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Themes and arguments

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Origin and importance of the Court of Final Appeal

This book is a study of the Court of Final Appeal (CFA) of the Hong Kong Special Administrative Region of the People's Republic of China (HKSAR). It traces the first 13 years of the work of its judges and their jurisprudence. The CFA came into being on the transfer of Hong Kong's sovereignty to China on 1 July 1997, marking the end of British rule of more than a century. It marked both a departure and a continuation, with continuation the more significant role. Its primary role is the preservation of the rule of law, widely perceived to be the most important innovation and legacy of British rule,[1] promoting both its market economy and human rights.[2] Its unique characteristics as a judicial body in China are the membership of foreign judges, the application of the common law, and total separation from the Mainland Chinese judicial system – the elements of continuity.

In some respects, the CFA is regarded as the successor to the Privy Council (PC), whose jurisdiction over Hong Kong ended just as that of the CFA began. But the challenges it faced are significantly different from those of the PC. The PC was the court of the imperial authority, embedded securely within the traditions of the common law, its legitimacy challenged in neither Britain nor Hong Kong. The new sovereign, China,

[1] See e.g. Steve Tsang, *A Modern History of Hong Kong* (Hong Kong: Hong Kong University Press, 2004); Steve Tsang (ed.), *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong: Hong Kong University Press, 2001).

[2] The assumption that Hong Kong's robust legal system was responsible for its economic system is somewhat exaggerated; many other factors contributed (e.g. cheap labour, forms of patronage, preferential position of key companies, low tax, lack of regulation of competition); see Yash Ghai, 'The rule of law and capitalism: reflections on the Basic Law' in R. Wacks (ed.), *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong: University of Hong Kong Press, l993) 342–66.

did not understand the common law or respect the independence of the judiciary. China had agreed to an institution such as the CFA to maintain confidence of the local and international community as investors in Hong Kong, before it fully understood the implications of the CFA. Negotiations on the details of the CFA, its composition and jurisdiction, were among the most difficult and protracted of any provisions of the Sino–British Joint Declaration and the drafting of the Basic Law (BL).[3] In the process, the composition as well as the jurisdiction of the CFA was modified. So unlike the PC, the CFA is not ultimately the final court for Hong Kong because in important ways, the CFA is subject to the overriding powers of the Standing Committee of the National People's Congress (NPCSC, the supreme state authority of China). Any account of the CFA has to take into consideration the impact of the NPCSC, even sometimes of its silences.

Hong Kong's legal system, based on the common law, often appears to be impenetrable to the Chinese authorities, who are not tuned in to the niceties of Western procedures and are more at home with the more flexible standards of Chinese law. The two legal systems have very different traditions, styles of interpretation, and capacity for accommodation to political pressures. The presence of a strong legal system in Hong Kong and the absence of a fully democratic system tend to convert contentious political, and sometimes social, matters into legal issues, but China prefers legal issues to be treated as political matters in which it has the upper hand. Courts thus often find themselves in the front line in the defence of the BL.

The scheme of the BL of the HKSAR, Hong Kong's constitution enacted by the National People's Congress (NPC), essentially subordinates Hong Kong's executive and legislature to the Mainland's authorities (see Chapter 2). The CFA's mandate to protect Hong Kong's autonomy and its people's rights is thus likely to bring the judiciary into conflict with other public authorities in the HKSAR. It is also likely to bring it into conflict with the Central Authorities, especially if common law assumptions of judicial review extend to the entire scheme of the BL. The law is deliberated on by the courts in an open process. Unlike the executive, the courts

[3] See M. Lee and W. Szeto, *The Basic Law: Some Basic Flaws* (Hong Kong: the Authors, 1988); Jonathan Dimbleby, *The Last Governor: Chris Patten and the Handover of Hong Kong* (London: Little, Brown and Co., 1997); and Chapters 5 (Young and Da Roza) and 8 (Thomas) in this volume.

cannot fudge issues; they have to decide disputes that are presented to them, and they have to do so in public and provide reasons and justifications for their decisions. Unlike secret political negotiations, awkward issues cannot so easily be ducked or fudged in a court (as is well illustrated by the sequence of events that led to the rights of abode cases, discussed in several chapters).

