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BOOK REVIEWS

Hong Kong's Final Court of Appeal: The Development of the Law of China's Hong Kong. Edited by Simon N.M. Young and Yash Ghai [Cambridge: Cambridge University Press, 2014. lv + 681 pp. Hardback £95. ISBN 9781107011212.]

The Sino-British Joint Declaration signed in Beijing in December 1984 by Margaret Thatcher and Zhao Ziyang set the stamp on the People's Republic of China's resumption of sovereignty of Hong Kong in 1997. The underlying principle embodied in the Joint Declaration was to be "one country, two systems". This constitutional mantra, which coincided with China's economic interests, connoted that, whilst under the direct authority of the Central People's Government of China, the Hong Kong Special Administrative Region (SAR) was to "enjoy a high degree of autonomy, except in foreign and defence affairs" (para. 3(2)). Thus, very different, not to say opposing, economic and social systems were to co-exist within a single national frontier. More particularly, the Declaration stipulated that Hong Kong was to have "executive, legislative and independent judicial power, including that of final adjudication". The laws in force in Hong Kong at the time of China's resumption of sovereignty were to "remain basically unchanged" (para. 3(3)), and it was further provided that the conditions guaranteed under the Joint Declaration would "remain unchanged for 50 years" (para. 3(12)).

Power of final judgment in Hong Kong SAR was vested in a Court of Final Appeal (CFA). True to undertakings given in the Joint Declaration, the Basic Law, promulgated in 1990 by decree of the President of the People's Republic of China, ordained that "the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the CFA" (art. 81). The CFA might "as required invite judges from other common law jurisdictions to sit" upon it (art. 82), and Hong Kong courts were authorised to continue to "refer to precedents of other common law jurisdictions" (art. 84). Additionally, common law articles of faith, such as judicial immunity from suit, trial by jury, and the presumption of innocence were specifically retained (arts. 85–87). The Chief Justice of the CFA was to be a "Chinese citizen who [is a] permanent resident of the Region with no right of abode in any foreign country" (art. 90), although other judges might be "recruited from other common law jurisdictions" (art. 92). As this sketch shows, for a minimum period of half a century, the doctrine of "one country, two systems" permits Hong Kong to maintain its traditional legal values and to adhere to the rule of law and, through recruitment of non-permanent judges from overseas (and by providing for lawyers from outside Hong Kong to work and practise within the region (art. 94)), appears actively to encourage Hong Kong's continued membership of a common law family of nations.

The constitutional accommodation achieved under the Joint Declaration and the Basic Law places the CFA in a position of some delicacy, which it has negotiated with some success. Foremost, there is the CFA's relationship with the Standing Committee of the National People's Congress (NPCSC). Just as art. 159 of Basic Law vests ultimate power to amend that very law in the exclusive hands of the National People's Congress, significantly art. 158 also lays down that "the power of interpretation of [Basic] Law shall be vested in the [NPCSC]". Thus, when adjudicating in matters "which are the responsibility of the Central

People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases", before making final judgments which are not subject to further appeal, courts are obliged seek an authoritative interpretation of the relevant provisions from the NPCSC through the medium of the CFA. The Hong Kong courts then "shall follow the interpretation of the [NPCSC]". Not only can the decision whether or not to engage the procedure under art. 158 arouse impassioned political debate within Hong Kong; in such cases, the CFA has not always presented a united front. Ultimate authority to interpret the law when such disputes are referred will vest in a body that scarcely shares Hong Kong's juridical aspirations, which operates no doctrine of separation of powers, and which has no perceived sympathy for common law constitutional checks and balances and, least of all, for human rights. Foreseeably perhaps, the CFA's brief existence has not been one of unruffled serenity. In its early days, in the so-called "right of abode case", *Ng Ka Ling v Director of Immigration* ((1999) 2 HKCFAR 141), for instance, the CFA's claim that it had the authority to review the constitutionality of the acts of China's legislative bodies created predictable political ructions. In *HKSAR v Ng Kung Siu* ((1999) 2 HKCFAR 442), whilst the CFA may have upheld two impugned Ordinances in a prosecution for desecration of both the Chinese and Hong Kong flags, it delivered what was widely considered a far-reaching judgment proclaiming the courts' power to review the constitutionality of Hong Kong legislation on human rights grounds in light of the Hong Kong Bill of Rights and, if need be, to strike down offending legislation. In contrast, in *Democratic Republic of the Congo v FG Hemisphere Associates LLC* ((2011) 14 HKCFA 395), the first case in which an interpretation of the law was requested of the NPCSC, the FCA's majority decision that foreign states in Hong Kong enjoy absolute, rather than restrictive, state immunity from jurisdiction – namely preferring the slightly anachronistic rule still practised in China to the widely observed common law doctrine of restrictive sovereign immunity, which had been practised in Hong Kong at the time of the handover – has not been without controversy in adverting to its concern that "a divergent state immunity policy [between Hong Kong and China could] embarrass and prejudice [China] in its conduct of foreign affairs" (at para. [269]).

