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THE CONSTITUTIONAL CRISIS IN HONG KONG—IS IT OVER?

Lin Feng†

Abstract: The judgment of the Hong Kong Court of Final Appeal ("CFA") in the right of abode case has created several constitutional issues, three of which will be addressed in this paper. They are: (1) whether the CFA has the authority to review Chinese legislation; (2) whether the National People's Congress Standing Committee ("NPCSC") should interpret or amend the Basic Law; and (3) whether an original legislative intent approach or a purposive approach should be adopted for the interpretation of the Basic Law. Prompt resolution of these issues is necessary to resolve constitutional uncertainty in Hong Kong. Successful resolution of these issues may require both the NPCSC and the CFA to adopt their own interpretive approaches and exercise their own constitutional authority in strict compliance with the procedures of the Basic Law. Adoption of this unique constitutional mechanism would preserve Hong Kong's common law system while allowing the concept of "one country, two systems" to be implemented.

I. INTRODUCTION

The constitutional crisis in Hong Kong began with the judgment of the Hong Kong Court of Final Appeal ("CFA") in the right of abode case, in which the CFA held, among other things, that it had the authority to review the constitutionality of the acts of China's legislative bodies, the National People's Congress ("NPC") and the NPC Standing Committee ("NPCSC"). The judgment attracted immediate criticism from mainland China ("the Mainland") because, from the Mainland's perspective, it is unacceptable for the regional courts in Hong Kong to have the authority to review Chinese legislation.

Although the jurisdictional issue is the Mainland's principal concern, the CFA's judgment will have many more serious consequences for Hong Kong. Strict implementation of the CFA's judgment, in particular its interpretation of Articles 22(4) and 24(2) of the Basic Law, will likely lead to the influx of up to 1.6 million Mainland Chinese into Hong Kong. This is

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The right of abode case was heard by the Court of First Instance, the Court of Appeal, and by the Court of Final Appeal. For details, see Ng Ka Ling v. Director of Immigration, Final Appeal Nos. 14-16, 1 HKC 291 (Hong Kong Court of Final Appeal 1999), available in LEXIS, Hong Kong Cases.

‡ Four senior constitutional scholars in China have argued that in this respect, the judgment constitutes a challenge to the sovereignty of the Mainland. For details, see Serious Debates on the Jurisdiction of the Court of Final Appeal, MING PAO, Feb. 8, 1999, Discussion Column.
a result that neither the Hong Kong government nor the majority of its people wants.

This anticipated event raises an additional constitutional issue: whether these two provisions of the Basic Law should be re-interpreted by the NPCSC or whether they should be amended in order to prevent mass immigration. The Hong Kong government chose to seek re-interpretation of the two relevant provisions from the NPCSC, the organ with the ultimate power of interpretation of the Basic Law. Although the NPCSC provided its interpretation on June 26, 1999, the constitutional crisis in Hong Kong has continued. When the NPCSC interpreted the two provisions of the Basic Law, it adopted an original legislative intent approach. The decision to adopt this approach, as opposed to an approach that interprets the law broadly and generously, raises an essential constitutional issue: should the Basic Law be interpreted according to a broad and generous approach, an original legislative intent approach, or some third, alternative approach?

These important constitutional issues remain unresolved and must be addressed immediately and properly. Failure to do so will, at a minimum, lead to great uncertainty in the legal system in Hong Kong. At worst, it will lead to an even more serious constitutional crisis and possibly to the complete destruction of the common law system and rule of law in Hong Kong. This Article first outlines the development of Hong Kong’s constitutional crisis from its start through the NPCSC re-interpretation. Next, it examines the three important constitutional issues raised by the decision: (1) the authority of the CFA to interpret the acts of the NPC or NPCSC; (2) the appropriateness of the NPCSC’s re-interpretation; and (3) the appropriate interpretive approach to be adopted for the interpretation of the Basic Law. Each of these issues is examined in detail, focusing on the inherent problems caused by the interaction (and conflicts) of the different legal systems in Hong Kong and the Mainland, which together operate under the concept of “one country, two systems.” Based on its examination of the

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3 See Zhongua Renmin Gongheguo Xianggang Tebie Xinzhengqu Jibenfa [Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China] (adopted Apr. 4, 1990) art. 158(1) [hereinafter Basic Law], translated in <http://www.constitution.org/cons/hongkong.txt>. The Basic Law is essentially Hong Kong’s written constitution and has been in place since the handover to China. Enacted by the national Chinese legislature, the Basic Law has a higher status in Hong Kong’s legal system than any other laws. See infra notes 52-58 and accompanying text.

4 “One country, two systems” refers to the arrangement under which the governments of Hong Kong and China currently coexist. Pursuant to this arrangement, for the 50 years following China’s resumption of sovereignty over Hong Kong, the Chinese socialist system and socialist policies are not to be enforced in Hong Kong, and Hong Kong’s previous capitalist system and lifestyle are to remain unchanged. Hong Kong is vested with executive, legislative, and independent judicial power, including that of final
three constitutional issues, this Article suggests that successful resolution of the constitutional crisis and any future constitutional issues requires the establishment of a unique constitutional mechanism. Under this proposed mechanism, both the NPCSC and the CFA would adopt their own interpretive approaches and exercise their own constitutional authority in strict compliance with the procedures set down in the Basic Law. The CFA could decide whether an act of the NPCSC is inapplicable in Hong Kong based on any inconsistency with the Basic Law. This mechanism would allow the NPCSC to exercise its authority to overrule a judgment of the CFA if it found a CFA judgment in violation of the Basic Law. Such a mechanism would permit the two legal systems to converge, thus allowing both the common law system and the rule of law to be maintained in Hong Kong.

II. THE DEVELOPMENT OF THE CONSTITUTIONAL CRISIS

The right of abode case involves the immigration status of four illegal immigrants who claimed permanent residency and a right of abode in Hong Kong. Of the four applicants, three arrived in Hong Kong on July 1, 1997. Each of these three individuals was born out of wedlock to a Chinese citizen father who had resided in Hong Kong for a continuous period of at least seven years. The fourth applicant, who was also born out of wedlock to a Hong Kong permanent resident, came to Hong Kong in December 1994 and overstayed his entry permit. Each applicant reported to the Immigration Department after July 1, 1997, and asserted his or her status as a permanent resident under Article 24(2) of the Basic Law. Article 24(2) provides that a person of Chinese nationality born outside Hong Kong to a Hong Kong permanent resident is automatically a permanent resident of Hong Kong. Accordingly, these applicants, by virtue of at least one parent's permanent adjudication. See Sino-British Joint Declaration, Annex 1 (1984), reprinted in YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER 513-14 (1997).

5 See Ng Ka Ling, 1 HKC 291.
6 This provision of the Basic Law was incorporated into local legislation by the Immigration (Amendment) (No. 2), which was adopted by the Provisional Legislative Council of Hong Kong and signed by the Chief Executive of Hong Kong. Immigration (Amendment) (No. 2) Ordinance, No. 122 of 1997 (adopted July 1, 1997) [hereinafter Immigration Ordinance (Amendment) (No. 2)]. For the amended version of the Immigration Ordinance, see Immigration Ordinance (adopted Apr. 1, 1972, multiple amendments) Cap. 115 [hereinafter Immigration Ordinance], translated in BLIS on Internet Homepage (visited May 14, 2000) <http://www.justice.gov.hk>.
resident status in Hong Kong, claimed that they had a right of abode as conferred by Article 24(3) of the Basic Law.\(^7\)

On July 1, 1997, the Provisional Legislative Council\(^8\) of Hong Kong enacted the Immigration (Amendment) (No. 2) Ordinance (the "No. 2 Ordinance"), which provides that any child asserting the right of abode under Article 24 of the Basic Law must be born in wedlock.\(^9\) On July 10, 1997, the Provisional Legislative Council also enacted the Immigration (Amendment) (No. 3) Ordinance (the "No. 3 Ordinance"), which was deemed retroactive to July 1, 1997.\(^10\) The No. 3 Ordinance established a new procedural mechanism under which a person’s status as a permanent resident could only be established by the possession of both a valid travel document and an attached certificate of entitlement.\(^11\) Under this ordinance, the certificate of entitlement is valid only if it has been affixed to a valid travel document.\(^12\)

Furthermore, the Immigration Department published a notice on July 11, 1997, which stipulated that an application for a certificate of entitlement must be made through the Exit-Entry Administration of the Public Security Bureau in the Mainland district where the applicant resides.\(^13\) Under Chinese law, applicants attempting to stay permanently in Hong Kong are governed by administrative regulations. One of these regulations provides that "Mainland citizens departing based on personal grounds in order to settle in Hong Kong/Macao shall be subject to examination and approval under the quota system in order to safeguard and maintain the economic prosperity of Hong Kong and Macao."\(^14\) An applicant must obtain a one-

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\(^7\) Article 24(3) provides that children of persons mentioned in Article 24(2) shall have the right of abode in the Hong Kong Special Administrative Region ("HKSAR") and shall be qualified to obtain, in accordance with the laws of the HKSAR, permanent identity cards which state their right of abode. See Basic Law, supra note 3, art. 24(3).

\(^8\) The Provisional Legislative Council is the legislative body of the HKSAR and was established in Hong Kong according to the decisions of the National People’s Congress Standing Committee. The legitimacy of its establishment was challenged in the right of abode case, but was confirmed by the Court of Final Appeal. See Ng Ka Ling, 1 HKC 291.

\(^9\) See Immigration Ordinance (Amendment) (No. 2), supra note 6, sched. 1, para. 2.

\(^10\) See Immigration (Amendment) (No. 3) Ordinance, No. 124 of 1997 (adopted July 10, 1997) sched. 1, para. 2 [hereinafter Immigration Ordinance (Amendment) (No. 3)]. For the amended version of the Immigration Ordinance, see Immigration Ordinance, supra note 6.

\(^11\) Id., sched. 1, para. 2.

\(^12\) Id.; see also Ng Ka Ling, 1 HKC 291.

