

JUDICIAL INDEPENDENCE UNDER THE BASIC LAW

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The Basic Law of the Hong Kong Special Administrative Region (the Basic Law) provides that the judiciary must exercise its power independently, free from any interference, that its members enjoy judicial immunity, and that judges be given tenure to ensure their independence. The Basic Law has embodied the doctrine of separation of powers by vesting specific powers in the Executive Government, Legislative Council, and judiciary respectively. It provides that judges be appointed by the Chief Executive on the recommendation of an independent commission, and that only the judiciary may exercise the judicial power of the HKSAR. These provisions were enacted to safeguard judicial independence. However, as regards members of the judiciary other than judges, the Basic Law maintains the previous system of appointment and removal. Under this system, the Chief Justice appoints deputy magistrates and deputy District Court and High Court judges, and the Chief Executive appoints permanent magistrates by warrant and temporary High Court judges as recorders. The power to appoint also includes the power to dismiss or suspend. It is argued that these practices violate the doctrine of judicial independence under the Basic Law, and accordingly should be replaced so as to ensure judicial independence in all judicial appointments.

Introduction

In the colonial period, Hong Kong's constitutional documents did not provide for judicial independence other than securing the tenure of Supreme Court and District Court judges.¹ Independence was otherwise left to constitutional conventions.² Since 1997, however, the concept of judicial

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¹ Letters Patent, Art XVIA.

² Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (Hong Kong: Longman Asia, 2nd ed 1994), pp 142-144.

independence has been firmly established by the Basic Law. Article 88, for example, provides that judges of the courts of the HKSAR shall be appointed by the Chief Executive on the recommendation of an independent commission. Yet in contemporary Hong Kong deputy magistrates, deputy District Court judges, and deputy High Court judges are appointed by the Chief Justice under ordinance. Are their appointments constitutional? The Basic Law maintains “the previous system of appointment and removal of members of the judiciary other than judges”.³ If, as is discussed below, deputy judges are members of the judiciary other than judges, the Chief Justice is properly empowered to appoint them. But are deputy judges, once appointed, able to act independently and free from interference, as required by the Basic Law?

This article first explores the concept of judicial independence under the doctrine of the separation of powers in the Basic Law. Then it discusses judicial power and the importance of its exclusive exercise by an independent judiciary. Finally, HKSAR legislation which contravenes judicial independence and the Basic Law is deconstructed and its flaws exposed.⁴

Judicial Independence and the Separation of Powers Under the Basic Law⁵

Judicial independence is a cardinal feature of the Basic Law, as has been expressly provided for in three separate provisions. Under the general principles, the HKSAR is to exercise a high degree of autonomy with independent judicial power, including that of final adjudication.⁶ In dealing with the relationship between the Central People’s Government and the HKSAR, the Basic Law again specifically makes it clear that the HKSAR shall be vested with independent judicial power, including that of final adjudication, on matters within the autonomy of the Region.⁷ Finally, it is stated that the courts of the HKSAR shall exercise judicial power independently, free from any interference.⁸ The repetition of the reference to exercising judicial power

³ Art 91 of the Basic Law.

⁴ The courts discussed in this paper are the specific courts and not special courts, such as the Small Claims Tribunal and the Labour Tribunal, provided for under Art 81 of the Basic Law. Objective rather than subjective criteria are used in determining whether a judicial officer is independent. There are always exceptions to the common perceptions, but the constitutional mechanisms to protect judicial independence aim to ensure that justice must be seen to be done. In case of ambiguity, the Chinese version of the Basic Law, which is its only authentic version, is referred to.

⁵ P. Wesley-Smith, “Executive Orders and the Basic Law” in Alice Lee (ed), *Law Lectures for Practitioners 1998* (Hong Kong: Hong Kong Law Journal Ltd, 1998), pp 187–209; “Individual and Institutional Independence of the Judiciary” in Steve Tsang (ed), *Judicial Independence and the Rule of Law in Hong Kong* (New York: Palgrave, 2001), ch 5.

⁶ Art 2 of the Basic Law.

⁷ *Ibid.*, Art 19.

⁸ *Ibid.*, Art 85.

independently demonstrates the important role expected of the judiciary. Some may argue that this repetition reflects poor drafting. However, one may also argue that it reflects the determination of the National People's Congress to uphold judicial independence in the HKSAR.

Judicial independence is commonly understood as a common law doctrine to protect judges from being interfered with in performing their functions. As a form of liberty, judicial independence has both negative and positive aspects in that it enables judges to avoid a distinct source of coercion and it provides judges the freedom to pursue the truth, the good, the just, and the law.⁹ The boundary between these aspects, however, is blurred. The concept entails freedom from physical compulsion,¹⁰ pecuniary consequence,¹¹ personal ambition,¹² and political control.¹³ In *Valente v The Queen*,¹⁴ the Supreme Court of Canada spelled out the essential conditions for judicial independence: (i) security of tenure – a judge should be removable only for cause related to capacity to perform judicial functions; (ii) financial security – the right to salary or pension must be established by law; and (iii) institutional independence – with respect to matters of administration bearing directly on the exercise of the judicial function. As a framework for judicial independence, the Basic Law provides for judicial immunity, an independent appointment process, and security of tenure for judges¹⁵ (which will be discussed in the following sections).

Judicial independence is an aspect of the separation of powers, which is based on the concept that each branch of government should have a degree of independence from the others. In the United States of America, the concept of judicial independence, which forms an integral part of the separation of powers in its constitution, has been criticised by some academics there as only partly in operation.¹⁶ Contrary to popular belief, the concept is still rather murky in Great Britain,¹⁷ being asserted rather than legally defined.¹⁸ For example, the head of the judiciary is the politically appointed Lord Chancellor, who also serves as a minister of the Crown and as the speaker of the House of Lords. Without any scientific evidence, the Lord Chancellor is considered politically neutral in appointing judges.¹⁹ In reality, relying on the

⁹ P. Karlan, "Two Concepts of Judicial Independence" (1999) 72 *South California Law Review* 535, at p 536.

¹⁰ *Ibid.*, p 537.

¹¹ *Ibid.*, p 538.

¹² *Ibid.*, p 540.

¹³ *Ibid.*, p 543.

¹⁴ [1985] 2 SCR 673.

¹⁵ Arts 88 to 93 of the Basic Law.

¹⁶ R. Stevens, "The Independence of the Judiciary: The Case of England" (1999) 72 *South California Law Review* 597.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, p 598.

¹⁹ K. Malleon, *The New Judiciary* (London: Ashgate Publishing Company, 1999), pp 83–85.

good faith of an office-holder defies common sense. The recent initiatives by the British Government to abolish the Lord Chancellorship and remove senior judges from the parliamentary House of Lords have met with opposition from the judges.²⁰ Judicial independence, however, is an idealist concept. The extent of judicial independence very much depends not only on the Basic Law, but also on the judges themselves, as well as the political structure and legal culture.²¹ A truly independent judiciary may well depend on each member of the judiciary rather than protective measures provided by the constitution and statute law. Full judicial independence is possible only if a judge is himself independent. Therefore, whilst the provisions in the Basic Law which safeguard judicial independence should set the minimal acceptable standard, other common law doctrines safeguarding judicial independence cannot be ignored. In *Gupta v President of India*,²² Justice Venkataramiah said:

“A Judge is a human being who is a bundle of passions and prejudices, likes and dislikes, affection and ill-will, hatred and contempt and fear and recklessness. In order to be a successful Judge these elements should be curbed and kept under restraint and that is possible only by ... a sense of humility and dedication to duty. These curbs can neither be bought in the market nor injected into the human system by the written or unwritten laws.”

