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THE UNIVERSITY *of* EDINBURGH

School of Law

**THE ROLE OF THE COURT OF FINAL APPEAL
OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION UNDER CHINA'S
"ONE COUNTRY, TWO SYSTEMS" PRINCIPLE**

WANLI WANG

**Thesis submitted for the Degree of Doctor of Philosophy
The University of Edinburgh
2010**

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DECLARATION

Pursuant to The University of Edinburgh Postgraduate Assessment Regulations for Research Degrees, I hereby declare that this thesis has been composed by me alone and the research work is my own. It has not been submitted for any other degree or professional qualification.

Signature:

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Date: 19th July 2010

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It should be noted that the views expressed in this thesis indicate merely the author's personal academic opinions. They do not reflect or represent the view, opinion and/or stance of any institution or organisation the author worked or working for.

I dedicate this thesis to my beloved parents.

Edinburgh
July, 2010

Wanli Wang

ABSTRACT

This thesis examines the constitutional performance of Hong Kong's Court of Final Appeal (the CFA or the Court), and explores the appropriate role it should play in Hong Kong's new constitutional order defined by China's "one country, two systems" principle. It includes a wider discussion of China's political and constitutional structure within which the Court's operational context is defined, a consideration of the legitimate role of senior courts, and an investigation of relevant UK and EU constitutional practices. It evaluates the Court's part, *inter alia*, in constitutional judicial review, the interpretation of the Hong Kong Basic Law, human rights protection, and the resulting constitutional and political implications.

The Court's role mirrors questions in relation not only to the internal political and legal order of Hong Kong itself but also to the broader constitutional order as to the central-regional relationship in China. It is the only institutional connection between Hong Kong's common law legal system and Mainland China's communist civil law system. When exercising its power of constitutional review and Basic Law interpretation, the Court faces dilemmas and sensitive situations, in which it has to handle with care the relationships between individual freedoms and collective good, judicial independence and executive efficiency, judicial scrutiny and legislative authority, regional interests and national concerns, the region's autonomy and the centre's power. A tendency of judicial supremacy emerges in post-handover Hong Kong, with profound implications for Hong Kong's political life. While playing a significant role in human rights protection, the maintenance of good governance, and the achievements in constitutionalism and the rule of law in Hong Kong, the Court may also make some positive contributions to Mainland China's own development in these areas. It is suggested that the Court adopt a modest and restrained approach in deciding politically sensitive constitutional questions, defining itself not only as a regional supreme court safeguarding Hong Kong's autonomy but also as a national court protecting sovereign interests. A relationship of coordination, reciprocity, mutual trust and mutual respect between Hong Kong and the Central Government, and between Hong Kong courts (the CFA in particular) and other Hong Kong institutions should be built.

Chapter 1

INTRODUCTION

11:59pm, 30th June 1997.

Fifth Floor Hall, Hong Kong Convention and Exhibition Centre's New Wing. The Handover Ceremony of Hong Kong.

The British union flag and the Hong Kong colonial banner were being lowered.

00:00:00am, 1st July 1997.

As the Chinese National Anthem being played, the flags of the People's Republic of China (PRC) and the Hong Kong Special Administrative Region (HKSAR, the SAR, or the Region) were simultaneously being raised to the tops of their poles. Hong Kong is now peacefully returned to "its original and rightful owner"¹ after having been under British colonial rule for 156 years. This signifies, from the Chinese perspective, that "from now on, Hong Kong compatriots have become true masters of this Chinese land and that Hong Kong has now entered a new era of development".² In this era, Hong Kong would become a special administrative region of China under the "one country, two systems" arrangement. According to that arrangement, the basic principle that "the Hong Kong people administering Hong Kong" and "a high degree of autonomy" would now be put in practice.

1:30am, 1st July 1997.

Seventh Floor, Hong Kong Convention and Exhibition Centre' New Wing. Ceremony of the Establishment of the HKSAR.

The Chinese President, His Excellency Mr Jiang Zemin declared to the world that "Now, the Hong Kong Special Administrative Region of the People's Republic of China is formally established". Subsequently, a swearing-in ceremony was held for the Chief Executive and various HKSAR officials, including members of the Executive Council, members of the Provisional Legislative Council, and senior judges.

1:46am, 1st July 1997.

Led by the Chief Justice Andrew Li, the permanent judges of the Court of Final Appeal (CFA or the Court) and judges of the High Court swore in front of the Chief Executive Tung Chee-Hwa, declaiming solemnly,

¹ Sze Yuen Chung, *Hong Kong's Journey to Reunification: Memoirs of Sze-yuen Chung* (Chinese University Press, 2001), p273

² Jiang Zeming, "Speech by President Jiang Zemin of the People's Republic of China at the Ceremony for the Handover of Hong Kong Held by the Chinese and British Governments (01/07/1997)", available at the official website of the Ministry of Foreign Affairs of the People's Republic of China, <http://www.fmprc.gov.cn/eng/wjdt/zyjh/t24924.htm>

*"I swear that, in the Office of a Judge of the Judiciary of the Hong Kong Special Administrative Region of the People's Republic of China, I will uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China, serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit."*³

Here and now, our main character, the CFA, represented by its Chief Justice and permanent judges, appeared for the first time in the spotlight.

The CFA is a major representation of the unique feature of China's "one country, two systems" principle and is an important indication of the HKSAR's high degree of autonomy, for even in a federal country its member states usually do not have their own court of final appeal exercising the "power of final adjudication"⁴, especially in the area of constitutional disputes. That power is usually grasped by the supreme judiciary at the central level rather than the member states' courts. Allowing Hong Kong to have its own CFA, in a sense, is unthinkable to such a country as China, which boasts such a long history of practising the unitary system and where centralism has been firmly embedded in its political and legal culture.

What would be the fate of Hong Kong in its "new era of development" under the "one country, two systems" settlement? Could a capitalist Hong Kong survive and thrive within a communist China? Would its residents continue to enjoy a reasonable level of freedom safeguarded by the rule of law, while their compatriots in the Mainland China are still under strict government control and the rule of man? Perhaps these questions were haunting every guest attending the ceremonies, and the audience watching televisions all over the world.

Although many voices had expressed optimism on these questions in and before 1997 especially from Chinese officials, claiming that Hong Kong would have "a splendid future" with the maintenance of "its long-term prosperity and stability",⁵ there was considerable scepticism or even trepidation. Perhaps this was best represented by a famous *Fortune* article, which was simply entitled "The death of Hong Kong" and stated bluntly that "The naked truth about Hong Kong can be summed up in two words: It's over."⁶ One major concern of those pessimists was the fate of judicial independence, common law, and the rule of law,⁷ which had been conceived as fundamental to Hong Kong's success not only to its economic prosperity, but also to the freedoms its residents had enjoyed. The CFA, as the supreme court of the HKSAR, is an important symbol of the rule of law and a manifestation of the high degree of autonomy in the Region, and was the cause of particular worries. As one commentator indicated, "The CFA issue directly affects the future existence of the rule of law

³ Oaths and Declaration Ordinance (Cap.11), Schedule 2, Part V

⁴ A term used by the Hong Kong Basic Law. See art.2, 82 of that law.

⁵ Jiang Zeming, "Speech by President Jiang Zemin of the People's Republic of China at the Ceremony for the Handover of Hong Kong Held by the Chinese and British Governments (01/07/1997)", available at the official website of the Ministry of Foreign Affairs of the People's Republic of China, <http://www.fmprc.gov.cn/eng/wjdt/zyjh/t24924.htm>

⁶ Kraar Louis and McGowan Joe, "The Death of Hong Kong", *Fortune*, 26 June 1995, available at http://money.cnn.com/magazines/fortune/fortune_archive/1995/06/26/203948/index.htm

⁷ Edward A. Gargan, "Hong Kong Fears Unraveling of Rule of Law", *The New York Times*, 7 May 1997, available at <http://www.nytimes.com/1997/05/07/world/hong-kong-fears-unraveling-of-rule-of-law.html?pagewanted=1>

in Hong Kong, which is determinative of Hong Kong's continued prosperity after 1997."⁸ It was doubted that the CFA's constitutional power of final adjudication⁹ would be really and truly exercised by the Court itself without any intervention from Beijing.¹⁰ Nonetheless, Hong Kong residents did have great expectations for the CFA, hoping it would play a significant role in safeguarding the rule of law, human rights, and autonomy in the HKSAR.¹¹

Time flies. More than 12 years have already elapsed since Hong Kong's reversion to China and existence as a SAR under the "one country, two systems" formula. Unexpectedly for those pessimists, Hong Kong is not "dead". What the *Fortune* article anticipated and feared has not come about. Today, "the consensus is that Hong Kong's decade as an SAR has, on the whole, been successful, despite some big challenges";¹² "there has come to be a recognition that there is the beginning of a real government, a turn to a viable economy, and a real society in Hong Kong".¹³ Most notably, Hong Kong stands now as one of the world's most open, transparent and successful economies.¹⁴ Politically, significant progress in democratisation has been made, although elections by universal suffrage of the Chief Executive and Legislative Council will not be adopted until 2017 and 2020 respectively. Human rights are generally respected by the government.¹⁵ The freedom of the press is still strong. The rule of law remains a treasure of the region. Even the British Foreign and Commonwealth Office repeatedly concludes in its six-monthly reports on Hong Kong that the "one country, two systems" principle has worked well and the rights and freedoms guaranteed in the Joint Declaration¹⁶ and the Basic Law¹⁷ have been respected.¹⁸ In a word, the capitalist Hong Kong is still alive and full of vigour under China's communist sovereignty.

In Hong Kong's story of continuous success after 1997, what contributions has the CFA – the most prominent representative of Hong Kong's judiciary and the rule of law, been making? How has the CFA's performance been as a newly established highest court of the Region replacing the previous role of the Privy Council in London? What lessons can be drawn from

⁸ See Jared Leung, "Concerns over the rule of law and the court of final appeal in Hong Kong", (1997) 3 ILSA Journal of Int'l & Comparative Law, p851.

⁹ Hong Kong Basic Law, art.82

¹⁰ Alison W. Conner, "Legal Institutions in Transitional Hong Kong" in Ming K. Chan (eds), *The Challenges of Hong Kong's Reintegration with China* (Hong Kong University Press, 1997), pp85-112

¹¹ This can be, to some extent, reflected by Hong Kong pro-democrats' struggle for a better settlement of the establishment of the CFA in 1990s. See James V. Feinerman, "Hong Kong Faces 1997: Legal and Constitutional Issues" in Warren I. Cohen and Li Zhao (eds), *Hong Kong Under Chinese Rule: the Economic and Political Implications of Reversion* (Cambridge University Press, 1997), pp79-84

¹² Kerry Brown, "Hong Kong Ten Years On: An Assessment of the Special Administrative Region", *Chatham House Briefing Paper*, October 2007, available at <http://www.chathamhouse.org.uk/publications/papers/view/-/id/550/>

¹³ Janet W. Salaff and Arent Greve, "A Decade of Responses in North America to the Handover" in Yue-man Yeung (eds), *The First Decade: The Hong Kong SAR in Retrospective and Introspective Perspectives* (Chinese University Press, 2008), p43

¹⁴ Kerry Brown, "Hong Kong Ten Years On: An Assessment of the Special Administrative Region", *Chatham House Briefing Paper*, October 2007, available at <http://www.chathamhouse.org.uk/publications/papers/view/-/id/550/>

¹⁵ U.S. Department of State, *2008 Human Rights Report: China (Includes Tibet, Hong Kong and Macao)*, February 25, 2009, available at http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119037.htm#hong_kong

¹⁶ The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong

¹⁷ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China

¹⁸ Foreign and Commonwealth Office of UK, *Six-monthly Reports On Hong Kong*, available at <http://ukinhongkong.fco.gov.uk/en/working-with-hong-kong/britains-commitment/six-monthly-reports>

its experience? Is there any improvement that could be made in its future work? In short, what role has the CFA been playing and should it play as a regional or sub-state supreme court under China's "one country, two systems" policy and Hong Kong's new constitutional order defined by that policy? These are questions well worth the effort of rigorous and penetrating scrutiny, for they are of great significance not only to the autonomy of the HKSAR itself, but also to the unity and harmony of the constitutional and legal order of the People's Republic of China (PRC) as a whole. However, although there have been numerous articles trying to provide assessments of Hong Kong's performance in economic, political, and legal and constitutional areas, no scholar has addressed solely the operations of the CFA so far. Therefore, it is precisely the aim of this thesis to launch such a full scale investigation of these questions. This is, to the best of my knowledge, the first thorough exploration centring on Hong Kong's CFA. Admittedly, due to time and space limitations, it is impossible to scrutinise all the activities of the Court. My focus will be placed on issues which are of great constitutional significance.

The discussion of the CFA's role would serve as a mirror reflecting questions in relation not only to the internal political and legal order of the HKSAR itself but also to the broader constitutional order as to the central-regional relationship in China. The CFA is located at a very special position within the PRC's constitutional framework and lies at the intersection of two different legal systems and legal cultures. One is Hong Kong's common law tradition and the other is mainland China's communist legal regime which possesses civil law features. These factors make it difficult to define the role of the CFA properly. A primary theme of this thesis is to challenge both, on the one hand, the view of those extreme autonomists who hold that the sole constitutional role of the CFA should be safeguarding the autonomy of Hong Kong from central control in Beijing and, on the other hand, the opinion of those centralists who insist that the CFA should be deferential to Beijing's will and subject to national sovereign interests unconditionally. Instead, this thesis will argue that a balance should be struck between the two approaches, and the CFA should provide constitutional protection not only for Hong Kong's regional interests but also for Beijing's sovereign concerns. Moreover, I will try to demonstrate that to build a relationship of coordination, reciprocity, mutual trust and mutual respect between Hong Kong (with the CFA in particular) and the Central Government in Beijing, as well as between Hong Kong's courts of law (again the CFA in particular) and other institutions of the HKSAR, is more appropriate to the "one country, two systems" practice.

It should be noted that my examination will not be narrowly limited to the performance of the CFA itself. Instead, the analysis will be placed in a wider discussion of the Court's operational context, such as the historical background, China's constitutional order and its "one country, two systems" settlement. These aspects constitute the conditions for the Court's performance. There will also be some mentioning of the examples in the European Union (EU) and the United Kingdom (UK) whose courts operate under constitutional frameworks which, although very different in many ways, have certain similar features to China's "one country, two systems" arrangement in terms of their plural elements. Study their experience can provide insights into the analysis of the CFA's constitutional role and may offer some lessons to the CFA or HKSAR in their constitutional practice in the future. Besides, some western scholars' theories about the legitimacy of adjudication with judicial constitutional review in a democratic polity in particular, will be discussed in an attempt to deepen our appreciation of the role of the CFA, whose democratic legitimacy has not yet been doubted by commentators in Hong Kong and China, but might be questioned due to the further progress in democratisation, especially when universal suffrage has been realised. Moreover,

my investigation will not see things in a static way nor will I analyse them in an isolated and rigid way; in contrast, dynamic elements and interaction aspects will be highlighted. By applying these approaches in the exploration, a better understanding not only of the CFA's constitutional role but also of China's "one country, two systems" policy and Hong Kong's new constitutional order, may be achieved.

Perhaps a further explanation should be made here about the relevance of the examination of the western's analysis as to the legitimacy of judicial review/adjudication. As already mentioned, Hong Kong is still on its way to full democracy. This may make it doubtful that the western scholars' exploration of the democratic legitimacy of courts in a real democracy could actually add useful analysis to the project and be appropriately translated into the context of this thesis as well as to the concept of legitimacy in the Hong Kong and Chinese contexts more specifically. However, in western scholars' work there could be valuable insights that may be of help in considering the question of Hong Kong and China, given that both of them are indeed in the process of transition to a more democratic and constitutional society; especially for Hong Kong since it will soon realise universal suffrage in elections of its Chief Executive and Legislative Council and that may raise concern over the CFA's democratic legitimacy. In *Ng Ka Ling*¹⁹ the CFA has claimed unequivocally Hong Kong courts' jurisdiction of constitutional review over not only regional legislation, but also national legislative acts.²⁰ Since the latter claim conflicted strongly with China's most fundamental constitutional and political principle – the principle of congressional supremacy, the CFA encountered severe criticism and great pressure and had to retreat.²¹ However, the jurisdiction which would ensure Hong Kong courts' power of scrutinising and invalidating laws enacted by the Legislative Council of the HKSAR faced little challenge. It has been firmly established, frequently exercised and well developed by the courts. The CFA based its justification for that practice primarily on the courts' interpretative power of the Basic Law,²² which serves as Hong Kong's mini-constitution. However, the question of democratic legitimacy remains: what could justify those unelected judges' striking down statutes passed by democratically elected legislators? Moreover, what could justify the courts' constitutional rule making through their constitutional interpretative power? This problem, described as the "mighty problem" in Mauro Cappelletti's term²³ or the "counter-majoritarian difficulty" in Alexander Bickel's words,²⁴ has been discussed by western political scientists and constitutional lawyers for many years. Their analysis could improve our awareness of the limits of the role of the Hong Kong courts, particularly of the CFA, in constitutional judicial review; and more importantly, it could offer useful arguments to defend that role. Thanks to their works, we do not need to construct our defence by starting from a clean state. What we need to do is to examine selectively some typical theories and try to fit their ideas into the Hong Kong and China's specific setting or develop our own explanation based on their thoughts. In other words, a discussion of western scholars' doctrines could give us a new angle to see and appreciate the constitutional role of the courts of the HKSAR, particularly of the CFA, under the "one country, two systems" principle. It may also provide us some clues for suggesting appropriate adjustments and improvements to that role.

¹⁹ *Ng Ka Ling v. Director of Immigration* (FACV14/1998)

²⁰ *Ng Ka Ling v. Director of Immigration* (FACV14/1998), para.61

²¹ *Ng Ka Ling v. Director of Immigration* [1999] 1 HKLRD 579-580

²² *Ng Ka Ling v. Director of Immigration* (FACV14/1998), para.61

²³ Mauro Cappelletti, "The Mighty Problem of Judicial Review and the Contribution of Comparative Analysis", (1979) 53 *S. Cal. L. Rev.* p.409

²⁴ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962), p.16

The thesis is organised as follows:

Chapter 2 will look at the constitutional context of the HKSAR within the PRC, which provides a setting and a basis for the operation of Hong Kong's CFA. The CFA role is largely defined, confined, and underpinned by that setting and basis. In order to gain a better understanding of the present constitutional order of the HKSAR, I will first briefly recall the history of the British acquisition of Hong Kong and China's recovery of the region. Then I will introduce the main elements of the "one country, two systems" policy proposed by China and Hong Kong's Basic Law (the Basic Law) which embodies, enshrines and constitutionalises that policy. As the core of the "one country, two systems" concept is that the HKSAR would remain a system distinctive from those practised in the mainland China. Thirdly, I will carry out an investigation into the uniqueness of Hong Kong's political, legal, economic, and cultural systems compared to that of the communist Mainland. Fourthly, I will talk about the PRC's constitutional structure and its systems, for they are the framework and foundation of the HKSAR's autonomy, being crucial to understand the "one country" aspect in the "one country, two systems" formula. The "one country, two systems" policy does not mean an absolute separation of the HKSAR from the Mainland; actually, there are important connections and active interactions between the two sides, and these are what we will talk about finally. In order to gain a clearer and deeper understanding of Hong Kong's constitutional status within China, this chapter will also make a comparative discussion of UK and EU's constitutional arrangement as to the centre-region relationship.

Chapter 3 will examine some typical western theories on the democratic legitimacy of judicial role so as to provide some comparative theoretical standards for the investigation and assessment of the specific CFA issues under Hong Kong's new constitutional order. Due to the huge amount of literature in this area, the discussion will be highly selective, that I will focus primarily on those doctrines which appear relevant and valuable to the analysis on the Hong Kong topic. I will begin with an examination of Professor Alexander Bickel's concern about the "counter-majoritarian difficulty" and Robert Martin's sharp critique of the Canadian Supreme Court: the former presents an early exploration while the latter typifies the contemporary inquiry. It will be followed by a discussion of some ideas which attempt to justify the courts' judicial review and certain approaches which are suggested by some jurists for courts to adopt to ensure and enhance their legitimacy. It will also involve Cass R. Sunstein's theory of judicial minimalism and his analysis of incompletely theorised agreements, and John Hart Ely's famous assertion of a participation-oriented, representation-reinforcing approach to judicial review. Finally, the theory of "dialogue" – another innovative explanation of courts' judicial scrutiny and primarily indicated in Professor Barry Friedman's work, will be discussed.

An institution's role is largely determined by its competence. To examine a court's competence or jurisdiction and power which are of constitutional importance is itself a way of indicating its constitutional role. This is what *Chapter 4* of this thesis will be discussing. The chapter will explore some important jurisdictional issues of Hong Kong's CFA which have been controversial and hotly debated. The first one is about Hong Kong courts' competence in relation to constitutional review. Although there is no provision in the Basic Law that explicitly granting Hong Kong courts that particular power, the CFA asserted it in *Ng Ka Ling* by firmly stating that Hong Kong courts have a constitutional duty to scrutinise the compatibility of both the Hong Kong regional law and the national legislative acts with

the Basic Law and strike down those found inconsistent.²⁵ A critique of the Court's claim will be made, centring primarily on the question: do HKSAR courts really have competence to review laws enacted by the National People's Congress (NPC) of the People's Republic of China or its Standing Committee (NPCSC)? At the same time, the Hong Kong courts' capability and constraints of reviewing regional legislation and executive actions as well as the consequent impact on Hong Kong's constitutional and political order will be examined. We will also look back into Hong Kong courts' previous practice of judicial review before 1997 so as to provide a historical background for our analysis of its new development after the handover. The second topic concerns the Court's role in interpreting the Basic Law. According to article 158 of the Basic Law, both Hong Kong courts and the NPCSC have competence to interpret that law with the NPCSC having the last word, and issues involving elements beyond Hong Kong's autonomy must be referred by the CFA to the NPCSC for interpretation. Our examination will concentrate on some important principles and approaches that have been established and developed by the CFA to direct Hong Kong courts' interpretative behaviours. Particular attention will be awarded to the CFA's duty of referring issues to the NPCSC for interpretation, which serves as one of the most important interface bridging the legal system of Hong Kong and that of the Mainland and is a manifestation of the dialectic nature of the "one country, two systems" policy. In this respect, what lessons Hong Kong could learn from the EU's practice of preliminary reference procedure will be considered. The third concern of this chapter is the concept of "acts of state", which is used to exclude Hong Kong courts, particularly the CFA, from exercising jurisdiction over some behaviour of the state. The key question will be addressed in the part is: "can the Chinese version of 'acts of state' be reconciled with the common law doctrine of 'act of state'?" By answering this question, the limitations on the Court and its relationship with the Central Government will become clearer.

Human rights protection and promotion is a key part of constitutional judicial review and also an important justification for it. *Chapter 5* will look at the CFA's performance in this area. First, the legal and constitutional framework of individual rights and freedoms in Hong Kong set up by the Sino-British Joint Declaration, the Basic Law, and the Bill of Rights Ordinance, will be considered. Following the analysis, two most prominent tests developed by the Court, namely the generous interpretation and the comparative approach, will be discussed, for they are indicative of the Court's attitude and philosophy with regard to how to deal with human rights issues. Furthermore, some leading decisions of the CFA concerning issues such as freedom of demonstration, of expression, and rights to equality and non-discrimination will be commented. In analysing these cases, attention will be awarded to the Court's stance as to how to deal with the subtle and sensitive relationship between the guarantee of individual freedoms and the concerns of public order as well as national interests.

Chapter 6 will explore the Court's political role. Judicial independence does not mean isolation or being static. On the contrary, there could be dynamic interaction or dialogue between the courts, the society, and other institutions. In this chapter I will investigate what role the CFA could play in Hong Kong and in the mainland China's politics, primarily by examining its influence on the political environments of the two different systems. The counter-influence on the Court exerted by the political situation of Hong Kong and the Mainland China will be discussed as well. At the Hong Kong level, I will examine the tension between the executive and the legislature, and the accompanying ideological conflict between the principle of executive-led government and the tendency of legislative dominance. The

²⁵ *Ng Ka Ling v. Director of Immigration* (FACV14/1998), para.61

implications of these confrontations for the Court and the Court's possible impact on the legislative-executive relationship will be highlighted. Moreover and more specifically, I will consider the Court's role in Hong Kong's public policy formation and the course of constitutional reform. The desirability of judicial modesty will be argued at this point. As far as the interaction with the mainland China is concerned, the following questions will be explored: what factors might lead to the Central Authorities' intervention? What strategies should the Court adopt to respond to Central Government's concerns? Could Hong Kong in general and the Court in particular positively make some contributions to the mainland China's transition to democracy, the rule of law, and constitutionalism?

Finally, some conclusions will be drawn in *Chapter 7*.

Before formally starting our exploration, I would like to make a brief introduction to our main character, the CFA, by providing some general information about its history of establishment, legal foundation, jurisdiction, powers, and composition so as to form an outline picture of it.

Under British colonial rule, Hong Kong's legal system was part of the whole British imperial legal system. It was the Judicial Committee of the Privy Council (JCPC) in London that served as the final appellate tribunal for the region. Hong Kong courts were bound by decisions of the JCPC and, on questions of English law applicable in the territory, by decisions of the House of Lords.²⁶

In the 1980s, Britain and China began to negotiate the arrangement of the future of Hong Kong. A Joint Declaration was signed in 1984. According to the Joint Declaration, Britain agreed to return Hong Kong to China in 1997 and China would enforce the "one country, two systems" policy in the region. This arrangement means Hong Kong would become a Special Administrative Region of the People's Republic of China, being vested with executive, legislative and independent judicial power, including that of final adjudication.²⁷ It was elaborated by the Chinese government in the Annex I of the Joint Declaration that the power of final judgment of the HKSAR would be vested in the Court of Final Appeal in the SAR.²⁸ In 1990, the National People's Congress (NPC) of China enacted *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (the Basic Law) to enshrine its basic policies regarding Hong Kong proclaimed in the Joint Declaration. It stipulates that the NPC authorises the HKSAR to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication; the power of final adjudication of the HKSAR would be vested in the CFA, which, together with other courts at different levels that would be established in the SAR; the judicial system previously practised in Hong Kong would be maintained except for those

²⁶ The House of Lords was not part of the hierarchy of Hong Kong courts. Its decisions could not therefore have been binding on the Hong Kong courts on the basis of any structural relationship. Hong Kong judges followed its decisions because of the following considerations: (1) the House of Lords was the supreme tribunal for the identification of English common law which applied in Hong Kong; (2) the judges who sat in the House of Lords also, for the most part, sat in the Judicial Committee of the Privy Council and were likely to decide the same way; (3) in an appeal from Hong Kong in 1985 (*Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] AC 80) the Judicial Committee stated that it was itself bound by the House of Lords on a matter of English Law. See Peter Wesley-Smith, *An Introduction to the Hong Kong Legal System* (3ed), (Hong Kong 1998), pp84,85

²⁷ Sino-British Joint Declaration 1984, para.3 (3)

²⁸ Sino-British Joint Declaration 1984, Part III in the annex I

changes consequent upon the establishment of the CFA.²⁹ While the Joint Declaration, an international treaty registered in the United Nations, framed a legal basis at international level for the establishment of Hong Kong's CFA, the Basic Law provided at national level a constitutional foundation for the form and function of the Court. In 1995, the CFA Ordinance was passed by the Hong Kong Legislative Council, which formed a detailed regional legal arrangement for the formation and function of the CFA. However, as agreed by Britain and China, the Ordinance "shall not come into operation on or before 30 June 1997 and the following day shall be the day for the coming into operation of the Ordinance, which shall be amended as necessary to ensure that it is in full conformity with the Basic Law" (s.1(2)).

According to the Basic Law, the courts in the HKSAR have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained; but they have no competence to deal with cases concerning acts of state, such as defence and foreign affairs.³⁰ Accordingly, the CFA Ordinance sets out the Court's jurisdiction and powers in detail. It provides that the CFA shall have the jurisdiction conferred on it under the Ordinance and by any other law, and reiterates that the Court shall have no jurisdiction over acts of state.³¹ The CFA hears appeals on civil and criminal matters from the High Court, which consists of the Court of Appeal and the Court of First Instance. Particularly, the following cases can be decided by the CFA. Firstly, for civil matters, an appeal shall lie to the Court (1) as of right from any final judgment of the Court of Appeal, where the matter in dispute amounts to or is worth \$1 million Hong Kong dollars or more or (2) at the discretion of the Court of Appeal or the CFA in any other civil matter if, in the opinion of either court, the question involved in the appeal is one which, because of its great general or public importance, or otherwise, ought to be submitted to the CFA for decision.³² Appeals relating to Chief Executive Elections are also within the CFA's jurisdiction.³³ Secondly, in terms of criminal matters, those can be dealt with by the CFA are appeals at the discretion of the CFA from any final decision of the Court of Appeal or any final decision of the Court of First Instance (not being a verdict or finding of a jury) from which no appeal lies to the Court of Appeal.³⁴ However, it is worth noting that the CFA has defined its criminal jurisdiction as concerned primarily with establishing general principles of criminal justice rather than being a general appeal court on criminal cases.³⁵ The CFA's controversial jurisdiction of interpreting the Basic Law and constitutional judicial review will be discussed in Chapter 4. It should be noted that leave to appeal is required.

The CFA is headed by the Chief Justice and comprises three permanent judges and a panel of non-permanent judges.³⁶ They are appointed by the Chief Executive on the recommendation

²⁹ Hong Kong Basic Law, art.81, 82

³⁰ Hong Kong Basic Law, art.19, 82.

³¹ Hong Kong Court of Final Appeal Ordinance (Cap.484), s.4.

³² The Ordinance, s.22(1)

³³ Ibid.

³⁴ The Ordinance, s.31

³⁵ *HKSAR v Zeng Liang Xin* [1997] HKLRD 1204

³⁶ The first Chief Justice is Mr Justice Andrew LI Kwok-nang, who will retire on 31 August, 2010. The present permanent judges are Mr Justice Bokhary, Mr Justice Chan, and Mr Justice Ribeiro. There are 16 non-permanent judges, including Mr William James Silke, Mr Kutlu Tekin Fuad, Sir Noel Plunkett Power, GBS, Mr Gerald Paul Nazareth, GBS, Mr John Barry Mortimer, GBS, the Hon Henry Denis Litton, GBM, the Hon Sir Anthony Mason, the Rt Hon the Lord Hoffmann, the Hon Sir Gerard Brennan, the Rt Hon Sir Thomas Eichelbaum, the Rt Hon the Lord Millett, the Rt Hon the Lord Woolf of Barnes, the Rt Hon the Lord Scott of Foscote, the Rt Hon Sir Ivor Richardson, Mr Michael McHugh, and the Rt Hon Thomas Munro Gault

of an independent commission.³⁷ Notably, the appointment or removal of them shall obtain the endorsement from the Legislative Council and be reported to the Standing Committee of the National People's Congress in Beijing for the record.³⁸ Judges from other common law jurisdiction may be invited to sit on the CFA.³⁹ In terms of nationality, the Chief Justice must be a Chinese citizen who is a permanent resident of the HKSAR with no right of abode in any foreign country.⁴⁰ In hearing and determining an appeal, the Court consists of five judges, and the Court may invite a non-permanent Hong Kong judge or a non-permanent judge from another common law jurisdiction to sit on the court.⁴¹

³⁷ Hong Kong Basic Law, art.88

³⁸ Hong Kong Basic Law, art. 90

³⁹ Hong Kong Basic Law, art.82

⁴⁰ Hong Kong Basic Law, art.90

⁴¹ The Ordinance, s.16

Chapter 2

The Constitutional Context of the HKSAR within China: The Conditions for the Court's Operation

1 Introduction

This chapter attempts to outline the broad constitutional framework within which the Hong Kong Special Administrative Region (HKSAR) and its Court of Final Appeal (CFA) are situated and operate. Firstly, a historical background as to China's loss and recovery (Britain's acquisition and returning) of Hong Kong will be introduced. Secondly, I will outline China's "one country, two systems" (OCTS) policy as enshrined in The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (the Basic Law) and how it is being applied in Hong Kong after its reversion. Thirdly, I will investigate Hong Kong's distinctiveness and uniqueness within a communist China by looking primarily at its political structure, rule of law, economy and cultural systems. I will also explore (the mainland) China's constitutional structure and systems, which provide the framework and foundation for Hong Kong's autonomy. Fourthly, I will find that despite the separation of Hong Kong from the mainland China under the OCTS principle, there are still various interfaces and interactions between the two parts in which they could both be benefited under the OCTS policy. Finally, a comparative discussion on similar constitutional practices in the EU and the UK in terms of centre-region relationship will be made in order to form a better understanding of Hong Kong's status under China's OCTS arrangements.

2 A Brief History of Britain's Acquisition and China's Recovery of Hong Kong

Long-term memory and its accompanying emotion play a crucial role in orienting one's decision making.⁴² The sentiment of humiliation and oppression by the imperialists experienced by China in its modern history, which began exactly from Britain's occupation of the Hong Kong Island⁴³ in 1840, have been firmly embedded into the memory of the Chinese people and have been heavily influencing China's contemporary politics. A recall of China's loss and recovery of Hong Kong and the accompanying sense of humiliation and pride respectively could facilitate our understanding of China's Hong Kong policies, of which the sovereign interest is always a great concern (perhaps the most important concern) from Beijing's point of view.

Hong Kong, consisting of Hong Kong Island, the Kowloon peninsula, the New Territories, and over 200 offshore islands, has been part of China's territory since ancient times. It was occupied by Britain step by step after the Opium War in 1840 through three unfair treaties with the Qing Dynasty authorities, the monarchical administration of China at the time. China remained the world's wealthiest country in the early 19th century,⁴⁴ but it still practised a

⁴² Kathleen D. Vohs, Roy F. Baumeister, George Loewenstein, *Do Emotions Help or Hurt Decision Making?* (Russell Sage Foundation, 2007); Bryan D. Jones, Frank R. Baumgartner, *The Politics of Attention: How Government Prioritizes Problems* (University of Chicago Press, 2005)

⁴³ Hong Kong Island is an island in the southern part of the Hong Kong region.

⁴⁴ In 1820, 20 years before the Opium War, China's GDP accounted for 30% of the world GDP. See Yan Xuetong, "The Rise of China in Chinese Eyes", (2001) 10 *Journal of Contemporary China*, p3; Shi Tao and Mao Yangguang, "The minutes of the Seminar about the Reappraisal of China's Traditional Economy (zhong

traditional self-sufficient agricultural economy and was ruled by a feudal regime – the Qing Dynasty. A closed-door policy was adopted by the imperial regime in which foreign trade was strictly restricted.⁴⁵ However, during the same period, great changes were dramatically occurring on the other side of the earth in western countries. The Industrial Revolution was launched in Britain in the late 18th century and quickly spread throughout Western Europe and North America during the 19th century that, economies dominated by industries and the manufacturing of machinery were replacing previous economies which based on manual labours. As a result, trade expanded drastically and production capacity increased rapidly. The outcome of this revolution was that the capitalist economy boomed considerably.⁴⁶ The newly industrialised countries enthusiastically undertook exploitations of the world market by expanding their colonies globally, and made huge amounts of profit by snatching raw materials from and dumping products to these overseas colonies over time.⁴⁷ Britain developed into a world super power during that period. Against this background, China naturally became one of the most ideal targets for those western predators as the country was weak but wealthy with a huge market potential for profits. Among the predators, Britain played a leading role as the most influential hegemonic power of the day.

Britain had a growing trade deficit with China in early 19th century.⁴⁸ To improve trade balance, Britain began to smuggle opium to China from British India. China was speedily filled with opium addicts. The effects were devastating and the Qing government decided to ban opium trade thoroughly within its territory.⁴⁹ As a response, Britain chose to use military force and as a result, the first Opium War broke out in 1839 where the Qing army was defeated. Hong Kong Island was occupied by Britain in 1840. Finally, the Qing Government was forced to agree an ignominious peace under the Nanking Treaty with Britain in 1842. The first Opium War marked the beginning of China's modern history of humiliation⁵⁰ and the Nanking Treaty was the first unequal treaty signed by the Chinese under the force of western powers.⁵¹ Thereafter, China transformed from an independent feudal society into "a semi-feudal and semi-colonial society",⁵² entering an era of being carved up by imperialists. Hong Kong was lost in the tide.

Britain seized the entire Hong Kong area by virtue of three treaties. As already mentioned, the first one was the Treaty of Nanking 1842⁵³ which ceded the Hong Kong Island. The

guo chuan tong jing ji zai pin jia yan tao hui ji yao", (2002) 1 *The Studies of China's Economy History (zhong guo jing ji li shi yan jiu)*, pp154-157. (in Chinese). Also see Angus Maddison, *The World Economy: Historical Statistics* (OECD Publishing, 2003), p249

⁴⁵ Han Zongying, "The Exploration of the Reasons of Failure in Opium War", (2002) 21 *Journal of Zhenzhou Institute of Aeronautical Management (Social Science Edition)*, p37 (in Chinese)

⁴⁶ Karl Marx and Fredrick Engels, *Manifesto of the Communist Party* (Wilder Publications, 2007), p12

⁴⁷ Ibid, p11

⁴⁸ By 1817 it was estimated that China had received £150 million worth of bullion from European traders. See Edgar Holt, *The Opium Wars in China* (Putnam, 1964), p37.

⁴⁹ Jack Beeching, *The Chinese Opium Wars* (Hutchison, 1975), pp63-93.

⁵⁰ Peter Hays Gries, *China's New Nationalism: Pride, Politics, and Diplomacy* (University of California Press, 2004), p51

⁵¹ University Press of the Pacific, Compilation Group, *The Opium War* (The Minerva Group, Inc., 2000), p96

⁵² Ibid.

⁵³ The Treaty was signed on 29 August 1842 aboard the British warship in Nanking and the Ratifications were exchanged at Hong Kong on 26 June 1843. In the Treaty the Qing government was forced to open more ports for foreign trade with low tariffs, compensate Britain 21 million ounce, give it most favoured nation status, permit extraterritoriality for British Citizens on Chinese soil and cede the Hong Kong Island to Britain. The full text in English of the Treaty of Nanking 1842 can be found in Appendix One of Yash Ghai's *Hong Kong's New Constitutional Order: the Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 1999), pp501-504. The full texts in both English and Chinese will also be found in *Treaties, Conventions, &c.*,

second treaty was the Convention of Peking 1860,⁵⁴ which was signed when the Anglo-France military force had occupied Beijing (spelled as Peking at the time) – capital of the Qing regime, in the Second Opium War. Not only did this Convention enlarged British commercial, diplomatic and extraterritorial privileges in China, the Qing government was also compelled to recognise the concession of the Kowloon peninsula to Britain.⁵⁵ The third treaty was the Convention for the Extension of Hong Kong Territory, which was concluded at Beijing (Peking) on the 9th June 1898.⁵⁶ The New Territories, consisting of the area north of Boundary Street of the Kowloon peninsula and more than 200 nearby inlands, was leased to Britain for 99 years.⁵⁷ Although this Convention did not come from the direct threat of military force, it was made under the intense diplomatic pressure exerted on the Qing government. By the time the third treaty was signed, Britain had occupied all the parts which constitute the modern Hong Kong region.

The Qing dynasty and the imperial rule were overthrown in 1911 in which China became a republic, and all succeeding regimes coherently refused to recognise the legality of the three treaties with Britain.⁵⁸ The Chinese Communist Party took over the mainland China and founded the People's Republic of China (PRC) in 1949. The PRC Government took a consistent position over Hong Kong, namely that Hong Kong is part of China's territory; and China do not recognise the three unequal treaties imposed by western imperialism regimes; the Hong Kong issue should be resolved through negotiations when conditions are permitted, and the existing status of Hong Kong should be maintained pending on a solution.⁵⁹ A policy of a "long-term plan and making full use of it" towards Hong Kong was adopted.⁶⁰ In 1972, China made a request to the United Nations Special Committee on Colonialism to remove Hong Kong and Macao from its list of territories for which independence should be sought. A letter addressed by the Chinese ambassador to the United Nations (UN) read, "...*Hong Kong and Macao are part of Chinese territory occupied by the British and Portuguese authorities. The settlement of the questions of Hong Kong and Macao is entirely within China's sovereign right and does not at all fall under the ordinary category of colonial territories... the Chinese government has consistently held that they should be settled in an appropriate way when conditions are ripe. The United Nations has no right to discuss these questions...*"⁶¹ Consequently, Hong Kong and Macao were deleted by the UN from the list. The UN's

between China and Foreign States: China, the Maritime Customs, III-Miscellaneous Series, No.30, 2 vols. 2nd ed., (Shanghai: Inspectorate General of Customs, 1917), Vol.1, pp.351-56, available at <http://ebook.lib.hku.hk/books/p2/B3144779XV1/pdf/>

⁵⁴ Ratified on 28 October 1860.

⁵⁵ Convention of Peking (1860), Article VI. See *Treaties, Conventions, &c., between China and Foreign States: China, the Maritime Customs, III-Miscellaneous Series*, No.30, 2 vols. 2nd ed., (Shanghai: Inspectorate General of Customs, 1917), Vol.1, p433, available at <http://ebook.lib.hku.hk/books/p2/B3144779XV1/pdf/00000455.pdf>

⁵⁶ Ratifications were exchanged in London, 6 August 1898.

⁵⁷ Convention of Extension of Hong Kong (1898), in *Treaties, Conventions, &c., between China and Foreign States: China, the Maritime Customs, III-Miscellaneous Series*, No.30, 2 vols. 2nd ed., (Shanghai: Inspectorate General of Customs, 1917), Vol.1, p539, available at <http://ebook.lib.hku.hk/books/p2/B3144779XV1/pdf/00000561.pdf>

⁵⁸ Zhang Guoliang and Zhang Lin, "The Actions of China's Various Regimes in its Modern History on Hong Kong Issue (Lun zhong guo jin xian dai guo jia zheng quan zai xiang gang wen ti shang de bu tong zuo wei)", (1997) 4 *Journal of PLA Nanjing Institute of Politics*, pp6-9. (in Chinese)

⁵⁹ See "The Chinese Government Resumed Exercise of Sovereignty over Hong Kong" on the official website of the Ministry of Foreign Affairs of the People's Republic of China at <http://www.fmprc.gov.cn/eng/ziliao/3602/3604/t18032.htm> (visited on 17 April 2009)

⁶⁰ Liu Shuyong, "Hong Kong: A Survey of its Political and Economic Development over the Past 150 Years", (1997) 151 *The China Quarterly*, p590.

⁶¹ Quoted in Anthony Dicks, "Treaty, Grant, Usage or Sufferance? Some Legal Aspect of the Status of Hong Kong", (1983) 95 *The China Quarterly*, p436

acceptance of China's stance provided an international legal legitimacy for China's claim of sovereignty over Hong Kong (and Macao), precluded the possibility of Hong Kong (and Macao)'s self-determination and independence, and also excluded the chance of international interference into the issue.

According to the Convention for the Extension of Hong Kong Territory, the term of lease of the New Territories would expire with the year 1997 drawing near. The Governor of Hong Kong, Sir Crawford Murray MacLehose visited Beijing in March 1979 in an attempt to find out China's position and attitude towards finding a solution to the issue.⁶² China's leader Deng Xiaoping told MacLehose that the PRC has sovereignty over Hong Kong and asserted the necessity of Hong Kong's return to China, upon which Hong Kong would be given special status by the PRC government.⁶³ On 24th September 1982, a meeting was held between the British Prime Minister Margaret Thatcher and Deng Xiaoping in Beijing. Thatcher insisted on the validity of the three treaties, proposing that if China agreed to Britain's continued administration of Hong Kong after 1997, Britain might later consider the demand for sovereignty claimed by China. Deng responded toughly. He remarked, "*On the question of sovereignty, China has no room to manoeuvre. To be frank, the question is not open to discussion. The time is ripe for making it unequivocally clear that China will recover Hong Kong in 1997. That is to say, China will not only recover the New Territories but also Hong Kong Island and Kowloon. It must be on that understanding that China and United Kingdom hold talks on the ways and means of settling the Hong Kong question.*"⁶⁴ China offered assurance that it would initiate special policies after recovering Hong Kong, including the establishment of a special administrative region (SAR), and the people of Hong Kong would be given the power to administrate the SAR to maintain its existing capitalism social and economic systems. This is the so-called "one country, two systems" policy.

From July 1983 to September 1984, twenty-two rounds of negotiations were held between China and Britain. In the end the two sides reached an agreement that China would recover Hong Kong and resume the exercise of sovereignty over it. China insisted that this has to be expressed in clear terms in the agreement. Britain did not accept the wording of "*resumption of the exercise of sovereignty over Hong Kong*" as suggested by China, whereas the Chinese side strongly objected to the British draft agreement implying the validity of the three unequal treaties. However, the two sides finally agreed to use the following expression in the form of a Joint Declaration: "*The Government of the People's Republic of China declares that it has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997;*" and "*The Government of the United Kingdom declares that it will restore Hong Kong to the People's Republic of China with effect from 1 July 1997.*" The sensitive question of sovereignty was therefore deliberately avoided in a flexible way.⁶⁵ On the 26th

⁶² Suzanne Pepper, "Elections, Political Change, and Basic Law Government: The Hong Kong System in Search of a Political Form", (2000) 162 *The China Quarterly*, p419.

⁶³ "The Negotiations between China and Britain and the Signing of Sino-British Declaration (zhong ying tan pan he zhong ying lian he sheng ming de qian shu)", (1997) 13 *World Affairs* (shi jie zhi shi), 1997 (in Chinese); Also see James T. H. Tang and Frank Ching, "Balancing the Beijing-London-Hong Kong 'Three Legged Stool' 1971-1986" in Ming K. Chan and Gerard A. Postiglione (eds), *The Hong Kong Reader: Passage to Chinese Sovereignty* (M.E. Sharpe, 1996), p47

⁶⁴ Deng Xiaoping, "Our Basic Position on the Question of Hong Kong", *Selected Works of Deng Xiaoping*, Vol. III (1982-1992), Edited by People's Daily Online at <http://english.peopledaily.com.cn/dengxp/vol3/text/c1040.html> (visited on 17 April 2009)

⁶⁵ See "The Chinese Government Resumed Exercise of Sovereignty over Hong Kong" on the official website of the Ministry of Foreign Affairs of the People's Republic of China at <http://www.fmprc.gov.cn/eng/ziliao/3602/3604/t18032.htm> (visited on 17 April 2009)

September 1984, a Sino-British Joint Declaration on the Question of Hong Kong and three Annexes were initialled. It was formally signed by the heads of the two governments in December of the same year. On the 27th May 1985, the two governments exchanged instruments of ratification of the Declaration; as of that day, Hong Kong entered into its transitional period up to 1997.

Subsequently, the National People's Congress (NPC) of China enacted *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (the Basic Law) to legalise the policies China promised in the Joint Declaration as well as to provide a constitutional foundation for the establishment and the future functions of the Hong Kong Special Administrative Region (HKSAR) in 1997. At the midnight of 30th June 1997, the Chinese and British governments held a ceremony for the handover of Hong Kong. From the 1st July 1997, the Chinese Government formally resumed the exercise of sovereignty over Hong Kong after the HKSAR was established. Hong Kong came into a new phase of history under the "one country, two systems" policy in which "Hong Kong people administering Hong Kong" and the region enjoys a high degree of autonomy. In other words, Hong Kong acquired a new constitutional order.

We can see that sovereignty has been always a great concern of the Chinese government. Its sensitivity is deeply rooted in the national sentiment and thus makes it the most important core interest of China. This is primarily resulted from the country's deep-seated memory of humiliation it has suffered in its modern history. This sentiment is a significant factor in understanding the attitudes and strategies of the central government of the PRC in dealing with Hong Kong affairs both before and after the establishment of the HKSAR. Secondly, the process of the talks held with Britain also indicates that China did show flexibility to a large extent and that it has adopted a pragmatic approach towards the Hong Kong issue as well. China was ready to settle the problems peacefully through negotiations and was willing to concede on some issues so as to reach agreements that all parties would accept. Such practice and experience was a moderate, flexible and pragmatic stance that was distinctive from its firmness on sovereignty, and it was also a vital point for observing and understanding China's actions regarding Hong Kong after 1997. From the enactment of the Basic Law, it can also be seen that China began to value the role of law in dealing with Hong Kong affairs. This indication shows that China might rely heavily on law, especially the Basic Law, to govern Hong Kong. Consequently, while actions of the central Chinese government are restricted significantly by law, it would be possible that the Basic Law is utilised as an instrument to realise the political will of Beijing towards Hong Kong. At the same time, the Basic Law could be wielded by the people of Hong Kong to safeguard their autonomy and human rights as well. In addition, the international community may use the Basic Law as an effective media or tool to comment and monitor China's decision-making and actions towards Hong Kong in post-1997 periods.

3 The "One Country, Two Systems" Policy and the Basic Law Enshrining It

The "one country, two systems" policy (the policy) put forward by the PRC government has played a crucial role in achieving a peaceful resolution on the Hong Kong issue, as not only did it successfully result in an agreement with Britain, but also in ensuring the confidence of the Hong Kong people towards the future. It is perceived by China and many Hong Kong people as the foundation for the SAR's sustainable stability and prosperity. The policy was

originally designed by the PRC to seek the reunification with Taiwan.⁶⁶ However, it was actually elaborated and applied in the course of solving the Hong Kong issue, and subsequently the recovery of Macao. The policy promised that when Taiwan, Hong Kong and Macao were reunified with the socialist mainland on the premise of "one China", their own capitalist economic and political systems and social structure would remain unchanged; and that they would enjoy a high degree of autonomy with the rule of local people except that the central government would be responsible for defence and foreign affairs. As for Taiwan, it could even maintain its own military force.⁶⁷

The "one country, two systems" is a result of the pragmatic approach adopted by the Communist Party of China (CPC) after the end of the fanatic and disastrous Cultural Revolution. The CPC subverted the Kuomintang (usually denoted as the KMT, meaning the Chinese Nationalist Party) regime to found the PRC in 1949, and the KMT government was exiled to Taiwan after being defeated in the civil war. That is the historical origin of the Taiwan issue. After the Cultural Revolution, the CPC gave up the line of class struggle and began to concentrate on economic development. Policies to reform and opening to the outside world were adopted as China's basic state strategy. Consequently, making efforts to realise a peaceful reunification between Taiwan and the mainland China became the CPC's agenda and as one of its "three main tasks" in 1980s, this replaced the previous policy of "liberating Taiwan" which implied overthrowing the existing capitalist system in the island with armed forces.⁶⁸ The Standing Committee of the National People's Congress (NPCSC) announced on the 1st January 1979 the newly developed policy of "respecting for the current situation of Taiwan and seeking for a peaceful reunification".⁶⁹ In 1981, nine more detailed policies towards the Taiwan issue were delivered by Ye Jianying, the Chairman of the NPCSC at the time, proposing that, *inter alia*, Taiwan may become a special administrative region with a high degree of autonomy after the reunification. Under this policy, the existing social and economic systems, way of life as well as its economic and cultural connections with foreign countries would remain unchanged. Taiwan would even be permitted to keep its own military forces, a privilege that Hong Kong and Macao do not have.⁷⁰ Ye's proposal was the embryonic form of the "one country, two systems" doctrine. In China's new Constitution 1982 (the present one), article 31 confirms that "*The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be described by law enacted by the National People's Congress in the light of specific condition*".⁷¹ This forms a constitutional foundation for the implementation of the "one country, two systems" policy.

When negotiating with Britain on the Hong Kong issue, China advocated the "one country, two systems" idea as a basic principle to resolve the problem and ensure Hong Kong's future

⁶⁶ Hsing Kuo-chiang, "One Country, Two Systems: Theory and Practice", (1987) 23 *Issues and Studies*, pp77-90.

⁶⁷ Deng Xiaoping, "An Idea for the Peaceful Reunification of the Chinese Mainland and Taiwan (June 26, 1983)", *Selected Works of Deng Xiaoping*, Vol. III, (electronic version), See <http://english.peopledaily.com.cn/dengxp/vol3/text/c1120.html>

⁶⁸ Liu Zongwu, "How CCP Introduced and Developed the Three Major Historical Missions of Our Country (Lun Dang Dui Woguo San Da Lishi Renwu De Tichu Ji Qi Fazhan Bianhua)", (2003) 7 *The Theory Monthly*(*Lilun Yuekan*), p9 (in Chinese)

⁶⁹ "A Letter to the Taiwan Compatriots from the Standing Committee of the National People's Congress of the People's Republic of China", the official websites of the Ministry of Foreign Affairs of the People's Republic of China, at <http://www.fmprc.gov.cn/chn/ziliao/wzzt/2311/t10733.htm>

⁷⁰ People's Daily (Renmin Ribao), October 1, 1981.

⁷¹ Art.31 of the Constitution of the People's Republic of China.

stability and prosperity. China developed the idea into twelve points of basic policy regarding Hong Kong and set them out in the Sino-British Joint Declaration. An elaboration of these policies was annexed to the Joint Declaration.⁷² Thereafter, these policies were embodied and enshrined by the NPC's enacting of the Basic Law which served as mini-constitution for the HKSAR.

The constitutional arrangement of the "one country, two systems" policy enshrined in the Basic Law can be outlined as follows:

In the "one country" aspect:

HKSAR is an inalienable part of the PRC (art.1). Upholding national unity and territorial integrity is one of the most important purposes for establishing it (Preamble). Its high degree of autonomy derives from the authorisation of the NPC (art.2). HKSAR is a local administrative region coming directly under the Central Government (art.12), which is responsible for defence and foreign affairs relating to the Region (art.13, 14). The power of appointing and removing the Chief Executive and principal officials of the Hong Kong government is possessed by the Central Government (art.15). Appointment or removal of judges of the Court of Final Appeal and the Chief Judge of the High Court of the HKSAR shall be reported to the NPCSC for record (art.90). The Chief Executive is accountable to both the Central Government and to the HKSAR (art.43). He or she has the duty to implement the directives issued by the Central Government (art.48). The Chief Executive, the principal officials, the majority of the members of legislature, the Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court shall be Chinese citizens who are permanent residents of the HKSAR with no right of abode in any foreign country (art.44, 61, 67 and 90). Laws enacted by the HKSAR legislature must be reported to the NPCSC for record and those returned shall immediately be invalidated (art.17). National laws mainly relating to defence and foreign affairs could be applied in the HKSAR through the way of listing them in Annex III to the Basic Law (art.18). Courts of the HKSAR have no jurisdiction over acts of state such as defence and foreign affairs (art.19). Hong Kong residents having Chinese citizen status are entitled to participate in the management of state affairs (art.21). Laws to prohibit any act of treason, secession, sedition, subversion against the Central Government should be enacted by the HKSAR on its own (art.23). The final power of interpretation and amendment of the Basic Law is vested in the NPCSC and NPC respectively (art.158, 159). The development of democracy subsequent to the year 2007 should obtain the consent from the NPCSC (art.7 of Annex I and part III of Annex II).

In the "two systems (autonomy)" aspect:

HKSAR is authorised to exercise a high degree of autonomy and enjoy executive, legislative, and independent judicial power, including that of final adjudication (art.2). The previous capitalist system and way of life will remain unchanged (art.5). The executive authorities and legislature shall be composed of permanent residents of Hong Kong (art.3). The laws previously in force shall be maintained except for any that contravene the Basic Law (art.8). HKSAR formulates its own monetary and financial policies, maintain its own currencies, formulates its own policies on education, culture, sports, social welfare system, etc. within the framework of the Basic Law (Chapters V and VI). While the Central Government is

⁷² See art.3 and annex I of the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong.

responsible for Hong Kong's foreign affairs, HKSAR is permitted to enjoy extensive powers in dealing with its external affairs, *inter alia*, representatives of the HKSAR Government may participate, as members of delegations of the PRC, in diplomatic negotiations that directly affect the Region, and in other international organisations or conferences limited to states and affecting the region; for those international organisations and conferences not limited to states, the SAR may participate using the names in the form of "Hong Kong, China" (art.150, 151, 152.).⁷³ The Basic Law also provides constitutional protection on various fundamental human rights and freedoms. Specially, the International Covenant on Civil and Political Rights is given a constitutional status through the Basic Law (art.39).

The drafting committee of the Basic Law was composed of members both from Hong Kong and from the mainland China. Consequently, the Basic Law, to some extent, is a mixture of the common law and civil law philosophy. However, as members from the mainland played a dominant role in the drafting process, the Basic Law mainly possesses a civil law feature. Notably, although the Basic Law is perceived as a mini-constitution for the SAR providing a constitutional framework acting the highest legal status in the Region, it is an ordinary national statute located in the Chinese legal hierarchy. It is not applied to the HKSAR solely; all the other parts of the mainland China should also comply with it. That is to say, the Basic Law has nationwide effect. Another distinct feature of the drafting process is that the Chinese Government had laid stress on the realisation of "two systems" within "one country"⁷⁴. Thus, as we can see from the outline above, while granting Hong Kong a high degree of autonomy, China has taken care to eliminate any tendency of deviating from the premise of "one country". This is a logical result from China's consistently sensitive concern for its sovereignty.

There are actually some divergences on the proper understanding of the policy. Some commentators lean too much towards the "two systems" aspect,⁷⁵ awarding more attention to the autonomy of the HKSAR and the separation of the two systems between the SAR and the mainland while ignoring or even denying the integrity of "one country" or the interests of the Central Government.⁷⁶ Other views on the other hand, stress mainly on the "one country" aspects, holding that the expression of "one country" takes precedence over the aspect of "two systems"⁷⁷ and Hong Kong is obliged to maintain and develop its capitalist system under the premise that it is part and parcel of China. It is therefore desirable to achieve a much more balanced appreciation of the policy, which takes both aspects into account as well as considering the interests of both sides.

⁷³ For example, Hong Kong was and is an independent member of the World Trade Organization. Indeed there are a huge number of treaties and international agreements to which Hong Kong is a party. Frank Columbus, *Asian Economic and Political Issues* (Nova Publishers, 2003), p25; also see the official website of WTO at http://www.wto.org/english/thewto_e/gattmem_e.htm. For a list of these international treaties and agreements, please see the official website of the Department of Justice of HKSAR at <http://www.legislation.gov.hk/choice.htm#intro>

⁷⁴ Ming K. Chan and David J. Clark (Ed), *The Hong Kong Basic Law: Blueprint for "Stability and Prosperity" under Chinese Sovereignty?* (Hong Kong University Press, 1991), p229.

⁷⁵ Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd edn Hong Kong University Press, 1999), pp138-142.

⁷⁶ Fu Huangling and Richard Cullen, "But Hong Kong Should Seek A Better Way", *Hong Kong Journal*, April 2006, Issue Two, www.hkjournal.org; "Does Liang Jiajie Want to Seek Hong Kong's Independence by Advocating Decentralization? (Liang Jiajie Qu Zhongyang Hua, Yu Gao Gangdu Hu)", *Wenwei Daily*, 16th March 2007.

⁷⁷ Rao Geping, "Two Views of Hong Kong's Basic Law: From Beijing, 'One Country' Must Dominate the Two Systems..." *Hong Kong Journal*, April 2006, Issue Two, www.hkjournal.org

Since the establishment of the SAR, the "one country, two systems" policy has been implemented for more than 12 years. 12 years' practice indicates that although some controversial episodes occurred and were criticised seeming to have negative impact on the autonomy of the region, however the policy succeeds in general not only in maintaining the prosperity and stability of Hong Kong, but also in safeguarding individual liberty and human rights of the people in the SAR. The worries and suspicions towards the policy are fading, at the same time satisfaction with the present situation and confidence in the future appears to be increasing gradually. It should be borne in mind that the doctrine of "one country, two systems" is by no means "present perfect"; in fact, it is still "present progressive". That is to say, the policy is a living being that needs to be developed and improved continually according to the situation of its actual practice, rather than a rigid dogma. It is just like that in the UK that devolution has been said to be a process not an event.⁷⁸ Indeed, perhaps this is exactly where the vitality of the policy of "one country, two systems" really lies. Admittedly, the policy does have some inherent contradictions from within, such as the relation between autonomy and sovereignty, centralism and decentralism, collectivism and democracy, socialist civil law system and capitalist common law system. Therefore, to seek a harmony between these tensions is vital to realising the policy successfully. In other words, a balance among the various aspects of the doctrine should be struck from time to time. To achieve this harmony and balance, the relevant institutions and infrastructures for interaction, coordination and correction would play a crucial role and this will be discussed later.

4 The Distinctiveness of the HKSAR Systems within China

Undeniably, one of the major features of the "one country, two systems" concept is to maintain the systems adopted in the HKSAR that are distinctive from those practised in the mainland China,⁷⁹ just as the former PRC president Jiang Zemin pointed out that "the well water should not interfere with river water".⁸⁰ What does the capitalist system as practised in Hong Kong which has been promised by the Basic Law to maintain for 50 years actually refer to? In other words, what is Hong Kong's uniqueness compared with the mainland China? It seems to connote at least four aspects, including the political, judicial, economic and cultural systems.⁸¹

First we look at the political aspect. During most of the time in the 150-year of British rule, Hong Kong lacked democracy.⁸² The Governor appointed by London possessed absolute power in the colony.⁸³ However, having realised China's inevitable determination to recover Hong Kong in the 1980s, the British government began to actively embrace the tide of

⁷⁸ R. Davies, *Devolution: A Process not An Event* (Cardiff: Institute of Welsh Affairs, 1999)

⁷⁹ Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd edn Hong Kong University Press, 1999), pp138-142

⁸⁰ This remark was made when Jiang received visitors from Hong Kong in Beijing, prescribing that Hong Kong should stay away from politics on the mainland. However, it can also be understood vice versa. See *People's Daily*, 12th July 1989.

⁸¹ Wong Man Fong, *China's Resumption of Sovereignty over Hong Kong*, David C. Lam Institute for East – West Studies, 1997, Hong Kong Baptist University.

⁸² Liu Shuyong, "Hong Kong: A Survey of its Political and Economic Development over the Past 150 Years", (1997) 151 *The China Quarterly*, pp583-586

⁸³ He was the head of the executive and all the members of the Executive Council which served as the cabinet of the colonial government were appointed by him. He was also naturally the president of the Legislative Council; all the non-*ex-officio* members of it were appointed by him until the first indirect election was introduced in 1985. A Bill passed by the Legislative Council could not become law until he gave his assent to it. He was nominally the Commander-in-Chief of the armed forces. He was empowered to appoint court justices and other government officials, and grant pardons.

democratisation and take substantial measures to initiate democracy reforms so as to construct a fire wall resisting the assumed China's interference in the future. In the 1990s, dramatically political reforms was proposed and pushed by the last Governor Chris Patten. Such actions resulted in Beijing's establishment of a provisional legislative council for the HKSAR to replace the one elected in 1995 which should have continued its work after 1997 if Patten had not changed its method of election so drastically.⁸⁴

As the HKSAR follows the principles of "one country two systems", "Hong Kong people administering Hong Kong" and "exercising a high degree of autonomy", Hong Kong's political systems entered into a new stage, which are different from either the previous governor-centred arrangement imported by Britain⁸⁵ or the one-party state systems practised in the mainland China at present. In fact, the new systems absorbed the effective aspects of the former political structure, adopted the democratic elements in accordance with Hong Kong's practical situation, and set up the final goal of gradually realising full democracy as well.⁸⁶

The Chief Executive (CE) replaced the role of Governor as the top leader of the HKSAR. However, the CE must be a Chinese citizen and a permanent resident of Hong Kong who is elected by the local people prior to the Central Government's appointment. The CE cannot serve more than two consecutive five-year terms. As an ultimate aim, the post will be selected by universal suffrage upon nomination by a broadly representative nominating committee. The CE represents the SAR, being accountable to the Central Government as well as to the HKSAR.⁸⁷ The CE has broad executive and legislative power as well as extensive power of personnel, such as appointing or removing the government's principal officials subject to confirmation by the Central Government, appointing or removing members of the Executive Council, appointing or removing judges of the courts at all levels and appointing or removing holders of public office.⁸⁸ The CE is assisted by the Executive Council in policy-making.

The CE is not only the leader of the HKSAR but also the head of the SAR government, which consists of a Department of Administration, a Department of Finance, a Department of Justice, and various bureaux, divisions and commissions.⁸⁹ In the first five years after the handover, the posts of the principal government officials were held by previous senior civil servants of the colonial government due to considerations that continuity in the civil service and the preservation of political impartiality and professionalism were key factors in ensuring Hong Kong's continuing stability and prosperity. However, on 1st July 2002, in order for the SAR Government to become more open and responsive to public demands, the Chief Executive Tung Chee-hwa introduced a new system for appointing top officials. Under the new system, principal officials of the SAR Government are installed by political appointments by the CE, which replaced the previous appointment system of selecting and

⁸⁴ Li Changdao, "Analysis of the Cause of the Political Reform Program Pushed Forward by the British Hong Kong Government (Gang Ying Zheng Gai Fang An Chu Long Yuan You Yan Xi)", (1994) 3 *Political Science and Law* (Zhengzhi Yu Falu), (in Chinese)

⁸⁵ However, it mainly evolved from the systems practiced before 1997.

⁸⁶ Ji Pengfei, *An Explanation of the Draft of the Basic Law of Hong Kong Special Administrative Region of the People's Republic of China and its relevant documents (Guanyu zhonghuarenmingongheguo xiangguang tebie xingzhengqu jibenfa caoan jiqi youguan wenjian de shuoming)*, Reported on 28th March 1990 to the Seventh National People's Congress of the People's Republic of China at its Third Session.

⁸⁷ Art.43, 44, 45 of the Basic Law.

⁸⁸ Art.48 of the Basic Law.

