The jurisdiction of themselves was one of the constitutional issues that the courts of the HKSAR have had to encounter immediately after the transfer of sovereignty. In the case HKSAR v Ma Wai-kwan David & Ors,\(^1\) the three judges of the Court of Appeal of the HKSAR chose to express their views on whether the courts of the HKSAR have the power to question the validity of any legislation or acts passed by the sovereign.\(^2\)

The aim of this paper is to provide a comprehensive study on the jurisdiction of the courts of the HKSAR on the basis of the Basic Law and in the light of the decision of Ma Wai-kwan David.

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\(^1\) [1997] 2 HKC 315.

\(^2\) The main issue in the case was whether the common law offence of conspiracy to pervert the course of justice is preserved after the transfer of sovereignty. The trial against the three respondents started but was not finished before the transfer of sovereignty. Immediately after the transfer of sovereignty when the trial was resumed, the respondents raised the issue that the common law offence was no longer part of the laws of the HKSAR. They argued that Art 160 of the Basic Law required a positive act of adoption of these laws either by the SCNPC or by the legislature of the HKSAR. They alleged that the Standing Committee had made no such positive act. Also, the Reunification Ordinance failed to adopt the laws though it was legislated to provide for the continuity of laws. That the ordinance was passed by the Provisional Legislative Council was the main reason. It was argued that the establishment of the Provisional Legislative Council contradicted the Basic Law and all laws passed by this illegal body were therefore invalid. The judges decided that there was no need to have a positive act by the SCNPC in order to adopt the common law into the laws of the HKSAR. The provisions of the Basic Law were sufficient to achieve this purpose. The case actually could have stopped here as the legal issue before the court had already been resolved. However, the judges chose to continue to discuss the legality of the Provisional Legislative Council and the judges gave their comments on the jurisdiction of the courts of the HKSAR.
Article 19 of the Basic Law

Article 19 of the Basic Law will be our starting point as this is the most relevant article in the Basic Law about the jurisdiction of the courts of the HKSAR.\(^3\) Article 19 provides that:

The HKSAR shall be vested with independent judicial power, including that of final adjudication. The courts of the HKSAR shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained. The courts of the HKSAR shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.

There are several general comments or observations about Art 19:

- The HKSAR, authorised by the National People's Congress (NPC), enjoys independent judicial power, including the power of final adjudication.\(^4\) The judicial power will be exercised by the courts of the HKSAR\(^5\) in accordance with the provisions of the Basic Law.\(^6\)

- The general principle concerning the jurisdiction of the courts of the HKSAR is that the courts of the HKSAR have jurisdiction over all cases in Hong Kong.

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\(^3\) Before the transfer of sovereignty, no provision in Hong Kong's constitutional documents specified the scope of the jurisdiction of Hong Kong courts. The jurisdiction of Hong Kong courts was defined by ordinary legislation and common law. However, after the transfer of sovereignty, with a provision directly spelling out the jurisdiction of the courts of the HKSAR, the Basic Law must be the primary material that we must consider first.

\(^4\) Article 2 of the Basic Law.

\(^5\) Article 81 of the Basic Law.

\(^6\) Ibid.
The general principle is subject to restrictions. To find out what the restrictions are on the jurisdiction of the courts of the HKSAR, we shall have to find out what the restrictions are on the courts of Hong Kong under colonial rule. However, only restrictions imposed by the legal system and principles will be maintained. Also, if the restrictions that were previously in force have been changed consequent upon the establishment of the Court of Final Appeal of the HKSAR, they may not be maintained.\(^7\)

- The courts of the HKSAR have no jurisdiction over acts of state such as defence and foreign affairs.
- The courts of the HKSAR will not decide every question of facts in adjudication. If they are questions of facts concerning acts of state such as defence and foreign affairs, the courts of the HKSAR shall obtain a certificate from the Chief Executive on such questions. This certificate shall be binding on the courts. The Chief Executive shall obtain a certifying document from the Central People's Government (CPG) before issuing such a certificate.

These general comments or observations need further interpretation and clarification before we can identify the exact scope of the jurisdiction of the courts of the HKSAR and consider the implications of the relevant provisions.

**Judicial power**

The discussion about the jurisdiction of the courts of the HKSAR here is in the context of the judicial powers\(^8\) exercised by the courts.\(^9\) Therefore, we need to understand what kinds of power are actually

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\(^7\) Article 82 of the Basic Law.

\(^8\) The discussion of judicial power in this paper is not about whether only the courts of the HKSAR have the authority to exercise judicial powers and bodies other than the courts have no authority to exercise judicial powers. It is also not about whether the courts of the HKSAR may exercise powers other than judicial powers. Discussion of these questions can be found in Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1997), pp 286-91.

\(^9\) Courts in certain situations may exercise powers other than judicial powers.
covered by 'judicial power' as provided in the Basic Law. If a particular power is not included in the meaning of 'judicial power,' the absence of such power will not be a limitation on the jurisdiction of the courts as they do not enjoy that power from the beginning.

The first source that we will look at in order to find out the meaning of certain words, phrases, or provisions in the Basic Law is the Basic Law itself. Even though the Basic Law does not contain an interpretation clause, we may still refer to the provisions of the Basic Law to ascertain the meaning. They may indirectly provide a definition or at least a description.

The Basic Law in various places describes 'judicial power' as 'the power to adjudicate.' According to Art 2 and para 1 of Art 19, judicial power includes final adjudication. Reference is made to adjudication in para 3 of Art 19, 'the courts of the Region shall in the adjudication of cases ...' and in Art 84, 'the courts of the HKSAR shall adjudicate cases ...'. Also, Art 158 states that 'the Standing Committee of the NPC shall authorise the courts of the HKSAR to interpret on their own, in adjudicating cases, the provisions of this Law....'

If we look at the Chinese version, it is even clearer. Articles 2 and 19 of the Basic Law states that the HKSAR enjoys judicial power (司法權). However, Art 80 states that the courts of the HKSAR shall exercise the judicial power (審判權) of the HKSAR. '司法權' and '審判權' are both translated as 'judicial power.' From the context, it seems that '司法權' and '審判權' are referring to the same thing. Actually, another translation for '審判權' can be 'the power to adjudicate.'

The Basic Law does not provide any further and direct explanation for the meaning of 'adjudication' or 'the power to adjudicate.' We may still refer to other articles of the Basic Law to ascertain the meaning though they may only provide some indirect hints. In this kind of case, we may assume that the literal meaning of certain words, phrases, or provisions in the Basic Law should be applied unless from the immediate literal context or from the context of the whole Basic Law such a meaning has to be excluded.

10 Articles 2, 19, 80, and 85 of the Basic Law.
The power to adjudicate

Literally, 'the power to adjudicate'\textsuperscript{11} includes the following aspects:

(1) the power to receive a case;
(2) the power to determine the facts of the case on the basis of evidence submitted by the parties;
(3) the power to determine which laws are relevant to the case;
(4) the power to determine whether the applicable laws are constitutionally or legally valid under the hierarchy of laws;
(5) the power to interpret the applicable laws;
(6) the power to apply the applicable laws to the factual situation of the case and to make a binding decision on the legality of the acts involved in the case; and
(7) the power to determine the legal consequence of its decision and provide a remedy to the suffering party if necessary.

We will examine each of the aspects and see whether the meaning of 'the power to adjudicate' as illustrated above is compatible with its immediate context and the Basic Law as a whole. The first aspect is the power to receive a case. The courts must have this power before it can do anything with the case. In the Basic Law, para 1 of Art 35 provides that Hong Kong residents shall have the right to access to the courts. Paragraph 2 of the same article provides that Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel. Article 63 states that the Department of Justice of the HKSAR shall control criminal prosecutions. Article 87 states that anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs. All these articles imply that if any person initiate a legal proceeding in the courts of the HKSAR, those courts have the authority to receive the case and such authority cannot be challenged by the accused or by any other person. This is a duty as well as a power. If a case is initiated, the courts have a duty to receive the case.

\textsuperscript{11} A good discussion of the concept of adjudication can be found in Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard LR 353.
However, it is not so clear whether the courts have the power to initiate a case on its own.

The second aspect is the power to determine the facts of the case on the basis of evidence submitted by the parties. If the courts are to adjudicate on anything in a case, the courts must be able to ascertain what had actually happened. Usually, the courts will not initiate an inquiry of the facts on their own but will rely on the evidence put forward by the parties. In the Basic Law, Art 87 states that anyone who is lawfully arrested shall be presumed innocent until convicted by the judicial organs. In other words, the prosecution needs to submit sufficient evidence to the courts to prove that the accused is guilty. It implies that the courts have the power to determine whether the evidence is strong enough to support the charge. In assessing the evidence, the courts are actually determining the facts of the case.

The third aspect is the power to determine which laws are relevant to the case. Any decision made by the courts in a case must be on the basis of laws applicable in that specific situation. The courts must have the power to determine what the relevant laws are for a particular case. Article 84 states that the courts of the HKSAR shall adjudicate cases in accordance with the laws applicable in the HKSAR as prescribed in Art 18 of the Basic Law. The role of the courts is to identify the relevant laws according to the context of the facts of that case from the various sources of law so listed out in Art 18.

The fourth aspect is the power to determine whether the relevant laws are legally or constitutionally valid under the hierarchy of laws. If any law contravenes a law of a higher order in the hierarchy, that law is actually not a law at all and therefore is not applicable. Article 11 states that 'no law enacted by the legislature of the HKSAR shall contravene the Basic Law.' According to Art 17, the Standing Committee of the

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12 They include: the Basic Law, the laws previously in force in Hong Kong (the common law, rules of equity, ordinances, subordinate legislation, and customary law), the laws enacted by the legislature of the HKSAR, and the national laws listed in Annex III of the Basic Law. The laws previously in force in Hong Kong in general will be maintained except those that contravene the Basic Law. Article 160 authorises the SCNPC, upon the establishment of the HKSAR, to declare which of the laws previously in force in Hong Kong are in contravention of the Basic Law and thus are invalid. The SCNPC on 23 February 1997 passed a decision listing a number of Hong Kong ordinances that had contravened the Basic Law and would not be adopted as the laws of the HKSAR (reproduced in (1997) 27 HKLJ 419-24). Article 84 also allows the courts to refer to precedents of other common law jurisdictions.
NPC (SCNPC) may return any law enacted by the legislature of the HKSAR to that legislature if it considers that such law is not in conformity with the provisions of the Basic Law. Any law returned by the SCNPC will immediately be invalidated. However, this power of the SCNPC is limited to the provisions of the Basic Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the HKSAR. If the relevant provisions are not regarding such affairs or such relationship, the Basic Law is silent. It is not clear which body will exercise the power to determine and invalidate the laws enacted by the legislature of the HKSAR.

However, from the context of the Basic Law, we can see that the courts of the HKSAR will exercise this power. Article 81 states that the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal of the HKSAR. Before the transfer of sovereignty, Hong Kong courts did exercise such a power. After the transfer of sovereignty, the courts of the HKSAR have also exercised this power to review the constitutionality of an ordinance passed by the Provisional Legislative Council of the HKSAR and have declared certain provisions invalid for contravening the Basic Law.

Article 160 provides that the laws previously in force in Hong Kong will be adopted as the laws of the HKSAR except for those which the SCNPC declares to be in contravention of the Basic Law upon the transfer of sovereignty. If any laws are later discovered to be in contravention of the Basic Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by the Basic Law. It is not clear from the Basic Law how they will be invalidated in accordance with the procedure as prescribed by the Basic Law. It cannot be the SCNPC as the power of the SCNPC to declare such laws to be in contravention of the Basic Law is a one-off power to be exercised at the

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14 Cheung Lai-wah v The Director of Immigration, 1997 HCAL Nos 68, 70, 71, 73; CA No 216 of 1997, CA No 203 of 1997 and Chan Kam-nga v The Director of Immigration, 1997 HCAL No 104, CA No 40 of 1998.
15 Decision of the SCNPC concerning the pre-existing laws of Hong Kong in accordance with the Basic Law of the HKSAR adopted by the Standing Committee of the Eighth NPC at its 24th session on 23 February 1997 (see (1997) 24 HKLJ 419-24).
time of the transfer of sovereignty. It also cannot be the legislature of the HKSAR as it can only amend or repeal such laws. Therefore, naturally, it can only be the courts of the HKSAR that will exercise this power.

The fifth aspect is the power to interpret the applicable laws. Laws must be interpreted so as to give substantial meaning to the words used by the legal rules in the context of the case before the courts. Article 84 provides that the courts of the HKSAR shall adjudicate cases in accordance with the laws applicable in the HKSAR. This assumes that the courts of the HKSAR have the power to interpret all the laws of the HKSAR. However, the power of the courts of the HKSAR to interpret the Basic Law is not inherent. Article 158 states that the power of interpretation of the Basic Law is vested in the SCNPC and the SCNPC authorises the courts of the HKSAR to interpret the provisions of the Basic Law.

The sixth aspect is the power to apply the applicable laws to the factual situation of the case and to make a binding decision on the legality of the acts of the parties. As the task of the courts is to resolve the dispute on the basis of laws, this power to apply the laws is incidental to every adjudication. Also, the whole purpose of an adjudication is to allow the courts to decide whether the acts of the parties are legally valid. Adjudication will not have much meaning if the decisions of the courts are not binding on the parties. Article 84 states that anyone who is lawfully arrested shall be presumed innocent until convicted by the judicial organs. Therefore, the courts will decide whether the act of the accused is legal or not. If it is illegal, he will be convicted. Article 39 states that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. If the HKSAR government makes any decision or commits any act that restricts the rights and freedom of Hong Kong residents, such decision or act could be invalidated by the courts if it is not permitted by law. Again, the courts will resolve the dispute by judging the legality of the acts.

