

**ADMINISTRATIVE LAW
IN
HONG KONG**

Third Edition

Temple Chambers

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CHAPTER 1

THE PURPOSE AND NATURE OF ADMINISTRATIVE LAW IN HONG KONG

1. THE PURPOSE OF ADMINISTRATIVE LAW

[1-1] To a reader unfamiliar with administrative law, the subject may conjure up rather uninspiring images of tedious rules applied perfunctorily by faceless bureaucrats, and of endless, extremely dull decisions by technical committees, tribunals and courts. This book aims to show that the reverse is true. Administrative law, close to the pulse of politics in Hong Kong, engages with some of the territory's most pressing contemporary concerns. Should classes at The Chinese University of Hong Kong be conducted in Chinese as the principal language of instruction?¹ Should the government prioritise reduction of air pollution over economic development?² Should domestic helpers be exempted from eligibility for permanent residence in Hong Kong?³ Which providers should be granted free to air television broadcasting licenses?⁴ Should a post-operative transsexual be permitted to marry in her 'new' gender identity, and indeed, what do the categories 'man' and 'woman' mean today in Hong Kong?⁵ Should there be different levels of hospital fees for different categories of women giving birth in Hong Kong hospitals?⁶ Can the police informally freeze the bank accounts

- 1 *Li Yiu Kee v The Chinese University of Hong Kong* [2010] HKCU 1607 (unreported, CACV 93/2009, 23 July 2010) (CA).
- 2 *Clean Air Foundation Ltd & Anor v The Government of HKSAR* [2007] HKCU 1265 (unreported, HCAL 35/2007, 26 July 2007) (CFI).
- 3 *Vallejos & Anor v Commissioner of Registration & Anor* [2013] 4 HKC 239, (2013) 16 HKCFAR 45, [2013] 2 HKLRD 533 (CFA).
- 4 *Asia Television Ltd v Communications Authority (Successor of the Broadcasting Authority)* [2013] 3 HKLRD 618, [2013] HKCU 1128 (CA).
- 5 *W v Registrar of Marriages* [2013] 3 HKC 375, (2013) 16 HKCFAR 112, [2013] 2 HKLRD 90 (CFA).
- 6 *Fok Chun Wa & Anor v Hospital Authority & Anor* [2012] 2 HKC 413, (2012) 15 HKCFAR 409 (CFA).

of people suspected of money laundering via letters of no consent?⁷ Should there be a specific offence criminalising forced labour, particularly when the suspected victims of forced labour are normally foreign domestic helpers, who contribute significantly to the Hong Kong economy and 'way of life'?⁸ Is the 'live-in' requirement—which mandates that foreign domestic helpers live in their employers' residence—unconstitutional?⁹ Should same-sex couples be excluded from access to public rental housing units and the Home Ownership Scheme, and if so, for what reasons?¹⁰ Is the Government obliged to set up an alternative framework to recognise same-sex relationships?¹¹

[1-2] People can reasonably disagree about the answers to these questions. And it is because of the proximity of administrative law to politics that there is also fundamental disagreement as to what and how much this branch of law should do when the courts are presented with these questions. However, in an attempt to define the purpose of administrative law, one key school of thought is that the purpose of this field of law is to control the exercise of governmental power.¹² The need to control the administrative state is premised on a classic libertarian mistrust of government.¹³ James Madison, one of the founding fathers of the United States and its fourth president, encapsulated the critical need for control of power in *The Federalist Papers*:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature. If men were angels, no government would be necessary. If angels were to govern men, neither would be necessary.

7 *Tam Sze Leung & Ors v Commissioner of Police (No 3)* [2024] 4 HKC 437, (2024) 27 HKCFAR 288, [2024] HKCFA 8.

8 *ZN v S-J & Ors* [2020] 2 HKC 75, (2020) 23 HKCFAR 15, [2019] HKCFA 53; *CB v Commissioner of Police & Ors* [2025] HKCU 2919, [2025] HKCFA 10.

9 *Lubiano v Director of Immigration (No 2)* [2020] 5 HKC 662, [2020] 5 HKLRD 107, [2020] HKCA 782.

10 *Infinger v Hong Kong Housing Authority (No 3)* [2024] 6 HKC 783, (2024) 27 HKCFAR 498, [2024] HKCFA 29.

