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## CONSTITUTIONAL ADJUDICATION IN POST-1997 HONG KONG

Albert H. Y. Chen<sup>†</sup>

*Abstract:* In July 1997, the British colony of Hong Kong was returned to the People's Republic of China ("PRC"). It became a Special Administrative Region ("SAR") of the PRC in accordance with the concept of "one country, two systems" embodied by the Sino-British Joint Declaration of 1984. The constitutional instrument of Hong Kong's new legal and political system is the Basic Law of the SAR of Hong Kong, enacted by the National People's Congress of the PRC and effective as of July 1997.

Under colonial rule, Hong Kong inherited a British-style legal system. English common law formed the foundation, and the British tradition of the Rule of law and the independence of the judiciary were transplanted to Hong Kong. In the post-War era, the people of Hong Kong enjoyed relatively more civil liberties than did the people of mainland China and Taiwan. Since the signing of the Sino-British Joint Declaration in 1984, the legal system of Hong Kong was further liberalized, and the political system partially democratized. Following the Tiananmen massacre of 1989, the British colonial government introduced into Hong Kong's constitution a Bill of Rights for the purpose of boosting residents' confidence in Hong Kong's future. Since the enactment of the Hong Kong Bill of Rights, the courts of Hong Kong have developed a solid body of case law on the protection of human rights, and have begun to exercise the power of judicial review of legislation. The era of constitutional adjudication thus began in Hong Kong.

After the establishment of the SAR of Hong Kong in 1997, the judiciary faced dual challenges of finding a place in the new constitutional order of "one country, two systems" and leading Hong Kong forward in its legal and constitutional development. Delicate issues of Hong Kong's constitutional relationship with the central government in Beijing have arisen, which often underscore the contradiction between the Communist Party-led legal system in mainland China and the tradition of judicial independence and the Rule of law in Hong Kong. At the same time, the courts of Hong Kong have had to tackle the classic constitutional problem of trying to work out the appropriate balance between civil liberties on the one hand and public order and communitarian values on the other hand. This article will review and evaluate how the Hong Kong courts have responded to these challenges.

### I. INTRODUCTION

In July 1997, the British colony of Hong Kong was returned to the People's Republic of China ("PRC") in accordance with the Sino-British Joint Declaration of 1984 and became a Special Administrative Region ("SAR") of the PRC. The Joint Declaration provided in detail how Hong Kong would be governed after 1997. Hong Kong would enjoy a high degree of autonomy under Chinese sovereignty, and its existing economic, social and legal systems would be preserved. The constitutional arrangement,

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known as “one country, two systems,” has been said to be an important innovation that contributes to the practice of peaceful resolution of international disputes.<sup>1</sup>

The constitutional instrument of Hong Kong’s new legal and political system is the Basic Law of the SAR of Hong Kong, a law for the governance of post-1997 Hong Kong enacted by the National People’s Congress of the PRC in 1990. The concept of “one country, two systems” has been given concrete legal form in the Basic Law, which came into force on July 1, 1997. The Basic Law is now the “mini-constitution” of Hong Kong as an autonomous territory within the PRC.<sup>2</sup>

Under colonial rule, Hong Kong inherited a British-style legal system.<sup>3</sup> English common law formed the foundation of Hong Kong’s legal system,<sup>4</sup> and the British tradition of the Rule of law and the independence of the judiciary were transplanted to Hong Kong.<sup>5</sup> In the post-War era, Hong Kong Chinese enjoyed relatively more civil liberties than Chinese in both mainland China and Taiwan.<sup>6</sup> After the signing of the Sino-British Joint Declaration in 1984, the legal system of Hong Kong was further liberalized,<sup>7</sup> and the political system partially democratized.<sup>8</sup> Following the Tiananmen incident of 1989, the British colonial government introduced into Hong

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<sup>1</sup> See generally Yiguo Liangzhi Gailun [General Principles of “One Country, Two Systems”] (Zhao Chunyi ed., 1988); “Yiguo Liangzhi” Yu Zhongguo Tongyi [“One Country, Two Systems” and China’s Reunification] (*Lianwang zhoukan haiwanban bianjibu* [Editorial Department of the Overseas Edition of *Lianwang Weekly*] eds., 1988); Huang Yi, Xianggang Wenti He Yiguo Liangzhi [The Question of Hong Kong and “One Country, Two Systems”] (1990); Deng Xiaoping On “One Country, Two Systems” (2004); Albert H.Y. Chen, *The Concept of “One Country, Two Systems” and Its Application to Hong Kong*, in *Understanding China’s Legal System: Essays in Honor of Jerome A. Cohen* 353 (C. Stephen Hsu ed., 2003).

<sup>2</sup> See generally *The Basic Law and Hong Kong’s Future* (Peter Wesley-Smith & Albert Chen eds., 1988); Yash Ghai, *Hong Kong’s New Constitutional Order* (2d ed. 1999); Introduction to the Basic Law of the Hong Kong Special Administrative Region (Wang Shuwen ed., 2000); Xiao Weiyun, *One Country, Two Systems: An Account of the Drafting of the Hong Kong Basic Law* (2001); Daniel R. Fung, *Foundation for the Survival of the Rule of Law in Hong Kong – The Resumption of Chinese Sovereignty*, 1 *UCLA J. Int’l L. & Foreign Aff.* 283 (1996).

<sup>3</sup> See Peter Wesley-Smith, *An Introduction to the Hong Kong Legal System* 38-42 (3d ed. 1998); Norman Miners, *The Government and Politics of Hong Kong* 53-61 (5th ed. 1995).

<sup>4</sup> See PETER WESLEY-SMITH, *THE SOURCES OF HONG KONG LAW* 3 (1994); Peter Wesley-Smith, *The Common Law of England in the Special Administrative Region*, in *HONG KONG, CHINA AND 1997: ESSAYS IN LEGAL THEORY* 5 (Raymond Wacks ed., 1993); Peter Wesley-Smith, *The Content of the Common Law in Hong Kong*, in *THE NEW LEGAL ORDER IN HONG KONG* 10 (Raymond Wacks ed., 1999).

<sup>5</sup> See generally 1 Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* 12 (1995); Berry Hsu, *The Common Law in Chinese Context* 7-19 (1992); *Judicial Independence and the Rule of Law in Hong Kong* (Steve Tsang ed., 2001).

<sup>6</sup> See generally *CIVIL LIBERTIES IN HONG KONG* (Raymond Wacks ed., 1988); *HUMAN RIGHTS IN HONG KONG* (Raymond Wacks ed., 1992).

<sup>7</sup> See Albert H.Y. Chen, *Civil Liberties in Hong Kong: Recent Controversies, Evolving Consciousness and Future Legal Protection*, 2 *J. Chinese L.* 137 (1988).

<sup>8</sup> See Lo Shiu-Hing, *The Politics of Democratization in Hong Kong* (1997).

Kong's legal system a Bill of Rights for the purpose of boosting residents' confidence in Hong Kong's future.<sup>9</sup> Since the enactment of the Hong Kong Bill of Rights Ordinance in 1991, the courts of Hong Kong have developed a solid body of case law on the protection of human rights, and have begun to exercise the power of judicial review of legislation.<sup>10</sup> The era of constitutional adjudication thus began in Hong Kong.

After the establishment of the SAR of Hong Kong in 1997, the courts of Hong Kong had to face the new challenges of finding their place in the new constitutional order of "one country, two systems" and leading the new-born Hong Kong SAR forward in its legal and constitutional development. Delicate issues of Hong Kong's constitutional relationship with the central government in Beijing have arisen, which often underscore the contradiction between the Communist Party-led legal system in mainland China and the tradition of judicial independence and the Rule of law in Hong Kong.<sup>11</sup> At the same time, the courts of Hong Kong have to tackle the classic constitutional problem of trying to work out the appropriate balance between individuals' rights on the one hand and public interest on the other hand, and to resolve internal tensions within Hong Kong society generated by conflicting demands among different classes and groups.

This article reviews and evaluates how the Hong Kong courts have responded to this dual challenge of defining Hong Kong's constitutional relationship with Beijing and of defending rights while delineating the limits of these rights. It argues that, considering the inevitable tensions that inhere in the constitutional experiment of "one country, two systems," the record of the Hong Kong courts in dealing with these challenges has thus far been positive. The judiciary, led by the Final Court of Appeal, has chosen the middle path<sup>12</sup> or the "golden mean"<sup>13</sup> between confrontation with and subservience to Beijing, and between judicial activism and judicial restraint. In tackling their relationship with Beijing, the courts have adopted an approach that may be described—in a phrase translated from the Chinese—as "neither too proud nor too humble" (*bukang bubei*). In the domain of human rights, the tenor of the courts' decisions may be described as

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<sup>9</sup> See The Hong Kong Bill of Rights: A Comparative Approach 2 (Johannes Chan & Yash Ghai eds., 1993).

<sup>10</sup> See introductory section in Part II of this article.

<sup>11</sup> See generally Albert H.Y. Chen, An Introduction to the Legal System of the People's Republic of China (3d ed. 2004); Randall Peerenboom, China's Long March Toward Rule of Law (2002).

<sup>12</sup> In the language of Chinese philosophy, such a middle path may be called "*zhongyong zhidao*." *Zhong Yong* (Book of the Mean) is one of the "Four Books" in the Confucian classics. See generally FUNG YU-LAN, A SHORT HISTORY OF CHINESE PHILOSOPHY 43-44, 172-174 (Derk Bodde, ed., 1966).

<sup>13</sup> See, e.g. James S. Hans, The Golden Mean (1994).

moderately liberal—neither radically liberal nor conservative. This article suggests that such a middle path is indeed appropriate in the context of Hong Kong under “one country, two systems.”

This article, including this introduction (Part I), is divided into five parts. Part II examines how the Hong Kong judiciary has contributed to shaping the evolving constitutional relationship between the Hong Kong SAR and the central government in Beijing. Part III considers the role of the Hong Kong courts as guardians of the rights enshrined in the Basic Law. Part IV considers the significance of Hong Kong’s experience in the practice of “one country, two systems” for China as a whole. In Part V, the article will conclude with some general reflections on the work of Hong Kong’s judiciary in constitutional adjudication in the post-1997 era.

## II. THE EVOLVING CONSTITUTIONAL RELATIONSHIP BETWEEN HONG KONG AND BEIJING

This part will begin by explaining the characteristics of the general constitutional framework of “one country, two systems” in which Hong Kong operates. It then reviews in chronological order the major court cases and related constitutional events that have marked the evolving constitutional relationship between Hong Kong and Beijing since the establishment of the Hong Kong SAR. It will conclude with some reflections on the jurisprudence of “one country, two systems” that the Hong Kong courts have developed.

### A. *The Constitutional Framework of “One Country, Two Systems”*

Like federalism, “one country, two systems” (“OCTS”) as practiced in Hong Kong (and also in Macau, a Portuguese colony returned to the PRC in 1999)<sup>14</sup> is a constitutional arrangement under which a local or regional government enjoys autonomy<sup>15</sup> with regard to a specified range of domestic affairs within the region. A legal formula typically divides power between the central or national government on the one hand and the local or regional government on the other hand. The wider the range of domestic affairs within the jurisdiction of the regional government, the higher its degree of autonomy. The more constitutionally entrenched the formula for the division of power, the more secure is the region’s autonomy.

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<sup>14</sup> For the case of Macau, see Yash Ghai, *The Basic Law of the Special Administrative Region of Macau: Some Reflections*, 49 INT’L & COMP. L.Q. 183 (2000).

<sup>15</sup> See generally *Models of Autonomy* (Yoram Dinstein ed., 1981); Hurst Hannum, *Autonomy, Sovereignty and Self-Determination* (1990).

Hong Kong, under OCTS, enjoys a high degree of autonomy. Its autonomy is greater than that enjoyed by states and provinces of federal countries such as the United States, Canada and Australia.<sup>16</sup> Basically, all governmental affairs in the Hong Kong SAR other than defense and foreign affairs are within the scope of the SAR's autonomy. The PRC mainland's criminal and civil laws are not applicable to Hong Kong; Hong Kong does not need to pay any tax to the mainland government; Hong Kong has its own currency, administers its own system of entry and exit controls on persons, is a separate customs territory, and can sign international agreements relating to non-sovereign business. These features suggest that Hong Kong's autonomy far surpasses those of the constituent units of most federal states.

When we turn from the *breadth* of autonomy to the *legal security* of autonomy however, Hong Kong under OCTS does not compare as favorably with states or provinces of the United States, Canada or Australia. This is because the formula for division of power between the central government and the SAR is not entrenched in the PRC Constitution itself. The formula is provided for instead in the Basic Law of the Hong Kong SAR "HKSAR," a law made, and amendable unilaterally<sup>17</sup> by, the National People's Congress ("NPC"), which is the supreme legislative organ of the PRC. Indeed, mainland Chinese scholars prefer to use the language of "delegation of power" by the national government to the SAR rather than that of "division of power" between the national government and the SAR.<sup>18</sup> Furthermore, unlike in the United States, Canada and Australia, there is no national Supreme Court in OCTS that arbitrates and resolves jurisdictional disputes between the national government and the regional government. Instead, the highest authority for the interpretation of the Basic Law, including the formula for division of power embodied in the Basic Law, is the NPC Standing Committee ("NPCSC")<sup>19</sup>—a political or parliamentary institution rather than a Supreme Court or constitutional court staffed by judges and jurists. The lack of legitimacy—in the eyes of many people in Hong Kong, particularly its legal community and a significant segment of its political

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<sup>16</sup> See Yash Ghai, *A Comparative Perspective, in HONG KONG'S BASIC LAW: PROBLEMS AND PROSPECTS* 1, 9 (Peter Wesley-Smith ed., 1990); Chen, *supra* note 1, at 364-365; INTRODUCTION TO THE BASIC LAW, *supra* note 2, at 66-88, 221-239.

<sup>17</sup> It should however be noted that no amendment to the Basic Law has actually been introduced since it came into force. The procedure for its amendment is governed by article 159 of the Basic Law, which in effect prohibits any amendment that contradicts the PRC's "one country, two systems" policies towards the Hong Kong SAR as enshrined in the Sino-British Joint Declaration of 1984.

<sup>18</sup> See, e.g., INTRODUCTION TO THE BASIC LAW, *supra* note 2, at 66-67, 221-223; GANG'AO JIBENFA JIAOCHENG [TEXTBOOK ON THE BASIC LAWS ON HONG KONG AND MACAU] 48, 53, 71 (Xu Chongde ed., 1994).

<sup>19</sup> See generally Chen, *supra* note 11, at 58-59.

elite—of the NPCSC in performing the task of constitutional interpretation has proved to be the major cause of constitutional controversies in post-1997 Hong Kong.

*B. The Ma Wai Kwan Case*

The first of these controversies between the national and regional governments arose at the time of the establishment of the Hong Kong SAR in 1997, and related to the legality of the establishment of the Provisional Legislative Council ("PLC") by the Preparatory Committee for the SAR appointed by the NPCSC. Critics, including pro-democracy politicians<sup>20</sup> in Hong Kong and the influential Hong Kong Bar Association,<sup>21</sup> alleged that the PLC was not lawfully established as it was not provided for in the Basic Law. Since the Basic Law was enacted in 1990 on the assumption that there would be a political "through train" in the sense that the members of the pre-1997 legislature would become members of the first legislature of the SAR,<sup>22</sup> there was no provision for the establishment of the PLC (whose members were chosen by the Preparatory Committee). The PLC was basically a contingency measure to deal with the "derailing" of the through train as a result of political reforms introduced by Governor Chris Patten in the mid-1990's, which Beijing considered to be contrary to the Basic Law and to the understanding reached between the Chinese and British Governments when the Basic Law was enacted in 1990.<sup>23</sup>

The constitutional issues revolving around the PLC were adjudicated shortly after the SAR was established in *HKSAR v. Ma Wai Kwan*,<sup>24</sup> a case decided by Hong Kong's Court of Appeal on July 29, 1997. *Ma Wai Kwan* was a criminal case, where the main issue was whether the common law had

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<sup>20</sup> There are two major camps in Hong Kong politics – the pro-democracy politicians and the pro-China politicians. The former are generally critical of Beijing's policies towards Hong Kong and believe that the Basic Law does not adequately provide for Hong Kong's democratization. See generally Lo, *supra* note 8.

<sup>21</sup> The Bar Association is formed by all barristers in Hong Kong. The professional body of solicitors in Hong Kong is the Law Society of Hong Kong. Hong Kong follows the English system of having a legal profession divided into solicitors and barristers (the latter have the exclusive right of audience before the higher courts of Hong Kong).

<sup>22</sup> See the Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region, enacted at the same time as the enactment of the Basic Law on Apr. 4, 1990 and published together with the Basic Law. The Decision is reproduced in Ghai, *supra* note 2, at 568-569.

<sup>23</sup> See generally BENNY TAI, *The Development of Constitutionalism in Hong Kong*, in *THE NEW LEGAL ORDER IN HONG KONG* 39, 55-58, 67-70 (Raymond Wacks ed., 1999).

<sup>24</sup> *HKSAR v. Ma Wai Kwan*, [1997] H.K.L.R.D. 761 (C.A.). The court judgments in the cases discussed in this article are all available at the website of the Hong Kong Judiciary, <http://legalref.judiciary.gov.hk>.

survived the handover. One of the arguments for the common law's survival was that the PLC had enacted an ordinance<sup>25</sup> which provided for the common law's survival. The question of whether the PLC had been lawfully established therefore arose.