The comprehensive study under review takes stock of the first 13 years of the CFA's existence – a period coterminous with the tenure of Hong Kong SAR's first Chief Justice, Li Kwok Nang, to whom fulsome tribute is paid in the opening pages. The contributors comprise an impressive array of noted academic lawyers, judges, and practitioners. The essays fall into five broad groupings. A first section sets the scene, dealing notably with the notion of legal autonomy, expressly guaranteed in the Joint Declaration and in Basic Law, and the potentially uneasy situation under which two bodies, the CFA and NPCSC, are destined to apportion the duty to interpret that Basic Law. The second section focuses from different angles on the CFA's jurisdiction as a court of final appeal. The third, entitled "Judges and Judging", has thoughtful contributions on the role of the Chief Justice and the other permanent and non-permanent members of that Court as well as a sophisticated investigation of the use of concurring, joint, and dissenting judgments in the CFA's first 13 years. The fourth and largest section comprises detailed, subject-by-subject consideration of the CFA's rich case law. Following this *tour d'horizon*, a final section looks to the CFA's impact beyond Hong Kong SAR, incorporating a comparison between Hong Kong's CFA and the differently constituted TUI (Court of Final Appeal) set up in 1999 in neighbouring Macau SAR.

Professors Young and Ghai's book contains a profuse wealth of data and accompanying critical commentary that cover every conceivable major aspect of the CFA's work. Rather than simply enumerating all 24 studies, this review will conclude by briefly highlighting three of the more absorbing aspects of the CFA's accomplishments that this volume brings to the fore. First, a theme that recurs in the essays is the CFA's engagement with questions of human rights. They have arisen in a good number of cases that primarily have been concerned with areas of law like right of abode/immigration and basic elements of criminal justice. Even if some would claim that its resolve has waned in recent times, the CFA's upholding of such rights needs to be viewed against the backdrop of a powerful neighbour whose disregard for such contrivances is conspicuous and indisputable. The CFA's commitment to promoting human rights values and, more generally, the proper course it should steer are vigorously disputed within Hong Kong legal circles. These controversies, profoundly steeped in politics as they are, are fully manifest in these pages. Secondly, both in the essays examining individual subject areas in the fourth section of the book and in the thoughtful contribution of Sir Anthony Mason, the former Chief Justice of the High Court of Australia who has sat as a non-permanent member of the CFA since its inception, the question is posed as to the direction in which common law in Hong Kong is developing, and indeed ought to develop. Before China's resumption of sovereignty, when still a Crown colony and later a British dependent territory, Hong Kong courts were required by ordinance to apply English common law except where that law might be "inapplicable to the local circumstances", which it never was. Privy Council opinions no longer bind in Hong Kong SAR and, whilst decisions of English courts are accorded respect, they are not ineluctably followed. Indeed, on several occasions in the period under review, the CFA has either declined to follow or questioned decisions of the Privy Council and the House of Lords (see e.g. Munday ((1998) 162 J.P.N. 338 and 359) commenting on the CFA's refusal to follow *R v Aziz* ([1996] A.C. 41) in *Tang Sui Man v HKSAR (No. 2)* ((1998) 1 HKFCAR 107)) or has preferred a solution previously adopted by another common law jurisdiction to which its attention has been drawn (e.g. *Sze Kwan Lung v HKSAR* ((2004) 7 HKCFAR 475)). In addition, the CFA, as Sir Anthony Mason makes clear, has begun to develop its own distinctive common law doctrines, even to the extent of providing novel authority for English courts in turn to pore over (e.g. *Cheng v Tse* (2000) 3 HKCFAR 339). With the array of judicial talent the CFA has managed to muster since 1997 (currently, its non-permanent members include seven English Supreme Court Justices, four Justices of the High Court of Australia, and a former Chief Justice of New South Wales), such a development should not occasion particular surprise. Although "it takes time, after elimination of the [Privy Council] appeal, for a jurisdiction to develop its own coherent substantial body of jurisprudence" (p. 350), this process is very obviously under way. The CFA already radiates considerable self-confidence. Finally, a third issue that is immanent throughout the entire book is the circumscribed nature of the pledge delivered in para. 3(12) of the 1984 Joint Declaration that its basic policies, later enacted in the Basic Law, "will remain unchanged for 50 years". And, what then? Eighteen years have already elapsed; the clock is ticking ever louder. Whether, for all its lively invention, the work of the CFA will simply prove to have been a constitutional curiosity that will be shut down in 32 years' time or whether some more durable accommodation is reached remains anyone's guess. What is clear from this book, however, is the CFA's considerable achievement, in its early years, in having astutely steered a course through potentially turbulent constitutional waters, in having upheld the rule of law and recognised human rights in a corner of a