Perhaps the fundamental difficulty in the exercise of the jurisdiction of the CFA lies in differing concepts of the role of the courts on the Mainland and Hong Kong. In Hong Kong, courts are separate from and independent of the executive and the legislature. It is their responsibility to review the validity of legislation and executive acts. A judgment adverse to the government is not regarded as a challenge to its legitimacy or the right to rule. In China, courts follow Chinese Communist Party directives in appropriate cases and cannot refuse to enforce a law because it might be considered to contravene the constitution. There seems to be insufficient appreciation among Mainland officials and lawyers as to the bounds within which Hong Kong courts have to make decisions. The courts have little choice about what is litigated and are compelled by the generally accepted notions of the responsibilities of common law judges to adjudicate disputes brought before them in accordance with the law, albeit that the law is frequently flexible.

In its first 13 years, the CFA had to decide weighty matters such as the legality of the Provisional Legislative Council, the relationship of the BL to the People's Republic of China (PRC) Constitution, the scope of the application of Mainland legislation in Hong Kong, the validity of rules governing disciplinary and other aspects of public service, the right of abode in Hong Kong of certain Mainland residents, the fate of thousands of refugees from Vietnam, complex issues of land law, and the regime for the protection of rights and freedoms of Hong Kong residents. These issues have raised central questions about the autonomy of the HKSAR and the competence of the Central Authorities of the PRC over Hong Kong.

They have also major consequences for the social and economic future of Hong Kong, particularly the decisions on the right of abode, which affect the flow of migrants from the Mainland, the right to public housing, and the reach of the defamation law. More specifically, the litigation on the BL has raised questions about the place of law and legality in the mediation of the relationship between Hong Kong and the Mainland, and the role of the courts in defining or sustaining that relationship. These are momentous matters in a largely uncharted territory. Consequently, it is not

surprising that the constitutional role of the courts, especially the CFA, has given rise to great controversy.[4]

But the CFA's jurisdiction goes beyond the constitution, covering all areas of the law. The foundation of its jurisdiction, in addition to the BL, is the common law, but not the common law as at the time of the resumption of Chinese sovereignty because it is freed from the English common law. Instead, it is free to choose from the common law of any particular country. This has given the CFA enormous flexibility in moulding the common law to the changing circumstances of Hong Kong. The membership of judges from other jurisdictions has enabled the CFA to understand developments in other common law countries and to assess their relevance for Hong Kong. This factor is equally, if not more, important in constitutional law, a field where Hong Kong had little experience, especially as regards human rights.

In the first 13 years of the resumption of sovereignty, Andrew Li was the Chief Justice (CJ) of Hong Kong and in that capacity presided over the CFA. The CFA must have five judges to constitute the bench. But the number of permanent judges (including the CJ) has not exceeded four (perhaps as a matter of policy) so that the CFA always had to sit with a non-permanent judge (NPJ) – in the majority of the cases with an overseas judge and occasionally with one overseas and one local NPJ. The procedures for the appointment and dismissal of judges are broadly in line with generally accepted standards (although in recent times the fairness with which the process is followed has been criticised, both for undue dominance of the influence of the executive and the lack of any public explanation as to the reasons and merits of overseas judges; see Chapter 9).

Li's role as CJ and as chair of the Judicial Officers Recommendation Commission was crucial to the fashioning of the HKSAR's legal and judicial system and ethos. Li had a brilliant legal and political career but had no judicial experience. His experience was largely in commercial and business law – and in what passed for politics in those days (as member of the Governor's Council). But these factors turned out to be no handicap, and his experience of the political and administrative system of Hong Kong was a great asset in dealing with the government and the wider

[4] The first major controversy, about the right of abode of Mainland children with links to Hong Kong, is documented at length in J. Chan, H.L. Fu, and Y. Ghai (eds.), *Hong Kong's Constitutional Debate: Conflict Over Interpretation* (Hong Kong: Hong Kong University Press, 2001).

public. He played a decisive role in the appointment of the other CFA judges, particularly the foreign judges. In that sense, as well as in other ways, for the first 13 years, the CFA was very much Li's court. But Li as CJ developed a very collegial style of administration and decision making. He assembled a remarkable bench of outstanding talent and openness, local as well as foreign. There are three categories of judges of the CFA: permanent (PJ), non-permanent overseas (NPJ overseas), and non-permanent local (NPJ local) – contrary to the provision in the Joint Declaration (JD) and BL, which provided for only the first two categories (see Chapter 11).