11 *Sham Tsz Kit v S-J (No 3)* [2023] 6 HKC 91, (2023) 26 HKCFAR 385, [2023] HKCFA 28.

12 Wade and Forsyth, *Administrative Law* (10th edn, Oxford University Press 2009) at 4.

13 See, for example, David Hume, *Essays: Moral, Political and Literary* (1752) (Liberty Classics 1987) at 38; James Mill, *Essay on Government* (1820) (Library of Liberal Arts 1955) at 54; James Madison in *The Federalist Papers* (Clinton Rossitor ed, Mentor Books 1961) (No 37). For earlier views, see Thomas Hobbes, *Leviathan* (1651); John Locke, *Second Treatise of Government* (Awnsham Churchill 1689). For judicial dictum on this, see O'Connor J in *Tso Joe-Tak and Ors v The A-G* [1980] HKLR 120 at 124, [1980] HKCU 14 (HC). The aims of administrative law are further discussed below.

In framing a government which is to be administered by men over men, the greatest difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.¹⁴

[1-3] Not all abuses of power will be of the grotesque kind. Administrative law would be failing to control the vast majority of abuses of power if it so restricted itself. In a vast administrative state, with decision-makers under constant pressure to meet demands placed upon them, mistakes are inevitable. Conscientious decision-makers may misapprehend the limits of their authority and commit well-intentioned excesses of their power.¹⁵ It is therefore considered necessary for decision-makers to have an external check on their legal powers.

[1-4] In this respect, control, from the perspective of an administrative lawyer, is to be secured through the courts. As stated by Wade and Forsyth: 'The essence of administrative law lies in judge-made doctrines which apply right across the board and which therefore set legal standards of conduct for public authorities generally'.¹⁶ In other words, administrative law provides a body of norms with which the decision-maker must comply if his exercise of power is to be deemed lawful.¹⁷ Thus, the feature of control in administrative law is premised on the decision-maker's powers being subject to legal limitations; they can only act within the 'four corners' of their prescribed power. The means by which the court determines the lawfulness of a decision-maker's action is through the process known as 'judicial review'. The courts will examine whether a given act or decision was lawful, rational or procedurally fair.¹⁸ There are other court-focused controls on the executive, for example, through tort and contract, however, in such instances, the decision-maker is subject to private law like any other person or entity, and hence these legal proceedings fall beyond the scope of this book.

[1-5] Control is certainly a primary purpose of administrative law, but should not be regarded as its sole focus. As Peter Cane observed, 'control is a negative and parasitic activity. What citizens most expect of governments is that they should contribute to making society a good place to live. The

14 James Madison, *The Federalist Papers* (Clinton Rossitor ed, Mentor Books 1961) (No 37).

15 *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941 (CA, Eng) at 945, per Lord Donaldson MR.

16 Wade and Forsyth, *Administrative Law* (10th edn, Oxford University Press 2009) at 5.

17 M Loughlin, *Public Law & Political Theory* (Clarendon Press 1992): Loughlin offers two ideal types of administrative law, the normative and the functional. The former seeks to control by setting standards or norms, the latter to facilitate governance.

18 These make up the three recognised heads of judicial review, of which, see Part II of this book. A considerable portion of this book will be devoted to the principles of judicial review. For a standalone treatment of the topic, see Members of Temple Chambers, *Judicial Review in Hong Kong* (3rd edn, LexisNexis 2025).

primary role of laws and legal institutions is to assist the realisation of this objective. Their function as tools for controlling government activity is only secondary.¹⁹ Thus, in addition to control, another school of thought posits that a key purpose of administrative law should be facilitative or functional. That is, that administrative law should enable government to engage in an efficient, expeditious and economical system of public administration.²⁰ To some, it may be desirable for there to be a multi-layered appeal and review process before an executive decision is made; to others, this creates systemic inefficiency and overcautious administrators. Some of the adverse effects of control were outlined by the former Secretary for Justice, Mr Wong Yan Lung SC, at the Hong Kong conference 'Effective Judicial Review: A Cornerstone of Good Governance':

[Judicial review] can also have long-term effect on the mentality of some decision-makers, who may become over cautious, reluctant to break new grounds or exercise discretion which might court controversy. Furthermore, in order to minimise uncertainty and to shield oneself from any allegation of irrationality or Wednesbury unreasonableness, he may become inclined to promulgate more rules, turning into excessive regulatory fetters, which in turn may generate more judicial reviews.²¹