In its judgment the Court of Appeal affirmed the legality of the PLC, pointing out that its establishment was consistent with the text and the purpose of the Basic Law, given the derailing of the through train and the need for an interim legislative authority to exist immediately upon the establishment of the SAR. Another reason given by the court in support of its ruling however, proved to be controversial, and paved the way for a subsequent constitutional crisis during the spring of 1999. The court concluded that as a local or regional court, it had no power to review or overturn an act of a sovereign authority such as the NPC or the NPCSC. It reasoned that article nineteen of the Basic Law maintains but does not enlarge the pre-existing jurisdiction of the Hong Kong courts. As the court could not question the validity of an act of the sovereign before 1997 (such as an Act of Parliament applicable to Hong Kong or the appointment of the Governor of Hong Kong), it likewise could not adjudicate the validity of an act of the NPC or the NPCSC after 1997. This reasoning was however criticized by some commentators<sup>26</sup> on the ground that the colonial analogy regarding the relationship between the imperial government in the metropolitan territory and the overseas colony was inappropriate to the new constitutional order of Hong Kong. Though this analogy may indeed be questionable, it does not necessarily follow that the conclusion reached by the Court of Appeal was wrong. It is indeed doubtful whether a Hong Kong court may strike down an act of the NPC or NPCSC.<sup>27</sup> We shall return to this point later.<sup>28</sup>

A less noticed, but equally if not more important aspect of the *Ma Wa Kwan* case concerns the power of Hong Kong courts to review acts of the Hong Kong legislature. While it accepted the Solicitor General's submission that Hong Kong courts have no power to review the acts of the national legislative organs in Beijing, the Court of Appeal also accepted his argument that since Hong Kong courts had before 1997 enjoyed the power to review

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<sup>25</sup> Hong Kong Reunification Ordinance, No. 110, (1997) 3 O.H.K..

<sup>26</sup> See, e.g., Yash Ghai, Dark Day for Our Rights, *SOUTH CHINA MORNING POST*, July 30, 1997; see also Johannes Chan, The Jurisdiction and Legality of the Provisional Legislative Council, 27 H.K.L.J. 374 (1997).

<sup>27</sup> See generally Albert H.Y. Chen, The Concept of Justiciability and the Jurisdiction of the Hong Kong Courts, 27 H.K.L.J. 387 (1997); Daniel R. Fung and Peter H.H. Wong, Constitutional Law and Litigation in the First Year of the Hong Kong SAR: Past Trends and Future Developments, 28 H.K.L.J. 336 (1998).

<sup>28</sup> See the discussion below of the *Ng Ka Ling* case.



the constitutionality of local legislation (on the basis of the Letters Patent – the colonial constitution), and article nineteen of the Basic Law enables them to retain their former jurisdiction, the courts of the Hong Kong SAR have the “power to determine the constitutionality of SAR-made laws vis-à-vis the Basic Law.”<sup>29</sup> Although this part of the judgment is dicta, it dealt with the most crucial issue in the new constitutional order of Hong Kong, and the proposition it upheld has never been challenged by any party in subsequent cases. In this way, *Ma Wai Kwan* paved the way for subsequent decisions by the Hong Kong courts exercising the power of judicial review of SAR laws alleged to be inconsistent with the Basic Law. The *Ma* case may thus be regarded as the *Marbury v. Madison*<sup>30</sup> of the constitutional history of the Hong Kong SAR.

### C. *The Ng Ka Ling and Chan Kam Nga Cases and Their Aftermath*

#### 1. *The Cases*

The issues of the legality of the PLC and of whether the acts of the Beijing authorities are susceptible to judicial review in Hong Kong came before the Hong Kong courts again—this time the Court of Final Appeal (CFA)—in the case of *Ng Ka Ling v. Director of Immigration*.<sup>31</sup> The CFA was established at the same time as the establishment of the Hong Kong SAR in July 1997,<sup>32</sup> and replaced the Judicial Committee of the Privy Council as the final appellate court in Hong Kong’s legal system. The Basic Law<sup>33</sup> vests the power of final adjudication of all cases litigated in Hong Kong in the CFA; there is no channel of appeal to a mainland Chinese court whereby the CFA’s judgments may be overturned. On January 29, 1999, the CFA rendered its judgments in the cases of *Ng Ka Ling v. Director of Immigration*<sup>34</sup> and *Chan Kam Nga v. Director of Immigration*.<sup>35</sup> In these decisions the CFA attempted to assert its supreme judicial authority as the constitutional guardian of the Basic Law, of Hong Kong’s autonomy and of

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<sup>29</sup> *Ma Wai Kwan*, [1997] 2 H.K.C. 315 at 351.

<sup>30</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>31</sup> *Ng Ka Ling v. Director of Immigration*, [1999] 1 H.K.L.R.D. 315 (C.F.A.).

<sup>32</sup> See the Hong Kong Court of Final Appeal Ordinance, Cap. 484, L.H.K. For the background to the establishment of the court, see Lo Shiu Hing, *The Politics of the Debate over the Court of Final Appeal in Hong Kong*, 161 CHINA QUARTERLY 221 (March 2000).

<sup>33</sup> Arts. 19, 82.

<sup>34</sup> *Ng Ka Ling*, [1999] 1 H.K.L.R.D. 315.

<sup>35</sup> *Chan Kam Nga v. Director of Immigration*, [1999] 1 H.K.L.R.D. 304 (C.F.A.).

the rights of the people of Hong Kong. Unfortunately, the CFA's assertions backfired and ultimately led to Beijing's intervention.

Both *Ng Ka Ling* and *Chan Kam Nga* were appeals to the final appellate court from lower courts by seekers of the "right of abode" in Hong Kong. The applicants were children of Hong Kong permanent residents, but they were born on the mainland. Some were born before their parents became Hong Kong permanent residents; some were born after at least one of their parents became such residents (e.g. the children were born on the mainland to women whose husbands were Hong Kong permanent residents living in Hong Kong); some were illegitimate children. The children claimed the right of abode in Hong Kong under the Basic Law,<sup>36</sup> and argued that the immigration legislation (passed by the PLC)<sup>37</sup> that defined who was entitled to the right (thereby excluding them from entitlement) and regulated the procedures for migration to Hong Kong for settlement was in contravention of the Basic Law. Two controversies resulted from the CFA's decisions in these two cases.

## 2. *The Constitutional Jurisdiction of Hong Kong Courts to Review Acts of the NPC or NPCSC*

The first controversy arose in the context of the CFA's handling of the issue of the legality of the PLC. In *Ng Ka Ling*, the CFA heard arguments that the immigration legislation passed by the PLC was invalid as the PLC itself was not lawfully established. While the CFA reached the same conclusion as the Court of Appeal in *Ma Wai Kwan* regarding the legality of the PLC, it attempted in its judgment to overrule the Court of Appeal's ruling in *Ma* that Hong Kong courts had no jurisdiction to overturn acts of the NPC or NPCSC. The CFA stated in *Ng Ka Ling* that Hong Kong courts have jurisdiction "to examine whether any legislative acts of the National People's Congress or its Standing Committee are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent" (hereinafter called "the Statement").<sup>38</sup> This provoked an immediate strong reaction from mainland China,<sup>39</sup> and led to the SAR Government's

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<sup>36</sup> Basic Law, art. 24(2)(3).

<sup>37</sup> The Immigration Ordinance, Schedule No. 2, (1997), and the Immigration Ordinance, Schedule No. 3 (1997).

<sup>38</sup> *Ng Ka Ling*, [1999] 1 H.K.L.R.D. 315, 337 (C.F.A.).

<sup>39</sup> In a highly publicized seminar reported in Hong Kong and mainland Chinese media on 7 February 1999, four leading Chinese law professors, who were also former members of the Drafting Committee for the Basic Law and the Preparatory Committee for the establishment of the HKSAR, attacked the statement. They suggested that it had the effect of placing Hong Kong courts above the NPC, which is the supreme organ of state power under the Chinese Constitution, and of turning Hong Kong into an "independent

unprecedented and unexpected application to the CFA to “clarify” the relevant part of its judgment. The CFA acceded to the request and stated that (1) the Hong Kong courts’ power to interpret the Basic Law is derived from the NPCSC under article 158 of the Basic Law; (2) any interpretation made by the NPCSC under article 158 would be binding on the Hong Kong courts; and, (3) the judgment of January 29 did not question the authority of the NPC and its Standing Committee “to do any act which is in accordance with the provisions of the Basic Law and the procedure therein.”<sup>40</sup>

### 3. *The Significance of the “Clarification”*

The very act of applying to the CFA for “clarification” was, as of February 1999, the government’s most controversial act in the short constitutional history of the Hong Kong SAR. There was no precedent for such an intervention and the legal basis for the application was dubious.<sup>41</sup> It was clear to everyone in Hong Kong that the application was made entirely because of Beijing’s displeasure with the CFA’s Statement. The application was thus fiercely criticized by outspoken members of the legal community and pro-democracy politicians as a blatant exertion of political pressure on the highest court of Hong Kong.<sup>42</sup>

The application for “clarification” represented the first major test endured by the CFA since its establishment in 1997. The CFA had three options: (a) reject the application and decline to “clarify”; (b) “clarify” by retreating from its original position; or (c) “clarify” without such a retreat. Considering the matter strictly from the legal perspective, there was much to be said for the first option. The political consequences of choosing the first option, however, could have been serious. The “war of words” between Beijing and those in Hong Kong’s legal community defending the CFA’s original Statement could have escalated. It was also conceivable that Beijing might resort to its power of interpretation of the Basic Law in order

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political entity.” After the HKSAR’s Secretary for Justice Elsie Leung’s visit to Beijing on 12-13 February 1999 to discuss the matter, it was reported that Chinese officials had criticized the statement as unconstitutional and called for its “rectification.” See generally HONG KONG’S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION 73 (Johannes M.M. Chan, H.L. Fu & Yash Ghai eds., 2000) [hereinafter HONG KONG’S CONSTITUTIONAL DEBATE].

<sup>40</sup> Ng Ka Ling v. Director of Immigration (No. 2), [1999] 1 H.K.L.R.D. 577 (C.F.A.).

<sup>41</sup> The application was made pursuant to rule 46(1) in part X of the Rules of the Court of Final Appeal. This provision relates to applications for orders and directions on matters of practice and procedure generally, and does not refer specifically to applications for “clarification.” Counsel for Government argued that the CFA had inherent jurisdiction to entertain the application; the CFA agreed with this view. See HONG KONG’S CONSTITUTIONAL DEBATE 91, *supra* note 39.

<sup>42</sup> See, e.g., Yash Ghai, A Play in Two Acts: Reflections on the Theatre of the Law, 29 H.K.L.J. 5 (1999).

to resolve the constitutional issue.<sup>43</sup> On the other hand, by acting pursuant to the second or third option, the CFA could at least take the matter into its own hands, seize the initiative and steer the way forward in an attempt to resolve the crisis. It may be said therefore, that the CFA's rejection of the first option was a sensible course of action in difficult circumstances.

In retrospect, the CFA's "clarification" may be considered a skillful and successful maneuver. The crisp one-page judgment issued by the CFA was ambiguous enough to sustain different interpretations. No one could tell for sure whether the CFA had chosen the second or third option. Both Beijing and Hong Kong's legal communities could read from it what they desired. The CFA's "clarification" was generally understood at the time by Hong Kong's legal community,<sup>44</sup> not as a retreat from the court's original position as defined in its judgment of January 29th, but as a statement rendering explicit what was implicit in its original judgment. The original judgment after all, never attempted to deny the NPCSC's power to interpret the Basic Law. The powers that be in Beijing also seemed satisfied with the "clarification."<sup>45</sup> The "clarification" was, therefore, effective in resolving the constitutional crisis precipitated by the CFA's Statement. The jurisprudential problems at issue, however, are more complicated than suggested by the text of the "clarification" and have remained unresolved.<sup>46</sup> In particular, it is not clear whether the Hong Kong court has jurisdiction to review an act of the NPC or NPCSC when the act is not accompanied by a formal interpretation by the NPCSC stating that the act is compatible with the Basic Law. Conversely, if such an interpretation is made simultaneously with the promulgation of the act, it is clear under the "clarification" that the

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<sup>43</sup> Beijing's power under article 158 to interpret the Basic Law will be discussed below. If an interpretation were made by the NPCSC in response to the CFA's Statement, it was likely that the jurisdiction of the Hong Kong courts would be expressly delineated in the interpretation, and it was difficult to predict at the time to what extent the NPCSC might attempt to curtail the jurisdiction of the Hong Kong courts when it made such an interpretation.

<sup>44</sup> See, e.g., Benny Y.T. Tai, *Chapter 1 of Hong Kong's New Constitution: Constitutional Positioning and Repositioning*, in *CRISIS AND TRANSFORMATION IN CHINA'S HONG KONG* 189, 196 (Ming K. Chan & Alvin Y. So eds., 2002); Yash Ghai, *Litigating the Basic Law: Jurisdiction, Interpretation and Procedure*, in *HONG KONG'S CONSTITUTIONAL DEBATE* 3, 18, *supra* note 39.

<sup>45</sup> On 27 Feb 1999, which was the day following the day of the "clarification", the Legislative Affairs Commission of the NPCSC issued a statement commenting that the "clarification" had been "essential". On the following day, Vice-Premier Qian Qichen made a comment which implied that the constitutional crisis was over. For the full text of the Legislative Affairs Commission's statement, see *HONG KONG'S CONSTITUTIONAL DEBATE* 246, *supra* note 39. See also Albert H.Y. Chen, *Hong Kong's Legal System in the New Constitutional Order*, in *IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA* 213, 230 (Jianfu Chen, Yüwen Li & J.M. Otto eds., 2002).

<sup>46</sup> See Albert H.Y. Chen, *Constitutional Crisis in Hong Kong: Congressional Supremacy and Judicial Review*, 33 *INT'L. LAW.* 1025 (1999); Bing Ling, *Can Hong Kong Courts Review and Nullify Acts of the National People's Congress?* 29 *H.K.L.J.* 8 (1999).

Hong Kong courts will be bound by the interpretation and cannot review the act.

The issue of whether the acts of Beijing authorities are susceptible to review by the Hong Kong courts has so far been merely theoretical. Apart from the abovementioned cases on the legality of the PLC,<sup>47</sup> no case has yet arisen in which any act of the NPC, NPCSC, or any other central government agency has been challenged before a Hong Kong court.<sup>48</sup> There also has been no litigation of the kind common in federal states arising from jurisdictional disputes between the central government and the autonomous regional governments.

This lack of dispute is largely attributable to the fact that under the OCTS arrangement, the SAR's autonomy level is so high that in practice almost every matter (other than defense and foreign affairs on which no controversies have arisen in the short lifespan of the Hong Kong SAR) falls within the SAR's jurisdiction. Furthermore, few acts have actually been performed by the Beijing authorities with regard to Hong Kong in exercise of the former's power under the Basic Law. For example, article seventeen of the Basic Law empowers the NPCSC to nullify any law made by the Hong Kong SAR legislature, but this power has never been exercised. Article eighteen of the Basic Law provides for a short list of mainland Chinese laws (including, for example, the Chinese Nationality Law) which apply to the Hong Kong SAR; mainland laws that are not so listed are inapplicable to Hong Kong. It also empowers the NPCSC to add to the list where necessary. The only laws added to the list after 1997 were the Law on the Exclusive Economic Zone and the Continental Shelf, an uncontroversial law relating to the law of the sea that was made applicable to Hong Kong in December 1998,<sup>49</sup> and the Law on the Immunity Against Judicial Execution of the Property of Foreign Central Banks, another uncontroversial law made applicable to Hong Kong in October 2005.<sup>50</sup>

The "clarification" mentioned above refers to article 158 of the Basic Law. This article—one of the most crucial provisions of the Basic Law—establishes a complex scheme in which both the NPCSC and courts of Hong

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<sup>47</sup> The legality of the PLC was affirmed for reasons other than the non-susceptibility of the Beijing authorities' acts to judicial review in Hong Kong. The term of office of the PLC expired in 1998 when the first legislature of the SAR was duly elected in accordance with the basic law.

<sup>48</sup> The issue nearly arose in the *Ng Kung Siu* case discussed *supra* section B(2) of Part III below, but the CFA managed to avoid it.

<sup>49</sup> Promulgation of National Law 1998, in Government of the Hong Kong Special Administrative Region Gazette, No. 52/1998, Legal Supplement No. 2, L.N. 393 of 1998 (Dec. 24, 1998).

<sup>50</sup> See Decision of the National People's Congress Standing Committee on an Addition to the National Laws Listed in Annex III to the Basic Law of the Hong Kong Special Administrative Region of the PRC dated 27 Oct. 2005, Gazette of the NPC Standing Committee, Nov. 2005.

Kong may interpret the Basic Law. Article 158(1) declares that “[t]he power of interpretation of this Law shall be vested in the NPCSC.” Article 158(2) and (3) authorize the courts of Hong Kong to interpret the Basic Law when adjudicating cases, except that the CFA should refer to the NPCSC for interpretation of relevant Basic Law provisions “concerning affairs which are the responsibility of the Central People’s Government, or . . . the relationship between the Central Authorities and the Region.”<sup>51</sup> The article also mandates consultation with the Basic Law Committee<sup>52</sup> before the NPCSC issues an interpretation, and provides that judgments already given by Hong Kong courts before an NPCSC interpretation will not be affected by that interpretation. This “legislative interpretation,” as it is called in the PRC legal system,<sup>53</sup> only binds the courts when they try cases after the interpretation has been promulgated.

The practical significance of the “clarification,” which also may be considered an inference from the text of the Basic Law itself, is that the Hong Kong courts’ power to interpret the Basic Law and to determine whether it is consistent with acts of government authorities is not absolute. It is not absolute because it is subject to the overriding power of the NPCSC. In the absence of an interpretation by the NPCSC, the Hong Kong courts have full authority to interpret the Basic Law on their own and to decide cases in accordance with their own interpretation. Once the NPCSC has spoken however, the Hong Kong courts must comply. But when can the NPCSC speak? Can it speak only when the CFA asks for its interpretation in accordance with article 158(3) of the Basic Law? Or can it speak even when not asked by the CFA? This question was answered in the course of the second controversy flowing from the CFA’s January 29th decision.

#### 4. *Interpretation by the NPCSC*

The second controversy stemmed from the CFA’s interpretation of articles 24(2)(3) and 22(4) of the Basic Law, and its decision not to refer the latter to the NPCSC for interpretation even though that article seemed to be covered by article 158(3) of the Basic Law. Article 24(2)(3) of the Basic

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<sup>51</sup> Basic Law, art. 158(3).