The seventh aspect is the power to determine the legal consequence of its decision and provide remedy to the suffering party if necessary. Any party that initiates a proceeding in a court will expect certain legal consequences from the decision of the court. The role of the courts in adjudication is not merely pronouncing the legality of the acts of the parties but to protect the lawful rights and interests of citizens. Article 35
which states that Hong Kong residents shall have the right to judicial remedies confirms this aspect of the power of the courts.

As illustrated above, the seven aspects of the 'power to adjudicate' or 'judicial power' are consistent with the other provisions of the Basic Law and in certain cases may even be implied by the provisions of the Basic Law.

**Jurisdiction**

If 'judicial power' describes the nature of the power enjoyed by the courts of the HKSAR, then 'jurisdiction' is the scope of the power to be exercised by the courts of the HKSAR.\(^6\) Usually, when we say that a court has no jurisdiction over a case, there may be two possible meanings. One is that the court does not have jurisdiction from the beginning because there is nothing in the case that could trigger the exercise of its jurisdiction. Another meaning is that the court has jurisdiction at the beginning but a restricted one only. Practically, there may be no difference in what causes the court to have no jurisdiction. However, conceptually and legally, the governing principles may be very different.

The first meaning of 'no jurisdiction' looks at factors that give jurisdiction to the courts. The second meaning looks at factors that take away the jurisdiction. Consideration will surely be different. The principles that give jurisdiction to the courts are mainly related to how the local legal system relates to other legal systems.\(^7\) The principles that take away jurisdiction on the other hand are mainly related to the internal allocation of powers.\(^8\) In a case where the court has no jurisdiction from the beginning, the court may not even have the authority to decide whether it has the power to receive the case. If the court insists on exercising jurisdiction over that case, it may cause the parties or even other sovereign states to take political action on the

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\(^6\) See Roda Mushkat, *One Country, Two International Legal Personalities: The Case of Hong Kong* (Hong Kong: Hong Kong University Press, 1997), Chapter 2 and David Tolliday-Wright, 'In-flight Crime on Hong Kong-bound Aircraft,' in Gary N Heilbronn (ed), *Essays on Aviation and Travel Law in Hong Kong* (Hong Kong: Hong Kong University Press, 1990).

\(^7\) Though the governing rules are defined by local laws, they are also subject to public as well as private international law.

\(^8\) The case of Hong Kong is more complicated as its relationship with the Mainland legal system is twofold. Hong Kong and the Mainland are two separate legal districts. However, at the same time the legal source of the Hong Kong legal system is the Mainland legal system.
international level to prevent the court from exercising jurisdiction.\(^{19}\) However, if the court has jurisdiction but only restricted, it has the authority to decide whether the requirements for restriction are satisfied.

In this part, we will look at factors that give jurisdiction to the courts of the HKSAR and the remaining parts of this paper will concentrate on the restrictions on the jurisdiction of the courts of the HKSAR.

Article 19 states that the courts of the HKSAR shall have jurisdiction over all cases in the HKSAR. From the phrase ‘in the HKSAR,’ it seems that the triggering factor is territorial.\(^{20}\) In other words, the courts of the HKSAR have the power to adjudicate any case involving any person, property, or acts or events occurring within the territorial limits of the HKSAR. However, from the Chinese version of the Basic Law, which is the authentic version,\(^{21}\) it is not so clear whether the territorial principle ought to be applied.

The Chinese version is rather ambiguous as the relevant phrase may be translated as ‘the courts of the HKSAR shall have jurisdiction over all cases in the HKSAR’ or ‘the courts of the HKSAR shall have jurisdiction over all cases of the HKSAR.’ If we adopt the latter translation, it is unclear what the triggering factor is. What makes a case ‘a case of the HKSAR’?

The importance of the meaning of this statement is that it defines the legal basis of the jurisdiction of the courts. If the legal basis is territorial, the courts may have no jurisdiction over any case that cannot satisfy the territorial requirement. However, if the legal basis is otherwise, the courts may have jurisdiction over cases that may not necessarily have any territorial link with Hong Kong.

\(^{19}\) In the Lotus case (PCIJ Reports, Series A, No 10), the French steamer Lotus collided with the Turkisk steamer Boz-Kourt on the high seas. Eight Turkish sailors and passengers of Boz-Kourt died as a result. Criminal charge was laid against the officer of the watch on board the Lotus in the Turkish court by the Turkish government. The French initiated an action against the Turkish government in the Permanent Court of International Justice to challenge the authority of the Turkish courts to hear the case on the ground that the courts failed to point to some title to jurisdiction recognised by international law. The Permanent Court of International Justice finally ruled that there was no international law to prevent the Turkish courts from exercising jurisdiction in that case.

\(^{20}\) Lord Macmillan in Compania Naviera Vascongada v Cristina SS [1938] AC 485, 496-7 stated that ‘It is an essential attribute of the sovereignty of this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and all causes civil and criminal arising within these limits.’

In this kind of situation, we may have to use a purposive approach\(^\text{22}\) to interpret the relevant provision so that various provisions of the Basic Law will 'so far as possible, be read in such a way that they are consistent with each other.'\(^\text{23}\) Then, what is the purpose of this part of Art 19?

The main issue is whether it intends to establish a general principle to govern the scope of the power of the courts of the HKSAR or to maintain the scope of the jurisdiction of the courts as it was before the transfer of sovereignty. Article 19 only expressly states that the restrictions on the jurisdiction of the courts will be maintained. However, it is not explicit that the jurisdiction shall also be maintained. One possible meaning is that the courts' jurisdiction will be defined by a new principle but the previous restrictions on jurisdiction will be maintained. Another possible meaning is that both the restrictions on jurisdiction and the jurisdiction will be maintained.

It will be clearer if we look at other provisions of the Basic Law. Article 81 states that the judicial system previously practised in Hong Kong shall be maintained. If the judicial system previously practised in Hong Kong allowed the courts to exercise extraterritorial jurisdiction in certain cases, there is no reason that the courts' jurisdiction should now be restricted. Article 8 also states that the laws previously in force in Hong Kong shall be maintained. Some ordinances do apply extraterritorially.\(^\text{24}\) It would be rather strange if the HKSAR had a power to legislate but not the power to enforce. If these ordinances are maintained, the courts' jurisdiction to enforce such laws should also be maintained.

Therefore, the intention of the Basic Law should be the maintenance of both the jurisdiction and the restrictions on the jurisdiction of the courts. The translation we should adopt is 'cases of the HKSAR' rather than 'cases in the HKSAR.' To determine the jurisdiction of the courts of the HKSAR, we will have to examine the jurisdiction of Hong Kong courts before the transfer of sovereignty as factors that triggered the latter will also trigger the former.


\(^{23}\) The Director of Immigration v Cheung Lai-wah, CA Nos 203, 216, 217, and 218 of 1997.

\(^{24}\) Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance; Dumping at Sea Ordinance; Aviation Security Ordinance; s 9 of the Offences Against the Person Ordinance; and ss 19-21 of the Crimes Ordinance.
The rules to determine the jurisdiction of the courts are different for different areas of the courts' jurisdiction. For criminal jurisdiction, the guiding principle is basically territorial. The offence must be committed within the territory. According to the Decision of the NPC on the Establishment of the HKSAR, the area of the HKSAR covers Hong Kong Island, Kowloon Peninsula, and the islands and adjacent waters under its jurisdiction. The State Council in a decree provides a literal description for the boundary of the HKSAR. The territory of the HKSAR covers the land territory, internal waters, territorial sea, and the airspace within this boundary.

On the basis of the different objectives of adjudication, the nature of interests to be protected and the procedures of adjudication, the jurisdiction of the courts is divided into three areas. They are criminal jurisdiction, civil jurisdiction in the private law sphere, and civil jurisdiction in the public law sphere (or administrative jurisdiction).

The objective of adjudication in criminal jurisdiction is to determine whether any person has committed any criminal offence and to enforce criminal laws. The interests that such adjudication seeks to protect are the individual rights of the accused as well as the common interest of the society as a whole that certain behaviours should be prohibited. Usually, the government will initiate the adjudication. The procedures used in such adjudication tend to provide more protection to the accused to prevent wrongful conviction. These may include the presumption of innocence and the rule against self-incrimination.


Adopted by the Seventh NPC at its Third Session on 4 April 1990.

Decree 221 of the State Council of the PRC, Literal Description for the Boundary of the HKSAR of the PRC issued on 1 July 1997.

According to Art 2 of the Law of the PRC on the Territorial Seas and the Contiguous Zone, waters on the landward side of the baselines of the territorial sea of the HKSAR constitute the internal waters of the HKSAR. The Law of the PRC on the Territorial Seas and the Contiguous Zone was adopted at the 24th Meeting of the Standing Committee of the Seventh NPC on 25 February 1992, and promulgated by Order No 55 of the President of the PRC on the same day. This law is included in Annex III of the Basic Law and is promulgated to be applicable in the HKSAR.

According to Art 2 of the Law of the PRC on the Territorial Seas and the Contiguous Zone, the territorial sea of the PRC is the sea belt adjacent to the land territory and the internal waters of the PRC. The breadth of the territorial sea of the PRC is twelve nautical miles, measured from the baselines of the territorial sea. Hong Kong's territorial sea is the sea belt adjacent to the land territory and internal waters not exceeding the set boundary.

It is not expressly stated in the Decision of the NPC on the Establishment of the HKSAR that the area of the HKSAR includes the airspace above the land territory and adjacent waters. Article 1 of the 1944 Chicago Convention on International Civil Aviation provides that the contracting states recognise that every state has complete and exclusive sovereignty over the airspace above its territory. The PRC is a party to this treaty and the treaty is applicable to the HKSAR. Therefore, we may assume that the air space above the land territory and adjacent waters of the HKSAR is within the area of the HKSAR.

The area of the HKSAR only includes the adjacent waters within its jurisdiction. Therefore, even though according to the Law of the PRC on the Territorial Seas and the Contiguous Zone, the breadth of the territorial sea is twelve nautical miles, the jurisdiction of the HKSAR cannot extend beyond the boundary set in the relevant order of the State Council. See Heilbronn, Criminal Procedure in Hong Kong (Hong Kong: Longman Hong Kong, 2nd ed 1994), pp 88-9.
The territory of the HKSAR may be extended physically to the ships registered in the HKSAR flying the flag of the HKSAR and Hong Kong-controlled aircraft.

The territory of the HKSAR may be further extended conceptually so as to bring certain offences committed abroad within the jurisdiction of the courts of the HKSAR. If an offence is commenced outside the HKSAR but completed or intended to be completed within the HKSAR, according to the 'objective territorial principle' it may be deemed to be committed within the HKSAR.

If a person commits an act within the HKSAR, which is not illegal by itself but becomes illegal when completed outside the HKSAR, according to the 'subjective territorial principle' the courts of the HKSAR may still have jurisdiction over the case.

According to Art 37 of the Merchant Shipping (Registration) Ordinance, any ship registered in the HKSAR may fly the regional flag of the HKSAR with the national flag of the PRC immediately above it. Article 92 of the United Nations Convention on the Law of the Sea provides that ships shall sail under the flag of one state only and shall be subject to its exclusive jurisdiction on the high seas. This Convention is applicable in both the PRC and the HKSAR. Such ships, as they fly both the flag of the PRC and the flag of the HKSAR, may be within the jurisdiction of both the Mainland courts and the HKSAR courts.

However, the CPG through Art 125 of the Basic Law authorises the HKSAR to maintain its own shipping registry using the name 'Hong Kong, China.' We may assume that the HKSAR has jurisdiction over those ships. See ss 23A, 23B, and 23C of the Crimes Ordinance.

The principle is well recognised by common law. See DPP v Doot [1973] AC 807 and AG v Yeung Sun-shum [1987] HKLR 987, 997. These cases are concerned with conspiracy formed abroad to commit an offence within the territory and acts in furtherance of the conspiracy which are carried out in the territory. The Criminal Jurisdiction Ordinance now modifies the common law rule for certain offences (mainly offences of fraud and dishonesty). For those offences, if any one of the elements of the offence occurred in Hong Kong, the courts of Hong Kong will have jurisdiction. No longer must the result of the offence occur in Hong Kong. For homicide offences, see s 8B of the Offences Against the Person Ordinance.

The position in common law is not very clear. It seems that the authorities are against such a principle. See Board of Trade v Owen (note 27 above) at pp 625, 626, Treacy v DPP [1971] AC 537, and Janice Brabyn, 'The Extraterritorial Reach of Hong Kong Criminal Law and the Hong Kong Court of Appeal' (1993) 23 HKLJ 178. However, the Criminal Jurisdiction Ordinance has also established jurisdiction for Hong Kong courts over certain offences even though the act committed in Hong Kong is not illegal by itself but becomes illegal when completed outside of Hong Kong. For homicide offences, see s 9 of the Offences Against the Person Ordinance.

The objective territorial principle and the subjective territorial principle are recognised by s 7 of the Criminal Law of the PRC. It states that, 'When either the act or consequence of a crime takes place within the territory of the PRC, a crime is to be deemed to have been committed within the territory of the PRC.'
Besides the territorial jurisdiction, the courts also enjoy certain extraterritorial criminal jurisdiction. In those cases, the factors that will trigger the exercise of the courts' criminal jurisdiction are the nationality of the offender, the nationality of the victim, the nature of the act, and the consequence of the act.

For civil jurisdiction in the private law sphere, the governing rule in theory is not territorial but a procedural consideration. For actions in personam except matrimonial proceedings, anyone may invoke or become amenable to the jurisdiction if the defendant has been served with a writ. Therefore, the courts may have jurisdiction over a case even if the cause of action has no factual connection with Hong Kong. The condition is just that a writ has been served on the defendant who may

39 According to the 'active nationality' principle, a state has jurisdiction over its nationals for their acts done abroad. See Shearer, Starke's International Law (London: Butterworths, 11th ed 1994), p 210 and Halsbury Laws of England (4th ed) Vol 18, para 1527. According to s 23B(3) of the Crimes Ordinance, the Hong Kong courts have jurisdiction over offences committed by a British national on board a foreign ship to which he is not belonging. However, it is not clear how the term 'British national' will be interpreted or modified after the transfer of sovereignty. It would be rather strange if the courts of the HKSAR could exercise jurisdiction over British nationals on this basis as some of the people included in the definition of British national will not be a Chinese national or even a resident of the HKSAR.