[1-6] Leading on from this, even if well-intentioned administrators exceed their powers, why does it necessarily follow that control is the most suitable method to prevent future abuse? Improving the standards of public administration, and instituting appropriate internal procedures, is likely to provide a greater safeguard against future abuses than external checks on an ad hoc basis when something goes wrong. In this regard, it can also be said that administrative law serves to provide a framework to facilitate good governance. As Wade and Forsyth said: 'At every point the question is, how can the profession of the law contribute to the improvement of the technique of government?'²² For example, in the context of human rights protection, at the Hong Kong conference 'Effective Judicial Review', the former Secretary for Justice pointed out how judicial principles on 'proportionality' have led to a change in the manner in which the executive approach decision-making. Through landmark cases and clear judicial guidance, proportionality has been 'entrenched in government's thinking process'; the method of proportionality review is 'being memorised like the

19 P Cane, *Administrative Law* (4th edn, Oxford University Press 2000) at 9.

20 M Loughlin, *Public Law & Political Theory* (Clarendon Press 1992).

21 Secretary for Justice's Keynote Address at 'Effective Judicial Review: A Cornerstone of Good Governance' (Joint Conference organised by the Faculty of Law, The Chinese University of Hong Kong and the Centre for Public Law, University of Cambridge) (11 December 2008) available at the Department of Justice website: www.doj.gov.hk accessed 24 May 2025.

22 See Wade and Forsyth, *Administrative Law* (10th edn, Oxford University Press 2009) at 7.

multiplier table'.²³ Administrative law can therefore play a part in fostering a culture that executive acts and decisions will comply with principles of good governance. As the Secretary for Justice also said:

Although defeats in judicial reviews can be hard to swallow immediately, I am convinced, and I know that conviction is shared by many of my colleagues in the government, that the commitment to the high standards of legality, reasonableness and fairness, and the metamorphosis brought about by judicial discipline at times, will improve public administration, and will make Hong Kong a better society and home for our next generation. Effective judicial review is and remains a corner stone for good governance in Hong Kong.²⁴

1.1 Red, green and amber light theories of the purpose of administrative law

[1-7] Clearly, then, there are two markedly different views of the function of administrative law: control and facilitation have been conceptualised by Harlow and Rawlings as the red light and green light theories of administrative law.

[1-8] The red and green light theories adopt fairly different views on the balance to be struck between judicial and non-judicial methods of promoting good administration. These different views are largely dependent on whether the theorists believe that the interests of good administration are best served through 'controlling' the exercise of administrative power or, alternatively, through 'facilitating' the exercise of administrative power. It is this that gives the theories their names as 'red' and 'green' light theories: red light theorists are so-called because of their focus on 'control' through administrative law; whereas green light theorists are so-called because of their view of administrative law as a 'green light' which 'facilitates' the exercise of administrative power.²⁵

1.1.1 Red light theory

[1-9] The red light theorists are motivated by their 'overt suspicion of the vast empires of executive power' coupled with the expectation that

23 Secretary for Justice's Keynote Address (n 21).

24 Secretary for Justice's Keynote Address (n 21).

25 Red light theorists include: P Craig, *Administrative Law* (6th edn, Sweet & Maxwell 2008); P Cane, *Administrative Law* (4th edn, Oxford University Press 2004) ch 1; Wade and Forsyth, *Administrative Law* (10th edn, Oxford University Press 2009); and green light theorists include: JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1; R Bellamy, *Political Constitutionalism, A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007); A Tomkins, *Our Republican Constitution* (Hart Publishing 2005).

government will 'run amok'.²⁶ There is also a concern, therefore, that the executive is capable of arbitrary infringements of an individual's rights. In view of these 'suspicion[s]', the emphasis is placed on the need to control the exercise of executive power. This control has to be external to the executive in order to be effective and is done largely through the courts. This outlook is in line with the theorists' view of a balanced constitution, where the executive, who are prone to abusing power, should be subject to both political control by the legislature and legal control through the common law by the courts, with the latter being necessary. As Harlow and Rawlings observed, '[c]entral to red light theory ... is the idea of the rule of law. Closely linked is the view that law courts are the primary weapon for protection of the citizen and control of the executive'.²⁷