<sup>52</sup> See the 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 at the same time as the enactment of the Basic Law on Apr. 4, 1990, and published together with the Basic Law. The decision is reproduced in Ghai, *supra* note 2, at 569-70.

<sup>53</sup> See generally Albert H.Y. Chen, *The Interpretation of the Basic Law—Common Law and Mainland Chinese Perspectives*, 30 H.K.L.J. 380 (2000).

Law confers the right of abode in Hong Kong on children born in mainland China of Hong Kong permanent residents.<sup>54</sup> It is ambiguous however as to whether the right is confined to a child of at least one parent who was already a Hong Kong permanent resident at the time of the child's birth ("the narrow interpretation"), or whether it extends also to a child whose parents were not Hong Kong permanent residents at the time of the child's birth, but at least one of the parents subsequently became a Hong Kong permanent resident ("the broad interpretation"). Article 22(4) provides that "people from other parts of China" must apply for approval from the mainland authorities in order to enter Hong Kong. It too is ambiguous however, regarding whether this requirement is only applicable to mainland residents who have no right of abode in Hong Kong under article twenty-four of the Basic Law ("the narrow interpretation") or whether the requirement is also applicable to those mainland residents on whom the right of abode in Hong Kong has been conferred by article 24(2)(3) of the Basic Law ("the broad interpretation").

In the course of the litigation, the Court of First Instance adopted the broad interpretation of article 24(2)(3) and the broad interpretation of article 22(4). The Court of Appeal adopted the narrow interpretation of article 24(2)(3) and the broad interpretation of article 22(4). When the cases were appealed to the CFA, the CFA chose the broad interpretation of article 24(2)(3) and the narrow interpretation of article 22(4). It also decided that article 22(4) need not be referred to the NPCSC for interpretation, because it was not the "predominant provision" to be interpreted in the case. It found the "predominant provision" to be article 24(2), which in the CFA's opinion did not concern the central government's responsibility or the relationship between the central government and the SAR and did not therefore need to be referred to the NPCSC.<sup>55</sup>

On the basis of sample surveys and statistical studies conducted after the CFA's decisions were rendered, the SAR Government estimated that the implementation of articles 24(2)(3) and 22(4) as interpreted by the CFA would mean that Hong Kong would need to absorb a migrant population from mainland China of 1.67 million in the coming decade,<sup>56</sup> imposing a

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<sup>54</sup> Before the Basic Law came into operation on 1 July 1997, such children had no legal entitlement to reside in Hong Kong. See generally IMMIGRATION LAW IN HONG KONG: AN INTERDISCIPLINARY STUDY (Johannes Chan & Bart Rwezaura eds., 2004).

<sup>55</sup> For a criticism of the "predominant provision" approach, see Albert H.Y. Chen, *Ng Ka-ling and Article 158(3) of the Basic Law*, 5 JOURNAL OF CHINESE AND COMPARATIVE LAW 222 (2001-2).

<sup>56</sup> This figure is the sum total of 690,000 (being the "first generation" consisting of children of current Hong Kong permanent residents) and 980,000 (being the "second generation" consisting of children (already born) of the "first generation" who will be entitled to the right of abode after their parents—as

social and economic burden so enormous that Hong Kong would find it hardly endurable. In the Government's opinion however, Hong Kong would not need to bear this burden because the CFA's interpretation of the relevant Basic Law provisions was of dubious validity. The Government argued that although the CFA is the court of final adjudication in Hong Kong, it is not necessarily the final tribunal for the interpretation of the Basic Law, because under article 158(1) of the Basic Law the NPC Standing Committee has the ultimate authority to interpret the Basic Law.

Thus on May 21, 1999, the Chief Executive, Mr. Tung Chee-hwa, requested the State Council to refer the relevant Basic Law provisions to the NPCSC for interpretation.<sup>57</sup> This decision was made in the midst of strong opposition from certain sectors of the community, particularly the legal profession and the pro-democracy politicians. The request was granted, and the NPCSC issued an interpretation on June 26, 1999.<sup>58</sup> The NPCSC adopted the narrow interpretation of article 24(2)(3) and the broad interpretation of article 22(4), the same as those adopted by the Court of Appeal before its decision was overturned by the CFA. The CFA's decision on these points was effectively overruled, although the parties to the litigation were not to be affected by the NPCSC's interpretation.<sup>59</sup> In the text of its decision, the NPCSC also pointed out that the litigation did involve Basic Law provisions concerning the central government's responsibility or the central-SAR relationship. It noted that these issues ought to have been referred to the NPCSC for interpretation by the CFA under article 158(3).

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members of the "first generation"—have migrated to Hong Kong and resided there for seven years). See generally Fung Ho-lup, *The "Right of Abode" Issue: A Test Case of "One Country, Two Systems,"* in "ONE COUNTRY, TWO SYSTEMS" IN CRISIS 97 (Wong Yiu-chung ed., 2004); Albert H.Y. Chen and Anne S.Y. Cheung, *Debating Rule of Law in the Hong Kong Special Administrative Region, 1997-2002*, in *ASIAN DISCOURSES OF RULE OF LAW* 250, 253-260 (Randall Peerenboom ed., 2004).

<sup>57</sup> It should be noted that although art. 158(3) provides for reference by the CFA of a Basic Law provision to the NPCSC for interpretation in certain circumstances, art. 158 does not provide expressly that the Hong Kong SAR Government may request the NPCSC to interpret the Basic Law. Art 158(1) does stipulate however that "[t]he power of interpretation of this Law shall be vested in" the NPCSC.

<sup>58</sup> Government of the Hong Kong Special Administrative Region Gazette Extraordinary, Legal Supplement No. 2, June 28, 1999, p. 1577 (L.N. 167 of 1999).

<sup>59</sup> This is provided for in art. 158(3) of the Basic Law and is also reiterated in the text of the NPCSC's interpretation. The precise scope of application of the interpretation in terms of who were affected by it and who were not was subsequently dealt with by the CFA in *Ng Siu Tung v. Director of Immigration*, [2002] 1 H.K.L.R.D. 561, [2002] 5 H.K.C.F.A.R. 1 (C.F.A.). For a commentary on this case, see Benny Y.T. Tai and Kevin K.F. Yam, *The Advent of Substantive Legitimate Expectations in Hong Kong: Two Competing Visions*, [2002] PUBLIC LAW 688.



### 5. *The Significance of the Interpretation*

The referral to the NPCSC for interpretation was extremely controversial because there is nothing in the Basic Law which suggests that the executive branch of the SAR Government can request the NPCSC to interpret the Basic Law. Furthermore, the reference to the NPCSC was criticized as a self-inflicted blow to Hong Kong's autonomy, judicial authority, Rule of law, and system for protecting individual rights.<sup>60</sup> The SAR Government probably recognized that these were indeed the negative implications of the referral, but decided nevertheless that this price was worth paying as the alternative scenario of absorbing the huge number of migrants from the mainland was even less palatable.

The nature of constitutional judicial review is such that once a Supreme Court or constitutional court has determined the constitutionality of a legislative enactment, this legal position cannot be reversed by ordinary legislative processes. Normally the legal position may be reversed only by a constitutional amendment. Under the constitutional arrangement established by the Basic Law, the Hong Kong legislature has no power to amend the Basic Law—the constitutional instrument of the Hong Kong SAR. Only the NPC has the power to do so.<sup>61</sup> Thus any attempt to reverse the legal position as defined by the CFA in *Ng Ka Ling* and *Chan Kam Nga* regarding the unconstitutionality of existing legislation governing the right of abode would require referral of the matter to Beijing and its cooperation.

From a theoretical point of view, it would have been possible for the Hong Kong Government to propose to Beijing an amendment to the Basic Law in order to address the migration problems generated by the CFA's decisions.<sup>62</sup> There were however, at least two factors which led to this amendment being ruled out.<sup>63</sup> First, the NPC only meets once a year in a spring session lasting several weeks. Thus the earliest an amendment could be enacted was spring 2000. Before this time, existing migrants would have qualified as Hong Kong permanent residents in accordance with the CFA's rulings, and there would also be a flood of new migrants coming to Hong

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<sup>60</sup> See generally HONG KONG'S CONSTITUTIONAL DEBATE, *supra* note 39; Peter Wesley-Smith, *Hong Kong's First Post-1997 Constitutional Crisis*, [1999] LAWASIA J. 24; Lin Feng, *The Constitutional Crisis in Hong Kong—Is It Over?* 9 PAC. RIM L. & POL'Y. J. 281 (2000). Yongping Xiao, *Comments on the Judgment on the Right of Abode by Hong Kong CFA*, 48 AM. J. COMP. L. 471 (2000).

<sup>61</sup> See article 159 of the Basic Law.

<sup>62</sup> Under article 159 of the Basic Law, an amendment may be proposed by either the Beijing side or the Hong Kong side. As far as the latter is concerned, an amendment may be initiated by the Chief Executive acting together with two-thirds of the members of the Hong Kong Legislative Council and two-thirds of the Hong Kong deputies to the NPC.

<sup>63</sup> See Chen, *supra* note 45, at 232-37.

Kong to benefit from the rulings. Secondly, the Beijing authorities were apparently of the view that this was a case in which the CFA should have referred the relevant Basic Law provisions to the NPCSC for interpretation in the first place in accordance with article 158 of the Basic Law. This view is in fact shared by some Hong Kong and overseas academic commentators on the *Ng Ka Ling* case.<sup>64</sup> It therefore made sense to address the problems—problems caused by the CFA's "incorrect" interpretation resulting from its failure to refer the matter to the NPCSC—by utilizing the NPCSC's power of interpretation to "correct" the CFA's interpretation. When all these factors are taken into account, the Government's ultimate decision to refer the matter to the NPCSC could not be considered unreasonable or contemptuous of the Rule of law. It was understandable and to a large extent dictated by the structural constraints inherent in the Basic Law and the Chinese constitutional system.

It should be noted that although the CFA's interpretation of article 24(2)(3) in *Chan Kam Nga* and article 22(4) in *Ng Ka Ling* is no longer good law after the NPCSC interpretation, other parts of the *Ng Ka Ling* judgment still stand because they were not touched by the interpretation. For example, in *Ng Ka Ling* the CFA struck down the part of the Immigration Ordinance<sup>65</sup> which denied the right of abode in the Hong Kong SAR to mainland-born illegitimate children whose fathers were Hong Kong permanent residents. The court held that this provision was inconsistent with the Basic Law as interpreted in light of the International Covenant on Civil and Political Rights which is applicable to Hong Kong under article thirty-nine of the Basic Law. This ruling remains valid and the Hong Kong Government subsequently introduced an amendment<sup>66</sup> to the legislation recognizing the right of abode of such illegitimate children. In addition to this specific ruling, the general approach to the interpretation of the Basic Law enunciated by the CFA in *Ng Ka Ling* remains very much alive and has been relied upon in many subsequent judgments. Thus the "purposive

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<sup>64</sup> See Chen, *supra* note 45, at 222; see also Chen, *supra* note 1, at 362 (see quotation from the testimony given by Professor Jerome Cohen before the Subcommittee on East Asian and Pacific Affairs of the U.S. Senate Foreign Relations Committee on 1 July 1999); see also Jerome Cohen, *Unrealistic Expectations Stir Controversy*, SOUTH CHINA MORNING POST, 6 July 1999 (Includes an edited extract of Professor Cohen's submission to the subcommittee). Professor Yash Ghai also expressed doubt regarding the correctness of the CFA's reasoning behind the failure to refer article 22 of the Basic Law to the NPCSC for interpretation: see his commentary on the *Ng Ka Ling* decision at [1999] 1 H.K.L.R.D. 360, 363-364, and Ghai, *supra* note 42, at 34-35.

<sup>65</sup> See Immigration Ordinance (P.R.C.), Schedule 1, para. 1(2)(b) (introduced by the Immigration (Amendment) (No. 2) Ordinance 1997).

<sup>66</sup> See L.N. 192 of 1999, in Government of the Hong Kong Special Administrative Region Gazette, Legal Supplement No. 2, July 1999.

approach” of constitutional interpretation as well as the approach of giving a “generous interpretation” to those provisions in the Basic Law that provide constitutional guarantees for fundamental rights and freedoms continue to be utilized in Hong Kong.<sup>67</sup>

D. *The Lau Kong Yung Case*

In December 1999, the CFA had the opportunity to determine the effect of the NPCSC’s interpretation on the Hong Kong legal system in the case of *Lau Kong Yung v. Director of Immigration*.<sup>68</sup> In that case seekers of the right of abode argued that the interpretation should be disregarded since it was not issued in response to a request for interpretation by the CFA under article 158(3). This argument was rejected by the court. In a unanimous decision by the five-member court, the CFA held that the interpretation made by the NPCSC in June was binding on the Hong Kong courts. It pointed out that the NPCSC’s power to interpret the Basic Law under article 158(1) of the Basic Law is a “free-standing” one,<sup>69</sup> in the sense that it can be exercised at any time, even in the absence of a reference by the CFA. Any interpretation issued by the NPCSC, whether on its own initiative or upon a reference by the CFA, is thus binding on the Hong Kong courts. Applying the common law approach and English case law, the CFA held that the interpretation had a retroactive effect in the sense that the text of the interpretation states what the legal position should always have been since the Basic Law came into effect. The CFA also acknowledged in *Lau Kong Yung* that since the preamble to the NPCSC interpretation suggests that a referral to the NPCSC for interpretation should have been made by the CFA, it might be necessary for the CFA to re-visit in the future, the test (such as the “predominant provision” test) for determining when such a referral should be made.

Different assessments have been made of the CFA’s “constitutional repositioning”<sup>70</sup> in *Lau Kong Yung*. Professor Jerome Cohen opined that the CFA had moved “from one extreme to the other.” He noted that “instead of again provoking the Central Government [as in *Ng Ka Ling*], [the CFA] unnecessarily prostrated itself before Beijing.”<sup>71</sup> Professor Yash Ghai

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<sup>67</sup> *Ng Ka Ling v. Director of Immigration*, [1999] 1 H.K.L.R.D. 315, 339-40 (C.F.A.).

<sup>68</sup> *Lau Kong Yung v. Director of Immigration*, [1999] 3 H.K.L.R.D. 778 (C.F.A.).

<sup>69</sup> *Id.* at 820.

<sup>70</sup> See Tai, *supra* note 44 (Professor Tai uses this term).

<sup>71</sup> Jerome A. Cohen, *Hong Kong’s Basic Law: An American Perspective* 7, paper presented on April 1, 2000, at the international symposium to commemorate the 10<sup>th</sup> anniversary of the promulgation of the Hong Kong SAR Basic Law organized by the Faculty of Law, University of Hong Kong (on file with author).

discussed “the total capitulation by the Court to the Central Authorities” and “the excessive deference that the CFA has paid to the NPCSC.”<sup>72</sup> On the other hand, Professor Benny Tai suggested that “the CFA did not have much choice,” and that the CFA’s stance in the *Lau* case was consistent with “its constitutional position as the guardian of the rule of law.”<sup>73</sup>

The better view seems to be that the approach adopted by the CFA was the only approach consistent with the NPCSC’s power of interpretation of law under the Chinese Constitution<sup>74</sup> and the Basic Law of the Hong Kong SAR. The power of interpretation is not one that is exercised in deciding a case litigated before a court. It is a legislative power<sup>75</sup> and its exercise is governed by procedures similar to those applicable to law-making by the NPCSC.<sup>76</sup> The effect in practice of the promulgation of an interpretation by the NPCSC is virtually the same as if the law were amended by having the text of the interpretation incorporated into it.<sup>77</sup> Thus, although the NPCSC’s enactment is called an interpretation, it performs the same function as a legislative enactment and does not operate like a court judgment.

Given this system and the language of article 158 of the Basic Law (which does not provide any express limit on the scope of the NPCSC’s power of interpretation), the only conceivable way in which the CFA could have limited the scope of the power of interpretation would be to assert that the Hong Kong court may scrutinize whether an enactment which the NPCSC calls an interpretation of the Basic Law is indeed an interpretation of the Basic Law. However, this would amount to competing with the NPCSC for the power to define the word “interpretation” in article 158 of the Basic Law. Given the way article 158 of the Basic Law was drafted,<sup>78</sup> it would seem that the Hong Kong courts do not have a secure legal basis for

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<sup>72</sup> Yash Ghai, *The NPC Interpretation and Its Consequences*, in HONG KONG’S CONSTITUTIONAL DEBATE 199, 213, *supra* note 39.

<sup>73</sup> Tai, *supra* note 44, at 205 (in Tai’s opinion, the CFA’s approach was deliberately nonprovocative in order to avert actions by the NPCSC to curtail the jurisdiction of the Hong Kong courts, which would further damage the Rule of law in Hong Kong).

<sup>74</sup> Art. 67(4).

<sup>75</sup> See generally Chen, *supra* note 53, at 411-16; Albert H. Y. Chen, *An Introduction to the Legal System of the People’s Republic of China* 118-23 (3d ed. 2004).

<sup>76</sup> See Law on Legislation (*Lifa fa*) enacted by the NPC in 2000, arts. 42-47.

<sup>77</sup> However, the extent to which such an “interpretation” may have retrospective effect has not apparently been settled in mainland Chinese law.

<sup>78</sup> Art. 158(1) of the Basic Law vests the power of interpretation of the Basic Law in the NPCSC, while art. 158(2) provides that the NPCSC “shall authorize” the Hong Kong courts to interpret the Basic Law. As the CFA pointed out in the “clarification” mentioned above, “[t]he courts’ jurisdiction to interpret the Basic Law in adjudicating cases is derived by authorization from the Standing Committee under arts. 158(2) and 158(3).” *Ng Ka Ling v. Director of Immigration* (No. 2) [1999] 1 H.K.L.R.D. 577, 578.

“winning” the competition. It is therefore submitted that the CFA’s approach in *Lau Kong Yung* was adopted not only because—as suggested by Professor Tai—politically the court had no other alternative, but also because this approach was mandated by the structure of the national constitutional system in which the Hong Kong courts are situated. Given the context of “one country, two systems,” it would not have been possible for the Hong Kong CFA to assert the full jurisdiction of a national Supreme Court or constitutional court vis-à-vis the national parliament.

