CHAPTER 1

HONG KONG LAW IN GLOBAL PERSPECTIVE

1. Introduction

This introductory chapter provides a foundation for the study of law in Hong Kong, the only common law jurisdiction in East Asia, in a global context. It is organised as follows. The second section familiarises the reader with the distinctive features of Hong Kong law. The third explores the common law tradition from which this legal system unquestionably derives. It also compares and contrasts the common law with civilian law (also known as "civil law"), the other world leading legal tradition. The fourth section describes the various ways to classify law. The fifth and the last section sums up the chapter's main points. 1.001

2. The Uniqueness of Hong Kong Law

Founded as a British Crown Colony in 1843 and converted to a Chinese Special Administrative Region in 1997, modern day Hong Kong combines a densely populated international financial centre with large swaths of sparsely inhabited rural countryside in its hinterlands, peninsulas and 263 islands, spanning a total land area of 1,104.43 km^2 and a further sea area of 1,650.60 km^2. Bordering the northern end of the South China Sea and situated on the south-eastern tip of the Pearl River Delta, Hong Kong had a population of about 7.2 million as of 2013, comparable to that of Switzerland. Whilst the vast majority is of ethnic Chinese descent, hundreds of thousands of residents belong to the gamut of ethnicities hailing from every inhabited continent. 1.002

Established in 1843 as a stand-alone jurisdiction separate from England and Wales, the Hong Kong legal system predates those currently in force in mainland China,[1] Japan,[2] the Koreas,[3] Macau,[4] Mongolia[5] and Taiwan,[6] and it is the oldest continuously functioning legal system in East Asia. Save for a brief interruption of three years and eight months, when the Japanese occupied Hong Kong (1941–1945),[7] the same legal system has held sway in the territory over the course of no less than 170 years, even 1.003

---

1 The legal system of the People's Republic of China was originally established in 1949 but underwent destruction during the Cultural Revolution (1966–1976). It was not re-established until the late 1970s.

2 The modern Japanese legal system emerged after the Meiji Restoration, which started in 1868.

3 The "fourteen reforms" declared by the Chosun dynasty in 1895 signified the emergence of modern Korean law. See SH Kim, "The Democratization and Internationalization of the Korean Legal Field", in Y Dezalay and BG Garth (eds), *Lawyers and the Rule of Law in an Era of Globalization* (Routledge, 2011).

4 Despite Portuguese presence since 1553, Portugal's sovereignty over Macau was asserted only in 1845. It was only after the Luso-Chinese Treaty of Friendship and Trade of 1887 that a legal system modelled after Portuguese law began to develop. Macau's Legislative Assembly was established in 1920, and its competence to legislate locally was confirmed in 1976 with the enactment of art.2 of the *Estatuto Orgânico de Macau* (Organic Statute of Macau). The *Lei de Bases da Organizacao Judiciaria* (Law of the Basic Organisation of the Judiciary) 1991 finally marked the establishment of a Macau legal system separate from the Judicial District of Lisbon. See, for example, Z Hao, *Macau History and Society* (Hong Kong University Press, 2011).

5 Modern Mongolian law first emerged when Mongolia became independent in 1911. Mongolia, with its legal system, came under Communist control in 1921. In 1992, it transitioned into an independent representative democracy in 1992. See, for example, T Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003).

6 The current legal system in force in Taiwan originated from that of the Republic of China, first established in 1912 after the fall of the Qing Empire.

7 The British Hong Kong legal system operated on a limited basis even during Japanese occupation. See A Birch, "Confinement and Constitutional Conflict in Occupied Hong Kong 1941-45" (1973) 3 HKLJ 293.

after the resumption of sovereignty in 1997 by the People's Republic of China, which operates a system of law based on Socialist and civilian law principles.[8]

1.004 The predominance of the common law in Hong Kong entails that its legal system shares few of the Continental European civilian law principles and practices of all nearby jurisdictions.[9] This means, unsurprisingly, that its legal system has been, both before and after the 1 July 1997 Handover, incomprehensible in many ways to jurists and officials from China, who are inured to very different juridical traditions, ways of legal interpretation, and configurations of law and politics.[10]

1.005 The Basic Law of the Hong Kong Special Administrative Region[11] was promulgated by the National People's Congress on 4 April 1990, to codify the promises of the People's Republic of China to conserve the pre-existing institutions and way of life of Hong Kong. It is no ordinary legal document but an offshoot of the Sino-British Joint Declaration of 1984,[12] a United Nations-registered, binding international treaty brought forth by two veto-wielding members of the Security Council.

1.006 Also extraordinary is the Court of Final Appeal that wields the nascent Special Administrative Region's independent judicial power of final adjudication. It is a cosmopolitan court not limited to local jurists but inclusive of sitting or retired justices of the Supreme Court of the United Kingdom, the Judicial Committee of the Privy Council, the High Court of Australia and the Supreme Court of New Zealand. Given its Commonwealth composition, the Court has naturally put unusual stress on the need to internationalise the Region's legal system after the resumption of Chinese sovereignty. In *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381, 401, Sir Anthony Mason NPJ opined:

> In interpreting the provisions of chap. III of the Basic Law and the provisions of the Bill, the Court may consider it appropriate to take account of the established principles of international jurisprudence as well as the decisions of international and national courts and tribunals on like or substantially similar provisions in the ICCPR, other international instruments and national constitutions.

1.007 More generally, in *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117, 133, Li CJ admonished:

> After 1 July 1997, in the new constitutional order, it is of the greatest importance that the courts in Hong Kong should continue to derive assistance from overseas jurisprudence. This includes the decisions of final appellate courts in various common law jurisdictions as well as decisions of supra-national courts, such as the European Court of Human Rights. Compared to many common law jurisdictions, Hong Kong is a relatively small jurisdiction. It is of great benefit to the Hong Kong courts to examine comparative jurisprudence in seeking the appropriate solution for the problems which come before them. This is underlined in the Basic Law itself. Article 84 expressly provides that the courts in Hong Kong may refer to precedents of other common law jurisdictions.

[8] See R Wacks, "Can the Common Law Survive the Basic Law?" (1988) 18 HKLJ 435.

[9] See T Ruskola, "The East Asian Legal Tradition", in M Bussani and Uo Mattei (eds), *The Cambridge Companion to Comparative Law* (Cambridge University Press, 2012).

[10] Y Ghai, "Themes and Arguments", in SNM Young and Y Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press, 2014) 2.

[11] Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990 Promulgated by Order No 26 of the President of the People's Republic of China on 4 April 1990 Effective as of 1 July 1997).

[12] Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (19 December 1984) .

1.008 The nineteenth-century acquisition by Queen Victoria of Hong Kong Island and the territories surrounding it from the Daoguang Emperor, as well as the late twentieth-century transfer of these acquisitions from the sovereignty of the United Kingdom to that of the People's Republic of China, were international events regulated by the international law of the day.[13] Hong Kong nevertheless defies classical concepts of international relations and international law,[14] being a non-independent territory,[15] which has "a distinct international voice".[16]

1.009 The internationalisation of Hong Kong law owes partly to wider globalisation processes and partly to the special needs of a territory that lacks significant natural resources. Heavily dependent on international trade from the beginning, the Hong Kong economy, in order to thrive and stay competitive, was forced to maintain extensive trade, business and cultural links with the rest of the world. It was observed more than 30 years ago that "Hong Kong is international or she is nothing".[17]

1.010 Industrialisation and development as an international financial centre occurred without any meaningful support from either Britain, which cut her loose financially in 1958, or China, which groaned under civil wars, Cultural Revolution purges and poverty until the late 1970s. More recently, it was remarked that if the Special Administrative Region "does not proactively position itself to participate in potential solutions to mitigate against the brutality of globalization … [it] might be left behind".[18]

1.011 This outward orientation of Hong Kong's economy entailed the negotiation and maintenance of bilateral and multilateral treaties, participation in regional and global organisations, and constant legal as well as practical reforms to keep up with best practices across advanced economies.[19] Hong Kong's legal system, which upholds the

[13] Y Ghai, "Hong Kong's Autonomy: Dialects of Powers and Institutions", in Y Ghai and S Woodman (eds), *Practising Self-Government: A Comparative Study of Autonomous Regions* (Cambridge University Press, 2013) 319.

