to be compatible with the protection of fundamental rights in the Basic Law.[40]

The content of these laws has been adequately discussed elsewhere already.[41] 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.

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[38] 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); Societies Ordinance, Cap 151, s 8(1) (proscription of society from establishing ties with foreign or Taiwan political organisations 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. See also the contribution of Simon Young in this collection.

[39] Hong Kong Reunification Ordinance; Interpretation and General Clauses Ordinance, Cap 1, Schedule 8, para 1.

[40] Indeed, it appears that the real issue is whether peaceful 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 Art 23. It is simply a question how far Hong Kong is prepared to curtail freedom of speech.

[41] See, eg, H Fu, CJ Petersen, and SNM Young (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (Hong Kong, Hong Kong University Press, 2005) and the contribution of Simon Young in this collection.

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 heads of policy bureaus, who were 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. She is the principal legal advisor to the government and government departments, providing legal advice in a confidential manner. She oversees all criminal prosecutions, and represents the government in all civil matters. She 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 , she is involved in all discussions on legal matters with the Mainland Government. In this regard, she may also have to represent the Mainland Government's interests should the occasion arise, such as by intervening in the *Congo* case.[42] At the same time, she is also the guardian of the public interest. She has the duty to protect the due administration of justice, and if necessary to take out contempt proceedings or relator proceedings. She 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.[43] The multiplicity of functions make this post a curious one, 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.[44] The conflict of interests, or at least the perception of a conflict of interests,

[42] In the *Congo* case (above n 25), 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.

[43] She 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.

[44] Samuels described the office of Attorney General as 'long standing and honourable but undeniably and irredeemably anomalous': A Samuel, 'Abolish the Office of Attorney General' (2014) *PL* 609.

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 her role as the guardian of public interest.[45] 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 basis 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. When the Secretary for Justice decided to take out disqualification proceedings against a number of popularly elected legislators for failing to take a proper oath of allegiance;[46] when she decided to review the lenient sentences imposed on three student leaders in a protest that the trial court has found to be restrained and out of public motives without any private gain;[47] and more recently, when she departed from the established practice of the Department of Justice to seek independent legal advice in deciding not to prosecute the former Chief Executive, the Secretary for Justice was widely criticised for doing so out of political motivation, if not also bowing to political pressure. 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's ability to separate and compartmentalise her different roles as a minister with her 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 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. The POAS eroded this tradition. Article 63 does not require prosecution decisions to be made by the Secretary for Justice personally, and there is nothing to suggest that such decisions could not be vested in the hands of the Director of Public Prosecutions. Indeed, none of the successive Secretaries for Justice since 1997 specialised in criminal practice, and yet the Secretary for Justice has the power to override the advice of the

[45] Sir Harry Woolf, Hamlyn Lectures 1990; J Steyn, 'The Weakest and the Least Dangerous Department of Government' (1997) *PL* 84, 91–92; AW Bradley, 'Justice, Good Government and Public Interest Immunity' (1992) *PL* 514, 517.

[46] *Chief Executive of the HKSAR v The President of the Legislative Council* [2016] 6 HKC 417 (CFI); [2017] 1 HKLRD 460 (CA); (2017) 20 HKCFAR 390 (sub nom *Yau Wai Ching v Chief Executive of the HKSAR*) (1st oath case); *Chief Executive of the HKSAR v President of the Legislative Council* (2017) 4 HKLRD 115 (CFI) (2nd oath case).

[47] *Secretary for Justice v Wong Chi Fung* (2018) 21 HKCFAR 35.

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 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 5,000 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 that 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. Woolf advocated for the creation of an independent Director of Civil Proceedings, a suggestion that is even more apt for Hong Kong today than for England 20 years ago. There is no reason why a politically appointed Secretary for Justice should oversee civil and criminal proceedings. She 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.

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.[48] 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 at stake. However, in recent years a trend has emerged, especially in the UK, of appointing a special advocate in closed materials proceedings when secret materials involving national security are relied upon in both civil and criminal proceedings.[49] As described by Lord Bingham in *R v H*,

> 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

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

[49] The procedure was introduced as a result of comments made by the European Court of Human Rights in *Chahal v United Kingdom* (1997) 23 EHRR 413 [131]. It was initially confined to immigration and deportation cases, but was later extended to cover 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': Justice and Security Act 2013, s 6.

