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Constitutional Review in Hong Kong
under the 'One Country, Two Systems' Framework: An Inquiry into
its Establishment, Justification and Scope

Guangxiang Li

A Thesis submitted for the degree of
Doctor of Philosophy



Durham Law School

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Establishment, Justification and Scope

Guangxiang Li

Abstract

This thesis enquires into the establishment, justification and scope of constitutional review in Hong Kong against the unique constitutional order of 'One Country, Two Systems' established in Hong Kong after its return to China in 1997. Constitutional review had emerged in Hong Kong in the pre-handover judicial enforcement of the Bill of Rights. But its establishment was in the CFA's decision in *Ng Ka Ling*. The central question concerning constitutional review in Hong Kong is that the text of the Basic Law does not expressly provide for this authority.

In light of the theories on the law of constitution and constitutional review advocated by Kelsen, Dworkin and Cappelletti, this thesis argues that the higher law status of the Basic Law, understood in both positive and normative senses, makes constitutional review not only scientifically necessary but morally desirable. Further, it is argued that given the common law legal system and the checks and balances in the political structure of present Hong Kong, it is most appropriate for the courts to exercise the power of constitutional review.

However, constitutional review under the Basic Law is an intra-jurisdictional issue, involving not only the operation of the Hong Kong legal system, but also the legal system in mainland China. The Hong Kong courts' jurisdiction of constitutional review is therefore a limited one. In that sense and to that extent, there is what might be called the 'counter-Beijing difficulty' in the Hong Kong courts' exercise of the power of constitutional review. Nonetheless, the power of constitutional review has made the CFA a powerful court. It is the unwritten Basic Law formulated by the courts that is shaping OCTS. It is argued that to maintain the workability of the OCTS framework, due judicial restraint seems sensible and desirable.

List of Abbreviations

BLC	Basic Law Committee
BLDC	Basic Law Drafting Committee
BORO	Bill of Rights Ordinance
BPnPR children	Children both of whose parents are not Hong Kong permanent residents
CA	Court of Appeal
CDTF	Constitutional Development Task Force
CEship	The office of the Chief Executive
CFA	Court of Final Appeal
CFI	Court of First Instance
CPG	Central People's Government
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ExCo	Executive Council
EU	European Union
HKSAR	Hong Kong Special Administrative Region
HMO	Hong Kong and Macao Affairs Office of the State Council
HRA	Human Rights Act 1998
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LegCo	Legislative Council
LPO	Legal Practitioners Ordinance
NPC	National People's Congress (China)
NPCSC	Standing Committee of the National People's Congress

OCMFA	Office of the Commissioner of the Ministry of Foreign Affairs
OCTS	One Country, Two Systems
PLC	Provisional Legislative Council
POO	Public Order Ordinance
PRC	People's Republic of China
SNP	Scottish National Party
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America

Declarations

The product of this thesis is the author's own research. Where there is citing of other people's work, due references have been made.

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To do a Ph. D degree at a relatively advanced age might not be as challenging as climbing Mount Everest, but it is certainly not an easy task. The old saying — ‘the older, the wiser’ — is not necessarily true when it comes to reading books, articles and cases, most of which are not written in one’s own tongue, not to say writing some serious legal stuff in a foreign language. For the older, the mind is naturally not as quick and the memory not as strong as when they were younger. Very often, the unfortunate situation is ‘the spirit is willing but the body is weak’. When asked why he climbed Mount Everest, the English mountaineer George Mallory famously answered: because it is there. I wish I could reply in the same way if asked why I did this Ph. D research in my advanced years. Nonetheless, I have to say that I am certainly proud of myself that I made it.

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Introduction

On 1 July 1997 Hong Kong was returned to China after over a century and a half of British rule.¹ This event was heralded by the Chinese people as the end of China's 'hundred years of humiliation'.² In most western eyes, Hong Kong's return to China was 'further evidence of China's emergence as a Great Power'.³ However, one journalist writing for *Fortune* in 1995 pronounced 'the death of Hong Kong' upon its return to China, because it would then become part of a country which was 'governed by corruption and political connection rather than the even-handed rule of law'.⁴ Among the Hong Kong people, feelings were mixed. Whilst there was, mostly out of pure nationalism, a general support for reversion, there were also great fears about what would become of their capitalist way of life when the territory was ruled by a communist party.⁵

1. A new constitutional order in Hong Kong: One Country, Two Systems

The policy China adopted to rule Hong Kong is known as *One Country, Two Systems* (OCTS). It was originally devised to achieve the reunification of Taiwan with the mainland; but, as it turned out, it was first applied to Hong Kong, and later to Macao. This intention behind OCTS was made clear by Deng Xiaoping, who is regarded as its architect:

The concept of 'one country, two systems' has been formulated according to China's realities..... China has

¹ The history of Hong Kong and its reunion with China have been well documented. For a general account, see for example Gerald Segal, *The Fate of Hong Kong* (Simon and Schuster 1993); Steve Shipp, *Hong Kong, China: A Political History of the British Colony's Transfer to Chinese Rule* (Jefferson 1995); Michael Sida, *Hong Kong Towards 1997: History, Development and Transition* (Victoria Press 1994). For Sino-British negotiations on the question of Hong Kong, see Robert Cottrell, *The End of Hong Kong: The Secret Diplomacy of Imperial Retreat* (John Murray (Publishers) Ltd. 1993); For the transition of government, see Ralf Horlemann, *Hong Kong's Transition to Chinese Rule: The Limits of Autonomy* (Routledge Curzon, Taylor & Francis Group 2003); Enbao Wang, *Hong Kong, 1997: The Politics of Transition* (Boulder 1995).

² 李后 Hou Li, *百年耻辱史的终结 — 香港问题始末* (*The End of a Hundred Years Humiliation: the history of the Hong Kong Question*) (中央文献出版社 Central Party Literature Press 1997) 1. Note: in this research, references to works written in Chinese are laid out in both Chinese and English. Unless otherwise stated, the translation of the title is the researcher's own, while the translation of the name of the publisher is the publisher's own. For endnote purpose, the Chinese name will begin with the given name followed by the family name.

³ Warren I. Cohen, 'Introduction' in Warren I. Cohen and Li Zhao (eds), *Hong Kong under Chinese Rule: the Economic and Political Implications of Reversion* (CUP 1997) 1.

⁴ Louis Kraar, 'The Death of Hong Kong' *Fortune* (June 26, 1995).

⁵ See generally Werner Menski (ed), *Coping with 1997: The Reaction of the Hong Kong People to the Transfer of Power* (Trentham Books and SOAS 1995).

not only the Hong Kong problem to tackle but also the Taiwan problem. What is the solution to this problem? Is it for socialism to swallow up Taiwan or for the 'Three People's Principles' preached by Taiwan to swallow up the mainland? The answer is neither.⁶

As to the meaning of OCTS, Deng said that

within the People's Republic of China, the mainland with its one billion people will maintain the socialist system, while Hong Kong and Taiwan continue under the capitalist system.⁷

In 1982 the Chinese Constitution was amended to provide a legal basis for OCTS and its implementation. According to Article 31, the state may establish special administrative regions when necessary, and the systems of governance to be instituted in these regions shall be prescribed by law enacted by the National People's Congress (NPC) in light of the specific conditions.⁸

Deng's definition of OCTS was further enunciated into twelve basic policies China pronounced to adopt towards Hong Kong. These basic policies are often summarized into three 'sloganezed' phrases, which, however, may well be regarded as the three intertwined general principles of Hong Kong's new constitutional order: 'one country, two systems', 'a high degree of autonomy' and 'Hong Kong people ruling Hong Kong'. Based on these basic policies, China entered diplomatic negotiation with Britain over the question of Hong Kong in the 1980s. The negotiation resulted in the signing of the Sino-British Joint Declaration,⁹ in which China declared to resume the exercise of sovereignty over Hong Kong as of 1 July 1997¹⁰ and promised to establish a Hong Kong Special Administrative Region (HKSAR) and that a HKSAR Basic Law would be enacted to ensure that this and other specific OCTS policies would be implemented.¹¹ In 1990, nearly six years after the signing of the Joint

⁶ Xiaoping Deng, *Selected Works of Deng Xiaoping*, vol III (Foreign Languages Press 1994) 69.

⁷ Ibid 68.

⁸ For an English version of the Chinese Constitution, see <http://www.npc.gov.cn>, accessed in July 2012. Under the Chinese Constitution (Art 62), the NPC is the highest state organ of power.

⁹ 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, signed in Beijing on 19 December 1984 and came into force on 27 May 1985.

¹⁰ Ibid Art 1.

¹¹ Ibid Art 3 (1) and 3 (12).

Declaration, the Basic Law was promulgated.¹² But it would not come into force until 1 July 1997.

Under the Basic Law, the HKSAR is an inalienable part of the PRC.¹³ It is an administrative region that comes directly under the authority of the central government, but is authorized to exercise a high degree of autonomy and enjoys executive, legislative and independent judicial powers, including the power of final adjudication.¹⁴ As a general principle, the socialist system and policies practised in the mainland shall not be practised in the HKSAR and the previous capitalist system and way of life shall remain unchanged for 50 years.¹⁵ More specifically, the common law system previously in force in Hong Kong shall remain and continue to operate.¹⁶ Judicial independence is guaranteed and reinforced by establishing the Court of Final Appeal (CFA) which replaces the Privy Council as the top judicial authority in Hong Kong's legal system.¹⁷ Rights and freedoms, as well as private ownership are ensured and protected by law.¹⁸ The HKSAR Government shall be composed of Hong Kong permanent residents.¹⁹ Moreover, the HKSAR is given what may amount to near independent powers in economic and social policies. To name a few, the HKSAR shall have independent finances,²⁰ an independent taxation system and its own currency.²¹ It shall, on its own, formulate policies on education, science, culture, sports, religion, labour and social services.²² It shall retain the status of a free port and a separate customs territory.²³ It may, on its own but under the name of 'Hong Kong, China', maintain and develop economic and cultural relations and conclude relevant agreements with states, regions and international organizations.²⁴ The HKSAR shall keep its own police;²⁵ it maintains its own immigration

¹² The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, passed by the NPC on the 4th of April 1990. For a good account of the drafting process, see M.K. Chan and D.J. Clark (eds), *The Hong Kong Basic Law: blueprint for 'stability and prosperity' under Chinese sovereignty?* (Armonk 1991).

¹³ Basic Law Art 2.

¹⁴ Ibid Art 2.

¹⁵ Ibid Art 5.

¹⁶ Ibid Art 8.

¹⁷ Ibid Art 82.

¹⁸ Ibid Art 4 and Chapter III.

¹⁹ Ibid Art 3.

²⁰ Ibid Art 106.

²¹ Ibid Art 108.

²² Ibid Chapter VI.

²³ Ibid Chapter V.

²⁴ Ibid Art 151.

²⁵ Ibid Art 14 (2).

control; and it issues its own passports.²⁶

On the other hand, the Central Government is responsible for the foreign affairs relating to the HKSAR and the defence of the Region.²⁷ The Chief Executive (the head of the HKSAR) and principal government officials must be appointed by the Central Government.²⁸ The appointment of the Chief Justice of the CFA and the Chief Judge of the High Court has to be reported to the central authorities for record.²⁹ The Central Government may issue directives to the Chief Executive 'in respect of the relevant matters provided for in this Law'.³⁰ The Standing Committee of the NPC (NPCSC) may declare the HKSAR in 'a state of war' or 'a state of emergency', in which cases 'the relevant national laws' may be applied to the HKSAR.³¹ In normal times, certain national laws relating to foreign affairs and national defence are applied to the HKSAR³² and the NPCSC may add to or delete from the list of such national laws.³³ However, no department of the Central Authorities or local governments in the mainland may interfere with the affairs that are within the autonomy of the HKSAR.³⁴ People from the mainland must apply for approval for entry into or settlement in the HKSAR.³⁵

Clearly, whilst the autonomous powers given to the HKSAR are to ensure the separateness of the 'two systems', the powers the Central Authorities retain over the HKSAR serve to maintain the unity of 'one country'. In practice as well as in theory, the problem is where the line lies between 'one country' and 'two systems'. Questions may arise as to where the 'two systems' end and 'one country' starts.

Scholars have tried to grasp the features of the new constitutional order in Hong Kong by trying to reveal the inherent contradictions and tensions of OCTS. For some, OCTS make the 'incorporation of a largely free-wheeling laissez-faire society into a nation [ruled by]

²⁶ Ibid Art 154.

²⁷ Ibid Arts 13, 14.

²⁸ Ibid Arts 45, 48 (5).

²⁹ Ibid Art 90.

³⁰ Ibid Art 48 (8).

³¹ Ibid Art 18.

³² Ibid Annex III.

³³ Ibid Art 18.

³⁴ Ibid Art 22.

³⁵ Ibid.

Communists,³⁶ thus changing Hong Kong 'from a tiny capitalist enclave to an uneasy schizophrenic existence as a region of the world's largest socialist state.'³⁷ For others, OCTS is a 'symbiosis of a seamless integral whole',³⁸ which forms a 'union of two very different legal, political and social systems'³⁹ while demonstrating a rare 'unity in diversity'.⁴⁰ But for some others, the constitutional order under OCTS in Hong Kong is 'the offspring of an unhappy marriage of two strange bedfellows with distinctive different characters'.⁴¹

Sure enough, compromises and pragmatism are what lie beneath those contradictions and tensions. The idea of OCTS is undoubtedly at once theoretically ingenuous and politically pragmatic. In modern Chinese politics, sovereignty has always been a particularly sensitive and important issue. This is apparently due to its painful memories of the history of western invasions and bullying in the second half of 19th century. After the Chinese Communist Party took power in 1949, three portions of Chinese soil — Taiwan, Hong Kong and Macao — had long remained, though for different historical reasons, out of the practical control of the new regime. To solve these problems and thus to accomplish national union has long been a sovereignty issue for the Chinese government. 'There are two ways of achieving this', Deng once remarked, 'one is by force and the other is through peaceful settlement'.⁴² But at the time when Deng was determined to rescue China from the tragedy of the Cultural Revolution and to open China to the outside world, the use of force could not have been the first choice in his mind. But peaceful solutions, on the other hand, were not easily obtained. As one commentator noted, in dealing with the thorny sovereignty issue over Hong Kong, China faced a dilemma:

on the one hand, it would like to resume sovereignty over Hong Kong unconditionally; on the other hand, it was eager to maintain the status quo as to preserve prosperity and stability of the 'Pearl of the Orient'.⁴³

³⁶ Stephen Vines, *Hong Kong, China's New Colony* (Orion Business Books 1999) 2.

³⁷ Raymond Wacks (ed), *The Future of the Law in Hong Kong* (OUP 1989) 3.

³⁸ James C. Hsiung (ed), *Hong Kong the Super Paradox Life after Return to China* (St. Martin's Press 1999) 14.

³⁹ Hualing Fu, Lison Harris and Simon N. M. Young, 'Introduction' in Hualing Fu, Lison Harris and Simon N. M. Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave 2007) 1.

⁴⁰ Hsiung (ed) 15.

⁴¹ Po Jen Yap, 'Constitutional Reivew under the Basic Law: The Rise, Retreat and Resurgence of Judicial Power in Hong Kong' (2007) 37 Hong Kong LJ 474.

⁴² Deng 69.

⁴³ Wong Yiu-chung, 'One Country' and 'Two Systems': Where is the Line?' in Wong Yiu-Chung (ed), *'One*

Hong Kong was the sole bridge through which the New Red China in its early years had contact with the western world. After Deng's open-door policy in the 1980s, Hong Kong soon became the largest source of 'foreign investment' in the newly open Chinese market. To use force to recover Hong Kong would certainly have killed 'the goose that lays golden eggs'—a goose that was so dearly needed at the dawn of China's modernization programme.⁴⁴ Those were the realities Deng had certainly had in mind. Realities called for practical solutions. 'As far as I can see it', Deng said, 'the only solution lies in practising two systems in one country'.⁴⁵

So, when Deng announced the OCTS solution to the Hong Kong question, the then British Prime Minister Margaret Thatcher, who signed the Joint Declaration on Britain's behalf, responded that this was indeed 'an ingenious idea'.⁴⁶ For Deng, however, it was more than ingenious; it was 'scientific' in that it embodied 'dialectical Marxism and historical materialism' and the principle of seeking truth from facts.⁴⁷ Such political science is perhaps the most striking feature of what is now referred to in China's contemporary politics as 'Deng Xiaoping Theory' which lays the theoretical foundation of the so called 'socialism with Chinese Characteristics'. The same political science underlines yet another of his famous statements: the cat that catches the mouse is a good cat, regardless of whether it is white or black.

Given the inherent tensions in OCTS, how then does it work? How do we assess whether its implementation has been a success or a failure? There are obviously no easy answers to these questions. Nor is there an agreed set of standards by which they may be addressed and assessed. For many in the mainland, including the leadership in Beijing, 'one country' is the precondition and the basis of 'two systems'.⁴⁸ In other words, it is sovereignty, or

Country, Two Systems' in Crisis: Hong Kong's Transformation since the Handover (Lexington Books 2004) 9.

⁴⁴ Jacques Delisle and Kevin P. Lane, 'Cooking Rice without Cooking the Goose: The Rule of Law, the Battle over Business, and the Quest for Prosperity in Hong Kong after 1997' in Warren I. Cohen and Li Zhao (eds), *Hong Kong under Chinese Rule: the Economic and Political Implications of Reversion* (CUP 1997) 31.

⁴⁵ Deng 69.

⁴⁶ Cottrell 174.

⁴⁷ Deng 107.

⁴⁸ See for example the speech of the NPC Chairman, Wu Bangguo, at the 10th anniversary of the implementation of the Basic Law: 吴邦国 Bangguo Wu, '深入实施香港特别行政区基本法把「一国两制」伟大实践推向前

territorial integrity that comes first, the high degree of autonomy comes second. If things are all going fine and well, 'one country' will leave 'two systems' alone; or as Jiang Zemin (who succeeded Deng after 1989) once put it, 'well water shall not interfere with river water'. But what if something happens in Hong Kong that will harm its interests or the interests of the country as a whole? What if Hong Kong is being turned into a base of opposition to the mainland? Deng once asked and then said: 'we have no choice but to intervene.'⁴⁹ Sovereignty had been the core concern with the OCTS innovation, and it will remain as such in the future working of this system.

On the other hand, for those who tend to perceive OCTS from the angle of 'two systems', the working of OCTS hinges on whether the Region's promised autonomy is secured from interference by the central authorities.⁵⁰ For them, the success of OCTS will be assessed against the preservation of the rule of law,⁵¹ the protection of fundamental rights and the advancement of democracy in the Region.⁵² In their point of view, OCTS would be a failure if Hong Kong eventually became 'just another coastal Chinese city' like Shanghai.⁵³

In short, the OCTS constitutional order in Hong Kong is a very special constitutional device designed to deal with a special political issue in a special way. By 'one country', it exerts and emphasizes national sovereignty; by 'two systems', it accommodates two fundamentally different, or ideologically hostile social systems within one sovereign state. Creative and ingenious it certainly is, very much so as it is politically pragmatic. Expediencies and compromises are obvious and inevitable at the heart of this formula. Given its uniqueness and inherent tensions, it is not surprising that in practice, while it offers plenty of room for creativity it may also give rise to frustrating difficulties. The past 15 years of its implementation has certainly proved this point. Like any constitutional arrangement, the OCTS framework, which is going to operate in Hong Kong for at least 50 years, also faces the

进 Deepen the implementaton of the HKSAR Basic Law and push the great practice of the OCTS forward' *Tagong Bao* (Hong Kong July 6, 2007).

⁴⁹ Deng 220.

⁵⁰ See generally Yash Ghai, 'The Imperatives of Autonomy: Contradictions of the Basic Law' in Johannes Chan and Lison Harris (eds), *Hong Kong's Constitutional Debates* (Hong Kong Law Journal Limited 2005) and Albert H Y Chen, 'Some Reflections on Hong Kong's Autonomy' (1994) 24 *Hong Kong LJ* 173-180.

⁵¹ Steve Tsang (ed), *Judicial independence and the rule of law in Hong Kong* (Palgrave 2001) 1.

⁵² James Allan, 'Liberalism, Democracy, and Hong Kong' (1998) 28 *Hong Kong LJ* 167-169.

⁵³ Keneth Ka-Lok Chan, 'Taking Stock of "One Country, Two Systems"' in Yiu-chung Wong (ed), *One Country, Two Systems'In Crisis: Hong Kong's Transformation Since the Handover* (Lexington Books 2004) 55.

challenge of adapting itself to meet the changes of the society. Surely, its workability is to be tested over and over again in the years to come.

2. Question and thesis

The new constitutional order in Hong Kong is certainly a unique one. It is in this unique constitutional context that we are going to explore the specific issue of constitutional review in Hong Kong. By 'constitutional review', we mean the practice of examining and ruling on the constitutionality of legislation or executive acts. In the US and other common law jurisdictions where such constitutionality issues are examined and decided by the common law courts, the practice is referred to as 'judicial review'. In civil law systems like Germany and Italy where these constitutionality issues are left for a special tribunal — the constitutional court — to decide, the terminology of 'constitutional review' rather than 'judicial review' is used. In Hong Kong, the courts have always enjoyed the traditional English common law power of 'judicial review' of executive decisions, whereby the legality of such decisions is reviewed to see whether they are *ultra vires*. To distinguish the review of constitutionality from the review of legality, the term of 'constitutional review' is adopted in this thesis so as to avoid confusion with the traditional English common law 'judicial review'. Strictly speaking, the latter is an issue of administrative law and the former one of constitutional law. In the course of discussion, we may sometimes use the term of 'judicial constitutional review' so as to distinguish constitutional review by common law judges from constitutional review by a constitutional court or other possible alternatives of constitutionality control such as legislative constitutional review.

Constitutional review has become a significant feature of modern constitutionalism. The world-wide spread of constitutional review is accompanied with the world-wide spread of the idea of human rights and the international efforts for the promotion and protection of human rights. Yet, as a matter of law, the justification of constitutional review remains a much debated issue. What is the legal basis of constitutional review? What is its nature? Why, in a common law jurisdiction, are the unelected judges who carry out the seemingly very much politicalised task of constitutional review?

The form of constitutional review varies across jurisdictions. The American model is known as the 'decentralised' review, because review can take place in any court, with the federal Supreme Court having the last word. In contrast, many European countries adopt the 'centralized' model of review, which leaves the task of constitutionality control solely to a specialized constitutional court.⁵⁴ One striking difference between the two models is that while the American decentralized review takes place in the course of adjudicating cases and controversies, the traditional European model of centralized review examines a statute in the abstract, with no connection to actual controversy.⁵⁵ Relatedly, the European model of review allows ex ante review, but the American model admits only posterior review.⁵⁶ Apart from these two traditional models, there has now emerged what is referred to as the new 'Commonwealth model',⁵⁷ whereby ordinary judges are involved in some form of constitutional review, but it is the parliament that maintains the final word on constitutionality issues.

One of the reasons why civil law countries adopt the centralised model of constitutional review is because their judicial decisions do not have binding effect as precedents.⁵⁸ As a result, divergence of constitutional interpretation may emerge, which in turn will undermine the principle of legal certainty. This problem of interpretive plurality is obviously neutralized in common law jurisdictions by the doctrine of precedent. Kelsen once argued that the Austrian model of centralised review was more favourable than the American model of decentralised review, because the American model pursues the same aim but by 'juristically

⁵⁴ This is the case in Austria, Germany, Italy, Spain, Belgium. The French *Conseil Constitutionnel* was not created as a constitutional court, but is now operating very much as such. For the establishment of the institution of constitutional review in European countries, see generally Louis Favoreu, 'Constitutional Review in Europe' in Louis Henkin and Albert J. Rosenthal (eds), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Columbia University Press 1989); see also Klaus von Byne, 'The Genesis of Constitutional Review in Parliamentary Systems' in Christine Landfried (ed), *Constitutional Review and Legislation: An International Comparison* (Baden-Baden: Nomos Verlagsgesellschaft 1988); For the different models of constitutional review in European countries, see Victor Ferreres Comella, 'The European model of constitutional review of legislation: Toward decentralization' (2004) 2 *International Journal of Constitutional Law* 461-491.

⁵⁵ It should be noted that the German Constitutional Court hears concrete cases which involves constitutional review. This development is apparently a departure from the traditional centralized review envisaged by Kelsen. For a good discussion of the difference between and the convergence of the American and German model of constitutional review, see Danielle E. Finck, 'Judicial Review: The United States Supreme Court Versus the German Constitutional Court' (1997) 20 *Int'l & Comp. L. Rev* 123-157.

⁵⁶ For the contrast between the two models, see Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4 *The Journal of Politics* 183-200; see also John E. Ferejohn, 'Constitutional Review in the Global Context' (2002) 6:49 *Legislation and Public Policy* 49-59.

⁵⁷ Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *Am J Comp L* 707-760.

⁵⁸ Again, this statement should be qualified by the development in Germany.

imperfect means'.⁵⁹ However, as Freeman concludes, what model of constitutional review is appropriate for a particular constitutional order is ultimately a prudential matter, which therefore entails prudential considerations.⁶⁰

Moreover, it should be noted, many of the issues concerning the legitimacy of constitutional review are, at their roots, the extension in the specific context of constitutional law of the old questions in jurisprudence about the concept of law. Is the piece of law at stake a *valid* law? But then, is it a *just* law? More troubling, is an unjust law a valid law? Clearly, constitutional review can be perceived very differently if it treats merely the positive validity of law, or if it also deals with the normative justness of law. Many comparative studies have tried to offer a general or trans-jurisdictional justification of constitutional review.⁶¹ Clearly any such justification has to be defensible from both the positive and normative dimensions.⁶²

In Hong Kong, the CFA in its first ever decision, *Ng Ka Ling and others v the Director of Immigration*,⁶³ asserted that the HKSAR courts did have the power of constitutional review. It held that the HKSAR courts not only had the power to review and to strike down local legislation or administrative acts if found inconsistent with the Basic Law, but also the same power to review and strike down acts of the NPC or the NPCSC.⁶⁴ But nowhere in the Basic Law is to be found an express grant of this authority. So the question to be asked is: do the HKSAR courts have the power of constitutional review? In the US, when *Marbury v Madison*,⁶⁵ which laid the cornerstone for modern American judicial review, was decided, Chief Justice John Marshall was accused of usurpation simply because the power of constitutional review he asserted in his decision cannot be found in the text of the American

⁵⁹ Kelsen 192.

⁶⁰ Samuel Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990) 9 *Law and Philosophy* 361.

⁶¹ See for example Mauro Cappelletti, *Judicial Review in the Contemporary World* (The Bobbs-Merrill Company, INC 1971), Carlos Santiago Nino, 'A Philosophical Reconstruction of Judicial Review' (1992-1993) 4 *Cardozo Law Review* 799-846; Michel Troper, 'Marshall, Kelsen, Barak and the Constitutionalist Fallacy' (2005) *International Journal of Constitutional Law* 24-38.

⁶² This is the underlying statement in Stephen M. Griffin's conclusion that an overall justification of judicial review remains yet to be written. Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton University Press 1996) 123.

⁶³ *Ng Ka Ling and Another v The Director of Immigration* [1999] HKCFA 72; [1999] 1 HKLRD 315; (1999) 2 HKCFAR 4.

⁶⁴ *Ibid* para 337.

⁶⁵ *Marbury v Madison* 1 Cranch 137 US (1803).

Constitution. The question of whether the Supreme Court had been ‘usurper or grantee?’⁶⁶ led to a century-long heated debate over the legitimacy of judicial review. Likewise, it seems that the American question of ‘usurper or grantee’ can also be asked and needs also to be probed into in the new and unique constitutional order in Hong Kong.

This is no doubt a matter of great significance both to the theoretical understanding, as well as to the practical operation, of the new constitutional order in Hong Kong. For if usurpation had happened, it means that there had been a substantive departure from the intentions, principles and spirit of the Basic Law, which might have led to an inadvertent constitutional restructuring. If there had not been usurpation, then what is the legal basis of this power, i.e. how can it be justified in accordance with the Basic Law? Furthermore, given the unique character of the constitutional order in Hong Kong, even if the legitimacy of this power is proved, does that uniqueness have any bearing, in form or substance, on the practice of constitutional review in Hong Kong? Is there any special limitation on the courts’ exercise of this power? What is the role of the judiciary, equipped with the awesome power of constitutional review, in the working of the OCTS machinery?

It shall be argued that the supremacy of the Basic Law entails constitutional review vis-à-vis the Basic Law. The fundamental rights and freedoms entrenched in the Basic Law further enhance the legitimacy of constitutional review. As to why this power should be exercised by the courts, we shall argue that given the common law legal system and the checks and balances in the political structure in the Region, it is appropriate for constitutional review to be performed by the courts. However, we shall also argue that the power of constitutional review that the HKSAR courts have is ultimately a limited one, for not only the supremacy of the Basic Law is not to be understood in its ordinary sense under OCTS, but more significantly, the power of final interpretation of the Basic Law is not in the hands of the CFA. In addition, the checks and balances within the HKSAR governmental system itself are weak, which then does not suggest the desirability of a vigorous institution of constitutional review in Hong Kong. In reality, however, the power of constitutional review and its robust exercise (overwhelmingly in human rights field) in the past decade have made the CFA a very

⁶⁶ Charles A. Beard, ‘The Supreme Court-Usurper or Grantee?’ in Robert Green McCloskey (ed), *Essays in Constitutional Law* (Alfred A Knopf 1957) 24.

powerful court. To an extent, it is the unwritten Basic Law formulated by the courts (the CFA in particular) that is actually shaping the implementation of OCTS. If the courts are to abuse or over-use the power of constitutional review, they might easily cause a constitutional crisis, either in the HKSAR itself or between the HKSAR and the Central Authorities. To avoid this danger and to maintain the workability of the framework of OCTS, it shall be concluded, judicial self-restraint is nowhere more politically sensitive and desirable than in present Hong Kong.