This book examines how the Court discharged its responsibilities in its first 13 years and how a very special set of judges put their imprint on the court and its jurisprudence.

Note on contributors

Contributors to this volume have achieved distinction in several fields and bring to their chapters the benefits of considerable scholarship and practical experience of autonomy systems, leading to differences in perspectives. Some of them have been deeply involved in the operation of autonomy systems: Sir Anthony Mason, the longest serving foreign judge; Michael Thomas, attorney general of Hong Kong during the formative years when the Sino–British Joint Declaration took shape and the long process for its implementation began; Albert Chen, the longest serving Hong Kong member of the Committee of the BL; Paulo Cardinal, the senior legal adviser to the Macau Legislative Assembly; William Waung, a former member of Hong Kong's Court of First Instance; Josef Marko, who served on the Constitutional Court (CC) of Bosnia-Herzegovina (BiH) as a foreign judge in which he played a critical role in the jurisprudence of that country; and Ghai, who has advised in a number of countries on autonomy or federal arrangements. Others have litigated or submitted legal opinions in litigation on the BL: Johannes Chan, Thomas, P. Y. Lo, Mark Daly, Ghai, Oliver Jones, Simon Young, and Antonio Da Roza. Among the authors are also the leading scholars of the BL and Hong Kong's, as well as China's, legal systems: Chen, Ghai, Jill Cottrell, Jones, Rick Glofcheski, Young, Mason, Gary Meggitt, Xiaonan Yang, and Malcolm Merry. Many authorities bring comparative perspectives to bear on the BL: Ghai, Marko, Cardinal, Cottrell, Jorge Godinho, and Yang. And most have, in different ways, contributed to education about the BL.

Hong Kong's autonomy in comparative perspective

The historical and comparative dimensions of Hong Kong's system are subthemes of the book. Ghai (see Chapter 2) locates the HKSAR within the system of autonomies and shows the distinct ways in which it differs from most autonomy systems – a rapidly growing constitutional phenomenon that has been adopted in many countries in the past few decades. He uses the comparative dimensions to assess the strengths and mostly the weaknesses of Hong Kong's autonomy, its lack of effective entrenchment, the subordination of the executive to the Chinese government, a less than democratic legislature in Hong Kong that fails fully to reflect the concerns of its residents, and the absence of a tradition of legality on the Mainland.

Autonomy connotes self-government, the ability of a region or community to organise its affairs without interference from the central government, neighbouring regions, or neighbouring communities. The foundations of most autonomies lie in constitutional and sometimes international arrangements, entrenched and based on traditions of the rule of law. Unlike most autonomies where ethnic differences dominate, Hong Kong's autonomy is characterised by different economic and social systems and the unusual detail with which the division of powers between Hong Kong and China are specified – a testimony perhaps to fundamental differences between ideologies and systems between the two entities. At the same time, this restricts policy options for Hong Kong.

On its own, the HKSAR cannot alter the main institutions of its government; the electoral laws; or, significantly, its rather laissez-faire economic system. But the NPC can change the BL on its own, subject to certain restrictions. But these restrictions have been overcome, with dubious legality, by some interpretations by the NPCSC. Another aspect of the institutional arrangements, centring on the office and powers of the Chief Executive, was Beijing's plan to acquire ultimate control over Hong Kong's affairs.

Other ways in which Hong Kong's autonomy differs from other autonomies lie in its origins and mode of negotiations (Sino–British negotiations within a framework established by China, with no participation by Hong Kong people). Institutions and procedures internal to Hong Kong are not democratic, so they do not always reflect people's choice nor do they set up a framework for free and vibrant politics. There is no really independent mechanism for adjudication of relations between the Central Authorities and Hong Kong. The absence of the rule of law in the relations between the two is a major weakness of Hong Kong's autonomy.

