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## THE POLITICS OF CONSTITUTIONAL COMMON LAW IN HONG KONG UNDER CHINESE SOVEREIGNTY

Eric C. Ip<sup>†</sup>

*Abstract:* This article studies how the Hong Kong Court of Final Appeal has come to develop a sophisticated judicial gloss on the provisions of the Basic Law, Hong Kong's constitutional document, in ways unforeseen by the Chinese National People's Congress that enacted it. The ascendancy of constitutional common law in Hong Kong after the end of British rule is remarkable when considered in light of the continuing denial of democratic self-rule by China's authoritarian Party-state. This article argues that the profusion of political transaction costs due to the fragmentation of the ruling elite and state-society discord consequent to the resumption of Chinese sovereignty has created the requisite space for the Court to craft, with impunity, consequential yet politically realistic doctrines bearing on such weighty matters as constitutional interpretation, central-local relations, separation of powers, and rights protection.

### I. INTRODUCTION

Independent and politically consequential judicial review commonly coincides with the conventional understanding of authoritarianism<sup>1</sup> as disregarding constitutional limits on rulers' authority and showing scant respect for individual rights.<sup>2</sup> Against this backdrop, it seems all the more remarkable that the Hong Kong Court of Final Appeal has ascended into an "activist,"<sup>3</sup> "independent,"<sup>4</sup> and "pivotal"<sup>5</sup> "custodian of the constitution,"<sup>6</sup>

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<sup>1</sup> See Peter H. Solomon, *Courts & Judges in Authoritarian Regimes*, 60 *WORLD POL.* 122, 125–28 (2007).

<sup>2</sup> David S. Law & Mila Versteeg, *Constitutional Variation Among Strains of Authoritarianism*, in *CONSTITUTIONS IN AUTHORITARIAN REGIMES* 165, 166 (Tom Ginsburg & Albert Simpser eds., 2014).

<sup>3</sup> Laifan Lin & Mingkang Gu, *Can Courts in Hong Kong Examine the Constitutionality of the Legislative Conduct of the PRC?*, in *HONG KONG IN TRANSITION: ONE COUNTRY, TWO SYSTEMS* 175, 188 (Robert Ash et al. eds., 2003).

<sup>4</sup> Eric C. Ip, *The Evolution of Constitutional Adjudication in the Chinese Special Administrative Regions: Theory and Practice*, 61 *AM. J. COMP. L.* 799, 801 (2013).

<sup>5</sup> Johannes Chan, *Hong Kong's Constitutional Journey, 1997–2011*, in *CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY* 169, 179 (Albert H.Y. Chen ed., 2014) [hereinafter Johannes Chan, *Hong Kong's Constitutional Journey*].

<sup>6</sup> Albert H.Y. Chen & P.Y. Lo, *The Basic Law Jurisprudence of the Court of Final Appeal*, in *HONG KONG'S COURT OF FINAL APPEAL: THE DEVELOPMENT OF THE LAW IN CHINA'S HONG KONG* 352, 390 (Simon N.M. Young & Yash Ghai eds., 2014).

notwithstanding the continuing denial of democratic self-rule and oversight by China's authoritarian Party-state.<sup>7</sup>

Since its inception on July 1, 1997, the Court has defied the “authoritarian”<sup>8</sup> government of the Hong Kong Special Administrative Region (SAR) to hold that persons “unlawfully” detained by the police “are entitled to use reasonable force to free themselves,”<sup>9</sup> and that the executive has “a positive duty . . . to take reasonable and appropriate measures to enable lawful assemblies to take place peacefully.”<sup>10</sup> The Court of Final Appeal has declared a criminal law provision that subjected homosexual men to unjustified differential treatment on the basis of their sexual orientation as unconstitutional,<sup>11</sup> recognized the right of postoperative transsexuals to marry in their new gender,<sup>12</sup> affirmed the right of non-permanent residents to travel to and return from overseas,<sup>13</sup> invalidated statutory limits on its own competence to hear parliamentary election petitions,<sup>14</sup> quashed a seven-year residency requirement before new immigrants may apply for social security payments,<sup>15</sup> and demanded that the Legislative Council enact corrective covert surveillance legislation within a specified time limit.<sup>16</sup> It has even designed new procedures for constitutional adjudication, reviving defunct British Imperial laws as

<sup>7</sup> Martin S. Flaherty, *Hong Kong Fifteen Years After the Handover: One Country, Which Direction?*, 51 COLUM. J. TRANSNAT'L L. 275, 276 (2013).

<sup>8</sup> There is broad scholarly consensus that the political regime in Hong Kong is an “authoritarian” one. See, e.g., Matthew Y.H. Wong, *Party Models in a Hybrid Regime: Hong Kong 2007–2012*, 15 CHINA REV. 67, 69 (2015) (“Hong Kong is generally considered to be an example of liberal authoritarianism . . .”); STAN HOK-WUI WONG, ELECTORAL POLITICS IN POST-1997 HONG KONG: PROTEST, PATRONAGE, AND THE MEDIA 7–9 (2015); BRIAN C.H. FONG, HONG KONG'S GOVERNANCE UNDER CHINESE SOVEREIGNTY: THE FAILURE OF THE STATE-BUSINESS ALLIANCE AFTER 1997 7 (2014); Tai-lok Lui & Stephen Wing-kai Chiu, *Governance Crisis and Changing State-Business Relations: A Political Economy Perspective*, in REPOSITIONING THE HONG KONG GOVERNMENT: SOCIAL FOUNDATIONS AND POLITICAL CHALLENGES 91, 94 (Stephen Wing-kai Chiu & Siu Lun Wong eds., 2012); Dexter Boniface & Alon Ilan, *Is Hong Kong Democratizing?*, 50 ASIAN SURV. 786, 797 (2010) (“Hong Kong is still far from meeting the procedural minimal definition of democracy: basic standards of participation, free and fair elections, civil liberties, and autonomy.”). See Mark Tushnet, *Authoritarian Constitutionalism: Some Conceptual Issues*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES, *supra* note 2, at 36, 36–37, 45–48 (explaining the existence of “authoritarian constitutionalism” and defining “authoritarianism” as a system in which “all decisions can potentially be made by a single decision maker whose decisions are both formally and practically unregulated by law.” In sum, an authoritarian regime need not be one that arrests political opponents arbitrarily or suppresses every criticism of its policies).

<sup>9</sup> *Yeung May Wan v. H.K.*, [2005] 8 H.K.C.F.A.R. 137, 139, 160 (C.F.A.).

<sup>10</sup> *Leung Kwok Hung v. H.K.*, [2005] 8 H.K.C.F.A.R. 229, 250 (C.F.A.).

<sup>11</sup> *Sec'y for Justice v. Yau Yuk Lung*, [2007] 10 H.K.C.F.A.R. 335, 336 (C.F.A.).

<sup>12</sup> *W v. The Registrar of Marriages*, [2013] 16 H.K.C.F.A.R. 112 (C.F.A.).

<sup>13</sup> *Gurung Kesh Bahadur v. Dir. of Immigr.*, [2002] 5 H.K.C.F.A.R. 480 (C.F.A.).

<sup>14</sup> *Mok Charles v. Tam Wai Ho & Another*, [2010] 13 H.K.C.F.A.R. 762 (C.F.A.).

<sup>15</sup> *Kong Yunming v. Dir. of Soc. Welfare*, [2013] 16 H.K.C.F.A.R. 950, 997 (C.F.A.).

<sup>16</sup> *Koo Sze Yiu v. Chief Executive of H.K.*, [2006] 9 H.K.C.F.A.R. 441, 472 (C.F.A.).

additional grounds for judging the validity of acts passed before July 1, 1997,<sup>17</sup> striking down a non-infringing provision to better achieve statutory ends,<sup>18</sup> and applying remedial interpretation to “read down” constitutionally defective statutes.<sup>19</sup>

Today, those who rely on constitutional law, be they politicians, judges, lawyers, journalists, or activists, must consult not just the Hong Kong Basic Law<sup>20</sup> itself, but also the voluminous case law of the Court of Final Appeal thereon, whether they agree with the Court’s expansive role or not.<sup>21</sup> The institutional common denominator of these judgments is a full-fledged constitutional common law consisting of a sizeable repertoire of substantive, procedural, and remedial judicial doctrines that were inspired, but not strictly required, by the Basic Law.<sup>22</sup> The common law’s gloss on the Basic Law is now well established. In the extrajudicial words of one of the Court’s most influential judges, former Chief Justice of Australia Sir Anthony Mason, “[t]here is an essential unity between the Basic Law and

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<sup>17</sup> *Solic. & Law Soc’y of H.K. v. Sec’y for Justice*, [2003] 6 H.K.C.F.A.R. 570 (C.F.A.).

<sup>18</sup> *Koon Wing Yee v. Insider Dealing Tribunal*, [2008] 11 H.K.C.F.A.R. 170, 173 (C.F.A.).

<sup>19</sup> *H.K. v. Hung Chan Wa*, [2006] 9 H.K.L.R.D. 842, 855, 867–68 (C.F.I.).

<sup>20</sup> XIANGGANG JIBEN FA (H.K.) [hereinafter Basic Law] (Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Adopted on April 4, 1990 by the Seventh National People’s Congress of the People’s Republic of China at its Third Session)).

<sup>21</sup> The Court of Final Appeal’s exercise of constitutional judicial review has attracted criticism from mainland Chinese legal circles. For an excellent review of this literature, see PUI YIN LO, *THE JUDICIAL CONSTRUCTION OF HONG KONG’S BASIC LAW: COURTS, POLITICS AND SOCIETY AFTER 1997* 185–203 (2014). These critical viewpoints ultimately culminated in a White Paper published by the State Council Information Office of the People’s Republic of China on June 10, 2014, titled “The Practice of the ‘One Country, Two Systems’ Policy in the Hong Kong Special Administrative Region,” which *inter alia* asserts, “Under the policy of ‘one country, two systems,’ all those who administrate Hong Kong, including . . . judges of the courts at different levels and other judicial personnel, have on their shoulders the responsibility of correctly understanding and implementing the Basic Law, of safeguarding the country’s sovereignty, security and development interests, and of ensuring the long-term prosperity and stability of Hong Kong . . . All this is necessary for displaying sovereignty, ensuring loyalty to the country by the mainstay of Hong Kong administrators and helping them to subject to oversight by the central government and Hong Kong society, while taking their responsibility for the country, the HKSAR and Hong Kong’s residents.” See INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA, *THE PRACTICE OF “ONE COUNTRY, TWO SYSTEMS” POLICY IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION* 46–47 (2014), reprinted in *FULL TEXT: CHINESE STATE COUNCIL WHITE PAPER ON “ONE COUNTRY, TWO SYSTEMS” POLICY IN HONG KONG*, SOUTH CHINA MORNING POST EDITION: HONG KONG (June 10, 2014), <http://www.scmp.com/news/hong-kong/article/1529167/full-text-practice-one-country-two-systems-policy-hong-kong-special>.