The guarantee of the judiciary as an independent branch of government in the HKSAR goes beyond the fundamental doctrine that each branch of government should perform its own functions independently. The judiciary should be given sufficient power to sustain its own existence and repel interference from other branches of government.²³ The judicial branch in most countries is considered the least powerful branch of government, as it always runs the risk of being influenced by other branches and its only influence is its judgments.²⁴ The great French jurist, Charles de Secondat, Baron de Montesquieu (1689–1755) once wrote, “Of the three powers ... the judiciary is in some measure next to nothing”.²⁵ Protection in the written constitution

²⁰ “The mother of parliamentary rows”, *The Economist Global Agenda* (London, 9 Mar 2004); “Judges and the constitution – Wigs on the warpath”, *The Economist* (London, 13 Mar 2004), p 54.

²¹ S. Shetreet, “Judicial Independence: New Conceptual Dimensions and Contemporary Challenges” in S. Shetreet and J. Deschenes (ed), *Judicial Independence: The Contemporary Debate* (Dordrecht: Martinus Nijhoff Publishers, 1985), p 595.

²² AIR (1982) Supreme Court 149, at p 672.

²³ R.N. Wilentz, “Separation of Powers – Judicial Independence in the 1980s” (1997) 49 *Rutgers Law Review* 835, at p 836.

²⁴ A. Hamilton, J. Jay and J. Madison, *The Federalist* (New York: The Modern Library, 1937), p 504.

²⁵ C.B. de Montesquieu, *The Spirit of Laws*, translated by Thomas Nugent (Kitchener, Ontario: Batoche, 2001), p 177.

is an attempt to guarantee that “the least powerful branch” maintains its important position in the constitutional scheme.

The Australian Commonwealth Constitution does not expressly provide for the separation of powers. Nevertheless, it entrenches this doctrine by vesting specific legislative, executive, and judicial powers in the Commonwealth parliament, executive government, and judiciary respectively.²⁶ Such a division of the constitution could not have been treated merely as a convenient arrangement by its architects. Both the Basic Law and the Australian Commonwealth Constitution have structures similar to those of the United States Constitution, which similarly does not expressly provide for the separation of powers.²⁷ The Basic Law embodies the doctrine of the separation of powers by providing that specific executive, legislative and judicial powers are to be vested in the Chief Executive and Government, the Legislative Council, and the judiciary of the HKSAR respectively.²⁸ The powers vested in the executive and legislative branches under the Basic Law are very detailed and specific. It seems that the Basic Law is intended to restrict the powers of each branch of government by specifically vesting the enumerated powers in each of them.

The Basic Law’s provisions expressly enumerate the powers of the Chief Executive and the Government.²⁹ These powers conform to the traditional view that the executive functions involve performing particular acts or issuing particular orders in accordance with the law. Its provisions also expressly state the powers of the Legislative Council.³⁰ Such powers fall within the traditional view that legislative functions involve the formulation of rules of general application and the supervision of the executive government. There is no provision in the Basic Law that empowers the Executive Government or the Legislative Council to exercise any powers exceeding those specifically

²⁶ The relevant provisions in the Commonwealth Constitution are: s 1 which provides “The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate and a House of Representatives, and which is hereinafter called ‘The Parliament’ or ‘The Parliament of the Commonwealth’”; s 61 which provides “The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and to the execution and maintenance of this Constitution and of the laws of the Commonwealth”; and Art 71 which provides “The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia; and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices not less than two, as the Parliament prescribes.”

²⁷ The relevant provisions in the United States Constitution are: s 1, Art I, which provides “All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives”; s 1, Art II, which provides “The executive power shall be vested in a President of the United States of America”; and s 1, Art III, which provides “The judicial power of the United States shall be vested in one supreme Court, and in such other inferior courts as the Congress from time to time may ordain or establish.”

²⁸ Arts 48, 62, 72, 73 and 80 of the Basic Law.

²⁹ *Ibid.*, Arts 48 and 62.

³⁰ *Ibid.*, Arts 72 and 73.

provided therein.³¹ None of the powers vested in the executive government or the Legislative Council of the HKSAR involves the exercise of judicial power. Therefore, the provisions of the Basic Law are designed to have judicial power exercised exclusively by the judiciary. This can only be achieved if members of the judiciary are independent of the executive government and the Legislative Council.

Judicial Power of the HKSAR

As members of the judiciary have to exercise their judicial power independently, what constitutes judicial power warrants further discussion. The Basic Law provides that the structure, powers, and functions of the courts of the HKSAR shall be prescribed by law.³² The powers and functions of the courts, however, must be restricted to the judicial power of the HKSAR, as the courts can only exercise judicial power and powers incidental to them. The Basic Law has specifically stated that the courts of the HKSAR have jurisdiction over all cases within the HKSAR, save for matters which are beyond the autonomy of the HKSAR.³³ It does not, however, expressly define judicial power. Therefore, precedents from other common law jurisdictions must be consulted. There is no easy answer, as illustrated by *Brandy v Human Rights and Equal Opportunity Commission*,³⁴ where the Australian High Court said:

“Difficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic. Moreover, there are functions which, when performed by a court, constitute the exercise of judicial power but, when performed by some other body, do not ... One is tempted to say that, in the end, judicial power is the power exercised by courts and can only be defined by reference to what courts do and the way in which they do it, rather than by recourse to any other classification of functions. But that would be to place reliance upon the elements of history and policy which, whilst they are legitimate considerations, cannot be conclusive.”

³¹ There are no residual powers of any sort. At common law, residual powers are exercised by the State as a form of prerogative power. After 30 June 1997, the residual executive and legislative powers of the HKSAR are exercised by the Central People's Government.

³² Art 83 of the Basic Law.

³³ *Ibid.*, Arts 19 and 158.

³⁴ (1994–1995) ALR 1, at p 16.

At common law, the function of the judiciary is to declare what the law is and to interpret legislation. Judicial power is the power “to adjudicate between adverse parties as to legal claims ... and to order right to be done”.³⁵ It concerns “the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist ... at the moment the proceedings are instituted ... Enforcement [is peculiar to judicial power]”.³⁶ In other words, the exercise of judicial power involves the application of pre-existing standards rather than formulation of policy or the exercise of an administrative discretion.³⁷ In deciding cases involving the existence of judicial power, the common law courts have produced a number of tests which, when applied to the statutory provision in question, determine whether or not a power purportedly granted or being exercised by any body is in fact judicial.³⁸ An example is the distinction between judicial power and arbitral power. The latter power only ascertains and declares, but does not enforce, what in the opinion of the arbitrator are the respective rights and liabilities of the disputing parties.³⁹ That is, it creates rights and duties of the parties in regulating their future relations.⁴⁰ Judicial power, on the other hand, declares rights and duties on the basis of the law as it stands in the light of past conduct and it enforces those rights⁴¹ (if this distinction seems obscure, it reflects the difficulty in formulating a comprehensive definition of judicial power). When an arbitrator determines a dispute by applying law to the past conduct of the parties and issues a binding order, judicial power is in fact exercised. Judicial decisions must be definitive and declare rights conclusively, and must be based on legal principles. Therefore, judges when reviewing executive decisions cannot go into the merits of a case (except for the purpose of establishing irrationality), as this would involve the exercise of administrative discretion.