40 The 'passive nationality' principle confers jurisdiction over offences committed by aliens outside its territory if the victim of the crime is a national of the state assuming jurisdiction. See Shearer (see note 39), pp 210-11 and Halsbury Laws of England (4th ed) Vol 18, para 1530. If this principle is applied to HKSAR, it is not clear how to determine the link between the victim and the HKSAR. The victims may be Chinese nationals or permanent residents of the HKSAR (including non-Chinese nationals who are residents of the HKSAR).

41 Under the 'universal principle,' some crimes attract the jurisdiction of every state. These include the crimes of piracy, genocide, and hijacking. See Shearer (note 39 above), pp 212-13 and Halsbury Laws of England (4th ed) Vol 18, para 1529. For offences concerning piracy, see ss 19-22 of the Crimes Ordinance. For an offence concerning genocide, see s 9A of the Offences Against the Person Ordinance. For an offence concerning hijacking, see s 8 of the Aviation Security Ordinance.

42 According to the 'protective principle' a state has jurisdiction with respect to crimes committed outside its territory by an alien against the security, territorial integrity, or political independence of the state. See Shearer (note 39 above), pp 211-12 and Halsbury Laws of England (4th ed) Vol 18, para 1528. See also the obiter dictum in the case AG v Yeung Sun-shum (note 36 above) at p 998 concerning the application of this principle to Hong Kong.

43 The objective of adjudication in civil jurisdiction in the private law sphere is to resolve the relationship and disputes between individual citizens. The interests that it seeks to protect are the interests of the parties. Unlike criminal procedures, adjudication will only be activated if one of the parties to the relationship chooses to do so.

44 These are inter partes actions concerning the settlement of the rights of the parties as between themselves. Examples are an action for damages for breach of contract or in a tort case.

45 Examples are petitions for divorce, nullity of marriage, judicial separation, presumption of death, and dissolution of marriage.
be only in the course of passage through Hong Kong. Also, the courts will not have jurisdiction over a case merely because the cause of action is closely related to Hong Kong if a writ cannot be served on the defendant who is not physically present in Hong Kong.

However, the common law and practice of Hong Kong courts have modified the general rule. In most cases, there must be a certain kind of territorial link between the case and Hong Kong before the court will exercise jurisdiction. On the basis of the principle of forum non conveniens, the court may exercise discretion to stay an action even if a writ has been successfully served on the defendant who is physically within the territory. Though the factors that the court will consider in exercising this discretion may not always be territorial, the court will stay the action if the case has a real and substantial connection with a foreign country. The parties may have to go abroad to the courts of that foreign country to resolve their disputes.

If the defendant is not physically within the territory so that a writ cannot be served on him, the court may exercise discretion to allow service of a writ on the defendant out of the jurisdiction. If such a writ is served out of the jurisdiction, the court will have jurisdiction over the case. Many factors that the court will consider in exercising this discretion require the case to have certain linkage with any person, thing, or act within the territory.

The courts will also exercise jurisdiction over an action in personam where they would otherwise have no jurisdiction if the parties voluntarily submit to the jurisdiction of the courts.

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46 The first factor that the court will consider is whether there is a more appropriate forum for trial abroad. The court will look at whether the foreign country has the most real and substantial connection with the case by considering issues like convenience, expense, availability of witnesses, the law governing the relevant transaction, and the place where the parties respectively reside or carry on business. Another factor that the courts will consider is whether the plaintiff will be deprived of some advantage that he would have obtained from a trial in Hong Kong.

47 Order 11 of the Rules of High Court.

48 Order 11(1) of the Rules of High Court. Generally, for cases involving tortious liability, the act has to be committed within the territory. For cases involving contracts or trusts, Hong Kong laws must be the governing laws. For cases involving land or properties, the subject matter must be situate in the territory.
Similarly for actions in rem, the general rule is that the res must be in Hong Kong at the time when the writ is served. The only action in rem recognised in common law is that which lies against a ship or other rights associated with the ship within the admiralty jurisdiction of the courts. There is no requirement that the dispute over the rights of the res must have any connection with Hong Kong. Again the common law has modified the rule to allow the courts to exclude certain cases on the basis of the principle of forum non conveniens.

In matrimonial proceedings, the triggering factors are to a certain extent territorial as well as personal. At the date of the petition or application, if the party has been domiciled in Hong Kong; has been habitually resident in Hong Kong; has been a resident of Hong Kong; or has had a substantial connection with Hong Kong, the courts will have jurisdiction.

The third area of the courts' jurisdiction is the civil jurisdiction in the public law sphere (or administrative jurisdiction). The guiding

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49 If a person starts an action in Hong Kong courts, he will be treated as having voluntarily submitted to the jurisdiction of the courts in the counterclaim action on related matters. Another typical example of submission is where the defendant voluntarily appears in the trial. If a contract contains a provision that the courts of Hong Kong shall have jurisdiction to determine any action in respect of the contract, the defendant will also be deemed to have submitted to the jurisdiction of the courts.

50 That is actions brought to vindicate a right such as ownership available against all persons. The res may be a ship or any cargo or freight connected with a ship. It may also be an aircraft or hovercraft though that is rather rare.

51 The Owners of Cargo lately laden on board the Ship or Vessel 'Adhiguna Meranti' v The Owners of the Ship or Vessel 'Adhiguna Meranti' (1870) LR 4 HL 414, 418.

52 Castanque v Imre (1870) LR 4 HL 414, 418.

53 Sections 12A, 12B, and 12C of the High Court Ordinance.

54 The Owners of Cargo lately laden on board the Ship or Vessel 'Adhiguna Meranti' v The Owners of the Ship or Vessel 'Adhiguna Meranti' [1987] HKLR 904.

55 The major triggering factor is a personal link between the party and Hong Kong.

56 Proceedings for divorce, nullity, separation proceedings, and presumption of death and dissolution of marriage. See Matrimonial Causes Ordinance, ss 3(a), 4(a), 5(a), and 6(1)(a).

57 Proceedings for divorce, nullity, separation proceedings, and presumption of death and dissolution of marriage. See Matrimonial Causes Ordinance, ss 3(b), 4(b), and 6(1)(b). The parties had to be habitually resident in Hong Kong throughout the period of three years immediately preceding the date of the petition.

58 Proceedings for divorce, nullity, separation proceedings, and presumption of death and dissolution of marriage. See Matrimonial Causes Ordinance, ss 4(c), 4(d), and 5(b).

59 Proceedings for divorce, nullity, separation proceedings, and presumption of death and dissolution of marriage. See Matrimonial Causes Ordinance, ss 3(c), 4(d) and 5(d)

60 The objective of adjudication is to ensure that the government acts in accordance with the law. The interests that it seeks to protect are individuals' interests against decisions of the government and the public interest to maintain an efficient and effective government. The courts will play the role of balancing these two interests and the procedures tend to give more protection to the government than the individual.
The jurisdiction of the courts of the HKSAR

common law principle is basically territorial.\(^{61}\) Most of the cases are against the government of the HKSAR, and it is rare that a decision or an act of the government of the HKSAR is not made and implemented in the HKSAR. Also, the impact of that decision or act is usually within the boundary of the HKSAR. However, if the decision or act is made and implemented outside of the territory and the impact of such decision or act is felt outside the territory, the courts may have no jurisdiction over the case according to the territorial principle. An example is a decision or an act made by the Central Authorities of the HKSAR.\(^{62}\)

**Restrictions**

After stating the general principle that the courts of the HKSAR have jurisdiction over certain kinds of case, Art 19 further provides that the restrictions on jurisdiction imposed by the judicial system and principles previously in force in Hong Kong shall be maintained. The phrase 'judicial system and principles' is very vague. It may cover not merely the laws (statutory laws as well as the common law), but also the constitutional conventions and the structural relationships within the constitutional framework previously in force in Hong Kong. The courts of Hong Kong, as colonial courts of the British constitutional system, were subject to various restrictions. Such colonial and British characteristics of the courts may strangely be maintained as well.\(^{63}\) In addition, certain laws that have been repealed by the SCNPC at the time of the establishment of the HKSAR may still be indirectly maintained through Art 19 if they

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\(^{61}\) *Ng King-luen v Rita Fan* [1997] HKLRD 757. In this case, the judge decided that Hong Kong courts only had jurisdiction over what took place in Hong Kong and therefore had no jurisdiction to question the legality of the meeting of the Provisional Legislative Council in Shenzhen before the transfer of sovereignty. Such decisions or acts by the Central Authorities may not be within the jurisdiction of the HKSAR on other grounds like non-justiciable issue or act of state. See the following discussion under the heading 'Non-justiciable issues.'

\(^{62}\) See the reasoning of Chan CJHC in *HKSAR v Ma Wai-kwan David* concerning the jurisdiction of the courts of the HKSAR. He has used the appointment of the governor of Hong Kong by the Queen and the supreme status of Acts of Parliament to support his decision that regional courts had no jurisdiction to query the validity of any legislation or acts passed by the sovereign. Though in a later case, *Cheung Sai-wah v The Director of Immigration*, CA, Civil Appeal No 216 of 1997, Chan CJHC admitted that his analogy with the colonial courts in the previous case might not be entirely appropriate.
restricted the jurisdiction of the courts before the transfer of sovereignty.\textsuperscript{64}

As Art 19 only states that such restrictions will be maintained, it does not preclude the Basic Law, the Central Government, and the legislature of the HKSAR from imposing additional restrictions on the jurisdiction of the courts of the HKSAR. Therefore, in order to examine the scope of the judicial power of the courts, we also have to examine other provisions of the Basic law, the national laws applicable in the HKSAR, and the laws enacted by the legislature of the HKSAR. However, as illustrated above, the basic intent of the Basic Law is to maintain the jurisdiction of the courts of the HKSAR. Unless it is clearly stated, we should assume that they will not impose more restrictions on the jurisdiction of the courts of the HKSAR than before the transfer of sovereignty.

When we say that the courts' jurisdiction is subject to restrictions, sometimes it is not so clear how the judicial power or the power to adjudicate is restricted. As illustrated above, there are seven different aspects of the power to adjudicate. Therefore, we will examine how the restrictions limit the power to adjudicate in each of the aspects.

\textit{Act of the sovereign}
The first aspect of the power to adjudicate is the power to receive a case. Restrictions on this aspect may prevent the courts from receiving a case or the authority of the courts to consider the case may be challenged and excluded.

The courts may not have the jurisdiction to receive a case if it involves an act of the sovereign. The sovereign may commit acts or make decisions for the government. These acts or decisions may or may not directly affect any person’s interest recognisable by private and public law. If it does not affect a person’s interest directly, he may not have any right to initiate an action against the sovereign in the courts. Then, it will not involve the question whether the courts have power to receive the case against the sovereign.

In that kind of case, a person may still be affected by the act of the sovereign indirectly or incidentally in his dealing with another person.\textsuperscript{64} See notes 97 and 133 below.
If it gives rise to any claim against that other person, the courts will receive the case as they receive other cases not involving the sovereign. The courts will have to consider the legality of the act of the sovereign in that proceeding if its legality is relevant in resolving the dispute between the parties unless some other principles apply preventing the courts from doing so. We will consider these principles in the following parts. In this part, we will look only at whether the courts have the power to receive a case against the sovereign when a person is affected directly by an act of the sovereign in the private or public law sphere.

Before the transfer of sovereignty, the sovereign of Hong Kong was the Crown of the United Kingdom. Under English law, the Crown has various capacities. In her personal capacity as the monarch, the Crown enjoys some privileges, immunities, and duties. In her capacity as the head of state of the United Kingdom, she exercises various executive, legislative, and judicial powers personally. The Crown may also be the executive authority of the United Kingdom. In this capacity, the Crown will not exercise any personal discretion but act on the advice of her ministers. All the non-self-governing colonies of the United Kingdom were ruled by the Crown directly. In this capacity, the Crown was the executive authority of the colonial government. Therefore, the Crown in Hong Kong was different from the Crown in the United Kingdom.

The Crown in her different capacities may act in the private and public law spheres. In the private law sphere, the Crown may make contracts or commit tort liabilities as an ordinary person. At common law, the Crown cannot be sued in her courts including the colonial courts for her civil liabilities. The common law principle had been modified by statute. According to the Crown Proceedings Ordinance, the Crown

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65 See the following discussion under the headings ‘State immunity’ and ‘Non-justiciable issues.’

66 See the following discussion under the headings ‘Fact of state’ and ‘Non-justiciable issues.’

67 These include the principle that the King can do no wrong, the King is a preferred creditor, and time does not run against the King. See Stanley de Smith and Rodney Brazier, Constitutional and Administrative Law (England: Penguin Books, 7th ed 1994), pp 145-9.

68 The Crown in this capacity has no real discretion as she is subject to various constitutional conventions. Examples are appointment of the prime minister and dissolution of the Parliament. The Crown is also the source of justice. The constitutional status of the judiciary originates from the Crown.

69 The concept of the Crown is not indivisible and undivided. See R v Secretary of State for Foreign and Commonwealth Affairs, ex p Indian Association of Alberta [1982] 1 QB 892.
may be sued by her subjects. However, this 'Crown' was only the Crown in Hong Kong. Section 34(1) of the ordinance provided that the ordinance would not apply to proceedings against the Crown in her private capacity. Moreover, the ordinance did not authorise proceedings against the Crown initiated under this ordinance otherwise than in her capacity as the Crown in Hong Kong.\textsuperscript{71}

Therefore, the courts of Hong Kong had jurisdiction to receive cases against acts of the sovereign if they were acts of the Crown acting in her capacity as the executive authority of Hong Kong but not in any other capacities. If the act was committed by the Crown in her capacity as the executive authority of the United Kingdom, the courts of Hong Kong would have no jurisdiction to receive the case though the party might initiate a proceeding against the Crown in the United Kingdom in the English courts under the Crown Proceedings Act.