<sup>22</sup> See Henry P. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1, 1–3 (1975) (discussing the concept of Constitutional Common Law, which has its roots in American Supreme Court jurisprudence where the Court often goes beyond mere interpretation of the language of the Constitution). See also PO JEN YAP, *CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA* 80–103 (2015) [hereinafter PO JEN YAP, *CONSTITUTIONAL DIALOGUE*].

the common law that is denied if they are treated as if each occupies a separate watertight compartment.”<sup>23</sup>

The Court of Final Appeal, lacking enforcement or budgetary powers of its own,<sup>24</sup> can prevail only if political officials refrain from overturning its rulings,<sup>25</sup> which in turn requires the Court to adopt a pragmatic course of action.<sup>26</sup> The ascendancy of this body of constitutional common law of “exceptionally high quality”<sup>27</sup> is puzzling in light of the Basic Law’s undisputed socialist and civil law pedigree<sup>28</sup> and the absence of any meaningful constitutional adjudication throughout the British era<sup>29</sup>—a time when Hong Kong was governed by a liberal democratic common law sovereign, and characterized by the persistent impasse over democratization.<sup>30</sup>

How did the Hong Kong Court of Final Appeal prevail against all odds over the past two decades? To address this question, this article examines the application of the Basic Law within the context of the modern Hong Kong political climate and the historically authoritarian roots of the doctrine. Section II outlines the theoretical framework: high political transaction costs make regimes likelier to acquiesce in assertive claims to constitutional judicial review powers, which empower courts in turn to invent doctrines that heighten the cost of overturning those claims. The net result is to inure the regime to the flowering of constitutional rule of law in the teeth of its own authoritarianism. Section III outlines the Basic Law’s oft-overlooked authoritarian character and the web of constraints in which it might entangle the Court of Final Appeal’s constitutional authority. Section IV applies the theoretical framework, explaining the durability of

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<sup>23</sup> Anthony Mason, *The Common Law, in HONG KONG’S COURT OF FINAL APPEAL*, *supra* note 6, at 327, 335 (Sir Anthony Mason is one of the Court’s most influential judges and the former Chief Justice of Australia).

<sup>24</sup> See generally JON ELSTER, *EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 444 (2d ed. 2015).

<sup>25</sup> Matthew D. McCubbins & Daniel B. Rodriguez, *The Judiciary and the Role of Law, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY* 273, 274 (Barry R. Weingast & Donald A. Wittman eds., 2006).

<sup>26</sup> Po Jen Yap, *10 Years of the Basic Law: The Rise, Retreat and Resurgence of Judicial Power in Hong Kong*, 36 *COMMON L. WORLD REV.* 166, 167 (2007).

<sup>27</sup> Yash Ghai, *Themes and Arguments, in HONG KONG’S COURT OF FINAL APPEAL*, *supra* note 6, at 1, 13.

<sup>28</sup> Pui Yin Lo, *Hong Kong: Common Law Courts in China, in ASIAN COURTS IN CONTEXT* 183, 223 (Jiunn-Rong Yeh & Wen-Chen Chang eds., 2015).

<sup>29</sup> KEMAL BOKHARY, *HUMAN RIGHTS: SOURCE, CONTENT AND ENFORCEMENT* 30 (2015).

<sup>30</sup> See Alexei Trochev, *Fragmentation? Defection? Legitimacy? Explaining Judicial Roles in Post-Communist “Colored Revolutions.” in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE* 67, 68 (Diana Kapiszewski et al. eds., 2013).

constitutional common law in terms of the broader political context, highlighting seven of the Court's core doctrines: the Basic Law's supremacy, the living constitution, the separation of powers, legality, proportionality, the margin of appreciation, and avoidance of judicial reference. Section V concludes with a summary of its theoretical and empirical findings, a discussion of how changes in the wider political context might impact constitutional common law, and how the Court could defend its review authority.

## II. PERDURABLE JUDICIAL INTERPRETATION OF THE CONSTITUTION UNDER AUTHORITARIANISM

One cannot dismiss the legal basis of every authoritarian government as a “camouflage constitution.”<sup>31</sup> Such constitutions can leverage rulers to coordinate oligarchs and to regulate the bureaucracy in meaningful ways.<sup>32</sup> But like all constitutions, authoritarian ones do not execute themselves, for even the most intelligent autocrat cannot handle every decision by himself.<sup>33</sup> All constitutions must include principal-agent bargain guiding agents, such as administrative officials and judges, in their implementation.<sup>34</sup> Be it ever so authoritarian, a regime cannot withhold all discretion from courts if a constitutional text is to be meaningfully implemented.<sup>35</sup> Reliance on judicial means, in particular, to arbitrate core political controversies “knows no democratic/authoritarian borders” nowadays.<sup>36</sup> Inevitably, this raises the possibility of constitutional jurisprudence straying from the authoritarian regime's preferences.

The divergence between constitutional text encoding the regime's preferences and the jurisprudence of courts will sooner or later incite the principal to rein in the agent. To achieve this end, the regime may deploy, in addition to formal amendments of the constitution, less formal means like impeachment of “rogue” judges, curtailment of jurisdiction, a supermajority requirement for unconstitutionality rulings, budget slashing, and court

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<sup>31</sup> JAN-ERIK LANE, *CONSTITUTIONS AND POLITICAL THEORY* 119 (1996).

<sup>32</sup> Tom Ginsburg & Alberto Simpser, *Introduction: Constitutions in Authoritarian Regimes*, in *CONSTITUTIONS IN AUTHORITARIAN REGIMES*, *supra* note 2, at 1, 2.

<sup>33</sup> Xin He, *The Party's Leadership as a Living Constitution in China*, in *CONSTITUTIONS IN AUTHORITARIAN REGIMES*, *supra* note 2, at 245, 258–59.

<sup>34</sup> TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 23 (2003).

<sup>35</sup> Martin Shapiro, *The Mighty Problem Continues*, in *CONSEQUENTIAL COURTS*, *supra* note 30, at 380, 383–86.

<sup>36</sup> RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* 248 (2010). *See also* Tamir Moustafa, *Law and Authoritarian Regimes*, 10 *ANN. REV. L. & SOC. SCI.* 281, 283 (2014).

packing.<sup>37</sup> But the regime must be able to detect judicial malfeasance in the first place before it can decide and implement a response. Here, the obstacle of political transaction costs figures prominently. These include the costs of running the polity, of making decisions, of giving orders, and of monitoring, measuring, and enforcing compliance.<sup>38</sup> Opposition by citizens, civil society, and the legal profession to government action that weakens the court, or court-curb, is not unique to democracies.<sup>39</sup> Even authoritarian regimes, to remain secure in their power, must heed public opinion from time to time.<sup>40</sup> And yet, even “given the fickleness of majorities,”<sup>41</sup> external resistance in combination with the regime’s internal incohesion can advance judicial empowerment in the long run.

Genuine separation of powers seldom thrives in authoritarian regimes, but neither are ruling elites adamant monoliths. Varying policy agendas and political visions coexist amongst political elites,<sup>42</sup> as do contrary evaluations of the utility of judicial power.<sup>43</sup> A regime encumbered by high internal transaction costs is prone to indecision or “legislative inertia”<sup>44</sup> as to whether and how to react to controversial judicial decisions. As recent empirical case studies confirm,<sup>45</sup> chronic internal fragmentation, combined with potent resistance by media, civil society organizations, and mass movements, can handicap even an authoritarian government that might otherwise sanction assertive judicial claims.<sup>46</sup> Insurmountable political transaction costs are necessary but insufficient for judicial interpretations of the constitution to be sticky. Courts have to institutionalize their

<sup>37</sup> See Todd Schneider, *David v. Goliath? The Hong Kong Courts and China’s National People’s Congress Standing Committee*, 20 BERKELEY J. INT’L L. 575, 595 (2002).

<sup>38</sup> EIRIK G. FURUBOTN & RUDOLF RICHTER, INSTITUTIONS AND ECONOMIC THEORY: THE CONTRIBUTION OF THE NEW INSTITUTIONAL ECONOMICS 47 (1997).

<sup>39</sup> TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 19 (2007).

<sup>40</sup> Sherzod Abdukadirov, *The Problem of Political Calculation in Autocracies*, 21 CONST. POL. ECON. 360, 362 (2010).

<sup>41</sup> Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. POL. SCI. 345, 361–62 (2009).

<sup>42</sup> Mark A. Graber, *Constitutional Politics in the Active Voice*, in CONSEQUENTIAL COURTS, *supra* note 30, at 363, 369.

<sup>43</sup> John Ferejohn, *Judicial Power: Getting It and Keeping It*, in CONSEQUENTIAL COURTS, *supra* note 30, at 349, 353.

<sup>44</sup> PO JEN YAP, CONSTITUTIONAL DIALOGUE, *supra* note 22, at 85.

<sup>45</sup> See, e.g., PAULA NEWBERG, JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS (2002); Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291 (2002); MOUSTAFA, *supra* note 39; ALEXEI TROCHEV, JUDGING RUSSIA: CONSTITUTIONAL COURT IN RUSSIAN POLITICS 1990–2006 (2008); DANIEL COMPAGNON, A PREDICTABLE TRAGEDY: ROBERT MUGABE AND THE COLLAPSE OF ZIMBABWE (2011).

<sup>46</sup> Trochev, *supra* note 30, at 69.

constitutional preferences, while their doctrines must accommodate political reality if they are to stand the test of time.<sup>47</sup> Having few resources to withstand political backlash, courts that aim to vindicate constitutional values and rights must anticipate the reactions of weighty regime insiders in order to avert court-curbing.<sup>48</sup> Judicial doctrines must be strategically crafted to not only maximize judicial power but also to return substantial benefits to diverse parties outside *and* inside the regime in ways that raise the opportunity and transaction costs to the regime of retaliating.

### III. THE POLITICAL STRUCTURE OF THE BASIC LAW

In December 1984, the Sino-British Joint Declaration, an international treaty registered with the United Nations, set in motion the transfer of Hong Kong, which had been ceded by the Qing Emperor to the British Crown in the nineteenth century, to Communist China by an “almost surgical exercise.”<sup>49</sup> To shore up eroding domestic and international confidence, the Joint Declaration provided for the establishment of a highly autonomous Special Administrative Region under Chinese sovereignty<sup>50</sup> vested with executive, legislative, and independent judiciary powers<sup>51</sup> and led by a Chief Executive appointed by Beijing on the basis of locally held elections or consultations.<sup>52</sup> The contracting parties undertook to preserve the then-British dependency’s pre-existing legal,<sup>53</sup> social, and economic systems and life-styles, rights and liberties;<sup>54</sup> status as an international financial centre;<sup>55</sup> separateness of its port and customs;<sup>56</sup> finance and taxation arrangements;<sup>57</sup> and public security forces<sup>58</sup> from those of mainland China. The parties also sought to maintain Hong Kong’s economic ties with the United Kingdom and the rest of the world<sup>59</sup> and endow it with power to issue passports and

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<sup>47</sup> John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT’L REV. L. & ECON. 263, 263 (1992).

<sup>48</sup> John Ferejohn et al., *Comparative Judicial Politics*, in THE OXFORD HANDBOOK OF COMPARATIVE POLITICS 727, 744 (Charles Boix & Susan Stokes eds., 2007).