In ensuring that judicial power is exercised, and independently exercised, only by the judiciary, non-judicial tribunals which exercise this power should not be permitted.⁴² Otherwise, the right of citizens to appear before an independent judiciary is diminished and the role of the judiciary marginalised. The following example illustrates this issue. In the HKSAR, under the Inland Revenue Ordinance,⁴³ the Board of Review makes final decisions on

³⁵ *Waterside Workers' Federation of Australia v J. W. Alexander Ltd* (1918) 25 CLR 434.

³⁶ *Ibid.*, at pp 463, 465.

³⁷ *Brandy v Human Rights and Equal Opportunity Commission* (1994–1995) ALR 1, at p 17.

³⁸ *Re Tracey, Ex p Ryan* (1989) 166 CLR 518; *R. v Davison* (1954) 90 CLR 353.

³⁹ See *Waterside Workers' Federation of Australia* (n 35 above), p 463.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² P. Wesley-Smith, “Judges and Judicial Power under the Hong Kong Basic Law” (2004) 34 *HKLJ* 83.

⁴³ Cap 112, Laws of Hong Kong.

facts and its decision on law can be appealed to the High Court.⁴⁴ The Board of Review can impose fines and award costs,⁴⁵ but only the District Court can enforce its judgment.⁴⁶ In *Commissioner of Inland Revenue and the Board of Review, Ex p Herald Ltd*,⁴⁷ the Court of Appeal held that the Board of Review is obliged to act like a judicial tribunal and must follow legal precedents and strict procedures notwithstanding that it falls within the category of an administrative tribunal. According to the Privy Council in *Shell Co of Australia Ltd v Federal Commissioner of Taxation*,⁴⁸ the above functions of the Board of Review are an exercise of judicial power. In *Brandy v Human Rights and Equal Opportunity Commission*⁴⁹ it was held that it makes no difference whether the court acts as an agent in enforcing the payment. The crucial point is that, when a tribunal exercises judicial power, its members do not have security of tenure under the Basic Law and are not independent.⁵⁰ In lieu of the Board of Review, appeals against decisions of the Commissioner of Inland Revenue ought be made to the Administrative Appeals Board, which was established to hear appeals against certain administrative decisions and to exercise administrative discretion.⁵¹

Judicial Independence and Other Provisions of the Basic Law

The Basic Law expressly asserts its own supremacy over all other laws in the HKSAR. Accordingly, no law enacted by the Legislative Council can contravene a provision of the Basic Law, including any of the three “judicial independence” articles.⁵² Therefore, the judicial system, including the methods of appointment and removal of members of the judiciary other than judges as practised in former Hong Kong, can be maintained only if the implementing ordinances do not contravene the Basic Law’s unequivocal requirement of judicial independence. A purposive rather than a mechanistic approach should be taken in construing the Basic Law. Any system of judicial appointment which may potentially bring about impairment or compromise of or prejudice to the independent exercise of judicial power must be avoided at all costs, leaving no room for doubt that compliance with the Basic Law has

⁴⁴ *Ibid.*, s 69(1).

⁴⁵ *Ibid.*, ss 68(8) and (9).

⁴⁶ *Ibid.*, s 75.

⁴⁷ [1964] HKLR 224, at pp 231, 236.

⁴⁸ (1930) 44 CLR 530, at p 543.

⁴⁹ (1994–1995) ALR 1, at p 17.

⁵⁰ B. Hsu, *Laws of Taxation in the Hong Kong Special Administrative Region* (Hong Kong: Hong Kong University Press, 2001), pp 42–43.

⁵¹ Administrative Appeals Board Ordinance (Cap 442).

⁵² *Ibid.*, Art 11.

been achieved. The purposive approach is strengthened by other provisions of the Basic Law, which can only be meaningful when an independent judiciary exists.

The Basic Law provides that all residents in the HKSAR are equal before the law.⁵³ This would imply that a resident is entitled to be tried by a fair and impartial tribunal. The provisions of the International Covenant on Civil and Political Rights as applied to the former Hong Kong are to remain in force and they have been implemented in the laws of the HKSAR.⁵⁴ This covenant states that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”,⁵⁵ which is also provided by the Hong Kong Bill of Rights Ordinance.⁵⁶ In criminal proceedings, the Basic Law guarantees that an accused person has the right to a fair trial by the judiciary without delay.⁵⁷ These provisions can only be honoured by an independent judiciary.

The Basic Law further guarantees that all HKSAR residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in courts, and judicial remedies.⁵⁸ It also provides that all HKSAR residents shall have the right to institute legal proceedings against the Executive Government.⁵⁹ These rights can only be upheld if there is an independent judiciary, as well as an independent legal profession.

Temporary and Part-time Judges and Magistrates

In Great Britain the London and Westminster Police Bill of 1785, which would have appointed senior barristers to act as “occasional judges”, was withdrawn after public outcry.⁶⁰ There were concerns that these occasional judges might be biased in seeking to please the executive government in exchange for rewards in their careers.⁶¹ Nevertheless the modern judicial system in Britain encompasses deputy judges appointed on a temporary basis and recorders

⁵³ *Ibid.*, Art 26.

⁵⁴ *Ibid.*, Art 39.

⁵⁵ Art 14(1) of the International Covenant on Civil and Political Rights.

⁵⁶ Art 10 of the Hong Kong Bill of Rights; s 8 of the Hong Kong Bill of Rights Ordinance (Cap 383).

⁵⁷ Art 87 of the Basic Law.

⁵⁸ *Ibid.*, Art 35.

⁵⁹ *Ibid.*

⁶⁰ L. Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (London: Stevens, 1956), pp 119–120.

⁶¹ *Ibid.*

appointed on a part-time basis.⁶² This system was adopted by the former Hong Kong colony and inherited by the HKSAR, where deputy judges are appointed to sit for an average period of six to seven months and recorders sit for four weeks each year.⁶³ Under the British system these temporary and part-time judgeships are normally seen as not incompatible with judicial independence as their appointment and re-appointment are made by the Lord Chancellor, the head of the judiciary,⁶⁴ even though he is a member of the government. The advantages of this system in alleviating the workload of permanent judges, however, should be weighed against its flaws.⁶⁵ In the HKSAR in 2003, the average number of District Court deputy judges and High Court deputy judges sitting in each month respectively were 10.⁶⁶ However there were only 30 permanent District Court judges and 24 permanent High Court judges.⁶⁷ These figures demonstrate that the judiciary has a substantial proportion of temporary and part-time personnel.

Magistrates' courts dispose of over 99 per cent of criminal cases⁶⁸ and have jurisdiction over summary offences as well as some indictable offences on a summary basis.⁶⁹ They may impose sentences of up to three years' imprisonment under specific ordinances and a fine of HK\$500,000. Therefore, the independence of magistrates – as well, of course, of deputy judges and recorders – is vital to the integrity of the entire judicial system. However, as will be discussed later in this article, magistrates do not enjoy full judicial immunity and they can be easily dismissed.

