

# Preface

This book now appears on the official reading list for most courses in Hong Kong Basic Law and Hong Kong Constitutional Law, from sub-degree level through undergraduate and postgraduate level to both the Hong Kong Bar Association and Law Society of Hong Kong's examinations for overseas lawyers seeking to practise in Hong Kong.

For introductory courses at the sub-degree level, this book aims to provide a one-stop solution so that it should be possible to pass your course without the need to rely on any other text. For students on higher-level courses, this book serves as a useful starting point. With more than 1,500 footnotes pointing to the detailed descriptions of particular issues in other leading works in this area, this book will make it much easier to get a feel for the subject and know where to turn if you need to study any particular issue in more depth.

Although this book is designed to help students, its intended audience is far wider. As a review in the *Hong Kong Law Journal* of the first edition put it, this book is written to be "read not only by law students, but also by anyone who is interested in how Hong Kong is being run after 1997".

In this second edition, I have sought to preserve the emphasis on a highly readable text that can be easily understood by those with no prior knowledge of the subject. For general interest readers, I would advise skipping the footnotes (which are used to avoid cluttering up the main text) and using the book to get a general feel for the important issues shaping Hong Kong's future.

For that reason, changes in this second edition are confined to essential updates on recent developments. The overall structure of the book remains broadly unchanged from the first edition. However, reflecting some of the concerns that have arisen in Hong Kong following the events of the past few years, I have added a new concluding chapter considering the future of the "one country, two systems" concept.

A word on the numerous references to specific provisions in the Hong Kong Basic Law: in order to make it easier for readers to understand exactly which part of these often lengthy provisions is being described, I have followed the common practice of referring to specific paragraph numbers. So, for example, Article 158(3) denotes the third paragraph of Article 158. Where, as is occasionally the case, the Hong Kong Basic Law uses sub-section numbers, these follow the relevant paragraph number. So, for example, Article 24(2)(3)—which was the subject of one of the first controversies over the Hong Kong Basic Law—refers to the third sub-section of the second paragraph of Article 24.

I owe a debt of gratitude to those who have assisted me so greatly in my understanding of this subject. Particularly to my PhD supervisors, Professors Simon N. M. Young and Richard Cullen, but also to many others who have been so generous with their advice and time, including Professors Albert Chen, Johannes Chan, and Fu Hualing. To Justice Kemal Bokhary, who responded so quickly and enthusiastically to my request for an endorsement of the first edition of this book, I owe a debt of gratitude for his advice and kindness.

My thanks goes also to all those who took the time to read and comment on the first edition of this book, and particularly to the many reviewers of this book for their generous comments and helpful suggestions, which I have tried to incorporate into this new edition wherever possible. Special mention must be made here of Kevin Lau, then editor of *Ming Pao* and a long-time friend, who was the first to review this book within weeks of the publication of the first edition. Only months later, Kevin was the victim of a brutal knife attack that shocked Hong Kong. No one who knows Kevin, and his wife Vivien, can fail to be impressed with the courage and determination which they have since shown in moving on with their lives after this terrible crime, and their example should serve as an inspiration to us all.

I would also like to express my gratitude to all my past and present colleagues at the University of Hong Kong's School of Professional and Continuing Education for their support and encouragement especially Mrs. Y. L. Cheng, Professor Chan Wing Wah, Dr T. M. Kwong, Dr Tommy Ho, and Mr Michael Fisher. Special thanks goes to Susie Han, Clara Ho, Jenifer Lim and all the staff at Hong Kong University Press for bringing this second edition to fruition.

Finally, my most heartfelt thanks go to my parents, without whom I would never have come to Hong Kong and written this book. I will always be grateful to my father, John, for sparking my interest in Hong Kong and China, and changing my life as a result. For my late mother, Aelfthryth, who enjoyed so many happy times in Hong Kong but tragically died shortly before the publication of the first edition of the book, this new edition is dedicated to her memory.

Equally heartfelt thanks go to my incredible wife Candy, for all her support and encouragement. For my children, Rebecca and Mark, I can only hope that Hong Kong will be the sort of place in which they will still wish to live in by the time they are adults.

I have attempted to state the law as it appeared to me as of 1 January 2016. Any mistakes or omissions are, of course, my own.

Danny Gittings  
January 2016

# Chapter 1

## Introduction

From deciding who has the right to live in Hong Kong to determining how the government is allowed to spend taxpayers' money, virtually every aspect of life in Hong Kong is affected in innumerable ways by the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (or "Hong Kong Basic Law", as it will be called in this book). As the highest law with practical effect in Hong Kong, it sets the framework for Hong Kong's system of government, how its courts operate, and the rights and freedoms enjoyed by its residents, to name just a few examples.

That makes an introductory knowledge of the Hong Kong Basic Law vital for anyone who wishes to understand not only Hong Kong's legal system, but also Hong Kong's way of life and system of government—as well as how these can be expected to evolve in years to come. The good news is that the Hong Kong Basic Law is a relatively youthful document, by comparison with many other constitutional documents around the world. Students of the US Constitution, for instance, must wade through more than 200 years of court cases to understand its provisions. By contrast, in Hong Kong's case, it is still only a matter of decades since the Hong Kong Basic Law came into force on 1 July 1997.

That does not mean ignoring everything which happened before that date. As is explained in Chapter 2 on the "Birth of the Hong Kong Basic Law", many of the biggest controversies in modern-day Hong Kong involve issues first fought while the Hong Kong Basic Law was being written between 1985 and 1990. From the arguments over what form democratization should take to the battles over who has the power to interpret the Hong Kong Basic Law, the debates during the drafting process often had a profound effect on where Hong Kong finds itself today.

Take, for instance, the persistent suspicions about any attempt to enact the national security legislation required under Article 23 of the Hong Kong Basic Law. In 2003, such suspicions brought more than half a million protesters onto the streets in a watershed moment which, as we will see in this book, prompted Beijing to begin tightening its policy towards Hong Kong. The origins of such suspicions can be traced back to the history of the drafting of the Hong Kong Basic Law, which saw much tougher language inserted into Article 23 in the final draft of the Hong Kong Basic Law, primarily to punish Hong Kong people for supporting the Tiananmen protests that were crushed on 4 June 1989.

Official histories tend to portray the emergence of the Hong Kong Basic Law in its final form as the carefully calibrated result of a long and thoughtful process. But the picture presented in this book is of a series of historical accidents which—partly through

luck—resulted in a largely fortuitous outcome, although less fortuitous than what might have been achieved had the Hong Kong Basic Law been finalized only a year earlier, before the events of June Fourth.

Those accidents began with the British colonizers agreeing, for reasons of diplomacy, to hold most parts of the territory on a 99-year lease with an expiry date of 30 June 1997—so setting a deadline by which the issue of Hong Kong's future would have to be resolved. They continued with China's emergence from decades of international isolation under the pragmatic leadership of Deng Xiaoping who sought to copy Hong Kong's economic success, just as the future of that success was starting to come into question because of increasing concerns about what would happen after 1997. That a solution presented itself in the shape of the "one country, two systems" formula which China devised for Taiwan was a stroke of luck. Perhaps fortuitously for Hong Kong, Taiwan rejected this formula—so prompting the change of strategy in Beijing that resulted in this formula being applied to Hong Kong instead.

As we will see in Chapter 2, the result of that series of historical accidents was first the Sino-British Joint Declaration, the 1984 international treaty in which Beijing and London agreed on how one country, two systems would be applied in Hong Kong, and then the Hong Kong Basic Law in which those promises were written into a law enacted by China's National People's Congress. Although it endured an often rocky path, with disagreements between Britain and China persisting up until the night of 30 June 1997, that agreement has proved strong enough to survive so far. Several decades later, what is striking is how much the provisions of that 1984 treaty still provide a generally accurate picture of Hong Kong today. It is an agreement that has, to a large extent, stood the test of time and for all its undoubted flaws probably represents a better deal for Hong Kong than might well have been secured at almost any other time in Hong Kong's history.

Some of the more confusing aspects of the Hong Kong Basic Law are its multiple dimensions. In Chapter 3 on "What Is the Hong Kong Basic Law?", this book seeks to disentangle them. As already noted, its origins lie in the 1984 agreement between Britain and China, so providing an international dimension to the Hong Kong Basic Law which means that the Joint Declaration is still sometimes referred to in court cases to help understand the correct meaning of ambiguous provisions in the Hong Kong Basic Law. But the actual legal status of the Hong Kong Basic Law is that of a statute enacted by the National People's Congress, the highest body of constitutional power in China. That gives rise to its domestic dimension, as well as the name "basic law"—which, in fact, more properly describes a whole class of laws enacted by the National People's Congress rather than this one single enactment.

By far the most important dimension from Hong Kong's perspective is the constitutional one, with the Hong Kong Basic Law serving as the highest law with practical effect in Hong Kong, and the benchmark against which the legality of all other laws in Hong Kong are judged. Note, however, the qualification imposed by those three words: with practical effect. As we will see in Chapter 3, the Hong Kong Basic Law is not the highest

law of all—a title which, instead, goes to the national constitution, the Constitution of the People's Republic of China 1982. But since most of the provisions in that constitution concern the socialist system on the mainland which are of little practical effect in Hong Kong, that raises difficult—and, to some extent, unanswered—questions about how much of the national constitution actually applies in Hong Kong, and the nature of its relationship with the Hong Kong Basic Law.

At the heart of the Hong Kong Basic Law is the concept of a high degree of autonomy. However, nowhere is this concept precisely defined. Instead, Article 2 of the Hong Kong Basic Law refers only in general terms to Hong Kong enjoying "executive, legislative and independent judicial power, including that of final adjudication". That refers to three of the fundamental powers that international experts on autonomy have identified as central to most autonomous arrangements elsewhere in the world—the right of any area to administer its own affairs, make its own laws and judge its own cases.

As we will see in Chapter 4 on "A High Degree of Autonomy?", in all three respects the Hong Kong Basic Law confers, at least on paper, extraordinarily wide-ranging powers upon Hong Kong. From exclusive jurisdiction to administer its financial affairs and participate in some international organizations to the power to make laws on almost every subject and the existence of a Court of Final Appeal, Hong Kong enjoys powers which are rarely exercised at a local level elsewhere in the world. But we will also see that, in all three respects, much depends on how much self-restraint China chooses to exercise. From its control over the Chief Executive to the power to supplant decisions of the Hong Kong courts with its own interpretations of the Hong Kong Basic Law, Beijing has ample means to exercise greater control over Hong Kong simply by showing less self-restraint in how it chooses to use these powers.

As is explained in Chapter 4, that is what has gradually begun to happen in the years since 1 July 1997, as China has moved slowly in the direction of a more interventionist approach towards exercising its powers under the Hong Kong Basic Law. In 2014, a White Paper from the national government claimed, for the first time, "comprehensive jurisdiction" over Hong Kong, raising the possibility that China might assert a right to intervene directly in matters which fall within the scope of the autonomy granted to Hong Kong. When Beijing does choose to exercise its powers in a way which reduces Hong Kong's autonomy—as with a 2004 interpretation from the National People's Congress Standing Committee seizing control of decisions on any changes to the system for electing the Legislative Council—there is no legal mechanism for Hong Kong to challenge this. As we will see, that is one of the biggest shortcomings of the autonomy granted to Hong Kong under the Hong Kong Basic Law since, unlike many autonomous arrangements elsewhere in the world, there is no independent mechanism for resolving any disputes about who exercises any particular power.

One of the most important functions of the Hong Kong Basic Law is to set out the system of government in Hong Kong. Nearly 40% of its 160 provisions are devoted to this, more than any other subject. But as is explained in Chapter 5 on the "System of Government", despite this large number of provisions, there are some important points

missing from its description of Hong Kong's system of government. The Hong Kong Basic Law goes into great detail about the powers of the Chief Executive who, as the head of the Hong Kong SAR Government, is responsible for leading Hong Kong. The powers of Hong Kong's legislature, known as the Legislative Council, are described in similar detail. What is missing is a full description of the precise relationship between the Chief Executive's powers and those of the Legislative Council, an omission which has arguably done much to contribute to the repeated conflicts—and persistently poor relations—between the executive and legislature throughout much of the history of the Hong Kong SAR.

China prefers to describe the system of government set out in the Hong Kong Basic Law as one of “executive-led government”. That description, inherited from the colonial era, focuses on the powers of the Chief Executive and so has the advantage, from Beijing's perspective, of emphasizing the powers of the one part of Hong Kong's political structure which lies directly under the Central Government's control. As we will see in Chapter 5, the Hong Kong Basic Law does grant the Chief Executive sweeping powers, such as the power to make appointments without any need for approval by the legislature. Those powers are so sweeping, at least on paper, that one comparative study even found that the Hong Kong Basic Law grants the Chief Executive theoretically greater powers than popularly elected presidents in 33 other countries, including the US.

Despite its frequent use by both Chinese and Hong Kong SAR Government officials, the term “executive-led government” does not appear anywhere in the text of the Hong Kong Basic Law. Many scholars, pointing to the other important powers placed in the hands of the Legislative Council and the courts, argue that it is more accurate instead to describe the system of government under the Hong Kong Basic Law as one of “separation of powers”—so placing more emphasis on the division of powers between the executive, legislature and judiciary.

In addition, the small-circle election process which has always been used to choose the Chief Executive so far deprives Hong Kong's leader of the legitimacy that a democratic mandate confers on popularly elected leaders in many other countries. As is explained in Chapter 5, this makes it very difficult in practice for Hong Kong's Chief Executive to exercise many of the sweeping powers granted to the Chief Executive under the Hong Kong Basic Law.

Many members of the Legislative Council are also elected through small-circle elections in functional constituencies, some of which have only a few hundred voters. However, since half of all seats in the legislature are elected through universal suffrage, the overall franchise in Legislative Council polls is currently far higher than in elections for the Chief Executive. That greater democratic legitimacy of the legislature, together with the rigid separation of its membership from that of the executive, has done much to fuel the frequent conflicts between Hong Kong's executive and legislature in recent years.

In an apparent attempt to address this problem, China has agreed in principle to allow future Chief Executives to be elected through universal suffrage. However, the rules

under which it would allow such an election to take place are so restrictive, particularly in relation to the nomination process, that it has so far proved impossible to reach agreement on the introduction of universal suffrage, and may continue to be difficult to do so for many years to come. In any case, as we will see in Chapter 5, it is far from certain that the introduction of universal suffrage would necessarily bring an end to the repeated conflicts between Hong Kong's executive and legislature.