⁸⁹ Art.60 of the Basic Law.

promoting from permanent civil servants. Politically appointed principal officials are on fixed-term contracts and are directly responsible to the CE. All the fourteen principal officials are the members of the Executive Council, making it more of a cabinet-style body. Politically appointed principal officials are supported by the civil service, which continues to be permanent, meritocratic and politically neutral.⁹⁰

The Legislative Council (LegCo) is the Legislature of the SAR. It is constituted by election. The present assembly (elected in 2008) is the fourth term of the LegCo after the establishment of the HKSAR and comprises 60 members, with 30 members returned by geographical constituencies through direct elections and 30 members returned by functional constituencies representing different sectors of the community. The ratio between the two types of legislators of the present LegCo is the same as that of the LegCo elected in 2004. The composition of the two terms of the LegCo (2004 and 2008) indicates that significant progress of democracy had been achieved as they had the highest proportion of directly elected legislators since the handover with 50% directly elected, up from 40% (24 out of 60) in the 2000 election and 33% (20 out of 60) in 1998.⁹¹ It is worth noting that the Basic Law requires that the method for forming the LegCo be specified in the light of the actual situation in the SAR and in accordance with the principle of gradual and orderly progress.⁹² Again, the ultimate aim is the election of all the legislators by universal suffrage.⁹³

Since the handover, one of the most serious governing difficulties facing the SAR is how to establish good relations between the executive and the LegCo.⁹⁴ As already mentioned, unlike previous Hong Kong Governors appointed by Britain, the CE of the SAR does not at the same time serve as the president of the LegCo. Due to the rule that the CE cannot belong to any political party⁹⁵, the government often lacks a stable and solid supportive force in the LegCo. As a result, many bills initiated or policies introduced by the executive are opposed and even blocked by the LegCo which leads to the efficiency of the administration being damaged. Even worse, with more and more legislators being directly elected, the legitimacy and authority of the indirectly-elected CE faces more and more challenges. Moreover, as political parties are not permitted to nominate their own candidates to stand for the CE election, to compete for the seats in the LegCo becomes the only way for them to seek political power and achieve political ends. Naturally, political parties and legislators lack incentives to support the CE and the government. They tend to make the LegCo to play a dominant role in the SAR's political life since this is their best option under the present political arrangement. However, the Central Government insists that the political structure in the HKSAR must be the executive-led system, which means all political institutions should centre on the CE, on the ground that the CE is not only the head of the executive but also the head of the SAR representing the whole region. Therefore, to the Central Government, the CE and his government ought to play a leading role in the SAR's political life. This is claimed as the original purpose of the drafting committee for the Basic Law in designing

⁹⁰ Christine Loh and Richard Cullen, "Political Reform in Hong Kong: the Principal Officials Accountability System. The First Year (2002-2003)", (2005) 14 *Journal of Contemporary China* (2005), pp158-163

⁹¹ Annex II of the Basic Law.

⁹² Art 68 of the Basic Law.

⁹³ Art.68 of the Basic Law.

⁹⁴ "Zeng Yinquan Pointed Out the Ten Pairs of Relation in Hong Kong (zeng yinquan zhichu xianggang de shi da maodun)", *Xingtao Daily* (3 March 2007). (in Chinese)

⁹⁵ Section 31 of Chief Executive Election Ordinance (CAP569), Bilingual Laws Information System, http://www.legislation.gov.hk/blis_export.nsf/home.htm

HKSAR's political systems.⁹⁶ Under such political life, there actually exist political tensions caused by the two conflicting beliefs, which need to be tackled through the further constitutional reforms. It seems to me that the separation of the executive, legislative and judicial powers has been achieved in the Region, but good "checks and balances" as well as mutual respect and cooperation among these three branches have not yet been established; in other words, improved relations and better interactions are in need to be explored and developed. That is the foundation of good administration in the SAR.

The second aspect involves the judicial system. One of the proudest claims of Hong Kong is probably the rule of law – the most precious legacy left by the British rule. Hong Kong's legal systems were transplanted from the common law system of England and Wales by the British government. It functioned excellently and contributed greatly to Hong Kong's prosperity and stability.⁹⁷ This legal system has retained after the handover. The laws previously in force, including the common law, rules of equity, ordinances, subordinate legislation, and customary law, are maintained save for any that contravene the Basic Law, and subject to subsequent amendment by the SAR legislature.⁹⁸ National laws of the PRC are not applied in the HKSAR except for a number of such laws relating to defence and foreign affairs which are listed in Annex III to the Basic Law.⁹⁹ HKSAR is vested with independent judicial power, including that of final adjudication. The Judiciary of Hong Kong consists of the newly established Court of Final Appeal (which replaced the previous role of the Privy Council in London), the High Court (composed of court of first instance and court of appeal), district courts, magistrates' courts, and other special courts.¹⁰⁰ The courts have jurisdiction over all cases in the Region except for acts of state such as defence and foreign affairs.¹⁰¹ Based on the power of interpreting the Basic Law,¹⁰² the courts of the HKSAR have claimed and frequently used the power of constitutional judicial review which seems to be the most important weapon for the courts to check and balance the branches of executive and legislature. The high quality of judges and high standard of judgments are essential to the rule of law. In order to achieve that, judges in the SAR are chosen with reference to their judicial qualities and they may be recruited from other common law jurisdictions.¹⁰³ They are free to refer to precedents of other common law jurisdictions.¹⁰⁴ The quality of Hong Kong's legal system is also supported and guaranteed by a highly qualified legal profession and excellent legal education.

Thirdly, Hong Kong has a bustling free market economy based on the capitalist system with few tariff or non-tariff barriers. Since 1970, Hong Kong has been consistently described as the world's freest economy by notable international institutions.¹⁰⁵ A policy of "positive non-intervention" has been pursued by the Hong Kong government since the 1960s. This in fact involves two policies. First, a liberal economic philosophy is pursued by maintaining Hong

⁹⁶ Chen Hongyi, "The Origin of the Concept of Executive-led (xingzheng zhudao de youlai)", *Mingpao Daily* (April 23 to April 26, 2004)

⁹⁷ Lords Hansard Text for 12 June 1997 (1706 12-09) (House of Lords Debates on Hong Kong Issue) See <http://www.publications.parliament.uk/pa/ld199798/ldhansrd/vo970612/text/70612-09.htm>

⁹⁸ Art.8 of the Basic Law

⁹⁹ Art.18 of the Basic Law

¹⁰⁰ Art.81 of the Basic Law

¹⁰¹ Art.19 of the Basic Law

¹⁰² Art.158 of the Basic Law

¹⁰³ Art.92 of the Basic Law

¹⁰⁴ Art.84 of the Basic Law

¹⁰⁵ Bloomberg News, "Hong Kong again named the World's Freest Economy for a 13th Year", *International Herald Tribune*, 16th January 2007.

Kong's free port status, adhering to the system of free enterprise, improving the investment environment to encourage competition, and consolidating the economic base. Secondly, any defects brought about by the *laissez-faire* economic policy are remedied by a series of measures involving an application of necessary intervention within appropriate limits.¹⁰⁶ Hong Kong has developed into an international financial centre, an international trade centre and an international transport centre. Its economy continues to thrive after 1997 in spite of temporary recessions during 1998's Asia financial crisis and 2003's SARS breakout.¹⁰⁷ The secret for its continuous economic success lies primarily in the "one country two systems" policy, in which the HKSAR maintains a free and open market economy with a free flow of capital, goods, information and services, and a freely convertible currency. The HKSAR government formulates its own economic policies, manages its own finances, prepares its own budgets, issues its own freely convertible currency, keeps its low and simple tax regime, pursues a policy of free trade and maintains a level playing field.¹⁰⁸

Last but not least, Hong Kong possesses a unique cultural system which has various distinctive features different from that in the communist mainland China. It can be indicated by the core values and way of life cherished in the society. Hong Kong is a place where the eastern culture and western culture converge. On the one hand, the traditional Chinese values and customs are still well kept by many local Chinese people. Unlike the mainland China, the storm of communist revolution and the Great Cultural Revolution which attempted to destroy all the influence of traditions did not sweep dramatically in Hong Kong. Luckily, as a result the Chinese traditional cultural heritage did not suffer a disastrous result as it did in the mainland. The Chinese people in Hong Kong still, ideologically and behaviourally, attach importance to some Confucian values.¹⁰⁹ On the other hand, as a free port and a colony of Britain, in the tide of modernisation and globalisation, Hong Kong has been influenced and moulded considerably by western cultures and way of life which contributed a lot to Hong Kong's prosperity. Some core values including liberty, democracy, human rights, rule of law, fairness, social justice, peace and compassion, integrity and transparency, plurality, respect for individuals, and upholding professionalism¹¹⁰, are derived and developed from western civilisation. Many Hong Kong people are convinced that safeguarding these core values is essential to the region's sustainable development and the quality of people's life.¹¹¹ In other words, Hong Kong is a dynamic colourful cosmopolitical city being driven by its pluralist cultures.

5 China's Constitutional Structure and Systems

Although the HKSAR boasts many distinctive systems, which are relatively separate from those practised in mainland China, Hong Kong is by no means a self-sufficient isolated system without constitutional connection and interaction with institutions of the mainland China. On the contrary, the SAR is a local administrative region reports directly to the State Council of the PRC¹¹². It is located within the general constitutional structure of the PRC and

¹⁰⁶ Chen Duo and Cai Chimeng, *Hong Kong's Economy (I)* (Beijing, 1996), p153

¹⁰⁷ Alan Siu and Y. C. Richard Wong, "Economic Impact of SARS: The Case of Hong Kong", (2004) 3 *Asian Economic Papers*, pp62-83

¹⁰⁸ Basic Law articles 62, 106-119

¹⁰⁹ Wei-ming Tu, *Confucian Traditions in East Asian Modernity: Moral Education and Economic Culture in Japan and the Four Mini-Dragons* (Harvard University Press, 1996), p270

¹¹⁰ "Core Values in Hong Kong – 2004 Review", Core Values Network, January 2005

¹¹¹ Ibid.

¹¹² Basic Law art. 12

the two systems are meshing. Thus we must not ignore the "one country" aspect in the "one country, two systems" policy, for the constitutional structure and order of the PRC provide the framework, foundation and environment for the SAR's autonomy. That is what we will discuss now.

First of all, the PRC is a socialist state¹¹³ led by the Communist Party of China ("CPC", or "the Party") in which the CPC predominates in China's politics. Although the so-called "system of multiparty cooperation under the leadership of the CPC"¹¹⁴ is embedded in the Party's Constitution, the eight non-Communist parties¹¹⁵ in China indeed play a very limited role in general political life. Apart from these eight parties, no new political organisations are permitted to be established. In fact, what the CPC practices is a single-party form of government. The structure of the CPC organisation is set up like a pyramid which mirrors that of the structures of the state. Theoretically, the CPC's highest governing body is its National Congress whose members meet every five years. The CPC's National Congress elects the Central Committee, which in turn, elects the Politburo. The primary organs of power in the CPC are as follows: the Politburo Standing Committee (consisting of 5 to 9 members), the Politburo (consisting of about 20 members, including those in the Politburo Standing Committee), the Secretariat, the Military Commission and the Discipline Inspection Commission.¹¹⁶ The Politburo and its Standing Committee is the real power centre of the Party and thus the state. The Party controls the power over personnel of the state and the selection of key officials of state organs are decided by the Party and then appointed formally according to the relevant law. Furthermore, the Party possesses the decision-making power, providing the direction for the country; thus all important policies are made by the Party. We may say that in a sense, the Party is the real decision-making body whilst the state organs, including the people's congresses (National People's Congress and various local congresses), the governments, the courts, the procuratorates, and the military at all levels, are the executing agencies of the Party's will. Therefore, the CPC is the foundation upon which the rest of the governmental structure is built in China.¹¹⁷

Under the shadow of the CPC's leadership, the state is structured and functioned according to the Constitution of the PRC. The current version of the constitution was passed by the NPC on the 4th December 1982 when the CPC had given up the line of class struggle pursued in the Cultural Revolution and began to concentrate on economic development of the country. Three previous state constitutions – those of 1954, 1975 and 1978, were superseded in turn. The 1982 constitution was further revised in 1988, 1993, 1999 and 2004 to enshrine some significant policies or principles, such as the recognition of individual property right, the doctrine of market economy and the protection of human rights, which were gradually developed and accepted by the CPC and the state in the process of modernisation under the policy of reform and opening up. The Constitution consists of five sections: (i) the preamble, (ii) general principles, (iii) the fundamental rights and duties of citizens, (iv) the structure of

¹¹³ Article 1 of PRC Constitution. It should be noted that there is a view that doubts whether China is still a socialist state and claims that actually China has been transferred into a capitalist state after more than 30 years' enforcement of its reform and open-up policy. See Document of the DSP, Doug Lorimer, *Democratic Socialist Party (Australia), The Class Nature of the People's Republic of China* (Resistance Books, 2004)

¹¹⁴ See the General Programme of the Constitution of the Communist Party of China.

¹¹⁵ Apart from the CPC, China has eight non-Communist parties. They had established a cooperative relation with the CPC before the CPC overthrew the regime of Nationalist Party in 1949.

¹¹⁶ The Constitution of the Communist Party of China

¹¹⁷ Marc Rosenberg, "The Chinese Legal System Made Easy: A Survey of the Structure of Government, Creation of Legislation, and the Judicial System Under the Constitution and Major Statutes of the People's Republic of China", (2000-2001) 9 *University of Miami International and Comparative Law Review*, p227

the state, and (v) the national flag and emblems of state. The Constitution is the highest law of the PRC and all other laws are derived from it and cannot contravene it. "*All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law.*"¹¹⁸ According to the wording, even the CPC must obey and behave within the limits of the Constitution and the law.¹¹⁹ However in practice, the implementations of laws are often manipulated by political influence and the Constitution does not seem to have real restriction to limit the Party's wills.

The state structure of the PRC is unitary and centralised. Unlike the United States but similar to the UK, China adopts the principle of congressional supremacy rather than separation of powers as its foundation of constitutional order. The system of people's congress is the fundamental political system of China; it is claimed that all the powers belong to the people and the people exercise state powers through the National People's Congress (NPC) and the local people's congresses at different levels across the country.¹²⁰ The NPC is the highest organ of the state power;¹²¹ its main functions and powers include formulation of laws, delegation authority, policy formulation, and supervision of other governing organs. Among the broad powers of the NPC is the power to amend the Constitution, to elect the president and vice-president of the PRC, to decide the appointment of the premier of the State Council, to elect the Chairman of the Central Military Commission, and to elect the president of the Supreme Court as well as the Procurator-General of the Supreme Procuratorate.¹²² The Central Government (the State Council), the Supreme Court and the Supreme Procuratorate are responsible to the NPC; they must produce an annual report for the NPC's Plenary Session held in March every year. The NPC consists of about 3,000 delegates who are elected in and by the provinces, the four municipal cities directly under the State Council¹²³, the five national autonomy regions (NAR)¹²⁴, the two special administrative regions (SAR)¹²⁵, and the Military, according to relevant law and procedures.¹²⁶ A single term of a NPC deputy is five years.¹²⁷ The NPC Standing Committee is the permanent supreme state organ of power and legislation. Because the NPC is too large in size and due to the fact that its plenary session is only once a year, the NPC Standing Committee assumes responsibility to exercise the highest state and legislative powers when the NPC general assembly is not in session. The Standing Committee is composed of 158 members;¹²⁸ it has the power to interpret the Constitution and supervises the implementation, enact and amend laws except for those relating to fields reserved for the NPC general assembly, partially supplement and amend laws enacted by the NPC when that body is not in session, and to interpret laws in general.¹²⁹

The President of the PRC is legally the Head of State. This position is elected by the NPC according to art.62 of the Constitution. The President promulgates statutes adopted by the

¹¹⁸ Art.5 of the PRC Constitution.

¹¹⁹ Actually, Constitution of the Communist Party of China claims, "the Party must conduct its activities within the framework of the Constitution and other laws." See paragraph 30 of the General Program.

¹²⁰ Art.2 of the PRC Constitution.

¹²¹ Art.57 of the PRC Constitution.

¹²² Art.62 of the PRC Constitution.

¹²³ The four municipal cities directly under the State Council are Beijing, Tianjin, Shanghai, and Chongqing.

¹²⁴ The five national autonomy regions are Xinjiang Uyghur Autonomous Region, Inner Mongolia Autonomous Region, Tibet Autonomous Region, Ningxia Hui Autonomous Region, and Guangxi Zhuang Autonomous Region.

¹²⁵ The two special administrative regions are Hong Kong and Macao.

¹²⁶ Electoral Law of the National People's Congress and Local People's Congress of the PRC, Art.15.

¹²⁷ Organic Law of the National People's Congress of the PRC, art.39.

¹²⁸ See the official websites of the NPC at <http://www.npc.gov.cn>

¹²⁹ Art.67 of the PRC Constitution.

NPC and its Standing Committee. The President also has the formal power to appoint the Premier (of the State Council), Vice-Premiers, State Council members, ambassadors to foreign countries, Ministers of all government departments, and all legislative committee chairs, treasurers and secretaries. The President has the power to give Special Presidential Decrees, and can declare a state of emergency, and declare war. The President is assisted by the Vice-President. It must be pointed out that all of these powers are *pro forma* indeed, for the President must follow what the Party instructs. In fact, the power of the President varies under different circumstances and it is possible that the President could be powerless and acts as the nominal head of state in some situations. If the President of the People's Republic is held by the head of the Communist Party concurrently, for example the current President Hu Jintao and the former President Jiang Zemin, the Presidency is a powerful position since the person is both the head of state and the head of the Party. It seems that the head of Communist Party serving concurrently as the President of the People's Republic has gradually become an institutional arrangement or a constitutional convention in China.

The relation between government and people's congresses in China differs considerably with that in the United States, where the executive branch is separated from the legislative branch under the principle of separation of powers and checks and balances. The Central People's Government of the PRC acting under the name of the State Council is the executive body of the highest organ of state power, say, the NPC. It is the highest organ of state administration.¹³⁰ The State Council is composed of a premier, vice-premiers, state councillors, ministers in charge of ministries and commissions, the auditor-general, and the secretary-general. The State Council is responsible for carrying out the principles and policies of the Communist Party as well as the regulations and laws adopted by the NPC, and dealing with such affairs as China's internal politics, diplomacy, national defence, finance, economy, culture and education. Under the current Constitution, the State Council exercises the power of administrative legislation, the power to submit proposals, the power of administrative leadership, the power of economic management, the power of diplomatic administration, the power of social administration, and other powers granted by the NPC and its Standing Committee.¹³¹ The State Council is responsible, and reports on its work, to the NPC and its Standing Committee. However, the State Council appears to be more powerful than the NPC and its Standing Committee in practice, although the former is formally inferior to the latter.¹³²

At the central level, other state organs below and responsible to the NPC and its Standing Committee are the Central Military Commission, the Supreme People's Court and the Supreme People's Procuratorate. The Central Military Commission directs the armed force of the country. Under the principle of "the Party commanding the gun" adhered firmly to by the CPC, the Central Military Commission of the CPC performs the function of the Central Military Commission of the State simultaneously. That is to say, the two institutions are actually the same one. The Supreme People's Court is the highest judicial organ. Unlike the judges in most western countries having life tenure, the term of office of the President (the Chief Judge) of the Supreme People's Court is the same as that of the NPC appointing him, which is five years, and he shall serve no more than two consecutive terms.¹³³ The Supreme

¹³⁰ Art.85 of the PRC Constitution.

¹³¹ Art.89 of the PRC Constitution.

¹³² In recent years, the people's congresses began to apply their power actively. Maybe some day they would become "iron stamps". See Minxin Pei, "Creeping Democratization in China", (1995) 6 *Journal of Democracy*, p71.

¹³³ Art.124 of the PRC Constitution.

People's Procuratorate is the highest state organ of legal supervision and prosecution. Notably, before a court, a prosecutor performs concurrently both the function of prosecuting criminals and the role of overseeing the application of law by the court. That means a prosecutor in court enjoys a status not only more powerful than the accused, but also higher than the judges in a sense.

To match the central institutions, corresponding institutions (except for the military commission) are established vertically at different local levels. Formally, all local governments, courts, procuratorates are created by and responsible to the local people's congresses and their standing committees at the same level. However, they are actually subject to the leadership of the CPC's local organisations. Concurrently, they are also subject to the leadership or supervision of their corresponding institutions at superior levels.

All the state organs, both at central level and local levels, function under the principle of democratic centralism.¹³⁴ As it is generally understood, democratic centralism consists of four rules: (1) the individual should be subordinated to the organisation; (2) the minority should be subordinated to the majority; (3) the low-level organ should be subordinated to the higher level organ; (4) the local authority should be subordinated to the central authority.¹³⁵ This principle appears to be favourable for strengthening the solidarity and improving the efficiency of China's huge and complex institutions. Another principle applied and insisted on by China worth mentioning here is that China practises a unitary system rather than a federal one. The essence of a unitary system, generally understood by Chinese, is that all the local regions' power, no matter how high and how broad, derives from the authorisation of the Central Government, mainly the State Council or the NPC and the NPCSC.¹³⁶ Unlike the members in a federal state, the local regions in China have no residue power. Conversely, it is claimed that all the residue power is reserved by the Central Government.¹³⁷ That is the major reason why the commentators in the mainland China insist that the establishment of Hong Kong and Macao Administrative Regions and vesting them high degree of autonomy which seems to be even higher than that enjoyed by the members in federal state does not change the feature of China's unitary system.¹³⁸ To these commentators, the autonomy of the HKSAR and the MCSAR are granted by the Central Government and the SARs do not have inherent or residual powers.¹³⁹

Another unique institution in China's political life is the Chinese People's Political Consultative Conference (CPPCC), which serves as a broadly representative organisation of the patriotic united front¹⁴⁰ and an important institution of multiparty cooperation and

¹³⁴ Art.3 of the PRC Constitution.

¹³⁵ Marc Rosenberg, "The Chinese Legal System Made Easy: A Survey of the Structure of Government, Creation of Legislation, and the Judicial System under the Constitution and Major Statutes of the People's Republic of China", (2000-2001) 9 *University of Miami International and Comparative Law Review*, p277

¹³⁶ The Constitution of the PRC (1982), Article 5 stipulates: "the state upholds the uniformity and dignity of the socialist legal system." Article 5 stipulates: "The People's congresses of provinces and municipalities directly under the Central Government and their standing committees may adopt local regulations, which must not contravene the Constitution and the law and administrative rules and regulations, and they shall report such local regulations to the Standing Committee of the National People's Congress for the record."

¹³⁷ Fan Zhongxin, *One Country, Two Systems and Trans-century China* (yi guo liang fa yu kua shi ji de zhong guo) (Hong Kong Culture & Education Publishing Ltd), p168

¹³⁸ Fan Zhongxin, *One Country, Two Systems and Trans-century China* (yi guo liang fa yu kua shi ji de zhong guo) (Hong Kong Culture & Education Publishing Ltd), pp86, 168

¹³⁹ Raymond Wacks, *The New Legal Order in Hong Kong* (Hong Kong University Press, 1999), p175

¹⁴⁰ Paragraph 10, Preamble, the PRC Constitution. According to Article 19 of the Amendment to the Constitution of PRC, the patriotic united front led by the CPC is composed of democratic parties and people's

political consultation led by the CPC. The Constitution of the PRC guarantees this system to exist and develop over a long period of time.¹⁴¹ The CPPCC has a National Committee and local committees, working on the principle of “lasting coexistence, mutual supervision, working together with open minds and sharing weal and woe (with the CPC)”.¹⁴² The two most important features of China’s socialist democracy are that the NPC exercises its power through elections and voting and that before such elections and voting occurs, the CPPCC conducts thorough consultations. The relation between the CPPCC, the NPC and the Government is that the CPPCC holds discussions before policy decisions are made, the NPC votes on policy decisions after discussions are finished, and the government carries them out after policy decisions are finalised. The three functions are unified under the leadership of the CPC. The three bodies share the work and cooperate, each doing its own job, and they mutually complement each other.

Having discussed China’s political structure, we now turn to look at its economic system, which has substantial influence on Hong Kong’s economic performance.¹⁴³ The Chinese Constitution has many provisions prescribing its economic system. Perhaps that is a distinctive feature of a socialist constitution and an important aspect of China’s constitutional order. Interestingly, the current economic system of China is indeed by any definition a capitalist one but in the name of socialism. Perhaps we can consider it is a communist-led capitalist economy. China began to initiate its market-oriented economic reform in 1978; thanks to nearly three decades of continuous efforts, China’s economic system has changed from the rigid Soviet Union style socialist planned economy into a kind of market economy with great vitality. The provision of economic planning in the Chinese Constitution was amended and the market economy was adopted instead. Article 15 of the present Constitution reads “*The State has put into practice a socialist market economy. The State strengthens formulating economic laws, improves macro adjustment and controls and forbids according to law any units or individuals from interfering with the social economic order.*” The private economy was perceived previously as one of the major features of capitalism and thus opposed firmly by the CPC, but it began to be recognised as a major component of socialist economy by the Party. The relevant provision of the Constitution was revised into “*Individual, private and other non-public economies that exist within the limits prescribed by law are major components of the socialist market economy*”,¹⁴⁴ “*The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy*”.¹⁴⁵ The Constitution also declared that “*Citizens’ lawful private property is inviolable*” and “*The State, in accordance with law, protects the rights of citizens to private property and to its inheritance.*”¹⁴⁶ Consequently, numerous laws were enacted to provide a legal foundation for the development of a market economy. Among them, the most significant movements may be the Contract Law which protects the freedom of transaction, and the Property Law which protects individuals’

organizations and embraces all socialist working people, all builders of socialism, all patriots who support socialism, and all patriots who stand for reunification of the motherland.

¹⁴¹ Paragraph 4, Amendment Two, the PRC Constitution.

¹⁴² Paragraph 6, General Principles, Charter of the Chinese People’s Political Consultative Conference.

¹⁴³ Michael J. Enright, “Globalization, Regionalization and the Knowledge-Based Economy in Hong Kong” in John H. Dunning (ed), *Regions, Globalization, and the Knowledge-Based Economy* (Oxford University Press, 2002), pp393-4

¹⁴⁴ Amendment three of the PRC Constitution.

¹⁴⁵ Paragraph 5, Amendment Fourth, the PRC Constitution.

¹⁴⁶ Paragraph 6, Amendment Fourth, the PRC Constitution.

ownership of things. At the same time, the process of economic reform and openness has also brought the country into deeper engagement with the outside world. The absorption of foreign investment was adopted as an important content of China's fundamental principle of opening up to the outside world.¹⁴⁷ China also sought to participate in the international economy community and officially entered into the World Trade Organization (WTO) in 2001.¹⁴⁸ Significant economic achievements have been made since China opened its market. For the past 25 years, China's economy has grown on an average rate of 9.4% annually and this has resulted into 400 million Chinese people being brought out of poverty. In 2007, China's economy was nearly ten times larger than it had been in 1978, overtaking Germany to become the world's third-largest economy and behind the United States and Japan in terms of gross domestic product (GDP).¹⁴⁹ If the current trends continue, China is set to become the world's second largest economy within a decade. However, China's GDP per capita remains well behind leading economies given the fact that the country has the world's largest population of 1.3 billion people.¹⁵⁰ With the huge success in economic development, China has become the new factor in global politics and economics.¹⁵¹ As David Chan-oong Kang observes, "Now China is in the middle of what may be a long ascent to global great power status. Indeed, it may already be a great power, with the only question being how much bigger China may become."¹⁵²

While China is making amazing progress in economic achievements, the country is also undergoing dramatic social and political changes. The Chinese society is moving towards a more pluralistic direction, marked primarily by, *inter alia*, the emerging of a civil society that might be the engine of democratic regime change.¹⁵³ Civil society organisations, notably non-governmental organisations (NGOs), have been enjoying a rapid emergence and vigorous development with government's increasing tolerance of their independence.¹⁵⁴ A middle class of the society, which is widely regarded as the most important driving force for democratisation, has appeared and is rising steadily.¹⁵⁵ The media industry thrives and the freedom of expression increases considerably although media control is still an important governing means of the party. The fast development of the internet begins to have profound impact on creating and maintaining a more and more open and pluralistic society.¹⁵⁶ Political reform has not only been hotly debated and broadly discussed among Chinese intellectuals but also has become an official policy objective listed on the CPC agenda and governmental meetings and official publications.¹⁵⁷ Grassroots democracy, such as direct elections in some

¹⁴⁷ "Overview of FDI in China", on the official websites of China's Ministry of Commerce.

<http://english.mofcom.gov.cn/aarticle/topic/bizchina/fdiinchina/200406/20040600233643.html>

¹⁴⁸ The People's Daily, Tuesday, 11th December 2001.

¹⁴⁹ Ashley Seager, "China Becomes World's Third Largest Economy", *www.guardian.co.uk* (14th January 2009) <http://www.guardian.co.uk/business/2009/jan/14/china-world-economic-growth>, visited on 21st April 2009

¹⁵⁰ Ibid

¹⁵¹ Will Hutton, *The Writing on the Wall: China and the West in the 21st Century* (Little, Brown, 2007), p4

¹⁵² David Chan-oong Kang, *China Rising: Peace, Power, and Order in East Asia* (Columbia University Press, 2007), p197

¹⁵³ Jude Howell, "New Directions in Civil Society: Organized around Marginalized Interests" in Jude Howell (ed), *Governance in China* (Rowan & Little Field, 2003), pp143-171; Also see Mary E. Gallagher, "China: the Limits of Civil Society in a Late Leninist State" in Muthiah Alagappa (ed), *Civil Society and Political Change in Asia: Expanding and Contracting Democratic Space* (Stanford University Press, 2004), pp419-454

¹⁵⁴ Yiyi Lu, "NGOs in China: Development Dynamics and Challenges" in Yongnian Zheng and Joseph Fewsmith (eds), *China's Opening Society: the Non-state Sector and Governance* (Routledge, 2008), pp89-104

¹⁵⁵ David S. G. Goodman (ed), *The New Rich in China: Future Rulers, Present Lives* (Routledge, 2008)

¹⁵⁶ Zixue Tai, *The Internet in China: Cyberspace and Civil Society* (CRC Press, 2006)

¹⁵⁷ Suisheng Zhao (ed), *Debating Political Reform in China: Rule of Law vs. Democratization* (M. E. Sharpe, 2006)

rural and urban areas, is promoted positively by the government. As a result, people's political participation and awareness improve greatly,¹⁵⁸ laying a foundation for further democratisation in China. The country is also in a transition from the rule of man as well as rule by law to a version of rule of law, in which the two important hallmarks of modernity: the rule of law and the protection of human rights, are increasingly weighed. The CPC has endorsed the establishment of a socialist rule-of-law state in which the government must act in accordance with law, and the new policy was expressly incorporated via amendment into the Constitution in 1999.¹⁵⁹ Numerous laws and regulations have been enacted to meet the huge need in commercial transactions and everyday life. The legislative forms, skills and the underpinning concepts and values of most of these laws were borrowed or learnt from western countries. Reforms of the legal or judicial system have been steadily carried out. The number of lawyers and their overall level of expertise have increased rapidly. The legal profession has also become much more independent. Chinese citizens and private entrepreneurs are increasingly using the legal system to protect their personal and property rights. More strikingly, China's theoretical underpinnings of law appear to be changing from a purely instrumental conception of law toward a conception of rule of law where law was meant to bind both government officials and citizens alike.¹⁶⁰ Thus, generally speaking, China has made various progresses in building a modern legal system that can effectively protect property rights and human rights.¹⁶¹ As far as human rights are concerned, significant progress has also been made as respect for and protection of human rights has been enshrined in the Constitution and effective measures have been taken to promote the cause of human rights. While enjoying enhanced material and cultural life, the Chinese people have been provided with firm guarantees for their political, economic, cultural and social rights.¹⁶² "[A] new chapter has opened in the history of the development of the cause of human rights in China."¹⁶³ All these evidences are showing that China is rising and changing; and that it is gradually transitioning into a much more civilised, modernised and democratic country. This will inevitably have considerable impact on its attitude towards and the practice of the "one country, two systems" policy, because its own progresses will help the Central Government in Beijing to understand better the values of the systems of the SARs.

However, it must be noted that although great social and political progress has been achieved, we may draw an interesting conclusion from the above investigation that the system practised in the mainland China can be referred as a kind of "one country, two systems" as well – in the political aspect, China is still firmly adhered to the traditional socialist system; while in the economic sphere, western style capitalist is adopted. Both of the aspects are subject to the leadership of the CPC. Overall, the political system appears not to match the development of economic progress; in other words, the pluralism-oriented political reforms in China lag behind its economic reforms. This seems to be an effective model which is helpful to us in

¹⁵⁸ Gunter Schubert, "Village elections, citizenship and regime legitimacy in contemporary rural China", and Thomas Heberer, "Institutional change and legitimacy via urban elections? People's awareness of elections and participation in urban neighbourhoods (*Shequ*)" in Gunter Schubert (ed), *Institutional Change and Legitimacy in Contemporary China* (Taylor & Francis, 2008), pp55-78 and pp79-106

¹⁵⁹ Amendment Three, the Constitution of the PRC.

¹⁶⁰ Randall P. Peerenboom, *China's Long March toward Rule of Law* (Cambridge University Press, 2002), pxii

¹⁶¹ Minxing Pei, "Statement to the Senate Foreign Relations Committee (7th June 2005)",

<http://www.carnegieendowment.org/files/PeiTestimony050607.pdf> accessed on 23rd April 2009

¹⁶² State Council Information Office of PRC, National Human Rights Actions Plan (2009-2010), *People's Daily Online* (April 13, 2009), <http://english.people.com.cn/90001/90776/90785/6635641.html> accessed on 23rd April 2009

¹⁶³ Ibid

observing and understanding the complexity of China's systems, which has significant implications in Hong Kong's autonomy.

6 The Intersections and Interactions Between the Two Systems

As already mentioned, although the HKSAR enjoys such a high degree of autonomy under the doctrine of "one country, two systems", it does not necessarily mean that Hong Kong is an independent political unity or an isolated island outside China. On the contrary, the HKSAR is situated within the constitutional framework of China as it has many unique intersections and interactions with the mainland China.

First of all, it is worth noticing that the Basis Law, which serves as the HKSAR's mini-constitution, is also a national statute of the PRC enacted by the NPC in accordance with the Constitution of the PRC.¹⁶⁴ However, the relationship or the compatibility between Hong Kong's Basic Law and the PRC's Constitution is still a particularly ambiguous and debatable question. The Constitution declares that the PRC is a socialist state and the state upholds the unity and dignity of the socialist legal system,¹⁶⁵ while the Basic Law guarantees the capitalist and the common law system in Hong Kong to be continued and it even bestows Hong Kong with the final adjudication power.¹⁶⁶ Although Article 31 of the Constitution authorises the state to establish special administrative regions when necessary and implies that different systems may be practiced in the special administrative regions, it is not clear to what extent any newly established region may deviate from the socialist system and what provisions of the Constitution should be excluded from being applied into Hong Kong.¹⁶⁷ To resolve the problem of questioning the constitutionality of the Basic Law, the NPC made a decision when passed it to proclaim that the Basic Law "is constitutional as it is enacted in accordance with the Constitution of the People's Republic of China and in the light of the specific conditions of Hong Kong" and affirm that the systems, policies and laws to be instituted in the HKSAR shall be based on the Basic Law.¹⁶⁸ However, it did not answer the question of whether or how the Constitution shall be applied to Hong Kong. Some scholars argue that the Constitution applies as a whole, not only the concrete articles, to Hong Kong.¹⁶⁹ This is indeed a strange and confused argument, for it is not easy for us to understand how to apply a constitution as a whole without applying any specific articles. Others insist that the Constitution only partially applies and attempt to identify the exact provisions that should be applied or excluded.¹⁷⁰ Another interesting argument advocates that the Basic Law should not be regarded just as an ordinary statute; rather, it is a special law of the Constitution. Therefore it is legitimate that the Basic Law contains provisions different from those in the Constitution and no question of constitutionality would be raised, since in

¹⁶⁴ Preamble of the Basic Law.

¹⁶⁵ Art. 1 and 5 of the Constitution of the PRC.

¹⁶⁶ Art.2, 5 and 8 of the Basic Law.

¹⁶⁷ Article 31 of the PRC Constitution provides that, "the state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions". Article 62(13) further provides that the NPC has the power "to decide on the establishment of special administrative regions and the systems to be instituted there".

¹⁶⁸ Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Adopted at the Third Session of the Seventh National People's Congress on 4th April 1990.

¹⁶⁹ Fu Hualing and Richard Cullen, "But Hong Kong Should Seek A Better Way..." *Hong Kong Journal*, April 2006, Issue Two, at http://www.hkjournal.org/archive/2006_spring/fu.html accessed on 24/5/2009

¹⁷⁰ Fu Hualing and Richard Cullen, "But Hong Kong Should Seek A Better Way..." *Hong Kong Journal*, April 2006, Issue Two, at http://www.hkjournal.org/archive/2006_spring/fu.html accessed on 24th May 2009

China's legal theory the principle that the special law prevails over the general law is adopted.¹⁷¹ It seems to me that the concrete articles of the Constitution indeed do not directly apply to the special administrative regions, but the Basic Law is the instrument or the bridge through which the Constitution apply to Hong Kong indirectly. In other words, applying the Basic Law itself is applying the Constitution, as the Basic Law is derived directly from the Constitution and it materialises the Constitution. Perhaps we may say that the Constitution is Kelsen's basic norm¹⁷² for the Basic Law, which in turn serves as the basic norm for all the other laws applied in the HKSAR.

Although the Basic Law maintains and safeguards the uniqueness and distinctiveness of Hong Kong's system, it is by no means aims at separating or cutting off Hong Kong's system entirely from that of the mainland China as perceived by some scholars.¹⁷³ In fact, the Basic Law also provides many significant interfaces or intersections for the two systems. Among them, the role of the Chief Executive (CE) may be the most important one. The CE is appointed by the Central Government after being selected by the local election and he or she shall be accountable to the Central Government (the State Council) as well as to the HKSAR.¹⁷⁴ The CE has the duty to implement the directives issued by the Central Government in respect of the relevant matters provided for in the Basic Law. All the principal officials of the HKSAR Government are nominated by the CE and nominations shall be reported to the Central Government for approval and appointment.¹⁷⁵ In practice, the CE travels to Beijing once each year to report his or her work officially and directly to the President and the Premier of the PRC. In day-to-day work, the CE's office and the SAR government's Constitutional and Mainland Affairs Bureau keep close communications and connections with the State Council's Hong Kong and Macao Affairs Office. The CE is the head of the HKSAR who represents the Region; through the role of the CE, the HKSAR is connected with or locked to the huge and complex systems of the mainland China. According to Article 22(5) of the Basic Law, the Government of the HKSAR also sets up a Beijing Office in Beijing to further enhance liaison and communication between the SAR Government and the Central Government and other mainland authorities.¹⁷⁶

Another interface is the legislative connection of the two systems. The HKSAR enjoys a high degree of legislative autonomy and the legislature is created by local elections. However, all the laws enacted by the legislature must be reported to the NPCSC for "record".¹⁷⁷ The NPCSC may return and thus immediately invalidate any of those laws regarding affairs within the responsibility of the Central Government or regarding the relationship between the Central Government and the Region, on the ground that they are not in conformity with the

¹⁷¹ Li Xi, "The Nature of the Basic Law of Special Administrative Region: A Special Law of the Constitution (Tebie xingzhengqu jibenfa zhi xingzhi: xianfa de tebie fa)", (2002) 5 *Journal of Xiamen University (Arts & Social Science)*, pp15-23 (in Chinese)

¹⁷² Basic norm (German: Grundnorm) is a concept created by Hans Kelsen, a jurist and legal philosopher. Kelsen used this word to denote the basic norm, order, or rule that forms an underlying basis for a legal system. The theory is based on a need to find a point of origin for all law, on which basic law and the constitution can gain their legitimacy. See Hans Kelsen, *General Theory of Law And State* (The Lawbook Exchange, Ltd., 2007), pp110-111

¹⁷³ Yash Ghai, *Hong Kong New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong 1999), pp138-142.

¹⁷⁴ Art. 43, 45 of the Basic Law.

¹⁷⁵ Art. 48 of the Basic Law.

¹⁷⁶ See the official websites of the Beijing Office of the Government of HKSAR at <http://www.bjo.gov.hk/eng/index.htm>

¹⁷⁷ Art.17 of the Basic Law

Basic Law.¹⁷⁸ The HKSAR applies its own laws, but some national laws can be inserted in Hong Kong's legal system by being listed in Annex III of the Basic Law or being ordered by the Central Government when the HKSAR is in a state of emergency.¹⁷⁹ Notably, an amendment of the Basic Law would to some extent be a result of the interaction of the two systems. The power of the amendment of the Basic Law is vested in the NPC. The HKSAR has the right to propose bills for amendment which should be submitted to the NPC by the delegation of the Region to the NPC after obtaining the consent of two-thirds of the deputies of the Region to the NPC, two-thirds of all the members of the Legislative Council of the Region, and the CE of the Region. Before a bill for amendment is put on the agenda of the NPC, the Committee for the Basic Law of the HKSAR consisting of members both from the SAR and the mainland China shall study it and submit its views.¹⁸⁰ The amendment of Annex I and Annex II of the Basic Law, which provides the method for the selection of the Chief Executive and the method for the formation of the Legislative Council, shall be reported to the NPCSC for approval or record.¹⁸¹ The NPCSC also has the power to decide beforehand whether to initiate the amending process of the two Annexes.¹⁸² So far, the Basic Law has not experienced an amendment. However, the NPCSC has agreed that Annex I and Annex II of the Basic Law may be amended for the selection of the Chief Executive and the formation of the Legislative Council in the year of 2012.¹⁸³

As for the judiciary, the HKSAR possesses an independent court system and the power of "final adjudication".¹⁸⁴ As a SAR of China, any court case in Hong Kong can be resolved locally and does not need to go outside the SAR to a superior adjudicator in Beijing. All the courts in the mainland China, including the People's Supreme Court, has no jurisdiction over Hong Kong's cases. The CFA has the last word in a local dispute. Nonetheless, there would still be some direct interactions occurring between the courts and the NPCSC under certain circumstances as the NPCSC has the final power of interpreting the Basic Law. The courts of the HKSAR are authorised by the NPCSC to interpret the provisions of the Basic Law, but when they need to interpret the provisions concerning the responsibility of the Central Government or concerning the relationship between the Central authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts shall, before making their final judgment which are not appealable, seek an interpretation of the relevant provisions from the NPCSC through the CFA.¹⁸⁵ In addition, the Basic Law also provides that the HKSAR may maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other.¹⁸⁶ Three important arrangements of

¹⁷⁸ Art. 17 of the Basic Law.

¹⁷⁹ Art. 18 of the Basic Law.

¹⁸⁰ Art. 159 of the Basic Law.

¹⁸¹ Annex I and II of the Basic Law.

¹⁸² See The Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, S.S. No.5 to Gazette Extraordinary No.8/2004.

¹⁸³ Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage (Adopted by the Standing Committee of the Tenth National People's Congress at its Thirty-first Session on 29 December 2007), available at <http://www.hklii.org/hk/legis/en/ord/2211.txt>

¹⁸⁴ Article 2 and section 4 of chapter iv of the Basic Law

¹⁸⁵ Art. 158 of the Basic Law.

¹⁸⁶ Art. 95 of the Basic Law.

mutual legal assistance between the SAR and the mainland China have been signed.¹⁸⁷ These form a framework for the daily interactions between the courts of the two sides.

Furthermore, there are two political arrangements connecting the HKSAR with the national polity and political life. One is the deputies of the HKSAR to the National People's Congress; another is the members specially invited from the HKSAR to the Chinese People's Political Consultative Conference (CPPCC). As Hong Kong is an inalienable part of the PRC, its residents who are Chinese citizens have the right to participate in the management of state affairs.¹⁸⁸ The HKSAR has thirty-six deputies to the NPC, representing the people of the SAR in the highest organ of state power. They are supposed to perform the following functions: to attend NPC conferences, deliberating the bills and reports put on the NPC's agenda, submitting bills, proposals and opinions according to law, participating in elections; to take part in activities organised by the NPCSC when the NPC is not in session and to make proposals, criticisms and opinions to the NPCSC; to submit the bill for amendment to the Basic Law according to article 159 of that law and to participate in electing the Chief Executive of the HKSAR and part of the legislature members of the HKSAR subject to relevant provisions of the Basic Law; to play a positive role in the social affairs of the HKSAR, but not to intervene in the work of the SAR Government and the affairs within the SAR's autonomy.¹⁸⁹ It is expected that these duties could serve as an effective channel to facilitate the communication and interaction between the HKSAR and the mainland China. Members of the HKSAR invited to the CPPCC play a similar role as well. The two organs have provided platforms for Hong Kong people to participate, primarily through their representatives to the two organs, in the management of state affairs and thus strengthen their identity of being Chinese citizens as well as to make closer connection between the HKSAR and the mainland China.

There are three institutions representing the Central Government in the Hong Kong SAR. They are the Liaison Office of the Central Government, the Office of the Commissioner of the Ministry of Foreign Affairs, and the People's Liberation Army Hong Kong Garrison. The latter two institutions deal with foreign affairs related to the territory and perform defence duties respectively, which are not within the autonomy of the HKSAR.¹⁹⁰ The Liaison Office of the Central Government is responsible for liaisons with the other two institutions, and is also responsible for liaisons with major state-owned Chinese companies in Hong Kong, and facilitating economic, cultural, educational, technology and sport exchanges and co-operations between the SAR and the mainland China. It is worth mentioning that according to the Basic Law, all institutions representing the Central Government in Hong Kong cannot interfere with the SAR's internal affairs and must abide by Hong Kong's law.¹⁹¹ Also

¹⁸⁷ They are *Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts*, signed in Shenzhen on 14.1.1999 *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region*, signed in Shenzhen on 21.6.1999 *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned*, signed in Hong Kong on the 14th July 2006. See the official websites of the Department of Justice of HKSAR at: <http://www.legislation.gov.hk/intracountry/eng/index.htm#la>

¹⁸⁸ Art.21 of the Basic Law

¹⁸⁹ "The Official of the General Office of the NPCSC Answered the Questions about the Election of the Deputies of Macao to the NPC", *People's Daily*, 22nd December 1999, the first page. The explanations also apply to the situation of Hong Kong.

¹⁹⁰ The Basic Law, art.12, 13, 14

¹⁹¹ The Basic Law, art.14, 22

according to the Basic Law, departments of the Central Government or provincial governments may set up representative offices in Hong Kong under strict procedural requirements.¹⁹² However, no such office has been set up so far.

In the economic aspect, we see much closer and broader connections and interactions. Historically, the proximity to the mainland China was a vital element for Hong Kong's economic success as the mainland served as a supportive base for Hong Kong's economic development, supplying the region with important resources such as abundant manpower and raw materials. After China adopted the policy of reform and opening-up in the late 1970s, the capital from Hong Kong flowed into the mainland China and Hong Kong soon became the top "foreign" investor in China; as a result, China's economy was soon stimulated and activated. At the same time, an economic upsurge as a reward of such investment activities emerged in Hong Kong which has attracted world-wide attention and made the region one of the four "Asian dragons". Since the reunification in 1997, significant measures have been taken to institutionalise and enhance the economic connections and interactions between the HKSAR and the mainland China, which played an important role in making Hong Kong to recover from the economic depression caused by the Asian financial crisis in 1998 and the SARS crisis in 2003. Among all economic cooperations after the reunification, the most significant event may be the "Mainland China and Hong Kong Closer Economic Partnership Arrangement" (CEPA) signed in 2003 and its supplements signed in the subsequent years. CEPA offers Hong Kong companies, products, and residents preferential access to the mainland market.¹⁹³ The arrangement has enhanced Hong Kong's attractiveness to foreign direct investment (FDI) and resulted in a rise of it. The CEPA has also promoted employment in Hong Kong, especially in the service sector. The Individual Visitor Scheme introduced in the CEPA framework has attracted a considerable number of Chinese tourists to Hong Kong, resulting in an increase in employment and aggregate consumption. It is seen as a major contributing factor in Hong Kong's economic recovery.¹⁹⁴ To cope with the economy recession caused by the world financial crisis in 2008, the Central Government took many important measures to help Hong Kong. For example, a cross-border Renminbi (currency of the PRC in the mainland China, currency code CNY) settlement centre pilot programme was approved by the State Council to be launched in Hong Kong.¹⁹⁵ The programme would contribute significantly to strengthening Hong Kong's status as an international financial centre. Supported by the Central authorities, the construction of a bridge connecting Hong Kong, Macao, and Zhuhai is under progress,¹⁹⁶ which would stimulate greatly Hong Kong's economic performance. In addition, to participate actively in the Pan-Pearl Delta Development Scheme is another important step that the HKSAR Government has taken to strengthen its economic links with the South China. The agreement of the Scheme was signed by nine Chinese provinces (Fujian, Jiangxi, Hunan, Guangdong, Guangxi, Hainan, Sichuan, Guizhou and Yunnan) as well as the two special administrative regions, Hong Kong and

¹⁹² The Basic Law, art.22

¹⁹³ Documents of *Mainland and Hong Kong Closer Economic Partnership Arrangement*, on the official websites of the Trade and Industry Department of HKSAR Government, <http://www.tid.gov.hk/english/cepa/legaltext/fulltext.html>

¹⁹⁴ Zhang Yang, "Hong Kong's Closer Economic Partnership with China", Briefing Series – Issue 12, China Policy Institute of the University of Nottingham, http://www.nottingham.ac.uk/china-policy-institute/china/documents/Briefing12_HK_China_CEPA.pdf

¹⁹⁵ "Hong Kong selected for RMB settlement center pilot program", *People's Daily Online* (March 10, 2009) <http://english.people.com.cn/90001/90776/90884/6610985.html> accessed on 27/4/2009

¹⁹⁶ "Premier: Bridge connecting Hong Kong, Macao and Zhuhai to be built this year", *NEWSGD.COM* (13th March 2009) http://www.newsgd.com/news/chinakeyword/2009TwoSessions/content/2009-03/13/content_4984043.htm accessed on 27th April 2009

Macao (therefore referred as "9+2"), aiming at reducing trade barriers among these eleven members, standardising regulations, improving infrastructures and jointly tapping international resources and markets.¹⁹⁷ A special Hong Kong/Guangdong Co-operation Conference is held annually between the two governments, promoting and enhancing their co-operation in various areas. From these facts, we can see that the separation of the two economic systems does not prevent their cooperation and integration. Hong Kong embraces the economic integration with the mainland China favourably and positively, making good use of the opportunities it has provided and hence benefiting greatly.¹⁹⁸

With the development of links and intersections between the two sides, a serious problem emerges: that is, a neutral institution above both sides serving as an authoritative adjudicator to solve the likely legal and constitutional disputes or conflicts arisen between the two sides during the course of interactions does not exist. The courts in the mainland China, including the Supreme People's Court, have no jurisdiction over the HKSAR. Hong Kong enjoys the power of final adjudication, but the SAR's CFA has no jurisdiction over the so-called acts of state¹⁹⁹ and it cannot exercise the power of judicial review over the acts of the NPC or the NPCSC.²⁰⁰ The NPCSC exercises its power to interpret the Basic Law provisions concerning the relationship between the Central authorities and the HKSAR seems to be playing the role of the needed adjudicator, but its neutrality or fairness is doubtful as the NPCSC is a political body without judicial function whose duty does not include dealing with the concrete cases but to abstractly interpret provisions of law. Moreover, in most cases the NPCSC can be a party of the disputes or conflicts between the mainland China and the HKSAR; how can such an institution adjudicate disputes that involves itself appropriately? To tackle the problem of lacking dispute resolving adjudicator, there tend to be three options. The first option, advocated by Professor Yash Ghai, is to judicialise the Committee for the Basic Law of the Hong Kong Special Administrative Region of the NPCSC, empowering it with a judicial role within the NPCSC structure to deal with disputes or conflicts mentioned above.²⁰¹ Option two is to make the CFA of the HKSAR to play a significant part in resolving the problem; this may mean a reform to its jurisdiction to cover these issues. The third option is to create a new institution to assume the function.

7 A Comparison of the HKSAR's Constitutional Arrangements with the EU and the UK

The primary feature of China's "one country, two systems" (OCTS) doctrine is that within one united polity, there exist various subunits which enjoy a high degree of autonomy with relatively independent social, economical, political and legal systems. In this sense it is similar to the constitutional arrangement of the European Union (EU) and that of the United Kingdom (UK) as to the centre-region relationship despite huge differences between them. In order to make China's OCTS a constitutional order, which constitutes the conditions and

¹⁹⁷ The Agreement of the Framework of the Pan-pear Delta Cooperation, See the official websites of the Office of the Daily Work of the Pan-Pearl Delta Cooperation Organization at http://www.pprd.org.cn/ziliao/zhengce/200503/t20050304_358.htm

¹⁹⁸ For example, CEPA raises Hong Kong's real economic growth by 2.82% a year compared to without such an agreement. See Cheng Hsiao, H. Steve Ching, Shui Ki Wan, "Measuring the Benefits of Political and Economic Integration of Hong Kong and China Mainland", at <http://www-stat.stanford.edu/~ckirby/ted/conference/Cheng%20Hsiao.pdf> p48.

¹⁹⁹ Art. 19 of the Basic Law.

²⁰⁰ *Ng Ka Ling v. the Director of Immigration*, [1999] 1 HKLRD 577

²⁰¹ Yash Ghai, *Hong Kong New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 1999), pp218-224

environment for the CFA's operation, emerge more clearly, a comparative discussion on the constitutional practices in the EU and the UK will be made in this section. The focus will be placed mainly on the evolution of the EU's legal order and its nature, and the UK's devolution settlement in Scotland under its parliamentary sovereignty doctrine. The two cases seem to represent two ends of the spectrum of the plural polity structure practised in Europe today in terms of the degree of centralisation or decentralisation. The UK case occupies the densest end due to its unitary nature while the EU example takes the lightest end because of its intergovernmental or quasi-federal characteristic. At the same time, the UK's devolution settlement indicates a centrifugal inclination and the EU's evolution reflects a centripetal trend. Under China's OCTS arrangement, decentralisation is a major element. In some aspects, the Special Administrative Regions (SARs) even have powers as high as that of sovereign states. But China's constitutional order is unitary; to maintain that, some crucial aspects of the OCTS also shows centralisation preference so that the SARs can be kept as inalienable parts of China. A comparative examination will therefore be helpful to finding a proper position on the spectrum for the HKSAR.

Firstly, we will take a look at the EU's story. The EU is an economic and political community with both supranational and intergovernmental features, consisting of twenty-seven member states at present. While the objective of China's OCTS policy is to achieve a peaceful reunification with Hong Kong, Macao and Taiwan and to maintain their stability and prosperity, the primary utilitarian justification for the EU integration has been also based on two identical ideals which have remained central to the process and the project of the EU integration to date: peace and prosperity.²⁰² The EU's origin can be traced back to the European Coal and Steel Community (ECSC) created in 1951²⁰³ and the European Economic Community (EEC) established by six European Countries in 1957. Thereafter the size of the EEC was enlarged considerably through the accession of more and more new members. Its powers also increased significantly. Its current legal framework was formed by the Maastricht Treaty in 1993. In 2007 the Treaty of Lisbon was signed. It amends the existing EU treaties and adopts some reforms. The Treaty entered into force on 1 December 2009. Important institutions of the EU include the European Commission, the European Parliament, the Council of the European Union, the European Court of Justice (ECJ), and the European Central Bank. The EU citizens elect the Parliament every five years. By now the EU seems to have, arguably, evolved into a quasi-federal polity which enjoys a single market, maintains common policies in areas such as trade, agriculture, fisheries and regional development, and adopts a common currency.²⁰⁴ Most notably, a unique EU constitutional order and legal system has been formed and consolidated.

The EU law can be categorised into Treaties, International Agreements, the EU legislation, and case law of the ECJ. Through the development of its case law, primarily by using the preliminary rulings procedure (it will be further discussed in Chapter 4 when considering the interpretative mechanism of Hong Kong's Basic Law), the ECJ, with the cooperation from member states' national courts, has made significant contributions to the creation of an autonomous EU legal order and the evolution and integration of the EU itself. The most influential and important constitutional principles that have been developed by the ECJ are the notions of supremacy and of direct effect. They have played a crucial role in developing a uniform legal order for the EU.

²⁰² J. H. H. Weiler, *The Constitution of Europe*, (Cambridge: Cambridge University Press, 1999), 240.

²⁰³ Karen Davies, *Understanding European Union Law* (Routledge-Cavendish 2007), p8

²⁰⁴ It has been adopted by sixteen member states.

In the ECJ's point of view, "the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited fields."²⁰⁵ Therefore, it holds that EU law is superior to member states' domestic laws,²⁰⁶ and even member states' constitutions.²⁰⁷ Where a conflict arises between EU law and the law of a member state, EU law prevails and the law of the member state must be disapplied. Moreover, the ECJ has established the principle of directive effect to ensure individuals can invoke directly the provisions of EU law before national courts not only to challenge member states but also to against individuals.²⁰⁸ In a series of leading cases, the ECJ has extended direct effect to treaty articles, regulations, directives, decisions, and even to provisions of international agreements to which the EU is a party.²⁰⁹ The direct effect principle serves as an essential factor for the integration of EU legal order. As Stephen Weatherill points out, "Direct effect is a constitutional device that shape a system within which Community law are not distinct layers, but instead part of the same mixture. Community law becomes national law and is enforced through the national system. National courts become Community courts and enforce Community rules."²¹⁰

Although, as mentioned, the EU may be seen as a quasi-federal polity, there has actually no consensus on its nature among commentators. As Cormac Mac Amhlaigh has indicated, "The attempt to give a precise account of what the European Union (EU) actually constitutes – an international organisation, supranational entity, multilevel governance structure, nascent federal state, or '*un objet politique non-identifié*' – is a perennial issue in European integration studies."²¹¹ Here I will examine selectively several typical explanations of the EU legal order's nature so as to acquire a general understanding of the issue. In fact, when exploring the nature of China's "one country, two systems" constitutional architecture, we encounter the same difficulty in providing a precise account of it. Scholars' efforts in analysing the EU issue may offer us some useful thoughts and constructive approaches for the discussion of Hong Kong's constitutional framework.

There is no doubt that initially the European Community was a traditional international organisation governed by international law. Due to its considerable evolution and integration progress, especially after the effective establishment of the principles of supremacy and of direct effect by the ECJ, different views about the nature of EU's legal order emerge. Some insist that it still remains an international organisation primarily because the member states remain as the masters of the EU treaties.²¹² Contrarily, some scholars argue that the EU has indeed evolved into a federal or quasi-federal polity, although an imperfect one, with an autonomous legal order and supranational nature.²¹³ In their opinions, the ECJ's

²⁰⁵ Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1

²⁰⁶ Case 6/64 *Costa v ENEL* [1964] CMLR, 455, 456

²⁰⁷ *Internationale Handelsgesellschaft mbH v Einfuhr - und Vorratsstelle fur Getreide und Futtermittel Case* [1970] ECR; *Simmmenthal II* (Case 106/77) [1978] ECR 629; *Factortame I* (Case C-213/89) [1990] ECR 1-2433

²⁰⁸ Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1

²⁰⁹ Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1; ²⁰⁹ *Grad v Finanzamt Traunstein* (Case 9/70) [1970] ECR 825; *Van Duyn v Home Office* (case 41/74) [1974] 1

W.L.R.1107; *Becker v Finanzamt Munster-Innenstadt* (Case 8/81) [1982] ECR 53; *Verbond van Nederlandse Ondernemingen* (1977) ECR 113; Case 12/86 *Meryem Demirel v Stadt Schwabisch Gmund* [1987] ECR 3719

²¹⁰ Stephen Weatherill, *Law and Integration in the European Union* (1995), p99

²¹¹ Cormac Mac Amhlaigh, "Revolt through referenda? In search of a European Constitutional Narrative", presented on 13th February 2009 for Europa Postgraduate Reading Group at Edinburgh University Law School.

²¹² Clive H. Church, David Phinnemore, *Understanding the European Constitution: An Introduction to the EU Constitutional Treaty* (Routledge, 2006), p35

²¹³ Michael Longo, *Constitutionalising Europe: Processes and Practices* (2006), pp58-87

jurisprudence in *Van Gend en Loos*²¹⁴ and *Costa*²¹⁵, together with its doctrines of supremacy and direct effect, served to generate a process of constitutionalising the Treaties.²¹⁶ Through the process the Community Treaties has been transformed into constitutional documents and the ECJ has itself evolved into a constitutional court. They therefore claim that the legal system the ECJ has constituted is unmistakably "federal" in orientation.²¹⁷ However, it has also been noticed that the Community has adopted constitutional practices without any underlying legitimising constitutionalism. That means, although the EU has some of the characteristics of a constitutional order, it lacks the most fundamental property: legitimation through a popular constituent power which can only be the European people(s).²¹⁸

Another classical articulation of the EU's nature is an assertion from a pluralist perspective. As Neil MacCormick famously argued,

"...the most appropriate analysis of the relations of legal systems is pluralistic rather than monistic, and interactive rather than hierarchical. The legal systems and their common legal system of EC law are distinct, but interacting systems of law, and hierarchical relations of validity within criteria of validity proper to distinct systems do not act up to any sort of all-purpose superiority of one system over another. It follows also that the interpretative power of the highest decision-making authorities of the different systems must be, as to each system, ultimate."²¹⁹

The pluralist approaches have recently gained popularity in explaining the relationship between the Community and national legal orders. The pluralist concepts generally regard the national and European constitutional documents as no longer being the emanation of two independent legal orders, where the sovereign states are the ultimate source and centre of authority.²²⁰ Instead, the relationship between the orders "is now horizontal rather than vertical – heterarchical rather than hierarchical".²²¹ Each highest court within a subsystem – constitutional courts, ECJ, as well as other adjudicating bodies such as the European Court of Human Rights and the WTO Dispute Settlement Body – derives both authority and legitimacy from its own basic document, retaining "interpretation competence-competence".²²² The focus here is on the prevention of conflicts through cooperation and interaction. If conflicts nonetheless occur, they should be solved on the basis of certain principles, taking account of the concrete constitutional context, time and practicalities;²²³ on occasion "some political action" may be necessary to produce a solution.²²⁴

²¹⁴ Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR I. See pp47-8.

²¹⁵ Case 6/64 *Costa v ENEL* [1964] ECR 585

²¹⁶ J. H. H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and other Essays on European Integration* (Cambridge University Press, 1999), p295.

²¹⁷ Michael Longo, *Constitutionalising Europe: Processes and Practices* (2006), p58-9.

²¹⁸ J. H. H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and other Essays on European Integration* (Cambridge University Press, 1999), pp297-98

²¹⁹ N. MacCormick, "The Maastricht Urteil: Sovereignty Now", (1995) *1 European Law Journal* 259, p264

²²⁰ N. Walker, "The Idea of Constitutional Pluralism", (2002) *65 MLR*, p.317

²²¹ *Ibid*, p.337

²²² N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press 1999), p.259.

²²³ M. Kumm, "Who is the final arbiter of constitutionality in Europe?: three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice", *36 CML Rev.* (1999) p.356.

²²⁴ N. MacCormick, *supra* note 88, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press 1999), p.265.

Due to its preference for avoidance of conflict solution by courts, this theory might potentially jeopardise the efficacy and uniformity of the EU law, which is the pre-condition of the survival and functioning of the EU itself. In reality, there certainly would emerge conflicts between the rules of the EU system and that of its member states system. A single highest legal authority to say the final word on this type of disputes seems necessary for saving the EU system from a possible danger of fragmenting. However, there is no doubt that a pluralistic analysis could considerably enhance our understanding of the EU legal order. Moreover, compared with other models of analysing the nature of the EU, the pluralistic approach seems to be a better and constructive tool which can be borrowed to illuminate the nature of Hong Kong's new constitutional order under China's "one country, two systems" policy.

Having examined the EU practice, now we turn to another example of multi-systems within a single polity: the devolved Scotland in the United Kingdom. The value of such an investigation is based on the following comparability: Firstly, technically both China and the UK can be seen as unitary states, primarily in the sense of not have federal characteristics. Secondly, both states' Parliaments (in China the National Peoples Congress) are the highest organs of state power. And thirdly, both Scotland and Hong Kong enjoy high degrees of autonomy granted by the Parliament (the UK Parliament and the NPC of China respectively) through a constitutional document (the Scotland Act 1998 and the Basic Law of the HKSAR respectively). Admittedly, although similarities exist as mentioned, there are also huge differences in constitutional, political, legal, economic, societal and cultural aspects between Scotland and Hong Kong. However, these differences do not necessarily make a selective comparative discussion impossible. In addition, the fact that Hong Kong was a British colony and now a SAR of China itself could be a good connective factor for our comparison.

In the first place, we will start our discussion by looking at the parliamentary sovereignty doctrine, which is the most important constitutional principle of the UK, under which the devolved institutions of Scotland and its judiciary operate. In other words, the principle of parliamentary sovereignty is the major element of the constitutional context against which the legal relationship between Scottish institutions and the Central authorities of the UK is defined and framed. Interestingly, the communist China has a similar constitutional principle – the idea of congressional supremacy, under which the Hong Kong autonomy and its legal system functions. When defining the roles of Hong Kong's CFA, especially the role in interpreting the Basic Law, the NPCSC's unchallengeable power of constitution and law interpretation stemmed certainly from the congressional supremacy principle must be borne in mind, for it is a precondition of the Courts of Hong Kong's constitutional interpretative power. Thus an examination of UK's parliamentary sovereignty might be helpful in our later exploration of the case of Hong Kong.

The supreme status of the UK Parliament can be traced to the Bill of Rights 1689, which makes the Crown to subject to the will of the Parliament (the Parliament of England) and also recognises that the Parliament (the Crown, Lords, and Commons) has unlimited legislative authority.²²⁵ This view was typically presented by Dicey, who believed that "Parliament... has under the English constitution the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to

²²⁵ Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis*, (Hart Publishing 2007), pp9-13.

override or set aside the legislation of Parliament,” and it is “the very keystone of the law of the constitution.”

The legal sovereignty of Parliament has been regarded as the founding principle of the UK constitution.²²⁶ It embraces four principal propositions: First, the Parliament has the capacity to pass or repeal any law without any legal limits. Second, the Parliament cannot bind its successors – Today’s Parliament cannot enact a law that cannot be changed or repealed by a future Parliament. That means the most recent statute takes priority over those in an older statute because the Parliament’s last word on the matter controls. Third, no other body has the authority to challenge the validity of laws made by the Parliament in the proper manner, therefore courts are incapable of invalidating primary legislation through judicial review.²²⁷ The fourth and the last point is that parliamentary sovereignty determines that the UK is a unitary state. All the powers of its regional subunits are stemmed from Westminster; their autonomy are granted by the UK Parliament through devolution Acts. Those Acts, at least in theory, can be suspended, changed or even repealed by the Parliament at will.

It must be noted that however, there have been some developments that erode the absoluteness of parliamentary sovereignty. Among them the most prominent ones are the UK’s membership of the EU and its acceptance of the European human rights law. Indeed, parliamentary supremacy has been limited by EU law and the European Convention on Human Rights.²²⁸ Nonetheless, the doctrine remains orthodoxy in Britain’s political life and has considerable restriction on the flexibility of the UK’s constitution.²²⁹

Under the parliamentary sovereignty doctrine, devolution settlement for Scotland was made. So far it has been a success story. There must, therefore, be something that Hong Kong could learn from when practising its own autonomy under China’s OCTS, or at least something could help in identifying Hong Kong’s own problems. Scotland was united with England in 1707 when the Acts of Union took effect. However, it continues to boast a separate legal system – a distinct body of Scots law, a national education system and the Kirk (Church of Scotland).²³⁰ All of these have contributed to the continuation of Scottish culture and Scottish national identity since the Union. Stimulated by the discovery of reserves of oil and gas in the North Sea in the 1960s and the UK membership of the European Economic Community in 1973, Scottish nationalism had increasingly influence in political life,²³¹ and the demand for “home rule” had been growing. There was even an emergence of a minority seeking independence. Responding to the situation, the Labour Party was determined to create devolved institutions in Scotland. It was finally arranged in 1999 through the enactment of the Scotland Act 1998.