\(^13\) This notice was published on July 16, 1997. See Government HKSAR Gazette Extraordinary 67-70 (1997).

way travel permit from the applicant’s local Exit-Entry Administration of the Public Security Bureau before he or she can depart the Mainland for settlement in Hong Kong.15

The Director of Hong Kong’s Immigration Department has taken the position that an applicant’s status as a permanent resident by descent can only be established in accordance with the No. 3 Ordinance, or, in other words, by holding a one-way travel permit affixed with a certificate of entitlement.16 In the right of abode case, none of the applicants held either a one-way travel permit or a certificate of entitlement. Thus, according to the Director of Immigration, none of the applicants enjoyed the right of abode, and they were required to return to the Mainland to apply to the local Exit-Entry Administration for travel permits. In addition, the fact that the applicants arrived in Hong Kong on or before July 1, 1997, and submitted their applications to the Immigration Department before July 10, 1997, was deemed irrelevant because the No. 3 Ordinance had retroactive effect. However, the Director of the Immigration Department was satisfied that the applicants (with one exception) were permanent residents within the third category defined in Article 24(2) of the Basic Law.17

Five issues were identified by the CFA in the right of abode case: (1) whether the CFA has jurisdiction to interpret the relevant provisions of the Basic Law, or whether it is bound to seek an interpretation of such provisions from the NPCSC; (2) whether the scheme introduced in the No. 3 Ordinance is constitutional; (3) whether the retroactive application of the No. 3 Ordinance is constitutional; (4) whether the requirement in the No. 2 Ordinance that a child be born in wedlock to obtain permanent residency is constitutional; and (5) whether the Provisional Legislative Council is a legal legislative body.18

According to the CFA’s judgment, the courts in Hong Kong have jurisdiction to determine whether legislative acts of the NPC or the NPCSC are consistent with the Basic Law and to declare them invalid when they are inconsistent.19 In making such decisions, Hong Kong courts are to adopt a purposive approach in the interpretation of the Basic Law, under which they consider the purpose of the Basic Law and its relevant provisions, as well as the language of its text in light of the context.20 The purpose of a particular

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15 Id. art. 6.
16 See Ng Ka Ling, 1 HKC 291.
17 Id.
18 Id.
19 Id.
20 Id.
provision of the Basic Law may be ascertained from its nature, from other provisions of the Basic Law, or from relevant extrinsic materials. The CFA alone has the authority to decide whether the conditions for making a referral to the NPCSC are satisfied.\(^1\) The No. 3 Ordinance was held unconstitutional to the extent that it required permanent residents residing on the Mainland to obtain a one-way permit before they could enjoy the constitutional right of abode.\(^2\) The retroactive provision in the No. 3 Ordinance was deemed unconstitutional because it took away the constitutional right of abode that the applicants already enjoyed, and the No. 2 Ordinance was found unconstitutional to the extent that it treated children born out of wedlock differently from legitimate children.\(^3\) Finally, the CFA held that the formation of the Provisional Legislative Council was consistent with the Basic Law.\(^4\)

The CFA’s judgment was immediately hailed as a landmark constitutional case in Hong Kong,\(^5\) primarily because the CFA laid down the parameters of its statutory interpretive authority, in particular its authority to review laws enacted by China’s national legislature.\(^6\) However, the judgment has been strongly criticized by some scholars from the Mainland. They argue that the CFA erred by not referring the case to the NPCSC for interpretation and that the CFA exceeded its interpretative authority when it stated that it could review Chinese national legislation.\(^7\)

Shortly after the judgment was issued, the CFA, pursuant to an application from the Hong Kong government, released a clarification of its decision.\(^8\) The CFA stated that it accepted the authority of the NPCSC to

\(^{1}\) Id.
\(^{2}\) Id.
\(^{3}\) Id.
\(^{4}\) Id.
\(^{5}\) Many scholars and pro-democracy groups have commented that in terms of the constitutional development of Hong Kong this case has had the same impact that *Marbury v. Madison*, 5 U.S. 137 (1803), had in the United States.
\(^{6}\) These include the laws enacted by the National People’s Congress and its Standing Committee.
\(^{7}\) The most serious criticism came from four eminent Chinese constitutional scholars who were also drafters of the Basic Law. For details, see *Serious Debates on the Jurisdiction of the Court of Final Appeal*, supra note 2. Some scholars from Hong Kong also criticized the judgment, believing the CFA had made some fundamental mistakes in its judgment. For details, see Albert Chen, *The Court of Final Appeal’s Ruling in the “Illegal Migrant” Children Case: A Critical Commentary on the Application of Article 158 of the Basic Law* (1999), reprinted in *Hong Kong’s Constitutional Debate: Conflict over Interpretation* 73-74, 90 (Johannes M. M. Chan et al. eds., 2000) [hereinafter Essay 1]; Albert Chen, *The Court of Final Appeal’s Ruling in the “Illegal Migrant” Children Case: Congressional Supremacy and Judicial Review* (1999), reprinted in *Hong Kong’s Constitutional Debate: Conflict over Interpretation*, supra, at 113, 113-14, 141 [hereinafter Essay 2]; Lin Laifan et al., *Renda Kezuo Rouxin Jieshi [The NPC Can Make a Flexible Interpretation]*, MING PAO, May 18, 1999.
\(^{8}\) The full statement of clarification was printed in *Ng Ka Ling v. Director of Immigration*, No. 2, 1 HKC 425 (Hong Kong Court of Final Appeal 1999). This statement of clarification was hailed by the
make an interpretation under Article 158 of the Basic Law and that such an interpretation, if consistent with the Basic Law, would be followed by the courts in Hong Kong.\textsuperscript{29} However, the clarification avoided the issue of whether or not the CFA has the authority to review the acts of the NPC or NPCSC when such acts are inconsistent with the Basic Law.\textsuperscript{30}

Although the CFA's clarification prevented one potential constitutional crisis regarding the NPCSC's authority to, on its own initiative, overrule the judgment of the CFA through re-interpretation, the CFA's judgment was still effective and required implementation. A preliminary report by the Hong Kong government showed that strict implementation of the CFA's judgment would lead to the influx of 1.6 million Mainland Chinese into Hong Kong.\textsuperscript{31} Such an impact was perceived to be too onerous for Hong Kong to handle. The focus of the constitutional debate then shifted to the issue of how to legally stop the influx of the majority of those people, either by amending the Basic Law or by asking the NPCSC to interpret the two provisions of the Basic Law relevant to the case.\textsuperscript{32} After a period of heated debate regarding the constitutionality of those two options, the Hong Kong government decided to seek re-interpretation from the NPCSC. This decision was ratified by the Provisional Legislative Council.\textsuperscript{33} The Chief Executive then sent his report to the Mainland's State Council\textsuperscript{34} and requested its assistance in seeking interpretation from the NPCSC. The State Council, after studying the report,
made a request to the NPCSC to interpret the two provisions of the Basic Law.

The Committee of the Chairmen of the NPCSC, after examining the request and consulting the Basic Law Committee, submitted a bill to the NPCSC seeking its interpretation of Articles 22(4) and 24(2). After a half-day of discussion at its bi-monthly meeting, the NPCSC adopted the bill of interpretation on June 26, 1999. The re-interpretation stated that the CFA did not seek an interpretation from the NPCSC as required by Article 158(3) of the Basic Law and that the CFA’s interpretation was inconsistent with the original legislative intent of the Basic Law. It also stated that Article 22(4) and Article 24(2) are provisions concerning affairs that are the responsibility of China’s central government and that concern the relationship between the Central Government and Hong Kong. On those bases, the NPCSC re-interpreted the relevant provisions of the Basic Law and in effect reversed the CFA’s decision in the right of abode case. The re-interpretation of the two provisions of the Basic Law by the NPCSC should have ended the five-month long constitutional crisis. Unfortunately, that was not the case. Instead, the constitutionality of the re-interpretation itself has been debated and will very likely be challenged before the CFA. Thus, Hong Kong’s constitutional crisis is continuing to develop and may lead to a more serious

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35 This Committee was established according to the Basic Law and is composed of six members from the Mainland and six members from Hong Kong. The Committee was designed to check on the ability of the NPCSC to exercise its authority to interpret the Basic Law. See Quanguo Renmin Daibiao Dahui Guanyu Zhonghua Renmin Gongheguo Xiangang Tebie Xingzhengqu Jibenfa Qiao de Jueshi [Decision of the National People’s Congress to Approve the Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People’s Congress] (adopted Apr. 4, 1990), reprinted in ZHONGHUA RENMIN GONGHEGUO QUANGUO RENMIN DAIBIAO DAHUI CHANGWU WEIYUANHUI GONGBAO [GAZETTE OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE’S CONGRESS OF THE PEOPLE’S REPUBLIC OF CHINA], Mar. 25, 1990, at 106-07.


37 Id.

38 Id.

39 The re-interpretation states that the phrase “persons of Chinese nationality born outside Hong Kong of those residents listed in categories 1 and 2” means “both parents of such persons, whether born before or after the establishment of the Hong Kong Special Administrative Region, or either of such parents must have fulfilled the condition prescribed by category (1) or (2) of Article 24(2) of the Basic Law of the Hong Kong Special Administrative Region at the time of their birth.” See id.
crisis or ultimately even to the breakdown of Hong Kong’s common law system.

Throughout the constitutional crisis, many fascinating and fundamental constitutional issues have arisen and been discussed. Because many of these issues have already been explored in great detail by other scholars, the following parts of this Article focus on an examination of three interrelated fundamental constitutional issues: (1) whether the CFA has the authority to interpret the acts of the NPC or NPCSC; (2) whether interpreting, as opposed to amending, the Basic Law is appropriate; and (3) what the appropriate interpretative approach for the Basic Law is. Satisfactory resolution of these issues is essential to the survival of the common law system in Hong Kong.

III. THE AUTHORITY OF THE CFA TO INTERPRET THE ACTS OF THE NPC OR NPCSC

The most controversial issue raised by the CFA’s judgment in the right of abode case was whether the CFA had the power to review acts of China’s two legislative bodies, the NPC and the NPCSC. The CFA stated unambiguously in its judgment that it had the authority and, in fact, the obligation to declare invalid any acts of the NPC or the NPCSC that were inconsistent with the Basic Law. Since Hong Kong considers the Basic Law its “mini-constitution,” the issue can be restated as whether the CFA has the power of constitutional review. If the CFA does in fact have the power of constitutional review, a secondary issue regarding the scope of that authority arises.

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40 For example, Professor Albert Chen has written two articles that discuss the supremacy of the NPC and NPCSC in judicial review and the criteria that the CFA may use in making a referral to the NPCSC for its interpretation of the Basic Law under Article 158. For details, see Essay 1, supra note 27; Essay 2, supra note 27.