In contrast to its detailed descriptions of the powers of both the Chief Executive and the Legislative Council, the Hong Kong Basic Law says relatively little about the role of the courts. As is explained in Chapter 6 on the “Role of the Courts”, this reflects an emphasis on continuity rather than detail since the judicial system that existed in Hong Kong prior to 1 July 1997 was widely viewed as one of the ingredients of Hong Kong's success. As a result, the Hong Kong Basic Law preserves that judicial system largely unchanged, with the exception of the creation of the Court of Final Appeal to succeed the Judicial Committee of the Privy Council in London, which had served as Hong Kong's highest court under colonial rule.

The Hong Kong Basic Law goes to some lengths to seek to protect the independence of the judiciary, particularly when it comes to judicial appointments. These are placed in the hands of an independent commission, so limiting the Chief Executive's influence over the process. Once appointed, judges enjoy near absolute job security until they reach retirement age, although their salaries are not similarly protected, a point of some concern to the judiciary, which has unsuccessfully sought to persuade the Hong Kong SAR Government to change this.

As we will see in Chapter 6, the absence of any detailed description of the powers of the courts in the Hong Kong Basic Law has left the courts free to define some of these powers for themselves. That is particularly true in the field of judicial review, an important and growing area of law, where the courts exercise the power to determine the legality of actions of the government and other public bodies. In its landmark January 1999 decision in *Ng Ka Ling v Director of Immigration*,<sup>1</sup> the first case decided by the Court of Final Appeal on the Hong Kong Basic Law and one of the most important cases in Hong Kong's legal history, the court asserted that this power includes the power to invalidate any other Hong Kong laws which it decides are in breach of the Hong Kong Basic Law. Although this power is not explicitly granted to the courts under the Hong Kong Basic Law, and at least one mainland drafter claims it was never China's intention to do so, the court's assertion of the right to exercise this power has never been seriously challenged in Hong Kong since then—and has become an important part of the rule of law in Hong Kong.

In the *Ng Ka Ling* case, the Court of Final Appeal also sought to extend this power even further, controversially claiming the Hong Kong courts have a power to invalidate any actions of the National People's Congress and its Standing Committee which they decide are in breach of the Hong Kong Basic Law. That provoked a furious response

1. (1999) 2 HKCFAR 4.

from Beijing, which calls into question whether the courts would ever dare to exercise this power in practice. It also put the Court of Final Appeal on the defensive, especially after a June 1999 interpretation of the Hong Kong Basic Law by the Standing Committee reversed much of the substance of what the court had decided in the *Ng Ka Ling* case.

The result, as is explained in Chapter 6, was a couple of questionable decisions in subsequent politically charged cases, where the Court of Final Appeal appeared to be at least partly motivated by a desire to avoid another confrontation with Beijing so soon. But this period of apparent retreat only lasted from 1999 to 2001, ending when the court demonstrated once more in the important case of *Director of Immigration v Chong Fung Yuen*<sup>2</sup> that it was still willing to take unpopular decisions that risked angering Beijing where this was the inevitable consequence of the clear wording of the Hong Kong Basic Law. After that case, most observers agree the Court of Final Appeal recovered its confidence and, ever since then, the court has generally played a strong role in protecting the fundamental freedoms guaranteed under the Hong Kong Basic Law.

Nonetheless, the shadow of the National People's Congress Standing Committee's power to interpret any part of the Hong Kong Basic Law at any time continues to hang over the Hong Kong courts. As is explained in Chapter 7 on "Interpretation and Amendment", there is strong evidence to suggest that it was never the intention of the drafters of the Hong Kong Basic Law to confer such an unrestricted power of interpretation on the Standing Committee, especially the power to determine the meaning of the large parts of the Hong Kong Basic Law which concern matters that fall within Hong Kong's autonomy. Nonetheless, that is the position which has emerged in practice after the Standing Committee's June 1999 interpretation was swiftly accepted by the Court of Final Appeal in an unfortunate decision in the case of *Lau Kong Yung v Director of Immigration*.<sup>3</sup> Decided at a time when the court was still in its period of judicial retreat, that case saw the Court of Final Appeal adopt an even wider view of the Standing Committee's powers than the Standing Committee had, at that time, unequivocally asserted for itself.

Although the accepted position now is that there are no legal limits on the Standing Committee's power to interpret the Hong Kong Basic Law, the Standing Committee has been very cautious about exercising this power so far. The Standing Committee issued only a handful of interpretations during the early decades of the Hong Kong SAR and only one of these, in 2004, was at the Standing Committee's own initiative. That 2004 interpretation, on changes to Hong Kong's electoral system, illustrated the importance of Standing Committee interpretations by taking a power which Hong Kong would have been allowed to exercise on its own under the original wording of the Hong Kong Basic Law, and interpreting it in a way which instead gave the Standing Committee the final decision on the matter.

2. (2001) 4 HKCFAR 211.

3. (1999) 2 HKCFAR 300.

However, as we will see in Chapter 7, on other issues the Standing Committee has so far declined to intervene, even when it strongly disagreed with decisions of the Hong Kong courts, such as after the *Chong Fung Yuen* case. The Hong Kong SAR Government also seems to have adopted a cautious approach to requesting interpretations from the Standing Committee, generally trying to exhaust all other legal avenues first. The Court of Final Appeal showed similar caution during the early years of the Hong Kong SAR, despite a provision in the Hong Kong Basic Law requiring it to seek an interpretation from the Standing Committee of those provisions in the Hong Kong Basic Law covering matters outside Hong Kong's autonomy, when these are necessary to decide a particular case. In early decisions such as *Ng Ka Ling* and *Chong Fung Yuen*, the Court of Final Appeal always found reasons for concluding that these were not cases which needed to be referred to the Standing Committee.

Only in 2011, did the court finally overcome its reluctance to refer an issue of interpretation to the Standing Committee by a narrow 3 to 2 majority in the case of *Democratic Republic of Congo v FG Hemisphere*.<sup>4</sup> Even then, the Court of Final Appeal was careful to keep as much control as possible over the process, presenting its own views to the Standing Committee on how these provisions should be interpreted in a lengthy judgment which the Standing Committee swiftly endorsed.

One of the most important tasks of the Court of Final Appeal, and indeed the Hong Kong courts as a whole, is to uphold the wide range of fundamental freedoms guaranteed under the Hong Kong Basic Law. As is explained in Chapter 8 on "Protection of Human Rights", these freedoms go beyond the long list of rights specifically mentioned in the Hong Kong Basic Law to include many more in several international human rights treaties such as the International Covenant on Civil and Political Rights, most parts of which continue in force under the Hong Kong Basic Law.

Comprehensive protection of fundamental freedoms in Hong Kong did not start with the Hong Kong Basic Law. In 1991, the enactment of the Hong Kong Bill of Rights Ordinance (Cap. 383) marked Hong Kong's first human rights revolution as it wrote most of the rights listed in the International Covenant on Civil and Political Rights into Hong Kong law, allowing government actions that breached those fundamental freedoms to be challenged in the courts for the first time.

But, as we will see in Chapter 8, the Hong Kong Basic Law marked Hong Kong's second human rights revolution, setting off a further wave of legal challenges, especially over its generous—but often controversial—provisions on who has the right to reside permanently in Hong Kong (which is known as the "right of abode").

That does not mean that the rights listed in the Hong Kong Basic Law can never be restricted. In any society, it is sometimes necessary to restrict even such fundamental rights as freedom of speech and the right to protest if only to protect, for example, the rights and freedoms of others. The Hong Kong Basic Law explicitly recognizes this but

4. (2011) 14 HKCFAR 95.

then, again drawing heavily on provisions of the International Covenant on Civil and Political Rights, lays down a succession of stringent tests which must be satisfied before any restriction can be imposed, so ensuring that any restrictions on rights are kept to a minimum.

Since 1 July 1997, the Hong Kong courts have generally adopted a rigorous approach in applying these tests in defence of the fundamental freedoms protected under the Hong Kong Basic Law. But, as is explained in Chapter 8, there have been isolated exceptions such as the Court of Final Appeal's December 1999 decision in the politically sensitive case of *HKSAR v Ng Kung Siu*,<sup>5</sup> which involved a law protecting China's national flag and was decided at a time when the court was still in its period of judicial retreat.

No discussion of the Hong Kong Basic Law would be complete without considering its future. Although Article 5 guarantees that Hong Kong's "previous capitalist system and way of life shall remain unchanged" for a minimum of 50 years starting from 1997, China's adoption of a more interventionist approach towards Hong Kong has left some wondering whether "one country, two systems" can really survive until 2047.

As we will see in the conclusion to this book, Chapter 9 on "What Will Happen to One Country, Two Systems?", given the changes that have already taken place since 1997 in how "one country, two systems" is applied in Hong Kong, it would only be realistic to expect such changes to continue—and perhaps even accelerate—during the remainder of the 50-year period. Nonetheless, all the evidence at the time of writing still tends to suggest that "one country, two systems" will probably survive in some form through until 30 June 2047.

That, of course, raises the question of what will happen after that date, when the protection against fundamental change provided by Article 5 would appear to expire. As we will see in Chapter 9, a few mainland legal scholars are now advocating that China take advantage of this opportunity to dismantle "one country, two systems" after 2047. But that is far from inevitable, nor even the most likely scenario. Much will depend on decisions to be taken by future generations of Chinese leaders, balancing the advantages and disadvantages to China of changing or maintaining Hong Kong's present system. However, since the Hong Kong Basic Law contains no expiry date, it could remain in force beyond 2047, and it is perfectly possible that some variant of "one country, two systems"—although possibly rather different from that which exists today—may continue to survive in Hong Kong long beyond that date.

5. (1999) 2 HKCFAR 442.

## Chapter 2

# Birth of the Hong Kong Basic Law

History is sometimes described as a series of accidents of timing, some fortuitous, others not. In Hong Kong's case, most would probably agree that, while the path was often a rocky one, those accidents of history ultimately had a generally fortuitous outcome. That fortuitous outcome is a remarkable arrangement, known as "one country, two systems", under which Hong Kong is allowed to differ far more radically from the rest of the country of which it is a part—and, in some areas, function almost like a separate country—than almost anywhere else in the world that is not a country in its own right. It is an arrangement enshrined in an equally remarkable document, the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China—or Hong Kong Basic Law, as it will be called in this book.

The Hong Kong Basic Law was the product of a brief window of opportunity as China began to emerge from decades of isolation during the early 1980s. Although promulgated by China in 1990, its contents were effectively decided six years earlier in 1984, when Britain and China concluded the Joint Declaration on the Question of Hong Kong. In return for reluctantly promising to return all of Hong Kong to China on 1 July 1997, that 1984 agreement saw Britain persuade an equally reluctant China to make extremely detailed promises about the nature of the "one country, two systems" arrangement that Hong Kong would be permitted to enjoy for at least 50 years beyond that date, together with a commitment to write these promises into a document that would be known as the Hong Kong Basic Law.

It would have been inconceivable for China to have made those promises at any time up until a few years earlier. From shortly after the Communists took power in 1949 through to the end of the Cultural Revolution in 1976, China had been plagued by decades of Maoist-inspired political campaigns aimed at eradicating any trace in the rest of the country of the capitalist system practised in Hong Kong. While Communist rulers tacitly tolerated Hong Kong's continued existence as a separate entity under British rule, any Chinese leader who might have been foolish enough, during those periods of leftist turmoil, to formally advocate enshrining the continued existence of a capitalist system in Hong Kong would have been signing their own arrest warrant.

Only with Deng Xiaoping's rise to power in the late 1970s, and the advent of more pragmatic policies emphasizing economic development, in which Hong Kong was expected to play a major role, did a brief window of opportunity to strike a deal securing the city's future emerge. Just how brief that window of opportunity would be is only

evident with the benefit of hindsight. For instance, from today's perspective, it seems almost inconceivable that Chinese leaders would have agreed to such an extraordinary arrangement for Hong Kong had the same negotiations taken place now, when China has already emerged as an economic power in its own right and Hong Kong no longer plays such a critical role as a conduit for foreign investment.

## 2.1 The 1997 Deadline

That Hong Kong's future should have fallen to be determined by a deadline of 1 July 1997 was the product of another accident of history almost a century earlier. Britain had begun its conquest of Hong Kong by bombarding Qing dynasty China into signing treaties ceding parts of the colony in perpetuity: first Hong Kong Island under the Treaty of Nanking in 1842 concluding Britain's first Opium War with China, and then the southern tip of Kowloon under the Convention of Peking in 1860 concluding a second Opium War.

By the time it came to the last major extension of Hong Kong's boundaries in 1898, to add the New Territories including all of Kowloon north of the present Boundary Street in Mongkok, the Qing authorities refused to cede any further territory to Britain in perpetuity, for fear of setting a precedent which would be seized upon by other foreign powers. Instead, they offered a 99-year lease, which Britain readily accepted and was written into the Convention for the Extension of Hong Kong Territory as starting from 1 July 1898—with little attention apparently being paid to the fact that this started the clock ticking on a 30 June 1997 deadline for British rule over most of Hong Kong.

Even then, the significance of that deadline might have been reduced if Britain had drawn a distinction between those parts of Hong Kong ceded in perpetuity under the two earlier treaties, and the land leased under this third treaty. But, with questionable legality<sup>1</sup> and little thought for the future, Britain almost immediately cast aside this distinction. An Order in Council, made by the British government in the name of the Queen on 20 October 1898, declared the New Territories and those parts of Kowloon leased with it integrated into the rest of Hong Kong and to be treated until 30 June 1997 "for all intents and purposes as if they had originally formed part of the said colony".<sup>2</sup> Before long, Boundary Street, the notional border between the ceded and leased parts of Hong Kong had become simply another street in the urban sprawl of Kowloon.

1. Wesley-Smith draws an interesting analogy between Britain's rights over the leased territory and a tenant's rights over property owned by another landlord. See Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (Longman Asia, 2nd edition, 1994) at 27. [Note: Unless otherwise stated, all references following cited source(s) in footnotes are to page number(s) in those source(s).]
2. Clause 1 of The New Territories Order in Council, reprinted in Peter Wesley-Smith, *Unequal Treaty 1898–1997: China, Great Britain and Hong Kong's New Territories* (Oxford University Press, revised edition, 1998) at 321–322.