[14] MS Neves, "The External Relations of the Hong Kong Special Administrative Region", in R Ash, P Ferdinand, B Hook, and R Porter (eds), *Hong Kong in Transition: The Handover Years* (St Martin's Press, 2000) 272–273.

[15] The Hong Kong Special Administrative Region is not an independent sovereign state, see art.1 of the Basic Law: "The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China", but it is a distinct customs territory in its own right, see art.116(1) of the Basic Law: "The Hong Kong Special Administrative Region shall be a separate customs territory".

[16] J Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd ed., 2006) 251–252.

[17] AJ Youngson, *Hong Kong Economic Growth and Policy* (Oxford University Press, 1982) 114.

[18] LM Cummings and JTH Tang, "The External Challenge of Hong Kong's Governance: Global Responsibility for a World City", in M Sing (ed), *Politics and Government in Hong Kong: Crisis under Chinese Sovereignty* (Routledge, 2009) 189.

[19] Y Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 1997) 429.

rational predictability requisite to a free and efficient market, is widely acknowledged to have contributed significantly to its transformation from an insignificant cluster of remote fishing villages to a leading international financial centre in many ways on a par with New York and London.[20]

1.012 The absorption of jurisdictions operating under a different legal tradition into a state practising common law is not unprecedented; consider Louisiana in the United States, Quebec in Canada and Scotland in the United Kingdom. Hong Kong by contrast is thus far the only common law jurisdiction to have been incorporated into a state not only without the common law but also adherent to a Socialist variant of the civilian law. The Basic Law left a mark in the history of decolonisation when it brokered the merger of a former British enclave with the world's largest remaining Leninist state.

1.013 Hong Kong's legal system, moreover, little resembles those of ordinary provinces in unitary states, the constituents of federated states, or even cities in both unitary and federated states. There are many objections to considering Hong Kong a mere "city" in legal terms. There is, for instance, no such thing as a City of London legal system,[21] New York City legal system[22] or Municipality of Shanghai legal system[23] comparable to Hong Kong's. Unlike Hong Kong, none of London, New York and Shanghai is:[24]

(1) For all practical purposes exempt from the constitution and laws of its own Sovereign;

(2) Competent to enact primary legislation on virtually all matters;

(3) Completely exempt from paying taxes to its own Sovereign;

(4) Vested with the power of final adjudication in a local court of last resort;

(5) Vested with legal power to impose customs control independently of its own Sovereign and

(6) Vested with power to conclude binding treaties with foreign states in many policy domains.

1.014 Indeed, both before and after 1 July 1997, the Sovereign (*viz* the British Crown and the People's Republic of China, respectively) avoided designating Hong Kong a "city" or "municipality".[25] It might cause confusion with entities that deserve that

[20] M Elliott, "NyLonKong: A Tale of Three Cities", *Time Magazine* (28 January 2008).

[21] London is the capital of the United Kingdom.

[22] New York City is the largest city of the State of New York in the United States.

[23] Shanghai is a provincial-level municipality of the People's Republic of China.

[24] See AHY Chen, "The Theory, Constitution and Practice of Autonomy: The Case of Hong Kong", in J Oliveira and P Cardinal (eds), *One Country, Two Systems, Three Legal Orders — Perspectives of Evolution: Essays on Macau's Autonomy after the Resumption of Sovereignty by China* (Springer, 2009) 759–760.

[25] Unlike New York or London, which is 'a national financial centre with a large international component', Hong Kong is 'an international financial centre with a limited national component, see DC Donald, *A Financial Centre for Two Empires: Hong Kong's Corporate, Securities and Tax Laws in its Transition from Britain to China* (Cambridge University Press, 2014) 219.

title unambiguously, like London and Shanghai. Hong Kong's Sovereigns rather designated its legal status with rubrics like "British Crown Colony" (1843–1983), "British Dependent Territory" (1983–1997) and "Chinese Special Administrative Region" (1997–present).

1.015 There are entities legally designated cities *inside* Hong Kong, the most prominent of which is still, by law, known as the "City of Victoria" pursuant to Schedule 1 of the Interpretation and General Clauses Ordinance (Cap.1). The centre of the City of Victoria is more commonly known as "Central" today and is the business and political heart of the territory.

3. The Common Law and Civilian Law Traditions

(a) The common law tradition

1.016 Hong Kong's legal system has remained firmly embedded in the common law tradition notwithstanding her departure from the Commonwealth in 1997. Decisions of the Court of Final Appeal have been cited with approval by courts of last resort across the common law world, from England and Wales, Scotland, Australia, Canada, New Zealand, Malaysia, Singapore, the Eastern Caribbean territories, the Cayman Islands, Trinidad and Tobago, Fiji and Tonga.[26]

1.017 Nevertheless, the legal system of Hong Kong is no mere clone of the English; it admits Chinese customs in lieu of English ones, for example, in appropriate circumstances. A "common law of Hong Kong" has thus been in existence from the beginning. In *China Field Ltd v Appeal Tribunal (Buildings) (No 2)* (2009) 12 HKCFAR 342, 351–352, Bokhary PJ observed:

> The emergence of a common law of Hong Kong can be traced to almost the earliest stage of British rule here. By s.3 of the Supreme Court Ordinance 1844 and later s.5 of the Supreme Court Ordinance 1873, the Hong Kong courts were empowered and required to apply English common law except where the same was "inapplicable to the local circumstances of [Hong Kong] or of its inhabitants". One of the things which that exception did was to leave some room in certain spheres for ethnic Chinese domiciled in Hong Kong to resort to the laws and customs of traditional China, and some such room remains to the present day. Another consequence of the exception is that the Hong Kong courts had to develop what amounted to a common law of Hong Kong even though it was for the most part identical to English common law.

1.018 It is nowadays widely recognised that, whilst all common law systems sprang directly or indirectly from England, the common law is no longer monolithic, and may differ from one jurisdiction to another.[27]

[26] PY Lo, "Impact of Jurisprudence beyond Hong Kong", in SNM Young and Y Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press, 2014) 580.

[27] JMM Chan, "The Judiciary", in JMM Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell, 2011) 303.

Table 1: The Common Law in Four Senses

The common law The inherent social order of a free, just and reasonable community
Common law system versus civilian law system A type of legal system based on the common law as opposed to other types of legal system (eg the French civilian law tradition)
Case law versus legislation Legal principles emanating from judgments delivered by the superior courts of record based on the common law, as opposed to legislation enacted by the legislature
Law versus equity A branch of case law principles known as the "rules of the common law" or simply "law", as opposed to another branch of case law principles known as the rules of equity

1.019 The term "common law" is used every day to refer to the case law that judges make through adjudication. This informal usage contrasts with the law that springs from other sources, such as legislation enacted by representative legislatures (known as "Ordinances" in Hong Kong).

1.020 Lawyers may use "common law" to mean those case law principles that exclude equity rulings.[28] Although the rules of equity were originally inspired by notions of natural law and justice, nowadays equity is "no more and no less natural justice than the common law, and is in fact nothing other than a particular branch of law" since England reorganised its judiciary by the Judicature Act 1873, merging the Court of Chancery (that had governed equity) with the Courts of King's Bench and Common Pleas (that had governed the law) into one High Court of Justice.

1.021 The interchangeableness of the terms "case law" and "common law" is largely due to the high-profile activity of courts in common law systems to declare and modify the meaning of the common law. The confusion of terms is not entirely unproblematic.