When the Crown exercised statutory and prerogative powers, her acts and decisions might affect the interests of other people. However, they might not be able to initiate any private law action against the Crown as the interests in question were not recognised by any private law. Nevertheless, it was well established that, in the public law sphere, the courts could review those acts, decisions, or omissions.\textsuperscript{72} Any person might initiate an action for judicial review against the Crown if the Crown had affected his interest by an act, decision, or omission in exercising her statutory or prerogative powers.\textsuperscript{73}

It is not so clear whether judicial review would only be initiated against the Crown in her capacity as the Crown in Hong Kong or would also be applicable to the Crown in the United Kingdom. Theoretically, if the Crown in the United Kingdom did exercise some statutory or prerogative powers within Hong Kong, there should be nothing to prevent the courts of Hong Kong from enforcing the law to ensure the powers were exercised in accordance with the law. However, in practice, the courts seldom exercised that jurisdiction. The main reason was that the colonial structure did not require the Crown in the United Kingdom to act directly. Most of the decisions were made by the Crown in Hong Kong.

\textsuperscript{71} Section 34(2), Crown Proceedings Ordinance.
\textsuperscript{72} \textit{Council of Civil Service Unions v Minister for the Civil Service} [1985] AC 374.
\textsuperscript{73} Section 21K, High Court Ordinance and Order 53 of the Rules of High Court.
Kong through the Governor of the colony appointed by the Crown.\textsuperscript{74} If there was a situation that the Crown in the United Kingdom had to act directly, the issue involved would usually be such that the courts had no power to question its legal validity.\textsuperscript{75} Therefore, it is not very certain whether the courts of Hong Kong had the power to receive an application for judicial review against the Crown in the United Kingdom.

Following the principle stated in Art 19, an act of the sovereign of the HKSAR committed in her capacity as the head of state and the executive authority of the central government in the private law sphere may not be within the jurisdiction of the courts of the HKSAR. Since 1 July 1997, the government of the People’s Republic of China (PRC) has resumed the exercise of sovereignty over Hong Kong.\textsuperscript{76} The sovereign of the HKSAR, therefore, is the government of the PRC. Under the Chinese constitutional structure, the sovereign has no personal capacity. According to the Constitution of the PRC, the President is the head of state and the State Council is the executive organ of the government of the PRC. Therefore, the courts of the HKSAR may not receive any civil claim against the President or the State Council.\textsuperscript{77} Nevertheless, people in Hong Kong may still initiate proceedings against the sovereign in the Chinese courts.\textsuperscript{78}

In the public law sphere, the status of the sovereign of the HKSAR in the above capacities encounters the same uncertainties as it did before the transfer of sovereignty. The sovereign usually will not act directly in the HKSAR. If it does, it will be mainly in the area of foreign affairs and defence\textsuperscript{79} which will usually involve non-justiciable issues. Sometimes it is not clear whether the courts of the HKSAR have no power to receive the case or to consider the legal validity of the act of the sovereign.

\textsuperscript{75} See the following discussion under the heading ‘Non-justiciable issues.’
\textsuperscript{76} Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the PRC on the Question of Hong Kong.
\textsuperscript{77} Article 22 of the Basic Law provides that the departments of the Central Government, provinces, autonomous regions, or municipalities may set up offices in the HKSAR. However such offices shall abide by the laws of the HKSAR. Presumably, the courts of the HKSAR will entertain any civil claim against these offices.
\textsuperscript{78} Article 41 of the Constitution of the PRC and the Administrative Litigation Law of the PRC.
\textsuperscript{79} Articles 13 and 14 of the Basic Law.
The government of the HKSAR has taken up the capacity of the Crown as the executive authority of Hong Kong. The Basic Law has already recognised the right of Hong Kong residents to sue the executive authorities of the HKSAR both in the private and public law spheres.

Members of the armed forces
Though the Crown enjoyed a special status in the judicial system previously in force in Hong Kong, the Crown's servants did not have any privilege and were subject to the civil as well as criminal jurisdiction of the courts of Hong Kong. There was no difference between officials of the Crown in Hong Kong and of the Crown in the United Kingdom. One exception was the members of the armed forces stationed in the colony. If a person committed an offence arising out of and in the course of his duty as a member of the armed forces, the courts of Hong Kong would have no jurisdiction.

If a member of the armed forces committed an offence against someone associated with the armed forces or against property owned by a department of the government of the United Kingdom or the armed forces, the courts of Hong Kong had no jurisdiction.

According to s 8 of the Crown Proceedings Ordinance, if a member of the armed forces of the Crown while on duty committed any act that caused the death of or personal injury to another person who was also a member of the armed forces of the Crown, no proceeding against the person committing the act or the Crown could be initiated in the courts of Hong Kong.

Article 22 of the Basic Law provides that all officials of the offices of the departments of the Central Government, provinces, autonomous regions, or municipalities set up in the HKSAR shall abide by the laws of the HKSAR. They will be subject to the civil and criminal jurisdiction of the courts of the HKSAR, but again members of the armed forces stationed in the HKSAR will enjoy some special treatment. Article 14

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80 Paragraph 1, Annex III, Decision of the SCNPC on the Treatment of the Laws previously in force in Hong Kong in accordance with Article 160 of the Basic Law of the HKSAR of the PRC, adopted by the Standing Committee of the Eighth NPC at its 24th Session on 23 February 1997.
81 Article 35 of the Basic Law.
82 Section 3(1a), United Kingdom Forces (Jurisdiction of Colonial Courts) Order 1965.
83 Section 3(1b) and (1c), United Kingdom Forces (Jurisdiction of Colonial Courts) Order 1965.
provides that members of the garrison shall abide by the laws of the HKSAR. However, according to the Law of the PRC on the Garrisoning of the HKSAR, the jurisdiction of the courts of the HKSAR will be excluded in certain situations and the restriction is wider than it was before the transfer of sovereignty. We may assume that any legal rules concerning the restrictions on the courts' jurisdiction over military officials previously in force in Hong Kong are repealed by the Law of the PRC on the Garrisoning of the HKSAR.84

Criminal offences committed by members of the Hong Kong garrison are not within the jurisdiction of the courts of the HKSAR. The courts of the HKSAR will only have jurisdiction over such members if they commit criminal offences when they are not performing their official duties.85

Cases of tort arising from acts committed by members of the Hong Kong garrison when performing their official duties shall be subject to the jurisdiction of the Supreme People's Court of the PRC, but not the courts of the HKSAR. Nevertheless the compensation for any loss or injury incurred by acts of tort will be governed by the laws of the HKSAR. Cases of tort arising from acts committed by members of the Hong Kong garrison when not performing their official duties shall be subject to the jurisdiction of the courts of the HKSAR.86

The main question in determining the scope of the courts' jurisdiction is how to interpret the phrase 'performing their official duties.' An official of the NPC has suggested three principles for the term:87 whether the duty being performed was for national defence, whether it was undertaken under the command of a superior, and whether it was carried out by troops in uniform or using military vehicles. It is not clear whether the three principles need to be considered together. It would be rather strange that each principle can be a separate ground for determining whether a member of the Hong Kong garrison was performing his official duties. That a member is wearing uniform does not necessarily mean that he is performing an official duty.

84 Article 3, Decision of the Standing Committee on the NPC on the Treatment of the Laws previously in force in Hong Kong in accordance with Article 160 of the Basic Law of the HKSAR of the PRC and s 2A(2)(c), Interpretation and General Clauses Ordinance.
85 Article 20, the Law of the PRC on the Garrisoning of the HKSAR.
86 Article 22, the Law of the PRC on the Garrisoning of the HKSAR.
87 Qiao Xiaoyang, vice-chairman of the NPC Commission on Legislative Affairs.
State immunity
Some other persons or entities may also be immune from the jurisdiction of the courts of the HKSAR. The courts will have no power to receive a case against them.

Foreign sovereign states may not be sued in the courts of Hong Kong for their acts committed in the territory. This immunity from jurisdiction is recognised by the common law. For actions in rem, such immunity will only apply to governmental acts but not commercial acts. However, for actions in personam, it is not clear whether the immunity will also cover commercial acts. Judges in a Privy Council decision upheld the doctrine of absolute immunity by ruling that the immunity applied to all the acts of the foreign sovereign and that there was no difference between governmental and commercial acts. However, a later English Court of Appeal case decided that the doctrine of restrictive immunity should be followed so that the immunity only covered governmental acts. The common law was then modified by the State Immunity Act which was also made applicable to Hong Kong. The Act followed the direction of the English Court of Appeal that a state was not immune in respect of proceedings relating to a commercial transaction entered into by the state. It was not adopted as the law of the HKSAR and there is also no local legislation on this aspect. It is unclear whether the previous common law rule will be revived or not. Also, it is not very certain what the common law rule is.

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88 The concept 'foreign sovereign state' includes the corporate entity of a state, the head of state of a state, and the government or any department of the government of a state.

89 A foreign sovereign state may voluntarily submit to the jurisdiction of the courts of Hong Kong.

90 Duff Development Co Ltd v Kelantan Government [1924] AC 797.

91 Owners of the ship Philippine Admiral v Wallem Shipping (Hong Kong) Ltd [1976] 1 All ER 78.

92 Ibid.


94 The Act was enacted to codify the law on state immunity. It was argued that the common law before the enactment was in such a confused state that legislative intervention was required. The Act establishes a general rule that a state is immune from the jurisdiction of the courts subject to a list of exceptions.

95 The State Immunity (Overseas Territories) Order 1979.

96 Section 3(1a) of the State Immunity Act.

97 There is an argument that the State Immunity Act is still applicable in the HKSAR even though it was not adopted as the law of the HKSAR. Article 19 of the Basic Law provides that the restrictions on the jurisdiction of the courts of the HKSAR imposed by the legal system and principles previously in force in Hong Kong shall be maintained. The State Immunity Act might be indirectly adopted as the law of the HKSAR as it provided some restrictions on the jurisdiction of the courts of the HKSAR.
If a statute merely modifies the common law without purporting to destroy it, the repeal of the statute will revive the common law in its original state. From its context, it seems that the State Immunity Act has only modified the common law rule without destroying it. Therefore, the repeal of the Act will revive the common law rule, which will probably be the rule contained in the Privy Council decision rather than the English Court of Appeal decision. However, if the common law cannot be revived because the statute has totally replaced it, there will be a legal vacuum and it is not clear whether the Chinese practice will be applied to fill that vacuum.

The Chinese practice itself is also uncertain. There is no statute directly governing state immunity. The Chinese practice (if any) was suggested by some statements of the executive authorities of the PRC and academic opinions. The topic was not given much attention in Chinese law before the 70s. It was only after 1979 when the issue arose in a case before a court of the United States that the Chinese government and the Chinese academic circle started to give attention to the matter. The case was the Huguang Railroad Bonds case.

Nine Americans in the United States held some bearer bonds issued by the imperial Qing government of China in 1911. In 1979, they filed a suit against the PRC demanding repayment of the principal and interest. A default judgment was entered against the Chinese government after China’s failure to appear or answer. Damages were subsequently awarded.

The Chinese government in a memorandum to the government of the United States alleged that China, as a sovereign state, enjoyed absolute immunity. Later in a special appearance before the court of the United States to set aside the default judgment, the Chinese

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98 See Peter Wesley-Smith, *The Sources of Hong Kong Law* (Hong Kong: Hong Kong University Press, 1994), p 124.
99 The Act provides that its provisions are not retrospective. Therefore, matters occurring before it came into force would still be governed by the common law. Matters not covered by the Act would also be governed by the common law. As the common law is still relevant in regulating state immunity, we may argue that the common law is only modified but not destroyed by the Act. See Charles J Lewis, *State and Diplomatic Immunity* (London: Lloyd’s of London Press, 3rd ed 1990), pp 7-10.
100 Mushkat (note 16 above), pp 65-8.
government again asserted the doctrine of absolute immunity as one of the arguments. Academic opinions in China after the case mainly supported the absolute doctrine.\(^\text{103}\)

However, there was a change in the mid-80s. In 1986, the International Law Commission finished the first reading of the Draft Articles on Jurisdictional Immunities of States and their Property. In the Sixth Committee of the 41st Session of the General Assembly of the United Nations, the representative of the Chinese government expressed the new Chinese views on state immunity. The Chinese representative firstly restated the principle of sovereign equality and the principle that one sovereign cannot exercise jurisdiction over another. He then expressed his reservation that the Draft Articles failed to establish firmly that state immunity was the general principle.\(^\text{104}\) Nevertheless, he agreed that there could be exceptions to state immunity including commercial contracts, immovable properties, and ships engaged in commercial service. At the end, he asserted that there should not be too many exceptions. To a certain extent, this showed that the Chinese government had given up her strict approach of absolute immunity and moved cautiously to the doctrine of restrictive immunity.\(^\text{105}\) The academic opinions also have shifted to support the doctrine of restrictive immunity.\(^\text{106}\)


\(^{104}\) Article 6 of the Draft Articles states that '[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles [and the relevant rules of general international law].' Though the article stated that state immunity was the general principle, it was argued that it failed to foreclose or negate other theoretical considerations completely. An alternative general principle is territorial jurisdiction subject to an exception of state immunity. See Greig, 'Forum State Jurisdiction and Sovereign Immunity under the International Law Commission's Draft Articles' (1989) 38 ICLQ 243.