²²⁶ Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan 1959), pp40 and 70.

²²⁷ The Bill of Rights 1689, article 9; *British Railways Board v Pickin* [1974] AC 765, 789

²²⁸ Paul Craig, “Britain in the European Union”, in Jeffrey L. Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford University Press, 2007), pp84-107; Anthony Lester QC and Kate Beatii, “Human Rights and the British Constitution” in Jeffrey L. Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford University Press, 2007), pp59-83

²²⁹ Martin Loughlin, “The Flexible Constitution?”, Inaugural lecture to launch the Edinburgh Centre for Constitutional Law, Lecture Theatre 175, Edinburgh University School of Law, 17:15-18:30, Old College, South Bridge, Edinburgh, 23rd September 2009.

²³⁰ Daniel Béland, André Lecours, *Nationalism and Social Policy: The Politics of Territorial Solidarity* (Oxford University Press US, 2008), pp100-101

²³¹ Atsuko Lchijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge, 2004), pp104-105

The Act creates the Scottish Parliament and empowers it to pass laws which are called Acts of the Scottish Parliament.²³² The Scotland Act defines the Scottish Parliament's legislative competence by specifying the matters over which it enjoys no competence (reserved powers),²³³ rather than listing the matters over which it is competent to legislate (devolved powers). Furthermore, a list of statutes which are not amenable to amendment or repeal by the Scottish Parliament is designated.²³⁴ Even when acting within its legislative competence, the Act further constrains the powers of the Scottish Parliament, as well as the Scottish Executive (which is composed of by Ministers, the Lord Advocate and the Solicitor-General for Scotland)²³⁵, by inhibiting it from acting in a manner incompatible with the European Convention on Human Rights or European Community Law.²³⁶ Moreover, the UK Parliament retains power to legislate even in areas devolved to Scotland. Although the "Sewel Convention" requires that the UK Parliament not normally to do so without the consent of the Scottish Parliament,²³⁷ the situation has not worked out quite as envisaged in practice because Scotland's Parliament and Executive have regularly consented to the UK Parliament legislating on devolved matters.²³⁸ Therefore, Westminster legislation continues to be of importance in relation to certain devolved areas of competence. These limits to the Scottish legislative competence might to some extent reflect the Westminster's effort to ensure its parliamentary sovereignty would not be undermined by the devolution arrangement. The unitary feature of the UK's constitutional order thus seems to have not changed much.

The Scotland Act creates a Scottish Administration which constitutes the government of Scotland in respect of devolved matters. It assumes the previous functions of the Scottish Office, which was a Department of the UK government exercising a wide range of government functions in relation to Scotland under the control of the Secretary of State for Scotland,²³⁹ and associated departments (Agriculture, Environment and Fisheries; Development; Education and Industry; Home and Health; as well as a Central Services department²⁴⁰). The Scottish Administration is under the direction and control of a Scottish Executive, drawn from the Scottish Parliament on the Westminster model, and is responsible to it for the devolved government of Scotland. The accountability of the Executive to the Parliament is underpinned by the provisions of the Act, which require members of the Executive to resign in the event of a motion of no confidence in it being passed by the Parliament.²⁴¹

As mentioned earlier, Scotland remains a separate legal system from other parts of the United Kingdom after the union. The Court of Session is the supreme civil court in Scotland. However, certain civil cases from the Court of Session may go to the Supreme Court (previously the House of Lords) for final appeal. By contrast, for criminal cases, there is no further appeal to the Supreme Court (in London) from the High Court of Justiciary (of

²³² s.28, the Scotland Act 1998.

²³³ Schedule 5, the Scotland Act 1998.

²³⁴ Schedule 4, the Scotland Act 1998.

²³⁵ s.44, the Scotland Act 1998.

²³⁶ s.29(2)(d), 57(2), the Scotland Act 1998.

²³⁷ House of Commons, Scottish Affairs Committee, *The Sewel Convention: the Westminster perspective* (Fourth Report of Session 2005-2006)

²³⁸ Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (Hart Publishing 2007), p191.

²³⁹ Peter Lynch, *Scottish Government and Politics: An Introduction* (Edinburgh University Press, 2001) pp129-147

²⁴⁰ *Ibid*, p41

²⁴¹ s.45(2), 47(3) and 48(2), the Scotland Act 1998.

Scotland), in which the latter is the supreme criminal court of Scotland. Notably, appeals as to devolution issues under the Scotland Act 1998 are to be heard and determined by the Supreme Court (previously the Judicial Committee of the Privy Council).²⁴²

The devolution arrangement enhances the role of the courts. They may be asked to examine whether the provisions of Acts of Scottish Parliament or actions by a member of the Scottish Executive are within their respective competence. Both of these types of question constitute what are described in the Act as "devolution issues"²⁴³ and grant the courts a kind of constitutional judicial review power, addition to their normal power of judicial review. The Act also makes the Supreme Court as the common court of final appeal for devolution issues. In order to avoid disputes and reduce the need to amend legislation, the courts perform the above statutory role with the assistance of new interpretative rules which place judges under an obligation to read Scottish legislation and subordinate legislation so as to render any measure under consideration within the legislative competence of the Scottish Parliament if possible.²⁴⁴ This is sometimes called the principle of efficacy, under which the courts seek to give effect to legislation rather than to invalidate it.²⁴⁵

Devolution cases can be appealed to the Supreme Court and they can also be referred to the Supreme Court directly by the court in Scotland under certain circumstances. As devolution issues may be involved in certain criminal cases and thus fall in the jurisdiction of the Supreme Court, this changes the traditional principle that criminal cases in Scotland cannot be appealed to London.

Moreover, the Act designs a pre-legislative scrutiny mechanism, under which the Advocate General, the Lord Advocate or the Attorney General may refer the question of whether a Bill or any provision of a Bill would be within the legislative competence of the Scottish Parliament to the Supreme Court for decision.²⁴⁶ This can occur at any time during the four weeks from the passing of the Bill or any subsequent approval.²⁴⁷ Since such a review is not based on a concrete dispute, but on hypothetical facts, we may claim that in a sense the Act gives the Supreme Court not only a new concrete constitutional review jurisdiction to deal with devolution issues, but also the abstract constitutional review power to exercise pre-legislative scrutiny.

It must be noted that although the Scotland Act 1998 plays a significant role in reshaping the constitutional order of the United Kingdom, it is by no means the end of the story of the reconstruction of the relationship between Scotland and the Central Government of the UK. As Professors Himsworth and Munro indicate, the process of devolution has been evolutionary, and the Act marks merely a further stage in this process, albeit an important one.²⁴⁸ The Act may cause fresh problems or issues, such as the West Lothian question (which concerns the fact that after the establishment of the Scottish Parliament the Scots MPs at Westminster can speak and vote on English matters while English MPs cannot speak and

²⁴² Schedule 6, the Scotland Act 1998.

²⁴³ Schedule 6, the Scotland Act 1998.

²⁴⁴ s.101(2), the Scotland Act 1998.

²⁴⁵ Explanatory Notes to the Scotland Act 1998

²⁴⁶ s.33(1) of the Scotland Act 1998.

²⁴⁷ s.33(2) of the Scotland Act 1998.

²⁴⁸ C.M.G. Himsworth and C.R. Munro, *The Scotland Act 1998* (Second Edition), (2000), page xxi

vote on matters devolved to the Scottish Parliament),²⁴⁹ and result in further constitutional reforms.²⁵⁰

All in all, the above examination of the EU and UK constitutional practices as to the relationship between the regions and the Central can provide us with many valuable clues and insights for a deeper appreciation of Hong Kong's constitutional relationship with Beijing. In summary, those points that could be placed side by side so as to achieve a better understanding of each other can be listed as follows: (1) the supremacy and direct effect of EU law vs. the Annex III of the HKSAR's Basic Law, which lists national laws that can be enforced in Hong Kong, and the relationship between the Basic Law and China's Constitution; (2) the ECJ's preliminary rule procedure vs. the Basic Law's interpretative mechanism; (3) the UK's parliamentary sovereignty vs. China's congressional supremacy (Indicated in the devolution Acts, the UK Parliament has residual powers and retains competence to enact any law for the devolved regions. According to the Basic Law, China's NPC also enjoys residual powers, but it cannot directly enact laws for the SARs, rather, its Standing Committee has the power to interpret all the provisions of the Basic Law.); (4) the judicial role in devolution issues and its impact on Scotland's courts' power of final appeal vs. Hong Kong's final adjudication power and its relationship with the NPCSC's power of interpreting the Basic Law; (5) The EU legal order's nature, the UK's unitary system with federal feature caused by the devolution vs. China's "one country, two systems, three legal orders, and four law districts" phenomenon and its claim of the remaining of the unitary nature; (6) There is a need to change the orthodoxy to improve the constitutional flexibility to contain new developments and provide better account: Unitary system vs. federalism vs. pluralism. Due to limitations of space and knowledge, I cannot analyse all these issues here in detail, the brief comparison only serves to call for sufficient attention when we explore the project so as to deepen and better develop our understanding of the HKSAR and the CFA's operational environment and conditions.

8 Conclusion

Before 1997, many people doubted whether capitalist Hong Kong would survive within a communist China. Since the handover, more than twelve years' practice has showed that Hong Kong not only survives but also thrives. Socialist and capitalist was once seen as two incompatible systems like fire and water, but Hong Kong's experience has demonstrated that these two systems can now peacefully coexist and develop side by side not only internationally but also domestically. Moreover, under the "one country, two systems" policy, socialist and capitalist even tend to contribute to each other's sustainable prosperity, for the coexisting of them within a country constitutes a vivid pluralist environment in which the country can gain the dynamic force and vitality necessary to its continuous thrive in the tide of globalisation. Certainly, there would be inevitable disputes or even conflicts between the two systems during their interactions, thus appropriate principles and constitutional arrangements need to be established to settle such disputes or conflicts smoothly in case they arise. As a result, a harmonious relationship between the HKSAR and the mainland China could be maintained and developed, which would be vital to the benefits of the two sides. In this respect, some useful lessons may be learnt from the EU and UK's experience in dealing

²⁴⁹ Arthur Aughey, *The Politics of Englishness* (Manchester University Press, 2007), p190; Hugh Berrington, *Britain in the Nineties: The Politics of Paradox* (Routledge, 1998), p168; Oonagh Gay and Helen Holden, *The West Lothian Question* (House of Commons Research Paper, July 18, 2008)

<http://www.parliament.uk/commons/lib/research/notes/snpc-02586.pdf> visited on 24th March 2009.

²⁵⁰ Ibid.

with their centre-region relationships. Last but not least, it is very fortunate for China to have a capitalist Hong Kong; and it is very fortunate for Hong Kong to return to a rising China, because the Motherland provides the Region with strong support both politically and economically.

Chapter 3

The Legitimate Role of Courts

1 Introduction

This chapter aims to provide some comparative theoretical standards for the illumination and explanation of the work of Hong Kong's Court of Final Appeal (CFA) in the following chapters. I will mainly focus on western scholars' exploration of the "Mighty Problem"²⁵¹ or the "counter-majoritarian difficulty"²⁵² faced by the judiciary – that is, the legitimacy of courts' judicial review power within a democratic society. In other words, what justifies unelected and unaccountable judges to examine and strike down laws enacted by the elected legislature which represents the will of the people and the actions taken by accountable governments? Although this is a major topic which has been investigated deeply by constitutional theorists in western democracies, it is strangely that such question has not yet been raised in Hong Kong at all, neither in public debates nor in academic discussions. The reason for the silence may lie in the fact that Hong Kong is still not a democratic society as full democracy has not been realised yet. The Chief Executive (CE) of the HKSAR and half of the legislature members are still elected indirectly. However, it must be noted that democracy in Hong Kong has been developing steadily and significantly. The first CE of the SAR was elected by a four-hundred member electing committee, and the present CE (the third term of office since the establishment of the SAR) was elected by an eight-hundred member electing committee. As promised by Beijing, the representativeness of the electing committee will continue to be broadened, and the ultimate goal of the CE election by universal suffrage set by the Basic Law will be achieved in 2017.²⁵³ As for the Legislative Council, 24 members were directly elected in the second term of office, and 30 members were elected directly in the third term of office accounting for 50% of the total numbers of legislature members. All the legislators will be elected by universal suffrage in 2020.²⁵⁴ With the democratisation being incrementally achieved in Hong Kong, the concern over the counter-majoritarian difficulty of the courts' judicial review may be raised and this would be worth addressing in our discussion of the roles of the CFA. Moreover, the CFA has claimed that the courts of Hong Kong have the power to review the constitutionality of actions of the National People's Congress (NPC) or its Standing Committee (NPCSC),²⁵⁵ which are the national legislature of the People's Republic of China (PRC) representing the will of the Chinese people according to the Constitution of the PRC.²⁵⁶ Of course, this power asserted by the CFA faces the counter-majoritarian difficulty for it is doubtful that the courts of Hong Kong as regional judiciary which are composed of unelected judges are capable of challenging the authority of the NPC and its Standing Committee who are the highest

²⁵¹ Termed by Mauro Cappelletti in "The 'Mighty Problem' of Judicial Review and the Contribution of Comparative Analysis", (1979-80) 53 *South California Law Review*, 409-412

²⁵² Termed by Alexander M. Bickel in his famous book, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962) 16-23.

²⁵³ The Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage (29th December 2007)

²⁵⁴ *Ibid*

²⁵⁵ *Ng Ka Ling and Others v The Director of Immigration* [1999] 1 HKLRD 577

²⁵⁶ Constitution of the People's Republic of China 1982, art.2, 3, 57 and 58

democratic institutions (not in the western sense) through which the Chinese people exercise state powers.²⁵⁷ Therefore, the CFA's assertion needs to be legitimised not only from a pure legal analysis but also from a justification of the counter-majoritarian difficulty. However, I will not deal with this Hong Kong-related particular issue in this chapter; rather, I will examine some typical works of western scholars on the problem in an attempt to set up a theoretical standard for further discussions of the CFA issue in the following chapters.

Academic works in this area are numerous and it is impossible to examine all of them in one chapter. Therefore my investigation will be highly selective, emphasising primarily on some views which appear to be relevant and helpful in our discussion of the Hong Kong case. First, I will examine Professor Alexander Bickel's worry on the "counter-majoritarian difficulty", and Robert Martin's sharp critique about the Canadian Supreme Court which he marks as "the most dangerous branch". Second, I will discuss W. J. Waluchow's common law conception of Charters and judicial review. Third, I will discuss Cass R. Sunstein's theory of judicial minimalism and his analysis of incompletely theorised agreements, which are supposed to be useful for enhancing courts' legitimacy. Fourth, I will explore John Hart Ely's famous assertion of a participation-oriented, representation-reinforcing approach to judicial review. Fifth and finally, I will look at the theory of "dialogue" represented by Professor Barry Friedman, another creative answer to the "counter-majoritarian difficulty". After the exploration of various theoretical discussions of the democratic legitimacy of judicial review, we may obtain a schematic picture of what western scholars think about the role of courts and this could give us a theoretical background for our analysis of the behaviour of the CFA in Hong Kong later.

2 Counter-Majoritarian Difficulty: Questioning the Legitimacy of Judicial Review

The power of judicial review is perhaps the most important weapon which could be wielded by the judiciary to make the "least dangerous branch"²⁵⁸ strong enough in the modern constitutional democracies. There might be little doubt that judicial review has become one of the most remarkable features of the rule of law and constitutional democracy in the contemporary era. Interestingly, however, the compatibility of judicial review with majoritarian democracy has been seriously questioned by political scientists and academic lawyers.

Professor Alexander Bickel was one of the earliest scholars who raised seriously the question of judicial democratic legitimacy. Actually, the term of "Counter-Majoritarian Difficulty" was named by him in his famous book, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. When unelected, unaccountable judges sought to substitute their views for those of elected, accountable legislators, this could give rise to what Bickel described as the "counter-majoritarian difficulty". He pointed out that "judicial review is a deviant institution in the American democracy"²⁵⁹ as it worked counter to the distinguishing characteristic of the system, that is, the policy-making power of representative institutions was born of the electoral process.²⁶⁰ He even believed that judicial review might have a tendency over time seriously to weaken the democratic progress because he thought that relying on the correcting function of judicial review, the legislature would pay little attention to its own duty of

²⁵⁷ Constitution of the People's Republic of China 1982, art.2, 57

²⁵⁸ Alexander M. Bickel in his famous book, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962) 1

²⁵⁹ *Ibid*, at 18.

²⁶⁰ *Ibid*, at 19.

considering the constitutionality of its enactments and thus the level of legislative performance might be lowered considerably. The fact that the correction of legislative mistakes came from the outside would damage the political capacity of the people and their sense of moral responsibility.²⁶¹ Bickel claimed, "It is that judicial review runs so fundamentally counter to democratic theory that in a society which in all other respects rests on that theory, judicial review cannot ultimately be effective" and "our chief protection lies elsewhere".²⁶² However, Bickel's purpose was to defend judicial review rather than merely criticised and discarded it. Recognising these concerns, he believed that judicial review was acceptable if it was based upon certain practices and the avoidance of others. He thought that the Court's appropriate role was to judge on the basis of principle. He also stressed that the Court should make frequent and strategic use of what he called the "passive virtues"²⁶³ – techniques to avoid deciding cases on substantive grounds if narrower grounds existed to decide the case, and should wait until the appropriate principle had "ripened" before finally applying it to the issue in question.²⁶⁴ To him, the doctrines of "standing, case and controversy, ripeness and political question" were the means the Court adopted to prevent itself from being an active politicised judiciary and whereby the legitimacy of judicial review could be ensured.²⁶⁵

It is worth mentioning here that although Professor Bickel is thought to be the father of studying the counter-majoritarian difficulty, he is by no means the first one who noticed the problem. In fact, this was also the intellectual tradition of figures such as James Bradley Thayer, Learned Hand, Felix Frankfurter, and perhaps Oliver Wendell Holmes and Louis Brandeis as well.²⁶⁶ However, Bickel's contribution is that his concern provoked a heated debate about this issue. For at least two or three decades after his naming of this problem, it dominated constitutional theory. Numerous articles and books have been written to try to resolve the counter-majoritarian difficulty. My discussion in this thesis will be focusing on some selected writings which might be much more helpful to our understanding of this issue.

One of the strongest critiques of the legitimacy of judicial review might be a recent book by Robert Martin. Martin's analysis focuses on the situation in Canada. Interestingly, contrary to Bickel, Martin names his book as *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Democracy*.²⁶⁷ Actually, Martin agrees with Bickel that courts must be guided by reason and principle when exercising their power of judicial review. But he alleges that the practice of judicial review by the judges of the Supreme Court of Canada is a process seriously lacking in principle and reason and characterised to an unacceptable degree by personal preference and personal power.²⁶⁸ He believes that these judges are "arrogant and unprincipled poseurs, largely out of control" who "amend the Constitution at will" with "capricious, arbitrary, unpredictable, and largely ad hoc"²⁶⁹

²⁶¹ Ibid, at 21-22.

²⁶² Ibid, at 23.

²⁶³ Ibid, at 111

²⁶⁴ Ibid, at 134

²⁶⁵ Ibid, at 197

²⁶⁶ Barry Friedman, "The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five", (2002) 112 *The Yale Law Journal* 160

²⁶⁷ (McGill-Queen's University Press, 2003)

²⁶⁸ Robert Ivan Martin, *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Our Democracy* (McGill-Queen's University Press, 2003) p5

²⁶⁹ Ibid, p30.

decisions. In his eyes, the judges and their judgements are not guided by the law and the Constitution, but by the demands of the prevailing orthodoxy.²⁷⁰

In Martin's view, law is general, consistent, coherent, and predictable. But he thinks that the decisions of the Supreme Court violate these standards of law, mainly by employing the "contextual approach".²⁷¹ He complains that the invention of the "contextual approach" and rejection of the "abstract approach" by the Court has abandoned the standard that law should be general and thus "discards principle in favour of the personal social preference of the judge".²⁷² As a result, the question of whether a litigant may claim a Charter right will depend largely on a judge's purely subjective view as to the litigant and the litigant's situation.²⁷³ What is worse, according to him, the judges have politicised their role. The dominant orthodoxy has become the primary factor that determines the outcome of litigation before the Court. The Supreme Court has taken the lead in transforming the courts into eager instruments for the application of the dominant ideology just like Nazi Germany and Stalinist Russia, in his opinion.²⁷⁴

Moreover, Martin harshly accuses the Court to be an attack on democracy. He claims, "The Supreme Court has acted so as to undermine the essential structure and subvert the process of Canadian constitutional democracy."²⁷⁵ Although there may be flaws in the Canadian democratic system, Martin believes they are certainly not so serious that can justify replacing democracy with rule by the judges.²⁷⁶ He points out that "in a constitutional democracy unelected, unaccountable judges should not do certain things. Included amongst these would be setting the social agenda, amending legislation, amending the constitution, and publicly attacking democracy and democratic institutions. The judges of the Supreme Court have, in recent years, done all these things."²⁷⁷ The alleged judicial usurpation is labelled by Martin as "judicialisation of politics", which "denotes where the central issues which engage a society are resolved in the courtroom, making judges the significant political decision makers and lawyers the mediators of political activity."²⁷⁸ In other words, in the process of judicialisation of politics, all social issues eventually become legal issues and thus the social, intellectual, and moral agendas are set by lawyers. As a result, the active participation of citizens to the political process, an essential element of democracy, is excluded by the domination of lawyers and judges in that process.²⁷⁹ It seems that Martin attributes the Court's aggression to the adoption of the Canadian Charter of Rights and Freedoms. He feels that the individual rights enshrined in the Charter, which is thought to be enjoyed actually by the elite or the "chattering class", has taken precedence in the minds of Canadians over the collective good. Canadians have been persuaded that rights and more of them are the answer to all social ills and seem have forgotten that the things which Canadians value most are the result of political action, not of litigation over rights.²⁸⁰ According to Martin, the judges of the Supreme Court have used the Charter inappropriately to justify their creation of law. They have created rights not specified in the Charter through the technique of "reading in". That is, they have created

²⁷⁰ Ibid. p3.

²⁷¹ Ibid, pp29-30.

²⁷² Ibid, pp30-31.

²⁷³ Ibid, p32.

²⁷⁴ Ibid, pp35-36.

²⁷⁵ Ibid, p7.

²⁷⁶ Ibid, p41.

²⁷⁷ Ibid.

²⁷⁸ Ibid, p49.

²⁷⁹ Ibid, pp49-50.

²⁸⁰ Ibid, p49.

or amended legislation by adding "words not placed in [an existing] statute by the legislature."²⁸¹

Another of Martin's serious accusations of the Supreme Court of Canada's anti-democratic behaviour is that it embraces both interest group and identity politics. Interest group politics and identity politics are seen to be highly exclusive, eliminating everyone who does not seek a particular objective or is not a believer or does not share the requisite identity. Evidently, Martin points out, the organisations of such politics are unlikely achieve significant electoral support due to their essential feature of exclusivity. However, "the individuals involved have turned to litigation, hoping to win victories from the courts which they could not have achieved through the ballot box."²⁸² On the other hand, the Court has facilitated their employing of such strategy by largely discarding early rules of "standing", which regulate the eligibility of an individual to bring an issue before the courts. As a result, it is now very easy for anyone who just dislikes a state act to challenge it through judicial review. And even worse, Martin indicates, a litigant may bring a matter before the court on the basis of an alleged violation of someone else's rights, not necessarily of his or her own.²⁸³ Consequently, the Supreme Court has turned itself, in Martin's words, into the forum of choice for interest group and identity politics. The very process of turning political and social issues into legal battles over rights, he claims, is by its nature anti-democratic, because there is no negotiation and give-and-take in this process, which is the essential element of a democracy. Indeed, it is a winner-take-all process. He reminds us of noting the fact that the courts are simply incapable of finally resolving all social issues.²⁸⁴

Martin dislikes the alleged anti-democratic performance of the Supreme Court of Canada so much that he offers some extreme proposals attempting to restrict the judges' arbitrary. They include establishing an independent judicial nominating commission, making legislation tightening the rules on standing and limiting intervenors in a particular appeal, cutting the funding of the Court, promoting a degree of public openness of the judicial process and even rehabilitating section 33 of the Charter of Canada so as to reassert Parliamentary control over public policy.²⁸⁵

Martin's critique of the Supreme Court is extremely sharp, but we cannot thereby make a conclusion that he is hostile to individual rights. Conversely, we can find according to his book that he is indeed a liberalist who favours civil liberties enthusiastically. His sharpness comes from his deep love of liberty as he really believes that the behaviour of the Court threatens the democracy of Canada and thus the freedom of the Canadian people. The primary purpose of his book is to awaken the people by telling them the truth he finds, and as he expects, the democracy and liberty might thus be saved from the erosion of the orthodoxy which underlies the performance of the Court and blinds the people. I believe that Martin's sharp critique, although set in the context of Canada, could serve as a typical representative of numerous works of those who question the legitimacy of judicial review. From his book, we could see a general impression of those scholars' concern about this issue and understand the necessity of exploration and answering the challenge of anti-majoritarian difficulty. In fact, since the Basic Law came into force in Hong Kong after the handover, there has also emerged a trend of what Martin calls the "judicialisation of politics". Courts are frequently

²⁸¹ Ibid, p157.

²⁸² Ibid, p51.

²⁸³ Ibid.

²⁸⁴ Ibid pp51-53.

²⁸⁵ Ibid, pp193-195.

turned into the extensions of political battle fields. Judicial review is often used by some politicians as a strategy or means to achieve their political ends. It tends to be abused as a panacea for all social and political issues. Martin's analysis of the Canada case could illumine our observation of Hong Kong's situation. Bickel's finding of the "counter-majoritarian difficulty" and his suggestion of "passive virtues" are also valuable for our discussion on the relationship between the Judiciary of Hong Kong and political branches and defining an appropriate role for the courts of Hong Kong. Next, I will examine a theory proposed by another Canadian scholar Professor Waluchow, which might serve as an answer to Bickel's question and Martin's challenge.

3 Waluchow's Answer: the Living Tree Theory

Professor W. J. Waluchow in his recent book, *A Common Law Theory of Judicial Review: the Living Tree*,²⁸⁶ discusses carefully the views both of the advocates and opponents of adopting a constitutional Charter which would be enforced by courts through judicial review. Like Martin, Waluchow's investigation is also set in the context of Canada. Unlike Martin, however, Waluchow is a defender of judicial review. His comment is not so sharp or emotional. His analysis is meticulous and systematic. Based on a delicate examination, Waluchow puts forward a new theory for understanding the judicial review and thereby defending its legitimacy.

Firstly, let us look at Waluchow's general responses to some typical arguments against the democratic legitimacy of judicial review. Critics point out that "allowing (largely) unelected judges to overrule the considered views of responsible, representative legislators represents the complete abandonment of self-government"²⁸⁷, which lies at the very heart of democratic forms of government. Waluchow thinks that the critics' starting point seems to be wrong. Their critique stems from the idea that in a democracy, it is the people who are making the law-determining decisions that affect them, not the judges. However, the critics fail to acknowledge that there always exists a distance between the people and the law-determining decisions made on their behalf. In other words, law-determining decisions are not made by "the people" most of the time and such decisions are made by other people on their behalf. Moreover, there are numerous law-determining decisions made by unelected individuals who are appointed to sit in administrative bodies and responsible for developing legally binding rules and regulations in modern indirect democracies. Waluchow believes this situation "undermines the suggestion that we consider a system in which law-determining decisions are sometimes made by unelected representatives unworthy of the title 'democratic'".²⁸⁸ Although it might be argued that members of administrative agencies are appointed by representatives who have been elected by the people and thus we can trace the line of authority back far enough we eventually come to decisions made by the people themselves, much the same thing is true of unelected judges, because they too are appointed, and often vetted, by government representatives. Therefore Waluchow points out, judicial review, even when undertaken by unelected judges, shares much of the democratic pedigree we accord many other law-determining bodies.²⁸⁹

²⁸⁶ Cambridge University Press, 2007

²⁸⁷ W. J. Waluchow, *Common Law Theory of Judicial Review: the Living Tree*, (Cambridge University Press, 2007), p134.

²⁸⁸ Ibid, pp145-146.

²⁸⁹ Ibid, p146.

Another defence provided by Waluchow is that unlike the case of United States, in Canada the decisions of judges are seldom "final" because the Parliaments remain a potentially powerful tool, the section 33 of Canadian Constitution Act 1982, to override those decisions and also because the idea of a shared partnership, involving a dialogue between Parliament and the courts, has begun to take hold in both public debate and judicial decisions. To Waluchow, the effect of judicial review in Canada is rarely to thwart the democratic will but to influence the design and implementation of legislation expressive of that will. In other words, judicial review is on stage in the ongoing democratic process.²⁹⁰ However, the critics may insist that the claimed "dialogue" between courts and Parliament is nothing but shallow rhetoric as the Supreme Court justices are accountable to no one but themselves, and thus nothing could prevent the Supreme Court from removing itself from the dialogue whenever it sees fit to do so. Waluchow demonstrates that this is not the case in fact. He indicates that there are effective limits to the normative powers of Supreme Court Justices indeed, including the requirements of the constitution and the good-faith requirement.²⁹¹ Judges are bound to apply the constitution with the duty to come to their best understanding of it. More importantly, the constitutional rules defining the role of Supreme Court justices are not entirely within the normative power of judges to change or eliminate. On the contrary, they are rules of the political system, and the justices play only one part in that system.

Some critics may still doubt the effectiveness of good-faith requirement for judges as they worry about that there may be no one who can force the judges to comply with their duty to apply the constitution in good faith. They ask, "Who is to guard the Guardians?" Waluchow answers: it is the social pressures posed by "we", the people, that guard the Guardians. He says,

*"[w]e must bear in mind that the fundamental rules in terms of which we establish our political systems are social rules. They exist within, and only within, a complex web of practices involving the behaviour and attitudes of a great many people serving in a great many roles. Individuals who ignore these rules threaten the very foundations of the system, a system that most of us find conducive to our interests and that we will normally take great pains to protect through a variety of social pressures. Judges who flout their constitutional duties will not be immune from these pressures. Indeed, the critical reactions—and judicial reactions to these critical reactions – cited above suggest that judges are quite sensitive to the various pressures emanating from the public, and from the wider political sphere in which they operate. Judges do not want to be seen as usurping someone else's role. They do not want to be seen as violating the fundamental rules of the constitutional system of which they form an integral part. If we cannot trust our judges to act with integrity in honouring their constitutional duties – including the ever-present good-faith requirement—in the face of such pressures, then what hope is there for constitutional democracy?"*²⁹²

It must be noted that in his book, Waluchow ties the legitimacy of judicial review closely with the justification of adopting a Charter which would be enforced by courts. He sketches and examines the so-called "Standard Case", which refers to the typical arguments of the Advocates of Charters who attempt to answer the question: "why, among the numerous possibilities open to it, would a democratic society choose a system of government in which the powers of government are limited by an entrenched, written Charter of Rights? And why would it then call upon one of the parties whose powers are created and regulated by

²⁹⁰ Ibid, pp146-147.

²⁹¹ Ibid, p148.

²⁹² Ibid, pp149-150.

*constitutional law and convention – the judiciary – to apply this Charter in ways that can sometimes thwart the will of the legislature and, arguably, the people upon whose authority the legitimacy of the entire system rests? What could possibly justify the taking of such a monumental step?”*²⁹³ The protection of minority and individual interests from government and majority excesses is a central element of the Standard Case. Waluchow agrees with the advocates that an inherent flaw of the representative democracy is that under it the minorities are vulnerable to “tyranny of the majority”, because the majority-voting procedures and the representatives’ role of voting only for his/her constituents’ interests tend to ignore or even infringe the minorities’ rights. Therefore, an entrenched constitutional Charter enshrining minority rights and enjoying immunity from the ordinary process of political change will serve to overcome the deficiencies of unencumbered majoritarianism. Thus, Waluchow indicates, “[e]nshrinement in an entrenched Charter then, is a means by which a society ties itself to the mast of its fundamental beliefs, values, commitments, and settled preferences. It is a means of helping to ensure that the legislative process never falls victim to the inauthentic wishes of a majority. It provides a (limited) immunity from such occurrences.”²⁹⁴ Moreover, Waluchow claims, enforcing a Charter by unelected judges through judicial review can also provide the desired immunity from political pressures and therefore judges are better situated to be guardians of minority rights and interests.²⁹⁵ Other benefits of a Charter mentioned by Waluchow include increasing public awareness of moral rights, facilitating effective enforcement of moral rights, raising public debate concerning fundamental questions of political morality, introducing a uniformity of rights and helping to establish a nation’s moral identity.²⁹⁶

After examining these typical opposing arguments and the Standard Case of advocates, Waluchow chooses the work of Jeremy Waldron, one of the strongest critics of the “Standard Case”, to continue his careful investigation. Waldron argues that there is a deep inconsistency in the advocates’ idea of judicial review (the Standard Case). On the one hand the people are viewed as autonomous moral agents worthy of the possession and informed, responsible exercise of the moral rights enshrined in Charters. On the other hand the people and their agents are also viewed as predators, which cannot be trusted to exercise their rights responsibly without undermining the rights of others. As Waluchow thinks, Waldron pointed out rightly that these two views of human agents cannot possibly be reconciled.²⁹⁷ Waldron claims that the fact that the circumstances of politics include radical dissensus about rights has important implication for the Standard Case. “*If we cannot agree in advance what our rights and freedoms are, cannot know what these are and what it is we have committed ourselves to in adopting a system of judicial review that both embodies and protects them, then it cannot be important to have such a system. Nor can it be important to strive to achieve these lofty goals. It can only amount to sheer stupidity – or as Waldron might say, sheer idiocy.*”²⁹⁸ As for the advocates’ claim that judicial review is a valuable means of improving public debate, Waldron disagrees and points out that transforming debates of political morality into constitutional disputes is as likely to reduce the level of public debate as to improve it. He also thinks the “verbal rigidity” of the provisions of Charters would result in a comparatively low quality of political discourse.²⁹⁹

²⁹³ Ibid, p115.

²⁹⁴ Ibid, p118.

²⁹⁵ Ibid, p117.

²⁹⁶ Ibid, pp120-122.

²⁹⁷ Ibid, pp150-152.

²⁹⁸ Ibid, p154.

²⁹⁹ Ibid, pp171-179

After having provided some immediate responses to the critics' case, Waluchow ambitiously determines to subvert the foundation of the critics' arguments entirely by developing a new conception of Charters. He discovers that most writers, both critics and advocates, base their arguments on the assumptions that a Charter provides a stable, fixed point of agreement on and pre-commitment to moral limits to government power and there are "objective" truths concerning political morality, the framers' intention, or the Charter's plain or original meaning, which an impartial, morally neutral judiciary is capable of discerning and drawing upon in making Charter decisions.³⁰⁰ To Waluchow, if these assumptions are accepted, defending the adoption of a Charter and judicial review would be difficult. Therefore, it is necessary to propose an alternative understanding of a Charter, which can even be legitimated by Waldron's claim of "circumstances of politics" rather than being undermined by it.

Waluchow begins his journey by drawing on the work of H. L. A. Hart, particularly of Hart's analysis of distinction between primary and secondary rules. Primary rules refer to legal rules which impose duties and obligations directly upon people. Secondary rules are rules about rules. They do not impose duties, rather they "*provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations.*"³⁰¹ The typical secondary rules are those power-conferring rules. In Hart's view, a legal system can emerge within a society only with the introduction of secondary rules and their "union" with the society's primary rules. In a hypothetical, pre-legal society which has only primary rules, there exist a number of inherent "defects" such as uncertainty, the static quality of the rules, and inefficiency in their enforcement. Each defect can be remedied through the introduction of such secondary rules as rule of recognition, rules of change and rules of adjudication.³⁰²

However, Hart points out that a legal system having secondary rules could develop two major dangers. The first one is the emergence of a divorce between validity and acceptance resulting from the introduction of rule of recognition. In a pre-legal society, the validity of social rules depends upon the wide social acceptance of such rules, while in a legal system the validity of legal rules is primarily determined by the rule of recognition. Thus, "*There is nothing to guarantee that what is legally valid will be generally acceptable. Nor is there anything to guarantee that the rules will in any way serve the interests of justice, fairness, or utility.*"³⁰³ Waluchow believes that this danger could be overcome by coupling law with democratic procedures because in a society in which legal validity is heavily dependent on the people's direct or indirect approval Hart's worry is far less likely to emerge.³⁰⁴

Another inherent hazard of legal regulation that Hart worries about is the rigidity of legal formalism. Tightly crafted written rules lack flexibility and adaptability to suit the changing world. They leave no room for judges to use discretion when dealing with concrete cases.³⁰⁵ Waluchow attempts to demonstrate that besides using open-textured terms by legislators, adopting common law methodology – that is, to leave rule development to the courts, could satisfy both of Hart's fundamental needs: the needs for fixity and adaptability of rules. The

³⁰⁰ Ibid, p180.

³⁰¹ H.L.A. Hart, *The Concept of Law* (Clarendon Press, 1984), p80

³⁰² W. J. Waluchow, *Common Law Theory of Judicial Review: the Living Tree*, (Cambridge University Press, 2007), pp186-190

³⁰³ Ibid, p192.

³⁰⁴ Ibid, p193.

³⁰⁵ Ibid, pp194-195.

reason, Waluchow believes, is that under the common law judges abide by the precedents on the one hand, they may also escape from the restriction of a precedent and develop the rules by distinguishing the case when they see fit on the other hand. Therefore, he proposes to use the common law as a model for understanding Charters and the roles they are capable of playing, that is, to view Charters as setting the stage for a kind of common law jurisprudence of the moral rights cited in the Charter.³⁰⁶

To explain further his argument, Waluchow discusses Denise Reaume's analysis of the difficulties encountered in the area of Canadian discrimination law, which is in desperate need of change. Reaume attributes the problem facing Canadian discrimination law to the "top-down model" of legal regulation. According to this highly idealised model, legal regulations tend to announce precise rules in advance, refusing further need of law-creating activity on the part of adjudicators. As a result, injustice, in the case of discrimination law, appears and lacks remedy. To resolve this problem, Reaume introduces a "bottom-up model" of legal regulation, which lets the implications of the abstract principles be revealed incrementally through confronting fact situations on a case-by-case basis rather than attempt a comprehensive theory issuing a precise network of rules at the outset. She argues that the bottom-up model is far more promising than the top-down model as a way of developing discrimination law.³⁰⁷ Based on Reaume's ideas, Waluchow declares that the notion that a Charter can establish fixed points of agreement and pre-commitment to moral limits on government power is wrong, instead, the categories are never closed and they demand the case-by-case, incremental changes and improvements that common law methodology makes possible.³⁰⁸

Waluchow continues his efforts to defend judicial review from the popular complaint of the critics – that is, judges engaged in judicial review are being allowed to substitute their own subjective moral views for those of the community and its democratic representatives. He offers the concepts of "reflective equilibrium", "moral opinions", "true moral commitments" and "the community's constitutional morality" to establish his arguments.³⁰⁹ He believes that the constitutional morality can include an overlapping consensus of true commitments on many issues. It can also be included in our conditions of legal validity, entrusting judges with the task of deciding whether and when the relevant norms of this morality have been compromised by general legislative rules, so that the danger of divorcing legal validity with social acceptance by secondary rules could be avoided. While the community can be wrong about what its own constitutional morality requires, judges might discern the "true" constitutional morality of a community by "reflective equilibrium". Moreover, judicial discretion can help legal systems to deal with unforeseeable issues and cases. The bottom-up, common law method exercised by judges is exactly what Charter cases demand and make them better equipped than legislators to deal with relevant issues in Charter cases. The insulation from the various political pressures can also put courts in a much better position than legislatures to take constitutional rights seriously. However, the author points out, "*judges and legislators need not be seen to be in competition with each other over who has more courage or the better moral vision. On the contrary, they can each be seen to contribute, in their own unique ways, from their own unique perspectives, and within their unique contexts of decision, to the achievement of a morally sensitive and enlightened rule of*

³⁰⁶ Ibid, pp203-204.

³⁰⁷ Ibid, pp204-207.

³⁰⁸ Ibid, p208.

³⁰⁹ Ibid, pp230-238.

law.”³¹⁰ Thus, his argument of judges being in fact respecting, not violating, democratic principles is proved.

All in all, Waluchow defends judicial review in his book by rejecting the fixed ways of viewing Charters as attempts to establish illusory fixed points of agreement and pre-commitment. Instead, he proposes the Common Law methodology to view Charters as living trees whose roots are fixed by some factors while whose branches should be allowed to grow over time through a developing common law jurisprudence of that same community's constitutional morality.

Some comments on Waluchow's theory need to be made here. As I mentioned earlier, Waluchow tightly links Charters with judicial review in his analysis. He has two primary tasks, one is to justify the adoption of a Charter and the other is to legitimate judicial review, but he does not analyse the two issues separately. On the contrary, he attempts to use a common law conception to achieve both goals at the same time. According to Waluchow's logic and put simply, the adoption of a Charter can be justified by its enforcement by courts through judicial review, because judicial review can make the Charter a living tree and at the same time, based on the same reason the legitimacy of judicial review is proved. In other words, if A can be demonstrated (or justified) by B, then B is also demonstrated (justified). It seems to me that this might be a vicious circle. Another problem that might emerge from the interlocking of the two is that it is unlikely to provide an answer to justify judicial review in a constitutional system without a Charter. In a broader context, unlike Canada, judicial review may not be a means of enforcing a Charter. It may just concentrate on supervising the power division set up by a Constitution. Therefore Waluchow's common law methodology, which comes from the link-up of Charters and judicial review, seems unable to offer a satisfactory explanation in that situation.

It is doubtful that Waluchow's proposal of common law methodology could resolve the counter-majoritarian difficulty of judicial review. His argument seems to have confused the legitimacy of common law with that of judicial review. He ignores the fact that common law is subject to statutes, which is a fundamental feature of common law and makes it free from democratic problems. However, the case of judicial review is obviously different. Judicial review concerns the interpretation of a constitution. Judges play a most significant role in discerning the meaning of the relevant provisions of the constitution when discharging their constitutional interpretative function. They can use their understanding of the constitution to strike down a statute which is duly enacted by the legislators. So judges' exercising of the power of judicial review is not subject to the will of the legislature. Therefore, adopting the common law methodology to understand and justify judicial review might be flawed by this ignorance of the difference between them.

Another problem of Waluchow's doctrine is that it applies only to common law systems. Judicial review is a pervasive legal phenomenon. It is practised in systems other than those which boast common law traditions. For example, in many European countries such as Germany and France, judicial review plays an important part in their political life as well. These countries have civil law systems which are very different from their counterparts – the common law systems practised in the US, Canada and the UK. To use Waluchow's common law conception to explain and legitimate Charters and judicial review in the civil law countries is problematic. In other words, even if Waluchow's theory could justify judicial

³¹⁰ Ibid, pp269-270.

review in common law systems, difficulty would arise to provide legitimacy for judicial review based on civil law systems and their jurisprudence. Waluchow seems to have ignored that judicial review has been a global phenomenon which does not merely exist in the common law world. Therefore, his model cannot provide an universal explanation of the legitimacy of judicial review.

Moreover, Waluchow seems to base his theory on a wrong assumption like most other advocates and critics do. They all assume that democracy is the supreme value in a society and democracy is the only authoritative criterion to judge institutions and their actions. Thus, critics attempt to demonstrate that judicial review violates democratic principles while advocates do their best to work out theoretical models to reconcile judicial review with democracy. In my view, their starting point is questionable as there are other values which have equal merit with democracy in a society: human rights and the rule of law can serve as two examples. They are not necessarily dependants of democracy as some may argue. For instance, human rights may be achieved by the benevolent rule or the rule of "philosopher king", which has no element of modern democracy. The same is true for the rule of law. It can be argued that the rule of law may be realised without modern democracy provided that the law satisfies requirements of justice. In other words, the rule of law is dependant of justice other than that of democracy. However, justice involves human rights more than democracy. There are two points we must bear in mind. First, if the law enforced in a society systematically violates human rights, thus inconsistent with the requirements of justice, then we cannot call this society a society of rule of law. Secondly, democracy is by no means a perfect institution which can guarantee justice such as human rights by itself due to the possibility of majority tyranny. Therefore, if we acknowledge democracy is not the only good that a modern society should provide as there are other equal values to which democracy must pay respect, then the counter-majoritarian difficulty might not be a problem any more, as judicial review rather than democracy, is better suited to reflect or to guarantee these equal values. Perhaps that is enough for justifying judicial review.

Given the facts that under the "one county, two systems" principle, Hong Kong continues its common law system inherited from Britain and fundamental rights are enshrined by the Basic Law and enforced by Hong Kong courts primarily through judicial review. Waluchow's living tree theory based on Canada's adoption of a Charter and common law practice may, nonetheless, offer an alternative perspective to improve our appreciation of the role of the courts of Hong Kong in constitutional adjudication. However, as mentioned earlier, Waluchow's theory does not seem to provide a fully satisfactory defence of that role.

4 Incompletely Theorised Agreements and Judicial Minimalism

Based on their respective understandings of the democratic legitimacy of judicial review and the appropriate role of courts, scholars advocate accordingly judicial self-restraint and judicial activism so as to ensure the justification of judicial behaviour. Judicial self-restraint may cover both interpretativism, which means that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution,³¹¹ and originalism, which indicates that interpretation of a written constitution should be consistent with the original intent of the drafters³¹² or based on what reasonable persons living at the time of its adoption would have declared the ordinary meaning of the

³¹¹ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980), p1

³¹² Black's Law Dictionary, 6th. ed., p.1133

text to be³¹³. Judicial activism may be referred to as noninterpretivism, indicating the view that courts should go beyond the text of constitution and enforce norms that cannot be discovered in the document.³¹⁴ Between judicial self-restraint and judicial activism, there is a moderate assertion, that is, judicial minimalism, on which my discussion will be mainly concentrated in this section.

Judicial minimalism is originally defined by Cass R. Sunstein, who remains its primary advocate. Minimalists believe that judges should focus primarily on deciding the case at hand, and avoid making sweeping changes to the law or decisions that have broad-reaching effects by leaving fundamental issues undecided. They believe minimalism could be democracy-promoting and thus hopefully avoid the counter-majoritarian difficulty. Minimalism's theoretical foundation is Sunstein's doctrine of "incompletely theorised agreements". In *Legal Reasoning and Political Conflict*,³¹⁵ Sunstein points out that there are three kinds of incompletely theorised agreements. The first one is the "*incompletely theorised agreement on a general principle*", by which it means that people who accept the principle need not agree on what it entails in particular cases.³¹⁶ This phenomenon makes constitution-making and much law-making possible. The second phenomenon is that sometimes people agree on a mid-level principle but disagree with both general theory and particular cases.³¹⁷ Sunstein's particular interest is in the third one, which is perceived by him as of special interest for law. That is, "incompletely theorised agreements on particular outcomes, accompanied by agreements on the narrow or low-level principles that account for them."³¹⁸ He believes when people diverge on some relatively high-level proposition, they might be able to agree when they lower the level of abstraction. He promotes strongly the constructive use of silence in legal process. "In law," he indicates, "as elsewhere, what is said is no more important than what is left unsaid."³¹⁹ He also points out that the principle of stare decisis helps courts produce incompletely theorised agreements as people can agree to follow precedent when they disagree on almost everything else so that they do not need to constantly struggle over basic principle and "build the world again" every time a dispute arises.³²⁰

To Sunstein, incompletely theorised agreements play a valuable part in a legal system. He lists the reasons that call for them as follows: First of all, incompletely theorised agreements could reduce the political cost of enduring disagreements. With it, losers in a particular case lose just a decision. Their own theory are not being rejected or ruled inadmissible. "When the authoritative rationale for the result is disconnected from abstract theories of the good or the right, the losers can submit to legal obligations, even if reluctantly, without being forced to renounce their largest ideals".³²¹ Second, incompletely theorised agreements are valuable for us to seek for moral evolution over time by allowing a large degree of openness to new facts and perspectives. A completely theorised judgement would be too rigid to accommodate changes in facts and values. Thus, the Supreme Court tends to "decide[s] cases rather than to offer fully theorised accounts, partly because society's understandings of facts and values, in a sense its very identity, may well shift in unpredictable ways."³²² Third, incompletely

³¹³ Antonin Scalia, "Originalism: The Lesser Evil", (1989) 57 *U. Cin. L. Rev.* 849 at 864

³¹⁴ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980), p1

³¹⁵ Cass R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press, 1996)

³¹⁶ *Ibid.*, p35.

³¹⁷ *Ibid.*, p36.

³¹⁸ *Ibid.*, p37.

³¹⁹ *Ibid.*, p39.

³²⁰ *Ibid.*, p40.

³²¹ *Ibid.*, p41.

³²² *Ibid.*, p42.

theorised agreements may be the best approach that is available for people of limited time and capacities, such as ordinary lawyers and judges, as they could resolve cases without spending too much energy to search for a full theorised legal conception. Fourth, incompletely theorised agreements are well-adapted to a system that should or must take precedents as fixed points. If a judge or a lawyer were to attempt to reach full theorisation, the unique role of precedents would be overlooked, resulting in many problems. Last but not least, incompletely theorised judgements are well-suited to a moral universe that is diverse and pluralistic. "Human morality recognises irreducibly diverse goods, which cannot be subsumed under a single 'master' value. The same is true for the moral values reflected in the law. Any simple, general, and monistic or single-valued theory of a large area of the law – free speech, contracts, property – is likely to be too crude to fit with our best understanding of the multiple values that are at stake in that area. It would be absurd to try to organise legal judgements through a single conception of value."³²³ Notably, although incompletely theorised agreements have so many significant advantages, Sunstein acknowledges that their virtues are partial. He admits that some cases cannot be decided at all or well without introducing a fair amount in the way of theory. Thus, he indicates, "If a good theory is available and if judges can be persuaded that the theory is good, there should be no taboo on its judicial acceptance. The claims on behalf of incompletely theorised agreements are presumptive rather than conclusive".³²⁴

Going further from his incompletely theorised agreements doctrine, Sunstein examines the minimalist method employed by the American Supreme Court. He finds that the judges frequently decide very little and leave things open when they answer some large constitutional questions. This practice of saying no more than necessary to justify an outcome, and leaving as much as possible undecided is described as "decisional minimalism".³²⁵ Sunstein believes that decisional minimalism has two attractive features. First, it is likely to reduce the burdens of judicial decision. Second, it is likely to make judicial errors less frequent and less damaging for a court that leave things open will not foreclose options in a way that may do a great deal of harm.³²⁶

What Sunstein emphasises is the close connection between minimalism and democracy. He attempts to demonstrate that minimalism could produce democracy-promoting results. In his view, American constitutional system actually aspires to a system of deliberative democracy rather than simple majoritarianism. The most important characteristic of deliberative democracy is that it embodies a commitment to political equality and also to reason-giving in the public domain. "For the deliberative democrat, political outcomes cannot be supported by self-interest or force. 'Naked preferences,' in the form of legislation supported by power but not reasons, are forbidden. Existing judgments and desires must be made to survive a process of reflection and debate; they are not to be taken as sacrosanct or automatically translated into law."³²⁷ Sunstein suggests that certain forms of minimalism can be democracy-promoting, not only in the sense that they leave issues open for democratic deliberation, but also and more fundamentally in the sense that they promote reason-giving and ensure certain important decisions are made by democratically accountable actors. Sometimes, a court might decline to hear a case at all or to make a decision narrowly rather than broadly so as to

³²³ Ibid, p43.

³²⁴ Ibid, p54.

³²⁵ Cass R. Sunstein, *One Case at A Time: Judicial Minimalism on the Supreme Court*, (Harvard University Press 1999), pp3-4.

³²⁶ Ibid, p4.

³²⁷ Ibid, pp24-25.

avoid foreclosure and allow democratically accountable bodies to function. Some other times, courts' minimal decisions may provide spurs and prods to trigger or improve the process of democratic deliberation. Thus, Sunstein claims "democracy-promoting forms of minimalism, designed to promote both accountability and reason-giving, are appropriate and salutary judicial functions; they promote constitutional ideals without risking excessive judicial intervention into political domains."³²⁸

Sunstein also attempts to link the minimalist project with Bickel's idea of "passive virtues".³²⁹ He thinks that the notion of "passive virtues" can be analysed in a more productive way if we see the notion as part of judicial minimalism and as an effort to increase space for democratic choice as well as to reduce the costs of decision and the costs of error. Passive virtues are exercised when a court refuses to assume jurisdiction based on the basic principles of justiciability such as mootness, ripeness, reviewability and standing. These principles serve to limit the occasions for judicial interference with political processes and thus minimise the judicial presence in public life. As a result, short-term decision costs and error costs will be reduced and the scope for democratic deliberation about the issue at hand will be increased. Sunstein believes that those who favour passive virtues, narrow decisions and incompletely theorised agreements tend to be humble about their own capacities. Since they know that they might be wrong, they attempt to decide cases in the hope that several different conceptions of the point can allow convergence on a particular outcome. Therefore, "judicial minimalism is rooted in a conception of liberty amid pluralism – a conception that is central to the democratic idea."³³⁰

In Sunstein's view, judicial minimalism has a great deal in common with the form of political liberalism discussed by John Rawls, which is intended to ensure that diverse people, operating from their own foundational accounts, can converge on a range of basic principles, thus making it possible to achieve an "overlapping consensus" on those principles.³³¹ Sunstein believes that incompletely theorised agreements produced by minimalist courts allow people to live together amid intense disagreements. Thus social stability and a form of mutual respect in a heterogeneous society enjoying "reasonable pluralism" can be achieved. Political liberalism has similar goals.

It must be noted that Sunstein also clearly acknowledges that there might be problems with minimalism. For instance, minimalism might be threatening the rule of law insofar as it does not ensure that decisions are announced in advance. It could also have negative effects on democracy. Thus, as Sunstein points out, minimalism is an appropriate course only in certain contexts. He points out that the choice between minimalism and the alternatives depend partly on pragmatic considerations and partly on judgments about the capacities of various institutional actors.

Sunstein's theory may provide a doctrinal foundation for Waluchow's living tree model of Charter and judicial review. They both favour a way in which large issues are dealt with step by step and case by case. In other words, they embrace the "bottom up" methodology and are sceptics of the "top down" methodology. They value the process of moral evolution rather than merely staying at a fixed point in the process. They both seem to belong to the modest camp for they advocate being humble about what we do. They clearly know the limitation of

³²⁸ Ibid, p28.

³²⁹ Ibid, pp39-41.

³³⁰ Ibid, p41.

³³¹ Ibid, p50.

our capacity thus they do not think that pre-commitments or fully theorised judgements are favorable. However, minimalism seems not to be as limited as Waluchow's common law conception. It can be employed beyond the common law system and be applied to the civil law system in an attempt to justify judicial review. It seems to me that Sunstein's theory is of particular value for Hong Kong's judicial practice. When first exercising its constitutional adjudication power in *Ng Ka Ling*,³³² the CFA appeared to be too ambitious. Rather than focusing on deciding the case at hand, the CFA attempted to produce a full theorised account of constitutional judicial review power of the courts of Hong Kong. Its controversial assertion of jurisdiction to scrutinise and strike down the actions of the National People's Congress and its Standing Committee, which seems unnecessary for resolving the disputes at stake, provoked a constitutional crisis in Hong Kong and finally resulted in the CFA's deference by clarifying that it had no intention to challenge the authority of the national legislature.³³³ In my view, if the CFA could follow Sunstein's suggestions of "incompletely theorised agreements" and "decisional minimalism", it might play a better role in its constitutional interpretation activities, which would accord better with Hong Kong's new constitutional order under China's "one country, two systems" doctrine.

Sunstein's understanding of democracy, which could be promoted by minimalism and thus justify minimalism, is quite persuasive. To him, democracy does not necessarily mean simple majoritarianism. The conception of deliberative democracy introduced by him aspires not only to political equality but also reason-giving. Therefore, counter-majoritarianism is not necessarily equal to counter-democracy. Thereby the democratic legitimacy of judicial review might be saved as judicial review could in fact promote democracy despite it might be counter-majoritarian. In my opinion, the idea of deliberative democracy might be a constructive perspective from which Hong Kong's on-going constitutional development – whose ultimate end is to achieve universal suffrage both in the election of the Chief Executive and the election of all the legislators, is observed.

5 Ely's Representation Reinforcing Approach

Another theory defending judicial review by focusing on its function of democracy-ensuring is introduced by John Hart Ely in his famous book *Democracy and Distrust*.³³⁴ Ely attempts to demonstrate the three popular avocations of judicial role in constitutional review, namely "interpretivism", "originalism" and "textualism", are impossible and might be harmful as strict construction would fail to do justice to the open texture of many of the Constitution's provisions.³³⁵ He also argues against the notion that judges may infer broad moral rights and values from the Constitution as he thinks that would be radically undemocratic.³³⁶ Then Ely elaborates his own theory of judicial review which he believes is consistent with "the underlying democratic assumptions of our system" and "in fact constructed so as to enlist the courts in helping to make them a reality."³³⁷

Opposed to the traditional view of the function of judicial review which insists courts should provide a series of substantive goods or fundamental values, Ely's argument suggests that courts' decisions should be process-oriented – that is, to ensure that the political process

³³² *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 577

³³³ *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 577

³³⁴ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 2002)

³³⁵ *Ibid*, pp41-42.

³³⁶ *Ibid*, pp43-72.

³³⁷ *Ibid*, see the "Preface".

functions properly so that fundamental values could be properly identified, weighed and accommodated through it. Ely takes the Warren Court's approach as an example. He points out that the themes of Warren Court's famous footnote in *United States v. Carolene Products Co.*³³⁸ are concerned with participation. "They ask us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted."³³⁹ However, Ely acknowledges that these two sorts of participation may not be consistent, as "a system of equal participation in the processes of government is by no means self-evidently linked to a system of presumptively equal participation in the benefits and costs that process generates; in many ways it seems calculated to produce just the opposite effect."³⁴⁰ To understand the ways they join together in a coherent political theory, he examines the American system of representative democracy.

Ely indicates that a serious problem of representative democracy is that it does not ensure the effective protection of minorities and may lead to majority tyranny.³⁴¹ Thus, he thinks the documents of 1789 and 1791 adopt two major strategies in an attempt to overcome the problem. One is to list in the Bill of Rights things that cannot be done to anyone by the federal government. Another is a strategy of pluralism, one of structuring the government, and to a limited extent society generally, so that a variety of voices would be guaranteed to be heard and no majority coalition could dominate.³⁴² However, these constitutional devices were still not sufficient for protecting minorities, as no finite list of entitlements can possibly cover all the ways majorities can tyrannise minorities and the informal and more formal mechanisms of pluralism cannot always be counted on either. Then the Fourteenth Amendment's Equal Protection Clause was ratified, embodying the ideal that the representative should not sever his interests from those of a majority of his constituency and should also not sever a majority coalition's interests from those of various minorities so that a refusal to represent minority groups could be precluded. In other words, the Fourteenth Amendment quite plainly imposes a judicially enforceable duty of virtual representation of the sort that Ely describes. Taking the landmark case of *McCulloch v. Maryland*³⁴³ for example, Ely demonstrates that even before the enactment of the Equal Protection Clause, the Supreme Court was prepared at least under certain conditions to protect the interests of minorities that were not literally voteless by constitutionally tying their interests to those of

³³⁸ 304 U.S. 144 (1938). In Foot Note Four, Justice Harlan Stone introduced the idea of levels of judicial scrutiny, establishing the rational basis test, an extremely low standard of judicial review, for economic regulation and proposing a higher level of judicial scrutiny for legislation that met certain conditions. The text of the Footnote is as follows: "There may be narrower scope for operation of the presumption of constitutionality when *legislation appears on its face to be within a specific prohibition of the Constitution*, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth... It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious... or national... or racial minorities...: whether prejudice against *discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a prejudice against correspondingly more searching judicial inquiry."

³³⁹ Ibid, p77.

³⁴⁰ Ibid, p77.

³⁴¹ Ibid, p78.

³⁴² Ibid, p80.

³⁴³ 17 U.S. 316 (1819)

groups that did possess political power and by intervening to protect such interests when it appeared that such a guarantee of "virtual representation" was not being provided.³⁴⁴ In Ely's opinion, the Court's discussion in *McCulloch* "suggests by its reference to the property taxes the clear assumption of even that early day that representatives were expected to represent the entirety of their constituencies without arbitrarily severing disfavoured minorities for comparatively unfavourable treatment. And it suggests by its invalidation of the bank operations tax its further assumption that at least in some situations judicial intervention becomes appropriate when the existing processes of representation seem inadequately fitted to the representation of minority interests, even minority interests that are not voteless."³⁴⁵ Thus Ely believes the two conflicting American ideals – the protection of popular government on the one hand, and the protection of minorities from denials of equal concern and respect on the other – can be understood as arising from a common duty of representation. One of the courts' significant functions is policing the process of representation. Therefore Ely asserts that judicial review should be participation-oriented and representation-reinforcing.

Ely provides three arguments in favour of the participation-oriented and representation-reinforcing approach to judicial review. First, he examines the nature of the American Constitution and reveals that the primary theme of the Constitution is not to state general values. Actually, Ely thinks the selection and accommodation of substantive values is left almost entirely to the political process. He indicates that instead the Constitution is overwhelmingly concerned both with procedural fairness in the resolution of individual disputes and with ensuring broad participation in the processes and distributions of government.³⁴⁶ In other words, the Constitution pursues its substantial concern of preserving liberty "by a quite extensive set of procedural protections, and by a still more elaborate scheme designed to ensure that in the making of substantive choices the decision process will be open to all on something approaching an equal basis, with the decision-makers held to a duty to take into account the interests of all those their decisions affect."³⁴⁷ Ely points out the underlying assumption of the Constitution's strategy is that by structuring decision-making processes at all levels to try to ensure everyone's interests to be actually or virtually represented, and the processes of individual application would not be manipulated, and majority tyranny could be effectively avoided therefore the interests of minorities could be protected.³⁴⁸ Second, Ely argues that, unlike an approach of judicial review based on discovering fundamental values, the representation-reinforcing orientation approach is perfectly consistent with the American system of representative democracy. "It recognises the unacceptability of the claim that appointed and life-tenured judges are better reflectors of conventional values than elected representatives, devoting itself instead to policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent."³⁴⁹ Third and final, Ely thinks the representation-reinforcing approach assigns judges a role they are conspicuously well situated to fill. Lawyers and judges are experts on both process writ small and process writ larger. More importantly, unlike elected representatives, appointed judges are comparative outsiders in the governmental system and need not worry about continuance in office as much, and this puts them in a position

³⁴⁴ Ibid, pp84-86

³⁴⁵ Ibid, p86.

³⁴⁶ Ibid, p87.

³⁴⁷ Ibid, p100.

³⁴⁸ Ibid, pp100-101

³⁴⁹ Ibid, p102.

objectively to assess claims.³⁵⁰ Therefore, Ely believes that by employing the approach he recommended, judges can play a significant role in resolving the inherent problems of representative democracy – that is, choking off the channels of political change and the danger of majority tyranny.³⁵¹

Interestingly, Ely's theory can be compared with Waluchow's common law conception. As we know, Waluchow's analysis is based on the fact of Canada's adoption of a Charter and its enforcement by the judiciary. This sort of judicial review is necessarily concerned with fundamental rights or values. Waluchow believes that courts can serve as an indispensable chain in the process of evolution of these substantive rights and values,³⁵² but he leaves a significant part of the constitution that is in relation to such provisions as structuring the government, distributing powers and relevant judicial review out of consideration. Conversely, Ely does not take into account the courts' role in implementing a Charter or bill of rights, which is an essential element of modern constitutional law in many countries. He insists that judicial review can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack. Put simply, Ely's analysis is process-oriented while Waluchow's is centred on substantive rights enforcement. The main reason of Ely's losing sight of this important respect of judicial review might be that in his times in the end of 1970s and early 1980s, courts did not play such an active part in safeguarding human rights as they do today. Nowadays, with the fast development of human rights awareness and adoption of bill of rights in constitutional law by more and more countries, to deal with human rights cases has become a significant task of judicial review. Although it seems that Ely's theory does not provide a sufficient explanation to our concern in this regard of judicial review, his stressing of the role of courts in policing the political process may enlighten our later exploration of the role of the Hong Kong Judiciary in the political life of the HKSAR, such as what part the courts could and should play in Hong Kong's democratisation process, and what relationship should be established between the courts of Hong Kong and the Hong Kong political branches, so on and so forth. Actually, Ely's view seems in consistent with Bickel's assertion of "passive virtues" and Sunstein's "decisional minimalism" in the sense that they all believe that courts are by no means omnipotent and should focus on what courts should do. Their views about courts' role may be illuminated by the famous saying of Jesus – "Give to Caesar what belongs to Caesar, and to God what belongs to God".³⁵³

6 From "Difficulty" to "Dialogue"

So far the theories we have discussed which try to defend the legitimacy of judicial review by suggesting an appropriate judicial role are normative and based on an assumption that there actually exists such a thing as "counter-majoritarian difficulty" needs to be addressed. Now we move to a kind of arguments which attempts to subvert the very premises of "counter-majoritarian difficulty". They are the theories of constitutional dialogue. The dialogue theorists emphasise that "the judiciary does not (as an empirical matter) nor should not (as a normative matter) have a monopoly on constitutional interpretation. Rather, when exercising the power of judicial review, judge engage in an interactive, interconnected and dialectical conversation about constitutional meaning. In short, constitutional judgements are, or ideally

³⁵⁰ Ibid, p103

³⁵¹ Ibid

³⁵² Wilfrid J. Waluchow, *A Common Law Theory of Judicial Review: the Living Tree* (Cambridge University Press, 2007), p208

³⁵³ Mt 22: 21

should be, produced through a process of shared elaboration between the judiciary and other constitutional actors.”³⁵⁴ As Christine Bateup comments, theories of constitutional dialogue “offer an alternative way of filling the legitimacy lacuna, because if the political branches of government and the people are able to respond to judicial decisions in a dialogic fashion, the force of the countermajoritarian difficulty is overcome, or at the very least, greatly attenuated.”³⁵⁵ Because the theories of constitutional dialogue abound, my discussion will focus on a descriptive and creative one represented by Professor Barry Friedman. Although Friedman’s account is set in the American constitutional context, in my view his argumentation and the essence of his discovery have the value of being applied to analysing the courts’ constitutional interpretative role in other jurisdictions.