41 It should be noted that these are not the only three constitutional issues that have been raised in the constitutional crisis. There are many others such as the supreme authority of the NPCSC to interpret the Basic Law, the proper criteria for referral, the authority of the Chief Executive of Hong Kong to seek interpretation from the NPCSC, the appropriate procedures for both amendment and interpretation of the Basic Law, the legitimacy of the NPCSC’s re-interpretation, and so on. Some of these issues have already been discussed in detail by other scholars. See, e.g., Essay 1, supra note 27; Essay 2, supra note 27.

42 See Ng Ka Ling v. Director of Immigration, Final Appeal Nos. 14-16, 1 HKC 291 (Hong Kong Court of Final Appeal 1999), available in LEXIS, Hong Kong Cases.

43 The authority and mechanism of constitutional review exists in most countries with a written constitution. But the organ that exercises such authority may be different from one country to another. It may be an ordinary court, a special constitutional court, or the supreme legislature.
A. The CFA's Authority to Review the Acts of the NPC and the NPCSC

Most common law scholars in Hong Kong believe that the CFA should have the power of constitutional review. This view is based on the fact that prior to its handover to China in 1997, Hong Kong had two constitutional documents, the Letters Patent and the Royal Instructions. These two documents established the constitutional structure in Hong Kong and allocated authority to the principal government organs such as the Governor, the Legislative Council, and the courts. In theory, courts in Hong Kong had the authority to review the constitutionality of all local legislative and administrative acts. In practice, however, they rarely exercised their authority to review the constitutionality of local legislation. This situation changed in 1990, when the Bill of Rights Ordinance was enacted and the Letters Patent was amended. Since then, many cases have been brought before the courts in Hong Kong challenging local legislative and administrative acts on the basis of their inconsistency with either the Bill of Rights Ordinance or the amended Letters Patent.

Prior to Hong Kong's handover to China, the British Parliament could also enact laws for Hong Kong. Under the British constitutional principle of parliamentary sovereignty, the status of the acts of Parliament was higher than that of Hong Kong's colonial constitutional documents, which were the documents issued through the exercise of the residual royal prerogative.

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44 See Yash Ghai, supra note 4, at 195-97 (1997); see also Michael C. Davis, Constitutional Confrontation in Hong Kong: Issues and Implications of the Basic Law 39-78 (1989).
45 These two documents were issued by the Queen through the exercise of royal prerogative. See Peter Wesley-Smith, Constitutional and Administrative Law in Hong Kong apps. at 406-26 (2d ed. 1994).
46 Id.
47 Id.
48 Article 7(3) was added to the Letters Patent, which provides the following:
The provisions of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 16 December 1966, as applied to Hong Kong, shall be implemented through the laws of Hong Kong. No law of Hong Kong shall be made after the coming into operation of the Hong Kong Letters Patent 1991 (No. 2) [8 June 1991] that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that Covenant as applied to Hong Kong.
Hong Kong Letters Patent 1991 (No. 2) art. 7(3) (June 8, 1991).
49 Most cases allege violations of the Bill of Rights Ordinance. There is only one case where the court stated that the actual legal ground for challenging the validity of legislation was the colonial constitutional document, i.e., the Letters Patent. See Lee Miu-ling v. Attorney General, 1 HKC 124 (Hong Kong Court of Appeal 1996), available in LEXIS, Hong Kong Cases.
50 See Wesley-Smith, supra note 45, at 32-38.
Courts in Hong Kong did not have the authority to challenge the legality or validity of any acts of the British Parliament.51

Hong Kong has a written constitution, the Basic Law, which has been in place since the handover to China. The Basic Law has a higher status in Hong Kong's legal system than all Hong Kong local legislation. Additionally, it has at least the same status as any other Chinese national legislation within China's legal system.52 Thus, some scholars have argued that the courts in Hong Kong have not been granted any authority of constitutional review.53 The legal basis for this argument is a narrow interpretation of the term "constitution," which focuses on the fact that the Basic Law is technically not a constitution.54 This view is correct from the perspective of the Mainland. But from Hong Kong's perspective, the Basic Law has the highest status in Hong Kong's legal hierarchy and performs all the necessary functions of a constitution.55 Thus, the Basic Law can be regarded as Hong Kong's constitution.56 This view is generally shared by scholars in Hong Kong.57 Although the Basic Law does not establish any special mechanisms for constitutional review, it guarantees that Hong Kong's common law system will remain unchanged for at least fifty years.58 As a result, Hong Kong's original constitutional review mechanism, as part of the common law system, should also be maintained following the handover.

51 See id. at 32-33.
52 Some Chinese constitutional scholars argue that the Basic Law has a higher status than any other national legislation, but such an understanding is not supported by any specific constitutional provisions or authorities. See HU JINGGUANG, ZHONGGUO XIANFA WENTI YANJIU [EXAMINATION OF CHINESE CONSTITUTIONAL LAW ISSUES] 290-95 (1998).
54 This argument is based on the fact that China only has one constitution and the Basic Law is a piece of national legislation enacted by the NPC, not a constitution. For details, see HU JINGGUANG, supra note 52.
55 A constitution performs the functions of setting up and allocating powers to main governmental organs, defining the relationship between different governmental organs, and protecting the fundamental rights of the citizen. See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 1-35 (18th ed. 1959).
56 See Peter Wesley-Smith & Albert Chen, Preface to THE BASIC LAW AND HONG KONG'S FUTURE iii (Peter Wesley-Smith & Albert Chen eds., 1988). See also WESLEY-SMITH, supra note 45, at 68.
57 See YASH GHAI, supra note 4, at 137-84.
58 See Basic Law, supra note 3, arts. 2, 8, 19, 81.
B. *Limitation on the CFA’s Authority to Review the Acts of the NPC and the NPCSC*

While most scholars accept the view that courts in Hong Kong still enjoy the power of constitutional review, different views exist as to the scope of that power following the handover. The dispute centers on whether the courts have the authority to examine the consistency of the acts of the NPC and the NPCSC with the Basic Law—the very issue that started the constitutional crisis. A satisfactory answer requires a careful examination of the interaction between China’s civil law system and Hong Kong’s common law system.

In the right of abode case, the CFA examined the issue of constitutional review and found that it had the power to review acts of the NPC and the NPCSC for consistency with the Basic Law.\(^5\) Shortly afterwards, upon the request of the Hong Kong government, the CFA issued a statement of clarification regarding this issue. The clarification stated that the CFA did not question the authority of the NPCSC to make an interpretation under Article 158, which would be binding on the courts in Hong Kong.\(^6\) The clarification also stated that the CFA’s decision did not question, and the CFA accepted that it could not question, the authority of the NPC or the NPCSC to promulgate any laws or take action in accordance with the provisions of the Basic Law and the procedures therein.\(^6\) However, the CFA attached two conditions to its acceptance of the position that the acts of the NPC and NPCSC cannot be challenged.\(^6\) First, those acts must be consistent with the provisions of the Basic Law.\(^6\) Second, those acts must be undertaken in accordance with the procedures set down in the Basic Law.\(^6\) The CFA did not express any view as to whether it has the authority to challenge the validity of acts of the NPC or the NPCSC if those acts violate one or both of the conditions.

Whether the courts in Hong Kong have the authority to review the acts of their sovereign is a novel issue which the courts in Hong Kong have no former experience with. In colonial times, the legal status of Hong Kong’s constitutional documents was inferior to acts of the British

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59 Most of people in the HKSAR, including legislators, legal professionals, scholars, and citizens, have interpreted the decision in the right of abode case this way.

60 See Ng Ka Ling v. Director of Immigration, No. 2, 1 HKC 425 (Hong Kong Court of Final Appeal 1999), available in LEXIS, Hong Kong Cases.

61 Id.

62 Id.

63 Id.

64 Id.
Parliament. There were no constitutional grounds on which the courts in Hong Kong could challenge the acts of the British Parliament. Since the transfer of sovereignty, however, Hong Kong’s constitution has been the Basic Law, a piece of Chinese national legislation. It was the first national legislation, in addition to the Constitution of the People’s Republic of China ("PRC Constitution"), which was applied to Hong Kong by the NPC and has an entrenched status. The Basic Law has a status at least equal to, if not superior to, other Chinese national legislation. In order to determine whether courts in Hong Kong can review the acts of the NPC or the NPCSC, a close examination of Chinese constitutional jurisprudence is necessary.

Under the PRC Constitution, and in accordance with constitutional theory, the NPC and the NPCSC are the highest organs of state power. They have the authority to enact, interpret, and amend all national legislation as long as they act in accordance with the PRC Constitution. In the case of Hong Kong, the NPC, in enacting the Basic Law, has imposed certain substantive and procedural restrictions upon itself with regard to the interpretation and amendment of the Basic Law. In Chinese constitutional theory, such self-restrictive national legislation does not deprive the NPC or the NPCSC of their constitutional authority to interpret or amend the Basic Law. The NPC and the NPCSC have the constitutional authority to interpret or amend the self-restrictive provisions of the Basic Law, provided that such amendments are made in accordance with the Basic Law’s

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65 See generally WESLEY-SMITH, supra note 45.
66 Article 159 of the Basic Law has this effect. See Basic Law, supra note 3, art. 159.
67 Different scholarly views exist. But the Chinese legislature (i.e., the NPC and NPCSC) has not made any decision as to whether the law made by the NPC has a higher status. In practice, they are treated as having equal status in the Chinese legal system, even though the laws enacted by the NPC touch upon issues of more fundamental importance. See CAI DINGJIAN, ZHONGGUO RENMIN DAIBIAO DAHUI ZHIDU [CHINESE PEOPLE’S CONGRESS SYSTEM] 274-76 (1998).
68 See PRC Constitution, supra note 34, art. 57.
69 Id. arts. 62, 67.
70 Both substantive and procedural restrictions are provided in Article 159 of the Basic Law. The substantive restriction is that no amendment shall contravene the established basic policies of China regarding Hong Kong. The procedural restriction set out in Article 159(2) states the following:

the power to propose bills for amendments to this Law shall be vested in the Standing Committee of the National People’s Congress, the State Council and the Hong Kong Special Administrative Region. Amendment bills from the Hong Kong Special Administrative Region shall be submitted to the National People’s Congress after obtaining the consent of two-thirds of the deputies of the Region to the National People’s Congress, two-thirds of all the members of the Legislative Council of the Region, and the Chief Executive of the Region.

