



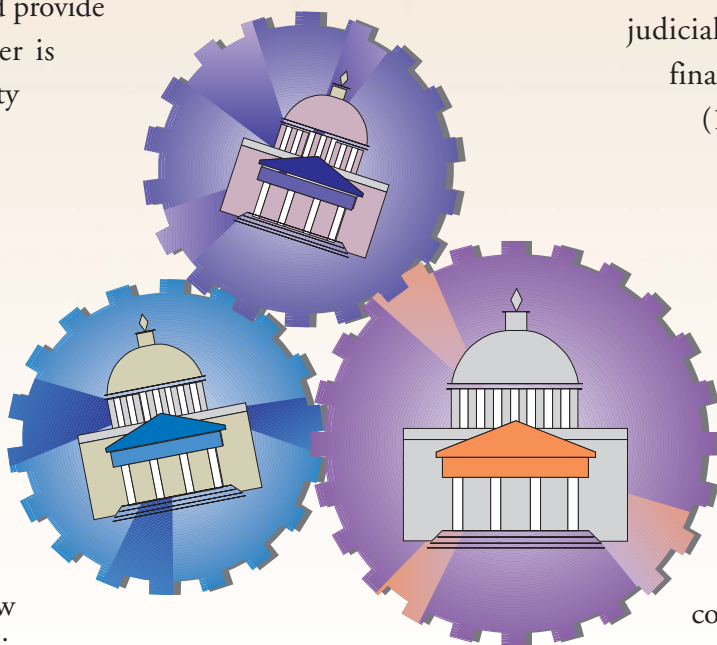
THE FOCUS

The Judicial System of the HKSAR Continuity and Change

INTRODUCTION

The rule of law is one of the essential factors that make Hong Kong a success story. It entails, in brief, the principle of legality, ie everything must be done in accordance with the law. In the context of the government, its powers must derive from the law and be exercised in accordance with the law (BL 64). In respect of the legislature, no law enacted by the legislature shall contravene the Basic Law (BL 11). Citizens have the right to challenge in court the legality of acts of the government and the validity of the law under which it acts. The courts are in a position to settle disputes and provide remedies. As a result, order is maintained in the community and citizens' rights and freedoms are protected by the law as applied by the courts.

Hong Kong's independent judiciary has been playing a vital role in upholding the rule of law. The principle of "one country, two systems" enshrined in the Basic Law ensures that Hong Kong's previous legal system and judicial system have continued in place as the foundation of the rule of law in the HKSAR. In *The Focus* of this issue, we shall outline the basic institutional arrangements of and changes to the judicial system brought about by the Basic Law. *The Focus* in the next issue will discuss the role of the judiciary in the implementation of the Basic Law.



AN OVERVIEW OF THE JUDICIAL SYSTEM OF THE HKSAR

BL 81(2) provides that the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the CFA. The following are the major aspects of the judicial system entrenched by the Basic Law.

Composition and Jurisdiction of HKSAR Courts

The HKSAR exercises independent judicial power, including that of final adjudication (BL 2 & 19 (1)). The HKSAR courts at all levels shall be the judiciary of the Region and exercise the judicial power of the HKSAR (BL 80). The judiciary under the Basic Law is essentially the same as the one operating before the Reunification, except for the renaming of certain courts and the establishment of a local court of final appeal, ie the CFA. The CFA, which is vested with the power of final adjudication of the HKSAR (BL 82), replaces the Judicial Committee of the Privy Council in London as the final appellate court for Hong Kong.

The HKSAR courts have jurisdiction over all cases in the HKSAR except as restricted by the legal system

and principles previously in force in Hong Kong (BL 19(2)) and they have no jurisdiction over acts of state such as defence and foreign affairs (BL 19(3)). Under BL 84, they shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in BL 18. Such laws include the Basic Law, the national laws applied to the HKSAR under Annex III to the Basic Law, the “laws previously in force” as set out under BL 8 (ie, the common law, rules of equity, ordinances, subordinate legislation and customary law). Principles previously applied in criminal and civil proceedings are maintained by BL 87. To preserve Hong Kong as a common law jurisdiction, local courts are expressly authorized by BL 84 to refer to precedents of other common law jurisdictions. Judges (including judges who sit on the CFA) and other members of the judiciary may be recruited from other common law jurisdictions (BL 82 & 92).