[1-10] Wade and Forsyth also made a comment on the potential for 'abuse' by the executive and the need to protect citizens against such abuse:

a first approximation to a definition of administrative law is to say that it is the law relating to the control of governmental power ... The powers of all ... public authorities are subordinated to the law ... All such subordinate powers have two inherent characteristics. First, they are all subject to legal limitations; there is no such thing as absolute or unfettered administrative power ... Secondly, and consequentially, it is always possible for any power to be abused. ... The primary purpose of administrative law is, therefore, to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok. 'Abuse', it should be made clear, carries no necessary innuendo of malice or bad faith. Government departments may misunderstand their legal position as easily as may other people, and the law which they have to administer is frequently complex and uncertain. Abuse is therefore inevitable, and it is all the more necessary that the law should provide means to check it.²⁸

1.1.2 Green light theory

[1-11] The red and green light theorists are largely in agreement on the aims of administrative law, namely, to promote good administration. However, in contrast with the red light theorists, the green light theorists emphasise the need for administrative law to facilitate rather than control the exercise of executive power. To achieve this, they place more reliance on the political process and non-judicial avenues for redress as prospective

²⁶ Harlow and Rawlings, *Law and Administration* (Cambridge University Press 2009) at 23.

²⁷ Harlow and Rawlings, *Law and Administration* (Cambridge University Press 2009) at 25.

²⁸ Wade and Forsyth, *Administrative Law* (9th edn, Clarendon Press 2004) at 4-5.

(versus retrospective) measures for achieving good administration. This is largely due to the shortcomings they perceive in the law and the courts as institutions capable of achieving the aims of good administration, at least in a democratic and representative way. As Harlow and Rawlings commented in an earlier edition of their book:

... where red light theorists favour judicial control of executive power, green light theorists are inclined to pin their hopes on the political process... and while red light theory looks to the model of the balanced constitution, green light theory sees in administrative law a vehicle for political progress and welcomes the administrative state.²⁹

[1-12] For green light theorists, ultimately administrative law is there to facilitate the exercise of public power and ensure it operates effectively to achieve its objectives, and therefore, ensure 'political progress'. This could be done, inter alia, through the terms of the legislation or regulations that delegate powers to the executive. Legislation and regulations could prescribe the limits on powers and these limits could be policed primarily by the executive themselves without recourse to the courts.

1.1.3 Amber light theory

[1-13] The focus of the discussion on red and green light theories may give the impression that legal systems can be described in such definite terms. However, there is also a view put forward by some academics that systems will usually display characteristics of both red and green light theories. Beatson, Matthews and Elliott have commented that:

[t]he red and green light theories of administrative law are presented... as polar opposites in order that their differences might be drawn out. In reality, most administrative systems reflect aspects of both traditions, relying upon a combination of external court-based control, and internal regulation of the administrative process... [Wade & Forsyth recognise that] judicial intervention does not have to be characterised in wholly combative terms, observing that the judge-made body of administrative law may serve as a template of best practice for administrators. The role of the courts thus transcends that which is ascribed to them by red light theory ...³⁰

Harlow and Rawlings have identified key questions that are the focus of the red and green light debate in an earlier edition of their book. These

²⁹ Harlow and Rawlings, *Law and Administration* (2nd edn, Cambridge University Press 1997) at 67.

³⁰ J Beatson, M Matthews and M Elliott, *Administrative Law: Text and Materials* (Oxford University Press 2005) at 5.

are useful tools to determine what we think the primary purpose of administrative law should be:

... the key questions [in this area are] what powers should be used for and how it should be controlled... For red light theorists, the answer lay in courts, the Rule of Law and Separation of Powers theory. Green light theorists, however, took a very different attitude to judges and lawyers. Openly advocating reform of the antiquated legal system, they viewed the legal profession as too old fashioned to reform itself... green light theory has focused on [democratic forms of] alternatives to courts... a main concern of many green light writers was to minimise the influence of courts. Courts, with their legalistic values, were seen as obstacles to progress, and the control which they exercise as unrepresentative and undemocratic ... in green light theory, decision-making by an elite judiciary imbued with a legalistic, rights-based ideology and eccentric vision of the 'public interest' ... was never a plausible counter to authoritarianism ... A second distinction is between prospective and retrospective control. Judicial review of administrative action is primarily retrospective, although it can possess a prospective element if the administration accepts that judicial precedent establishes the limits of its future conduct. Legislation is primarily prospective ... legislation controls administrative activity by prescribing its limits ... (footnotes omitted).³¹

[1-14] The questions raised by Harlow and Rawlings arise from academic discussions in relation to English administrative law. However, similar questions arise in Hong Kong. For example, should our administrative law system have an underlying emphasis on judicial versus non-judicial controls? Should its focus be on controlling versus facilitating the exercise of public power? Some of the assumptions made by, for example, the green light theorists may need to be revisited. For instance, one of the reasons green light theorists prefer political non-judicial controls is because of what they view as the undemocratic and unrepresentative nature of the courts. Nonetheless, the theories serve as useful analytical tools for assessing the nature of Hong Kong administrative law and whether any particular kind of system is more desirable in the Hong Kong context.