See Basic Law, supra note 3, art. 159.
71 See Wu Jianfan, Legal Basis for China’s Top Legislature to Interpret Basic Law of Hong Kong, CHINA L., Aug. 1999, 51-56.
procedures. Application of the principle of the rule of law demands that the NPC and the NPCSC comply with their own legislation, including those self-restrictive provisions of the Basic Law, before amending the Basic Law itself.

The Basic Law provides that among Chinese national laws, only the Basic Law and the laws included in Appendix III of the Basic Law will be enforced in Hong Kong. No other Chinese laws are applicable in Hong Kong. Thus, the issue of the general compatibility of Chinese laws with the Basic Law is unlikely to arise. Hence, we only need to examine whether the CFA has the authority to evaluate the consistency of Chinese laws in Appendix III with the Basic Law, and what the CFA can do if an inconsistency exists.

From Hong Kong's perspective, the Basic Law is Hong Kong's constitutional document and the highest law in the territory. Assuming that the inclusion of Chinese national laws in Appendix III is lawful, since all the appendices are part of the Basic Law, it follows that all the laws in Appendix III are also part of the Basic Law. It can thus be argued that all the laws in Appendix III may be applied directly in Hong Kong and by its courts. In practice, however, not all the Chinese laws included in Appendix III are directly applicable in Hong Kong. Article 18 of the Basic Law provides that the national laws listed in Appendix III shall be implemented and applied in Hong Kong through either promulgation or through local legislation. Of the ten Chinese laws included in Appendix III, eight have been implemented through promulgation while two have been implemented through local legislation.

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72 This is the consequence of applying the principle of the rule of law. The legislature should also comply with the laws it enacts, notwithstanding its authority to abolish or amend the law.
73 See Basic Law, supra note 3, art. 18(2).
74 Those national laws not listed in Appendix III are not applicable in Hong Kong. It follows that the courts in Hong Kong cannot and need not interpret them.
75 As argued by one of my colleagues, it is possible to challenge the inclusion of a specific Chinese law in Appendix III of the Basic Law because only those laws relating to the central-local relationship, foreign relations, and national defense can be lawfully included in Appendix III. See Bing Ling, Can Hong Kong Courts Review and Nullify Acts of the National People's Congress?, 29 HONG KONG L.J. 393 (1999).
77 See Basic Law, supra note 3, art. 18.
78 The two laws implemented through local legislation are the Law of the People's Republic of China on the National Flag and the Law of the People's Republic of China on the National Emblem. Both have been implemented in Hong Kong through the National Flag and National Emblem Ordinance of
If a national law is implemented through promulgation and provisions of that law are inconsistent with the Basic Law, one can argue that there is an inconsistency between different provisions of the Basic Law. Then the issue becomes how to resolve the conflict within the Basic Law. The answer hinges upon the interpretation of the provisions concerned. Because all of the laws included in Appendix III should relate to either the affairs of the central government of the PRC or the central-local relationship, the CFA should, according to Article 158(2) of the Basic Law, seek an interpretation from the NPCSC before it issues a judgment interpreting these laws.

Another view treats the Basic Law and the national law at issue as two different pieces of Chinese national legislation, leaving the inconsistency to be resolved by some authority. The issue is whether the courts in Hong Kong or the NPCSC should be that authority. According to the PRC Constitution and constitutional jurisprudence, the Basic Law and all other Chinese national laws have equal legal status within the Chinese legal system. When there are disputes concerning the interpretation of any piece of national legislation or conflicts between different national laws, the NPC and the NPCSC have the authority to resolve them. But from Hong Kong's perspective, the Basic Law, not the set of national laws in Appendix III, is Hong Kong's constitutional document. It can be argued that the Basic Law has a higher legal status in Hong Kong than any other national law. According to Article 158 of the Basic Law, courts in Hong Kong should have jurisdiction to accept cases concerning inconsistencies between the national laws in Appendix III and the Basic Law. However, since all the

79 These include both foreign affairs and national defense. See Basic Law, supra note 3, art. 19.
80 The possibility exists that such an issue may arise when a case is before the Court of First Instance or the Court of Appeal, as in the flag burning case. In such instances the trial of the case should be suspended and a referral made by that court to the CFA requesting that the latter seek interpretation from the NPCSC.
83 Some eminent Chinese constitutional law scholars and Basic Law drafters have argued that Hong Kong courts do not enjoy such authority under the Basic Law, not even the authority to review the consistency between local legislation (ordinances) and the Basic Law. Such an approach clearly deprives Hong Kong courts of the authority they enjoyed before the handover. See Xiao Weiyun et al., Why the Court of Final Appeal Was Wrong: Comment of the Mainland Scholars on the Judgment of the Court of
laws in Appendix III of the Basic Law relate to either affairs of the central government of the PRC or to the central-local relationship, the CFA should refer the issue to the NPCSC for an interpretation before issuing its own judgment.

Regardless of whether we treat the conflict between the Basic Law and a national law in Appendix III as a conflict between different provisions of the Basic Law or as a conflict between two different national laws, the result is the same. Two organs, the CFA and the NPCSC, will be involved in determining whether a law listed in Appendix III is consistent with the Basic Law. A special constitutional interpretive approach should be adopted in order to give full consideration of the concepts of "two systems" and "one country." In order to ensure the existence of "two systems," especially the maintenance of a common law system in Hong Kong, the CFA should be granted the authority to accept these legal disputes. However, the exercise of such authority should be restricted in the case of legal actions relating to the laws in Appendix III that concern either the affairs of the central government of the PRC or the central-local relationship. In these cases, the courts in Hong Kong should exercise their authority in accordance with the procedures in Article 158(3) of the Basic Law and seek an interpretation from the NPCSC before delivering a final judgment. The final decisionmaking authority should be vested in the NPCSC, and its decision should be followed by the CFA. Such an arrangement is reasonable because the Basic Law is not only a Chinese national law but also Hong Kong's constitutional document. The Basic Law is a bridge between the Chinese civil law system and Hong Kong's common law system.

Chinese national laws, such as the Law of the People's Republic of China on the National Flag ("PRC National Flag Law"), may also be implemented in Hong Kong through local legislation. If the power of constitutional review enjoyed by the courts in Hong Kong before the handover is to be maintained as promised by the Basic Law, these courts

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84 Otherwise, the national law in dispute should not be included in Appendix III in the first place. It is possible, as has been argued by Mr. Bing Ling, that an action can be brought that challenges the validity of the inclusion of a national law in Appendix III. If that is the case, the case will focus on whether or not the substance of the national law at issue concerns affairs of the central government or the central-local relationship. The final authority to make such a decision lies with the NPCSC. See Bing Ling, supra note 75.

85 See Basic Law, supra note 3, art. 18(1).

86 It has been argued under the Basic Law that the common law system in the HKSAR must be maintained. Accordingly, the constitutional review authority of the HKSAR courts should also be maintained.
must have the authority to review local legislation for consistency with the Basic Law. In a recent case on the issue of flag-burning, for example, the Hong Kong courts were asked to review the legality of Section 7 of the National Flag and National Emblem Ordinance (Ordinance No. 116 of 1997) and Section 7 of the Regional Flag and Regional Emblem Ordinance (Ordinance No. 117 of 1997), both of which criminalize public flag-burning activities. It was alleged in the case that both ordinances were inconsistent with Article 16 of the Bill of Rights Ordinance and Article 39 of the Basic Law. Courts in Hong Kong should have the authority to determine whether or not both ordinances are consistent with Article 39 of the Basic Law. However, the National Flag and National Emblem Ordinance is not ordinary local legislation. Section 7 of the Ordinance is the local equivalent of a similar provision, Article 19 of the PRC National Flag Law, which is included in Appendix III of the Basic Law. Assuming that inclusion of this law in Appendix III is lawful, Article 19 should relate exclusively to either the affairs of the central government of the PRC or the central-local relationship. If the interpretation of Article 19 affects the decision of the CFA in its final adjudication, the CFA should seek an interpretation from the NPCSC. In the actual case, however, the Hong Kong Court of Appeal held

87 "A person who desecrates the national flag or national emblem by publicly and willfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 years." National Flag and National Emblem Ordinance, supra note 78, § 7.

88 A person who desecrates the regional flag or regional emblem by publicly and willfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and is liable: (a) on conviction on indictment to a fine at level 5 and to imprisonment for 3 years; and (b) on summary conviction to a fine at level 3 and to imprisonment for 1 year. Regional Flag and Regional Emblem Ordinance (adopted July 1, 1997) Cap. 2601, § 7, translated in BLIS on Internet (visited May 19, 2000) <http://www.justice.gov.hk>.

89 See HKSAR v. Ng Kung-siu, 2 HKC 10 (Eastern Magistracy 1998), available in LEXIS, Hong Kong Cases.

90 An example of the exercise of this authority by the Court of First Instance and Court of Appeal can be seen in the flag-burning case. See id.

91 The Law of the PRC on the National Flag was enacted by the NPCSC on June 28, 1990, and took effect on October 1, 1990. Article 19 of that law provides:

Whoever desecrates the National Flag of the People's Republic of China by publicly and willfully burning, mutilating, scrawling on, defiling or trampling upon it shall be investigated for criminal responsibilities according to law; where the offence is relatively minor, he shall be detained for not more than 15 days by the public security organ in reference to the provisions of the Regulations on Administrative Penalties for Public Security.


92 As discussed before, the legality of the inclusion of the law in Appendix III can be challenged on the issue of both the procedure of incorporation and the substance of the law. See Bing Ling, supra note 75.
that Section 7 of the National Flag and National Emblem Ordinance was inconsistent with the Basic Law.\textsuperscript{92} The implication of this holding is that Article 19 of the PRC National Flag Law is inconsistent with Article 39 of the Basic Law.

Since the decision of the Court of Appeal is not yet final, the court is not obligated under the Basic Law to seek an interpretation from the NPCSC before it delivers its judgment.\textsuperscript{93} But when the case is presented to the CFA, as has happened in the right of abode case, the CFA is obligated to seek an interpretation from the NPCSC before it makes a final decision.