> the ordinary sense professionally responsible to that party, but who, subject to those constraints, is charged to represent that party's interests.[50]

The only case in Hong Kong in which this procedure has been invoked is *PV v Director of Immigration*.[51] 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's challenge to the court's jurisdiction to grant bail, was rejected, and he 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 for all the documents containing information upon which the Director had acted to detain the applicant. The court upheld this claim 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. 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

[50] *R v H* [2004] 2 WLR 335 [21], adopted by Hartmann J in *PV v Director of Immigration* [2004] 3 HKC 637 [15].
[51] ibid.

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.[52]

While Hartmann J took a bold step to introduce the procedure to Hong Kong, one must note that the procedure has its own ethical and practical problems:[53] There is a severance of lawyer-client relationship because such severance is the only basis on which the Government would accept appointment of the special advocate. 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, 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.[54] At the same time, a party to the proceeding is excluded from the closed part of the trial. As Lord Dyson pointed out, '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'.[55] The problem goes to the root of fundamental fairness and the due process.

In this regard, a distinction may have to be drawn between disclosure and 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 disclose the same to the defendants. Since the celebrated decision of *Conway v Rimmer*,[56] the court has insisted that a claim for public interest immunity operated only as an exclusionary rule of evidence that 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

[52] ibid [47]–[49].
[53] *R v H* [2004] 2 WLR 335, 345 (Bingham LJ): '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'.
[54] These are examples cited by John Jackson: see J Jackson, 'The role of special advocate: advocacy, due process and the adversarial tradition' (2016) *International Journal of Evidence and Proof* 343, 354.
[55] *Al Rawi v Security Service* [2012] 1 AC 531 [35]–[36].
[56] *Conway v Rimmer* [1968] AC 910. See also *Makanjuola v Commissioner of Police* [1992] 3 All ER 617.

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.[57] 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 excluded from the proceedings. 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 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.[58]

Notwithstanding this reservation, Parliament has intervened in the UK, 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.[59]

In light of the global concern in respect of terrorism, it is now difficult to turn the clock back and to reject the special advocate procedure. The fact that a special advocate is able to scrutinise 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 challenge is to fine-tune and improve 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'.[60] The history of how the special advocate procedure has developed from an exceptional procedure in immigration cases to become a general and widely used procedure in national security cases is itself a vivid illustration. Secondly, a statutory scheme would have to cater for the possible withdrawal of the special advocate from the proceedings when the special advocate finds that he could no longer

[57] Jackson, 'The role of special advocate' (above n 54) 355.
[58] *Al Rawi* (above n 55) [41], [45].
[59] *A v United Kingdom* (2009) 49 ECHR 29.
[60] *Al Rawi* (above n 55) [44].

discharge his duties, and for the court to make an 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. Thirdly, consideration should be given to permit the special advocate, upon application to the court, to converse with counsel for the applicant upon an express undertaking of both counsel to the court that any sensitive information is to be kept confidential between counsel. It is important to maintain public confidence 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.[61] Fourthly, 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.

3. The Judiciary

What has been discussed to this point mostly concerns external threats to the judiciary. This section will look at some internal problems of the judiciary in relatively brief terms. 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 provision of reasoned judgments. 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.[62] While there is room for the court to be more succinct in its 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

[61] See also Jackson, 'The role of special advocate' (above n 54) 360.

[62] 'Hong Kong courts accomplices to abuses of judicial review', speech by the Hon Henry Litton, as reported in G Cheung, 'Hong Kong courts accomplices to abuse of judicial reviews, says former top judge Henry Litton' *South China Morning Post* (Hong Kong, 17 Dec 2015), available at www.scmp.com/news/hong-kong/law-crime/article/1892247/hong-kong-courts-accomplices-abuse-judicial-reviews-says.