<sup>49</sup> Nihal Jayawickrama, *Public Law*, in THE LAW IN HONG KONG 1969–1989 49, 53 (Raymond Wacks ed., 1989).

<sup>50</sup> Sino-British Joint Declaration on the Question of Hong Kong, Dec. 19, 1984, art. 3(1)-(2), China-Eng., 1399 U.N.T.S. 23391.

<sup>51</sup> *Id.* art. 3(3).

<sup>52</sup> *Id.* art. 3(4).

<sup>53</sup> *Id.* art. 3(3).

<sup>54</sup> *Id.* art. 3(5).

<sup>55</sup> *Id.* art. 3(7).

<sup>56</sup> *Id.* art. 3(6).

<sup>57</sup> *Id.* art. 3(8).

<sup>58</sup> *Id.* art. 3(11).

<sup>59</sup> *Id.* art. 3(9).

conclude certain agreements with foreign states and international organizations.<sup>60</sup> In addition to the Sino-British Joint Declaration, all of these policies were codified into a document called the Basic Law.<sup>61</sup> However, nothing more than Beijing's goodwill guaranteed the observance of these grandiose promises on the part of China after the withdrawal of British rule on June 30, 1997. As the leading mainland Chinese Basic Law drafter Wu Jianfan noted, "[The Joint Declaration] says nothing about who decides whether the laws enacted are in accordance with the Basic Law and legal procedures or how to handle laws which do not accord with the Basic Law and legal procedures."<sup>62</sup>

The Basic Law Drafting Committee convened in June 1985 under the auspices of paramount leader Deng Xiaoping. It consisted of fifty-nine people, most from the mainland and all handpicked by the Chinese Communist Party and approved by the Standing Committee of the National People's Congress.<sup>63</sup> None of the committee members were representatives of the general public of Hong Kong.<sup>64</sup> The Hong Kong Basic Law was enacted by the Seventh National People's Congress and promulgated without referendum by the President of the People's Republic of China five years later, on April 4, 1990. The Basic Law may have purported to perpetuate the past independence from mainland China, but its actual provisions fall short of that goal.<sup>65</sup> It reflects Socialist legal and political assumptions.<sup>66</sup> It was, and is, seen by Beijing as a political manifesto declaring China's policy regarding the former British dependency.<sup>67</sup> The objectives of China's policies are "national unity," "territorial integrity," "prosperity," and "stability."<sup>68</sup> For Deng Xiaoping and other Chinese leaders, Hong Kong's prosperity and stability were interrelated with China's

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<sup>60</sup> *Id.* art. 3(10).

<sup>61</sup> *Id.* art. 3(12).

<sup>62</sup> Wu Jianfan, *Several Issues Concerning the Relationship between the Central Government of the People's Republic of China and the Hong Kong Special Administrative Region*, 2 J. CHINESE L. 65, 75 (1988).

<sup>63</sup> CINDY YIK-YI CHU, *CHINESE COMMUNISTS AND HONG KONG CAPITALISTS: 1937-1997* 71 (2010).

<sup>64</sup> Liu Yiu-Chu, *Interpretation and Review of the Basic Law of the Hong Kong Special Administrative Region*, 2 J. CHINESE L. 49, 51 (1988).

<sup>65</sup> Eric C. Ip, *Mapping Parliamentary Law and Practice in Hong Kong*, 3 CHINESE J. COMP. L. 97, 104 (2015).

<sup>66</sup> See Ignazio Castellucci, *Legal Hybridity in Hong Kong and Macau*, 57 MCGILL L.J. 665, 689-93 (2012).

<sup>67</sup> Ann D. Jordan, *Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region*, 30 CORNELL INT'L L.J. 335, 350-52 (1997).

<sup>68</sup> Basic Law, *supra* note 20, preamble; Wang Shuwen, *The Basic Rights and Obligations of Residents of the Hong Kong Special Administrative Region*, 2 J. CHINESE L. 123, 136 (1988).

developmental strategy.<sup>69</sup> Proceeding almost naturally from “stability” and “prosperity” is hostility toward electoral democracy and universal suffrage. For Beijing, democratization implied the encroachment of “Western” influence onto Chinese soil, to the detriment of its sovereignty and national security.<sup>70</sup>

Seen in this light, the grant of “a high degree of autonomy” to Hong Kong can hardly mean genuine self-government. The Chief Executive, the “linchpin” of the SAR,<sup>71</sup> represents the Chinese state in Hong Kong and the SAR externally.<sup>72</sup> He is appointed by the State Council of the People’s Republic of China on the recommendation of a corporatist electoral college currently comprised of 1,200 members, the vast majority of whom are not selected by direct elections and are sympathetic to Beijing’s interests.<sup>73</sup> Moreover, the “functional constituencies,” a strategically selected cross-section of Hong Kong society made up of hierarchically organized professional bodies and dominated by special interests, occupies no less than half the Legislative Council. No statute enacted by the Legislative Council is valid until the Chief Executive assents to it.<sup>74</sup> No one may introduce a bill related to “government policies” without the Chief Executive’s “written consent,”<sup>75</sup> and indeed, only the Chief Executive himself may introduce bills related to “public expenditure[s],” the “political structure,” or the “operation of the government.”<sup>76</sup> The Chief Executive has legal authority to maneuver in matters not directly affecting China’s national interests.<sup>77</sup>

The Basic Law contains no independent enforcement mechanism for its provisions. Paramount power to interpret the Basic Law is vested in the Standing Committee of the National People’s Congress,<sup>78</sup> making it a “most powerful and effective tool” for Beijing to intervene in Hong Kong politics

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<sup>69</sup> KIT POON, *THE POLITICAL FUTURE OF HONG KONG: DEMOCRACY WITHIN COMMUNIST CHINA* 27–28 (2008).

<sup>70</sup> SONNY SHIU-HING LO, *THE DYNAMICS OF BEIJING-HONG KONG RELATIONS: A MODEL FOR TAIWAN?* 134 (2008) [hereinafter SONNY SHIU-HING LO, *THE DYNAMICS*].

<sup>71</sup> Yash Ghai, *The Rule of Law and Capitalism: Reflections on the Basic Law*, in *HONG KONG, CHINA AND 1997: ESSAYS IN LEGAL THEORY* 343, 365 n.100 (Raymond Wacks ed., 1993).

<sup>72</sup> Basic Law, *supra* note 20, at art. 43.

<sup>73</sup> Li Pang-kwong, *The Executive*, in *CONTEMPORARY HONG KONG POLITICS AND GOVERNMENT* 27, 29 (Wai-man Lam et al. eds., 2d ed. 2012).

<sup>74</sup> Basic Law, *supra* note 20, art. 49.

<sup>75</sup> *Id.* art. 74.

<sup>76</sup> *Id.*

<sup>77</sup> Steve Tsang, *China and Political Reform in Hong Kong*, 2 *PAC. REV.* 68, 72 (1989).

<sup>78</sup> Basic Law, *supra* note 20, art. 158.

and governance.<sup>79</sup> Nothing, however, obliges Congress or its Standing Committee, to square any amendments to or interpretations of the Basic Law with the Joint Declaration.<sup>80</sup> The Chief Executive is expressly charged with safeguarding the Basic Law,<sup>81</sup> but it is incredible to imagine him enforcing it against his own government or his political principals in Beijing. Nor does the Basic Law contain guidance on how to rectify breaches of its provisions by statutes made by Hong Kong's autonomous Legislative Council, other than for the Legislative Council to amend or repeal them.<sup>82</sup> The Standing Committee may invalidate acts of the Legislative Council if it considers them contrary to the Basic Law's provisions on matters wholly or partially outside the SAR's autonomy.<sup>83</sup>

While Article 158 of the Basic Law mandates the Standing Committee to "authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region," it does not clarify whether the SAR courts are entitled to review and strike down legislation and executive decisions on constitutional grounds.<sup>84</sup> Prominent Basic Law drafters in fact warned against just that. Liu Yiu-chu argued that to vest in the Court of Final Appeal "the power of final adjudication over disputes which concern the 'constitutionality' of [SAR] legislation" would not just be "strange," but also tantamount to "establishing [the Court's] supremacy" over the Hong Kong and Chinese governments "in all matters covered by the Basic Law."<sup>85</sup> Wu Jianfan commented that to vest the Court of Final Appeal with "power to declare a portion of . . . or the entire [Act of the Legislative Council] invalid" and review "whether laws are in accordance with the Basic Law and legal procedures" might contravene the Chinese Constitution, which empowers the Standing Committee "to review local regulations enacted by the organs of state power in the provinces, autonomous regions, and municipalities directly under the Central Government and . . . repeal those local laws and regulations that contravene

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<sup>79</sup> Xiaonan Yang, *Two Interpreters of the Basic Law: The Court of Final Appeal and the Standing Committee of the National People's Congress*, in *HONG KONG'S COURT OF FINAL APPEAL*, *supra* note 6, at 69, 78.

<sup>80</sup> Basic Law, *supra* note 20, art. 159(4).

<sup>81</sup> *Id.* art. 48(2).

<sup>82</sup> *Id.* art. 160.

<sup>83</sup> *Id.* art. 17(3).

<sup>84</sup> Basic Law, *supra* note 20, art. 158 (quoted); Albert H.Y. Chen, *The Relationship Between the Central Government and the SAR*, in *THE BASIC LAW AND HONG KONG'S FUTURE* 107, 124 (Peter Wesley-Smith & Albert H.Y. Chen eds., 1988).

<sup>85</sup> Liu Yiu Chu, *supra* note 64, at 56.

the Constitution.” Such a power might even result in “a dramatic change in the common law judicial system [of Hong Kong];” whence, “it is doubtful whether this method of review is feasible.”<sup>86</sup> Basic law drafter Xiao Weiyun insisted that “the power to review whether the laws enacted by the Hong Kong legislature were consistent with the Basic Law was vested in the National People’s Congress Standing Committee and not in the Court of Final Appeal.”<sup>87</sup> Zhang Youyu dismissed the Basic Law as a valid basis for any judicial review whatsoever in these words: “the Basic Law is not in and of itself a ‘constitution.’”<sup>88</sup>

What is more, by limiting the power of the courts to “adjudication,” the Basic Law implies that their work is confined to resolving disputes, not invalidating statutes inconsistent with the Basic Law or judging the actions of political officials.<sup>89</sup> It excludes from the courts’ jurisdiction “acts of state,” including, but not limited to, foreign affairs and national defense, with the consequence, at least in theory, that officials can contend in court that any act of theirs under constitutional challenge is an act of the state and non-justiciable.<sup>90</sup> The Basic Law requires every appointment to the Court of Final Appeal to be confirmed by the semi-unelected Legislative Council<sup>91</sup> and does not forbid the Chief Executive from vetoing a judicial nominee even if recommended by the Independent Judicial Officers Recommendation Commission.<sup>92</sup> That the Basic Law apparently empowers major political actors of the SAR to be judges in their own cases should surprise no one familiar with contemporary Chinese constitutional law, which affords no legal remedy for breaches of the Chinese Constitution by the State.<sup>93</sup> It is a truism that constitutional rights “do not have primacy” in China’s legal system. The Constitution “has not become the standard for judging the

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<sup>86</sup> Wu Jianfan, *supra* note 62, at 76.