1.022 Sir William Blackstone, a former Justice of the Court of King's Bench and the first Vinerian Professor of English Law at the University of Oxford, in his seminal *Commentaries on the Laws of England*, wrote, "the law, and the opinion of the judge, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law". Instead, "the decisions of courts of justice" are not the common law itself but, more accurately, "the evidence of what is common law".[29]

1.023 In *R v Bembridge* (1783) 3 Doug KB 327, 332, 99 ER 679, 681, the great jurist Lord Mansfield CJ, likewise opined, "The law does not consist of particular cases but

[28] See A Gillespie, *The English Legal System* (Oxford University Press, 4th ed.) 12–13.
[29] W Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) Vol. 1, 71.

of general principles, which are illustrated and explained by these cases". In other words, case law, though it may embody the norms of the common law, is not properly considered common law in itself.

1.024 The common law is more than case law. Traditionally, the common law has been understood as the unwritten customary law which had gradually evolved over a period of 1,000 years, "first in England and later on every inhabited continent" on earth.[30] It lays claim to ancient prescription, ongoing adaptability, correct principle and reason, and conformability to society and social consent; it is rational and principled, and descended from time immemorial.[31] It is directed toward maintenance of the peace, the protection of the people and the pursuit of justice.[32] It is not static; it adapts itself to changes of society, yet always within limits and without obliterating the past.[33]

1.025 The common law, in short, embodies the inherent social order of a free, just and reasonable community that constantly evolves. It is ascertained, clarified and developed through the medium of cumulative case law precedents and traditions that, however, are never uncritically received by judges. Consider the landmark decision of Lord Mansfield CJ in *Somerset v Stewart* (1772) Lofft 1, 98 ER 499, 509, which abolished slavery at common law in England and Wales four years before the independence of the United States:

> The state of slavery is of such a nature, that it is incapable of being now introduced by Courts of Justice upon mere reasoning or inferences from any principles, natural or political; it must take its life from positive law; the origin of it can in no country or age be traced back to any other source: immemorial usage preserves the memory of positive law long after all traces of the occasion, reason, authority and time of its introduction are lost; and in a case so odious as the condition of slaves must be taken strictly, the power claimed by the return was never in use here; no master was ever allowed to take a slave by force to be sold abroad because he had deserted from his service, or for any other reason whatever? We cannot say the cause set forth by the return is allowed or approved by the laws of this Kingdom, therefore the man must be discharged.

1.026 If case law — the handiwork of judges — no longer reflects the latest common law position manifested in social realities and popular expectations, it will lose its persuasiveness, if not its relevance.[34]

1.027 Rather than "detailed rules", it is a distinct set of "attitudes, methods, procedures, general principles", which constitute "the essential heritage of the common law".[35] The common law now "stands for a set of concepts, interests, and values which it has protected during the course of its long history [which] include the rule of law,

[30] S Hall, *Law of Contract in Hong Kong: Cases and Commentary* (LexisNexis, 3rd ed., 2011) 51.
[31] BZ Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, 2006) 32.
[32] MRLL Kelly, "Common Law Constitutionalism and the Oath of Governance: 'An Hieroglyphic of the Laws'" (2009) 28 *Mississippi College Law Review* 121, 166.
[33] DA Strauss, *The Living Constitution* (Oxford University Press, 2010) 3.
[34] Hall (n 30 above) 53.
[35] P Wesley-Smith, "The Reception of English Law in Hong Kong" (1988) 18 HKLJ 183, 216.

5. Chapter Summary

4.105

(1) Hong Kong's version of the rule of law is a direct descendant of the English common law tradition of the rule of law, which was the yield of centuries of struggle between power and freedom.

(2) The rule of law has contributed enormously to the economic and financial development of Hong Kong, and is now a constitutive and defining value of the community.

(3) This rule of law tradition is highly pragmatic; it is much more interested in upholding the rule of law in practice, not just in theory.

(4) The rule of law is the rule of the spirit of the law rather than mere legality (*viz* the rule of ordinary laws such as statutes and case law).

(5) The spirit of the law centres on the pursuit of individual liberty. The rule of law advances this by protecting the community from unpredictable and arbitrary government interferences with their life choices.

(6) Excessive and unjustifiable suppression of fundamental rights and liberties, even for the sake of maintaining law and order, is prohibited by the rule of law.

(7) The People's Republic of China has unambiguously recognised the value of rule of law to the Special Administrative Region's future. The rule of law, therefore, became a fundamental assumption of the Basic Law.

(8) Executive, legislative and judicial oversight mechanisms ensure that the rule of law is enforced against persons wielding political power, even the Chief Executive — the State Council's appointee and high representative of the Chinese State in Hong Kong — who as an ordinary human being vested with almost draconian authority may not be trusted to exercise self-restraint at all times.

(9) The power of the Standing Committee of the National People's Congress to enact Interpretations of the Basic Law is not prima facie inconsistent with the common law or the rule of law it entails. Instead, it is the ways that the Standing Committee uses and might use this power that poses a threat to the rule of law.

(10) Notwithstanding the pro-government majority, the Legislative Council, as it has become increasingly representative, has acted as a formidable check on the powers of the Government in some matters but not others.

(11) The courts have strictly judged legislative and administrative acts against the precepts of the rule of law through the medium of judicial review and statutory interpretation.

(12) It is dangerous to uproot the rule of law once it has been entrenched into the moral fabric and way of life of a community.

Chapter 5

THE LEGISLATIVE PROCESS

1. Introduction

This chapter introduces the reader to the legislative process, broadly defined as those procedures used by the Legislative Council for enacting Ordinances and scrutinising subsidiary legislation, and the rules and conventions that regulate it. The complexities of this framework cannot be properly understood in isolation from the context of its history as part of a British Crown Colony. In *Cheng Kar Shun v Li Fung Ying* [2011] 2 HKLRD 555, 589, the Court of First Instance (Andrew Cheung J) noted: **5.001**

> [I]t must be remembered that the Basic Law does not create a new legislature out of nowhere. Although it would be simplistic to suggest that the Legislative Council of the Hong Kong Special Administrative Region is simply a continuation of the colonial legislature prior to 1997, the relevant provisions in the Basic Law establishing the new legislature do not intend a complete break from the past, nor is that the contention of any party. Like what was done in colonial days, budgets, taxation and public expenditure have continued to be discussed by the Legislative Council at its committee level as before, although, as I have said, insofar as they require legislation, that must be done in a plenary meeting of the Legislative Council, just as in the colonial days.

This chapter is organised as follows. Section 2 examines the leading role of the Government, through the Chief Executive in Council, in the legislative process. Section 3 studies the investigatory powers as well as the parliamentary privilege possessed by the Legislative Council. Section 4 outlines the procedures for enacting a bill into an Ordinance. Section 5 discusses important issues relating to the control of subsidiary legislation with special reference to the 2010 Country Parks showdown between the Government and the Legislative Council. Section 6 gives a concise summary of the chapter. **5.002**

2. The Executive in the Legislative Process

(a) The Chief Executive in Council

(i) *The Executive Council*

It is sometimes assumed that the Executive Council, described by art.54 of the Basic Law as "an organ for assisting the Chief Executive in policy-making", must be the de facto cabinet of Hong Kong.[1] This assumption is understandable but mistaken. The Cabinets of common law jurisdictions, sovereign or not (eg Bermuda, Ontario, the United Kingdom, and the Commonwealth of Australia) comprise none but full-time Government ministers; they are powerhouses of policy formulation and implementation. By contrast, 14 out of 29 of incumbent Executive Councillors (nearly half) are non-officials who serve only part-time and play no decisive role. The Chief **5.003**

---

[1] See, for example, SH Ng, *Labour Law in Hong Kong* (Kluwer Law International, 2010) 21.