The acknowledgement by the CFA in *Lau Kong Yung*, of the binding authority of the NPCSC interpretation of the Basic Law, even where the interpretation is not made pursuant to a referral by the CFA to the NPCSC, further explicates the position adopted by the CFA in its “clarification” of February 1999. The full implication of article 158 of the Basic Law was now apparent: although the CFA has the power of final adjudication of cases while the NPCSC has no power to decide any case litigated in the Hong Kong courts, the NPCSC, at least in theory, may issue an interpretation of the Basic Law at *any* time, and thereupon the Hong Kong courts must follow such interpretation when they decide cases. It follows that if the NPCSC were to exercise this overriding power frequently, the autonomy and authority of the Hong Kong courts in deciding cases on their own (at least in cases that touch upon an interpretation of the Basic Law) would be severely hampered. Such an erosion of the common law system in Hong Kong would undermine local and international confidence in the Rule of law in Hong Kong.

Fortunately, this has not happened. The NPCSC has practiced a degree of self-restraint in exercising its power of interpretation of the Basic Law. Since its interpretation of 1999, only two other interpretations have been promulgated, one in 2004 on the issue of political reform and democratization in Hong Kong and the Beijing authorities’ role in the process,<sup>79</sup> and one in 2005<sup>80</sup> on the issue of the term of office of the successor to Chief Executive Tung Chee-hwa who resigned in March 2005 before completing his second term of office of 2002-07.<sup>81</sup> The 2004 interpretation was issued on the NPCSC’s own initiative in the absence of any litigation on the matter or any request for interpretation by the Hong Kong Government. The 2005 interpretation was issued at the request of the Hong Kong Government at a time when litigation (to challenge a bill

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<sup>79</sup> See Albert H.Y. Chen, *The Constitutional Controversy of Spring 2004*, 34 H.K.L.J. 215 (2004).

<sup>80</sup> See Albert H.Y. Chen, *The NPCSC’s Interpretation in Spring 2005*, 35 H.K.L.J. 255 (2005).

<sup>81</sup> Mr. Donald Tsang was subsequently elected unopposed as Mr. Tung’s successor.

introduced in the Hong Kong legislature on the Chief Executive's term of office) was pending but before there had been a full trial in any court.

Both interpretations were controversial and were resisted by many prominent figures in the legal community and the pro-democracy camp in Hong Kong. The primary complaints were that the interpretations were motivated by political rather than jurisprudential considerations, and that they actually introduced additional content into the Basic Law and were effectively amendments to the Basic Law that bypassed the amendment procedure stipulated in article 159 of the Basic Law. These criticisms are legitimate. There is much to be said for invoking the amendment procedure to deal with the issues covered by the two interpretations. Even though the ultimate power of amending the Basic Law is in the hands of the NPC, the amendment procedure at least provides for more transparency and room for public debate on the bill containing the proposed amendment.<sup>82</sup> It seems that, as in the case of the 1999 interpretation, the amendment procedure was not adopted in these two cases mainly because an amendment would have had to wait until the next annual meeting of the NPC, while a timely interpretation by the NPCSC could more easily be made, as the latter meets at least once every two months in a session lasting a few days. However, as this article focuses on constitutional adjudication by Hong Kong courts, these issues will not be further explored here.

#### E. *The Chong Fung Yuen Case*

The last major case decided by a Hong Kong court and dealing with the constitutional relationship between the Beijing authorities and the Hong Kong SAR is the CFA's decision in *Director of Immigration v. Chong Fung Yuen*.<sup>83</sup> This case may be said to symbolize the restoration of the self-confidence of the Hong Kong courts after the "trauma" of 1999. Moreover, the aftermath of this case demonstrated the spirit of accommodation and tolerance of the difference between the "two systems" on the part of the mainland authorities. In *Chong Fung Yuen*, the issue was whether, under article 24(2)(1) of the Basic Law, the right of abode in Hong Kong vests in children born in Hong Kong to Chinese parents who are not Hong Kong

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<sup>82</sup> For the lack of transparency and other procedural defects in the current system for interpretation of the Basic Law by the NPCSC, see Ghai, *supra* note 42, at 50-51; Yash Ghai, *The Imperatives of Autonomy: Contradictions of the Basic Law*, in HONG KONG'S CONSTITUTIONAL DEBATES 29, 39-41 (Johannes Chan & Lison Harris eds., 2005); Chen, *supra* note 80, at 263-64.

<sup>83</sup> [2001] 2 H.K.L.R.D. 533 (C.F.A.). The discussion of this case here draws on Albert H.Y. Chen, *The Constitution and the Rule of Law*, in THE FIRST TUNG CHEE-HWA ADMINISTRATION 69, 81-83 (Lau Siu-kai ed., 2002).

residents but who are mainlanders visiting Hong Kong temporarily or illegally staying in Hong Kong. A literal interpretation of article 24(2)(1) would read that such children are Hong Kong permanent residents and enjoy the right of abode. The Preparatory Committee for the SAR in 1996, however, had suggested otherwise when it issued an opinion on the implementation of article 24. In its June 1999 interpretation the NPCSC stated, *inter alia*, that the Preparatory Committee's 1996 opinion "reflected" the "legislative intent" behind article 24(2) of the Basic Law. The question for the CFA in *Chong Fung Yuen* was whether it should follow the views of the Preparatory Committee in this regard, given that such views had been affirmed in the text of the NPCSC's interpretation of 1999.

The CFA's judgment in this case was an emphatic statement that when Hong Kong courts interpret the Basic Law, they should adopt the common law approach to interpretation, and do not need to resort to or otherwise take into account any principle or norm of the mainland legal system. The common law approach gives effect "to the legislative intent as expressed in the language."<sup>84</sup> "Whilst the courts must avoid a literal, technical, narrow or rigid approach, they cannot give the language a meaning which the language cannot bear."<sup>85</sup> Applying the common law approach to interpretation in this case, the CFA held that there was only one possible answer to the legal question raised: the child concerned was entitled to the right of abode in Hong Kong. As for the Preparatory Committee's opinion, since it was issued years after the enactment of the Basic Law, it could hardly be regarded (from the common law perspective) as evidence of the legislative intent behind the Basic Law. The CFA also did not attach any weight to the suggestion in the June 1999 interpretation by the NPCSC that the Preparatory Committee's opinion reflected the legislative intent behind article 24 of the Basic Law. The CFA stressed that this was an interpretation only of articles 22(4) and 24(2)(3) of the Basic Law. It was not an interpretation of article 24(2)(1) of the Basic Law, which was the provision being interpreted in the *Chong Fung Yuen* case. In the absence of any NPCSC interpretation of article 24(2)(1), the CFA was free to apply its own interpretation.

In *Chong Fung Yuen*, the CFA rejected the Government's argument that the interpretation of article 24(2)(1) should be referred to the NPCSC because the "implementation" of the provision would have a "substantive effect" on the relationship between the Hong Kong SAR and the Central

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<sup>84</sup> *Chong Fung Yuen*, 2 H.K.L.R.D. at 546.

<sup>85</sup> *Id.*

Authorities, or on affairs which are the responsibility of the Central Government. The CFA held that in determining whether a referral to the NPCSC should be made, the court is to look at the character of the Basic Law provision concerned rather than the factual determination of the effect of its implementation. Article 24(2)(1) concerns only the right of abode in Hong Kong of persons of Chinese nationality born in Hong Kong and makes no specific reference to the question of whether the parents of such persons are residents of Hong Kong, mainland China, or any other country. Thus, the CFA held that the character of this provision is such that it does not concern the relationship between the Hong Kong SAR and the Central Authorities, or affairs which are the responsibility of the Central Government. On this basis, the court held that article 24(2)(1) need not be referred to the NPCSC. The court considered it unnecessary in this case to re-visit the “predominant provision” test for reference to the NPCSC, which was applied in *Ng Ka Ling* and which is only relevant when more than one Basic Law provision is at issue. The *Chong* case concerned the interpretation of only one Basic Law provision.

The CFA’s decision in *Chong Fung Yuen* was generally applauded by the legal community of Hong Kong,<sup>86</sup> although there was some public concern about pregnant women from the mainland being induced to come to Hong Kong to give birth to their babies. In a very unusual manner not seen since the constitutional crisis of February 1999, Beijing reacted publicly to the decision as well. On July 21, 2001, the morning after the CFA’s decision, a spokesman from the Legislative Affairs Commission of the NPCSC pointed out in a widely reported press statement<sup>87</sup> that the CFA’s decision in *Chong Fung Yuen* was “not consistent” with the NPCSC’s interpretation, and “expressed concern” about the matter. Apart from this terse statement, however, no further action on the matter was taken by the Beijing side. In particular, no interpretation on the issue was issued by the NPCSC.

The statement of July 21, 2001 was an indication that the NPCSC wanted to distance itself from the CFA’s interpretation of article 24(2)(1), and suggested that if the NPCSC had interpreted the provision, it probably would have interpreted it differently. The statement can also be understood as an expression of Beijing’s displeasure about the CFA’s lack of respect for the text of the NPCSC’s interpretation of June 1999, which, after all, did say that the Preparatory Committee’s opinion reflected the legislative intent

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<sup>86</sup> See various Hong Kong newspapers of July 21, 2001, e.g., *Legal Community Praises CFA Realizing Autonomy*, MING PAO (H.K.), July 21, 2001.

<sup>87</sup> The statement was reported in various Hong Kong newspapers on July 22, 2001.



behind the whole of article 24(2). Given these considerations, Beijing's reaction to the *Chong Fung Yuen* decision must be considered a very muted one. Utmost self-restraint was adhered to in order not to undermine the authority of the Hong Kong courts and public confidence in the Rule of law in Hong Kong.<sup>88</sup>

In *Chong*, the CFA implicitly claimed for itself and exercised on its own the power to interpret the text of any NPCSC interpretation in the course of considering whether and how to apply it to a case before the court. It concluded—as a matter of interpretation—that as far as the particular text of June 1999 was concerned, it did not constitute an interpretation of article 24(2)(1) of the Basic Law. This conclusion is well justified on jurisprudential grounds. The title of the June 1999 interpretation is “The Interpretation by the NPCSC of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong SAR.” There is nothing either in the text of the interpretation itself, or in the explanatory speech<sup>89</sup> made by Mr. Qiao Xiaoyang, the official introducing the bill for the interpretation to the NPCSC, that suggests that it constitutes an interpretation of any Basic Law provisions other than articles 22(4) and 24(2)(3).

The CFA in *Chong* relied on a strategy commonly employed by courts in the common law world. Although courts are bound by legislative texts in accordance with the doctrine of separation of powers (putting aside for the moment the question of constitutional judicial review), they jealously guard their power to interpret the text in the course of applying it. Insofar as the text is ambiguous, the courts may resolve the ambiguity in a way they deem appropriate. On the other hand, where the legislature has spoken clearly and the text is unambiguous, the courts must apply the legislative text no matter how much they dislike it. The NPCSC did not make clear that the June 1999 interpretation constituted an interpretation of article 24(2)(1), or for that matter, any of the various limbs of article 24(2) other than article 24(2)(3). Under article 158 of the Basic Law, the Hong Kong courts are only bound by official interpretations issued by the NPCSC. Hence the CFA could legitimately choose to ignore what the NPCSC had said about the Preparatory Committee's views.

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<sup>88</sup> See generally Albert H.Y. Chen, Another Case of Conflict Between the CFA and the NPC Standing Committee?, 31 H.K.L.J. 179 (2001).

<sup>89</sup> For an English translation of the texts of the interpretation and the speech, see HONG KONG'S CONSTITUTIONAL DEBATE, *supra* note 39, at 478-86.

F. *In Conclusion: The Jurisprudence of “One Country, Two Systems”*

The abovementioned cases represent the jurisprudence that has evolved thus far on the constitutional relationship between the Hong Kong SAR and the central governmental authorities in Beijing. Unlike the complex jurisprudence governing the division of power between national and provincial authorities in federal systems, the jurisprudence of “one country, two systems” is relatively simple. The NPCSC has supreme authority over the interpretation of the Basic Law—including Basic Law provisions governing the relationship between Hong Kong and Beijing, as well as provisions pertaining to Hong Kong’s domestic affairs—which it can exercise through the legislative process of interpretation. Whether, when, and how it will exercise this power is not governed by law but is a matter of practice which is, or will hopefully be, governed by evolving constitutional conventions that supplement the written text of the Basic Law.<sup>90</sup>

In the absence of any relevant interpretation by the NPCSC, the courts of Hong Kong are free to interpret the Basic Law on their own when adjudicating cases. In doing this, they adhere to the common law approach of constitutional and statutory interpretation and do not take account of any mainland Chinese approach. Any approaches to or theories underlying the interpretation of the Basic Law that may be implicit in the interpretations issued thus far by the NPCSC will not affect how Hong Kong courts interpret the Basic Law. Interpretations of the Basic Law by the NPCSC operate in practice as legislative amendments to the Basic Law that nevertheless have the same retroactive effect as interpretations of the law contained in decisions by a common law court.<sup>91</sup> The NPCSC’s interpretations have the same force as legislation once they are issued, but they cannot overturn any court judgment as far as the rights and interests of the parties to the litigation are concerned.

Faced with the constitutional crisis that followed the CFA’s twin decisions of January 29, 1999, the Hong Kong courts under the CFA’s leadership have not attempted to resist or limit the authority of the NPCSC

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<sup>90</sup> As pointed out by Jennings, “constitutional conventions . . . provide the flesh which clothes the dry bones of the law; they make the legal constitution work.” Ivor Jennings, *THE LAW AND THE CONSTITUTION* 81-82 (5th ed. 1979). For constitutional conventions in colonial Hong Kong, see Wesley-Smith, *supra* note 5, at 6-8. For constitutional conventions in post-1997 Hong Kong, see Sonny Shiu Hing Lo, *The Emergence of Constitutional Conventions in the Hong Kong Special Administrative Region*, 35 *H.K.L.J.* 103 (2005).

<sup>91</sup> When a common law court interprets the meaning of a statutory provision, the provision is taken to have always meant (from the time of its enactment) what the court now says it means. In this sense a judicial decision has retroactive effect. It declares what the legal position has always been since the statutory provision (now interpreted) was enacted.

to interpret the Basic Law, nor even the right of the Hong Kong SAR Government to request an NPCSC interpretation in the absence of an express Basic Law provision authorizing the SAR Government to do so.<sup>92</sup> That does not mean, however, that the Hong Kong judiciary has betrayed the ideal of “one country, two systems” or has let it be turned into “one country, one system.” While accepting the authority of the NPCSC to promulgate interpretations of the Basic Law, which (putting aside the issue of how article 158 should be interpreted, as argued in *Lau Kong Yung*) it is empowered to do under the PRC Constitution,<sup>93</sup> the Hong Kong courts have developed a jurisprudence of treating such interpretations as no more than legislative pronouncements. The courts have retained and continue to exercise the authority to interpret the Basic Law in accordance with those principles of interpretation that they themselves choose to adopt, so long as the relevant Basic Law provision has not been interpreted by the NPCSC. Furthermore, they have retained and continue to exercise the authority to interpret the meaning, scope, and effect of any NPCSC interpretation of the Basic Law, and to apply it to concrete cases, just as they have the authority to interpret any law in force in Hong Kong and to apply it to concrete cases. Thus, when it comes to what fate befalls the litigant in a particular case, the Hong Kong courts still have the last word.

### III. THE RIGHTS AND LIBERTIES OF HONG KONG PEOPLE

This part will begin by explaining the history of the development of the constitutional framework for the protection of civil liberties and human rights in Hong Kong. It will then review the leading cases decided by the Hong Kong courts since 1997 on several key domains of human rights, including freedom of speech and expression, freedom of assembly and procession, and the right to equality and non-discrimination. It will

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<sup>92</sup> Both the interpretations of 1999 and 2005 were requested by the Hong Kong SAR Government by submitting a report to China’s State Council, which in turn requested the NPCSC to make an interpretation. In each case the SAR Government purported to rely on articles 43 and 48(2) of the Basic Law as the legal basis for the submission of the report to the State Council. (Article 43 provides, *inter alia*, that the Chief Executive of the Hong Kong SAR shall be accountable to the Central People’s Government (which, according to article 85 of China’s Constitution, is the State Council) and the Hong Kong SAR. Article 48(2) provides that the Chief Executive shall be responsible for the implementation of the Basic Law and other laws which apply in Hong Kong. For an English translation of the full text of the Chief Executive’s report to the State Council in 1999, see HONG KONG’S CONSTITUTIONAL DEBATE, *supra* note 39, at 474-77.) On the other hand, the NPCSC interpretation of 2004 was not requested by the Hong Kong SAR Government but was initiated by the Council of Chairpersons of the NPCSC itself.

<sup>93</sup> Article 67(4) of the Constitution empowers the NPCSC to interpret any law. It also has the power to interpret the Constitution itself under article 67(1).

conclude with some reflections on the human rights jurisprudence developed by the Hong Kong courts in the post-1997 era.

A. *Historical Background and Constitutional Framework*

Apart from managing the relationship between different governmental organs, the other major task of constitutional adjudication is to safeguard the human rights and civil liberties of citizens and other individuals in the state. As mentioned in the introductory section of this article, since the enactment of the Hong Kong Bill of Rights in 1991, the courts of Hong Kong have practiced the art of reviewing the compatibility of executive acts and legislation with constitutional guarantees of human rights. Their work in this regard has seen further progress in the post-1997 era. The Basic Law has proved to be even more potent than the Hong Kong Bill of Rights in facilitating constitutional challenges by way of judicial review.

Hong Kong's pre-1997 constitution<sup>94</sup> was contained in the Letters Patent issued by the British Crown.<sup>95</sup> Before the 1991 amendment of the Letters Patent, the Hong Kong courts in theory enjoyed the power to review the constitutionality of local legislation, but in practice never had the opportunity to exercise that power.<sup>96</sup> This was because the rudimentary Letters Patent did not contain any guarantee of civil liberties or human rights, nor did it set up any system of division of power as between the colonial government and the metropolitan government.