3. Methodology and content

This research is mostly based on secondary sources. Comparative methods are adopted, though this thesis is not a wholesale comparative study. Instead, comparison is made with different constitutional systems wherever it is thought to be necessary and appropriate. The considerations for this approach are mainly the following four. First, as far as constitutional status is concerned, Hong Kong under the OCTS framework is genuinely unique, and we believe its uniqueness is better revealed by comparing it with different constitutional systems rather than with any particular one. For instance, Hong Kong under OCTS is not another Tibet in China. Nor is it a Chinese Quebec. It is not in the same constitutional status as a state in a federal system or a British devolved region (like Scotland) is in. While comparing Hong Kong with any of those territories would certainly be interesting, it is, we think, by comparing with all of them on different aspects that we might get a clearer picture of what Hong Kong is under OCTS.

Secondly, since our thesis is mainly concerned with the power of constitutional review, comparison with the American type of judicial review is inevitable in the sense that modern practice of constitutional review started with the US Supreme Court decision in *Marbury v Madison*. There are further reasons why comparison with American judicial review may be necessary. (1) The CFA's reasoning in *Ng Ka Ling* ran a similar line to that of *Marbury v Madison*. (2) Like the American Constitution, the Hong Kong Basic Law does not expressly confer on the courts this power. (3) In respect of human rights protection, the Hong Kong Basic Law, like the American Constitution, guarantees the protection of fundamental rights and freedoms. But, unlike the American Constitution, the Basic Law also entrenches the

International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). (4) The legal system in America and in Hong Kong alike is the common law system, with the same origin and thus sharing the same jurisprudential philosophy. (5) The political background against which the *Marbury v Madison* in America and *Ng Ka Ling* in Hong Kong were decided was, in a not very remote sense, seemingly alike: they were both decided after a transfer of political power at a particular moment of history. In America, that was the time when the Federalists and anti-Federalists struggle in real politics seemed to be at a decisive moment;⁶⁷ in Hong Kong, that was the time when the sovereign power had just been transferred and the new constitutional order had just started to operate. But comparing with the US judicial review is not sufficient, for the reason, which is our third consideration.

Thirdly, Hong Kong's common law legal system was transplanted from the UK. This system is maintained after the handover of sovereignty. Thus, not only the English common law tradition is kept, but the close ties Hong Kong had maintained with the whole common law world also remain as close as ever, if not even closer. As a matter of fact, the common law in Hong Kong today is still very much influenced by common law developments in the UK or in the rest of the common law world. This is not only because the Basic Law allows the Hong Kong CFA to invite judges from other common law jurisdictions to sit on its bench,⁶⁸ but also allows the courts, in adjudication, to refer to precedents of other common law jurisdictions.⁶⁹ In the legislation that established the CFA, it is provided that the Court, when sitting, will comprise five judges — the Chief Justice, three permanent judges and one non-permanent judge from Hong Kong or another common law jurisdiction.⁷⁰ The overseas judges not only bring their wisdom, experience and professional techniques,⁷¹ but more importantly, their different perspectives, which serve to connect Hong Kong and the rest of the common law world. In fact, as one of the non-permanent judges, Sir Anthony Mason, points out extra-judicially, that the use of comparative law and legal materials has been and will continue to be 'an extremely valuable resource' for the development of the

⁶⁷ William E. Nelson, *Marbury v Madison, the Origins and Legacy of Judicial Review* (University Press of Kansas 2000), see in particular Chapter 4, 'Marbury and the Crisis of 1801-1803'.

⁶⁸ Basic Law Art 82.

⁶⁹ Ibid Art 84.

⁷⁰ Hong Kong Court of Appeal Ordinance (Cap 484), S 5.

⁷¹ Johannes Chan, 'Basic Law and Constitutional Review: the First Decade' (2007) 37 Hong Kong LJ 420.

constitutional jurisprudence of Hong Kong.⁷² The Hong Kong courts' reception of comparative materials has not been focused on any particular jurisdiction; rather, they are taking the fruits from jurisdictions around the world. Against this historical, institutional and jurisprudential background, it is thought that it is worthwhile to compare Hong Kong on different aspects with different legal systems.

Finally, the purpose of this thesis is to provide a comprehensive examination into the establishment, justification and scope of constitutional review in Hong Kong, which, we humbly think, is still lacking in contemporary Hong Kong jurisprudence. Given the previous three considerations, we think 'comprehensiveness' is more likely to be achieved through comparing with more jurisdictions rather than less. However, due to space limits, not all comparison that is made in this research is as complete and thorough as it should be in a purely comparative study. At some points, we might be a bit sweeping; at others, we might seem to be raising the question more than answering it. But if they serve to build up the overall picture of constitutional review in Hong Kong, our primary goal is achieved.

If our efforts will not turn out to be a total failure, any degree of success in providing the 'comprehensiveness' would be claimed as our bit of contribution to the study of the constitutional law in Hong Kong. More specifically, though, originality might also be claimed in our development of the 'two faces' of the justification of constitutional review in general, in our discussion on the nature of the Basic Law, on the checks and balances in the HKSAR political system as well as on the special limitations on the scope of constitutional review in Hong Kong.

The layout and the main content of the thesis are as follows. Chapter I tries to establish a theoretical framework on which to argue for the justification of constitutional review in Hong Kong. It starts with a distinction between the need for constitutional review and the practical choice of a certain model of constitutional review. It argues that it is the positivization of normative values as a higher law that makes it not only practically possible but also morally (or normatively) desirable to have the institution of constitutional review.

⁷² Anthony Mason, 'The Place of Comparative Law in the Developing Jurisprudence on the Rule of Law and Human Rights in Hong Kong' (2007) 37 Hong Kong LJ 317.

The supremacy of the constitution is therefore not just a positive status but also a normative mandate — hence the two faces of the justification of constitutional review. Judicial constitutional review is then a secondary matter that only comes after the necessity condition has been satisfied. As other models of constitutional review, judicial constitutional review is a practical choice arising out of a concrete historical and philosophical background. In a constitutional order which adopts the doctrine of separation of powers, the checks and balances inherent within such a system further enhances the need for the review of constitutionality. If such a political system operates in a common law system, it seems most convenient and appropriate that the function of constitutional review should be performed by the courts. However, wherever the model of judicial constitutional review is adopted, there appears to be a more pressing need to perceive of the role of constitutional review against the workability of the whole system, of which the judiciary is not a co-sovereign but a constituent part.

Chapter II explores the emergence and establishment of constitutional review in Hong Kong. Going back to the judicial enforcement of the Bill of Rights Ordinance (BORO)⁷³ in the pre-handover period, it is argued that judicial declaration of a repealed ordinance was not a power of constitutional review in form, but was such in essence. Given this tricky situation, it is perhaps more appropriate to regard the pre-handover experience with the Bill of Rights as the emergence of constitutional review in Hong Kong. The real moment of establishment of constitutional review was in *Ng Ka Ling*, which was the first case decided by the CFA and in which the CFA expressly declared and formulated the power of constitutional review vis-à-vis the Basic Law. The reasoning in *Ng Ka Ling* apparently follows John Marshall's line in *Marbury v Madison*. Like the problem with American judicial review, the declaration in *Ng Ka Ling* also faces the practical challenge that the text of the Basic Law does not expressly provide for this authority. The old American question of 'usurpation or grantee' to American judicial review might well be renewed in Hong Kong and demands an answer in its own context.

⁷³ The Bill of Rights Ordinance (Cap 383). This Ordinance was enacted in 1991 so as to provide for the incorporation into the law of Hong Kong of provisions of the ICCPR.

Chapter III starts to look for the answer by firstly looking into the nature of the Basic Law. A seemingly awkward question is asked at the outset: is the Basic Law the constitution of Hong Kong? The immediate answer is 'yes' and 'no'. A fuller answer, however, requires a deeper analysis of the constitutional set-up under the OCTS framework. Under OCTS, Hong Kong is a capitalist Region of the socialist China, whose constitution proclaims a unitary rather than a federal national constitutional regime. As far as the Basic Law drafters understood the difference between a federation and a unitary state, a region of a unitary country, unlike a constituent unit in a federation, does not actually have its own and hence a separate **constitution**. Unless the adoption of OCTS had effectually changed the unitary China into a federal one, it is theoretically inappropriate to call the Basic Law Hong Kong's constitution. Devolution in the UK offers not much light in this respect. The devolved Scotland, for example, was a different nation and was itself sovereign before the union was formed. A proper answer to the status of the Basic Law is, we suggest, *the national Constitution in the HKSAR*, which means that the Basic Law is ruling Hong Kong in the behalf of the national Constitution. This status implies that the Basic Law is not self-contained; it has always to be read with the Chinese Constitution. As such, it entails as much as it limits constitutional review in the HKSAR.

Chapter IV goes on to articulate the need for constitutional review under the Basic Law by looking into the need for and the power of interpreting the Basic Law. The scheme of interpretation established in the Basic Law has great implications as to the justification of constitutional review and the scope thereof. As explained in this Chapter, the ultimate power of interpreting the Basic Law vests in the NPCSC. The interpretative powers that the HKSAR courts exercise are in essence delegated from the NPCSC, a nature that implies a sense of supervision by the latter. Judicial interpretation of the interpretation scheme, however, apparently rejects such a reading of supervision into the Basic Law. As a matter of fact, the CFA has asserted time and again that a purposive approach should be adopted in the interpretation of the Basic Law, which, under the cover of safeguarding judicial independence and the rule of law in the HKSAR, is tantamount to a claim of unrestrained power of interpretation by the Region's courts, and the CFA in particular. Nowhere than in the power of interpretation of the Basic Law are the tensions inherent in OCTS more striking and intense.

Chapter V focuses on the checks and balances in the political structure in the HKSAR. The purpose is to justify why the power of constitutional review is to be performed by the courts. Are there checks and balances built into the HKSAR political structure? What about judicial independence? As we shall see, the checks and balances mechanism does exist in the Basic Law, but it is a rather weak one. A look into the constitutional role of the Chief Executive of the HKSAR explains that point. Judicial independence in the HKSAR, on the other hand, is not much doubted. Not only the principle of judicial independence is expressly prescribed in the Basic Law, but also material guarantees such as salary and tenure are also ensured by the Basic Law. One particular anxiety about judicial independence in HKSAR is its independence from the mainland. Institutionally, this anxiety can be immediately dispelled, for, in principle, the courts in Hong Kong hear and settle all cases in the Region, no appeals are to be made to the People's Supreme Court in Beijing. However, judicial independence in Hong Kong is not secure at all in respect of the interpretation of the Basic Law, because, as has been shown in Chapter IV, in certain circumstances the Region's courts have to, via the CFA, refer the provision[s] at stake to the NPCSC for interpretation. In addition, the NPCSC may also interpret, on its own initiative, any provisions of the Basic Law and overrule an interpretation rendered by the Region's courts, if it finds their interpretation inconsistent with the Basic Law.

In Chapter VI, we continue our efforts in searching for the justification of constitutional review in Hong Kong; this time focusing on the human rights aspect of the new constitutional order in Hong Kong. In Hong Kong today, there are not only entrenched rights in the Basic Law, but also a separate human rights enactment containing a Bill of Rights. The moral need for protecting human rights reinforces the positive necessity of constitutional review entailed by the supremacy of the Basic Law. In practice, constitutional review in Hong Kong has mainly taken place in human rights related issues. Since *Ng Ka Ling*, there has been robust judicial constitutional review. If there had been any doubt over the legitimacy of constitutional review in Hong Kong, the repeated exercise of this power might have already justified it.

In the final Chapter, we are going to look at how the practice of constitutional review may fit

with the unique constitutional framework of OCTS. Is there the counter-majoritarian difficulty with judicial constitutional review in the HKSAR? Is there any additional difficulty that the Hong Kong judges may face when they exercise the power of constitutional review? What then is the role of the judiciary, the CFA in particular, in preserving the workability of OCTS? As we shall see, in Hong Kong today, there does not appear to have much concern about the question that judicial constitutional review might dwarf democracy; instead, it is the fear of the lack of democracy that had driven public support for judicial constitutional review. There is therefore the Hong Kong version of 'democracy and distrust' that underscores judicial constitutional review in Hong Kong. However, as we shall also see, there is indeed what might be called the *counter-Beijing difficulty* with judicial constitutional review in Hong Kong, implicit not only in the interpretation scheme in Article 158 of the Basic Law, but also in the specific circumstances Article 17 and 160 respectively prescribe. As such, constitutional review in Hong Kong may have to be perceived as an inter-jurisdictional matter; it straddles across the common law system in the HKSAR and the socialist legal system in the mainland. Because of the inherent tensions therein, judicial restraint is perhaps nowhere more needed than in present Hong Kong under OCTS.

Chapter I

Constitutional Review: Its Justification, Nature and Scope

Introduction

It is generally acknowledged that the modern practice of constitutional review started with the American Supreme Court's decision in *Marbury v Madison*. But it has spread world-wide 'like wild fire',¹ especially after the Second World War and more recently, after the collapse of the former Soviet Communist Block.² Nowadays, there is little doubt that the practice of constitutional review has become a significant feature of modern constitutionalism. The coming of the 'rights age' has contributed hugely to this development,³ for, with an entrenched bill of rights, human rights become constitutional rights, thus demanding a higher level of protection.⁴

Yet, questions surrounding constitutional review remain, some of which are much debated. What is the justification for constitutional review? What is its nature? In the case where this power is exercised by the ordinary judges, further questions may be asked as to why it should be the unelected judges who carry out the seemingly politicalised task, and consequently, what impact the exercise of judicial constitutional review may have on the working of the whole constitutional system. When should the judges intervene? Shall they defer to the views of the elected bodies when balancing between law and politics? These are the questions to be examined in this Chapter. The aim is to provide a theoretical framework by which we are going to analyse constitutional review in Hong Kong.

¹ John E. Ferejohn, 'Constitutional Review in the Global Context' (2002) 6:49 *Legislation and Public Policy* 50; See also in general Tom Ginsburg, 'The Global Spread of Constitutional Review' in Keith E. Whittington, R. Daniel Kelemen and Gregory A. Caldeira (eds), *The Oxford Handbook of Law and Politics* (OUP 2008); William E. Nelson, *Marbury v Madison, the Origins and Legacy of Judicial Review* (University Press of Kansas 2000), Chapter 8.

² For a comprehensive discussion of the establishment of constitutional review in Eastern Europe and the American influence thereupon, see respectively Wojciech Sadurski (ed), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in post-Communist Europe in a Comparative Perspective* (Kluwer Law International 2002) and Louis Favoreu, 'Constitutional Review in Europe' in Louis Henkin and Albert J. Rosenthal (eds), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Columbia University Press 1989).

³ See generally Louis Henkin, *The Age of Rights* (Columbia University Press 1990).

⁴ See generally Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) and Robert Alexy, 'Balancing, constitutional review, and representation' (2005) 3 *International Journal of Constitutional Law* 572-581.

Section 1 discusses the justification issue. It focuses on what is termed here as ‘necessity justification’. The reason for this focus is the common sense of putting the horse before the cart: whether constitutional review is necessary is one thing and who is to do it quite another that comes second. It will be argued that it is the supremacy of the constitution that is the sole basis of constitutional review. But there are two faces of the supremacy of the constitution, one positive and the other normative. That is to say, it is the combined reading of the constitution as higher law in both positive and normative senses that provides the full justification for constitutional review. Hans Kelsen’s a pure law or *scientific* justification and Ronald Dworkin’s *rights-based* or normative justification will be briefly visited. And by presenting Kelsen and Dworkin face to face, it is hoped to show one crucial point: that is, there are *two levels of the need* for constitutional review, one positive the other normative, each reflecting a different conception of law. This synthesis will be supported by reference to the proposition of ‘positivization of higher law’ advocated by Mauro Cappelletti.

Section 2 attempts to demonstrate the necessity justification in two concrete contexts. The reasoning in *Marbury v Madison* will be examined briefly. This is to be followed by a more detailed discussion on the emergence and establishment of constitutional review in the UK. It will be demonstrated that the UK’s experience is particularly telling that with the enactment of a higher law, constitutional review is inevitable, though what form of constitutional review is appropriate is a question that has to be taken prudentially.

Section 3 considers the justification for judicial constitutional review, i.e. why it should be the judges who decide. It will be argued that it is the want of a final arbiter in the implementation of the constitution and the checks and balances within a certain constitutional system that make it necessary and appropriate for the ordinary courts to exercise the power of constitutional review. It is certainly a huge democratic question whether it is appropriate for the unelected judges to strike down legislation made by the elected legislature. But pure democracy is nowhere to be found. The democratic deficit of judicial constitutional review might be off-set by its potential of preventing the whole democratic system from malfunctioning or collapse.

The nature of constitutional review is examined in section 4. It will be argued that constitutional review by nature is legislation not interpretation. This means that in exercising constitutional review, especially when striking down an existing law, judges are not only making law, but also making the constitution. Yet all this is done in the name of law, under the disguise of legal or constitutional interpretation, while the fact is that politics have been heavily involved.

Finally, in section 5, the question of the impact of judicial constitutional review on the working of the whole constitutional system is to be discussed. It will be argued that given the nature of constitutional review, judges with the power of constitutional review in their hands, should always be mindful of the adverse impact the exercise of this awesome power might have on the whole political system. It will be suggested that some judicial restraint is needed in order to maintain a workable government which is governed by the constitution not the judges.

This Chapter will be concluded with explanations on how this understanding of the justification for, and the nature and the scope of constitutional review will be applied in the examination of constitutional review in Hong Kong.

1. The necessity justification: positive and normative aspects

Since the very consequence of the exercise of constitutional review is the announcement of the validity (or invalidity) of an existing law, to justify it is in essence to answer these questions: what is a valid law? is an unjust law a valid law? and indeed, what is law? As H.L.A. Hart notes, few questions in the human society have been asked and answered with such persistence yet in so many diverse, strange and paradoxical ways as the question 'what is law?'.⁵ Not surprisingly, there are different and even opposing views on the conception of constitution and constitutional review. In a sense, the disputes over the justification and the nature of constitutional review are in fact an extension of the old disputes over the concept of law.

⁵ H.L.A. Hart, *The Concept of Law* (Clarendon Press 1961) 1.

Richard Fallon, while reflecting on the jurisprudence of Ronald Dworkin, argues that law has two faces, one looking into the real world and the other the ideal one.⁶ Our understanding of law, he submits, 'will be deeply impoverished if we fail to recognize this duality'.⁷ Positivism and the natural law theories (Dworkin's conception of law has been regarded as a renaissance of natural law in America⁸) are the traditional two opposite schools of thoughts, each representing one of the two faces of law. If so, it follows that there must also be two faces of the basis on which the practice of constitutional review can be justified, one positive the other normative, each revealing a different level of the *need* for constitutional review. Fallon would certainly agree that our understanding of constitutional review would be impoverished if we failed to recognize this duality.

Kelsen's hierarchical conception of the constitution and Dworkin's moral reading of the constitution are perhaps typically representative of the two faces of the justification of constitutional review. Standing alone, however, each might appear insufficient. The theory of positivization of higher law advocated by Cappelletti seems to be a success in putting the two faces together.

1.1 Kelsen versus Dworkin

Kelsen's concept of law is typically positivist. In his pure theory of law, he defines law in such a way as 'to eliminate from the object everything that is not strictly law'.⁹ Strictly, therefore, law is only an order of human behaviour, to which the failure to obey leads to deprivation of life, liberty, health or economic values. Other orders of human behaviour, such as morals, political biases and religion, are not based on such coercive measures, and hence, should be excluded from the pure or scientific (as opposed to political) definition of law.¹⁰ For Kelsen, a pure theory of law is free from the idea of justice, political ideology and moral values. A science of positive law, he writes, must be clearly distinguished from a philosophy of justice, for law and justice are two different concepts and there are, in the real world, legal orders

⁶ Richard H. Fallon, 'Reflections on Dworkin and the Two Faces of Law' (1992) 67 *Notre Dame L Rev* 572.

⁷ *Ibid* 573.

⁸ See generally David A.J. Richards, 'Taking Taking Rights Seriously Seriously: Reflections on Dworkin and the American Revival of Natural Law' (1977) 52 *New York University Law Review* 1265-1340.

⁹ Hans Kelsen, *The Pure Theory of Law* (University of California Press 1967) 1.

¹⁰ *Ibid*.

which are, from a certain point of view, unjust.¹¹

Accordingly, Kelsen argues that the constitution as law should be seen in the material rather than the formal sense of the term. He defines the two senses of constitution as this:

The constitution in the formal sense is a certain solemn document, a set of legal norms that may only be changed under the observation of special prescriptions, the purpose of which it is to render the change of these norms more difficult. The constitution in the material sense consists of those rules which regulate the creation of the general legal norms, in particular the creation of statutes.¹²

As Kelsen explains, the constitution in the material sense is law, because it is those rules that determine the making of valid laws, whereas the constitution in the formal sense should be understood in politics rather than in pure law.¹³ However, it needs the formal constitution to safeguard the material constitution. For only when the constitution is made difficult to amend, then the material provisions in the constitution which regulate the making of laws can be maintained. And it is because of the material part of the constitution that it is possible and necessary to distinguish constitutional law from ordinary laws.¹⁴ For Kelsen, the material constitution is an essential element of every legal order, but the formal constitution is only possible with a written constitution. In UK, for example, there is no formal constitution — the solemn document called ‘The Constitution’, and the material constitution in that country has the character of customary law, hence, there exists no difference between constitutional and ordinary laws.¹⁵ Kelsen’s account of the British unwritten constitution therefore fits with the description of it by the Royal Commission on Reform of the House of Lords as being ‘extraordinarily dynamic and flexible with the capacity to evolve in the light of changes in circumstances and society.’¹⁶ Or in the words of John Griffith, in the UK ‘[e]verything that happens is constitutional. And if nothing happened that would be constitutional also.’¹⁷ This would not have been the case if there were a formal constitution, which makes the amendment of the material constitution difficult.

¹¹ Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1945) 5.

¹² *Ibid* 124.

¹³ *Ibid* 124, 259.

¹⁴ *Ibid* 124.

¹⁵ *Ibid* 125.

¹⁶ Quoted in Jack Beatson, ‘Reforming an Unwritten Constitution’ (2010) 48 *Law Quarterly Review* 48.

¹⁷ J A G Griffith, ‘The Political Constitution’ (1979) 42 *The Modern Law Review* 19.

Kelsen sees a State as a legal order in a hierarchical structure. The constitution of a state, presupposing the basic norm, is both the basis and the highest authority of the national legal order. It is therefore the fundamental law.¹⁸ As such, Kelsen concludes, the function of a constitution is the grounding of validity.¹⁹ While the material constitution provides the grounding of the validity of positive laws, the formal constitution safeguards the grounding itself.²⁰

Thus, for Kelsen, constitutional review is, as a matter of logic, an absolute necessity to uphold the supreme status of the constitution.²¹ On the one hand, since all norms derive their validity ultimately from the basic norms in the constitution, it is a straightforward logic that those which are contrary to the constitution are not valid. On the other hand, given that the provisions in the constitution are often open-textured, and yet, all the law-applying organs are equally entitled to interpret the constitution, there is a practical need of achieving *uniformity* in deciding constitutional questions; the lack of which, Kelsen says, 'is a great danger to the authority of the constitution.'²² Uniformity must be achieved vertically — between lower and higher norms in the legal hierarchy, as well as horizontally — between different law-applying organs at the same level of the legal hierarchy. It is then the need for achieving the entire uniformity that makes it necessary to have constitutional review.

Dworkin is a strong opponent to legal positivism. But he rarely confronts Kelsen's arguments directly. His attack on legal positivism is well known by his attack on his mentor H.L.A. Hart.²³ Presumably, as far as Dworkin remains an anti-positivist, he would not disagree with Kelsen any less than he does with Hart. For Dworkin, the Kelsenian or Hartian positivist concept of law, which is free from the idea of justice and moral values, is utterly unacceptable. In his view, law does not consist entirely of rules but also of *principles*. More importantly, it is the

¹⁸ Kelsen, *General Theory of Law and State* 124, 258.

¹⁹ Hans Kelsen, 'The Function of a Constitution' in Richard Tur and William Twining (eds), *Essays on Kelsen* (Clarendon Press 1986) 119.

²⁰ Kelsen, *General Theory of Law and State* 258.

²¹ Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4 *The Journal of Politics* 184.

²² *Ibid* 185.

²³ See in general Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (Butterworths 1989) and Scott J Shapiro, 'The "Hart-Dworkin" Debate: A Short Guide for the Perplexed' (Public Law and Legal Theory Working Paper Series, Paper No 77, March 2007, Law School, University of Michigan).

principles that provide the justification of existing rules. Principles may or may not have been formulated expressly or written down in black letters. But they are there, 'all around us', always identifiable, or discoverable, in existing rules and precedents.²⁴ Thus, what the law is does not ultimately depend on such a criterion as a Hartian rule of recognition or a Kelsenian basic norm, but upon 'constructive' interpretation which is at once based on and in search for principles. For Dworkin, legal (as well as constitutional) interpretation is a continuing and creative process — a process in search of justice and fairness.²⁵

Accordingly, Dworkin strongly advocates a moral reading of the constitution; a reading which 'proposes that we all — Judges, lawyers, citizens — interpret and apply these abstract clauses [of the constitution] on the understanding that they invoke moral principles about political decency and justice.'²⁶ The interpretation of these broadly framed rights invokes moral principles, which require 'fresh moral judgments' to make them applicable in concrete cases.²⁷

Dworkin's moral reading of the constitution is centrally rights-based. For Dworkin, the rights of the individual against the state exist outside of the written law and precede the interest of the majority.²⁸ It follows that a right is a political trump which overrides political considerations.²⁹ A right that does not have some overriding power would not be a genuine right. The more important a right is, the greater trumping power it carries with itself.³⁰ As one commentator notes, Dworkin's 'rights as trumps' theory is a complete rejection of the traditional utilitarianism, according to which individual rights will be protected only where that will maximize welfare overall.³¹ Thus, when we ascribe a right to someone, we are in effect holding that that person ought not to be interfered with. The prospect of a marginal increase in the general welfare can never be a good reason for restricting or interfering with

²⁴ Dworkin explains this point in his analysis of *Riggs v. Palmer* 115 NY 506 (1889). See Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 28.

²⁵ Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 228.

²⁶ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press 1996) 3

²⁷ *Ibid.*

²⁸ Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978) vi. .

²⁹ Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (OUP 1985) 153.

³⁰ *Ibid.*

³¹ N.E. Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (Sweet & Maxwell 1986)141.

someone's right.³²

Thus, for Dworkin, it is very much the nature of rights and the trumping power inherent in rights that provide the basis for constitutional review, which he has taken for granted that should be exercised by the judges.³³ Dworkin does not discuss much about the supremacy of the constitution in its positive sense. In his view, the supremacy of the constitution does not merely rest upon the fact that it had been 'Ordained by We the People', but more fundamentally, because 'We the People' believe it *deserves* our support.³⁴ Therefore, it is not necessarily the positive constitutional supremacy that entails constitutional review; rather, it is the need of maintaining the morals and values that we the people dearly cherish that justifies it. Dworkin's moral reading of the constitution therefore suggests what might be called 'morality, justice and fairness review' rather than positive legality review.

The differences between Dworkin and Kelsen are as fundamental as they are self-evident. But, for our purpose, Dworkin and Kelsen do share one common proposition: a law contrary to the constitution should be void and have no effect whatever. That is, they both justify the necessity of constitutional review, albeit through a completely different approach — positive versus normative. What might be drawn from the comparison between the positivist Kelsenian and the normative (moral) Dworkinian justification of constitutional review is perhaps this. Neither of them standing alone is sufficient in justifying the necessity of constitutional review. For Dworkin, the practical question is whether constitutional review is possible at all if without the positive enactment of the constitution as the supreme law of the land. For Kelsen, a pure law justification of constitutional review based on a hierarchical higher status of the constitutional might may well lead to the unsatisfactory result that an unjust law remains a valid law. If law has two faces — positive and normative, the necessity justification of constitutional review has also to be seen from a positive as well as a normative perspective. The true justification, it seems to us, does not lie in Kelsen **versus**

³² Ibid 148.

³³ It has been submitted that Dworkin in *Freedom's Law* divorces the question of how to interpret the Constitution from the question of who is empowered to interpret it, and that in Dworkin's view, the fact that courts are the ultimate expositors of constitutional law in America is so widely settled that judicial constitutional review can be taken as a given. See Ara Lovitt, 'Constitutional Confusion?' (1998) 50 *Stanford Law Review* 575.

³⁴ For this point of Dworkin's conception of constitutional supremacy, see Daniel A. Farber and Suzanna Sherry, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (The University of Chicago Press 2002) Chapter 7, 'Ronald Dworkin and the City on the Hill'.

Dworkin; rather, it has to be in Kelsen **and** Dworkin.

1.2 The positivization of higher law

Cappelletti's argument about the positivization of the higher law seems a good attempt to bring the two faces of the basis of constitutional review within a unitary analysis. He argues that the institution of judicial review of legislation 'represents a fascinating synthesis of two seemingly contradictory schools of thought (positive and natural law)'.³⁵ In short, written constitutions express the 'positivization' of higher values, and that judicial review of legislation is the method for rendering these values effective.³⁶ By positivization of higher principles, he means a process of three stages: (1) the making of a written constitution as a codification of individual and social values; (2) giving the constitution a rigid character, conferring a relative immutability on the superior law and the values it enshrines; (3) providing a means for guaranteeing the constitution, separate from the legislative power itself.³⁷

Looking into the history of western civilization, Cappelletti finds that the search to create or discover a hierarchy of laws and to guarantee this hierarchy has been one of 'man's never-ending attempts to find something immutable in the continuous change which is his destiny'.³⁸ In much of the West, the search shares a common evolutionary pattern: from the period of 'natural justice', articulated by the various schools of natural law theories, through the era of 'positive or legal justice', characterized by the primacy of the written statute and the popular legislature, to our own time of 'constitutional justice', which 'combines the forms of legal justice and the substance of natural justice'.³⁹ The higher law concept assumes a preeminent position in the natural law theories. As a matter of logic, 'the law contrary to natural law is void and has no binding effect whatever'.⁴⁰ However, an institution similar to modern constitutional review to enforce the higher law did not come into existence in the

³⁵ Mauro Cappelletti, *Judicial Review in the Contemporary World* (The Bobbs-Merrill Company, INC 1971).