Executive needs only to "consult [them] before making important policy decisions, introducing bills to the Legislative Council, making subordinate legislation, or dissolving the Legislative Council". They have no advisory role as to "the appointment, removal and disciplining of officials and the adoption of measures in emergencies".[2]

5.004 The Executive Council is akin to the most prestigious advisory body in Hong Kong; its fundamental aim, like the Executive Councils and Privy Councils elsewhere in the common law world, is elite co-optation. Members of the Legislative Council (MLCs) from Government-friendly political parties, leading business people, and the Chief Executive's close aides are routinely appointed as Non-official Executive Councillors. All of them are entitled to be addressed as "The Honourable", and take ceremonial precedence over Justices of the Court of Final Appeal and MLCs under protocol.[3]

(ii) *The Policy Committee*

5.005 Whilst the Executive Council may be regarded as Hong Kong's de jure cabinet, the Special Administrative Region's answer to a "Cabinet" in the practical sense of the word is the Policy Committee of the Government. Currently, it consists of the following principal officials:

(1) Chief Secretary for Administration
(2) Financial Secretary
(3) Secretary for Justice
(4) Secretary for Transport and Housing
(5) Secretary for Home Affairs
(6) Secretary for Labour and Welfare
(7) Secretary for Financial Services and the Treasury
(8) Secretary for Commerce and Economic Development
(9) Secretary for Constitutional and Mainland Affairs
(10) Secretary for Security
(11) Secretary for Education
(12) Secretary for the Civil Service
(13) Secretary for Food and Health
(14) Secretary for the Environment
(15) Secretary for Development

5.006 The Policy Committee is chaired by the Chief Secretary. As Claude Burgess, a former holder of that office put it in 1962, the Governor "does not guide and control [the] various Heads of Department [but] exercises his authority [*via* the Chief Secretary

[2] Article 56 of the Basic Law.
[3] Protocol Division of the Government Secretariat, *HKSAR Precedence List* (April 2014).

who] in terms of business organisation … corresponds in some ways with the managing director, if you imagine the Governor as the chairman of the board of directors".[4] The wisdom of this convention is to pool the risks of political misjudgement by forestalling the excessive concentration of decision-making powers into the hands of one person (*viz* the Governor). Today, the Chief Executive *of the Hong Kong Special Administrative Region* as formal head of the executive government fulfils a role analogous to that of the chairman of a corporation, whereas the Chief Secretary as the most senior principal official effectively functions as the chief executive officer *of the Government*.

5.007 Although its formal mandate is "policy co-ordination", it is "an open secret" that the Committee "is the real centre of policy-making within the Hong Kong Special Administrative Region government".[5] In this sense, the Policy Committee may be seen as the standing committee of the Executive Council, as by convention, all of its Members are also Official Executive Councillors. They deliberate, coordinate and clear major policies before submission to the Chief Executive in Council for confirmation, which, in many (but not all) cases, means rubber-stamping.[6] And like Cabinets in many common law jurisdictions, the Policy Committee's powers are mainly a matter of convention rather than law.[7] A related body, known as the Committee on Legislative Priorities, also chaired by the Chief Secretary, determines the Government's legislative programme for each session of the Legislative Council.[8] Its other members include the Financial Secretary, the Secretary for Justice and the Law Draftsman.

5.008 The most important decisions of the Policy Committee are customarily attributed to the "Chief Executive in Council", as defined by s.3 of the Interpretation and General Clauses Ordinance (Cap.1). It is a practice widely adopted in the common law world: the "Queen in Council" in the United Kingdom, the "Governor General in Council" in New Zealand or the "Governor in Council" in New South Wales epitomises in legal parlance the supreme executive power of the "government of the day".

5.009 The Westminster Parliament being originally a creature of royal prerogative, the summonsing and prorogation of Parliament are performed to this day by the Queen through Orders in Council.[9] In Hong Kong, it is likewise for the Chief Executive in Council to:

(1) Fix the starting date of each term of the Legislative Council,[10] which runs for four years according to the Basic Law;[11]
(2) Fix the date for holding a general election;[12]

[4] CB Burgess, *The Government and the People* (Hong Kong Government Press, 1962) 5–6.
[5] BCH Fong, "Executive-legislative Disconnection in Post-Colonial Hong Kong: The Dysfunction of the HKSAR's Executive-Dominant System, 1997–2012" (2014) 2004/1 *China Perspectives* 5, 13 n 45.
[6] See, generally, ABL Cheung, "Public Management Reform in Hong Kong", in SF Goldfinch and JL Wallis (eds), *International Handbook of Public Management Reform* (Edward Elgar, September 2009) 317–335.
[7] See C Turpin and A Tomkins, *British Government and the Constitution* (Cambridge University Press, 7th ed., 2011) 416.
[8] Law Drafting Division of the Department of Justice, *How Legislation is made in Hong Kong: A Drafter's View of the Process* (Government of the Hong Kong Special Administrative Region, 2012) 9.
[9] D Oliver and E Ellis, "The Law of Parliament" in D Feldman (ed), *English Public Law* (Oxford University Press, 2nd ed., 2009) 88.
[10] Sections 4(3) and 4(4) of the Legislative Council Ordinance (Cap.542).
[11] Article 69 of the Basic Law.
[12] Section 6(1) of the Legislative Council Ordinance.

(3) Prorogue the Legislative Council, closing its session on a date certain[13] and

(4) Convene at least one ordinary session of the Legislative Council in each year.[14]

5.010 To the detriment of individual MLCs, the Chief Executive in Council has exclusive power to initiate bills relating to: [15]

(1) Public expenditures;

(2) Governmental operations and

(3) Political structures

(b) Prerogative orders

5.011 Both in Hong Kong and in the United Kingdom, prerogative powers entail a limited right in the Chief Executive or Governor or Crown to make "prerogative orders" in certain policy domains.[16] The classical definition of the prerogative was offered by Professor Albert Venn Dicey:

> Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative.[17]

5.012 In substance, this is "executive legislation made without parliamentary approval or scrutiny",[18] and thus in many ways "an uncomfortable fit" with constitutional values such as the rule of law. It has been called "an inherently untrustworthy source of power … far removed from the modern archetype of legitimate law-making",[19] which in the Hong Kong setting means an Ordinance enacted by the Legislative Council.

5.013 One of the most significant domains traditionally governed by the prerogative is the administration of the civil service.[20] A prerogative "order" (despite the name) is more like a statute than an executive command. In both structure and drafting style, it is reminiscent of an Ordinance. Prerogative orders must yield nonetheless to the Basic Law and Ordinances. Additionally, as affirmed in the *Case of Proclamations* (1611) 12 Co Rep 74, no prerogative order can alter or supersede the common law. Prior to the Handover, the common law had already empowered the Legislative Council to abolish or alter, in Hong Kong, not only the prerogative powers of the Governor, but also those of the British Crown.[21]

5.014 The following cases illustrate how the courts accept prerogative orders as "legal procedures" and "law", even though they were made by the Chief Executive alone or the Chief Executive in Council instead of the Legislative Council, and without enabling

[13] *Ibid.*, s.6(3) and 6(4).
[14] *Ibid.*, s.9(1).
[15] Article 74 of the Basic Law.
[16] J Auburn, J Moffett and A Sharland, *Judicial Review: Principles and Procedure* (Oxford University Press, 2013) 500.
[17] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Classics, 8th ed., 1982 [1915]) 282–283.
[18] R Moules, "Judicial Review of Prerogative Orders in Council" (2009) 68 *The Cambridge Law Journal* 14, 14.
[19] T Poole, "United Kingdom: The Royal Prerogative" (2010) 8 *International Journal of Constitutional Law* 146, 147.
[20] D Greenberg (ed), *Craies on Legislation* (Sweet & Maxwell, 2008) 115.
[21] *Attorney-General v Chiu Tat Cheong, David* [1992] 2 HKLR 84, 109.