Friedman believes that the never ending attempts of legitimatising judicial review after Bickel raised the question have obviously failed to persuade, because “the countermajoritarian difficulty and the premise supporting it do not rest upon an accurate portrayal of the constitutional system we actually enjoy.”³⁵⁶ Thus, he thinks such scholarly work has consumed the academy and distracted scholars from recognising and studying the actual constitutional system. Friedman offers a very different description of American constitutionalism. He points out that the process of constitutional interpretation that actually occurs does not set electorally accountable (and thus legitimate) government against unaccountable (and thus illegitimate) courts. Rather, to him, the everyday process of constitutional interpretation integrates all three branches of government: executive, legislative, and judicial. The Constitution is interpreted on a daily basis through an elaborate dialogue as to its meaning, and the actual role of judicial review is dialogic. Courts play a unique role in facilitating and molding a society-wide constitutional dialogue so that the document takes on meaning.³⁵⁷ In other words, courts are seen as promoters of, and participants in, a national dialogue about the meaning of the Constitution.

Friedman’s argument proceeds in three steps. First of all, he challenges the basic notion that courts and judicial review are counter-majoritarian and attempts to demonstrate that courts are not systematically less majoritarian than the political branches of government. In fact, he indicates “courts do not trump majority will, or remain unaccountable to majority sentiment, nearly to the extent usually depicted. Measured by a realistic baseline of majoritarianism, courts are relatively majoritarian.”³⁵⁸ To start his examination, Friedman sets out some benchmarks of majoritarianism against which judicial review can be measured. They include substance majoritarianism and process majoritarianism. Substance majoritarianism in turn has two measures: results and sources.³⁵⁹ His examination of source majoritarianism indicates that courts often rely on majoritarian sources in interpreting constitutional guarantee.³⁶⁰ As for result majoritarian, Friedman points out public opinion polls establish that, contrary to common thought, judicial decisions often enjoy substantial public support; and even the most controversial judicial decisions often obtain popular support from a majority or a substantial plurality, although there may be sharp disagreement nationally on these issues.³⁶¹ When

³⁵⁴ Christine Bateup, “The Dialogue Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue” (2005-2006) 71 *Brook. L. Rev.* ,p1109

³⁵⁵ Christine Bateup, “The Dialogue Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue” (2005-2006) 71 *Brook. L. Rev.* ,p1110

³⁵⁶ Barry Friedman, “Dialogue and Judicial Review” (1993) 91 *Michigan Law Review*, p584

³⁵⁷ *Ibid*, pp580-581.

³⁵⁸ *Ibid*, p586.

³⁵⁹ *Ibid*, p589

³⁶⁰ *Ibid*, 590-607.

³⁶¹ *Ibid*, p607-609.

assessing process majoritarianism question of accountability, Friedman reveals that the judiciary is much more accountable than it appears. He points out: many state judges in the United States are elected; although federal judges are not elected, they are appointed by the President who stands for popular election and judicial appointments often mirror the popular will that elected the President; the confirmation process for federal judges ensures that they are in the mainstream of popular views.³⁶² Responding to the complaint of judges' life tenure, Friedman claims that this complaint makes the fundamental mistake of assessing institutional accountability with reference to the selection and retention of individual institutional actors, rather than looking at the institution as a whole. "True, judges decide individual cases (just as senators make individually important decisions). But for matters of serious public moment, decisions are made by the judiciary as a whole. Matters of policy treated by the judiciary bubble up through a judicial system until agreement is reached. Really important questions are decided not by one court, but by several – often many. As a question advances through tiers of review, the judicial bodies become less monolithic and more collegial, with individual district judges giving way to appellate panels. Decisions depend not on one judges, but on a collection of 'representatives'".³⁶³ Therefore, he believes the judiciary as an institution does appear responsive to majoritarian will, not only with regard to substantive results, but from a process perspective as well.

Friedman's second strategy is to challenge the assumptions underlying the very foundations of the counter-majoritarian difficulty. He indicates that the counter-majoritarian difficulty rests on two premises: one is a bedrock principle that constitutional government is accountable to the people, and another is that judicial review conflicts with this principle. They in turn rely on two highly contestable assumptions: majority will which can be represented by government decisions does exist; and judicial decisions are final and thus trump such will. Friedman shows that neither of these assumptions is correct. Firstly, in his view, there is actually no identifiable majority will in reality. Majorities come and go as the public engages in debate. At best there is a constantly shifting tide of public opinion. "The political process cannot possibly reflect individuals' and society's constantly changing preferences. More likely, a governmental choice is the result of structured decision-making that represents 'majority will' only after ruling out many choices many people would have preferred."³⁶⁴ Therefore, Friedman claims the assumption that there is a majority whose will is embodied in governmental decisions is overstated and thus the first foundation of counter-majoritarian difficulty sinks. Secondly, Friedman points out that the assumption of judicial finality seriously overstates the impact of a judicial decision. In his opinion, a judicial decision is an important word on any subject, but it is not necessarily the last word. He indicates that there is a continuum of non-enforcement of judicial decrees and he takes executive clemency and defiance as examples. As for the "lawsaying" function of the courts, Friedman thinks that civil disobedience can and does undermine the finality of the relevant decisions. Moreover, the function of state legislatures continually passing laws that slid around, sought to narrow, and even blatantly challenge the Supreme Court's decision could make it change its mind.³⁶⁵ Because the judicial word is not the last word, Friedman believes the counter-majoritarian difficulty loses forces. After accusing counter-majoritarian difficulty's premises of inaccurately describing the American constitutionalism, Friedman puts forward his own ideas. They are: government operates not to represent a majority but to

³⁶² Ibid, p610-612.

³⁶³ Ibid, p613.

³⁶⁴ Ibid, p641.

³⁶⁵ Ibid, p647.

hear and integrate the voices of many different constituencies;³⁶⁶ the constitutional text is spacious enough to accommodate the several interpretations inevitably offered by shifting constituencies; and that the process of constitutional interpretation is dynamic, not static, giving primacy to different interpretations at different times.³⁶⁷

Finally, Friedman offers his own description of the judicial role in the U.S. constitutional system, that is, the dialogue theory. According to his opinions, the Constitution is not interpreted by aloof judges imposing their will on the people; rather, constitutional interpretation is an elaborate discussion between judges and the body politic.³⁶⁸ Courts are not merely an active participant in the debate over the Constitution's meaning. More importantly, they facilitate and shape the constitutional debate. Courts act as go-betweens in the dialogue, synthesising society's views on constitutional meaning, causing, focusing, shaping, moderating and tending the debate, giving voice and body to the dialogue, and prodding other institutions to speak.³⁶⁹ Courts mediate the views of various people in this dialogue process. The process is interactive, and the ultimate result depends on participation by all interested parties. Thus judicial review can hardly be accused of being against the people. As to the worry that the dialogic view permits judges to do anything, Friedman points out that the dialogue does constrain judges. The constraint is internal for it is produced by the political system surrounding judges. "When judges stray too far from the mark, pressures build – in judicial appointments and in political rhetoric – to bring them back into line. The dialogic protection is that the judiciary, or the people – always are struggling to achieve convergence. The constraint is inherent in the judicial process rather than external to it. The people will follow judicial decrees so long as the judges seem right. When the judges no longer appear to be correct, the people will press for judicial change. Intuitively, at least, the judges know this."³⁷⁰ Friedman believes his dialogue theory is a more accurate description of the reality of American constitutionalism, sidestepping the faulty premises of the counter-majoritarian difficulty and integrating the triple virtues of spaciousness, dynamism, and constituency representation. In his belief, it can legitimatise judicial review with a solid foundation.

Although Hong Kong's constitutional context is very different from that of the United States, Friedman's description can be used to reveal the similar role of the courts of Hong Kong to some extent and thereby justify their adjudicative activities. In fact, the courts of Hong Kong have played a significant part in provoking, facilitating or promoting public debates over many sensitive constitutional issues since the Basic Law came into force. The theory of constitutional dialogue does seem to be an appropriate articulation of the function of the courts of Hong Kong in the sense of "facilitating and molding a societywide constitutional dialogue so that the document takes on meaning."³⁷¹ More importantly, from the angle of improving institutional dialogue, the theory may be a constructive standard for defining and building a cooperative relationship and harmonious interactions not only between the judiciary and other governmental branches in Hong Kong, but also between the Hong Kong judiciary and central government authorities in Beijing.

³⁶⁶ Ibid, pp642-643.

³⁶⁷ Ibid, pp648-653.

³⁶⁸ Ibid, p653.

³⁶⁹ Ibid, pp668-670

³⁷⁰ Ibid, pp679-680

³⁷¹ Ibid, pp580-581

7. Conclusion

The above theoretical exploration of the democratic legitimacy of judicial review and advisable judicial role from selected scholars will serve as doctrinal tools for the analysis of the performance of the CFA in Hong Kong under China's "one country, two systems" policy in the next chapters. Although these theories may not fit the context of Hong Kong and China directly and exactly, and comprise just a selection of the thoughts about the contribution to the legitimacy debate, there are still apparent benefits from considering them, as they can provide us with a comparative theoretical framework and thus a fresh perspective to look at the case of Hong Kong. Analysis of existing theoretical explorations can help us to obtain a more apprehensive illumination and explanation not only of the CFA's work but also of the constitutional order within which the CFA operates. A better understanding of the CFA's legitimate role under China's sovereignty will also be achieved by considering these doctrinal claims.

Chapter 4

Jurisdictional Competence: Controversies over Constitutional Review, Basic Law Interpretation, and Acts of State

1 Introduction

A court's jurisdiction delimits its role in a constitutional order. What status the Court of Final Appeal ("CFA" or "the Court") enjoys and what part it could play under the "one country, two systems" principle depend largely on the power and competence that can be actually enjoyed and employed by the Court in its legal practice. An exploration of issues relating to the Court's jurisdictional competence of constitutional significance could therefore itself be an effective way of illuminating the Court's constitutional role. It is also an appropriate starting point for our further investigation of the Court's performance. Three issues will be discussed in the chapter. All concern the question of how the legal system of Hong Kong correctly positions itself properly with regard to the power of the central institutions. They can demonstrate the dilemma of the CFA standing at the interface between the two legal systems, namely, the common law system in a subordinate Hong Kong and the civil law or socialist system in the predominate mainland China. That dilemma might be an inherent problem faced by the CFA under China's "one country, two systems" constitutional framework, as it is indeed a settlement based on a huge asymmetry between a tiny autonomous Hong Kong and an immense powerful mainland China.

Firstly, we will debate the CFA's capability of reviewing the constitutionality of the local legislation, executive actions, as well as the legislative acts of the National People's Congress (NPC) and its Standing Committee (NPCSC). We will begin by looking at Hong Kong courts' previous practice of constitutional adjudication under British colonial rule. Then the development and change after the return to China will be investigated, primarily by looking at its new legal and constitutional foundation and the CFA's relevant leading decisions. It will be argued that Hong Kong courts, including the CFA, have no competence to examine the NPC and NPCSC's legislative acts while they do have jurisdiction to scrutinise the local legislative and executive acts' consistency with the Basic Law provisions which are within the Region's autonomy. The implications of constitutional judicial review for the Hong Kong internal political and constitutional order as well as the resulting question of legitimacy will be explored. Secondly, we will consider the CFA's role in interpreting the Basic Law. Those will be analyzed include the constitutional rules, the interpretative approaches, the tests for judicial reference, and the attitude and philosophy which have been established and developed by the CFA, as well as the NPCSC's stance, and the Chief Executive's possible influence in this respect. Some European Union (EU)'s experiences, particularly the practice of the European Court of Justice (ECJ)'s preliminary reference procedure, will be investigated specifically, for that procedure is the origin of the drafting of the Basic Law's interpretative mechanism and its actual function may thus offer some helpful insights for Hong Kong courts to deal with the reference issue of the Basic Law. Thirdly, the exclusion of the CFA's jurisdiction by the concept of "acts of state" will be discussed. By comparing with English common law's doctrine of "act of state", it will prove that China's version imposes much more restriction on the CFA's capacity. By exploring these issues, I shall demonstrate that the CFA's unique position under China's "one country, two systems" constitutional order makes it extremely important for it to be modest and self-restrained when dealing with affairs

involving the constitutional relationship between the Central Government and the Region. In my view, Hong Kong courts, especially the CFA, should serve not only Hong Kong's autonomy but also the national interest when exercising their constitutional jurisdiction.

2 Constitutional Judicial Review

The CFA's jurisdiction of constitutional review, which refers to the Court's competence to examine the compatibility of legislation or executive actions with the Basic Law of Hong Kong, is of great controversy, for there is no provision in the Basic Law expressly granting it such a power. However, to scrutinise the constitutionality of actions of the legislature and executive is a common practice in most of the common law jurisdictions with a written constitution. This may be the reason why the majority of Hong Kong judges, legal professions, academic lawyers and politicians are not opposed to Hong Kong courts' claim and exercise of such a power. Even the Hong Kong government, whose actions are frequently challenged by various litigants through constitutional judicial review since reunification, has not shown any doubt about the courts' jurisdiction in this regard when arguing its cases before them. Actually the Secretary for Justice, Mr Wong Yan Lung, attempted to defend and justify Hong Kong courts' exercising this power before the officials of the Central Government during his first visit to Beijing.³⁷² Conversely, some leading scholars in mainland China tend to deny that the courts in HKSAR have this power.³⁷³ Particularly, they firmly oppose the opinion that Hong Kong courts enjoy the competence to review the acts of NPC or its standing committee. However, notably, as for the Hong Kong commentators, most of them acknowledge that the courts in HKSAR do have the jurisdiction of constitutional review over the local legislation and executive actions, but there is no consensus among them on whether the courts are competent to examine the acts of the national legislature.³⁷⁴

2.1 *The Practice before Handover*

Those denying Hong Kong courts' power of constitutional review support their argument by claiming that before 1997 when governed by Britain Hong Kong courts were not allowed to strike down legislation, especially the legislation passed by British Parliament due to the doctrine of parliamentary sovereignty. After 1997, they argued, the courts in HKSAR should have the same jurisdictional restriction according to art.19 of the Basic Law.³⁷⁵ So in order to clarify the question, it is necessary to find out the actual history of Hong Kong courts' relevant jurisdiction in the era of British rule, which would be inherited by the courts of HKSAR after handover.

³⁷² Wong Yan Lung, Secretary for Justice, "The Legal System and the Practice of 'One Country, Two Systems' in Hong Kong Special Administrative Region", presented for the officials in Central Authorities concerning Hong Kong affairs at Diao Yu Tai State Guests Hotel in Beijing on April 12, 2006.

³⁷³ Xiao Weiyun and others, "Why the Court of Final Appeal was Wrong: Comments of the Mainland Scholars on the Judgement of the Court of Final Appeal", Press Release by the New China News Agency on 6 February 1999. See *China Daily*, 8 February 1999. Also see Li Guoming, "xianggang tebie xingzhengqu jibenfa shishi liangzhounian yantaohui zongshu [An overview of the conference for the two years' application of the Basic Law of HKSAR]", *Peking University Law Journal*, Vol.5, 1999, at 128

³⁷⁴ Yash P. Ghai, Hualing Fu and Wenmin Chen (ed), *Hong Kong's Constitutional Debate: Conflict Over Interpretation* (Hong Kong University Press 2000)

³⁷⁵ Xiao Weiyun and others, "Why the Court of Final Appeal was Wrong: Comments of the Mainland Scholars on the Judgement of the Court of Final Appeal", Press Release by the New China News Agency on 6 February 1999. See *China Daily*, 8 February 1999.

Under British colonial rule, especially before 1991 when the Bill of Rights was enacted, in practice Hong Kong courts did not claim and exercise the so-called jurisdiction of constitutional review to strike down legislation or executive acts according to Hong Kong's written constitutional documents of that time, although they did examine and invalidate executive acts in accordance with statute or common law standards. In theory, however, Hong Kong courts did have the jurisdiction to examine the constitutionality of local legislation and executive acts by reference to the Letters Patent and Royal Instructions, which served as a constitution for colonial Hong Kong.³⁷⁶ Hong Kong courts could also strike down any Ordinance passed by the local legislature which was repugnant to a British Act of Parliament applicable to Hong Kong.³⁷⁷ However, in practice, no significant case on the issue actually arose probably because of the lack of normative content in the Letters Patent and Royal Instructions, that is, without detailed and enforceable provisions, the two documents appear to be too simple and vague to be employed by litigants to argue for their cases before the courts.

The situation changed significantly after 1991 when a Hong Kong bill of rights ordinance was enacted by Hong Kong Legislature to adopt the International Covenant on Civil and Political Rights (ICCPR) and the Letters Patent were accordingly amended to provide that no local law could be made to restrict the rights and freedoms enjoyed in Hong Kong in a manner which was inconsistent with the ICCPR as applied to Hong Kong.³⁷⁸ This played a significant role in awaking the courts to start performing their constitutional review function actively and substantially by providing them with the newly more practical constitutional standards. With these weapons, the courts boldly invalidated some provisions in local legislation, such as in the Dangerous Drug Ordinance, the Fire Arms and Ammunition Ordinance and Election Law 1994, on the ground that these provisions were not in conformity with the criteria provided by Hong Kong Bill of Rights and ICCPR.³⁷⁹ By doing so the courts confirmed their constitutional review jurisdiction, claiming they had the power to examine and strike down any Hong Kong regional legislation breaching the Bill of Rights Ordinance and ICCPR.

The more difficult question is whether the colonial Hong Kong courts were allowed to examine the validity of legislation passed by British Parliament which was applied to Hong Kong. It seems unimaginable for Hong Kong courts to do that as generally even the British courts themselves lacked such jurisdiction due to the doctrine of parliamentary sovereignty.³⁸⁰ Based on this doctrine and Hong Kong's colonial status as well, in *HKSAR v David Ma*,³⁸¹ the counsel for HKSAR government argued that prior to 1st July 1997 the Hong Kong courts could not have determined the constitutionality of either UK metropolitan or imperial legislation *vis-à-vis* either the unwritten British Constitution or the Hong Kong Letters Patent, and if the British Parliament legislated on a topic, the colonial courts were

³⁷⁶ Cheng Hongyi, "Lun Xianggang Tebie Xingzhengqu de Weixian Shencha Quan [on the Constitutional Judicial Review in HKSAR]", *Peking University Law Journal*, vol.5, 1998, p12.

³⁷⁷ *Rediffusion (Hong Kong) Ltd v Attorney General* [1970] AC 1136 at 1157

³⁷⁸ Hong Kong Government, *Hong Kong Human Rights Report 1993*,

http://www.hkhr.org.hk/content/publications/UN_reports/1993hrreport/re93_01.htm accessed on 19 November 2008

³⁷⁹ *R v Sin Yau-ming* (1992) 2 HKPLR 182; *R v So Sai-fong* (1992) 2 HKPLR 697; *Lee Miu-ling v Attorney General* (1996)1 Hong Cases 124

³⁸⁰ A.V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (BiblioBazaar, LLC, 2009), pp35-79; also see Colin Turpin and Adam Tomkins, *British Government and the Constitution: Text and Materials* (6th Cambridge University Press, 2007), p40

³⁸¹ *HKSAR v David Ma* [1997] HKLRD 761 or *HKSAR v. Ma Wai Kwan David* (CAQL1/1997)

bound by that. Chan CJHC was convinced and agreed that Hong Kong courts had no power to challenge the validity of acts passed by the British Parliament or acts of the Queen in Council. However, he believed that they did have the jurisdiction to “*at least examine whether such legislation or imperial act existed, what its scope was and whether what was done in Hong Kong was done in pursuance of such legislation or imperial act.*”³⁸² Chan CJHC’s acceptance of the counsel’s arguments was criticised. Professor Yash Ghai pointed out that it was not true that colonial courts could not review legislative acts of Britain by providing examples of *Abeyeskera v Jayatalike*³⁸³ and *Sammut v Strickland*³⁸⁴.³⁸⁵ Mr. Johannes Chan further pointed out that before changeover the doctrine of supremacy of parliament did not apply fully to Hong Kong and since the promulgation of the Hong Kong (Legislative Power) Orders 1986 and 1989, Hong Kong courts may declare an UK Act applied to Hong Kong repealed if it was inconsistent with a Hong Kong statute in certain defined areas such as civil aviation, merchant shipping, admiralty jurisdiction and implementation of an international treaty which applies to Hong Kong.³⁸⁶ In fact, it seems that, although in theory there did exist some rare exceptions as Professors Ghai and Chan mentioned, generally Hong Kong courts in the era of British rule did not have, or at least did not exercise, the power of reviewing British legislation. This must be the case. Otherwise the experienced Chief Judge of the Court of Appeal in *Ma* would not have made a conclusion that “*It would be difficult to imagine that the Hong Kong courts could, while still under British rule, challenge the validity of an Act of Parliament passed in U.K. or an act of the Queen in Council which had effect on Hong Kong.*”³⁸⁷

When we look at the previous constitutional jurisdiction of Hong Kong courts, an important element must be borne in mind. That is, the courts of colonial Hong Kong had no power of final adjudication. The British Judicial Committee of the Privy Council in London served as Hong Kong’s court of final appeal. That means, even if the Hong Kong courts were bold enough to assert and employ the constitutional review power to examine and repeal the legislation enacted by the British Parliament applied to Hong Kong, such power and the results of its exercise were still subject to the Privy Council’s examination. In other words, the Privy Council had the privilege, subject to the law of course, to confirm, alter, restrict or even abolish Hong Kong courts’ such jurisdiction and their decisions based on it when a relevant case was appealed to the Privy Council.

2.2 *Are Hong Kong Courts Competent to Review Acts of the NPC and NPCSC?*

After 1997 Hong Kong became a Special Administrative Region of China, being granted a high degree of autonomy. The Basic Law was enacted by NPC to serve as a written constitution for HKSAR. The Court of Final Appeal was established to replace the role of Privy Council as the supreme court of HKSAR to exercise the power of final adjudication which was newly gained by the Region. The previous common law system was maintained. Under the new constitutional order, what are the changes in Hong Kong courts’ constitutional review jurisdiction?

³⁸²*HKSAR v. Ma Wai Kwan David* (CAQL1/1997) Para.51

³⁸³ [1932] AC 260

³⁸⁴ [1938] AC 678

³⁸⁵Yash P. Ghai, Hualing Fu and Wenmin Chen (ed), *Hong Kong’s Constitutional Debate: Conflict Over Interpretation* (Hong Kong University Press 2000), at 307

³⁸⁶ Johannes Chan, “Judicial Independence: Controversies on the Constitutional Jurisdiction of the Court of Final Appeal of Hong Kong Special Administrative Region”, (1999) 33 *The International Lawyer*, p1019

³⁸⁷*HKSAR v. Ma Wai Kwan David* (CAQL1/1997), para.57

Shortly after reunification, the question was raised in *David Ma*.³⁸⁸ In this case the litigant contended that the common law had not survived the handover by arguing that its survival required a positive act of adoption by the NPC or NPCSC but there was no such an act at all. Moreover, the validity of the Reunification Ordinance, which had been enacted by Hong Kong's Provisional Legislative Council (PLC) and served to adopt the previous laws, including the common law, was also challenged primarily on the ground that the NPC's very decision of establishing the PLC itself was unconstitutional. To handle these sensitive issues, the courts (the Court of First Instance and the Court of Appeal) must first ensure their own competence. Relying on art.19 of the Basic Law, the courts assumed the jurisdiction to examine the constitutionality of laws enacted by Hong Kong Legislative Council, without any objection from HKSAR government. Conversely, as far as the acts of central legislature, namely, the NPC and NPCSC, was concerned, the Court of Appeal (not the CFA) was convinced by government counsel and held that the courts in HKSAR had no power to challenge the validity of the NPC Decisions or Resolutions or the reasons behind them, on the ground that there was no legal basis for regional courts to query the validity of any legislation or acts passed by the sovereign.³⁸⁹ It came to this conclusion from an analogy of the relationship between HKSAR and China with that between colonial Hong Kong and the UK. However, the court took the view that the HKSAR courts do have the jurisdiction to examine the existence (as opposed to the validity) of the acts of the Sovereign or its delegate.³⁹⁰

Two years later, the Court of Appeal's opinion in *David Ma* was reversed by the CFA in *Ng Ka Ling*.³⁹¹ In its decision, the CFA unequivocally asserted the constitutional jurisdiction of the courts in HKSAR. It declared that the courts "*undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion...*"³⁹² As for the constitutional jurisdiction over the legislative acts of NPC and its Standing Committee, the CFA thought that the Court of Appeal's view in *Ma* was wrong as its analogy with the old order was misconceived because the new constitutional order of HKSAR was fundamentally different from that prior to its return to China.³⁹³ While acknowledging acts of NPC and NPCSC were acts of sovereignty, the CFA claimed that the jurisdiction of the Region's courts to examine their acts to ensure consistency with the Basic

³⁸⁸ *HKSAR v. Ma Wai Kwan David* (CAQL1/1997)

³⁸⁹ *HKSAR v. Ma Wai Kwan David* (CAQL1/1997) para.57-60

³⁹⁰ *HKSAR v. Ma Wai Kwan David* (CAQL1/1997) para.61

³⁹¹ *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 577 or *Ng Ka Ling v Director of Immigration* (FACV14/1998). In the case, the Court of Final Appeals was asked to rule on two major issues in the challenge of the constitutionality of the Immigration Ordinance. One of which was whether, in order to be deemed a permanent resident under Article 24(2)(3) of the Basic Law, "persons of Chinese nationality born outside of Hong Kong of those residents listed" who were permanent residents under Article 24(2)(1) and Article 24(2)(2) must have been born at a time when either parent had already become a permanent resident, or whether it was sufficient that either parent subsequently acquired permanent residence. Another issue was whether persons of PRC nationality living in mainland China who qualified for permanent residence in Hong Kong under Article 24 would have to acquire an exit permit from the Chinese government to leave mainland China before they could exercise the right of abode in Hong Kong. This requirement was allegedly justified on the basis of Article 22 of the Basic Law, which states that "people from other parts of China must apply for approval" from the Chinese government before entering Hong Kong, and that the central government in Beijing determines the number of people who may enter Hong Kong for settlement, after consultation with the Hong Kong government. The issue thus became one of whether Article 22 constituted a restriction to free exercise of Article 24.

³⁹² *Ng Ka Ling v Director of Immigration* (FACV14/1998), para.61

³⁹³ *Ng Ka Ling v Director of Immigration* (FACV14/1998), para.66-71

Law was derived precisely from the Sovereign in that the NPC had enacted the Basic Law for the Region pursuant to Article 31 of the Chinese Constitution. Thus the restrictions of Hong Kong courts' jurisdiction in the colonial era could not apply to HKSAR's courts after July 1, 1997. Therefore, the CFA held, the courts of the Region did have jurisdiction and indeed the duty to examine any legislative acts of the NPC or NPCSC to ensure their consistency with the Basic Law and to declare them to be invalid if found to be inconsistent.³⁹⁴

The CFA's bold assertion seemed to be a gamble. If it was lucky enough to attract no serious reaction from the sensitive central authorities, the judgment would stand as one of great historic significance in Hong Kong's legal history. It may thus be called Hong Kong's "*Marbury v. Madison*"³⁹⁵, a leading case decided by the Supreme Court of USA in 1803 and creating the system of constitutional judicial review in America. However, the CFA's venture was unacceptable to Beijing. Under great political pressure, the CFA eventually had to, unprecedentedly, give a clarification of its judgment to state that it cannot question the authority of the NPC and NPCSC to "*do any act which is in accordance with the provisions of the Basic Law and the procedure therein [emphasis added]*"³⁹⁶. Thereby the central government's unhappiness was appeased. However, it could be argued that the clarification had no substantial change to what the CFA had said in *Ng Ka ling* regarding its constitutional jurisdiction over the national legislature. Indeed, it did not recede from its original position as it apparently implied that it had the power to question any act of NPC or its Standing Committee which was **not in accordance with** the Basic Law. Although there were no clear words about who had the power to determine whether an act of the NPC or its Standing Committee was in accordance with the Basic Law or not, it seemed that the CFA presumed that this jurisdiction would be logically enjoyed by the courts in HKSAR.

Actually, we cannot say that the CFA's reasoning for its assertion of constitutional jurisdiction over the acts of the NPC and NPCSC is flawless. Firstly, its legal basis appears fragile. The CFA's conclusion is mainly based on its understanding of the nature of the Basic Law. It pointed out that the Basic Law was enacted by the sovereign, namely, the NPC, for HKSAR pursuant to Article 31 of the Chinese Constitution. The Basic Law is a national law but the constitution of the Region. No law should be allowed to be inconsistent with the Basic Law. The courts in HKSAR had the jurisdiction to enforce and interpret the Basic Law. These points, to the CFA, entailed the courts' jurisdiction to scrutinise whether acts of the NPC and its Standing Committee were consistent with the Basic Law.³⁹⁷ However, it must be noted that in fact there is no provision in the Basic Law expressly granting such a jurisdiction to the courts of HKSAR or any other court. The Basic Law is a law of devolution.³⁹⁸ It delegates authority from Beijing to the Special Administrative Region. The powers enjoyed by the Hong Kong authorities must be clearly listed in the text of the Basic Law.³⁹⁹ Unlike federal constitutional arrangements, Hong Kong's new constitutional order under China's "one country, two systems" does not recognise that the Region possesses any residuary power.⁴⁰⁰ On the contrary, the so called residuary powers are claimed to be enjoyed by the

³⁹⁴ *Ng Ka Ling v Director of Immigration* (FACV14/1998), para.62

³⁹⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)

³⁹⁶ *Ng Kaling v. Director of Immigration* [1999] 1 HKLRD 579-580

³⁹⁷ *Ng Ka Ling v Director of Immigration* (FACV14/1998), para.62

³⁹⁸ A Speech delivered by Wu Bangguo, the Chairman of the NPC, on June 6, 2007. See "Basic Law 'guarantees democracy'", *People's Daily Online* (June 7, 2007), http://english.peopledaily.com.cn/200706/07/eng20070607_381760.html accessed on 21 November 2008

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*

Central Government.⁴⁰¹ Additionally, it is firmly believed in China that under a unitary state a regional court has certainly no competence to decide on its own competence (*Kompetenz-Kompetenz*). So, if there is no provision in the Basic Law plainly granting Hong Kong courts the constitutional jurisdiction over the acts of NPC and NPCSC, it points very persuasively to the direction that Hong Kong courts do not have that power indeed.

Moreover, the actual status of the Basic Law within China's legal system may further demonstrate the weakness of the CFA's claim. As we mentioned, the CFA inferred its constitutional jurisdiction over the acts of the sovereign from the provisions of Basic Law. But within the Chinese legal order, the Basic Law, an ordinary statute, is incompetent to distribute such an important power as to restrict acts of NPC and its Standing Committee. Despite enjoying a constitutional law status in HKSAR, the Basic Law is merely an ordinary national statute within the national system of laws. It possesses the same status as other ordinary national basic statutes enacted by the NPC, such as the Criminal Law, the Civil Law, and the Administrative Law, so on and so forth. Under Chinese constitutional order, the NPC is the highest organ of state power and NPCSC is its permanent body.⁴⁰² They are above all the other state institutions, including the Central Government (the State Council), the Supreme People's Court, the Supreme People's Procuratorate and the Central Military Commission. The functions and powers of the NPC and NPCSC are enumerated by Chinese Constitution.⁴⁰³ That means any attempt to change or restrict their functions and powers cannot be realised by merely enacting an ordinary statute. Instead, you must amend the Constitution. To give the courts of HKSAR the constitutional jurisdiction over acts of NPC and NPCSC apparently amounts to a substantial restriction of the functions and powers of the NPC and NPCSC granted by Chinese Constitution. Except by amending the Constitution, the Basic Law as an ordinary basic statute cannot make such a distribution of powers. Otherwise, it would usurp the role of the Chinese Constitution. Thus, it seems impossible that the drafters of the Basic Law might have intended to give constitutional jurisdiction to the courts in HKSAR to examine and invalidate the acts of NPC and NPCSC. The CFA's reliance on the Basic Law to claim the courts of HKSAR enjoy that jurisdiction therefore seems wrong due to its misunderstanding of the status of the Basic Law within China's legal order and ignorance of the legislative intent of the Basic Law.

However, some may argue that rather than substantial restrictions, the Basic Law can provide manner and form requirements for the acts of NPC or NPCSC such as the procedures for interpreting or amending the Basic Law.⁴⁰⁴ Yes, that is the case indeed, but it does not necessarily mean that the NPC and NPCSC's observance of those manner and form requirements should be subject to Hong Kong courts' examination. If that had been the intention of the drafters, they should have written it expressly in the Basic Law. Even if they have put that in the Basic Law expressly, as an ordinary national statute provision, its constitutionality is still questionable due to China's principle of congressional supremacy (discussed in Chapter 2), under which Chinese judiciary is not capable of reviewing

⁴⁰¹ Chengjie, "Hong Kong's judicial power under dual politics [lun shuanggui zhengzhi xia de xianggang sifaquan]", *The Journal of Chinese Jurisprudence*, (2006), vol.5, at 47-59

⁴⁰² Art.57 of the Chinese Constitution

⁴⁰³ Art.62 and Art.67 of the Chinese Constitution

⁴⁰⁴ Bing Ling, "The Proper Law for the Conflict between the Basic Law and Other Legislative Acts of the National People's Congress", In Yash Ghai, Chen Wenmin and Fu Hualing (ed.) *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, (Hong Kong University Press, 2000), at 163-169

legislative acts of the national parliament,⁴⁰⁵ say, the NPC and the NPCSC. Interestingly, there is indeed a provision in the Basic Law, art.159(3), attempting to substantially restrict the NPC's competence by providing that "[n]o amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong".⁴⁰⁶ Actually, as Mr. Bing Ling has argued, the NPC represents the sovereign will of the people of China and thus the NPC of today has no power to so limit the will of the people of tomorrow that a future NPC cannot repeal or amend a particular law, "[t]o allow the NPC to bind its future successors on substantive matters would be repugnant to the sovereign status of the people who must be absolutely free to make whatever decisions on whatever matters the people (through the NPC) may deem appropriate at any given time."⁴⁰⁷ Therefore, the constitutionality of art.159 (3) is questionable. It appears to be of no legal binding effect on a future NPC when it deals with such an issue.

The other important element which has been largely ignored by the commentators is that, under the Chinese constitutional framework, legal and political culture, and reality, to allow regional courts to question the acts of sovereignty is just as unrealistic as a day dream, for in the eyes of the mainland China authorities and even Chinese academia, it is naturally wrong and absolutely unacceptable to do that. Therefore, how could it be the intent of the Basic Law which was enacted by the Chinese highest legislature to allocate such an important power to the courts of HKSAR without any signs of clearly saying so? You can imagine, if the CFA really persistently declares an act of NPC or NPCSC invalid by alleging it contravenes the Basic Law, will the central authorities accept that and act according to what the CFA decides? The answer is certainly negative. In China, a correct political stance is probably more important than legal correctness to courts. According to China's dominant socialist legal jurisprudence, law is conceived as the instrument to realise political ends.⁴⁰⁸ It is still hard for law to prevail over politics. In China, we may say that politics is the master of law and law is the servant of politics. Therefore, regarding such important political principles as the superiority of the NPC and the dignity of acts of sovereignty, there seems to be little space for Beijing to compromise. It can be expected that such a judgment of the CFA could not be respected, implemented and tolerated by the central authorities. The Central Government would use its entire means to strike down the challenge of the CFA. In extreme cases, arguably, even the power of final adjudication could be taken back by the Central Government by amending the Basic Law. Under such a political reality, for Hong Kong courts to deal with this kind of sensitive issue, therefore, disclaiming jurisdiction, rather than expanding its power with rigid stance and aggressive attitude which will inevitably attract attack from the central authorities, would be more favourable for the independence of the judiciary and the autonomy of the Region.

2.3 *Constitutional Review of Regional Legislation and Executive Actions*

The constitutional jurisdiction of the courts in HKSAR over regional legislative and executive acts raises fewer legitimacy questions. In fact, there have been many decisions of

⁴⁰⁵ Hualing Fu, "Putting China's Judiciary into Perspective: Is it Independent, Competent, Fair?", in Erik Gilbert Jensen, Thomas C. Heller (ed.), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford University Press, 2003), at 213.

⁴⁰⁶ The Basic Law, art.159(3)

⁴⁰⁷ Bing Ling, "The Proper Law for the Conflict between the Basic Law and Other Legislative Acts of the National People's Congress", In Yash Ghai, Chen Wenmin and Fu Hualing (ed.) *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, (Hong Kong University Press, 2000), at 163.

⁴⁰⁸ Suisheng Zhao, *Debating Political Reform in China: Rule of Law vs. Democratization* (M.E. Sharpe, 2006), at xi, xii and 165.

the CFA and other Hong Kong courts assuming and exercising the power to review and invalidate regional legislation and executive acts since 1997. The Hong Kong Government and Legislative Council have not expressed any opposition to the courts' assertion and employment of this jurisdiction. On the contrary, they have shown their respect for it.⁴⁰⁹ There is, therefore, no doubt that this jurisdiction has been established firmly and developed well through case law in HKSAR. According to the latest official figures available, the number of judicial review applications stands at 132 in 2006, and around 150 in the previous two years.⁴¹⁰ Many of them involve Basic Law interpretations and constitutional review. As the Chief Justice recognised, "judicial review is an established and vital feature of our legal system",⁴¹¹ and "has redefined the legal landscape"⁴¹². Thus, although the Basic Law does not expressly grant the courts such jurisdiction, now its actual existence and being frequently exercised in the practice of the Hong Kong courts cannot be easily ignored. In addition, if we deny Hong Kong courts' competence of constitutional review over the regional legislation and executive acts, especially the latter, it may amount to an infringement of Hong Kong people's fundamental right guaranteed in art.35 of the Basic Law, which says, "Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel". However, some may reject that and insist on their denial of Hong Kong courts' constitutional review power over regional legislation by invoking art.84 of the Basic Law which provides that Hong Kong courts "shall adjudicate cases in accordance with the laws applicable in the Region". This, according to them, can be read as that the courts merely have the power to use the existing laws to decide cases and have no jurisdiction to question the applicable laws, for the validity of the laws has been established since they go through all the legislative procedures provided by the Basic Law.⁴¹³ The flaw of the argument is that it ignores the courts' constitutional responsibility of interpreting the Basic Law and their role as the guardian of the Basic Law, which disable them from applying local laws inconsistent with the Basic Law. In fact, art.84 does not exclude the courts from identifying the applicability of a local law according to the Basic Law. On the contrary, it may imply that the courts should have a responsibility to ensure and determine whether a relevant local law is actually applicable in Hong Kong before applying it to the resolution of a concrete dispute at hand. Constitutional review of local legislation is thus necessary for the courts to discharge their adjudicative function.

A relevant question worthy of discussing here is that whether all the provisions regarding autonomy affairs in the Basic Law can be used by the courts as standards to review and invalidate the local legislation and executive actions. In other words, are all those provisions of the Basic Law justiciable? Besides the political structure and fundamental rights of the residents, the provisions of the Basic Law regarding the autonomy of the Region cover

⁴⁰⁹ Una So, "Leung Loses out as Court Dismisses Judicial Review", *The Standard* (23 January 2007) http://www.thestandard.com.hk/news_print.asp?art_id=36657&sid=11842780 accessed 5 May 2008; Speech by Secretary for Justice, Mr. Wong Yan Lung, to the Central Government officials at Diaoyutai Hotel, Beijing, on April 12, 2006.

⁴¹⁰ The Chief Justice Mr. Andrew Kwok-nang Li, "CJ's speech at Ceremonial Opening of the Legal Year 2007", *Press Releases* (8 January 2007), <http://www.info.gov.hk/gia/general/200701/08/P200701080120.htm> accessed on 24 November 2008

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*

⁴¹³ Xiaozhuang Song, *Lun Yiguoliangzhi xia zhongyang yu xianggang tebie xingzhengqu de guanxi* [An discussion of the relationship between the Central Government and the Hong Kong Special Administrative Region under the principle of "one country, two systems"] (China Renmin University Press, 2003), at 255 (in Chinese); Also see Xie Weiwu, "Sifa fuhe zengjia de zhongyao youyin [The important cause of the increase of judicial review]", *Bauhinia Magazine Online* (January 2007, No.195), <http://www.zijing.com.cn/GB/channel3/22/200610/08/2323.html> accessed on 27 November 2008 (in Chinese)

almost all the social and economic matters, from education, science, culture, sports, religion, labour and social services to public finance, monetary affairs, trade, industry, commerce, land leases, shipping and civil aviation. Most of them concern the relevant policies of the HKSAR Government in those areas. Some of these provisions are binding (setting restrictions or obligations on the government) while some are guiding (not compulsory).⁴¹⁴ If all of them are justiciable, namely, they could be invoked by litigants to launch judicial challenges and used by the courts to examine the constitutionality of government's actions, the constitutional jurisdiction of the courts would extend to almost all the policy issues. That may threaten the principle of separation of powers and blur the boundary between the executive and the judiciary. The courts' caseload would perhaps rocket too. So some scholars, represented by Professor Ghai, tend to allow only some of the provisions of the Basic Law to be justiciable, excluding those articles which "are not written in a language that would easily lend itself to judicial interpretation (e.g. low tax policy or creating an environment conducive to investment, etc.) and areas "where courts might themselves regard judicial intervention as inappropriate".⁴¹⁵ This seems appropriate at first glance. However, a dilemma will ensue from it for it goes with a potential conflict with the role of the Hong Kong judiciary as the authoritative interpreter of the Basic Law defined by art.158 of it, which authorises the Hong Kong courts to interpret all the provisions of the Basic Law falling within Hong Kong's autonomy.⁴¹⁶ If some provisions are not justiciable, the courts will lose the opportunity to produce interpretations of those provisions. This could constitute a restriction or divestment of the courts' constitutional power of interpretation. Additionally, in practice it is very difficult, if not impossible, to identify which articles of the Basic Law are justiciable and which are not, given that the Basic Law provisions cover issues so broadly and the accompanying questions of how, who and why to make that identification are not easy to answer. An artificial distinction of the nature of the provisions of the Basic Law in terms of justiciability would complicate the situation. Therefore, I am of the view that Hong Kong courts, with appropriate restraints, could use all the provisions which fall within the scope of the Region's autonomy to examine the constitutionality of the regional legislation and executive acts.

An important question is then what those appropriate restraints are when Hong Kong courts exercise their jurisdiction of constitutional review at the local level. It seems that the answer could be found in the UK model of judicial review in dealing with human rights cases. The UK model's key feature is that, unlike the US style, the courts have no power to strike down a law found unconstitutional or in breach of a fundamental right.⁴¹⁷ Under the Human Rights Act 1998, the judges are required to interpret legislation "in so far as it is possible" in a way which is compatible with the European Convention on Human Rights. If a compatible interpretation is not possible, the higher courts have, in respect of primary legislation, the right to make a "declaration of incompatibility",⁴¹⁸ which does not affect the continuing validity of the legislation.⁴¹⁹ It is left to the Parliament to amend such a declared incompatible law. Similarly, in Hong Kong, although no similar statute requirement exists, when the courts exercise their constitutional jurisdiction to examine a piece of local legislation, they had better, in my opinion, interpret it in so far as it is possible in a way which

⁴¹⁴ Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 1999), p152.

⁴¹⁵ Ibid, p306.

⁴¹⁶ The Basic Law, art.158

⁴¹⁷ Kate Malleson, *The Legal System* (Oxford University Press, 2007), at 38

⁴¹⁸ Human Rights Act 1998, s.3

⁴¹⁹ Human Rights Act 1998, s.4

is consistent with the Basic Law. Only when a consistent interpretation is not possible, the courts can make a declaration of incompatibility. Such a declaration has no the effect of invalidating the law. It is the Government and the Legislative Council's responsibility to correct this legislation. This type of practice, despite no special legislation, could be achieved through the case law of the CFA. Unfortunately, the CFA, as an heir of the British Judicial Committee of the Privy Council after Hong Kong's returning to China, has not inherited the British humble style of judicial review. Some may doubt the humility of the British way of judicial review by indicating the fact that the Judicial Committee may exercise power of striking down overseas jurisdiction's legislation when it acts as the final constitutional court for various commonwealth dependencies and colonies. However, that was not the case for Hong Kong. In Hong Kong's colonial era, the Judicial Committee of the Privy Council took a restrictive approach towards local official decisions and seldom exercised its review power to correct Hong Kong Administration's mistakes,⁴²⁰ not to mention to scrutinise legislation. The point here is that as the Hong Kong legal system was an integral part of British imperial legal system before 1997, it might be more appropriate for Hong Kong courts to learn judicial review experience from British practice. Rather, the CFA has adopted an American model by claiming that Hong Kong courts have full power to strike down not only regional legislation but also the legislative acts of the national parliament as unconstitutional.⁴²¹ Although it seems that it has retreated from the latter assertion as to reviewing the national legislative acts, its claim of the power of invalidating regional law which is found unconstitutional by the courts remains unchanged. With the continuing enhancement of the democratic mandate of the Legislative Council through the constitutional reform and the final realisation of the aim of electing all the legislators through direct election, the Court, as an legal institution lacking of democratic legitimacy, had better reconsider its stance as to the constitutional review of local legislation. To adapt from American style to the more modest UK model may be a good option.

Another point may deserve stressing is that Hong Kong courts' constitutional review can only be concrete review, which requires "a genuine adversary proceeding, the existence of a case or controversy *inter partes*".⁴²² They cannot render a judgment on a purely abstract or hypothetical question unaccompanied by a specific fact-setting. In other words, unlike some European constitutional courts, Hong Kong courts, including the CFA, are not competent to render advisory opinions on legal questions not directly arising from concrete cases. In the controversy over the term of a successor of a resigned Chief Executive in 2005, when the Hong Kong government decided to refer the issue to the NPCSC for an interpretation of the relevant provisions of the Basic Law and submitted a bill to the Legislative Council to amend the Chief Executive Election Ordinance, legislator Albert Chan Wai-yip filed in the Hong Kong High Court a judicial review application, asking the court to declare that the true effect of art.46 of the Basic Law is that the length of office should be five years whether or not the Chief Executive resigns before the end of his term and also declare that the proposed government bill to amend the Chief Executive Ordinance covering the length of office for the successor of a resigned Chief Executive is a revision of the Basic Law and therefore unlawful.⁴²³ However, soon after the NPCSC's delivering of an interpretation on the relevant

⁴²⁰ Raymond Wacks, *The New Legal Order in Hong Kong* (Hong Kong University Press, 1999), p44

⁴²¹ *Ng Ka Ling v Director of Immigration* (FACV14/1994), para.61, 62

⁴²² Edward McWhinney, *Supreme Courts and Judicial Law-making: Constitutional Tribunals and Constitutional Review* (Martinus Nijhoff Publishers, 1986), at 15

⁴²³ Alber Wong, "Chan takes CE term row to High Court", *The Standard* (April 7, 2005), http://www.thestandard.com.hk/archive_news_detail.asp?pp_cat=&art_id=5903&sid=&con_type=1&archive_d_str=20050407 accessed on 27 November 2008

Basic Law provision,⁴²⁴ Mr. Chan withdrew his application. Thus we cannot investigate the court's attitude on the issue as it did not actually deal with that. But it seems to me that there was little chance for Mr. Chan's application to be approved by the court largely because his application appeared to be more like request for abstract constitutional review or advisory opinion, rather than concrete review. Moreover the bill challenged by him was still under deliberation by the Legislative Council.⁴²⁵ In other words, it was half way the legislative process and not an enacted law yet. Under such a circumstance, it is doubtful that the court could interfere without constituting an abstract review or advisory opinions giving. The case will be further discussed in Chapter 6. Here my purpose is just to point out that being limited to only concrete constitutional review is an inherent feature of Hong Kong courts' constitutional review over the local legislation. It places a restraint on the judicial interference. This restraint is a reasonable and appropriate one which is in line with Hong Kong's legal history and legal order. It would be desirable that Hong Kong courts continue to exercise only concrete constitutional review, rather than step into the area of giving advisory opinion which constitutes abstract review.

We have argued that Hong Kong courts have jurisdiction, in adjudicating cases, to examine a regional law's conformity to the provisions of the Basic Law which are within the limits of the autonomy of Hong Kong. However, as far as the compatibility of a regional law with the provisions of the Basic Law beyond the autonomy of the Region is concerned, the courts, in my view, have no competence to scrutinise, for that is the power of the NPCSC which is granted by art.17 of the Basic Law. Art.17 requires all the laws enacted by the legislature of HKSAR to be reported to the NPCSC for the record and authorises the NPCSC to examine their consistency with the provisions of the Basic Law regarding affairs which are the responsibility of the Central Government or concerning the relationship between the Central Authorities and the Region. If a breach is found, the NPCSC would invalidate these laws by returning them.⁴²⁶ As for the laws which are not returned, their constitutionality, in terms of their consistency with the non-reginal provisions of the Basic Law above mentioned, should be seen as having been confirmed by the NPCSC. If inconsistency has not been detected by the NPCSC at that time, individuals or institutions who notice or concern the issue could inform or request the NPCSC to determine at any later time. The possibility of a failure to detect does not necessarily mean Hong Kong courts could therefore exercise the review power. Actually, in my opinion, the courts in HKSAR cannot question the recorded legislation's conformity with these provisions of the Basic Law any more (but, of course, still can examine their consistency with those provisions of the Basic Law concerning regional affairs), for, as argued earlier, Hong Kong courts' competence of challenging the authority of the NPCSC is questionable. Even if just seen from a procedural perspective, it is also appropriate to exclude Hong Kong courts from scrutinising those laws. Otherwise, if the courts have the power to review their compatibility with non-regional provisions of the Basic Law and strike down the contents of the laws found inconsistent according to the American model mentioned earlier, that would mean the versions of those laws that have been reported to and recorded by the NPCSC are altered by the courts for the courts' invalidation of the

⁴²⁴ Interpretation by the Standing Committee of the National People's Congress Regarding the Second Paragraph in Article 53 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the 15th Meeting of the Standing Committee of the Tenth National People's Congress on April 27, 2005)

⁴²⁵ Alber Wong, "Chan takes CE term row to High Court", *The Standard* (7 April 2005), http://www.thestandard.com.hk/archive_news_detail.asp?pp_cat=&art_id=5903&sid=&con_type=1&archive_dstr=20050407 accessed on 27 November 2008

⁴²⁶ It has never happened in practice up to now.

provisions in question would apparently constitute a deletion of the original text of the relevant laws. The SAR has, arguably, to report these new versions of laws to the NPCSC for record again under its constitutional duty. Accordingly the NPCSC would again exercise its constitutional review responsibility over these laws' new versions. Serious problems would arise when the NPCSC is in disagreement with the courts' alteration of the laws. If the NPCSC denies the constitutionality of the new versions, invalidates them by returning, and insists on the effect of the previously recorded laws regardless of the fact that certain provisions of them have been struck down by the courts, this would damage the authority of the Hong Kong courts greatly and place them in a very difficult position. To avoid such a direct confrontation with the NPCSC and its negative consequences, limiting Hong Kong courts' constitutional jurisdiction within issues concerning mere autonomous constitutional provisions without touching the NPCSC's affairs seems to be necessary. Indeed, this kind of demarcation of constitutional review jurisdiction between the NPCSC and the courts of HKSAR subject to the nature of various provisions of the Basic Law is consistent with the double-track interpretation mechanism of the Basic Law designed in art.158, which authorises the Hong Kong courts to interpret all the provisions of the Basic Law except for those concerning the Central Government and the relationship between the Central Authorities and HKSAR, which should be referred by the CFA to the NPCSC for interpretation when a final judgement is pending. According to this arrangement, if Hong Kong courts doubt a regional law's conformity to the non-regional provisions of the Basic Law, they may choose to refer the issue to the NPCSC for resolution because of its inevitably involvement of the interpretation of the relevant provisions of the Basic Law in relation to the duty of the NPCSC. Hong Kong courts lack the competence to handle it themselves.

2.4 *Implications*

Hong Kong courts' exercise of constitutional jurisdiction over regional legislative and executive acts has significant implications for Hong Kong's constitutional order. It places the courts in a special position within the Region's governmental structure and gives rise to a tendency of judicial supremacy, making the question of democratic legitimacy, which has been explored in the former chapter, more difficult to answer. Although it is officially claimed that Hong Kong's polity is a kind of executive-led system, it does appear to embrace the principles of "separation of powers" and "checks and balances", according to the political structure framed by the Basic Law. However, if the courts follow the bold US style of constitutional review rather than the much modest UK model we suggested, the checks and balances of the political system within HKSAR would be broken. While the courts are capable of scrutinising and striking down not only the executive actions but also the local legislation, sometimes can even question the legislature's procedure of making laws,⁴²⁷ or even directly amend laws by adding or deleting words, the executive and the legislature in Hong Kong lack effective constitutional means to check and balance the courts' power of constitutional review so as to maintain it under the final control from the democratic will possessed by the other two governmental branches.⁴²⁸ Even in the US, the courts' constitutional interpretation could at least in theory be remedied by the Congress and Government through amending the constitution. In fact, in other democratic states amending the constitution is usually a last remedy which could be employed to place a check and

⁴²⁷ Yash P. Ghai, Hualing Fu and Wenmin Chen (ed), *Hong Kong's Constitutional Debate: Conflict Over Interpretation* (Hong Kong University Press 2000), at 307; Also see *Leung Kwok Hung v. The President of the Legislative Council of the Hong Kong Special Administrative Region and Another* [2007] 1 HKLRD 387

⁴²⁸ Although full democracy has not been achieved yet in the organization of the executive and the legislature in Hong Kong, the two branches still have more democratic elements than the judiciary.

balance on the courts' constitutional review behaviour and ensure the will of people is not usurped by the unelected judges. As a result the courts' legitimacy of review might be defended for they are not beyond the last control of democracy indeed. However, interestingly, this is not the case in Hong Kong as the Legislature of HKSAR has no power to amend the Basic Law. The power of amending the Basic Law is exclusively enjoyed by the NPC which is a national institution outside Hong Kong.⁴²⁹ Although the Legislative Council and Chief Executive may play a part in initiating the process of amending the Basic Law, it is very difficult for them to do that to rectify a court's constitutional interpretation as the relevant requirement⁴³⁰ is very strict and complex and the whole amending process is lengthy and may be full of uncertainty, not to mention the huge political cost of doing that. Therefore, the executive and legislature tend to show their compliance with the courts' constitutional decisions even when they are unhappy or in disagreement with the courts' holdings. Consequently, the authority of the courts to make constitutional decisions through interpreting the Basic Law is secured.

Moreover, the trend of judicial supremacy is strengthened by the phenomenon of "*judicialisation of law-making*" and "*judicialisation of policy-making*", which is carefully analyzed by Professor Sweet in his study of the European constitutional politics.⁴³¹ Applying his theory to Hong Kong, we can expect that when the executive makes a policy or drafts a legislation proposal, it would do its best to predict and evaluate the courts' likely opinion about the issue and adopt them in advance in order to minimise the possibility of future intervention from the courts through constitutional review. So would the legislature during its process of making laws. In other words, when discharging their own functions, the officials of government and the legislators would act as a constitutional judge to preview the actions they are deliberating. Therefore, constitutional judicial review changes not only Hong Kong's legal culture and practice but also its political landscape, making the tendency of judicial supremacy coexist with the claim of executive leading and the rising of legislature dominance. Further discussion in the regard will be made in Chapter 6.

However, it must be pointed out that, in some extreme cases, the executive or legislature may be reluctant to submit to the judges' will. Without the means to check and balance at the local level, they may tend to invite the Central Authorities to interfere so as to make the order come back to a balance. Take the immigrant children cases for example, the government of HKSAR feared that the decisions of the CFA would result in an influx of 1.6 million mainland immigrants into Hong Kong, but it was unable to change the CFA's constitutional decisions through enacting a regional statute. And the chance of amending the Basic Law was also tiny due to the complicated procedures. Moreover, the power to amend the Basic Law is enjoyed by the NPC which is only in session in March for about two weeks every year, it was unpractical for the Hong Kong government to launch that process in the time available. Therefore, under such circumstances, the Hong Kong government was actually forced to opt to seek assistance from the Central Government. Consequently, the NPCSC adopted Hong Kong government's opinion and delivered an interpretation of the Basic Law⁴³² to rectify the CFA's constitutional interpretation and avoid the influx of immigrants. The CFA's

⁴²⁹ Art.159 of the Basic Law.

⁴³⁰ Art.159 of the Basic Law.

⁴³¹ A. S. Sweet, *Governing with Judges: Constitutional Politics in Europe*, (Oxford 2000)

⁴³² The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted by the Standing Committee of the Ninth National People's Congress at its Tenth Session on 26 June 1999)

constitutional ruling was effectively reversed. This shows that the external force, particularly the intervention from the Central Government, can play a crucial role in maintaining or changing the checks and balances of constitutional order between and among the judiciary, the legislature and the executive within HKSAR. However, to invite the Central Government to interfere may threaten the autonomy of the Region and the independence of the judiciary. From a realistic view, therefore, it is desirable to form a coordinated relationship, a constructive dialogical interaction, between the judiciary and other governmental branches, minimising the confrontation and excluding the likelihood of external force's coming in. This coordinative relationship needs the courts to adopt a modest style of constitutional review, without robustly invalidating the statutes as they usually do, and embrace a self-restrained approach when exercising their power of scrutiny.

Fortunately, the Chief Justice has realised the necessity of reminding his colleagues and the public of the limits of judicial review and its boundary with the political process.⁴³³ The Chief Justice's caution and humility are further demonstrated by his discarding of the potential arguability test for granting leave for application for judicial review in *Po Fun Chan*.⁴³⁴ Under the potential arguability test which was previously adopted by Hong Kong courts, the applicant need not demonstrate an arguable case. It is sufficient for him merely to satisfy the court that on further consideration at a subsequent hearing an arguable case might be demonstrated. To the Chief Justice, it is the time to impose a higher threshold so as to more effectively serve the leave mechanism's function of filter. He adopted the arguability test. Under this test, arguability means reasonable arguability. "A claim for relief which is not reasonably arguable could not be regarded as arguable. A reasonably arguable case is one which enjoys realistic prospects of success. Whilst the test adopted represents a higher threshold than the potential arguability test, claims which are reasonably arguable would be given leave to go forward under it. It is in the public interest that challenges which are not reasonably arguable should not be given leave to proceed."⁴³⁵ The Chief Justice's adoption of the test perhaps indicated his worry about the abuse of judicial review and the increasing tendency of the public's blindly reliance on judicial review to resolve a broad range of social, economic and political problems.

Anyway, constitutional judicial review has been a primary feature of Hong Kong's development of constitutionalism and may be of great significance to Hong Kong's transition to modern constitutional democracy. It gives the judiciary a new role to play in Hong Kong's constitutional politics. Judges must be cautious and modest when performing their new role as constitutional rule makers if they want to reduce the problem of democratic legitimacy and accountability. As a matter of principle, building a coordinative relationship, that is, a relationship of constructive dialogical interaction instead of a tension of constant conflicts, between the judiciary and other governmental branches in Hong Kong may benefit not only the autonomy of the Region but also the independence of judiciary and the rule of law.

3 Interpreting the Basic Law

As mentioned, to the CFA, Hong Kong courts' jurisdiction of constitutional review stems from their power of interpreting the Basic Law. A proper understanding of that power and its

⁴³³ "CJ's speech at Ceremonial Opening of the Legal Year 2006", Press Releases, <http://www.info.gov.hk/gia/general/200601/09/P200601090137.htm> and "CJ's speech at Ceremonial Opening of the Legal Year 2007", Press Releases, <http://www.info.gov.hk/gia/general/200701/08/P200701080120.htm>

⁴³⁴ *Po Fun Chan v. Winnie Cheung* (FACV10/2007), para.1-17

⁴³⁵ *Po Fun Chan v. Winnie Cheung* (FACV10/2007), para.15

application is crucial to defining the CFA's constitutional role under the "one country, two systems" principle, since the interpretative mechanism of the Basic Law serves to be an interface bridging Hong Kong's common law legal system with mainland China's communist legal system.⁴³⁶

In the common law tradition, producing authoritative interpretations of law is the exclusive prerogative of courts, but under Chinese legal system it is the NPCSC, the national legislature, that discharges the function of interpreting law.⁴³⁷ In practice the NPCSC allows the Supreme People's Court to make abstract judicial interpretation of law to guide the judiciary's concrete application of law in their work of adjudication.⁴³⁸ But when adjudicating cases, all courts, including the Supreme People's Court, have no capacity of interpreting law in the sense of forming binding rules for future cases. They just apply law to the concrete cases they are dealing with. Therefore, we may say, in China judges are merely the user or consumer of the law produced by the legislature; unlike their common law brethren, they are not the maker of rules. However, the mechanism of interpreting the Basic Law, which is a Chinese national statute and also serves as the constitution for HKSAR, is significantly different from both the interpretation doctrine in the common law tradition possessed by Hong Kong and the legal practice in mainland China. Actually, it is some kind of compromise between, or a combination of, the two.

Under article 158 of the Basic Law, while the NPCSC has the final say on the interpretation of all provisions of the Basic Law, the courts of HKSAR, in adjudicating cases, are also vested with the power to interpret all the provisions within the autonomy of HKSAR and other provisions outside the autonomy (the Excluded Provisions) subject to certain prescriptions. As for the Excluded Provisions, when four conditions are satisfied the courts of HKSAR must refer them to the NPCSC for interpretation: (1) an interpretation is necessary for resolving the case at hand; (2) the controversial provisions fall within the responsibility of the Central Government or concern the relationship between the Central Authorities and the Region; (3) the interpretation of the provisions will affect the judgment on the case; (4) the courts' hearing of the case must be final, by which it means the decision of the courts on this case will be unappealable. Procedurally, it is through the CFA that the courts refer such an interpretation issue to the NPCSC.⁴³⁹ The lower courts cannot refer issues directly to the NPCSC. In other words, the CFA is the only institutional channel connecting Hong Kong judiciary with the national legal system. It deserves noting that there is an interesting situation. That is, the CFA has no chance of delivering its opinion on the meanings of the Excluded Provisions because it is obliged to refer those provisions to the NPCSC for interpretation due to the finality of its judgment, while other lower courts could interpret Excluded Provisions for most of their judgments are still appealable and thus do not need to be referred. Nonetheless, the interpretative mechanism gives the CFA a unique constitutional status under the constitutional order of "one country, two systems", which requires it to define its constitutional role not only from a regional perspective but also from a national angle.

⁴³⁶ Hualing Fu, Lison Harris, and Simon N.M. Young, *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan, 2007), at 4.

⁴³⁷ Chinese Constitution, art.67(4)

⁴³⁸ The Resolution of the National People's Congress on further Strengthening the Work of Interpreting Law (1981), art.2 http://www.chinacourt.org/flwk/show1.php?file_id=1906 and The Regulation of the Supreme People's Court regarding the Work of Judicial Interpretation (2007) http://www.legalinfo.gov.cn/misc/2007-03/29/content_575931.htm

⁴³⁹ Art.158 of the Basic Law.

However, in its actual exercise of the interpretative power, the CFA seems to have placed much importance on the Region's autonomy and paid little attention to the nation's sovereign interests. The CFA has positively established and developed philosophies, approaches and tests to regulate Hong Kong courts' interpretation of the Basic Law. In so doing, it attempts to avoid the influence of the Central Government and reduce the chance of referring issues to the NPCSC for interpretation. By now there is not one case that has been referred by the CFA to the NPCSC although in several disputes the parties actually made such requests.⁴⁴⁰

3.1 *The CFA's Approaches to Interpretation*

The CFA dealt with the interpretation issue in *Ng Ka Ling*⁴⁴¹ for the first time and it took this opportunity to state its philosophy of interpreting the Basic Law unequivocally. Two significant approaches for constitutional interpretation, the purposive approach and the generous approach, were established by the CFA for the construction of the Basic Law. The Court believed that in general the purposive approach should be applied in the interpretation of a constitution such as the Basic Law. It pointed out, "[g]aps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context..."⁴⁴² Specifically, as to articles in Chapter III of the Basic Law which provide the fundamental rights of the Hong Kong residents, the CFA asserted that a generous interpretation should be given to them as it conceived that such constitutionally guaranteed fundamental rights and freedoms "*lie at the heart of Hong Kong's separate system.*"⁴⁴³ The CFA's establishment of the two approaches is very important and significant in the legal history of HKSAR because they form the basic principles guiding all the courts of HKSAR, including the CFA itself, to exercise their newly gained power of interpreting a mini-constitution under Hong Kong's new constitutional order.

Commentators have shown little doubt about the CFA's adoption of the purposive approach in interpreting the Basic Law, for the approach is widely recognised as an important criterion for legal interpretation not only in the common law world but also in continental legal systems.⁴⁴⁴ However, the difficulty is how to identify the real purpose of a particular provision of the Basic Law under the constitutional context of "one country, two systems." Is it the exact intention of the drafters or the purpose indicated by the text that we should look for? What are the differences between the two? Or the purpose of a constitutional provision is what judges say? The CFA declared, "*the purpose of the Basic Law is to establish the Hong Kong Special Administrative Region being an inalienable part of the People's Republic of China under the principle of 'one country, two systems' with a high degree of autonomy in accordance with China's basic policies regarding Hong Kong as set out and elaborated in the Joint Declaration. The purpose of a particular provision may be ascertainable from its nature or other provisions of the Basic Law or relevant extrinsic materials including the Joint*

⁴⁴⁰ Po Jen Yap, "Interpreting the Basic Law and the Adjudication of Politically Sensitive Questions", *Chinese Journal of International Law* (2007), Vol.6, No.3, 550-553

⁴⁴¹ *Ng Ka Ling v. Director of Immigration* (FACV14/1998)

⁴⁴² *Ng Ka Ling v. Director of Immigration* (FACV14/1998), para.74

⁴⁴³ *Ng Ka Ling v. Director of Immigration* (FACV14/1998), para.77

⁴⁴⁴ Aharon Barak and Sari Bashi, *Purposive Interpretation in Law* (Princeton University Press, 2005), at 86.