That action removed any doubt that when 30 June 1997 arrived, the issue of Hong Kong would have to be dealt with as a whole. But it was not an issue that successive Chinese governments were in any rush to address. From at least the 1920s onwards, those in power in Beijing, first the Kuomintang and then the Communists, refused to recognize the three treaties as granting Britain any legal authority to rule Hong Kong. They argued that these were "unequal treaties", which had been forced upon China against its will and so were invalid, a position which finds some support in modern international law.<sup>3</sup>

Whatever their formal position, those in power in Beijing were careful not to disrupt the status quo. When the People's Liberation Army conquered Guangdong for the Communists in October 1949, they stopped 25 miles north of the border with Hong Kong. Even at the height of the Cultural Revolution in 1967, Chinese Premier Zhou Enlai reportedly intervened to halt plans drawn up by a local army commander to invade Hong Kong.<sup>4</sup>

Whether it was as a conduit for smuggling goods into China in the 1950s, in breach of the international embargo imposed during the Korean War, or as a means of attracting foreign investment after China began to open up its economy in the late 1970s, Hong Kong under British rule served a useful purpose for many decades as China's window on the outside world. That was reflected in China's repeatedly stated official position that, while Britain had no legal right to be in Hong Kong, the status quo should be maintained until some undefined time in the future when "conditions are ripe" for a change.<sup>5</sup>

Deng Xiaoping's rise to power in the late 1970s brought with it a new enthusiasm for forging more cordial ties with the Western world. However, that did not initially arouse any interest in Beijing in addressing the issue of Hong Kong's future. Taiwan was seen as a more immediate priority, especially after the US cut official ties with the island in 1979 in order to open full diplomatic relations with Beijing. Hoping to make the isolated island more receptive towards overtures for reunification, China quickly came up with an early version of a policy—which would later become known as "one country, two systems"—designed to woo Taiwan down this path. First mentioned in general terms in 1979 by the National People's Congress Standing Committee, by 1981 it had taken on the shape of a nine-point plan.

Many of these nine points, such as allowing Taiwan a high degree of autonomy and the right to retain its socio-economic system as well as existing way of life, would eventually be applied to Hong Kong. But that was not the intention at this stage. As far as China

3. Article 52 of the Vienna Convention on the Law of Treaties 1969, 1155 United Nations Treaty Series 331, states that: "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." However, the Vienna Convention is not retrospective and so does not apply to pre-1969 treaties. See further Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 2nd edition, 1999) at 11–12.
4. "PLA invasion aired twice", *South China Morning Post*, 23 June 2007.
5. See, for instance, the editorial on this point which appeared in the *People's Daily*, the official newspaper of China's ruling Communist Party, on 8 March 1963.



was concerned, Hong Kong should be satisfied with a few general reassurances. That was most vividly demonstrated in March 1979, during the first official visit to Beijing by a Hong Kong Governor, Sir Murray MacLehose. Deng brushed aside MacLehose's attempt to raise the most pressing problem concerning the 1997 deadline with a vague statement that investors in Hong Kong should "put their hearts at ease".

Such vague reassurances could not solve the problem of the expiry of government land leases in the New Territories and, in practice, throughout the rest of Hong Kong. Fittingly for a city which had built so much of its prosperity upon soaring property prices, it was the issue of land rights which provided the immediate impetus for resolving Hong Kong's future. Apart from one site in Central,<sup>6</sup> all land in Hong Kong was ultimately owned by the British Crown, and sold to its users by the Hong Kong Government, not in perpetuity but on long leases of 75 years, or sometimes even 999 years. That system was a great way of filling the government's coffers, and does much to explain why Hong Kong's taxation rates are among the lowest in the developed world. But it suffered from the drawback that it was generally assumed that leases granted under British rule could only last for as long as Britain had the legal authority to rule Hong Kong.<sup>7</sup> As a result, all land leases in the fast-expanding New Territories were set to expire before 30 June 1997.

Britain cited the land lease issue as its ostensible reason for pushing so hard during the late 1970s and early 1980s to resolve the issue of Hong Kong's future,<sup>8</sup> despite China's lack of interest in discussing the issue and its evident willingness to allow British rule to continue unchallenged for the immediate future. British officials involved in the discussions at the time claim business confidence in Hong Kong was being undermined by the inability to issue leases lasting beyond 30 June 1997, so shortening the timeframe in which any new investment in the New Territories would have to be recouped.<sup>9</sup> Others are more sceptical, noting that there was little public sign of such a lack of confidence, with the Hang Seng Index soaring to new heights in 1978 and 1979, while property prices actually rose faster in the New Territories than Kowloon.<sup>10</sup>

In practice, while the uncertainty over land leases played a part, it seems more likely that the main reason why London pushed the issue so hard at this point was a desire to take advantage of what was described as "a window of opportunity"<sup>11</sup> to settle Hong Kong's future, before developments in China slammed the window shut again. It is

6. St. John's Cathedral on Garden Road.

7. See, however, Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (see note 1) at 59–61 for a brief discussion of the various options that were canvassed as providing a possible legal basis for extending land leases beyond this period.

8. Her Majesty's Government, *White Paper on a Draft Agreement Between the Government of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong* (26 Sept 1984) at 2.

9. See, for instance, Robin McLaren, *Britain's Record in Hong Kong* (Royal Institute of International Affairs, 1997) at 12.

10. Robert Cottrell, *The End of Hong Kong: The Secret Diplomacy of Imperial Retreat* (John Murray, 1993) at 41–44.

11. McLaren, *Britain's Record in Hong Kong* (see note 9) at 13.

not that Britain was clairvoyant enough to see how China's economy would grow to a point where Hong Kong's role as a gateway for foreign investment (and, with it, perhaps some of the rationale for allowing "one country, two systems" in Hong Kong) would become relatively less important. Rather, in the words of Sir Percy Cradock, one of the major architects of British policy towards Hong Kong, it was simply a matter of moving quickly to take advantage of the fact that, after decades of instability, China finally had a pragmatic leader in the form of Deng Xiaoping: "We could not be sure how long this situation would last. We would be wise to exploit it while we could."<sup>12</sup>

It was not easy to persuade China to make the issue of Hong Kong's future a priority. A British proposal to solve the land lease problem by extending individual leases in the New Territories beyond 30 June 1997 was rejected by Deng Xiaoping during his 1979 meeting with Governor MacLehose, possibly without even understanding what was actually being proposed.<sup>13</sup> Rebuffed on this specific proposal, Britain continued to press the issue of Hong Kong's future, provoking some annoyance from China. "They are forcing the issue. But we will not be forced," Liao Chengzhi, then China's top official on Hong Kong affairs, was quoted as complaining during this period.<sup>14</sup>

The persistent British pressure paid off. According to Ching (2010), in December 1981 a meeting of the Politburo of China's ruling Communist Party took the historic decision that was to make possible the Sino-British Joint Declaration and the Hong Kong Basic Law.<sup>15</sup> With Taiwan showing no interest in responding to overtures for reunification, and Britain continually pushing the issue of Hong Kong, China decided to deal with Hong Kong first, rather than Taiwan. The "one country, two systems" formula that had been devised for Taiwan was adapted to apply instead to Hong Kong first, and hopefully set such a good example that Taiwan would become more enthusiastic about embracing the same arrangement at a later date.

## 2.2 Sino-British Joint Declaration

This change of policy finally made possible negotiations between China and Britain over Hong Kong's future. But it did not make them easy. For all its enthusiasm to begin such negotiations, Britain never expected the outcome would be its departure from Hong Kong. From London's perspective, the 19th-century treaties granting Hong Kong to Britain were just as valid as any other international treaties. While the lease on the

12. Percy Cradock, *Experiences of China* (John Murray, 1999) at 165.

13. Deng appears to have believed, possibly due to a mistake by his translator, that Governor MacLehose was proposing extending Britain's lease over the New Territories as a whole, as opposed to simply the granting of individual leases within the New Territories. See Cottrell, *The End of Hong Kong* (see note 10) at 55.

14. During a breakfast meeting with top Hong Kong financier Fung King Hey. Quoted in Cottrell, *The End of Hong Kong* (see note 10) at 63.

15. See Frank Ching, "Looking Back: How London and Beijing Decided the Fate of Hong Kong" (April 2010) 18 *Hong Kong Journal*.

New Territories only lasted until 30 June 1997, in theory the 1842 and 1860 treaties allowed Britain to remain in Hong Kong Island and southern Kowloon in perpetuity. The most that London initially envisaged was to exchange sovereignty for administration: by making a formal concession of Chinese sovereignty, that included Hong Kong Island and southern Kowloon, in return for an agreement on a continuing British role in running all of Hong Kong beyond 30 June 1997.

According to Ching (2010), some elements within the Chinese government were initially prepared to consider allowing some kind of continued British role in Hong Kong.<sup>16</sup> But more senior Chinese leaders ultimately decided against this. While Beijing tacitly tolerated the colonial presence in Hong Kong, senior leaders ultimately decided that entering into an agreement that formally recognized and extended Britain's presence would be as bad as signing the original treaties. Hence Deng Xiaoping's famous retort to then British Prime Minister Margaret Thatcher in September 1982, that: "[I]t would mean that the present Chinese government was just like the government of the late Qing dynasty."<sup>17</sup>

That remark came during a stormy meeting in the Great Hall of the People on the edge of Tiananmen Square, after Thatcher explicitly rejected "one country, two systems", or any other formula unless it allowed for a continuing British role in Hong Kong after 1 July 1997.<sup>18</sup> Thatcher then, coincidentally, slipped down the steps of the Great Hall of the People on exiting the meeting—an event widely interpreted as a bad omen in Hong Kong, and which ushered in a period of increasing nervousness over the two countries' fundamental disagreements over Hong Kong's future.

China stuck to its guns, in July 1983 unilaterally announcing a 12-point plan that adapted the "one country, two systems" formula for implementation in Hong Kong.<sup>19</sup> Gone were some of the concessions included in the original version of the formula with Taiwan in mind, notably the promise that the island could retain its own armed forces. In this area, China intended something very different for Hong Kong, with Deng Xiaoping subsequently making it clear that troops from the People's Liberation Army would be stationed in Hong Kong after 30 June 1997.<sup>20</sup> But in other areas, the first indications began

16. Ibid. These reportedly included the Department of Treaty and Law, West European Department, Foreign Trade Ministry and Xinhua News Agency.

17. "Our Basic Position on the Question of Hong Kong" (24 Sept 1982) in *Deng Xiaoping on the Question of Hong Kong* (Foreign Languages Press, 1993) at 2.

18. Cradock, *Experiences of China* (see note 12) at 178–180.

19. In a gesture of contempt for Britain, this 12-point plan was first unveiled to a group of visiting Hong Kong secondary school students, and British officials only learnt of its existence through press reports. See Cottrell, *The End of Hong Kong* (see note 10) at 112–113.

20. During a meeting with Sir S.Y. Chung and two other members of Hong Kong's Executive Council in June 1984, Deng dismissed as "sheer nonsense" reported suggestions by former Chinese foreign minister Huang Hua and former defence minister Geng Biao that there would be no need for such forces. See Ming K. Chan, "Different Roads to Home: The Retrocession of Hong Kong and Macau to Chinese Sovereignty" (2003) 12(36) *Journal of Contemporary China* 493, 509.

to emerge of the policies that subsequently would be enshrined in the Joint Declaration and the Hong Kong Basic Law. These included promises that Hong Kong could retain its existing legal system and have its own Court of Final Appeal.

Shaken by the September 1983 Hong Kong dollar crisis, in which the local currency was only saved from collapse by being pegged to the US greenback, Britain quickly gave way. In October, it agreed to negotiate on the basis of China's 12 general principles, conceding a month later that it no longer sought any kind of "authority" in Hong Kong after 30 June 1997.<sup>21</sup>

After that, the talks over Hong Kong's future began to make progress with British negotiators finding, to their amazement, that China appeared to have given no thought to the detailed implementation of "one country, two systems", beyond these 12 general principles. "We had been pushing at the door of a locked room, containing, as we thought, treasures of Chinese planning. Now the door was open and the room was found to be virtually empty," recalled Sir Percy Cradock, then Britain's chief negotiator.<sup>22</sup> "This offered us an invaluable opportunity to fill the void with our essentials for post-1997 Hong Kong."

As a result, the detailed arrangements for "one country, two systems" were filled in largely on the basis of briefing papers supplied by British negotiators to their Chinese counterparts. These included, for instance, a British proposal in a paper on Hong Kong's legal system that the future Court of Final Appeal should be able to bolster its expertise by inviting judges from other common law jurisdictions to help hear its cases.<sup>23</sup> Swiftly adopted, this would prove of great significance to the development of Hong Kong's highest court after 1 July 1997.<sup>24</sup> Another concession was to prove of particular significance, both before and after the handover. In the final days of the negotiations, Britain persuaded China to agree to a provision stating that the Legislative Council would be "constituted by elections" after 1 July 1997.<sup>25</sup>

By September 1984, the deal over Hong Kong's future had been done and was published for the world to see. It was to be a further three months before the agreement was formally signed on 19 December 1984, during another visit to Beijing by Thatcher.<sup>26</sup> Even after that, the Joint Declaration did not finally come into force until three days after it was formally ratified on 27 May 1985.

21. Cradock, *Experiences of China* (see note 12) at 190–192.

22. Ibid. at 192–193.

23. Cottrell, *The End of Hong Kong* (see note 10) at 134–135.

24. See further "6.3: Composition of the Court of Final Appeal" in Chapter 6 for more on the subsequent controversy over the implementation of this provision in the Joint Declaration and the role played by these judges on the Court of Final Appeal.

25. Cottrell, *The End of Hong Kong* (see note 10) at 171. However, the Joint Declaration did not specify what form these "elections" would take, and this omission subsequently became a cause of controversy during the drafting of the Hong Kong Basic Law.

26. The delay was necessary in order to allow the Joint Declaration to be first approved by the British Parliament and China's NPC Standing Committee. The latter is a permanent body which handles many of the tasks of the NPC between its annual meetings.

The difference in opinion between China and Britain over the legality of the 19th-century treaties under which Britain had originally acquired Hong Kong was papered over in a series of parallel statements at the start of the Joint Declaration on the Question of Hong Kong. While China declared that “it has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997” (paragraph 1), Britain separately acknowledged that it would “restore Hong Kong to the People’s Republic of China” from that date (paragraph 2).