<sup>87</sup> Xiao Weiyun et al., *Why the Court of Final Appeal Was Wrong: Comments of the Mainland Scholars on the Judgment of the Court of Final Appeal*, in HONG KONG’S CONSTITUTIONAL DEBATE: CONFLICTS OVER INTERPRETATION 53, 56 (Johannes M.M. Chan et al. eds., 2000) [hereinafter HONG KONG’S CONSTITUTIONAL DEBATE].

<sup>88</sup> Zhang Youyu, *The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and Its Essential Contents and Mode of Expression*, 2 J. CHINESE L. 5, 7 (1988).

<sup>89</sup> P. Y. LO, THE HONG KONG BASIC LAW 468 (2011).

<sup>90</sup> Basic Law, *supra* note 20, art. 19(3).

<sup>91</sup> *Id.* art. 90(2).

<sup>92</sup> *Id.* art. 88; DANNY GITTINGS, INTRODUCTION TO THE HONG KONG BASIC LAW 162 (2013).

<sup>93</sup> Albert H.Y. Chen, *The Court of Final Appeal’s Ruling in the “Illegal Migrant” Children Case: Congressional Supremacy and Judicial Review*, in HONG KONG’S CONSTITUTIONAL DEBATE, *supra* note 87, at 73, 77.

behaviour of state organs or citizens,”<sup>94</sup> and the people’s courts rarely, if ever, cite constitutional provisions in either criminal or civil judgments.<sup>95</sup> Nothing in the Basic Law stops itself from descending to a “nominal” instrument which functions “partly as propaganda and partly as camouflage,” much like the Chinese Constitution itself.<sup>96</sup> To make sense of why “virtually every aspect of life in Hong Kong is affected in innumerable ways by the Basic Law,”<sup>97</sup> one must look *beyond* the document.

#### IV. THE POLITICAL FOUNDATIONS OF CONSTITUTIONAL COMMON LAW

##### A. *The Endurance of Constitutional Common Law*

If the Basic Law had established any system of constitutional judicial review, it was at best one of “weak-form review.”<sup>98</sup> Based on the text of the Basic Law, the Court of Final Appeal could have easily abdicated the power of constitutional review by holding that such a power is vested exclusively in the Standing Committee of the National People’s Congress and that any legislation not vetoed by the latter must be presumed consistent with the Basic Law and by the courts.<sup>99</sup> Had the Basic Law been mechanically interpreted, no constitutional common law could have arisen. Moreover, the SAR authorities or the Standing Committee of the National People’s Congress could easily have brought the Court back into line with the latent authoritarianism and judicial minimalism of the Basic Law by formal or informal means ranging from amendment to court-curbing.

Yet, no end to constitutional common law is in sight. No trend toward non-compliance by the political authorities with the Court’s jurisprudence has been detected.<sup>100</sup> No jurisdiction-stripping legislation has been enacted and no retaliatory judicial budget slashing has been reported. Indeed judicial independence “remains solid and alive.”<sup>101</sup> The Standing Committee has

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<sup>94</sup> Mo Jihong, *The Constitutional Law of the People’s Republic of China and its Development*, 23 COLUM. J. ASIAN L. 137, 182 (2009).

<sup>95</sup> Wang Zhenmin & Tu Kai, *Chinese Constitutional Dynamics: A Decennial Review*, in CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY, *supra* note 5, at 118, 122–23.

<sup>96</sup> PETER WESLEY-SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG 48 (2nd ed., 1994).

<sup>97</sup> GITTINGS, *supra* note 92, at 1.

<sup>98</sup> See generally Mark Tushnet & Rosalind Dixon, *Weak-Form Review and Its Constitutional Relatives: An Asian Perspective*, in COMPARATIVE CONSTITUTIONAL LAW IN ASIA 102, 105 (Rosalind Dixon & Tom Ginsburg eds., 2014) (defining “weak-form review”).

<sup>99</sup> See Albert H.Y. Chen, *supra* note 84, at 124.

<sup>100</sup> Pui Yin Lo, *supra* note 28, at 221.

<sup>101</sup> SONNY SHIU-HING LO, HONG KONG’S INDIGENOUS DEMOCRACY: ORIGINS, EVOLUTION AND CONTENTIONS 86 (2015).

confined its Interpretations to areas outside Hong Kong's autonomy,<sup>102</sup> which, so far, "have been absorbed by the Hong Kong system of government without difficulty."<sup>103</sup> Consistent with the theoretical framework expounded in Section II, Hong Kong's constitutional common law has emerged out of a polity heavily laden with escalating political transaction costs. These favorable conditions have allowed the Court to fashion doctrines that maximized judicial influence while raising the costs to the SAR authorities, and by extension the Standing Committee, of counteracting that influence.

### B. *A High Political Transaction-Cost Polity*

In the course of more than 150 years of political isolation, Hong Kong and its inhabitants have assumed a unique civic identity, with political values differing radically from those of the mainland Chinese.<sup>104</sup> Hong Kong residents are known for their willingness to push back against infringements of principles they hold dear, like the rule of law, judicial independence, and civil liberties.<sup>105</sup> For example, a half-million-strong march in July 2003 stopped, with the help of a critical defection from the ruling elite, proposed national security legislation sanctioned by Beijing but deemed too draconian by residents. Another example of successful activism by Hong Kong residents is the September 2012 encirclement of the Government Secretariat by tens of thousands of demonstrators who forestalled the introduction of compulsory primary school "moral and national education" courses condemned by the press and civil society as "brainwashing."<sup>106</sup> A decision of the Standing Committee in August 2014, conclusively affirming the Communist Party's *de facto* right to disqualify politically unacceptable Hong Kong residents from running for Chief Executive, ignited the historic Umbrella Revolution in which protestors occupied streets in three of the busiest districts for seventy-nine days between September and December 2014 in defiance of riot police and public order laws.<sup>107</sup> It is estimated that as many as 1.2 million out of a total

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<sup>102</sup> Ling Bing, *Subject Matter Limitation on the NPCSC's Power to Interpret the Basic Law*, 37 H.K.L.J. 619, 644 (2007).

<sup>103</sup> Anthony Mason, *The Rule of Law in the Shadow of a Giant: The Hong Kong Experience*, 33 SYDNEY L. REV. 623, 643 (2011).

<sup>104</sup> Eric C. Ip, *The High Court of the People: Popular Constitutionalism in Hong Kong under Chinese Sovereignty*, 36 LAW & POL'Y 314, 331 (2014) [hereinafter Ip, *The High Court*].

<sup>105</sup> Stuart Hargreaves, *From "Fragrant Harbour" to "Occupy Central": Rule of Law Discourse and Hong Kong's Democratic Development*, 9 J. PARLIAMENTARY & POL. L. 519, 565 (2015).

<sup>106</sup> Ip, *The High Court*, *supra* note 104, at 331.

<sup>107</sup> See Samson Yuen, *Hong Kong After the Umbrella Movement: An Uncertain Future of "One Country, Two Systems"*, 2015 CHINA PERSP. 49 (2015).

population of 7.2 million people participated in the movement at various times in various ways.<sup>108</sup>

Set against this backdrop, the transaction costs to the SAR authorities of passing legislation or proposing an amendment to the Basic Law to overturn a Court of Final Appeal decision are exorbitant. Absent an Interpretation of the Standing Committee, the SAR authorities will find it practically impossible to agree to amend the Basic Law just to overturn one decision of the Court of Final Appeal. Between 2005 and 2015, the Legislative Council vetoed two out of three government proposals to amend the Basic Law's electoral rules.<sup>109</sup> Achieving agreement on a statutory proposal to curb the Court is only slightly less difficult. Despite the fact that the majority of seats in the Legislative Council are held by pro-China parties, empirical investigations revealed that the government's legislative success rate, measured by the number of legislative proposals passed, during the C.H. Tung and Donald Tsang tenures (1997–2012) stood at a low level of only 56.05% because 40.04% of all legislative initiatives originally scheduled were shelved or suspended by defiant parliamentarians.<sup>110</sup> This lack of comity has turned the Legislative Council adversarial, superseding the old consensual politics with open confrontation.<sup>111</sup> “Very damaging divisions” further fragmented the ruling elite in the aftermath of the 2012 Chief Executive election, which pitted two pro-China candidates against each other in a bitter election.<sup>112</sup> The SAR's “corporatist”<sup>113</sup> regime succumbed to rampant intra-elite conflicts that eventually plunged Hong Kong “into a political quagmire of pervasive public discontent and distrust”<sup>114</sup> and reinforced external resistance to any controversial governmental action. It was against this background of high political transaction costs that the Hong Kong Court of Final Appeal fashioned an impressive body of constitutional common law.

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<sup>108</sup> Victoria Tin-bor Hui, *Hong Kong's Umbrella Movement: The Protests and Beyond*, 26 J. DEMOCRACY 111, 111 (2015).

<sup>109</sup> Simon N.M. Young, *Hong Kong: End of Occupy Central, Government's Proposal for Universal Suffrage Reform*, 2015 PUB. L. 502–03 (2015).

<sup>110</sup> Brian C.H. Fong, *Executive-Legislative Disconnection in Post-Colonial Hong Kong: The Dysfunction of the HKSAR's Executive-Dominant System, 1997–2012*, 2014 CHINA PERSP. 5, 11 (2014).

<sup>111</sup> Jermain T.M. Lam, *The Hong Kong Legislative Council: A Friend or an Enemy of Donald Tsang?*, in *THE SECOND CHIEF EXECUTIVE OF HONG KONG: EVALUATING THE TSANG YEARS 2005–2012* 59, 60–64 (Joseph Y.S. Cheng ed., 2013).

<sup>112</sup> Joseph Yu-shek Cheng, *The 2012 Chief Executive Election in Hong Kong and the Challenges for the Chinese Authorities*, 5 E. ASIAN POL'Y 91, 100 (2013).

<sup>113</sup> See Ma Ngok, *Eclectic Corporatism and State Interventions in Post-Colonial Hong Kong*, in *REPOSITIONING THE HONG KONG GOVERNMENT*, *supra* note 8, at 63, 74–80.

<sup>114</sup> FONG, *supra* note 8, at 233

### C. *The Core Doctrines*

This subsection examines seven of the Court's core constitutional common law doctrines: supremacy of the Basic Law, the living constitution, the separation of powers, legality, proportionality, the margin of appreciation, and avoidance of judicial reference, all of which are selected on the basis of their apparent difference from the Basic Law's literal text.

#### 1. *Supremacy of the Basic Law*

The supremacy of a constitutional text does nothing by itself to establish judicial supremacy over constitutional questions.<sup>115</sup> In principle, the Basic Law decrees that “[n]o law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law.”<sup>116</sup> Yet, it provides no specific process for disposing of primary or delegated legislation enacted after the resumption of Chinese sovereignty and suspected of unconstitutionality, let alone mandate its judicial invalidation. Given that non-judicial actors such as the Chief Executive and the Legislative Council are vested with considerable constitutional authority, it is not absurd for them to lay claim to interpretive authority on par with courts, at least when performing their constitutional duties.<sup>117</sup> In this regard, the doctrine of Basic Law supremacy is the most fundamental of all constitutional common law doctrines, without which the Court of Final Appeal would find it impossible, most of the time, to equate its reading of the Basic Law with the document itself.