Ordinance. The Court of First Instance in *Association of Expatriate Civil Servants of Hong Kong v Chief Executive of HKSAR* [1998] 1 HKLRD 615 confronted a petition for judicial review of the Public Service (Administration) Order,[22] promulgated by the new Chief Executive within two weeks of the Handover. It set forth his authority to manage the civil service, and to this end contained an elaborate disciplinary procedure.[23]

The Order was made to conserve the framework of civil service administration established by prerogative orders previously made by the Governor that had lapsed upon the Handover.[24] The applicant argued, however, that the Order failed to satisfy art.48(7) of the Basic Law, which requires the Chief Executive "[t]o appoint or remove holders of public office in accordance with legal procedures", in that it was not an Ordinance enacted by the Legislative Council. 5.015

Rejecting this argument, Keith J held that art.48(7) must be read together with art.103, mandating the "previous system of recruitment, employment, assessment, discipline, training and management for the public service [to be] maintained". This system was "established by the Crown under the Hong Kong Letters Patent and the Colonial Regulations in the exercise of its prerogative", and none "required the approval of either Parliament in the United Kingdom or the Legislative Council in Hong Kong".[25] As the learned judge opined: 5.016

> Since the procedures laid down by the Chief Executive by the Executive Order maintain Hong Kong's previous system of recruitment and discipline in the public service and were therefore lawfully established, it follows that those procedures fall within the phrase 'legal procedures' in art.48(7).[26]

The same approach was applied in the decision in *Wong Kei Kwong v Principal Assistant Secretary for Civil Service* (unrep, HCAL 49/2007, [2008] HKEC 261), delivered 10 years later, where the Court of First Instance (Saunders J) affirmed that the same Order, "being an executive order, falls within the expression 'legal procedures', as that expression is used in art.48(7) Basic Law",[27] and proceeded to rule that "there is nothing in the Basic Law to prohibit the Chief Executive from making an executive order in which he grants a power to himself, and then makes provision for the delegation of that power".[28] 5.017

The Court of First Instance applied the same method of interpreting Ordinances in *Rowse v Secretary for Civil Service* [2008] 5 HKLRD 217, 266–267 to a case of interpreting the Public Service (Administration) Order. Hartmann J began by ascertaining the purpose of the Order: "to maintain the system of [civil service] discipline in force 5.018

[22] Executive Order No 1 of 1997.
[23] See A Mak, *Disciplinary and Regulatory Proceedings in Hong Kong* (LexisNexis, 2011) 545–553.
[24] The Disciplinary Proceedings (Colonial Regulations) Regulations and the Civil Service (Disciplinary) Regulations were prerogative legislation made by the former Governor of Hong Kong pursuant to Articles XIV and XVI of the Letters Patent and Regulations 56(1) and 57(1) the Colonial Regulations, themselves prerogative legislation made by the British Crown.
[25] *Association of Expatriate Civil Servants of Hong Kong v Chief Executive of HKSAR* [1998] 1 HKLRD 615, 621 (Keith J).
[26] *Ibid.*, 622 (Keith J).
[27] *Wong Kei Kwong v Principal Assistant Secretary for Civil Service* (unrep, HCAL 49/2007, [2008] HKEC 261), [49] (Saunders J).
[28] *Ibid.*, [57] (Saunders J).

before the change of sovereignty". Next, he read the Order "in context", giving words "their ordinary English meaning". Finally, he concluded that "the Chief Executive acted outside of the powers given to him in the Administration Order".

5.019 The learned judge noted in *obiter dicta* that the Order "is an executive order … not legislation";[29] nevertheless, his judgment affirms that a prerogative order, once enacted, is no less binding on and enforceable against the Chief Executive than an Ordinance.

5.020 More recently, the Court of Final Appeal in *Kong Yunming v Director of Social Welfare* [2014] 1 HKC 518 was to determine the constitutionality of an Order in Council barring non-permanent residents from social security distributions under the Government's Comprehensive Social Security Assistance scheme. The prerogative order had been made pursuant to art.145 of the Basic Law, which empowers the Government — instead of the Legislative Council — to "formulate policies on the development and improvement of [the social welfare] in light of the economic conditions and social needs … on its own … [and o]n the basis of the previous social welfare system".

5.021 One of the appellant's challenges to the Order in Council was that it infringed the right of non-permanent residents to "social welfare in accordance with law",[30] in that a prerogative order, unlike an Ordinance or subsidiary legislation, is simply not "law" within the meaning of the Basic Law. Ribeiro PJ found this argument unacceptable:

> Article 145 recognizes and endorses the validity of 'the previous social welfare system' which consisted of a non-statutory system of administrative rules and policies. Accordingly, reading Article 36 together with Article 145, the intention of the Basic Law must be taken to be that such administrative system — consisting of rules that are accessible, systematically applied and subject to a process of administrative appeal — is to be treated as a system providing 'social welfare in accordance with law' within the meaning of Article 36.[31]

5.022 The impugned part of the Order in Council was in fact found unconstitutional, and the Court issued a declaration of unconstitutionality, the remedy normally reserved for unconstitutional Ordinances, rather than granting *certiorari*, the remedy normally used for quashing unlawful administrative acts. This evidences the de facto if not de jure legislative status enjoyed by prerogative orders, despite their relative desuetude nowadays.

5.023 What is more, the Chief Executive in Council inherited from the British Crown "Henry VIII powers" to decree delegated legislation that overrides or amends even statutory laws. The Emergency Regulations Ordinance (Cap.241), s.2(1), for instance, permits the Chief Executive in Council to "make any regulations whatsoever which he may consider desirable in the public interest … on … occasion of emergency or public danger … [which] shall have effect notwithstanding anything inconsistent therewith contained in any enactment".

5.024 The Legal Aid Ordinance (Cap.91), s.28(2)(s) empowers the Chief Executive in Council to "make regulations … for the better carrying out of this Ordinance",

[29] *Rowse v Secretary for Civil Service* [2008] 5 HKLRD 217, 224 (Hartmann J).
[30] Article 36 of the Basic Law.
[31] *Kong Yunming v Director of Social Welfare* [2014] 1 HKC 518, 533 (Ribeiro PJ).

including the seemingly paradoxical competence "to modify any provision of this Ordinance so far as it appears to be necessary to meet the circumstances where a person seeking or receiving legal aid – (i) is not resident in Hong Kong; (ii) is concerned in a representative, fiduciary or other capacity". Henry VIII clauses are constitutional anomalies and ought to be contested when they authorise the undoing of laws enacted by a legislature that is at least in part democratically elected.[32]

(c) Principal officials in the Legislative Council

(i) *Fusion of executive–legislative personnel*

5.025 The Basic Law, far from precluding an executive–legislative fusion of personnel, actually authorises the appointment of sitting MLCs to become Executive Councillors at the same time.[33] The President of the Legislative Council may have to disqualify an MLC "when he or she accepts a government appointment and becomes a public servant";[34] however, from this alone it does not follow that principal officials of the Policy Committee may never be selected from incumbent MLCs.

5.026 According to constitutional law expert Professor Yash Ghai, "a government appointment by itself does not disqualify a member, and there is nothing which explicitly requires a principal official to be a public servant".[35] For that matter, accepting any ordinary "government appointment" does not make anyone a "principle official" within the meaning of the Basic Law; rather, one must be appointed to that dignity by the State Council of the People's Republic of China[36] — (known as the "Central People's Government",[37] or the "Central Government"[38] in the text of the Basic Law, but never "government", a term reserved for the Government of the Region) — upon nomination by the Chief Executive.

5.027 The drafting record of the Basic Law suggests that nothing prohibits principal officials from "doubling as Members of the Legislative Council";[39] therefore, only career civil servants and unelected state functionaries generally are barred from sitting as MLCs — not unlike the effect of the Disqualification Act 1974 on the British House of Commons.