1.2 Further purposes of administrative law

[1-15] Moving beyond the purposes of control and facilitation, there are other purposes behind administrative law that help shape its scope and development. First, administrative law serves to command the performance

³¹ Harlow and Rawlings, *Law and Administration* (2nd edn, Cambridge University Press 1997) at 72-77.

of public functions. This will often be the case where an Ordinance places a legal duty on a decision-maker to meet certain obligations. For example, where the Inland Revenue overcharges on a tax return, they are under an obligation to return money to the taxpayer. Second, administrative law serves the purpose of holding the executive accountable for the decisions they make. Even if no remedy can be granted to an individual that leads to the desired outcome, the executive is required to justify their decisions against accepted standards. Third, administrative law provides a mechanism for participation in the processes of government. In Hong Kong, where some have argued that the courts provide the only effective channel to hold the executive to account,³² this participatory function is of particular relevance. Fourth, and perhaps most important for an aggrieved resident, administrative law serves to provide remedies for wrongs committed by public authorities.

[1-16] All of these purposes, generally, flow from the imperative need to keep the executive in check. In this respect, the extent to which public administrators should be subject to control is the central theme of this book. However, it would be unwise to consider administrative law only as a court-focused process of reviewing public authorities. In advising a client on prospective judicial review proceedings, a practitioner would consider the full range of means to seek redress for the client's grievances. While judicial review is perhaps the most visible form of control, and a popular route for Hong Kong residents, it must also be borne in mind that litigation often comes at a considerable expense to the parties concerned. Judicial review is, in reality, just the tip of the iceberg as far as control of public authorities is concerned. The administrative state in Hong Kong makes thousands of decisions, ranging from the trivial to the momentous, every day. No court system could ever be equipped to address the multifarious grievances which an individual has with the administrative state.

[1-17] Indeed, there are certain reasons why non-judicial forms of control may, in certain cases, be preferable. A major reason is remedial; judicial review is a process of considering the legality of a decision, not the underlying merits. Often, the critical question to be asked is this: Is this a decision that the decision-maker can lawfully make? If they can make this decision lawfully within their powers, then merely because the courts disagree with the outcome does not furnish a basis to grant relief to the aggrieved party. As the former Chief Justice of the HKSAR, Andrew Li, cautioned:

Court decisions in many judicial review cases have important repercussions for various political, economic and social problems which confront our society. But I must reiterate that judicial review proceedings cannot provide

³² J Chan, 'Basic Law and Constitutional Review: The First Decade' [2007] 37 HKLJ 407.

a panacea for these problems. The constitutional role of the courts is only to determine the limits of legality by reference to the relevant constitutional and statutory provisions and the applicable common law principles. The courts are only concerned with what is legally valid, and what is not, in accordance with legal norms and principles.³³

[1-18] This view has been affirmed by Andrew Li's successor to the role of Chief Justice, The Hon Mr Justice Ma who said:

The judicial oath requires judges to look no further than the law as applied to the facts. The starting point and the end position in any case, is the law.

This is the true role of the courts. The courts do not serve the people by solving political, social or economic issues. They are neither qualified nor constitutionally able to do so. However, where legal issues are concerned, this is the business of the courts and whatever the context or the controversy, the courts and judges will deal with these legal issues.³⁴

[1-19] This view has also been affirmed by Chief Justice Ma's successor, the Hon Mr Justice Andrew Cheung, who recently said at the Opening of the Legal Year 2025:

Judges, far from being designed to serve political ends, are bound by legal principles. Courts are not arbiters of public opinion, nor are they an extension of the prosecution authority; they are above all, guardians of the law. Their decisions are reasoned, published, and subject to appeal. It is through this process that the rule of law is upheld.³⁵

[1-20] It is important, therefore, to take a broad approach to administrative law as a mechanism to control decision-makers. Control can come in both judicial and non-judicial forms. **Chapter 2** considers these non-judicial forms of control, which include the ombudsman, administrative tribunals, statutory inquiries and political control through the legislature.