Historically, a precept of the British Hong Kong legal system was its doctrine of the supremacy of the Letters Patent—the constitutional document of Hong Kong during British rule. Like parliamentary supremacy in England, this was never codified, but evolved as a rule via judges exercising their judgment of the political reality.<sup>118</sup> As the Supreme Court of Hong Kong held over one century ago, the doctrine entails that “[a]ny enactment [that the Legislative Council] may purport to pass, which is not within the scope of the Letters Patent is made without jurisdiction, and the Courts would have no hesitation in pronouncing it bad.”<sup>119</sup> Naturally, this rule

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<sup>115</sup> KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 9 (2007).

<sup>116</sup> Basic Law, *supra* note 20, art. 11(2).

<sup>117</sup> Po Jen Yap, *Interpreting the Basic Law and the Adjudication of Politically Sensitive Questions*, 6 CHINESE J. INT'L L. 543, 563 (2007) [hereinafter Po Jen Yap, *Interpreting the Basic Law*].

<sup>118</sup> ERIC C. IP, LAW AND JUSTICE IN HONG KONG 68 (2014) [hereinafter IP, LAW AND JUSTICE].

<sup>119</sup> Rex v. Ibrahim [1913] 8 H.K.L.R. 1, 18 (H.C.).

lapsed on July 1, 1997 with the abrogation of the Letters Patent as the constitutional document of Hong Kong. The Court of Final Appeal seized the opportunity of its first major case, *Ng Ka Ling v. Director of Immigration*,<sup>120</sup> to convert that doctrine to one of Basic Law supremacy, resurrecting thereby the interpretive supremacy of the judiciary over the canonical constitutional text of the day. “As with other constitutions,” the Court intoned, “laws which are inconsistent with the Basic Law are of no effect and are invalid” for “the courts of the Region have independent judicial power within the high degree of autonomy conferred on the Region;” “[i]t is therefore for the courts of the Region to determine questions of inconsistency and invalidity when they arise.”<sup>121</sup> Significantly, the Court claimed that “[t]he exercise of this jurisdiction is a matter of obligation, not of discretion [. . .] the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency.”<sup>122</sup> The Standing Committee’s subsequent override of the *Ng Ka Ling* decision by way of an Interpretation was narrowly confined to that judgment’s substantive pro-immigration aspects; it took no action to hamper the consolidation of the doctrine of Basic Law supremacy, which in many contexts is tantamount to judicial supremacy. Consider the following statement of the Court in another case, more than ten years later and under another Chief Justice: “It is important to acknowledge that while the views of the legislature are to be considered, it is the court that has the ultimate responsibility to determine whether legislation is constitutional,” something which is “a matter of law, only for the courts to determine.”<sup>123</sup>

Integral to the doctrine are credible judicial remedies for breaches of the Basic Law, as determined by the courts. The Court of Final Appeal has taken the lead in developing two main remedies: remedial interpretation and declarations of invalidity.<sup>124</sup> Remedial interpretation, though subtler than declarations of invalidity, is probably no less consequential, for it empowers the Court to rescue the constitutionality of a statute “in an altered form”<sup>125</sup> through its own “judicial techniques such as reading down and reading in.”<sup>126</sup> To justify this power, the Court simply imputed to the Legislative Council the implied intention that it would rather “its legislative provision to

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<sup>120</sup> *Ng Ka Ling v. Dir. of Immigr.* [1999] 2 H.K.C.F.A.R. 4 (C.F.A.).

<sup>121</sup> *Id.* at 26.

<sup>122</sup> *Id.* at 25.

<sup>123</sup> *Mok Charles v. Tam Wai Ho*, [2010] 13 H.K.C.F.A.R. 762, 787 (C.F.A.).

<sup>124</sup> BOKHARY, *supra* note 29, at 37–40.

<sup>125</sup> *H.K. v. Lam Kwong Wai*, [2006] 9 H.K.C.F.A.R. 574, 610 (C.F.A.).

<sup>126</sup> *H.K. v. Ng Po On*, [2008] 11 H.K.C.F.A.R. 91, 108 (C.F.A.).

have a valid, even if reduced, operation than to have no operation at all.”<sup>127</sup> If an impugned provision cannot be remedially interpreted in a way that is not “fundamentally at odds with the intent of the legislation in question,”<sup>128</sup> it must be declared unconstitutional.<sup>129</sup> Though declarations of invalidity do not literally expunge provisions from the statute books,<sup>130</sup> they do obligate inferior courts to “disapply” them with both retrospective and prospective effect in all adjudications.<sup>131</sup> It is thus rightly called “a course of last resort in the fullest sense.”<sup>132</sup>

The Court of Final Appeal has also asserted the judicial competence to temporarily suspend remedial interpretations and declarations of invalidity. In *Koo Sze Yiu v. Chief Executive of the HKSAR*,<sup>133</sup> the Court, in consideration of the pragmatic value of covert surveillance “in the detection and prevention of crime and threats to public security,”<sup>134</sup> suspended its declarations against a statutory provision and an executive order. These had authorized covert surveillance by law enforcement agencies for a grace period of six months. The Court’s decision was to give the political authorities time to update the legal framework in line with constitutional guarantees of privacy and communication rights. This innovation was so extraordinary that Sir Anthony Mason, on the *Koo Sze Yiu* Court, conceded that it might raise “fundamental doctrinal questions relating to the separation of powers, the role of the courts, the relationship between the courts and the legislative branch of government.”<sup>135</sup> The Legislative Council nonetheless complied with legislation revised with reference to the ruling.

The Court went a step further in *W v. Registrar of Marriages*, in which it remedially interpreted statutory marriage provisions that had, in the majority’s view, unconstitutionally excluded postoperative male-to-female transsexuals from the meaning of “woman” and “female.”<sup>136</sup> The Court not only suspended its orders for twelve months, but also ruled that even if “such legislation does not eventuate,” the courts below would still be bound to “decide questions regarding the implications of recognizing an

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<sup>127</sup> *Lam Kwong Wai*, [2006] 9 H.K.C.F.A.R. at 610.

<sup>128</sup> *Ng Po On*, [2008] 11 H.K.C.F.A.R. at 109.

<sup>129</sup> *W v. Registrar of Marriages* [2013] 16 H.K.C.F.A.R. 112, 186 (C.F.A.).

<sup>130</sup> *PUI YIN LO*, *supra* note 21, at 253.

<sup>131</sup> *Id.* at 252.

<sup>132</sup> *Registrar of Marriages*, [2013] 16 H.K.C.F.A.R. at 186.

<sup>133</sup> *Koo Sze Yiu v. Chief Exec. of H.K.*, [2006] 9 H.K.C.F.A.R. 441 (C.F.A.).

<sup>134</sup> *Id.* at 449.

<sup>135</sup> *Id.* at 460.

<sup>136</sup> *Registrar of Marriages*, [2013] 16 H.K.C.F.A.R. at 112.

individual's acquired gender for marriage purposes as and when any disputed questions arise" in accordance with its judgment.<sup>137</sup> Subsequently, the Legislative Council's failure to agree on a response before expiry of the suspension period did not prevent the Court from granting the appellant's prayer for relief.<sup>138</sup>

## 2. *The Living Constitution*

The Basic Law gives no methodological guidance on how it should be interpreted, and its final interpreter, the Standing Committee of the National People's Congress, has never attempted to provide any,<sup>139</sup> despite "considerable anxiety and debate" in Hong Kong itself.<sup>140</sup> Vague gestures to "stability and prosperity" have been invoked in lieu of clear legal propositions to justify its Interpretations.<sup>141</sup> Constitutional common law has filled this gap in the Hong Kong legal system. In *Ng Ka Ling*, the Court pronounced the Basic Law "a living instrument intended to meet changing needs and circumstances" the interpretation of which required a "purposive approach" to ascertaining its "true meaning" by reference to "the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context."<sup>142</sup> The courts "should give a generous interpretation" to the Basic Law's rights provisions so as to "give to Hong Kong residents the full measure of fundamental rights and freedoms so constitutionally guaranteed."<sup>143</sup> In *Director of Immigration v. Chong Fung Yuen*,<sup>144</sup> the Court went further, opining that constitutional interpretation must be an "objective exercise" and avoid "a literal, technical, narrow or rigid approach" on the one hand, and respect the statutory language that has been used on the other.<sup>145</sup> The task of the courts "is not to ascertain the

<sup>137</sup> *Id.* at 171.

<sup>138</sup> Johannes M.M. Chan, *Right to Judicial Remedies*, in *LAW OF THE HONG KONG CONSTITUTION* 1109, 1129 (Johannes M.M. Chan & C.L. Lim eds., 2d ed. 2015).

<sup>139</sup> See Michael W. Dowdle, *Constitutionalism in the Shadow of the Common Law: The Dysfunctional Interpretive Politics of Article 8 of the Hong Kong Basic Law*, in *INTERPRETING HONG KONG'S BASIC LAW: THE STRUGGLE FOR COHERENCE* 55, 72 (Hualing Fu et al. eds., 2007). See also Robert J. Morris, *The "Replacement" Chief Executive's Two-Year Term: A Pure and Unambiguous Common Law Analysis*, 35 *H.K.L.J.* 17, 23 (2005).

<sup>140</sup> Ling Bing, *supra* note 102, at 620.

<sup>141</sup> Yash Ghai, *Hong Kong's Autonomy: Dialects of Powers and Institutions*, in *PRACTISING SELF-GOVERNMENT: A COMPARATIVE STUDY OF AUTONOMOUS REGIONS* 315, 345 (Yash Ghai & Sophia Woodman eds., 2013) [hereinafter Yash Ghai, *Hong Kong's Autonomy*].

<sup>142</sup> *Ng Ka Ling v. Dir. of Immigration*, [1999] 2 *H.K.C.F.A.R.* 4, 28 (C.F.A.).

<sup>143</sup> *Id.* at 29.

<sup>144</sup> *Dir. of Immigration v. Chong Fung Yuen*, [2001] 4 *H.K.C.F.A.R.* 211 (C.F.A.).