In light of this background, what happened in 1991 can be regarded as the first constitutional revolution in Hong Kong—the second being, of course, the reversion to Chinese rule and the commencement of the operation of the Basic Law in 1997 (which involved a shift in the *Grundnorm*).<sup>97</sup> In 1991, in an attempt to restore confidence in Hong

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<sup>94</sup> The discussion here draws on Chen, *supra* note 53, at 417-20.

<sup>95</sup> See generally Miners, *supra* note 3, ch. 5; Wesley-Smith, *supra* note 5, ch. 2.

<sup>96</sup> See generally Wesley-Smith, *supra* note 5, at 96-105; Ghai, *supra* note 2, at 305-06. There were however a few cases in which the Hong Kong courts were called upon to interpret the provisions of the Letters Patent: see Peter Wesley-Smith, *Constitutional Interpretation*, in *HONG KONG'S TRANSITION* 51, 69-70 (Peter Wesley-Smith ed., 1993). The leading case in this regard is *Rediffusion (Hong Kong) v. Attorney-General of Hong Kong* [1970] A.C. 1136. See also Peter Wesley-Smith, *Legal Limitations upon the Legislative Competence of the Hong Kong Legislature*, 11 H.K.L.J. 3 (1981).

<sup>97</sup> The concept of the "*Grundnorm*" (a German word) was developed by the legal philosopher Hans Kelsen for the purpose of analyzing the structure of a legal system. For its application to the Hong Kong context, see generally Albert H.Y. Chen, *The Provisional Legislative Council of the SAR*, in 27 H.K.L.J. 1, 9-10 (1997); Albert H.Y. Chen, *Continuity and Change in the Legal System*, in *THE OTHER HONG KONG REPORT* 1998, 29, 30 (L.C.H. Chow and Y.K. Fan eds., 1999).

Kong's future which had been deeply shaken by the Tiananmen incident,<sup>98</sup> the Hong Kong Government enacted the Hong Kong Bill of Rights Ordinance ("Ordinance").<sup>99</sup> The Ordinance incorporated into the domestic law of Hong Kong, the provisions of the International Covenant on Civil and Political Rights ("I.C.C.P.R.") which had already been applied by the British to Hong Kong on the level of international law since 1976. The Ordinance expressly repealed all pre-existing legislation that was inconsistent with it.<sup>100</sup> At the same time, the Letters Patent were amended to give the I.C.C.P.R. supremacy over future ordinances enacted by the colonial legislature.<sup>101</sup> As the Court of Appeal explained in 1994:

The Letters Patent entrench the Bill of Rights by prohibiting any legislative inroad into the International Covenant on Civil and Political Rights as applied to Hong Kong. The Bill is the embodiment of the covenant as applied here. Any legislative inroad into the Bill is therefore unconstitutional, and will be struck down by the courts as the guardians of the constitution.<sup>102</sup>

The Bill of Rights and the corresponding amendment to the Letters Patent inaugurated the era of judicial review of legislation on the basis of constitutional guarantees of human rights. The case law developed by Hong Kong courts during this period has been well documented.<sup>103</sup> It demonstrates that Hong Kong courts had acquired considerable experience in judicial review of the constitutionality of legislation by the time the Basic Law came into force in July 1997. They had introduced into Hong Kong law basic principles of constitutional review such as the principles of rationality and proportionality. They had also adopted the approach to constitutional interpretation advocated by the Privy Council in cases such as

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<sup>98</sup> See generally Albert H.Y. Chen, *The Suppression of China's Democracy Movement and Hong Kong's Future*, 19 H.K.L.J. 283 (1989); Albert H.Y. Chen, *The Basic Law, the Bill of Rights and the British Citizenship Scheme*, 20 H.K.L.J. 145 (1990).

<sup>99</sup> Cap. 383, L.H.K. See generally HONG KONG'S BILL OF RIGHTS (Raymond Wacks ed., 1990); THE HONG KONG BILL OF RIGHTS, *supra* note 9; HUMAN RIGHTS IN HONG KONG, *supra* note 6; Hong Kong Bill of Rights Ordinance, No. 59 (1999).

<sup>100</sup> Hong Kong Bill of Rights Ordinance, No. 59, (1999) § 3.

<sup>101</sup> The amendment related to article VII of the Letters Patent. See THE HONG KONG BILL OF RIGHTS, *supra* note 9, at 539-540.

<sup>102</sup> R v. Chan Chak Fan [1994] 3 H.K.C. 145, 153 (C.A.).

<sup>103</sup> Yash Ghai, *Sentinels of Liberty or Sheep in Wolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights*, 60 MOD. L. REV. 459 (1997); Johannes M.M. Chan, *Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence*, 47 I.C.L.Q. 306 (1998); Andrew Byrnes, *And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights*, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES (Philip Alston ed., 2000).

*Minister of Home Affairs v. Fisher*<sup>104</sup> and *Attorney General of the Gambia v. Jobe*,<sup>105</sup> which was to give provisions on rights “a generous and purposive construction”<sup>106</sup> and to avoid “the austerity of tabulated legalism.”<sup>107</sup> Generally speaking, the courts were more activist in judicial review in the early history of the Bill of Rights litigation, but subsequently leaned towards judicial restraint.<sup>108</sup>

It is noteworthy that the legitimacy of judicial review in Hong Kong in this era was never queried. It was evident that the kind of “counter-majoritarian difficulty”<sup>109</sup> that constitutional theorists encounter in the United States and other liberal democratic states was not relevant to colonial Hong Kong. In the early 1990s, Hong Kong was just beginning its journey of democratization, with the first ever direct election on the basis of universal suffrage introduced in 1991 (the 1985 and 1988 elections were both on the basis of “functional constituencies” only).<sup>110</sup> Most laws on the books had been enacted by a legislature that consisted solely of members appointed by the Governor. In these circumstances, the use by the judiciary (though predominantly expatriate)<sup>111</sup> of international and comparative human rights jurisprudence to review the constitutional validity of Hong Kong laws could only be a welcomed phenomenon for the local community.

Although the colonial constitution embodied in the Letters Patent lost its force when the Hong Kong SAR was established, article eight of the Basic Law provides for the continued validity of laws previously in force in Hong Kong that are consistent with the Basic Law, subject to any amendment by the SAR legislature. Under article 160 of the Basic Law, the NPCSC may declare which of Hong Kong’s pre-existing laws contravene the Basic Law and cannot therefore survive the 1997 transition. This declaration was made by the NPCSC on February 23, 1997, in its Decision

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<sup>104</sup> [1980] A.C. 319.

<sup>105</sup> [1984] A.C. 689.

<sup>106</sup> *Jobe*, A.C. 689 at 700.

<sup>107</sup> *Fisher*, A.C. 319 at 328.

<sup>108</sup> Professor Andrew Byrnes stated “After an initial period of expansive rhetoric, reasonably generous interpretations of the Bill of Rights, and a preparedness on the part of the courts to subject legislative and executive decisions to substantive scrutiny, the trend has been towards a more conservative and parochial approach to interpretation of the Bill of Rights, with an increasing reluctance on the part of the courts to subject the legislature and executive to meaningful scrutiny against the standards of the Bill.” Byrnes, *supra* note 103, at 352.

<sup>109</sup> See generally Alexander M. Bickel, *The Least Dangerous Branch; The Supreme Court at the Bar of Politics*, 16-18 (1962).

<sup>110</sup> On the developing political and electoral system in Hong Kong, see Lo, *supra* note 8; ALVIN Y SO, *HONG KONG’S EMBATTLED DEMOCRACY* (1999).

<sup>111</sup> See generally Peter Wesley-Smith, *The Judiciary*, in *INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM* (Mark S. Gaylord & Harold Traver eds., 1994); Ghai, *supra* note 2, ch. 8.

on the Treatment of the Laws Previously in Force in Hong Kong.<sup>112</sup> The Decision declared, *inter alia*, the non-adoption of three interpretative provisions in the Hong Kong Bill of Rights Ordinance,<sup>113</sup> apparently on the ground that they purported to give the Ordinance a superior status over other Hong Kong laws, a mandate that is inconsistent with the principle that only the Basic Law is superior to other Hong Kong laws.

The operative force of the Hong Kong Bill of Rights and the Hong Kong courts' power of judicial review of legislation on human rights grounds have survived the non-adoption of these provisions in the Hong Kong Bill of Rights Ordinance. This is clear from the case law of the post-1997 era, particularly the CFA's decisions in *Ng Kung Siu* (on the freedom of expression) and *Leung Kwok Hung* (on the freedom of assembly and procession) discussed below. The Hong Kong courts' post-1997 approach to human rights protection, which has not been challenged by litigants or their lawyers in any case and thus represents the consensus of the legal community in Hong Kong, is basically as follows. The courts may review any legislative or executive action for violations of the human rights guaranteed by Chapter III of the Basic Law or by the I.C.C.P.R. (the applicable provisions of which have, as mentioned above, been reproduced in the Hong Kong Bill of Rights) which is given effect by article thirty-nine of the Basic Law. The courts<sup>114</sup> have interpreted article thirty-nine to mean that the relevant provisions override laws that are inconsistent with these provisions. In this regard reliance has been placed on article eleven of the Basic Law, which provides: "No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law."

The net effect of the commencement of the operation of the Basic Law in July 1997 and the Hong Kong courts' interpretation of its judicial

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<sup>112</sup> For an English translation of this decision, see Albert H. Y. Chen, Legal Preparation for the Establishment of the Hong Kong SAR: Chronology and Selected Documents, 27 H.K.L.J. 419 (1997).

<sup>113</sup> The interpretive provisions concerned were sections 2(3), 3 and 4 of the Ordinance. Section 2(3) provides that "[i]n interpreting and applying this Ordinance, regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong of provisions of" the I.C.C.P.R. Section 3 provides that "[a]ll pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction"; "[a]ll pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed." Section 4 provides that "[a]ll legislation enacted on or after the commencement date [of this Ordinance] shall, to the extent that it admits of such a construction, be construed so as to be consistent with" the I.C.C.P.R. For the effect of the non-adoption of these provisions, see Peter Wesley-Smith, *Maintenance of the Bill of Rights*, 27 H.K.L.J. 15 (1997); Johannes Chan, *The Status of the Bill of Rights in the Hong Kong Special Administrative Region*, 28 H.K.L.J. 152 (1998).

<sup>114</sup> The relevant cases are discussed below.

review power under the Basic Law has been a broadening of the grounds on which legislative and executive actions may be challenged by way of judicial review. After 1991, but before 1997, it was possible to launch such a challenge on the basis of the provisions of the Hong Kong Bill of Rights, which are identical to those provisions of the I.C.C.P.R. that are applicable to Hong Kong. After 1997, a challenge may still be launched on this basis, but in addition, a challenge may also be based on other provisions of the Basic Law, particularly those which confer rights that are not expressly or adequately provided for in the I.C.C.P.R., such as the right of abode<sup>115</sup> or the right to travel.<sup>116</sup> In this section of the article, several leading cases on rights and liberties decided by the Hong Kong courts in the post-1997 era will be discussed in order to elucidate the courts' approach to the constitutional protection of human rights in the context of "one country, two systems."

### *B. Freedom of Speech and Expression*

Freedom of speech and expression is one of the most fundamental civil liberties of the modern world. It often provides a litmus test of the extent to which a society is free and open. Hong Kong had the good fortune of being one of the freest societies in Asia during the pre-1997 decades of British colonial rule. Free speech continued to flourish in the Hong Kong SAR after its establishment in 1997. The following cases, which are the leading cases since 1997, illustrate how the courts have tackled the constitutional task of delineating the boundaries of free speech. They will be briefly introduced in chronological order.

#### *1. The Press Freedom Case*

In *Wong Yeung Ng v. Secretary for Justice*,<sup>117</sup> Wong was the chief editor of *Oriental Daily News*, a popular newspaper which, at the time, had captured 53% of the newspaper market in Hong Kong. He was convicted on two counts of contempt of court and sentenced to four months'

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<sup>115</sup> Leading cases on the right of abode other than those mentioned above include *Tam Nga Yin v. Director of Immigration*, [2001] 2 H.K.L.R.D. 644 (C.F.I.); *Fateh Muhammad v. Commissioner of Registration*, [2001] 2 H.K.L.R.D. 659 (C.A.), [2001] 4 H.K.C.F.A.R. 278 (C.F.A.); *Prem Singh v. Director of Immigration*, [2003] 1 H.K.L.R.D. 550 (C.F.I.), (2003) 6 H.K.C.F.A.R. 26 (C.F.A.).

<sup>116</sup> Leading cases on the right to travel include *Gurung Kesh Bahadur v. Director of Immigration*, [2002] 2 H.K.L.R.D. 775 (C.F.A.), [2002] 5 H.K.C.F.A.R. 480 (C.F.A.) *Director of Immigration v. Lau Fong*, [2004] 2 H.K.L.R.D. 204 (C.F.I.), [2004] 7 H.K.C.F.A.R. 56 (C.F.A.). For a commentary on the *Bahadur* case and its significance (particularly in terms of the standards for reviewing restrictions to rights provided for in the Basic Law), see Simon N. M. Young, *Restricting Basic Law Rights in Hong Kong*, 34 H.K.L.J. 109 (2004).

<sup>117</sup> [1999] 2 H.K.L.R.D. 293 (C.A.).



imprisonment.<sup>118</sup> He appealed to the Court of Appeal and challenged the contempt of court law under which he was convicted on the ground that it violated the constitutionally protected freedom of expression and freedom of press. The two counts of contempt of court related respectively to a series of articles vehemently attacking the judiciary in abusive and scurrilous language (for biased decisions against and political persecution of the *Oriental Daily* newspaper) published in the newspaper in December 1997 and January 1998, and a 24-hour “paparazzi” type pursuit and surveillance of a High Court judge conducted by reporters and photographers of the newspaper for three consecutive days in January 1998 (purportedly to “educate” the judge on the meaning of “paparazzi” which the judge had allegedly referred to in his judgment on a case involving the *Oriental Daily* and to “punish” him for the judgment). The grievances the newspaper had against the judiciary stemmed from decisions of the Obscene Articles Tribunal and other courts against the newspaper regarding its publication of obscene and indecent materials. There had also been a judicial decision unfavorable to the newspaper in a civil suit in which the Oriental Press Group sued *Apple Daily*—its main competitor—for copyright violation when the latter re-printed a photo published by Oriental. The photo was of the singer Faye Wong revealing that she was pregnant, and was taken by an *Oriental Daily* reporter clandestinely at the airport in Beijing.

Wong’s appeal was dismissed unanimously by the three-member bench of the Court of Appeal in February 1999. It was pointed out that although the Basic Law, the I.C.C.P.R. and the Hong Kong Bill of Rights protect freedom of expression, one of the grounds recognized by the I.C.C.P.R. and the Bill of Rights on which this freedom may be limited, is that of “public order (*ordre public*).”<sup>119</sup> The court held that this concept is wide enough to cover the due administration of justice and the maintenance of the authority of the judiciary. The court further held that the restrictions on freedom of expression imposed by the contempt of court law—in particular, those portions of the law that prohibit “scandalizing the court” and interference with the administration of justice as a continuing process—are justified and not inconsistent with the I.C.C.P.R. standards for freedom of expression. The court followed New Zealand case law<sup>120</sup> (rather than the different Canadian case law<sup>121</sup>) in holding that contempt is committed when

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<sup>118</sup> Secretary for Justice v. Oriental Press Group Ltd., [1998] 2 H.K.L.R.D. 123 (C.F.I.).

<sup>119</sup> The French term “*ordre public*” forms part of the text of the relevant provisions in the I.C.C.P.R. and the Hong Kong Bill of Rights.

<sup>120</sup> Particularly Solicitor-General v. Radio Avon Ltd., [1978] 1 N.Z.L.R. 225 (C.A.).

<sup>121</sup> Particularly R. v. Kopyto, [1988] 47 D.L.R. 213.

the publication or action entails a “real risk” (as distinguished from “real, substantial and immediate danger” as suggested by the Canadian case law) that public confidence in the administration of justice will be undermined or the administration of justice will be interfered with. The court stressed that in determining what constitutes contempt of court and in choosing between varying interpretations of foreign case law, the local circumstances of Hong Kong should be taken into account. In this regard, the court referred to “the relatively small size of Hong Kong’s legal system,” the ease of “communication with a very substantial proportion of the population,” the “special importance” in Hong Kong of “confidence in our legal system, the maintenance of the rule of law and the authority of the court,” the “frequent, if misconceived, expressions of anxiety in this respect,” and the fact that “the ordinary citizen in Hong Kong regards the court as his ultimate and sure refuge from injustice and oppression.”<sup>122</sup>

Although the court decided against Wong in this case and chose to follow the more conservative New Zealand approach rather than the more liberal Canadian approach to the law of contempt of court, this case was not a deliberate attempt to restrict freedom of the press in post-1997 Hong Kong. The decision is explicable on the particular facts of the case, in which a coordinated and sustained campaign was launched by a newspaper to discredit the Hong Kong judiciary and to put pressure on individual judges. The “paparazzi” type pursuit of the judge clearly went far beyond acceptable norms of journalist behavior. On the other hand, it may be questioned whether the court was too harsh in holding that the publication of the relevant articles in the newspaper also constituted contempt. It is arguable that Hong Kong should follow Canadian and American law in this regard and allow greater freedom to criticize the courts. By restricting the freedom to publish attacks on the judiciary in abusive and scurrilous language, the *Wong* case has indeed drawn a legal limit to possible criticisms of the judicial branch in Hong Kong. On the other hand, it should be noted that in the post-1997 era, Hong Kong courts have never silenced criticisms of the executive or legislative branches of government, and the law of defamation has never been invoked by government officials against their critics.