\(^{105}\) In 1991, the Sixth Committee of the 41st Session of the General Assembly of the United Nations again discussed the second reading of the Draft Articles on Jurisdictional Immunities of States and their Property prepared by the International Law Commission. The representative of the Chinese government asserted that the exceptions to state immunity should be strictly limited to situations that were necessary and be kept to the minimum. See Gong Renchu, Comparative Study of State Immunity (Beijing: Beijing University Press, 1994), p 161 (in Chinese) and (1991) Chinese Yearbook of International Law 558, 563 (in Chinese).

The jurisdiction of the courts of the HKSAR

Diplomatic and consular immunities
The law governing diplomatic privileges before the transfer of sovereignty was provided in a local ordinance, the International Organisation and Diplomatic Privileges Ordinance. After the transfer of sovereignty, a national law on the same topic, the Regulations of the PRC concerning Diplomatic Privileges and Immunities, is applicable to the HKSAR. If there is any conflict, it is a good case to say that the national law should prevail. According to the Regulations of the PRC concerning Diplomatic Privileges and Immunities, diplomatic representatives of a foreign sovereign state and their spouses and under-age children are immune from criminal and civil jurisdiction of the courts of the HKSAR. There are some exceptions to the immunity from civil jurisdiction. If it is an action relating to succession in which such persons are involved as private persons or an action relating to any professional or commercial activity conducted by them in Hong Kong outside their Members of the administrative and technical staff of the diplomatic mission, together with their spouses and under-age children, are also immune from legal process. However, the immunity from civil jurisdiction shall be confined to acts performed in the course of official duties.

The immunity from the jurisdiction of the courts of the HKSAR of consular officers of foreign states and members of the administrative and technical staff of the consular post are provided in a local ordinance and the Regulations of the PRC concerning Consular Privileges and

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107 Section 6 of the International Organisations and Diplomatic Privileges Ordinance provides that '[n]otwithstanding any provision to the contrary contained in the law applicable to the Colony, the law and custom relating to the immunities and privileges as to person, property or servants of sovereigns, diplomatic agents, or the representatives of foreign powers for the time being in force in England shall, in so far as the same is applicable mutatis mutandis, have effect and be enforced in the Colony.' The exact content of the law is unclear as the English situation is governed by an Act of Parliament, the Diplomatic Privileges Act 1964. Applicable to the HKSAR under Art. 18 and Annex III of the Basic Law.

108 It is doubtful whether English law could still be relevant after the change of sovereignty as the matters in question are related to foreign affairs. See Yash Ghai (note 8 above), p 369 and Zhou Wei, 'The Sources of Law in the HKSAR' in Hong Kong's Transition Problems & Prospects (Hong Kong: Faculty of Law, University of Hong Kong, 1993).

109 According to Art. 20 of Regulations of the PRC concerning Diplomatic Privileges and Immunities, the spouse and under-age children of a diplomatic agent must be living with the diplomatic agent and not nationals of China.

110 Article 14 of the Regulations of the PRC concerning Diplomatic Privileges and Immunities.

111 The spouse and under-age children of the member of staff must also be living with the member of staff and not nationals of China in order to enjoy such immunity.

112 Consular Relations Ordinance.
Immunities.\textsuperscript{114} As both were enacted to give effect to the Vienna Conventions on Consular Relations 1963, there should not be any substantial difference between the local law and the national law and they may supplement each other. According to the Regulations of the PRC concerning Consular Privileges and Immunities, consular officers and members of the administrative and technical staff of the consular post enjoy immunity in respect of acts performed in the exercise of consular functions subject to various exceptions.\textsuperscript{115}

There are other bodies that enjoy similar immunities as diplomatic representatives and consular officers under local ordinances. International organisations are immune from legal suit and process.\textsuperscript{116} Representatives of any organ of the organisations, members of any committee of the organisations, high officers of the organisations, and persons employed on missions on behalf of the organisations enjoy similar immunities as diplomatic representatives of a foreign sovereign state.\textsuperscript{117} Their spouses and children under the age of 21 and accompanying official staff will also be treated in the same way as in the case of

\textsuperscript{114} Article 14 of the Regulations of the PRC concerning Consular Privileges and Immunities. Immunity from judicial jurisdiction enjoyed by consular officers and members of the administrative or technical staff of the consular post shall not apply to any of the following civil actions:

1. an action arising out of a contract not concluded by an officer or a member of staff expressly as an agent of the sending state;
2. an action relating to private immovable property situated in Hong Kong, unless an officer or a member of staff holds it as an agent of the sending state for the purposes of the consular post;
3. an action relating to succession in which an officer or a member of staff is involved as a private person; or
4. an action for damages arising from an accident in Hong Kong caused by a vehicle, vessel, or aircraft.


\textsuperscript{117} Section 2 and Part II of Schedule 1 to the International Organisations and Diplomatic Privileges Ordinance.
diplomatic representatives.\textsuperscript{118} Representatives of foreign states attending an international conference held in the HKSAR will also enjoy the same immunities as diplomatic representatives.\textsuperscript{119}

There is a specific ordinance that governs the immunity of the International Committee of the Red Cross.\textsuperscript{120} The committee and its delegates are immune from suit and legal process for things done in the course of the performance of official duties.

Judges, registrars, suitors of the International Court and their agents, counsel, and advocates will enjoy such immunities, privileges, and facilities as may be required to give effect to any resolution or convention approved by the General Assembly of the United Nations.\textsuperscript{121} According to the Statute of the International Court of Justice, the judges of the court when engaged in the business of the court shall enjoy diplomatic immunities.\textsuperscript{122} The agents, counsel, and advocates of parties before the court shall enjoy the immunities necessary for the independent exercise of their duties.\textsuperscript{123}

A senior officer of the Commonwealth Secretariat and his family will enjoy the like immunities as a diplomatic agent and the members of his family.\textsuperscript{124} Other officers or servants of the Commonwealth Secretariat will be immune from suit and legal process in respect of acts or omissions in the course of the performance of official duties, subject to some exceptions.\textsuperscript{125}

Before the transfer of sovereignty, officers holding diplomatic passports of the Visa Office of the Ministry of Foreign Affairs of the PRC were immune from judicial jurisdiction.\textsuperscript{126} Officers holding service passports of the Visa Office were also immune from judicial jurisdiction but only

\textsuperscript{118} Section 2 and Parts III and IV of Schedule 1 to the International Organisations and Diplomatic Privileges Ordinance.
\textsuperscript{119} Section 3 of the International Organisations and Diplomatic Privileges Ordinance.
\textsuperscript{120} Privileges and Immunities (International Committee of the Red Cross) Ordinance.
\textsuperscript{121} Section 4 and Parts III and IV of Schedule 1 to the International Organisations and Diplomatic Privileges Ordinance.
\textsuperscript{122} Article 19 of the Statute of the International Court of Justice.
\textsuperscript{123} Article 42(3) of the Statute of the International Court of Justice.
\textsuperscript{124} Section 7 and Part I of Schedule 2 to the International Organisations and Diplomatic Privileges Ordinance.
\textsuperscript{125} Section 7 and Part II of Schedule 2 to the International Organisations and Diplomatic Privileges Ordinance. The exceptions are civil actions for damage alleged to have been caused by a motor vehicle belonging to or driven by an officer or servant of the Commonwealth Secretariat, or in respect of a motor traffic offence involving such a vehicle.
\textsuperscript{126} Schedule 1 to the Chinese Visa Office (Privileges and Immunities) Ordinance.
in respect of acts performed in the exercise of their official functions. The immunities of the officers were all subject to exceptions. The Chinese members of the Joint Liaison Group and the Land Commission and their dependants were immune from criminal and civil jurisdiction, subject to exceptions. The experts, supporting staff of diplomatic rank of the two bodies, and their dependants enjoy similar immunities. For those supporting staff who were not of diplomatic rank and their dependants, their immunity from civil jurisdiction would not be extended to acts performed outside the course of their duties. However, it is doubtful whether the Chinese officials in these offices situated in the HKSAR should continue to enjoy immunities similar to those enjoyed by diplomatic representatives of a foreign state after the transfer of sovereignty. China is no longer a foreign state but the mother state of Hong Kong and Art 22 of the Basic Law provides that all offices set up in the HKSAR by the Central Government and the personnel of these offices shall abide by the laws of the HKSAR.

127 The immunities were not applicable to the following civil actions:
   (a) arising out of a contract concluded by an officer of the Visa Office in which he did not contract expressly or impliedly on behalf of the Ministry of Foreign Affairs of the PRC;
   (b) by a third party for damage arising from an accident in Hong Kong caused by a vehicle, vessel, or aircraft;
   (c) relating to private immovable property situated in Hong Kong unless the officer of the Visa Office held it on behalf of the Ministry of Foreign Affairs of the PRC for the purposes of the Visa Office;
   (d) relating to succession in which the officer of the Visa Office was involved as executor, administrator, heir, or legatee as a private person and not on behalf of the Ministry of Foreign Affairs of the PRC; or
   (e) relating to any professional or commercial activity exercised by the officer of the Visa Office in Hong Kong outside his official functions.

128 Privileges and Immunities (Joint Liaison Group and Land Commission) Ordinance. The exceptions are:
   (a) a real action relating to private immovable property situated in Hong Kong, unless a member held it on behalf of the PRC for the purposes of the Joint Liaison Group or of the Land Commission;
   (b) a civil action relating to succession in which he was involved as executor, administrator, heir, or legatee as a private person and not on behalf of the PRC; and
   (c) a civil action relating to any professional or commercial activity exercised by him in Hong Kong outside his official functions.

129 Paragraph 5(4A) of the Schedule to the Privileges and Immunities (Joint Liaison Group and Land Commission) Ordinance.

130 Mushkat (note 16 above), p 69.
The status of the members of visiting military forces of other foreign states is unclear. Before the transfer of sovereignty, a member of a visiting force could not be tried in the courts of Hong Kong for certain criminal offences under the laws of Hong Kong. The service courts of a visiting force were granted the power to exercise jurisdiction over members of such visiting force in accordance with the powers enjoyed by them according to the law of the sending country of the visiting force. If a person had been tried by a service court of a visiting force, the person would not be tried for the same crime by the courts of Hong Kong. However, the relevant laws were not adopted as the laws of the HKSAR. There is no local or national legislation on this aspect. Presumably, they will not enjoy any immunity.

Legislative, judicial, and executive immunities
Members of the Legislative Council before the transfer of sovereignty enjoyed immunity from civil and criminal proceedings under the Legislative Council (Powers and Privileges) Ordinance. The immunity covered words spoken before the Legislative Council or a committee of the Legislative Council as well as written statements in a report made to the Council or its committees. The Basic Law also provides a similar immunity but of a more limited scope. Literally, it only covers words spoken but not written statements. Also, the councillors will only be protected in the full house meeting but not in the committees. However, if the intention of Art 19 is to maintain the restrictions on the jurisdiction of the courts of the HKSAR, the immunity under the Legislative Council (Powers and Privileges) Ordinance should be treated as a supplement to the Basic Law.

131 The Visiting Forces Act (Application to Colonies) Orders 1954 to 1967 applied the Visiting Forces Act 1952 to Hong Kong. Section 3 of the Act provided that a member of a visiting force or a member of a civilian component of such a force shall not be liable to be tried in the courts of Hong Kong for the following offences: (a) an offence committed by him in the course of his duty; (b) an offence against the person and the victim was a member of the force or a dependant of a member; (c) an offence against property and the property was owned by the sending country of the visiting force.

132 Section 4 of the Visiting Forces Act.

133 The Visiting Forces Act may still be applicable in the HKSAR even though it was not adopted as the law of the HKSAR (see the argument in note 97 above).

134 Section 4 of the Legislative Council (Powers and Privileges) Ordinance.

135 Article 77 of the Basic Law.
Members of the judiciary also enjoy immunity under both the pre-existing laws and the Basic Law. The situation before the transfer of sovereignty was governed by the common law and statutory laws. Judges of superior courts were not liable in civil action for anything done or said within their jurisdiction even if the acts or words were malicious, corrupt, or oppressive. Judges of inferior courts enjoyed a more limited immunity. They only enjoyed immunity if they were acting within their jurisdiction. Even if they were within their jurisdiction, they might still be liable if the acts or words were made maliciously and without reasonable and probable cause. As the common law lacked clear guidelines for determining whether a judge had acted without or in excess of jurisdiction, each case might have to be considered according to its own facts.

According to the Judicial Officers Recommendation Commission Ordinance, the following officers are judicial officers: Chief Justice; Judge of the Court of Final Appeal; Chief Judge of the High Court; Justice of Appeal; Judge of the Court of First Instance; Recorder of the Court of First Instance; Chief District Judge; District Judge Coroner; Chief Magistrate; Principal Magistrate; Magistrate; Special Magistrate; President of the Lands Tribunal; Presiding Officer of the Lands Tribunal; Member of the Lands Tribunal (who is in the full-time service of the Crown); Principal Presiding Officer of the Labour Tribunal; Presiding Officer of the Labour Tribunal; Principal Adjudicator of the Small Claims Tribunal; Adjudicator of the Small Claims Tribunal; Registrar of the High Court; Deputy Registrar of the High Court; and Assistant Registrar of the High Court.

Superior courts are those courts of unlimited jurisdiction. Before the transfer of sovereignty, they included the Judicial Committee of the Privy Council, the Court of Appeal, and the High Court. After the transfer of sovereignty, they will include the Court of Final Appeal, the Court of Appeal, and the Court of First Instance.

It is not very clear whether the Labour Tribunal and the Lands Tribunal are superior or inferior courts. Members of the Obscene Articles Tribunal enjoy immunity as a court in the exercise of the Tribunal’s functions according to Art 9 of the Control of Obscene and Indecent Articles Ordinance. Presumably, it is an inferior court.