³⁶ Ibid Preface.

³⁷ Ibid Preface.

³⁸ Ibid Preface.

³⁹ Ibid 32.

⁴⁰ Thomas Aquinas, quoted in *ibid*.

natural law era.⁴¹ In Europe, particularly in the civil law world, the positivist thought had been heavily influential throughout the 19th century. But the bad experience with the Nazi-Fascism had ultimately shaken people's faith in the popular legislature as the only source of law. People then began to reconsider the judiciary as a check against the legislative disregard of principles once considered immutable.⁴² It is the coming of the age of constitutionalism that provides the instrument whereby natural law and positive law could be assimilated within a unitary legal order.⁴³ The central theme of modern constitutionalism, according to Cappelletti, is the embodiment of 'natural law' principles in the positive law of the state'.⁴⁴

1.3 The legal basis of constitutional review

From the above discussion, it may now be safe to say that the sole basis of constitutional review is the higher law status of the constitution. That is, it is the supremacy of the constitution that entails constitutional review. However, the supremacy of a written constitution has to be understood not only in the Kelsenian scientific sense but also in the Dworkinian normative (or moral) sense. The constitution cannot be read just positively, nor can it be read merely morally. It is the combined effect of the positive and normative supremacy of the constitution that makes constitutional review necessary, desirable, and even unavoidable.

As one study shows, it is a common phenomenon that a written constitution is given a higher status in the legal system; but more importantly, there is a *reason* for doing so, and that reason is the belief in limited government.⁴⁵ The political theory that underpins the belief in limited government is the theory of popular sovereignty, which in turn has its root in the belief in individual liberties, including the right of self-determination.⁴⁶ As Edward S. Corwin wrote more than half a century ago, there is undoubtedly the higher law background of American constitutional law; a background that can be traced back to the ideals of justice

⁴¹ Ibid 32.

⁴² Ibid Preface.

⁴³ Ibid 32.

⁴⁴ Ibid 97.

⁴⁵ K C Wheare, *Modern Constitutions* (OUP 1962) 10.

⁴⁶ Samuel Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990) 9 *Law and Philosophy* 327.

expressed by the natural law theorists.⁴⁷ Phillip Bobbit observed that the American founding fathers, in a typical lawyer's line of reasoning, had reckoned that, in order to effectively bind the government, a written document was needed just as a normal legal writing would bind the parties to a contract.⁴⁸ If what Bobbit had noted is the 'positive face' of the constitution, John Marshall articulated the 'other face' of the binding effect of the constitution; it is '[t]he people [who] made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will.'⁴⁹ These words of Marshall are reminiscent of the celebrated words of Abraham Lincoln that a limited government is a government 'of the people, by the people and for the people.'⁵⁰

In a sense, therefore, as Cappelletti observes, modern constitutionalism is indeed a revival of the natural law theories and the realization of the utopian desire which natural law theorists had expressed.⁵¹ The natural law's ill-defined and abstract higher principles are now defined, written down, or 'positivized' (though still generally) into a single document, alongside with express or implied remedies and institutions to ensure their enforcement. It is this 'positivization', or the transfiguration of the higher law, that makes constitutional review practically possible.⁵² The revival of natural law seems unstoppable, for the ideals imbedded there is an irrepressible facet of human nature. If the constitution, as a 'positivization' of the higher law, is to govern the government, constitutional review is necessary to ensure that the government will not make *unjust* laws contrary to the values, principles upheld as immutable, universal and unchangeable.

Therefore, the supremacy of the constitution as the basis for constitutional review has 'two faces': it has to be understood both positively and normatively.⁵³ Positively, it provides the basis as well as the highest authority of the legal system. Normatively, it demands constant upholding of the enduring values and principles embedded in the constitution. Hence,

⁴⁷ See generally Edward S Corwin, 'The Higher Law Background Of American Constitutional Law ' (1928-1929) 42 Harv L Rev 365-409.

⁴⁸ Phillip Bobbitt, *Constitutional Interpretation* (Blackwell, Oxford UK & Cambridge USA 1991) 3.

⁴⁹ *Cohens v. Virginia* 19 US (6 Wheat) 264, 389 (1821).

⁵⁰ The Gettysburg Address by US President Abraham Lincoln, November 19, 1863.

⁵¹ Cappelletti, Preface.

⁵² *Ibid* Preface.

⁵³ A similar view is that the constitution is not only descriptive and also prescriptive. See David Feldman, 'None, One or Several? Perspectives on the UK's Constitution[s]' (2005) 64 *The Cambridge Law Journal* 334-335.

government 'of the people, by the people and for the people' is not merely governance by the people through their representatives, but also, and ultimately, by the people themselves. People always maintain their sovereignty; they delegate the power to govern to the government, but they maintain their right to resist the government when they feel it acting against their will through, for example, making unjust laws.⁵⁴ Resistance may be bloody or peaceful.⁵⁵ Peaceful resistance through legal process is mostly possible only if a higher law has been positivized. And constitutional review is such a resistance or at least an attempt to resist.⁵⁶ In other words, it is the positivization of the higher law that makes constitutional review *practically necessary and possible*, but it is the positivization of the abstract values and principles (which are genuinely regarded as 'true law') that makes constitutional review *morally necessary and desirable*. Cappelletti does not elaborate the justification for constitutional review as such. But this seems to be the nutshell of his genuine coinage of the word 'positivization'. The supremacy of the constitution, taken as the positivization of the higher normative values and principles, is the real basis of constitutional review, the secondary question of who is to do the review notwithstanding.

2. Necessity justification in concrete analysis

2.1 The *Marbury v Madison* line of justification

Indeed, it is mainly based on the enunciation of the supremacy of the American Constitution that Marshall asserted the power of constitutional review in *Marbury v Madison*. He argued with great logical clarity.

If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case.⁵⁷

⁵⁴ For this point, see generally Freeman. See also Edward Rubin, 'Judicial Review and the Right to Resist' (2008-2009) 97:61 *The Georgetown Law Journal* 61-118.

⁵⁵ The Arab Spring of 2011 is a good example.

⁵⁶ Rubin, Chapter II 'Judicial Review as an Alternative to Resistance' 85.

⁵⁷ *Marbury v Madison* 1 Cranch 137 US (1803).

And

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.⁵⁸

If we can translate the ‘ifs’ upon which Marshall ran his logic, it seems that they boil down to one ‘if’: if the constitution is to be obeyed as the higher law, or the supreme law of the land, laws in contravention to it must be declared null and void. To suggest otherwise is, in Marshall’s own words, ‘to reduce a written constitution to nothing’.⁵⁹ The logic that Marshall employed is exactly the same which the natural law theorists had used in their claim that natural law was the true law and the higher law. The very reason that Marshall could do what the judges in the natural law era could not do — to announce a law inconsistent with the higher law as having no effect, is simply because Marshall had in hand what the natural law era judges did not have; that is, a positivized higher law, written in black letters, tangible and ready for enforcement.

Corwin noted that it was extremely doubtful whether Cicero’s adumbrations of constitutional review had actually affected the framers of the American Constitution, but it was almost certain that they were fully aware of the pre-independence experience that colonial laws which were regarded as not reasonable or contrary to the higher laws of the Kingdom of England were null and void.⁶⁰ For Cappelletti, there is a long history of both theory and practice standing behind Marshall in *Marbury v Madison*; it is not a brand new invention, but a fulfilment of the past.⁶¹

But Marshall’s claim of this jurisdiction had been criticized on two fronts; one often noticed, the other less so. While the logic that a higher law overrides a lower law is simple,

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Corwin 160.

⁶¹ Cappelletti 41.

straightforward and powerful, Marshall left himself open to attack by sweepingly claiming that 'it is emphatically the province and duty of the judicial department to say what the law is'⁶² — that is, 'to say whether a law is a valid law vis-à-vis the constitution'. For many early commentators, Marshall's claim was a sheer act of usurpation.⁶³ Thayer criticized Marshall's claim of judicial review as 'based upon the 'simple and narrow' line of reasoning flowing from the supremacy of the constitution, which took no notice of the remarkable peculiarities of the situation [and] went so smoothly as if the constitution were a private letter of attorney, and the court's duty under it were precisely like any of its most ordinary operation'.⁶⁴ Bickel said that Marshall begged the wrong question — why should it be the courts to decide?⁶⁵ At one point, Charles Black proclaimed that judicial review was a usurped power, but it has obtained legitimacy through popular acquiescence.⁶⁶ Marshall disagreed; in his view, had there been usurpation, it might still be resisted even after a long and complete acquiescence.⁶⁷

The other less-noticed front on which Marshall in *Marbury v Madison* was open to attack is the lack of *normative analysis* of the supremacy of the constitution. In other words, he did not support his logic with *reason* — the reason why the constitution is given a higher law status and why this higher status should be upheld. He even did not cite any precedents to support his opinion. However, his later statements on the nature of the constitution and constitutional interpretation had certainly buttressed his defence. As quoted above, for Marshall, the supremacy of the Constitution carries with it the will of the people. Since the will of the people is to limit the government, Marshall would certainly agree with Black that the struggle for a written constitution was 'to make certain that men in power would be governed by law, not the arbitrary fiat of the man or men in power.'⁶⁸ But for Marshall, the struggle of implementing of the Constitution is a never ending process, thus, '[w]e must

⁶² *Marbury v Madison*.

⁶³ See generally Charles A. Beard, 'The Supreme Court-Usurper or Grantee?' in Robert Green McCloskey (ed), *Essays in Constitutional Law* (Alfred A Knopf 1957).

⁶⁴ James B. Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) VII *Harvard Law Review* 138-139.

⁶⁵ Alexander M. Bicke, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (The Bobbs-Merrill Company, INC. 1962) 3.

⁶⁶ Quoted by Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Harvard University Press 1977) 353.

⁶⁷ *M'Culloch v Maryland* 17 US (4 Wheat) 401.

⁶⁸ *re Winship* 397 US 358 (1970), Black dissenting.

never forget that it is a constitution we are expounding...[which] is intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.⁶⁹

Despite these attacks, it seems that the logic that Marshall had demonstrated in *Marbury v Madison* is unquestionable as far as *the necessity* of constitutional review is concerned — in order to uphold the constitution as the supreme law of the land, laws in contravention to it must be declared as having no effect whatever. In other words, a written constitution, which is given a higher status in the legal system, necessarily entails constitutional review. Who is to do the job is another matter. It should be noted that even those, like Thayer and Bickel, who had criticized Marshall for begging the wrong question, did not question the need for constitutional review per se. They were certainly right to ask why it should be the courts to do the job since the constitution does not expressly grant this power to the judiciary. They did not offer an alternative solution other than the courts. What they were mainly concerned about is how the courts should exercise this awesome power. But as said just now, whether there is the need for doing something is quite another matter from whether someone is suitable of doing it. Indeed, as Freeman notes, whether judicial constitutional review is appropriate in a certain legal system is a prudential matter to be considered in that particular system.⁷⁰ We shall return to the justification of judicial constitutional review later in this Chapter.

2.2 Constitutional review in the UK under the HRA

The UK is well known for not having a written constitution — in the sense of a single codified document titled as ‘the constitution’ — or in Kelsen’s eye, it does not have a formal constitution. In history, the un-codified British constitution had been regarded as the pioneer in rights protection.⁷¹ Even in a French eye of the late 19th century, ‘[t]he English Constitution is undoubtedly the first of all free constitutions in age, in importance, and in originality’, which is ‘most remarkable’ in embracing and protecting individual rights.⁷² Still earlier, another Frenchman, also jealous of and inspired by the freedoms and rights that the

⁶⁹ *M’Culloch v Maryland*.

⁷⁰ Freeman 361.

⁷¹ Emile Boutmy, *Studies in Constitutional Law: France-England-United States* (Macmillan and Co 1891) 3.

⁷² *Ibid.*

English people were entitled to enjoy, realized that in order to secure individual rights and liberties, state's powers needed to be separated so as to reduce the likelihood of them being abused; that, in his conclusion, is 'The Spirit of Law'.⁷³ Given this historical heritage, one might think that a Dworkinian moral reading of the British constitution would suggest that there should have emerged the practice of constitution review under the British constitution, notwithstanding what form the constitution takes. It did, at one point of history, emerge but did not survive.

Coke's announcement in *Bonham's case* is well known. He claimed that the common law was superior to parliamentary enacted laws, therefore,

in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void.⁷⁴

In Coke's time, as Corwin observed, the common law was pictured 'invested with a halo of dignity peculiar to the embodiment of the deepest principles and to the highest expression of human reason and of the law of nature implanted by God in the heart of man'.⁷⁵ Obviously, Coke's claim of the common law as being superior to parliamentary enacted laws is by and large the higher law claim that the classic natural law theorists had made.

After the Glorious Revolution of 1688, legislative supremacy took root. The principle of parliamentary sovereignty was established as the cornerstone of the British unwritten constitution.⁷⁶ Parliamentary sovereignty, as Dicey famously said, means that Parliament has the right to

make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.⁷⁷

⁷³ Montesquieu, *The Spirit of Law* (University of California Press 1977).

⁷⁴ *8 Coke's Reports 118 a 77 Eng Rep 652*. For an interesting analysis of *Bonham's case* as an early attempt of constitutional review, see Charles M Gray, 'Bonham's Case Reviewed' (1972) 116 *Proceedings of the American Philosophical Society* 33-58.

⁷⁵ Corwin 178-9.

⁷⁶ See generally Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 1999).

⁷⁷ A V Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1985) 40.

Blackstone, writing more than a century earlier than Dicey, was even more absolute about parliamentary sovereignty. 'Parliament can do everything that is not naturally impossible', he said and added that even 'if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it'.⁷⁸ Consequently, the type of common law review of parliamentary acts, which Coke had attempted, did not survive in English law. Instead, subsequent judicial opinions are easily located which unreservedly accepted the sovereignty of Parliament. In *Cheney v Conn*,⁷⁹ for example, the judge said that 'what the statute itself enacts cannot be unlawful, because what the statute says is itself the law, and the highest form of law that is known to this country.' Thus, 'it is not for the court to say that a parliamentary enactment, the highest law in this country, is illegal'.⁸⁰ Even when Parliament has acted seemingly against the country's international obligations, the court has said that they had 'nothing to do with...whether an act of the legislature is ultra vires as in contravention of generally acknowledged principles of international law.' Moreover, the court added, 'an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms'.⁸¹

Hence, under the traditional view of parliamentary sovereignty, there was no mechanism within the British constitution for declaring an Act of Parliament legally invalid.⁸² Nor was there the necessity for such a mechanism. In the time when the orthodox doctrine of parliamentary sovereignty prevailed, therefore, the notion of 'constitutional review [of primary legislation]' was alien in UK's public law.⁸³ No British judge had ever declared an Act of Parliament as 'unconstitutional' and therefore invalid.⁸⁴

But the constitutional history has changed significantly since the UK's membership of the

⁷⁸ William Blackstone, *Commentaries on the Laws of England*, vol 1 (An edition of the 9th edition (1783) edn, Cavendish) 63.

⁷⁹ *Cheney v Conn* [1968] 1 All ER 779.

⁸⁰ Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights; A critical introduction* (5th edn, OUP 2009) 35.

⁸¹ *Mortensen v Peters* (1906) 14 SLT 227.

⁸² *Ibid.*

⁸³ Anthony King, *The British Constitution* (OUP 2007) 45-46.

⁸⁴ *Ibid.* Note that the Privy Council had long been engaged in reviewing the constitutionality of colonial legislation vis-à-vis imperial parliamentary acts, but it could not review the Acts enacted by Westminster Parliament. See Sir Ivor Jennings, *Constitutional Law of the Commonwealth* (Clarendon Press 1957).

European Community (now the EU), which was followed by domestic constitutional reforms highlighted by the devolution process and the enactment of the Human Rights Act 1998 (HRA). As the result of these developments, the Diceyan principle of parliamentary sovereignty is qualified both in form and substance.⁸⁵ Alongside came the significant change of the judicial role, which began to shift towards constitutional review⁸⁶ that is 'closely analogous to the role of constitutional courts in other common law countries' with an entrenched bill of rights.⁸⁷ By virtue of European Community Act 1972, for instance, Parliament has accepted that EU law is superior to domestic law in the fields that the relevant EU law covers. Thus, in *Factortame (No 2)*,⁸⁸ the British judges, for the first time in history, 'disapplied' a parliamentary Act, on the ground that it was contrary to an EC directive. Although the court did not declare the Act invalid, the decision to 'disapply' was itself revolutionary, at least legally speaking. The enactment of the HRA, as we shall see, accelerated this change by firmly establishing the institution of constitutional review.

In *Thoburn*,⁸⁹ Laws LJ captured the undergoing constitutional change by noting that there has emerged in the UK 'constitutional statutes', which his Lordship defined in hierarchical terms, and which are not subject to 'implied repeal'.⁹⁰ The European Community Act 1972, the HRA 1998 and the Scottish Act 1998 are among those Acts that Laws LJ regarded as 'constitutional statutes'. Laws' characterization of 'constitutional statutes' is not without dispute.⁹¹ But crucially, it should be noted that Laws' characterization of constitutional statutes was made in the context of implied repeal. It is from the non-appliance of this traditional doctrine to those statutes that the higher status they are in can be revealed, hence properly called constitutional statutes. In this sense, the emergence of constitutional statutes has effectively done away with the specific aspect of the traditional concept of parliamentary sovereignty that every act is equal in status to others. It marked the

⁸⁵ See generally Anthony Bradley, 'The Sovereignty of Parliament—Form or Substance?' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (6th edn, OUP 2007).

⁸⁶ See generally Jeffrey Jowell, 'Beyond the rule of law: towards constitutional judicial review' [2000] *Public Law* 671-683.

⁸⁷ Lord Lester, 'The art of the possible - interpreting statutes under the Human Rights Act' (1998) *European Human Rights Law Review* 668. See also Geoffrey Marshall, 'On Constitutional Theory' in Basil S. Markesinis (ed), *The Impact of the Human Rights Bill on English Law* (OUP 1998).

⁸⁸ *R v Secretary of State for Transport ex parte Factortame* [1991] 3 CMLR 589.

⁸⁹ *Thoburn v. Sunderland City Council* [2003] QB151.

⁹⁰ *Ibid* para 62.

⁹¹ Editorial, 'Constitutional statutes' (2007) 28 *Statute Law Review* iii-v.

inauguration of an era in the UK in which the higher laws are positivized so that the validity or applicability of other laws has to be measured against the pre-written standards set out in the positivized higher laws. Constitutional review is inescapably in need, though how it is to be deployed is another matter—about which the UK has once again made the history in inventing a new model of constitutional review. We shall explore this further in the context of the HRA.

The Higher Law status of the HRA

The purpose of enacting the HRA was to incorporate the European Convention on Human Rights into British domestic law.⁹² In designing the way of incorporation, different models had been considered, aiming to maintain the principle of parliamentary sovereignty as the cornerstone of the British constitution.⁹³ The American model was instantly eliminated, simply because it cannot be reconciled with that principle. Many were passionate in recommending the Canadian model,⁹⁴ but it was also rejected, for fear that to give the judges the power to set aside primary legislation, past or future, on the ground of incompatibility with Convention rights, would easily draw the judiciary into serious conflict with Parliament.⁹⁵ In the end, the British government of the day decided to go by and large for the New Zealand way, but sought to provide ‘a bit more’ protection than under the New Zealand Bill of Rights.⁹⁶ That was to give the judges of higher courts the power to issue declarations of incompatibility on primary legislation if found incompatible with Convention rights.⁹⁷ Such a statute, however, stands as valid law unless and until Parliament or the Executive take remedial action which will lead to the amendment or repeal of the statute.⁹⁸ Parliamentary sovereignty is thus indigenously reconciled with the introduction of the HRA.⁹⁹

⁹² Government White Paper: Rights Brought Home, Cm 3871, Oct. 1997. See <http://www.archive.official-documents.co.uk/document/hoffice/rights/rights.htm>, accessed in June 2009.

⁹³ Ibid para 2.16.

⁹⁴ John Wadham and Francesca Klug, 'The 'Democratic' Entrenchment of a Bill of Rights: Liberty's Proposals' [1993] *Public Law* 579-588.

⁹⁵ Government White Paper para 2.13.

⁹⁶ Jonathan L. Black-Branch, 'Parliamentary Supremacy or Political Expediency? The Constitutional Position of the Human Rights Act under British Law' (2002) 23 *Statute Law Review* 61-64.

⁹⁷ The Human Rights Act, s 4.

⁹⁸ Ibid s 4, 10.

⁹⁹ This seems to be the mainstream position, academically and politically, on the reconciliation of the principle

That the HRA provides but ‘a bit more’ protection of human rights than the New Zealand Bill of Rights is quite possibly an underestimation. The significance and real impact of the HRA, as Leigh and Masterman observe, is in its triggering an overall constitutional reform in the UK that has led to a more nuanced form of separation of powers.¹⁰⁰ One can hardly appreciate this change without a proper understanding of the status of the HRA in the British constitutional system.

The central question is whether or not the HRA is entrenched, or enjoys a higher status. For many, the HRA is in one way or another entrenched. Some say it is ‘relatively entrenched’;¹⁰¹ or it is entrenched in reality though not in form,¹⁰² or entrenched politically though not legally.¹⁰³ For them, the HRA does enjoy a higher constitutional status,¹⁰⁴ at least as far as rights are concerned.¹⁰⁵ On the theoretical plane, those who stand fast to the orthodox Diceyan conception of parliamentary sovereignty may insist that entrenchment is constitutionally impossible since Parliament cannot bind itself or its successors. That a sovereign Parliament cannot bind itself or its successors is mostly clearly expressed in *Ellen Street Estates Ltd v Minister of Health*.¹⁰⁶ And this is indeed the rationale underpinning the special doctrine in English constitutional law – the doctrine of implied repeal. There are others, however, who argue that it is possible to entrench human rights while maintaining parliamentary sovereignty, and the way to achieve this is to facilitate inter-institutional dialogue between the legislature and the courts.¹⁰⁷

In our view, the HRA is indeed entrenched in the sense and to the degree that it is not

of parliamentary sovereignty with the introduction of the HRA in particular. See for example Ian Leigh and Roger Masterman, *Making Rights Real; The Human Rights Act in its First Decade* (Hart Publishing 2008), Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2008) and William Wade, ‘Human rights and the judiciary’ (1998) 5 *European Human Rights Law Review* 527.

¹⁰⁰ Leigh and Masterman 18.

¹⁰¹ Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 303.

¹⁰² Lord Irvine, ‘Sovereignty in Comparative Perspective: Constitutionalism in Britain and America’ (2001) 76 *New York University Law Review* 22.

¹⁰³ King 131.

¹⁰⁴ Kavanagh 304.

¹⁰⁵ Julian Rivers, ‘A Theory of Constitutional Rights and the British Constitution’ in Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) xxii.

¹⁰⁶ [1994] 1 KB 590. Maughan LJ said that, according to the British constitution, ‘[t]he legislator cannot...bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal.’

¹⁰⁷ See for example Young 2.

subject to implied repeal — a view which seems largely shared in the British academy as well as amongst the judges.¹⁰⁸ Yet, it is entrenched in a unique or a British way. It is not as fully entrenched as the American Bill of Rights, nor is it as strongly entrenched as the Canadian Charter. But it is certainly entrenched as compared to the New Zealand Bill of Rights. It is unique in that its status is ‘higher but not supreme’. This is the constitutional innovation which supports section 4. As David Feldman submits, section 4, by establishing the compatibility review mechanism, affords the HRA a higher status than other laws.¹⁰⁹ Yet, by subjecting the legal effect of judicial compatibility review ultimately to the will of Parliament, the higher law status of the HRA is ultimately subject to parliamentary sovereignty. This uniqueness of the entrenchment of the HRA has been sometimes defined as a ‘typical English compromise’¹¹⁰, which indigenously manages to give the British people ‘the new and tempting cake of ‘judicial review of primary legislation’ while retaining for [their] delectation of the old cake of ‘parliamentary sovereignty’”.¹¹¹ It would not be an overstatement to say that this is a typical British constitutional innovation.

The HRA has therefore substantially altered, if not abandoned, one aspect of the traditional concept of parliamentary sovereignty, which denotes that all parliamentary Acts are of equal status, none is superior to others, and entrenchment is impossible. It is said that there is now a trend that Britain is *moving towards* constitutionalism.¹¹² If so, the emergence of what Laws LJ defines as ‘constitutional statutes’ (which enjoy the ‘higher law’ status) is the inescapable step.¹¹³ After all, at the core of constitutionalism is the supremacy of the constitution.

A novel type of constitutional review

The unique method of the entrenchment of the HRA has led to the establishment of a

¹⁰⁸ See *ibid* Chapter 2, II, ‘The Narrow Scope of Implied Repeal’. See also Loveland Chapter 24, I, ‘Entrenchment of fundamental law re-visited’.

¹⁰⁹ David Feldman, ‘The Human Rights Act 1998 and Constitutional Principles’ (1999) 19 *Legal Studies* 165.

¹¹⁰ Young Preface.

¹¹¹ A. W. Bradley, ‘Relations between Executive, Judiciary and Parliament: an evolving saga?’ [2008] *Public Law* 475.

¹¹² Irvine 21.

¹¹³ See Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009), Chapter 9 ‘Towards a written constitution?’.

unique model of constitutional review in the UK. It has already been observed that the judicial declaration of incompatibility is in effect judicial review of legislation 'in all but name'.¹¹⁴ Jowell is of the view that the role of the British judiciary has significantly moved towards constitutional review after the implementation of the HRA.¹¹⁵ Lord Irvine writes that the HRA 'does introduce a limited form of constitutional review which is able fully to coexist with the theory of parliamentary sovereignty'.¹¹⁶ Kavanagh shares similar view and seeks to explore the legitimacy as well as the scope of constitutional review under the HRA.¹¹⁷ But it seems that the nature and the innovative form of constitutional review under the HRA are yet to be more fully appreciated.

The overwhelming majority of the literature on the enlarged role of the judiciary is largely concerned with various specific topics thought to have been affected by the HRA, for example, the standard of judicial review, the difference of the approaches of review between the *Wednesbury* Unreasonableness and the test of proportionality, judicial deference, et al.¹¹⁸ These discussions certainly find compatibility review under the HRA as being substantially different from the traditional judicial review of executive administrative acts characterized by *Wednesbury* Unreasonableness. But they only treat those differences as a matter of degree of intensity of review, rather than as two different types of review. Although Kavanagh rightly defines compatibility review under the HRA as constitutional review, she fails to grasp the full picture of the innovative constitutional review regime set up by the HRA. She confines constitutional review under the HRA merely to judicial compatibility review, while regarding what the government and Parliament have to do in the legislative process to ensure compatibility and, after a judicial declaration of incompatibility, to deal with the incompatibility, as the 'impacts' the HRA has on the government and Parliament's 'willingness and ability' to secure compatibility.¹¹⁹ This does not seem to be an inaccurate description of the constitutional review regime under the HRA.

A more accurate picture is perhaps that constitutional review under the HRA is a Parliament-

¹¹⁴ Bradley 55.

¹¹⁵ Jowell 671.

¹¹⁶ Irvine 19.

¹¹⁷ Kavanagh 56.

¹¹⁸ A best proof of this point is in the overview of the HRA in its first ten years, see Leigh and Masterman.

¹¹⁹ Kavanagh 356-358.

led review; it is a mixture of *ex ante* and *posteriori* constitutional review, as well as a mixture of political and judicial control of constitutionality. It is neither the American type of judicial review of legislation, nor the French type of political control of constitutionality; it has a bit of both. It is also by far different from the German or the Austrian type of constitutional review, carried out by an independent constitutional court and sometimes involves abstract review. It is a unique and indeed a new type of constitutional review. For its striking *Britishness*, it may well be referred to as *the British model of constitutional review*.¹²⁰ This can be elaborated in three aspects.

First, as required by the HRA, the government, when introducing a bill to Parliament, must do their homework to ensure, as far as they can, that the proposed bill is compatible with Convention rights.¹²¹ When the Bill is introduced to Parliament, it will then be subject to intensive scrutiny by Parliament in general and by the Joint Parliamentary Committee on Human Rights in particular to ensure its compatibility with Convention rights.¹²² This pre-legislation scrutiny of compatibility, as far as its purpose is concerned, is very much the same with the kind of *ex ante* constitutional review in other jurisdictions. In France, for example, the control of constitutionality is conducted by the *Conseil Constitutionnel*, which is not sitting in its parliament, and whose function is generally recognized as non-judicial. Moreover, the *Conseil Constitutionnel's* control of constitutionality is exercised prior to the promulgation of the statute. It is thus a political control which is purely preventative.¹²³ The pre-legislation compatibility review under the HRA starts from government and ends within Parliament.¹²⁴ It is likewise in nature political and mainly preventative.

Secondly, judicial compatibility review takes place only after the Bill has become an Act which then has come into force, and further, has been challenged in court. Except for the

¹²⁰ Gardbaum seems to share this view. See Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 Am J Comp L 707-760.

¹²¹ The HRA, S. 19.

¹²² For a brief and concise description of the Committee's function, see A W Bradley and K D Ewing, *Constitutional & Administrative Law* (15th edn, Pearson Education Ltd 2011) 414-415.

¹²³ Cappelletti 2-5

¹²⁴ At this point, we shall recall the English lawyer L.S. Amery's observation that in the UK the function of legislation has always been predominantly exercised by the government, and that the main task of Parliament is but to secure full discussion'. L.S. Amery, *Thoughts on the Constitution* (OUP 1953)12

outcome, judicial compatibility review under the HRA is indeed ‘very closely analogous’¹²⁵ to the American type of judicial constitutional review, which is a *posteriori and substantive (as opposed to abstract)* review.