## 2. *The Flag Desecration Case*

Later in the year, in December 1999—the month the CFA in *Lau Kong Yung* determined the effect of the NPCSC interpretation of June 1999—the CFA gave judgment in probably the most theoretically significant

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<sup>122</sup> Wong Yeung Ng v. Secretary for Justice, [1999] 2 H.K.L.R.D. 293, 313 (C.A.).

constitutional case on civil liberties and human rights in the legal history of the Hong Kong SAR thus far. In *HKSAR v. Ng Kung Siu*,<sup>123</sup> the defendants had participated in a demonstration in Hong Kong for democracy in China during which they displayed a defaced national flag (of the PRC) and a defaced regional flag (of the SAR). They were subsequently charged with violations of section seven of the National Flag and National Emblem Ordinance and section seven of the Regional Flag and Regional Emblem Ordinance. These sections prohibit desecration of the national and regional flags and emblems. The former section was basically reproduced from article nineteen of the PRC Law on the National Flag and article thirteen of the PRC Law on the National Emblem.<sup>124</sup> These two PRC laws were listed in Annex III to the Basic Law as among those mainland laws that are applicable to Hong Kong under article eighteen of the Basic Law.<sup>125</sup>

The defendants were convicted by the magistrate; they were neither fined nor imprisoned, but bound over<sup>126</sup> to keep the peace on a recognizance of HK\$2000 for each of the two charges for 12 months. They successfully appealed against their conviction before the Court of Appeal. The court held that the sections under which they were charged were contrary to the guarantee of freedom of expression in article nineteen of the I.C.C.P.R. as applied by article thirty-nine of the Basic Law. In the court's opinion, the prohibition of desecration of the national or regional flag, being a restriction on freedom of expression, cannot be justified by any necessity to protect "public order (*ordre public*)."<sup>127</sup>

The Government appealed the case to the CFA, which rendered its judgment on December 15, 1999. The CFA unanimously allowed the appeal, and the impugned ordinances were upheld as constitutional and valid. The CFA pointed out that the national and regional flags are important and unique symbols of the nation and of the Hong Kong SAR respectively. The court noted that the objective behind the flag desecration laws was to

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<sup>123</sup> [1999] 3 H.K.L.R.D. 907 (C.A.), [1999] 2 H.K.C.F.A.R. 442 (C.F.A.). The following discussion draws on Albert H.Y. Chen, *Hong Kong's Legal System in the New Constitutional Order: The Experience of 1997-2000*, in IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA 213, 219-20 (Jianfu Chen, Yuwen Li & Jan Michiel Otto eds., 2002).

<sup>124</sup> See also the Criminal Code of the PRC, art. 299.

<sup>125</sup> See Promulgation of National Laws (No. 2) 1997, in Government of the Hong Kong Special Administrative Region Gazette, No. 1/1997, Legal Supplement No. 2, p. B119 (L.N. 386 of 1997).

<sup>126</sup> For the practice of "binding over," see Wesley-Smith, *supra* note 5, at 26-27.

<sup>127</sup> Both the English and French expressions appear in the text of article 19 of the I.C.C.P.R. The Court of Appeal in its judgment referred to two decisions of the United States Supreme Court to the effect that the criminalization of flag desecration violates the "free speech" clause in the U.S. Constitution and is unconstitutional: *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990). Each of these cases was decided by a majority of 5 to 4 in the Supreme Court and was extremely controversial in the United States.

uphold the societal and community interests in the protection of the flags. Such protection was held to fall within the concept of “*ordre public*” as used in the I.C.C.P.R. The CFA concluded that the court below adopted too narrow a conception of “*ordre public*” which, in the context of the I.C.C.P.R., is not confined to the common law notion of maintaining law and order. The CFA determined that “*ordre public*” should be construed more broadly to embrace notions of the “general welfare” and the “interests of the collectivity as a whole.”<sup>128</sup> This conception of the public order is “an imprecise and elusive one,” and “must remain a function of time, place and circumstances.”<sup>129</sup>

The next questions for the CFA were whether the flag desecration laws impose restrictions on the freedom of expression, and, if so, whether such restrictions can be justified on the ground that they are necessary for the protection of “*ordre public*” and proportionate to the objective sought to be achieved. Here the court held that flag desecration is indeed “a form of non-verbal speech or expression,”<sup>130</sup> and the impugned laws do constitute a restriction thereon. The court pointed out however, that such restriction is only applicable to a particular mode of expression (i.e. flag desecration); the same message which the actor wants to express could still be freely expressed by other modes.<sup>131</sup> It was therefore concluded that the “necessity” and “proportionality” tests had been satisfied.<sup>132</sup>

It is noteworthy that the CFA took into account separation of powers considerations in its decision (e.g. giving “due weight to the view of the HKSAR legislature that the enactment of the National Flag Ordinance ... is appropriate for the discharge of the Region’s obligation to apply the national law arising from its addition to Annex III [to the Basic Law] by the Standing Committee”<sup>133</sup>). At the same time, the court stressed the importance of considerations of “time, place and circumstances”:

The intrinsic importance of the national flag and the regional flag to the HKSAR as such unique symbols is demonstrated by the fact that at the historic moment on the stroke of midnight on 1 July 1997, the handover ceremony in Hong Kong to mark the People’s Republic of China’s resumption of the exercise of sovereignty over Hong Kong began by the raising of the

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<sup>128</sup> HKSAR v. Ng Kung Siu, 2 H.K.C.F.A.R. at 459 (C.F.A.).

<sup>129</sup> *Id.* at 460.

<sup>130</sup> *Id.* at 455.

<sup>131</sup> *Id.* at 456.

<sup>132</sup> *Id.* at 460-61.

<sup>133</sup> *Id.* at 460, 467.

national flag and the regional flag. . . . Hong Kong is at the early stage of the new order following resumption of the exercise of sovereignty by the People's Republic of China. The implementation of the principle of "one country, two systems" is a matter of fundamental importance, as is the reinforcement of national unity and territorial integrity. Protection of the national flag and the regional flag from desecration, having regard to their unique symbolism, will play an important part in the attainment of these goals.<sup>134</sup>

Apart from its decision to uphold the flag desecration law, *Ng Kung Siu* is also significant because the CFA reaffirmed the power of the Hong Kong courts to review the constitutionality of Hong Kong legislation on human rights grounds, and, if necessary, to strike down such legislation. Although no legislation was actually struck down by the CFA in this case, the constitutional review power that it has authoritatively affirmed is a potent one.

The day the CFA delivered its judgment in *Ng Kung Siu* was a moment of great constitutional importance. The case must have been extremely difficult for the CFA. At issue was more than striking a balance between the individual's freedom of expression and the public and national interest in the protection of the national flag. What was even more significant—although not discussed in the judgment of the court below—was that the national flag desecration law challenged in this case had been enacted by the Hong Kong legislature for the purpose of implementing a national law which the NPCSC had decided to apply to Hong Kong. If the CFA had determined that the flag desecration law constituted an unnecessary or disproportionate restriction on freedom of expression, it would then have to deal with the politically sensitive issue of whether a Hong Kong court could decline to enforce a national law made applicable to Hong Kong. An affirmative answer would bring the Hong Kong courts into direct conflict with the NPCSC, and a constitutional crisis like that witnessed in early 1999 would likely ensue. Fortunately, the CFA did not have to tread this path of potential collision with Beijing.<sup>135</sup>

As far as the structure of legal reasoning is concerned, two different routes would have been equally viable for the purpose of reaching a decision in this case. The first route was the one actually taken by the CFA. The second route would be as follows. The CFA would first consider whether it

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<sup>134</sup> *Id.* at 447, 461.

<sup>135</sup> Tai offers a similar analysis; *see supra* note 44 at 205-07.

had the power to strike down a law enacted by the Hong Kong legislature to implement a national law that the NPCSC had decided to apply to Hong Kong. If this question was answered in the negative, then it would be unnecessary to proceed further, and the appeal would be allowed. If this question was answered in the affirmative, then the CFA would have to proceed to consider whether the flag-desecration laws constituted an unconstitutional restriction on freedom of expression.

Logically, both routes were equally viable, and neither is logically preferable to the other. Politically speaking, however, the first route was clearly preferable, because by taking this route, it might be possible to avoid the issue of whether the Hong Kong court may decline to enforce an applicable national law. Route (a) being that actually taken by the CFA, it may be said that the CFA acted strategically in choosing the “line of least resistance” from the political point of view. Furthermore, given the fact that even the American Supreme Court was divided five to four on the issue of whether the criminalization of flag desecration was unconstitutional,<sup>136</sup> the CFA’s decision in *Ng Kung Siu* is defensible jurisprudentially, and is certainly consistent with the political reality of Hong Kong under “one country, two systems.”

### 3. *The Taxi Driver Case*

The next “free speech” case in the legal history of the Hong Kong SAR concerned a relatively trivial matter—foul language spoken by a taxi driver to his passenger. In *HKSAR v. Tsui Ping Wing*,<sup>137</sup> Tsui, a taxi driver, aggrieved by the shortness of the journey ordered by his passenger, verbally abused and insulted the passenger. He was charged with the offense of not behaving “in a civil and orderly manner,” convicted by the magistrate, and fined HK\$500. He appealed to the Court of First Instance and argued that the law creating the offense was too vague and that it violated the constitutional guarantees of freedom of expression and equality before the law in the Basic Law and the I.C.C.P.R. The court dismissed the appeal in April 2000, holding that the impugned law was not too vague and that the restriction on freedom of expression imposed by it was justifiable and not excessive. The court considered that the law served to protect the rights of others, the public order, and public morals (permissible grounds for restriction under article sixteen of the I.C.C.P.R.). In reaching this conclusion, the court took into account the fact that a taxi driver needs a

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<sup>136</sup> See *supra* note 127.

<sup>137</sup> [2000] 3 H.K.C.F.I. 538 (C.F.I.).

license in order to operate, and that “Hong Kong’s reputation, to a not insignificant degree, depends on the manners of its taxi drivers. . . . [T]hey represent and epitomise Hong Kong’s standard of behaviour at street level.”<sup>138</sup>

The *Tsui* case suggests that the use of foul language deserves a lower degree of constitutional protection than “political speech.” Not only is the validity of this conclusion hardly questionable, but the decision on the facts of the case is also reasonable and probably in line with community sentiments.

#### 4. *The Defamation Case*

The “free speech” cases mentioned so far concern the boundary of the law of criminal punishment for speech and acts of expression such as flag desecration. Free speech is also relevant in the context of civil law, particularly the law of defamation. In *Cheng v. Tse Wai Chun*,<sup>139</sup> Albert Cheng and the other defendant in this case were hosts of a phone-in radio talk show. Tse sued them for defamatory statements they made about him during the radio program, and the defendants raised the defense of fair comment. According to the English common law of defamation, if a defamatory comment consists of opinions genuinely held by the commentator on matters of public interest, and such opinions have some objective factual basis, then the commentator is not liable for defamation. However, this defense may be negated by the fact that the commentator was actuated by malice in making the comment. In the Court of First Instance, the judge gave directions to the jury regarding these legal principles, and the jury found the defendants liable for defamation. The defendants appealed to the Court of Appeal which dismissed the appeal. On further appeal to the CFA, the CFA held that the Court of First Instance had misdirected the jury on the law governing the defense of fair comment and ordered a new trial.

The main judgment in the *Cheng* case was delivered by Lord Nicholls of Birkenhead, a member of the highest appellate court in England (the House of Lords in its judicial capacity), who served as a nonpermanent judge for the CFA in this case.<sup>140</sup> The judgment affirmed the importance of

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<sup>138</sup> *Id.* at 255.

<sup>139</sup> [2000] 3 H.K.L.R.D. 418.

<sup>140</sup> The CFA consists of a five-member bench in hearing each case. There are four permanent judges and a number of nonpermanent judges of the court. The five-member bench normally consists of the four permanent judges and one nonpermanent judge. While some of the nonpermanent judges are retired Hong Kong judges, others are retired or serving judges of the highest courts in England and Australia. For example, Sir Anthony Mason, retired former chief justice of Australia, sat as nonpermanent judge in most of the constitutional cases heard by the CFA mentioned in this article.

free discussion on matters of public interest and held that the defense of fair comment should be given a generous interpretation. It redefined the meaning of the “malice,” which can negate the defense of fair comment. Before the CFA’s decision, some books and authorities in the common law world suggested that the maker of the defamatory statement would be regarded as having been actuated by malice if he had some improper and personal motive or objective when he made the statement, such as personal gain or to injure his enemy’s reputation. The CFA held that so long as the defamatory statement satisfies the requirements of the defense of fair comment (as mentioned above), the “impurity” or moral dubiousness of the motive or purpose behind the statement would not of itself negate the defense. This does not mean that evidence as to such motive or purpose is entirely irrelevant, for it may be used to show that the speaker did not genuinely and honestly hold the opinion expressed, in which case one of the essential elements of “fair comment” is missing.

In 2000, Denis Chang S.C., one of Hong Kong’s most famous lawyers, posed the following question as the title of an article: “Has Hong Kong Anything Special or Unique to Contribute to the Contemporary World of Jurisprudence?”<sup>141</sup> He gave an affirmative answer to the question, citing the *Cheng* case as part of the evidence. In particular, he underscored the Chinese element in this contribution:

The CFA’s decision, whilst rooted in the common law, has an added dimension which comes from the very fact that the Court which delivered it is on territory which is part of China and which is governed by the Basic Law. The Court clearly did not see anything in the Basic Law which inhibited it from giving the right of fair comment (as an integral part of the freedom of speech) its full measure. Quite the contrary, it adopted a generous approach and *developed* the right to a fuller measure than what the common law had generally been perceived to give.<sup>142</sup>

*Cheng* is a landmark freedom-of-speech case and is likely to have an impact on other jurisdictions in the common-law world.

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<sup>141</sup> 30 H.K.L.J. 347 (2000).

<sup>142</sup> *Id.* at 349 (emphasis in original).



### C. *Freedom of Assembly and Procession*

The freedom of assembly, procession, and demonstration is closely related to the freedom of expression and is one of the hallmarks of civil society. The number of demonstrations in Hong Kong in recent years, such as the one-half-million-person march on July 1, 2003, against the proposed national security bill to implement article twenty-three of the Basic Law (which was as a result postponed indefinitely),<sup>143</sup> the annual vigil in memory of the victims of the June 4, 1989, massacre, and protests by Falun Gong practitioners against the persecution of their sect in mainland China, is testimony to the success of “one country, two systems” and the reality of political freedom and social openness in Hong Kong. As far as the legal aspect of assemblies and demonstrations is concerned, two leading cases stand out in the post-1997 era, both of which reached the CFA in 2005.

#### 1. *The Falun Gong Case*

The first case is *Yeung May-wan v. HKSAR*,<sup>144</sup> concerning the prosecution of Falun Gong protesters in 2002. In this case the police resorted to the law of obstruction of public places,<sup>145</sup> traditionally used in Hong Kong against illegal hawkers in the streets, to deal with the demonstrators. The case arose from a small-scale demonstration staged by sixteen Falun Gong activists<sup>146</sup> outside the entrance to the Liaison Office of the Central People’s Government in Hong Kong on March 14, 2002. Because the number of demonstrators was small, there was no need under the Public Order Ordinance (discussed in the *Leung* case below) to notify the police in advance or to comply with procedural requirements, which are only applicable to assemblies involving more than fifty persons or processions involving more than thirty persons. After the protesters refused to leave despite repeated police warnings, the police arrested them. There was some physical violence during and after the arrests.

The protesters were charged with obstructing a public place and obstructing or assaulting police officers in the execution of their duty. In August 2002, after a twenty-seven-day trial, a magistrate judge convicted the protesters of the offenses charged, and they received fines ranging from HK\$1300 to \$3800. They appealed to the Court of Appeal, which gave

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<sup>143</sup> See generally National Security And Fundamental Freedoms: Hong Kong’s Article 23 Under Scrutiny (Fu Hualing et al. eds., 2005).

<sup>144</sup> The citations of the Court of Appeal’s and the CFA’s decisions in this case are provided below.

<sup>145</sup> See the Summary Offences Ordinance, §§ 4(28) and 4A.

<sup>146</sup> For Falun Gong in Hong Kong, see Chen and Cheung, *supra* note 56, at 261-62.

judgment in November 2004.<sup>147</sup> In a unanimous decision, the Court of Appeal held that due regard to the protection of the right of assembly should be given in applying the law of obstruction of public places. The court overturned the conviction on the ground that the magistrate failed to address sufficiently whether the manner in which the protesters exercised their right of assembly was so unreasonable as to constitute an unlawful obstruction. The defendants lost on their appeal of the other charges and thus further appealed to the CFA on these issues.

The appeal was successful. On May 5, 2005, the CFA<sup>148</sup> unanimously held that the arrests of the defendants were unlawful. The police officers who carried out the arrests were not able to satisfy the court that they had reasonable grounds for suspecting that the defendants had committed the offense. The court stressed that the offense is not committed by mere obstruction. The use of the public place or highway must be unreasonable; if there is a lawful excuse for the obstruction, no offense is committed. The court held that in determining whether there was an unreasonable use or a legitimate excuse, the defendants' right to peaceful assembly and demonstration should be given due weight. The court further held that the defendants in the present case could not be convicted for obstructing or assaulting police officers in the execution of their duty even though physical resistance was involved. Since the arrest was unlawful, the police officers were not actually acting defendants. The court noted that citizens have a right to use reasonable force to resist an unlawful arrest and detention.

The political significance of the *Yeung* case exceeds its constitutional and legal significance. The case is politically significant because it concerned a demonstration staged by the Falun Gong group, which has been under intense and continuous persecution in mainland China since 1999,<sup>149</sup> outside of the highest representative office of the Beijing government in Hong Kong. Indeed, the police intervention on the day of the demonstration was prompted by a complaint made by staff of the Liaison Office of the Central Government. The ultimate acquittal for the Falun Gong activists was therefore an important symbolic victory for the sect in its struggles against Beijing. It also testifies to the equality of all—including the most vocal opponents of the Chinese government—before the law in Hong Kong, as well as the independence of the judiciary and the rigorous legal protection of human rights in the SAR.

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<sup>147</sup> HKSAR v. Yeung May Wan [2004] 3 H.K.L.R.D. 797 (C.A.).