The Validity of Judicial Appointments

The Basic Law provides that judges of the courts of the HKSAR are appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent

⁶² R. Stevens, *The Independence of the Judiciary - The View from the Lord Chancellor's Office* (Oxford: Clarendon Press, 1997), pp 164, 169; *Proposals for the Reform of Recorder and Deputy High Court Judge Tenure* (London: Department of Constitutional Affairs, May 2003), <http://www.dca.gov.uk/consult/judiciary/prorefen.htm#cons> (visited 1 Apr 2004).

⁶³ "Access to Information – Recorders & Deputy Judges", letter dated 6 Apr 2004 from the Judiciary Administration to the author.

⁶⁴ D.B. Casson and I.R. Scott, "Judicial Independence by Jurisdiction – Great Britain" in Shetreet and Deschenes (n 21 above), pp 147–148.

⁶⁵ See Shetreet (n 21 above), pp 625–627.

⁶⁶ See n 63 above.

⁶⁷ *Ibid.*

⁶⁸ *Statistics (2001–2002)* (Hong Kong: The Judiciary, 2003), http://www.judiciary.gov.hk/en/other_info/stat.htm (visited 1 Dec 2003).

⁶⁹ Sections 91 and 92 of the Magistrates Ordinance (Cap 227).

persons from other sectors.⁷⁰ This provision, part of the constitutional framework designed to safeguard the independence of the judiciary, was implemented by the Judicial Officers Recommendation Commission Ordinance.⁷¹ The commission, which appoints judges, must be independent and it must consider the judicial and professional qualities of the candidates as provided by the Basic Law.⁷² However, there is no transparency in the appointment process and the Chief Executive is not bound to appoint all persons recommended by the independent commission though he may appoint no other persons.⁷³ Although the courts in the HKSAR include the Court of Final Appeal (CFA), the High Court, District Court, magistrates' courts, and other special courts,⁷⁴ there is no express provision in the Basic Law that members of these courts must be "judges". The two issues that arise are: who may exercise judicial power and who are members of the judiciary other than judges?

According to the Basic Law, the courts of the HKSAR shall be the judiciary exercising the judicial power⁷⁵ of the HKSAR.⁷⁶ It is not expressly stated that only "judges" can exercise such judicial power. Under the relevant ordinances, all temporary and part-time members of the judiciary may exercise all the jurisdiction, powers and privileges of their permanent counterparts.⁷⁷ They are also assigned the same duties.⁷⁸ Can the judicial power of the HKSAR be exercised by temporary and part-time members of the judiciary? This depends on the previous judicial system, as inherited by the HKSAR – on the assumption that temporary and part-time judges are "members of the judiciary other than judges".

The Basic Law maintains the previous judicial system except those changes consequent upon the establishment of the CFA of the HKSAR,⁷⁹ and retains the previous system of appointment and removal of members of the judiciary

⁷⁰ Art 88 of the Basic Law.

⁷¹ Cap 92.

⁷² Art 92 of the Basic Law.

⁷³ The Chinese version of the *Basic Law* states that persons recommended by the independent commission "are appointed by the Chief Executive". Contrast its English version which uses the wording "shall be appointed by the Chief Executive". Contrast J. Cottrell and Y. Ghai, "Between Two Systems of Law: The Judiciary in Hong Kong" in P. Russell and D. O'Brien (ed), *Judicial Independence in the Age of Democracy* (Charlottesville and London: University Press of Virginia, 2001), p 212, who said, "in practice the recommendations of the JORC are treated as binding, as the Basic Law requires".

⁷⁴ Art 84 of the Basic Law.

⁷⁵ The meaning of judicial power has been discussed in the "Judicial Power of the HKSAR" section of this article.

⁷⁶ Art 80 of the Basic Law.

⁷⁷ Section 5A(2) of the Magistrates Ordinance (Cap 227); s 7(2) of the District Court Ordinance (Cap 336); ss 6A(3) and 10(2) of the High Court Ordinance (Cap 4).

⁷⁸ See n 63 above. This information was confirmed again in a telephone conversation between the author and Ms B. Leung of the Judiciary Administration on 8 Apr 2004.

⁷⁹ Art 81 of the Basic Law.

other than judges.⁸⁰ The “previous system” is probably intended to be the system at the time when China resumed the exercise of sovereignty over Hong Kong, that is, the system as it was on 1 July 1997.

The drafting of the Basic Law in respect to judges and other members of the judiciary, however, is far from satisfactory.⁸¹ It distinguishes between judges and other members of the judiciary, but does not define them.⁸² The drafting committee must have had in mind the Interpretation and General Clauses Ordinance, which defines “judges” and includes within the term deputy High Court judges and recorders, but not magistrates, District Court judges, and registrars.⁸³ This definition of judges, including deputy judges, was amended in 1994 to include recorders⁸⁴ and again in 1997 when an amendment replaced “Justice of Appeal” by “a judge of the Court of Final Appeal”.⁸⁵ Magistrates, District Court judges and registrars are thus not “judges” although deputy High Court judges and recorders *are*. In any event, under the Basic Law judicial power may be exercised by members of the judiciary who are not judges, to the extent that the previous system provided. The Basic Law is not concerned with whether these other members of the judiciary are temporary or part-time. Therefore, other members of the judiciary who are not judges, eg magistrates, District Court judges, and deputy District Court judges, which were established prior to 1997, may continue to be appointed to exercise judicial power in the same manner under the previous system subject to contrary provisions of the Basic Law such as the “judicial independence” provisions.⁸⁶ The same cannot be said for deputy magistrates, which were created only in 1999.⁸⁷

It is legitimate to rely on an ordinance to identify which judicial officers are “judges”, either because it was part of the previous system recognised by the Basic Law or because ordinary legislation may properly supplement or clarify a constitutional provision. It would therefore appear that magistrates, deputy District Court judges, District Court judges, and registrars may continue to be appointed as under the previous system, but not deputy High Court judges and recorders.

⁸⁰ *Ibid.*, Arts 81 and 91.

⁸¹ See Cottrell and Ghai (n 73 above), p 213.

⁸² Arts 91 to 93 of the Basic Law.

⁸³ Section 3 of the Interpretation and General Clauses Ordinance (Cap 1). Although the *Basic Law* is not a piece of HKSAR legislation, and therefore is not formally interpreted in the light of Cap 1, it is submitted that where it is an institution of the HKSAR legal system that is referred to it is appropriate to look to Cap 1.

⁸⁴ Section 58 of the Ordinance No 92 of 1975; s 7 of the Ordinance No 49 of 1983; s 10 of the Ordinance No 80 of 1994.

⁸⁵ Version: 1 Jul 1997.

⁸⁶ Magistrates, the District Court (s 3 of the Ordinance No 24 of 1949 and s 3 of the Ordinance No 1 of 1953) and deputy District Court judges (s 6 of the Ordinance No 21 of 1962) were all created prior to 1997.

⁸⁷ Section 13 of the Ordinance No 21 of 1999.

The provisions governing appointment of magistrates, deputy judges, and recorders are as follows. The Magistrates Ordinance provides that the Chief Executive may appoint magistrates by warrant and the Chief Justice may appoint deputy magistrates.⁸⁸ The Judicial Officers Recommendation Commission (JORC) advises and makes recommendations to the Chief Executive on appointing magistrates other than deputy magistrates.⁸⁹ The Chief Justice may appoint deputy District Court judges and deputy High Court judges under the District Court Ordinance⁹⁰ and High Court Ordinance respectively.⁹¹ The Chief Executive may appoint recorders under the High Court Ordinance,⁹² based on the advice and recommendation of the JORC.⁹³

It appears that (a) the appointment of deputy magistrates (who are members of the judiciary but the category was not established under the previous system) is not covered by the Basic Law; (b) the appointment of deputy District Court judges is validated under the previous system; but (c) deputy High Court judges, being “judges” under the Basic Law, ought to be appointed in the same manner as permanent judges, thus by the Chief Executive and not by the Chief Justice.