For Magistrates and District Court Judges, they might still be liable under s 125 of the Magistrates Ordinance and s 71 of the District Court Ordinance. However, for other judges of inferior courts, the common law rule is unclear. An obiter dictum in In Re McC (A Minor) (note 140 above) suggested that they enjoyed the same absolute immunity as judges of superior courts if they were acting within their jurisdiction.

An error of law or fact in deciding a collateral issue on which the jurisdiction depends would not be without or in excess of jurisdiction. Nor would the absence of any evidence to support a conviction be an error of law committed in reaching a finding of guilty even if it arose from a misconstruction of the particular legislative provision to be applied. However, if a judge in the course of hearing a case within his jurisdiction committed some gross and obvious irregularity of procedure, he might have acted without or in excess of jurisdiction. A judge would commit such irregularity if he absent himself for part of the hearing and relied on another to tell him what had happened during his absence, or if he refused to allow the defendant to give evidence in breach of natural justice. It was held that a magistrate had acted without or in excess of jurisdiction because he had sentenced a person to a period of detention
Literally, the Basic Law treats all members of the judiciary as the same and they are immune from legal action in the performance of their judicial functions.\textsuperscript{143} There is no distinction between judges of superior courts and those of inferior courts as that at common law before the transfer of sovereignty. It is not clear whether the Basic Law has modified the common law immunity. However, if the intention of the Basic Law is to maintain the restrictions on the jurisdiction of the courts of the HKSAR as far as possible, the common law rules will not be replaced by the general rule stated in the Basic Law. Such rules may again be treated as a supplement to the Basic Law.

Unlike members of the legislative and judicial branches of the government of the HKSAR, members of the executive branch do not enjoy any immunity. However, it is possible that the Chief Executive of the HKSAR may pardon certain government officials from criminal charges. The Chief Executive has the power to pardon under common law and the Basic Law. The power to pardon under the Basic Law is limited to convicted persons and seems to be narrower than that under common law.\textsuperscript{144} Before the transfer of sovereignty, the Governor of the colonial government on behalf of the Crown had the prerogative power to pardon convicted persons as well as offenders before their conviction.\textsuperscript{145} The Governor had once granted pardon to persons who had committed corruption offences in 1977.\textsuperscript{146} It is not clear whether this prerogative power is replaced by the relevant provision of the Basic Law so that pardon will only be limited to convicted persons. However, if it

\begin{footnotesize}
\textsuperscript{143} Article 85 of the Basic Law.
\textsuperscript{144} Article 48(12) of the Basic Law.
\textsuperscript{145} Article XV of the Letters Patent provided that the Governor had the power to grant pardon to accomplices and principal offenders before or after their conviction. See also de Smith and Brazier (note 67 above), p 150, n 121.
\textsuperscript{146} The amnesty was granted after a group of police officers stormed the office of the Independent Commission Against Corruption. The Commission was set up in 1974 to fight corruption in Hong Kong. The work of the Commission had proved to be successful and the main targets of the Commission in its early years were police officers. That caused much tension between the Commission and the police force as many police officers had been involved in corrupt practices in the past. In order to pacify the police officers, the Governor granted a conditional amnesty to those persons who might have committed corrupt offences. (See 'Government and community cannot yield to the corrupt says Governor,' Daily Information Bulletin 7 November 1977, Government Information Services, Hong Kong.) The pardon was later supported by an amendment to the Independent Commission Against Corruption Ordinance.
\end{footnotesize}
is treated as a supplement to the power under the Basic Law, the courts will not receive any case when the alleged offender has been pardoned. Though in theory a pardon is different from an immunity, the result is the same. In addition, the power of pardon is not subject to judicial review under common law as it is a non-justiciable issue. The courts have no power to challenge a pardon.

The Attorney General of the colonial government also had the prerogative power not to prosecute which had the same practical effect as a pardon. The Basic Law grants the power to prosecute to the Department of Justice. Impliedly, that includes the power not to prosecute. Though the power is granted to the Department of Justice under the Basic Law, the Criminal Procedure Ordinance specifies that the power is to be exercised by the Secretary for Justice. The Attorney General in the past enjoyed another similar prerogative power, the power to enter a nolle prosequi to stop or discontinue a prosecution. It is arguable that the general power to prosecute under the Basic Law provides the legal basis for reserving this common law power to the Secretary for Justice. Finally, the Secretary for Justice may enjoy an additional power under common law to grant immunity to a person accused or suspected of crime in exchange for co-operation with the authorities. There is again some theoretical difference between these

147 Section 116 of the Criminal Procedure Ordinance. See also Peter Wesley-Smith, 'Executive Authority in the Special Administrative Region,' in Peter Wesley-Smith (ed), Law Lectures for Practitioners 1997 (Hong Kong: Hong Kong Law Journal, 1997).
148 Theoretically, if a person enjoys an immunity, he is immune from the jurisdiction of the courts which means that there is not even a right to present the case to the court by the prosecution for any acts done by the person. If a person is pardoned, the prosecution authority still enjoys the power to prosecute but just chooses not to prosecute. The courts will still have jurisdiction to consider the case if the person is brought before the court again for the pardoned offences.
149 *Council of Civil Service Unions v Minister for the Civil Service* (note 72 above) at p 418, per Lord Roskill.
151 Article 63 of the Basic Law.
152 Section 15 of the Criminal Procedure Ordinance. In March 1998, the Department of Justice published a new *Prosecution Policy: Guidance for Government Counsel*. The booklet was published after the public and the media expressed much concern about the Secretary for Justice's decision not to prosecute Aw Sian in a conspiracy case. Three persons were charged with conspiracy and Aw Sian was named as a co-conspirator. Aw Sian is the chairperson of Sing Tao Holdings and a member of the National Committee of the Chinese People's Political Consultative Conference.
153 Section 76 of the District Court Ordinance provides the statutory basis for the power to enter a nolle prosequi.
powers of the Secretary for Justice and a pardon.\textsuperscript{155} The courts, in general, will not challenge these decisions of the Secretary for Justice.\textsuperscript{156} However, that does not prevent any private individual from initiating a voluntary bill to prosecute the alleged offender and the courts will not reject the case purely on the ground that the Secretary for Justice has refused to prosecute.\textsuperscript{157}

\textbf{Fact of state}

The courts have the power to determine the facts of the case in adjudication subject to some exceptions. The exceptions can be found in the common law, statutory laws, and the Basic Law. The common ground is that the courts will accept the facts stated in certificates issued by the executive authorities as conclusive. The common law exception on this aspect originated from the prerogative power of the Crown. Most of the certificates issued are related to matters such as the sovereign status of a foreign state or its head of state, whether a government is recognised, the commencement and termination of a state of war against another country and whether a state of war exists with a foreign country or between two foreign countries, the diplomatic status of a person, and the existence or extent of Hong Kong jurisdiction in a foreign country.\textsuperscript{158} Most of these matters are related to defence and foreign affairs and are now covered by statute.\textsuperscript{159} For matters other than foreign affairs and defence, some local ordinances also authorise the Chief Secretary to

\textsuperscript{155} A pardon may be pleaded in bar to subsequent prosecution. In cases where a decision not to prosecute or to discontinue the prosecution is made by the Secretary for Justice, the accused is not necessarily entitled to a stay of proceedings.


\textsuperscript{157} Emily Lau, a Legislative Councillor, successfully initiated a private prosecution against Jiang En-zhu, the Director of Xinhua News China Agency, for an offence under the Personal Data (Privacy) Ordinance after the Secretary for Justice decided not to prosecute.

\textsuperscript{158} Elizabeth Wilmshurst, 'Executive Certificates in Foreign Affairs: The United Kingdom' (1986) 35 ICLQ157.

\textsuperscript{159} Examples of this kind are: s 2 of the Trading with the Enemy Ordinance (certificate concerning any area that is under the sovereignty of a foreign state); s 11 of the Consular Ordinance (certificate concerning a person who enjoys immunity as a consular officer); s 238 of the Firearms and Ammunition Ordinance (certificate concerning a ship or aircraft of a foreign state); s 4 of the Privileges and Immunities (International Committee of the Red Cross) Ordinance (certificate concerning a person who is immune from legal suit).
issue a certificate certifying certain information as facts and such a certificate is conclusive as to the facts certified.160

According to the Basic Law, the courts of the HKSAR have to obtain a certificate from the Chief Executive on questions of facts concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. Before issuing such a certificate, which shall be binding on the courts, the Chief Executive shall obtain a certifying document from the CPG.161 It is unclear whether this has replaced the common law rule and repealed the relevant statutory provisions.

The arrangement under the Basic Law is very similar to the common law except that the Basic Law specifies that the questions of facts must be concerned with an act of state such as defence and foreign affairs. The uncertainty is caused by the addition of the term 'act of state such as defence and foreign affairs.' As illustrated by the above analysis, the intention of the Basic Law is to maintain the restrictions on the jurisdiction of the courts of the HKSAR. Therefore, the provisions of the Basic Law on this aspect are just to illustrate the relevant rules applicable to Hong Kong before the transfer of sovereignty. Though a different but not contradictory description has been used in the Basic Law, the common law rule should still be maintained as long as it is still compatible with the Basic Law.

For the statutory provisions that authorise the Chief Secretary to certify certain facts, they may still be maintained if they are unrelated to defence and foreign affairs as there will then be no conflict with the arrangement under the Basic Law. For those that are related to defence and foreign affairs, they may still be maintained as the HKSAR enjoys a limited power to conduct external affairs.162 If the provisions are within the scope of such power, the Chief Secretary may still certify the matter so that it does not have to be certified by the Chief Executive. Also, there is no need to go through the procedure provided in the Basic Law to obtain a certifying document from the CPG.

160 Examples of this kind are: s 18A of the Independent Commission Against Corruption Ordinance (certificate concerning an offence which is sufficiently heinous to warrant action) and s 59 of the Sex Discrimination Ordinance (certificate concerning an act done for the purpose of safeguarding the security of Hong Kong and not unlawful for the purposes of the ordinance).
161 Paragraph 3 of Art 19 of the Basic Law.
162 Article 13 and Chapter VII of the Basic Law.
Non-application of HKSAR laws to the state

The courts have the power to determine which laws are relevant in a case. Before the transfer of sovereignty, this power was subject to s 66 of the Interpretation and General Clauses Ordinance. The Crown was not bound by any ordinance unless it was expressly provided or appeared by necessary implication that the Crown was bound. Therefore, in any case concerning the Crown, the courts in general could not apply any ordinance against the Crown unless it was expressly or impliedly stated otherwise.

Section 66 of the Interpretation and General Clauses Ordinance was amended and the 'Crown' is now substituted by the 'State.' Another provision was added to the Interpretation and General Clauses Ordinance to define the 'State' as the government of the HKSAR, the Central Authorities of the PRC that exercise executive functions or functions for which the CPG has responsibility under the Basic Law, and the subordinate organs of the Central Authorities that exercise any of the functions that are not commercial functions on behalf of the Central Authorities.

As shown above, the Crown had various capacities before the transfer of sovereignty. We now have to replace the 'Crown' to adapt to the new constitutional order, and it may be acceptable to give the 'State' various meanings corresponding to the different capacities of the 'Crown.' However, there are some uncertainties as to the meaning of 'Central Authorities' and the 'subordinate organs of the Central Authorities.' The term 'Central Authorities' is not defined in the Constitution of the PRC, the Basic Law, or local statutes. According to the Constitution of the PRC, the central state organ that exercises executive functions is the State Council. It is responsible for conducting foreign affairs and direct and administering the building of national defence. It seems that the Central Authorities should include the State Council of the PRC. The Basic Law refers to various central state organs. The organs that exercise the functions for which the CPG (which is the State

164 Section 2.
165 Article 85 of the Constitution of the PRC.
166 Article 85(9) and (10) of the Constitution of the PRC.
Council) is responsible under the Basic Law are the Ministry of Foreign Affairs and the Hong Kong Garrison of the People’s Liberation Army. They should also be within the meaning of the Central Authorities.\textsuperscript{167}

If the subordinate organs of the Central Authorities are also included into the meaning of the state, its scope may be much wider than that of the Crown before the transfer of sovereignty. According to the general rule in the amended Interpretation and General Clauses Ordinance, all the departments of the State Council or even the sub-organs of the Ministry of Foreign Affairs and the Hong Kong Garrison of the People’s Liberation Army will be exempted from the ordinances of Hong Kong unless it is expressly or impliedly stated otherwise. The restriction on the courts’ jurisdiction will be much wider than it was before the transfer of sovereignty.

However, even the application of this general rule has problems within the context of the Basic Law. The effect of this general rule is to make a presumption that the state is not bound by any ordinance enacted by the legislature of the HKSAR. However, Art 64 of the Basic Law expressly states that the government of the HKSAR must abide by the law. Also, Art 22 of the Basic Law expressly states that all offices set up in the HKSAR by the departments of the Central Government shall abide by the laws of the HKSAR. It is difficult to apply this general rule to the state if the term refers to the government of the HKSAR, the departments of the State Council, and the sub-organs of the Ministry of Foreign Affairs and the Hong Kong Garrison of the People’s Liberation Army. As far as these bodies are concerned under the Basic Law, the presumption should be the other way round. They will be bound by all ordinances unless it is expressly or impliedly stated otherwise. The new s 66 may have contradicted the Basic Law and may be invalidated by the courts.

\textbf{Laws enacted by the sovereign}

The power to adjudicate includes the power to determine whether the applicable laws are constitutionally or legally valid under the hierarchy

\textsuperscript{167} According to the Constitution of the PRC, the Central Military Commission directs the armed forces of the country. It is unclear whether this Commission should also be within the meaning of the Central Authorities.
of laws. A law of a lower order cannot contravene a law of a higher order, and the courts will invalidate any such law. There is some uncertainty on the hierarchy of laws in the HKSAR especially in respect of laws enacted by the sovereign and this may affect the jurisdiction of the courts on this aspect. There are a number of laws enacted by the sovereign that are applicable in the HKSAR. They include the Constitution of the PRC, the national laws listed in Annex III of the Basic Law, and the decisions passed by the NPC and SCNPC concerning the HKSAR. We will examine the relationship between the Basic Law and each of these laws and consider how that will affect the courts' review power.