*Declaration.*⁴⁴⁵ However, when discussing the purpose of art.158 of the Basic Law, the CFA emphasised that the aim of the constitutional interpretative mechanism is to safeguard the autonomy of the HKSAR by looking merely at art.158(2), without analysing all the contents of the art.158 as a whole.⁴⁴⁶ Actually, safeguarding the SAR's autonomy is by no means the sole objective of the Basic Law. Clearly, another important purpose of the Basic Law is to safeguard the interests of sovereignty. That is the inherent logic of the doctrine of "one country, two systems" and indicated in the Preamble of the Basic Law.⁴⁴⁷ Accordingly, as Professor Albert Chen rightly argued, the true purpose of art.158, then, is to achieve an appropriate balance between the respective powers of interpretation of the Basic Law of the Hong Kong courts on the one hand and the NPCSC on the other hand.⁴⁴⁸ Based on it, in my opinion, Hong Kong courts, especially the CFA as the sole institutional link between the two legal systems, therefore, should define their role in constitutional interpretation as not only regional tribunals but also national legal institutions, looking after, without bias, both regional autonomy and the sovereign interest while making constitutional rules, for they are the primary interpreters of and the guardians for the Basic Law, a national statute which serves as the Region's constitution and aims at not only maintaining the prosperity and stability of Hong Kong but also upholding the national unity and territorial integrity.⁴⁴⁹

The CFA emphasised the importance of considering relevant extrinsic materials for ascertaining the purpose of a specific provision of the Basic Law. But as for what extrinsic materials are relevant, its approach appears confusing. Whilst requiring to use Sino-British Joint Declaration and the International Covenant on Civil and Political Rights to aid interpretation, the CFA showed a cold-shoulder to the Opinion of the Preparatory Committee of the NPCSC for the establishment of the HKSAR (the Opinion). It refused to consider that Opinion when ascertaining the purpose of a provision in the right of abode cases by alleging that the Opinion was made after the promulgation of the Basic Law and thus could not represent the purpose of the Basic Law. However, the NPCSC's interpretation in 1999 confirmed that the legislative intent of art.24 (2) of the Basic Law had been reflected in the Opinion.⁴⁵⁰ But the CFA did not regard this view as binding when dealing with the issue concerning art. 24(2)(1) of the Basic Law in *Chong Fung Yuen*⁴⁵¹ for it thought this view was obiter. Thus it refused to identify the intention of art. 24(2)(1) subject to the Opinion. Instead, it stated, "*The courts are bound to give effect to the clear meaning of the language. The 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.*"⁴⁵² Ironically, the CFA seemed to have forgotten what it had said in *Ng Ka Ling* when introducing the principle of purposive approach, that is, "*As to the language of its text, the courts must avoid a literal, technical, narrow or rigid approach. They must consider the context. The context of a*

⁴⁴⁵ *Ng Ka Ling v. Director of Immigration* (FACV14/1998), para.75

⁴⁴⁶ *Ng Ka Ling v. Director of Immigration* (FACV14/1998), para.81, 101

⁴⁴⁷ The Basic Law, the Preamble, para.2

⁴⁴⁸ Albert H Y Chen, "The Court of Final Appeal's Ruling in the 'Illegal Migrant' Children Case: A Critical Commentary on the Application of Article 158 of the Basic Law", in Yash P. Ghai, Hualing Fu, Wenmin Chen (ed), *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, (Hong Kong University 2000), p134.

⁴⁴⁹ Preamble of the Basic Law, para.2

⁴⁵⁰ The Interpretation by the Standing Committee of the National People's Congress of Article 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, art.2

⁴⁵¹ [2001] 2 HKLRD 533.

⁴⁵² [2001] 2 HKLRD 533 at 547.

*particular provision is to be found in the Basic Law itself as well as relevant extrinsic materials...*⁴⁵³

It may be curious that the CFA swung sometimes between the purposive approach and the natural meaning of the text. However, this seems to be a common feature of courts' constitutional interpretative behaviour. The CFA's counterparts in Europe have shown a similar tendency. As Roberto Gargarella demonstrates, "Courts do not choose one single interpretative theory and then stick to it in all subsequent decisions. In contrast, the tribunal tends to adopt many different interpretative theories at the same time, and make use of them more or less at will, depending on the case at hand. Thus, what usually happens is that the Court decides one case taking into account one particular interpretative theory, and the following by using the same or a different method."⁴⁵⁴ The key factor that makes the CFA choose to apply purposive approach or insist on the plain meaning of a text seems largely dependent upon whether there is a possibility of referring to a document made by the Central Authorities. If there is such a possibility, the CFA would be more likely to stick to the literal meaning of the Basic Law so that the use of the mainland's material to aid its interpretation work could be avoided, as it did in *Chong Fung Yuen*; If there is no question of the use of mainland materials, the CFA might tend to apply the purposive approach to interpret the Basic Law so that it could play a more creative role in its adjudication, as it did in *Ng Ka Ling*. This contradictory attitude of the CFA seems to reflect its worry, suspicion, fear and resistance of the influence from the mainland China's communist legal system. Avoiding as much as possible the legal influence from the Central Authorities might be a natural reaction of the CFA given it defines itself as mere a highest regional court. By doing so, it believes the autonomy of HKSAR could be safeguarded as much as possible. This kind of defensive attitude is also reflected in the CFA's analysis of the reference issue to which we now turn.

3.2 *The Reference Issue*

3.2.1 *Rules for Referring*

Under the mechanism framed by art.158 of the Basic Law, which was modelled on⁴⁵⁵ the EU's preliminary rulings procedure to the European Court of Justice,⁴⁵⁶ the CFA has a duty to refer some Basic Law provisions to the NPCSC for interpretations when the conditions prescribed are satisfied. This can be called "the reference issue". In *Ng Ka Ling* the CFA managed to establish operable rules for regulating its discharge of this constitutional duty. In its opinion, two conditions must be considered before referring an issue to the NPCSC.⁴⁵⁷ The first one is "the classification condition", meaning that the provisions in question must be the excluded ones which concern the affairs of the Central Government or the relationship between the Central Authorities and the Region. The second one is "the necessity condition", which means that in adjudicating the case such excluded provisions need to be interpreted

⁴⁵³ *Ng Ka Ling v. Director of Immigration* (FACV14/1998), para.76

⁴⁵⁴ Roberto Gargarella, "Motivating Judges: Democracy, judicial discretion, and the European Court of Human Rights", in Lynn Dobson and Andreas Follesdal (eds), *Political Theory and the European Constitution* (Taylor & Francis, 2004), at 167

⁴⁵⁵ *Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for Solicitation of Opinions)* (Hong Kong: Consultation Committee for the Basic Law, April 1988), 23 (introduction, par.52)

⁴⁵⁶ Consolidated Version of the Treaty on the Functioning of the European Union, Article 269 (formerly the Treaty Establishing the European Community/Treaty of Amsterdam (EC Treaty), Article 234 and the European Economic Community Treaty/Treaty of Rome (EEC Treaty), Article 177)

⁴⁵⁷ *Ng Ka Ling v. Director of Immigration* (FACV14/1998), para.89

and their interpretation will affect the final judgment. The CFA stressed that only when both of the conditions are satisfied will it be obliged to refer. Moreover, the CFA emphasised that it is for the Court itself alone, not the NPCSC, to judge whether the conditions are met.⁴⁵⁸ In other words, the CFA claimed itself had, during dealing with a case, the sole power of determining whether a provision of the Basic Law should be referred to the NPCSC, placing the NPCSC in a passive position in exercising its interpretation power. Consequently, the NPCSC's interpretative function would have to depend largely on the CFA's supply of caseload. For considering the classification condition, the CFA introduced a predominant provision test.⁴⁵⁹ According to it, when two provisions of the Basic Law are concerned in a case and only one of them is an excluded provision, it does not necessarily lead the CFA to refer this excluded provision to the NPCSC for interpretation. The Court must decide which provision is predominant in the adjudication of the case. If the excluded provision cannot be identified as predominant, then the CFA need not to refer it to the NPCSC and the courts in the Region can interpret it themselves.

While the CFA's establishment of the two terms of the "classification condition" and the "necessity condition" to deal with the reference issue itself has not been questioned by commentators, the predominant provision test created by it to aid its consideration of the classification condition is of more controversy. It was severely criticised by Professor Albert Chen.⁴⁶⁰ He argued that the test might violate art.158 (3) of the Basic Law, for applying it would result in an exclusion of the NPCSC's opportunity to interpret an excluded provision, even when that provision would affect the case substantially, due to the Court's identifying it as non-predominant. To him, the right order of reasoning should be to consider the "necessity condition" before the "classification condition" rather than the reverse as the CFA did. Reasoning in this order, he believed, could avoid the incorrect result of not referring an Excluded Provision, which was necessary for and would affect the judgment of the case, to the NPCSC for interpretation.

Professor Chen rightly pointed out the problem of the CFA's decision, but he seemed to complicate unnecessarily the reasoning model by highlighting the order of those two conditions. The order of the CFA's considering of the two conditions could be of no problem if the predominant provision test for determining the classification condition is discarded. The test is artificial and unnecessary. Its application can only lead to a considerable reduction of the possibility of referring a relevant provision to the NPCSC. That may be exactly the CFA's intention of creating the test. However, the test's constitutionality is questionable, for it could amount to an exemption of the CFA's constitutional obligation of referring under certain circumstances and the CFA itself seems to lack competence of making such an exemption. If the unnecessary predominant provision test is put away, the Court's two conditions model might be perfect. According to it, when any Excluded Provision identified by the classification condition is necessary for and affects the judgment of the case (determined by the necessity condition), it must be referred by the CFA to the NPCSC for interpretation, regardless of whether it is predominant or not compared with other provisions involved in the case.

⁴⁵⁸ *Ng Ka Ling v. Director of Immigration* (FACV14/1998), para.90

⁴⁵⁹ *Ng Ka Ling v. Director of Immigration* (FACV14/1998), para.103-105

⁴⁶⁰ Albert H Y Chen, "The Court of Final Appeal's Ruling in the 'Illegal Migrant' Children Case: A Critical Commentary on the Application of Article 158 of the Basic Law", in Yash P. Ghai, Hualing Fu, Wenmin Chen (ed), *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, (Hong Kong University, 2000), pp113-141)

Alternatively, based on Mr. Qiao Xiaoyang's explanatory speech to the NPCSC when it made the interpretation in 1999,⁴⁶¹ we may also suggest a "close relationship" test, by which it is meant when an Excluded Provision has such a close relationship with other non-excluded provisions that they are inseparable in dealing with the dispute, then the excluded provision would "absorb" other provisions and all the inseparable provisions should be referred to the NPCSC for interpretation if such an interpretation is necessary for handling the case. It seems therefore appropriate for the CFA to reconsider its predominant provision test some day.

The questionable predominant provision test was established by the CFA to determine whether to refer an issue to the NPCSC in the situation where more than two provisions, at least one Excluded Provision and one provision within autonomy, are involved. The decisive factor lies in the relationship between them. To the Court, only when the Excluded Provision is predominant, should the question be referred. If not so, it need not be referred and should be interpreted by Hong Kong courts. However, when there is just one provision of the Basic Law needed to be classified and no question of predominance can be asked due to the singleness of the provision, what should be the proper legal test? The CFA handled this question in *Chong Fung Yuen*.⁴⁶² In that case, the Director of Immigration contended that the legal test to decide whether a provision of the Basic Law was an Excluded Provision that satisfied the classification condition and thus might need to be referred to the NPCSC for interpretation, would be whether its implementation would have a 'substantive effect' on affairs which were the responsibility of the Central People's Government or the relationship between the Central Authorities and the Region. The CFA rejected that suggestion on the ground that art.158 (3) of the Basic Law did not refer to the effect of its implementation and thus the use of such a test was not justified on the language of art.158(3).⁴⁶³ Moreover, it worried, this test would mean that most if not all the articles in the Basic Law could be potentially excluded provisions and this would spell the end of Hong Kong's judicial autonomy. Instead, the CFA thought, it was the character of the provision that art.158 (3) required the Court to consider and therefore the right question to be asked should be whether the provision disputed had the character of one which concerned affairs which were the responsibility of the Central People's Government or the relationship between the Central Authorities and the Region, but the CFA did not further put forward any general guidance for ascertaining the character of a Basic Law provision.⁴⁶⁴

Indeed, the character of a provision is by no means static. Rather, it may change with the varying of context. Take art. 24(3), the disputed provision in *Ng Ka Ling*, for example. It defines one category of Hong Kong's permanent residents and ostensibly concern no element of the Central Government's responsibility, but when it is interlocked with another provision, art.22, which is an Excluded Provision and would qualify art.24 (3), then art.24 (3) would get "infected" by the character of art.22 and should be referred together with art.22 to the NPCSC for interpretation. Here the test advised by Mr. Po-Jen Yap seems more appropriate. He suggests that the proper question the CFA should ask is whether the disputed provision concerns a matter that falls within or conflicts with a power expressly retained by the central government under the Basic Law. When the answer is negative, then the matter falls within

⁴⁶¹ Qiao Xiaoyang's speech is contained in *Hong Kong's Constitutional Debate: Conflict over Interpretation*, (Hong Kong University Press 2000), pp 481-486

⁴⁶² *Director of Immigration v. Chong Fung Yuen* [2001] 2 HKLRD 533; or *Director of Immigration v. Chong Fung Yuen* (FACV26/2000)

⁴⁶³ *Director of Immigration v. Chong Fung Yuen* (FACV26/2000)

⁴⁶⁴ *Ibid.*

the limits of autonomy delegated to the regional courts and a judicial reference to the NPCSC is unnecessary. If the answer is yes, the Court must refer.⁴⁶⁵

It must be noted that, whether in *Ng Ka Ling* or *Chong Fung Yuen*, the CFA took considerable energy to analyze and establish the approaches and tests for the application of art.158 of the Basic Law, which provides the mechanism of interpreting the Basic Law. In fact, in my view, this has constituted a substantial interpretation of art.158 itself, which should be exclusively interpreted by the NPCSC for the article distributes powers of interpreting the Basic Law between the NPCSC and the courts in HKSAR and is thus obviously an Excluded Provision concerning the relationship between the Central Authorities and the Region over which the CFA has no jurisdiction of interpretation. Moreover, interpretation of art.158 is of course necessary to dealing with the two cases faced by the CFA, otherwise, the CFA should not have spent so much time in discussing it. Certainly, the interpretation of it would also affect the judgment of the cases, as the interpretation would give guidance for the CFA's determination of which substantive provisions involved should be referred to the NPCSC for interpretation and this would consequently have substantial impact on the final result of the judgments. In other words, interpretation of art.158 would provide a foundation for determining the reference issue itself. In fact, the CFA's opinion in the two decisions is a kind of constitutional rule-making of art.158 and has formed a binding precedent in Hong Kong. The approaches and tests (such as "classification condition", "necessity condition" and "predominant provision", especially the last one) created by the CFA for the application of art.158, without referring to the NPCSC, would effectively affect the relevant jurisdiction of the CFA and the NPCSC provided in art.158. Therefore the CFA's interpretation of art.158 of the Basic Law does constitute a violation of China's constitutional principle that to ensure the unitary character of the state regional courts are deprived of competence to decide their own competence (*Kompetenz-Kompetenz*). It is indeed a usurpation of the interpretative power of the NPCSC granted by art.158 itself.

3.2.2 *The Chief Executive's Role*

So what could we do if the CFA refused to make a reference to the NPCSC for interpretation where it should have been made? In fact, a very controversial practice has been used by the Chief Executive of HKSAR (CE) to tackle this problem in the event of right of abode litigation in 1999, that is, the CE may invite the assistance from the Central Authorities to rectify the CFA's refusal. The Government of HKSAR disagreed with the CFA's interpretation of the relevant provisions of the Basic Law in its judgments, believing the implementation of that would lead 1.6 million immigrants from mainland to flood into Hong Kong.⁴⁶⁶ This would be beyond the bearing capability of Hong Kong. To resolve the problem, the CE chose to report to the State Council, the Central Government of PRC, suggesting it ask the NPCSC to interpret the relevant provisions.⁴⁶⁷ Eventually, the State Council submitted a request to the NPCSC and the NPCSC delivered an interpretation which confirmed the HKSAR Government's understanding of the relevant provisions and thus

⁴⁶⁵ Po-Jen Yap, "10 Years of the Basic Law: the Rise, Retreat and Resurgence of Judicial Power in Hong Kong", (2007) 36 *Common Law World Review*, p177

⁴⁶⁶ Mark Landler, "Hong Kong Tries to Limit Court Ruling On Residency", *The New York Times* (19 May 1999),

<http://query.nytimes.com/gst/fullpage.html?res=9C00E7DC133EF93AA25756C0A96F958260&partner=rssnyt&emc=rss> accessed on 12 December 2008

⁴⁶⁷ "The Chief Executive's Report to State Council Concerning the Right of Abode Issue for An Interpretation of Relevant Provisions of the Basic Law", Website of the One Country Two Systems Research Institute, http://www.octs.org.hk/e_page_ce_doc.htm accessed on 12 December 2008

strike down the CFA's interpretation.⁴⁶⁸ The CE legitimated his action by basing it on art.43 and art.48 (2) of the Basic Law, which provide that the CE is accountable to the Central Government and one of his functions is to be responsible for the implementation of the Basic Law in HKSAR.⁴⁶⁹

The CE's action was severely criticised by many commentators. He was accused of having damaged the rule of law and autonomy of Hong Kong as he had no power to seek interpretation from NPCSC.⁴⁷⁰ The critics claimed that art.158 allocates the power or duty of referring a provision to NPCSC for interpretation solely upon the CFA and it is none of the CE's business. The CE employing art.43 and 48(2) to legitimate his action was alleged to be artificial. In my view, although these commentators rightly pointed out that there is no express constitutional arrangement in the Basic Law for the CE to seek for interpretation from the NPCSC, they seemed to ignore the fact that actually the CE did not apply directly to the NPCSC for an interpretation. He just reported to his boss, the State Council, the problems he was facing and sought its assistance. This action is constitutional and guaranteed by the Basic Law. It was the State Council that formally initiated the interpretation process after its receiving of the CE's report by submitting a bill to the NPCSC according to the provision of Chinese Constitution. It must be borne in mind that even when there is no bill from the State Council, the NPCSC can still make an interpretation on its own initiative. That means, in principle, not just the CE, but even an ordinary individual in Hong Kong could take appropriate actions to persuade the NPCSC to deliver an interpretation on its own as the NPCSC's interpretative authority is a free-standing one, say, procedurally the NPCSC's making of an interpretation of the Basic Law does not necessarily need a formal request from other bodies or individuals. Therefore, it seems that the attack on the CE's action lacks a legal basis. Of course, this might be an inherent flaw of the Basic Law, as the procedures for amendment of the Basic Law may also be avoided by using a similar method. The Basic Law vests the power to propose bills for amendment to it in the NPCSC, the State Council and the HKSAR. But it prescribes a very strict and complicated procedural requirement for HKSAR to propose a bill.⁴⁷¹ However, as what he did in the right of abode case, the CE could also avoid this procedural requirement by persuading (formally or informally, publicly or privately) the State Council or NPCSC to use its own power to propose such a bill for an amendment of the Basic Law to the NPC.

As analyzed earlier, the CE's seeking for assistance from the Central Authorities may be the result of the lack of checks and balance of the power of the CFA within HKSAR's own legal and political structures. The intervention from the central level may recover the check and balance of Hong Kong domestic political order. Of course, the interference may also have the effect of distorting and unbalancing the power order in HKSAR. Thus, the CE must be extremely cautious and prudent when considering whether to invite the Central Government to interfere. Normally, he should respect and implement the CFA's decision. Only in highly exceptional cases, he may seek assistance from the Central Government.

⁴⁶⁸ The Interpretation by the Standing Committee of the National People's Congress of Article 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China

⁴⁶⁹ "The Chief Executive's Report to State Council Concerning the Right of Abode Issue for An Interpretation of Relevant Provisions of the Basic Law", Website of the One Country Two Systems Research Institute, http://www.octs.org.hk/e_page_ce_doc.htm accessed on 12 December 2008

⁴⁷⁰ Martin Lee, "Interpretation of Basic Law (2)", Speech for the Motion Debate at the Legislative Council Meeting (26 May 1999) http://www.dphk.org/e_site/research/human990526.htm accessed on 12 December 2008

⁴⁷¹ Art. 159, the Basic Law.

3.2.3 *The Court's Retreat*

As discussed, in *Ng Ka Ling* the CFA refused to refer the Excluded Provision to the NPCSC for interpretation and on the one hand created the referral test to minimise the NPCSC's opportunity of interpretation, and on the other hand established significant interpretative approaches to guide local courts' constitutional interpretation. After the NPCSC's intervention, the CFA retreated from its previous judicial overreach and began showing deference to the national legislature's authority. In two key subsequent cases, *Lau Kong Yong v. Director of Immigration*⁴⁷² and *Director of Immigration v. Chong Fung Yuen*⁴⁷³, the CFA explicitly acknowledged that the NPCSC's power of interpreting the Basic Law was essentially unlimited, stating in *Lau Kong Yong* that "the power of interpretation of the Basic Law conferred by art.158(1) is in general and unqualified terms"⁴⁷⁴ and that "that power and its exercise is not restricted or qualified in any way by art. 158(2) and 158(3)."⁴⁷⁵ In *Chong Fung Yuen*, the CFA reiterated that "the power of the Standing Committee extends to every provision in the Basic Law and is not limited to the excluded provisions referred to in art.158(3)." The CFA's change of attitude was viewed by some commentators as not "excessive deference", but "strategic retreat" which has strengthened its ability to act as a protector of human rights, "in part by ensuring its attentions and strength were not diverted by regular run-ins with Beijing over exactly where the line between the CFA and the NPCSC lies."⁴⁷⁶ It seems to me, the CFA's restraint is a kind of self-rectification of its overreach in *Ng Ka Ling* and an awakening from its previous impulse when first dealing with constitutional interpretation issue. Its realisation of the limits of its competency and adoption of a modest stance would, under the political reality, avoid direct confrontation with the NPCSC and thus safeguard the autonomy of the region and its own authority.

3.2.4 *Lessons from the EU*

Besides negatively showing its respect for the NPCSC's interpretative power so as to avoid conflicts, the Court should also be expected to act positively to refer cases to the NPCSC for interpretation so as to facilitate and improve the integration and interaction of the two systems. In this regard, as the interpretative mechanism of article 158 of the Basic Law was actually learned from the ECJ's preliminary reference procedure and the constitutional order of the EU has some similar features to China's "one country two systems" settlement (primarily, that is, within a unified polity, various subunits with distinct constitutional and legal systems function parallelly and harmoniously), the EU's experience could, therefore, certainly offer some useful lessons for Hong Kong courts, particularly the CFA, to define their constitutional role in interpreting the Basic Law, especially in making judicial reference to the NPCSC.

According to Article 269 EC (previously 234), three types of issues can be dealt with by the ECJ through delivering preliminary rulings, including questions in relation to interpreting the EU Treaty, reviewing and interpreting acts of the EU institutions and of the European Central Bank, and interpreting the statutes of bodies established by an act of the Council. It must be

⁴⁷² [1999] 3 HKLRD 778

⁴⁷³ [2001] 2 HKLRD 533

⁴⁷⁴ [1999] 3 HKLRD 778, 798-99

⁴⁷⁵ [2001] 2 HKLRD 533, 548

⁴⁷⁶ Thomas E. Kellogg, "'Excessive Deference' or Strategic Retreat? Basic Law Article 158 and Constitutional Development in Hong Kong", *Hong Kong Journal* (Spring 2008), http://www.hkjournal.org/PDF/2008_spring/5.pdf, p.7, accessed on 12 December 2008

noted that the initiators of the procedure should be the courts or tribunals of the member states. When any such question is raised before them and a decision on the question would be necessary to enable them deliver a judgment, these courts or tribunals may refer the issue to the ECJ for a preliminary ruling at their discretion. However, if a decision of such question will lead member judiciary make a final judgment under national law, that court or tribunal must bring the matter before the ECJ. It must be pointed out that the preliminary rulings procedure is not an appeals procedure. Unlike appeal courts, the ECJ cannot decide facts of cases or overrule the decisions of national courts. Article 269 merely provides a means whereby national courts, when questions of EC law arise, may apply to the ECJ for a preliminary ruling on matters of interpretation or validity prior to themselves applying the law. Under the Basic Law's interpretation arrangement, China's NPCSC enjoys a role in interpreting analogous to the ECJ's part in delivering preliminary rulings; and Hong Kong courts, including the CFA, have a duty of making reference to the NPCSC which similar to that of the courts of the EU member states.

The primary purpose of article 269 is to secure a uniform EU legal order throughout the member states. As the ECJ pointed out, "Article 177 [now 269] is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances the law is the same in all states of the Community."⁴⁷⁷ The preliminary reference procedure provides an interface between the ECJ and the national courts by which the EU legal system is interlocked with the legal systems of all member states. In a sense, Article 269 effectively turns national courts into EU courts which serve as judicial institutions of the EU responsible for the implementation of EU law in their own states. This is apparently a cheap and efficient way to develop a uniform legal order in the EU. The interaction created by the procedure between the ECJ and national courts is important not only to the substantive development of the EU law, but also to the relationship between EU law and national law. Almost all the major principles securing the uniformity of the EU legal order, such as the crucial concepts of direct effects and the supremacy of EU law, established by the ECJ, were decided in the context of a reference to that court for a preliminary ruling under Article 269.⁴⁷⁸

As mentioned, another important function of the reference procedure is the development of EU law. About 45 percent of the cases that come to the ECJ are referred through this procedure.⁴⁷⁹ These cases provide the ECJ opportunities to develop new interpretations of EU law, resolve uncertainties, correct injustices, and enunciate principles. Almost all the significant rulings concerning EU law have resulted from such cases.⁴⁸⁰ Moreover, the mechanism devised by Article 269 also allows the ECJ to review the validity of the acts of the EU institutions. The ECJ's dealing with private parties' challenges to constraints imposed upon them by the EU institutions could maintain institutional balance. Additionally, the preliminary reference procedure has an administration of justice function. It enables national courts to decide disputes that involve EU law by allowing them to tap into the expertise of the ECJ.⁴⁸¹ The point here is not to assess the actual effectiveness of these EU procedures in

⁴⁷⁷ *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (No.1) (Case 166/73), [1974] ECR 33

⁴⁷⁸ Josephine Steiner, Lorna Woods and Christian Twigg-Flesner, *EU Law* (9th Edition), (Oxford University Press 2006), p193

⁴⁷⁹ Damian Chalmers, Christos Hadjiemmanuil, Giorgio Monti, Adam Tomkins, *European Union Law: Text and Materials* (Cambridge University Press 2006), p281.

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Ibid.*, pp.287-291.

detail. The value is as a model for the assessment of the Basic Law's interpretative mechanism provided by art.158 of the Basic Law and the CFA's performance under that mechanism.

The smooth running of the preliminary reference procedure which leads to the ECJ's significant contributions to the integration of the EU relies heavily on the cooperation of the national courts, which would provide the ECJ with caseload and enforce loyally what the ECJ has decided. As the ECJ itself pointed out, "That obligation to refer a matter to the Court of Justice is based on co-operation, established with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice. More particularly, the third paragraph of Article 234 [now 269] seeks to prevent the occurrence within the Community of divergences in judicial decisions on question of Community law. The scope of the obligation must therefore be assessed, in view of those objectives, by reference to the powers of the national courts, on the one hand, and those of the Court of Justice, on the other, where such a question of interpretation is raised within the meaning of Article 234 [now 269]".⁴⁸² In practice, generally, most of the national courts, except for last instance courts with constitutional powers, tend to support the reference procedure positively.⁴⁸³ They voluntarily make themselves be a part of the EU legal system despite that would result in some revolutionary consequences, such as to abandon the deeply entrenched principle of the prohibition against judicial review of legislation and to set aside whole class of traditional rules governing their jurisdiction and procedures. On the other hand, it must be noted that the ECJ has also shown sensitivity to the national constitutional courts' concerns about the Union institutions staying within the competences conferred upon them. It repealed a Community measure of political importance on the ground of lack of competence;⁴⁸⁴ it refused to extend horizontal direct effect to directives;⁴⁸⁵ it found that the EU has no competence to accede to the European Convention on Human Rights without a prior Treaty amendment.⁴⁸⁶ So the relationship between the ECJ and national courts has come to be described as "judicial dialogues" or "co-operative constitutionalism", which has been based on a structured and ongoing "conversation", co-operation and mutual trust.⁴⁸⁷ Then an important question emerges: Why do they, particular the national courts who are loyal to the sovereignty of their states, behave in a cooperative manner rather than a resistant or competitive way? This question is important to me because I assert in the thesis a harmoniously cooperative relationship being developed between the CFA and the NPCSC under the principle of "one country and two systems". In order to achieve that kind of relationship European courts' experience in the EU's evolution may provide us with some lessons. As for the EU national courts' incentives to cooperation, scholars provide the following answers.

The first one is the "judicial empowerment thesis", which assumes that through actively employing the procedure provided by Article 269 most national courts, except the supreme courts, could acquire powers they did not enjoy previously. These powers mainly concern

⁴⁸² *CILFIT v. Ministry of Health* (283/81) [1982] ECR 3415

⁴⁸³ Karen J. Alter, "The European Union's Legal System and Domestic Policy: Spillover or Backlash?", in Judith Goldstein, Miles Kahler, Robert O. Keohane, Anne-Marie Slaughter (ed.), *Legalization and World Politics* (MIT Press, 2001), p121.

⁴⁸⁴ Case C-376/98, *Germany v. European Parliament and Council*, [2000] ECR I-8419.

⁴⁸⁵ Case 91/92 *Dori v. Recreb Srl*. [1994] ECR I-3325.

⁴⁸⁶ *Opinion 2/94 on Accession by the Community to the ECHR*, [1996] ECR I-1759

⁴⁸⁷ Anneli Albi, Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of 'Co-operative Constitutionalism', *European Constitutional Law Review*, Volume 3 (2007), p29-30

reviewing the validity of national legislation, enhancing their own authority to control legal outcomes and reducing the control of other institutional actors.⁴⁸⁸ Alter has demonstrated that national lower courts are often more willing to make references because a reference bolsters their authority in the national legal system and allows the court a way to escape national legal hierarchies and challenge higher courts' jurisprudence.⁴⁸⁹ As Weiler indicates, "Even in countries which knew fully fledged judicial review, such as Italy and Germany, the EC system gave judges at the lowest level powers that had been reserved within the national system only to the highest courts in the land."⁴⁹⁰ Through the mechanism of Article 269, the lower courts and their judges of the member states also get a facility to engage with the highest jurisdiction in the EU. Moreover, it is the national courts themselves that Article 269 gives the discretion to decide whether refer a question to the ECJ. Thus they may not feel that the empowerment of the Court is at their expense. It seems that these elements encourage most of the courts make wide and enthusiastic use of the Article 269 procedure in many member states.

Another important dynamic could be found in the private actors' enthusiastic participation in the process. The doctrines of supremacy and direct effect established by the ECJ through preliminary reference procedure opened up the European legal system to private litigants. Motivated by their own interests, private litigants provided a steady supply of litigation capable of provoking the Article 269 procedure. Furthermore, with the expansion of the actors involved, a whole community of interests, by individuals, lawyers, and courts developed a stake – professional, financial, and social – in the successful administration of Community law by and through the national judiciary and have thus acted as an agency for its successful reception.⁴⁹¹

Thirdly, the legal formalism, which remains a very substantial power in European jurisprudence, seems to play a considerable part in facilitating national courts' compliance to the ECJ.⁴⁹² As Weiler points out, "The constitutional interpretations given to the Treaty of Rome by the European Court carried a legitimacy deriving from two sources: first from the composition of the European Court which had as members senior jurists from all Member States; and, second, from the legal language itself, the language of reasoned interpretation, 'logical deduction', systemic and temporal coherence, the artifacts which national courts would partly rely upon to enlist obedience within their own national courts."⁴⁹³ Put simply, the high quality of the Court and its works can be one explanation of the national courts' willingness to comply.

⁴⁸⁸ Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, (Oxford University Press 2000), p164

⁴⁸⁹ Karen J. Alter, "The European Court's Political Power", *West European Politics* (1996) 19(3), at 458-87

⁴⁹⁰ J. H. H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and other Essays on European Integration* (Cambridge University Press 1999), p197.

⁴⁹¹ See Anne-Marie Burley and Walter Mattli, "Europe Before the Court", *International Organization*, Vol.47, No.1, (Winter 1993), pp.41-76

⁴⁹² J. H. H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and other Essays on European Integration* (Cambridge University Press 1999), p195; Alex Warleigh, *Understanding European Union Institutions* (Routledge, 2002), p9

⁴⁹³ J. H. H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and other Essays on European Integration* (Cambridge University Press 1999), p195

Last but not least, according to Weiler's analysis, national courts' cooperation may be rooted in the transnational horizontal nature of the process.⁴⁹⁴ Sometimes courts in one member state tend to respect and accept what their counterparts in other member states are doing. In order to keep its own professional pride and prestige, a court may feel obligatory to accept a new doctrine when other similarly positioned courts have committed themselves. Especially when the court is satisfied that it is a part of a trend, its acceptance facilitated considerably.

All in all, these elements make national courts "has [have] come to accept the constitutional doctrines, structural and material, of the European Court."⁴⁹⁵ It seems that to understand these elements may play a role in helping us to explore whether a similar harmoniously cooperative relationship could be build between the Hong Kong judiciary, especially the CFA, and the NPCSC under the interpretation mechanism established by article 158 of the Basic Law.

Notably, EU member states enjoy sovereignty, but their national courts show a cooperative attitude to the ECJ's authority in interpreting the EU law, and make reference to the ECJ quite voluntarily, happily turning themselves into the role of EU judicial institutions; As a result, the uniformity of EU legal order was ensured. The integration of EU has been thereby enhanced considerably. Hong Kong, as a special administrative region of China, has no sovereign status; it should thus be much easier for its courts, particularly the CFA, to adopt a coordinative, dialogic attitude to the NPCSC's authority in interpreting the Basic Law. They should be happy to refer cases to the NPCSC, rather than being reluctant, resisting or competing. However, the difference between the EU's preliminary reference procedure and the Basic Law's interpretation arrangement is that in Hong Kong only the CFA has the reference obligation: Unlike the national lower courts in EU member states which can initiate the reference procedure, Hong Kong lower courts have neither duty nor discretion to make a reference to the NPCSC. They can interpret all the provisions of the Basic Law themselves so long as their judgement will not be final. As examined, the CFA, like some EU member states' national supreme courts, has shown its unwillingness to refer issues to the NPCSC. However, from the EU's experience, I do believe that Hong Kong courts, particularly the CFA, should define themselves not only as regional tribunals, but also national judiciary enforcing a national statute, the Basic Law, which serves at the same time as HKSAR's constitutional law. Moreover, it seems appropriate here to suggest an amendment to article 158 of the Basic Law to confer Hong Kong lower courts the discretion of directly referring provisions of the Basic Law which are outside the autonomous scope to the NPCSC for interpretation. In addition, private litigants may have a role to play in persuading courts to make reference as well. As for the NPCSC, it should place a heavier emphasis on the legal formalism aspect, *inter alia*, giving itself a quasi-judicial role and producing the text of interpretation with quality legal reasoning, so that its attractiveness for reference from Hong Kong courts would increase considerably. In a word, the EU lessons tell us that a structured and ongoing conversation, co-operation and mutual trust are desirable for Hong Kong courts, especially the CFA, and the NPCSC to achieve a harmonious relationship between the two legal systems and a uniform constitutional order required by the "one country" aspect of the "one country, two systems" formula.

⁴⁹⁴ J. H. H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and other Essays on European Integration* (Cambridge University Press 1999), p196

⁴⁹⁵ J. H. H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and other Essays on European Integration* (Cambridge University Press 1999), p192.

4 Acts of State

Acts of state are excluded from the CFA's jurisdiction. While confirming and guaranteeing extensive jurisdiction of HKSAR's judiciary, the Basic Law also explicitly provides that all the courts in HKSAR have no jurisdiction over "acts of state such as defence and foreign affairs."⁴⁹⁶ Moreover, it designs a mechanism to make the restriction executable, requiring that when an issue concerning an act of state arises in the adjudication of a case, the court must obtain a certificate from the Chief Executive (CE) on questions of fact and the certificate should be binding on the court. The CE is obliged to obtain a certifying document from the Central Government before issuing such a certificate.⁴⁹⁷ As we know, the Basic Law is an elaboration and legalisation of the Sino-British Joint Declaration 1984. However, in the Joint Declaration there is no such restriction. This provides an excuse for the opponents to question the exclusion of acts of state from the jurisdiction of the courts in HKSAR.⁴⁹⁸ But the Joint Declaration does clearly proclaim that foreign and defence affairs are exclusively the responsibilities of the Central People's Government.⁴⁹⁹ Some scholars thus conceive that the phrase "foreign and defence affairs" in the Joint Declaration modifies the whole administration in HKSAR, including the judiciary. In their view, this inclusion makes the Basic Law's restriction of the Hong Kong courts' jurisdiction by "acts of state" seem consistent with the Joint Declaration.⁵⁰⁰ In order to smoothly carry out the preparatory work of the establishment of Hong Kong's new supreme judiciary in the transitional period, Britain and China concluded the Court of Final Appeal Agreement in June of 1995. In the Agreement, Britain agreed to amend the draft of the Court of Final Appeal Bill and add the formulation of "acts of state" provided by Article 19 of the Basic Law into the bill to restrict the jurisdiction of the CFA.⁵⁰¹ Finally paragraph 3 of article 19 of the Basic Law was copied into section 4 of the bill and passed by the Legislature as the Hong Kong Court of Final Appeal Court Ordinance, which served as a domestic legal foundation for the future establishment and operation of the CFA.

The issue of "acts of state" was a controversial question from the beginning of drafting the Basic Law. As we know, China is extremely sensitive to issues concerning its sovereignty. It always holds a firm or even rigid stance on those issues. Clearly, "acts of state" is exactly such an issue, and thus we could imagine what attitude China would naturally have when dealing with it. Indeed, in the initial 1988 version of the draft of article 19 a much broader restriction on the jurisdiction of HKSAR's courts was suggested, which reflected China's great concern of the sensitive sovereignty elements in the issue. The 1988 draft said, "*Courts of the HKSAR shall have no jurisdiction over cases relating to defence and foreign affairs, which are the responsibility of the Central People's Government, and cases relating to the executive acts of the Central People's Government. Courts of the HKSAR shall seek the advice of the Chief Executive whenever questions concerning defence, foreign affairs or the executive acts of the Central People's Government arise in any legal proceedings. A statement issued by the Chief Executive regarding such questions shall be binding on the courts. Before issuing such a statement, the Chief Executive shall obtain a certificate from the*

⁴⁹⁶ Art.19, Para.1 and 2, the Basic Law.

⁴⁹⁷ Art. 19, Para.3, the Basic Law

⁴⁹⁸ Donna Lee, "Discrepancy between Theory and Reality: Hong Kong's Court of Final Appeal and the Acts of State Doctrine", *Columbia Journal of Transnational Law* (vol.35, 1997), at 184-185

⁴⁹⁹ Art.3(1) of the Sino-British Joint Declaration 1984.

⁵⁰⁰ Jared Leung, "Concerns over the Rule of Law and Court of Final Appeal in Hong Kong", *ILSA Journal of International and Comparative Law*, Vol.3 (1996-1997) p852.

⁵⁰¹ Point 3 of the CFA Agreement, reprinted in South China Morning Post, June 10, 1995, at 2.

Standing Committee of the NPC or the State Council" (emphasis added). This version was strongly criticised and opposed by many commentators and members of the drafting committee, particularly Martin Lee, a barrister and the leader of Hong Kong Democratic Party, as they thought such a broad exclusion would encroach on the promised autonomy and the rule of law in the future HKSAR. As a result of their efforts, the 1989 version of the draft deleted the formulation of "*the executive acts of the Central People's Government*" and narrowed the exclusion considerably. In a more succinct way, the draft provided, "*Courts of the HKSAR shall have no jurisdiction over acts of state. Courts of the HKSAR shall obtain a statement from the Chief Executive on questions concerning the acts of state whenever questions arise in any legal proceedings. This statement shall be binding on the courts. Before issuing such a statement, the Chief Executive shall obtain a certificate from the Central People's Government*". However, this version did not receive the necessary two-thirds votes of the drafters and thus failed to be adopted. Based on it, after some revisions were made, the final version eventually was formed and passed.⁵⁰²

What worries the critics most is the definition and scope of the "acts of state". The Basic Law and the CFA Ordinance do not define what acts of state exactly are. Do they just refer to defence and foreign affairs? The answer seems to be negative as in art.19 of the Basic Law and section 4 of the CFA Ordinance the words "defence and foreign affairs" merely serve as giving examples to what may be acts of state. They follow the words "such as", appearing to be not exhaustive. Then what else may be considered to be acts of state? Can they be hung together with the common law conception of "act of state"? Some commentators, particularly Jared Leung, Simon Holberton and Frank Ching, believe that the conception of acts of state in common law "*typically relate[s] to the making of treaties with foreign countries, declarations of law and the seizure of land and goods in right of conquest*".⁵⁰³ But the common law definition was not adopted to be written in the Basic Law and the CFA Ordinance despite suggestions from some drafters. This fact, conceived by the mentioned commentators, implies there is actually difference between the "acts of state" in the Basic Law and those in common law doctrine.⁵⁰⁴

Conversely, Professor Yash Ghai argues that it is possible to interpret art.19 of the Basic Law and s.4 of the CFA Ordinance as consistent with the common law doctrine of act of state.⁵⁰⁵ In his opinion, although art.19 says that acts of state are not within Hong Kong courts' jurisdiction, it does not necessarily mean the courts cannot consider cases which involve acts of state at all. Nor does an executive certificate which is conclusive only on points of fact relevant to the act of state do so. Indeed, it is the courts' responsibility to decide whether there is actually an act of state in existence. To Ghai, this is the same position as common law. Ghai also believes that the act of state in common law is not just limited to defence and foreign affairs and this perhaps can match the scope of acts of state implied in art.19 and s.4.

⁵⁰² The present article 19 stipulates, "The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government."

⁵⁰³ Supra note 4. Also see Simon Hoberton, "Hong Kong Law under Chinese Law: The Interface between Basic and Common Law", *Fin. Times*, Jun 12, 1995, at 3; Frank Ching, "Agreement on Court of Final Appeal Raises New Questions", *Far. E. Econ. Rev.* Jun 29, 1995, at 36.

⁵⁰⁴ "Clause Raises Worries on Human Rights after '97", *South Morning Post*, July 17, 1995, at 5.

⁵⁰⁵ Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*, (Hong Kong 1999), pp318-319.

Based on these considerations, he concludes that the provisions about acts of state in art.19 and s.4 seem superfluous and unnecessary, for the provisions of continuing the common law in HKSAR and that the courts' must be subject to the jurisdiction restrictions imposed on them by the legal system and principles previously in force in Hong Kong could be enough to ensure the Central Government's concern with issues of acts of state. In other words, he thinks writing the formulation of acts of state into art.19 and s.4 does not provide additional safeguards to the Central Government's interest.

However, with respect, I have to disagree with Professor Ghai's view. Actually, there are differences between the common law doctrine of act of state and that in the Basic Law. The gap is so deep that makes it difficult to reconcile them. In fact, the formulation of "acts of state" in the Basic Law and the CFA Ordinance makes the scope of the CFA's jurisdiction considerably narrower than the common law concept of "act of state" would do. In other words, China's "acts of state" would exclude more affairs from the purview of the courts than the common law "act of state" could do.

In English common law, the expression of "act of state" is generally used to describe "an act done by the Crown as a matter of policy in relation to another State or to an individual who is not within the allegiance to the Crown."⁵⁰⁶ Dr. E. C. S. Wade defined it as "*an act of the executive as a matter of policy performed in the course of its relations with another state including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown*",⁵⁰⁷ a definition formula recognised by the House of Lords in *Nissan*.⁵⁰⁸ Put another way, acts of state in common law appear to fall into two groups. "First, they may be acts in relation to foreign States such as the declaration of war or the annexation of territory. Secondly, in certain classes of case, an act of sovereign power relating to an individual may be claimed to be an act of State in order to prevent the grieved person claiming redress for damage done."⁵⁰⁹ Act of state cannot be pleaded by the Crown against its own subjects and alien friends within its jurisdiction. As reiterated by the House of Lords, an act of state "*presupposes an activity outside the country, since there is no such thing as an act of state in this country. It must be judged on a geographical basis.*"⁵¹⁰ To the Lords, that explains why enforcement of treaties which may affect persons within the jurisdiction must be authorised by Parliament through enacting new statutes.⁵¹¹ The foundation of act of state in the English common law is: allegiance carries protection. The Crown has the duty to protect those who owe allegiance to it, including its subjects and alien friends within its territory. They should be treated differently from enemy aliens. As for British subjects, their right to compensation and the Crown's inability to plead act of state arise even outside the jurisdiction of the state, for the subjects owe allegiance in any part of the world and the obligation of the Crown is reciprocal.⁵¹² In a word, the act of state doctrine cannot be used against a British subject anywhere, neither in his/her own country nor abroad.

It is worth noting that, even as far as the foreigners abroad are concerned, the rapid development of human rights law in recent years makes it more difficult to oust a court's

⁵⁰⁶ O Hood Philips and P Jackson, *Constitutional and Administrative Law*, P Jackson and P Leopold (eds), 8th edn, (2001), p. 321

⁵⁰⁷ E.C.S.Wade, *15 Year Book of International Law* (1934), p103.

⁵⁰⁸ *Attorney-General v. Nissan* [1970] AC 179 at 191

⁵⁰⁹ Helen Fenwick, Fenwick, Gavin Phillipson, *Constitutional and Administrative Law* (Routledge, 2003), p164

⁵¹⁰ *Attorney-General v. Nissan* [1970] AC 179 at 192.

⁵¹¹ *Ibid*

⁵¹² *Ibid*.

jurisdiction by employing the doctrine of act of state. In *Regina (Al-Skeini and others) v. Secretary of State for Defence*,⁵¹³ the House of Lords held that the Human Rights Act 1998 could be applied to a public authority acting not only in the United Kingdom but also within its article 1 jurisdiction outside its territory and the European Human Rights Convention may also bind a state or its military bases, embassies and consular agents outside its territory under certain circumstances. The significance of this decision is that the House of Lords implies that an action violating human rights, despite being in the name of act of state, could not be allowed to escape from the examination of a court. As a result, it seems that under English common law to exclude courts' jurisdiction by pleading the doctrine of act of state may face increasingly challenge from the Human Rights Act in the future.

The Basic Law is a Chinese national statute although it enjoys a semi-constitutional status in HKSAR. The definition of acts of state in art.19 of the Basic Law should be determined by the relevant doctrine in Chinese law. The interpretation mechanism designed in art.158 of the Basic Law guarantees the final power of the NPCSC in interpreting the provisions which concern the affairs outside the autonomy of HKSAR and relations between HKSAR and the Central Government.⁵¹⁴ Apparently, act of state in art.19 belongs to this category. Unfortunately, however, in China there is little development of the doctrine of acts of state either in practice or in theory. Among all China's effective national legislation, so far there are only three pieces clearly mentioning the expression of "acts of state."⁵¹⁵ One is the Administrative Procedure Law, of which art.12 provides that the people's courts shall not accept cases against acts of state in areas such as national defence and foreign affairs.⁵¹⁶ The other two are the Basic Law of HKSAR we are discussing now and the Basic Law of Macao SAR. All the three pieces of legislation do not define what acts of state exactly are. There are also no interpretations issued by the People's Supreme Court or the NPCSC to define the concept, since in practice no cases concerning this issue have actually arisen so far. In spite of the lack of authority in practice, one thing is sure. It can be reasonably concluded that all the terms of acts of state in the three laws should be interpreted coherently and consistently as they all are national statutes enacted by the same national legislature, the NPC. If the formulation of acts of state in art.19 of the Basic Law of HKSAR is interpreted with the doctrine of common law while the term of acts of state in the Administrative Procedure Law is determined in accordance with Chinese law, how to ensure the uniformity of Chinese legal system demanded by its Constitution?⁵¹⁷

It must be noted that in Chinese language, there is no distinction between "acts of state" and "acts of the state". Both are called "Guojia Xingwei (国家行为)" and tend to cover all actions made by the state. Chinese scholars have no consensus on the precise definition of acts of state and its legal meaning. The mainstream of academia in China puts acts of state into two categories: one is international, another is domestic. At the international level, acts of state

⁵¹³ [2007] UKHL 26

⁵¹⁴ Art.158, the Basic Law

⁵¹⁵ Hu Jinguang, "On Acts of State [Lun Guojia Xinwei]", available at http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=30493. Professor Hu indicated in the article that there were four pieces of national legislation containing the words of "acts of state". However, now there are actually only three because the Regulation of Administrative Reconsideration has been replaced by the Administrative Reconsideration Law which deletes the expression of "acts of state" in the Regulation.

⁵¹⁶ Art.12, the Administrative Procedure Law of the People's Republic of China. See "Laws and Regulations of the People's Republic of China Governing Foreign-related Matters" (1991.7), compiled by the Bureau of Legislative Affairs of the State Council of the People's Republic of China and published by the China Legal System Publishing House.

⁵¹⁷ Art.5, Chinese Constitution.

relate to a state's dealing with the relationships with other states; in the domestic aspect, acts of state concern the acts of using state power by state's institutions to govern the state.⁵¹⁸ According to Mr. Hu Jinguang, the primary element of acts of state is their highly political nature and it is this which makes the court unsuitable to handle them.⁵¹⁹ However, although acts of state are not justiciable, Chinese courts do in principle have the power to judge whether one governmental action is an act of state. If the answer is yes, then the courts should stop dealing with the matter. In fact, it must be pointed out that probably only the People's Supreme Court may exercise the judging power because the primary actors of acts of state in China are conceived to be the national congress, the state president and the State Council,⁵²⁰ over which the lower courts have no jurisdiction according to China's legal practice. In principle, only the national highest judicial institution might be competent to examine certain of their actions.⁵²¹

Under the "one country, two systems" principle, do the courts in HKSAR also have the power to judge whether an act of Central Government is indeed an act of state over which the courts enjoy no jurisdiction? It seems that unlike their counterpart in mainland China, the People's Supreme Court, the Hong Kong courts' similar power has been considerably restricted by the mechanism in art.19 of the Basic Law, which makes the courts subject to the certificate provided by the Chief Executive after consulting the Central Government.⁵²² Moreover, even without this kind of certificate issuing arrangement, as required by art.158 of the Basic Law the CFA still has to refer the issue to the NPCSC for interpretation if there is a need to clarify the meaning of "acts of state". Based on the Chinese version of the concept, acts of state which are excluded from the jurisdiction of Hong Kong courts may consist of more than merely the defence and foreign affairs exemplified in art.19 of the Basic Law. Arguably, besides them, other actions of the Central Government, such as the State Council's appointing of the Chief Executive and Primary Officials in HKSAR, the decisions of the NPCSC to add or reduce the national laws listed in Annex III of the Basic Law to make them enforceable in HKSAR, and the declarations of the NPCSC to invalidate those laws previously enforced in HK due to its lack of conformity to the Basic Law, might be identified as "acts of state" from Chinese jurisprudence, which not only defines the concept from the angle of the international element, but also stresses its domestic aspect.

All in all, the concept of act of state in Chinese law is much broader than that in the common law doctrine. Differently from the common law, acts of state in China can be employed by the state against its own citizens on its own land. The scope of them covers not only defence and foreign affairs but also other internal affairs which involve the state's exercise of governing power. A greater emphasis is placed on the political nature of the act opposed to the allegiance which is grounded by the common law. Local courts, arguably including the CFA in SAR, have no competence to judge whether a state action is indeed an act of state.⁵²³

⁵¹⁸ Fang Shirong, *Lun Juti xingzheng xingwei* [On Concrete Administrative Acts], (1996 Wuhan), pp106-113 (in Chinese). Also see Huang Jie (ed), *Xingzheng Susong Shiyong Daquan* [A Practical Encyclopaedia of Administrative Litigation] (Zhangjiakou: Hebei People's Publishing House, 1993)

⁵¹⁹ Hu Jinguang and Liu Feiyu, "Lun Guojia Xingwei de panduan biao zhun ji fanwei (On Criteria for and Scope of Acts of State)", (2000) 1 *The Journal of Renmin University of China*, pp83-87.

⁵²⁰ Jiang Mingan, *Jurisprudence on Administrative Procedure Law* [Xingzheng Faxue] (Peking University Press, 1993), p126 (in Chinese)

⁵²¹ *Ibid.*

⁵²² Art. 19, the Basic Law.

⁵²³ That is the reason why art.19 of the Basic Law provides "The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state... whenever such questions arise in the

Anyway, the formulation of acts of state in art.19 of the Basic Law has to be determined by Chinese law, which would give a higher degree of restriction over the jurisdiction of the courts in HKSAR on the relevant issues than the common law would. As a result, the Central Government's concern of safeguarding national interest may be provided much greater sense of satisfactory. However, this could also give rise to some degree of uncertainty in the area due to the fact that China lacks well-developed theory and judiciary practice on the doctrine. Fortunately, no cases concerning acts of state have actually arisen in HKSAR until now despite the SAR has been established more than 12 years. But we cannot exclude the possibility that one day this issue would face the CFA and the NPCSC. At that time, deferring to the Chinese jurisprudence or insisting on the common law method, that is a question for the CFA.

5 Conclusion

The "one country, two systems" doctrine promises the Hong Kong judiciary's enjoyment of independence, power of final appeal and extensive jurisdiction on the one hand. It imposes significant restrictions on their competence to deal with affairs concerning national sovereign interest on the other hand. These restrictions are primarily reflected in certain controversial jurisdictional issues such as constitutional judicial review, interpreting the Basic Law and acts of state, which largely define the CFA's constitutional role. The Hong Kong courts' exercise of constitutional review actually started from 1991 when the Bill of Rights Ordinance was enacted. After Hong Kong returned to China and the Basic Law took into effect in 1997, Hong Kong courts' constitutional adjudication flourished, reflected significantly in the CFA's active performance in *Ng Ka Ling*. The CFA's assertion of competence to scrutinise legislative acts of the NPC and its Standing Committee was an attempt to establish Hong Kong judiciary's authority and strengthen the region's autonomy under its new constitutional order. However, this is incorrect and unacceptable from the perspective of Chinese legal system, which should, inherently required by the "one country, two systems" framework, be taken seriously by Hong Kong courts when handling issues concerning national elements. Rather, disclaiming jurisdiction over the national legislature's acts might be beneficial to the Hong Kong judiciary's independence and authority for that would not provoke the Central Authorities to employ their constitutional power and political means, which is too powerful to be resisted by Hong Kong judiciary, to interfere. However, there is no doubt that Hong Kong courts do have full jurisdiction to review the constitutionality of regional legislative and executive acts. They can examine whether these acts are compatible with the provisions of the Basic Law which fall within the autonomy of the region; but it is not suitable for them to scrutinise these local acts' consistency with provisions of the Basic Law concerning the responsibility of the Central Government and the relationship between the Central Authorities and the region, which should be exercised by the NPCSC in accordance with art.17 of the Basic Law. Constitutional judicial review changes Hong Kong's legal and political landscape, making a trend of judicial supremacy coexist with the officially claimed executive-led feature of the polity and the emergence of legislature dominance. Due to the fact that the power of amending the Basic Law is not enjoyed by Hong Kong institutions, Hong Kong's legislative and executive branches are unable to put the courts in ultimate control of the democratic will by amending its constitution and in extreme circumstances may only invite the Central Government's intervention to rebalance the local political order. Both the question of democratic legitimacy or accountability and the need to

adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government."

maintain its independence and authority require the judiciary to be modest and restrained. In this regard, the UK model of judicial review in human rights cases, rather than the US way of constitutional review currently imitated by Hong Kong courts, seems more appropriate for Hong Kong judiciary to adopt. Essentially, that means the courts can only declare a law's incompatibility with a constitutional standard but cannot invalidate the law under examination. Additionally, the courts should be careful not to exercise abstract constitutional review. In fact, the CFA seems have realised the courts' limits and the necessity of being cautious and humble in constitutional adjudication.

The mechanism of interpreting the Basic Law provided by art.158 excludes the CFA's constitutional jurisdiction in relation to the Excluded Provisions and imposes on it a duty to refer these provisions to the NPCSC for interpretation, making the CFA the mere institutional channel connecting Hong Kong's common law legal system with the national, socialist and civil law legal system. This requires the CFA to define its role beyond a local perspective. The concerns of the other system should be taken into account and taken seriously. However, in practice the CFA has indeed indicated a defensive attitude towards the NPCSC's interpretative power probably because of its pride in its own common law tradition and the distrust and fear of the communist legal practice in mainland China. It established the purposive interpretation approach for guiding Hong Kong courts' constitutional interpretative activities. But its construction of the purpose of art.158 of the Basic Law cannot be seen as absolutely correct due to its focus solely on the regional autonomy and ignoring of the national sovereign aspect which underlies art.158's division of interpretative power. When using extrinsic materials to help identify the real intent of a Basic Law provision, the Court refused to adopt certain documents of the Preparatory Committee of the NPCSC for the establishment of the HKSAR. Indeed, there were signs that show the CFA oscillating between its assertion of purposive interpretation and sticking to the originalist approach. The decisive element seems to be whether there is a chance of invoking materials made by the authorities of the Central Government. If there is, the Court may tend to insist on the natural meaning of the Basic Law text. If there is not, purposive interpretation might prevail. As for the referral issue, the CFA established "classification condition" and "necessity condition" as the general tool to judge whether to refer an Excluded Provision to the NPCSC for interpretation. Specifically, it put forward the predominant provision test for dealing with the issue when both Excluded Provisions and non-Excluded Provisions are concerned. It further pointed out that it was the character of a provision, rather than the effect of its implementation, that should be considered when determining whether a provision is indeed an Excluded Provision. Notably, the CFA declared that it is for itself alone to decide whether to refer an issue. In my opinion, the appropriateness of the predominant provision test should be reconsidered, for it might have the effect of reducing the chance the NPCSC's exercise of its interpretative power in certain circumstances. Moreover, the character of a Basic Law's article may vary with the context. An appropriate test I suggest to replace the predominant provision test is the close relationship test or the absorbing test, which means where both Excluded Provisions and non-Excluded Provisions are concerned, if a close relationship exists between them in the context of the concrete case at stake, both of them should be referred to the NPCSC for interpretation as the Excluded Provision "absorbs" the non-Excluded Provisions. To establish these interpretative approaches and tests, the CFA has actually interpreted art.158 of the Basic Law, which is apparently an Excluded Provision and should be interpreted by the NPCSC, and thus usurped the national authority's constitutional power. The CFA's refusal to refer issues to the NPCSC forced the Chief Executive to seek assistance from the State Council, who subsequently requested the NPCSC's interpretation to rectify the CFA's decision. Arguably, this can be seen as a constitutional convention forming

a correcting mechanism to the CFA's behaviour. After *Ng Ka Ling*, the CFA retreated considerably from its bold stance by repeatedly acknowledging its respect for the NPCSC's final authority on interpreting the Basic Law. This is a kind of self-adjust, which could avoid direct confrontation with the Central Authorities and reduce the chance of their intervention. In this regard, a lesson can be learnt from the EU experience. That is, in order to achieve a uniform legal order, a relationship of coordination, dialogue and mutual trust should be built between the CFA and the NPCSC; Hong Kong courts, especially the CFA, like their brethren in EU member states, should define themselves not only regional interests' guardian but also national judicial institution.

The concept of "acts of state" is an important exclusion of the CFA's jurisdiction. One major problem is that there is no precise meaning of it provided in the Basic Law and the CFA Ordinance. This may have negative effects on the Court's exercise of its jurisdiction and give rise to certain degree of uncertainty. It is argued that the meaning of "acts of state" should be interpreted in accordance with Chinese jurisprudence, rather than the common law doctrine. Actually, there are significant differences between the two. In English common law, act of state involves mainly foreign elements. Usually it cannot be employed to against its own subjects and applied in its own territory. With the development of modern human rights law, the doctrine of act of state faces further restrictive requirements. However, in Chinese jurisprudence, much concern is placed on the political nature of the concept. Its scope covers not only the international level but also, notably, domestic aspect. That means state actions which could be identified as "acts of state" are not merely limited to foreign and defensive affairs. Lower courts, arguably including the CFA in Hong Kong, are of no competence to judge whether an activity is indeed an act of state. They are merely able passively to accept the relevant claim of the Central Authorities. Therefore, the Chinese version of acts of state tends to impose much more restrictions on Hong Kong courts' jurisdiction than the English Common Law doctrine could. That seems to be exactly the intent of the drafters of the Basic Law, who were greatly concerned with China's sovereign interest in this regard. As the guardian of the Basic Law in Hong Kong, the CFA should abide by such constraints whether it likes it or not.

Chapter 5

Protection and Promotion of Fundamental Rights and Freedoms

*"...a written charter of rights, enforced by an independent judiciary, is central to the protection of personal liberty."*⁵²⁴

– The Honorable Margaret H. Marshall

1 Introduction

When the issue of return to China was raised in the late 1970s and during the transitional period before 1997, especially after 1989's Tiananmen Square event, one of the major concerns of the Hong Kong people and international community was how to ensure Hong Kong's human rights would not be oppressed under communist China's rule after 1997. Establishing the Court of Final Appeal (CFA) was perceived as an important institutional arrangement to maintain the independence of the judiciary and the rule of law and thus facilitate the protection of human rights in Hong Kong. Thus the local people had great expectations of the CFA.⁵²⁵ Now Hong Kong has been governed by China for more than twelve years. Although during this period there have been several events and some facts viewed by certain observers as threats to human rights,⁵²⁶ no human rights tragedy actually occurred and in daily life human rights are protected well generally. As the British Government acknowledges, after Hong Kong's reunification with China, the rights and freedoms promised to Hong Kong in the Joint Declaration and the Basic Law continue to be upheld.⁵²⁷ The U.S. authority has delivered a similarly positive comment.⁵²⁸ Of course this achievement results from many factors. Among them the courts, especially the CFA, play a significant part. It will be seen that the Court has not failed the people's expectations. As a modern court with constitutional function, like its counterparts in other jurisdictions, one most important job of the CFA is to provide individuals with effective rights protection. The protection and promotion of human rights, as mentioned in Chapter 3, has been seen by many scholars as an important legitimisation of a constitutional court. In this chapter the CFA's contributions to protecting fundamental rights and freedoms in Hong Kong will be investigated. There will be the following sections. The first one explains the legal and constitutional framework for human rights protection in Hong Kong. Then we will discuss

⁵²⁴ Margaret H. Marshall, " 'Wise Parents do not Hesitate to Learn from the Children': Interpreting State Constitutions in An Age of Global Jurisprudence", (2004) 79 *New York University Law Review*, p1639

⁵²⁵ This can be, to some extent, reflected by Hong Kong pro-democrats' struggle for a better settlement of the establishment of the CFA in 1990s. See James V. Feinerman, "Hong Kong Faces 1997: Legal and Constitutional Issues" in Warren I. Cohen and Li Zhao (eds), *Hong Kong Under Chinese Rule: the Economic and Political Implications of Reversion* (Cambridge University Press, 1997), pp79-84

⁵²⁶ Amnesty International, "Hong Kong's return to Chinese sovereignty: ten years on", available at <http://www.amnesty.org/en/library/asset/ASA19/001/2007/en/c80092c6-d383-11dd-a329-2f46302a8cc6/asa190012007en.pdf>

⁵²⁷ Foreign and Commonwealth Office of UK, *Six-monthly Reports On Hong Kong*, available at <http://ukinhongkong.fco.gov.uk/en/working-with-hong-kong/britains-commitment/six-monthly-reports>

⁵²⁸ U.S. Department of State, *2008 Human Rights Report: China (Includes Tibet, Hong Kong and Macao)*, 25 February 2009, available at http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119037.htm#hong_kong

the CFA's generous interpretative approach and open-minded attitude in this respect, which demonstrate the CFA's continuous efforts in improving human rights protection level in Hong Kong under the new constitutional order. After that, some leading cases decided by the CFA concerning certain fundamental rights, such as the freedom of expression, demonstration and the right to equality, will be examined so that a clearer picture of the Court's role in the area will emerge. Last, a brief conclusion will be drawn.

2 The Legal and Constitutional Framework

Britain did not adopt a rights charter for Hong Kong during its colonial rule. Nor were sufficient democratic rights conferred. However, Hong Kong residents did enjoy a degree of freedom safeguarded by the rule of law in this period. Under British governance, the protection of human rights in Hong Kong relied heavily on the common law system transferred from England. The judiciary based on the common law played a significant role in protecting individual freedoms in Hong Kong. In the early 1980s, the question of China's resumption of the exercise of sovereignty over Hong Kong was put on the agenda. Hong Kong faced a historic change. To smooth Hong Kong's transition and maintain its future stability and prosperity, many important arrangements were negotiated, agreed and adopted by China and Britain. Britain also took certain unilateral precautions in an attempt to prevent the perceived threats to human rights from mainland China after 1997. In the process, human rights were entrenched and constitutionalised by a series of legal documents, including the Sino-British Joint Declaration 1984 (the Joint Declaration), the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (the Basic Law), and the Bill of Rights Ordinance 1991 (BRO). These documents formed the legal and constitutional basis for human rights protection in Hong Kong after its reversion to China.

The Joint Declaration encompasses the formal agreement of China and Britain on Hong Kong's return to China on 1 July 1997, China's basic policies regarding Hong Kong, and the two sides' assurance of a smooth transfer. According to the basic policies declared by China, a Hong Kong Special Administrative Region with executive, legislative and independent judicial power, including that of final adjudication, would be established, the existing legal, socio-economic and political structure were to survive the transfer of governance, the laws currently in force in Hong Kong would be basically unchanged, and rights and freedoms would be ensured by law.⁵²⁹ These policies listed in the Declaration laid a foundation for the future protection of human rights in Hong Kong. The Joint Declaration also clearly provided that protecting human rights is an obligation of HKSAR Government and then elaborated such rights. It stated that:⁵³⁰

The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law. The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom of the person, of speech, of the press, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, of strike, of demonstration, of choice of occupation, of academic research, of belief, inviolability of the home, the freedom to marry and the right to raise a family freely.

⁵²⁹ Para.3 of the Sino-British Declaration.

⁵³⁰ The Section XIII of the Annex I of the Sino-British Joint Declaration.

It also assured that the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong would remain in force.⁵³¹

It must be noted that, although the Joint Declaration played a crucial role in ensuring the stable transition of Hong Kong, its legal status in the HKSAR is not completely solid. This may diminish its role in Hong Kong's rights protection. The Joint Declaration is an international agreement between the Central Governments of China and Britain. Rather than being a party to the Declaration, Hong Kong is merely a "subject matter" of it. Despite the fact that the Joint Declaration was duly registered by both parties with the Secretariat of the United Nations, it has no direct effect in the HKSAR as Hong Kong practises a dualist approach toward international law, which requires that in order to be binding, international obligations must be incorporated into domestic law through enabling or implementing legislation. The Joint Declaration has not been adopted by the HKSAR legislature through an ordinance. Therefore, Hong Kong residents cannot directly invoke the provisions of the Joint Declaration to claim their rights before courts. However, judges always use the Declaration as valuable historical material to assist their interpretation of the Basic Law, a constitutional document elaborating the Joint Declaration and containing a rights charter for Hong Kong residents.⁵³² Thus, the Joint Declaration is an important legal document for human rights protection in Hong Kong. In addition, it could also serve as a legitimate basis for the international community to oversee China's commitments to Hong Kong's human rights guarantee.