C. Comments

The analysis above leads to the conclusion that regardless of how a Chinese national law is implemented in Hong Kong, any challenge to the legality or validity of a provision of that law should be referred to the NPCSC for interpretation if the case reaches the CFA. If a provision of the Chinese law were challenged before the courts in Hong Kong, the interpretation would certainly affect the final decision of the court.\textsuperscript{94} This is a logical and reasonable solution because it is not only consistent with Chinese constitutional jurisprudence, but also maintains the adjudicative autonomy of the courts in Hong Kong. Moreover, this approach allows for the consideration of both Hong Kong's common law approach and the Chinese civil law approach.

One remaining problem, however, is that the Basic Law only authorizes the CFA to seek interpretation from the NPCSC.\textsuperscript{95} In most cases, a referral to the NPCSC for interpretation is only possible after two appeals.\textsuperscript{96} This causes much delay in making a final decision, and as a result the parties concerned face a long period of uncertainty. It is also a waste of judicial and Legal Aid resources.\textsuperscript{97} A wiser and more effective process would make the referral discretionary when the case is heard by the court of first instance. In this regard, European Union law and its rich case

\textsuperscript{92} See Ng Kung-siu, 2 HKC 10.

\textsuperscript{93} This was confirmed by the CFA in the right of abode case. See Ng Ka Ling v. Director of Immigration, 1 HKC 291 (Hong Kong Court of Final Appeal 1999), available in LEXIS, Hong Kong Cases.

\textsuperscript{94} Otherwise, the plaintiff would not have standing to bring the case before the court in the first place.

\textsuperscript{95} See Basic Law, supra note 3, art. 158.

\textsuperscript{96} The flag-burning case was heard by the District Court, the Court of Appeal, and the CFA. The CFA delivered its judgment on December 15, 1999 without seeking an interpretation from the NPCSC.

\textsuperscript{97} Thus far, most of the cases relating to the Basic Law have been funded through Legal Aid.
precedents provide important guidance. Such borrowing is also logical given the fact that the intent of the drafters of Article 158 of the Basic Law was to create a referral mechanism similar to that of the European Union. However, establishing such a mechanism will not be possible until Article 158(3) is amended.

IV. RE-INTERPRETATION OF THE BASIC LAW BY THE NPCSC

A. Re-Interpretation Versus Amendment

Shortly after delivery of its judgment in the right of abode case, the CFA issued a statement of clarification. However, the clarification failed to prevent the escalation of Hong Kong’s constitutional crisis. Shortly after the clarification, the Hong Kong government announced the results of its preliminary study of the impact of the CFA’s judgment. It found that strict implementation of the CFA’s judgment would lead to the influx of approximately 1.6 million Mainland Chinese into Hong Kong. Such a dramatic population increase was not acceptable to either the Hong Kong government or to the general public. Therefore, something had to be done about the CFA’s decision. This problem has fostered the debate between those who advocate amendment of the Basic Law by the NPC and those who support re-interpretation of Articles 22(4) and 24(2) of the Basic Law by the NPCSC.

A sharp conflict exists among scholars, legislators, and legal practitioners in Hong Kong with regard to the legality, as well as the pros and cons, of amendment versus re-interpretation of the Basic Law. Proponents of amending the Basic Law strongly oppose seeking re-interpretation of the Basic Law from the NPCSC for three principal reasons. First, re-interpretation of the Basic Law would damage the judicial independence and final adjudicative authority of the CFA. Second, re-
interpretation by the NPCSC would overturn the CFA's decision and would be tantamount to repudiating not only the concept of "one country, two systems," but also the high degree of autonomy guaranteed by the Basic Law. 104 Third, re-interpretation would seriously and irreversibly damage the rule of law in Hong Kong. 105 It has been argued that law is supposed to be above politics. 106 But by seeking re-interpretation, the NPCSC, as a political body, will be drawn into the process of interpretation by the Hong Kong government. 107 It is understandable that lawyers with common law backgrounds have expressed these concerns because they have been trained to believe that the judiciary is the only institution that should interpret legislation.

On the other hand, the Hong Kong government and many others favor re-interpretation, rather than amendment, of the Basic Law. 108 Supporters have offered numerous arguments to bolster their position. First, the Basic Law grants interpretive authority to the NPCSC under Article 158(1). Second, rather than overruling the CFA's decision, the Hong Kong government merely wants to prevent the CFA's decision from becoming precedent. 109 This argument is based on the Basic Law's constitutional structure, which grants the CFA the power of final adjudication but not the power of final statutory interpretation. 110 Third, preventing the CFA's

would be contrary at least to the spirit of Article 158 which makes it necessary only to refer questions relating to matters other than the internal affairs of Hong Kong to the NPCSC. Where the CFA, being a court of final adjudication, has exercised its jurisdiction properly to interpret Article 24, such an attempt would effectively remove its power to finally adjudicate on matters concerning the internal affairs of Hong Kong. That would be contrary to Articles 2 and 19 of the Basic Law which guarantee independent judicial power of the local courts including that of final adjudication.

An attempt to make a more limited reference based on Article 22 only is no less damaging. The result would be that the CFA would lose its status as a court of final adjudication. That will not only destroy the concept of high autonomy which is to be enjoyed by Hong Kong but also the independence, authority and reputation the CFA has established since the Handover.

Letter from the Hong Kong Bar Association to the Chief Executive (May 5, 1999) <http://www.hkba.org/press-release/19990909.htm> [hereinafter Letter from the Hong Kong Bar Association].

104 id.
105 id.
106 id.
107 See Much More Than an Interpretation Is at Stake, S. CHINA MORNING POST, June 27, 1999, at 10.
108 The influential scholars include Professor Albert Chen, the Dean of the Law Faculty at the University of Hong Kong, who is also a member of the Committee for the Basic Law of the Hong Kong Special Administrative Region, Ms. Maria Tam, who is a member of the same committee, Professor Peter Wesley-Smith, another leading constitutional scholar in Hong Kong, and several senior counsels.
110 See id.
judgment from becoming judicial precedent would not damage judicial independence in Hong Kong. \(^{111}\) This argument is based on the fact that before the handover, both the British Parliament and the local legislature could enact legislation that prevented a Hong Kong court's judgment from becoming precedent. In Great Britain, there are many examples of Parliament enacting legislation to stop the implementation of judgments of the judiciary, including judgments of the House of Lords. \(^{112}\) No constitutional crisis ever arose out of that practice, nor did anyone argue that Britain's judicial independence had been compromised. However, one may argue that Hong Kong's situation before 1997 was different because it did not have a constitution. Fourth, re-interpretation would be retroactive to the date the Basic Law came into effect, July 1, 1997, \(^{113}\) while amendment of the Basic Law would only be triggered from the effective date of the amendments. Fifth, amendment of the Basic Law could only occur at the next NPC plenary meeting, while re-interpretation by the NPCSC could be undertaken much sooner. \(^{114}\) Sixth, the Basic Law should not be amended because the Basic Law itself did not cause the crisis. The crisis began when the CFA misinterpreted the relevant provisions of the Basic Law. \(^{115}\)

In order to discuss whether re-interpretation or amendment is the better solution, it is necessary to first examine the conditions under which re-interpretation or amendment should be sought. The need for interpretation arises when an ambiguity or uncertainty exists regarding the exact meaning of a specific provision in a piece of legislation, \(^{116}\) whereas amendment is required when legislation is badly drafted, outdated, or simply wrong. \(^{117}\) If ambiguity exists, re-interpretation by the NPCSC is the more appropriate option. In other cases, amendment should be sought. Differences of opinion exist, however, even on this initial issue. \(^{118}\)

\(^{111}\) Id.

\(^{112}\) See Burmah Oil v. Lord Advocate [1965] App. Cas. 75.

\(^{113}\) This view was reiterated by Ms. Maria Tam after the NPCSC issued its interpretation of the Basic Law. See Pan Xiao Ping, Renda Shefa Guochen Xianshi Aihu Xianggang [The Interpretation of the NPCSC Shows the Care of Hong Kong], WENHUI DAILY, July 3, 1999, at 8.

\(^{114}\) See Gangu Yao, Renda Jieshi Juquan Zilu Jianzhi Ershi Wan [The Number of Children for Right of Abode for Whom the HKSAR Seeks Interpretation from the NPCSC Decreases to 200,000], MING PAO, May 19, 1999, at A1.

\(^{115}\) See Ian Wingfield, The Interpretation of the NPCSC Should Stick to the Original Legislative Intent, HONG KONG ECON. DAILY, June 1, 1999, at A22.


\(^{117}\) See BENION, supra note 116, at 210-20.

\(^{118}\) Those in favor of re-interpretation argue that it is the CFA that misunderstood the relevant provisions of the Basic Law and that there is nothing wrong with the Basic Law. They insist that the controversy can be settled by re-interpretation of the relevant provisions of the Basic Law by the NPCSC. However, those in favor of amendment argue that the two relevant provisions of the Basic Law, Articles
On the one hand, the CFA holds that the phrase "people from other parts of China" in Article 22(4) should not include permanent residents of Hong Kong.\(^{119}\) On the other hand, before their status as permanent residents is established and confirmed by the relevant authority, those applicants still have residential registration somewhere in Mainland China. Their residential registration is removed after they obtain the appropriate approval to come to Hong Kong. The applicants in the right of abode case had not obtained such approval at the time of litigation. Thus, it is reasonable to treat them as "people from other parts of China." Ambiguity exists as to the meaning of "people from other parts of China" in Article 22(4). Therefore, interpretation is the better way to resolve the issue.

With regard to Article 24(2) and Article 24(3), however, it is clear that no conditions are attached to classification as a permanent resident or entitlement to the right of abode. The CFA's interpretation is consistent with the law's literal meaning. If the Hong Kong government wants those two provisions to contain certain conditions, it is better to seek amendment; otherwise the literal meaning of Article 24(2) and Article 24(3) would be strained.

The Basic Law is, however, a piece of Chinese legislation. Under Chinese constitutional theory and jurisprudence, the NPCSC has the sole authority to interpret all Chinese national laws. Two centuries ago, legislative interpretation was one of the prominent characteristics of the continental legal system, which was based on Roman law.\(^{120}\) China is one of the few countries in which legislative interpretation still exists.\(^{121}\) Legislative interpretation in China can either supplement a national law or clarify its meaning.\(^{122}\) Examination of the limited theory and practice of Article 22(4) and 24(2), are clear and that the CFA has properly interpreted them. Backers of amendment argue that if Hong Kong's government wants to give the two provisions meanings which are different from their plain meanings, it is better to amend the Basic Law. See Letter from the Hong Kong Bar Association, supra note 103.