<sup>145</sup> *Id.* at 223–24.

intent of the lawmaker on its own,”<sup>146</sup> but “[o]nce the courts conclude that the meaning of the language of the text when construed in the light of its context and purpose is clear, the courts are bound to give effect to the clear meaning of the language.”<sup>147</sup> In doing so, “[t]he courts will not on the basis of any extrinsic materials depart from that clear meaning and give the language a meaning which the language cannot bear.”<sup>148</sup> The Court took a narrow reading of the Standing Committee’s 1999 Interpretation of the Basic Law. The Interpretation had in passing cited an opinion of one of its own working committees, issued six years after the enactment of the Basic Law in 1990, as embodying the original intent of that Law. After *Chong Fung Yuen*, Hong Kong judges seemed to have no obligation to follow the Standing Committee’s arbitrary claims of “original” intent, which would have entailed ruinous legal uncertainty as well as loss of local judicial authority.<sup>149</sup>

This approach is demonstrated by the *W* case, in which the Court was to determine whether provisions in the Basic Law on “the freedom of marriage of Hong Kong residents”<sup>150</sup> protected the right of post-operative transsexuals to marry. When they drafted the Basic Law in the 1980s, its framers might well have intended to guarantee only the freedom of marriage of a person born male with a person born female, competent to procreate, excluding transsexuals. Yet the Court by a four-to-one majority claimed “the Basic Law (and the International Covenant on Civil and Political Rights as given constitutional effect by the Bill of Rights and art. 39 of the Basic Law) are living instruments intended to meet changing needs and circumstances.”<sup>151</sup> The majority continued, “[i]n present-day multi-cultural Hong Kong where people profess many different religious faiths or none at all . . . procreation is no longer (if it ever was) regarded as essential to marriage.”<sup>152</sup> Thus, it is unjustified to consider “the ability to engage in procreative sexual intercourse as a *sine qua non* premise for deducing purely biological criteria for ascertaining a person’s sex for marriage purposes.”<sup>153</sup>

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<sup>146</sup> *Id.* at 223.

<sup>147</sup> *Id.* at 225.

<sup>148</sup> *Id.* at 225. *See also* Po Jen Yap, *Constitutional Fig Leaves in Asia*, 25 WASH. INT’L L.J. 421, 435–36 (2016).

<sup>149</sup> *See* Eric C. Ip, *Constitutional Competition Between the Hong Kong Court of Final Appeal and the Chinese National People’s Congress Standing Committee: A Game Theory Perspective*, 39 L. & SOC. INQUIRY 824, 837 (2014).

<sup>150</sup> Basic Law, *supra* note 20, art. 37.

<sup>151</sup> *W v. Registrar of Marriages*, [2013] 16 H.K.C.F.A.R. 112, 152 (C.F.A.).

<sup>152</sup> *Id.* at 154.

<sup>153</sup> *Id.* at 155.

Without purporting to change the legal meaning of marriage as a union between a male and female, the Court ruled that to deny a postoperative transsexual woman the right to marry a man is to “deny her right to marry at all [and to] impair the very essence of the right to marry.”<sup>154</sup> The Court’s message was clear: the common law breathes life into the Basic Law, making a “living constitution” of it, not the other way round.<sup>155</sup> The constitution of Hong Kong, like other common law constitutions, is one that evolves, changes over time, and adapts to new circumstances without being formally amended.<sup>156</sup>

### 3. *The Separation of Powers*

The political system of Hong Kong is often described as “executive-led,” although neither the Basic Law nor the Letters Patent ever used such a term.<sup>157</sup> Indeed, when the Basic Law was drafted, Deng Xiaoping explicitly rejected the “Western” principle of “separation of powers” as incompatible with the “national situation” of China and the “reality” of Hong Kong.<sup>158</sup> Under this view, the Basic Law may be read as envisaging some kind of constitutional collaboration between the three branches of the SAR, requiring each to defer to the other’s institutional prerogatives when proper.<sup>159</sup> By contrast, constitutional common law posits that checks and balances between separate powers are equally important, and definitive of the Hong Kong political system. The role of the courts, according to the Court of Final Appeal, is to function as “a constitutional check on the executive and legislative branches of government,” so as “to ensure that they act in accordance with the Basic Law.”<sup>160</sup> The question to be asked is “whether the approach chosen by the legislature is one permitted by the Constitution,” something that “does not involve deference to the legislature.”<sup>161</sup>

The Court has said that while “the PRC [People’s Republic of China] Constitution does not provide for a separation of powers that is the same as or similar to the common law doctrine of the separation of powers,”<sup>162</sup> this

<sup>154</sup> *Id.* at 160.

<sup>155</sup> IP, LAW AND JUSTICE, *supra* note 118, at 69.

<sup>156</sup> See DAVID A. STRAUSS, THE LIVING CONSTITUTION 1 (2010).

<sup>157</sup> SWATI JHAVERI ET AL., ADMINISTRATIVE LAW IN HONG KONG 22 (2d ed. 2013).

<sup>158</sup> See MICHAEL C. DAVIS, CONSTITUTIONAL CONFRONTATION IN HONG KONG: ISSUES AND IMPLICATIONS OF THE BASIC LAW 37 n.47 (1990).

<sup>159</sup> Po Jen Yap, *Interpreting the Basic Law*, *supra* note 117, at 563.

<sup>160</sup> Ng Ka Ling v. Dir. of Immigration, [1999] 2 H.K.C.F.A.R. 4, 25 (C.F.A.).

<sup>161</sup> H.K. v. Ng Kung Siu, [1999] 2 H.K.C.F.A.R. 442, 467 (C.F.A.).

<sup>162</sup> Lau Kong Yung v. Dir. of Immigration, [1999] 2 H.K.C.F.A.R. 300, 345 (C.F.A.).

does not affect Hong Kong's identity as "a society with a strong commitment to the rule of law and its concomitants of an independent judiciary and respect for the separation of powers."<sup>163</sup> Separation of powers is a common law doctrine but one "which, in the case of Hong Kong, is reinforced by the constitutional separation of powers provided for by the BL [Basic Law]."<sup>164</sup> This principle is also a malleable "two-way street."<sup>165</sup> However, it has been invoked by the Court to justify non-interference in highly politicized matters. For instance, under the separation of powers, "the courts will recognise the exclusive authority of the legislature in managing its own internal processes in the conduct of its business [and] will not intervene to rule on the regularity or irregularity of the internal processes of the legislature but will leave it to determine exclusively for itself matters of this kind."<sup>166</sup>

#### 4. *The Principle of Legality*

In its statutory interpretive jurisprudence, the Court of Final Appeal has domesticated the English principle of legality, the effect of which is that in the absence of express words or necessary implication, legislation shall not be construed to justify infringing constitutional rights,<sup>167</sup> and "where necessary, the Court will effect a remedial construction of the relevant statutory provisions."<sup>168</sup> This is a principle "meant to guard against the risk that the full implications of general or ambiguous statutory language said to have abrogated or curtailed fundamental rights or freedoms went unnoticed by the legislature."<sup>169</sup> It requires that any restriction of fundamental rights must be sufficiently specific to allow the citizen to predict the legal consequences of his conduct, and to enable public officials to know the legitimate limits of their powers.<sup>170</sup> The principle of legality potentially ramifies into the relationship between the Hong Kong system of law and the Standing Committee.<sup>171</sup> Absent any formal recourse in the event the

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<sup>163</sup> *Dem. Rep. of the Congo v. FG Hemisphere Assoc. LLC* (No. 1), [2011] 14 H.K.C.F.A.R. 95, 165 (C.F.A.).

<sup>164</sup> *Leung Kwok Hung v. President of the Legislative Council* (No. 1), [2014] 17 H.K.C.F.A.R. 689, 701 (C.F.A.).

<sup>165</sup> James Spigelman, *Institutional Integrity and Public Law: An Address to the Judges of Hong Kong*, 44 H.K.L.J. 779, 791 (2014).

<sup>166</sup> *Leung Kwok Hung*, [2014] 17 H.K.C.F.A.R. at 702.

<sup>167</sup> JONATHAN AUBURN ET AL., *JUDICIAL REVIEW: PRINCIPLES AND PROCEDURE* 283 (2013).

<sup>168</sup> *GA v. Dir. of Immigr.*, [2014] 17 H.K.C.F.A.R. 60, 102 (C.F.A.).

<sup>169</sup> *A v. Comm'r of Indep. Comm'n Against Corruption*, [2012] 15 H.K.C.F.A.R. 362, 380 (C.F.A.).

<sup>170</sup> Johannes M.M. Chan & C.L. Lim, *Interpreting Constitutional Rights and Permissible Restrictions*, in *LAW OF THE HONG KONG CONSTITUTION*, *supra* note 138, at 565, 591.

<sup>171</sup> *IP, LAW AND JUSTICE*, *supra* note 118, at 123.

Standing Committee issues an Interpretation that threatens to infringe upon fundamental rights, the courts may reasonably ask whether the Committee may not have intended to annul the fundamental rights and liberties affirmed in the Basic Law in the absence of clear language to the contrary and in order to save the rule of law.

##### 5. *The Principle of Proportionality*

Like the principle of legality, the principle of proportionality is not expressed in the Basic Law. But unlike the former, which concerns the formalities by which a right may be circumscribed, the latter addresses the balance between means adopted and legitimate aims.<sup>172</sup> Ever since the British domesticated the International Covenant on Civil and Political Rights (ICCPR) in 1991, the courts, in cautious, incremental steps, have been adopting the European doctrine of proportionality when arguing the demerits of limitations to fundamental rights.<sup>173</sup> The Court of Final Appeal, undaunted by the resumption of Chinese sovereignty, continues to invoke this powerful doctrine in order to review legislation, executive decisions, and common law rules on many occasions.<sup>174</sup>

For example, the Court has held that the Commissioner of Police must apply the proportionality test whenever he exercises his statutory discretion to impose limits on the right of peaceful assembly, admonishing that police power may not be wielded arbitrarily.<sup>175</sup> The test was spelled out in exacting terms: “(1) the restriction must be rationally connected with one or more of the legitimate purposes; and (2) the means used to impair the right of peaceful assembly must be no more than is necessary to accomplish the legitimate purpose in question.”<sup>176</sup> The rationale of the principle of proportionality, the Court explained, is that the Basic Law, as “a constitution properly protective of human rights,” requires all public powers capable of restricting such rights to “be clearly and carefully limited to avoid the danger of it being exercised arbitrarily or disproportionately. The rule of law so demands.”<sup>177</sup> In the anti-discrimination context, the Court had ruled

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<sup>172</sup> Johannes M.M. Chan & C.L. Lim, *supra* note 170, at 596.

<sup>173</sup> In an early Bill of Rights decision, the Court of Appeal (Silke V-P) unequivocally declared, “The interests of the individual must be balanced against the interests of society generally but, in the light of the contents of the Covenant and its aim and objectives, with a bias towards the interests of the individual.” *The Queen v. Sin Yau Ming*, [1992] 1 H.K.L.R 127, 145 (C.A.).

<sup>174</sup> BOKHARY, *supra* note 29, at 32–36.

<sup>175</sup> *Leung Kwok Hung v. H.K.*, [(2005) 8 H.K.C.F.A.R. 229, 268 (C.F.A.).

<sup>176</sup> *Id.* at 253.