[1-21] As will become apparent, the extent to which the administrative state should be the subject of control is highly contextual. In general terms, the closer an area of public administration touches on the collective good and political issues that are highly contentious, the lesser control will be imposed. But where an area of public administration impacts an individual and human rights, any control will likely be more exacting. At

³³ Chief Justice Andrew Kwok-nang Li, 'Chief Justice's speech at the Ceremonial Opening of the Legal Year 2007' (Hong Kong, 8 January 2007) <http://www.info.gov.hk/gia/general/200701/08/P200701080120.htm> accessed 25 May 2025.

³⁴ Chief Justice Geoffrey Ma Tao-li, 'Chief Justice's speech at the Ceremonial Opening of the Legal Year 2011' (Hong Kong, 10 January 2011) <http://www.info.gov.hk/gia/general/201101/10/P201101100201.htm> accessed 25 May 2025.

³⁵ Chief Justice Andrew Cheung, 'Chief Justice's speech at the Ceremonial Opening of the Legal Year 2025' (Hong Kong, 20 January 2025) available at <https://www.info.gov.hk/gia/general/202501/20/P2025012000532.htm> accessed 8 June 2025.

a general level, it can be said that there is a sliding scale, with concepts of the 'collective' and the 'individual' being at opposite ends in determining the degree of control necessary. When reading this book, this context on the extent of control should be kept in mind.

2. GOVERNMENT IN HONG KONG

[1-22] In order to consider the purpose of administrative law, and especially the role of judicial review specifically in Hong Kong, whether as a means of control of abuse of public power or as a means of facilitating the business of the state, it is first necessary to understand the way in which government is structured in Hong Kong and the relationship between the three key institutions of the state: the executive, the legislature and the judiciary.

2.1 Before 1997: Colonial Government in Hong Kong

[1-23] Under the colonial government in Hong Kong, the three key governmental powers: the executive (including the civil service), the legislature and the judiciary were set up by the Letters Patent 1843 which established Hong Kong as a British colony and set out the colonial governmental structure for Hong Kong. Johannes Chan has said that the effect of the Letters Patent and Royal Instructions was not to attempt to 'set out any balance of power between the Crown and Hong Kong. On the contrary, in many ways they affirmed the unlimited sovereign power'.³⁶ The Letters Patent, supported later by the Royal Instructions for Hong Kong, established the Governor of Hong Kong as the representative of the sovereign power, the Queen and, as her representative, gave him extensive powers to legislate 'for the peace, order and good government of the Colony'.³⁷ Wesley-Smith has referred to the Governor's position as having been, by virtue of the Letters Patent, that of an autocrat, noting that, 'no laws can be made locally without his acquiescence'³⁸ and that the sovereign expected all inhabitants of Hong Kong to be obedient to him.³⁹ The Governor was able to avail himself, in his legislative function, of the advice of the Legislative Council, a body whose members he appointed and over which he presided, thus effectively combining within his own

³⁶ J Chan, 'The Jurisdiction and Legality of the Provisional Legislative Council' (1997) 27 Hong Kong Law Journal 374 at 374 and 377.

³⁷ Letters Patent 7; see also *Winfat Enterprises (HK) Co Ltd v A-G* [1988] 1 HKLR 5, [1988] HKCU 261 (PC).

³⁸ Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (Longman Asia Ltd 1994) at 122.

³⁹ Letters Patent 18.

person both the legislative and executive functions and maintaining control over the legislative process.

[1-24] However, whilst this pattern existed for some time, in response to the anticipated handover of territory and sovereignty to the People's Republic of China ('PRC') in July 1997, changes, though not self-evidently dramatic, were made to the manner in which members were appointed to the Legislative Council, introducing a degree of democratic participation in its composition. In 1985, the first election of representatives to the Legislative Council took place. 24 out of 57 legislative councillors were elected rather than being appointed by the Governor. Nonetheless, these councillors were not selected by direct election by the people but as representatives of functional constituencies. Those functional constituencies represented the interests of Hong Kong's major businesses and professional organisations. The relatively closed nature of these functional constituencies gave rise to perceptions that, despite these indirect elections, government in Hong Kong remained in the hands of the elite and privileged.⁴⁰