\(^{119}\) See Ng Ka Ling v. Director of Immigration, 1 HKC 291 (Hong Kong Court of Final Appeal 1999), available in LEXIS, Hong Kong Cases.


\(^{121}\) In Europe, Turkey had legislative interpretation until its constitution abolished it in 1961. Taiwan still retains legislative interpretation. However, a majority of countries under continental legal systems, including leading countries such as France and Germany, have given up legislative interpretation. See MERRYMAN, supra note 120, at 39-47.

\(^{122}\) These two functions of legislative interpretation are explicitly provided for by the Resolution of the NPCSC on Strengthening Interpretation of the Law, which was adopted in 1981. Some Chinese scholars have argued that a legislative interpretation also has a third function of amending a national law. See Cai Dingjian & Liu Xinghong, Lun Li Fa Jieshi [Analysis of Legislative Interpretation], ZHONGGUO
legislative interpretation in China shows that legislation can be interpreted in a manner that either expands or narrows a law's meaning. Furthermore, the NPCSC has no established procedure or format for legislative interpretation. Historically, the NPCSC has followed legislative procedures, although the forms of interpretation issued are described as interpretations, decisions, explanations, and others.

With respect to Article 24(2), the Preparatory Committee for the establishment of the HKSAR adopted an opinion in August 1996 that was later approved by the NPCSC. That opinion narrowly interprets Article 24(2) of the Basic Law and, through that interpretation, incorporates a restriction not expressly stated in the Basic Law. This restriction provides that only children born to those who reside lawfully in Hong Kong may rely on Article 24(2) to claim the right of abode. In the Chinese legal system, this is an acceptable means of interpreting national legislation. However, the CFA has failed to give effect to this opinion. Therefore, it can reasonably be

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See also Cai Dingjian & Liu Xinghong, supra note 122, at 40-42.

This committee was established by the NPC to do preparatory work for the establishment of the Hong Kong Special Administrative Region.

This opinion was approved by the NPCSC in 1997. See Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Pizhun Quanguo Renmin Daibiao Dahui Xianggang Tebie Xingzhengqu Choubei Weiyuanhui Jishu Gongzuo de Yijian de Jueding [Decision of the National People's Congress Standing Committee to Approve the Opinion of the National People's Congress Preparatory Committee for the Hong Kong Special Administrative Region], reprinted in Zhonghua Renmin Gongheguo Falu Quanshu [Collection of the Laws of the People's Republic of China] 17 (Wang Huaian et. al eds., 1997).

The opinion states:

Paragraph 2 of art. 24 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China provides for issues concerning permanent residents of the Hong Kong Special Administrative Region (HKSAR). For the purpose of implementing the provisions, the following opinions are hereby provided for the HKSAR to formulate the details of the implementation rules.

Chinese citizens born in Hong Kong as provided in Category (1) of Paragraph 2 of art. 24 of the Basic Law refer to people who were born during which either one or both of their parents were lawfully residing in Hong Kong, but excluding those who are born to illegal immigrants, overstayers or people residing temporarily in Hong Kong.

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argued that the CFA erred by failing to give effect to the legislative intent of the Basic Law. Here, legislative intent refers to the intent as explained in the opinion approved by the NPCSC.\textsuperscript{128}

With regard to amending the Basic Law, both sides agree that amendment is a possible solution. The Hong Kong government did not choose this approach mainly because it believes that amendment takes too long.\textsuperscript{129} This rationale, however, appears unconvincing. If the Hong Kong government wants to implement the CFA's judgment, interim administrative measures could be adopted until the NPC holds its plenary session. Perhaps the actual reason the Hong Kong government decided against amendment was its concern that amendment of the Basic Law would not stop the influx of 1.6 million Mainland Chinese.

For those countries using legislative interpretation, including China, a legislative interpretation is the most authoritative interpretation of the law.\textsuperscript{130} From the moment a legislative interpretation is made, ambiguous phrases in the law at issue assume the meaning given by the legislative interpretation. Although a legislative interpretation would not have retroactive effect for the parties involved in the right of abode case, it would be retroactive in the sense that it would have the same legal effect as the Basic Law, which became effective on July 1, 1997.\textsuperscript{131} If the alternative of amendment of the Basic Law were adopted, the 1.6 million Mainland Chinese who according to the CFA's judgment enjoy the right of abode in Hong Kong would be entitled to reside in Hong Kong permanently until the amendment is made. Although it is legally feasible for the Hong Kong government to wait to amend the Basic Law, ultimately the amendment may not be able to satisfy the objective of the Hong Kong government and the wishes of the majority of Hong Kong's people, which is to stem the influx of Mainland Chinese.\textsuperscript{132}

\textsuperscript{128} However, there are procedural provisions that address the problem of what can be done if the CFA misinterprets the Basic Law. According to common law tradition, the legislature can stop the decision of the court from becoming precedent by amending the law at issue. This is exactly what the side in favor of amendment has argued for.

\textsuperscript{129} It has been suggested that amendment of the Basic Law has its problems. One implication is that the interpretation by the CFA of the relevant provisions of the Basic Law is correct. Amendment of the Basic Law actually means that the HKSAR Government has changed its policy and that the government is required to compensate those harmed by the policy change. The second is that an amendment of the Basic Law cannot contradict China's basic policies towards the HKSAR as embodied in the Joint Declaration and the Basic Law. See Alan Hoo, XING BAO, May 14, 1999, at 7.

\textsuperscript{130} See Xiao Weiyun et al., supra note 83.

\textsuperscript{131} A legislative amendment is not retroactive and only comes into effect at the time the amendment is properly made. See MERRYMAN, supra note 120, at 28.

\textsuperscript{132} This point has also been admitted by Mr. Wingfield, a senior legal officer with the Department of Justice of the Hong Kong government. See Wingfield, supra note 109.
B. The Appropriateness of Seeking Re-Interpretation

If the argument that the CFA misinterpreted the Basic Law in the right of abode case stands, then the NPCSC’s re-interpretation simply states the “correct” meaning of the relevant provisions of the Basic Law. This re-interpretation is considered applicable from the date the Basic Law came into effect. This Article now examines in greater detail the Hong Kong government’s justifications for and the appropriateness of seeking re-interpretation from the NPCSC.

The authority to interpret the Basic Law is expressly stated in Article 158, which allows the NPCSC to retain the ultimate power to interpret the Basic Law. However, in adjudication of cases relating to the Basic Law, the NPCSC has delegated its authority to the CFA. The CFA has been entrusted with the final authority to interpret those provisions that fall within Hong Kong’s autonomy. Even for those provisions of law and issues falling outside the scope of Hong Kong’s authority, such as those within the authority of the central government of the PRC or those concerning the central-local relationship, the CFA may exercise its interpretive authority unless the interpretation would affect the outcome of the case. Within a well-established legal system, a reasonable interpretation of Article 158 would be that the NPCSC’s authority to interpret the Basic Law is extremely limited. Without a request from the CFA, the NPCSC should not interpret the Basic Law. If this were not the case, no adjudication by the CFA would ever be final.

The Chinese legal system, however, is not well developed. China is one of the few countries that has retained legislative interpretation. Under Chinese constitutional jurisprudence, the concept of authorization differs

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133 This is also a consequence of legislative interpretation. See MERRYMAN, supra note 120, at 40-41; see also Wu Jianfan, Legal Basis for China’s Top Legislature to Interpret Basic Law of Hong Kong, CHINA L., Aug. 1999, at 51.

134 See Basic Law, supra note 3, art. 158(1).

135 Id. art. 158(2).

136 See id.


138 An argument has been raised that the CFA’s authority of final adjudication does not deprive the NPCSC of its interpretation authority, and that final adjudication is restricted to each specific case and does not equal final interpretation. Under a common law system, such an argument does not stand because the essence of common law is that the ratio decidendi of a case, i.e., the statement of a legal principle or rule, will be binding. Final authority of adjudication should mean that the ratio decidendi stated by the CFA should be final, unless it is reversed properly through legislation or legislative amendment.
from that of separation of powers.\textsuperscript{139} Authorization means that the power-holder allows others to exercise power under defined conditions, but that its power is not reduced as a result.\textsuperscript{140} The authorization is conditional. One of the conditions under which the Hong Kong courts were given interpretive authority was that the courts in Hong Kong must respect the original legislative intent of the Basic Law.\textsuperscript{141} Though the validity of this condition is highly questionable, the argument that authorization does not equal relinquishment of authority is well received in Chinese constitutional theory and by scholars.\textsuperscript{142} It is also supported by practice.\textsuperscript{143} Under Chinese constitutional jurisprudence, the NPCSC may invoke Article 158(1) to interpret the Basic Law, provided there are no explicit statutory restrictions. However, the Basic Law imposes explicit restrictions on the NPCSC's exercise of general interpretive authority under Article 158(1). First, the NPCSC can only interpret those provisions of the Basic Law concerning either the responsibility of the central government or the relationship between the central government and the HKSAR. Second, the NPCSC will exercise its interpretation authority under Article 158(1) of the Basic Law only when the interpretation would affect the judgment of the case at issue and upon the request of the CFA.

The two provisions submitted to the NPCSC for re-interpretation are Article 22(4) and Article 24(2) of the Basic Law. Article 22 is in Chapter 2 of the Basic Law, which addresses the relationship between the central government of the PRC and the Hong Kong Special Administrative Region. It is primarily concerned with the central-local relationship.

In the right of abode case, the Director of the Immigration Department did not request the CFA to seek interpretation of Articles 22(4) and 24(2) from the NPCSC according to Article 158.\textsuperscript{144} Counsel for the Hong Kong

\textsuperscript{139} See Wu Jianfan, \textit{supra} note 133, at 53.