Thirdly, by virtue of sections 4 (6) and 20 of the HRA, the issue of incompatibility declared by the courts returns ultimately to Parliament for final decision. As Leigh and Masterman conclude, at the end of the day, the issue of compatibility ‘is in effect handed back to political process’.¹²⁶ That is to say, compatibility control has shifted back to political control.

Thus, in the whole enterprise of compatibility control under the HRA, the courts play only one part (though a very important one). Not only both the executive and Parliament have their own roles to play, but more importantly, the final determination and resolution of any incompatibility is, strictly speaking, in the hands of Parliament. The whole enterprise of compatibility control starts from pre-legislative scrutiny, then moves on to judicial incompatibility review but at the end returns back to Parliament for final decision. Looking at the whole enterprise, it is hard to agree with the view that the HRA and the judicial compatibility review merely enhance the role of parliamentary scrutiny. In our view, the whole enterprise is obviously, in form and in essence, a rights-based constitutional review, *ex ante plus posterior*, judicial plus political. It is an innovation.

What does the British experience tell us?

One thing that can be inferred from the British experience is perhaps this: although the need to protect human rights gives a strong normative basis for some kind of control of the justice and fairness of positive legislation, it in itself does not necessarily bring about constitutional review; constitutional review as a means of rights protection is not available unless and until rights are entrenched, or positivized as higher law. The strong tradition of protecting rights and liberties in the UK has been world-widely admired. But Coke’s attempt to control parliamentary legislation did not survive in the English law. For centuries long, English judges

¹²⁵ Lester 665.

¹²⁶ Leigh and Masterman 293.

had been 'dogs that seldom barked or even growled'.¹²⁷ It was not until the emergence of constitutional statutes, such as the European Community Act 1972 and the HRA 1998 that history made its turn. It is the making of these constitutional statutes as higher laws that makes it necessary to give the judges a bit more power. It is, however, by subjecting these higher laws to the ultimate sovereignty of Parliament that the new power given to the judges is not to override the will of Parliament.

3. Judicial constitutional review: why the judges to decide?

In the previous two sections, we have shown the necessity of constitutional review on the basis of the supremacy of the constitution, understood not only in the positive but also the normative sense. We shall now consider the next question: who is to do it? In the European centralized model of constitutional review, it is the special tribunal rather the ordinary judges that is given this task. In the newly emerged British model of constitutional review, as discussed in the previous section, judges play only one part. Their experiences show that there are other alternatives than the US model of judicial constitutional review which is exercised solely by the ordinary judges. That is to say, the necessity of constitutional review does not necessarily mean that it has to be done by ordinary judges. Under what considerations will it be appropriate to entrust the judges with the power of constitutional review? We shall examine this question in the American context, for it is there one finds the paradigm of judicial constitutional review.

In America, the question of why it should be the judges to decide on the constitutionality of legislation arises simply because the text of the Constitution does not confer on the judiciary this power. That is why, as noted earlier, Thayer criticized Marshall for being too sweeping, Bickel challenged him for begging the wrong question, and some earlier commentators accused him of usurpation of power. The need to uphold the constitution as the supreme law of the land does not necessarily mean that it should be done by the judges. This point is most clearly made by a Thayer's contemporaneous fellow American, a Pennsylvanian Supreme Court Justice, who said that

¹²⁷ King 115.

The constitution is said to be a law of superior obligation; and consequently, that if it were to come into collision with an act of the legislature, the latter would have to give way; that is conceded. But it is fallacy to suppose, that they can come into collision before the judiciary...It is by no means clear, that to declare a law void, which has been enacted according to the forms prescribed in the constitution, is not a usurpation of legislative power. It is an act of sovereignty.¹²⁸

If the necessity of constitutional review is *conceded*, then someone has to do the job. Obviously, in the absence of express constitutional grant of authority, this has to be inferred from the way the constitution distributes governmental powers and the way the constitutional system is expected to work. The American Constitution adopts the doctrine of separation of powers. It is based on separation of power that judicial constitutional review can be justified. There are two strong arguments in support of this proposition.

One is, as Learned Hand said, the want of an arbiter in the implementation of the constitution. According to Learned Hand, the American system of government, which divides power between the federal government and the states on the one hand, and separates power amongst the three 'Departments' of federal government on the other, would not work, or would even 'collapse' if it was 'without some arbiter whose decision should be final'.¹²⁹ Without such an arbiter, all constitutional disputes, whenever they arise, will have to be referred to popular decision, which is, needless to say, 'patently impractical'.¹³⁰ For Learned Hand, if some arbiter is needed, no one other than the judges is more appropriate to be trusted with the task. Therefore, even the authority of judicial review of legislation is nowhere expressed in the text of Constitution, it 'may, and indeed, must be inferred' therefrom.¹³¹ Such an inference is not only practically necessary but legally possible. After all, '[i]t was not a lawless act to import into the Constitution such a grant of power. On the contrary, in construing written documents it has always been thought proper to engraft upon the text such provisions as are necessary to prevent the failure of the undertaking.'¹³²

The other is the need for checks and balances within the governmental system. According to

¹²⁸ *Eakin v Raub* 12 S & R 330 (Pa 1825), per Justice Gibson.

¹²⁹ Learned Hand, *The Bill of Rights* (Harvard University Press 1958) 29.

¹³⁰ *Ibid* 66.

¹³¹ *Ibid* 66.

¹³² *Ibid* 29.

Madison, the American Constitution separates powers in such a way as to allow each branch to have 'partial agency in', or 'control over' the acts of others.¹³³ This 'connected and blended' kind of separation of powers demands checks and balances amongst the different branches of the government. It is the need to check and balance that provides the prerequisite of judicial constitutional review.¹³⁴ In contrast, a rigid separation of powers, under which each department of government is mutually independent of each other, each being coequal and co-sovereign within themselves, would not admit checks and balances among them.¹³⁵ In such a case, even the judiciary would be popularly elected and subject to electoral sanction. The corrective for the abuse of power is not to be found from within the government itself in the first place, but directly from the elective power of the people.¹³⁶ Thus, judicial constitutional review is immediately out of question.

Apparently, judicial independence is the precondition on which the courts can effectively check and balance the other two branches. As Hamilton observed, the judiciary, in comparison to the other two branches, is 'the least dangerous branch', which has 'neither force nor will, but merely judgment' (the enforcements of which still depend on the assistance of the executive).¹³⁷ By contrast, as Madison explained, the legislature, being 'at once more extensive and less susceptible of precise limits', can easily mask its encroachments on the co-ordinate department.¹³⁸ This asymmetric distribution of power to the disadvantage of the judiciary therefore suggests that there must be some extra-distributive care given to the judiciary to make it capable of imposing effective checks on the other substantively more powerful branches. That extra care is to secure judicial independence. Only with '*complete independence*', Hamilton said, would the judiciary be able to protect liberty and to guard the Constitution from encroachments, especially in the case of a limited Constitution that imposes specific limitations on the legislature.¹³⁹ Thus, he concluded:

¹³³ James Madison, *The Federalist Papers No. 47, 48*.

¹³⁴ M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Clarendon Press 1967); See also Eric Barendt, 'Separation of Powers and Constitutional Government' [1995] *Public Law* 559-619.

¹³⁵ Thomas Jefferson, 'Letter to William C. Jarvis' in P.L. Ford (ed), *The Writings of Thomas Jefferson* (1820) quoted by Vile 165.

¹³⁶ Vile 166.

¹³⁷ Alexander Hamilton, *The Federalist Paper No. 78*.

¹³⁸ James Madison, *The Federalist Paper No. 68*.

¹³⁹ Alexander Hamilton, *The Federalist Paper No. 78*.

The complete independence of the courts is peculiarly essential in a limited constitution....which contains specific exceptions to the legislative authority....Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.¹⁴⁰

The strongest opposition to judicial constitutional review comes from democratic considerations. Bickel's charge of the American judicial review as being counter-majoritarian is well known. But Bickel does not attempt to get rid of this 'deviant institution in the American democracy'; he only wants to temper it so that it could fit 'in our own time'.¹⁴¹ In contrast, Waldron's opposition to judicial review is more determined and persistent. To allow the unelected, unaccountable judges to strike down legislation made by the elected and accountable legislature, argues Waldron, is both substantively and procedurally undemocratic.¹⁴² Waldron's argument is very much 'disagreement based'. In any society committed to the idea of individual and minority rights (which a genuine democracy demands), he writes, there is apt to be 'a substantial dissensus as to what rights there are and what they amount to'.¹⁴³ The resolution of such disagreements is not a question of interpretation but a matter of choice.¹⁴⁴ When it comes to constitutional questions, very often, there is no question of which interpretation is right, but which choice of interpretation shall prevail, a choice that should, for the sake of democracy, be left for the democratic decision making process.¹⁴⁵ For Waldron, if we are to take rights seriously, we have to take the disagreement over rights seriously also. As democracy is concerned, the resolution of the elected legislature should be dispositive and should not be second-guessed or overruled by the judiciary.¹⁴⁶ By privileging majority voting among a small number of

¹⁴⁰ Ibid.

¹⁴¹ Alexander M. Bickel, *The Least Dangerous Branch; The Supreme Court at the Bar of Politics* (The Bobbs-Merrill Company, INC. 1962) 16-18.

¹⁴² Jeremy Waldron, 'The Core Case Against Judicial Review' (2005-2006) 115 *The Yale Law Journal* 1346-1406; See also Jeremy Waldron, *Rights and Majorities: Rousseau Revisited* in *Liberal Rights: Collected Papers 1981-1991* (CUP 1993); Jeremy Waldron, *Law and Disagreement* (OUP 1999). Richard Bellamy echoes Waldron's opposition to judicial constitutional review, but from a different perspective, which he calls as 'political constitutionalism'. See Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, (CUP 2007).

¹⁴³ Waldron, 'The Core Case Against Judicial Review' 1367.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid 1367.

unelected and unaccountable judges, Waldron contests, 'it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality'.¹⁴⁷

Dworkin, on the other hand, argues that judicial review does not compromise democracy, but to the contrary, enhances it.¹⁴⁸ Dworkin's conception of democracy is communal (as opposed to statistical), in which each one of the community equally has *a part* in any collective decision, *a stake* in it, and *independence* from it. Therefore, each member should be treated as an equal moral member and correspondingly with equal concern and respect.¹⁴⁹ That is to say, each individual has an equal right, not only to participate in the collective decision making, but also to re-evaluate the outcome of the decision-making process. For Dworkin, the task of re-evaluating legitimacy of the outcome of the democratic political process is better to be entrusted with an independent judiciary, which has the requisite competence to deal with moral questions, and whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence.¹⁵⁰ In contrast, the legislature lacks such competence and is too often and too easily inclined to surrendering to influences by power blocs and thus compromising on principles. By removing final decisions involving constitutional (hence moral) values from ordinary politics and to courts, Dworkin argues, individuals can better exercise the moral responsibilities of citizenship.¹⁵¹

As Griffin points out, the early American debate over the democratic justification of judicial constitutional review 'was a sham' in the sense that there was not an established democracy as it is now when the practice of judicial review of legislation was first established in 1803.¹⁵² Indeed, whether judicial constitutional review can be reconciled with democracy depends on what our perception of democracy is. In essence, the opposing views of Dworkin and Waldron on judicial constitutional review are rooted in their respective conceptions of democracy. For one thing, true democracy of rule of the people is utopian, for it is practically

¹⁴⁷ Ibid 1353.

¹⁴⁸ Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*.

¹⁴⁹ Ibid 24.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton University Press 1996) 102.

impossible in any community to have every single issue decided by popular vote. If there is, in reality, no perfect democracy, the democratic deficit of the institution of judicial constitutional review may be perfectly acceptable. In form, it just does not look like democracy at all for the unelected judges to strike down decisions made by the elected legislature. In outcome, however, judicial constitutional review can certainly be pro-democratic, though not always is the case. Very often, voters in most representative democracies are habitually forgotten after the polling day. Judicial review therefore opens a channel available to anyone in the community to make their voices heard at any time. It therefore makes post-electoral participation possible and substantive, though such participation necessarily takes the form of a suit rather than a vote. In this sense, judicial constitutional review serves as a safety-valve for the imperfect (and therefore can be malfunctioning) democracy; it is participation-guaranteed more than participation-oriented.¹⁵³ Indeed, it is very much based on result evaluation that the American public have come to accept judicial constitutional review — simply because it serves them well.¹⁵⁴

On further thought, one might even wonder if judicial constitutional review is necessarily attached to democracy. There are, of course, societies in this world, where the principle of rule of law is observed but where democracy is not yet established or not yet fully matured. In their cases, if there is a written constitution, which is given the supreme status *as a law*, the rule of law itself might be sufficient to justify the practice of constitutional review,¹⁵⁵ democracy or not notwithstanding. Moreover, as we shall see later in Chapter VII, in Hong Kong's case, it has been the lack of democracy, or the fear of not having democracy that had prompted public support of judicial constitutional review in Hong Kong.

4. The nature of constitutional review: legislation or interpretation?

There are opposing views on the nature of constitutional review. In Kelsen's view, judicial review of legislation results in the substitution of the will of the legislature with that of the

¹⁵³ It is Ely's theory that judicial review is process oriented and participation re-enforced. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

¹⁵⁴ Leonard Levy, *Judicial Review and the Supreme Court* (Harper & Row 1967) 24.

¹⁵⁵ For an illuminating articulation of constitutionalism and rule of law, see Berger Chapter 15, 'The Rule of Law'.

judges; it is in essence a legislative function — albeit a negative one.¹⁵⁶ This is because ‘an act is not void but only voidable’; a declaration of its nullity has therefore a ‘constitutive’ rather than a ‘declaratory’ character.¹⁵⁷ For many opponents to American judicial review, judicial review of legislation is in essence a legislative function. Waldron certainly appears to suggest so, though he is never as explicit as Kelsen is on this specific point. His core case against judicial review might be more powerful had he directly taken on it as a legislative function. For Dworkin and other supporters of judicial constitutional review, it is a matter of interpretation, though a creative one. This is because when a judge strikes down a law, as Dworkin argues, he does so by relying on principles which he finds in existing laws. For Dworkin, judges do not make law, but only declare the law. Thayer took an ambivalent view. He believed that judicial review was a judicial function, but involved the judiciary taking a part in the political conduct of government.¹⁵⁸

From a pure law perspective, Kelsen identifies a specific difficulty with constitutional review which reveals its nature. That is, constitutional review presupposes the existence of unconstitutionality. This presupposition leads to a pure theoretical dilemma: while no law is unconstitutional before it is declared to be so, a law so declared is, however, a valid law before that declaration.¹⁵⁹ One solution to this dilemma is to render the decision of review with retroactive effect. But that would mean not only the law in question has to be annulled ‘*ab initio*’, but also all the legal effects the law had produced before its annulment have to be abolished. Kelsen finds this solution ‘controversial’ and ‘not at all satisfactory’.¹⁶⁰ Obviously, to give a rule retroactive effect runs fundamentally counter to the basic principle of the rule of law.¹⁶¹

Thus, for Kelsen, only when we see constitutional review as legislation, can we escape from the dilemma of laws being at once ‘unconstitutional yet valid’. For taken as a legislative function, the declaration of an existing law unconstitutional is in effect a repealing of a valid

¹⁵⁶ Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' 187.

¹⁵⁷ Ibid 190.

¹⁵⁸ Thayer 152.

¹⁵⁹ Kelsen 190.

¹⁶⁰ Ibid 189-190.

¹⁶¹ Kelsen, *General Theory of Law and State* 157-158.

law; it actually admits the validity of that law before the declaration, but denies its validity from thereafter. The need for constitutional review is the need to coordinate legislative activities. Clearly, this conception of constitutional review is almost entirely forward-looking.¹⁶² That is to say, the purpose of review is not to deny the constitutionality of an act in its past application, but to re-shape its constitutionality in its future application. The constitutionality of a statute in its past application is simply un-annullable. That exists as a mere matter of fact. Hence, to review the constitutionality of an existing act is to *re-view* its contents and effects in the past context, but in light of our present understanding of the subject matter, so as to decide whether it should still remain constitutional in future application. In short, the decision of annulment either *repeals* a *valid* law, or *amends* it, not for the sake of redeeming the past, but for the sake of regulating future human behaviours. It does not to deny its past validity, but to deprive of its future validity.

It is mainly because of this perception of the nature of constitutional review that Kelsen prefers the Austrian type of centralized review rather than the American type of decentralised review. For Kelsen, diffused power of review is not desirable to achieve uniformity.¹⁶³ This problem may well be solved in the common law system where precedents have binding effects. However, in Kelsen's view, the main disadvantage of the American model of constitutional review is its inadequacy in meeting the public interest. As he notes, judicial review of constitutionality in the US is very much self-interest driven; the question of constitutionality arises 'only incidentally' when a party maintains that there is an illegal violation of its interest.¹⁶⁴ In Kelsen's eyes, that is not the least satisfactory; the interest in the constitutionality of legislation is a public one, which is better protected by 'a special procedure in conformity with its special character.'¹⁶⁵

The pure law difficulty with constitutional review that Kelsen has identified is not much discussed in the common law jurisdictions. But the discussion in common law jurisdictions

¹⁶² Except in the case of the application of the annulment to the concrete case from which the issue of constitutionality has been raised in the first place. This is, in Kelsen's view, a retroactive application. See Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' 196.

¹⁶³ Ibid 192.

¹⁶⁴ Ibid 193.

¹⁶⁵ Ibid.

on the issue of whether judges make law is seemingly addressing the same question. On this matter, Dworkin's view that judges do not make law but only discover law seems to be in the minority. Across common law jurisdictions, the fact of judicial law-making seems to have been increasingly recognized. Lord Denning is explicit in that 'judges do sometimes make laws'.¹⁶⁶ Sir Anthony Mason, the former Australian High Court Chief Justice, now a non-permanent justice of the Hong Kong CFA, wrote that the traditional declaratory theory of law was a fiction 'calculated to obscure' the fact of judicial law-making,¹⁶⁷ and that judicial law-making was especially inevitable when judges in top courts must make choices about the nature and application of the law.¹⁶⁸ The former Chief Justice of the Indian Supreme Court, when speaking to an audience of judges from the commonwealth countries, went still further as to say that the traditional Anglo-Saxon belief that judges do not make law is a 'lie' that hides the truth of the real nature of the judicial process.¹⁶⁹ Indeed, as far as the finality of judicial interpretation reaches, what Bishop Hoadly had famously spoken centuries ago remains true today: 'Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes'.¹⁷⁰

Judicial law-making in constitutional adjudication is in a sense self-evident when judges strike down an existing law, the effect of which is the same as the legislature repealing it. Striking down an existing law, however, is only a negative type of judicial law making. Very often, an active court in exercising constitutional review is not only making new laws (e.g. in criminal procedural law), but more significantly *making the constitution*. The segregation,¹⁷¹ reapportionment¹⁷² and the abortion cases¹⁷³ decided by the American Supreme Court are good examples in this regard. Leave aside for a moment whether it is appropriate for the court to do so. The very fact is that it is indeed thanks to judicial constitutional making that the American constitution, which is extremely difficult to amend, has become 'the living constitution' that is capable of evolving, changing over time, and adapting to new

¹⁶⁶ Lord Denning, *The changing law* (Stevens 1953) Preface.

¹⁶⁷ Anthony Mason, 'The Evolving Role and Function of the High Court' in B Opeskin and F Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press 2000) 18.

¹⁶⁸ *Ibid* 20-22.

¹⁶⁹ Bhagwati, 'The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint' (1992) 18 *Commonwealth Law Bulletin* 1263.

¹⁷⁰ Quoted in Kelsen, *General Theory of Law and State* 153.

¹⁷¹ *Brown v Board of Education* 347 US 483 (1954).

¹⁷² *Reynolds v Sims* 377 US 533; *Baker v Carr* 369 US 186 (1962).

¹⁷³ *Doe v Bolton* 410 US 179 (1973); *Roe v Wade* 410 US 113 (1973).

circumstances, without being formally amended.¹⁷⁴ It is also very much due to judicial constitutional making that, very often, a written constitution, after in operation in a while, becomes an unwritten one, the true meaning of which goes beyond the text, lying instead in the precedents, practices and conventions.¹⁷⁵

It is often said that law and politics are twins. This is even more obvious when it comes to constitutional law.¹⁷⁶ As an English lawyer puts it:

All constitutions deal with the business of governing, a dynamic and, to a great extent, political and pragmatic process. As a result constitutional law is political, in that it is concerned with the allocation of public power and has to explain or rationalise the allocation and exercise of that power, even when the practical day-to-day operation of government has moved away from the formulae embodied in formal rules and texts.¹⁷⁷

To the extent that constitutional review involves legislation, it is true to say that in a system where this power is exercised by the ordinary judges, the judges are not only doing law, but also doing politics. The emergence of constitutional review in the UK has led judges to believe that they are no longer be confined in the humble duty of 'disinterested application of the law'¹⁷⁸, but also engaged in a judicial evaluation of policies and legislative goals. In Lord Steyn's words, 'it would be a matter of public disquiet if the court did not do so'.¹⁷⁹ In short, constitutional review bears a duality of character: it is both law and politics. This is the reason, we think, that the right question to ask is not whether judges should intervene at all, but when and to what extent they should.

5. The scope of judicial constitutional review: when should the judges intervene?

As Bickel observed, the power of constitutional review had made the American Supreme

¹⁷⁴ David A. Strauss, *The Living Constitution* (OUP 2010); See also William H. Rehnquist, 'The Notion of a Living Constitution' (1976) 54 *Texas Law Review* 639.

¹⁷⁵ David A. Strauss, 'Constitutions, Written and Otherwise' (2000) 19 *Law & Philosophy* 452.

¹⁷⁶ See generally, Martin Shapiro, *Law and Politics in the Supreme Court* (Collier-Macmillan Limited 1964).

¹⁷⁷ Feldman, 'None, One or Several? Perspectives on the UK's Constitution[s]' 333.

¹⁷⁸ Devlin, 'Judges and Lawmakers' (1976) 39 *The Modern Law Review* 5.

¹⁷⁹ Lord Steyn, 'Deference: A Tangled Story' [2005] *Public Law* 357.

Court the most powerful court of law in the world.¹⁸⁰ If we look around the world today, this observation applies with equal truth to any supreme court in a system where the decentralized model of constitutional review is deployed. Few would doubt that the Canadian Supreme Court, the South African Constitutional Court, or the Indian Supreme Court may be added to the list of powerful supreme courts in the world. The emergence of a powerful supreme court inevitably rebalances the constitutional structure. Indeed, when the awesome power of constitutional review is exercised by the ordinary judges, it poses a serious question of how the exercise of this power will affect the working of the whole constitutional system which adopts some form of separation of powers. Put it bluntly: when should the judges intervene?

The potential danger of judicial constitutional review is that, like any public power, it might also be misused, or even worse, abused. The *Lochner* era¹⁸¹ and New Deal experiences in the American constitutional history are good examples to demonstrate the likelihood of such danger.¹⁸² The exercise of constitutional review, according to Justice Robert H. Jackson is, ultimately a matter of how to maintain 'a workable government'. In the *Steel Seizure* decision, he said:

[w]hile the constitution diffuses power...., it also contemplates that practice will integrate the dispersed powers into a workable government.¹⁸³

This is indeed a good example where the question arises as to when the judges should intervene.

5.1 The Thayerian clear-mistake rule

It is from the perspective of maintaining a workable government that we might better

¹⁸⁰ Bickel 1.

¹⁸¹ Named after the *Lochner v New York* (198 US 45) decision, in which state laws limiting work hours were struck down by the Supreme Court as unconstitutional.

¹⁸² Griffin 121. As Griffin notes, other countries have learned from the American experience and ensured that their constitutional courts are responsive to contemporary political conditions, by using an overtly political selection process, non-renewable terms, and mandatory retirement.

¹⁸³ *Youngstown Sheet & Tube Co. v Sawyer* 343, US 579 (1952). For an illuminating discussion of the American Constitution from the perspective of a workable government, see Burke Marshall (ed), *A Workable Government?: the Constitution after 200 years* (WW Norton and Company 1987).

understand Thayer, who writing a century ago, had urged that the power of judicial review of legislation should be confined to a limited scope and should be exercised only when it is clearly necessary and should always be exercised with great caution. In his view, judicial review of legislation should be supplemented by the clear-mistake rule:

For weighty reasons, it has been assumed as a principle in constitutional construction.....that an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.¹⁸⁴

Thayer had three reasons for this rule. First, the open-texture of the constitution often permits more than one possible interpretations, it is therefore inappropriate for the courts to insist that their interpretation is right and thus to overrule the interpretation of others as wrong. Secondly, in exercising the power of judicial review, the courts are actually taking a part, though a secondary part, in the political conduct of the government'. Therefore there is always the danger of the judiciary 'stepping into the shoes of the legislature'. And thirdly, frequent judicial interference into legislation may cause backlash against the judiciary itself; it might 'occasion so great a jealousy of this power and so general a prejudice against it as to lead to measures ending in the total overthrow of the independence of the judges, and so of the best preservative of the constitution.'¹⁸⁵ Thus, for Thayer, the courts should only interfere when there are 'clear and plain' mistakes made by other branches---'plain and clear' not in the judges' eyes, but in the eyes of all men of sense and reflection.¹⁸⁶ Thayer's clear-mistake rule is obviously an echo of Alexander Hamilton's remarks that the courts have the duty to declare acts which are contrary to the 'manifest tenor of the Constitution'.¹⁸⁷

The clear mistake rule might appear more hypothetical than pragmatic. Since the constitution does not always provide clear-cut answers, then, as the logic goes, there will seldom be such things as clear and plain mistakes. If Congress enacts a law to allow candidates under the age of 45 to stand for presidency, or makes ex post facto laws, or passes bills of attainder, those would be plain and clear mistakes in contravention of the

¹⁸⁴ Thayer 141.

¹⁸⁵ Ibid 142.

¹⁸⁶ Ibid 150.

¹⁸⁷ Hamilton, *The Federalist Paper* No.78.

American Constitution. But mistakes of such character rarely occur, or if they do, they may be quickly corrected before being challenged in the courts. Indeed, to insist on a 'plain and clear mistake' is almost to exclude the practical possibility of review. However, if it would be too much to ask the judges to confine themselves to the scope of clear and plain mistakes, it would not be too much to ask them to presume the constitutionality of the acts of other branches before considering interfering and striking them down in accordance to their own construction of the constitution. The clear mistake rule, therefore, is not to dictate to the courts which specific interpretation of the constitution to take, but to demand a general sense of judicial restraint which could remind the judiciary of its overall role in the integrated government system. Thayer was undoubtedly keeping his eyes on the workability of the whole system when he emphasized the clear mistake rule.

Learned Hand was not far away from Thayer's clear mistake rule when he, in considering the question of when the courts should intervene, suggested that the power of judicial review of legislation should be exercised only in those rare circumstances which justify its existence — that is when it is necessary to resolve a power struggle between the other branches of government, for 'without some arbiter whose decision is final the whole system.....would collapse.'¹⁸⁸ A power struggle happens when one department transgresses on to the domain of another's. Such transgression, it might be presumed, would be seen by Thayer as one sort of mistake that should be avoided and could well be rectified by courts. For Hand, the job of judicial constitutional review is very much to police the boundary lines of separation of powers. The mistakes that Thayer had in mind are perhaps more likely to occur when these lines are ignored or blurred, intentionally or otherwise.

In contrast, Dworkin might think that the fear was exaggerated that judicial review of legislation would damage the workability of a democratic government. 'The constitutional sail is a broad one', but it is never 'too big for a democratic boat'.¹⁸⁹ For Dworkin, what judges do is just what they should do: to find the principles existing in the law and the constitution and to apply them for the good of the nation. In performing this interpretative task, judges are already constrained by the black letters of the legal texts, by history

¹⁸⁸ Hand 29.

¹⁸⁹ Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 11-12.

(precedents) and by existing political and moral principles. A judge in interpreting a law, Dworkin explains further, is like a writer who is trying to continue a story started by earlier writers. The writer must be creative to continue the story, but he must also make sure that what he adds is consistent with what went before to make the story as good as it can be.¹⁹⁰ For Dworkin, therefore, these limitations are inherent on judicial interpretation of laws, there is no such need, as Thayer, Jackson and many others had suggested, as to specifically call for judicial self-restraint. However, in a Dworkinian empire of law in which Hercules the Superjudge is the king, it seems that the constitutional system has already shifted from constitutional supremacy to judicial supremacy. As is noted, the Dworkinian judge is after all a Platonic guardian.¹⁹¹ It is in fear of such fundamental shift that Hand has uttered that '[f]or myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.'¹⁹²

On the other hand, it should be noted that to advocate judicial restraint on the Thayerian rule of clear mistakes is certainly not to call for taking the constitution away from the courts as Tushnet has suggested,¹⁹³ or for abandoning judicial constitutional review as Jeremy Waldron is often understood to have proposed. For these opponents to judicial constitutional review, the very practical question is how the constitutional machinery will work if without some form of constitutional review. As Tushnet's argument is concerned, the experience around the world has shown that it is of course possible and sometimes desirable to take the constitution out of the ordinary courts. But in such a system as the American one, where there is no special court set up for the purpose of constitutional interpretation and adjudication, it is unavoidable that the constitution has to be applied by the common law courts. In such case, it is simply impossible to take the constitution out of the courts, unless the constitution is not to be treated as judicially enforceable law, as is the case in China.

Waldron frames his arguments against judicial review in an assumed ideal world, in which

¹⁹⁰ Ibid.

¹⁹¹ Farber and Sherry, in Chapter 7, 'Ronald Dworkin and the City on the Hill'.

¹⁹² Hand 73.