<sup>148</sup> Yeung May Wan v. HKSAR [2005] 2 H.K.L.R.D. 212 (C.F.A.).

<sup>149</sup> See, e.g., Anne S. Y. Cheung, In Search of a Theory of Cult and Freedom of Religion in China: The Case of Falun Gong, 13 Pac. Rim L. & Pol'y J. 1 (2004).

From the legal point of view, however, the case is of less constitutional significance than the national-flag case discussed above or the Public Order Ordinance case discussed below. The *Falun Gong* case did not involve judicial review of the constitutionality of legislation. The demonstrators were prosecuted mainly for obstruction of a public place, which is a statutory offense that on its face does not directly concern freedom of demonstration and has traditionally been used only against hawkers in the streets. The CFA's decision exemplifies the successful use of familiar techniques of statutory construction for the purpose of advancing a constitutional right. It was particularly significant in enhancing the right to assembly and procession in Hong Kong where the number of demonstrators does not exceed fifty (in the case of an assembly) or thirty (in the case of a procession) as stipulated in the Public Order Ordinance, to which we now turn.

## 2. *The Public Order Ordinance Case*

The next case, *Leung Kwok Hung v. HKSAR*,<sup>150</sup> concerned a demonstration of a slightly larger scale than that in *Yeung*. As mentioned above, the Public Order Ordinance requires organizers of demonstrations to notify the police in advance of the event. The ordinance also empowers the police to prohibit the proposed demonstration on certain specified grounds or to impose conditions which demonstrators must comply with.<sup>151</sup> In theory, demonstrators must comply with the rule regarding prior notification.<sup>152</sup> In practice, however, the rule has often been ignored. Many demonstrations took place without complying with this rule, and yet the organizers or demonstrators were not prosecuted.<sup>153</sup>

In 2002, the SAR Government attempted for the first time to enforce the notification rule. In May 2002, Leung Kowk-hung, a political activist

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<sup>150</sup> The citations of the decisions of the two appellate courts in this case are provided below.

<sup>151</sup> See generally Janice Brabyn, *The Fundamental Freedom of Assembly and Part III of the Public Order Ordinance*, 32 H.K.L.J. 271 (2002).

<sup>152</sup> See generally Janice Brabyn, *The Fundamental Freedom of Assembly and Part III of the Public Order Ordinance*, 32 H.K.L.J. 271 (2002).

<sup>153</sup> One hundred twenty-six protests were organized in 1998 and 183 protests in 1999 without applying for any notice of objection: see Alvin Y. So, *Social Protests, Legitimacy Crisis, and the Impetus Toward Soft Authoritarianism in the Hong Kong SAR*, in *THE FIRST TUNG CHEE-HWA ADMINISTRATION*, *supra* note 83, at 399, 405. However, the government did not prosecute any of the organizers. Other organizers of demonstrations complied with the legal requirements, and 1,388 protests were approved in 1998 and 1,283 in 1999. According to official figures in the period between July 1997 and March 2002, about one in seven public rallies were in fact held without notifying the police in advance. See Anne S. Y. Cheung & Albert H. Y. Chen, *The Search for the Rule of Law in the Hong Kong Special Administrative Region, 1997-2003*, in "ONE COUNTRY, TWO SYSTEM" IN CRISIS 61, 79, *supra* note 56.

(who was subsequently elected as a member of the Legislative Council in 2004) and two student activists were arrested by the police and charged with organizing an unauthorized procession.<sup>154</sup> The number of people participating in the procession varied at different points in time but was between 40 and 96.<sup>155</sup> The three defendants were convicted by a magistrate in November 2002 and were required to be bound over for three months on a recognizance for HK\$500 (i.e. to undertake that they would be of good behavior and not violate the law during this period; the breach of the undertaking would result in a fine of \$500).<sup>156</sup> The defense lawyers' challenge to the constitutionality of the Public Order Ordinance was unsuccessful. The defendants appealed to the Court of Appeal. In November 2004, the Court of Appeal dismissed the appeal by a majority ruling of two to one.<sup>157</sup> The majority held that the relevant provisions of the Ordinance were consistent with the guarantee of freedom of assembly and procession in the Basic Law, the Hong Kong Bill of Rights, and the I.C.C.P.R.. The dissenting judge, however, was of the view that the power conferred by the Ordinance on the police to prohibit or impose restrictions on demonstrations on, *inter alia*, the ground of "public order (*ordre public*)"<sup>158</sup> was problematic. The judge felt that it was framed in such a way as to fail the requirement of legal certainty, and that it also failed the "necessity" test which requires that any restriction of the right of assembly and procession be necessary. The case was appealed to the CFA.

On July 8, 2005, the CFA, by a majority of four to one, dismissed the appeal.<sup>159</sup> The court basically steered a middle course between the majority and minority views in the court below. It upheld the requirement in the Ordinance that organizers of public processions involving more than thirty persons should notify the police in advance. It pointed out that prior notification would not only enable the police to take steps to safeguard public order during the demonstration, but would also be in the interests of the demonstrators. It stated that "notification is required to enable the Police to fulfill the positive duty resting on Government to take reasonable and appropriate measures to enable lawful demonstrations to take place

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<sup>154</sup> See generally Cheung and Chen, *supra* note 56.

<sup>155</sup> See *id.*, *supra* note 56.

<sup>156</sup> See *supra* note 126.

<sup>157</sup> HKSAR v. Leung Kwok Hung, [2004] 3 H.K.L.R.D. 729 (C.A.).

<sup>158</sup> The term, including the French term in brackets, was in the Public Order Ordinance and is also in art. 21 of the I.C.C.P.R. on which the relevant provisions in the Ordinance were based.

<sup>159</sup> Leung Kwok Hung v. HKSAR, [2005] 3 H.K.L.R.D. 164 (C.F.A.).

peacefully.”<sup>160</sup> The court opined that such notification requirement is widespread in other jurisdictions.

The court upheld the authority of the police to restrict processions on the ground of “public order” in the “law and order” sense of the word but rejected as unconstitutional, the broader concept of “*ordre public*” as used in the Ordinance. The court determined that the concept was too broad and imprecise to satisfy the test of legal certainty. Here the court drew a distinction between the concept of “*ordre public*” as part of a constitutional norm (enshrined in the I.C.C.P.R. which is applicable to Hong Kong under article thirty-nine of the Basic Law) and the same concept as part of a norm in legislation to implement the constitution. While it is legitimate for “*ordre public*” to be used as a constitutional norm (the CFA itself applied it in *Ng Kung Siu* to review the constitutionality of the flag desecration law), this concept as used in the Public Order Ordinance failed to give a sufficient indication of the circumstances in which the police may restrict the right to freedom of demonstration. Therefore, insofar as the Public Order Ordinance provided that “*ordre public*” constituted a ground for restricting the freedom of demonstration, it failed to conform to the constitutional requirement that any restriction of this right must be “prescribed by law,” which imports a high requirement in terms of the certainty of the meaning and the predictability of the operation of the law concerned.

The court also stressed that in exercising discretionary power to regulate processions, the police must comply with the “proportionality” test. This test mandates that the police “must consider whether a potential restriction is rationally connected with one or more of the statutory legitimate purposes [public order as narrowly defined above, national security, public safety, etc.] and whether the potential restriction is no more than is necessary to accomplish the legitimate purpose in question.”<sup>161</sup> Furthermore, “[w]here the Commissioner [of Police] decides to object [to a notified procession] or to impose conditions, the reasons given must be sufficient to show that he has properly applied the proportionality test in making his decision.”<sup>162</sup> The discretionary power to control demonstrations “is thus not an arbitrary one but is a constrained one.”<sup>163</sup> The manner in which it is exercised in a particular case can be subject to judicial review on the basis of the principles enunciated by the CFA in this case.

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<sup>160</sup> *Id.* at para. 65.

<sup>161</sup> *Leung Kwok Hung v. HKSAR*, [2005] 3 H.K.L.R.D. 164 at para. 96 (C.F.A.).

<sup>162</sup> *Id.* at para. 59.

<sup>163</sup> *Id.* at para. 96.

The dissenting judge, Justice Bokhary, agreed that it is legitimate to impose a prior notification requirement on processions, but disagreed with the view that this requirement can be enforced by criminal sanctions. He also believed that the police power of prior restraint of demonstrations is unconstitutional.

The primary significance of *Leung* lies in the fact that it goes beyond the traditional “*Wednesbury* unreasonableness” principles of judicial review of administrative action in English administrative law,<sup>164</sup> and enunciates clearly the application of the “proportionality” principle to police decisions on any restriction of the citizen’s right to demonstrate. In this way the decision makes a major contribution to the advancement of the freedom of demonstration in the Hong Kong SAR. The majority’s legal reasoning on whether the statutory scheme for the control of demonstrations was constitutional however, is not completely convincing, particularly when compared with the dissent. Justice Bokhary’s conclusion that it is unconstitutional to attach penalties to the requirement of advance notification of processions (the stipulated maximum of which are severe sanctions of criminal punishment<sup>165</sup>) has much persuasive force. Regrettably, the majority judgment did not discuss this issue at all but instead chose to focus its constitutional analysis on “*ordre public*” as a possible ground for the restriction of the freedom of demonstration, a mere subsidiary question compared to that posed by the dissent.

Although the majority decision lacks legal rigor in this respect, it makes practical sense in the context of the actual operation of the regulation of demonstrations in Hong Kong. As discussed above, the law on notification has seldom been rigorously enforced, and in practice those who give advance notification of demonstrations to the police will invariably obtain approval for their activities. Given this reality, the majority in the CFA probably concluded that it made more practical sense to subject police actions regulating demonstrations to the proportionality test, rather than to strike at the fundamentals of the existing system of regulation by using criminal sanctions to enforce the regulatory requirements.

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<sup>164</sup> See generally H.W.R. Wade & C.F. Forsyth, *Administrative Law* 351-365 (9<sup>th</sup> ed. 2004).

<sup>165</sup> As stated in the majority’s opinion: “if a public procession subject to the statutory scheme takes place without complying with the notification or the no objection requirement, the public procession becomes an unauthorized assembly: section 17A(2)(a). Every person who holds or assists in holding a public procession after the same has become an unauthorized assembly is guilty of an offence. The maximum penalty is five years’ imprisonment on conviction on indictment or a fine of \$5,000 and three years’ imprisonment on summary conviction: section 17A(3)(b)(i). The appellants were summarily convicted of this offence.” *Leung Kwok Hung v. HKSAR*, [2005] 3 H.K.L.R.D. 164 at para. 63 (C.F.A.).

In both *Falun Gong* and the Public Order Ordinance case, the CFA stressed the importance of the constitutional right to freedom of peaceful assembly and demonstration. As the CFA put it at the opening of its judgment in *Falun Gong*:

The freedom to demonstrate is a constitutional right. It is closely associated with the freedom of speech. These freedoms of course involve the freedom to express views which may be found to be disagreeable or even offensive to others or which may be critical of persons in authority. These freedoms are at the heart of Hong Kong's system and it is well established that the courts should give a generous interpretation to the constitutional guarantees for these freedoms in order to give to Hong Kong residents their full measure.<sup>166</sup>

The CFA's decisions in the two cases may be interpreted as a recognition, consolidation, and to some extent expansion of the freedom of demonstration in the Hong Kong SAR. Collectively they epitomize the vibrancy of the life of the law and the spirit of human rights in Hong Kong and reveal the deeper meaning of "one country, two systems."

*D. The Right to Equality and Non-discrimination*

Equal protection under the law and non-discrimination are core elements of the modern concept of human rights. In Hong Kong, the constitutional principles of equal opportunity and non-discrimination were introduced in the 1990s by the Hong Kong Bill of Rights and amplified by a series of anti-discrimination laws such as the Sex Discrimination Ordinance. In the post-1997 era, the courts of Hong Kong have further developed the jurisprudence of equal rights and non-discrimination. The two following cases are the most well known in this regard.

*Secretary for Justice v. Chan Wah and Tse Kwan Sang*<sup>167</sup> was a politically controversial case. The legal arguments of Chan and Tse, however, were so persuasive that they won in all three courts—the Court of First Instance, the Court of Appeal, and the CFA. The litigation concerned local village elections in Hong Kong's New Territories ("NT"), a part of Hong Kong that is partly urbanized but still consists mainly of rural areas. Some of the residents of the villages of the NT are known as "indigenous

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<sup>166</sup> Yeung May Wan v. HKSAR [2005] 2 H.K.L.R.D. 212 at para. 1.

<sup>167</sup> Secretary for Justice v. Chan Wah, [2000] 3 H.K.L.R.D. 641, (2000) 3 H.K.C.F.A.R. 459 (C.F.A.).

inhabitants” or “indigenous villagers” (defined<sup>168</sup> as those descended through the male line of residents in the year 1898 of villages in the geographical area the British colonizers called the New Territories). In 1898 the British colony of Hong Kong—then comprising Hong Kong Island and Kowloon Peninsula—was expanded to include the New Territories north of Kowloon. Unlike Hong Kong Island and Kowloon, which were sparsely populated at the time of colonization, Chinese peasants had lived in the NT for many centuries before the territories came under British rule. The British colonial government recognized to a significant extent the existing land rights of the Chinese peasants in the NT at the time of colonization. The concept of “indigenous inhabitants” was therefore created and receives recognition in the Basic Law itself. Article forty of the Basic Law, for example, provides that “[t]he lawful traditional rights and interests of the indigenous inhabitants of the ‘New Territories’ shall be protected by the Hong Kong Special Administrative Region.”<sup>169</sup>

The villages in the NT had for decades operated their own system of election of village representatives (“VR”). The VR of a village is a member of the Rural Committee of the area in which the village is situated. There are a total of twenty-seven Rural Committees, which are linked to higher levels of government in the NT and the political system of Hong Kong (in which all Hong Kong permanent residents have voting rights). The rules governing such elections in most villages limited the right to vote and the right to stand as candidates to indigenous inhabitants. In the *Chan* case, Chan and Tse were non-indigenous inhabitants of the villages in which they lived. They challenged the electoral rules as discriminatory because the rules denied them the right to take part in the conduct of public affairs under article 21(a) of the Bill of Rights (article twenty-five of the I.C.C.P.R.).

In the final judgment<sup>170</sup> delivered in December 2000, the CFA held that the impugned electoral rules in this case imposed unreasonable restrictions on Chan’s and Tse’s right to take part in public affairs through freely chosen representatives. It also held that article forty of the Basic Law did not give indigenous inhabitants the political rights to vote and to stand as candidates in elections for VRs to the exclusion of others. In explaining its decision, the court noted that there were approximately 600 villages in the NT. It pointed out that the composition of the population of villages has changed in recent decades, with the migration away from the villages of many indigenous inhabitants and the migration into the villages of people

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<sup>168</sup> See the Government Rent (Assessment and Collection) Ordinance, Cap. 515. L.H.K.

<sup>169</sup> See also art. 122 of the Basic Law.

<sup>170</sup> Chan Wah, 3 H.K.L.R.D. 641.



from other parts of Hong Kong. Thus, in the village where Chan lived, there were approximately 400 indigenous inhabitants and 300 non-indigenous inhabitants. In Tse's village, 470 out of nearly 600 villagers were non-indigenous. The court pointed out that the VRs performed many functions, some of which related only to indigenous inhabitants and some of which related to all residents of the village, so that in relation to the latter the VRs should serve or represent the interests of all villagers as a whole. It was therefore, unreasonable for the electoral rules to deny voting rights to non-indigenous villagers. The CFA's decision caused the Government to reform the village election system by introducing legislation providing for a dual system in which each village would elect two VRs, one serving only the indigenous inhabitants, and the other all the villagers.<sup>171</sup>

While *Chan* concerned discrimination on the basis of origin or status, *Equal Opportunities Commission v. Director of Education*<sup>172</sup> dealt with gender discrimination. In that case, the Equal Opportunities Commission, a statutory body established by the Government in 1996 to promote equal rights and non-discrimination, challenged the Education Department's policy regarding the allocation of secondary school places to students completing primary school education. The system had been in operation since 1978, but the mechanics of the system did not become widely known until 1998, when the Equal Opportunities Commission began to receive complaints from parents. The effect of the operation of this system was that boys stood a better chance of admission to a preferred secondary school than did girls, despite equal academic merits. The policy was based on findings that girls' academic achievements (as measured by scores) at the time of completion of primary education were on average higher than boys because girls' intellectual development moves more quickly at that age. The policy was therefore designed to ensure a more balanced ratio between male and female students in the elite schools.

The Court of First Instance held that the Education Department's policy was discriminatory as against female students and that the discrimination was not justified by any of the reasons advanced by the Department. Referring to article twenty-five of the Basic Law, article twenty-two of the Hong Kong Bill of Rights, the Sex Discrimination Ordinance, and the Convention on the Elimination of All Forms of Discrimination Against Women, which was extended to Hong Kong in 1996, the court stressed that the right to equal treatment was a fundamental right of

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<sup>171</sup> See the Village Representative Election Ordinance, Cap. 576, L.H.K. (Ord. No. 2 of 2003).

<sup>172</sup> *Equal Opportunities Commission v. Director of Education*, [2001] 2 H.K.L.R.D. 690 (C.F.I.).

the individual that could not easily be subordinated to considerations of “group fairness”<sup>173</sup> or the desire to attain a better balance in schools between boys and girls. Any restriction of the girls’ right against discrimination in this case had to pass the stringent standards of the “proportionality test”<sup>174</sup> in order to be justified. After examining the Government’s arguments and the evidence submitted by it, the court held that the impugned scheme of allocation of school places failed the test.<sup>175</sup> As a result of this decision, the Education Department changed its original policy.

Both cases above concern matters of public policy; their ramifications extend far beyond the individual litigants or complainants in the cases. They demonstrate the increasingly significant role of the courts in Hong Kong in shaping social policy and in promoting social reform by employing jurisprudential concepts—in these two cases the fundamental human right to the equal protection of the law without discrimination.