\textsuperscript{140} \textit{Id.}

\textsuperscript{141} Although this condition cannot be found in the Basic Law, Professor Wu argues that this is an extremely important condition and goes without saying. \textit{See id.}

\textsuperscript{142} Scholars who share this view include Professor Xu Chongde and Professor Xiao Weiyun. \textit{See Xiao Weiyun, \textit{supra} note 83.}

\textsuperscript{143} In 1985, the NPCSC authorized the State Council to enact legislation relating to economic reform and the opening of China to the outside world, but the NPCSC has not stopped passing laws on this subject. \textit{See Zhonghua Renmin Gongheguo Di Liu Jie Quanguo Renmin Daibiao Dahui Di San Ci Huiyi Guanyu Shouquan Guowuyuan Zai Jingji Tizhi Gaige he Duixiai Kaifang Mian Keyi Zhiding Zanxing de Guiding Huozhe Tiaoli de Jueding [Decision of the Third Session of the Sixth National People's Congress of the People's Republic of China on Authorizing the State Council to Formulate Interim Provisions or Regulations Concerning the Reform of the Economic Structure and the Open Policy] (adopted Apr. 10, 1985), reprinted in \textit{ZHONGHUA RENMIN GONGHEGUO FAJU QUANSHU}, \textit{supra} note 82, at 86-87.}

\textsuperscript{144} Ng Ka Ling v. Director of Immigration, Final Appeal Nos. 14-16, 1 HKC 291 (Hong Kong Court of Final Appeal 1999), available in LEXIS, Hong Kong Cases.
government pointed out that he had raised the issue for the CFA’s consideration. Some scholars have argued that the CFA adopted an incorrect test to decide whether or not a referral should be made. The test adopted by the CFA asked whether the substance of the issue to be interpreted dealt with a matter that must be referred. If not, there could be no referral. The question of substance is a question solely for the CFA. As a result, the CFA concluded that it would only make a referral if (1) a provision of the Basic Law concerns either the exclusive affairs of the central government or the central-local relationship, and (2) the interpretation of that provision would affect the outcome of the case. This approach has been strongly criticized by some scholars, who have argued that examination of the legislative history of Article 158 demonstrates that the Basic Law’s drafters intended to incorporate into the Basic Law a referral mechanism similar to that of the European Union legal system. Borrowing from the approach of European Union law, the drafters intended a referral to be made when an interpretation of the Basic Law is necessary to enable the court to decide a case. Professor Albert Chen, in one of his essays, conducted an in-depth analysis of the test that should be adopted in making a referral. Chen argues convincingly that the interpretation of Article 22(4) was necessary for the CFA to make the judgment, although Article 22(4) was not the “predominant provision.” Accordingly, the CFA adopted the wrong test.

Article 24(2), which is located in Chapter 3 of the Basic Law, deals with the fundamental rights and duties of residents of Hong Kong. Such topics are clearly within Hong Kong’s autonomy, a point that the counsel for the Hong Kong government conceded in the right of abode case. It follows that the CFA, not the NPCSC, has the final authority to interpret that provision. However, the NPCSC has already interpreted Article 24(2). The NPCSC indicated in its re-interpretation that the only reason for its interpretation of Article 24(2) was the CFA’s misinterpretation of Article 22(4). This decision raises two further interrelated legal questions. First,
can the NPCSC's belief that the CFA misinterpreted the Basic Law be a ground for the NPCSC's re-interpretation, and who makes such a decision? Second, what role can the Hong Kong government play if it believes that the CFA misinterpreted the Basic Law?

Article 158 of the Basic Law only states that the NPCSC enjoys the final authority of interpretation. It does not specify misinterpretation of the Basic Law by the CFA as a ground for the NPCSC to exercise its general interpretation authority. If misinterpretation of the Basic Law by the courts in Hong Kong is a ground for the NPCSC to initiate interpretation, an institution must be designated to decide whether the courts in Hong Kong, particularly the CFA, have misinterpreted the Basic Law.\textsuperscript{153} Currently, the Basic Law does not indicate which organ has the authority to determine whether or not the CFA has misinterpreted the Basic Law. It is reasonable to say that the draftsmen of the Basic Law did not foresee the possibility that the CFA might not submit a provision of the Basic Law which should be submitted for interpretation, or that the CFA might have misinterpreted the Basic Law.\textsuperscript{154} Accordingly, it can be argued that the Basic Law does not foresee misinterpretation as a basis for the NPCSC to exercise its statutory interpretative authority under Article 158(1) of the Basic Law.

Assuming that the CFA misinterpreted the Basic Law or made a mistake by not referring it when it should have, can the Hong Kong government do anything about it? Article 158 of the Basic Law does not give the executive branch a role in the interpretation of the Basic Law. The executive branch should have requested that the CFA seek interpretation from the NPCSC in the right of abode case, but the Hong Kong government did not do so. After the CFA issued its interpretation, the only justification that could have been invoked by the Hong Kong government to seek re-interpretation from the NPCSC was the constitutional principle of necessity. But the application of this principle first requires the exhaustion of all other possible alternatives.\textsuperscript{155} Throughout the constitutional crisis, the Hong Kong government failed to prove that it exhausted all other alternatives before seeking interpretation from the NPCSC.\textsuperscript{156} The Hong Kong government

\textsuperscript{153} Scholars trained in Chinese law may argue that the NPCSC's final authority of interpretation should include the authority to decide whether or not the CFA has misinterpreted the Basic Law.

\textsuperscript{154} Professor Wu Jianfan, a draftsman of the Basic Law, has argued that this is an implied ground for the NPCSC to exercise its statutory interpretation authority under Article 158(1). See Wu Jianfan, supra note 133, at 53.


\textsuperscript{156} The HKSAR Government has failed to explain why it could not have adopted certain administrative measures while the Basic Law was being amended.
missed the best opportunity to make such a request during the adjudicative process in the right of abode case. If the Hong Kong government had made the request and the CFA had rejected it, it would have been more legally persuasive to invoke the principle of necessity to seek re-interpretation from the NPCSC through the State Council.

The debate about the appropriateness of seeking re-interpretation from the NPCSC also concerns the more fundamental issue of whether the constitutional structure established by the Basic Law is appropriate for Hong Kong, and whether that structure is capable of maintaining Hong Kong's common law system. More specifically, should the CFA be granted the final authority of adjudication or the final authority to interpret the Basic Law? The harsh reality is that every person or institution, including the courts, may be criticized by others for making decisions that are regarded as wrong. Due to their impartiality, however, the courts in Hong Kong are the least likely to make biased decisions. There is every reason to believe that the courts in Hong Kong, rather than the NPCSC (a political organ), are the most qualified institutions to faithfully interpret the Basic Law. If there is faith in the courts in Hong Kong, then there must be a willingness to pay the price for that faith, which is the possibility of undesirable or unpopular judgments. Moreover, checks and balances exist between the courts in Hong Kong and the NPC because the NPC has the power to amend the Basic Law and prevent the implementation of CFA judgments.

The discussion above reveals that the Hong Kong government's decision to seek interpretation from the NPCSC was the only solution, since amendment of the Basic Law will not stop the population influx. When compared with the Basic Law for the Macao Special Administrative Region, it is easy to see that the poor drafting of Article 24 of the Basic Law is the actual source of the escalating constitutional crisis in Hong Kong.

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158 Article 159 of the Basic Law provides a detailed procedure for the amendment of the Basic Law. See Basic Law, supra note 3, art. 159.

159 See Huang Qinkang, Fanbo Hong Qintian Xiansheng De Zizhe [Rebutting Mr. Hong Qintian's Accusation], MING PAO, June 2, 1999, at A32. This commentary was written by a lawyer at the Department of Justice and represents the Hong Kong government's position.

160 See Basic Law of the Macao Special Administrative Region of the People's Republic of China, Article 24, which provides:

The permanent residents of the Macao Special Administrative Region shall be:

(1) Chinese citizens born in Macao before or after the establishment of the Macao Special Administrative Region and their children of Chinese nationality born outside Macao;
However, the Hong Kong government will not admit this point. Instead, it must find legal justifications for requesting that the NPCSC interpret Articles 22 and 24. The Hong Kong government's current justifications are not convincing and cannot withstand close scrutiny. When its justifications are criticized, the government proposes different justifications. The constitutional crisis has finally reached a stage at which the most sensitive constitutional issue, the legality of the NPCSC's interpretation, needs to be examined and resolved. In order to stop the influx of 1.6 million Mainland Chinese, the Hong Kong government has put itself in the disadvantageous position of defending the flawed Basic Law. It has tried to assure the Hong Kong people and the legal profession that only under extreme circumstances will it seek interpretation from the NPCSC, which only rarely exercises its interpretive authority. However, such assurances have no legal substance. As one scholar argued, if the interpretation is

(2) Chinese citizens who have ordinarily resided in Macao for a continuous period of not less than seven years before or after the establishment of the Macao Special Administrative Region and their children of Chinese nationality born outside Macao after they have become permanent residents;

(3) The Portuguese who were born in Macao and have taken Macao as their place of permanent residence before or after the establishment of the Macao Special Administrative Region;

(4) The Portuguese who have ordinarily resided in Macao for a continuous period of not less than 7 years and have taken Macao as their place of permanent residence before or after the establishment of the Macao Special Administrative Region;

(5) Other persons who have ordinarily resided in Macao for a continuous period of not less than 7 years and have taken Macao as their place of permanent residence before or after the establishment of the Macao Special Administrative Region;

(6) Persons under 18 years of age born in Macao of those residents listed in category (5) before or after the establishment of the Macao Special Administrative Region.

The above-mentioned residents shall have the right of abode in the Macao Special Administrative Region and shall be qualified to obtain permanent identity cards.


161 This is a very complex issue and deserves another article for detailed discussion.

162 Including this interpretation by the NPCSC of the Basic Law, the NPCSC has at most exercised its legislative interpretation authority nine times. For discussion of the first six, see Cai Dingjian & Liu Xinghong, supra note 122, at 41. On the three most recent occasions the NPCSC has issued what it calls "interpretations." Two of these are the interpretations of the NPCSC on the application of the Nationality Law in Hong Kong and Macao, respectively. The last one is the most recent interpretation of the Basic Law.
legitimate and necessary, then whenever there is such a necessity, the Hong Kong government will make an interpretation request.\textsuperscript{163}

V. THE NPCSC’S INTERPRETIVE APPROACH

The NPCSC’s interpretation of Articles 22(4) and 24(2) states that the CFA failed to refer these two provisions of the Basic Law for interpretation as required by Article 158(3) of the Basic Law, and that the CFA’s interpretation was inconsistent with the original legislative intent of the Basic Law.\textsuperscript{164} The NPCSC’s interpretation clearly states that it must be followed by all the courts in Hong Kong.\textsuperscript{165} Moreover, this requirement was affirmed by the CFA itself in its statement of clarification in the right of abode case.\textsuperscript{166} If the legality of an interpretation by the NPCSC were accepted, then the interpretation of the NPCSC would have the same legal effect as the Basic Law itself.\textsuperscript{167} But one important theoretical question remains: which part of the NPCSC’s interpretation is binding, only the decisions on Articles 22(4) and 24(2), or the NPCSC’s interpretive approach as well? This issue remains because the NPCSC adopted the original legislative intent approach in its interpretation, while the Hong Kong courts have obviously taken a very different approach.