On the first day that the HKSAR courts operated in July 1997, it was argued in *HKSAR v Ma Wai Kwan, David & Others* [1997] HKLRD 761 that the common law had not survived the change of sovereignty. The CA in that case affirmed, having considered the relevant BL articles (ie BL 8, 18, 19, 81, 87 & 160), that the laws previously in force (including the common law) had survived the Reunification, and that the judicial system together with the principles applicable to court proceedings had continued (at 787H–I).

Sidelights at p 23 has details of the jurisdiction of HKSAR courts at various levels.

Independence of the Judiciary

To uphold the rule of law it is important to keep the

judiciary independent of other branches of the government. The independence of the judiciary is guaranteed by various provisions of the Basic Law.

Judicial autonomy

BL 2 and 19 emphasize that the judicial power of the HKSAR is independent. In particular, BL 85 provides that HKSAR courts shall exercise judicial power independently and free from any interference. This means that the HKSAR courts shall be free from any interference inside or outside the judiciary, and from that of the executive and the legislature. Under the common law doctrine of precedent, however, a court is bound on matters of law by decisions of the higher courts (and often its own previous decisions) (see *Sidelights* at p 11 and Issue No 2 on the relationship between the power of interpretation of the Basic Law by the NPCSC and the power of adjudication of HKSAR courts).

Appointment of judges

BL 88 provides that judges of the HKSAR courts are appointed by the CE on the recommendation of the Judicial Officers Recommendation Commission (the “JORC”). The JORC is of special significance to the independence of the judiciary. It is an independent statutory body established under the Judicial Officers Recommendation Commission Ordinance (Cap 92) to advise or make recommendations to the CE regarding (1) the filling of vacancies in judicial offices; (2) such representations from a judicial officer concerning conditions of services as may be referred to it by the CE; and (3) any matter affecting judicial officers which may be prescribed or which the CE may refer to it. Although judges are appointed by the head of the executive, the CE is bound by the constitutional requirement of BL 88 to appoint judges on the recommendation of the JORC. For a recent



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example of senior judicial appointments and the composition of the JORC, please refer to *Sidelights* at p 7.

Security of tenure

In order to entrench the independence of the judiciary, judges have security of tenure in office until they reach retirement age. A judge may only be removed for inability to discharge his duties, or for misbehaviour, by the CE on the recommendation of a tribunal appointed by the Chief Justice and consisting of not fewer than three local judges (BL 89(1)). The Chief Justice may be investigated only for inability to discharge his duty, or for misbehaviour, by a tribunal appointed by the CE and consisting of not fewer than five local judges (BL 89(2)). In addition to the above, in the case of the appointment or removal of judges of the CFA and the Chief Judge of the High Court, the CE has to obtain the endorsement of the LegCo and report such appointment or removal to the NPCSC for the record (BL 90 (2)).

Upon their appointment, judges of the District Court and the High Court have to give an undertaking to the CE that they will not, without the consent of the CE, return to practise as a barrister or solicitor in Hong Kong. In the case of judges of the CFA, s 13 of the Hong Kong Court of Final Appeal Ordinance (Cap 484) provides that the Chief Justice and judges of the CFA shall not be entitled to practise as a barrister or solicitor in Hong Kong either while he holds office as such a judge or at any time after he ceases for any reason to hold office as such a judge and shall be deemed upon and by virtue of such appointment to

be not qualified to practise as a barrister or solicitor. Such severance of any possible ties with private practice prevents any real or perceived conflict of interest and enhances the independence of judges and the perception of such independence.

Immunity from legal action

BL 85 provides that members of the judiciary shall be immune from legal action in the performance of their judicial functions. The purpose of judicial immunity under relevant common law principles has been explained as follows:

“This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who administer justice ought to be.”¹

The above institutional arrangements ensure that judges will continue to decide cases according only to law, without fear of any outside forces, and irrespective of whether the decision would be against the interest of any parties, including the executive.