(ii) *Senior principal officials in the Legislative Council*

5.028 Indeed, the three most senior principal officials of the Government — the Chief Secretary, Financial Secretary and Secretary for Justice — can in a sense be regarded as non-voting MLCs de facto: under the Rules of Procedure, they may:[40]

[32] A Le Sueur and E Ellis, "Constitutional Fundamentals" in D Feldman (ed), *English Public Law* (Oxford University Press, 2009) 46.
[33] Article 55 of the Basic Law.
[34] *Ibid.*, art.79(4).
[35] Y Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 1997) 266.
[36] Article 15 of the Basic Law.
[37] *Ibid.*, art.12.
[38] *Ibid.*, art.22.
[39] Basic Law Consultative Committee, Draft of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China Consultative Report Volume 3 — General Report of Provisions (November 1989) 172.
[40] Rule 10(3), Rules of Procedure.

(9) Post-Handover Hong Kong has remained an active international legal actor, a status recognised by foreign states and international organisations.

(10) China and Macau adopt the monist approach in recognising international treaties as taking domestic legal effect once signed and ratified, without need of being incorporated into the domestic body of statutory law.

(11) Hong Kong, by contrast, follows most other common law jurisdictions in adopting the dualist approach, allowing international treaties to take domestic legal effect only after being incorporated into domestic statutory law.

(12) Unincorporated treaties may nonetheless raise legitimate expectations as to government conduct in Hong Kong.

(13) International treaties made by China touching foreign affairs and national defence are *prima facie* applicable to Hong Kong.

(14) International treaties made by Hong Kong to which China is not a party continue to apply under the Basic Law framework.

(15) Bilateral treaties made by China generally do not apply in Hong Kong, and *vice versa*.

(16) Sanctions devised by the United Nations Security Council are binding on the People's Republic of China and are implemented in Hong Kong under the United Nations Sanctions Ordinance, which vests considerable rule-making powers in the Chief Executive in Council to criminalise behaviour subversive of such sanctions.

(17) Hong Kong may conclude treaties on virtually any matters except those which touch upon high international policy.

(18) Before concluding treaties touching upon air services, mutual legal assistance and visa abolition, Hong Kong must get approval from the Chinese State Council.

(19) Treaties touching upon double taxation avoidance, mutual legal assistance and the surrender of fugitive offenders are invariably given domestic effect by Ordinance.

(20) Customary international law is considered to form an integral part of the common law unless and until ousted by the Basic Law and Ordinances.

(21) *Jus cogens* is a small sub-set of international custom which prevails over any treaty to the contrary and may not be derogated from by states.

(22) The decisions of international tribunals, although not binding on the Court of Final Appeal and other Hong Kong courts, have often been regarded by them as valuable and persuasive.

Chapter 12

THE INTERFACE OF HONG KONG AND CHINESE LAW

1. Introduction

Hong Kong's geographical proximity to China, coupled with China's transition to a more market-oriented economy, means that the two jurisdictions are bound to interact with greater frequency. This chapter reviews the potentials and limits of the interface of the very different legal systems of the Hong Kong Special Administrative Region and the People's Republic of China, in a broader economic and social context. It is organised as follows. Section 2 briefly outlines the fundamental principles of China's legal system and discusses its relations with Hong Kong's. Section 3 reviews the "arrangements" concluded between Hong Kong and China since the Handover. Section 4 explores the dynamics of cross-border juridical cooperation on criminal matters. Section 5 concludes with a chapter summary. **12.001**

2. The Separation of Systems

(a) The legal system of the People's Republic of China

(i) *Overview*

In 1978, the post-Mao leadership of the People's Republic of China began the incremental transformation of its Socialist command economy towards a market-oriented, quasi-capitalist one, which they then paradoxically dubbed a "Socialist market economy with Chinese characteristics". China's real gross domestic product has grown at an average rate of over 9% per annum over the past three decades (1979–2009). By 2010, China was the world's third largest economy at market exchange rates and the second largest by purchasing power parity.[1] It officially overtook Japan as the world's second largest economy in 2011, a title Japan held for more than four decades. **12.002**

This development has been attended by a proliferation of commercial disputes, corruption, fraud, unemployment, popular revolts, rural poverty and the spread of HIV and other infectious diseases.[2] The Party has responded *inter alia* by building up a regulatory infrastructure of comprehensive statutes, competent lawyers, and professional legal officials.[3] Reversing Maoist lawlessness, Deng Xiaoping declared in 1980 that "there must be laws to rely on and to be obeyed, the enforcement of laws must be strict, and the breaking of laws must be punished".[4] Since then, the central government has legislated a large volume of economic regulations intended to establish a safer investment climate.[5] **12.003**

---

1 L Yueh, *The Economy of China* (Edward Elgar Publishing, 2010) 21.

2 See V Shue, "Legitimacy Crisis in China?" in P Gries and S Rosen (eds), *Chinese Politics: State, Society, and the Market* (Routledge, 2010) 41–68 and CX Lin, "A Quiet Revolution: An Overview of China's Judicial Reform" (2003) 4 *Asian-Pacific Law and Policy Review* 255.

3 See S Zhao, "Political Liberalization without Democratization" in S Zhao (ed), *Debating Political Reform in China: Rule of Law vs Democratization* (ME Sharpe, 2006) 49.

4 X Deng, *Collected Works of Deng Xiaoping* (Foreign Language Press, 1983) 146.

5 See PF Landry, *Decentralized Authoritarianism in China: The Communist Party's Control of Local Elites in the Post-Mao Era* (Cambridge University Press, 2008).

12.004 The use of law as a vehicle of reform entered a new phase in 1997, when Jiang Zemin made the precept "Governing the State in accordance with Law" a basic policy of the Chinese Communist Party. Legal reform gained momentum after China's accession to the World Trade Organisation in 2001.[6] There were in force as at January 2011 some 236 national statutes, 690 administrative regulations, 8,600 local regulations and many more rules and norms.[7]

(ii) *Political dependence of the legal system*

12.005 As we have seen in Chapter 3 the Constitution of the People's Republic of China which was promulgated in 1982 is unenforceable by the courts and has never been enforced by the Standing Committee of the National People's Congress. Peking University Law Professor Qianfan Zhang rightly called it "dead letter" because, unlike a "living constitution", it is "left unguarded against official violations" and lacks effect to fulfil any of the "long list of good ideals" declared in it.[8] It is a document "filled with political slogans [which] not only is difficult to enforce but may well have never been meant to be seriously enforced at all".[9] The only function this and all three predecessors perform (the Constitutions of 1954, 1975 and 1978) is to affirm the paramountcy of the latest group of leaders within the Party and their new ideological orientation.[10] For all practical purposes, the Constitution is in "the least important document" in the legal system.[11]

12.006 It should be no surprise, then, that China's Constitution does not even remotely describe, let alone prescribe the realities of the Chinese legal system. All State institutions of the People's Republic of China are in fact subordinated to the leadership of the Chinese Communist Party, although this is nowhere mentioned in the provisions of the Constitution.[12] For instance, the National People's Congress — held out by the Constitution as the "highest organ of state power"[13] — meets only a few weeks each year and always rubberstamps the Party's legislative programme.[14]

12.007 Likewise, the President of the Supreme People's Court heads up one of the four in theory co-equal constitutive organs of the State (the others being the State Council, the Central Military Commission and the Supreme People's Procuratorate), he disposes in practice far less clout than the Minister of Public Security of the State Council, who controls the police, and is moreover subordinate to the superintendence of the Head of the Party's Central Political-Legal Commission.[15]

[6] IW Chong, "Practising Law in China — The Rise of the Dragon" in HW Tang, M Hor and KSY Koh (eds), *The Practice of Law* (LexisNexis, 2011) 217.
[7] Q Zhang, *The Constitution of China: A Contextual Analysis* (Hart Publishing, 2012) 85.
[8] Q Zhang, "A Constitution without Constitutionalism? The Paths of Constitutional Development in China" (2010) 8 *International Journal of Constitutional Law* 950, 952.
[9] Zhang (n 7 above) 65, 175.
[10] S Guo, *Chinese Politics and Government: Power, Ideology, and Organization* (Routledge, 2013) 184.
[11] DC Clarke, "Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?" in CS Hsu (ed), *Understanding China's Legal System* (New York University Press, 2003) 103.
[12] X He, "The Party's Leadership As a Living Constitution in China" (2012) 42 HKLJ 73, 73.
[13] Article 57 of the Constitution of the People's Republic of China 1982.
[14] M Pei, *China's Trapped Transition: The Limits of Developmental Autocracy* (Harvard University Press, 2008) 61.
[15] He (n 12 above) 82.