In the right of abode case, the CFA clearly stated that it adopted a broad and purposive approach in interpreting the Basic Law, particularly the provisions relating to fundamental human rights.\textsuperscript{168} Furthermore, in the most recent case on adopted children decided by the Court of First Instance (“CFI”) of the High Court,\textsuperscript{169} the CFI held that the word “born” in Article 24(3) of the Basic Law should be interpreted broadly to include not only those children actually born to Hong Kong residents, but also those children

\textsuperscript{163} Personal discussion with Professor Wang Guiguo, Woo Po Shing Professor Chair Professor of Chinese and Comparative Law at the City University of Hong Kong School of Law.

\textsuperscript{164} See supra note 36.

\textsuperscript{165} See Basic Law, supra note 3, art. 158(1). Moreover, it has also been admitted by the CFA itself in its statement of clarification issued on February 26, 1999. See Ng Ka Ling v. Director of Immigration, No. 2, 1 HKC 425 (Hong Kong Court of Final Appeal 1999), available in LEXIS, Hong Kong Cases.

\textsuperscript{166} See Ng Ka Ling, 1 HKC 425.

\textsuperscript{167} This is because the Basic Law is the constitutional document of the HKSAR. It follows that any interpretation of the constitutional document will have the same effect as the constitutional document itself, provided that the interpretation is made by an organ with appropriate authority and according to appropriate procedure. See Regina Ip, Secretary for Security, Speech to the Legislative Council On Moving Motion for the Resolution for Amending Schedule 1 to the Immigration Ordinance (July 14, 1999).

\textsuperscript{168} See Ng Ka Ling, 1 HKC 425.

\textsuperscript{169} See Xie Xiao Yi v. Director of Immigration, 3 HKC 148 (Court of First Instance 1999), available in LEXIS, Hong Kong Cases; Tam Nga Yin v. Director of Immigration, 3 HKC 148 (Court of First Instance 1999), available in LEXIS, Hong Kong Cases. The Court of First Instance delivered its judgment on June 25, 1999. Xie Xiao Yi, 3 HKC 148.
adopted by Hong Kong residents. Various courts in Hong Kong at different levels have adopted the same approach in interpreting the Basic Law. However, those cases were decided before the NPCSC issued its interpretation of Articles 22(4) and 24(2) of the Basic Law.

The NPCSC’s interpretation states that Article 24(3) refers to children born to Hong Kong residents, of which at least one must have been a permanent resident before the children were born. As shown above, the NPCSC’s interpretation is inconsistent with the CFI’s interpretation in the adopted children case. Moreover, two drafters of the Basic Law have commented that when Article 24 of the Basic Law was drafted, no consideration was given to adopted children. Thus, the original legislative intent of Article 24(3) is restricted to children born to Hong Kong residents. Currently, there are two approaches to the interpretation of the Basic Law: one is broad and purposive and the other is based on original legislative intent. Which one should the courts in Hong Kong follow?

The original legislative intent approach may not be feasible for Hong Kong courts because all judges in Hong Kong are trained in common law. They are not experts on the Chinese legal system. The traditional rules of interpretation widely used in all common law jurisdictions are familiar to Hong Kong judges, and they are well trained in the application of those rules. In the common law system, courts seek out and give effect to the true intent of the legislature. However, legislative intent is expected to be reflected in the legislative record, and court findings are based on written legislation, objective standards, and actual materials rather than the memories or opinions of certain legislators or draftsmen. It is at least very difficult and unrealistic, if not impossible, for judges in Hong Kong to ascertain the original legislative intent of a provision of the Basic Law as understood by the NPCSC. One reason for this is the fact that the NPCSC

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170 This case is solely concerned with the interpretation of Article 24 of the Basic Law, which is within the autonomy of the HKSAR. No referral should be made to the NPCSC for interpretation.

171 See supra note 36.


173 See id.


175 The courts can refer to legislative background, the debates of legislators on the draft law, and various other external sources to find out the true intent of the legislature. See Bension, supra note 116, at 458-546; Bell & Engle, supra note 116, at 142-64; see also Chang, supra note 137.

176 In practice, the opinions of the Basic Law drafters about the original legislative meaning of a provision may differ from each other. See Johannes M. M. Chan, Renda Shifa Chongji Fazhi [The
may add new meanings to a law in its interpretation, and objective
documentation reflecting the changes prior to the interpretation do not exist.
The only way Hong Kong courts may ensure that their interpretations of the
Basic Law are consistent with those of the NPCSC is through interpretation
from the NPCSC. However, requiring a request for interpretation in every
case relating to the interpretation of the Basic Law violates Article 158 of
the Basic Law and completely ruins the Hong Kong courts’ authority of final
adjudication of those cases within Hong Kong’s autonomy. As a result,
judicial independence and the rule of law in Hong Kong would be
compromised under such an approach.

If the courts in Hong Kong are not required to follow the original
legislative intent approach in interpreting the Basic Law, then the only
viable and feasible alternative is to allow them to continue using a broad and
purposive approach as they did before Hong Kong’s handover to China.
This would give full effect to the concept of “two systems” in Hong Kong
without rejecting the concept of “one country” or denying the NPCSC’s
interpretive authority. While emphasizing the importance of maintaining the
distinctiveness of the two systems, it should also be noted that the Basic Law
brings the two legal systems together to interact with each other and
implement the concept of “one country.” As far as interpretive authority is
concerned, the NPCSC’s authority to interpret the relevant provisions of the
Basic Law should be fully acknowledged. Whenever the need for
interpretation arises, a referral should be made and the NPCSC should abide
by its own rules of interpretation. This is because the Basic Law is national
legislation, and the NPCSC has the authority to interpret it in accordance
with both Article 158(1) of the Basic Law and Article 67(4) of the PRC
Constitution. It is impractical to ask the NPCSC to interpret the Basic
Law according to the interpretive approach followed by the courts in Hong
Kong primarily for the same reasons that Hong Kong courts should not
apply the original legislative intent approach. Instead, the NPCSC should
continue to use its own interpretive approach. Therefore, two different
approaches should be adopted in the interpretation of the Basic Law by the
NPCSC and the courts in Hong Kong.

Interpretation of the NPCSC Damages the Rule of Law], reprinted in Hong Kong Bar Ass’n Homepage
177 Article 67(4) provides that the NPCSC has the power to interpret statutes. See PRC Constitution,
supra note 34, art. 67(4).

178 As a matter of fact, the NPCSC does not have a well-established interpretation method. That is
why some scholars have argued that Hong Kong has an important role to play in influencing the
development of the Chinese legal system. See, e.g., Wen Hongshi, The Impact of the NPCSC
VI. CONCLUSION

Theoretically, the issues in the right of abode case deal with a fundamental issue in constitutional law—the proper allocation of statutory interpretive authority among different governmental organs under the constitution. The unique situation here is the allocation of authority to interpret a regional constitution, rather than a national constitution, between the legislature of the central government and the judiciary of the local government. The case is further complicated by the fact that the central government and the local government have two different legal systems which the regional constitution brought together. The issue of the proper statutory interpretive approach is more jurisprudential and is not a pure constitutional law issue. It is a fundamental legal issue which impacts Hong Kong’s entire legal system. The interpretive approach adopted by Hong Kong’s judiciary will affect the interpretation of not only the Basic Law, which is the regional constitution, but also all regional legislation made by the regional legislature. There is little experience or theory that can be borrowed from other countries that relates to this unique system, so a new constitutional jurisprudence must be created.

This Article suggests that the idea of “one country, two systems” is a completely novel concept. It must be admitted that the authority to interpret the Basic Law is shared by the NPCSC and the courts in Hong Kong. With regard to the interpretation of the national laws listed in Appendix III of the Basic Law, the authority of the CFA is limited. Assuming that the inclusion of laws in Appendix III of the Basic Law is lawful, such laws will likely relate to either the affairs of the central government or the central-local relationship, and a referral will thus be needed. The final interpretive authority rests with the NPCSC. If an issue eligible for NPCSC interpretation were actually referred, then the direct overruling of CFA judgments, as occurred in the right of abode case, could be avoided.

However, the potential for conflict still remains. If such a conflict were to arise again, the following constitutional interpretive approach should be adopted. Mainland China and Hong Kong have different interpretive approaches, an original legislative intent approach and a broad and purposive approach, which are both involved in the interpretation of the Basic Law. The broad and purposive approach is one of the fundamental characteristics of the common law system in Hong Kong. If the promise contained in the regional constitution to maintain the pre-existing legal system in Hong Kong for at least fifty years is to be meaningful, the pre-existing interpretive approach should not be changed. In order to ensure the
realization of the “one country, two systems” concept, each system should follow its own approach when interpreting the Basic Law. When an interpretation from the CFA is overruled by an interpretation from the NPCSC, what should be overruled is the actual decision or judgment, rather than the interpretive approach used. This would allow one of the main characteristics of Hong Kong’s common law system to be preserved, thereby effectuating the Basic Law’s guarantee. Otherwise, only the shell, rather than the substance, of the common law system would survive.

The arguments above are not meant to imply that the author is in favor of Chinese constitutional jurisprudence in the area of statutory interpretation. China’s practice of granting legislative interpretation to the legislature had its origin in the continental legal system, but this practice has proved impractical and has been discarded by most countries within the continental legal system. At present, it is almost routine practice for countries with either a common law or continental law system to grant statutory interpretive authority to their judiciaries. It is the author’s hope that the current academic debate caused by Hong Kong’s constitutional crisis will cause Mainland Chinese scholars, as well as legislators, to rethink the PRC’s constitutional structure and the amendments necessary to eventually join the international community in this respect.