¹⁹³ See generally Mark Tushnet, *Taking the Constitution away from the Courts* (Princeton University Press 1999).

there are (1) democratic institutions in good working order; (2) a set of judicial institutions in good order and upholding the rule of law; (3) a society-wide commitment to rights, often seen in the adoption of a Bill of Rights; and (4) persisting, substantial and good-faith rights-disagreements.¹⁹⁴ There is no mentioning that in this world, there should be a written constitution that is a higher law than other laws. Nor is there sufficient consideration of the supremacy of a written constitution and the legal consequence it gives rise to. Without touching on this crucial element, one might wonder if his core case has been formulated as a convincing one. Neither Waldron nor Tushnet, it seems to us, has offered practical suggestion as to how the American governmental system would work if without (at least some form of) judicial constitutional review.

Thus, although advocated more than a century ago, the clear-mistake rule should not be neglected simply because of its age. Its virtues are obvious: practical and reasonable. It does not deny the necessity of judicial constitutional review in a system which observes constitutional supremacy but observes it by way of separation of powers; it does not go so far as to change the constitutional system from constitutional supremacy to judicial supremacy; it only calls for reasonable self-restraint from the judicial branch so that the judges may duly do their bit to maintain the workability of the whole constitutional system, of which they are also a part.

5.2 The British doctrine of judicial deference

Judicial deference is a judicially-developed doctrine in the UK's HRA jurisprudence. It is usually referred to the courts' disinclination to make their own independent judgment on a particular case, on the grounds of respect for Parliament or the Executive.¹⁹⁵ More specifically, the grounds of deference can be 'competence, expertise and democratic legitimacy'.¹⁹⁶ On those grounds, the courts are willing to accept that there are issues that are 'altogether ill-suited' for the courts,¹⁹⁷ whereas the legislature and the executive are

¹⁹⁴ Waldron, 'The Core Case Against Judicial Review' 1359-1368.

¹⁹⁵ Richard Clayton, 'Principles for Judicial Deference' (2006) *Judicial Review* 109

¹⁹⁶ See *International Transport Roth GmbH and others v Secretary of State for the Home Department* [2002] EWCA Civ 158; [2003] QB 728 para 87, per Laws LJ.

¹⁹⁷ *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 para 37.

‘better placed’¹⁹⁸ to deal with them. In these cases, therefore, it is appropriate for the courts to give ‘due respect’ or ‘due weight’ to the views of the elected bodies.¹⁹⁹ That is, to defer to them.

There have been differing views in opposition to judicial deference. T.R.S. Allan objects to adopting deference as an ‘independent general doctrine’, because he fears that it leads to abdication of judicial responsibility and the rule of law.²⁰⁰ Lord Hoffmann not only rejects the use of the word ‘deference’, which, in his opinion, bears the ‘overtones of servility’, or ‘gracious concession’,²⁰¹ but also the notion of deference itself. For Lord Hoffmann, when courts decide not to intervene, they are deciding the limits of their own decision-making power. In a society based upon the rule of law and the separation of powers, such a decision is inevitable. But it is a question of law, rather than a matter of courtesy or deference.²⁰² Ewing presents perhaps the strongest opposition. The adoption of deference, he argues, would make the HRA a futility.²⁰³

As with any constitutional issue in the UK, the doctrine of deference may not be properly understood without reference to parliamentary sovereignty. In *Roth*, Laws L.J. describes judicial deference as one of the ways to resolve the tension between parliamentary sovereignty and fundamental rights, which has arisen in the ‘half-way house’ created by the HRA between legislative and constitutional supremacy.²⁰⁴ The ‘half-way house’, as Leigh and Masterman jointly observe, is the fact that the British constitutional order has shifted towards a more nuanced form of separation of powers after the enactment of the HRA and the subsequent constitutional reform, and yet, very importantly, parliamentary sovereignty remains its cornerstone.²⁰⁵ Put simply, the judges are given greater power than ever before, but Parliament reserves the final word. Thus, the struggle between common law and

¹⁹⁸ *Brown v Stott* [2003] 1 AC 681 at 711.

¹⁹⁹ *Roth*.

²⁰⁰ T.R.S. Allan, ‘Judicial Deference and Judicial Review: Legal doctrine and legal theory’ (2011) 127 *Law Quarterly Review* 100. See also generally T.R.S. Allan, ‘Human Rights and Judicial Review: a Critique of “Due Deference”’ (2006) 65 *Cambridge Law Journal* 671-695; Richard A. Edwards, ‘Judicial deference under the Human Rights Act’ (2008) 65 *The Modern Law Review* 859-882.

²⁰¹ *R (on the application of Prolife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185 para 75,76.

²⁰² *Ibid*.

²⁰³ K. Ewing, ‘The Futility of the Human Rights Act’ [2004] *Public Law* 882.

²⁰⁴ *Roth*.

²⁰⁵ Leigh and Masterman 18.

Parliament will continue but with new dynamics. Kavanagh understands the inherent tension in the 'half-way house' as 'the twin demands of respecting the authority of parliament as the primary law-maker and protecting Convention rights', which she thinks that the development of a doctrine of deference helps to realize.²⁰⁶

In other words, it is from the workability of the nuanced form of separation, which nevertheless maintains parliamentary sovereignty, that the need of judicial deference is better appreciated. While it is because of the need for protecting rights that judges are empowered to intervene, it is for the need for maintaining and upholding parliamentary sovereignty that judicial intervention should be constrained. It is the doctrine of deference that makes it possible to meet at once both needs.

The practical question is when the judges should intervene and when they should not. Obviously, judicial deference takes place only in such circumstances where the courts have identified a *prima facie* parliamentary or executive interference of individual rights; otherwise, the case is dismissed, there is no need to consider whether to defer or not. Thus, as Kavanagh argues, when facing a *prima facie* parliamentary or executive interference of individual rights, judges may decide not to intervene because they feel '*uncertain* about what the correct decision is' or they 'disagree with the legislature or the executive but nonetheless have good reason not to intervene with those decisions.'²⁰⁷ She starts her argument in common sense:

When we agree with someone on a particular issue, we do not 'defer' to them. Rather, we simply assess the pros and cons of the issue ourselves, and come to an independent conclusion which matches the other person's conclusion. We only defer to the judgment of another when we are uncertain about what the right conclusion should be, or alternatively where we disagree with them, but nonetheless consider it appropriate to attach weight to their judgment.²⁰⁸

Thus,

²⁰⁶ Kavanagh 168.

²⁰⁷ Ibid 170.

²⁰⁸ Ibid 169-170.

[D]eference is a rational response to uncertainty. The less confident we are about what the right conclusion is, the more likely we are (and indeed the more justified we are) in deferring to the judgment of another, especially if we know that the other person possesses superior expertise, competence or legitimacy in arriving at that right answer. *So judicial deference and uncertainty have an inverse relationship: the more certainty, the less deference, and vice versa.*²⁰⁹

The benefit of doubt in the case of uncertainty, as Kavanagh argues, should go to Parliament who has the final word, by the same rationale that the benefit of doubt in a criminal case goes to the defendant. Kavanagh disagrees with Leigh in relying on the distinction between unqualified and qualified rights to decide whether deference is due. According to Leigh, Convention rights should be taken proportionately, since there are in the Convention qualified and unqualified rights. For the former, Leigh argues, deference is permissible, and is often worked out through the utilization of the proportionality test. For the latter, there should in principle permit no deference,²¹⁰ though this should not be taken as absolute.²¹¹ To the extent that Leigh's distinction between qualified and unqualified rights might have suggested a 'no-go zone' — one which excludes not judicial intervention but parliamentary or executive interference, Kavanagh is probably right to say that the qualified and unqualified rights distinction is no better guide by which judges decide when and in what degree deference is due.²¹² However, from the uncertainty perspective, Leigh's distinction might well provide some good guidance: judges may very likely feel less uncertain to intervene when it comes to unqualified rights and vice versa.

While the uncertainty argument does make sense, there are deeper questions about it that Kavanagh has not yet asked. What is the nature of those uncertainties, what causes them and, indeed, what is the nature of judicial deference — is it a *constitutional duty* for the courts to defer when they feel uncertain or is it no more than *an exercise of judicial discretion* when they do decide to defer?

²⁰⁹ Ibid 171. Emphasis added.

²¹⁰ Ian Leigh, 'Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg' [2002] *Public Law* 287.

²¹¹ Professor Leigh later admits that even in cases involving unqualified rights, judicial deference may still be due. One example is the decision in *R (Bloggs 61) v Secretary of State for the Home Department* [2003] EWCA Civ 686, [2003] 1 WLR 2724. Auld LJ opined that 'despite the fundamental and unqualified nature of the right to life, it is still appropriate to show some deference to and/or to recognise the special competence of the Prison service in making a decision going to the safety on an inmate's life. See Leigh and Masterman, in particular Chapter 6.

²¹² Kavanagh 258-262.

As we argued earlier, the nature of constitutional review is legislation; it involves both law and politics. The same might be said of constitutional review under the HRA. In exercising compatibility review, the British judges are, as Thayer understood of the American judges, taking a part in the political conduct of the government. That is, more than ever before, they are involved in legislation. However, as we all know, the line between law and politics is not always clear-cut. Nor is the line to be easily drawn between interpretation and judicial legislation. The truth is, in exercising compatibility review under the HRA, the judges need to play the balancing act.²¹³ Judges, who are human beings but not angels, are likely to feel uncertain when they come to the bordering area in that continuum where the legal aspect of the issue dilutes and the political aspect thickens. They might well come to a point where they feel certain about law but uncertain about politics. Their decision as to intervene or to defer is therefore a decision after weighing and balancing between law and politics; a decision that takes the form of law but carries with it connotations of politics.²¹⁴ As Lord Bingham puts it;

The more purely political...a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision....It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution....it is the function of the courts and not of political bodies to resolve legal questions.²¹⁵

It is in the judicial 'weighing and balancing' between law and politics that we can see that judicial deference is not as T.R.S. Allan said an 'abdication' of judicial responsibility and the rule of law. Instead, it is indeed a decision of law, in which, as Lord Hoffman understands it, the courts decide the limits of their own decision-making power. For Lord Hoffmann, the nuanced structure of separation of powers requires restraint from the judicial branch to

²¹³ Jowell 678.

²¹⁴ The House of Lords' decisions in the sound proofing case (*Southwark London Borough Council v Tanner* [2001] 1 AC 1.) and the wash basin case (*Ratcliffe v Sandwell Metropolitan Borough Council* [2002] 1 WLR 1488) are good examples. Both cases, as Lord Hoffmann admits, were 'pragmatic decision[s]', which were 'really about how public money should be spent'. See Lord Hoffmann, 'The COMBAR Lecture 2001: Separation of Powers' (2002) 7 *Judicial Review* 142.

²¹⁵ *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2AC 68 para 29, per Lord Bingham.

make the whole system work.²¹⁶ In his understanding, 'separation of powers means that there are things excluded from judicial decision and others are protected by the judiciary from invasion by other branches of government'.²¹⁷ As such, judicial self-restraint is not a sign of weakness, but the courts' source of power.²¹⁸

Lord Steyn goes a step further than Lord Hoffmann. For Steyn, deference is no doubt a display of judicial restraint. But this restraint is more than merely 'deciding the limits of their own power'; rather, it is about declining to exercise the power which is within the limit of their own. According to Steyn, the courts' jurisdiction to hear Convention rights disputes is comprehensive, but

The existence of jurisdiction does not mean that it ought always to be exercised. One of the reasons for a court refraining from exercising jurisdiction, may be a reasonable view that a particular matter is best left to the judgment of the legislature....or that the executive is better placed than the judiciary to make a judgment on a critical factual question....Acting within its jurisdiction, a court may in certain circumstances consider it right to defer to the views of the other branches of government. That itself is a judicial decision.....But the decision to defer is by law a matter entrusted to the discretion of the courts.²¹⁹

That '*the existence of jurisdiction does not mean that it ought always to be exercised*' is perhaps the true revelation of the nature of judicial deference. It is indeed an exercise of judicial discretion, which is deemed necessary in circumstances where the line between law and politics is obscure, where the courts are less uncertain about the right solution and therefore believe it is in the general good to leave it for the one who is accountable to the public and has the final word.

In the beginning of the HRA era, Lord Irvine had remarked that the constitutional theory on which the HRA rests is one of balance, and therefore, the conception of the judicial role in the interpretative process should also be a balanced one. He concluded with expectation that the balance between the competing imperatives of activism and restraint would be worked out in the judicial interpretation of the HRA:

²¹⁶ Hoffmann 139.

²¹⁷ Ibid 141.

²¹⁸ Ibid 139.

²¹⁹ Steyn 349.

In their development of public law to date, English courts have demonstrated a healthy understanding of their role and of its limits. The task which they will shortly face, as they begin to apply a set of written constitutional rights, is a difficult one; yet, it is, without any doubt, one that is well worth undertaking, and to which I am confident, our judges will rise with *characteristic pragmatism* and sound judgment.²²⁰

Nothing could be more *characteristically pragmatic* than not to exercise a jurisdiction that exists. Perhaps it is from the perspective of judicial deference that Lord Hoffmann's insight which we have just quoted may strike us even more profoundly: restraint is the courts' source of power.

Conclusion

In this preliminary discussion we have seen that the justification of constitutional review lies in the supreme or higher law status of the constitution. As the supreme law of the land, the constitution should be understood in both positive and normative senses. Without the positive enactment of a higher law in the first place, constitutional review is technically impossible. But a mere positive reading of the constitution is insufficient in justifying constitutional review, for it might lead to unjust laws being upheld as valid laws. Indeed, as Cappelletti observes, modern constitutionalism is seeking not merely legal justice but more importantly constitutional justice. A law thus should be declared void if found inconsistent with the higher norm; not only because the higher norm is higher in the legal hierarchy, but also because it enshrines the ideals and values that a community cherishes. However, whether or not it should be the ordinary judges to exercise the power of constitutional review is quite another matter. This has to be determined in the particular context of a certain constitutional system. Under a system which adopts some degree of separation of powers, the need for a final arbiter for the implementation of the constitution and the checks and balances inherent in the system are the justifications that it is appropriate for the judges to be given this task. Democratic opposition to judicial constitutional review often overlooks the imperfection of any democracy and the pro-democracy potentials of judicial constitutional review.

²²⁰ Lord Irvine, 'Activism and Restraint: Human Rights and the Interpretative Process' (1999) 4 *European Human Rights Law Review* 372. Emphasis added.

We have also seen that the nature of constitutional review is legislation rather than interpretation. In exercising constitutional review, judges are taking a part in the political conduct of government. They are not only doing law but also doing politics. For this reason, and for the sake of maintaining the workability of the whole constitutional system, of which the judiciary is a part, certain degree of judicial restraint is in general due. The danger of activist judicial constitutional review is in its tendency in turning constitutional supremacy into judicial supremacy, i.e. transforming government by the people into government by the judiciary. Lest this happen, judges should only intervene when there is a clear mistake, or where the line between law and politics is so unclear that it is better to leave the matter for the elected bodies to decide. To maintain the workability of a constitutional system, of which the judiciary is a part, due judicial deference is desirable and necessary.

With all these in mind, we shall proceed to examine the practice of constitutional review in Hong Kong. Is the Basic Law the constitution of Hong Kong? If it is, then the necessity of constitutional review is sufficiently justified. But since the Basic Law does not expressly confer this power on the judiciary, why then should it be the judges to decide as the reality is the case? What kind of power do the judges have in interpreting the Basic Law? Are there built-in checks and balances in the HKSAR political structure? What then about human rights protection? These are the questions that have to be answered if constitutional review by the judges in Hong Kong can be justified. In addition, as constitutional review in Hong Kong is overwhelmingly involved in human rights cases, a closer look at rights-based constitutional review is necessary before one might understand what the scope of the power of constitutional review should be and how this power should be exercised, taking into account of the uniqueness of the OCTS framework. But first, let the scene be set up: how did the practice of constitutional review come into existence in Hong Kong? To this, we shall now turn.

Chapter II

Emergence and Establishment of Constitutional Review in Hong Kong

Introduction

In this Chapter, a historical perspective is taken to trace the origin of constitutional review in Hong Kong. This involves a project of three parts. First, there is the question of whether the courts in the colonial history had the power of constitutional review. While a brief look at the pre-handover constitutional order is necessary, it is the pre-handover judicial enforcement of the Bill of Rights 1991 that is the main issue to be discussed. Secondly, two landmark cases in the post-handover era will be discussed; the *Ma Wai Kwan* case¹ and the *Ng Ka Ling* case,² both are watershed decisions in which the issue of the constitutional jurisdiction of the HKSAR courts was articulated in considerable depth by the courts. Thirdly, a brief account will be given to picture what happened after the CFA's assertion of the power of constitutional review in *Ng Ka Ling*. This is intended to show the wider political background against which the power of constitutional review was established in the HKSAR. Overall, it will be demonstrated that the power of constitutional review did not exist in Hong Kong's long pre-handover history, at least not until 1991 when the Bill of Rights was enacted. It will also be shown that the real *Marbury v Madison* moment in Hong Kong's constitutional history was the *Ng Ka Ling* decision handed down the CFA on 26 January 1999. Further, it will be submitted that constitutional review in Hong Kong under the OCTS framework may not be taken for granted; its justification and its scope will ultimately have to be found and ascertained in present Hong Kong under its present constitutional framework.

1. The pre-handover experience of constitutional review

The colonial political system in pre-handover Hong Kong was, as Wesley-Smith puts it, a

¹ *HKSAR v Ma Wai Kwan and Others* [1997] HKCA 652; [1997] HKLRD 761

² *Ng Ka Ling and Another v The Director of Immigration* [1999] HKCFA 72; [1999] 1 HKLRD 315; (1999) 2 HKCFAR 4.

'gubernatorial' government,³ which means that all political powers were vested in the Governor. The *Letters Patent*⁴ and the *Royal Instructions*⁵ together were regarded as the constitution of pre-1997 Hong Kong. Under these instruments, the Governor ruled the territory in the British monarch's behalf. He was authorized to create an Executive Council, which he chaired and the members of which he appointed.⁶ He was also authorized to create a Legislative Council.⁷ Up until 1993, the Governor himself was not only a member of the Legislative Council but the Chairman thereof. And up until 1985 (when the Sino-British Joint Declaration was signed), all Legislative Council members were appointed at the Governor's pleasure.⁸ Nothing was said in the constitution about the establishment or the structure of the courts of law, save that judges were to be appointed by the Governor.⁹ Nor was there, until 1991, any provision guaranteeing the protection of fundamental rights and freedoms. In contrast, the Governor was empowered to 'make laws for the peace, order, and good government of the Colony', 'by and with the advice and consent of the Legislative Council'.¹⁰ Truly though, there were some limitations, both substantive and formal, imposed on the Governor's legislative competency.¹¹ But as Wesley-Smith observes, apart from the prohibition on repugnancy to parliamentary Acts, other restrictions were more of theoretical than practical significance; they were, in Smith's words, 'fetters which serve no useful purpose'.¹²

Thus, as Miner observes, the enormous powers conferred on the Governor, were tantamount to turning him into 'a King of England' in the medieval ages,¹³ and if he chose to

³ Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong*, vol II (China and Hong Kong Law Studies 1987) 81.

⁴ The Letters Patent. Passed under the Great Seal of the United Kingdom constituting the Office of Governor and Commander-in-Chief of the Colony of Hong Kong and its Dependencies. Dated 14th February 1917. Amended to 1 July 1994.

⁵ Royal Instructions. Passed under the Royal Sign Manual and Signed to the Governor and Commander-in-Chief of the Colony of Hong Kong and its Dependencies. Dated February 1917. Amended to 1 July 1994.

⁶ The Letters Patent, V; Royal Instructions, II.

⁷ The Letters Patent, VI.

⁸ Norman Miners, *The Government and Politics of Hong Kong* (5th edn, Hong Kong Oxford Press 1991) 114.

⁹ The Letters Patent, XIV (1).

¹⁰ *Ibid* VII (1).

¹¹ For example, there were 10 categories of subjects he could not legislate unless the consent of the Crown was obtained and the Crown reserved the power to disallow any legislation made by the Hong Kong legislature. See Royal Instructions, XXVI; The Letters Patent, VIII.

¹² Peter Wesley-Smith, 'Legal Limitations upon the Legislative Competence of the Hong Kong Legislature' (1981) 11 Hong Kong LJ 31.

¹³ Miners 69.

exercise his authority to its full, he could easily become a dictator.¹⁴ This being the constitutional set-up, it is not difficult to see that judicial review of legislation was utterly unfitting.¹⁵ As a matter of fact, as Miner also observes, the Hong Kong courts in the pre-handover history had rarely been called upon to examine the validity of ordinances passed by the Legislative Council; nor had the courts ever found it necessary to strike down any such legislation.¹⁶

That the courts in the pre-1997 history did not have the power of constitutional review could not be much doubted at least as far as Acts of Parliament were concerned. As a British colony, the principle of parliamentary sovereignty applied to the territory in the same way as it applied at home, although most parliamentary Acts did not apply to Hong Kong. For those that did apply to the territory — application could be expressly provided in the Act, or inferred from ‘necessary implication’, or provided in prerogative or local legislation¹⁷ — it might be safely said that, due to parliamentary sovereignty, they were no more challengeable by colonial courts than they could be by domestic courts on the British soil. As is declared in the classic statement of Lord Reid in *Madzimbamuto v Lardner-Burke*¹⁸:

it is often said that it would be unconstitutional for....Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean it is beyond the power of Parliament to do such things. If Parliament chose to do any of them, the courts could not hold the Act of Parliament invalid.¹⁹

In theory, however, the colonial courts could challenge the validity of local legislation. This is simply because there were, as just mentioned, theoretical limitations on the Governor’s legislative competency. Of those limitations, the most practically significant one, which could have led to some form of constitutional review in the pre-1997 history, was that set out in

¹⁴ Ibid.

¹⁵ Albert Chen shares this view, see Albert H Y Chen, ‘Constitutional adjudication in post-1997 Hong Kong’ (2006) 15 Pacific Rim Law & Policy Journal 653.

¹⁶ Miners 58-59.

¹⁷ Peter Wesley-Smith, *The Source of Hong Kong Law* (Hong Kong University Press 1994) Part Two ‘The Reception of English Law. The Application of English Law Ordinance (CAP 88, not adopted as the law of the HKSAR) also listed a number of parliamentary Acts that were applied to Hong Kong.

¹⁸ *Madzimbamuto v. Lardner-Burke* [1969] 2 AC 645.

¹⁹ Ibid 723.

the Colonial Laws Validity Act 1865.²⁰

1.1 The Colonial Laws Validity Act 1865

This Act was enacted by the British Parliament for the purpose of removing doubts on the validity of laws enacted by the colonial legislatures. As such, it could have provided the legal basis for all former British colonial courts (including the pre-1997 Hong Kong courts) to pronounce local legislation invalid vis-à-vis imperial Acts, subject of course to the authority of the Privy Council as the final court of appeal for all colonial judicial systems. Section 2 of the Act was where this legal basis lay; it read:

Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

In a sense, the expected functionality of this provision is not much different from the supremacy clause often seen in a written constitution. Although each reflects a different sort of supremacy — the former parliamentary supremacy and the latter constitutional supremacy, it seems that the rationale behind them is the same: a higher law overrides a lower law if there exists any conflict between them.

In *Trethowan*,²¹ the Privy Council upheld the opinion of the court of New South Wales that the New South Wales' legislature, although having been given (a new) power to alter its constitution, was nonetheless subject to the form and manner limits that existing laws imposed on it. But this case was not specifically concerned with section 2 of the Colonial Laws Validity Act; it was about section 5 of the Act which gave colonial legislatures that new power. What is relevant to our discussion of section 2 is the distinction in the sovereign status between colonial legislatures and Westminster Parliament — the former were

²⁰ The Colonial Laws Validity Act 1865. An Act to remove doubts as to the validity of colonial laws.

²¹ *Attorney General for New South Wales v Trethowan* [1932] AC 526; (1931) 44 CLR 394 .

subordinate or non-sovereign and the latter supreme and sovereign.²² In so much as a non-sovereign legislature was under the control of the sovereign one, an ordinance by a colonial legislature could certainly be overridden by an Act of the sovereign legislature. This seems to be where the logical consistency between section 2 and section 5 of the Colonial Laws Validity Act lies.

Indeed it was based on this understanding of the constitutional status of the Hong Kong Legislative Council that a court opinion in 1913 had tried to assert the power of constitutional review; it said that the Hong Kong legislature

is a strictly non-sovereign body, deriving its powers wholly from the Royal Letters Patent. Any enactment it may purport to pass, which is not within the scope of the Letters Patent is made without jurisdiction, and the Courts would have no hesitation in pronouncing it bad.²³

But the reality was very different. The courts in Hong Kong in the long pre-handover history had been more than hesitant in doing so. No local legislation was struck down by the courts on the basis of inconsistency with parliamentary Acts as provided by the Colonial Laws Validity Act. Nor had there been legislation struck down on the basis of Letters Patent or the Royal Instruction.²⁴ In a few instances, the courts were called upon to declare a local ordinance invalid.²⁵ But the courts tended to refer to section 4 of the Colonial Laws Validity Act to save local legislation. By virtue of section 4, no colonial law should be declared void or inoperative 'by reason only of' any inconsistency with Royal instructions. In a case in the 1980s, for example, the court was asked to declare several sections in three different ordinances void because they were challenged as being inconsistent with relevant Royal instructions, the court said,

²² For this view, see generally H W R Wade, 'The Basis of Legal Sovereignty' (1955) 13 *The Cambridge Law Journal*; Sir Ivor Jennings held a different view. In his view, it is a common law rule that legislation may be enacted only in such manner and form as to be recognised by the courts as valid law and this rule applies to the UK Parliament as well. And What the Colonial Laws Validity Act did was to put this common law rule into statutory rule. That is to say, UK Parliament, like colonial legislatures, is subject to manner and form limits as well. See Sir Ivor Jennings, *The British constitution* (5th edn, CUP 1966) 153.

²³ *Ibrahim* (1913) 8 HKLR 1, per Gompertz J, quoted in Wesley-Smith, 'Legal Limitations upon the Legislative Competence of the Hong Kong Legislature' 31.

²⁴ See the conclusion of Norman Miner quoted in Section 1.

²⁵ See generally Wesley-Smith, 'Legal Limitations upon the Legislative Competence of the Hong Kong Legislature'; Wesley-Smith, *Constitutional and Administrative Law in Hong Kong*. See also Johannes Chan, 'Basic Law and Constitutional Review: The First Decade' (2007) 37 *Hong Kong LJ* 409 (footnote 5).

If the Governor does not follow instructions, and I read the term as used in s.4 of the Colonial Laws Validity Act, 1865, to include the Royal Instructions, then he may have to answer to the Sovereign for his neglect; but the section appears to me specifically to provide that failure on the part of the Governor is not to affect the validity of any law otherwise properly passed by the Legislative Council and assented to by the Governor.²⁶

In the Hong Kong Act 1985,²⁷ which was enacted as part of the British preparations for withdrawal from the territory, the Hong Kong Legislative Council was given the power to repeal or amend any enactment so far as it was part of the law of Hong Kong (including parliamentary acts applied to Hong Kong) and to make laws having extra-territorial operation.²⁸ As a result, the legal basis for constitutional review of local legislation vis-à-vis imperial laws apparently ceased to exist. Since the courts in the past had been reluctant to assert this power, they had less reason to do so after the enactment of the Hong Kong Act 1985.

Thus, despite the theoretical possibility the Colonial Laws Validity Act had provided, the reality was that constitutional review did not emerge in the long span of time the Act applied to Hong Kong. The discrepancy between theory and practice could only be explained that under the colonial political system, where all the powers were concentrated in the Governor, who ruled the territory as the representative of the British monarch, judicial constitutional review was simply politically unfitting and undesirable, though legally speaking, it was not totally impossible.

1.2 The Bill of Rights 1991

In history, it was said that the Hong Kong people, who were denied democratic government but driven by the spirit of commerce, had 'exhibited little interest in or concern for human

²⁶ *Winfat Enterprise (HK) Co Ltd v Attorney General* [1983] HKCA 306 para 98.

²⁷ Hong Kong Act 1985. An Act to make provision for and in connection with the ending of British sovereignty and jurisdiction over Hong Kong, [4th April 1985]. For a discussion on the Act as part of preparations of British withdrawal, see generally Wesley-Smith, *Constitutional and Administrative Law in Hong Kong*.

²⁸ Hong Kong Act 1985, s.3.

rights'.²⁹ Nor had the British Hong Kong Government ever been keen to give the Hong Kong people a bill of rights of their own.³⁰ The enactment of the Bill of Rights 1991 was therefore a significant moment in Hong Kong's constitutional history.³¹

The Bill was contained in the *Bill of Rights Ordinance (BORO)*.³² It was enacted to incorporate into the law of Hong Kong the provisions of the ICCPR as applied to Hong Kong.³³ The UK government signed the ICCPR in 1976 and extended it to Hong Kong with various declarations and reservations.³⁴ But the British Hong Kong Government had never thought it necessary to incorporate the treaty into domestic law. Ironically, it was the Tiananmen Square event in 1989 that had prompted the birth of the Bill of Rights. After the signing of the Sino-British Joint Declaration, there was already scepticism surrounding China's willingness to protect human rights in Hong Kong after the transfer of sovereignty. This scepticism intensified greatly in and after 1989.³⁵ Immediately after the Tiananmen Square event, the British Government adopted several measures to boost Hong Kong people's confidence in the territory's future after the 1997 transition, one of which was to guarantee the protection of human rights.³⁶ As one commentator noted, had there not been a significant change of the British policy towards Hong Kong in the aftermath of 1989, the

²⁹ Raymond Wacks, 'Introduction' in Raymond Wacks (ed), *Human Rights in Hong Kong* (OUP 1992) 1.

³⁰ Nihal Jayawickrama, 'The Bill of Rights' in Raymond Wacks (ed), *Human Rights in Hong Kong* (OUP 1992) 76.

³¹ Albert Chen referred the making of the Bill of Rights 1991 as the first constitutional revolution in Hong Kong's history; the second, he says, was the reversion of Hong Kong to Chinese rule and the commencement of the operation of the Basic Law in 1997. Chen 653.

³² The Law of Hong Kong, Cap 383.