Security of Tenure for Judges

In protecting the independence of the judiciary, the Basic Law provides that a judge may only be removed for “inability to discharge his or her duties, or for misbehaviour” by the Chief Executive on the recommendation of an independent tribunal appointed by the Chief Justice of the CFA consisting of at least three local judges.⁹⁴ The endorsement of the Legislative Council is also required for the removal of a Court of Appeal judge and the Chief Judge of the High Court.⁹⁵ The Chief Justice of the CFA may be removed only for inability to discharge his or her duties or for misbehaviour by the Chief Executive on the recommendation of a tribunal appointed by the Chief Executive consisting of at least five local judges.⁹⁶ The Basic Law also

⁸⁸ Sections 5 and 5A of the Magistrates Ordinance (Cap 227).

⁸⁹ Section 6 and Sch 1 of the Judicial Officers Recommendation Commission Ordinance (Cap 92).

⁹⁰ Section 7 of the District Court Ordinance (Cap 336).

⁹¹ Section 10(1) of the High Court Ordinance (Cap 4).

⁹² *Ibid.*, s 6A.

⁹³ Section 5 and Sch 1 of the Judicial Officers Recommendation Ordinance.

⁹⁴ Art 89 of the Basic Law.

⁹⁵ *Ibid.*, Art 90.

⁹⁶ *Ibid.*, Art 89.

provides judicial immunity⁹⁷ and, as we have seen, special appointment procedures for judges.⁹⁸ It would be inconsistent to protect judicial independence in such ways while allowing a body not subject to them to exercise judicial power.

There is a general legislative provision that the power to appoint includes the power to dismiss or suspend.⁹⁹ Accordingly, the deputy judges of the District Court and the High Court hold their offices at the pleasure of the Chief Justice,¹⁰⁰ and the recorders of the High Court hold their offices at the pleasure of the Chief Executive. As recorders are appointed by the Chief Executive on the advice and recommendation of the JORC,¹⁰¹ it is arguable that the termination of appointment of a recorder requires similar consultation.¹⁰²

These temporary and part-time judges have all the jurisdiction, powers and privileges and perform all the duties of a permanent judge of the respective courts,¹⁰³ but they do not enjoy the security of tenure of permanent judges as provided by the Basic Law.¹⁰⁴ As these members of the judiciary, like magistrates and deputy magistrates, exercise full judicial power, they should be able to act independently, free from any interference.¹⁰⁵ It may be perceived that these members of the judiciary would subconsciously read the minds of those who may remove or re-appoint them at their pleasure. Mr Justice Kirby of the Australian High Court considered the appointment of temporary judges objectionable in principle as they clearly lack judicial independence.¹⁰⁶ In *Reference re Territorial Court Act*,¹⁰⁷ the Northwest Territories Supreme Court in Canada had to determine whether a full-time deputy judge with a fixed-term appointment is proper under a constitutional provision which provides the right to be heard by an independent and impartial tribunal.¹⁰⁸ It was held that the discretion of the commissioner to appoint or reappoint deputy judges is incompatible with judicial independence and leads to a perception of partiality. The court held that the power to revoke the appointment of a deputy judge is constitutionally impermissible even with the recommendation of the chief judge, as a

⁹⁷ *Ibid.*, Art 85. For a discussion of judicial immunity under the Basic Law, see Y. Ghai, *Hong Kong's New Constitutional Order* (Hong Kong: Hong Kong University Press, 1999), pp 316–318.

⁹⁸ Arts 88 to 93 of the Basic Law.

⁹⁹ Section 42 of the Interpretation and General Clauses Ordinance.

¹⁰⁰ Section 7(4) of the District Court Ordinance; s 10(4) of the High Court Ordinance.

¹⁰¹ Section 5 and Sch 1 of the Judicial Officers Recommendation Ordinance.

¹⁰² *Gupta and Others v Union of India and Others*, AIR (1982) Supreme Court 149, at p 595. In this case, it was agreed that if the appointment of a retired judge has to be made in consultation with the Chief Justice, the termination of the appointment will also require similar consultation.

¹⁰³ Section 7(2) of the District Court Ordinance; ss 6A(3) and 10(2) of the High Court Ordinance.

¹⁰⁴ Section 5(5) of the District Court Ordinance; s 11A(5) of the High Court Ordinance.

¹⁰⁵ See Ghai (n 97 above), pp 308–316.

¹⁰⁶ M. Kirby, *Independence of the Judiciary – Basic Principle, New Challenges* (Hong Kong: International Bar Association Human Rights Institute Conference, 12–14 Jun 1998).

¹⁰⁷ [1997] Carswell NWT 24, para 126; 152 DLR (4th) 132; [1998] 1 WWR 733.

¹⁰⁸ Section 11(d) of the Canadian Charter of Rights and Freedoms.

reasonable, objective observer would not regard this as a sufficient safeguard. This follows *Valente v The Queen*,¹⁰⁹ where it was held that:

“The question that now has to be determined is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically would conclude that a provincial court judge ... was a tribunal which could make an independent and impartial adjudication. In answering this question it is necessary to review once again the specific concerns which were raised ... and then conclude whether singly or collectively they would raise a reasonable apprehension that the tribunal was not independent and impartial so far as its adjudication was concerned.”

In *Starrs and Chalmers v Ruxton*,¹¹⁰ the Lord Justice Clerk of the Scottish High Court of Justiciary considered the appointment of temporary sheriffs (judges) to supplement the work of their permanent counterparts as a “constitutional innovation”. In this case, the court had to determine whether the Lord Advocate had acted in a way which was incompatible with the rights of the accused to a fair trial by “an independent and impartial tribunal” under the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹¹¹ The Scottish court adopted the same test as in *Valente v The Queen*¹¹² and *Reference re Territorial Court Act*,¹¹³ ie whether or not there is a real risk that a well-informed observer would think that a temporary judge might be influenced by his hopes and fears as to his prospective advancement.¹¹⁴ The court held that it is insufficient to rely on practice. The real issue is whether there is a framework providing protection against improper interference or influence.¹¹⁵ The court denied that the practice of following removal procedures for temporary judges identical to those for their permanent counterparts was a sufficient safeguard.¹¹⁶ Accordingly, it held that the one-year appointment at the pleasure of the Lord Advocate did not give an appearance of independence.¹¹⁷ The executive was able to maintain a close control over the period for which such a judge holds office.¹¹⁸ In

¹⁰⁹ [1985] 2 SCR 673, para 13.

¹¹⁰ [2000] JC 208; [2000] SLT 42 (Lord Justice Clerk), para 4.

¹¹¹ *Arti* 6(1).

¹¹² [1985] 2 SCR 673.

¹¹³ See n 107 above.

¹¹⁴ *Starrs and Chalmers v Ruxton* [2000] JC 208; [2000] SLT 42 (Lord Justice Clerk), paras 25–28, 49.

¹¹⁵ *Ibid.*, (Lord Justice Clerk), para 28.

¹¹⁶ *Ibid.*, (Lord Prosser), para 10.