summary disposal of an application for judicial review should 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 means to correct judicial errors. Public criticisms are equally important and valuable. While constructive and rational criticisms would be valuable for the improvement of the law, it has to be accepted that 'not all public criticisms would be sweetly reasoned. Courts are not fragile flowers that would wither in the heat of criticism'.[63] The law of contempt, and notably contempt by scandalising the court, should limit such public outbursts and there should be no conviction for contempt without proof of an intention to scandalise the courts in a way to undermine public confidence in the due administration of justice.[64] At the same time, the strength of a judgment rests on its reasoning. 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. When the CA held that the offence of desecration of the national flag was inconsistent with the right to freedom of expression in *HKSAR v Ng Kung Siu*,[65] the three expatriate judges in that case were unfairly criticised on the ground of their race. More recently, judges have been subject to personal abuses when their judgments were found not to the liking of their critics.[66] When Judge Dufton sentenced seven police officers to two years' custodial sentence for assaulting an activist in the Occupy Central movement, the judge was subject to personal abuses and was criticised, without any foundation, for being politically motivated.[67] Likewise, when the CA substituted a jail sentence against three student demonstrators upon an application of review of sentences by the Secretary for Justice, it was alleged that the decision was politically motivated, again without any foundation, although the criticism now came from the opposite political camp. As former Chief Justice Andrew Li commented, such allegations are irresponsible and could have the effect of undermining public confidence in the judiciary.[68] The

[63] *R v Kopyto* (1987) 47 DLR (4th) 213, 227 [Cory LJ].
[64] *Secretary for Justice v Choy Bing Wing* [2005] 4 HKC 416 (CFI); [2011] HKEC 235 (CA).
[65] *HKSAR v Ng Kung Siu* [1999] 2 HKC 10. The judgment of the CA was reversed by the CFA: [2000] 1 HKC 117. For the attack on the CA by members of the National People's Congress, see M Tam, 'Court crisis after flag row' *The Standard* (Hong Kong, 25 March 1999).
[66] See also the contribution of PY Lo in this collection.
[67] *HKSAR v Wong Cho Shing* [2017] HKEC 255. The Defendants have since lodged an appeal against both conviction and sentence: see *HKSAR v Lau Cheuk Ngai* [2018] HKCA 59*, HKSAR v Wong Wai Ho* [2018] HKCA 101*; HKSAR v Chan Siu Tan* [2018] HKCA 151; *HKSAR v Wong Cho Sing* [2017] HKEC 2704.
[68] C Buddle, 'Is Hong Kong's rule of law really under threat?' *South China Morning Post* (Hong Kong, 27 Aug 2017), available at www.scmp.com/week-asia/politics/article/2108346/hong-kongs-rule-law-really-under-

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 judicial independence lies in the process of appointment.[69] 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 laypersons could join hands to veto a recommendation for judicial appointment or promotion even when the recommendation is unanimously supported by the 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.

Fourthly, there is a serious structural problem of a shortage of judges in recent years.[70] As Professor Reyes pointed out, a large number of deputy judges can be sitting on any day, sometimes as many as 60% of all sitting judges.[71] 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 judicial appointment would be unlikely to 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

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threat. The point was emphasised again by Geoffrey Ma CJ at the Opening of Legal Year in Jan 2019: www.info.gov.hk/gia/general/201901/14/P2019011400413.htm.

[69] See also the contribution of PY Lo in this collection.

[70] See also the contribution of PY Lo in this collection.

[71] A Reyes, 'The Future of the Judiciary: Reflections on Challenges to the Administration of Justice in Hong Kong' (2014) 44 *Hong Kong Law Journal* 429–446.

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 CFA). The reason for this is unclear. An associated problem is the lack of diversity on the bench. It was only in 2018 that two lady judges were first appointed as non-permanent judges of the CFA, and all permanent judges are men. Three of the four existing permanent judges of the CFA come from the same set of chambers, which has 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 that make up our community.[72]

Conclusion

'One country, two systems' is a highly asymmetrical model, the success of which rests entirely on self-restraint on the part of the sovereign power. The model was conceived at a time when Hong Kong had relatively strong economic but weak political power vis-à-vis the Mainland. 20 years down the road, the Mainland has 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 an exercise of comprehensive 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 context, except to adhere to the core values of Hong Kong and to commit to enhancing institutional strength. The two systems are distinguished by their core values, their institutional strengths, and their legal systems. This paper has highlighted a few

[72] See, eg, E Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Abingdon, Routledge, 2013).

areas that could make Hong Kong's institutions more resilient. The reason to maintain two systems is that the co-existence of a capitalist system with its own distinct values, lifestyle, 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 Hong Kong's contribution to China lies precisely in its social, economic, political, and legal differences, all relating to systems that 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.