³³ The Bill of Rights was almost in verbatim with the rights provisions in the ICCPR. But it did not fully incorporate the ICCPR. Article 20 of the ICCPR (prohibition of propaganda for war), for example, was not included. Nor were those provisions including Article 25 on which the UK government had made declarations and reservations.

³⁴ For a comprehensive discussion of those reservations and declarations, see Yash Ghai, 'Derogations and Limitations in the Hong Kong Bill of Rights' in Johannes Chan and Yash Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths 1993) 165-166.

³⁵ Wacks 2.

³⁶ See generally Jayawickrama and Philip Dykes, 'The Hong Kong Bill of Rights 1991: its Origin, Content and Impact' in Johannes Chan and Yash Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths 1993). Other measures included the granting of full British citizenship with right of abode in the UK to 50 thousand Hong Kong elites and their dependents (altogether 225,000 people), and increasing the number of direct elected seats to the legislature — from originally proposed 10 to 18 in 1991 and at least 20 in 1995 — so as to show its determination to speed up the democratization process in Hong Kong. For further discussion about this background of the Bill of Rights, see Johannes Chan and Yash Ghai, 'A Comparative Perspective on the Bill of Rights' in Johannes Chan and Yash Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths 1993) 39-50 and Ralf Horlemann, *Hong Kong's Transition to Chinese Rule: The Limits of Autonomy* (Routledge Curzon, Taylor & Francis Group 2003) 26-38.

cries for a Hong Kong bill of rights might not have been received at all.³⁷ Indeed, as was acknowledged by the Foreign Affairs Committee of the UK Parliament after its visit to Hong Kong in April 1989, the Bill of Rights was adopted as 'a matter of urgency'.³⁸

China was opposed to the enactment of the Bill of Rights from the outset. It had argued that according to successive British administrations in Hong Kong, the principles of common law were considered as an adequate protector of human rights; this being the case, there was no reason why the common law could not continue to perform that role either in the few remaining years of British rule or after the transfer of sovereignty, since common law would be retained in Hong Kong. Moreover, it was argued that there was no need to enact a Bill of Rights, since the Basic Law provided protection of fundamental rights and freedoms of the Hong Kong people.³⁹ In essence, it seems that what China was most opposed to was the intention to place the BORO above other laws; that superior position, from the Chinese point of view, should and must be reserved for the Basic Law.⁴⁰ More practically, China had feared that a Bill of Rights would inevitably have a negative impact on the ability of the administration to maintain law and order in the territory.⁴¹

Despite China's opposition, the making of the Bill of Rights seemed unstoppable. The drafters had two overarching goals in mind; one was to ensure that the Bill would enjoy some kind of entrenched constitutional status, so that its provisions could not simply be overridden by subsequent legislation, and the other was to secure its survival beyond 1997.⁴² But the British Hong Kong government was also hesitant to give the Bill of Rights such an entrenched status. The government was concerned that such a bill of rights would not only cause difficulties with the Basic Law (which in turn would make it difficult for the Bill to survive beyond 1997), but would also induce risks the government was not yet

³⁷ Jayawickrama 76.

³⁸ Quoted in *ibid* 71.

³⁹ Nihal Jayawickrama, 'The Hong Kong Bill of Rights: A Critique' in Johannes Chan and Yash Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths 1993) 56. For further discussion on protection of human rights under the Basic Law, see Chapter VI.

⁴⁰ Chan and Ghai 3.

⁴¹ *Ibid* 2.

⁴² Andrew Bynes, 'And Some Have Bill of Rights Thrust upon Them: the Experience of Hong Kong's Bill of Rights' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (OUP 1999) 334-335. See also Richard Swede, 'One Territory-Three Systems? The Hong Kong Bill of Rights' (1995) 44 *International & Comparative Law Quarterly* 361.

prepared to take.⁴³

The final solution was this. The BORO was enacted as an ordinary ordinance, liable to be amended or repealed, either expressly or by implication, in the ordinary legislative process.⁴⁴ But the ICCPR as applied to Hong Kong was entrenched through amending the Letters Patent. On the same day as the BORO came into force, the Letters Patent were amended; the amended Article VII (5) read:

The provisions of the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 16 December 1966, as applied to Hong Kong, shall be implemented through the laws of Hong Kong. No law of Hong Kong shall be made after the coming into effect of the Hong Kong Letters Patent 1991 (No.2) that restricts rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that Covenant as applied to Hong Kong.

As was admitted, the amendment to the Letters Patent intentionally ‘mirror-imaged’ Article 39 of the Basic Law,⁴⁵ hoping that not only the Bill of Rights would survive the handover, but the case law developed under it might influence human rights protection under the Basic Law after 1997.⁴⁶

The BORO was designed to operate as two different regimes; one in relation to pre-existing legislation and the other subsequent legislation. Section 3 and Section 4 provided respectively:

Section 3 Effect on pre-existing legislation

(1) All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction. (2) All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed.

⁴³ Dykes 41.

⁴⁴ Jayawickrama, 'The Bill of Rights' 60.

⁴⁵ Chan and Ghai 2. Article 39 of the Basic Law provides that the provisions of the ICCPR as applied to Hong Kong shall remain in force, and that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law, and that such restrictions shall not contravene the provisions of the human rights treaties including the ICCPR as applied to Hong Kong. For further discussion on Article 39 and the constitutional status of the Bill of Rights under the Basic Law, see Chapter VI.

⁴⁶ Bynes 334-345.

Section 4 *Interpretation of subsequent legislation*

All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be constructed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong.

Under the Section 3 regime, the courts were given the power to interpret all existing legislation to be consistent with the Bill of Rights. However, once construction consistent with the Bill of Rights was impossible, it was not for the courts to declare the legislation in question as invalid; instead, that legislation stood repealed by the BORO itself. That is to say, the essence of the judicial role in regard to section 3 was to *identify* which existing legislation had been repealed as the result of the coming into effect of the BORO, rather than to *declare* a law invalid and strike it down—which is the true sense of constitutional review. As Jayawickrama observed,

When the legislature states that a previous law or a section thereof is repealed, it must mean precisely that. As soon as the repealing law comes into operation, the previous law or section thereof stands repealed. No other procedural step, such as a declaration by a court, is necessary. Accordingly, ...*when the Hong Kong Bill of Rights came into operation, all existing law inconsistent with its provisions stood repealed.* But which enactments have been repealed, and to what extent, are questions which will necessarily have to be answered by a court.⁴⁷

Cases decided under the Section 3 regime shows the plausibility of the above understanding. In *R. v Sin Yau Ming*,⁴⁸ the early human rights leading case, the CA held that a number of presumptions contained in the Dangerous Drugs Ordinance⁴⁹ were inconsistent with Article 11 (1) of the Bill of Rights and had therefore been repealed on 8 June 1991 (the date the BORO come into force). The Court said emphatically that in implementing the BORO the duty of the courts was to decide whether that legislation was consistent with the Bill of Rights; and that the courts did not repeal legislation; instead, the repeal was made by

⁴⁷ Jayawickrama, 'The Hong Kong Bill of Rights: A Critique' 62-63. Emphasis added.

⁴⁸ *R. v Sin Yau Ming* [1991] HKCA 86.

⁴⁹ The Law of Hong Kong, Cap 134.

the Bill of Rights itself.⁵⁰ This reasoning was affirmed by the Privy Council in *Attorney-General v Lee Kwong-kut*⁵¹, where Lord Woolf said that ‘the first issue in the present appeals...is whether the Hong Kong Bill has repealed the statutory provisions’.⁵²

However, since the BORO did not list or give specific guidance as to which law had been repealed, and since it was ultimately up to the courts’ interpretation of a pre-existing law to ascertain whether or not it had been repealed, it was quite plausible to argue that it was *in reality* up to the courts to do the repealing. In other words, looking from the real effect, the judges’ role under section 3 of the BORO was constitutional review in all but name. The reason why so much ado was made just to keep the form from substance could, perhaps, only be found in the concern that the Bill of Rights should not be given a higher status. As far as the pre-handover constitutional system was concerned, it was perhaps the form, not the actual effect, which carried the fundamental constitutional implication. That is, it was for the legislature to enact laws and for the courts to interpret them. Section 3 ensured that this constitutional principle of the pre-handover regime was not *formally* undermined.

Apparently, the section 4 regime was different. If section 3 made the BORO ‘backward-looking’, in the sense that it only operated on pre-existing laws,⁵³ section 4 took a forward-looking approach, in that it required all *subsequent* legislation to be construed in such a way as consistent, not with the Bill of Rights, but with the ICCPR as applied to Hong Kong. A literal reading of section 4 and the amended Article VII (5) of the Letters Patent together would suggest that any subsequent legislation found inconsistent with the ICCPR as applied to Hong Kong should be void and inoperative. That is to say, the judicial role under section 4 was more likely than that under section 3 to be one of judicial constitutional review. This seems to be the understanding of the court in *R v. Chan Chak Fan*,⁵⁴ where Bokhary JA stated that

The Letters Patent entrench the Bill of Rights by prohibiting any legislative inroad into the International Covenant on Civil and Political Rights as applied to Hong Kong. The Bill is the embodiment of the Covenant

⁵⁰ *R. v Sin Yau Ming* para 54.

⁵¹ *Attorney-General v Lee Kwong-kut* [1993] AC 951.

⁵² *Ibid* 973.

⁵³ *Bynes* 337.

⁵⁴ *R v. Chan Chak Fan* [1994] 3 HKC 145 .

as applied here. Any legislative inroad into the Bill is therefore unconstitutional, and will be struck down by the courts as the guardians of the constitution. And the test of constitutionality is the same as the test of Bill consistency.⁵⁵

In *Lee Miu Ling*,⁵⁶ Bokhary JA restated his understanding of the judicial role under section 4 and Article VII (5) of the Letters Patent. At stake in this case were those provisions in the Legislative Council (Electoral Provisions) Ordinance⁵⁷ which were concerned about functional constituencies.⁵⁸ In the court below, those provisions were challenged as *having been repealed* by Article VII (5) of the Letters Patent and section 3 of the BORO. Bokhary JA said this was a wrongly framed challenge. ‘In truth’, he said, ‘since those provisions were enacted after the Bill of Rights had come into effect, the question raised by the challenge to them must be *whether they are unconstitutional*.’⁵⁹ In other words, the job the judges should do was not to discover, as they were required to do under section 3, whether a piece of pre-existing legislation had been repealed, but to examine the constitutionality of a subsequent law on the basis of Article VII (5) of the Letters Patent. As Bokhary JA added,

Our task is to decide whether such legislation is constitutional or unconstitutional. If we decide that it is constitutional, we uphold it. But if we decide that it is unconstitutional, then, simply by saying so, we strike it down.⁶⁰

However, on further thought, what Bokhary JA had asserted seems to be an assumption rather than a deduction, and the assumption was not necessarily true. Article VII (5) of the Letters Patent was silent on the validity of any subsequent legislation found inconsistent with the ICCPR. Nor did it expressly give the judges the power to declare a law invalid if found to be inconsistent with the ICCPR. Moreover, there was a practical difficulty for judges to exercise constitutional review relying on section 4 and Article VII (5) of the Letters Patent — a difficulty which Bokhary JA did not seem to have recognized. This was because to do so, judges were required to interpret and apply the ICCPR as applied to Hong Kong rather than

⁵⁵ Ibid 153.

⁵⁶ *Lee Miu Ling and Another v The Attorney General* [1995] HKCA 502.

⁵⁷ The Law of Hong Kong, Cap 381.

⁵⁸ Functional constituencies were introduced in the 1985 Legislative Council elections as a form of indirect democracy. They were actually business and professional sectors. For an introductory discussion, see Miners 115-117.

⁵⁹ *Lee Miu Ling* para 2. Emphasis added.

⁶⁰ Ibid para 3.

the Bill of Rights itself. But by the principle of the common law, international treaties would not be judicially enforceable unless they had been incorporated into domestic law. If judges were to treat the ICCPR as applied to Hong Kong provided in the Letters Patent as the Bill of Rights 1991, that would certainly render the distinction between the section 3 regime and the section 4 regime utterly redundant at best and wholly absurd at worst. On the other hand, if the ICCPR as applied to Hong Kong were not to be treated as the Bill of Rights 1991, there would be no judicially enforceable laws against which the courts could declare a piece of subsequent legislation invalid. Thus, there was a curious nature about the section 4 regime, which perhaps could only be explained in that, as mentioned above, it was mainly politically geared to look forward beyond 1997.

The practical difficulty mentioned just now did not emerge in *Lee Miu Ling*; or perhaps it had been skilfully avoided by the court. One plausible explanation was because the Letters Patent itself had provided for the existence of the functional constituencies.⁶¹ Thus in meeting the challenge that such electoral arrangements infringed the principle of equality of suffrage, the court did not have to interpret the ICCPR. It upheld their constitutionality not because they satisfied the principle of equality of suffrage, but because the Letters Patent had provided for their existence. Pragmatically, the court said, if those provisions were to be declared unconstitutional, 'there would be no Legislative Council' for the territory, democracy notwithstanding.⁶²

From the above discussion of section 3 and section 4 of the BORO, it might well be said that the pre-1997 Hong Kong courts had begun to exercise the power of constitutional review.⁶³ But the pre-1997 judicial experience with the enforcement of the Bill of Rights is probably more appropriate to be credited as the emergence rather than the establishment of constitutional review in Hong Kong, since, as revealed in the above discussion, the courts under section 3 did not have that power in name, whereas under section 4 there was an inherent difficulty for the courts to exercise such a power. In addition, as it was then feared, the Bill of Rights might not even survive the change of sovereignty in 1997. Although the

⁶¹ The Letters Patent, VI (1).

⁶² *Lee Miu Ling* para 9.

⁶³ Chen 654.

change of sovereignty was intended to be accomplished without much change to the previous legal system, it would nonetheless be a fresh start in Hong Kong. Thus, the real establishment of constitutional review in Hong Kong would have to wait until after the fresh start was kicked off.

2. The post-handover era: Hong Kong's *Marbury v Madison* moment

In the post-handover era, two important cases were decided which had led to the establishment of judicial constitutional review in present Hong Kong; one was the *Ma Wai Kwan* case decided by the CA shortly after the handover, and the other was the *Ng Ka Ling* case decided by the CFA more than a year after the handover. Each will be discussed in turn so as to find out which was the real *Marbury v Madison* moment in Hong Kong.

2.1 The *Ma Wai Kwan* decision

Ma Wai Kwan was a criminal case where the defendants were charged with the common law offence of conspiracy to pervert the course of justice. The proceedings had started in 1996 but were not completed before 1st July 1997. Three days after the handover, the courts re-opened for business, but re-named as the HKSAR courts. As the proceedings resumed, the defendants changed their defence tactic by taking issue of the transfer of sovereignty. Their main submission was that the common law previously in force in Hong Kong did not survive the handover and as the result, they were not liable to answer the case and that the trial should be dismissed. Their arguments were two fold. Firstly, although the Basic Law provided that the laws previously laws in Hong Kong (including the common law) should be adopted as the laws of the HKSAR, no 'positive act of adoption' was taken by the Chinese Government upon the resumption of sovereignty. Secondly, although the *Hong Kong Reunification Ordinance*⁶⁴ provided for the continuation of previous judicial proceedings, this Ordinance was void, because the Provisional Legislative Council (PLC), which enacted this Ordinance, was invalidly constituted.⁶⁵ It was around the question of the legality of the PLC that the issue of constitutional review arose.

⁶⁴ Hong Kong Reunification Ordinance, Cap 2601.

⁶⁵ *Ma Wai Kwan* para 8.

The creation of the PLC had a complicated political background.⁶⁶ Briefly put, it was this. On the same day when the Basic Law was promulgated, the NPC adopted the Decision on the 'Method for Formation of the First Government and the First Legislative Council of the [HKSAR]' (the 1990 Decision). In it, it was provided that if the composition of the last Hong Kong Legislative Council was in conformity with the relevant provisions of this Decision and the Basic Law, it would, subject to confirmation by the Preparatory Committee (which, according to this Decision, was to be established in 1996, and entrusted with the responsibilities for the preparation of the establishment of the HKSAR), become the first Legislative Council of the HKSAR. This particular arrangement, with the particular purpose of ensuring a smooth transition,⁶⁷ was known as the political 'through train' — a metaphor assimilated to the real through trains running across the border between Hong Kong and mainland China where passengers stay on board when the train crosses the border. But the political through train derailed as the result of the political roar between China and Britain over the last Hong Kong Governor Chris Patten's democratic reform introduced to the 1995 Legislative Council elections.⁶⁸ That reform, in China's view, was contrary to the Joint Declaration, contrary to the principle of convergence with the Basic Law, and contrary to the understandings reached between the Chinese and British governments.⁶⁹ In the absence of the political through train, China found it necessary to 'light a second stove'.⁷⁰ On 24th March

⁶⁶ The issue of the PLC has been well documented, see for example Benny Tai, 'The Development of Constitutionalism in Hong Kong' in Raymond Wacks (ed), *The New Legal Order in Hong Kong* (Hong Kong University Press 1999), Enbao Wang, *Hong Kong, 1997: The Politics of Transition* (Boulder 1995) and Horlemann.

⁶⁷ See 肖蔚云 Weiyun Xiao, *一国两制与香港特别行政区基本法 One Country Two Systems and the Basic Law of the Hong Kong Special Administrative Region* (香港文化教育出版社有限公司 Educational and Cultural Press Ltd. 1990) 250-251. According to Xiao, the reason why the method for the formation of the first Government and the first Legislative Council of the HKSAR was not provided in the Basic Law itself, but in a separate NPC Decision, was because China did not want to set up 'a second power centre' in Hong Kong before the handover. A through train (though Xiao himself thought this was not a very proper metaphor) therefore could avoid this second power centre while ensuring that the HKSAR government could start operating immediately after midnight 30 June 1997.

⁶⁸ The reform has also been well documented. Apart from references noted in footnote 67, see also generally (but in particular for the reform engineer's own description) Chris Patten, *East and West: the Last Governor of Hong Kong on power, freedom and the future* (Macmillan 1998).

⁶⁹ The Chinese position was made clear in the Working Report of the Preparatory Committee submitted to the NPC for approval on 10 March 1997. For a unofficial English version of the Report, see Albert H Y Chen, 'Legal Preparation for the Establishment of the Hong Kong SAR: Chronology and Selected Documents' (1997) 27 Hong Kong LJ 425-427. See also generally 钱其琛 Qian Qichen, *外交十记 Ten Episodes in China's Diplomacy* (Foreign Language Press 2006). Original translation of the title.

⁷⁰ This was the way many Chinese officials put it, meaning for another way of preparing for the return of Hong Kong. Chris Patten also quoted Lu Ping, the former director of the Chinese State Council's Hong Kong and

1996, the Preparatory Committee passed a decision that a Provisional Legislative Council was to be established, which would only make the kind of legislation that was essential for ensuring the proper operation of the HKSAR and which would not last more than one year (until 30th June 1998). On 11th December 1996, the PLC was established and began to work, not in Hong Kong, but in the neighbouring mainland city of Shenzhen. When the Preparatory Committee completed its mission, it submitted a Working Report to the NPC (which the NPC accepted by a resolution) in which the creation of the PLC was explained as an 'indispensable' contingency measure and was justified as within the ambit of the Preparatory Committee's power to make decisions for matters relating to the preparation for the establishment of the HKSAR.⁷¹

In *Ma Wai Kwan*, the legality of the PLC was challenged on the basis that the 1990 Decision did not mention any provisional legislative council, and that the PLC established by the Preparatory Committee was the de facto first Legislative Council of the HKSAR and yet it was not established in accordance with the Basic Law.⁷² Furthermore, it was submitted that the Preparatory Committee did not have the power to create the PLC, and that nothing short of an amendment to the Basic Law could suffice.⁷³

Before coming specifically on the issue of the legality of the PLC, the Court found it necessary to examine the general jurisdiction of the HKSAR courts. Writing for the Court's opinion, the Chief Judge Chan (as he then was) said he would accept the argument that

regional courts have no jurisdiction to query the validity of any legislation or acts passed by the sovereign. There is simply no legal basis to do so. 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.⁷⁴

Macau Affairs Office, as saying that by putting forward the political reform and thus derailing the through train, Patten had made himself 'a criminal who could be condemned for a thousand generations' and that China had to set up a second stove. See also Patten 68; Horlemann 73.

⁷¹ Chen, 'Legal Preparation for the Establishment of the Hong Kong SAR: Chronology and Selected Documents' 426.

⁷² *Ma Wai Kwan* para 66, 67.

⁷³ *Ibid.*

⁷⁴ *Ibid* para 57. The Court quoted the dictum of Lord Reid in *Madzimbamuto v. Lardner-Burke* in support of this point.

Recognizing that the sovereign of the HKSAR is now the PRC, Chief Judge Chan said he would accept that in the context of the present case

the HKSAR courts cannot challenge the validity of the NPC Decisions or Resolutions or the reasons behind them which set up the Preparatory Committee. Such decisions and resolutions are the acts of the Sovereign and their validity is not open to challenge by the regional courts.⁷⁵

Having this general view in mind, Chief Judge Chan went on to examine the legality of the PLC. He said that the Court was not concerned with whether there was any solution or which solution would be better to salvage the unfortunate situation of the derailing of the through train. The decision to set up the PLC might not be politically wise. But that was not the Court's concern. Rather, the task of the Court was

to examine whether the NPC had authorised the Preparatory Committee to establish this interim body, whether the Preparatory Committee had done so pursuant to its authority and powers and whether the Provisional Legislative Council is the interim body set up by the Preparatory Committee.⁷⁶

The Court found that the formation of the PLC was not intended to be the first Legislative Council, but an interim measure out of necessity, which 'the Sovereign has undoubtedly the power to do'.⁷⁷ Moreover, since the Preparatory Committee was authorised by the NPC to prepare for the establishment of the HKSAR and to organize the first Legislative Council, it was within the ambit of the authority and powers conferred on it to establish the PLC as an interim body, so as 'to enable the first Government to get going in the absence of the first Legislative Council'.⁷⁸ As such, the Court concluded that the PLC was legally established and that since the NPC was acting as the sovereign of the HKSAR, the validity of the acts of establishing this interim body could not be challenged in the HKSAR courts.⁷⁹

The decision, in particular the Court's position on the jurisdiction of the HKSAR courts, instantly received severe criticism, especially from the legal profession in Hong Kong. It was

⁷⁵ *Ma Wai Kwan* para 60.

⁷⁶ *Ibid* para 80.

⁷⁷ *Ibid* para 83.

⁷⁸ *Ibid* para 85.

⁷⁹ *Ibid* para 86.

claimed that the decision was a disastrous stroke to the integrity of the legal system of the HKSAR as well as to HKSAR's high degree of autonomy,⁸⁰ and consequently, the 'dark days' were coming.⁸¹ More specifically, it was alleged that the inability of the HKSAR courts to examine the acts of the Central Authorities would mean that there would be no real protection for Hong Kong's autonomy or for the rights of its residents, and that there would be no way to ensure the constitutional boundaries between Hong Kong and the mainland.⁸² Moreover, if the decisions or resolutions of the NPC cannot be challenged in the HKSAR courts, it would mean that the NPC could, by a rather informal decision or resolution, side-step all the elaborate guarantees laid down in the Basic Law; it could, for example, amend the Basic Law without having to follow the procedures on amendment as prescribed by the Basic Law, and even more worryingly, this power could be delegated to such a body as the Preparatory Committee.⁸³

The Court's reasoning was also criticized for its analogy of the NPC's power over the HKSAR with the power that Westminster Parliament used to have on the colonial Hong Kong. For most critics, the analogy was wrong and totally inappropriate, because the constitutional relationship between the HKSAR and mainland China is radically different from that between the colonial Hong Kong and the United Kingdom.⁸⁴ For example, as Johannes Chan explained, China has a written constitution and therefore the NPC's power is subject to and derives its legislative power therefrom, whereas in contrast, the UK Parliament was subject to no restriction regarding its legislative power over Hong Kong.⁸⁵ Thus, as Chan concluded, the Court's unquestioned assumption that the English doctrine of supremacy of Parliament is applicable in its full rigor in the new constitutional order in the HKSAR is 'at the very least, doubtful'.⁸⁶ In other words, from the fact that the colonial courts could not challenge the legality of a parliamentary Act it does not necessarily follow that the HKSAR courts cannot challenge the validity of the acts of the NPC or the NPCSC. Instead, whether or not the

⁸⁰ Johannes Chan, 'Jurisdiction and Legality of the Provisional Legislative Council, The Focus on the Ma Case ' (1997) Hong Kong LJ 381.

⁸¹ Yash Ghai, 'Dark Days of Our Rights' *South China Morning Post* (Hong Kong 30 July, 1997).

⁸² Yash Ghai, 'The Intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of Technique or Politics?' (2007) 37 Hong Kong LJ 376.

⁸³ Chan, 'Jurisdiction and Legality of the Provisional Legislative Council, The Focus on the Ma Case ' 382.

⁸⁴ Ghai, 'The Intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of Technique or Politics?' 375.

⁸⁵ Chan, 'Jurisdiction and Legality of the Provisional Legislative Council, The Focus on the Ma Case ' 377.

⁸⁶ *Ibid.*

HKSAR courts can have this power has to be determined in the context of the new constitutional order prescribed by the Basic Law.

It seems that the analogy was indeed wrong and inappropriate. There is little doubt that under the OCTS framework Hong Kong's constitutional status is fundamentally different from that under the British rule. The difference is so fundamental that any analogy between them is most probably politically incorrect and legally faulty. In this sense, it is not unfair to say that the analogy the CA had drawn in *Ma Wai Kwan* is a misinterpretation of the status and purpose of the Basic Law.⁸⁷

On the other hand, however, it should be recognised that the change of the constitutional order in Hong Kong after the handover in 1997 was not a complete break with the past, but a change out of continuation. The maintenance of the common law is a good example demonstrating that the new constitutional order maintains some features contained in the old one. Accordingly, the new constitutional order should not be interpreted as if there were no connections with the past; rather, reference to the past may sometimes be inevitable. From this perspective, it may well be argued that although the analogy itself was wrong, the conclusion — that the HKSAR courts cannot review the acts of the NPC simply because the pre-handover courts could not review the Acts of Parliament — might be right. This might sound a bit confusing at first blush. A look at Article 19 (2) of the Basic Law shall explain the point. Article 19 (2) provides for the general jurisdiction of the HKSAR courts; it reads

The courts of the [HKSAR] shall 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.

The key words here are '*restrictions*' '*shall be maintained*'. If, as Johannes Chan and many others had conceded, the colonial Hong Kong courts could not question the validity of parliamentary acts because of the principle of parliamentary sovereignty, then the question is whether this limitation falls within the restrictions Article 19 (2) intends to maintain. If it

⁸⁷ Ghai, 'The Intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of Technique or Politics?' 376.

does, then it is right to say that the HKSAR courts cannot review the acts of the NPC simply because the pre-handover courts could not review the Acts of Parliament — this was a restriction imposed on the courts by the principles previously in force in Hong Kong, and by virtue of Article 19 (2), it should be maintained. Here, the question is not one of analogy, but one of maintaining the restrictions previously imposed on the courts' jurisdiction. Of course, Article 19 (2) of the Basic Law has to be read with Article 160 which provides that the laws previously in force in Hong Kong shall only be maintained as the laws of the HKSAR if they were not in contravention to the Basic Law.⁸⁸ In other words, if any restriction imposed on the courts were to be found as in contravention to the Basic Law, they should not be maintained. It follows that the question to be answered is whether the limitation on pre-handover courts to review parliamentary Acts is in contravention to the Basic Law and therefore should not be maintained. Apparently, the CA did not examine the HKSAR courts' jurisdiction along this line. But as shall shortly be seen, the CFA did look at this plausibility.

The *Ma Wai Kwan* decision was not further appealed. But the CA's view on the jurisdiction of the HKSAR courts — that they, as regional courts, do not have the power to query the validity of any acts of the NPC — was to be overruled by the CFA in the *Ng Ka Ling* case.

2.2 The *Ng Ka Ling* decision

At stake in this case was the right of abode of those children born in mainland China but of a parent who was a Hong Kong permanent resident. The concept of the right of abode was first used in the Sino-British Joint Declaration and was introduced to the law of Hong Kong in 1987. The Basic Law enshrines the right of abode in Hong Kong. According to the Basic Law, the residents of the HKSAR shall include permanent residents and non-permanent residents, but only the permanent residents have the right of abode in Hong Kong.⁸⁹ Further, Article 24(2) of the Basic Law provides that the permanent residents shall be the six categories of persons set out therein; relevant in this case are the first three categories:

- (1) Chinese citizens born in Hong Kong before or after the establishment of the [HKSAR];

⁸⁸ For further discussion of Article 160, see Chapter VII.

⁸⁹ For further discussion of the rights of the Hong Kong residents, see Chapter VI.

- (2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the [HKSAR]; and
- (3) Persons of Chinese nationality born outside Hong Kong of those permanent residents listed in categories (1) and (2).

On the other hand, Article 22(4) of the Basic Law provides that people from other parts of China must apply for approval for entry into the HKSAR, and that the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central Government after consulting the HKSAR government.

In local legislation, the categories of persons who are Hong Kong permanent residents are set out in Schedule 1 of the Immigration Ordinance.⁹⁰ On 1 July 1997, the PLC adopted an amendment to the Ordinance by replacing with a new Schedule 1, paragraph 2 of which provides that a person within the following categories is a permanent resident

- (a) A Chinese citizen born in Hong Kong before or after the establishment of the [HKSAR] if *his father or mother was settled or had the right of abode in Hong Kong at the time of the birth of the person or at any later time.*
- (b) A Chinese citizen who has ordinarily resided in Hong Kong for a continuous period of not less than 7 years before or after the establishment of the HKSAR.
- (c) A person of Chinese nationality born outside Hong Kong to a parent who is a permanent resident of the [HKSAR] in category (a) or (b) *if the parent had the right of abode in Hong Kong at the time of the birth of the person.*⁹¹

On 10 July 1997, the PLC made a further amendment to the Immigration Ordinance, introducing a scheme to deal with the permanent resident status of persons belonging to category (c) of the new Schedule 1 (hereafter the Category (c) Scheme). The scheme requires that a Schedule 1 (c) person's status as permanent resident can only be established by his holding of: (a) a valid travel document issued to him and of a valid certificate of entitlement also issued to him and affixed to such travel document; (b) a valid HKSAR passport issued to him; or (c) a valid permanent identity card issued to him.⁹² This scheme

⁹⁰ The Immigration Ordinance, The Law of Hong Kong, Cap 115.