[1-25] Scott presents a more optimistic view of the development of the role of the Legislative Council during colonial rule, stating that the first functional constituency elections brought a small number of liberal members to the Council from the health, education and welfare functional constituencies and those councillors took up what was effectively an opposition role in reference to a number of policies proposed by the Executive.⁴¹ Scott also states that, once direct elections were allowed in 1991, returning 18 Legislative Council members, the liberal agenda continued to gain ground with an 'electoral sweep for the democratic parties'⁴² which further raised the public profile of the Legislative Council and the possibilities arising from democratic participation in the government of Hong Kong. This trend towards a more liberal and participatory legislature continued in the 1995 elections, in which 20 seats were made available through direct elections. Of those 20 seats, the democrats again achieved 16 seats in the Council. However, the 1995 elections did not meet with the approval of the leaders of the PRC, primarily due to the fact that the new structure of the Legislative Council did not conform with their expectations of the election process as set out under the framework of the Basic Law as agreed under

⁴⁰ Lau Siu Kai, 'The Rise and Decline of Political Support for the Hong Kong Special Administrative Region Government' in Ming Sing (ed), *Hong Kong Government and Politics* (Oxford University Press 2003) at 474-476.

⁴¹ I Scott, 'The Disarticulation of Hong Kong's Post-Handover Political System' in Ming Sing (ed), *Hong Kong Government and Politics* (Oxford University Press 2003) at 678.

⁴² I Scott, 'The Disarticulation of Hong Kong's Post-Handover Political System' in Ming Sing (ed), *Hong Kong Government and Politics* (Oxford University Press 2003) at 679.

the Sino-British negotiations, and the Legislative Council duly elected by Hong Kong voters in the 1995 elections was not subsequently therefore to be allowed to continue past the handover date but was terminated on 30 June 1997, to be replaced with the 'Provisional Legislative Council' ('PLC'). The PLC was a legislative body which was brought into existence following the 1995 elections in Hong Kong and which functioned prior to the handover date in parallel to the Legislative Council.

[1-26] In addition to the Legislative Council, the Letters Patent⁴³ also provided for the appointment of an Executive Council to support the Governor. The composition of the Executive Council was to include three ex-officio members: the Chief Secretary, the Financial Secretary and the Attorney-General.⁴⁴ In addition to these ex-officio members, the Queen, as sovereign power, could appoint further members and indeed, the Governor himself could make provisional appointments to the Council, to be confirmed by the Queen, and he could also suspend membership and revoke appointments. The Executive Council was not 'an executive body in the sense that it implements legislation or carries out administrative tasks. Its function is primarily advisory and is concerned mainly with the formulation of policy'.⁴⁵ Given the nature of their appointment and tenure, the majority of the members of the Executive Council, being those who were appointed on the 'unofficial' side and not ex-officio or from government departments, were largely regarded as being without significant individual powers to amend or challenge the policies put forward by the Governor or his government departments.⁴⁶ This, combined with the Governor's power of appointment of Legislative Council members and members of the judiciary, according to Langer, meant that 'the administration of Hong Kong was not merely executive-led; originally, it consisted of little more than the executive branch'.⁴⁷

[1-27] The signing of the 1984 Sino-British Joint Declaration raised the question of the future role and composition of the Executive Council. In addition to the ex-officio members of the Council, it had been common practice for governors to appoint selected members of the Legislative Council and prominent businessmen to sit on the Executive Council. This practice maintained the closeted nature of the Council and, in practice, meant that the door to the Executive Council was closed to any increased

⁴³ Letters Patent 5.

⁴⁴ Royal Instructions cl II.

⁴⁵ Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (Longman Asia Ltd 1994) at 124.

⁴⁶ Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (Longman Asia Ltd 1994) at 124.

⁴⁷ Lorenz Langer, 'The Elusive Aim of Universal Suffrage: Constitutional Developments in Hong Kong' (2007) 5 *International Journal of Constitutional Law* 419 at 422.

participation by Legislative Council members from the pro-democracy camp. Scott posits that, to allay claims of unequal inclusion in the Executive Council, without antagonising the leaders of the PRC, Chris Patten, Governor from 1992–1997, decided to cleave the membership of the Executive and Legislative Councils so that there would be no further overlap. As a consequence, Scott says, the Executive Council was effectively debilitated in terms of being part of a coherent system of governance because, and noted that: 'however prominent his (Chris Patten) appointees to the Executive Council, they had no base outside of the Council'.⁴⁸ Intentionally or not, it could be argued that this development, whilst seeking to treat all parties equally while also not irritating China, served only to further consolidate executive power in the hands of the Governor alone.