The Basic Law, a mini constitution for HKSAR, is the most important legal foundation for achieving human rights in the Region. First of all, based on the Joint Declaration, the Basic Law puts a new constitutional order in place for Hong Kong, under which the rule of law, the core foundation for the protection of human rights, is ensured. As far as the legal system is concerned, the Basic Law provides that: the common law and laws previously in force are to be maintained, unless found inconsistent with the Basic Law or amended by the legislature;⁵³³ the independence of the judiciary is guaranteed, and judges are given full security of tenure;⁵³⁴ Hong Kong residents are assured of the right to bring legal proceedings against acts of the executive authorities.⁵³⁵ These, and other guarantees, ensure that the rule of law prevails in Hong Kong and thus provide a solid foundation for protecting human rights. An exclusive chapter on fundamental Rights and freedoms of the residents (Chapter III) is written into the Basic Law to enshrine various human rights, including: freedom of speech, of the press and of publication, of assembly (art.27); freedom from arbitrary or unlawful arrest, detention or imprisonment (art. 28); freedom from arbitrary or unlawful search of, or intrusion into, a resident's home or other premises (article 29). Notably, article 39 in the Chapter III of the Basic Law creates a framework for domestic application of international human rights law in Hong Kong:

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

⁵³¹ Ibid.

⁵³² The Basic Law, Chapter III

⁵³³ Art.8 of the Basic Law

⁵³⁴ Art.2, 80,85,and 89 of the Basic Law

⁵³⁵ Art.35 of the Basic Law

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

There are also provisions in other chapters of the Basic Law relating to rights or means to exercise them.⁵³⁶ For example, the right of property and of the ownership of enterprises appears in Chapter V (Economy),⁵³⁷ and the presumption of innocence and the right to trial by jury are in Chapter IV (Judiciary).⁵³⁸

As the Basic Law serves as a constitutional document for Hong Kong and no law applied in Hong Kong is allowed to be inconsistent with it, the extensive rights and freedoms guaranteed by it obtain a constitutional status. The Basic Law also provides a much larger scope for judicial challenge of government actions than before reunification, primarily by giving the courts in Hong Kong the possibility to exercise constitutional judicial review power, one critical element in improving the level of protection of human rights in a modern society committed to constitutionalism.

The third important legal document is the Hong Kong Bill of Rights Ordinance, which was enacted by the Legislature of Hong Kong in June 1991 to codify and incorporate the provisions of International Covenant on Civil and Political Rights (ICCPR) as a domestic law of Hong Kong. Accordingly, the British authority amended the Letters Patent, the constitution of Hong Kong of the day, to entrench constitutionally the Bill of Rights Ordinance, making it superior to all other subsequent primary legislation passed by the Hong Kong Legislative Council. The Legislative Council was banned from enacting law inconsistent with the Ordinance.⁵³⁹ There were provisions in the Ordinance itself making it enjoy a special status as well. For example, section 2(3) spells out the purpose of the Bill as the domestication of the ICCPR and thus requires the courts to take the history, purposes and international jurisprudence of the ICCPR into consideration in interpreting the Bill; Section 3 states that all pre-existing legislation that admits of a construction consistent with this ordinance shall be given such a construction, and that all pre-existing legislation that does not admit of such a construction consistent with the Ordinance is, to the extent of the inconsistency, repealed; Section 4 states that all legislation enacted on or after the commencement dates shall, to the extent that it admits of such a construction, be construed so as to be consistent with the ICCPR as applied to Hong Kong.

It must be pointed out that the ICCPR, along with the International Covenant on Economic, Social and Cultural Rights, was extended to Hong Kong by the United Kingdom as long ago as 1976. But no legislation was made to incorporate them into Hong Kong's domestic law and thus those rights were not legally enforceable in Hong Kong for a long period. However, why did Britain suddenly decide to domesticate and even constitutionise the Bill of Rights for Hong Kong in 1991? The primary reason seemed to be a response to the consequences of the Tiananmen Square Event on the 4th June 1989, which provoked the Hong Kong people's great fear of the likely oppression of human rights after Hong Kong's reunification with

⁵³⁶ Michael C. Davis, "Constitutionalism and Political Culture: the Debate over Human Rights and Asian Values", (1998) 11 *Harvard Human Rights Journal*, p109.

⁵³⁷ Article 105 of the Basic Law.

⁵³⁸ Article 86, 87 of the Basic Law.

⁵³⁹ Hong Kong Letters Patent, No.2 1991, reprinted in *Public Law and Human Rights: A Hong Kong Source Book 19* (Andrew Byrnes and Johannes Chan eds., 1993)

mainland China.⁵⁴⁰ Due to its distrust of the Chinese authorities of the day, the British side unilaterally adopted some important policies regarding Hong Kong, such as to speed the democratisation process and enact the Bill of Rights Ordinance, in an attempt to take precautions against the anticipated abuse of rights from China in the future and thus ease people's worry.

The Chinese government opposed the Bill of Rights Ordinance 1991, claiming it breached the Basic Law and the Joint Declaration and would have negative impact on the future application of the Basic Law in HKSAR.⁵⁴¹ China's arguments primarily included: the "automatic repeal" in Section 3, *inter alia*, gave the Ordinance a special quality which placed it above other law; the Ordinance restricted the legislative capability of the Legislative Council; and it changed the previous judicial practice by providing courts with the power of reviewing legislation. In February 1997, prior to the handover, when reviewing the law previously in force in Hong Kong in accordance with art.160 of the Basic Law, the Standing Committee of the National People's Congress (NPCSC) of China amended the Ordinance by deleting section 2(3), 3 and 4 from it.⁵⁴² The original provisions of the Societies Ordinance and the Public Order Ordinance, which had been amended or repealed by Hong Kong legislature on the ground of inconsistency with the Bill of Rights Ordinance 1991, were restored to the statute book by the NPCSC.⁵⁴³

Beijing's action worried many people. They, typically represented by Martin Lee, lamented "It [the Ordinance] would in name still be a bill of rights, but it would offer no real protection against the passage of law by a Beijing-controlled legislature. Without these sections, a Beijing-appointed legislature could clearly introduce and pass laws that would be in blatant contravention of the International Covenant on Civil and Political Rights (ICCPR), and the Hong Kong courts would have no choice but to enforce these repressive laws."⁵⁴⁴ Has his anticipation come true? The answer is certainly not. It seems he had forgotten the Basic Law. The Basic Law guarantees a democratic legislature, rather than "a Beijing-appointed" one, for Hong Kong. This legislature, of which Martin Lee himself had been a member for about ten years since reunification, consists of various political forces and it is thus hard for it to pass laws "in blatant contravention of" human rights. More importantly, the Basic Law entrenches extensive rights and freedoms. Most significantly, art.39 of the Basic Law domesticates and constitutionalises all the rights contained in ICCPR, ICESCR and international labour conventions. Relying on the power of interpreting the Basic Law, Hong Kong courts gain the jurisdiction of constitutional review over local legislation and executive actions. They can scrutinise their compatibility with the rights not only guaranteed in the Basic Law itself but also contained in the mentioned international treaties. This has become a powerful weapon for the protection of human rights indeed. Now, let us look at the courts' role, particularly the CFA' performance, in this regard.

⁵⁴⁰ Martin C. M. Lee, "The Rule of Law in Hong Kong: Implications for 1997", (1996) 547 *Annals of the American Academy of Political and Social Science*, p169.

⁵⁴¹ The Talk of the Spoksperson of the Foreign Ministry on 6 June 1991 on the Enactment of the Bill of Rights Ordinance by the Legislative Council of Hong Kong, at <http://www.humanrights-china.org/china/rqlc/C3052001117145428.htm> (visited on 6 March 2008)

⁵⁴² Section 7, Annex II, The Decision of the Standing Committee of the National People's Congress on the Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, at http://www.locpg.gov.cn/big5/fvfg/jbxgwj/200702/t20070224_1643.asp (visited on 6 March 2008)

⁵⁴³ *Ibid*, at section 9, 10.

⁵⁴⁴ Martin C. M. Lee, "The Rule of Law in Hong Kong: Implications for 1997", *Annals of the American Academy of Political and Social Science*, vol.547 (Sep. 1996), p168.

3 Generous Interpretation Approach

Basically, the CFA may be marked as a liberal court in terms of its positive attitude towards human rights protection and promotion. So far the CFA does not seem to disappoint those who expected it would play a pivotal role in safeguarding the rule of law and human rights in post-handover Hong Kong. The most important principle developed by the CFA, which serves as the foundational approach for the courts in HKSAR to deal with human rights cases, might be the test of generous interpretation firstly adopted in *Ng Ka Ling*.⁵⁴⁵ *Ng Ka Ling* was heard by the CFA in January 1999, just about one and a half year after reunification. It was an appropriate time for the CFA to set out certain authoritative guidelines regarding rights protection for all the courts in HKSAR.

As we discussed in Chapter 4, there are considerable controversies about the CFA's decision in *Ng Ka Ling*, mainly concerning the courts' constitutional jurisdiction and the reference issue. The CFA's holdings involving these issues have been considerably amended by the subsequent interpretation of the NPCSC. However, notably, there is little controversy about the generous interpretation approach affirmed by the CFA to deal with rights provisions of the Basic Law and this approach is not touched by the interpretation of the NPCSC either. Thus it remains an effective instrument for all the courts in Hong Kong to employ when determining human rights disputes.

The CFA stated its generous interpretation approach in *Ng Ka Ling* as follows.⁵⁴⁶

Chapter III of the Basic Law begins by defining the class constituting Hong Kong residents including permanent and non-permanent residents and then provides for the rights and duties of the residents, including the rights of abode in the case of permanent residents. What is set out in Chapter III, after the definition of the class, are the constitutional guarantees for the freedoms that lie at the heart of Hong Kong's separate system. The courts should give a generous interpretation to the provisions in Chapter III that contain these constitutional guarantees in order to give to Hong Kong residents the full measure of fundamental rights and freedoms so constitutionally guaranteed.

Regarding the CFA's statement, three points should be addressed. First of all, it must be kept in mind that, literally speaking, the scope of applying a generous interpretation approach is limited by the CFA merely to the provisions contained in Chapter III of the Basic Law, which is entitled "Fundamental Rights and Duties of the Residents". As we mentioned earlier, however, other chapters of the Basic Law also have provisions guaranteeing certain rights such as the rights of property⁵⁴⁷, the presumption of innocence and the right to trial by jury⁵⁴⁸. It is hard to say that these rights do not "lie at the heart of Hong Kong's separate system". They are of course constitutionally guaranteed rights although ostensibly they are not identified as fundamental rights and freedoms by being placed in Chapter III. Actually, these rights do not appear to be less fundamental or less important than those provided in Chapter III. Contrarily, in certain cases they may even be more fundamental or more important than some rights entrenched in Chapter III. Then the question should be raised here is whether the generous interpretation approach could also be applied to construing these provisions outside

⁵⁴⁵ *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315.

⁵⁴⁶ *Ibid*, para. 77.

⁵⁴⁷ The Basic Law, Chapter V. art.105

⁵⁴⁸ The Basic Law, Chapter IV, art.86, 87

Chapter III? If not, then what test should be established for their interpretation? The CFA did not touch the question in *Ng Ka Ling*. Curiously, I find no commentators discussing the issue. But the question is so important for human rights protection that the CFA would have to address it some day. In my opinion, there seems to be no reason to treat these provisions differently from those stated in Chapter III. It seems inappropriate to make certain articles of the Basic Law enjoy a higher status than other articles of the same Basic Law, especially among those concerning the similarly constitutionalised rights. Therefore to apply the generous interpretation approach equally to the rights guaranteed by provisions of the Basic Law beyond Chapter III might be a proper answer.

The second issue deserving consideration here is the implication of the generous interpretation approach to the domestic application of international human rights law in Hong Kong. Notably, art.39, a provision contained in Chapter III of the Basic Law, affirms the continuation of the effectiveness of the ICCPR, ICESCR and the international labour conventions and their implementation in Hong Kong after 1997.⁵⁴⁹ It can be argued further that these international human rights laws are in fact constitutionalised by art.39 of the Basic Law as art.39 limits the legislative capacity of the legislature of HKSAR to pass laws which contravene the provisions of these international documents.⁵⁵⁰ Therefore, art.39 can be seen as a door, through which the rights provided by the ICCPR, ICESCR and the international labour conventions are able to, in one sense, come into the Basic Law and become a part or at least an attachment of Chapter III of the Basic Law. If the argument is convincing, then one subsequent question should be asked, that is, can the CFA's generous interpretation test regarding articles in Chapter III of the Basic Law be equally applied to the interpretation of the provisions of the above mentioned international human rights instruments which are incorporated by HKSAR law?⁵⁵¹ There seems to be no hint in *Ng Ka Ling*. In fact, the answer appears three years later in *Shum Kwok Sher*.⁵⁵² In this case the CFA expressly states that the purposive and generous approach established in *Ng Ka Ling* for interpretation of fundamental rights is to be adopted to the provisions of Hong Kong Bill of Rights,⁵⁵³ which is set out in Part II of the Hong Kong Bill of Right Ordinance and serves to incorporate the provisions of the ICCPR into Hong Kong laws.

Another point should be noted is that, although the CFA limits the scope of the application of the generous interpretation approach to the provisions in Chapter III of the Basic Law, this is by no means to say that all the articles in Chapter III would be subject to this approach. Generally there are three types of provision in Chapter III. Besides those directly pointing to fundamental freedoms and rights, the other two are the articles defining the class of Hong Kong residents⁵⁵⁴ and the provision setting out the constitutional duties of the residents⁵⁵⁵. In the CFA's view, only the provisions in Chapter III that contain constitutional guarantees for the freedoms, rather than all the articles of the Chapter, should be given generous interpretation.⁵⁵⁶ One of the major issues of the *Ng Ka Ling* was to deliver an appropriate interpretation of article 24(2) in Chapter III, which concerns identifying permanent resident

⁵⁴⁹ Para.1 of art.39 of the Basic Law.

⁵⁵⁰ Para 2 of art.39 of the Basic Law.

⁵⁵¹ Actually, there are considerable overlaps between the rights entrenched by the Basic Law and those contained in these international human rights documents. What we concern here are those rights entrenched by the latter but not mentioned by the Basic Law.

⁵⁵² *Shum Kwok Sher v. HKSAR* [2002] 2 HKLRD 793

⁵⁵³ *Ibid*, para.58.

⁵⁵⁴ The Basic Law, art.24

⁵⁵⁵ The Basic Law, art.42

⁵⁵⁶ *Ng Ka Ling v. Director of Immigration* [1999] 1 HKLRD 315, para.77.

status. The CFA pointed out, “*when interpreting the provisions that define the class of Hong Kong residents, including in particular the class of permanent residents (as opposed to the constitutional guarantees of their rights and freedoms), the courts should simply consider the language in the light of any ascertainable purpose and the context.*”⁵⁵⁷ However, the CFA recognised that the right of abode stated in art. 24(3) is a fundamental right and thus should be generously interpreted. But obviously, enjoying the permanent resident status is the prerequisite to exercise the right of abode. So cutting the contents of art.24 into two parts, one of which is given generous interpretation and another is not, seems inappropriate.

It must be pointed out that the CFA’s generosity towards the protection of human rights is also reflected in its attitude to restrictions on rights. In *Gurung Kesh Bahadur v. Director of Immigration*,⁵⁵⁸ while restating that a generous approach should be adopted to make the interpretation of the fundamental rights and freedoms, the Court held that restrictions to these rights and freedoms should be narrowly interpreted.⁵⁵⁹ In another case, the Court further stresses that “Needless to say, in a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed on them.”⁵⁶⁰ The Court also believes that the burden is on the Government to justify any restriction.⁵⁶¹

4 Open-mindedness: Comparative Approach, *Amicus Curiae*, and Adaptation of Traditional Tests

The CFA’s liberal stance to the protection and promotion of fundamental rights can be further demonstrated by its open-minded attitude in the using of international human rights jurisprudence and other jurisdictions’ experience to assist its analysis of rights issues. This attitude is reflected in the Chief Justice’s highlighting of the importance and significance of the comparative jurisprudence to judicial work.⁵⁶² It can also be proved by the CFA’s decision on *Shum Kwok Sher*.⁵⁶³ In that case the Court had to determine whether the common law offence of public misconduct contravened the ICCPR due to its vagueness, uncertainty and ill-defined-ness alleged by the appellant. As the provisions of the ICCPR were incorporated into Hong Kong domestic law by the Hong Kong Bill of Rights Ordinance, accordingly, the CFA acknowledged that the provisions of the Hong Kong Bill of Rights were the embodiment of the ICCPR as applied to Hong Kong. Then the CFA, as already mentioned, confirmed that the generous interpretation given to the Chapter III of the Basic Law should also be given to the provisions of the Bill as the object of those provisions was to guarantee the fundamental rights and freedoms of the residents of the HKSAR. Notably, the CFA went further and significantly developed a new approach. It stated that “*In interpreting the provisions of Ch. III of the Basic Law and the provisions of the Bill, the Court may consider it appropriate to take account of the established principles of international jurisprudence as well as the decisions of international and national courts and tribunals on like or substantially similar provisions in the ICCPR, other international instruments and*

⁵⁵⁷ Ibid, para78.

⁵⁵⁸ *Gurung Kesh Bahadur v. Director of Immigration* (2002) 5 HKCFAR 480

⁵⁵⁹ *Gurung Kesh Bahadur v. Director of Immigration* (2002) 5 HKCFAR 480 at para.24.

⁵⁶⁰ *Leung Kwok Hung v. HKSAR* [2005] 3 HKLRD 164 at para.16

⁵⁶¹ *HKSAR v. Ng Kung Siu* [1999] 3 HKLRD 907 at para.46

⁵⁶² Andrew Kwok-nang Li, “CJ’s Speech at Opening Ceremony of the 16th Commonwealth Law Conference in Hong Kong”, Hong Kong Government Press Releases, available at <http://www.info.gov.hk/gia/general/200904/06/P200904060130.htm>

⁵⁶³ *Shum Kwok Sher v. HKSAR* [2002] 2 HKLRD 793

national constitutions."⁵⁶⁴ Based on this open-minded comparative approach, the CFA referred to decisions of the European Court of Human Rights which equated the expression "prescribed by law" to the principle of legal certainty, set out the requirements of that principle and held that these requirements were applicable to the provisions in the Basic Law and the Bill of Rights which corresponded to the relevant provisions in the European Convention on Human Rights and Fundamental Freedoms.⁵⁶⁵

This approach, being heavily relied upon by the CFA in *Shum Kwok Sher*, seems to be able to enhance considerably the level and quality of protecting the constitutional rights enjoyed by Hong Kong residents, through incorporating and applying the advanced jurisprudence of human rights law in other jurisdictions. Moreover, it considerably, in one sense, broadens the sources of Hong Kong law in this area. That would provide people with more options and weapons when presenting their arguments before the courts. However, there might also be a risk of causing uncertainty and inaccessibility of law, since the scope of authoritative references set out here by the CFA is extremely wide and almost unlimited, covering all other jurisdictions from national tribunals to international courts and including not only judicial decisions but also international jurisprudence. In practice litigants might find themselves drowned by the sea of authority. Thus it might be difficult for them to ascertain or predict the law due to the impossibility of access to all the jurisprudence and judgments in all the jurisdictions above mentioned.

Arguably, this open-minded approach established by the CFA, which would have the effect of broadening the sources of Hong Kong human rights law significantly, seems lack a solid constitutional ground. The CFA merely declared that the approach should be adopted, without giving any reason and legal analysis to support. There is no provision in the Basic Law expressly upholding it. Although art.84 of the Basic Law authorises the courts in HKSAR "may refer to precedents of other common law jurisdictions" when adjudicating cases, the established principles of international jurisprudence as well as the decisions of international and national courts and tribunals referred to by the CFA in *Shum Kwok Sher* seem unlikely to fall within the meaning of "other common law jurisdictions" stated in art.84. It is apparent that European continent countries, such as France and Germany, are not common law jurisdictions. Their courts get their guidance mainly from the legislation and the courts' judgments, unlike in common law jurisdictions, need not to be followed by future courts as an authoritative source of law. Moreover, not all the international courts embrace common law practices. Strictly speaking, even the European Court of Human Rights whose decisions are heavily relied upon by the CFA in the case can hardly be viewed as a common law jurisdiction allowed by art.84 of the Basic Law. Therefore the constitutional foundation of the CFA's open-minded comparative approach for handling human rights cases appears weak.

One of the major benefits of referring to other jurisdictions' authorities seems to be that the quality of courts' application of fundamental rights law could be enhanced greatly by the assistance provided by such authorities. In other words, the CFA probably realises that keeping an open mind and acquiring assistance from extrinsic sources in the course of adjudication would be essential to facilitating its efforts in safeguarding human rights in HKSAR. This attitude is further indicated in *Chan Wah*,⁵⁶⁶ a case in which the government's arrangements for electing village representatives were challenged primarily on the grounds of

⁵⁶⁴ Ibid, para.59.

⁵⁶⁵ Ibid, para.60-65

⁵⁶⁶ *Secretary for Justice v. Chan Wah* [2003] HKLRD 641

sex discrimination and violation of the right to participate in public life. As far as the issue of discrimination is concerned, under the election arrangements, non-indigenous women married to indigenous villagers had the right to vote, but non-indigenous men married to indigenous villagers were excluded from voting. This was alleged to be discrimination against men. During the course of litigation, the Equal Opportunities Commission (EOC), a statutory body created by the Sex Discrimination Ordinance with the task of working towards the elimination of discrimination, applied to the CFA for leave to appear as an *amicus curiae* at the hearing of these appeals. After careful consideration, the CFA delivered a ruling to give leave to the EOC to provide the Court with services of counsel who would make submissions as an *amicus*.⁵⁶⁷ It was affirmed that the role of an *amicus curiae* was to help the court by expounding the law impartially, or if one of the parties were unrepresented, by advancing the legal arguments on his behalf. The implication of this ruling is that it opens a channel for human rights organisations to show their concerns and provide opinions to the courts. Just like the decision of *Shum Kwok Sher* opens a door for authorities from other jurisdictions, this would be of great help to the protection of human rights. Notably, although in this case the EOC was merely allowed to provide counsel service to the Court, the CFA realised with a clear mind that there might be future cases in which the EOC would seek to intervene to advocate a particular result. However, it is unclear whether the CFA would continue to be so liberal as to admit the EOC to act as an intervener at that time.

Moreover, the CFA also showed its open-mindedness in *Sin Hoi Chu*,⁵⁶⁸ in which the plaintiffs claimed right of abode on the ground, *inter alia*, of breach of their legitimate expectations. The CFA indicated its readiness of developing and reforming traditional legal test when constitutional rights are concerned. When discussing the standard of judicial review where legitimate expectations were disappointed, Mr Justice Bokhary PJ tended to welcome an adaptation and development of conventional *Wednesbury* test⁵⁶⁹ when the test would be used to analyze a case concerning fundamental rights. He observed,

*“...where human rights are engaged there can be such a thing as ... ‘the conventional Wednesbury basis adapted to a human rights context’. I am by no means committed to the Wednesbury test. In particular, I am mindful of Lord Cooke of Thorndon’s caveat ... that ‘It may well be ...that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd’. My purpose in discussing the Wednesbury test is to pave, or at least leave open, the way for its reformulation and adaptation as may be appropriate in the event of it being applied.”*⁵⁷⁰

Then he asserted that the standard of judicial review in legitimate expectation cases ought always to be intense, and it ought to be particularly intense in a case where the legitimate expectation concerned was in respect of an entrenched constitutional right.⁵⁷¹ He cited T.R.S. Allan’s words in *Constitutional Justice*⁵⁷² to support his position: “Where important constitutional rights are at stake, the boundaries of rationality are naturally drawn more tightly, the extent of judicial deference to administrative expertise and convenience being

⁵⁶⁷ *Cheung Kam Chuen v. Chan Wah* [2000] 2 HKLRD 880

⁵⁶⁸ *Sin Hoi Chu v. Director of Immigration* [2002] 1 HKLRD 561

⁵⁶⁹ Please see *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223. This is an English law case which set down the standard of unreasonableness of public body decisions which render them liable to be quashed on judicial review. This special sense is accordingly known as *Wednesbury* reasonableness.

⁵⁷⁰ *Sin Hoi Chu v. Director of Immigration* [2002] 1 HKLRD 561 para.370

⁵⁷¹ *Ibid*, para.373

⁵⁷² T.R.S. Allan, *Constitutional Justice: A liberal Theory of the Rule of Law* (Oxford University Press, 2001)

reduced accordingly”⁵⁷³. To further strengthen his argument, Mr Justice Bokhary PJ referred to the Daly case⁵⁷⁴, which concerned a prisoner’s right (under art.8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 as set out in Schedule 1 to the Human Rights Act 1998) to respect for his correspondence. In the Daly case Lord Steyn pointed out that the difference in approach between the traditional grounds of judicial review and the proportionality approach may sometimes yield different results. To him, it is therefore important that cases involving Convention rights must be analysed in the correct way. And he believed that it is possible to do so without a shift to merits review or any erosion of the fundamental distinction between the role of judges and the role of administrators.⁵⁷⁵ Mr Justice Bokhary PJ seemed to completely agree with Lord Steyn’s opinion, and in his view, what was true of Convention rights in European cases was also true of Basic Law rights in Hong Kong cases.⁵⁷⁶

Adopting the comparative approach, allowing *amicus* assistance, and asserting the flexibility of traditional judicial review tests prove the CFA’s open-mindedness in dealing with constitutional rights cases. Like its generous interpretative approach, its open-mindedness demonstrates its commitment to giving Hong Kong people a high quality of human rights protection. Although there might be some drawbacks, especially in its comparative approach of broadening Hong Kong human rights authoritative sources hugely, generally speaking, the CFA’s open-mindedness would benefit Hong Kong’s human rights condition significantly by providing Hong Kong people with a world-class protection of individual rights. As Margaret H. Marshall, Chief Justice of the Supreme Judicial Court of Massachusetts observed,

*“Consideration of the work of other courts with a differently inflected jurisprudence might allow us to unearth our deep-seated but often unstated assumptions, to expose our legal and normative constructs to the penetrating light of fresh scrutiny, and to examine our analyses and conclusions against a broader background of possibilities. Such acute reevaluation, wherever it leads, can only make our jurisprudence stronger.”*⁵⁷⁷

After articulating the CFA’s general attitude and approaches regarding individual rights, now we turn to discussing the CFA’s concrete views on several important constitutional rights, including freedom of demonstration, freedom of expression and the right to equality and non-discrimination, which were analyzed by the CFA in a few leading cases. These rights are of civil and political nature, being essential to a modern democratic society. Our exploration of the CFA’s performance in dealing with them may make us get a better understanding of its significant role in safeguarding the constitutionally enshrined fundamental liberties in the Region.

5 Freedom to Demonstrate

The CFA’s attitude towards people’s freedom of demonstration is well reflected by its declaration at the beginning of the judgment on *Yeung May-Wan*.⁵⁷⁸ It states,

⁵⁷³ *Sin Hoi Chu v. Director of Immigration* [2002] 1 HKLRD 561, para.373; also see T.R.S. Allan, *Constitutional Justice: A liberal Theory of the Rule of Law* (Oxford University Press, 2001), p131

⁵⁷⁴ *Regina v. Secretary of State for the Home Department, Ex Parte Daly* [2001]UKHL 26

⁵⁷⁵ *Sin Hoi Chu v. Director of Immigration* [2002] 1 HKLRD 561, para.373; also see *Regina v. Secretary of State for the Home Department, Ex Parte Daly* [2001]UKHL 26 para.28

⁵⁷⁶ *Sin Hoi Chu v. Director of Immigration* [2002] 1 HKLRD 561 para.373, 374

⁵⁷⁷ Margaret H. Marshall, “ ‘Wise Parents Do not Hesitate to Learn From Their Children’: Interpreting State Constitutions in An Age of Global Jurisprudence”, (2004) 79 *New York University Law Review*, p1650

⁵⁷⁸ *Yeung May-Wan v. HKSAR* [2005] 2 HKLRD 212

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

It appears quite unusual for the CFA to make such a statement at the very beginning of its decision. The reason perhaps lies in the politically sensitive facts of the case, which concerned a protest against the Central Government and the Communist Party's leaders. The demonstration was held outside the main entrance of the Central Government's Liaison Office in Hong Kong by members of Falun Gong, a banned quasi-religious group in mainland China. The Falun Gong had been banned by the Central Government on the ground that it "had been engaged in illegal activities, advocating superstition and spreading fallacies, hoodwinking people, inciting and creating disturbance, and jeopardising social stability."⁵⁷⁹ The mainland authority further declared that Falun Gong was a highly organised political group and illegal system "opposed to the Communist Party of China and the central government. It preaches idealism, theism and feudal superstition."⁵⁸⁰ Then a nationwide crackdown ensued with the exception of the special administrative regions of Hong Kong and Macau. In late 1999 legislation was created by China's National People's Congress Standing Committee to outlaw "heterodox religions," and applied to Falun Gong retroactively.⁵⁸¹ It is against this background that we can understand the significance of the CFA's decision. How the Court handled the case would be a parameter to measure the equality of all before the law, the independence of the judiciary, the autonomy and, of course, the legal protection of human rights in the region.

As the demonstration involved in *Yeung May-wan* was a small-scale one, with only sixteen participants, there was no need to notify the police as required by the Public Order Ordinance, which stipulated that to hold an assembly with more than fifty participants or procession with more than thirty participants the organiser must notify the police beforehand or to comply with procedural requirements.⁵⁸² The intervention of the police into this demonstration was triggered by the complaints made by the staff of the Central Government's Liaison Office. The police tried to make the demonstrators leave on the basis of the law of obstruction of public places,⁵⁸³ which was traditionally used in Hong Kong against illegal hawkers in the street. The demonstrators refused. Then the police arrested them. Some of them performed physical resistance during and after the arrests.

As a result, all of the demonstrators were charged with the offence of public place obstruction. The appellants in this case were additionally charged with wilfully obstructing police officers acting in the due execution of their duty. Two were also charged with assaulting police officers acting in the due execution of their duty. The magistrate convicted on all charges.

⁵⁷⁹ Xinhua, "China Bans Falun Gong", *People's Daily*, 22 July 1999.

⁵⁸⁰ Xinhua Commentary on Political Nature of Falun Gong, *People's Daily*, 21 July 1999

⁵⁸¹ Beatrix Leung, "China and Falun Gong: Party and Society Relations in the Modern Era," *Journal of Contemporary China*, 11:33 (2002), pp761-784; Also see The Standing Committee of Chinese National People's Congress, "The Decision to Ban Evil Cult Organizations, and to Crackdown on Evil Cult Activities" (30 October 1999)

⁵⁸² Public Order Ordinance (Chapter 245), s.7 and s.13, Hong Kong Ordinances at <http://www.hkllii.org/hk/legis/ord/245/>

⁵⁸³ Summary Offences Ordinance, ss 4(28) and 4 A.

The Court of Appeal quashed the public place obstruction convictions but upheld the wilful obstruction and assault convictions. The appeal to the CFA was against those remaining convictions.

The CFA confirmed the Court of Appeal's quashing of the public place obstruction convictions and pointed out that not every obstruction of a public place is an offence. It held that a balance between possibly conflicting interests of different users of the public place should be struck, based on a requirement of reasonableness. In the CFA's view, it was only where the obstruction was an unreasonable use of the public place given its extent and duration, the time and place where it occurred and the purpose for which it was done, that it was "without lawful excuse" and so amounted to an offence.⁵⁸⁴ As far as demonstration was concerned, the CFA stressed,

*"Where the obstruction in question results from a peaceful demonstration, a constitutionally protected right is introduced into the equation. In such cases, it is essential that the protection given by the Basic Law to that right is recognised and given substantial weight when assessing the reasonableness of the obstruction. While the interests of those exercising their right of passage along the highway obviously remain important, and while exercise of the right to demonstrate must not cause an obstruction exceeding the bounds of what is reasonable in the circumstances, such bounds must not be so narrowly defined as to devalue, or unduly impair the ability to exercise, the constitutional right."*⁵⁸⁵

The CFA agreed with the Court of Appeal that the police and the magistrate had not adequately considered the question of reasonableness. The minor obstruction caused by this small demonstration, in the view of the CFA and the Court of Appeal, could not be regarded as unreasonable and so did not constitute an offence. Then the CFA moved on to determine the lawfulness of the arrests in order to deal with the remaining convictions, wilfully obstructing police officers acting in the due execution of their duty and assaulting police officers acting in the due execution of their duty. Here, the arresting officers acted on the basis of information given to them at police briefings before the arrest operation and also on the basis of what they saw at the scene. The CFA held that while the officers had genuinely suspected that a public place obstruction offence had been committed, they did not have reasonable grounds for that suspicion. At the briefing, no consideration had been given to the material element of whether the demonstrators, in exercising their constitutional right to demonstrate, were creating an obstruction which was unreasonable and so without lawful excuse. Nothing evident at the scene supported such a conclusion. The arrest was therefore unlawful and subsequent acts done by officers while holding the appellants in custody were not done in the due execution of their duty. Therefore the Court allowed the appeal and quashed the remaining convictions.

Although the jurisprudence of the decision may not seem very far-reaching, it is still worthy of special noting, because it shows the CFA's commitment to fundamental rights protection. In its eye, even the Central Government's enemies deserve an equal protection. To achieve the protection, the Court successfully, as Professor Albert Chen indicates, employed the familiar techniques of statutory construction for the purpose of advancing a constitutional right.⁵⁸⁶ To Chen, it is particularly significant in enhancing the right to assembly and

⁵⁸⁴ *Yeung May-Wan v. HKSAR* (FACC19/2004), para.43

⁵⁸⁵ *Yeung May-Wan v. HKSAR* [2005] 2 HKLRD 212 para.44

⁵⁸⁶ Albert H. Y. Chen, "Constitutional Adjudication in Post-1997 Hong Kong", (2006) 15 *Pacific Rim Law & Policy Journal*, p668

procession in Hong Kong where the number of demonstrators does not exceed fifty (in the case of an assembly) or thirty (in the case of a procession) as stipulated in the Public Order Ordinance.⁵⁸⁷ It also exemplifies the Court's active role in using comparative materials for the purpose of a better protection of rights. By reviewing several cases from the United Kingdom⁵⁸⁸ and the European Court of Human Rights⁵⁸⁹, the Court reached the conclusion that the Hong Kong police were not acting in the due execution of their duties when they arrested the defendants and therefore the defendants had every right to use a certain amount of force to resist their unlawful arrest.⁵⁹⁰ This decision would considerably improve the level of rights protection for it confirmed that protesters, when exercising their constitutional right to demonstrate, need not to comply with arbitrary orders given by the police.⁵⁹¹ It has been an important constraint on police use of excessive force.

Another case deserving exploration here is *Leung Kwok Hung v. HKSAR*⁵⁹², which bears much greater significance to the right of demonstration. It concerned the constitutionality of the provisions of the Public Order Ordinance which, as mentioned above, imposed a prior notification requirement on assemblies and processions exceeding a certain number of participants. It was contended that the statutory discretion conferred on the Commissioner of Police to restrict the right of peaceful assembly by objecting to a notified public procession or by imposing conditions for the purpose of "public order (ordre public)" was too wide and uncertain to satisfy the requirements of constitutionality. The implications of the CFA's decision on the case can be primarily found in the following points.

Firstly, the Court acknowledged that the exercise of the right of peaceful assembly might be subject to restrictions provided that two requirements were satisfied, that is, the restriction must be prescribed by law, and the restriction must be necessary in a democratic society for a legitimate purpose such as the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Secondly, the Court pointed out that the right of peaceful assembly involved a positive duty on the part of Government to take reasonable and appropriate measures to enable lawful assemblies to take place peacefully. Therefore, it confirmed that the statutory requirement for a prior notification to the Commissioner of Police was constitutional.

Thirdly, as for the Commissioner's statutory discretion to restrict the right of peaceful assembly on the ground of "public order (ordre public)", the Court drew a distinction between the concept of "public order (ordre public)" as a constitutional norm and the same concept in the law and order sense. For the former, the Court thought, the concept was an imprecise and elusive one for a constitutional norm was usually and advisedly expressed in

⁵⁸⁷ Ibid.

⁵⁸⁸ Such as *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286, *Clarke v Chief Constable of North Wales Police* [1997] EWCA Civ 2432, *Chapman v DPP* (1988) 153 JP 27, *Mohammed-Holgate v Duke* [1984] AC 437, and *Castorina v Chief Constable of Surrey* (1998) 138 NLJ 180, etc.

⁵⁸⁹ Such as *Fox, Campbell and Hartley v UK* (1990) 13 EHRR 157 and *O'Hara v UK* (2002) 34 EHRR 32

⁵⁹⁰ *Yeung May-Wan v. HKSAR* (FACC19/2004), para.59-123

⁵⁹¹ On the other hand, perhaps the case also indicates that the Central Government's willingness to respect the independence of Hong Kong's judiciary as there was no sign of the Central Government's placing pressure on the courts during the whole legal proceedings, from the magistrate to the Court of Appeal and to the Court of Final Appeal.

⁵⁹² *Leung Kwok Hung v. HKSAR* [2005] 3 HKLRD 164

relatively abstract terms. Its boundaries beyond public order in the law and order sense, that is, the maintenance of public order and prevention of public disorder, could not be clearly defined. The concept of "public order (ordre public)" as a constitutional norm used in the ICCPR had been incorporated into the Public Order Ordinance in relation to the Commissioner's discretion to restrict the right of peaceful assembly. In the Court's view, the Commissioner's statutory discretion to restrict the right of peaceful assembly for the purpose of "public order (ordre public)" provided by the Ordinance did not give an adequate indication of the scope of that discretion due to the concept's vagueness as a constitutional norm. Therefore, the Court concluded, the Commissioner's discretion to restrict derived from the constitutional concept of "public order (ordre public) did not satisfy the constitutional requirement of "prescribed by law" which mandated the principle of legal certainty. However, the Court pointed out, public order in the law and order sense was sufficiently certain. The Commissioner's discretion to restrict the right of peaceful assembly for this purpose would give an adequate indication of its scope. It would satisfy the constitutional requirement of "prescribed by law" and would be constitutionally valid. Then the Court suggested to refer to the public order in law and order sense simply as "public order", being distinguished from the constitutional term, "public order (ordre public)". Thus the Court held that the appropriate remedy was to sever the public order in the law and order sense from "public order (ordre public)" in the relevant statutory provisions. After severance, only the concept of "public order" remained in the Ordinance. Consequently, the Court believed, the Commissioner's discretion in relation to public order in the law and order sense was constitutional as it satisfied both the constitutional requirement of "prescribed by law" and the constitutional requirement of "necessary in a democratic society" for the relevant constitutionally legitimate purpose.

Fourthly, the Court emphasised that "the Commissioner must, as a matter of law, apply the proportionality test"⁵⁹³ in exercising his statutory discretion to restrict the right of peaceful assembly. He must, the Court required, consider whether a potential restriction was rationally connected with one or more of the statutory legitimate purposes and whether it was no more than was necessary to accomplish such purposes. His discretion was thus not an arbitrary one but was a constrained one. As a result, to the Court's mind, the full protection of the fundamental right of peaceful assembly against any undue restriction would be ensured.

The Court dismissed the appeal and upheld the convictions. However, Mr. Justice Bokhary delivered a dissenting judgment. He agreed with the majority that the Commissioner's entitlement to prior notification of public meetings and procession was constitutional, but disagreed with the view that the requirement could be enforced by criminal sanctions. Moreover, he held that the Commissioner's powers of prior restraint were unconstitutional.

The primary contribution of the Court's decision in *Leung* to the advancement of the freedom of demonstration in Hong Kong, in Professor Albert Chen's opinion, was that "it goes beyond the 'Wednesbury unreasonableness' principle of judicial review of administrative action in English administrative law, and enunciates clearly the application of the 'proportionality' principle to police decisions on any restriction of the citizen's right to demonstrate."⁵⁹⁴ The decision was also noteworthy for, again, the CFA's reliance on the ICCPR and relevant international human rights law jurisprudence.⁵⁹⁵ Its cited interpretative materials were very

⁵⁹³ *Leung Kwok Hung v. HKSAR* (FACC1/2005)

⁵⁹⁴ Albert H. Y. Chen, "Constitutional Adjudication in Post-1997 Hong Kong", (2006) 15 *Pacific Rim Law & Policy Journal*, p671

⁵⁹⁵ *Leung Kwok Hung v. Hong Kong SAR* (FACC1/2005), paragraphs 71-78

broad and extensive, including the Hong Kong government's Second Periodic Report to the United Nations Human Rights Committee, the Siracusa Principles, Nowak's commentary on the ICCPR, and numerous judgments from jurisdictions outside Hong Kong, such as the European Court of Human Rights and courts in Canada, the United Kingdom, and South Africa.⁵⁹⁶ However, notably, there are strong criticisms on the majority's upholding the constitutionality of the Commissioner's statutory powers of prior restraint and the underlying legal reasoning. The sharpest one may be represented by Po-Jen Yap's words, "The CFA merely obliterated one vague concept from the impugned regulatory scheme and upheld the rest without explaining why. This is a serious omission. In fact despite the court's opening roar about the 'cardinal importance' of the 'precious' right to freedom of assembly and how it lies at the foundation of a democratic society, the rhetoric rang hollow in light of the actual result reached by the court."⁵⁹⁷ It seems to me that the comment is too severe and unfair. Indeed the CFA's confirmation of the Police Commissioner's power of prior restraint and its imposition on him the duty of abiding the proportionality test proves the Court's effort of seeking a balance between the safeguarding of fundamental freedoms and the need of public order. Although its analysis of the concept of "public order (ordre public)" and "public order" might be artificial, it does reflect the CFA's stance of acknowledging rights should be subject to legitimate controls. This stance has to be welcomed. However, the real problem of the Court's decision in *Leung*, in my view, is its remedy to sever public order from "public order (ordre public)" in ss.14(1), 14(5) and 15(2) of the Ordinance. As I argued in the former Chapter, in adjudicating constitutional cases, the appropriate model the CFA should adopt is the practice of the courts in United Kingdom. That is, courts only have the power to declare a statute's incompatibility with the constitutional provisions when consistent interpretation cannot be achieved. Whether to amend the declared unconstitutional statute provisions is left to the legislature to determine. It is inappropriate for courts to directly amend law enacted by the legislature in their judgments. Therefore, the CFA's amendment of the Ordinance in *Leung*, in my view, is not an appropriate exercise of judicial power. It does not seem to conform to its judicial role defined by the principle of separation of powers in a democratic society. However, on the other hand, the adopting of the remedy of severance might, arguably, improve the Court's capability of achieving better protection of human rights because that remedy could have the effect of extending its power in dealing with human rights cases.

6 Freedom of Expression (Speech)

Undoubtedly, the freedom of expression is one of the most important fundamental rights in modern democratic society. It is seen to be crucial for participatory democracy, the discovery of truth and promoting tolerance. These are the basic values in a civilised society such as Hong Kong. Freedom of expression is especially cherished by Hong Kong people, being regarded as one of the major advantages of HKSAR compared to mainland China. There were considerable worries about the fate of the Hong Kong people's freedom of expression after reversion to China. However, freedom of speech and press freedom have been enshrined in art.27 and art.4 of the Basic Law. According to the University of Hong Kong's

⁵⁹⁶ Carole J. Petersen, "Embracing Universal Standards? The Role of International Human Rights Treaties in Hong Kong's Constitutional Jurisprudence", in Hualing Fu, Lison Harris, and Simon N.M. Young (ed.), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan, 2007), p37.

⁵⁹⁷ Po-Jen Yap, "10 Years of the Basic Law: the Rise, Retreat and Resurgence of Judicial Power in Hong Kong", (2007) 36 *Common Law World Review*, p183.

independent surveys, the ratings for freedoms of speech and press have in fact upgraded since 1997.⁵⁹⁸ In this context, let us look at the CFA's contribution in this respect.

So far the most significant case dealt with by the CFA concerning the freedom of expression may be *Ng Kung Siu*,⁵⁹⁹ the flag desecration case. The question in *Ng Kung Siu* was whether the statutory provisions which criminalise desecration of the national flag and the regional flag were inconsistent with the constitutional guarantee of the freedom of expression. The defendants participated in a public demonstration for democracy in China during which they displayed a defaced national flag of the P. R. China and a defaced regional flag of the HKSAR. Subsequently they were charged with violation of s.7 of the National Flag and National Emblem Ordinance and s.7 of the Regional Flag and Regional Emblem Ordinance. Both Ordinances were passed by Hong Kong Legislative Council, but the former one was to incorporate the same national laws of China into the HKSAR legal system in accordance with the Basic Law. In its decision on *Ng Kung Siu*, while acknowledging that the freedom of expression, as a fundamental freedom in a democratic society, "lies at the heart of civil society and of Hong Kong's system and way of life"⁶⁰⁰, the CFA unanimously upheld the justification and constitutionality of the restrictions to the freedom of expression imposed by the two Ordinances through criminalising certain desecration behaviours.

The Court pointed out that the restriction was merely a limited one for it banned just one mode of expression. It did not interfere with the person's freedom to express the same message by other modes. Then the Court moved to examine the justifications of this limited restriction. It was held that the freedom of expression was not absolute. "...the exercise of the right to freedom of expression carries with it special duties and responsibilities and it may therefore be subject to certain restrictions."⁶⁰¹ The Court agreed with the Government that the restriction was necessary for the protection of public order (*ordre public*). It held that, like what it did in *Leung Kwok Hung*, the concept of public order (*ordre public*) at constitutional level was not limited to, but wider than, the public order in terms of law and order. In the Court's view, to understand the constitutional concept of public order (*ordre public*), the following points must be considered. First, the concept was an imprecise and elusive one. Its boundaries could not be precisely defined. Secondly, the concept included what was necessary for the protection of the general welfare or for the interests of the collectivity as a whole. Thirdly, the concept must remain a function of time, place and circumstances. As to the third point, the Court indicated, Hong Kong had a new constitutional order after China's resumption of the exercise of sovereignty. Its retuning to China was cited in the Preamble of the Basic Law as "fulfilling the long-cherished common aspiration of the Chinese people for the recovery of Hong Kong". In these circumstances, the Court thought, the legitimate societal interests in protecting the national flag and the legitimate community interests in the protection of the regional flag were interests which fell within the concept of public order (*ordre public*). Furthermore, the court pointed out, the national flag was the unique symbol of the one country, the P.R. China, and the regional flag was the unique symbol of the HKSAR as an inalienable part of the P.R. China under the principle of "one country, two systems". In the Court's view, these legitimate interests formed part of the general welfare and the interests of the collectivity as a whole mentioned above.

⁵⁹⁸ Press Freedom Has Improved since 1997, People's Daily Online, 4 June 2007 at http://english.peopledaily.com.cn/200706/04/eng20070604_380542.html (visited on 25 March 2008)

⁵⁹⁹ *HKSAR v. Ng Kung Siu* [1999] 3 HKLRD 907

⁶⁰⁰ *HKSAR v. Ng Kung Siu* [1999] 3 HKLRD 907 at para.41

⁶⁰¹ *Ibid*, at para.45

However, the court clarified that although these legitimate interests were within public order (ordre public), it did not conclude the question. It held that one must further examine whether the restriction on the guaranteed right to freedom of expression was necessary for the protection of such legitimate interests within public order (ordre public). Notably, in considering the question of necessity, the Court showed its respect for the view of the HKSAR's legislature who enacted the impugned ordinances. Moreover, in the Court's view, in applying the test of necessity, the question whether the restriction was proportionate to the aims sought to be achieved thereby must also be considered. Having regard to these elements, the Court believed that the test of necessity was satisfied and the limited restriction was proportionate to the aims sought to be achieved. The Court proclaimed,

*"Hong Kong is at the early stage of the new order following resumption of the exercise of sovereignty by the People's Republic of China. The implementation of the principle of 'one country, two systems' is a matter of fundamental importance, as is the reinforcement of national unity and territorial integrity. Protection of the national flag and the regional flag from desecration, having regard to their unique symbolism, will play an important part in the attainment of these goals. In these circumstances, there are strong grounds for concluding that the criminalisation of flag desecration is a justifiable restriction on the guaranteed right to the freedom of expression."*⁶⁰²

Ostensibly, the central issue of the case was how to strike a balance between the individual's freedom of expression and the public and national interest in the protection of the national and regional flags. However, the hidden question faced by the CFA was how to deal with the impugned National Flag and Emblem Ordinance, which incorporated the same national law into the HKSAR legal system. Art.18 of the Basic Law provided that no national law should be applied to Hong Kong except for those listed in Annex III to the Basic Law. The laws listed therein should be applied locally by way of promulgation or legislation by the Region. National Flag and Emblem laws of China were added to the list; accordingly the HKSAR legislature enacted the Ordinance to implement them. The difficult question in the case therefore was whether the courts in Hong Kong had jurisdiction to review and invalidate this type of ordinances which reproduced the relevant national laws. The Court chose to be cautious. It seemed deliberately to avoid this sensitive question; rather, it addressed itself to the balance issue. However, it must be pointed out that in fact the Court had reviewed the said ordinances by upholding their constitutionality. This may be a strategy of the Court to avoid irritating the mainland China again by its activism after the *Ng Ka Ling* case. The Court's retreat disappointed many commentators. It was thought that the CFA's conclusion undermined its own assertion that the freedom of expression lay at the heart of Hong Kong's way of life and the courts' exhortation about giving a generous interpretation to this constitutional guarantee which included the right to express ideas which the majority and the government may find offensive.⁶⁰³ However, there are also scholars praising the Court's decision as a "wiser option" for it serves the interests of safeguarding its long-term autonomy and independence.⁶⁰⁴ It seems to me the remarks of Professor Albert Chen are quite convincing. He observes, "given the fact that even the American Supreme Court was divided five to four on the issue of whether the criminalisation of flag desecration was unconstitutional, the CFA's decision in *Ng Kung Siu* is defensible jurisprudentially, and is

⁶⁰² Ibid, at para.61

⁶⁰³ R. Wacks, "Our Flagging Rights" (2000) *Hong Kong Law Journal* 1 at 3.

⁶⁰⁴ Po-Jen Yap, "10 Years of the Basic Law: the Rise, Retreat and Resurgence of Judicial Power in Hong Kong", (2007) 36 *Common Law World Review*, p176.

certainly consistent with the political reality of Hong Kong under 'one country, two systems'" .⁶⁰⁵

While in *Ng Kung Siu* the CFA directly explored the constitutionally guaranteed freedom of expression and its legitimate limits, in *Albert Cheng*⁶⁰⁶ the Court clarified and developed traditional common law regarding defence of fair comment in an attempt to provide a better safeguard for the exercise of the constitutional right of free speech. *Albert Cheng* involved the question of malice in defamation law in relation to the defence of fair comment, which had not been well developed in common law jurisprudence and usually the concept of malice in defence of qualified privilege was borrowed to apply in analyzing the defence of fair comment. The court was determined to develop the common law jurisprudence in this area, for it believed that the public interest in freedom to make comments was of particular importance in the social and political fields and it was right that the courts when considering and developing the common law should adopt a generous approach, rather than a narrow one, so that the right of fair comment on matters of public interest was maintained in its full vigour.⁶⁰⁷

Based on these considerations and an entire investigation of the relevant common law, the Court came to a conclusion that a comment which fell within the objective limits of the defence of fair comment would lose its immunity only by proof that the defendant did not genuinely hold the view he expressed. "Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not of itself defeat the defence"⁶⁰⁸ because "liberty to make such comments, genuinely held, on matters of public interest lies at the heart of the defence of fair comment. That is the very object for which the defence exists. Commentators, of all shades of opinion, are entitled to 'have their own agenda'. Politicians, social reformers, busybodies, those with political or other ambitions and those with none, all can grind their axes. The defence of fair comment envisages that everyone is at liberty to conduct social and political campaigns by expressing his own views, subject always... to the objective safeguards which mark the limits of the defence."⁶⁰⁹ The Court provided a clear distinction between the notion of malice in the defences of fair comment and that of qualified privilege. Regarding fair comment, in the Court's view, the defence was defeated by proof that the defendant did not genuinely believe the opinion he expressed; regarding qualified privilege, the defence was defeated by proof that the defendant used the occasion for some purpose other than that for which the occasion was privileged.⁶¹⁰

The CFA's decision in *Albert Cheng* indicates its innovative aspect in developing common law jurisprudence when fundamental rights protection is involved. It adopted a generous approach and developed the right to a fuller measure than what the common law had generally been perceived to give.⁶¹¹ It demonstrates that Hong Kong courts could make some unique contribution to the contemporary world of jurisprudence, rather than just being unidirectionally persuaded by foreign and international relevant judicial materials. As

⁶⁰⁵ Albert H. Y. Chen, "Constitutional Adjudication in Post-1997 Hong Kong", (2006) 15 *Pacific Rim Law & Policy Journal*, p663

⁶⁰⁶ *Albert Cheng v. Tse Wai Chun Paul* (FACV12/2000)

⁶⁰⁷ *Albert Cheng v. Tse Wai Chun Paul* (FACV12/2000), paragraphs 3, 41.

⁶⁰⁸ *Albert Cheng v. Tse Wai Chun Paul* (FACV12/2000), paragraph 75.

⁶⁰⁹ *Albert Cheng v. Tse Wai Chun Paul* (FACV12/2000), paragraph 44.

⁶¹⁰ *Albert Cheng v. Tse Wai Chun Paul* (FACV12/2000), paragraph 76.

⁶¹¹ Denis Chang, "Has Hong Kong Anything Special or Unique to Contribute to the Contemporary World of Jurisprudence?", (2000) 30 *Hong Kong Law Journal*, p349

Professor Chen believed, “*Cheng* is a landmark freedom-of-speech case and is likely to have an impact on other jurisdictions in the common-law world.”⁶¹² Moreover, it is worthy of noting that the main judgment in the *Cheng* case was delivered by Lord Nicholls of Birkenhead, a member of the British House of Lords in its judicial capacity, who served as a non-permanent judge for the CFA in this case. The fact proves the valuable aspect of the diversity of the composition of the CFA, which has the effect of enhancing the quality of the performance of the Court and the production of its adjudication. That would benefit the protection and promotion of human rights in Hong Kong.

7 The Right to Equality and Non-Discrimination

The principle of equality and non-discrimination is a primary principle of human rights.⁶¹³ It is enshrined in numerous international human rights instruments and is widely embodied in the constitutions of countries around the world. Hong Kong is no exception. It is constitutionally guaranteed by art.25 of the Basic Law. Further, the right is protected by the Bill of Rights contained in the Hong Kong Bill of Rights Ordinance,⁶¹⁴ which implements in accordance with art.39 of the Basic Law the provisions of the ICCPR as applied to Hong Kong. In applying these laws, the CFA has further developed the jurisprudence of equal rights and non-discrimination. The following two cases may show its contribution in this regard.

The first one is *Secretary for Justice v. Chan Wah and Tse Kwan Sang*.⁶¹⁵ It was discussed briefly above when we investigated the Court’s open-minded attitude in dealing with human rights disputes. In the previous discussion, we focused on the *amicus curiae* issue. Now we will concentrate on the Court’s jurisprudence on the right to equality and non-discrimination. The litigation concerned local village elections in Hong Kong’s New Territories. What were challenged in the case were the electoral arrangements for the position of village representative, which excluded the non-indigenous villagers from voting as a voter and standing as a candidate. The indigenous villagers⁶¹⁶ in New Territories enjoyed a special treatment by law both during the British rule and after Hong Kong’s return to China. Art.40 of the Basic Law provides that “The lawful traditional rights and interests of the indigenous inhabitants of the ‘New Territories’ shall be protected by the Hong Kong Special Administrative Region.” That appears to be the reason that the challenged electoral arrangements were made. The main questions that the Court needed to answer were as follows: whether the electoral arrangements in question violate the non-indigenous villagers’ right to take part in the conduct of public affairs which was guaranteed by the Hong Kong Bill of Rights;⁶¹⁷ whether they constituted discrimination; whether art.40 of the Basic Law could justify the arrangements. As for the first and third questions, the CFA held that the impugned electoral rules imposed unreasonable restrictions on Chan’s and Tse’s right to take part in public affairs through freely chosen representatives. It also held that art.40 of the Basic Law did not give indigenous villagers the political rights to vote and to stand as

⁶¹² Albert H. Y. Chen, “Constitutional Adjudication in Post-1997 Hong Kong”, (2006) 15 *Pacific Rim Law & Policy Journal*, p665.

⁶¹³ Garth Nettheim, “‘Peoples’ and ‘Populations’: Indigenous Peoples and the Rights of Peoples”, *The Rights of Peoples* (ed. James Crawford) (1988), at p123; Also see Nadirsyah Hosen, *Shari’a & Constitutional Reform in Indonesia*, (Institute of Southeast Asian Studies, 2007), p114.

⁶¹⁴ See art.1(1), 22 of the Hong Kong Bill of Rights.

⁶¹⁵ *Secretary for Justice v. Chan Wah* [2003] 3 HKLRD 641

⁶¹⁶ They are the residents in the New Territories of Hong Kong, whose ancestors were inhabitants there before the commencement of British rule in 1898 and have special rights to preserve their customs.

⁶¹⁷ Art.21(a) of the Hong Kong Bill of Rights.

candidates in elections for village representatives to the exclusion of others. Here, however, it is the Court's analysis on the second question, the discrimination issue, on which we will focus.

Under the election arrangements, non-indigenous women married to indigenous villagers had the right to vote. But non-indigenous men married to indigenous villagers were excluded from voting. This was alleged to be discrimination against men. The Court affirmed that in determining whether a particular arrangement involved sex discrimination the "but for" test established in a British case should be adopted. The test was enunciated by Lord Goff in that case as follows. "There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex. The intention or motive of the defendant to discriminate, though it may be relevant so far as remedies are concerned...is not a necessary condition of liability; it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex."⁶¹⁸ Applying this test, the Court concluded that there was indeed unlawful discrimination, because "[b]ut for his sex, the non-indigenous *man* (married to an indigenous villager) would have received the same treatment, that is the right to vote, as the non-indigenous *woman* (married to indigenous villager)."⁶¹⁹

The Court's decision led to the Hong Kong Government's reform of the village election system, which introduced legislation providing for a dual system in which each village would elect two villager representatives, one serving only the indigenous inhabitants, and the other all the villagers. This demonstrates that the Court can effectively influence government's public policy making so as to ensure fundamental rights are fully respected and not being infringed.

In *Chan Wah*, the discrimination issue was in relation to a political right of being equally represented, which primarily involved public life and political sphere. Another case, *Secretary for Justice v. Yau Yuk Lung Zigo*,⁶²⁰ which was decided by the CFA in July 2007, concerned mainly an issue of private and non-political nature. The question of the case was whether a provision of the Crimes Ordinance, which criminalised homosexual buggery committed otherwise than in private, was unconstitutional on the ground that it was discriminatory and infringed the constitutional right to equality.

The Court pointed out that the guarantee of equality before the law did not invariably require exact equality. Differences in legal treatment, it acknowledged, might be justified for good reason. It enunciated "the justification test".

*"In order for differential treatment to be justified, it must be shown that: (1) The difference in treatment must pursue a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established. (2) The difference in treatment must be rationally connected to the legitimate aim. (3) The difference in treatment must be no more than is necessary to accomplish the legitimate aim."*⁶²¹

⁶¹⁸ *R v Birmingham City Council Ex parte Equal Opportunities Commission* [1989] 1 AC 1155 at 1194 A-C

⁶¹⁹ *Secretary for Justice v. Chan Wah* [2003] 3 HKLRD 641 at para.55

⁶²⁰ *Secretary for Justice v. Yau Yuk Lung Zigo* [2007] 3 HKLRD 903

⁶²¹ *Secretary for Justice v. Yau Yuk Lung Zigo* [2007] 3 HKLRD 903 at Para.20

The Court affirmed that the burden was on the Government to satisfy the court that the justification test was satisfied. It also stressed that where one was concerned with differential treatment based on grounds such as race, sex or sexual orientation, the court would scrutinise with intensity whether the difference in treatment was justified. In the Court's opinion, where the difference in treatment satisfied the justification test, it then should be regarded as not constituting discrimination and not infringing the constitutional right to equality.

The Court recognised that the impugned provision of the Crimes Ordinance indeed gave rise to differential treatment on the ground of sexual orientation, and thus justification was required. Counsel for the government argued that there was a genuine need for the differential treatment because the offence in the provision was a specific form of the common law offence of committing an act outraging public decency, when turning it into the statute, the legislature should be taken to have considered that there was a genuine need for such a specific offence as part of the package to reform the law relating to homosexual conduct. The Court held that although the Legislature was entitled to decide whether it was necessary to enact a specific criminal offence to protect the community against sexual conduct in public which outrages public, in legislating for such a specific offence, it should not do so in a discriminatory way. It was claimed that the courts had the duty of enforcing the constitutional guarantee of equality before the law and of ensuring protection against discriminatory law, especially when a minority in the community was concerned. The Court pointed out that unlike the common law offence of committing an act outraging public decency covering all persons, whatever their sexual orientation, the challenged provision of the Crimes Ordinance only criminalised homosexual buggery otherwise than in private but did not criminalise heterosexuals for the same or comparable conduct when there was no genuine need for the differential treatment. Thus the matter failed at the first stage of the justification test, therefore the Court concluded that the impugned provision was a discriminatory law and unconstitutional.

The significance of the case lies in the fact that Hong Kong is mainly a Chinese community. Traditionally, Chinese community tends to hold a conservative moral view to sex, especially to the homosexual issue, which would usually be thought to be abnormal and disgusting. In such a community, homosexual persons are vulnerable to discrimination. The Court's decision shows its commitment to safeguard the principle of equality before law and its responsibility to protect the rights of such a minority group.

8 Conclusion

The principle of "one country, two systems" makes Hong Kong not only a special administrative region but also a special human rights region in China. Here, extensive fundamental rights and freedoms are entrenched and constitutionalised. Most importantly, they are judicially enforceable and the courts in the Region are committed to safeguarding them. The CFA contributes considerably in this regard. Although, perhaps due to its short history and highest appellate level, the CFA has so far dealt merely with a very few significant cases in each important fundamental right we have surveyed, there is no doubt that its decisions are of great significance because through them the Court has established some important principles, approaches, tests and guidance which are of high authority not only to the lower courts' future handling of human rights cases but also to the executive's daily behaviour of governance involving human rights issues. In terms of protecting human rights, the CFA can be called a liberal court indeed. It adopts a generous approach for the interpretation of the constitutional guarantees of the fundamental rights. At the same time, it

requires the restrictions on human rights should be narrowly interpreted and rigorously examined. It encourages the courts to refer to the authorities of international tribunals or of other jurisdictions to deal with human rights disputes. Although this approach lacks express endorsement from either the Basic Law or other statutes, it would facilitate the improvement of the level and quality of human right protection in Hong Kong by absorbing the advanced knowledge and practices in other jurisdictions. To achieve a high quality of dealing with rights disputes, the CFA allows human rights organisations to provide the services of counsel as *amicus curiae*, assisting the courts by expounding the law impartially. It also asserts that the conventional approaches for judicial review (in the administrative law sense), such as the *Wednesbury* test, should adapt to a human rights context.

The CFA has addressed certain typical fundamental rights concerning free expression, demonstration and equality in several leading cases. The CFA shows its concerns and commitments to safeguarding the constitutional individual rights in its decisions on these cases. However, it must be noted that although the judges of the Court are undoubtedly proponents of human rights, they are by no means absolutists in this regard. On the contrary, they acknowledge that there may be necessary restrictions on individual rights. In these cases, the essential question for the Court is where the proper balance between individual rights and community interests should be struck. Some points of the Court's decisions on these cases may be controversial, but the Court's sincerity of attempting to seek a fair and impartial answer seems to be not questionable. Rather than merely calling it the guarantor of human rights in Hong Kong, it seems to me that seeing the CFA as a guarantor both for the individual rights and for the community interests might be more appropriate. That would suit the constitutional role of the CFA as an impartial arbiter and interpreter of the Basic Law. Anyway, "a good society is one where individual rights flourish and where their protection and promotion constitute a public good",⁶²² the CFA has been playing significant part in Hong Kong's individual rights flourishing by providing them with quality and excellent judicial protection and promotion, that seems to be one important reason why the unelected CFA is surprisingly more popular, acceptable, authoritative and legitimate than the other two branches of the Hong Kong government in the local people's eyes.

The central government has shown a tolerant attitude to the flourish of a distinct human rights regime in Hong Kong, for most rights disputes there usually do not, in Beijing's eye, constitute a direct and serious threat to the foundation of China's constitutional and political order, although sometimes they do make the Central Government embarrassed (the *Falun gong* case is a good example), the CFA therefore has the space to play a positive and active role in Hong Kong's human rights protection and make some valuable contributions as to the jurisprudence innovation in this respect. It may even produce some constructive influence, directly or indirectly, on mainland China's progress towards the recognition of human rights and the rule of law.

⁶²² Charles Dlamini, "The Protection of Individual Rights and Minority Rights", in Bertus De Villiers, Frank Delmartino and André Alen (ed.), *Institutional Development in Divided Societies* (HSPC Press, 1998), p55.

Chapter 6

Judicial Politics: At Regional Level and Beyond

*“The genuine constitutional security of Hong Kong’s autonomy relies on a significant reform of China’s political and constitutional system. Hong Kong can certainly play a role in promoting such a reform by demonstrating to the Chinese people on the mainland the incomparable value of the rule of law in the Hong Kong system.”*⁶²³

– Bing Ling

1 Introduction

A supreme court, especially one with the function of constitutional review, cannot be simply perceived as a purely judicial institution which is isolated from and has nothing to do with politics. In fact it typically plays a unique role in the political life of a polity, interacting dynamically with politics. This chapter will discuss the relationships and interactions between the Court of Final Appeal (CFA) of HKSAR and the relevant political life, both at the regional (Hong Kong) level and at the central (Beijing) level. Certain ideas of the western scholars and the constitutional practices of EU and UK we have investigated in the former chapters will be referred to.