Quality of members of the Judiciary

As the quality of judges and other members of the judiciary is fundamental to the rule of law, BL 92 provides that they are to be chosen on the basis of their judicial and professional qualities, and may be recruited from other common law jurisdictions. Accordingly, the HKSAR could benefit from the

¹ *Sirros v Moore & Others* [1975] 1 QB 118 at 132G, quoting *Garnett v Ferrand* (1827) 6 B & C 611, 625.

calibre and experience of prominent judges and lawyers from both within the Region and other common law jurisdictions. *Sidelights* at p 7 has an outline of the background of the judges of the HKSAR courts.

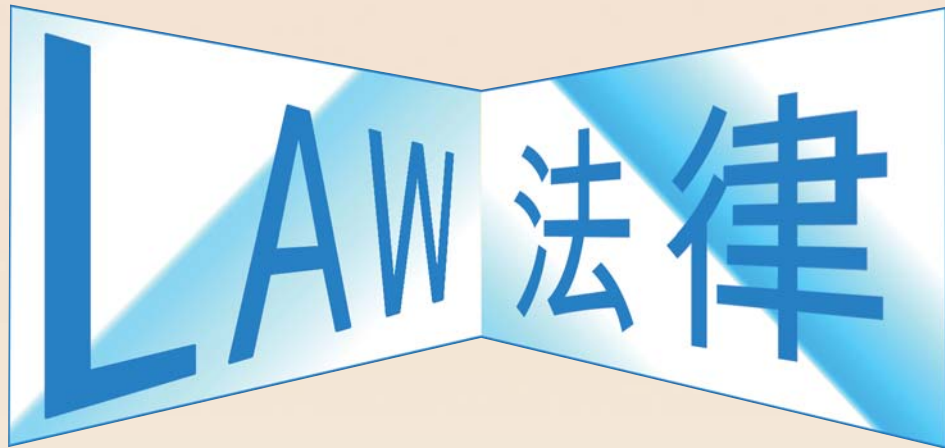
Bilingualism in the Law

Another change to the judicial system is found in BL 9, which provides that the judiciary may use English or the Chinese language (see the judgment summary of *Re Cheng Kai Nam Gary* at p 18 of Issue No 3). In fact the process of using Chinese language in courts has been a gradual one and started in the magistracies in 1974.² Not only the court but also the law has gone bilingual. Until 1989, laws were promulgated in Hong Kong only in English. Since then, laws have been enacted in both the English and Chinese languages. The official translation of all pre-existing legislation into Chinese was completed by May 1997. The increasing use of Chinese as an official language both in the law and in the courts is of immeasurable value to the community. It removes a language barrier, helps to de-mystify the law and promotes the ideal that law belongs to the people. But great care has been taken to ensure that the quality and integrity of the English-oriented common law system are not compromised by the use of the Chinese language. The majority of cases decided in the higher courts are still heard in English. Our links with other common law jurisdictions are therefore well maintained.

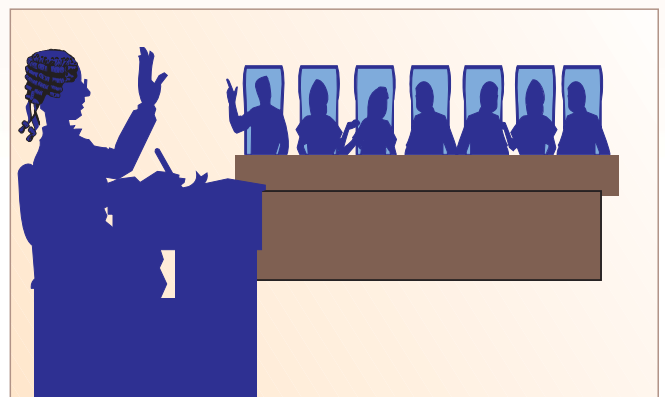
Jury System

BL 86 maintains the principle of trial by jury previously

practised in Hong Kong, which is an important facet of the administration of justice in most common law jurisdictions. The jury system enhances the legitimacy of the trial process as the accused could be judged by the standards of his fellow citizens, who are selected



according to the Jury Ordinance (Cap 3). The most serious offences, such as murder, manslaughter, rape, armed robbery and certain drug offences, are tried by a judge of the CFI, sitting with a jury of seven or, where a judge so orders, nine people. In some civil cases, such as actions for defamation or malicious prosecution, a party may elect to have the issues of fact tried by a jury. It is the jury alone which, after thorough deliberation free from any interference, decides whether the accused is guilty or not guilty by



² *Judgment Update* at pp 18-23 of Issue No 3 has more on the use of official languages in courts.