Basic Law and the Constitution of the PRC

In theory, the highest law in the HKSAR is the Constitution of the PRC but not the Basic Law, as the Basic Law also has to derive its authority from the Constitution of the PRC. However, not all the provisions of the Constitution of the PRC are relevant in the HKSAR. Article 11 of the Basic Law provides that the systems and policies practised in the HKSAR, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative, and judicial systems, and the relevant policies, shall be based on the provisions of the Basic Law. The effect is that provisions of the Constitution of the PRC concerning systems and policies will not be applicable in the HKSAR. In other words, other provisions of the Constitution of the PRC, especially those regarding the structure of the state and the powers and functions of various offices and government agencies including the President, the NPC, and the State Council, may still be applicable in the HKSAR.

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168 Article 18 of the Basic Law. The list may be amended by the SCNPC after consulting its Committee for the Basic Law of the HKSAR and the government of the HKSAR. The laws listed in Annex III to the Basic Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the HKSAR as specified in the Basic Law.

169 As the United Kingdom does not have any written constitution, there is nothing similar before the transfer of sovereignty to compare with. Concerning the Acts of Parliament that were applicable to Hong Kong directly, the courts, in theory under the Colonial Laws Validity Act 1865, had the power to invalidate any provision of the Letters Patent that conflicted with such Acts of Parliament. However, that was very unlikely to happen and had never happened.

170 Many provisions of the Basic Law assume the existence of these bodies.
From the context of the Basic Law, it seems that the courts of the HKSAR, like the courts in the Mainland, do not have the power or duty to enforce the applicable parts of the Constitution of the PRC in the HKSAR. According to the Constitution of the PRC, the state organs responsible for enforcing the Constitution of the PRC are the NPC\footnote{Article 62(2) of the Constitution of the PRC.} and the SCNPC.\footnote{Article 67(1) of the Constitution of the PRC.} The SCNPC exercising the relevant powers under Arts 17 and 18 of the Basic Law and the NPC exercising its power under Art 159 of the Basic Law will be responsible for enforcing the Constitution of the PRC in its application to the HKSAR. Also, in a decision of the NPC, the Basic Law is presumed to be constitutional as it is enacted in accordance with the Constitution of the PRC and in the light of the specific conditions of Hong Kong.\footnote{Decision of the NPC on the Basic Law of the HKSAR of the PRC adopted by the Seventh NPC at its Third Session on 4 April 1990.} Therefore, if the courts have to consider the relationship between the Basic Law and the Constitution of the PRC, they will have to assume that the provisions of the Basic Law are compatible with the Constitution of the PRC.\footnote{There may be questions on the legal status of the decision of the NPC concerning the constitutionality of the Basic Law.}

**Basic Law and national laws**\footnote{Before the transfer of sovereignty, the Crown could apply Orders in Council to Hong Kong. The relative status between the Letters Patent and these Orders in Council was also not clear. Presumably, the Letters Patent enjoyed a higher status. However, this was also a theoretical question as it was very unlikely that an Order in Council applicable to Hong Kong would have contradicted the Letters Patent.}

The status of the national laws listed in Annex III of the Basic Law in Hong Kong's legal hierarchy is unclear. Therefore, there is some uncertainty on whether the courts have the power to review these national laws on their compatibility with the Basic Law.\footnote{Ghai (note 8 above), p 368.}

Article 18 provides that these laws will be applied locally by way of promulgation or legislation by the HKSAR. They have no legal force in the HKSAR until they are applied locally by the HKSAR. If they are applied by way of legislation, they should be treated in the same way as other ordinances passed by the legislature of the HKSAR.\footnote{The Provisional Legislative Council of the HKSAR has passed the National Flag and National Emblem Ordinance to implement the Law of the PRC on the National Flag and the Law of the PRC on the National Emblem.}
However, the status of those national laws that are applied by way of promulgation\(^{178}\) is less clear. All such laws were promulgated by the Chief Executive by notices published in the Gazette.\(^{179}\) Article 48(3) provides that the Chief Executive has the power to sign bills passed by the Legislative Council and to promulgate laws. It seems that promulgation is one of the law-making procedures. A piece of legislation must be passed, signed, and promulgated before it can be the law of the HKSAR. For national laws applicable to the HKSAR, they are passed and signed by governmental agencies of the central government, but are promulgated by the Chief Executive. Arguably, as they are promulgated by the same person as the one promulgating ordinances passed by the legislature of the HKSAR, they should enjoy the same status as that of local ordinances and therefore be reviewable by the courts of the HKSAR.\(^{180}\)

**Basic Law and decisions passed by the NPC and SCNPC**

As stated at the beginning of this paper, *HKSAR v Ma Wai-kwan David* has posed a very important question concerning the power of the courts of the HKSAR: Do the courts of the HKSAR have the power to review decisions and resolutions concerning the HKSAR passed by the NPC and the SCNPC on their compatibility with the Basic Law? In that case, the decisions in question included a decision passed by the NPC,\(^{181}\) a decision passed by the SCNPC,\(^{182}\) a decision made by a

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178 The following national laws apply to the HKSAR by way of promulgation: Resolution on the Capital, Calendar, National Anthem and National Flag of the PRC; Resolution on the National Day of the PRC; Declaration of the Government of the PRC on the Territorial Sea; Nationality Law of the PRC; Regulations of the PRC Concerning Diplomatic Privileges and Immunities; Law of the PRC on the National Flag; Law of the PRC on the National Emblem; Law of the PRC on the Territorial Seas and the Contiguous Zone; Law of the PRC on the Garrisoning of the HKSAR; and the Regulations of the PRC concerning Consular Privileges and Immunities.


180 The status of the national laws applicable to the HKSAR relative to the laws enacted by the legislature of the HKSAR is unclear. See Zhou Wei (note 109 above) and Ghai (note 8 above), p 369.


182 Decision of the SCNPC on the Motion Proposed by Mr Zheng Yaotang and 32 Other Deputies to the NPC Adopted by the Ninth Session of the Standing Committee of the Eighth NPC on 31 August 1994 (reproduced in (1997) 27 HKLJ 414-15).
committee under the NPC\textsuperscript{183} and a resolution passed by the NPC.\textsuperscript{184} The judges decided that the courts of the HKSAR have no jurisdiction to query the validity of those decisions. The basis of the judgment was that before the transfer of sovereignty, Hong Kong courts did not have that power. Following the principle stated in Art 19, the restrictions on jurisdiction previously in force in Hong Kong are maintained. The courts of the HKSAR will also have no such power.

Before the transfer of sovereignty, the courts had no authority to question the legal validity of any Act of Parliament on its compatibility with the Letters Patent.\textsuperscript{185} The theoretical basis was the doctrine of parliamentary supremacy. If there was any inconsistency between the Letters Patent and an Act of Parliament that was applicable to Hong Kong directly, the courts of Hong Kong had to uphold the Act but not the Letters Patent.\textsuperscript{186} There was no restriction on the law-making power of the Parliament in respect of Hong Kong. The Crown could amend the Letters Patent and there was no procedural or substantial restriction.\textsuperscript{187}

The judgment has been subject to many criticisms.\textsuperscript{188} The major criticism is that the theoretical basis explaining the lack of jurisdiction before the transfer of sovereignty should not be applicable after the transfer of sovereignty. It was argued that the unlimited law-making power of the British Parliament on the basis of the doctrine of parliamentary supremacy was developed in the context of a constitutional system where there was no written constitution. As the PRC has a written constitution, the power of the NPC and the SCNPC to legislate for the HKSAR must be subject to certain constitutional and legal restrictions. They cannot make any law inconsistent with the Constitution of the PRC or the legal requirements contained in the Basic Law. Therefore,

\textsuperscript{183} Decision of the Preparatory Committee for the HKSAR of the NPC on the Establishment of the Provisional Legislative Council of the HKSAR. The Preparatory Committee was set up in accordance with the Decision of the NPC on the Method for the Formation of the First Government and the First Legislative Council of the HKSAR of the PRC. It was responsible for preparing the establishment of the HKSAR and prescribed the specific method for forming the first government and the first Legislative Council.

\textsuperscript{184} Resolution of the Eighth NPC at its Fifth Session on the Work Report of the Preparatory Committee for the HKSAR of the NPC adopted by the Eighth NPC at its Fifth Session on 14 March 1997 ((1997) 27 HKLJ 424-5).

\textsuperscript{185} The Letters Patent was the highest constitutional document within Hong Kong.

\textsuperscript{186} Section 2, Colonial Laws Validity Act 1865.

\textsuperscript{187} Art XX, Letters Patent.

\textsuperscript{188} Johannes Chan, 'The Jurisdiction and Legality of the Provisional Legislative Council' (1997) 27 HKLJ 374.
The courts of the HKSAR must have the power to review the laws so legislated by the NPC or SCNPC on their legal validity.

This argument is built on certain theoretical constitutional assumptions, and may encounter some difficulties when applied to the HKSAR. One assumption is that a constitution is used to restrict the law-making power of the legislature or the power of the government. However, that may not be necessarily the case in China. That totally depends on the theoretical assumption of the Chinese system concerning the function of its constitution.

Under the Chinese constitutional structure and theoretical framework, the function of the Constitution is not so much to impose restrictions on the government's powers as to provide the means for the state (which is the ruling Communist Party) to achieve its goals.\(^{189}\) According to the Constitution of the PRC, the NPC is the highest organ of state power.\(^{190}\) Its permanent body is the SCNPC.\(^{191}\) The NPC and the SCNPC exercise the legislative power of the state.\(^{192}\) The NPC with its standing committee enjoys a status even more supreme than that of the British Parliament as the SCNPC has the power to interpret the Constitution of the PRC\(^{193}\) and all statutes including the Basic Law legislated by the NPC and the SCNPC.\(^{194}\) In theory and in practice, their law-making power cannot be challenged in any Chinese court as the power to supervise the Constitution of the PRC is shared by the NPC and the SCNPC\(^{195}\) rather than exercised by the courts. The courts in the Mainland like the British courts do not have the power to review the constitutionality of any law passed by their national legislatures.

In the case of the HKSAR, the Constitution of the PRC provides that the systems to be instituted in special administrative regions shall be prescribed by the law enacted by the NPC in the light of the specific conditions.\(^{196}\) That does not restrict the NPC to legislate only once for

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189 Ghai (note 8 above), pp 83-6.
190 Article 57 of the Constitution of the PRC.
191 Ibid.
192 Article 58 of the Constitution of the PRC.
193 Article 67(1) of the Constitution of the PRC.
194 Article 67(4) of the Constitution of the PRC.
195 Articles 62(2) and 67(1) of the Constitution of the PRC.
196 Article 31 of the Constitution of the PRC.
The NPC and the SCNPC may legislate for the HKSAR in addition to the Basic Law and subject to no restriction from the Constitution of the PRC.

The Basic Law does contain a procedure of amendment. However, this procedure is merely a self-imposed restriction. It may only prevent implied amendment. If the NPC enacts any law to override certain parts of the Basic Law in express terms, the Basic Law cannot prevent the NPC from doing so. Even if the intention at the time of enactment of the Basic Law might be that the amendment procedure must be followed, there is no constitutional, legal, or political restriction to prevent the NPC or the SCNPC from changing their minds. If the legislation is just a supplement to the Basic Law but not an amendment, then the argument that the NPC and the SCNPC must follow the procedure provided in the Basic Law will be even weaker.

In the end, the Basic Law is still a Chinese law and cannot do what a Chinese law cannot do unless authorised or tolerated by the state. If the state decides to change its mind and act accordingly, the Basic Law has no capacity to restrict the state. Even if a question concerning the compatibility of certain decisions made by the NPC with the Basic Law is raised in the courts of the HKSAR, the courts will still have to refer the matter to the SCNPC for interpretation. Any questions concerning the meaning of Art 31 of the Constitution of the PRC, the extent of restrictions that the Basic Law may impose on the NPC and the SCNPC, and the nature of decisions passed by the NPC will all be decided by the SCNPC. It is doubtful whether the SCNPC will give an interpretation that will in one way or another invalidate decisions made by itself or the NPC.

Another assumption is that the intention of the Basic Law is to establish a relationship between Hong Kong and the PRC which will give priority to the systems of the HKSAR in case such systems conflict with those of the Mainland. The intention of the Basic Law is to authorise the establishment of a special administrative region in Hong

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197 Even if the NPC may be challenged on its power to enact another law to regulate the systems in the HKSAR, that may be a constitutional question to be decided by a constitutional structure in the Mainland system but not in the HKSAR system.

198 Article 159 of the Basic Law.

199 Article 158 of the Basic Law.
Kong enjoying a high degree of autonomy. The taking away of the jurisdiction of the courts in this aspect contradicts the intention of the Basic Law.

The legal system of the HKSAR is very different from the Mainland legal system in respect of its structures and rules to determine the legality and constitutionality of legislation. The Basic Law does not explicitly specify which set of structures and rules will be applied in determining whether the courts of the HKSAR have the power to review the laws enacted by the sovereign.

However, the high degree of autonomy enjoyed by the HKSAR originates from the policy of 'one country, two systems.' 'One country, two systems' is a policy on the unification of China formulated by the Chinese government. As the objective of the policy is unification of China, 'one country' must take priority over the 'two systems.'

The HKSAR enjoys a high degree of autonomy but the autonomy is only conferred on Hong Kong within the Chinese constitutional structure and theoretical framework. If the courts were allowed to review the laws enacted by the sovereign, priority would be given to the systems of the HKSAR. It is difficult to imagine how the courts of the HKSAR as regional courts within the Chinese constitutional structure could enjoy a power that would fundamentally change the constitutional assumptions of the system. The Chinese constitutional structure and theoretical framework are the foundation of the autonomy enjoyed by the HKSAR. If the exercise of autonomy may affect the foundation, it will also shaken the autonomy itself unless the autonomy could be built on another foundation.