[1-28] In addition to the Chief Executive and the Executive Council, there was a complete administrative structure including the different government bureaux, each of which was responsible for a specific task, dealing with discrete areas of responsibility such as housing, education, transport, etc. In addition to these bureaux, were a range of statutory bodies, such as the MTR Corporation and the Housing Authority, which were created to address further specific administrative and executive roles. The government bureaux and statutory authorities were staffed by the Hong Kong Civil Service, members of which owed a duty of obedience to the Governor. Civil servants have long been viewed as executive rather than political in nature⁴⁹ and could not therefore be members, by election, of the Legislative Council⁵⁰ but a number of high-ranking civil servants did sit in the Council as ex-officio or appointed members. Civil servants exercise powers given to them by statute, or act on the authority of their bureaux head and, as such, their acts and decisions must be lawful. Despite the traditional view of the civil servant as divorced from the political governance of a state, the status of senior civil servants in Hong Kong pre-1997 was that of powerful members of the executive branch, acting along a blurred boundary between the political and the administrative, yet facing little or no political accountability. As Christine Loh and Richard Cullen have said:

Until 1997, Hong Kong had a colonial system of government where bureaucrats acted effectively as both administrators and ministers. They

48 I Scott, 'The Disarticulation of Hong Kong's Post-Handover Political System' in Ming Sing (ed), *Hong Kong Government and Politics* (Oxford University Press 2003) at 676.

49 Loh and Cullen, 'Politics Without Democracy: A Study of the New Principal Officials Accountability System in Hong Kong' (2003) 4 *San Diego International Law Journal* 127 at 149–150.

50 Legislative Council Ordinance (Cap 542), s 39(1)(a)(ii).

were accountable in an administrative sense to their superiors and had to abide by civil service regulations but they were not accountable politically. They were answerable in the sense that they provided answers to the public directly and via the legislature. The fusion of politics and administration in the colonial model of government downplayed the importance of politics and political participation in policy-making. At the same time, the top layer of the civil service was in fact politicized as it also effectively played a political role.⁵¹

[1-29] In essence, the senior echelons of the civil service functioned along the boundary line between administrative and political powers but without political responsibility or accountability, whilst still owing direct allegiance to the Governor. In effect, the executive branch of the government in Hong Kong was heavily influenced by the interests and preoccupations of the civil service and existed without the restraining presence of an elected cabinet of ministers overseeing their work.

[1-30] The third branch of power in colonial Hong Kong, after the legislative and the executive powers, was that of the judiciary. In some senses, the judiciary existed at a greater distance from the office of the Governor than either the Legislative or Executive Councils and therefore presumably felt a greater degree of independence and thus ability to exert control. Under colonial rule, the final court of appeal for Hong Kong, as for a number of British colonial territories, was the Judicial Committee of the Privy Council, sitting in London. Indeed, not only were the decisions of the Privy Council binding on Hong Kong courts but also, following the decision in *De Lasala v De Lasala*,⁵² decisions of the House of Lords could be considered as somewhat more than merely persuasive authority in Hong Kong courts under certain circumstances, thus enhancing the distance between the Hong Kong courts and the influence of the Governor of Hong Kong. In *De Lasala*, the court stated:

So too in Hong Kong, where the reception of the common law and rules of equity is expressed to be 'so far as they are applicable to the circumstances of Hong Kong or its inhabitants' and 'subject to such modifications as such circumstances may require', a decision of the House of Lords on a matter which in Hong Kong is governed by the common law by virtue of the Application of English Law Ordinance is not ipso facto binding upon a Hong Kong court although its persuasive authority must be very great, since the Judicial Committee of the Privy Council, whose decisions on appeals from Hong Kong are binding on all Hong Kong courts, shares with the Appellate Committee of the House

51 Loh and Cullen, 'Politics Without Democracy: A Study of the New Principal Officials Accountability System in Hong Kong' (2003) 4 *San Diego International Law Journal* 127 at 149.

52 *De Lasala v De Lasala* [1979] HKLR 214, [1980] AC 546 (PC).