*E. In Conclusion: Bill of Rights Jurisprudence Under “One Country, Two Systems”*

The human rights jurisprudence of the Hong Kong SAR neither started from a clean slate, nor was it created instantaneously. Instead, constitutional adjudication on human rights issues in Hong Kong has a history dating back to the enactment of the Hong Kong Bill of Rights Ordinance in 1991. The accumulated judicial experience of 1991-1997 provides a secure foundation for the constitutional protection of human rights in the post-1997 era.

As discussed above, despite an attempt by the NPCSC at the time of the 1997 handover to tamper with the content of the Hong Kong Bill of Rights Ordinance, the courts have ensured, through interpretation of the Basic Law, that the power of judicial review of the constitutionality of legislation on human rights grounds would remain intact. The NPCSC has not intervened and thus has acquiesced in the Hong Kong courts’ post-1997 practice of constitutional review in the protection of human rights.

Hong Kong courts have by no means been conservative in the post-1997 era of constitutional adjudication. In *Chan Wah*, the CFA promoted equal rights and mandated a fundamental reform of the existing system of

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<sup>173</sup> *Id.* at para. 80.

<sup>174</sup> *Id.* at para. 121.

<sup>175</sup> *Id.*

village elections. In the *Equal Opportunities Commission* case, the court again outlawed discriminatory practices and pushed for comprehensive reform of the existing system of allocation of secondary school places. In the *Falun Gong* case, the CFA acquitted the demonstrators by interpreting the law of obstruction liberally. In the Public Order Ordinance case, the CFA exercised the power of constitutional review of legislation to strike down the “*ordre public*” provision in the Public Order Ordinance, and subjected police actions under the ordinance to the principles of proportionality. Finally, in *Cheng v. Tse*, the CFA liberalized the defense of fair comment in the common law of defamation in a way that was without precedent in the common law world.

Similar to the pre-1997 era, the Hong Kong courts have not been radically liberal in the post-1997 era. Thus, in *Wong Yeung Ng*, the Court of Appeal chose a more traditional common law version of the law of contempt of court than the liberal version adopted in North America. In the Public Order Ordinance case, the CFA tolerated the continued existence of a system for control of demonstrations that relied on criminal sanctions for its enforcement. In the flag desecration case, the CFA declined to follow the more liberal American approach and was sensitive to the political and ideological tensions within “one country, two systems.”

#### IV. THE IMPACT OF “ONE COUNTRY, TWO SYSTEMS” ON MAINLAND CHINA

For believers in constitutionalism, the highest hope is that the constitutional discourse as recounted above in this article regarding the Hong Kong Basic Law and human rights issues in the “one country, two systems” framework will not only serve to consolidate constitutionalism in Hong Kong but will also contribute to the development of constitutionalism in China and the search for a constitutional solution to the tension across the Taiwan Straits.

Comparative scholars of constitutional law have distinguished between nominal, semantic, and normative constitutions.<sup>176</sup> The constitutions in Communist states are generally nominal or semantic as opposed to normative constitutions “actually governing the dynamics of the power process instead of being governed by it.”<sup>177</sup> In Marxist-Leninist states such as the People’s Republic of China, the supremacy of the Communist Party means that the constitution and the law are not supreme. This is particularly true where there is a conflict between decisions and actions of

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<sup>176</sup> See generally Karl Loewenstein, *Political Power And The Governmental Process* 147-153 (1957).

<sup>177</sup> *Id.* at 150.

the party leadership and the formal requirements and procedures prescribed by law. In the case of China, although the current Constitution, enacted in 1982, provides for a functional division of powers among legislative, executive, judicial and procuratorial organs, all such organs are subject to the leadership of the Chinese Communist Party.<sup>178</sup> The high degree of concentration of power in party leaders and party organs, the limited extent of judicial independence,<sup>179</sup> the lack of any court or specialized tribunal having the power of constitutional adjudication,<sup>180</sup> and the weakness of independent civil actors capable of exercising checks and balances against the Communist Party-State are all factors that tend to minimize the relevance of the constitution as a device to contain, structure, or direct the operation of political forces and to safeguard citizens' rights.<sup>181</sup> Despite constitutional amendments, introducing concepts like the Rule of law, human rights, and private property rights into the Constitution,<sup>182</sup> mainland China today can hardly be called a constitutional state.

Most of the political and social factors militating against constitutionalism in mainland China do not exist in Hong Kong. Under "one country, two systems," the Basic Law of the Hong Kong SAR is a normative rather than a merely semantic constitutional document. This article demonstrates how much the Basic Law means to the people of Hong Kong, how seriously it is taken in practice, and how it is actually enforced by a robust and independent judiciary in Hong Kong. Hong Kong may therefore serve as a beacon of constitutionalism in a country where constitutionalism is under-developed. So can Taiwan, where constitutionalism has thrived under the leadership of an activist Constitutional Court since democratization in the late 1980s.<sup>183</sup> It is to be hoped that scholars, leaders

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<sup>178</sup> See, e.g., Chen, *supra* note 11, chs. 4, 5.

<sup>179</sup> See, e.g., Veron Mei-ying Hung, China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform, 52 AM. J. COMP. L. 77 (2004).

<sup>180</sup> See generally Shen Kui, Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's "First Constitutional Case," 12 PAC. RIM L. & POL'Y J. 199 (2003).

<sup>181</sup> See generally PEERENBOOM, *supra* note 11.

<sup>182</sup> The term "Rule of law" (or "*Rechtsstaat*" in German, which would be the more precise translation from the Chinese term *fazhi guojia* that now appears in the Chinese Constitution) was introduced into the Constitution by the 1999 amendment. The terms "human rights" and "private property rights" were introduced by the 2004 amendment. See Chen, *supra* note 11, at 45-46.

<sup>183</sup> See, e.g., Lawrence Shao-liang Liu, Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan, 39 AM. J. COMP. L. 509 (1991); F. Fraser Mendel, Judicial Power and Illusion: The Republic of China's Council of Grand Justices and Constitutional Interpretation, 2 PAC. RIM. L. & POL'Y J. 157 (1993); Jau-Yuan Hwang and Jiunn-rong Yeh, Taiwan, in ASIA-PACIFIC CONSTITUTIONAL YEARBOOK 1995, 279 (Cheryl Saunders & Graham Hassal eds., 1997); Sean Cooney, Taiwan's Emerging Liberal Democracy and the New Constitutional Review, in ASIAN LAWS THROUGH AUSTRALIAN EYES 163 (Veronica Taylor ed., 1997); Sean Cooney, A Community Changes: Taiwan's Council of Grand Justices and Liberal Democratic Reform, in LAW, CAPITALISM AND POWER IN ASIA 253

and others in mainland China will gradually learn more from Hong Kong and Taiwan about how constitutionalism can contribute to a better Chinese society in which human beings live in the full dignity accorded them by the doctrine of human rights. If the original objective of the theory of “one country, two systems” which Deng Xiaoping developed for Taiwan in the late 1970s and applied to Hong Kong in the early 1980s was to contribute to China’s unification and economic modernization, Deng probably underestimated the full potential of OCTS. For OCTS may have a role to play in contributing to China’s political and constitutional modernization as well.

#### V. CONCLUSION: THE ACHIEVEMENTS OF THE HONG KONG JUDICIARY IN THE POST-1997 ERA

In concluding an article written not long after the constitutional crisis of 1999, I drew an analogy between courts learning to cope with a new constitutional environment and children learning to walk:

Hong Kong is a latecomer to the world of constitutional interpretation and judicial review, and she has only started the journey of her constitutional history as an autonomous part of China. The child is learning to walk; she stumbles, she falls, she rises again; she staggers, and she then moves forward with greater confidence and more hope. So hope abides; and learning never ends.<sup>184</sup>

Six years since this passage was written, the record of the Hong Kong courts as covered in this article shows that the hope expressed in the passage was not misplaced. Hong Kong courts have coped well with the challenges of constitutional adjudication. After experiencing a steep learning curve initially, they have now reached a line of steady growth, a state of increasing confidence and growing maturity. Lord Irvine of Lairg QC, Lord Chancellor of Britain, described the early record of the British courts in interpreting and applying the Human Rights Act 1998 as follows: “[T]he overriding theme

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(Kanishka Jayasuriya ed., 1999); Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL’Y J. 531 (2002); TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES*, ch. 5 (2003); Thomas Weishing Huang, *Judicial Activism in the Transitional Polity: The Council of Grand Justices in Taiwan*, 19 TEMP. INT’L & COMP. L.J. 1 (2005). For the implications of “one country, two systems” as practiced in Hong Kong for Taiwan, see Sean Cooney, *Why Taiwan is Not Hong Kong: A Review of the PRC’s “One Country Two Systems” Model for Reunification with Taiwan*, 6 PAC. RIM L. & POL’Y J. 497 (1997); George E. Edwards, *Applicability of the “One Country, Two Systems” Hong Kong Model to Taiwan*, 32 NEW ENG. L. REV. 751 (1998).

<sup>184</sup> Chen, *supra* note 53, at 431.

that emerges is *balance*: balance between scrutiny and deference; between the individual and the community; and between interpretation and declarations of incompatibility.”<sup>185</sup> I believe exactly the same may be said of the overall performance so far of the Hong Kong courts in constitutional adjudication in the post-1997 era.

As mentioned in the introduction to this article, the Hong Kong courts in the new constitutional order established by the Basic Law faced the dual challenge of managing the constitutional relationship between the Hong Kong SAR and the central state organs in Beijing, and of serving as guardian of the civil liberties and human rights of the people of Hong Kong. As far as the first challenge is concerned, there has not been any concrete dispute regarding the respective competence of the SAR government and the central government which the Hong Kong courts have been called upon to resolve. The constitutional drama has revolved instead around the power of interpretation of the Basic Law under article 158. The significance of this issue was well described by Sir Anthony Mason:

In a nation-wide common law system, the link would normally be between the regional courts and the national constitutional court or the national Supreme Court. Here, however, there are not only two different systems, but also two different legal systems. In the context of “one country, two systems[,]” . . . Article 158 of the Basic Law provides a very different link. That is because the Article, in conformity with Article 67(4) of the PRC Constitution, vests the general power of interpretation of the Basic Law . . . in the NPC Standing Committee. Consistently with that vesting . . . the Standing Committee authorizes the courts of the Region to interpret “on their own, in adjudicating cases” the provisions of the Basic Law which are within the limits of the autonomy of the Region.<sup>186</sup>

The major constitutional controversy in the post-1997 era relates to the relationship between the respective powers of Basic Law interpretation of the NPCSC and the Hong Kong courts. As discussed in this article, the courts of Hong Kong led by the Court of Final Appeal have accepted unconditionally the “free-standing” power of the NPCSC to promulgate interpretations of the Basic Law irrespective of whether the CFA has requested an interpretation. At the same time, the courts have courageously

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<sup>185</sup> Lord Irvine of Lairg, *The Impact of the Human Rights Act: Parliament, the Courts and the Executive*, PUBLIC LAW 308, 313-14 (2003) (Eng.) (emphasis in original).

<sup>186</sup> *Lau Kong Yung v. Director of Immigration*, [1999] 3 H.K.L.R.D. 778 (C.F.A.).

defended their prerogative to apply the common law approach to the interpretation of the Basic Law in the absence of any relevant NPCSC interpretation. They have also rejected any suggestion<sup>187</sup> that in performing the task of interpretation, the Hong Kong courts should put themselves in the position of the NPCSC and seek to reach an interpretation which the NPCSC would itself be inclined to make.

There is a Chinese saying, “*bukang bubei*,” which may be translated as “neither too proud nor too humble.” I believe this is the appropriate characterization of the approach adopted by the Hong Kong courts in tackling their constitutional relationship with the Beijing authorities. In the words of the “clarification” of 1999, the courts do “not question the authority of the Standing Committee to make an interpretation under article 158 which would have to be followed by the courts of the Region”; neither do they “question the authority of the National People’s Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein.”<sup>188</sup> In the wide realm on which the NPCSC has not exercised its power of interpretation, however, the courts of Hong Kong and the common law system are still in complete control. In practice the NPCSC exercises self-restraint and thus implicitly recognizes the high degree of judicial autonomy in Hong Kong.

With regard to the second constitutional challenge, adjudicating the rights of the Hong Kong people, the courts have steered a middle course between judicial activism and judicial restraint. The tenor of their decisions may be described as moderately liberal — neither radically liberal nor conservative. They have built upon their experience since 1991 of judicial review of legislative and administrative actions on the basis of the I.C.C.P.R. (as reproduced in the Hong Kong Bill of Rights), and have continued the work of borrowing foreign jurisprudence in order to keep pace with contemporary international trends.

These positive evaluations of the performance of the Hong Kong courts in the post-1997 era will likely be disputed, particularly by “fundamentalists” of the Rule of law and human rights.<sup>189</sup> They would probably argue that the courts have not done enough or should have done more (a) in standing up to Beijing on issues of the constitutional relationship

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<sup>187</sup> See, e.g., *Chong Fung Yuen v. Director of Immigration* [2000] 3 H.K.L.R.D. 661, 682, 686 (C.F.A.).

<sup>188</sup> *Ng Ka Ling v. Director of Immigration (No. 2)* [1999] 2 H.K.C.F.A.R. 4 at 578 (C.F.A.).

<sup>189</sup> The descriptive concept of “fundamentalist adherents to the conception of the rule of law” in the context of constitutional discourse in Hong Kong was developed in Chen and Cheung, *supra* note 56, at 272-77. Such “fundamentalist” views have been expressed from time to time in the Hong Kong media by some politicians, lawyers, and commentators.

between Beijing and Hong Kong, and (b) in promoting the cause of civil liberties and human rights in Hong Kong. On point (a), they would likely criticize the CFA for acceding to the Government's request for "clarification" after *Ng Ka Ling* was decided. They might also question whether the CFA in *Lau Kong Yung* conceded too much to Beijing in not setting any limiting conditions for the recognition of interpretations made by the NPCSC. On (b), they would probably question whether the flag desecration case was rightly decided and whether the decision was politically motivated to placate Beijing; and they would probably prefer Justice Bokhary's dissent to the majority judgment in the Public Order Ordinance case.

In discussing the cases in this article, I have tried to analyze the courts' decisions and explain to what extent they were acceptable and reasonable. A more general point can be made here: in assessing the performance of the Hong Kong courts in the post-1997 era, due account should be taken of the constitutional and political context in which the courts operate. Constitutional jurisprudence is necessarily tailored to the particular configuration of legal, political, and social circumstances to which the constitution applies. In the case of Hong Kong, the constitutional instrument is the Basic Law, and the legal and political context is that of "one country, two systems." In developing Hong Kong's constitutional jurisprudence, the courts cannot focus only on the autonomy of the Hong Kong SAR under the "two systems" limb of the formula; they need also to give due weight to the "one country" limb of the formula, which in the Basic Law is mainly expressed in the form of the sovereign authority of the NPC and the NPCSC.

In making the "clarification" to *Ng Ka Ling* and in rendering the judgment in *Lau Kong Yung*, the CFA has given full recognition to the overriding authority of the NPCSC to interpret the Basic Law. I do not think the CFA can be faulted for doing so. Given the nature of the Chinese constitutional system in which the NPC and the NPCSC enjoy plenary powers similar to those of the British Parliament under the doctrine of Parliamentary supremacy,<sup>190</sup> and given the nature of the interface established by the Basic Law between the Chinese constitutional system and the Hong Kong SAR, the Hong Kong courts have no choice but to recognize the "free-standing" power<sup>191</sup> of the NPCSC to interpret the Basic Law. This results in a situation in which only self-restraint as a matter of practice on the part of the NPCSC, rather than constitutional principles enforceable in a Hong

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<sup>190</sup> For the analogous positions of the NPC and the British Parliament in terms of unlimited legislative authority, see Chen, *supra* note 46.

<sup>191</sup> *Lau Kong Yung v. Director of Immigration*, [1999] 3 H.K.L.R.D. 778, 820 (C.F.A.)



Kong court, can preserve judicial autonomy in Hong Kong. The situation may be unsatisfactory, but then the “fault” lies in the structural design of the Basic Law rather than the performance of the Hong Kong judiciary.

As to whether the courts have performed well as guardians of human rights, it seems that the decisions discussed in this article are generally in line with community sentiments. For example, flag desecration and the freedom to engage in such an act have not become contentious issues in public opinion in Hong Kong; the CFA’s decision in *Ng Kung Siu* has not been met with significant criticism. There has also been no suggestion that the CFA in the Public Order Ordinance case has failed to defend freedom of assembly in Hong Kong.

While a positive assessment<sup>192</sup> has been provided in this article of the performance of the Hong Kong courts in the post-1997 era, due credit also should be given to the institutional and social environment in which the courts have operated. Although Hong Kong is not yet a full democracy by Western standards, it does have a government committed to the Rule of law and respectful of judicial decisions. It is also blessed with a vibrant civil society, a strong middle class, a free media, active party politics, and dedicated lawyers and politicians skilled in the art of legal argumentation. Most important of all, it has a population that is sensitive to legal issues and interested in discussing and debating them. All of these elements provide a favorable environment for the discourse of constitutionalism and rights in Hong Kong. For what, after all, is the business of constitutional adjudication but “an ongoing discourse—a discourse with the other levels and branches of government, with the people at large, with courts that have gone before and courts yet to be appointed”?<sup>193</sup> As this article has shown, this discourse is very much alive and well in Hong Kong. The conversation and debate about the Hong Kong Basic Law will go on, for the Basic Law is—to borrow from what Professors Tribe and Dorf wrote of the American Constitution—“a text to be interpreted and reinterpreted in an unending search for understanding.”<sup>194</sup>

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<sup>192</sup> For other assessments, see, e.g., Paul Gewirtz, *Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics*, 31 H.K.L.J. 200 (2001); JAMES CRAWFORD, *RIGHTS IN ONE COUNTRY: HONG KONG AND CHINA* (Faculty of Law, University of Hong Kong, 2005).

<sup>193</sup> Laurence H. Tribe, *American Constitutional Law* 66 (2<sup>nd</sup> ed. 1988).

<sup>194</sup> Laurence H. Tribe & Michael C. Dorf, *On Reading The Constitution* 32-33 (1991).