¹¹⁷ *Ibid.*, (Lord Justice Clerk), para 40.

¹¹⁸ *Ibid.*

another Scottish case, *Clancy v Caird*,¹¹⁹ it was held that temporary judges did not necessarily contravene the above provision if there were sufficient security of tenure and the Crown was not involved in the case. As a consequence of *Starrs and Chalmers*, the British Government has implemented measures to safeguard the tenure of recorders. They are now effectively appointed to the statutory retirement age of seventy subject to good behaviour, and their five-year appointments are automatically renewed.¹²⁰ In May 2003, the Lord Chancellor issued a consultation paper on reform of the tenure of deputy High Court judges and recorders.¹²¹

Prima facie, appointing temporary judges is incompatible with the judicial independence provisions in the Basic Law¹²² and contrary to the interests of the accused, who might be tried by persons who “would have everything to hope for” from the executive government.¹²³ The question is whether or not there are sufficient safeguards to ensure their independence. There is no prohibition on deputy magistrates, deputy judges, and recorders receiving remuneration from outside the judiciary beyond their terms of appointment. In reality, their principal sources of income are generally derived from their private professional practices. When temporary members of the judiciary may accept instructions from the Secretary for Justice in their capacity as legal practitioners, their independence is called into question as they are in effect agents of the executive government while members of the judiciary. There are no provisions for a “cooling off” period. The classic remark by Lord Hewart is worth repeating here:

“It is ... of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”¹²⁴

The concepts of judicial independence, however, have changed over the years and opinions differ on what is necessary or desirable or feasible to achieve this objective.¹²⁵ Most people would call for the general adoption of the highest standards or safeguards.¹²⁶ In reality, it would not always be feasible to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement, which may have to be applied to a variety of tribunals.¹²⁷ In *Reference re Territorial Court Act*,¹²⁸ the test laid down by the

¹¹⁹ [2000] SLT 546.

¹²⁰ See *Proposals for the Reform of Recorder and Deputy High Court Judge Tenure* (n 62 above).

¹²¹ *Ibid.*

¹²² See Wesley-Smith, “Individual and Institutional Independence” (n 5 above).

¹²³ The quote comes from Radzinowicz’s book (n 60 above), p 119.

¹²⁴ *R. v Sussex JJ, Ex p McCarthy* [1924] 1 KB 256.

¹²⁵ *Valente v The Queen* [1985] 2 SCR 673, para 25.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ See n 107 above.

Northwest Territories Supreme Court in Canada is whether a reasonable observer would consider that the independence of a judge is impaired. The case established four safeguards for proper appointment of deputy judges, which may be a model for the HKSAR to implement. They are: (i) the appointment or reappointment would involve an independent tribunal; (ii) the position would be secure for the term of the appointment, and there would be no discretionary power to revoke the appointment before the expiry of the term; (iii) any revocation or removal must be for cause, and subject to the same removal process as for permanent judges; and (iv) there should be no differentiation in the total remuneration available for deputy and full judges. Nevertheless the court permitted appointment to the Bench of sitting tenured judges from another jurisdiction, inactive lawyers and retired judges, as no reasonable observer would consider their independence impaired.

In the HKSAR, temporary and part-time judges may be appointed from other common law jurisdictions, including non-permanent judges to the CFA under the Basic Law.¹²⁹ The independence of these judges would be impaired if the remuneration in their home jurisdictions was lower than in the HKSAR. The safeguards required in *Reference re Territorial Court Act* are absent under the present legislation in the HKSAR. As for retired judges, the Northwest Territories Supreme Court stated that their appointments would be valid provided they are prohibited from practising law within the jurisdiction. The Canadian decision made it clear that appointment of current legal practitioners would definitely be improper, as they could not be seen to be free from the pressures of government and business.

According to the Canadian safeguards, it would be undesirable for District Court judges to act as deputy High Court judges on a trial basis under the promotional system for members of the judiciary in the HKSAR. It has been argued that a policy of not promoting judges may contribute to judicial independence, as this would take away from judges the incentive to gain favour with those who could appoint them to more lucrative posts.¹³⁰ Studies in Japan have shown that its executive government used control over promotion to penalize judges who declared key electoral law unconstitutional.¹³¹ In the United States of America it has been reported that federal judges who supported higher penalties were more likely to be promoted.¹³² In the HKSAR the number of deputy judges and recorders being appointed to permanent judgeships is not very high.¹³³ There is always a risk that a probationary judge's

¹²⁹ Arts 82 and 92 of the Basic Law.

¹³⁰ D. Klerman, "Nonpromotion and Judicial Independence" (1999) 72 *South California Law Review* 455.

¹³¹ *Ibid.*

¹³² *Ibid.*, pp 455–456.

¹³³ Seven and nine out of about 49 deputy judges and recorders were appointed to permanent judgeships in 2001 and 2003, respectively. See n 63 above.

decision would be coloured by his plans for the future, as the opportunity for permanent appointment is limited.¹³⁴ There is a perception that he would try to please those on whose pleasure his reappointment depends¹³⁵ or those on whom he might rely for his livelihood when his judicial appointment expires. These types of probationary or temporary appointments are inconsistent with numerous international conventions and declarations. The Beijing Statement of Principles of the Independence of the Judiciary requires judges to be protected by security of tenure.¹³⁶ International standards simply disapprove appointing probationary or temporary judges.¹³⁷ As for appointing legal practitioners as deputy magistrates, deputy judges, and recorders in the HKSAR, the *Territorial Court Act* case provided the following wisdom: "One should not be able to use the judicial role as a means of material self-aggrandisement. That is exactly what one could be tempted to do by a temporary appointment knowing that it is merely temporary."¹³⁸ It has been suggested that the only way to ensure the independence of these temporary and part-time judges is to appoint them for a fixed term with no reappointment.

Recorders are appointed on a part-time basis. As discussed earlier, in Great Britain there was concern that this type of judicial appointment might lead to dispensing "second-rate justice".¹³⁹ There were perceptions that the orderly sequence of court sittings and consistency in sentencing would be jeopardised.¹⁴⁰ In *R v Lippé*,¹⁴¹ the Supreme Court of Canada held that appointing legal practitioners as part-time municipal judges does not contravene judicial independence because sufficient safeguards were in place to minimise the risk of bias. International standards call for appointing part-time judges with proper safeguards.¹⁴² These safeguards include the oath sworn by judges, the code of ethics to which they are subject, and the statutory restrictions in place to avoid conflicts of interest. The court considered the steps most municipal court judges had taken to make themselves more

¹³⁴ See Shetreet (n 21 above), p 625.

¹³⁵ *Ibid.*

¹³⁶ Arts 18 and 20 of the Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region; Arts 11 and 12 of the Basic Principles on the Independence of the Judiciary (adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 Aug to 6 Sep 1985 and endorsed by General Assembly resolutions 40/32 of 29 Nov 1985 and 40/146 of 13 Dec 1985).

¹³⁷ Art 23(a) of the International Bar Association's Minimum Standards of Judicial Independence (adopted 1982); Art 2.20 of the Universal Declaration on the Independence of Justice (adopted by the First World Conference on the Independence of Justice, Montreal, Jun 1983).

¹³⁸ [1997] Carswell NWT 24, para 126.

¹³⁹ See Shetreet (n 21 above), p 626.

¹⁴⁰ *Ibid.*

¹⁴¹ [1991] Carswell Que 45; [1990] 2 SCR 114.