12.008 The organ of paramount state power is actually the Standing Committee of the Party's Political Bureau (Politburo) which, again, is nowhere mentioned in the Constitution. Currently limited to seven members, it makes all important decisions for the State under the direction of the General Secretary.[16] Decisions of the Politburo are transmitted to the State Council and the Standing Committee of the National People's Congress (among other organs) for implementation. This is practically done through elaborate intra-Party coordinating mechanisms like the Finance and Economics Leading Group.

12.009 The Party permeates both law and society through and through in a way that no written document in the Chinese legal system can capture. Party groups which are officially outside the Party but vested with supervisory power are set up in each organisation.[17] Leading positions in State and non-State institutions, including organs of the legal system such as courts or local congresses, procuratorates, public security forces, lawyer's associations and law schools, are determined by the Organisational Department of the Communist Party under a Soviet-inspired *nomenklatura* system.[18]

12.010 The Chinese legal system thus enjoys no genuine independence from the will of politicians in any form. It has always been subordinate to the Party, which sees to it that "all the key aspects of political life … laws and the constitution [are] compatible with its own political ideology, norms, image, policy orientation, and need".[19]

(iii) *Socialist Rule by Law*

12.011 In 1999, the PRC Constitution was amended to include a new art.5(1), which provides:

> The People's Republic of China shall govern the State in accordance with law and construct a Socialist State ruled by law.

12.012 This amendment reflected the Party's recognition of how pivotally important is the legal system to economic development.[20] Even so, the precept of "Socialist rule by law" must not be confused with the "rule of law" as understood in Hong Kong. Its political origin was the Dengist reforms whereby the Party exploited law as a vehicle for state-building rather than liberalisation or democratisation. It is rooted still in the Marxist ideological assumption that law merely embodies the will of the ruling class, which dominates production relations.[21]

[16] CR McElwee, *Environmental Law in China: Managing Risk and Ensuring Compliance* (Oxford University Press, 2011) 43.
[17] He (n 12 above) 76.
[18] WA Joseph, "Ideology and Chinese Politics" in WA Joseph (ed), *Politics in China: An Introduction* (Oxford University Press, 2010) 169.
[19] Guo (n 10 above) 185–187.
[20] R Peerenboom, "Social Foundations of China's Living Constitution" in T Ginsburg (ed), *Comparative Constitutional Design* (Cambridge University Press, 2012) 147.
[21] EC Ip, "The Supreme People's Court and the Political Economy of Judicial Empowerment in Contemporary China" (2011) 24 *Columbia Journal of Asian Law* 367, 376.

12.013 Legally, "Socialist rule by law" was inspired by the German civilian law notion of the *Rechtsstaat*[22] which, properly understood,[23] means a "State *through* law" or "*by* law".[24] Law in this sense is but an instrument affecting the supreme will of the State and its rulers.[25] Asian versions of the *Rechtsstaat* vest all power in the State, which may or may not distribute rights and liberties to its citizens.[26] This is consistent with Chinese legal orthodoxy, which considers rights as specified benefits conferred and implemented at State discretion, and always conditional upon the satisfaction by its subjects of certain standards of performance.[27]

12.014 Socialist rule by law did not affect the *status quo* that the actual vindication of constitutional rights must yield to the "Four Cardinal Principles": keeping to the socialist path, upholding the People's Democratic Dictatorship, upholding the leadership of the Chinese Communist Party and loyalty to Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the "Three Representations" of Jiang Zemin.[28]

12.015 There is no emphasis on individual and personal liberty. A person not convicted of an offence may still be deprived of personal liberty by administrators under the Security Administration Punishment Law of 2005.[29] Behaviour contrary to civil and administrative regulations, as opposed to criminal laws, can also lead to "administrative disciplinary sanctions" that deprive persons of their liberty or property without a trial.[30] In this connection, Hong Kong has been criticised for its incompetence to safeguard the interests of its residents in China, many of whom had been detained by Chinese law enforcement agencies over civil and commercial rather than criminal disputes.[31]

12.016 It is beyond doubt that "Socialist rule by law" has never required the system to give primacy to law over political considerations; it is instead a tool to regulate the economy and discipline society so as to consolidate power and shore up the Party's survivability in the long term.[32] The doctrine of "Three Supremacies" is a supplement to "Socialist Rule by Law". In 2007, President Hu Jintao warned:

> Judges should always be aware of the supremacy of the leadership of the Communist Party, the supremacy of the interests of the people, and the supremacy of the Constitution and law. They should protect systematic social development, promote social harmony and political responsibility, and keep making great efforts to build justice, efficiency and public trust in the Socialist legal system.[33]

[22] See AHY Chen, "Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law" (1999) 17 *UCLA Pacific Basin Law Journal* 125.
[23] J Alder, *Constitutional and Administrative Law* (Palgrave Macmillan, 9th ed., 2013) 110.
[24] NE Nedzel, "The Rule of Law: Its History and Meaning in Common Law, Civil Law, and Latin American Judicial Systems" (2010) 10 *Richmond Journal of Global Law and Business* 57, 62.
[25] M Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 321.
[26] N Urabe, "Rule of Law and Due Process: A Comparative View of the United States and Japan" (1990) 53 *Law and Contemporary Problems* 61, 62.
[27] PB Potter, *China's Legal System* (Policy Press, 2013) 187.
[28] AHY Chen, *An Introduction to the Legal System of the People's Republic of China* (LexisNexis, 4th ed., 2011) 72.
[29] T Saich, *Governance and Politics of China* (Palgrave Macmillan, 3rd ed., 2011) 168.
[30] Chen (n 28 above) 279–280.
[31] DW Choy and H Fu, "Cross-Border Relations in Criminal Matters" in MS Gaylord, D Gittings and I Traver (eds), *Introduction to Crime, Law and Justice in Hong Kong* (Hong Kong University Press, 2009) 231.
[32] Saich (n 29 above) 165.