With that agreed, China then officially acknowledged for the first time that Britain would “be responsible for the administration of Hong Kong” until 30 June 1997 (paragraph 4). However, Britain was forced reluctantly to concede the creation of a Sino-British Joint Liaison Group (paragraph 5), consisting of senior diplomats from both countries, to conduct consultations on the implementation of the Joint Declaration and other subjects and to discuss matters relating to a smooth handover in 1997 (Annex II(3)). To allay British fears that this group would develop into a shadow government, it was explicitly described as “an organ for liaison and not an organ of power” that would “play no part in the administration of Hong Kong” (Annex II(6)). China also allowed Britain to issue and extend land leases until 30 June 2047 in return for an annual payment to the Hong Kong Government of “rent” equivalent to 3% of their rateable value (Annex III(2)–III(3)), so resolving the problem that was the ostensible impetus behind the decision to enter into negotiations in the first place.

The real meat of the Joint Declaration was in paragraph 3 of the main text, where China presented the final version of its 12-point plan, now described as “the basic policies of the People’s Republic of China regarding Hong Kong”. These provided for the future Hong Kong Special Administrative Region (or Hong Kong SAR), as Hong Kong would become known, to enjoy executive, legislative and independent judicial power, including the power of final adjudication (paragraph 3(3)). Crucially, these included exclusive responsibility for internal law and order (paragraph 3(11)), as well as the right to run its own finances independently without paying any taxes to the national authorities (paragraph 3(8)), maintain a separate currency (paragraph 3(7)), issue its own passports and even deal directly with foreign countries on a wide range of issues (paragraph 3(10)). Existing rights and freedoms would be preserved (paragraph 3(5)) and, in contrast to the situation in other parts of China, the Hong Kong SAR would be governed exclusively by “local inhabitants” (paragraph 3(4)). Only defence and foreign affairs (paragraph 3(2)), as well as the appointment of the future Chief Executive and his top officials (paragraph 3(4)), were expressly stated to be China’s responsibility.

Judged by today’s standards, these “basic policies” might seem like a relatively unremarkable statement of the realities of life in 21st-century Hong Kong. But judged from the perspective of the time when the Joint Declaration was concluded, they were revolutionary. The “basic policies” directly addressed many of the principal concerns of Hong Kong people about their future, especially fears that rights and freedoms would be restricted, Hong Kong’s wealth plundered and the PLA put in charge of enforcing law and order. They also provided, at least on paper, for the future Hong Kong SAR to enjoy

a degree of autonomy arguably higher than almost any other place in the world that is not a country in its own right.<sup>27</sup>

The basic policies placed a particularly heavy emphasis on preserving Hong Kong’s existing economic system as part of this system of autonomy. Four of the 12 points are exclusively concerned with economic and financial issues (see paragraphs 3(6), (7), (8) and (9)) while two more touch on the issue (see parts of paragraphs 3(5) and (10)). That reflects the economic rationale partly underlying China’s decision to allow Hong Kong to enjoy a modified version of the formula originally designed with Taiwan in mind, because of the huge economic benefits then flowing to China—especially in terms of foreign investment—through Hong Kong’s existing economic system. This would, however, later lead to fears that, by focussing so heavily on economic issues, the underlying basis for Hong Kong’s autonomy is fundamentally different from, and arguably weaker than, other places in the world that are also allowed to differ from the country of which they are part.<sup>28</sup> That is especially true if the original economic rationale for granting such autonomy starts to disappear, as may now be happening with Hong Kong’s diminishing economic importance to China.

Impressive though they are, the 12 “basic policies” in paragraph 3 are far from the full extent of the promises on autonomy in the 1984 agreement. Less than 1,200 words long, the main text of the Joint Declaration is unusually short for an international treaty of such importance. That reflects Deng Xiaoping’s reported aversion to including too much “detail” in any agreement with Britain,<sup>29</sup> a relic of Beijing’s initial insistence that Hong Kong should be satisfied with a few general assurances. To assuage Chinese sensitivities, the detailed arrangements for “one country two systems”, largely drawn from British briefing papers presented during the negotiations, were instead written into Annex I of the Joint Declaration. Running to more than 4,500 words, under the title “Elaboration by the Government of the People’s Republic of China of its Basic Policies Regarding Hong Kong”, Annex I is several times longer than the main text which it elaborates upon. It was here that Britain managed to get the detailed promises it sought on the arrangements for post-1 July 1997 Hong Kong—and which would subsequently form the core of the Hong Kong Basic Law—by the simple expedient of avoiding the word “details” and burying them near the back of the Joint Declaration.

Even a quick perusal provides a remarkably detailed—and generally accurate—picture of how “one country, two systems” would be put into practice after 1 July 1997. See, for instance, the detailed description of the sources of law that would be allowed to apply in the Hong Kong SAR in Annex I(II). This specifically mentions “the common law, rules of equity, ordinances, subordinate legislation and customary law”. Hong Kong’s post-1997 judicial system is set out in similar detail in Annex I(III), including the

27. This is discussed further in Chapter 4, “A High Degree of Autonomy?”

28. See further page 57.

29. British negotiators reported an angry reaction from their Chinese counterparts every time they mentioned the word “detail” during the negotiations (personal communication with senior British negotiator, 1994).

## Chapter 5

# System of Government

Hong Kong's political system is commonly described in a number of different, and arguably conflicting, ways. For the Hong Kong SAR Government and, especially, Chinese national authorities in Beijing, it is an "executive-led" system. This means, among other things, that the executive branch of Hong Kong's political structure (i.e., the Chief Executive and the top, or principal, officials and civil servants who report to the Chief Executive) exercise significant powers without the need for approval by either of the other two branches of Hong Kong's political structure: the legislature (or Legislative Council) and the judiciary. These include exclusive control over the formulation and implementation of government policy, and the sole power to appoint most holders of public office. Partly because of this, Hong Kong's Chief Executive has been sometimes described as exercising greater power domestically than the presidents of the US and many other countries in the world.

But this is far from the whole picture as far as Hong Kong's political system is concerned. Other powers of great importance to the executive in running Hong Kong can only be exercised with the approval of the Legislative Council. These include the power to make laws, levy taxes and spend public funds. The judiciary also exercises significant powers. These include the jurisdiction, under Article 35(2) of the Hong Kong Basic Law, of hearing challenges to actions of the executive authorities (which are normally described as "judicial review").<sup>1</sup>

This three-way division of powers has led some scholars to describe Hong Kong's political system as a "separation of powers". This means a system where significant—distinct—powers are exercised by all three branches of the political structure, as opposed to the executive alone. These powers are then used by the executive, legislature and judiciary to check and balance the actions of the other branches of the political structure and, in particular, curb any excesses. Separation of powers is a system widely practised in many countries, in some cases dating back hundreds of years, with one of the main reasons for such a system being a defence against "tyranny" being exercised by any one branch of the political system with unchecked powers.<sup>2</sup>

1. See further "6.2: Judicial Review" in Chapter 6.
2. The origins of the concept of "separation of powers" are sometimes traced back to the ancient Greek philosopher Aristotle (384–322 BC), but more often attributed to the French political thinker Baron de Montesquieu (1689–1755), who described the concept in more precise terms. See Hilaire Barnett, *Constitutional and Administrative Law* (Routledge, 10th edition, 2013) at 68–70.

This description of Hong Kong's political structure has been endorsed by the courts, where separation of powers has been described as "woven into the fabric of the Basic Law".<sup>3</sup> As a result, the principle of separation of powers has been used by the judiciary to invalidate actions of the executive and laws passed by the legislature that go beyond the permitted powers of those two branches of Hong Kong's political structure under the Hong Kong Basic Law.<sup>4</sup> Nonetheless, separation of powers remains a controversial concept as far as Hong Kong is concerned. Such a system is not practised elsewhere in China, and the existence of a system of separation of powers in Hong Kong has been repeatedly denied by Chinese leaders from Deng Xiaoping downwards, apparently fearful it would weaken the Central Authorities' ultimate control over Hong Kong.<sup>5</sup>

The tensions between these two sometimes competing descriptions—executive-led government and separation of powers—of the political structure laid down in Chapter IV of the Hong Kong Basic Law (which, with 62 articles, is by far the longest chapter in the Hong Kong Basic Law) go some way towards explaining the problems with the present political system in Hong Kong. This is widely seen as unsatisfactory. Scott (2000) describes the system as "uncoordinated, poorly developed, fractious and sometimes dysfunctional".<sup>6</sup> Members of the legislature complain of being treated almost with contempt by the executive. But some legislators are increasingly responding in the same way. A radical minority now regularly resort to high-profile stunts, including throwing objects at the Chief Executive and his top officials. Perhaps more worrying for the executive is the rejectionist attitude taking root among a number of legislators. Officials complain that some legislators often seem more interested in political posturing than constructive cooperation.

As we will see shortly, such problems are a by-product of a deeply flawed political system where legislators only have the power to say "no", rather than play a constructive role in government. The system already has been subject to some change since the Hong Kong Basic Law came into force. In particular, the outdated system (which, like many parts of Hong Kong's political structure, was inherited from colonial rule) of having civil servants fill all the top posts in the executive has been replaced with a system of political appointees nominated by the Chief Executive. But the changes so far have failed to improve the often poor relationship between the executive and legislature. Ma (2007) notes that there remain "multiple contradictions" within Hong Kong's current

system of government.<sup>7</sup> Many believe far more extensive changes will be needed in the years to come, with a particular focus on building better channels of communication between the executive and legislature.

## 5.1 Chief Executive

At the top of Hong Kong's political structure is the Chief Executive. Under the Hong Kong Basic Law, the Chief Executive is the head of the Hong Kong SAR and the region's representative at a national and international level (Article 43(1)). Only Chinese citizens, aged 40 or above, who are permanent residents of Hong Kong with no right of abode in any other country are eligible to serve as Chief Executive. In order to allay concerns that a recent migrant from the mainland might be foisted into the post, they are also required to have been ordinarily resident<sup>8</sup> in Hong Kong for at least 20 years (Article 44).

The Chief Executive is the only one of the three branches of Hong Kong's political structure formally appointed to office by Chinese national authorities, specifically the Central People's Government, although only on the basis of the results of a selection process in Hong Kong (Article 45(1)). The Chief Executive is also the only one of the three branches of Hong Kong's political structure made formally accountable to Chinese national authorities, again the Central People's Government, under the Hong Kong Basic Law (Article 43(2)). The Chief Executive is also required to implement the Central Government's directives on "relevant matters" under the Hong Kong Basic Law (Article 48(8)).

Hence the particular importance of the Chief Executive's position in China's eyes, as the only branch of Hong Kong's political structure which lies directly within its control. That also explains Beijing's adamant insistence that Hong Kong must follow an executive-led system of government, since this is the only way its control over the Chief Executive can be extended to embrace Hong Kong's political structure as a whole.<sup>9</sup>

It also puts the Chief Executive in an impossible position, caught between the often conflicting demands of two masters since, in addition to the Central People's Government, the Hong Kong Basic Law also makes the Chief Executive accountable to Hong Kong (Article 43(2)). However, the experience during the early years of the Hong Kong SAR

3. *Lau Kwok Fai v Secretary for Justice* (unrep., HCAL 177 and 180/2002, [2003] HKEC 711) at para. 19.

4. One well-known example is the case of *Yau Kwong Man v Secretary for Security* [2002] 3 HKC 457. See further note 41 later in this chapter and the accompanying text.

5. See, for example, "Speech at a Meeting with the Members of the Committee for Drafting the Basic Law of the Hong Kong Special Administrative Region", 16 April 1987 in *Deng Xiaoping on the Question of Hong Kong* (Foreign Languages Press, 1993) at 55.

6. Ian Scott, "The Disarticulation of Hong Kong's Post-Handover Political System" (2000) 43 *The China Journal* 29.

7. These include the lack of "supporting institutions" for the Chief Executive. See Ma Ngok in *Political Development in Hong Kong: State, Political Society, and Civil Society* (Hong Kong University Press, 2007) at 223–225.

8. The ordinarily resident requirement can usually be satisfied by living in Hong Kong for the specified period. However, this is subject to some exceptions. See further note 21 in Chapter 8 and the accompanying text.

9. As noted by Chen Zuocer, Deputy Director of the Hong Kong and Macao Affairs Office of the State Council, at a seminar in Beijing on 12 March 2004. Cited by Albert H.Y. Chen in "Executive-led Government, Strong and Weak Governments and Consensus Democracy" in Johannes Chan and Lison Harris (eds.), *Hong Kong's Constitutional Debates* (Hong Kong Law Journal Ltd., 2005) at 10.

was that the holders of the post of Chief Executive appeared well aware that it was the Central Authorities rather than anyone in Hong Kong who ultimately determined whether they got—and kept—their jobs. As a result, successive Chief Executives were accused of paying little more than lip service to their duty of accountability to Hong Kong, while recognizing that the real power lies with Beijing and its representatives in Hong Kong. For example, in what many critics saw as an acknowledgement of this reality, Leung Chun Ying made a high-profile visit to the Central People's Government's Liaison Office in Hong Kong one day after being elected Chief Executive in March 2012.<sup>10</sup>

On paper, the Hong Kong Basic Law vests sweeping powers in the hands of Hong Kong's Chief Executive. His position is best understood by comparison with presidents in countries around the world with a presidential system of government, such as the US. As in those countries, the Chief Executive leads the government (Article 48(1)) and is selected independently of the legislature for a fixed term in office (in Hong Kong, five years—Article 46). By contrast, in countries with a parliamentary system, such as the UK, the government is usually led by a prime minister who emerges from the legislature (in the UK, from the House of Commons), and whose term of office is generally linked to that of the legislature. Although not identical to the American system, Shiu (2010) notes that “the internal operation of Hong Kong's political system is quite similar to the American executive-legislative relations”.<sup>11</sup>

Even by comparison with other presidential systems, Hong Kong's Chief Executive exercises greater formal powers. Ma (2002) found that, on paper, Hong Kong's Chief Executive exercises greater power domestically than popularly elected presidents in 33 other countries, including the US.<sup>12</sup> Only two South American states (Chile in 1989, and modern-day Paraguay) could be found where presidents exercise greater powers.<sup>13</sup>

That assessment was based especially on the Chief Executive's power to appoint and remove the cabinet and top officials without any need for approval by the Legislative Council. In the US, for instance, although the president chooses members of the cabinet, those appointments must be approved by the US Congress. By contrast, under the Hong Kong Basic Law, the Chief Executive alone determines appointments to the Executive Council (Article 55(1)). This is the body of advisers charged with assisting the Chief

10. Phila Siu, “Leung walks into flak over high-profile Western visit”, *The Standard*, 27 March 2012. For more on the Liaison Office, see further notes 104–107 in Chapter 4 and the accompanying text.