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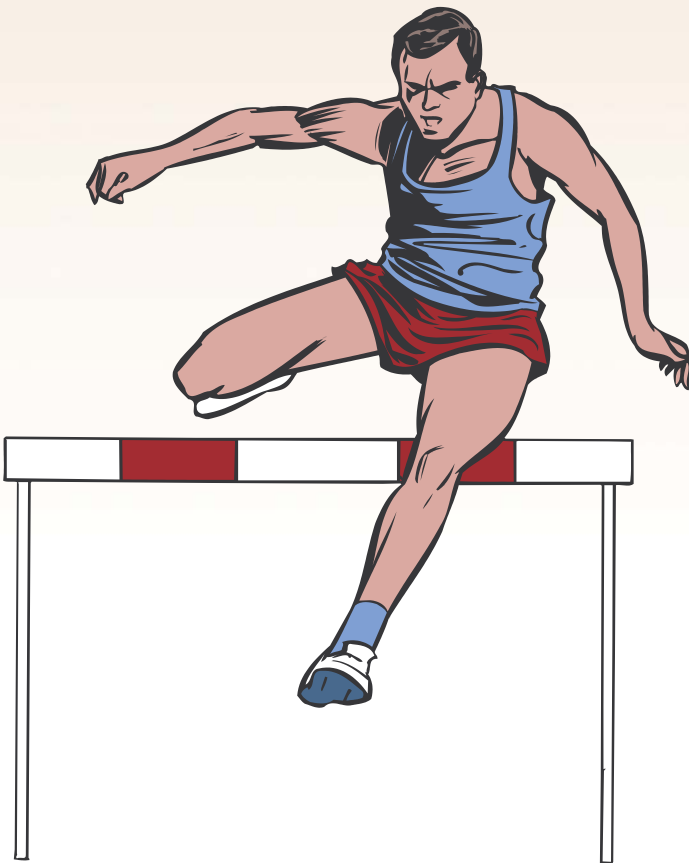
6 a majority verdict (eg five to two or seven to two, depending on the number of jurors empanelled). No reason is required for the verdict. Thus, in an extreme case, even if all the elements of the crime have been proved beyond reasonable doubt, a jury could still refuse to convict if, for example, it considers that the legislation in question is too harsh or unreasonable, or the prosecution was brought maliciously by the Government. That is why the jury has long been regarded as an important safeguard for civil liberty against possible government oppression or arbitrary laws passed by the legislature.³

Constitutionalism and Rule of Law

Upon the coming into effect of the Basic Law, the judiciary has an important constitutional role to play in the regulation of government powers under the concept of constitutionalism. The concept has a number of elements, including the rule of law and the existence of checks and balances between various branches of the government. In short, the principle of constitutionalism is deeply embedded in the Basic Law and has been clearly recognized by HKSAR courts. We shall discuss this constitutional role played by the judiciary in greater detail in the next issue.

CONTINUITY AND CHANGE

The impact of the Reunification on the legal and judicial systems therefore is a mixture of continuity and change. The systems are essentially the same, but are underpinned for the first time by a comprehensive written constitution. The judiciary is essentially the same, but is headed for the first time by a local court of final appeal. Legislation and litigation continue as before, but bilingualism is now constitutionally entrenched. The key concept which remains unchanged is the role of the independent judiciary in upholding the rule of law and protecting the fundamental rights and freedoms of Hong Kong residents. This role is, and will be, continued under the constitutional framework of the Basic Law. **BLB**



³ See generally Wesley-Smith, *An Introduction to the Hong Kong Legal System* (Oxford University Press, 3rd ed, 1998), at pp 112-113.