It may be totally unsatisfactory from the point of view of Hong Kong's constitutional tradition that the courts of the HKSAR do not have the power to review the compatibility of the decisions of the NPC and the SCNPC with the Basic Law. However, the new constitutional order established in Hong Kong after the transfer of sovereignty is built on the Chinese constitutional structure and theoretical framework. The authorities of the Basic Law and the courts of the HKSAR are all derived from this constitutional structure and theoretical framework. When we need to interpret any provision of the Basic Law to get an answer to a question not expressly addressed by the provision, we cannot ignore the Chinese constitutional structure and theoretical framework on which it
is built. We cannot change or modify the constitutional structure and theoretical framework of China through the Basic Law. That can only be done in a fundamental reform of the Chinese constitutional system itself. Before that, the political reality is still that the Chinese Government retains the ultimate authority within as well as outside the Basic Law to decide critical issues for the HKSAR.

From the above analysis, we can see that the Constitution of the PRC and the Basic Law impose no substantial or procedural restriction on the law-making power of the NPC and the SCNPC in respect of the systems of the HKSAR. Even though the analogy in Ma Wai-kwan David may be wrong, that does not mean that the courts of the HKSAR will have the power to review. The NPC and the SCNPC still have the authority to legislate in any form for the HKSAR, supplementing or overriding the provisions of the Basic Law, and the courts of the HKSAR have no power to challenge or review.

**Interpretation of the Basic Law**

Another aspect of the power to adjudicate is the power to interpret laws. The courts before the transfer of sovereignty enjoyed the full power to interpret all the applicable laws in Hong Kong including Acts of Parliament and prerogative legislation. It is a common law assumption behind the constitutional structure that the courts enjoy the final power of interpreting laws.

Under the Basic Law, the courts of Hong Kong enjoy the power of final adjudication presumably including the final power of interpreting laws. However, the courts of the HKSAR have lost this major aspect of the power of adjudication when it involves the interpretation of the Basic Law. According to the Basic Law, the power to interpret the Basic Law is vested in the SCNPC. This arrangement is consistent with the system in the Mainland where the legislative body enjoys the final power of interpretation of laws. The power of the courts to interpret the Basic Law is not original. They only enjoy that power through an authorisation by the SCNPC in the Basic Law. The courts may interpret the Basic

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200 Articles 2, 12, and 19 of the Basic Law.
201 Article 67(4) of the Constitution of the PRC.
202 Paragraphs 2 and 3 of Art 158 of the Basic Law.
The jurisdiction of the courts of the HKSAR

Law on its own while adjudicating cases if the provisions of the Basic Law are those within the limits of the autonomy of the HKSAR. When the courts have to interpret other provisions of the Basic Law including those concerning affairs which are the responsibility of the CPG, or concerning the relationship between the Central Authorities and the HKSAR, a new procedure is introduced by the Basic Law. 203

If the interpretation of certain provisions of the Basic Law will affect the outcome of the case, the courts of the HKSAR have to seek an interpretation of the relevant provisions from the SCNPC through the Court of Final Appeal of the HKSAR before giving their final judgments which are not appealable. The interpretation provided by the SCNPC will be binding on the courts, but judgments previously rendered will not be affected.

How this will affect the power of the courts in exercising their power of adjudication is still to be seen. However, the extent of the impact on the courts’ power to interpret laws may depend on rather irrational factors. According to Art 158 of the Basic Law, the courts only need to refer a provision of the Basic law for interpretation if four conditions are satisfied. Firstly, there must be a case being adjudicated by the courts. The SCNPC will not receive a referral from the courts on a hypothetical question. Secondly, the provision must be a provision concerning affairs which are the responsibility of the CPG, or concerning the relationship between the Central Authorities and the HKSAR. Thirdly, the judgment of the case has to depend on the interpretation of the provision. If the courts can resolve the dispute without relying on the provision, there is no need to refer. Fourthly, the referral will only need to be made if the judgment to be made by the courts is final and is not appealable. 204

It is not explicit in the Basic Law which body will decide whether the four conditions are satisfied. From the literal context and from the nature of the four conditions, it should be the courts of the HKSAR rather than the SCNPC. If the courts of the HKSAR decide that the conditions are not satisfied and that there is no need to refer any provision of the Basic Law to the SCNPC to interpret, the courts will decide the case accordingly. That does not prevent the SCNPC from intervening and inter-

203 Article 158 of the Basic Law.
preting as it has a general power to interpret any provision of the Basic Law even if there is no referral from the courts of the HKSAR. If the SCNPC does interpret a provision of the Basic Law, the courts of the HKSAR must follow the interpretation and apply the interpretation to the case even if the courts do not think that the provision needs to be referred to the SCNPC for interpretation at the beginning. However, judgments previously rendered will not be affected.

If the courts of the HKSAR manage to deliver a judgment before the SCNPC could give an interpretation of the relevant provision, the courts’ interpretation of the provision in the case being adjudicated will be unaffected. Nevertheless, the courts will still have to follow the interpretation given by the SCNPC in future cases. So the extent that the courts’ power to interpret the Basic Law will be limited by the SCNPC will depend on whether the courts can act faster than the SCNPC. Nevertheless, this has already created a fundamental change to the nature of the judicial power to be exercised by the courts of the HKSAR.

Act of state

The next aspect of the power to adjudicate is to make a binding decision on the legality of the acts involved in the case. Under common law, a person who suffered losses as a result of an act committed by the executive authority directly against him might initiate a proceeding against the executive authority in the courts. However, if the courts recognise the act as an act of state, they have no authority to question the legality of such act, subject to some exceptions. This is the doctrine of act of state.\(^{205}\)

The courts decide whether an act is an act of state. An act of state is an act of the executive as a matter of policy performed in the course of its relations with the subjects of another state, unless they are temporarily within the territorial jurisdiction of the Crown.\(^{206}\) The doctrine applies only if that person is an alien.\(^{207}\) If he is not an alien\(^{208}\) or if he is a subject

\(^{205}\) Salaman v Secretary of State for India [1960] 1 KB 613.
\(^{207}\) R v Bottrill, ex p Kuechenmeister [1947] 1 KB 41, Buron v Denman (1948) 154 ER 450.
\(^{208}\) Walker v Baird [1892] AC 491.
of an enemy state within the territorial jurisdiction of the state, the doctrine is not applicable.\textsuperscript{209} Therefore, an act of state cannot be pleaded in a proceeding initiated against the Crown by a British subject.

There were some conceptual uncertainties when this doctrine was applied to a British colony like Hong Kong. As most of the cases in this area were concerned with the jurisdiction of the courts in the United Kingdom, it was argued that the Crown in question was only the Crown in the United Kingdom.\textsuperscript{210} If such an argument was followed, the doctrine would not have any substantial impact on Hong Kong courts' jurisdiction as the colonial courts in Hong Kong in any case had no jurisdiction to entertain claims against the Crown in the United Kingdom.\textsuperscript{211}

If this doctrine were to have any impact, then we would have to assume that the Crown in the doctrine could also be the Crown in Hong Kong. Therefore, the Crown in Hong Kong might also commit an act of state. However, from the nature of the acts covered by the doctrine, it seems very unlikely that the executive authorities of a colonial government could commit an act of state.

These uncertainties are passed on to the HKSAR by virtue of Art 19 of the Basic Law. Following the principle stated in the second sentence of Art 19, this common law doctrine will presumably be preserved. Actions against the government of the HKSAR by Hong Kong residents cannot be excluded on the basis of the act of state doctrine.\textsuperscript{212} However, the chance that the government of the HKSAR will commit an act of state is small as an act of state usually involves acts committed in the fields of defence and foreign affairs.\textsuperscript{213}

An act of state may also not be applicable in actions against the Central Authorities by Hong Kong residents (even though they may not be Chinese citizens). He may still be able to get remedies from the courts of the HKSAR against the Central Authorities on the condition that the jurisdiction of the courts is not restricted on any other grounds discussed

\textsuperscript{209} Johnstone v Pedlar [1921] 2 AC 262.
\textsuperscript{211} See the above discussion under the heading ‘Act of the sovereign.’
\textsuperscript{212} Article 35 of the Basic Law.
\textsuperscript{213} The government of the HKSAR does enjoy a limited degree of external power and that may cause the government of the HKSAR to commit an act within the scope of act of state.
above. However, as stated above, the courts of the HKSAR may not have jurisdiction to receive a case against the Central Authorities in the private law sphere. Persons involved in such sphere may have to initiate an action against the Central Authorities in the Chinese courts. The Administrative Litigation Law of the PRC also has a principle of act of state excluding the jurisdiction of the court.\textsuperscript{214} However, the extent of the rule is not clear. It is unlikely that the common law restriction on the application of the principle to aliens will be incorporated.

There is some further uncertainty created by another sentence in Art 19. It states that the courts of the HKSAR shall have no jurisdiction over acts of state such as defence and foreign affairs. If it is taken as merely restating the common law principle, the statement has not much significance. However, if the statement is taken as a modification or a supplement to the previous statement, the impact will be much greater. It may be taken as introducing the Chinese concept of act of state rather than the common law concept into the Basic Law. In other words, the doctrine may even be invoked in actions initiated by Hong Kong residents. There may be no practical difference if the action is brought against the Central Authorities. However, in an action against the government of the HKSAR, the position will be substantially changed. The courts' jurisdiction will be excluded even though the common law principle will not apply in that kind of case.

Another uncertainty is the meaning of acts of state. The use of the expression 'such as' causes worries that the definition will be wider than the common law meaning. Again, there will not be any practical difference if the action is against the Central Authorities as the courts of the HKSAR do not have jurisdiction in any case involving the Central Authorities. The real worry is in actions against the government of the HKSAR. Article 19 may exclude cases that are originally within the jurisdiction of the courts under the common law.

Actually Art 19 is a rather strange article. It is found in Chapter 2 of the Basic Law. Presumably, it is concerned with the jurisdiction of the judicial body of the HKSAR vis-à-vis the Central Authorities. If that intention is to be followed, then the third sentence of Art 19 will have no substantial meaning. If some meaning is to be given to that sentence,
then the subject matter of the article will be shifted to the jurisdiction of
the courts of the HKSAR vis-à-vis the government of the HKSAR. Even
in that kind of case, if the common law meaning is still applied, the whole
sentence will again cause no change to the situation previously in force
in Hong Kong. It becomes again just an empty clause.

Non-justiciable issues

Incidentally, the courts may have to decide the legality of the acts or
decisions of people other than the parties directly involved in the
adjudication. This decision may seriously affect the result of the case that
the courts are handling at the time. As stated above, the courts may not
have the power to query the legality of certain acts of the sovereign
incidental to a proceeding. The common law recognised a number of
such non-justiciable issues, including the making of treaties, national
defence, the dissolution of the legislature, and the appointment of
ministers. These are issues that the courts consider inappropriate for
them to decide. However, there is no clear and consistent principle by
which to determine what are non-justiciable issues.

Following the common law position, certain acts of the Chief
Executive of the HKSAR may be regarded as non-justiciable. They
include the nomination of principal officials, the appointment of
members of the Executive Council, refusal to sign a bill passed by the
Legislative Council, and the dissolution of the Legislative Council.
Certain acts of the Central Authorities may also be non-justiciable.
They include defence and foreign affairs, decisions to return legis-
lation passed by the legislature of the HKSAR, decisions to amend
Annex III of the Basic Law, decisions to declare emergency in the

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215 Council of Civil Service Unions v Minister for the Civil Service (note 72 above).
217 Article 48(5) of the Basic Law.
218 Article 55 of the Basic Law.
219 Article 49 of the Basic Law.
220 Article 50 of the Basic Law.
221 Article 14 of the Basic Law.
222 Article 13 of the Basic Law.
223 Article 17 of the Basic Law.
224 Article 18 of the Basic Law.
HKSAR, and permissions for people from other parts of China to enter into the HKSAR.

Some provisions of the Basic Law by their nature and language may not be justiciable. Article 108 of the Basic Law provides that the HKSAR shall, taking the low tax policy previously pursued in Hong Kong as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation. The courts may not be able to determine the meaning of 'low' tax if a person initiates an action to challenge the tax rate set by the government of the HKSAR.

For all these matters, the courts of the HKSAR do not have the power to decide the legality of the acts referred to above.

Remedies

The last aspect of the power to adjudicate is to determine the legal consequence of the decision and provide a remedy to the suffering parties if necessary. In actions against the Crown before the transfer of sovereignty, prerogative remedies like certiorari, prohibition, and mandamus were not available against the Crown. The reason was totally historical: because of the peculiar nature of the Crown in the British constitutional structure, prerogative orders were not available against the Crown. Similarly, the Crown Proceedings Ordinance also prohibits the courts from granting an injunction or specific performance against the Crown.

After the transfer of sovereignty, the Crown has been replaced by the state, and thus there is no reason why we should maintain those restrictions on the courts' power to grant remedies. The conceptual restrictions on granting remedies against the state should be removed, at least against the government of the HKSAR. However, if Art 19 is to be taken strictly, such restrictions will also need to be maintained.
Conclusion

The intention of the Basic Law is to maintain the jurisdiction of the courts of Hong Kong as well as the restrictions on such jurisdiction. However, owing to the special relationship between Hong Kong's and the Mainland's legal systems and the different nature of the two systems, the formula in Art 19 leads to some strange and unexpected results. Some of those results may be merely technical. However, others may be related to the fundamental nature of the role of the judiciary in the constitutional system of Hong Kong. That cannot be changed unless the Basic Law is amended or the theoretical or policy basis of the Basic Law is reformed.