country where such things are scarcely prized, and in having begun to impress Hong Kong's own distinctive brand on its post-1997 common law. The editors are to be warmly congratulated on having chronicled this story and on having assembled such a wealth of informed writings.

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Judging Positivism. By Margaret Martin. [Oxford and Poortland, Oregon: Hart Publishing, 2014. xii + 185 pp. Hardback £45. ISBN 978-1-84946-099-6.]

Despite its broad title, this book explores how far various strands of Joseph Raz's legal theory are internally consistent and present a coherent picture of law in modern societies. Given that the author is reviewing a series of works written over nearly 40 years, in one sense it is not surprising if the various ideas developed over that long time are not fully consistent. But it matters whether there is a coherent legacy from all his writing. Martin offers a valuable challenge to the interest of that legacy, but is less effective in challenging its internal coherence.

In terms of internal coherence, a central part of the author's critique is that what Raz has written on the subject of adjudication undermines the claims of the sources thesis. She argues "At the very centre of his account of the nature of law is an understanding of the role of judges" (p. 3). Raz's sources thesis argues that it is possible to identify what is law and what is not without recourse to moral judgments. Martin argues that, in central ways, this thesis does not work. In particular, the identification of legal rules involves not only a factual enquiry about which textual provisions were enacted by a legislator or decided by a judge in a previous case, but requires interpretation. That exercise of interpretation involves the making of evaluative judgments – which is the best way to achieve the purpose of the provisions? In Martin's view, common law reasoning is particularly difficult to fit with the sources thesis in that there is no canonical factual source. Common law reasoning is not even a matter of identifying a rule and grafting on to it an exception, but, following Simmonds, it is typically a matter of casting the rule in a new light (see Chapter 2). Treating this feature as a peculiarity of common law reasoning is not helpful to her argument. Anyone familiar with codified legal systems realises that there is no greater difficulty in finding the English rules on trusts than the current norms associated with particular articles of a civil code (e.g. article 1384 of the French Civil Code). Martin would have been better stressing the distinction between identifying a legal text (code, statute, or precedent ruling) and identifying a legal norm arising from any other those sources (what must I do from the legal point of view?). As Simmonds explains, casting in a new light is a general feature of legal reasoning. This leads her in Chapter 3 to explain Raz's "morally robust theory of adjudication" in which the legal reasoning associated with deciding cases in which there are difficult questions of law is seen as a subspecies of moral reasoning. Chapter 5 again returns to the issue with a discussion of Postema's critique of Raz (which also shapes the concluding Chapter 7). Postema's argument that interpretation often involves judgments about the "reasonableness" of understanding a previous case or statute (p. 110) makes it hard, she says, to characterise the citizen or judge as engaging in purely factual identification of legal rules. She picks up Raz's statement in his debate with Postema that "much of legal reasoning is interpretative reasoning, and interpretative reasoning is not, in general, autonomous"