<sup>177</sup> *Id.* at 292.

unconstitutional statutory provisions that solely criminalized homosexual buggery committed in public for breaching the Basic Law's guarantee of legal equality: "differential treatment" cannot be justified unless there exists some "genuine need for such difference [which must also] be rationally connected to the legitimate aim [and] be no more than is necessary to accomplish the legitimate aim."<sup>178</sup>

#### 6. *The Margin of Appreciation*

The "margin of appreciation," a doctrine adopted from European supranational jurisprudence, holds that courts should appreciate the informational advantages of the government and the Legislative Council, just as international courts do those of national governments, even if the courts cannot be said to be unfamiliar with local conditions.<sup>179</sup> In *Fok Chun Wa v. Hospital Authority*,<sup>180</sup> the Court upheld an administrative policy denying the non-resident spouses of permanent residents eligibility for subsidized services at public hospitals. The Court explained its decision in the following terms, "where limited public funds are involved, the courts have recognized that lines have had to be drawn by the executive or the legislature" which should not be disturbed unless "shown to be manifestly without reasonable foundation."<sup>181</sup>

The classic statement of this doctrine, touching judicial approaches to constitutional adjudication of civil and political rights on one hand and social and economic rights on the other, can be found in *Kong Yunming v. Director of Social Welfare*.<sup>182</sup> There the Court reviewed a policy, contained in an Order in Council, excluding all non-permanent residents from eligibility for benefits under the Comprehensive Social Security Assistance scheme.<sup>183</sup> The Court distinguished between "fundamental rights" and "socio-economic policies." The former encompasses rights like the freedom of expression and the presumption of innocence, any restriction of which should be regarded as "disproportionate" unless justifiable as no more than a "minimal impairment." A "minimal impairment" is defined as an action that "goes no further than necessary to achieve the legitimate objective in

<sup>178</sup> Sec'y for Justice v. Yau Yuk Lung, [2007] 10 H.K.C.F.A.R. 335, 349 (C.F.A.).

<sup>179</sup> Johannes M.M. Chan & C.L. Lim, *supra* note 170, at 602.

<sup>180</sup> See *Fok Chun Wa v. Hosp. Auth.*, [2012] 15 H.K.C.F.A.R. 409 (C.F.A.).

<sup>181</sup> *Id.* at 438.

<sup>182</sup> See *Kong Yunming v. Dir. Soc. Welfare*, [2013] 16 H.K.C.F.A.R. 950 (C.F.A.).

<sup>183</sup> For a discussion of the law and policy implications of this decision, see Karen Kong, *Kong Yunming v. Director of Social Welfare: Implications for Law and Policy on Social Welfare*, 44 H.K.L.J. 67 (2014).

question.”<sup>184</sup> By contrast, the allocation of finite public funds in a social welfare context risks neither violation of “fundamental rights” nor “discrimination on inherently suspect grounds.” Under the margin of appreciation principle, courts ought to intervene only if the impugned act is “manifestly without reasonable justification.”<sup>185</sup> The Court of Final Appeal astonished many when it announced that the “right to social welfare is not a fundamental right but a right which intrinsically involves the Government setting rules determining eligibility and benefit levels.”<sup>186</sup>

### 7. *Predominant Provision Test*

The Basic Law obligates the SAR courts, when interpreting provisions on matters not wholly within the Region’s autonomy in the course of final adjudication, to “seek an interpretation of the relevant provisions from the Standing Committee of the National People’s Congress through the Court of Final Appeal.”<sup>187</sup> Interestingly, “relevant provisions” are not defined, nor is the Standing Committee forbidden to circumscribe at will the scope of validity of Hong Kong judicial doctrines, as embodied in the precedents of its courts.<sup>188</sup> In theory, this referral procedure is a *carte blanche* for Beijing to “secure the total subordination of Hong Kong to China.”<sup>189</sup> It was justly called “a nightmare to the Court of Final Appeal that it cannot get rid of.”<sup>190</sup> If used with any frequency, it would prohibit Hong Kong’s common law from operating as a free-standing legal system.<sup>191</sup>

Constitutional common law has mediated the effect of the referral procedure through the so-called “predominant provision test” formulated by the Court of Final Appeal in *Ng Ka Ling*. The test divides Basic Law provisions into two types: “non-excluded provisions” (those belonging to the autonomous jurisdiction of the Hong Kong SAR), and “excluded provisions” (matters for which the Chinese Central People’s Government has responsibility or touching relations between the Central People’s

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<sup>184</sup> Kong Yunming, [2013] 16 H.K.C.F.A.R. at 969.

<sup>185</sup> *Id.* at 969–70.

<sup>186</sup> *Id.* at 970.

<sup>187</sup> Basic Law, *supra* note 20, art. 158.

<sup>188</sup> Zhenmin Wang, *From the Judicial Committee of the British Privy Council to the Standing Committee of the Chinese National People’s Congress: An Evaluation of the Legal Interpretive System after the Handover*, 37 H.K.L.J. 605, 611 (2007).

<sup>189</sup> YASH GHAI, *Hong Kong’s Autonomy*, *supra* note 141, at 345.

<sup>190</sup> Benny Y.T. Tai, *The Constitutional Game of Article 158 (3) of the Basic Law*, 41 H.K.L.J. 61 (2001).

<sup>191</sup> See generally Cora Chan, *Reconceptualising the Relationship Between the Mainland Chinese Legal System and the Hong Kong Legal System*, 6 ASIAN J. COMP. L. 1 (2011).

Government and the SAR). The courts may refer to the Standing Committee an “excluded provision” *only* if it is a “predominant provision” in the case at bar, meaning that it “will affect the judgment on the case.”<sup>192</sup> Even in such a case, a referral to the Standing Committee may be avoided if a competent court can show that the provision is not essential for the result of its decision.

In practice, the Court of Final Appeal avoids referring matters to the Standing Committee with impunity. The first-ever referral was not made until 2011—fourteen years after the resumption of Chinese sovereignty—in the case of *Democratic Republic of the Congo v. FG Hemisphere Associates LLC (No. 1)*.<sup>193</sup> That case involved the question of whether China’s policy of granting foreign states absolute immunity in its mainland courts extended to Hong Kong, where common law judges have traditionally applied the English doctrine of restrictive immunity. China’s responsibility for foreign affairs is exclusive, whereas the courts of Hong Kong are bound to defer to Beijing’s decisions “on matters of foreign affairs relating to the People’s Republic of China as a sovereign State.”<sup>194</sup> Accordingly, a majority of the Court took the then unprecedented step of referring to the Standing Committee for an Interpretation. The Standing Committee duly returned an Interpretation that directly quoted each of the Court’s questions and provided acute and affirmative answers.<sup>195</sup> The Court then issued its own final judgment applying the Standing Committee’s Interpretation to the case in favor of the Congo.<sup>196</sup> In delivering a detailed and principled judgment that evaluated all relevant legal and policy issues, and in rendering its own provisional ruling before the Standing Committee got around to an Interpretation, the Court of Final Appeal created the impression that it remained the real final adjudicative authority in Hong Kong *de facto*. Each of the four questions referred to the Standing Committee had been narrowly drafted to require only a binary (“yes” or “no”) answer. This strategy has been praised as “a laudable attempt that reduces the arbitrariness of the referencing process.”<sup>197</sup>

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<sup>192</sup> *Ng Ka Ling v. Dir. of Immigration*, [1999] 2 H.K.C.F.A.R. 4, 31–33 (C.F.A.).

<sup>193</sup> *Dem. Rep. of the Congo v. FG Hemisphere Assoc. LLC (No. 1)*, [2011] 14 H.K.C.F.A.R. 95 (C.F.A.).

<sup>194</sup> *Id.* at 212.

<sup>195</sup> The Interpretation of the Standing Committee of the NPC with Regard to art. 13, § 1 of the Basic Law, 19 (2011).

<sup>196</sup> *Dem. Rep. of the Congo v. FG Hemisphere Assoc. LLC (No. 2)*, [2011] 14 H.K.C.F.A.R. 395 (C.F.A.).

<sup>197</sup> Johannes Chan, *Hong Kong’s Constitutional Journey*, *supra* note 5, at 191.

The “predominant provision” test stands untouched after the first and only referral so far. *Vallejos v. Commissioner of Registration*<sup>198</sup> challenged the constitutionality of a statute that controversially prohibited foreign domestic helpers from acquiring permanent residency, no matter how long they have resided in Hong Kong. This was allegedly contrary to the Basic Law’s permission for Chinese citizens “who have ordinarily resided in Hong Kong for a continuous period of not less than seven years” to acquire permanent residency.<sup>199</sup> Though affirming the status quo, the Court rejected the Commissioner of Registration’s request for a referral to the Standing Committee for a final interpretation of the meaning of certain parts of its 1999 Interpretation as a matter of obligation, notwithstanding the *Chong Fung Yuen* principles. The Court reaffirmed that the reference mechanism is mandatory only upon the two well-established conditions of the avoidance doctrine, namely, “classification” and “necessity,” both of which must be satisfied before it can proceed to a reference.<sup>200</sup> The Court jealously defended its prerogative “to decide and for it alone to decide”<sup>201</sup> whether to make any reference and dismissed the Commissioner’s request as “unnecessary.”<sup>202</sup> The provision in question, though an “excluded provision,” does not legally apply to foreign domestic helpers, who are “qualitatively so far-removed from what would traditionally be recognized as ‘ordinary residence.’”<sup>203</sup> Importantly, the Court formalized a third hurdle in the doctrine by ruling that a reference request must satisfy a third “arguability” condition, designed to eliminate “a risk of potential abuse” by avoiding the slippery slope along which “all sorts of fanciful arguments could then be made just to seek a reference to the Standing Committee.”<sup>204</sup> Thus the Court has created for itself even greater latitude in avoiding engagement with the Standing Committee of the National People’s Congress.

#### D. Analysis

The importance of political transaction costs to the durability of constitutional common law under authoritarianism cannot be overstated. It is perhaps best illustrated, albeit negatively, by the landmark *Ng Ka Ling*

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<sup>198</sup> *Vallejos v. Comm’r of Registration*, [2013] 16 H.K.C.F.A.R. 45 (C.F.A.).

<sup>199</sup> Basic Law, *supra* note 20, art. 24(2)(2).

<sup>200</sup> *Vallejos*, [2013] 16 H.K.C.F.A.R. at 83.

<sup>201</sup> *Id.* at 86.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 76–77.

<sup>204</sup> *Id.* at 85.

saga. Public opinion appeared to be on the government's side<sup>205</sup> after it alleged that the Court's pro-immigrant ruling would cause an estimated 1.675 million more immigrants from mainland China to flood into Hong Kong, precipitating a severe social and economic crisis.<sup>206</sup> On June 26, 1999, upon a constitutionally dubious petition from the Chief Executive through the State Council, the Standing Committee duly delivered its Interpretation, which reinstated the anti-immigrant provisions invalidated by the Court. Fortunately for the Court, the alliance of popular opinion, the SAR authorities, and the Standing Committee proved to be short-lived. By the same token, the almost complete absence of constitutional adjudication throughout much of the British era can be attributed to extremely low levels of political transaction costs, as elite cohesion was high and systemic popular resistance was non-existent.<sup>207</sup>

The stable evolution of constitutional common law in Hong Kong after the resumption of Chinese sovereignty can moreover be explained by the benefits of its constitutive doctrines to the authorities and the citizenry. The doctrine of Basic Law supremacy has rendered that document—notwithstanding its undemocratic origin and authoritarian tenor—an authoritative, respectable, credible “constitutional instrument of binding force.”<sup>208</sup> The reality is that the Basic Law is Hong Kong's constitution because “the courts and others treat it so.”<sup>209</sup> Credible judicial remedies, upheld by the separation of powers principle, have convinced aggrieved citizens that they will lessen their costs by seeking legal remedies under the Basic Law rather than by acting extra-constitutionally, even if power-holders do oftentimes get affirmed. The living constitution doctrine enables the courts to adapt the Basic Law enacted more than a quarter of a century ago to present conditions, at low cost to the polity, in light of shifting social attitudes, the demands of rapid technological change, and other modern challenges.<sup>210</sup> It has spared public officials not only the cost of formally amending the Basic Law for the foregoing considerations, but also the burden of interpreting it themselves simply to remove the uncertainty proceeding from the ambiguity of incompleteness inherent in all

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<sup>205</sup> SONNY SHIU-HING LO, *THE DYNAMICS*, *supra* note 70, at 106.