⁹¹ Ibid Schedule 1. Emphasis added.

⁹² Ibid s 2 AA (1).

was deemed to have come into operation on 1 July 1997.

In *Ng Ka Ling*, the appellants were Chinese nationals born in the mainland. At the time of their birth, their father was a Hong Kong permanent resident. The applicants entered Hong Kong illegally on 1 July 1997. They went to the Immigration Department to assert their right of abode under the third category in Article 24(2) of the Basic Law. Instead of making a successful claim, they were arrested for illegal entry into Hong Kong but then were released on recognizances. They therefore sought to challenge the constitutionality of the Immigration Ordinance as amended by the PLC and the legality of the PLC itself.⁹³ The case (along with other similar right of abode cases) went all the way through to the CFA.

As this was the first case to come before the CFA and the case involved the interpretation of the Basic Law, the Court considered it crucially necessary to examine such general things as the nature of the Basic Law, the constitutional jurisdiction of the courts in general and the approach to the interpretation of the Basic Law before it went on to deal with the substance of the case itself. In defining the HKSAR courts' constitutional jurisdiction, the then Chief Justice Andrew Li, writing for a unanimous opinion of the Court, asserted that

[i]n exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that Law. They *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.⁹⁴

He then went on to note, in a passing way, that it has been controversial whether the HKSAR courts have the jurisdiction to examine any legislative acts of the NPC or NPCSC vis-à-vis the Basic Law and to declare them to be invalid if found to be inconsistent. Nonetheless, he asserted that in the Court's view,

the courts of the Region do have this jurisdiction and indeed the duty to declare invalidity (of the acts of the NPC or NPCSC) if inconsistency is found. It is right that we should take this opportunity of stating so

⁹³ *Ng Ka Ling* para 57.

⁹⁴ *Ibid* para 61. Emphasis added.

unequivocally.⁹⁵

The CFA's justification of the HKSAR courts' jurisdiction of constitutional review is, in its nutshell, very much akin to the logical line adopted by Marshall in *Marbury v Madison*. That is, the Basic Law is the supreme law of the Region and it is emphatically the courts' province and duty to say what the law is. However, having assumed that the HKSAR courts *undoubtedly* have the power to review and strike down local legislation if found inconsistent with the Basic Law, the Court did not feel it necessary to say more on this justification per se. For the Court, the need for constitutional review is self-evident in the supreme status of the Basic Law which is the constitution of the Region (the Court made this point more clearly when it came to justify constitutional review of acts by NPC or NPCSC). Thus, the exercise of constitutional review to ensure the implementation of the Basic Law 'is a matter of obligation, not of discretion', and the courts 'are bound to' declare a law or an executive act invalid if found in contravention to the Basic Law.⁹⁶ As to the question why the task of constitutional review should be performed by judges, the Court's answer was that the courts have the constitutional role under the Basic Law to act as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law.⁹⁷

In contrast, the Court made a greater attempt to justify the jurisdiction over the acts of the NPC or NPCSC. In the Court's view, this jurisdiction 'is derived from the Sovereign' because the NPC had enacted the Basic Law pursuant to the Chinese Constitution.⁹⁸ That is to say, it is *given* by the NPC through the enactment of the Basic Law, because the Basic Law, though a national law at the national level, is enacted as the constitution of the HKSAR.⁹⁹ Like other constitutions, the Court said, the Basic Law distributes and delimits powers, as well as provides for fundamental rights and freedoms. As with other constitutions, the Court continued, laws which are inconsistent with the Basic Law are of no effect and are invalid. Since the HKSAR courts have independent judicial power within the high degree of autonomy conferred on the Region, it is for them to determine questions of inconsistency

⁹⁵ Ibid para 62.

⁹⁶ Ibid para 61.

⁹⁷ Ibid.

⁹⁸ Ibid para 63.

⁹⁹ Ibid.

and invalidity when they arise, including determining whether an act of the NPC or NPCSC is inconsistent with the Basic Law.¹⁰⁰

Moreover, the Court found additional strength in support of the jurisdiction over the acts of the Central Authorities. As the Court understood it (and apparently rightly), the Basic Law was enacted to implement China's basic policies regarding Hong Kong, which, as declared and elaborated in the Joint Declaration, were intended to remain unchanged for at least 50 years. Indeed, Article 159(4) of the Basic Law provides that no amendment thereto shall contravene those established basic policies. In light of these circumstances, the Court said that the jurisdiction of the HKSAR courts to enforce and interpret the Basic Law necessarily entails the jurisdiction over acts of the NPC or NPCSC to ensure their consistency with the Basic Law.¹⁰¹

Having stated its position, the CFA went on to expressly overrule the position held by the CA in *Ma Wai Kwan*; it said that the conclusion of the CA as to the jurisdiction of the HKSAR courts 'is wrong'.¹⁰² In the CFA's view, the analogy the CA drew with the old constitutional order was misconceived and was an incorrect interpretation of Article 19 (2) of the Basic Law.¹⁰³ Seeing that the new constitutional order set up by the Basic Law is fundamentally different, the Court said that Article 19 (2) 'cannot bring into the new order restrictions *only relevant to legislation of the United Kingdom Parliament imposed under the old order*',¹⁰⁴ and that 'any limitation on the courts' jurisdiction must be found in the Basic Law itself'.¹⁰⁵ In other words, the restriction on the courts' ability to challenge parliamentary acts was a restriction *only relevant* to the old order where the principle of parliamentary supremacy was applied. As the result of the change of the constitutional order, this restriction was no longer relevant, and was not intended to be maintained in the new order. What Article 19 (2) refers to, the Court pointed out, is the maintenance of such restrictions as illustrated by Article 19 (3), where it is provided that the HKSAR courts shall have no jurisdiction over acts

¹⁰⁰ Ibid para 64.

¹⁰¹ Ibid para 65.

¹⁰² Ibid para 66.

¹⁰³ Ibid para 68.

¹⁰⁴ Ibid para 69. Emphasis added.

¹⁰⁵ Ibid para 72.

of state such as defence and foreign affairs.¹⁰⁶ Another limitation on the HKSAR courts' jurisdiction that is to be found in the Basic Law itself, according to the CFA, is the restriction on the CFA's power to interpret the Basic Law.¹⁰⁷

There is apparently some truth in the CFA's arguments, though not wholly convincing. On further thought, it might be argued that the Court had not really answered the question why the restriction on the previous courts to review the Acts of Parliament should not be maintained in the new constitutional order. A mere claim that the new constitutional order is fundamentally different does not seem to suffice. As was argued in the last subsection, the matter here is not about the analogy, but whether this restriction should be adopted as the law of the HKSAR and thus be maintained by virtue of Article 19 (2) of the Basic Law. And the only test for this purpose is to see whether this particular restriction contravenes the Basic Law. Apparently, the CFA did not address this question in this way. Instead, by assuming, in quite a sweeping way, that Article 19 (2) cannot bring into the new order things only relevant to the old one, the Court could be said to have begged two bigger questions: is there a clear-cut definition as to what things are only relevant to the old constitutional order? And even assuming there is, does it mean that any element brought into existence in Hong Kong that is only relevant to the old constitutional order should not be maintained in the new one?

If this were the case, then there might have been a huge misconception of OCTS, and indeed the maintaining of the common law system itself might be problematic. As a matter of fact, the common law system in Hong Kong was transplanted from the UK; it inherited and shared the same jurisprudence of the English common law.¹⁰⁸ Some common law principles, if not to be understood as rooted in the principle parliamentary supremacy, were at least stamped with its influence.¹⁰⁹ Such common law principles are easy to identify: that international

¹⁰⁶ Ibid.

¹⁰⁷ Ibid. For our discussion on the interpretation of the Basic Law, see Chapter III.

¹⁰⁸ See generally Peter Wesley-Smith, 'The Reception of English Law in Hong Kong' (1988) 18 Hong Kong LJ ; Peter Wesley-Smith, *An Introduction to the Hong Kong Legal System* (3rd edn, OUP 1998).

¹⁰⁹ This might sound a bit sweeping, given the complex and the much disputed (academically) relationship between common law and parliamentary sovereignty. The doctrine of bi-polar sovereignty, for example, will refuse to accept this or similar point. See generally C.J.S. Knight, 'Bi-polar Sovereignty Restated' (2009) 68 Cambridge Law Journal 361-387; C.J.S. Knight, 'Striking down Legislation under Bi-polar Sovereignty' (2011) Jan Public Law 90-114.

treaties are not enforceable by domestic courts unless and until they have been incorporated into domestic law; that statutes are superior to common law; and that in statutory interpretation due deference should be given to legislative intent as the literal rule and the mischief rule so require.¹¹⁰ These common law principles have been part of Hong Kong's jurisprudence and are still being observed.¹¹¹ If these principles that bear the heritage of parliamentary supremacy can be maintained — and indeed they had been maintained, why then could not the restriction on the courts' jurisdiction to review the validity of parliamentary acts be maintained as well? In addition, while Article 19 (2) is clear that the restrictions that shall be maintained are those imposed by *the legal system and principles* previously in force, it does not expressly exclude any restriction imposed by the principle of parliamentary supremacy. Is it not possible that it was meant that even those restrictions imposed by the principle of parliamentary supremacy shall also be maintained, so long as they are not in contravention with the Basic Law? Here, a mere reliance on the change of sovereignty and the change of the fundamental constitutional principles might not be sufficient. The maintaining of the previous systems, including those restrictions on them, is really something that to some extent derogates from the traditional ways of asserting sovereignty. This must be one of the compromises or pragmatism that is inherent in the concept of OCTS. Without such derogation, there might not have been this constitutional arrangement at all.

Apart from this problem with Article 19(2), the CFA's justification of constitutional review based on the supremacy of the Basic Law also seems insufficient. Since there is no express authority in the Basic Law, the justification of constitutional review under the Basic Law requires a fuller exploration of the nature of the Basic Law, of the power given to the judges to interpret the Basic Law, and of the role the judges play (as checks and balances within whole the political structure, of which the judiciary itself is a part). The CFA touched on these issues, but, with great respect, only at unsatisfactory depth and width. The role of the judiciary as checks on the other branches of government, for example, was only assumed

¹¹⁰ It is certainly true that these statutory interpretation rules are themselves judge-made. But students of English legal system are often taught that the basic rules of statutory interpretation, the literal rule for example, 'respects parliamentary sovereignty, giving the courts a restricted role and leaving law-making power to those elected for the job'. See Catherine Elliott and Frances Quinn, *English Legal System* (9th edn, Pearson Longman 2008) 44.

¹¹¹ Wesley-Smith, *An Introduction to the Hong Kong Legal System* 91-93.

but not explained.

Nevertheless, the CFA in *Ng Ka Ling* not only assumed the power of constitutional review, but exercised it. It declared parts of the Category (c) Scheme unconstitutional—to the extent that it required permanent residents of the Region residing in the mainland to get approval from the mainland authorities (as required by Article 22 of the Basic Law) before they could enjoy the constitutional right of abode in Hong Kong.¹¹² In the Court's opinion, 'people from other parts of China' as provided in Article 22 do not include permanent residents of the Region upon whom the Basic Law confers the right of abode in Hong Kong.¹¹³ More surprisingly, the Court not only ruled that part of the Immigration Ordinance unconstitutional, but took the labour to correct it — by expressly laying out how it should be rewritten.¹¹⁴ This gives rise to the question of whether the HKSAR courts, when exercising the power of constitutional review, are interpreting or legislating. This is the question we shall come back to in Chapter VII.

3. The aftermath of *Ng Ka Ling*: the CFA's Clarification and the NPCSC's Interpretation

As far as the establishment of constitutional review in Hong Kong is concerned, the above description of the two cases might have been technically sufficient. But what happened immediately after the *Ng Ka Ling* decision was not only a crucial part of the wider background against which the power of constitutional review in Hong Kong was established, but also, in one way or another, closely relevant to our later discussion in search of the justification and the scope of constitutional review in Hong Kong. It is therefore convenient and necessary that a brief account of its aftermath should be given here.

Public reactions to the CFA's decision in *Ng Ka Ling* were strong. In Hong Kong, the *Ng Ka Ling* decision was generally heralded as a champion for constitutional protection of fundamental rights,¹¹⁵ as a victory for Hong Kong's autonomy, judicial independence and the

¹¹² *Ng Ka Ling* para 119.

¹¹³ *Ibid* para 112.

¹¹⁴ The Court held that the constitutionality issue with the Scheme could be resolved by severing the constitutional part from the unconstitutional part and then revising the unconstitutional part. See *ibid* para 123-130.

¹¹⁵ Johannes Chan, 'Basic Law and Constitutional Review: the First Decade' (2007) 37 Hong Kong LJ 420.

rule of law.¹¹⁶ The CFA was particularly praised and admired for the courage it demonstrated in upholding the cherished values of the common law, and standing up as the guardian of the Basic Law.¹¹⁷

But the Courts' assertions caused a fierce backlash and ultimately intervention from Beijing. In Beijing's view, the Hong Kong courts did not enjoy the power of constitutional review before the changeover because of the doctrine of parliamentary sovereignty, and, by virtue of Article 19 (2) of the Basic Law, the HKSAR courts could not have this power either.¹¹⁸ It was further argued that the only power of constitutional review that the Basic Law did confer was vested in the NPCSC under Articles 17 and 160 of the Basic Law.¹¹⁹ But for Beijing, the most concerning of all was that, by claiming the power to invalidate the acts of the NPC or NPCSC, the CFA had rendered the effect of putting itself above the sovereign,¹²⁰ and in that sense and to that extent, turning Hong Kong into an 'independent political entity'.¹²¹ Moreover, the Court was also criticized for failing to refer Article 22 (4) to the NPCSC for interpretation, because this Article falls within the domain of 'affairs concerning the relationship between the Central Authorities and the Region' under Article 158, according to which, the CFA must refer the question of interpretation to the NPCSC.¹²²

The strong reaction from Beijing led to the HKSAR government taking an unprecedented and unexpected step;¹²³ it applied to the CFA to 'clarify' in particular its statements on the courts' power over the acts of the central authorities. Equally unprecedentedly, though not as unexpectedly given the political circumstances, the CFA accepted the application and made a Clarification which clarified nothing but merely repeated its position by 'rendering explicit

¹¹⁶ Albert H Y Chen, 'The Court of Final Appeal's Ruling in the 'Illegal Migrant's Children Case: A Critical Commentary on the Application of Article 158 of the Basic Law' in Johannes M M Chan, H L Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press 2000) 113.

¹¹⁷ *Ibid.*

¹¹⁸ This view of the mainland legal experts was summarised by Johannes Chan, in Johannes M M Chan, 'Judicial Independence: A Reply to the Comments of the Mainland Legal Experts on the Constitutional Jurisdiction of the Court of Final Appeal' in Johannes M M Chan, H L Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press 2000) 63.

¹¹⁹ *Ibid.* 64. For a more in-depth discussion of Article 17 and 160, see Chapter VII.

¹²⁰ *Ibid.* 66.

¹²¹ Noted in Chen, 'Constitutional adjudication in post-1997 Hong Kong' 635 (footnote 39).

¹²² Chan, 67. For more detailed discussion on the interpretation of the Basic Law see Chapter IV.

¹²³ Chen, 'Constitutional adjudication in post-1997 Hong Kong' 636.

what was implicit in its original judgment'.¹²⁴ In the Clarification, the Court said that its judgment in *Ng Kg Ling* handed down on 29 January 1999

did not question the authority of the Standing Committee to make an interpretation under Article 158 which would have to be followed by the courts of the Region. The Court accepts that it cannot question that authority. Nor did the Court's judgment question, and the Court accepts that it cannot question, the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein.¹²⁵

As Albert Chen observes, the Clarification was so skilfully made that both Beijing and the legal community in Hong Kong could read from it what they desired.¹²⁶ At the political level, the constitutional crisis that had been precipitated by the *Ng Ka Ling* decision seemed to have been resolved. Or as Ghai put it, the Clarification was an act necessary to placate the mainland authorities rather than an exercise in elucidation.¹²⁷ But the story did not end there.

The HKSAR government was not happy with the Court's interpretation of Article 24 (2) (3) and 22 (4) of the Basic Law either. But what it was gravely concerned about was the practical difficulties the implementation of the Court's ruling would bring about. The Chief Executive of the day, Tung Chee-hwa, therefore decided to seek assistance from the Central Government. In his report to the Central Government,¹²⁸ the Chief Executive said that the Court's interpretation of Article 24 (2) (3) and 22 (4) was 'different from' the HKSAR government's understanding of these provisions and that the effect of the Court's interpretation would be to place 'unbearable pressure' on the HKSAR.¹²⁹ More specifically, the Report said that as the result of the Court's ruling, the HKSAR would have to absorb a migrant population from the mainland of 1.67 million in the coming decade, which would create 'enormous pressure on Hong Kong', which in turn would 'have serious and adverse

¹²⁴ Ibid 637.

¹²⁵ *Ng Kg Ling and Another v The Director of Immigration* 1999] HKCFA 72; [1999] 1 HKLRD 315; (1999) 2 HKCFAR 4 para 6.

¹²⁶ Chen, 'Constitutional adjudication in post-1997 Hong Kong' 637.

¹²⁷ Ghai, 'The Intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of Technique or Politics?' 379.

¹²⁸ Report on Seeking Assistance from the Central People's Government in Solving Problems Encountered in the Implementation of the Basic Law of the [HKSAR], 20 May 1999. See www.basiclaw.gov.hk/en/materials/1999_6_26.html, accessed in June 2012.

¹²⁹ Ibid 2.

effect on the stability and prosperity of Hong Kong'.¹³⁰ As the Chief Executive saw it, the issue at stake was 'one of principle' involving the interpretation of the Basic Law as well as the relationship between the HKSAR and the Central Authorities; as such, the HKSAR was 'no longer capable of resolving the problem on its own'.¹³¹ Relying on Articles 43 and 48 (2) of the Basic Law,¹³² the Chief Executive therefore requested assistance from the Central government. He suggested that 'the State Council [of the Central Government] should ask the NPCSC to interpret Articles 22 (4) and 24 (2) (3) of the Basic Law according to the true legislative intent'.¹³³ The Chief Executive admitted this was an exceptional decision which he was 'compelled to take in the face of exceptional circumstances'.¹³⁴

The request for assistance was, not surprisingly, granted shortly, and the NPCSC issued an interpretation on 26 June 1999 (hereafter the 1999 Interpretation).¹³⁵ In this Interpretation, the NPCSC stated that the provisions the Chief Executive requested to be interpreted 'concern affairs which are the responsibility of the Central People's Government and concern the relationship between the Central Authorities and the [HKSAR]'. It therefore criticized the CFA for not having referred the relevant provisions to the NPCSC for interpretation as required by Article 158 of the Basic Law. Moreover, it said, 'the interpretation of the CFA is not consistent with the legislative intent'.¹³⁶ Having stated these, the NPCSC decided to exercise its power under Article 158 of the Basic Law to interpret the two Basic Law provisions. According to the NPCSC's Interpretation, 'people from other parts of China' as prescribed in Article 22(4) of the Basic Law includes 'those persons of Chinese nationality born outside Hong Kong or Hong Kong permanent residents'; they must apply to the relevant mainland authorities for a valid travel document for entry into Hong Kong. In regard to Article 24 (2) (3), the NPCSC said that it covers only those children one or both of whose parents were permanent residents of Hong Kong at the time of their birth. The

¹³⁰ Ibid 4-5.

¹³¹ Ibid 5.

¹³² Article 43 of the Basic Law provides that the Chief Executive shall be the head of the HKSAR and shall represent the Region. Article 48 (2) provides that the Chief Executive shall be responsible for the implementation of this Law and other laws which, in accordance with this Law, apply in the HKSAR.

¹³³ Chief Executive's Seeking Assistance Report 5-6.

¹³⁴ Ibid 5.

¹³⁵ The Interpretation by the NPCSC of Articles 22(4) and 24(2)(3) of the Basic Law of the HKSAR . For an unofficial English version of the Interpretation, see www.basiclaw.gov.hk/en/materials/1999_6_26.html, accessed in June 2012.

¹³⁶ Ibid.

NPCSC then went on to note that the legislative intent of this sub-Article as well as of the whole of Article 24 (2) had 'been reflected' in the Opinion issued by the Preparatory Committee in 1996 (the 1996 Opinion).¹³⁷ In the Interpretation the NPCSC made it clear that this Interpretation did not affect the right of abode which the parties to the *Ng Ka Ling* decision had acquired under the CFA's judgment. However, the NPCSC instructed the HKSAR courts to 'adhere to' this Interpretation should they have to refer to the relevant provisions in latter adjudication.¹³⁸

For our purpose, it should be noted in particular that although the NPCSC expressly overruled the CFA's interpretation of the two Basic Law Articles, it said nothing in the Interpretation as to whether the HKSAR courts have the power of constitutional review, especially whether they can review the acts of the NPC or NPCSC and declare them invalid if found inconsistent with the Basic Law.

Both the Chief Executive's decision to seek assistance from the Central Government and the NPCSC's Interpretation were ill-received in the Hong Kong community, the legal profession in particular. In the critics' view, the rule of law and the autonomy of the Region had consequently been undermined. But the HKSAR government and the central authorities lauded it for strengthening the rule of law and OCTS.¹³⁹ In Ghai's assessment, this development has made an 'unquestionable' shift in the parameters of Hong Kong's legal system and the balance of power within the HKSAR as well as between Hong Kong and the mainland.¹⁴⁰ To what extent this assessment is true, however, is debatable. But while the NPCSC certainly has the power to interpret the Basic Law, whether the Chief Executive has the power to apply for an NPCSC interpretation is indeed questionable. This and other things concerning the interpretation of the Basic Law will be discussed in Chapter IV. For now, it suffices to note that the power of constitutional review in Hong Kong, as revealed by the aftermath of the *Ng Ka Ling* case, though assuming it can be justified on the basis of the

¹³⁷ The Opinion mentioned here is the Opinions on the Implementation of Article 24(2) of the Basic Law of the HKSAR, adopted by the Preparatory Committee on 10 August 1996. In a later case, which will be discussed in Chapter IV, the CFA re-interpreted this part of the NPCSC's interpretation as not binding as if it were common law obiter dictum.

¹³⁸ The 1990 Interpretation.

¹³⁹ Yash Ghai, 'The NPC Interpretation and Its Consequences' in Johannes M M Chan, H L Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press 2000) 199.

¹⁴⁰ *Ibid* 199.

supremacy of the Basic Law, may turn out to be a handicapped one, given the CFA's handicapped position in the interpretation of the Basic Law. Its justification might not be found, nor its scope be ascertained, by merely referring to the Hong Kong's common law system.

Conclusion

It has been suggested that the power of constitutional review by the Hong Kong courts has almost been taken for granted,¹⁴¹ or that the courts' exercise of this power 'goes to the root of the common law'.¹⁴² Quite to the contrary, in the long pre-handover history, the Hong Kong judges had long been, to borrow Anthony King's words, dogs that did not bark.¹⁴³ Under the colonial constitutional framework, which was ultimately anchored in parliamentary sovereignty at Westminster, judicial review of imperial legislation by colonial courts was utterly out of the question. As far as legislation by the colonial legislature was concerned, it seems that the colonial courts should have the power to declare any such legislation ultra vires, thence invalid. The Colonial Laws Validity Act 1865, for example, had provided clear mandate for such an exercise. But, as Miner had concluded, the Hong Kong courts in the long colonial history had rarely been called upon to examine the validity of ordinances passed by the Legislative Council; nor had they ever found it necessary to strike down any such legislation. This could only be explained by reference to the discrepancy between theory and practice. In real politics, given the colonial political system was a governor-dictatorship one, a powerful judiciary to scrutinize the legislature (which was actually the Governor himself) simply did not fit. The enactment of the Bill of Rights in 1991 made the turn of history. With the new interpretative power granted by the Bill of Rights, the Hong Kong judges had the first taste of substantive judicial review of legislation. Yet, the jurisprudence of section 3 of the BORO was constitutional review in substance but not in name, whereas the inherent difficulty with section 4 of the BORO would suggest constitutional review in name but not in fact. Thus, the pre-handover experience of constitutional review, although in a way substantive, was not in any sense fully and firmly

¹⁴¹ Chan, 'Basic Law and Constitutional Review: The First Decade' 410.

¹⁴² Yash Ghai, 'Litigating the Basic Law: Jurisdiction, Interpretation and Procedure' in Johannes MM Chan, H.L. Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (2000) 14.

¹⁴³ See our discussion in Chapter I, 48.

established. It was, most truly, a warming-up exercise, with an eye looking beyond 1997.

In the post-handover era, the decision in *Ma Wai Kwun* by the CA had seemingly affirmed the power to review the constitutionality of local legislation vis-à-vis the Basic Law, but declined the same jurisdiction over national laws, or for that matter, the acts of the NPC or NPCSC. Given the disputes over *Ma Wai Kwun* as well as the fact that it was not a decision by the supreme court of the Region, it seems that the real *Marbury v Madison* moment in Hong Kong was the CFA's decision in *Ng Ka Ling*, where the CFA not only asserted but also exercised the power of constitutional review.¹⁴⁴ However, it should be noted that while the CFA confidently stated that the HKSAR courts *undoubtedly* have the jurisdiction of constitutional review over local legislation and executive acts, it was not that sure and firm when it came to the jurisdiction over the acts of the NPC or NPCSC. Yet, it took the opportunity to state it unequivocally that the courts do have this jurisdiction. In many a sense, *Ng Ka Ling* was a fresh start in Hong Kong's constitutional history. However, the CFA in *Ng Ka Ling* did not seem to have offered a convincing justification for the practice of constitutional review, nor did it articulate the possible scope of this awesome power.

And the aftermath of the *Ng Ka Ling* decision shows that there are more complicated things other than the straightforward logic premised on the supremacy of the Basic Law to be explored so as to reveal the justification and the scope of constitutional review in Hong Kong under the OCTS framework. Indeed, it is possible to argue that, as far as 'two systems' are bridged together under 'one country', constitutional review in Hong Kong is not merely a matter within Hong Kong's own legal system, but also a matter that involves the operation of the legal or constitutional system in the mainland. In other words, it is an inter-jurisdictional issue, which has to be ultimately justified not only from the independence of Hong Kong's own legal system, but also from its connection with the mainland constitutional order. This is indeed a unique question to which there is no ready answer from any other jurisdictions; Hong Kong has to find its own solution, in its own case.

¹⁴⁴ Albert Chen thinks that *Ma Wai Kwan* is Hong Kong's *Marbury v Madison* because it paved the way for subsequent decisions by the Hong Kong courts to exercise to power of constitutional review. See Chen, 'Constitutional adjudication in post-1997 Hong Kong' 634.

The remaining part of the thesis is going to be devoted, on the one hand, to searching for the justification of constitutional review in Hong Kong's present time — under the unique constitutional order of OCTS, and on the other, to identifying its scope. The two issues are in many ways intertwined. An inquiry into each of them necessarily involves an examination of the nature of the Basic Law, the interpretation of the Basic Law, the checks and balances built into the political structure of the HKSAR and the constitutional role of the judiciary in the working of the OCTS machinery. It is convenient that we shall look at the nature of the Basic Law first.

Chapter III

The Nature of the Basic Law

Introduction

It has been demonstrated in the last Chapter that constitutional review in Hong Kong cannot be taken for granted; it was established as a fresh start as Hong Kong entered a new constitutional era after 1997. In a fundamental way, this development was more of a break from the English common law tradition which Hong Kong inherited than a natural evolution of it. If the judges had not been prepared to speak for the Basic Law, it might not have existed at all. However, nowhere in the text of the Basic Law is to be found the express grant of this authority. The power of constitutional review therefore needs to be justified; and if justified, its scope needs to be identified. The ultimate test for this is perhaps to see whether the existence and exercise of this judicial power is in harmony with the overall purpose as well as the comprehensive functioning of OCTS.

As discussed in the last Chapter, the CFA in *Ng Ka Ling* adopted the *Marbury v Madison* line of reasoning to justify the establishment of constitutional review in Hong Kong. The major premise on which this line of reasoning rests is the assertion that the Basic Law is the constitution of Hong Kong, a status therefore suggests that any law in conflict with it should be void and null. But is the Basic Law the constitution of Hong Kong? Such a question might sound somewhat awkward at first blush. No one would sensibly question Marshall if the legal instrument on which he had relied to examine the validity of a Congress act were the Constitution of the United States. However, this otherwise unimaginable question is apparently the first thing we have to deal with if we are to justify constitutional review in Hong Kong, for there have been conflicting conceptions of the Basic Law. This is the question we are going to deal with in this Chapter. Section 1 will discuss the two conflicting conceptions of the Basic Law. Section 2 goes on to describe the form and substance of the Basic Law. Section 3 examines in particular the arguments against taking the Basic Law itself as the constitution of Hong Kong. In section 4, it will be argued that the Basic Law is not a self-contained instrument but has to be read with the Chinese Constitution. In other words,

the Basic Law alone is not the constitution of Hong Kong; it is the Basic Law, read as what might be termed as 'the Chinese Constitution in Hong Kong', that is the true constitution of the HKSAR.

1. Conflicting conceptions of the Basic Law

There have always been two conflicting conceptions of the constitutional status of the Basic Law, each holding its prevalence on one side of the border between Hong Kong and the mainland. One conception sees the Basic Law as the constitution of Hong Kong, though at the same time accepts that it is also a piece of China's national law. The other sees it essentially as a national law; it refuses to take the Basic Law as the constitution of Hong Kong, but accepts that the Basic Law is a constitutional instrument which is different from other ordinary national laws.