The ambiguity of what happens to Hong Kong's political, social, and economic system a few decades down the line (the autonomy is granted only for 50 years) – a matter for China to decide – is a further element in the unequal relations between the two entities. On the other hand, the divisions of powers are clearer than in other federal or autonomy systems – and they are overwhelmingly in Hong Kong's favour. Ghai argues Hong Kong's relationship with China is best understood as autonomy with the existence of two separate economic and politico-legal systems but with the HKSAR firmly under the ultimate direction of Beijing. The tensions that this creates are reflected in public law.

The Court of Final Appeal's role

The CFA's role and jurisdiction have to be understood in the context of Hong Kong's autonomy. The judiciary has played and plays a crucial role in maintaining the framework of autonomy and resolving disputes between the national government and the autonomous region. This task is normally performed by national courts, but that solution was not possible in Hong Kong because of weaknesses of the judicial system in China, including the absence of judicial independence. The legal and judicial system in Hong Kong was capable of this task, but as a regional court, its authority over national institutions and laws was limited. This has produced a lacuna, which the BL seeks to fill by the political role of the NPC through its Standing Committee. Thus, the legality approach of the CFA comes into clash with the political sovereignty and role of the NPCSC. This, reinforced by the rulings of the NPCSC, has rendered the CFA impotent in dealing with legal issues that touch on the constitutional and political relationships between the HKSAR and the national government. And gradually, it has reduced and weakened the CFA's role in the interpretation of the BL, blurred the distinction between the interpretation and the amendment of the BL, and marginalised the CFA's role in the protection of Hong Kong's autonomy against onslaughts from the national government. The CFA has, however, been robust in dealing with constitutional and other legal issues 'internal' to Hong Kong.

Privy Council and the Court of Final Appeal

Historically, the obvious comparison of the CFA is with the PC, which it replaced. Jones (Chapter 4) provides an historical introduction to the PC,

emphasising its imperial origins and with the judiciary for the most part drawn from English courts. He notes a change with the independence of colonies because whereas in the early days its role was to establish a uniform understanding of the common law, after independence it made attempts to relate the law to the circumstances of the country from which the appeal had emanated (although in Chapter 13, Mason finds little evidence of this approach in respect of Hong Kong). And if in the earlier phase there might have been a tendency to favour imperial interests, later it asserted its role as the supreme court of the country concerned – and found a role for certain judges from the commonwealth. Jones notes that it is not easy to compare the PC with the CFA because one has a history of more than 150 years and the other just 13 (at the time of writing). One had appellate functions in respect of numerous jurisdictions, the other of only one. And the constitutional frameworks with which the two operated are fundamentally different (making public law a major component of the CFA's docket in comparison with the PC). Nevertheless, the history and decisions of the PC covering numerous jurisdictions might well be of interest to scholars of emerging regional and international tribunals. And a number of authors in this volume do compare the approach of the PC and the CFA, their workload, accessibility to court, principal areas of appeal, and styles of decisions.

Given that the justification for inclusion of foreign judges on the CFA was maintaining confidence in the quality and independence of Hong Kong's judiciary, it was perhaps more than coincidence that some of the foreign judges in its early years were members of the PC, such as Lords Hoffmann, Cooke, and Woolf. The diversity of the home jurisdictions of judges in the CFA is broader, although restricted to 'white' jurisdictions, with the curious exclusion of Canada. If the PC was a multijurisdictional court, the CFA is single jurisdictional but with judges from multiple jurisdictions. And unlike the PC, the CFA now looks to the precedents from several common law countries (allowing for a more flexible approach and openness to wider sources of ideas).

If the role of the PC was to preserve the interests of the empire, that of the CFA might be said to preserve the powers and authority of the HKSAR. That brings us to another point of (imperial) comparison. The CFA is not the final appeal court in the way the PC was. In one sense, the NPCSC is more like the PC – external to Hong Kong, which has no role in its composition, more concerned with the Mainland interests than Hong Kong's, able to overrule the CFA – but with the important distinction that the PC applied the common law, NPCSC Chinese law. And if the

origins of the PC lay in a citizen's right to appeal a decision to the sovereign, outside the regular court system, might one regard the NPC as the supreme authority in similar although not identical terms? And if territorial courts might have been influenced by the possibility of an appeal to the PC, how far is the CFA influenced by the presence of the NPCSC?