The following issues will be focused on. The first one concerns the Court’s relationship with the government and the Legislative Council (LegCo) in Hong Kong. Given the lack of trust and cooperation between the executive and the legislature after Hong Kong’s reversion to China, special emphasis will be placed on the impact of the executive-legislature conflict on the Court, and the Court’s possible reaction to and influence on their relationship. Secondly, the Court’s role in forming or changing Hong Kong’s public policies will be explored. Thirdly, Hong Kong is facing the problem of constitutional reform, that is, how to democratise in accordance with the provisions of the Basic Law. What part the Court would play in this process will be discussed. Fourthly, the Central Government’s attitude to the Court and the Court’s possible influence on the politics and the rule of law in mainland China will be investigated. I attempt to demonstrate that the Court could play a significant part in Hong Kong’s internal politics, and it may also make some contributions to legal reform and the transition to constitutionalism and the rule of law in mainland China as well. Given its great potential influence in this regard, it will be argued that the Court should adopt a modest attitude, rather than a robust one, to deal with politically sensitive questions so that a cooperative relationship could be built between the judiciary and other regional governmental branches, and between the Court and the central authorities in mainland China.

2 The Relationship with the Regional Government and the Legislature

During his visit to Hong Kong in July 2008, Xi Jinping, the Vice-President of China, held a meeting with the Region’s principal Executive, Legislative and Judiciary officials, urging

⁶²³ Bing Ling, “The Proper Law for the Conflict between the Basic Law and Other Legislative Acts of the National People’s Congress”, In Yash Ghai, Chen Wenmin and Fu Hualing (ed.) *Hong Kong’s Constitutional Debate: Conflict Over Interpretation*, (Hong Kong University Press, 2000), p170

“solidarity and sincere cooperation within the governance team” as well as “mutual understanding and support amongst the Executive, the Legislature and the Judiciary” of HKSAR.⁶²⁴ Soon the remarks attracted criticism from Hong Kong society, which accused Mr. Xi of misunderstanding the relationship between the Judiciary and the other governmental branches of HKSAR. The Hong Kong Bar Association issued a statement to clarify that the independence of Hong Kong judiciary is firmly guaranteed by the Basic Law, which is to keep the judiciary separate and independent from the Executive and the Legislature and shall not be regarded as a part of the “governance team” as Xi identified.⁶²⁵ In this section, we will examine what the possible interactions between the independent judiciary, particularly the CFA, and the other governmental branches in Hong Kong under the executive-led order and the unsatisfactory relationship between the Executive and the Legislature.

According to the design of the drafters of the Basic Law, the primary characteristic of the political system of the HKSAR is neither the separation of powers represented by the United States nor the parliamentary supremacy practised by the United Kingdom. Rather, it was devised to be an executive-led system,⁶²⁶ which is inherited from the previous British colonial rule. Actually, the so called executive-led system means the-Chief-Executive-led system. It must be emphasised that, as we mentioned in Chapter 2, under the Hong Kong’s new constitutional order, the Chief Executive (CE) is not only the head of the HKSAR government⁶²⁷ but also the head of the Special Administrative Region and represents the Region.⁶²⁸ He is accountable both to the Central Government and the HKSAR.⁶²⁹ In other words, we cannot regard the post of the CE as only the head of the executive branch which is in parallel with the LegCo and the Court. On the contrary, within HKSAR’s political structure, the post of the CE sits at the top of the pyramid of the regional institutions, ranking formally above not only the other executive authorities, but also the Legislature and the CFA.⁶³⁰ In this sense, it is somewhat like the role of the previous Hong Kong Governor, although with some reduction of its power and being selected locally.

Perhaps because of the special constitutional status of the CE, which connects the Central Government and the HKSAR closely, the Basic Law stipulates that he should be appointed by the Central Government after having been locally selected in Hong Kong by election.⁶³¹

⁶²⁴ “Xi Jinping ask Hong Kong officials to govern ‘sensibly, reasonably, cooperatively and efficiently’”, *ChinaNews.Com* (8 July 2008), <http://www.chinanews.com.cn/ga/zqmd/news/2008/07-08/1305089.shtml> accessed on 13 November 2008

⁶²⁵ Hong Kong Bar Association, “Press Statement of the Hong Kong Bar Association” (9 July 2008), <http://www.hkba.org/whatsnew/press-release/20080709.pdf> accessed on 11 November 2008

⁶²⁶ Christine Loh, Civic Exchange, *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council* (Hong Kong University Press, 2006), p327; Also see the speech of Wu Bangguo, the President of the Standing Committee of the National People’s Congress of the PRC, at a symposia commemorating the 10 years’ application of the Hong Kong Basic Law held on 6 June 2007, released by the Xinhua net, the official news net of the Chinese Government, at http://news.xinhuanet.com/politics/2007-06/06/content_6205144.htm (visited on 23 April 2008)

⁶²⁷ Art.60 of the Basic Law

⁶²⁸ Art.43 of the Basic Law

⁶²⁹ Art.43 of the Basic Law

⁶³⁰ Art.43 of the Basic Law

⁶³¹ Art.45(1) of the Basic Law. So far the Chief Executive is elected by a broadly representative Election Committee in Hong Kong before the Central Government’s appointment; since 2017 he/she may be elected through universal suffrage before being appointed by the Central Government. See The Basic Law, Annex I and The Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage (29 December 2007)

The Basic Law also equips the CE with extensive important powers to ensure he be able to discharge his duties smoothly. These powers include leading the government of HKSAR, deciding on governmental policies and issuing executive orders, nominating the principal officials and reporting it to the Central Government for appointments, signing bills and promulgating laws, appointing or removing judges of the courts at all levels in accordance with legal procedures, implementing the directives issued by the Central Government, conducting external affairs as authorised by the Central Authorities, etc.⁶³² The Basic Law further provides that the CE may return a bill passed by the LegCo on the ground of incompatibility with the overall interests of the Region.⁶³³ He even has the power to dissolve the LegCo in certain circumstances.⁶³⁴

The implications of the executive-led system to the Court can be appreciated from at least three aspects. Firstly, the CE's responsibility to implement the Basic Law, provided by art.48 (2) of the Basic Law, may compete with the Court's power of interpreting the Basic Law. As we discussed in Chapter 4, in some extreme circumstances, the CE may rely on art.48 (2) to appeal to the Central Government for a reinterpretation of the Basic Law so as to reverse the Court's interpretation which he dislikes. The CE chose to do so when dealing with the crisis following the CFA's decision on *Ng Ka Ling* in 1999 and effectively made the NPCSC alter the interpretation of the Court on art.22 (4) and art.24 (2) (3) of the Basic Law. As earlier discussed, although the CE's action was based on his consideration of the public interest of Hong Kong and effectively avoided the possible sudden flooding of 1.6 million mainland immigrants into Hong Kong, it was strongly criticised by some commentators for they thought that it damaged the independence of the Court. I have attempted to defend the CE's action in Chapter 4, there seems to be another point which might further justify it. As we know, the CE has power to return a bill to the Legislature for reconsideration if he thinks the bill violates the overall interest of Hong Kong.⁶³⁵ Arguably, this might add some justification to the CE's seeking assistance from the Central Government to change the Court's interpretation of the relevant Basic Law provision if he thinks it damages the overall interest of Hong Kong because the Court's interpretation could be conceived as an indirect law or bill which has a similar legal force or legal effect. The argument may seem artificial. But the point is that the Court actually has the power of law-making, especially after it gains the jurisdiction of constitutional review through the power of interpreting the Basic Law, and it seems, at least arguably, legitimate that this kind of law-making power should also be subject to the check and balance of the CE's power under the executive-led system, given that the law-making power of the Legislature would be. However, it must be stressed again that in order to uphold the authority of the CFA and the independence of the judiciary, only in very rare extreme cases the CE should interfere by wielding the weapon of art.48 (2). In normal cases he should be self-constrained and respect court decisions. This has indeed been frequently promised by the HKSAR government.⁶³⁶

⁶³² Art.48 of the Basic Law

⁶³³ Art.49 of the Basic Law

⁶³⁴ Art.50 of the Basic Law

⁶³⁵ The reconsideration must be made within three months. See art.49 of the Basic Law.

⁶³⁶ "Government Statement on FAC's Report", on the official website of the Constitutional and Mainland Affairs Bureau, at http://www.cmab.gov.hk/en/press/press_11.htm (visited on 24 April 2008). Also see "Hong Kong Government would not seek interpretation from the Central Government easily", at <http://www.chinanews.com.cn/ga/zxgagc/news/2007/04-04/907911.shtml> (visited on 24 April 2008). Strangely, these promises were made by the Hong Kong government officials rather than the Chief Executive himself or his representative. As the CE is not only the head of Hong Kong government but also the head of the whole region, government officials are incompetent to make promise setting boundaries for the CE's future action.

Another implication of the executive-led political system to the Court would stem from art.48 (3) of the Basic Law, which requires the CE to implement the directives issued by the Central Government in respect of the relevant matters provided for in the Basic Law. Potentially the provision may produce a dilemma for the CE when a directive of the Central Government is in conflict with a decision of the CFA. In fact the Central Government may deliberately adopt this strategy to disregard a ruling of the CFA such as the judgment in *Ng Ka Ling*, although this might be politically unwise and risky due to its appearance of much toughness and disrespect to the authority of Hong Kong judiciary. However, if the Central Government really issues such a directive one day, the CE would have to make a choice between carrying it out and on the other hand respecting the Court's judgment. In such a situation, because of his constitutional status the CE would be more likely to implement the Central Government's order rather than the Court's words. Fortunately so far this has not happened in practice and it seems there is little possibility that it would happen in the near future given that the NPCSC could instead use its interpretation power to rectify the Court's opinion. Nonetheless, we cannot discount it, for the option is actually an effective constitutional weapon of the Central Government and cannot be removed from its arsenal. Whether to use it or not is fully at the Central Government's discretion. If it were deployed to reverse a Court decision, great damage would be inflicted on the Court's authority.

Thirdly, the CE may use his power of appointing judges to influence the political stance of the CFA. As the American experience has shown, when a vacancy occurs on the Supreme Court, the President can attempt to use his power of nomination strategically in order to bring the Court in line with his own policy preferences.⁶³⁷ That is why when Barack Obama had been elected to be the President of the USA there was great expectation that he would use his chance of appointing federal judges to reverse the judiciary's shift to the right under President George W. Bush.⁶³⁸ Even when there is not a vacancy, in very extreme cases, the US president may employ the Court-packing strategy to submit the Court. The famous example is Franklin Delano Roosevelt's Court-packing of 1937 which sought to enlarge the number of judges in the Supreme Court from nine to fifteen in an attempt to ensure the Court's support of his New Deal measures.⁶³⁹ Although the bill did not actually become law, it placed great pressure on the Court and eventually made it give up its conservative stance on the president's social and economic reforms. As a result, one of the hardest obstacles of FDR's New Deal policy was removed. In Hong Kong, the CE has power to appoint all judges.⁶⁴⁰ It is reasonable to suppose that he may follow American presidents' practice to mould the Court in his image by staffing the Court with jurists who read the Basic Law his way. However, that does not mean he could do it arbitrarily. Actually there are considerable constraints on the CE's power of appointing judges. As for the procedural aspect, his appointments would be based on the recommendation of an independent commission, which is composed of local judges, persons from the legal profession and eminent persons from other sectors,⁶⁴¹ although he might have discretion in deciding whether to accept the commissions' nomination. As far as the appointment of the judges of the CFA is concerned, the legislative endorsement is necessary.⁶⁴² The appointment must also be reported to the NPCSC for record.⁶⁴³

⁶³⁷ Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* (Rowman & Littlefield Publishers 1999)

⁶³⁸ Andy Sullivan, "Obama Likely to Push Courts Away From Right", ABC News (14 November 2008), <http://abcnews.go.com/US/wireStory?id=6251682> accessed on 4 February 2009

⁶³⁹ Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* (Rowman & Littlefield Publishers, 1999), 157-188

⁶⁴⁰ Art.88 of the Basic Law

⁶⁴¹ Art.88 of the Basic Law

⁶⁴² Art.90 of the Basic Law and Section 7A of the Hong Kong Court of Final Appeal Ordinance.

Additionally, the CE may not interfere with the way judges carry out their functions, but through his power to pardon and commute⁶⁴⁴ he can interfere a little with judicial activity after the event. However, so far no pardon has been made by a CE yet.

Having discussed the possible impacts of the executive-led political system on the CFA, we may easily get an impression that the CFA is just passively subject to the influence of the government, particularly the CE. However, that is not the case. Actually the CFA can produce a significant counter-force in the executive-led system. On the one hand, it might contribute to strengthening the executive's dominant role in the system by consistently supporting the government's policies and the related legislation when they are challenged by judicial review. Such endorsement may enhance a policy's legitimacy considerably and make it much easier to be accepted by and implemented in the society. As a result the authority of the executive could be safeguarded and strengthened. In other words, when the Court cooperates with the executive, it adds its own authority into the executive's authority and consolidates the executive-led system. On the other hand, of course, the Court may also weaken the dominant role of the executive branch by expanding its own power through constitutional review and acting as an activist court. However, under such a circumstance, the government's tolerance and obedience to the court constitutional review power might in fact enhance the legitimacy of the government and its policies, because that would be an evidence showing that the government and its governance is under the laws and the constitution, not above them. That is a fundamental requirement of the rule of law and constitutionalism.⁶⁴⁵

From the actual performance of the CFA since its establishment, especially after its frustration by the NPCSC's interpretation in 1999, it may be concluded that the Court has "steered a middle course between judicial activism and judicial restraint".⁶⁴⁶ This is of great significance not only to the executive-led feature of the system but also to the independence of the Court itself. As we know, the former CE, Mr. Tung Chee-Hwa, suffered a serious governance crisis during his terms and encountered strong opposition from various sectors of the community, making the authority of the government decline dramatically.⁶⁴⁷ In such a circumstance, it might be reasonable to suppose that the cases of disobedience would grow and the numbers of judicial review against government would increase accordingly. If the Court chose to be too active in scrutinising and formulating public policies, the government would face much more difficulty and the Central Government desired executive-led system would be threatened much more seriously. Consequently, the possibility of the interference from the Central Government to correct the situation would enhance and the independence of the CFA would be under threat. In fact, the NPCSC's interpretation of the Basic Law in 1999 to reverse the Court's decision in the *Ng Ka Ling* case serves as a good example. However, after that the Court seems to have adopted a cautious and moderate stance, especially when dealing with cases involving Central Government elements or having local domestic law and order implications,⁶⁴⁸ in an attempt, perhaps, to avoid direct confrontation with the local executive branch or provocation to the central authorities. From its restraint, both the

⁶⁴³ Ibid.

⁶⁴⁴ The Basic Law, art.48(12)

⁶⁴⁵ Frederick Lee Morton, *Law, Politics, and the Judicial Process in Canada* (University of Calgary Press, 2002), p71

⁶⁴⁶ Albert H. Y. Chen, "Constitutional Adjudication in Post-1997 Hong Kong", (2006) 15 *Pacific Rim Law & Policy Journal*, p680.

⁶⁴⁷ Ming Sing, "The Problem of Legitimacy for the Post-Handover Hong Kong Government", (2001) 24 *International Law Journal of Public Administration*, pp847-867

⁶⁴⁸ Po-Jen Yap, "10 Years of the Basic Law: the Rise, Retreat and Resurgence of Judicial Power in Hong Kong", (2007) 36 *Common Law World Review*

authority of the government and the independence of the Court probably have benefited. As Mr. Wong Yan Lung, the Secretary for Justice of Hong Kong, indicated, "Hong Kong's experience shows that the practice of judicial review has not been an obstacle to the operation of government, to the contrary, it enhances the people's confidence in the government. Neither before nor after reunification, were there governance problems caused directly by the practice of judicial review."⁶⁴⁹

The "executive-led system" is an official version of construing the political structure devised by the Basic Law. But there is no mention of the exact wording "executive-led" in the Basic Law itself at all. Some scholars think that the correct description of the feature of the political system in Hong Kong, which is primarily defined by the executive-legislative relationship, is a system of mutual cooperation and checks and balances.⁶⁵⁰ Indeed, the Basic Law places significant constraints on the power of the CE and the government by improving the role of the legislature. For example, it provides that the government of HKSAR must abide by the law and be accountable to the LegCo: it shall implement laws passed by the Council and already in force, present regular policy addresses to the Council, answer questions raised by members of the Council and obtain approval from the Council for taxation and public expenditure.⁶⁵¹ As for the CE, when a bill which has been returned by him is passed by the LegCo again by not less than a two-thirds majority of all the members, he must make a choice between signing it and dissolving the LegCo.⁶⁵² If he chooses the latter and the new elected LegCo again passes the bill by not less than a two-thirds majority, he must sign it or resign.⁶⁵³ Further the Basic Law grants the LegCo the power to initiate investigation on the CE's serious breach of law or dereliction of duty, and to initiate impeachment.⁶⁵⁴

Most significantly, perhaps, unlike the governors during the British rule, the CE does not have the power to appoint the members of LegCo any more, and he does not serve as the president of the LegCo. Actually all the legislators come from elections, although a significant part of them are still elected indirectly.⁶⁵⁵ Just as Professor Yash Ghai has pointed out, the Basic Law seems to have inherent contradictions in its design of the political system of HKSAR.⁶⁵⁶ On the one hand, the power of the executive authorities and the Central Government reflects authoritarianism; on the other hand the provisions of the LegCo represent democratic politics. The directly elected legislators obtain a mandate from their constituencies and usually have more popularity and legitimacy than the officials of the executive authorities who are appointed. Moreover, the CE is not elected through universal suffrage and cannot be a member of a political party.⁶⁵⁷ If he nominates members from a political party for being appointed by the Central Government as Hong Kong's principal

⁶⁴⁹ Speech by Secretary for Justice, Mr. Wong Yan Lung, to the Central Government officials at Diaoyutai Hotel, Beijing, on 12 April 2006.

⁶⁵⁰ Xu chongde, *Gang Ao Jibenfa Jiaocheng* [An Instruction of the Basic Laws for Hong Kong and Macao], (China Renmin University Press 1994), p164. (in Chinese)

⁶⁵¹ Art.64 of the Basic Law

⁶⁵² Art.50 of the Basic Law

⁶⁵³ Art.52 of the Basic Law

⁶⁵⁴ Art.73(9) of the Basic Law

⁶⁵⁵ By now half of the sixty members are returned by geographical constituencies through direct elections and another half are returned by functional constituencies. From 2022 all the members may be returned by direct election. See Annex II of the Basic Law and The Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage (29 December 2007).

⁶⁵⁶ Yash Ghai, *Hong Kong's New Constitutional Order*, (2nd ed 1999), pp292-302.

⁶⁵⁷ The Chief Executive Election Ordinance, s 31.

officials, they must follow the CE's policy preference, rather than their own parties' assertions. Thus so far the legislature is the main arena for the parties to compete for political power. There is a lack of institutional connections between the legislature and the government in terms of personnel. In other words, the government is institutionally isolated from political parties. Consequently, it is hard for the government to acquire consistent and solid support from the legislature.⁶⁵⁸ This is seen as the main reason for the strain in the executive-legislative relationship after the reunification.⁶⁵⁹ Although this situation might also happen in a separation of powers system, it could be eased by mature party politics for no matter how weak a government is, it always has its own supporters in the legislature who belong to the same party as that of the head of the government. Therefore, some believe a resolution of this problem in Hong Kong should be a promotion of the development of party politics in the region, allowing political parties to compete not only for the legislative seats but also the executive posts.⁶⁶⁰ In other words, the CE and his principal officials could be members of political parties, thus hopefully, they would be able to get stable support from their "comrades" in the legislature, or at least attract less attack.

What we are concerned with here is the impact of the lack of cooperation between the legislature and the government on the Court and the possible influence of the Court on that relationship. Firstly, there were signs indicating that legislators tended to use judicial review as a technique to oppose the government's policies and bills. In order to please voters or get noticed by the public, legislators prefer to adopt strategies such as criticising government policies strongly in the media, questioning officials sharply, and voting against government's bills in a high profile. If an opposed bill is passed by the majority of the legislature, the minority may choose to continue their objection by wielding the weapon of judicial review. By so doing, they extend the battlefield beyond the legislature to the courts and get a possibility to reverse their failure in the former. Even though they may fail again, they could at least get massive media coverage in the process, which is critical to their political careers.

Take the controversial adoption of the *Interception of Communications and Surveillance Ordinance* 2006 for example. The pro-democracy legislators opposed firmly the Hong Kong government's bill of the Ordinance and proposed about 200 amendments to it. But all their amendments were rejected by the president of the LegCo on the ground that there were longstanding rules in the legislature barring members from introducing amendments to government-sponsored bills if the amendments would affect government revenues or spending.⁶⁶¹ Then the opposition legislators walked out of the chamber in protest and the remaining legislators passed the bill by a vote of 32 to 0. Soon after, Leung Kwok-hung, one of the legislators strongly opposing the bill, filed a legal challenge to the legislature's rules on which the president's decision was based. Five months later, Leung's case was struck down by the High Court, which acknowledged that Hong Kong has an executive-led

⁶⁵⁸ Li Guoming, "Xianggang tebie xingzhengqu jibenfa shishi liang zhounian yantaohui zongshu [An Overview of the Conference on The Two Years' Application of the Hong Kong Basic Law]", *Peking University Law Journal*, (May, 1999), at 127-129

⁶⁵⁹ Rita FAN HSU Lai-tai, "The Relationship between the Executive Authorities and the Legislature", (Speech at the Luncheon held by the Hong Kong Democratic Foundation on 26 October 2004), <http://www.hkdf.org/newsarticles.asp?show=newsarticles&newsarticle=155> accessed on 1 May 2008.

⁶⁶⁰ Audrey Eu, "The Civic Party's Mission", *Hong Kong Journal* (January 2007), http://www.hkjournal.org/PDF/2007_spring/eu.pdf accessed on 6 October 2008

⁶⁶¹ Keith Bradsher, "Hong Kong Surveillance Law Passes", *The New York Times* (6 August 2006), <http://www.nytimes.com/2006/08/06/world/asia/06cnd-ong.html?hp&ex=1154923200&en=e455dd319aff644e&ei=5094&partner=homepage/> accessed on 5 May 2008

government and confirmed the constitutionality of the legislature's rules.⁶⁶² Although this case had no chance of going to the CFA, it did reflect the fact that judicial review may be used by politicians as a significant means to achieve their political ends. In other words, there appears to be increasing possibility that the courts, including the CFA, are dragged into the political process.

The number of judicial review applications in Hong Kong has reached a level of around 150 a year in recent years.⁶⁶³ Many challenging issues, primarily involving the proper interpretation of the Basic Law, the construction of statutes and common law principles, are submitted to the courts for decision through judicial review.⁶⁶⁴ The Chief Justice, Mr. Andrew Li Kok-nang, has thus pointed out, "it is important to recognise that judicial review is an established and vital feature of our legal system... It is not an exaggeration to say that the phenomenon of judicial review has redefined the legal landscape... the availability and use of judicial review has had a significant impact on the conduct of the business of government and has exercised a considerable influence on public debate on many issues... Court decisions in many judicial review cases have important repercussions for various political, economic and social problems which confront our society."⁶⁶⁵ However, as indicated in Chapter 4, the Chief Justice clearly understands that there should be a boundary between the role of courts and the function of the political process. He has also implied that he has a concern about the abuse of judicial review by litigants, especially, perhaps, by politicians.⁶⁶⁶ (The phenomenon that politicians use judicial review to block government's policies will be further illuminated by our discussion of the *LINK REIT* case in the following section.)

The comments made by Mrs. Rita Fan on Leung's challenge to the legislature's rule may additionally demonstrate the courts' impact on political arena. First, she complained, "If any Legco member has a problem with the rules of procedure, he or she has the right to bring it to Legco's Committee on Rules of Procedure. There are channels in place, but Mr. Leung did not utilise the channels and went straight to court."⁶⁶⁷ That means the president of the LegCo preferred the disputes arose in the legislative process to be handled within the legislature, rather than being appealed directly to courts, implying that the courts as outsiders might complicate the situation and should be the last resort. That might be a reasonable stance, for either the principle of separation of powers or the doctrine of parliamentary sovereignty (or congressional supremacy) tends to justify limitations on judicial intervention with the legislative process, especially where the courts have no abstract judicial review power. However, Fan also indicated that she would respect any judgment made by the court.⁶⁶⁸ This shows political leaders' willingness to subject themselves to the authority of courts, despite their dislike of their intervention. Therefore the potential intervention from the courts could be an important factor that politicians have to

⁶⁶² *Leung Kwok Hung v. The President of the Legislative Council of the Hong Kong Special Administrative Region* (HKAL000087/2006), at paragraphs 64-72

⁶⁶³ The Chief Justice Mr. Andrew Kwok-nang Li, "CJ's speech at Ceremonial Opening of the Legal Year 2007", *Press Releases* (8 January 2007), <http://www.info.gov.hk/gia/general/200701/08/P200701080120.htm> accessed on 24 November 2008

⁶⁶⁴ *Ibid.*

⁶⁶⁵ *Ibid.*

⁶⁶⁶ *Ibid.*

⁶⁶⁷ Una So, "Leung Loses out as Court Dismisses Judicial Review", *The Standard* (23 January 2007)

http://www.thestandard.com.hk/news_print.asp?art_id=36657&sid=11842780 accessed 5 May 2008

⁶⁶⁸ *Ibid.*

take into account in the political process. The start-up of the NPCSC's interpretation process of art.53(2) of the Basic Law, which concerns the term of a successor of a resigned CE, is a good example. It will be discussed later.

It deserves noting that the government's initiation of the legislative process of the Interception of Communications and Surveillance Ordinance was actually driven by a decision of the CFA in *Koo Sze Yiu*.⁶⁶⁹ In that case the CFA confirmed the lower courts' declarations of the unconstitutionality of s.33 of the Telecommunication Ordinance and the Executive Order which had served as the legal foundation of interception of communications and other covert surveillance in Hong Kong. However, to afford an opportunity for the enactment of corrective legislation, the Court granted six months suspension of the declaration of unconstitutionality so as to postpone its coming into operation. As a response, the government drafted the controversial bill and attempted to enact it within the six months period provided by the Court. This example is a further demonstration of the Court's impact on Hong Kong's political process, for it shows that courts can sometimes set the legislative agenda for the government and trigger the legislative process. This may diminish to some extent the so-called executive-led feature of Hong Kong's political system.

Interestingly, another point in *Koo Sze Yiu* could further show that courts can be a critical element to the executive-led system. One of the major goals of the plaintiffs in that case was to employ constitutional judicial review⁶⁷⁰ to make the CE bring the proposed scheme of Interception of Communications Ordinance into operation.⁶⁷¹ This Ordinance was passed by the Legislature days prior to reunification. Unlike the repugnant s.33 of the Telecommunication Ordinance granting "the Governor, or any public officer authorised in that behalf by the Governor" may order an interception, the Interception of Communications Ordinance prohibited any interception of communication by post or telecommunications save where such interception was authorised by the order of a High Court judge. However, s.1(2) of the Ordinance provided that it "shall come into operation on a day to be appointed by the Governor by notice in the Gazette".⁶⁷² But neither the Governor prior to the handover nor either CE since has appointed such a day. The plaintiffs, one of them was a legislator, then challenged the constitutionality of the CE's omission. But the courts gave no support to them on this issue as in the judges' view s.1(2) did not impose a duty on the CE to bring the Ordinance into force at any particular time, although it did impose a continuing obligation on the CE to consider whether to bring it into force.⁶⁷³

Another important case that demonstrates courts' considerable influence on the institutional relationship in Hong Kong is *Cheng Kar-shun*,⁶⁷⁴ a case recently decided by the High Court, in which the power of a select committee of the LegCo to order witnesses to attend before it to give evidence and to produce documents was challenged on the grounds of

⁶⁶⁹ *Koo Sze Yiu and Leung Kwok Hung v Chief Executive of the HKSAR* (FACV12/2006)

⁶⁷⁰ I use the term of "constitutional judicial review" to refer to courts' review of the constitutionality of a conduct, which is different from the traditional judicial review before 1997 when there was no a constitutional document such as the Basic Law in Hong Kong and also different from the constitutional review exercised by a special Constitution Court or a Legislature, rather than the ordinary courts, in some countries.

⁶⁷¹ *Koo Sze Yiu and Leung Kwok Hung v Chief Executive of the HKSAR* (FACV12/2006), at para.10

⁶⁷² The Interception of Communications Ordinance s.1(2)

⁶⁷³ *Koo Sze Yiu and Leung Kwok Hung v. Chief Executive of the HKSAR* (CACV87/2006), paras.18-28 and (HCAL 107/2005), paras.47-98

⁶⁷⁴ *Cheng Kar-shun Another v. Hon Li Fung-Ying, BBS, JP* (HCAL79/2009)

unconstitutionality and *ultra vires*. As for the constitutional challenge, the court exercised its jurisdiction without hesitation. It interpreted the relevant provisions of the Basic Law and held that the challenged power of the select committee was constitutional. As far as the issue of *ultra vires* is concerned, however, the court became much cautious. It stated that "the courts of the Hong Kong Special Administrative Region do not, as a rule, interfere with the internal working of the legislature. Exceptionally, where questions of whether the Legislative Council, in going about its business, has acted in contravention of the provisions in the Basic Law arise, the courts do have jurisdiction to intervene. But the jurisdiction must be exercised with great restraint, having regard to the different constitutional roles assigned under the Basic Law to different arms of the government."⁶⁷⁵ Finally, it rejected the applicants' argument of *ultra vires* too. Thus, the court found in favour of the legislators. This case shows the judiciary's respect for the legislature and the principle of separation of functions among the three governmental branches on the one hand, and its determination of its duty and jurisdiction as to constitutional interpretation and constitutional review, on the other hand.

From these examples, it can be argued that in the context of the competition, rather than cooperation, between the legislature, especially the opposition legislators, and the government, the courts, ultimately the CFA, may play an important part in their relationship and interactions. To seek courts' intervention could be an optional strategy for legislators to attempt to reverse the situation when they feel that they may be unable to win a political battle in the legislature chamber. The government has to compete with them for the support from the courts. Thus courts would become an extension of the two branches' battlefield, and the courts' attitudes could change the balance between them.

However, this would raise the legitimacy question. As a constitutional arbiter, the CFA has the last word, at the regional level, on matters involving constitutionality. Due to its non-elective nature, the democratic legitimacy of its decision-making power in constitutional issues depends largely on the extent to which it subjects itself to the checks and balances from other democratically established institutions, primarily the legislative and executive branches. Here I do not mean to challenge the independence and finality of the Court's action. What I mean is that the democratic institutions should maintain a power which can be deployed to remedy the Court's law-making in the constitutional area when necessary. Certainly this power can only be used in extreme circumstances. However, despite the rareness of being exercised, the very existence of such a power in democratically elected bodies could legitimate, to some extent, the constitutional review power of the Court for under that check the Court actually is not as far beyond the democratic control as it might appear to be. Take the US constitutional judicial review practice for example, although the Supreme Court has great power to interpret the Constitution, handle constitutional disputes and produce high authoritative interpretation of statutes, it is still under the last control of democracy indeed, for the democratic government may opt initiating the process of amending the Constitution, although very difficult, or introducing and passing legislation that overturns or modifies judicial law-making, as a last resort to achieve checks and balances over the Court.⁶⁷⁶ Similarly, in Hong Kong the local legislative power can be used as a remedy to courts' interpretation of statutes. Notably, however, as we discussed in

⁶⁷⁵ *Cheng Kar-shun v. Hon Li Fung-Ying, BBS, JP and Others* (HCAL79/2009), paragraph 220.

⁶⁷⁶ Richard A. Paschal, "Continuing Colloquy: Congress and the Finality of the Supreme Court", *Journal of Law & Politics* (1991-1992), pp. 143-226

Chapter 4, as far as the courts' constitutional interpretations are concerned, the story is different. Under Hong Kong's constitutional order, the substantive power of amending the Basic Law does not lie in the Hong Kong legislature; instead, it is vested in the National People's Congress.⁶⁷⁷ Although the HKSAR does have power to propose a bill for amending the Basic Law, there are considerable procedural restrictions on it, making its exercise extremely difficult.⁶⁷⁸ The CFA therefore in a sense occupies a position supreme not only in Hong Kong's legal system, but also in its political structure. Under this circumstance, the check and balance over the Court's role can only come from the central government's intervention through its final power of interpreting or amending the Basic Law, rather than from a counter power within the local political structure in Hong Kong.

3 Impact on Public Policies

This section attempts to explain the Court's political role further by exploring its impact on public policies entailed from its rulings on challenges to Hong Kong governments' schemes which involve public concern or interest. The Court's decision or even just the proceeding of such litigation itself could have the effect of thwarting, deferring or promoting a government policy. In other words, the Court may exercise a function of divesting, derogating, granting or consolidating the legitimacy of a public policy, not to mention its role in substantively (re)formulating public policies. My argument is based on the following discussion of two influential cases heard by the CFA. Both concern the government's arrangements responding to certain financial problems.

The first one is *Secretary for Justice v. Lau Kwok Fai Bernard*⁶⁷⁹, in which the Court had to determine the constitutionality of two Ordinances purporting to implement the Government's policy of reducing the pay of public officers. At the time being Hong Kong was hit by the South East Asian financial crisis and had encountered economic recession. As a result, the Government faced a serious fiscal deficit. In order to tackle the problem, austerity measures were adopted by the Government, of which adjusting the pay of public officers was a part. Due to the lack of an express provision authorising the Government to reduce pay in the contractual arrangements between it and the vast majority of serving civil servants, seeking the enactment of legislation to implement the pay reduction policy was eventually adopted by the Government in an attempt to avoid legal uncertainty.⁶⁸⁰ Moreover, to ensure its constitutionality, the adjustments proposed did not make the actual reduction of the pay of public officers employed before handover below their salary on 30 June 1997, so that, according to the Government, the requirement of art.100 of the Basic Law would be satisfied. However, the enacted legislation, namely, the Public Officer Pay Adjustment Ordinance, Cap.574 and the Public Pay Adjustments (2004/2005) Ordinance, Cap.580, were still challenged by two public officers through judicial review on the ground that the Ordinances breached art.100 and 103 of the Basic Law.

⁶⁷⁷ The Basic Law art.160(1)

⁶⁷⁸ The Basic Law art.160(2)

⁶⁷⁹ *Secretary for Justice v. Lau Kwok Fai Bernard*, FACV15/2004,
http://legalref.judiciary.gov.hk/doc/judg/word/vetted/other/en/2004/FACV000015_2004.doc

⁶⁸⁰ Civil Service Bureau, "2003 Civil Service Pay Adjustment", Brief for the Legislative Council, 25 February 2003, <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN011818.pdf> accessed on 10 October 2008

Art.100 of the Basic Law provides, “ *Public servants serving in all Hong Kong government departments, including the police department, before the establishment of the Hong Kong Special Administrative Region, may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service **no less favourable than before.*** (emphasis added)” Art.103 further provides, “*Hong Kong’s previous system of recruitment, employment, assessment, discipline, training and management for the public service, including special bodies for their appointment, pay and conditions of service, shall be maintained, except for any provisions for privileged treatment of foreign nationals.*”

The two public officers claimed that the Government was prevented by art.100 from introducing legislation to reduce the pay of the public officers appointed before 1 July 1997, even if the reduction did not take the level of pay below that prevailing immediately prior to 1 July 1997. As for art.103, it was argued that the legislation failed to conduct a Pay Trend Survey and thus constituted a breach of art.103 because such a survey, in their eyes, had become an established part of the system employed for assessing adjustments to public service pay and this “system” should be adhered to by the Government in accordance with art.103. The public officers lost their case in the first instance but gained the support from the Court of Appeal. The Government appealed to the CFA.

The Court’s stance would have great implications for the Government’s efforts of solving the deficit problem, which could impede the trend of economic recovery and even trigger financial crisis if there was continuing deterioration.⁶⁸¹ To cut expenditure was an important part of the Hong Kong Government’s three-pronged approach for tackling the fiscal deficit.⁶⁸² The handling of the civil service pay adjustment was a key factor which would have significant impact on the Government’s target to reduce operating expenditure in 2006-07 by \$20 billion.⁶⁸³ If the Government failed to get endorsement from the Court in the case, it would be put in a very difficult situation. As Mr. Joseph W P Wong, the then Secretary for the Civil Service, had acknowledged earlier, “If the pay reduction decision could not in the end be implemented, the public at large might be under the impression that civil servants are only concerned with their personal interests and are unwilling to share the burden with the community. Another possible consequence is that the Government will be unable to ameliorate the fiscal deficit. Such an outcome would be detrimental to the interests of both the civil service and the community at large.”⁶⁸⁴ Against this background, how the Court would decide attracted great attention.

Eventually the Court found in favour of the Government, unanimously confirming the constitutionality of the challenged Ordinances. First of all, it upheld, without hesitation, the legislative power to alter contracts of service. It ruled, “The plenary legislative powers enjoyed by the Legislative Council since 1 July 1997, subject to the Basic Law, are relevantly no less extensive than those that existed before that date. These powers clearly

⁶⁸¹ The Government of the Hong Kong Special Administrative Region, *The 2003-04 Budget*, <http://www.budget.gov.hk/2003/eng/budget.htm#The%20Urgency%20of%20Solving%20the%20Deficit%20Problem> accessed on 13 October 2008, para.19

⁶⁸² *Ibid*, para.21.

⁶⁸³ Civil Service Bureau, “2003 Civil Service Pay Adjustment”, Brief for the Legislative Council, 25 February 2003, <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN011818.pdf> accessed on 10 October 2008, para.2

⁶⁸⁴ Joseph W P Wong, “Pay Reduction by Legislation is Reasonable and Fair”, *CSB-Media Release Archive 2002-June 24* (3), <http://www.csb.gov.hk/print/english/info/1063.html> accessed on 14 October 2008

extend to the alteration of a term in public officers' contracts of service and a reduction in their pay, subject, of course, to the provisions of the Basic Law. Likewise, there is now no firmer basis for implying a contractual term against introducing legislation to reduce pay than there was before 1 July 1997. If anything, the separation of powers, notably the separation of the legislative from the Executive power, effected by the Basic Law might make the case for making such an implication, if anything, even weaker."⁶⁸⁵ As far as art.100 was concerned, the Court stressed that a purposive construction must be given. It pointed out that to ensure continuation of employment was the principal object of art.100 and "the article does not seek to prohibit or inhibit changes to pay, allowances, benefits or conditions of service of public officers appointed before 1 July 1997, except to the extent that such changes are less favourable than those entitlements before that date."⁶⁸⁶ The article, the Court indicated, was designed to preserve the continuity of Hong Kong's previous system of recruitment, employment, assessment, discipline, training and management for the public service. It was emphasised, "It is the continuity of that **system** that is preserved. Preservation of that system does not entail preservation of all the elements of which the system consists. Some elements may change and be modified or replaced without affecting the continuity of the system as a whole."⁶⁸⁷ Therefore, for the same reason, art.103, according to the Court, did not require that a Pay Trend Survey must be conducted every time that public service pay was to be adjusted. The Government won.

Another case is the *Link REIT Case*,⁶⁸⁸ which also involves the Government's financial policy to reduce the fiscal deficit caused by the Asian financial crisis in 1997 and the ensuing prolonged economic recession. The respondent Housing Authority (the Authority) is a statutory corporation whose core function is the provision of public rental housing for low income families. Apart from that, the Authority also sold flats to eligible families at discounted prices under the Home Ownership Scheme (HOS) and the Tenants Purchase Scheme (TPS). Significant income was gained by the Authority from these sales. After being hit by the Asian financial crisis, Hong Kong property prices tumbled by over 60%.⁶⁸⁹ Responding to that, the Government conducted a comprehensive review of its housing, planning and lands policy with a view to restoring the public's confidence in the property market and decided to withdraw gradually Government's involvement in the property market.⁶⁹⁰ In line with this general policy direction, HOS and TPS were to be ceased. The cessation, however, would lead to financial difficulties for the Authority, probably making its cash balance decrease from \$28 billion in April 2003 to minus \$5.5 billion in March 2006.⁶⁹¹ This threatened its capacity of discharging its core function, that is, to provide subsidised rental accommodation to low-income families which are unable to afford private rental housing. As a remedy, the Government required the Authority to divest its retail and

⁶⁸⁵ *Secretary for Justice v. Lau Kwok Fai Bernard*, FACV15/2004, http://legalref.judiciary.gov.hk/doc/judg/word/vetted/other/en/2004/FACV000015_2004.doc accessed on 15 October 2008, para.42

⁶⁸⁶ *Ibid*, para.36

⁶⁸⁷ *Ibid*, para.65

⁶⁸⁸ *Lo Siu Lan v. Hong Kong Housing Authority* Court of First Instance (HCAL 154/2004), Court of Appeal (CACV378/2004), Court of Final Appeal (FAMP2/2004)

⁶⁸⁹ "Statement by Secretary for Housing, Planning and Lands", *Press Release in 2002*, <http://www.devb-plb.gov.hk/eng/press/2002/20021113244.htm> accessed on 15 October 2008

⁶⁹⁰ *Ibid*.

⁶⁹¹ "Divestment of Housing Authority's retail and car-parking facilities approved", Press Releases (Thursday, 24 July 2003), Hong Kong Housing Authority and Housing Department, <http://sc.housingauthority.gov.hk/gb/www.housingauthority.gov.hk/tx/en/aboutus/news/pressreleases/0,,2-0-6928,00.html> accessed on 17 October 2008

car-parking facilities (RC). The move was seen as consistent with the Government's policy commitment to the "free market" and "small government".⁶⁹²

The plan of divestment was approved by the Executive Council on 15 July 2000. According to it, the Government would first set up a new company, Link Properties Limited, and then divest 100 percent of its ownership by way of listing a real estate investment fund ("Link REIT") through an initial public offer (IPO) to both institutional and retail investors; and also that the Authority would inject the RC assets into the Link, which would own and manage the facilities. It took the Authority two years to complete the necessary administrative and legal arrangements. On the 25th November 2004, Link REIT published its Global Offering Circular inviting applications for units. The offering was most successful and over-subscribed heavily. The listing of Link REIT was originally planned on the 16th December 2004. Expenses of over \$100 million had been spent on the Global Offering exercise. Had it been completed, the Authority would have received from Link REIT about \$30 billions as consideration for the RC. However it was aborted by two public housing residents through judicial review.

Some public housing tenants and shop-owners raised their worry about the negative impact on their life that would be caused by the divestment to a few legislators in September 2004.⁶⁹³ In November 2004, 100 tenants sought support from pro-democracy legislators to help safeguard their interests.⁶⁹⁴ Inside the legislative chamber, the opposing legislators could only seek to pass non-binding motions to urge the Authority to postpone the Link REIT listing until consensus was reached with commercial tenants.⁶⁹⁵ In the end, the opponents resorted to judicial review in order to abort the listing. On the 8th December 2004, just eight days before dealing in the units would commence, two public housing residents, Lo Siu-lan and Mak Ki-chiu, filed for judicial review, challenging the Authority's legal power to divest the assets in the way proposed. It is widely believed that the applicants were encouraged and financially backed by a legislator, Mr. Albert Cheng,⁶⁹⁶ who was accused by the Government of abusing of process and using courts for political ends.⁶⁹⁷

Taking into account the tight schedule of the divestment arrangement, the Court of First Instance promptly heard the case and delivered a judgment in favour of the Authority on the 15th December 2004, one day before the planned listing of Link REIT on the Hong Kong Stock Exchange.⁶⁹⁸ The applicants appealed to the Court of Appeal. As a result, the deadline for listing had to be extended to the 20th December. In the light of the urgency, the Court of Appeal decided, in response to the Authority's application, abridging the time for appealing

⁶⁹² Hong Kong Housing Authority and Housing Department, "Divestment of Housing Authority's retail and car-parking facilities approved (Thursday, 24 July 2003)", *Press Releases*, <http://www.housingauthority.gov.hk/en/aboutus/news/pressreleases/0,,2-0-6928,00.html> accessed on 20 October 2008

⁶⁹³ Rikkie L K Yeung, "Divestment in Hong Kong: Critical Issues and Lessons", (2005) 27 *The Asia Pacific Journal of Public Administration*, p153.

⁶⁹⁴ *Ibid.*

⁶⁹⁵ *Ibid.*

⁶⁹⁶ Marcal Joanielho, Carrie Chan, Jonathan Li and Mukul Munish, "Tung Fury over Challenge", *The Standard* (17 December 2004) http://www.thestandard.com.hk/stdn/std/Front_Page/FL17Aa01.html accessed on 21 October 2008

⁶⁹⁷ *Lo Siu Lan v. Hong Kong Housing Authority*, Court of First Instance, HCAL 154/2004, para.15

⁶⁹⁸ *Ibid.*

and heard it on the 16th December. On the same day a decision was made by the court.⁶⁹⁹ The appeal was dismissed. But it is not the time for the Authority to laugh for the story did not end here. The applicants were determined to take it all the way to final appeal. The Authority sought an order to abridge the time for the applicants to seek leave to appeal to the CFA. It was rejected by the Court of Appeal. Then the Authority applied to the Appeal Committee of the CFA for such an order. The Committee ruled that it did not have the statutory power to abridge the time for the applicants to appeal to the CFA.⁷⁰⁰ This made the Authority decide not to proceed with the scheduled listing of Link REIT on the 20th December 2004 and the Global Offering lapsed.⁷⁰¹

Finally the appeal was adjudicated by the CFA on 5th and 6th of July 2005. The Court determined⁷⁰² that the divestment was *intra vires* the Authority as a statutory corporation. The Chief Justice ruled that, according to the Housing Ordinance, the Authority plainly had the power to sell the retail and carpark facilities to the Link REIT given the sale was consistent with its object laid down in s.4(1) of the Ordinance, which was to secure the provision of housing and ancillary amenities for such kinds or classes of persons as the Authority may, subject to the Chief Executive's approval, determine. The Chief Justice pointed out, it was significant that the statutory object did not use the phrase "to provide"; instead the phrase "to secure the provision of" was used. In his view, to secure the provision of the facilities did not mean that the Authority had to itself be the direct provider. He held, "The Authority secures the provision of the facilities so long as the facilities are available, although they are provided not by the Authority but by Link REIT, a third party over whom the Authority has no control."⁷⁰³ Therefore the sale was within the Authority's capacity. The Chief Justice's opinion was agreed by all other judges. The Authority won and the legal uncertainty was finally removed. Consequently, the Link REIT was successfully listed in late November 2005.⁷⁰⁴

The two cases involve apparently matters of public interest and politics. They may reflect a phenomenon of "the politicisation of judicial review", that is, according to Anthony B L Cheng and Max W L Wong, "the purpose of initiating judicial review is not merely to review an administrative decision, but also to embarrass the government on particular policy issues, or to delay the policy decision. Sometimes, legal challenges are used to force the government to go back to the negotiation table."⁷⁰⁵ However, if the challenged policy passes the examination and gets an endorsement from the courts, its legitimacy and acceptability would increase significantly, so will the efficiency of its implementation. When dealing with the above cases, the Court was clearly aware of the sensitiveness of the issues and the possible great social, economic and political repercussion that would be caused by its rulings.

⁶⁹⁹ *Lo Siu Lan v. Hong Kong Housing Authority*, Court of Appeal, CACV378/2004

⁷⁰⁰ *Lo Siu Lan v. Hong Kong Housing Authority*, Court of Final Appeal, FAMP2/2004

⁷⁰¹ Hong Kong Housing Authority and Housing Department, "Global Offering of Units in the Link REIT Offering Lapses", Press Releases (20 December 2004), <http://www.housingauthority.gov.hk/en/aboutus/news/pressreleases/0,,2-0-11908,00.html> accessed on 21 October 2008

⁷⁰² *Lo Siu Lan v. Hong Kong Housing Authority*, Court of Final Appeal, FACV10/2005

⁷⁰³ *Ibid*, para. 38

⁷⁰⁴ Rikkie L K Yeung, "Divestment in Hong Kong: Critical Issues and Lessons", (2005) 27 *The Asia Pacific Journal of Public Administration*, p150

⁷⁰⁵ Anthony B L Cheng and Max W L Wong, "Judicial Review and Policy Making in Hong Kong: Changing Interface Between the Legal and the Political", (2006) 28 *The Asia Pacific Journal of Public Administration*, p123

The judges were cautious. Although the Court's decisions actually served to support the Government's policies, ensured the smooth implementation of the relevant public policies and therefore safeguarded the Government's authority, the judges seemed to deliberately avoid giving an impression of involving political consideration. They attempted to appear to focus themselves purely on the statutory construction or basic law interpretation. As Justice Bokhary in the case of *Lo Siu Lan* stressed, "the question presented to the Court in this appeal is a pure question of legal capacity to be decided as a matter of statutory interpretation".⁷⁰⁶ The Court's cautiousness might also be found in its division of work in the public officers' salary reduction case. It is worth noting that the ruling was fully made by Sir Anthony Mason, a non-permanent judge from another common law jurisdiction. Curiously, the Chief Justice and three permanent judges unanimously agreed with Sir Anthony Mason without giving any further opinion. The reason for their silence might lie in the fact that the Government's plan for the adjustment of the pay and conditions of judges and judicial officers was still under consultation with the Chief Justice.⁷⁰⁷ The fate of the present scheme of reducing the pay of public officers would certainly have some impact on the following reform of the mechanism of judges and judicial officers pay. The Court was in a sensitive situation. In order to appear neutral and fair, letting a non-permanent judge from foreign country having high reputation to handle this case seemed to be a wise option for the Court. Although, as mentioned above, the Court took effort to bend itself to pure legal analysis when dealing with public policy issues, it did show its willingness to consider all the relevant matters, rather than pure legal elements, and make a balance among them. The attitude was further implied by the Chief Justice's statement when refusing to abridge the applicants' time for appeal in *Lo Siu Lan*. He stressed, "it must be observed that even if the Court had power to abridge time, in exercising such a power, it would need to have regard to all relevant considerations. These include Hong Kong's reputation as an international financial centre, the interests of investors who had subscribed for units in the Link Real Estate Investment Trust and the interests of the Authority. At the same time, justice must be done and must be seen to be done and the Court would have to ensure that all parties have a proper opportunity of presenting their cases."⁷⁰⁸

To sum up, from our discussion of the pay reduction case and the *Link REIT* case, we can see the courts' engagement in public policy affairs could have two potentialities. First, while it may be used by some minority or disadvantaged groups in a society to protect their interest from encroachment by the government in the name of public good, it could also be employed by certain politicians as their "Archimedes' lever" to move the Earth⁷⁰⁹ as they may effectively get the result of setting policy agenda for the government, forcing the government to give up, change or adjust a policy, or blocking or suspending a public policy's implementation through launching a judicial review proceeding. Secondly, courts' endorsement of a government's policy may enhance its acceptability and legitimacy, and thus ease its implementation in the society. Actually, the two cases indicated that the judges tended to be supportive of the government in some important and influential policy issues by using pure legal reasoning so as to hide their political consideration.

⁷⁰⁶ *Lo Siu Lan v. Hong Kong Housing Authority*, Court of Final Appeal, FACV10/2005, para.48

⁷⁰⁷ Civil Service Bureau, "2003 Civil Service Pay Adjustment", Brief for the Legislative Council, 25 February 2003, <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN011818.pdf> accessed on 10 October 2008, para.21.

⁷⁰⁸ *Lo Siu Lan v. Hong Kong Housing Authority*, Court of Final Appeal, FAMP2/2004, para.10

⁷⁰⁹ The ancient Greek scientist Archimedes' famously remarked that "Give me a place to stand and I will move the Earth" – meaning that if he had a lever sufficiently long, he could shift the Earth by his own efforts. See David Macaulay and Neil Ardley, *The New Way Things Work* (Houghton Mifflin Harcourt, 1998), p374.

4 The Court's Role in Democratic Development

4.1 *Constitutional Reform*

Since reunification, democratic development has been a main theme of Hong Kong's political life. It is mainly reflected in constitutional reform, by which it is meant how to amend the methods provided by the Basic Law for the selection of the Chief Executive (CE) and the formation of the Legislative Council (LegCo) after 2007. Although the Basic Law stipulates that the ultimate aim is to elect both the CE and all the members of the LegCo by universal suffrage,⁷¹⁰ it offers neither timetable nor roadmap for achieving that aim. It merely requires the reform should be subject to the "actual situation" in the HKSAR and the principle of "gradual and orderly progress".⁷¹¹ However it does allow amendments to the selection and formation methods subsequent to the year of 2007 if there is a need and the required procedures are followed.⁷¹²

Before 2007, Hong Kong had three experiences of selection of the CE. The first one was held in 1996, in which Mr. Tung Chee-hwa was elected from four eligible candidates by a 400-member Selection Committee as the first CE of HKSAR.⁷¹³ The 400 members were representatives from the following four sectors: industrial, commercial and financial sectors (100), the professions (100), Labour, grass-roots, religious and other sectors (100), and former political figures, Hong Kong deputies to the National People's Congress, and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference (100).⁷¹⁴ For the election of the second CE in 2002, an Election Committee of 800 members, which had been in place for the election of 6 members of LegiCo in 2000, was used.⁷¹⁵ They had been returned from four sectors slightly different from the former 400-member Selection Committee. Each sector had returned 200 members.⁷¹⁶ They were: (1) industrial, commercial and financial sectors, (2) the professions, (3)labour, social services, religious and other sectors, (4)members of the Legislative Council, representatives of district-based organisations, Hong Kong deputies to the National People's Congress, and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference.⁷¹⁷ However, there was no actual election held this time because Mr. Tung secured 714 nominations during the nomination stage, thereby making it impossible for any other candidate to receive the minimum 100

⁷¹⁰ The Basic Law art.45(2), art.68(2)

⁷¹¹ Ibid.

⁷¹² Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex 1 and Article III of Annex 2 to the Basic Law of the Hong Kong Special Administrative Region of the Peoples' Republic of China.

⁷¹³ Joyce Barnathan and David Lindorff, "Hong Kong's New Boss (int'l edition): Will tycoon C.H. Tung stand up for the territory – or just be a figurehead?", *Business Week* (23 December 1996)
<http://www.businessweek.com/1996/52/b35077.htm> accessed on 23 October 2008

⁷¹⁴ Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region (Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990), art.3
<http://www.hklii.org/hk/legis/en/ord/2202/longtitle.html> accessed on 23 October 2008

⁷¹⁵ The Basic Law, Annex I.

⁷¹⁶ Ibid.

⁷¹⁷ Ibid.

nominations in order to proceed with an election.⁷¹⁸ Tung moved on uncontested to his second term as CE. In 2005, Mr. Tung unexpectedly resigned. Mr. Donald Tsang eventually was selected by the Election Committee, which was the same one as that elected Mr. Tung for his second term, to be the new CE to complete the remainder of Tung's term, which was due to expire in 2007. But there was a big controversy about how long the term should be. It will be discussed later. Again this time saw no actual election, for Mr. Tsang gained the support of 710 Election Committee members during the nomination stage and the election process was not triggered.⁷¹⁹

As far as the election of the LegCo is concerned, three elections, apart from the election of the Provisional Legislative Council of the HKSAR in 1996, were held before 2007. In the first post-colonial LegCo election that took place in May 1998, only twenty legislators were returned from geographical constituencies through direct elections, while thirty were returned by functional constituencies⁷²⁰ and ten by an 800-member Election Committee.⁷²¹ The first term of office of the LegCo was 2 years and after that it is 4 years.⁷²² So the second election was held in 2000. This time the number of legislators elected by the Election Committee was reduced to six while the number of directly elected legislators was increased to 24.⁷²³ In the 2004 election the six Election Committee seats were replaced by those returned by universal suffrage and the LegCo was composed of thirty directly elected members based on five geographical constituencies and thirty from a variety of functional constituencies concerned predominantly with business and professional interests.⁷²⁴ These elections indicate a stable development of democracy in Hong Kong, rather than an idealist sudden leap. They seem to conform to the Basic Law's requirement that Hong Kong's democratisation must be in line with "the actual situation" in the HKSAR and "the principle of gradual and orderly progress".⁷²⁵

Hong Kong's post-colonial democratic development can be pictured by exploring the debate over how to achieve the goal of universal suffrage in elections of both CE and LegCo. The debate was heated up by the constitutional reform of the two procedures after 2007. The

⁷¹⁸ "Tung Chee Hwa Wins 2002 HKSAR Chief Executive Election", *People's Daily Online* (1 March 2002), http://english.people.com.cn/200202/28/eng20020228_91172.shtml accessed on 23 October 2008

⁷¹⁹ "Tsang Declared HK's New Leader", *BBC News* (16 June 2005), <http://news.bbc.co.uk/1/hi/world/asia-pacific/4098714.stm> accessed on 23 October 2008

⁷²⁰ The practice of functional constituencies was a relic of British colonial rule in Hong Kong and accepted by Chinese government for Hong Kong's legislature elections after 1997. A functional constituency is a professional or special interest group involved in the electoral process. Eligible voters in a functional constituency may include natural persons as well as other designated legal entities such as organisations and corporations. Pro-democracy supporters criticise this arrangement for giving a minority too much power and influence. The right of corporations and legal entities to vote is also controversial, as it gives some individuals multiple votes. In some functional constituencies, the entire body of eligible voters comprises legal entities that are not natural persons. See Christine Loh, Civic Exchange (ed), *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council* (Hong Kong University Press, 2006); Hsin-Chi Kuan (ed), *Power Transfer and Electoral Politics: The First Legislative Election in the Hong Kong Special Administrative Region* (Chinese University Press, 1999), pp20-24.

⁷²¹ The Basic Law, Annex II; Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region (Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990), art.6, <http://www.hklii.org/hk/legis/en/ord/2202/longtitle.html> accessed on 24 October 2008

⁷²² The Basic Law, art.69.

⁷²³ The Basic Law, Annex II, art.1

⁷²⁴ Ibid.

⁷²⁵ The Basic Law, art.68

controversy over the constitutional reform focuses primarily on the following issues. The first one is the question of “when”, that is, what is the precise year for adopting universal suffrage or the pace of democratisation in Hong Kong. The pro-democrats seek full democratisation as early as possible while the conservatives and pro-Beijing figures prefer to a much delayed timetable.⁷²⁶ The Basic Law provides merely the election methods prior to 2007 and states that the ultimate end of the democratic development is universal suffrage, without pointing to a precise year. Therefore, in theory, even if it were achieved in 2047, the last year of exercising the policy of “one country, two systems” in Hong Kong promised by the Basic Law and thus the last year of the effect of the Basic Law (strictly speaking),⁷²⁷ that would still be constitutional, despite the fact that it might be politically unacceptable in reality for that would make the Central Government be seen as insincere to its promise of democracy for Hong Kong. However, the Basic Law does leave space for the democratic development subsequent to 2007 by providing that if there is a need to amend the two methods, it would be allowed provided that the procedural requirements are satisfied.⁷²⁸ So the pro-democrats struggled for achieving universal suffrage in 2007’s selection of CE and 2008’s election of LegCo. But their enthusiastic dream was ended by a Decision of the NPCSC,⁷²⁹ which denied the universal suffrage being exercised in 2007 and 2008 by claiming that it would not conform to the “actual situation” in Hong Kong and the principle of “gradual and orderly progress”. But it permitted that appropriate amendments could be made to the two election methods. The decision was condemned by the pro-democrats for its delaying democratisation. They protested and urged universal suffrage be fully realised by 2012.⁷³⁰ The pro-democrats in the LegCo vetoed the proposal of the Hong Kong Government on the constitutional reform in 2007 and 2008, which was based on the NPCSC’ Decision and proposed to double the number of the Election Committee of selecting the CE to 1,600 and expand the LegCo to 70 members, from 60.⁷³¹ One primary reason of their opposition was the government’s proposal did not contain the timetable for achieving universal suffrage which they were fighting for.⁷³² As a result the election of the CE in 2007 and the formation of the Legislative Council in 2008 would continue to use the existing methods without any progress. Ironically the pro-democrats’ action seems to have led to an undemocratic result this time because if the Government’s proposal were adopted, the democratic element of the elections in 2007 and 2008 would at least increase to a large extent. Now due to their refusal, the previous less democratic methods would have to be used in the two years’ elections, making Hong Kong’s democratisation stay at the original position. The status quo was maintained. No progress at all. Even worse, their efforts for universal suffrage by 2012 were again frustrated by a Decision of the NPCSC.⁷³³ However,

⁷²⁶ Ian Scott, “Constitutional Reform and the Problem of Consent”, *Hong Kong Journal* (07 January 2007) http://www.hkjournal.org/archive/2007_fall/3.htm accessed on 27 October 2008

⁷²⁷ The Basic Law, art.5

⁷²⁸ The Basic Law, art.7 of Annex I and III of Annex II

⁷²⁹ Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in the Year 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008, S.S.No.5 To Gazette Extraordinary No.8/2004

⁷³⁰ “Thousands March for Universal Suffrage in H.K. by 2012”, *BNET United Kingdom* (Asian Political News, 21 January 2008) http://findarticles.com/p/articles/mi_m0WDQ/is_/ai_n24270154 accessed on 27 October 2008

⁷³¹ Constitutional and Mainland Affairs Bureau, “Government gives notices to LegCo to move motions concerning 2007/2008 electoral methods”, *Press Briefings and Releases* (6 December 2005), <http://www.cmab.gov.hk/cd/eng/media/p120605.htm> accessed on 27 October 2008

⁷³² Ian Scott, “Constitutional Reform and the Problem of Consent”, *Hong Kong Journal* (07 January 2007) http://www.hkjournal.org/archive/2007_fall/3.htm accessed on 27 October 2008

⁷³³ The Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming

this time a timetable was set, allowing universal suffrage for selecting the CE by 2017 and all legislators by 2020.⁷³⁴ Moreover, the Decision also provided that appropriate amendments conforming to the principle of gradual and orderly progress could be made to the two electoral methods for 2012.⁷³⁵ These amendments will lay a solid foundation for attaining universal suffrage for the CE in 2017 and for the LegCo in 2020.

Although the question of “when” has got its answer, there still remains the question of “how”, that is, the substantive arrangements of the universal suffrage, need to be addressed. Three issues are primarily concerned. First of all, the composition and size of the Nomination Committee for nominating the candidates of the CE and the method of nomination have been heatedly debated.⁷³⁶ Secondly, in terms of forming LegCo by universal suffrage, the primary issue is how to deal with functional constituency seats, which constitute half of the Legislative Council at present. Two types of opinion dominate so far. One is to replace functional constituency seats with district-based seats returned through direct election while another advocates retaining functional constituency seats but changing the electoral methods.⁷³⁷ Thirdly, many people are concerned about the development of political parties in Hong Kong, being of the view that the present restriction, which requires the CE should not belong to a political party, needs to be reformed, and to the contrary, political parties should be encouraged to send members to be the candidates for the CE election.⁷³⁸

4.2 *The Courts' Impact*

As it has been shown above, the primary feature of the process of the constitutional developments in Hong Kong is the lack of consensus among various political forces and different interest groups on the issues such as pace, Nomination Committee, functional constituencies, and party politics. Politicians and interest groups are using every possible means to try to influence the forming of the government's final proposals, in an attempt to get proposals which would best suit their own political ideal or needs and desires. If they cannot achieve their ends or reach a compromise through the political process, they may choose to appeal to the courts. For example, Shan Zhongxie, the vice-president of the Hong Kong Democracy Party, once criticised sharply a proposal of electing the CE by universal suffrage put forward by Tan Huizhu, a Hong Kong deputy to the National People's Congress, warning that if the proposal was adopted by the government, it would be challenged by a judicial review.⁷³⁹ Tan's proposal asserted that CE candidates must obtain nominations from at least nine Hong Kong deputies to the NPC. Mr. Shan claimed that it would violate the Basic Law for it would form a screening mechanism which was incompatible with the spirit

the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage (29 December 2007)

⁷³⁴ Ibid.

⁷³⁵ Ibid.

⁷³⁶ The Government of Hong Kong Special Administrative Region, *Green Paper on Constitutional Development* (July 2007), pp.17-32, <http://www.cmab-gpcd.gov.hk/doc/GPCD-e.pdf>

⁷³⁷ Ibid, pp.33-39

⁷³⁸ The Democratic Party, *Policy Recommendation on Policy Address* (06/07), pp.45-46, http://www.dphk.org/2003/outspoken/address0610/20061113eng_full.pdf accessed on 27 October 2008

⁷³⁹ “Pan-democrats oppose Tan Huizhu's and Hu Hanqing's Proposals on Constitutional Developments, Asking the Government not to Adopt it.” (News of the Singtao Net, Hong Kong & Macao, 16 April 2007) http://www.stnn.cc/hongkong/200704/t20070416_514603.html accessed 16 May 2008

of universal suffrage provided by the Basic Law. However, Shan's real concern was that the screening mechanism might effectively prevent the pro-democrats from being nominated. Inevitably such political concerns would continue to emerge in the constitutional reform process. If the political process lacks the ability to resolve them, courts will become their choice. Even if the issues could be resolved by politics, politicians might also put them before the courts as a strategy for bargaining. Therefore what role the Court should play when disputes concerning constitutional development come to it deserves discussion.

In mature constitutional democracies, courts with constitutional review power play a significant part in the political process. Much literature has explored the unique political role of the US Supreme Court. For example, as indicated in Chapter 3, many theoretical explanations for courts' legitimate role, such as Sunstein's judicial minimalism, Ely's representation reinforcing approach and Friedman's dialogue account, have indeed based on enquiries on the US Supreme Court's role in politics. As for the Western Europe, constitutional courts are conceived as a third legislative chamber.⁷⁴⁰ Their review activities have effectively changed the behavior of the first and second Chambers, which tend to cater for the taste of the constitutional courts.⁷⁴¹ As Martin Shapiro and Alec Stone point out, "European constitutional courts have created situations in which legislators feel obliged to enter into constitutional discourse, both an internal discourse and a discourse with the court, to make and to take seriously constitutional arguments, and to cast and recast statutory language in the light of potential constitutional objections."⁷⁴² In transitional democracies, as it has been shown by the cases of post-communism countries in east Europe and Russia, constitutional review could also contribute considerably to realising constitutional democracy in the transitional period, by helping society and public bodies to adapt to new social and public changes and to soften negative consequences of this transition and of various politically sensitive questions.⁷⁴³ However in these new democracies, constitutional courts act usually in an extremely cautious way. Their performance, active or constrained, depends largely upon their calculation of the risk and benefit for the establishment of their authority, namely, public support or legitimacy in the long-run.⁷⁴⁴

Hong Kong is also in a period of transitional democracy. During that period, through constitutional reforms, the ultimate aim of universal suffrage would be achieved in a gradual and orderly way. From the above democracies' experience, it might be reasonable to expect that Hong Kong courts, particularly the CFA, could have some significant impact on the progress with its constitutional review power. But it must be noted that the courts in Hong Kong exercise only concrete constitutional review and have no jurisdiction of abstract review or giving advisory opinions. That means they can only address particular political constitutional issues in actual disputes; unlike the constitutional courts in most European

⁷⁴⁰ Martin Shapiro and Alec Stone, "the New Constitutional Politics of Europe" in Howard J. Wiarda (ed), *Comparative Politics: Critical Concepts in Political Science* (Taylor & Francis, 2005), p91.