<sup>206</sup> Johannes M.M. Chan, *Immigration Policies and Human Resources Planning*, in HONG KONG MOBILE: MAKING A GLOBAL POPULATION 149, 188 (Helen F. Siu & Agnes S. Ku eds., 2008).

<sup>207</sup> Eric C. Ip, *The Economic Structure of Hong Kong Administrative Law: Efficiency and Legality of Government Decision-Making Since China's Resumption of Sovereignty*, 12 WASH. U. GLOBAL STUD. L. REV. 227, 235–36 (2013).

<sup>208</sup> PUI YIN LO, *supra* note 21, at 12.

<sup>209</sup> LAW OF THE HONG KONG CONSTITUTION, *supra* note 138, at xi.

<sup>210</sup> See JOHN LAWS, *THE COMMON LAW CONSTITUTION* 7–9 (2014).

constitutions and owing to the inevitable informational and organizational limitations of its drafters.<sup>211</sup>

Standards of constitutionally appropriate behavior, like proportionality and legality, benefit the whole political system by confirming the legitimacy of policies and statutes that the courts maintain or forbear to nullify through constitutional review.<sup>212</sup> Proportionality in particular tests arbitrariness by obliging officials and lawmakers to duly weigh the pros and cons of their acts, consistent with the percepts of cost-benefit analysis.<sup>213</sup> Improved legislative and administrative rationality in turn promotes market rationality, eases pressures on elites to reform the political system, and offers aggrieved citizens a sense of vindication.<sup>214</sup> The opportunity costs to the SAR authorities of voiding the Court's constitutional jurisprudence would be high, as acknowledged by the Secretary for Justice, the third most senior principal official of the SAR, who in 2008 stated that "[a]lthough defeats in judicial reviews can be hard to swallow immediately," there is a widespread conviction within the government, that "the commitment to the high standards of legality, reasonableness and fairness, and the metamorphosis brought about by judicial discipline at times, will improve public administration, and will make Hong Kong a better society."<sup>215</sup>

Additionally, the Court of Final Appeal's standard interpretations of the Basic Law, disseminated by the media, help clarify the citizenry's understanding of what is a constitutional violation, raise the costs of oppression, and serve as a resource civil society can use to rally support for worthy causes. For example, the Court's generous interpretation and enforcement of the individual rights under the Basic Law has provided useful information for interested parties and non-state actors like the Catholic Church, academics, human rights advocacy groups, radio personalities, and opposition politicians to coordinate resistance to transgressions by political authority.<sup>216</sup> Kemal Bokhary, a long-time judge of the Court, went so far as to suggest that the "people's assertiveness [is]

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<sup>211</sup> ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 67 (2009).

<sup>212</sup> See JERRY L. MASHAW, *GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 51 (1997).

<sup>213</sup> Sofia Ranchordás & Boudewijn de Waard, *Proportionality Crossing Borders: Why It Is Still Difficult to Recognise Sparrows and Cannons*, in *THE JUDGE AND THE PROPORTIONALITY USE OF DISCRETION: A COMPARATIVE STUDY* 1, 3 (Sofia Ranchordás & Boudewijn de Waard eds. 2016).

<sup>214</sup> MOUSTAFA, *supra* note 39, at 82.

<sup>215</sup> Yan Lung Wong, *Secretary for Justice's Speech at Conference on Effective Judicial Review: A Cornerstone of Good Governance* (Dec. 11, 2008).

<sup>216</sup> Eric C. Ip, *The Democratic Foundations of Judicial Review under Authoritarianism: Theory and Evidence from Hong Kong*, 12 INT'L J. CONST. L. 330, 340 (2014).

the mainstay of [Hong Kong's] legal system,"<sup>217</sup> and that "imperiling judicial independence would be more harmful [in Hong Kong] than in a fully developed democracy [. . .] In so far as a shortfall in democracy increases the burden on the courts, we accept that increased burden."<sup>218</sup> The Court's principled avoidance of making reference of constitutional questions to the Standing Committee has won considerable respect from the public.<sup>219</sup>

Since *Ng Ka Ling*, the Court has shown more self-awareness that its constitutional jurisprudence must be moderated by "a keen understanding" of political consequences,<sup>220</sup> and that sustainable judicial interpretations accommodate the preferences and sensitivities of major political stakeholders, even when transaction costs prohibit political retaliation. The Court has sensibly implemented doctrines that signal to the authorities its awareness of the political boundaries of its assertions of constitutional jurisdiction. The separation of powers doctrine is a double-edged sword the Court can aim at itself when a respectable pretext is needed to acquiesce to the boundaries of the government and the Legislative Council. The margin of appreciation has "hardwired" both judicial deference and hard-headed principles of law and economics into Hong Kong's constitutional common law,<sup>221</sup> in a way that is consistent with the Basic Law's neoliberal spirit.<sup>222</sup>

## V. CONCLUSION

The constitutional common law that has sprung from the Hong Kong Court of Final Appeal in the face of lasting authoritarianism is unique. The doctrine of Basic Law supremacy has staked out for the judiciary a real primacy over constitutional meaning and enforcement in a way only implicit in its text. The living constitution doctrine has freed the Court from the chains of real or alleged original intent so that it can confidently construe constitutional provisions in line with the common law tradition and in light of societal and technological metamorphosis. The separation of powers has legitimized the Court's checks and balances on the political branches. The

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<sup>217</sup> Kemal Bokhary, *The Rule of Law in Hong Kong: Fifteen Years after the Handover*, 42 H.K.L.J. 87, 89 (2012).

<sup>218</sup> Kemal Bokhary, *An Independent Judiciary*, in EFFECTIVE JUDICIAL REVIEW: A CORNERSTONE OF GOOD GOVERNANCE 169, 180 (Christopher Forsyth et al. eds., 2010).

<sup>219</sup> Simon Tat-ming Ng & Kuan Hsin-chi, *Legal Culture*, in INDICATORS OF SOCIAL DEVELOPMENT: HONG KONG 2006 39–40 (Sai-wing Leung et al. eds., 2008).

<sup>220</sup> Albert H.Y. Chen & P.Y. Lo, *supra* note 6, at 388.

<sup>221</sup> Eric C. Ip *Kong Yunming Manifest Unreasonableness: The Doctrinal Future of Constitutional Review of Welfare Policy in Hong Kong*, 44 H.K.L.J. 55, 64 (2014).

<sup>222</sup> See generally Eric C. Ip, *The Constitution of Economic Liberty in Hong Kong*, 26 CONST. POL. ECON. 307 (2015) [hereinafter Ip, *Economic Liberty*].

principles of legality and proportionality have imposed important limits on arbitrary government decision making, prescribing effective standards of constitutionally permissible legislative conduct. The margin of appreciation has lent the Court discretion to adopt a hands-off approach to resource-allocation without abdicating a judicial role in social and economic rights. Judicial reference avoidance has averted interference by the Standing Committee of the National People's Congress in Basic Law interpretation, at least in relation to adjudication.

For all practical purposes, it has been the constitutional common law of the Court of Final Appeal, which underpins and transcends all instances of constitutional litigation in Hong Kong, not the text of the Basic Law, that has shaped the meaning and meaningfulness of the Basic Law in the minds of millions of residents of the SAR, making it a morally—not just legally—binding document. How did this come to pass? This article has theorized the plenitude of political transaction costs: internal regime fragmentation and state-society discord in Hong Kong since the resumption of Chinese sovereignty that crucially created conditions favorable for the impunity of an independent judiciary and constitutional common law in the shadow of an authoritarian sovereign. To survive such odds, judicial interpretations must yield important benefits that win support or coax acquiescence from the regime and the citizenry alike. Constitutional common law, nowadays miraculously an unquestioned feature of Hong Kong's landscape, is hardly a natural outcome of the Basic Law. An alternative set of political conditions with negligible political transaction costs may have produced very different and very sinister results.

What might the future hold for Hong Kong's constitution under Chinese sovereignty? High transaction-cost politics is unlikely to fade. The diametrically opposed views of Beijing and the pan-democratic forces on the selection of the Chief Executive almost certainly guarantee protracted constitutional conflict.<sup>223</sup> The Umbrella Revolution hints that Beijing will no longer offer any concessions toward electoral competition in Hong Kong, even in face of unprecedented popular mobilization.<sup>224</sup> Corporatist rule will not wither away in the foreseeable future; the Chief Executive is heavily dependent on Legislative Council support for passing bills, and loyalist parliamentarians have yet to canvass majority support from the electorate at

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<sup>223</sup> Michael C. Davis, *Hong Kong's Umbrella Movement: Beijing's Broken Promises*, 26 J. DEMOCRACY 101, 109 (2015).

<sup>224</sup> TAI WEI LIM & XIAOJUAN PING, CONTEXTUALIZING OCCUPY CENTRAL IN CONTEMPORARY HONG KONG 147 (2015).

large.<sup>225</sup> The future of constitutional common law remains cautiously optimistic if the Court will adhere to its strategy of raising the costs of court-curbing and if the polity will persist in fragmentation.

Potentially dangerous undercurrents nonetheless must not be ignored. The incumbent Chief Executive has not only adopted relatively hostile rhetoric towards the judiciary,<sup>226</sup> but also taken steps to combat political infighting by replacing the traditional professional elites with his own active supporters in the Executive Council and important agencies.<sup>227</sup> Besides, democratic electoral reform is one area in which the Court of Final Appeal must ideally avoid. Any substantive interpretation of the Basic Law's electoral reform provisions must deeply unsettle either rulers or the ruled, causing them to withdraw their acquiescence in or support from the Court regardless of transaction costs, an outcome that is sure to weaken the political foundations of constitutional common law, to devastating effect.<sup>228</sup> In the aftermath of the deeply polarizing Umbrella Revolution, however, it is uncertain how long the Court can stay aloof from democratization controversies.

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<sup>225</sup> PO JEN YAP, CONSTITUTIONAL DIALOGUE, *supra* note 22, at 37.

<sup>226</sup> See Lai Ying-kit & Christy Leung, *Hong Kong leader CY Leung blames legal challenges for transport infrastructure project delays*, SOUTH CHINA MORNING POST (Oct. 27, 2015), <http://www.scmp.com/news/hong-kong/economy/article/1872668/hong-kong-leader-cy-leung-blames-legal-challenges-transport>.

<sup>227</sup> See GU YU, HONG KONG'S LEGISLATURE UNDER CHINA'S SOVEREIGNTY 1998–2013 227–29 (2015).

<sup>228</sup> Ip, *Economic Liberty*, *supra* note 222, at 351.