¹⁴² Art 25 of the International Bar Association's Minimum Standards of Judicial Independence (adopted 1982); Article 2.20 (Explanatory Note) of the Universal Declaration on the Independence of Justice (adopted by the First World Conference on the Independence of Justice, Montreal, Jun 1983).

independent and impartial, eg by living and practising law outside their respective municipal court jurisdictions, and stated that a reasonably well-informed person with full knowledge of the municipal court system and its safeguards should not have an apprehension of bias in a substantial number of cases. These safeguards would be difficult to implement in the HKSAR, which has only one jurisdiction. Although barristers in the HKSAR practise independently in their own chambers, they are not immune to influence by instructing solicitors, the Secretary for Justice who may instruct them, and businesses. In any event there is no relevant legislation regulating judicial conduct and a Guide to Judicial Conduct is only on the drawing board.¹⁴³ On a positive note, virtually all the recorders appointed were reappointed during the past three years.¹⁴⁴

As for the CFA, permanent judges are appointed by the Chief Executive on the advice and recommendation of the JORC.¹⁴⁵ Non-permanent local judges and judges from other common law jurisdictions are appointed by the Chief Executive under similar procedures and two lists of such appointments are compiled.¹⁴⁶ All these judges may be removed only for an inability to discharge their duty or for misbehaviour and only by the Chief Executive on the recommendation of a tribunal in accordance with the procedures provided by the Basic Law.¹⁴⁷ The appointment or removal of any judge of the CFA, whether permanent or non-permanent,¹⁴⁸ must be endorsed by the Legislative Council and be reported to the Standing Committee of the National People's Congress.¹⁴⁹ To minimise conflicts of interest, all these judges are debarred from practising law in the HKSAR forever.¹⁵⁰ Although the chance that they may be influenced by multinational corporations cannot be ruled out, the possibility that this would happen is virtually nil. *Prima facie*, it appears that judicial independence is assured in the CFA. A non-permanent judge, however, holds office for a term of three years, which may be extended for one or more periods of three years by the Chief Executive on the recommendation of the Chief Justice.¹⁵¹ This may create a perception that non-permanent judges could be influenced by fear that their ideology and jurisprudence are not endorsed by the Chief Justice or the Chief Executive.

¹⁴³ See n 63 above; "CJ's Speech at Ceremonial Opening of Legal Year 2004" (Hong Kong: The Judiciary, 12 Jan 2004), <http://www.info.gov.hk/gia/general/200401/12/0112136.htm> (visited 6 Apr 2004).

¹⁴⁴ See n 63 above.

¹⁴⁵ Section 7 of the Hong Kong Court of Final Appeal Ordinance.

¹⁴⁶ *Ibid.*, ss 8 and 9.

¹⁴⁷ Art 89 of the Basic Law; ss 14(7) and (8) of the Hong Kong Court of Final Appeal Ordinance.

¹⁴⁸ Non-permanent judges include judges from other common law jurisdictions: s 2 of the Hong Kong Court of Final Appeal Ordinance.

¹⁴⁹ *Ibid.*, s 7A.

¹⁵⁰ *Ibid.*, s 13.

¹⁵¹ *Ibid.*, s 14(4).

As the CFA may invite non-permanent judges to sit on it,¹⁵² the entire process should be transparent and prescribed by law in ensuring that there is no appearance of bias in selecting the panel members. There is always a concern that non-permanent judges may be invited to sit in the CFA so as to affect the outcome of the cases.¹⁵³

The Magistrates' Ordinance provides that the Chief Executive may appoint magistrates by warrant¹⁵⁴ on the advice and recommendation of the JORC.¹⁵⁵ Magistrates may be appointed on a permanent basis or fixed-term contract.¹⁵⁶ The warrant stipulates whether a magistrate is permanent or fixed term.¹⁵⁷ There is no guarantee that, in the latter case, the contract will be renewed. In any event, a warrant appointing a magistrate may be revoked at any time by the Chief Executive without any cause,¹⁵⁸ and a deputy magistrate holds office at the pleasure of the Chief Justice.¹⁵⁹

Appeals from the magistrates' courts lie to the Court of First Instance.¹⁶⁰ Those members of the legal profession who moonlight as deputy High Court judges or recorders, regularly or from time to time, may be put in a moral dilemma when they are asked to represent their clients in magistrates' courts. As they wield full judicial power when they sit in the High Court, the pressure on the magistrates and their learned friends on the other side of the bar may be palpably felt. Any appeal hearing they preside over may have repercussions, as they may appear in magistrates' courts. Under the inherited judicial promotion system of colonial Hong Kong, the last thing a magistrate who has any ambition for higher office would prefer is to have many of his or her decisions successfully appealed. Moreover, all decisions of superior courts, including decisions made by these moonlighting judges, bind magistrates' courts. A conflict of interest would arise if any of these decisions were relevant to their clients' case in the magistrates' courts. Judicial independence, fair play in the legal profession, and equality before the law may perceivably be challenged.

Moreover, if not all members of the judiciary enjoy judicial independence, the system can be manipulated by the government. The choice of venue for

¹⁵² *Ibid.*, ss 5(2) and (3).

¹⁵³ For a discussion of appointing temporary judges, see Shetreet (n 21 above), p 627. One expects that the footnote will give support to the risk identified in the text – but it does not do so.

¹⁵⁴ Section 5 of the Magistrates Ordinance.

¹⁵⁵ Section 6 and Sch 1 of the Judicial Officers Recommendation Commission Ordinance.

¹⁵⁶ M. Chui, *Justice Without Fear or Favour: Reflections of a Chinese Magistrate in Colonial Hong Kong* (Hong Kong: Ming Pao Publications Ltd., 1999), p 3.

¹⁵⁷ *Ibid.*, p 2: an example of this warrant may be found here.

¹⁵⁸ Section 5(5) of the Magistrates Ordinance.

¹⁵⁹ Section 42 of the Interpretation and General Clauses Ordinance.

¹⁶⁰ Sections 105 and 113 of the Magistrates Ordinance.

prosecution is always the privilege of the Secretary for Justice.¹⁶¹ In borderline cases, the prosecution may choose the magistrates' courts, whose members are not independent. There is no equality before the law as judicial independence depends on the level of court, the type of appointment of the sitting member of the judiciary, and the pleasure of the Secretary for Justice.

Judicial Immunity

The Basic Law provides that members of the judiciary are immune from legal action in the performance of their judicial functions.¹⁶² The judicial immunity provided by the Basic Law covers all members of the judiciary in the performance of their judicial functions.¹⁶³ The Basic Law makes no distinction between levels of courts. Therefore, the extent of immunity ought to be the same for all members of the judiciary. However, at common law, immunity is only available to judges and magistrates and the degree of immunity available depends on the level of court.¹⁶⁴ Judges of inferior courts normally enjoy immunity if they are acting within the scope of their jurisdiction and it is immaterial whether or not they are acting in good faith.¹⁶⁵ The extension of judicial immunity to all members of the judiciary, and not just judges, gives effect to the intention expressed in the Basic Law to uphold a truly independent judiciary. In a leading English case, *Sirros v Moore*,¹⁶⁶ the Court of Appeal made an idealist though not universally accepted statement:¹⁶⁷

“Every judge of the courts of this land – from the highest to the lowest – should be protected to the same degree and liable to the same degree. If the reason underlying this immunity is to ensure ‘that they may be free in thought and independent in judgment’, it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence free from fear ... What he does may be outside his jurisdiction – in fact or in law – but so long as he honestly believes it to be within his

¹⁶¹ Art 63 of the Basic Law provides that the Department of Justice shall control criminal prosecutions, free from any interference.