⁷⁴¹ *Ibid*, at p89

⁷⁴² Martin Shapiro and Alec Stone, "the New Constitutional Politics of Europe", (1994) 26 *Comparative Political Studies*, p417.

⁷⁴³ Vaidotas A. Vaičaitis, "Transitional Democracy and Judicial Review: Lithuanian Case" (Paper for VII World Congress of the International Association of Constitutional Law, 12 June 2007) [http://www.enelsyn.gr/en/workshops/workshop5\(en\).htm](http://www.enelsyn.gr/en/workshops/workshop5(en).htm) accessed 19 May 2008

⁷⁴⁴ Lee Epstein, Olga Shvetsova and Jack Knight, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government", (2001) 35 *Law & Society Review*, pp131-156

countries, such as France, Russia and Germany,⁷⁴⁵ Hong Kong courts cannot give legal opinions to the legislature or government on the constitutionality of a specific issue without actual litigation. However, although the influence of the courts in Hong Kong on the development of constitutional democracy may not be as obvious as that of their counterparts in Europe, they do have an important part to play in the process. Even though no actual litigation comes to them, their presence itself may serve to deter the occurrence of unconstitutionality. Take the NPCSC's interpretation of art.53 (2) of the Basic Law for example. In 2005 the CE Mr. Tung Chee Hwa resigned and a new CE had to be elected within six months. It was said that at first the Central Government had no plan to interpret the Basic Law at all for it naturally thought that the term of office of the new CE selected through a by-election shall be the remainder of that of the previous CE. However, divergent views arose on this in Hong Kong society. One view supported the remainder of the term of office of the previous CE, and the other was for a five-year term for the new CE.⁷⁴⁶ Standing with the Central Government, the Hong Kong government drafted an amendment to the Chief Executive Election Ordinance, prescribing that the term of office of the succeeding CE should expire upon the expiry of the term of office of the succeeded CE. However, some members of the LegCo and individuals publicly threatened that they would raise judicial review of the draft amendment.⁷⁴⁷ In fact, the court received an application from a member of the LegCo for such judicial review on April 4, 2005. In order to avoid the delay of the election the possible judicial review might cause, eventually referral was made by Hong Kong Government and the NPCSC interpreted the Basic Law provision to clarify that the term would be the remainder of that of the previous CE.⁷⁴⁸ Although the interpretation was still of controversy, it did have the effect of removing the legal uncertainty and strengthening the constitutional foundation of the by-election of the CE. Consequently, the legislator withdrew his application for judicial review from the court.⁷⁴⁹ This example demonstrates courts' deterrent impact on political actors' behaviors. Although no judicial proceeding has been actually started, the possibility of courts' engagement itself may substantially change the political process. Therefore when analyzing Hong Kong's constitutional reform, the courts' role cannot be overlooked.

4.3 *The Justiciability of Political Questions*

However, the capacity of courts to engage in political questions, which, to some extent, determines courts' influence on Hong Kong's constitutional reform, will be limited by the

⁷⁴⁵ Jack Knight, "Institutionalizing Constitutional Interpretation", in John A. Ferejohn, Jack N. Rakove and Jonathan Riley (ed), *Constitutional Culture and Democratic Rule* (Cambridge University Press, 2001), pp383-389; Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press, 2005), pp87,89-90

⁷⁴⁶ Wai Man Sin, "Law, autonomy and politics: The changing socio-political roles in postcolonial Hong Kong", (2006) 34 *International Journal of the Sociology of Law*, pp70-71.

⁷⁴⁷ Li Fei, "Explanations on the Draft Interpretation of Paragraph 2, Article 53 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress" (At the 15th Session of the Standing Committee of the Tenth National People's Congress on 24 April 2005) http://www.info.gov.hk/basic_law/fulltext/article2.pdf accessed on 19 May 2008

⁷⁴⁸ NPCSC, Interpretation of Paragraph 2, Article 53 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the 15th Session of the Standing Committee of the 10th National People's Congress on 27 April 2005)

⁷⁴⁹ BBC News, "Hong Kong Legislator Decided to Withdraw His Application for Judicial Review of the Term of the Chief Executive [gang yiyun jue ding che teshou renqi sifa fuhe shenqing]", http://news.bbc.co.uk/chinese/simp/hi/newsid_4500000/newsid_4501700/4501739.stm accessed on 20 May 2008 (in Chinese)

idea of justiciability, by which it is meant, in terms of constitutional reform, whether the proposals, reports and decisions of the government concerning the constitutional developments are subject to constitutional judicial review. Some commentators may hold the view that Hong Kong courts should be strictly constrained by the doctrine of nonjusticiability of political questions. Actually, Professor Yash Ghai has put his doubts on the justiciability of all the provisions of the Basic Law, pointing out that some articles (e.g. requiring the Hong Kong government to keep a low tax policy, to create an environment conducive to investments, or whether a bill presented by the Chief Executive to the Legislative Council is sufficiently "important" to justify him or her dissolving the Legislative Council if it rejects it, etc.) may be unsuitable for judicial interpretation or intervention.⁷⁵⁰ Professor Albert Chen also argues that certain political issues should be excluded from Hong Kong courts' constitutional jurisdiction based on the American courts' "political question" doctrine.⁷⁵¹ His view is shared by Yap Po Jen, who asserts that not all constitutional affairs falling within the limits of Hong Kong's autonomy are automatically justiciable and where they are inappropriate for judicial resolution and they would be more effectively addressed by political branches, the courts should allow the political process to take its course.⁷⁵²

The political question doctrine was created and developed by American courts following the English common law tradition of judicial self-restraint.⁷⁵³ According to it, courts may decline to decide certain kinds of controversies because they are more appropriately within the purview of the political branches of government. The doctrine seems to be a logical result from the principle of separation of powers established by the US constitution. It implies that some constitutional questions fall outside the purview of the judiciary. However, it is still for courts to determine whether an issue at stake is indeed a political one and should be addressed by political process. In other words, "the courts still determine which branch decides the question, so there is an initial evaluation by the judiciary even when the political question doctrine applies. To that extent, the judiciary is still saying 'what the law is.' But the questions become 'political' in the sense that, after that determination, their resolution is left to the political branches".⁷⁵⁴ The implication of this for the Hong Kong situation is that, although political question doctrine may be deployed to reduce the courts' possible influence in democratic development, the courts' initial evaluation would still make them play a part in the constitutional reform if there are disputes presented to them. The initial evaluation itself could, arguably, be viewed as a kind of judicial intervention. Its result could be appealed to superior courts, and ultimately to the CFA. That means the judicial process could be strategically used to delay a constitutional reform even when the controversial issue is apparently a pure political question.

⁷⁵⁰ Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, Hong Kong 1999) p306

⁷⁵¹ Albert H Y Chen, "The Concept of Justiciability and the Jurisdiction of Hong Kong Courts", (1997) 27 *Hong Kong Law Journal*, pp 387-390

⁷⁵² Yap Po Jen, "Interpreting the Basic Law and the Adjudication of Politically Sensitive Questions", (2007) 6 *Chinese Journal of International Law* pp 558-564

⁷⁵³ William Orville Douglas, *We the Judges: Studies in American and Indian Constitutional Law from Marshall to Mukheriea* (Doubleday 1956), p54-55

⁷⁵⁴ Rachel E. Barkow, "More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy", (2002) 102 *Columbia Law Review*, pp244-246

Moreover, however, as Tushnet has demonstrated, even in America the “political question” doctrine is gradually fading out.⁷⁵⁵ It is asserted that “a matter is ‘clearly political’ cannot negate its existence as a ‘legal matter’. Every matter is a ‘legal matter’, in the sense that the law takes a position on whether it is permitted or forbidden.”⁷⁵⁶ In some modern democracies there seems a tendency of replacing the “political question” claim with the claim of “subjection of parliamentary organs to the principle of the constitution”,⁷⁵⁷ of which the final interpretative power is claimed to be exclusively possessed by the courts. In other words, the political question doctrine is increasingly facing a challenge from the rise of judicial supremacy, a trend, exemplified primarily by America, that the Supreme Court has embraced the view that it alone among the three branches of government has the power and competency to provide the full substantive meaning of all constitutional provisions.⁷⁵⁸ Actually, a similar tendency emerges in Hong Kong. Leung Kwok Hung’s challenge to legislature’s rule of procedure in the interception case⁷⁵⁹ we discussed earlier may serve as a good example of the signs of judicial supremacy in Hong Kong. More importantly, the Basic Law does not explicitly exclude Hong Kong courts from dealing with “sensitive political questions”, except for the exclusion of acts of state such as foreign and defence affairs from their jurisdiction.⁷⁶⁰ On the contrary, it does authorise Hong Kong courts to interpret all the provisions of the Basic Law, not only those which are within the limits of the autonomy of the Region but also those involving matters beyond the Region’s autonomy, given specific requirements are satisfied in the latter circumstance.⁷⁶¹ If only part of the Basic Law is justiciable, as argued by Professor Ghai, the courts’ constitutional interpretation power would be diminished considerably given the further fact that they can only carry out concrete constitutional review. That would result in an absurd situation in which a portion of the Basic Law would not be subject to any interpretation of the courts while the Basic Law explicitly grants Hong Kong courts the power of interpreting all its provisions except for those Excluded Provisions which should be referred to the NPCSC for interpretation before making their final judgments which are not appealable due to their involvement of the Central Government’s responsibilities or the relationship between the Central Authorities and the region.⁷⁶² Therefore, it may be safely argued that Hong Kong courts, based on their interpretation power, have jurisdiction to review any matters, other than acts of state, involving the application and the appreciation of the provisions of the Basic Law given that there is no need to refer them to the NPCSC for interpretation. Political questions certainly fall within their jurisdiction as long as the questions do not concern foreign and defence affairs and affairs beyond Hong Kong’s autonomy.

Indeed the CFA does tend to assert courts’ power over all the disputes involving interpretation of any provision of the Basic Law. In other words, the CFA seems to embrace

⁷⁵⁵ M. Tushnet, "Symposium: Baker V. Carr: A Commemorative Symposium: Panel I: Justiciability and The Political Thicket: Law And Prudence In The Law Of Justiciability: The Transformation And Disappearance Of The Political Question Doctrine", (2002) 80 *N.C.L. Rev.* p1203

⁷⁵⁶ Justice Barak (former President of the Supreme Court of Israel) in the *Ressler* case (HCJ 448/81 *Ressler v. Minister of Defense* 35 P.D (1981) 81).

⁷⁵⁷ Suzie Navot, “Judicial Review of the Legislative Process”, (2006) 39 *Isr. L. Rev.* p182

⁷⁵⁸ Rachel E. Barkow, “More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy”, (2002) 102 *Columbia Law Review*, pp317-319

⁷⁵⁹ *Leung Kwok Hung v. The President of the Legislative Council of the Hong Kong Special Administrative Region* [2007] 1 HKLRD 387, supra note 30.

⁷⁶⁰ The Basic Law, art. 19(3)

⁷⁶¹ The Basic Law, art.158

⁷⁶² The Basic Law, art.158(2)

the view that all the provisions of the Basic Law are justiciable. As advanced by the Chief Justice in *Ng Ka Ling*,

*They [the courts of the HKSAR] undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the court is bound to hold that a law or executive act is invalid at least to the extent of the inconsistency. [Stress added]*⁷⁶³

The CFA emphasised that it was the final authority in Hong Kong to judge the constitutionality of the legislative and executive actions according to the provisions of the Basic Law. Notably, the Court even strongly declared that the judiciary would not exercise any discretion to subject its commitment of constitutional review to political branches. This stance thus may reduce the space for arguing that courts' constitutional jurisdiction could be subject to political question doctrine. According to it, when a dispute over the constitutionality of a political question appropriately comes to the courts, the courts must answer it by providing their interpretation of the relevant provisions of the Basic Law, rather than merely give up their jurisdiction with the excuse of political question doctrine. To exercise their jurisdiction to deal with controversies over the construction of the Basic Law provisions regulating a specific political matter, in the CFA's view, is actually Hong Kong courts' obligation, not a matter of discretion. They just have no power to give up that jurisdiction simply because of the fact that the Basic Law authorises them to be the authoritative interpreter of all its provisions (including the Excluded Provisions so long as their judgments are not final).⁷⁶⁴ They must discharge that duty loyally and to be a guardian of the application of the Basic Law in Hong Kong. As far as constitutional development is concerned, it may be anticipated from the CFA's above statement that the government's acts or even the legislature's decisions concerning the constitutional reform matters would be under the scrutiny of the courts for their constitutionality if they are appealed to the courts. This approach seems to conform to Hong Kong's new development of constitutionalism and its traditionally treasured rule of law.

4.4 *The Virtue of Modesty*

However, the exercise of jurisdiction over political issues of course has its shortcomings. As Dr. Suzie Navot indicated in her analysis of Israeli cases, if a Supreme Court is occasionally regarded as the body that grants final "confirmation" to political decisions, this would provide an incentive for the filing of appeals on almost every decision of political bodies.⁷⁶⁵ Consequently, the expected function of the political process would be diminished due to its loss of finality and certainty about issues previously within its prerogative. Accordingly, the

⁷⁶³ *Ng Ka Ling v. Director of Immigration Department* [1999] 1 HKLRD 315 at 337

⁷⁶⁴ The Basic Law, art.158(2)

⁷⁶⁵ Suzie Navot, "Political Questions in the Court: Is 'Judicial Self-restraint' a Better Alternative than a 'Nonjusticiable' Approach?", paper for the workshop: judicial review political sensitive questions, 12 June 2007, VII World Congress of the International Association of Constitutional Law, p11. <http://www.enelsyn.gr/papers/w5/Paper%20by%20Dr.%20Suzie%20Navot.pdf> accessed on 24 May 2008.

constitutional balance of powers would be undermined by the rise of judicial supremacy.⁷⁶⁶ Therefore, judicial modesty should be called for so that both guaranteeing courts' constitutional jurisdiction over political issues and ensuring the realisation of the functional efficiency of the political process could be achieved. Judicial modesty requires courts not to replace the function of the political organs when scrutinising a political question at issue; rather, the courts' role should primarily focus on the examination of the legality and constitutionality of the involved political issue with a appropriate restraint, the substantive decision of the political question should still be left to the political process to determine. This would satisfy not only the requirement of the rule of law and constitutionalism, but also the principle of separation of powers. Some might say that is indeed all judges could do and what they always claim to do. However, we cannot ignore the fact that lawmaking – within certain limits – is an inevitable and legitimate element of the judge's role.⁷⁶⁷ As far as constitutional interpretation is concerned, as a former Chief Justice of the U.S. Supreme Court famously remarked, "the constitution is what the judges say it is."⁷⁶⁸ A court employing a radical interpretative approach may easily lead to intrusion to the political branches' territory, especially when constitutional questions are dealt with. So it seems not superfluous to reiterate here what judges always claim when defining their roles, that is, not to invade the Executive and Legislature's space. The point is that what has been said should be really kept in practice.

To achieve judicial modesty in this area some jurists' theories we examined in Chapter 3, such as Bickel's suggestion of "passive virtues", Sunstein's "judicial minimalism", and Ely's representation reinforcement approach, may be helpful and worth borrowing ideas from. But I am not advocating here that to use these theories to justify limiting courts constitutional jurisdiction. My point is, however, first, as indicated above, Hong Kong courts do have constitutional jurisdiction over all political questions, nevertheless, secondly, for the public good they should be encouraged to adopt a self-restraint approach when reviewing such a political question, focusing solely on constitutionality and legality of the relevant issue as they always claim. In other words, whether to be self-restrained depends entirely on the courts themselves. It is not their obligation; it is at their discretion.

In fact the CFA has retreated from its initial stance in *Ng Ka Ling*. It has shown a change of attitude from activism to more restraint in dealing with politically sensitive questions since its frustration generated by the NPCSC's interpretation of the Basic Law in 1999,⁷⁶⁹ which served to reverse the CFA's activist opinion on constitutional questions in *Ng Ka ling*. According to Chen's assessment,⁷⁷⁰ after that, the CFA embraced self-restraint in cases involving the relationship between the respective powers of Basic Law interpretation of the NPCSC and the Hong Kong courts by accepting unconditionally the "free-standing" power of the NPCSC to promulgate interpretation of the Basic Law irrespective of whether the

⁷⁶⁶ Rachel E. Barkow, "More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy", (2002) 102 *Columbia Law Review*, pp300-335

⁷⁶⁷ Lord Irvine of Lairg, "Activism and restraint: human rights and the interpretative process", (1999) 10 *King's College Law Journal*, pp177-197.

⁷⁶⁸ Chief Justice Charles Evans Hughes quoted in Dexter Perkins, *Charles Evans Hughes and American Statesmanship* (Little, Brown, 1956)

⁷⁶⁹ Albert H. Y. Chen, "Constitutional Adjudication in Post-1997 Hong Kong", (2006) 15 *Pacific Rim Law & Policy Journal Association*, pp627-682; also see Po-Jen Yap, "10 Years of the Basic Law: the Rice, Retreat and Resurgence of Judicial Power in Hong Kong", (2007) 36 *Common Law World Review*, pp166-191.

⁷⁷⁰ *ibid*

CFA has requested an interpretation; At the same time, to Chen, the Court has steered a middle course between judicial activism and judicial restraint, neither radically liberal nor conservative, in adjudicating the rights of the Hong Kong people. In Po-Jen Yap's opinion,⁷⁷¹ since *Ng Ka Ling*, the CFA has become "cognisant" of the repercussions of its decisions and now adopted a pragmatically view toward its adjudicatory role and is keenly conscious of the consequence of its actions. As a result, Yap points out, where decisions implicate the validity of NPCSC decisions or PRC laws implemented under the Basic Law, the court would always defer to the central government as the judiciary is fully "cognisant", after *Ng Ka Ling*, that the central government does not tolerate bold judicial activism on matters concerning Beijing's sovereignty over the Region; where disputes concern alleged human rights violations that have no PRC implications but have law and order implications in Hong Kong, the Court is generally conservative and tends to be supportive of other governmental branches measures, so as to afford the legislature or the executive much latitude in preserving peace and stability; in right-infringement controversies with neither NPCSC nor domestic law and order implications, the Court intervenes aggressively. Chen and Yap's analysis shows a similarity, that is, for the CFA, whether to be active or restraint, aggressive or modest, it depends, to a large extent, on the nature of the issues being addressed. It is apparent that the CFA would consciously exercise self-restraint when the issues in hand are politically sensitive, especially those involving Central Government elements. It seems that the more politically sensitive an issue is the more self-restrained the Court would choose to be. As Mr. Justice Andrew Li, the Chief Justice of the CFA, recognises,

"Court decisions in many judicial review cases have important repercussions for various political, economic and social problems which confront our society. But I must reiterate that judicial review proceedings cannot provide a panacea for these problems. The constitutional role of the courts is only to determine the limits of legality by reference to the relevant constitutional and statutory provisions and the applicable common law principles. The courts are only concerned with what is legally valid, and what is not, in accordance with legal norms and principles.

*Within the limits of legality, the practical solutions to the complex and difficult political, economic and social problems faced by society must be discussed and found through the proper operation of the political system. Citizens have to look to the political process to deliver appropriate workable solutions to these problems."*⁷⁷²

Therefore it might be anticipated that if a political dispute concerning Hong Kong's constitutional development goes to the courts, they would not hesitate to exercise jurisdiction over it. But their examination would be on the legality and constitutionality of the involved question and would be in a self-restrained way, showing respect to the authority of the Legislature and the autonomy of decision making of the Executive. However, it must be noted that if the case finally goes to the CFA, the CFA should refer the interpretation issue to the NPCSC in accordance with the requirement provided by art.158 of the Basic Law, for the constitutional development issues are obviously matters beyond the autonomy

⁷⁷¹ Ibid

⁷⁷² CJ's speech at Ceremonial Opening of the Legal Year 2007, Press Releases (8 January 2007), <http://www.info.gov.hk/gia/general/200701/08/P200701080120.htm> accessed on 30 May 2008

of Hong Kong itself and relating to the relationship between the Region and the Central Government.

5 Interaction with Mainland China's Political Life

5.1 Influences from the Central Government

As we discussed in Chapter 2, China is a state where politics takes precedence over almost everything. The Communist Party and its government dominate political life. Centralism, collectivism and authoritarianism are seen by many in China, especially politicians, sometimes even Chinese democrats, as necessary for governing such a huge country.⁷⁷³ Democracy and the rule of law are still underdeveloped but significant progress has been made since the "reforming and opening-up" policy was adopted since 1978.⁷⁷⁴ As to the judiciary, courts have no jurisdiction of judicial review; the provisions of the Constitution are not justiciable; the view that law should serve politics and that the judiciary is the instrument for governing is still commonly shared by judges.⁷⁷⁵ However, to build a socialist country with the rule of law has been written in the Constitution as the country's goal.⁷⁷⁶ Considerable judicial reforms have been carried out.⁷⁷⁷ Anyway, China has started on its way to transfer to modern democracy and constitutionalism.⁷⁷⁸ On the contrary, however, in Hong Kong although direct democracy has not been fully achieved yet, the actual level and quality of democracy which has been realised, as well as the democratic political culture, seem to be higher and more successful, at least until now, than that in the mainland China.⁷⁷⁹ More importantly, the rule of law has been the main feature and advantage of the Region. Since reunification, Hong Kong has also been developing into a constitutionalism polity⁷⁸⁰

⁷⁷³ Baogang He, *The Democratization of China*, (Routledge, 1996), p245; Tianjian Shi, "China: Democratic Values Supporting an Authoritarian System", in Yun-han Chu, Larry Diamond, Andrew J. Nathan and Doh Chull Shin (eds), *How East Asians View Democracy* (Columbia University Press, 2008), pp209-235

⁷⁷⁴ Henry Rowen, "When Will the Chinese People be Free?", *Journal of Democracy*, Volume 18, Number 3, July 2007, at 38-50; Randall Peerenboom, "Globalization, Path Dependency, and the Limits of Law: Administrative Law Reform and Rule of Law in People's Republic of China", in Lowell Dittmer and Guoli Liu (ed), *China's Deep Reform: Domestic Politics in Transition* (Rowman & Littlefield, 2006), at 191-228; Jamie P. Horsley (2006), "The Rule of Law in China: Incremental Progress", available at <http://www.comw.org/cmp/fulltext/0603horsley.pdf> accessed on 5 November 2008

⁷⁷⁵ Balme, Stephanie (2005) "The Judicialisation of Politics and the Politicisation of the Judiciary in China (1978-2005)," *Global Jurist Frontiers*: Vol. 5, Iss. 1, Article 1, <http://www.bepress.com/gj/frontiers/vol5/iss1/art1> accessed on 5 November 2008

⁷⁷⁶ Suisheng Zhao, *Debating Political Reform in China: Rule of Law Vs. Democratization*, (M.E. Sharpe, 2006), at 239

⁷⁷⁷ Wang Liming, "The Achievements and Prospect of Court Reforms in China", *Frontiers of Law in China*, Volume 1, Number 1, January 2006, at 1-13; Zou Keyuan, "Towards the Rule of Law: An Overview of China's Legal Reform", in Guangwu Wang and John Wong (eds), *China: Two Decades of Reform and Change* (World Scientific, 1999), at 41-66

⁷⁷⁸ Henry Rowen, "When Will the Chinese People be Free?", *Journal of Democracy*, Volume 18, Number 3, July 2007, at 38-50; Lin Feng, "Modern Constitutionalism in China", in Pietro Costa and Danilo Zolo (eds), *The Rule of Law: History, Theory and Criticism* (Springer Netherlands, 2007), at 633-646

⁷⁷⁹ Martin C. M. Lee, "The Hong Kong Example", *Journal of Democracy* 9.4(1998), at 4-8; Sony Lo, "The Political Cultures of Hong Kong and Mainland China: Democratization, Patrimonialism, and Pluralism in the 2007 Chief Executive Election", *The Asia Pacific Journal of Public Administration*, Vol. 20, No.1, (June 2007), at 101-128

⁷⁸⁰ Albert H.Y. Chen, "The Theory, Constitution and Practice of Autonomy: The Case of Hong Kong", in Jorge Costa Oliveira and Paulo Cardinal (eds.) *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution: Essays on Macau's Autonomy after the Resumption of Sovereignty by China* (Springer, 2009), p765.

as a result of the enforcement of the Basic Law and the accompanying practice of constitutional judicial review.

The politics in mainland China could have great impact on Hong Kong courts' work, especially that of the CFA, despite China's promise of a high degree of autonomy for the Region and the independence of its courts. As already mentioned, in 1999 the NPCSC, an important political institution of the Central Government, did not hesitate to exercise its constitutional interpretation power to reverse the CFA's interpretation of the Basic Law provisions in *Ng Ka Ling*. The immediate result was that the CFA's constitutional opinion in the case was effectively reversed; but more importantly, after that the CFA became very cautious, or even compliant, when dealing with issues involving mainland China, trying not to provoke the Central Government and doing its best to avoid direct confrontation with the Central Authorities.⁷⁸¹ The CFA's change of attitude perhaps reasonably implies that to be self-restrained or even conservative toward sensitive political issues concerning the Central Government on Hong Kong courts' own initiative is better and safer for the Region's autonomy and judicial independency than to be aggressive and incur the intervention from the political institution of the mainland China. Another example we mentioned earlier is the NPCSC's interpretation of the term of the Chief Executive in 2005, which served to stop the possible constitutional judicial review of this issue. Again it effectively made the litigant withdraw his application from the court.

However we must not get a wrong impression that the Central Government, particularly the NPCSC, tends to interfere rashly with Hong Kong courts' decisions. In fact, except for these two examples, there is no other intervention from the NPCSC so far. Contrarily it tends to be cautious and tolerant about the Court's performance perhaps because of the constitutional constraint and careful political risk evaluation. Actually, since its resumption of exercising sovereignty over Hong Kong, in most circumstances, the Central Government has acted with restraint.⁷⁸² In recent years, it decided to "leave well enough alone, adopting a mostly hands-off attitude regarding the Hong Kong legal system".⁷⁸³ As Professor Chen demonstrates, "a practice or unwritten norm seems to have been developed whereby the central government exercises utmost self-restraint so as to minimise its intervention and to maximise the SAR's autonomy."⁷⁸⁴ The incentive of China's self-control might lie in its caring about its international image and its worry about the political risk that would be provoked by its frequent interventions, that is, the furious protest from Hong Kong people and sharp criticism from international community.

It must also be pointed out that although the interference of the Central Government is primarily based on its political consideration, it always tries to improve its actions' legitimacy by attaching much importance to the legality and constitutionality of the concrete

⁷⁸¹ Thomas E. Kellogg, "Excessive Deference or Strategic Retreat? The Impact of Basic Law Article 158", *Hong Kong Journal*, http://www.hkjournal.org/archive/2008_spring/5.htm accessed on 6 November 2008

⁷⁸² Sir Robin MacLaren, "Hong Kong 1997-2007: a personal perspective", *Hong Kong Journal*, http://www.hkjournal.org/archive/2007_fall/5.htm accessed on 6 November 2008

⁷⁸³ Thomas E. Kellogg, "Excessive Deference or Strategic Retreat? The Impact of Basic Law Article 158", *Hong Kong Journal* (01 January 2008), at http://www.hkjournal.org/PDF/2008_spring/5.pdf accessed on 8 November 2008

⁷⁸⁴ Albert H.Y. Chen, "The Theory, Constitution and Practice of Autonomy: The Case of Hong Kong", in Jorge Costa Oliveira and Paulo Cardinal (eds.) *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution: Essays on Macau's Autonomy after the Resumption of Sovereignty by China* (Springer, 2009), p762

measures of the interference. This can be indicated by the procedural improvement of NPCSC's interpretations of the Basic Law and relevant Decisions, as well as their wording. All of these interpretations and decisions have been well dressed in an account of legality and constitutionality. This strategy may have an effect of reducing Hong Kong people's resistance, for the more legal and constitutional the measures of the intervention appear to be, the better the political effect or simply the acceptance of the people, might be. Therefore the Central Authorities do have the incentive both to self-restrain from arbitrary intervention and to abide by the constitution and law when exercising its interfering power.

As we know from Chapter 2, the essential concerns of China's Central Government are always the unification of the country and the unchallengeability of its sovereignty. Thus its attitude toward Hong Kong courts could largely depend on the courts' performance and role in this regard. If Hong Kong courts, particularly the CFA, could play a positive role in improving the integration of the country under its "one country, two systems" constitutional arrangement, just like the contribution of European Court of Justice (ECJ) and its counterparts in European member states to the evolution of the European polity, the Central Government and the Communist Party might be more likely to respect and support the Court's job and less likely to intervene politically. As we discussed in Chapter 1 and 4, the ECJ develops and maintains a uniform legal order for the EU, which is primarily characterised by the supremacy and direct effect of EU law and mainly realised through the preliminary reference procedure. A coordination or dialogue relation has been established between the ECJ and the courts of the member states. This ensures the sufficient caseloads of the ECJ, which are willingly provided by the member states' courts, and enhances the efficient enforcement of the ECJ's decisions in member states. In other words, the courts of member states have been effectively turned into the courts of the EU. All in all, the integration of Europe, to a large extent, is achieved by the efforts of the courts, both the ECJ and the courts of the member states. However, Hong Kong has a different story. Hong Kong courts, including the CFA, merely view themselves as the courts for Hong Kong, serving solely the realisation of the autonomy and the rule of law for the Region. They are not yet conscious of defining themselves as not only the courts for Hong Kong but also the courts for the whole country, as the EU member states' courts re-define their role in the process of EU integration. According to the design of the "one country, two systems" policy, which is embodied by the Basic Law, the institutional connection between the HKSAR and mainland China is primarily ensured through the post of the Chief Executive of HKSAR. Perhaps we may say that the integration of Europe to some extent is promoted and maintained by courts, while the unification between Hong Kong and mainland China, in terms of institution arrangement, is mainly achieved by the executive branch. However, Hong Kong courts, especially the CFA, like their counterparts in Europe, do have the possibility of contributing to the unification of the country while at the same time safeguarding the autonomy of the Region. They can deliver constitutional opinions in favour of the integration of the country; they can exercise self-restraint and show respect when dealing with issues concerning the authority of the Central Government; especially, they can, in accordance with the provision of art.158 of the Basic Law and through the CFA, identify and refer questions beyond the autonomy of the Region to the NPCSC for interpretation without reluctance and resistance by artificially distinguishing the issues as irrelevant for referral, like it did in *Ng Ka Ling*, so that the NPCSC could have sufficient caseload and opportunities to make more concrete and practical constitutional standards of pro-integration for the relationship between Hong Kong and mainland China. If a dialogue or co-operative relationship is established between the Hong Kong courts, particularly the CFA, and the NPCSC, it might be beneficial not only to

the unification of the country but also the autonomy of the Region, for in so doing the concern of the Central Government would be largely achieved by an institutionally accommodative way and as a result its interference, which could be politically risky to it because of the accompanying conflict, would seem to be obviously costly and thus unnecessary any more. On the contrary, if Hong Kong courts, especially the CFA, choose to disregard the authority of the NPCSC, just like some constitutional courts of the member states of EU did to the decisions of the ECJ⁷⁸⁵ and the CFA itself did in *Ng Ka Ling*, the risk of attack from the Central Authorities would increase considerably.

Although the Central Government's attitude toward the work of Hong Kong courts might, as discussed above, largely depend on the courts' attitude and actual role in strengthening the unification of the country, that is the "one country" aspect of the "one country, two system" slogan, in general it seems that the Central Government may even prefer to guarantee the independence of the judiciary in Hong Kong. Its underlying evaluation is that ensuring courts' insulation from political influence could make it not so easy for the local hostile political forces to use courts blocking policies favoured by the Central Government. Imagine that Hong Kong courts could easily be forced to defer to the local political forces, there is a possibility that the pro-democrats, who are still unacceptable to the Central Government by now, might influence or even dominate the courts in some political disputes. That is certainly a danger which should in the eyes of the Central Government be avoided. Due to the constitutional constraint to the Central Authorities and the ideology and belief firmly held by the CFA as a common law supreme court, it is unrealistic for the Central Government to attempt to make the Hong Kong courts, particularly the CFA, always side with it or to interfere as it wishes to ensure the CFA's deference. So it is reasonable for the Central Government to adopt a strategy of respecting or even safeguarding the independence and neutrality of the Hong Kong courts so that the immunisation of the courts from local political forces, specifically the pro-democrats, could be ensured.

5.2 *The Positive Impact of Hong Kong's Experience on Mainland China*

We must also bear in mind that Hong Kong courts are not just negatively subject to the influence from the Central Government. To the contrary, they could have positive impact on the transitional process of the rule of law and constitutionalism in mainland China as well. China is modernising not only economically but also politically, although the latter seems lagging behind the former. Hong Kong could be valuable for China in this regard. It could provide China a successful model, from which China could learn a lot, of how to realise the rule of law in a Chinese society which has a long history of rule of man. With the development of closer exchange and interaction between Hong Kong legal institutions (including the judiciary) and their counterparts in mainland China after reunification, there are signs that show Hong Kong does contribute to the progress of the rule of law in China. Firstly, three arrangements for mutual legal assistance have been signed between Hong Kong and the mainland so far, including mutual service of judicial documents in civil and commercial proceedings,⁷⁸⁶ mutual enforcement of arbitral awards,⁷⁸⁷ and reciprocal

⁷⁸⁵ Such as the *Solange I* and *II* and *Maastricht* decisions of the German Constitutional Court, the *Granital* and *Frontini* decisions of the Italian Constitutional Court, and the *Maastricht* decision of the Danish Supreme Court.

⁷⁸⁶ Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts, signed in Shenzhen on 14 January 1999, <http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandmutual1e.pdf> accessed on 6 June 2008.

recognition and enforcement of judgments in civil and commercial matters.⁷⁸⁸ These arrangements have considerable impact on the legal system in mainland China, especially the last one, in which Hong Kong's concerns have made the mainland reform its traditional practice. One of the main concerns of Hong Kong in the negotiation of the arrangement is the "finality" of the judgments of the courts' in mainland China. In common law legal theory, the finality in adjudication is viewed as a condition of the rule of law.⁷⁸⁹ However China has an adjudication supervision system which is designed to correct "wrongly decided" final adjudications. China's Civil Procedure law provides that a decided case may be retried if the relevant courts, procuratorates or litigants find or consider there is definite error in the legal effective judgment or written order.⁷⁹⁰ This procedure is seen in the mainland China as a good means to prevent unjust judicial decisions and thereby guarantee justice. But it had been a primary obstacle of coming to an arrangement between Hong Kong and mainland China on reciprocal recognition and enforcement of judgments in civil and commercial matters, for the Hong Kong side feared that the adjudication supervision procedure would make the judgments of the courts in mainland China lack finality, which was thought essential to the rule of law. After several years' negotiations, the mainland China agreed to limit the judgments that could be reciprocally recognised and enforced to a specific scope which was smaller than that of the actual enforceable judgments of all the courts in mainland China so that Hong Kong's concern about finality might be satisfied.⁷⁹¹ In recent years, China has also adopted measures to reform the adjudication supervision system by restricting the conditions for initiating the retrial procedure, in an attempt to strike a balance between ensuring the correctness of the judgments and guaranteeing their finality.⁷⁹² This example proves that the Hong Kong element could be an incentive for mainland China to reform and improve its legal practice.

The NPCSC's efforts to improve its practice of interpreting the Basic Law can further demonstrate Hong Kong's positive influence on the progress of rule of law in China. As we discussed in Chapter 2, unlike the practice in common law system, in China interpreting the law and the constitution is the power of the NPCSC⁷⁹³ and traditionally the judiciary primarily performs a mechanical role in adjudicating cases without the power of interpreting law in such a way as the common law judiciary does.⁷⁹⁴ However, the NPCSC authorises the People's Supreme Court to deliver judicial interpretation of law to guide other courts'

⁷⁸⁷ Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, signed in Shenzhen on 21 June 1999,

<http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandmutual2e.pdf> accessed on 6 June 2008

⁷⁸⁸ Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned, signed in Hong Kong on 14 July 2006,

<http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandrej20060719e.pdf> accessed on 6 June 2008.

⁷⁸⁹ Timothy A. O. Endicott, "The Impossibility of the Rule of Law", (1999) 19 *Oxford Journal of Legal Studies*, pp 9-11.

⁷⁹⁰ Civil Procedure Law of the People's Republic of China, Chapter XVI Procedure for Trial Supervision.

⁷⁹¹ *Supra* note 64, art.2.

⁷⁹² Zhang Xianchu, "An Appraisal of the 'Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned'", *Chinese Download Centre for Thesis*, <http://www.studa.net/minfa/080307/09303963.html> accessed on 9 June 2008, p7-8

⁷⁹³ The Constitution of the People's Republic of China, art.67(1)(4).

⁷⁹⁴ Wang Chenguang, "Law-making functions of the Chinese courts: Judicial activism in a country of rapid social changes", *Frontiers of Law in China*, Volume 1, Number 4, (December 2006), at524-549

application of law.⁷⁹⁵ In practice, although the NPCSC has the interpretation power, it had never exercised it since 1979 when the NPC and NPCSC restarted enacting laws.⁷⁹⁶ The interpretation of the Nationality Law for Hong Kong in 1996 was the first interpretation made by the NPCSC. Since then it has delivered several interpretations and most of them concern Hong Kong or Macao matters. The most historic and controversial one perhaps is its response to the CFA's interpretation of the Basic Law in *Ng Ka Ling* in 1999. The NPCSC's interpretation reversed the CFA's opinion. This was the first time that the NPCSC exercised its constitutional power to interpret the Basic Law since the establishment of the Hong Kong Special Administrative Region. It is therefore of great significance in the history of "one country, two systems" practice and the contemporary legal history of China. After that, Hong Kong's concern indeed has made the NPCSC enhance the quality of its interpretation of the Basic Law both in terms of procedure and substantial contents. As we know, due to its lack of experience in interpreting statute and its accustomed style of legislating, the NPCSC's procedure for interpreting was not transparent and the content of its interpretation was simple, without detailed explanation of reasons. Therefore there are doubts on its legitimacy among many Hong Kong people, particularly among its legal professions, scholars and political elites.⁷⁹⁷ They worry that the NPCSC's interpretative power would be deployed by the Central Government to suit political exigencies and erode Hong Kong's autonomy.⁷⁹⁸ They complain that the way the NPCSC goes about interpretation provides little basis for predictability.⁷⁹⁹ They are also unhappy with the fact that the NPCSC's interpretations are not fully tested at the ballot box, and its pronouncements, once issued, cannot be questioned or reviewed.⁸⁰⁰ There are some mainland scholars who have shown their doubt about the efficiency and fairness of this system as well. They argue that the NPCSC, as a non-judicial organ, might not be able to interpret laws according to the needs of complicated and ever-changing realities, especially when it holds a meeting only once every two months.⁸⁰¹ A suggestion of judicialising the interpretative power of the NPCSC under art.158 of the Basic Law has been put forward by Professor Yash Ghai⁸⁰² as follows: The NPCSC will not interpret the Basic Law on its own initiative; no new provisions can be added to the interpretation of the Basic Law; and the NPCSC can not bypass art.159 to amend the Basic Law; a committee should be established under the NPCSC to advise the NPCSC in interpreting the Basic Law, and that committee should hear the arguments of the litigating parties; The NPCSC should analyze the law and give its reasoning when giving the interpretation. There are other scholars holding a similar opinion. They suggest developing the NPCSC's Basic Law Committee into a quasi-judicial institution responsible for

⁷⁹⁵ The Decision of the Standing Committee of the National People's Congress on Strengthening the Work of Interpreting Law, http://www.chinacourt.org/flwk/show1.php?file_id=1906 accessed on 9 June 2008.

⁷⁹⁶ During the Cultural Revolution, China's legal system was totally destroyed and there was no law at all.

⁷⁹⁷ Albert H. Y. Chen, "Constitutional Adjudication in Post-1997 Hong Kong", (2006) 15 *Pacific Rim Law & Policy Journal*, at 627, 631-632

⁷⁹⁸ Chan, Phil C.W., "Hong Kong's Political Autonomy and its Continuing Struggle for Universal Suffrage", (2006) *Singapore Journal of Legal Studies*, at. 285-311; Yash P. Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*, (Hong Kong University Press 1999), at 213.

⁷⁹⁹ Yash Ghai, "Interpreting the Basic Law is not What It Seems", *Apple Daily* (26 April 2004), http://www.hkhrm.org.hk/CR/ghai_0426.html accessed on 10 November 2008

⁸⁰⁰ Thomas E. Kellogg, "Excessive Deference? or Strategic Retreat? Basic Law Article 158 and Constitutional Development in Hong Kong", *Hong Kong Journal* (01 January 2008), at http://www.hkjournal.org/PDF/2008_spring/5.pdf accessed on 10 November 2008

⁸⁰¹ Yahong Li, "Law-making Law: A Solution to the Problems in the Chinese Legislative System", (2000) 30 *Hong Kong Law Journal*, at 137

⁸⁰² Yash Ghai, "Litigating the Basic Law: Jurisdiction, Interpretation and Procedure" in Johannes M M Chan, H L Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debates: Conflict Over Interpretation* (Hong Kong University Press 2000), at 3-52.

exercising the interpretative power through improvements including allowing submissions or even oral arguments from interested parties, the open publication of the Committee's final detailed recommendations to the NPCSC, with the reasoning behind those recommendations fully spelled out, and the disclosure of any dissenting views.⁸⁰³ These views are echoed by a few mainland scholars who argue that the NPCSC' power to interpret the Constitution should be passive, on an ad hoc basis and in a judicial manner.⁸⁰⁴ It is believed that more well-reasoned and persuasive interpretations from the NPCSC would significantly enhance the degree of public acceptance of the NPCSC's interventions.⁸⁰⁵ These suggestions reflect the opinions of quite a few Hong Kong people. Although it is unrealistic that they will be all adopted by the Central Government, they do provide an impetus for NPCSC's improvement of its interpretation practice. When making the two interpretations of the Basic Law after 1999, the NPCSC paid much attention to its procedural aspect. In order to ensure the legitimacy of its interpretation and enhance its acceptance in Hong Kong, the NPCSC took into account Hong Kong people's concerns and developed a constitutional custom in the two interpretations, that is, to send senior officials to listen to the opinions of the representatives from various sectors of Hong Kong community prior to finalising its interpretation drafts,⁸⁰⁶ after the interpretations were delivered, the same officials were sent again to Hong Kong to explain them to those representatives. Moreover, measures have also been taken to strengthen the work of the Basic Law Committee of the NPCSC, which is responsible for giving opinions on the interpretation issues. It seems that these developments pushed by Hong Kong issues, although far from satisfactory, could serve to improve the quality of the NPCSC's interpretations and guarantee the interests of Hong Kong to some extent. They represent the progress of the rule of law in mainland China as well. Some optimists' believe that the Basic Law Committee has the potential to set a broader example for the future of constitutionalism on the mainland.⁸⁰⁷ If it is permitted to be reformed, they think, it may boost the gradually increasing momentum to establish a constitutional committee of the NPC as a more legitimate instrument for interpreting the PRC Constitution itself.⁸⁰⁸

In recent years, Chinese legal scholars have been calling for "judicialising the Constitution" and pushing the development of constitutionalism in China.⁸⁰⁹ They advocate that the courts should enjoy the power of interpreting the constitution and employing the provisions of the constitution to resolve concrete legal issues, just as the common practice of constitutional

⁸⁰³ Thomas E. Kellogg, " 'Excessive Deference' or Strategic Retreat? Basic Law Article 158 and Constitutional Development in Hong Kong", *Hong Kong Journal* (1 January 2008), at

http://www.hkjournal.org/PDF/2008_spring/5.pdf accessed on 10 November 2008

⁸⁰⁴ Yuan Jiliang, "On Weak Points of Legislation Interpretation System", (1994) 4 *Zhongguo Faxue* (Chinese Legal Science), at 28.

⁸⁰⁵ Thomas E. Kellogg, " 'Excessive Deference' or Strategic Retreat? Basic Law Article 158 and Constitutional Development in Hong Kong", *Hong Kong Journal* (1 January 2008), at

http://www.hkjournal.org/PDF/2008_spring/5.pdf accessed on 10 November 2008

⁸⁰⁶ "Qiao Xiaoyang meets HK community" (8 April 2004),

<http://www.news.gov.hk/en/category/administration/040408/html/040408en01001.htm> accessed on 11 June 2008.

⁸⁰⁷ Paul Gewirtz, "Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics," *Hong Kong Law Journal*, Vol. 31, (2001), at 200

⁸⁰⁸ Jerome A. Cohen, "Hong Kong's Basic Law: An American Perspective", International Symposium to Commemorate 10th Anniversary of the HKSAR Basic Law, April 1, 2000, cited in Thomas E. Kellogg, " 'Excessive Deference' or Strategic Retreat? Basic Law Article 158 and Constitutional Development in Hong Kong", *Hong Kong Journal* (1 January 2008), at http://www.hkjournal.org/PDF/2008_spring/5.pdf accessed on 10 November 2008

⁸⁰⁹ "An Overview of the Conference on Judicializing the Constitution [xianfa sifahua lilun yantaohui zongshu]", *People's Congress Studies [Renda Yanjiu]*, (Vol.4, 2006), at 24-29. (in Chinese)

judicial review in some western countries, such as USA and Germany.⁸¹⁰ In practice, the courts in mainland China have tentatively cited an article of the Constitution concerning the constitutional right of education to handle a dispute.⁸¹¹ The rule of law and constitutionalism seem more acceptable than multiparty politics to the Chinese Communist Party. This has been indicated in an amendment of China's Constitution, which claims that "The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law".⁸¹² Therefore, to establish a constitutional adjudication system to achieve the rule of law and human rights protection is more likely to be China's option in its political reform than the institutionalisation of political pluralism. For this process, the western models, particularly the American and European practices, are quite attractive to many Chinese legal scholars.⁸¹³ Although the western models could be productive and helpful to China's transition, they also produce their own limits due to the different legal traditions, political cultures and realities. However, Hong Kong's experience could be much more valuable to mainland China. They both are Chinese communities enjoying the same cultural identity in a traditional sense. Although they practise different social systems, they both are under one unified constitutional order. The exchange, cooperation, connections and integration between them have been improving considerably since the reunification. The practice of constitutional judicial review in Hong Kong has become increasingly mature. As the Chief Justice points out, judicial review has become an established and vital feature of Hong Kong's legal system.⁸¹⁴ It seems that China could achieve much better results with less effort in its political reform if Hong Kong's lessons could be learnt from.

6 Conclusion

Our examination of the role of Hong Kong courts, particularly the role of the CFA, in politics shows a picture of interactions between the Hong Kong judiciary and the political institutions as well as other political forces both within the Region and beyond it. At the local level, the dominant role of the Chief Executive defined by the so called "executive-led" system could potentially have a negative impact on the Court's authority and independence. At the same time, the Court's behaviour could have the effect of strengthening the executive-led order or weakening it. It depends on what stance the Court holds, liberal or conservative, active or restrained. In Hong Kong's political reality, cooperation between the executive and the legislature is lacking and the conflicts between them are constant. They may compete for the Court's support. Thus the Court could be their extended battlefield. The Court's stance is therefore an important factor in Hong Kong's political balance.

More specifically, the Court's role in scrutinising public policies is of great significance not only to the protection of individual rights, but also to the efficiency and legitimacy of the government. Individuals or politicians may use judicial review as a strategy to delay or block

⁸¹⁰ Ibid.

⁸¹¹ M. Ulric Killion, "Post-WTO China and Independent Judicial Review", (2004) 26 *Houston Journal of International Law*, pp553-554.

⁸¹² Amendment Three of the Constitution of the People's Republic of China, para.3.

⁸¹³ Stephanie Balme, "Constitutionalism and Judicial Power in China", the summary of the international conference held in France on Consitutionalism and judicial power in China today on 12-13 December 2005, <http://www.ceri-sciencespo.com/archive/jan06/introangsb.pdf> accessed on 12 June 2008

⁸¹⁴ "CJ's speech at Ceremonial Opening of the Legal Year 2007", Press Releases (8 January 2007), <http://www.info.gov.hk/gia/general/200701/08/P200701080120.htm> accessed on 11 November 2008

a governmental scheme so as to safeguard their interest or change the political bargaining condition with the government. The Court's endorsement of such a public policy will save the government's face, maintain its authority and ensure an effective enforcement of the policy by enhancing considerably the public acceptance of it. The possibility of courts' intervention has altered government's way of decision-making. It becomes more cautious and attaches much importance to legal risk assessment in the whole process of policy making.

It was argued that Hong Kong courts have jurisdiction over politically sensitive issues concerning Hong Kong's constitutional development process on the ground that the Basic Law has granted them the power to interpret all the provisions of the Basic Law rather than just a portion of it. Therefore the courts could play a significant part in Hong Kong's transitional democracy. Although they can only exercise concrete constitutional review, their presence itself could have the effect of changing the behaviour of the political actors. When making decisions, the political forces, political institutions and politicians will evaluate the risk of constitutional judicial review, take into account the possible opinions of the courts in the possible judicial review litigations, and adapt their actions and strategies accordingly. When exercising their intervention in this regard, the courts had better avoid taking an extremely radical view of their interpretative duty; rather, appropriate caution and restraint are necessary for the judges to deal with possible disputes concerning constitutional development issues. The substantive content of the issues should certainly be left to the political branches to address. The courts should also be encouraged to exercise its jurisdiction over political questions in a modest or even restrained way. Actually the CFA has adopted a more humble attitude toward political sensitive issues since its aggressive performance in *Ng Ka Ling*.

The interactions between Hong Kong and mainland China in this area have also been examined. In theory the Central Government could easily deploy the final interpretation power of the NPCSC to change Hong Kong courts' constitutional decisions just as it did to *Ng Ka Ling*. But in reality, the NPCSC tends to be cautious and tolerant to Hong Kong courts' performance perhaps due to its careful assessment of the huge political cost that would be brought about by its rash intervention. Given the constitutional constraint and the political risk of its own interference, the Central Government may prefer to support and even safeguard the independence and neutrality of the judiciary in Hong Kong because it would worry that Hong Kong local political forces, especially the pro-democrats, could influence and dominate the courts. If Hong Kong courts, particularly the CFA, could play a significant part in improving the integration and safeguarding of the sovereignty of the country, just as the ECJ and its counterparts in EU member states have been doing in the evolution of EU, perhaps the Central Government would be more likely to constrain its intervention. Hong Kong courts and legal professions might contribute significantly to mainland China's transitional rule of law and constitutionalism. The increasing exchange and cooperation between them may make the mainland learn a lot from the experience of Hong Kong's mature and advanced practice of the rule of law. Actually, China's reform of adjudication supervision system and improvement of NPCSC's procedure of interpreting the Basic Law have been pushed to a large extent by Hong Kong's concerns.

Chapter 7

Conclusions

*...the ultimate key to Hong Kong's success is still the strict adherence to the rule of law. This is not just holding on firmly to the core values and high standards, but also means a readiness to meet the new challenges of the modern day, to be responsive to the needs created by the new constitutional, economic and social order, as well as to be alert to the change of the legal landscape of the world.*⁸¹⁵

– Wong Yan Lung

9:00am, 6th April 2009, Hong Kong Convention and Exhibition Centre.

The Opening Ceremony of the 16th Commonwealth Law Conference was taking place where delegates from three dozen Commonwealth countries were present.

The Honourable Mr. Justice Andrew Kwok-nang Li, Chief Justice of the CFA of the HKSAR delivered a speech to open the Conference.⁸¹⁶ He pointed out, “this is the first time when the Commonwealth Law Conference is held in a non-Commonwealth jurisdiction”, the Hong Kong Special Administrative Region of the People’s Republic of China, in which the common law system has continued to be maintained and to thrive under China’s sovereignty. The convening of this conference in Hong Kong, to the Chief Justice, “represent[ed] a recognition of the successful implementation of the principle of ‘one country, two systems’”.

Hong Kong had previously hosted the Commonwealth Law Conference in the colonial era in 1983, when China and Britain had just begun negotiations over Hong Kong’s future. Participants at that time could hardly foresee that in a quarter of a century later, this very same conference would be held again in Hong Kong – no longer a British colony nor a Commonwealth member but a special administrative region of China, where the judiciary is headed by a Chief Justice of Hong Kong’s own Court of Final Appeal and the common law principles still apply.

As we have seen, the Judiciary of Hong Kong in general, represented mainly by the CFA, operates properly and efficiently under China’s “one country, two systems” arrangement. It plays a significant role in upholding the rule of law, safeguarding the individual rights, providing the public with satisfactory judicial service, so as to build up the confidence of international investors in Hong Kong and thus facilitate the region’s continuous prosperity and stability, as well as maintain the region’s sense of identity, way of life and value systems which set Hong Kong from those prevailing in the mainland China. At the same time, the courts face many new challenges, primarily arising from Hong Kong’s new constitutional

⁸¹⁵ Wong Yan lung, Secretary for Justice, “SJ speaks at luncheon of Commonwealth Law Conference 2009”, Hong Kong Government Press Releases, available at <http://www.info.gov.hk/gia/general/200904/07/P200904070194.htm>

⁸¹⁶ Andrew Kwok-nang Li, “CJ’s Speech at Opening Ceremony of the 16th Commonwealth Law Conference in Hong Kong”, Hong Kong Government Press Releases, available at <http://www.info.gov.hk/gia/general/200904/06/P200904060130.htm>

order and political environment. The CFA's constitutional status and dilemma, that is, a supreme court of common law jurisdiction within a communist regime with civil law model and a vulnerable sub-state court of a region within an enormously powerful "Chinese empire"⁸¹⁷, are indeed indicative of the complexity and sensitivity of the Central-SAR relationship under China's "one country, two systems" settlement. The CFA is also an institutional reflection of the plurality and of the dialectic nature of that settlement. It manifests the contradiction, interaction, dialogue and mutual influence between the parallel systems which coexist in a common constitutional framework.

Like other "one polity, multi legal orders" in the world such as constitutional practices in the EU and UK, the uniqueness of Hong Kong's legal system, in which the CFA is the apex, is entrenched by a constitutional document and immune from the encroachment from the parallel system or the Centre of the polity. To a large extent it is self-sufficient in terms of norms provision and disputes adjudication. However, it is by no means an isolated island; rather, it is an open system. It grows steadily by constantly absorbing nutrition from the outside legal world and adapts, directly or indirectly, to the constraints imposed by the external spheres (either other local governmental branches or the mainland China institutions). It contributes to the legal and constitutional development in other jurisdictions as well. In other words, we cannot ignore the interplay between the Hong Kong legal system and that of the common law world, between it and the mainland China's legal order, between it and international jurisprudence. The CFA's invitation of overseas judges to sit on its panel, highlighting the importance of referring to comparative materials in human rights issues, avoiding direct confrontation with the central authorities, and providing helpful lessons for the mainland China's legal reform and human rights protection, could serve as good examples for such dynamic reciprocal influence. Moreover, although the judiciary as the core institution of a legal system enjoys a high degree of independence, it does not mean an absolute insulation from other governmental branches and social, economic, and political forces; there exist sort of interaction and dialogue between them. Again, the CFA's role in Hong Kong's legislature-executive relationship, public policy bargains and political games are a demonstration of these mutual influences.

The year 2009 witnessed the CFA's twelfth birthday. To Chinese people, one's twelfth birthday or that of the multiples of twelve has special meaning, as in China's tradition the astrological signs of twelve animals represent a twelve year cycle that is aligned with the sun and the moon. Hong Kong's CFA was born in 1997 – the year of Oxen: this, according to Chinese belief, implies it would be diligent, tame, and honest just like a farm cattle. Is that actually the character shown by the CFA in its short history of existence? In fact, our investigation reveals that the CFA's twelve-year history has indeed been a running-in period in which the Court takes shape of its "personality" by constantly adapting its behaviour so as to conform to its constitutional status and fit its new constitutional setting and political order. The Court tried to establish constitutional precedents with courage, adjusted its constitutional performance with wisdom, and insisted on the core constitutional principles without fear; it has grown from a learning toddler into a skilful adult and changed from an impulsive idealist into a staid realist.

As a Chinese proverb says, "Newborn calves are not afraid of tigers." That is exactly the portrayal of the Court's bold decision in *Ng Ka Ling* in January 1999, two years after the Court was founded. The decision unequivocally asserted the constitutional jurisdiction of the

⁸¹⁷ Ross Terrill, *The New Chinese Empire: And what it means for the World?* (UNSW Press, 2003)

courts of Hong Kong over legislative actions of the National People's Congress and its Standing Committee and is seen by many as a defying of the authority of China's "highest organ of state power"⁸¹⁸. It is indeed a reflection of the CFA's overreach and activism at its early age, when its behavioural pattern was not yet formed and was still taking shape. At the same time, there was much space for the Court to make creative constitutional rules through interpreting the Basic Law, as the mini-constitution for Hong Kong only just came into force and its provisions were still virgin – that is, not touched by the courts at all. This factor may also, apart from its immaturity, be an important element for us to understand the CFA's robust and aggressive attitude in the migrant children case. After being taught a lesson by the tiger (through political pressures and a NPCSC's interpretation of the Basic Law), the Court seemed to have realised the huge unbalance between itself and the powerful Central Government authorities and been aware of its own vulnerability under that asymmetrical relationship. It calmed down soon from its initial impetuosity and became very cautious when dealing with issues involving elements of the mainland China, trying strategically to avoid provoking the Central Government. However, its retreat does not necessarily mean a sacrifice of its independence; it is indeed a tactic attempting to ensure and safeguard its independence by minimising Beijing's chance or excuse of intervention. In fact, the Court still showed its persistence, in the *Fa Lun Gong* case⁸¹⁹ for instance, on human rights issues which would embarrass Beijing. In the calming down period, the Court also began to realise the limits of judicial constitutional review and the importance of political process in seeking solutions to social and economic problems. The Court had been growing from a dreamer to a realist. In recent years, it seems that the CFA's life has become normal or even boring due to the lack of significant constitutional disputes. This may be a result of the fact that many provisions of the Basic Law that are apt to be cited before courts have indeed been interpreted by the courts themselves thus avoiding possible dispute. Accordingly, the needs for the CFA to perform creative constitutional rule-making shrink considerably. However, we cannot conclude that the importance of the Court's constitutional role has decreased, because on the one hand, the presence of the Court itself can be an effective deterrent or supportive element for other actors' constitutional behaviour and, on the other hand, there will inevitably be new constitutional controversies arising in the future sooner or later, which would need to be decided by the Court. When Hong Kong's constitutional reform is carried out in the following years, political disputes could be translated into or dressed up as constitutional and legal issues. The courts might therefore be dragged into a political battle field; when this happens, the CFA's operations would become "interesting" again. However, as a supposed Chinese curse says, "May you live in interesting times",⁸²⁰ being interesting can sometimes actually be a bad thing rather than a blessing perhaps due to the accompanying uncertainty and risks.

According to our investigation of the constitutional part that the CFA has been playing, we find that a more appropriate constitutional role could be achieved by properly dealing with three relationships.

The first one is the relationship between the CFA and Central Government authorities. Given its vulnerability resulting from the massive asymmetry between the two systems, it is realistic for the Court to be modest and restrained when handling issues concerning the Central-SAR relationship and sovereign interest. Although literally and formally the CFA is merely a Hong

⁸¹⁸ Art.52, Constitution of the PRC.

⁸¹⁹ *Yeung May Wan v. HKSAR* (FACC19/2004)

⁸²⁰ In fact, the Chinese language origin of the phrase has not been found. It may be a version of Chinese proverb as understood by westerners.

Kong internal court watching over Hong Kong's autonomy and interest, substantially it is also a national court which should care for national concerns as well. Therefore it is desirable for the CFA to serve sides, acting as an impartial adjudicator above the two parties and being without bias when handling cases involving important constitutional questions. In so doing, the acceptability of the Court to both sides will be improved greatly. Especially it could ease Beijing's worry on the possible challenges over China's sovereign interests, which are always of high sensitivity and great concern to China and would very likely lead to Central Government authorities' intervention when being ignored by the CFA. Playing safe by the Court is less likely to attract interference from Beijing, the most dangerous factor threatening Hong Kong's judicial independence. Consequently, Hong Kong's autonomy would benefit in the long run. Moreover, apart from the pragmatic consideration, to be a neutral constitutional court taking care of both regional and national interests is determined by the very nature of the CFA as an impartial judicial institution with the function of neutral adjudication and a primary interpreter of the Basic Law which is not only a constitutional law for Hong Kong but also an ordinary national statute. This is also a natural requirement of the "one country, two systems" principle, which aims precisely at a harmonious balance between regional autonomy and national concerns. In this respect, the CFA could obtain some inspirations from the experience of European courts (ECJ and EU member state courts) in promoting the evolution of a uniform legal order with pluralist features. The Court may try to make some positive contributions in facilitating the harmonious coexistence of and interaction between the two legal systems so as to strengthen and consolidate the "one country" constitutional order which serves as the precondition and basis of the "two systems" principle. As a result, the relieved Central Government authorities would be more willing to respect the Court's independence and Hong Kong's autonomy.

The second relationship that needs to be considered cautiously by the Court concerns how to get along with other Hong Kong governmental branches, primarily the executive and the legislature. The Court's active involvement in constitutional review has given rise to a worry on the emergence of "judicial supremacy", which would be in confrontation with the official principle of "executive-led-ness" and the new trend of legislative dominance and therefore lead to some changes to Hong Kong's political order and balance. The causes of the judicial supremacy lay firstly in the phenomenon that in Hong Kong almost every social, economic, and political issue can be submitted to the courts for a final decision. As a result, the importance of political process in providing solutions and seeking consensus may be diluted. Moreover, from a structural perspective, Hong Kong's institutions, both the executive and the legislature, lack the means to remedy the Court's constitutional rule making. It is very difficult for them to correct a court's constitutional decision by amending the Basic Law, for the amending power is solely possessed by the NPC and the initiating procedure is extremely restrictive. As a result, the Central Government may step in to rebalance the relationship among the three branches, by interpreting or amending the Basic Law or by political pressures. To avoid such intervention, the Court should be humble when dealing with internal affairs as well. It is desirable for the Court to show its mutual respect to its brethren of other institutions while scrutinising legislation and policies made by them and avoid overarching and overstepping. This can also ease the discomfort of those who question the Court's democratic legitimacy. Here the CFA may learn something from the UK courts' practice in reviewing human rights issues, that is, courts only have competence to declare a UK Act's incompatibility with certain constitutional rights, but no power to invalidate the law found inconsistent. It is left for the government and parliament to decide whether and how to amend or repeal that law. However, the CFA has instead adopted a US style of judicial constitutional review. For this the CFA does not only examines the constitutionality of a law, but also

strikes it down when found unconstitutional, sometimes the Court even amends the law under review directly by deleting words. Arguably, that could be seen as a trespass on the legislature's territory and therefore should not be encouraged. Under Hong Kong's political reality, it seems more appropriate for the Court, a replacement of the Privy Council in London, to follow the UK model of judicial review of Acts enacted by Westminster rather than to adopt the US practice. Put simply, in my opinion, when exercising constitutional review, the courts of Hong Kong can declare whether an Ordinance is constitutional or unconstitutional, but ought not to strike down or amend that Ordinance, for that is the duty of the Legislative Council. What the courts can do is just a negatively disapplying of those provisions in an Ordinance found unconstitutional. This conforms to "the different constitutional roles assigned under the Basic Law to different governmental arms"⁸²¹.

Last but certainly not least, the Court should strike a balance between civil liberties and public order or community interests. This has indeed been implied by the requirement of appropriate handling of the former two relationships. Notably, issues involving fundamental rights and individual freedoms have comprised a large portion of the Court's constitutional review cases. The Court's relationship with other internal governmental branches or with the Central Government can in fact be seen to a large extent in its way of dealing with these cases. A good balance struck by the Court in these rights disputes would facilitate the harmony between the Court itself and other institutions, either internal within the HKSAR or national within the PRC. Otherwise, if the Court leans too much towards individual freedoms and neglects the collective good or national concerns, it could be a cause of tension with other actors. Therefore, the Court should be an impartial guarantor of both liberty and collect good. However, it should be pointed out that, at first glance, human rights issues may be a major conflict between the Central Government and Hong Kong because of the very different values and views between the two sides. However human rights issues are not as sensitive as Beijing's concern over the unity of the country, for the former does not challenge China's basic structure. Thus Hong Kong can be permitted to have a human rights regime distinct from that of the mainland China. Human rights protection and promotion might be a potential area that the CFA could contribute to the constitutional development in the mainland China with interactions between the two sides broadening and deepening increasingly and provide that the Court holds a friendly fashion and respectful attitude towards the Central Government in Beijing.

These relationships reflect the CFA's dilemma and indicate its actual constitutional role. The Court's practice and experience in this regard constitute an integral part of the application of the "one country, two systems" ideal. A successful experiment on that ideal in Hong Kong and Macao may offer some useful experience facilitating China's reunification with Taiwan. Although Taiwan has expressed its reluctance to accept the exact Hong Kong model, the spirit of the "one country, two systems" settlement is still valuable for seeking a more acceptable solution to the final reunification of the country. It might also provide some clues and insights for China to tackle its other territoriality problems such as those in Xingjiang and Tibet, as the essential part of those problems concerns precisely the constitutional relationship between regional autonomy and national sovereignty. For that, the Hong Kong practice has been a successful one so far. Although our discussion of the CFA's constitutional role seems to have no direct link to the broader territoriality problems of China, it is the elements, environment, structure, condition, climate, and relationships which define, shape, delimit and determine the Court's actual role and performance that matter while China's

⁸²¹ *Cheng Kar-Shun v. Hon Li Fung-Ying*, BBS, (HCAL79/2009), paragraph 220

central-regional arrangement in other areas is under consideration. Indeed, the CFA is a mirror reflecting the complexity and sensitiveness of China's central-local relationship. It can provide lessons for China to improve its constitutional order in relation to state structure.

Since the handover in 1997 and the application of the Basic Law, the HKSAR has evolved into a constitutional polity, characterised essentially by the allocation of power by constitution (the Basic Law), constitutionally guaranteed individual rights, governance according to law, and politics regulated by the constitution and law. In the course of the constitutional journey, courts, especially the CFA, have been playing a critical part. At present, with the realisation of universal suffrage in the near future, Hong Kong's constitutionalism is developing into a new stage of constitutional democracy. Predictably, the Court will have much more important roles to play in that stage, contributing continuously and more substantially to the stability and prosperity of the region. Moreover, China is on the way to gradually transforming to constitutionalism, democracy, and rule of law. The experience of Hong Kong in general, with issues concerning the CFA's in particular as mentioned in this thesis, will certainly provide valuable lessons.

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