11. Shiu Sin-por, “Executive-Legislative Relations Under the Basic Law” in *Seminar on Review and Prospect of the Basic Law: Collection of Articles 2007* (One Country Two Systems Research Institute, 2010) at 272.

12. Ma Ngok, “Executive-Legislative Relations: Assessing Legislative Influence in an Executive-Dominant System”, in Lau Siu-kai (ed.), *The First Tung Chee-hwa Administration: The First Five Years of the Hong Kong Special Administrative Region* (The Chinese University Press, 2002) at 353 and 368, citing work by Matthew S. Shugart and John Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (Cambridge University Press, 1992).

13. *Ibid.* at 353.

Executive in policy making (Article 54); it meets weekly throughout much of the year and is sometimes described as the Chief Executive's cabinet. The Chief Executive is required to consult the Executive Council before taking most major decisions (Article 56(2)).<sup>14</sup> However, the Chief Executive is free to reject its advice, prompting Ma (2007) to suggest that, at least in theory under the Hong Kong Basic Law, “the CE can practically rule as a dictator and ignore the opinions of all the others in the executive branch”.<sup>15</sup> The only formal restriction under the Hong Kong Basic Law is that, if the Chief Executive chooses to reject the Executive Council's advice, the Chief Executive must put on record the reasons for doing so (Article 56(3)).

The Chief Executive also has a wide-ranging power to appoint and remove other holders of public office (Article 48(7)). These range from the chairman and members of major public bodies, such as the Housing Authority and Hospital Authority, to hundreds of smaller advisory committees. For many years, this appointment power also extended to choosing a significant number of members of the District Councils,<sup>16</sup> the local bodies most of whose members have long been chosen through popular elections. In the past, this allowed the Chief Executive partially to reverse the outcome of those elections, by appointing more government supporters.<sup>17</sup> However, in a step towards greater democracy, all appointments to the District Councils by the Chief Executive were abolished from 2016 onwards.<sup>18</sup>

The Chief Executive's powers of appointment amount to a major power of patronage that can be used to reward support for government policy, and punish those who are too critical. In 2003, for instance, then Chief Executive Tung Chee Hwa refused to renew the appointment of then Equal Opportunities Commission Chairperson Anna Wu after the anti-discrimination body had, under her leadership, brought several high-profile actions against the government over its discriminatory practices.<sup>19</sup>

Only in the case of a small number of top government posts known as “principal official” positions is approval required for the Chief Executive's choices.<sup>20</sup> Even then,

14. Article 56(2) makes an exception for the appointment, removal and disciplining of officials, as well as the adoption of measures in emergencies.

15. Ma, *Political Development in Hong Kong* (see note 7) at 59.

16. This appointment power was abolished in 1994 by the last British Governor Chris Patten, as part of political reforms which caused a bitter dispute with China (see further “2.5: Sino-British Disputes” in Chapter 2), and subsequently reversed after 1 July 1997. Appointed seats have traditionally constituted about 20% of the membership of District Councils.

17. Fanny W.Y. Fung, Albert Wong and Eva Wu, “Appointees strengthen hand of government in districts”, *South China Morning Post*, 15 Dec 2007.

18. See District Councils (Amendment) Ordinance (No. 3 of 2013). All seats are now elected, except those allocated to Rural Committee chairmen in the New Territories.

19. These include successful challenges against government employment practices and the Education Department's allocation of school places (see Ma Ngok, *Political Development in Hong Kong* (see note 7) at 88–89). However, after Donald Tsang succeeded Tung as Chief Executive, Wu was subsequently appointed to the Executive Council in 2009.

20. See further pages 115–116 later in this chapter for more on which posts in the Hong Kong SAR Government constitute principal official positions.

that approval does not come from the legislature, which is not given any formal role in the appointment or removal of government officials under the Hong Kong Basic Law,<sup>21</sup> in contrast to the situation in most countries with a presidential system of government. Instead, it comes from Chinese national authorities. As a symbol of sovereignty, the Hong Kong Basic Law gives the Central People's Government the formal power to appoint and remove these principal officials, although only on the basis of nominations by the Chief Executive (Article 48(5)). In keeping with its initial policy of self-restraint, all the available evidence suggests that the Central People's Government initially endorsed whatever names were put forward by the Chief Executive in the years immediately after 1 July 1997, even in the case of nominees who were not necessarily Beijing's preferred candidates.<sup>22</sup> However, in more recent years, that appears to have changed with at least two reports of the Central Government rejecting names put forward by the Chief Executive for principal official positions.<sup>23</sup>

An exception is also made for the appointment of judges, in the interests of protecting judicial independence. Although formally appointed by the Chief Executive (Article 48(6)), in this case he or she is normally expected to follow the recommendations of an independent commission consisting primarily of judges and lawyers (Article 88),<sup>24</sup> so denying the free hand that the Chief Executive exercises over most other appointments.<sup>25</sup> In the case of a few senior judges,<sup>26</sup> approval is also required from the Legislative Council and their appointment or removal must be reported to the National People's Congress Standing Committee for the record. However, neither body has so far used this to interfere in the choice of judges for such posts.<sup>27</sup>

Policy formulation is, under the Hong Kong Basic Law, meant to be the exclusive preserve of the executive branch of the government (Articles 48(4) and 62(1))—another example of the Chief Executive's extensive powers. The Legislative Council's official remit on policy matters is limited to receiving and debating the Chief Executive's annual address (Article 73(4)), which sets out in broad terms the executive's policy agenda for the coming year. Legislators are even prohibited from introducing any bills relating

21. Although, in practice, the Legislative Council has used its power to "debate any issue concerning public interests", under Article 73(6) of the Hong Kong Basic Law, to debate motions of no confidence in government officials which, if passed, may leave them with little practical choice but to resign.
22. See further note 109 in Chapter 4.
23. See further note 110 in Chapter 4.
24. This is known as the Judicial Officers Recommendation Commission. See further note 63 in Chapter 6 and the accompanying text.
25. It may, however, be possible for the Chief Executive to reject the recommendations of this commission in certain circumstances. See further notes 71 and 73 in Chapter 6 and the accompanying text.
26. These are judges on the Court of Final Appeal and the Chief Judge of the High Court (Article 90(2)).
27. In addition, there is some dispute about the circumstances in which the Legislative Council is entitled to refuse to approve a judicial appointment. See further note 65 in Chapter 6.

to government policies without the Chief Executive's written consent (Article 74), a sweeping restriction that has largely put a stop to the private members' bills that played such an important role in influencing the policy agenda in the final years of British rule.<sup>28</sup>

In practice, legislators are often not informed of the details of new government policies until the day they are publicly unveiled—and sometimes not even then, as the executive increasingly skips the formality of briefing legislators in favour of simply announcing policies directly to the public through a press conference. In the past, it was not uncommon for political journalists with good contacts in the executive to have more advance notice of new government policies than Legislative, or even Executive, Councillors.<sup>29</sup>

Even after a policy has been announced, the executive authorities led by the Chief Executive will sometimes try to avoid any need to seek approval from the Legislative Council. Some policies are implemented without any new legislation, or using the executive's powers under existing laws. Even when new legislation is required, the executive may prefer to use a lower-level form of law known as subsidiary legislation which is not subject to such extensive scrutiny by the Legislative Council. One extreme example of this came with the introduction of the Principal Officials Accountability System. This was a fundamental change in the structure of the Hong Kong SAR Government, which is discussed in more detail later in this chapter.<sup>30</sup> Critics said such a fundamental change should have required at least primary legislation, and possibly even an amendment to the Hong Kong Basic Law. Instead, it was implemented through subsidiary legislation, with the Hong Kong SAR Government explicitly stating that there is no requirement for policy decisions of the Chief Executive, however important, to be formally implemented through primary legislation.<sup>31</sup>

As a result, even major policies are sometimes implemented by the executive without being fully debated in the Legislative Council. That includes, for example, the Link REIT privatization of car parks and shopping malls owned by the Housing Authority in 2004–05, which prompted an unsuccessful action for judicial review.<sup>32</sup> In 2015, the executive also tried to avoid legislative scrutiny of plans to build a third runway at the Hong Kong International Airport, by announcing that the project would be instead funded primarily through ways which do not require Legislative Council approval, including a higher levy on passengers using the airport.<sup>33</sup>

28. See further note 279 later in this chapter.
29. Based on the author's personal experience as a political journalist at the *South China Morning Post* from 1990 to 2001.
30. See further "5.4: Hong Kong SAR Government".
31. Secretary for Justice Elsie Leung, "Speech on Legal Aspects of the Accountability System at LegCo Motion Debate on the Accountability System", Legislative Council, 30 May 2002. See further note 155 later in this chapter.
32. *Lo Siu Lan v Hong Kong Housing Authority* (2005) 8 HKCFAR 363. See further pages 187–188.
33. Ernest Kao and Joyce Ng, "Legco left out in cold under third runway funding plan", *South China Morning Post*, 18 March 2015.

The Chief Executive cannot make primary legislation,<sup>34</sup> a constraint on the powers of the executive. But the Chief Executive exercises extensive influence over the legislative process. Shiu (2010) notes that the Chief Executive “is able to lead and control legislation” in most areas, and describes this as one of the main differences between the system of government in Hong Kong and that in the US.<sup>35</sup> When new legislation is required, in most cases it can only be introduced by the Hong Kong SAR Government since, as mentioned earlier, the Hong Kong Basic Law imposes sweeping restrictions on private members’ bills (Article 74). Once in the Legislative Council, it enjoys priority over non-government bills (Article 72(2)) and benefits from a simpler voting procedure designed to maximize the prospects for passing any government bills.<sup>36</sup>

If the Legislative Council nonetheless refuses to pass the government’s annual budget or any other important bill,<sup>37</sup> the Chief Executive can dissolve the legislature and call fresh elections in the hope these will return a more cooperative Legislative Council (Article 50(1)). But this is a power which has to be exercised with care. For a start, it can only be used once during the Chief Executive’s five-year term of office (Article 50(2)). At a more practical level, if the Chief Executive is unpopular with the Hong Kong public, it runs the risk of returning a new Legislative Council with an even greater number of government opponents.<sup>38</sup> If that new legislature still refuses to pass the government’s budget or important bill then, in order to break the impasse, the Hong Kong Basic Law requires the Chief Executive to resign (Article 52(3)).

Other important powers conferred on the Chief Executive under the Hong Kong Basic Law include the power to sign bills (Article 48(3)). No bill can become law until it is signed by the Chief Executive. In the unlikely event that the Legislative Council passes a bill which the Chief Executive disapproves,<sup>39</sup> he or she has the power to refuse to sign

34. See further notes 58–64 later in this chapter and the accompanying text.

35. Shiu, “Executive Legislative Relations Under the Basic Law” (see note 11) at 273. This refers, especially, to the fact that in the US it is members of the legislature, not the executive, who usually initiate new bills.

36. Under Annex II(II) of the Hong Kong Basic Law, bills introduced by the government only require the support of a simple majority of legislators in order to be passed. However bills not introduced by the government must secure majority support under a more complicated “split voting system”, requiring two separate majorities from different groups of legislators. See further note 226 later in this chapter, and the accompanying text.

37. The term “important” is not defined in the Hong Kong Basic Law. However, the Hong Kong SAR Government argues that it is up to the Chief Executive to decide whether any particular bill falls into this category. See *Legislative Council Panel on Constitutional Affairs, Article 50 of the Basic Law* (July 2005) at para. 10.

38. However, Benny Tai [in “The Development of Constitutionalism in Hong Kong” in Raymond Wacks (ed.), *The New Legal Order in Hong Kong* (Hong Kong University Press, 1999) at 91] argues that the threat of a dissolution may be enough to persuade legislators to change their minds and enact the bill in question.

39. This is unlikely to arise in practice because, under Article 74, no bill relating to government policies can be introduced into the Legislative Council without the Chief Executive’s consent. Only if a bill was amended during the course of its passage through the Legislative

it into law on the grounds that it “is not compatible with the overall interests” of Hong Kong (Article 49). The Chief Executive can even dissolve the Legislative Council and call fresh elections if it persists in passing the bill again by a two-thirds majority (Article 50(1)). Once again, this could ultimately lead to the Chief Executive being forced to resign, if the new Legislative Council persists in passing the bill yet again by a two-thirds majority (Article 52(2)). However, this situation is even more unlikely to arise in practice, since the Chief Executive can always back down at any stage and agree to sign the bill.

Like many presidents in countries with a presidential system of government, the Chief Executive exercises a limited judicial power—being empowered to pardon or commute the sentences of criminal offenders (Article 48(12)). Any other sentencing matters must be left to the courts, as was made clear in the case of *Yau Kwong Man v Secretary for Security*,<sup>40</sup> when the Court of First Instance struck down a statutory provision that sought to give the Chief Executive the power to determine minimum sentences for a limited category of prisoners.<sup>41</sup> In that case, the court held that this was not a power given to the Chief Executive under the Hong Kong Basic Law.

Most of these powers granted to the Chief Executive under the Hong Kong Basic Law are directly copied from those previously exercised by British Governors during colonial rule. In fact, British Governors exercised even more sweeping powers prior to 1 July 1997. These have even been compared to the absolute power wielded by Kings and Queens of England in ancient times, before the advent of parliamentary democracy in Britain.<sup>42</sup>

It was during the earlier decades of British rule that the term “executive-led government” most closely described Hong Kong’s political system. Under the Hong Kong Letters Patent, the main constitutional document during the colonial era,<sup>43</sup> the Governor was, in theory, the Chief Executive and legislature rolled into one. Although Hong Kong’s

Council into a form with which the Chief Executive disapproves might the situation arise. Even then, providing it was a government bill, the Chief Executive could simply choose to withdraw it instead of allowing the bill to be passed.

40. [2002] 3 HKC 457.

41. Section 67C of the Criminal Procedure Ordinance (Cap. 221), which purported to give the Chief Executive the power to specify a minimum sentence for prisoners detained at “executive discretion”. This is a term originally known as “at Her Majesty’s Pleasure”, which was used for children under 18 convicted of murder before 1993, when the law was changed to provide for mandatory life sentences for all murderers, whatever their age.