¹⁶² Art 85 of the Basic Law.

¹⁶³ *Ibid.*

¹⁶⁴ See Ghai (n 97 above), pp 316–317.

¹⁶⁵ *Ibid.*

¹⁶⁶ [1975] QB 118, at p 136.

¹⁶⁷ It is considered by the author to represent an ideal because it provides full judicial immunity. However, it is not accepted in all cases. For discussions, see Ghai (n 97 above), pp 316–317.

jurisdiction – he should not be liable ... Nothing will make him liable except it is shown that he was not acting judicially ... knowing that he had no jurisdiction to do it.”

The Magistrates Ordinance and the District Court Ordinance provide lesser standards of judicial immunity than those enjoyed by the superior courts. The Magistrates Ordinance protects magistrates from action for any act done in the execution of his or her duty with respect to any matter within his or her jurisdiction, unless such act was done maliciously and without reasonable and probable cause.¹⁶⁸ For any act done by a magistrate without or in excess of his or her jurisdiction, there is no need to prove that the act was done maliciously and without reasonable and probable cause.¹⁶⁹ The District Court Ordinance provides that judges in the District Court enjoy judicial immunity except where there is malice and absence of reasonable and probable cause.¹⁷⁰ These provisions are in line with the established common law doctrine that only superior court judges enjoy full judicial immunity. The Basic Law, however, makes no differentiation between superior and inferior courts and extends judicial immunity to all courts and all members of the judiciary, including magistrates and registrars. Therefore, these ordinances provide merely the minimum safeguards for magistrates and District Court judges.

All legislation in the HKSAR must be compatible with the Basic Law. Arguably, the judicial immunity provisions in the Magistrates Ordinance and the District Court Ordinance are *ultra vires* the Basic Law and should be repealed. Given that the judges themselves may construe any ambiguity in favour of wider judicial immunity,¹⁷¹ the judicial immunity provisions in the Magistrates Ordinance and District Court Ordinance may be redundant.¹⁷² After all, the extent of judicial immunity under the Basic Law has yet to be determined by the CFA. However, there is still concern by some that “the performance of their judicial functions” may be interpreted narrowly by the CFA, and covers only acts within their jurisdiction.¹⁷³ This narrow approach seems to be unlikely to be adopted. As it is still uncertain how the judicial immunity provision in the Basic Law is to be interpreted, a better approach is to repeal the relevant provisions in the above ordinances and allow the question to be regulated by the Basic Law.

¹⁶⁸ Section 125 of the Magistrates Ordinance.

¹⁶⁹ *Ibid.*, s 126.

¹⁷⁰ Section 71 of the District Court Ordinance.

¹⁷¹ See Cottrell and Ghai (n 73 above), p 214.

¹⁷² See Ghai (n 97 above), p 318.

¹⁷³ See Cottrell and Ghai (n 73 above), p 214.

Conclusion

The ordinances concerning the appointment of deputy High Court judges and the judicial immunity provided to inferior court judges are patently inconsistent with the Basic Law. Appointing temporary and part-time judges without ensuring their independence has been rejected by jurisprudence in Australia, Canada, and Great Britain and disapproved of by international standards. The Basic Law firmly entrenches the doctrine of judicial independence and provides a supporting framework for its successful operation. The drafters of the Basic Law could not reasonably be expected to have foreseen all the consequences of maintaining the judicial system previously practised in Hong Kong. In ensuring the express provisions of the Basic Law are operational notwithstanding the continuation of the previous legal system, the Basic Law expressly states its supremacy over all laws of the HKSAR.¹⁷⁴ All laws in the previous judicial system must be construed with such modifications, adaptations, limitations, and exceptions as may be necessary so as not to contravene the Basic Law.¹⁷⁵ Accordingly, the judicial system should ensure that members of the judiciary are independent. Any judicial appointment should guarantee that the appointee is able and may be seen to perform his or her judicial functions independently, free from any interference. All members of the judiciary should be given full judicial immunity and security of tenure. The validity of judicial decisions made by members of the judiciary who are not perceived to be independent is questionable. The conflict between maintaining the previous system of judicial appointment and removal and the independence of the judiciary should be resolved by adopting a purposive approach in interpreting the Basic Law.

Any legislative change for the “judicial appointment” provisions to conform to the Basic Law requirements would await a successful court challenge unless the Executive Government, enjoying the status quo, first took the initiative. Therefore the legal profession and the judiciary have the responsibility to uphold judicial independence themselves. Although the legal profession in the HKSAR is generally independent of the Executive Government, it does not follow that no practitioner would compromise independence for monetary reward. The Chief Justice has the power to appoint Senior Counsel.¹⁷⁶ Members of the legal profession who are deputy judges, recorders, and Senior Counsel tend to enjoy a higher reputation and, hence,

¹⁷⁴ Art 8 of the Basic Law.

¹⁷⁵ Section 2A(1) of the Interpretation and General Clauses Ordinance.

¹⁷⁶ Section 31A of the Legal Practitioners Ordinance (Cap 159).

command higher fees. The question is whether they would perceive challenging the power of the Chief Justice in appointing temporary and part-time members of the judiciary as jeopardizing their career advancement. One former Hong Kong magistrate, who questioned the independence of the judiciary, put it:

“The pursuit of independence is the pursuit of impartiality. Impartiality is a state of mind and the mind of man can be affected by the real as by the spectral; by intended results as by unintended. The state of mind to which regard must be had is that of the judge.”¹⁷⁷

A few former members of the judiciary have alleged that, under the judicial system in former Hong Kong as maintained by the HKSAR, their independence had been compromised.¹⁷⁸

The implementation of the judicial independence provisions of the Basic Law very much depends on how they are interpreted by the judiciary. As the HKSAR is to exercise a high degree of autonomy under the Basic Law, the judiciary plays a crucial role in protecting the constitutional rights of all HKSAR residents. In preserving “one country, two systems” and ensuring fair elections, an impartial judiciary is crucial. Without the rule of law and judicial independence, a democratic society cannot function. The paradox is that how the Hong Kong judiciary would approach the construction of the provisions supporting judicial independence in the Basic Law depends on whether they are themselves independent. The judicial appointment provisions invest the Chief Justice with power to appoint temporary magistrates and judges, an executive discretion which may well go beyond the incidental power in the exercise of his or her judicial functions. This is radically different from being a member of the judicial appointment commission, whose power of selection can hardly be challenged. Whilst there is no evidence to suggest that the Chief Justice would not exercise his or her power independently, judicial bias may unfortunately be perceived by some. This is an unfair burden to place on any Chief Justice. It is the task of the legislature, at the behest of the Executive Government, to implement safeguards as discussed in this article to ensure that temporary and part-time judicial appointments do not jeopardise judicial independence.

¹⁷⁷ E. Barnes, “The Independence of the Judiciary in Hong Kong” (1976) 6 HKLJ 7, p 19.

¹⁷⁸ See Chui (n 156 above), pp 47–60, 67–73; Barnes (n 177 above) (a judicial officer’s job could be made miserable with his or her promotional opportunity at risk if he or she defied the administrative branch).