12.017 Similar exhortations were reiterated by Zhou Qiang, the incumbent President of the Supreme People's Court, in a 2013 opinion article:

> Rule by law should be the basic *modus operandi* of the Party in public management, [but] with emphases on the Party's leadership role over the people in making the Constitution and laws; the Party's leadership role over the people in implementing the Constitution and the laws. The Party should operate within the bounds of the Constitution and the laws so as to truly realise the Party's leadership over law-making, law enforcement, and law-abiding.[34]

(iv) *The People's Courts*

12.018 China has over 3,500 courts divided into four levels: *viz* Basic People's Courts, Intermediate People's Courts, High People's Courts and the Supreme People's Court. There are also specialist courts handling military and maritime matters. Normally, a court has several divisions: *viz* the Filing, Enforcement and Trial Divisions, which manage pre-trial, trial and post-trial activities.[35] Proceedings happen at two levels: the first instance and second instance. A judgment of the first instance may be appealed to the Court at the next higher level, but not any higher.[36] In 2011, the Supreme People's Court handled 11,876 cases and the rest of the courts system handled a total of 12.2 million cases.[37]

12.019 Cases are heard before a panel of three adjudicators (*shenpanyuan*), but minor cases may be heard by a single judge. China's version of the inquisitorial mode focusses on the review of documentary evidence: oral questioning of witnesses is not a common practice, even in criminal cases. Most trials never exceed three days; Party costs are not recoverable from the losing litigant, and the so-called "people's assessor" (literally, people's juror) has little influence on the eventual judgment of the court.[38] A typical court judgment in China is short and does not set forth the judges' legal reasoning in detail like the judgments of common law courts or even non-Socialist civilian law courts.[39]

12.020 Chinese courts were never meant to be fora purely for applying the law, but are political organs entrusted with the responsibility to promote the Party's agenda and ideology. Article 3 of the Organic Law of the People's Courts 2006 obligates judges to "ensure the smooth progress of the Socialist revolution and Socialist construction

[33] J Hu, "Use the 'Three Supremacies' As the Guidance Thought of the Judicial Practice", cited in Z Xu, *"The Three Supremacies": Finding a Chinese Road to Judicial Reform* (Law Press China, 2010) 205.
[34] Q Zhou, "Proactively Promote the Construction of a Socialist Rule of Law State: A Study of Comrade Xi Jinping's Important Discourse in Relation to the Building of the Rule of Law", *People's Daily* (12 August 2013) [author's translation].
[35] W Gu, "The Judiciary in Economic and Political Transformation: *Quo Vadis* Chinese Courts?" (2013) 1 *The Chinese Journal of Comparative Law* 303, 309.
[36] Chong (n 6 above) 220.
[37] Gu (n 35 above) 303, 312.
[38] Chong (n 6 above) 219.
[39] Gu (n 35 above) 303, 325.

in the country … [and] educate citizens in loyalty to their Socialist motherland and voluntary observance of the Constitution and laws". It is ironic that such a provision, amidst instructing the courts to "educate" citizens, should give no mandate to enforce the Constitution or superintend other organs of the State to act compatibly with it.

12.021 The courts are lumped together with the police and the procuracy and named as one entity, the *gongjianfa*. Traditionally, staff in this institutional trinity rubbed shoulders with each other inside and outside the workplace.[40] Personnel transfer and job rotation between them was usual. Today, they still form the core of the Communist Party's Political-Legal System of state security bureaucracies. The Political-Legal System's first duty is not to do justice, but maintain public order and collect intelligence.

12.022 Within each court is a body known as the Adjudication Committee, with power to review and approve judicial decisions made by judges outside the Committee. Committees are usually chaired by the court's Party Secretary, an arrangement which ensures judicial decisions will stay in line with political directives from higher up.[41]

12.023 Presidents of Chinese courts in the 1990s used to be former soldiers trained in the judicial system; they have a low reputation among better educated judges.[42] In fact, it was not until 2002 that candidates for local judgeships had to pass the National Judicial Examination and be approved by the Provincial High People's Court, and not until 2005 that the number of judges with undergraduate degrees passed 50 per cent (a sevenfold increase from 1995).[43] No statute requires that judges, even senior ones, must read law for a degree.[44] Turnover in the People's Courts system remains high. Head hunters even hoped that the global economic downturn in 2008 would be an opportunity to attract young law graduates into the system who had failed to secure jobs in the private sector.[45]

(v) *Lawyers*

12.024 Like the courts system, Chinese legal practice is not independent of the State. It is rather subject to the Party's regulatory superintendence through the Ministry of Justice, the All-China Lawyers' Association and, of course, the United Front Work Committee. Notably, the Lawyers' Law 2007 was enacted to curb legal representation for collective disputes and protestors,[46] and in 2012, the Ministry of Justice made Chinese lawyers take the following oath before being admitted to the bar:

> I volunteer to become a legal practitioner of the People's Republic of China and promise to faithfully perform the sacred duties of a legal worker for socialism with Chinese characteristics; to be loyal to the motherland and the people; to uphold the leadership of the Chinese Communist Party and the Socialist system; to safeguard the dignity of the Constitution and the law; to practice on behalf of the people; to be diligent, professionally honest, and incorrupt; to safeguard the legitimate rights and interests of clients, the rightful implementation of the law, and social fairness and justice; and diligently strive for the cause of Socialism with Chinese characteristics.

[40] JP Cabestan, "The Political and Practical Obstacles to the Reform of the Judiciary and the Establishment of a Rule of Law in China" (2005) 10 *Journal of Chinese Political Science* 56.
[41] Potter (n 27 above).
[42] S Balme, "Local Courts in Western China: The Quest for Independence and Dignity" in R Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press, 2010) 172.
[43] BJ Liebman, "China's Courts: Restricted Reforms" in DC Clarke (ed), *China's Legal System: New Developments, New Challenges* (Cambridge University Press, 2008) 71.
[44] Gu (n 35 above) 303, 305.
[45] Balme (n 42 above).
[46] Potter (n 27 above) 71–72.

12.025 As at December 2011, China had 200,000 lawyers and 17,000 law firms.[47] In general, lawyers have stronger academic and/or professional qualifications than judges and procurators. In an increasingly competitive market, lawyers tend to concentrate on serving corporate clients and developing specialist expertise in commercial law.[48] This should surprise no one: the role of lawyers in criminal and administrative law appears to be poorly understood, not just by the general public but also by the courts: activist lawyers who are committed to their clients in "*weiquan*" (rights maintenance) cases are frequent victims of physical abuse and arbitrary arrest.[49]

(b) The separation of the two systems

12.026 The People's Liberation Army stopped short of crossing Sham Chun River (Shenzhen River) and attacking the British Crown Colony of Hong Kong when it conquered Shenzhen in the final phases of the Chinese civil war. Mao Zedong was reported to have said that "utilising the current status of Hong Kong is more beneficial to China in developing its global network and trade relation with the rest of the world".[50] Zhou Enlai, the first Premier of the State Council of the People's Republic of China, consistently defended Hong Kong's crucial role in China's external financial relations against ideological extremists until his death in 1976.[51]

12.027 The People's Republic of China for all practical purposes treated the British Crown Colony Government as a lawful government, concluding with it several important economic agreements, acquiescing in its reception of foreign consular representatives and enacting laws that consistently treated the China–Hong Kong boundary along Sham Chun River — which, despite its name, is under Hong Kong's jurisdiction — as a *de facto* international border.[52] China's toleration of British presence rested on one condition: the British dependency must not be used as a base to subvert the Chinese Communist Party.[53]

[47] *Ibid.*
[48] R Peerenboom, "Economic Development and the Development of the Legal Profession in China" in MYK Woo and ME Gallagher (eds), *Chinese Justice: Civil Dispute Resolution in Contemporary China* (Cambridge University Press, 2011) 125.
[49] MYK Woo, "Justice" in C Ogden (ed), *Handbook of China's Governance and Domestic Politics* (Routledge, 2013) 57.
[50] S Shen, "Navigating the Grey Area: Hong Kong's External Relations under the Tsang Administration" in JYS Cheng (ed), *The Second Chief Executive of Hong Kong SAR: Evaluating the Tsang Years 2005–2012* (City University Press, 2013) 471.
[51] LF Goodstadt, *Reluctant Regulators: How the West Created and How China Survived the Global Financial Crisis* (Hong Kong University Press, 2011) 93.
[52] A Dicks, "Treaty, Grant, Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong" (1983) 95 *The China Quarterly* 427, 439.
[53] W Ting, "Hong Kong in between China and the Great Powers: The External Relations and International Status of Hong Kong after the Chinese Resumption of Sovereignty" in JYS Cheng (ed), *The Second Chief Executive of Hong Kong SAR: Evaluating the Tsang Years 2005–2012* (City University Press, 2013) 262.