42. Norman Miners, *The Government and Politics of Hong Kong* (Oxford University Press, 5th edition, 1998) at 69.

43. The Hong Kong Letters Patent 1917–1995, a short document consisting of only 21 articles, was supplemented by a second constitutional document known as the Hong Kong Royal Instructions 1917–1993, which set out in more detail the rules on the functioning of the executive and legislature during the colonial era. For more on the difference between these two documents, see Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (Longman Asia, 2nd edition, 1994) at 42–46.



## Chapter 7

# Interpretation and Amendment

How the Hong Kong Basic Law is interpreted, or most crucially, who interprets the Hong Kong Basic Law, has been one of the most consistently controversial issues, from its drafting back in the 1980s through to today. The article on interpretation, which ultimately became Article 158 in the final draft of the Hong Kong Basic Law, was the subject of more argument than almost any other during the drafting process.<sup>1</sup> Issues involving interpretation of the Hong Kong Basic Law have been at the heart of some of the major controversies that have erupted in recent years, from the repeated disputes over who has the right to live in Hong Kong to the long-running arguments over how to change Hong Kong's electoral system.

One reason why the issue has proved so controversial is that interpretation affects every aspect of the Hong Kong Basic Law. Few, if any, laws are written in language that is clear enough to cover every possible situation which may arise after their enactment. That is especially true of constitutional instruments such as the Hong Kong Basic Law, which state general principles covering a wide range of issues. "Gaps and ambiguities are bound to arise", as Hong Kong's Court of Final Appeal stated in the seminal case of *Ng Ka Ling v Director of Immigration*.<sup>2</sup> When such ambiguities arise, how they are resolved can determine the meaning of any part of the Hong Kong Basic Law including, for instance, how far the apparently generous provisions on human rights really protect fundamental freedoms in Hong Kong.

Another reason why interpretation has proved so controversial is that it is one of the very few areas where there is some interface between the two different legal systems that exist in Hong Kong and the rest of China, and which most other provisions in the Hong Kong Basic Law seek to keep separate from one another. In contrast to so many other issues covered by the Hong Kong Basic Law, interpretation is not the exclusive responsibility of either Hong Kong or mainland Chinese authorities. Instead, it is a power shared by institutions in Hong Kong and the mainland—although, as we will see, not necessarily equally.

1. For a flavour of these arguments, see an account by one of the key participants in Martin Lee, "A Tale of Two Articles", in Peter Wesley-Smith and Albert Chen (eds.), *The Basic Law and Hong Kong's Future* (Butterworths, 1988) at 309–325.
2. (1999) 2 HKCFAR 4, 28.

Given the huge differences that still exist between these two systems, it should be no surprise that this sometimes leads to conflict. As then Secretary for Justice Elsie Leung once noted in a moment of candour: "It is unavoidable that the Mainland organs and legal sectors and the local institutions and legal sectors will sometimes have different interpretations of the provisions of the Basic Law."<sup>3</sup> Given that reality, perhaps the biggest surprise is not that there have been some conflicts over how to interpret the Hong Kong Basic Law since 1997. Instead, it is that such conflicts have so far been confined to a handful of occasions.

Who interprets the Hong Kong Basic Law was one of the few important issues not mentioned in the 1984 Joint Declaration, the Sino-British agreement that went into exhaustive detail about most other aspects of Hong Kong's future after 1997.<sup>4</sup> That omission, which subsequently became a cause of frustration to some lawyers in Hong Kong,<sup>5</sup> is perhaps symptomatic of the lack of understanding in some quarters of the very different way in which laws are interpreted under the Chinese legal system.

For many lawyers in Hong Kong, it initially seemed guarantee enough that the Joint Declaration provided for the continuation of the common law system in Hong Kong after 1 July 1997, and the creation of a Court of Final Appeal with the power to finally decide all cases that fall within its jurisdiction. Under the common law system, it is only the courts which can interpret legislation and, in most circumstances, only when deciding court cases. Ghai (2007) notes that this "might have given at least the Hong Kong public the impression that the final power to interpret the Basic Law would be with the Hong Kong courts" after 1997.<sup>6</sup>

But it soon became clear that this overlooked the very different system that applies in the rest of China, where interpretation of legislation is not necessarily linked to deciding court cases. In China, most courts lack the power to issue authoritative interpretations of legislation.<sup>7</sup> Even the one exception, the Supreme People's Court, issues many of its interpretations outside court cases and in a form unrecognizable to most common law lawyers.<sup>8</sup>

3. Secretary for Justice Elsie Leung, "Statement on the Term of the New Chief Executive", Press Conference, 12 March 2005, at para. 15.
4. See further "2.2: Sino-British Joint Declaration" in Chapter 2.
5. See, for instance, Martin Lee's complaint that the issue "should have been settled between the Chinese and British Governments during their negotiations over Hong Kong in 1984" in Lee, "A Tale of Two Articles" (see note 1) at 323.
6. Yash Ghai, "The Political Economy of Interpretation" in Hualing Fu, Lison Harris and Simon N.M. Young (eds.), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan, 2007) at 128.
7. This was explicitly stated by the Supreme People's Court in "A Reply From the Supreme People's Court that Local Courts at Various Levels Shall Not Make Judicial Interpretations" (31 March 1987), cited by Chen Jianfu, *Chinese Law: Context and Transformation* (Martinus Nijhoff, 2008) at 201.
8. Some of these "interpretations" are longer than the original text of the law they purport to interpret. For example, a 200-article "interpretation" of the 156-article long PRC General Principles of the Civil Law, was issued by the Supreme People's Court in April 1988. See Chen Jianfu (2008) at 200.

Under the Chinese legal system, it is the body that enacts a particular piece of legislation, or a representative of that body, which has the power to issue binding interpretations explaining the meaning of that legislation in an authoritative manner,<sup>9</sup> with the emphasis overwhelmingly on reflecting the intention behind the law, sometimes even to the extent of defying the plain meaning of its wording. Mason (2011) summarizes the Chinese system of interpretation as one which holds that "the institution which best understands what the legislative intention was, is the institution which enacted the law".<sup>10</sup>

In the case of laws passed by the National People's Congress, including the Hong Kong Basic Law, the representative body of the National People's Congress responsible for interpreting these laws is its Standing Committee. Article 67(4) of the PRC Constitution 1982 specifically tasks the Standing Committee with responsibility for interpreting all laws passed by the National People's Congress and its Standing Committee.

That led to some bitter battles during the drafting of the Hong Kong Basic Law about how to resolve the conflict between the Hong Kong and mainland legal systems over which body would be responsible for interpreting the Hong Kong Basic Law, including warnings by some mainland drafters that the Hong Kong courts might "get it wrong" if they were given an unrestricted power to interpret the Hong Kong Basic Law.<sup>11</sup> These battles were made more intense by the fact that the two bodies involved, the Hong Kong courts and the National People's Congress Standing Committee, could hardly be more different from one another. On the one hand, the Hong Kong courts, which are responsible for interpretation under the common law system, function independently of the government and are not supposed to take political considerations into account. On the other hand, the Standing Committee, which is responsible for interpretation under the Chinese legal system, is a legislative body that is part of China's political structure and functions in a manner far removed from a court. Although officially elected by the full National People's Congress, in reality its membership list is approved beforehand at a high level within the Chinese Communist Party by its Central Committee.<sup>12</sup> As a result, Ghai (2000) concludes that the Standing Committee is "correctly perceived to be a political body under the control of the Central Government and the Communist Party".<sup>13</sup>

The eventual solution, which was portrayed as a compromise by mainland drafters at the time,<sup>14</sup> was Article 158, the sole article in the Hong Kong Basic Law on the issue of

9. See Joseph Y.S. Cheng, "The Constitutional Relationship between the Central Government and the Future Hong Kong Special Administrative Region Government" (1988) 20 *Case Western Reserve Journal of International Law* 65, 79.
10. Sir Anthony Mason, "The Rule of Law in the Shadow of the Giant: The Hong Kong Experience" (2011) 33 *Sydney Law Review* 623, 629.
11. Lee, "A Tale of Two Articles" (see note 1) at 315-317.
12. John Burns, "China's Nomenklatura System" (1987) 36(5) *Problems of Communism* 36, 42.
13. Yash Ghai, "Litigating the Basic Law: Jurisdiction, Interpretation and Procedure", in Johannes M.M. Chan, H.L. Fu, and Yash Ghai (eds.), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press, 2000) at 36.
14. See, for instance, Xiao Weiyun, *One Country, Two Systems: An Account of the Drafting of the Hong Kong Basic Law* (Peking University Press, English edition, 2001) at 173.

interpretation. Although long—at 230 words, Article 158 is among the longest provisions in the Hong Kong Basic Law—it is far from explicit on certain crucial matters. Article 158 does make clear that both systems will play some role in interpreting the Hong Kong Basic Law. But, beyond that, this highly complex<sup>15</sup> provision is itself open to competing interpretations over the precise division of responsibilities as to who interprets which parts of the Hong Kong Basic Law, and is best described as an uneasy compromise between the two legal systems.

It starts, in Article 158(1), with an unhelpfully brief statement of the Standing Committee's ultimate power to interpret the Hong Kong Basic Law. That simply reflects the general principle in relation to interpretation under the Chinese legal system stated in Article 67(4) of the PRC Constitution 1982. But there is no elaboration on when that power (which has been rarely used by the Standing Committee, even in relation to other laws)<sup>16</sup> will be exercised in practice, or whether it is subject to any restrictions, especially in the context of the overall framework for "one country, two systems" in Hong Kong.

Article 158 then goes on to delegate to the Hong Kong courts a considerable part of the Standing Committee's interpretative powers. Under Article 158(2), the courts are empowered to interpret *on their own* all provisions in the Hong Kong Basic Law that fall within Hong Kong's autonomy, without any need to consult the Standing Committee. Only in the case of the "relatively few"<sup>17</sup> provisions concerning matters outside Hong Kong's autonomy are the courts required, under Article 158(3), to consult the Standing Committee.<sup>18</sup> Even then, that only applies to cases involving a final judgment, so effectively limiting the requirement to consult the Standing Committee to a tiny number of cases heard by the Court of Final Appeal.<sup>19</sup>

What the wording of Article 158 leaves unclear is whether the delegation to the Hong Kong courts of such wide-ranging powers to interpret large parts of the Hong Kong Basic Law on their own means that, as would normally be the case in China,<sup>20</sup> the Standing Committee has chosen to give up its own power to interpret those parts of the Hong Kong Basic Law that lie within Hong Kong's autonomy, and will instead confine itself to

15. See Johannes Chan's characterization of Article 158 in "Basic Law and Constitutional Review" (2007) 37 *HKLJ* 407, 415.
16. From 1949 to 2000, there were no more than nine instances of interpretation of laws by the Standing Committee. See Albert Chen, *An Introduction to the Legal System of the People's Republic of China* (LexisNexis, 4th edition, 2011) at 155–156.
17. See Solicitor General Robert Allcock, "Application of Article 158 of the Basic Law", Constitutional Law Conference on Implementation of the Basic Law: A Comparative Perspective, 29 April 2000, at para. 11.
18. The precise definition of those categories of provisions that fall outside Hong Kong autonomy under Article 158(3) is explained on page 231.
19. See further "7.4: Judicial Referral" later in this chapter for a more detailed discussion of the circumstances when the Court of Final Appeal is required to refer an issue to the Standing Committee for interpretation under Article 158(3).
20. See further note 65 later in this chapter and the accompanying text.

interpreting the smaller number of provisions that lie outside Hong Kong's autonomy. Or whether Article 158 still gives the Standing Committee a parallel power to intervene and interpret any part of the Hong Kong Basic Law at any time, including the many provisions (such as those on human rights) on matters that lie within Hong Kong's autonomy, and which would normally be left to the Hong Kong courts to interpret.

It is this crucial ambiguity which lies at the heart of some of the major controversies over interpretation since 1997. Although now resolved as a matter of law, as we will see it still has important—and troubling—implications for the true extent of Hong Kong's autonomy under the Hong Kong Basic Law.

## 7.1 Hong Kong Courts

For all their significance, Standing Committee interpretations are rare. Instead, on the vast majority of occasions it is the Hong Kong courts which are interpreting the Hong Kong Basic Law in deciding cases, as they are authorized to do under Articles 158(2) and (3) of the Hong Kong Basic Law.

The courts take a purposive approach towards interpreting the Hong Kong Basic Law, supplemented by a generous interpretation of its human rights provisions.<sup>21</sup> The importance of adopting a purposive approach was explained by the Court of Final Appeal in its first major case involving the Hong Kong Basic Law, *Ng Ka Ling v Director of Immigration*. In that case, the court emphasized the constitutional nature of the Hong Kong Basic Law, noting that: "As is usual for constitutional instruments, it uses ample and general language. It is a living instrument intended to meet changing needs and circumstances."<sup>22</sup>

That means the "adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms".<sup>23</sup> Or to put it more simply, a purposive approach is necessary to fill in the gaps left by the lack of definition, or detail, in the Hong Kong Basic Law.

While the Court of Final Appeal has been consistent in stating the need to use a purposive approach in interpreting the Hong Kong Basic Law, it has been less consistent in how it applied that purposive approach in practice. In another case involving the interpretation of a Hong Kong statute the following year, the court described the purposive approach as a modern development of the "mischief rule in particular".<sup>24</sup> That refers to one of the oldest rules of statutory interpretation, with cases in the English courts dating back more than 400 years.<sup>25</sup> The mischief rule was the first to recognize that it is sometimes

21. *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 28–29.

22. *Ibid.* at 28.

23. *Ibid.*

24. *Medical Council of Hong Kong v Chow Siu Shek David* (2000) 3 HKCFAR 144, 153.

25. See, for example, *Heydon's Case* (1584) 3 Coke's Reports 7a, which is generally regarded as the leading statement of the mischief rule.

necessary to consider the purpose why a particular provision in a law has been enacted,<sup>26</sup> although generally only by reference to what is stated in other parts of the same law.<sup>27</sup>

The purposive approach allows the courts to go much further than the mischief rule in trying to ascertain the reasons for the enactment of a particular provision, by also considering material in other documents (which is known as “extrinsic material”). In *Ng Ka Ling*, the Court of Final Appeal explained the application of the purposive approach as follows: “[I]n ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.”<sup>28</sup>

The court made clear that such purpose could be established not just by looking at the wording of the particular provision in the Hong Kong Basic Law at issue in a case, but also by reference to “other provisions of the Basic Law or relevant extrinsic materials including the Joint Declaration”.<sup>29</sup> The same considerations could also be taken into account in considering how to interpret one provision in the Hong Kong Basic Law in the context of the wording of other provisions<sup>30</sup> (this is known as a “contextual approach”).