Although Jones focuses on the history of the PC, Young and Da Roza (Chapter 6) compare the functions, work, and impact of the CFA with those of the PC, with a wealth of statistical analyses. They say (and several other contributors say) that the intention of structuring the CFA to maintain the authority and reassurance provided by the PC to investors has been amply achieved. They imply that the CFA has been even more efficient and successful than the PC. Its caseload is considerably heavier than that of the PC (in respect of Hong Kong cases). It turns a case around more speedily than the PC used to; it deals with a much larger variety of legal issues, particularly in public law; it is more innovative and willing to look at common law developments in many more jurisdictions than the PC; and its location in Hong Kong has greatly increased access to the final court. One could also say, as Young and Da Rosa imply, that the CFA has generally played a greater role in moulding people's thinking about justice.

Of course, one must not read these necessarily as criticisms of the PC. Many of the differences are the result of the changed context of Hong Kong. For most of the period of the jurisdiction of the PC, Hong Kong had no constitution to speak of, no entrenched guarantees of human rights, and no delicate balance between the colony or autonomy and the sovereign that the CFA has to manage. Most importantly, the PC did not have to play the role that has fallen to the CFA: bringing into operation and sustaining a constitutional order, shaping it by interpretations of the founding document, the BL. That is what final courts do in most democratic states.

Standing Committee of the National People's Congress and the Court of Final Appeal

This discussion appropriately brings us to the comparison between the NPCSC and the CFA. Comparisons can be drawn with regard to their function of interpretation, where their jurisdiction, style, and authority differ. Several chapters touch on these matters and the relationship between them, but the most systematic analysis is provided by Yang (Chapter 3). Her chapter is important to understand the role, influence,

and orientation of the NPCSC. Its role is varied, although the greatest attention has been paid to interpretation under BL Article 158, which has been exercised relatively sparingly but significantly.

Yang examines the different traditions of and approaches to legality in China and Hong Kong and the constraints under which the NPCSC and the CFA operate. She draws connections between the common law and capitalism and between common law and the rule of law (the two, of course, are connected in bourgeoisie ideology). She analyses the institutional settings of the two interpreters and argues that different institutional concerns and missions inevitably bring the two interpreters to different interpretations of the BL. In China, the power to interpret belongs to the same organ as makes the law. Law is seen as the will of the ruling class, and the principles of checks and balances and the separation of powers are not applicable.

Yang points to the different roles that the NPCSC plays in Hong Kong and China as regards interpretation. On the Mainland, the ideal function of legislative interpretation is to achieve a compromise between conflicting state organs. In respect of Hong Kong, the NPCSC does not passively adapt itself to political, legal, and historical settings but strategically adjusts behaviour to achieve individual or institutional goals. Yang identifies its three key political missions as an interpreter of the Hong Kong BL: to maintain the prosperity and stability of the HKSAR, to maintain the authority of 'one country' as a state representative, and to behave as a self-restrained interpreter. She argues that the main concern of China regarding Hong Kong, from the time that it began to consider the resumption of sovereignty, has been to maintain the economic prosperity of Hong Kong. These active strategies are reflected in a change of interpretative styles and approaches in respect of Hong Kong.

The two bodies operate under different theories and conceptions of law and functions of interpretation – the CFA places importance on the role of law as limiting power and promoting predictability through it, and the NPC on the task to safeguard the supremacy of political power. Theoretically, the NPC's authority is derived from the will and power of the people, which therefore brooks no checks and balances and no separation of power and justifies the legislature's authority to interpret laws. In practice, the NPC is a creature of the Chinese Communist Party. Yang considers that for the NPCSC, 'the interpretation of the Basic Law is the most powerful and effective tool to exercise the powers of sovereignty'. Comparing approaches of the CFA and the NPCSC to interpretation – purposive,