What the court left unclear in *Ng Ka Ling* was what comes first in its purposive approach towards interpreting the Hong Kong Basic Law: the wording of a particular provision, or the purpose behind its enactment? While both factors will often point in the same direction, it is also possible for evidence to emerge of a purpose which conflicts with the plain wording of a particular provision. This raises the question: Which of these two factors—wording or purpose—should ultimately prevail in such circumstances?

In *Ng Ka Ling*, the Court of Final Appeal appeared unsure on this point. Some parts of the judgment laid great emphasis on the importance of following the “ordinary language” of the Hong Kong Basic Law, particularly in deciding one of the most crucial issues in the case, whether children born in mainland China to a Hong Kong Chinese parent require permission from mainland authorities before they can lawfully move to Hong Kong.<sup>31</sup> But Ghai (2000) notes that other parts of the *Ng Ka Ling* judgment disregarded the “plain meaning” of the Hong Kong Basic Law,<sup>32</sup> most notably in refusing to refer

26. This was described in terms of the “mischief” at common law which the legislation was designed to remedy, so giving rise to the name “mischief rule”.
27. Particularly the statement of purpose in the Preamble to the law.
28. *Ng Ka Ling* at 28.
29. *Ibid.*
30. *Ibid.*
31. *Ibid.* at 33–35. The issue revolved around the wording of Article 22(4), which allows mainland authorities to restrict the entry into Hong Kong of “people from other parts of China”. The Court of Final Appeal decided that children born in China to a Hong Kong Chinese parent “are not, as a matter of ordinary language, people from other parts of China”, and therefore not subject to this provision. It reinforced this conclusion by reference to what it described as the purpose of the Hong Kong Basic Law in granting a high degree of autonomy to Hong Kong.
32. Yash Ghai, “Litigating the Basic Law” (see note 13) at 35.

a provision on matters outside Hong Kong’s autonomy to the Standing Committee for interpretation,<sup>33</sup> as would seem to be required by the wording of Article 158(3) of the Hong Kong Basic Law.<sup>34</sup>

The Court of Final Appeal justified its refusal to refer this provision to the Standing Committee in *Ng Ka Ling* by an extreme application of the purposive approach, in which the purpose behind Article 158(3) appeared to be accorded greater priority than its wording. That purpose was described by the court exclusively in terms of protecting Hong Kong’s high degree of autonomy, a purpose which the Court of Final Appeal believed would be undermined if it was required too frequently to refer issues of interpretation to the Standing Committee.<sup>35</sup>

But a high degree of autonomy, important though it is, is not the only purpose of the Hong Kong Basic Law. As Chen (2000) points out, in a powerful attack on this aspect of the *Ng Ka Ling* judgment, a more balanced approach might have given equal weight to another purpose of the Hong Kong Basic Law, which also allows Chinese Central Authorities “to exercise supervisory powers to ensure that the limits of autonomy are not exceeded”.<sup>36</sup> In other cases, the courts have interpreted the purpose of the Hong Kong Basic Law in very different terms. In *HKSAR v Ma Wai Kwan David*, for instance, the court described the purpose of the Hong Kong Basic Law in terms of ensuring “continuity” across 1 July 1997 to safeguard “stability and prosperity” in Hong Kong.<sup>37</sup>

That highlights the inherent problem with a wide version of the purposive approach which, at its most extreme, allows judges to decide almost whatever they want. Ghai (2000) notes that: “[C]ourts assume wide discretion when they apply the purposive rules. It is up to them to decide what the purpose of the legislation is” and the courts can even “ignore the plain meaning of the legislation if they think it is not in accordance with what they formulate as the purpose of the law”.<sup>38</sup> Such a wide formulation of the purposive approach also makes it more difficult to distinguish the common law system of interpreting legislation from that which prevails in mainland China where, as we will see shortly, an almost overwhelming emphasis is often placed on purpose (or legislative intent), even to the extent of sometimes rewriting the wording of laws to accord with such purpose.<sup>39</sup>

33. This was Article 22(4), which is described in note 31.
34. See further “7.4: Judicial Referral” later in this chapter for more on Article 158(3) and this aspect of the *Ng Ka Ling* judgment.
35. See *Ng Ka Ling* at 33, where the court held that a referral to the Standing Committee in this case “would be a substantial derogation from the Region’s autonomy and cannot be right”.
36. Albert H.Y. Chen, “The Court of Final Appeal’s Ruling in the ‘Illegal Migrant’ Children Case” in Chan, Fu and Ghai (eds.), *Hong Kong’s Constitutional Debate* (see note 13) at 133–134. For a more detailed discussion of the supervisory powers that the Hong Kong Basic Law allows Chinese Central Authorities to exercise over Hong Kong, see further “Chapter 4: A High Degree of Autonomy?”.
37. [1997] HKLRD 761, 772.
38. Yash Ghai, “Litigating the Basic Law” (see note 13 above) at 30.
39. See further note 135 later in this chapter and the accompanying text.

Clarification came two years later when the Court of Final Appeal, perhaps anxious to emphasize the difference between the Hong Kong and mainland legal systems when it comes to the interpretation of laws, subtly redefined how it applies the purposive approach in the case of *Director of Immigration v Chong Fung Yuen*.<sup>40</sup> Gone was the heavy, almost exclusive, emphasis on purpose that was evident in some parts of the *Ng Ka Ling* judgment. Ghai (2007) notes that, “in contrast to *Ng Ka Ling*” this later decision “places the primary emphasis on the language of the text”.<sup>41</sup> As the court explained in an important passage in *Chong Fung Yuen*, the purpose (or legislative intent) behind the law is only relevant in so far as it helps explain that language:

Their task is not to ascertain the intent of the lawmaker on its own. Their duty is to ascertain what was meant by the language used and to give effect to the legislative intent as expressed in the language. It is the text of the enactment which is the law and it is regarded as important both that the law should be certain and that it should be ascertainable by the citizen.<sup>42</sup>

What that means is that while the purpose behind the Hong Kong Basic Law can still be relevant in helping to understand the language of the law, once the meaning of that language is clearly established, the courts are bound to give effect to it, even if this leads to consequences which the judges would prefer to avoid. So, for instance, in *Tam Nga Yin v Director of Immigration*,<sup>43</sup> another case decided on the same day as *Chong Fung Yuen*, a majority of judges on the Court of Final Appeal reluctantly denied residency rights to children born outside Hong Kong and adopted by Hong Kong parents. This was because the majority on the court found that the only possible meaning of the wording “born outside Hong Kong of” (emphasis added) used in the relevant provision in the Hong Kong Basic Law<sup>44</sup> was that it only granted residency rights to children *born of*—rather than adopted by—Hong Kong parents.<sup>45</sup>

40. (2001) 4 HKCFAR 211.

41. Yash Ghai, “The Intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of Technique or Politics” (2007) 37 *HKLJ* 363, 386.

42. *Chong Fung Yuen* at 213.

43. (2001) 4 HKCFAR 251.

44. This is Article 24(2)(3), a provision also at issue in a different context in the earlier cases of *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 and *Chan Kam Nga v Director of Immigration* (1999) 2 HKCFAR 82, which led to the first interpretation of the Hong Kong Basic Law by the Standing Committee in June 1999 (see further notes 89–90 later in this chapter and the accompanying text). However, in *Tam Nga Yin*, the Court of Final Appeal held (at 256) that this 1999 interpretation was not relevant to the case because it did not address the issue of adopted children (see further note 180 later in this chapter).

45. *Tam Nga Yin* at 263, where the majority made clear that if the language of Article 24(2)(3) had been ambiguous, they would “lean in favour of an interpretation that adopted children are included”. Justice Bokhary dissented in this case, arguing (at 264–265) that the wording of Article 24(2)(3) was wide enough to cover adopted children. Despite losing in court, the case had a happy ending for the adopted children involved as an outpouring of public support led to a change in government policy that allowed them to stay in Hong Kong. See Chow Chung-yan, “Tears of joy as Agnes finally gets to call Hong Kong ‘home’”, *South China Morning Post*, 26 Oct 2001.

Similarly in *Chong Fung Yuen*, the court held that the only possible meaning of the clear and unambiguous language used in Article 24(2)(1) of the Hong Kong Basic Law, which states that “Chinese citizens born in Hong Kong” are entitled to permanent residency, was that this applied to all Chinese children born in Hong Kong, even if their parents had no connection with the city, and were only visiting Hong Kong to give birth.<sup>46</sup> The decision in *Chong Fung Yuen* would prove to have major social implications. Although the numbers involved were relatively small at the time of the judgment,<sup>47</sup> the court’s decision paved the way for a large influx of mainland mothers seeking to give birth in Hong Kong in subsequent years. For several years, the situation became so serious that pregnant Hong Kong mothers complained about a shortage of hospital beds,<sup>48</sup> and the situation only began to ease after the Hong Kong SAR Government imposed, in 2013, a near-total ban on mainland mothers with no connection to Hong Kong giving birth in local hospitals.<sup>49</sup>

But in holding that their task was confined to interpreting the language actually used in the Hong Kong Basic Law, what the Court of Final Appeal was essentially saying in *Chong Fung Yuen* was that it is not the task of the courts to deal with the consequences that might arise if the language used in the Hong Kong Basic Law did not accurately reflect the intention of the drafters of that document. That does not mean the intention behind a particular provision in the Hong Kong Basic Law will never be taken into account by the courts. In *Chong Fung Yuen*, the key point was that the court held there was only one possible meaning of the wording in dispute. Where the wording of a particular provision is not entirely clear, considerations of the purpose behind that provision can still assume considerable importance, and even tilt the balance in favour of adopting a less obvious interpretation of the wording in dispute.

So, for example, in *Chan Yu Nam v Secretary for Justice* the Court of Appeal dismissed a challenge to the legality of allowing companies and other organizations to vote in elections for many functional constituencies in the Legislative Council through a system known as corporate voting.<sup>50</sup> Viewed in isolation, the most obvious interpretation of Article 26 of the Hong Kong Basic Law might have tended to support this challenge. The wording of this provision only refers to certain individuals (namely Hong Kong permanent residents) having the right to vote, and does not directly state that this right can be exercised by companies or other organizations.<sup>51</sup> But, in contrast to the decision in

46. *Chong Fung Yuen* at 233, where the court held that, “[t]he meaning of the provision is not ambiguous, that is, it is not reasonably capable of sustaining competing interpretations”.

47. *Ibid.* at 226, where the court noted figures for births since 1 July 1997, which suggested the number of children involved was, at that time, around 555 per annum.

48. See, for example, Dennis Chong, “Birth pains”, *The Standard*, 15 April 2011.

49. The total ban did not apply to mainland mothers with Hong Kong husbands, who were still allowed to give birth in private hospitals in Hong Kong.

50. [2012] 3 HKC 38 An application for leave to appeal the case was subsequently dismissed by the Court of Final Appeal (unrep., FAMV 39 and 40/2011, [2012] HKEC 94). For an explanation of the corporate voting system, see further note 231 in Chapter 5 and the accompanying text.

51. However as the court noted in *Chan Yu Nam* (at 66), nor does Article 26 explicitly exclude the possibility of companies or other organizations having the right to vote. See further note 237 in Chapter 5.

*Chong Fung Yuen*, the Court of Appeal held that the wording of the provision at issue in this case was not entirely clear, and susceptible to different possible meanings.<sup>52</sup> Stressing the importance of looking at “the whole of the Basic Law” rather than any one provision in isolation, the court concluded that Article 26 should be interpreted in the context of other provisions that indirectly refer to corporate voting elsewhere in the Hong Kong Basic Law, as “part of a mosaic” allowing for the continuation of this system of voting.<sup>53</sup>

Where the wording of a particular provision in the Hong Kong Basic Law is ambiguous, extrinsic materials may still sometimes be relevant in interpreting the purpose behind that provision. In *Chan Yu Nam*, the Court of Appeal devoted a substantial part of its judgment to examining a wide range of extrinsic materials on the history of elections to the Legislative Council, including the provisions on this issue in the Joint Declaration.<sup>54</sup> That 1984 agreement with Britain was, for many years, one of the most important extrinsic materials, since the primary purpose of the Hong Kong Basic Law (as stated in its Preamble) is to implement the policies on “one country, two systems” that the Chinese government originally set out in the Joint Declaration. However, as the passage of time makes the 1984 agreement seem more remote, it would not be surprising to see the courts place less emphasis on this document, especially given China’s insistence in recent years that the Joint Declaration is no longer of any continuing relevance.<sup>55</sup>

A small portion of what was said during the enactment of the Hong Kong Basic Law may also be relevant. Put simply, if the wording of a particular provision in the Hong Kong Basic Law is open to different possible interpretations, authoritative statements during the enactment process may help to establish which of those interpretations most accurately reflects the original purpose behind the drafting of that particular provision. A parallel can be drawn with the situation in other countries where courts are often willing to consider, to a greater or lesser extent, evidence of the original intention of the drafters of a law. In England, the legal system on which the Hong Kong courts still rely most heavily for precedents, ever since the landmark decision of the House of Lords in *Pepper v Hart* the courts have been allowed to look at clear statements made in parliament by the promoter (or presenter) of a piece of legislation during the enactment process for assistance in interpreting provisions in that legislation which are unclear.<sup>56</sup> But statements by

52. *Ibid.* at 66–67.

53. *Ibid.* at 47 and 68. See, in particular, the references to “corporate bodies” in Annex I(3) and Annex II(I)(2) in the English text of the Hong Kong Basic Law. These are described in more detail in note 239 in Chapter 5.

54. *Ibid.* at 49–64. See, in particular, the court’s citing (at 51–52) of the provision in Annex I(I) of the Joint Declaration requiring the Legislative Council to be “constituted by elections”. For more on this important provision, see further note 179 in Chapter 5 and the accompanying text.

55. See pages 39–40 for more on arguments by both the Central and Hong Kong SAR Governments that seek to diminish the importance of the Joint Declaration today.

56. [1993] AC 593, 640.

anyone else, or any other discussion that took place during the process of enacting the law, are strictly irrelevant as far as the English courts are concerned.<sup>57</sup>

In Hong Kong, the courts appear to adopt a broadly similar approach as far as the Hong Kong Basic Law is concerned. In *Chong Fung Yuen*, the Court of Final Appeal explicitly included, in the permissible extrinsic materials to which the courts are allowed to refer, a lengthy statement made by Basic Law Drafting Committee Chairman Ji Pengfei in presenting the Hong Kong Basic Law to the National People’s Congress shortly before its enactment in 1990.<sup>58</sup> Titled an “Explanation” of the Hong Kong Basic Law and related documents, this speech arguably performs a broadly similar role in relation to the Hong Kong Basic Law as the statements made to the UK Parliament to which the English courts are allowed to refer under the principle laid down by the House of Lords in *Pepper v Hart*.<sup>59</sup>

But the Ji Pengfei speech only represents a tiny fraction of what was stated by members of the Basic Law Drafting Committee during the lengthy process of writing the Hong Kong Basic Law. In common with their English counterparts, the Hong Kong courts have so far proved reluctant to open the floodgates to detailed examination of the mass of material that accumulates during the drafting of any law. That is because to admit such a large quantity of extrinsic material would inevitably detract from the primary focus that the courts have, at least since the *Chong Fung Yuen* case, placed on the actual language used in the Hong Kong Basic Law, and the need that the meaning of any particular provision “should be certain and that it should be ascertainable” from its wording.<sup>60</sup>

As the Court of First Instance noted in *Cheng Kar Shun v Li Fung Ying*, expressing reservations about an unsuccessful argument based around a detailed analysis of the drafting history of the Hong Kong Basic Law: “[I]f the true interpretation of the law can only be ascertained after a lengthy examination and reconstruction of the drafting history as well as the lawmaker’s thinking process, it is difficult to see how the law is certain and ascertainable to the citizen.”<sup>61</sup>

Such reservations become even stronger when the materials presented to the court were written after the drafting of the Hong Kong Basic Law had been completed. In

57. For a useful summary of the conditions laid down by the House of Lords in *Pepper v Hart* and their subsequent application in other English cases, see Simon N.M. Young, “Legislative History, Original Intent and the Interpretation of the Basic Law” in Fu, Harris and Young (eds.), *Interpreting Hong Kong’s Basic Law* (see note 6) at 19–23.

58. (2001) 4 HKCFAR 211, 224.

59. Young (see note 57) describes (at 25) this as a “literal” application of the *Pepper v Hart* criteria to the Hong Kong Basic Law. But, noting the important role in drafting the Hong Kong Basic Law that was played by sub-groups of the Basic Law Drafting Committee, he argues in favour of a broader approach that would also allow the courts to refer to documents of these sub-groups.

60. *Chong Fung Yuen* at 223.

61. *Cheng Kar Shun v Li Fung Ying* [2011] 2 HKLRD 555, 603. For more on this case, see further notes 296–297 in Chapter 5 and the accompanying text.

*Chong Fung Yuen*, the Court of Final Appeal cautioned that there was a particular need to be “prudent” in considering such documents because “under a common law system which includes a separation of powers, the interpretation of laws once enacted is a matter for the courts”.<sup>62</sup>

That is not the case under the Chinese legal system, where most courts lack the power to issue authoritative interpretations of laws. Mason (2006), one of the judges in the *Chong Fung Yuen* case, notes that the court’s primary focus on the language used in the Hong Kong Basic Law stands “in contrast to other systems which may place more weight on the way in which the instrument came into existence or on post-enactment materials”.<sup>63</sup>

## 7.2 Standing Committee

The issue of interpretation led to bitter arguments during the drafting of the Hong Kong Basic Law.<sup>64</sup> After that, controversy over this issue initially faded away. Amid all the other battles in the run-up to 1997 over issues such as elections to the Legislative Council, concern about the potential impact of the Standing Committee’s power of interpretation on Hong Kong’s legal system was largely relegated to the sidelines. That was especially so since many assumed that the way in which the final draft of the Hong Kong Basic Law was written restricted the Standing Committee’s interpretative powers to a relatively small part of the Hong Kong Basic Law, and severely limited the circumstances under which such a power could be exercised.

As we have already seen, under Article 158(2), the Standing Committee delegated to the Hong Kong courts the important power to interpret on their own all provisions in the Hong Kong Basic Law that fall within Hong Kong’s autonomy. Ling (2007) notes that the normal position in China is that when one body delegates a power to another body, then the body which originally possessed that power will no longer exercise that power themselves.<sup>65</sup> Many such examples can be found scattered throughout the Hong Kong Basic Law.<sup>66</sup> This suggests that once the Standing Committee delegated such

62. *Chong Fung Yuen* at 223. As a result, the court refused (at 233) to follow an opinion issued in 1996 (see note 138) by the Preparatory Committee, a body established by the NPC Standing Committee to prepare for the establishment of the Hong Kong SAR. This opinion advocated denying residency rights to the category of children at issue in this case.

63. Sir Anthony Mason, “The Role of the Common Law in Hong Kong” in Jessica Young and Rebecca Lee (eds.), *The Common Law Lecture Series 2005* (Faculty of Law, University of Hong Kong, 2006) at 12.

64. See further “2.4: Battles and Changes” in Chapter 2.

65. Ling Bing, “Subject Matter Limitation on the NPCSC’s Power to Interpret the Basic Law” 37 *HKLJ* 619, 633–639.

66. For example, the delegation by the Central People’s Government to the Hong Kong SAR Government of the authority to issue Hong Kong SAR passports under Article 154(1) means that the Central People’s Government has never, so far, exercised the power to issue such passports itself.

wide-ranging interpretative powers to the Hong Kong courts under Article 158(2), it was no longer able to interpret those same provisions, which concern matters that fall within Hong Kong’s autonomy and constitute the vast majority of the provisions in the Hong Kong Basic Law. This is often described as a *subject-matter limitation* on the Standing Committee’s power to interpret the Hong Kong Basic Law, and there is strong evidence to suggest it was the original intention of the drafters of the Hong Kong Basic Law to impose such a limitation on the Standing Committee.<sup>67</sup> For instance, the existence of such a subject-matter limitation which would prevent the Standing Committee from interpreting those provisions in the Hong Kong Basic Law that fall within Hong Kong’s autonomy was explicitly mentioned in a 1989 report from the sub-group of the Basic Law Drafting Committee responsible for writing the final version of Article 158.<sup>68</sup>

The existence of such a subject-matter limitation is crucial because it would limit the Standing Committee’s role in interpreting the Hong Kong Basic Law to the much smaller number of provisions in the Hong Kong Basic Law that concern issues which are outside Hong Kong’s autonomy. These are more precisely defined in Article 158(3) as provisions concerning:

- (1) Affairs which are the responsibility of the Central People’s Government; or
- (2) The relationship between the Central Authorities and Hong Kong.

These two categories are known as “excluded provisions”,<sup>69</sup> because they are the only parts of the Hong Kong Basic Law which the Court of Final Appeal is excluded from always interpreting entirely by itself.

Even when it comes to these two categories of excluded provisions, which would only seem to cover relatively few articles in the Hong Kong Basic Law, the Standing Committee’s role initially seemed to be limited. Under Article 158(3), the Court of Final Appeal is assigned an important gatekeeper role in deciding when issues which arise during court cases involving excluded provisions must be referred to the Standing Committee for interpretation. In *Ng Ka Ling*, the court emphasized that “it is for the Court of Final Appeal and for it alone to decide”<sup>70</sup> when such a referral is necessary. Since, under the common law system, interpretation of laws only occurs during court cases, this seemed to suggest that, even in these two limited categories of excluded provisions, there is a *procedural limitation* on the Standing Committee’s power to interpret the Hong Kong Basic Law. This procedural limitation is that the Standing Committee cannot

67. See the detailed analysis of the drafting history of Article 158 in Ling, “Subject Matter Limitation” (see note 65) at 625–633.

68. *Report by the Subgroup on the Relationship Between the Central Authorities and the HKSAR on the Amendment of Articles* (Basic Law Drafting Committee Secretariat, 1989) cited in Ling, “Subject Matter Limitation” (see note 65) at 631. See further Ling’s analysis of the significance of the wording used in this report at 631–632.

69. *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 30.

70. *Ibid.* at 31.

simply decide to interpret the Hong Kong Basic Law on its own initiative. Instead, it has to wait for a referral from the Court of Final Appeal before it can interpret any particular provision in the Hong Kong Basic Law, a referral that the “predominant provision test”<sup>71</sup> formulated by the court in *Ng Ka Ling* suggested would be an extremely rare event.

But that conclusion ignores the reality that under the Chinese legal system, interpretation of laws is not necessarily linked to court cases, and often occurs quite independently of any specific case.<sup>72</sup> Thus, if the Standing Committee simply follows the same system that it applies to interpreting other laws in China, there is no need to wait for a referral by the Court of Final Appeal, or for any court case at all.<sup>73</sup> In any case, the Court of Final Appeal’s arguably over-zealous assertion of its gatekeeper role in *Ng Ka Ling* quickly triggered a chain of events which swept away any possibility of legal limits on the extent of the Standing Committee’s powers to interpret the Hong Kong Basic Law.

Fearing that the decision in *Ng Ka Ling* and the closely related case of *Chan Kam Nga v Director of Immigration*,<sup>74</sup> which was also decided on the same day, opened the floodgates to an uncontrollable influx of more than one million children born on the mainland to Hong Kong parents,<sup>75</sup> the Hong Kong SAR Government looked for ways to reverse the effects of the court’s judgments in these cases.<sup>76</sup> The Court of Final Appeal had invalidated provisions in the Immigration Ordinance (Cap. 115) which restricted the number of such children who were entitled to permanent residency rights,<sup>77</sup> and made

71. *Ibid.* at 33. For more on this aspect of the *Ng Ka Ling* judgment, and criticism of it, see further notes 208–214 later in this chapter and the accompanying text.

72. For an excellent analysis of interpretations of other laws issued by the Standing Committee, see Yang Xiaonan “Legislative Interpretations by the Standing Committee of the National People’s Congress in China” (2008) 38 *HKLJ* 255–285.

73. That conclusion is supported by Yash Ghai (in *Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and The Basic Law* (Hong Kong University Press, 2nd edition, 1999) at 198) where he states that the Standing Committee’s “power may be exercised in the absence of litigation” (cited with approval in *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, 324).

74. (1999) 2 HKCFAR 82.

75. It was estimated that 692,000 children would immediately acquire the right to live in Hong Kong as a result of these judgments, followed by a further 983,000 children seven years later. See Hong Kong SAR Government, “Estimates of the Number of Mainlanders with Right of Abode” (6 May 1999), reproduced in Chan, Fu and Ghai (eds.), *Hong Kong’s Constitutional Debate* (see note 13) at 265.

76. See Hong Kong SAR Government, “Right of Abode: The Solution” (18 May 1999), reproduced in Chan, Fu and Ghai (eds.) at 310–319.

77. In *Chan Kam Nga*, the court invalidated what was known as the “time of birth” restriction, by holding (at 92–93) that the wording in Schedule 1, paragraph 2(c) of the ordinance restricting such rights to those children with a parent who was already a Hong Kong permanent resident “at the time of the birth” of the child was inconsistent with Article 24(2)(3) of the Hong Kong Basic Law. In *Ng Ka Ling* (at 40–43), the court reached a similar conclusion in respect of a provision in Schedule 1, paragraph 1(2)(b) preventing illegitimate children with a Hong Kong father from claiming the right of abode.

it more difficult for even those who were entitled to such residency rights to enter Hong Kong.<sup>78</sup> The court reached this decision on the basis that these provisions contravened its interpretation of Articles 22(4) and 24(2)(3) of the Hong Kong Basic Law. This meant the Hong Kong SAR Government could not solve the problem by simply proposing further legislation in Hong Kong to reintroduce similar restrictions, since that would again run foul of the court’s interpretation of Articles 22(4) and 24(2)(3). Instead, the only way to prevent any possibility of a mass influx, which was portrayed by the Hong Kong SAR Government as having unacceptable social and economic consequences for Hong Kong,<sup>79</sup> was to displace the court’s interpretation of the relevant provisions in the Hong Kong Basic Law.

Where similar situations have arisen elsewhere in the common law world, with governments struggling to cope with the effects of court judgments which were perceived as leading to intolerable social and economic consequences, the usual response has been to pass new legislation or amend the wording of the law in question so that it no longer allows for such unacceptable consequences. That need not undermine the authority of the court which delivered the original judgment, since the court will still be seen to have correctly interpreted the wording of the law as it stood at the time the case was decided. Changing the law after a court judgment simply recognizes that a sovereign legislature generally has the power to pass new legislation or amend the wording of existing legislation, and the courts will then follow this new legislation or wording in subsequent cases.<sup>80</sup> In Britain, for instance, the government famously reacted to a court defeat that laid it open to large compensation claims in the case of *Burmah Oil v Lord Advocate* by successfully persuading the UK Parliament to enact fresh legislation removing any liability for such claims.<sup>81</sup>

Adopting the same response to the *Ng Ka Ling* judgment would have meant amending the wording of the Hong Kong Basic Law to prevent uncontrolled entry of mainland-born

78. In *Ng Ka Ling*, the court invalidated what was known as the “one-way permit” restriction by holding (at 33–37) that provisions requiring most such children to obtain a one-way permit from mainland authorities before they were allowed to reside in Hong Kong (added by the Immigration (Amendment)(No. 3) Ordinance (No. 124 of 1997), which was rushed through the Provisional Legislature on 10 July 1997 to try to prevent a mass influx of these children) could not be justified by reference to Article 22(4) of the Hong Kong Basic Law. The court held that Article 22(4) did not apply to this category of children. See further note 31 earlier in this chapter.

79. See Hong Kong SAR Government, “Assessment of Service Implication in Relation to the Judgment of the Court of Final Appeal on the Right of Abode Issue Tabled at the Legislative Council” (6 May 1999), reproduced in Chan, Fu and Ghai (eds.), *Hong Kong’s Constitutional Debate* (see note 13) at 274–283.

80. See further on this point Chan, “Basic Law and Constitutional Review” (see note 15) at 417.

81. [1965] AC 75. Following the House of Lords decision that the British government was required by law to pay compensation for damage inflicted by British forces during World War II, the UK Parliament enacted the War Damage Act 1965 changing the law so that no compensation payments were necessary.