The Hong Kong community in general and the legal sector in particular, tend to take the Basic Law as the constitution of Hong Kong.¹ Many commentators, however, often make this claim in such a sweeping way as if it is something that goes without saying.² In his seminal work on the new constitutional order in Hong Kong, Ghai spends quite a lot of space on discussing *the nature of the regime set up under the Basic Law* rather than the nature of the Basic Law itself.³ Arguably, there may well exist some subtle difference between the Basic Law and the regime it sets up, inasmuch as there exists a difference between the dancer and the dance. For strictly speaking, the Basic Law is a legal instrument, whereas the regime set up by the Basic Law is the political structure prescribed by the Basic Law; that is, a framework according to which the HKSAR is established and is expected to operate. Ghai is apparently aware of this subtle distinction, for he realizes that there are some people who tend to 'regard the Basic Law as an ordinary statute and the regime as an administrative delegation of limited authority'.⁴ But his main concern is about the scope of autonomy the

¹ See generally Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong*, vol II (China and Hong Kong Law Studies 1987), Peter Wesley-Smith, 'The SAR Constitution: Law or Politics?' (1997) 27 Hong Kong LJ and Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd edn, Hong Kong University Press 1999).

² In academic works on the Basic Law, the claim that that the Basic Law is the constitution of Hong Kong is often found. But commentators seldom question whether this is the appropriate way to perceive the Basic Law.

³ Ghai, Chapter Four, 'Sovereignty and Autonomy: The Framework of the Basic Law'.

⁴ Ibid 137.

HKSAR is guaranteed to enjoy according to the Basic Law rather than the constitutional status the Basic Law enjoys. As shall be seen later on in section 3, many a difficulty that Ghai notices with the Basic Law regime might well be better appreciated if one gets, first of all, a grasp on the nature of the Basic Law itself.

Very often, the Basic Law is also referred to, by men in the street and scholars in the academia alike, as a 'semi-constitution',⁵ the meaning of which seems to have been taken for granted. Though without a definition, the 'semi-constitution' perception seems to have qualified the position which takes the Basic Law as the constitution of Hong Kong, for the prefix 'semi-' (which the Longman Dictionary of Contemporary English defines as meaning 'exactly half; partially but not completely') apparently carries with it the implication that there is something lacking that makes it inappropriate to call the Basic Law a constitution in its full sense. In Ghai's view, what one can infer from the prefix is the indication that the Basic Law is subject to the PRC constitution.⁶

In Wesley-Smith's view, the Basic Law is undoubtedly a constitution because it sets out a binding framework for the establishment and operation of the HKSAR government.⁷ For Wesley-Smith, since all sorts of non-state entities (from the UK's NHS to a constituent state in a federal system like that of the US) have their constitutions, there is nothing inappropriate for Hong Kong, though a non-state and dependent polity under OCTS, to have its own constitution.⁸ In his view, any controversy on whether the Basic Law can be seen as the constitution of Hong Kong is a mere matter of terminology, which would not matter at all, only if to label it otherwise is to reduce or deny its legal effect on the central authorities.⁹ This pragmatic approach can easily remind his readers of Shakespeare's observation of the rose: a rose called otherwise would smell just as sweet.¹⁰ But of course, matters concerning name (or form) and substance in constitutional law discourse may not be dismissed as romantically. A legal instrument labelled otherwise than as a constitution might not 'smell

⁵ Ibid.

⁶ Ibid.

⁷ Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* 68.

⁸ Ibid.

⁹ Ibid.

¹⁰ Jonathan Bate and Eric Rasmussen (ed), *Romeo and Juliet by William Shakespeare* (Palgrave Macmillan 2009) scene II.

just as sweet’—it might not have the same effect, symbolically for sure and substantively possibly, if it were to be treated as an ordinary law rather than a constitutional instrument. Bagehot’s discovery that there are ‘dignified parts’ and ‘efficient parts’ of the English constitution shows that the constitution not only works in substance, but also in name or in form—the dignified parts ‘excite and preserve the reverence of the population’, while in fact it is the ‘efficient parts’ that ‘works and rules’.¹¹ The Basic law would certainly be placed on a more dignified position and consequently could be more capable of, to paraphrase Bagehot, exciting and preserving the reverence of the population of Hong Kong, if it can be labelled as the constitution of Hong Kong. On the other hand, whether or not the Basic Law can be taken as the constitution of Hong Kong might also have deeper implications to the understanding of the constitutional status of the HKSAR within the PRC. Indeed, this is not a mere matter of terminology, but a matter of significant constitutional implications.

That is probably one of the main reasons why many mainland scholars, including those who were drafters of the Basic Law, have consistently refused to take the Basic Law as the constitution of Hong Kong. A most representative view is that the Basic Law is just an ordinary law enacted pursuant to the PRC Constitution; as such, it cannot be in and of itself a constitution.¹² One of the mainland leading scholars on the Basic Law, Xiao, expressly denies any appropriateness in calling the Basic Law a constitution; neither does he think it appropriate to call it a semi-constitution. In his view, both are wrong perceptions of the Basic Law, for the HKSAR is not a country, but an administrative region of the PRC, and as such it simply cannot have its own constitution.¹³ For Xiao, the Basic Law is simply a basic law¹⁴ which enjoys equal legal status as other basic laws enacted pursuant to the PRC constitution.¹⁵ However, Xiao admits that the Basic Law is different from other basic laws in that it embodies the OCTS policies and accordingly delineates powers between the central

¹¹ Walter Bagehot, *The English Constitution* (OUP 2001) 44.

¹² 张友渔 Zhang Youyu, 'Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and Its Essential Contents and Mode of Expression' (1988) 2 *Journal of Chinese Law* (中国法学) 7.

¹³ 肖蔚云 Weiyun Xiao, *一国两制与香港特别行政区基本法 One Country Two Systems and the Basic Law of the Hong Kong Special Administrative Region* (香港文化教育出版社有限公司 Educational and Cultural Press Ltd. 1990) 78.

¹⁴ As Xiao explains, under the Chinese constitution, laws enacted by the NPC pursuant to the constitution are generally regarded as basic laws, while legislation made by the NPCSC is regarded simply as law. *Ibid.*

¹⁵ *Ibid.* 73.

authorities and the HKSAR.¹⁶

The HKSAR courts' position, as expressly stated in both *Ma Wai Kwan* and *Ng Ka Ling*, is that the Basic Law is the constitution of Hong Kong as well as a national law of the PRC.¹⁷ But judicial articulation on why the Basic Law can be taken as the constitution of Hong Kong seems lacking. In *Ma Wai Kwan*, for example, the Chief Judge explained his perception of the nature of the Basic Law only by looking at its general purpose:

It translates the basic policies enshrined in the Joint Declaration into more practical terms. The essence of these policies is that the current social, economic and legal systems in Hong Kong will remain unchanged for 50 years. The purpose of the Basic Law is to ensure that these basic policies are implemented and that there can be continued stability and prosperity for the HKSAR. Continuity after the change of sovereignty is therefore of vital importance.¹⁸

The CFA in *Ng Ka Ling* did not offer further explanation either. Rather, it stated straightforwardly that

The Basic Law of the [HKSAR] was enacted pursuant to Article 31. It was adopted by the [NPC] and was promulgated on 4 April 1990. It became the constitution of the [HKSAR] upon its establishment on 1 July 1997 when China resumed the exercise of sovereignty over Hong Kong.¹⁹

Although the courts generally accept that there is a duality of the status of the Basic Law—that is, the constitution of the HKSAR on the one hand, and a PRC national law on the other, judicial approach to the interpretation of the Basic Law, in particular that adopted by the CFA (as shall be seen in the next Chapter), has been purely constitutional. In fact, the CFA's assertion of the power of constitutional review is solely based on its position that the Basic Law is the constitution of Hong Kong. What bearings the character of the Basic Law being a PRC national law might have on the interpretation of the Basic Law as well as on the scope of constitutional review vis-à-vis the Basic Law has seldom been considered.

¹⁶ Ibid.

¹⁷ *HKSAR v Ma Wai Kwan and Others* [1997] HKCA 652; [1997] HKLRD 761 para. 13; *Ng Kg Ling and Another v The Director of Immigration* 1999] HKCFA 72; [1999] 1 HKLRD 315; (1999) 2 HKCFAR 4 para 63.

¹⁸ *Ma Wai Kwan* para 13.

¹⁹ *Ng Kg Ling* para 10.

From the abovementioned different and conflicting perceptions of the Basic Law, it can be submitted that the question of whether or not the Basic Law can be taken as the constitution of Hong Kong may go to the core of how OCTS should be understood in theory and how it is expected to work in practice. To define the constitutional status of the Basic Law is therefore a matter of defining the scope of powers that the HKSAR enjoys and its relationship with the central authorities. The workability and proper functioning of the new constitutional order depend by a large measure on how these two essential aspects of the Basic Law regime are to be properly defined.

But before proceeding to examine this question, it may be necessary to ask the general yet basic question: what is a constitution? There does not seem to be a well-established and concise definition of what a constitution is. However, at a highly general level, it can be said that all constitutions are about government. They all deal with these constitutive matters as to what a government a country has and how the government is expected to govern. Constitutions are often differentiated between written and unwritten constitutions, depending on whether there is a single codified instrument expressly titled as 'the Constitution'. In the case of a written constitution, the constitution is the legal instrument which sets out the fundamental and superior principles and values of a nation. It usually not only describes the institutions of the state, but also allocates power amongst them by laying down a number of basic rules which determine the relationship between them.²⁰ As has been concluded, modern constitutions sprang from the belief in limited government.²¹ And for this reason, it is a usual practice that a written constitution places limits on the exercise of government power and sets out the rights and duties of individual citizens. It is also a common phenomenon that a written constitution is given a higher status in the nation's legal system.²² Kelsen, for example, defines the constitution as the supreme law of the state, which, he recognizes as a hierarchy of laws.²³ The supreme status of the constitution is ensured by a procedure imbedded in the constitution itself which makes it more difficult to

²⁰ See generally S E Finer (ed), *Five Constitutions* (Harvester 1979).

²¹ K C Wheare, *Modern Constitutions* (OUP 1962) 10.

²² *Ibid.*

²³ For Kelsen's definition of a constitution, see our discussion in Chapter I.

amend it. This is known as the entrenched effect.²⁴ In short, a written constitution is a higher law, or the fundamental law; it is different from ordinary laws in both substance and status. If laws are inevitably intertwined with politics, a constitution is apparently even more so.²⁵

This definition, though still a broad one, is nevertheless a narrower one than the common usage of the word of constitution (in the way as Wesley-Smith seems to have used) which includes, for example, the institutional constitutions of a club, a political party, or a trade union. Such common usage of the word is perhaps better to be avoided in constitutional discourse, for they blur rather than help to clarify what a constitution is and what it is for.

In light of these understandings and keeping in mind the abovementioned conflicting conceptions of the Basic Law, we shall now examine whether the Basic Law is or can be taken as the constitution of Hong Kong.

2. The form and substance of the Basic Law

At first glance, the Basic Law does look like a constitution. It apparently has all the features that a constitution commonly bears. Even Xiao, who expressly refuses to take the Basic Law as a constitution, admits that the overall structure of the Basic Law takes the form of a constitution.²⁶ The Basic Law has a Preamble, 9 Chapters (all together 160 articles) and 3 Annexes. This general layout alone might not tell much. A brief look at the substance that is fit into this layout is therefore necessary, if the constitutional characteristics of the Basic Law are to be revealed.

The Basic Law starts with a preamble—which is obviously often seen only in a written constitution, wherein the historical background of the Hong Kong question, the basic policies China has adopted towards Hong Kong, which are summed up as OCTS, as well as the constitutional basis for and the objective of the enactment of the Basic Law are

²⁴ See generally Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Larry Alexander (ed), *Constitutionalism, Philosophical Foundations* (CUP 1998).

²⁵ For a study of the American constitution as both law and politics, see generally Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton University Press 1996); Martin Shapiro, *Law and Politics in the Supreme Court* (Collier-Macmillan Limited 1964).

²⁶ Xiao78.

prescribed, though in the briefest possible way. It is stated in the Preamble that China's decision to resume the exercise of sovereignty over Hong Kong is for the sake of 'upholding national unity and territorial integrity' as well as 'maintaining the prosperity and stability of Hong Kong',²⁷ and that the Basic Law is enacted 'in accordance with' the PRC Constitution, 'in order to ensure the implementation of the basic policies of the People's Republic of China regarding Hong Kong'.²⁸ Compared to the lengthy and much more ideological-oriented Preamble to the PRC constitution,²⁹ the Preamble to the Basic Law is much shorter, though perhaps equally ideologically sensitive — in that it states expressly that the socialist system and policies will not be practised in Hong Kong. As is known, the American Constitution also begins with a Preamble, wherein it is stated that it is 'We the people' who 'do ordain and establish this Constitution' and that the purpose of making the constitution is 'in order to form a more perfect union' and inter alia, to 'secure the blessings of liberty to ourselves and our posterity'. These words are very likely to sound more pleasant to the ears of common human beings than the political slogans as seen in, for example, the Preamble of the PRC constitution. Nevertheless, the functional purpose of a preamble, i.e., for stating the legitimacy and the purpose of making the enactment, is very much the same, either with the Basic Law, the PRC constitution or the American constitution. The fact that the Basic Law has such a preamble already shows that it is in a markedly way different from ordinary legislation.

Chapter 1 of the Basic Law prescribes the general principles that govern the establishment and the operation of the HKSAR. These principles are the transfiguration of the major policies of OCTS, i.e. 'a high degree of autonomy', 'Hong Kong people ruling Hong Kong' and the maintaining of the capitalist system. Thus, it is provided, at the very beginning, that the

²⁷ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Preamble para 2.

²⁸ Ibid, Preamble para 3.

²⁹ For example the Preamble to the Chinese Constitution contains such highly politicized prescriptions: 'Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of the 'Three Represents', the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship, follow the socialist road, steadily improve socialist institutions, develop socialist democracy, improve the socialist legal system and work hard and self-reliantly to modernize industry, agriculture, national defence and science and technology step by step to turn China into a socialist country with a high level of culture and democracy. The last of on the ideology list—the important thought of 'Three Presents' was added to the Preamble when the Constitution was amended in 2004. It was advocated by Jiang Zeming, who succeeded Deng; it means that the Chinese Communist Party should always represent the development needs of China's advancing productivity, represent the onward direction of China's advancing culture, and represent the fundamental interests of the biggest majority of Chinese people.

HKSAR is an *inalienable* part of the PRC,³⁰ thus making clear the principle of ‘one country’. This is immediately followed by the provision that the NPC *authorizes* the HKSAR ‘to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law’,³¹ thus guaranteeing a high degree of autonomy. The maintaining of another system as different from that in the mainland is ensured by prescribing: (1) that the socialist system and policies shall not be practised in the HKSAR, and the previous capitalist system and way of life in Hong Kong shall remain unchanged for 50 years;³² and (2) that the laws previously in force in Hong Kong, including the common law, shall be maintained.³³ The principle of Hong Kong people ruling Hong Kong is ensured by prescribing that the executive authorities and legislature of the HKSAR shall be composed of permanent residents of Hong Kong.³⁴ As a general principle, it is also provided that the HKSAR shall safeguard the rights and freedoms of its residents as well as of other persons in the Region.³⁵ Moreover, to further embody HKSAR’s distinctive status within the PRC, it is provided that the HKSAR, apart from displaying the national flag and national emblem, may also use a regional flag and regional emblem.³⁶

Based upon these principles, the Basic Law then goes on to stipulate in subsequent chapters: (1) the relationship between the Central Authorities and the HKSAR,³⁷ (2) the fundamental rights and duties of the residents,³⁸ (3) the political structure of the HKSAR,³⁹ (4) economy,⁴⁰ (5) education, science, culture, sports, religion, labour and social services,⁴¹ (6) external affairs,⁴² (7) the interpretation and amendment of the Basic Law.⁴³ The last chapter of the Basic Law is clearly only for transition purpose; it consists of only one article whereby it is provided that upon the establishment of the HKSAR the laws previously in force in Hong

³⁰ Basic Law, Art 1. Emphasis added.

³¹ Ibid Art 2. Emphasis added.

³² Ibid Art 5.

³³ Ibid Art 8.

³⁴ Ibid Art 3.

³⁵ Ibid Art 4.

³⁶ Ibid Art 10.

³⁷ Ibid Chapter II.

³⁸ Ibid Chapter III.

³⁹ Ibid Chapter IV.

⁴⁰ Ibid Chapter V.

⁴¹ Ibid Chapter VI.

⁴² Ibid Chapter VII.

⁴³ Ibid Chapter VIII.

Kong shall, subject to certain conditions, be adopted as laws of the HKSAR and that documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the HKSAR, provided that they do not contravene the Basic Law.⁴⁴

It may not be necessary to go through in more detail the provisions in those chapters of the Basic Law. Looking at the above brief accounts and recalling the Preamble and the general principles, students of constitutional law might already get the impression that the Basic Law is undoubtedly all about government, though mainly about the HKSAR government; it delineates powers between the HKSAR and the central authorities; it also lays down rules according to which the intra-governmental relationship and the state-citizen relationship within the HKSAR are to be regulated. In this regard, one can hardly disagree with Wesley-Smith that the Basic Law is indeed a constitution in that 'it sets out a binding framework' for government in HKSAR.⁴⁵

However, two specific provisions of the Basic Law have to be mentioned, because they reveal in a more technical way the constitutional characteristics of the Basic Law. One is the supremacy clause contained in Article 11 (2) which reads:

No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law.

Apparently, the wielding of supremacy is a fundamental function that can normally be given to and carried out by a constitution. If the making of the Basic Law, to use Cappelletti's word, positivizes the policies of OCTS, then by virtue of Article 11 (2), this positivization is a making of a higher law. Thus, one thing is for sure: at least within the HKSAR, the Basic Law is the supreme or the fundamental law.

The other provision is Article 159 which stipulates the power to amend the Basic Law and the procedure according to which amendments can be made. According to Article 159, the

⁴⁴ Ibid Art 160.

⁴⁵ Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (China & Hong Kong Law Studies 1995) 68.

power of amendment belongs to the NPC. But the NPCSC, the State Council and the HKSAR are the three organs that have the power to propose an amendment. The procedure as to how the NPCSC or the State Council may propose an amendment is missing. As far as the HKSAR is concerned, if it wants to propose an amendment, it has to follow this procedure:

Amendment bills from the [HKSAR] shall 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 Chief Executive of the Region.

For any amendment bill, either proposed by the NPCSC or the State Council, or the HKSAR, the Basic Law Committee (BLC)⁴⁶ must be consulted before it can be put on the agenda of the NPC. But again, the procedure according to which the NPC will exercise the power of amendment is lacking in Article 159.

However, as a general principle governing the amending of the Basic Law, it is provided in Article 159 that

No amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong.

Thus, despite any defect in Article 159 (especially as the procedure of amendment is concerned), the legal effect is that the Basic Law is entrenched. This is obvious because there are not only substantive but also procedural limits which make it more difficult to amend the Basic Law. For those mainland scholars who refuse to take the Basic Law as a constitution, their position cannot be convincingly defended without explaining this entrenched effect, and of course, the supremacy clause as well. As mainland scholars all know, no ordinary law in China needs to go through such strict procedures to get repealed or amended.⁴⁷

⁴⁶ The BLC was established as a working committee under the NPCSC; it is composed of twelve members, six from the mainland and six from Hong Kong. The task of the BLC is to study questions arising from the implementation of Articles 17, 18, 158 of the Basic Law and to submit its views thereupon to the NPCSC. See Decision of the NPC Approving the Proposal by the Drafting Committee for the Basic Law of the HKSAR on the Establishment of the BLC under the NPCSC, adopted on 4 April 1990.

⁴⁷ Under the Chinese Constitution, the NPCSC has the power to make or amend all laws except those should be made or amended by the NPC (Art. 67). The NPCSC's rules of procedure provide that motions and bills shall be

From the form and substance of the Basic Law so far discussed, it seems rather obvious that the Basic Law does carry with it most characteristics of a modern constitution. This said, however, it may still be too soon to conclude that it is the constitution of Hong Kong. The form and the substance alone may turn out to be insufficient. There is another and perhaps the more fundamental question to be answered: can Hong Kong, itself being an inalienable part of China which is a unitary state, have its own constitution?

3. The unitary and federal arguments

Indeed, the very reason to question the Basic Law as the constitution of Hong Kong, as is argued by many mainland legal experts, is the conventional doctrine that a non-state entity in a unitary country does not have its own constitution. This is because, unlike a constituent unit in a federal system, a non-state entity is not in itself sovereign, whereas a constituent unit in a federation was a sovereign state before the union and retains part of its sovereignty thereafter. Accordingly, Hong Kong, being part of China, cannot and is not allowed to have a constitution of its own, simply because China is, as is proclaimed in its Constitution, a unitary country.⁴⁸ However, this position may be open to challenge from two fronts. First, people like Wesley-Smith who holds the common usage of the word 'constitution' would doubt if this conventional understanding still holds good in modern constitutional theory. Secondly, it might be argued, (in fact it was argued during the drafting of the Basic Law), that the adoption of OTCS could have changed China from a unitary system into a federal or quasi-federal one⁴⁹ and consequently made it possible for Hong Kong to have its own constitution, just as, for example, the member states in the US having theirs. We shall discuss these two possible challenges in turn.

3.1 Can a non-state entity have its own constitution?

If the definition of a constitution is confined, as mentioned at the end of last section, to the

passed by bare majority. (Art 30).

⁴⁸ The Preamble of the PRC Constitution provides that the PRC is 'a unitary multi-national state'.

⁴⁹ 肖蔚云 Weiyun Xiao, *一国两制与香港特别行政区基本法 One Country, Two Systems and the Hong Kong Basic Legal System* (北京大学出版社 Beijing University Press 1990)125-126.

fundamental law of a nation, it seems that the conventional understanding that a non-state entity may not have a constitution of its own still stands. By 'non-state', it means that the entity, whatever it might be referred to, is not independent and therefore not in itself sovereign. The definition of sovereignty, as advocated by Blackstone as meaning that '[t]here is and must be in every state a supreme, irresistible, absolute and uncontrolled authority, in which the right of sovereignty resides,'⁵⁰ is, for many modern commentators, out of date. Views have also been expressed that sovereignty is neither necessary to the existence of law and state, nor even desirable.⁵¹ Still, it is argued that the idea of sovereignty is so utterly incompatible with modern constitutional democracy that, if we take it seriously, we cannot have constitutional law, and that it is a mistake of some kind of absent-mindedness to speak of law and constitution in relation to sovereignty.⁵²

But one thing the history of modern constitutions clearly shows is that state sovereignty (expressed first and foremost in the form of state independence) is the necessary, if not the sufficient, pre-condition of making a constitution. We may look at two episodes to illustrate this point.

One is the first wave of constitution making in human history which took place in the late 18th and early 19th centuries. That was a time when many new states were created and the old ones reorganized their political structure. New states were created as the result of former colonies breaking their sovereign ties with the imperial regimes. Thus, the American Revolution led to the independence of the 13 former British colonies, which, upon the newly gained independence, made their own constitutions (Charters). Later, driven by the need for stronger common defence and better common welfare, the newly independent states sought to form a more perfect union. The federal Constitution was therefore made, giving birth to a new sovereign country—the United States.⁵³ The American example was widely

⁵⁰ William Blackstone, *Commentaries on the Laws of England*, vol 1 (An edition of the 9th edition (1783) edn, Cavendish) Chapter 7.

⁵¹ Neil MacCormick, *Questioning sovereignty : law, state, and nation in the European Commonwealth* (OUP 1999) 129.

⁵² Pavios Eleftheriadis, 'Law and Sovereignty' (2010) 29 *Law & Philosophy* 538.

⁵³ There is an abundance of literature on the history of the American Constitution making, an excellent one is Andrew C McLaughlin, *A constitutional history of the United States* (D. Appleton-Century Company 1935). But for the point made here, see in particular Carl J. Friedrich and Robert G. McCloskey (eds), *From the Declaration of independence to the Constitution : the roots of American constitutionalism* (Liberal Arts Press

followed.⁵⁴ Constitutions were produced in Latin America after the independence movement claimed victory in the formal Spanish or Portuguese colonies and later in Asia and in Africa as the result of the decolonization process.⁵⁵ For all these new-born states, sovereignty (independence) is clearly the precondition for making a constitution; that precondition is a matter of political fact, rather than a matter of law.

The other is the constitution-making in the case of some other former British colonies, which were often referred to as Dominions. The constitutions of such former British colonies as South Africa, Ceylon, Australia, New Zealand and Canada were, in the first place, given or imposed by Westminster Parliament rather than home-made.⁵⁶ Yet, it can hardly be taken as anything but a truth that the enacting of such a constitution was a de facto withdrawal of sovereign control by the Imperial Empire, and a full independent status established on the side of the colony concerned. Indeed as one English commentator notes, as the result of the early revolution against colonization, 'the relationship between Britain and its colonies may be characterized as the movement from full British sovereignty over the territories through to increasing self-government and independence'.⁵⁷ Therefore, although the waiving of sovereignty by the imperial power was effectuated via a Westminster legal measure, the territory's reception of an independent status was in most cases celebrated in the colony as a political victory—a political turn which in their eyes was irreversible once it had started. As the Supreme Court of South Africa proudly declared, 'freedom once conferred cannot be revoked'.⁵⁸ The Statute of Westminster Act 1931 claims to maintain Parliament's power to legislate for the Dominions.⁵⁹ But as Lord Sankey said, 'that is theory and has no relation to realities'.⁶⁰

1954), and Lawrence M Friedman and Harry N. Scheiber (eds), *American law and the constitutional order : historical perspectives* (Harvard University Press 1978).

⁵⁴ Wheare 14.

⁵⁵ See generally George Athan Billias, *American constitutionalism abroad: selected essays in comparative constitutional history* (Greenwood Press 1990); Lawrence Ward Beer, *Constitutionalism in Asia: Asian Views of the American Influence* (University of California Press 1979).

⁵⁶ In any major work on British Constitutional law, in particular in the part discussing parliamentary sovereignty, this is certainly mentioned as a matter of historical fact, though at various depth or width. But Jennings' explanation on this aspect is certainly very clear. See Sir Ivor Jennings, *Constitutional Law of the Commonwealth* (Clarendon Press 1957).

⁵⁷ Hilaire Barnett, *Constitutional & administrative Law* (8th edn, Routledge 2011) 20.

⁵⁸ *Ndlwana v Hofmeyr* 1937 AD 229, 237.

⁵⁹ The Statute of Westminster Act 1931. Section 4 provides that the United Kingdom Parliament shall not legislate for a Dominion without the request and consent of that Dominion.

⁶⁰ *British Coal Corporation v R* [1935] AC 500, 520. For an authoritative discussion of the Statute and dominion

If we return from history back to the present day, the status quo in the UK might offer a good case to examine the question of whether a non-state part in a unitary country has its own constitution. The UK, as is generally known, is a unitary country, which consists four distinctive parts—two of which used to be sovereign countries: England and Scotland. The fundamental law of the United Kingdom (as it is now) is of course the British Constitution embedded in the principle of parliamentary sovereignty. The Queen in Parliament (at Westminster) is the sovereign. This being the case, then the question to be asked is: is there also, say, a Scottish Constitution? It would not be surprising at all if someone stands up and begins to talk of ‘the Scottish Constitution’ as if there were one. But it might be a bit surprising that no major work on *British* constitutional law seems to have ever used that phraseology. The Act of Union 1707, which brought Scotland into the United Kingdom, and the Scotland Act 1998 which devolves power from Parliament at Westminster to the Scottish Parliament at Holyrood, are certainly of great constitutional significance. But they are apparently parts of the whole British Constitution. As such, does it make sense or is it appropriate to call them the constitution of Scotland? As mentioned in Chapter I, Laws LJ in *Thoburn* defined the Scotland Act as a ‘constitutional statute’; he could have referred to it as the Scottish Constitution if his Lordship had considered that a correct way of putting it. And we have yet to find any Scottish courts’ opinion which expressly refers the Scotland Act or the Act of Union 1707 as the constitution of Scotland. Some might say, as Wesley-Smith probably would, that this is a mere and trivial matter of phraseology. If this is to be taken as such, the great constitutional implications that the deliberate judicial choice of words bears might have been wrongly neglected.

That there would not be a Scottish constitution until and unless Scotland regains full independence may be further illustrated by the Scottish National Party’s (SNP) blueprint draft of ‘the Scottish Constitution’. That draft was made, as the principal draftsman admitted, on the vision of Scotland’s ‘ceasing to be an incorporated part of the UK’.⁶¹ The SNP has long been campaigning for Scottish independence and it has accelerated this

status, see generally K C Wheare, *The Statute of Westminster and dominion status* (OUP 1953).

⁶¹ Neil MacCormick, ‘An Idea for a Scottish Constitution’ in Wilson Finnie, C M G Himsworth and Neil Walker (eds), *Edinburgh Essays in Public Law* (Edinburgh University Press) 160.

campaign since its overwhelming victory in the Scottish parliamentary elections in 2011. As a matter of fact, at the time of writing, a Scottish 'in' as well as a Scottish 'out' campaign is going on in the UK and a referendum on Scottish independence is going to be held in 2014. If the 'Out' camp wins, then there will certainly be a Scottish Constitution.

The case of Quebec in Canada, or the Basque region in Spain might also be good cases to examine the question of whether a non-state region may have its own constitution. But due to space limit, they shall not be examined here. Suffice it to just note that given Canada is a federal country,⁶² it might well be appropriate to speak of 'the constitution of Quebec', even though, unlike a state in the US having its written constitution titled as such, there is in Quebec not a document called as such.⁶³ Basque is one of the 'Self-governing Communities' in Spain.⁶⁴ Under the Spanish Constitution, those Self-governing Communities do have a high degree of autonomy.⁶⁵ But under the Spanish parliamentary monarchy political system, it is the central government that retains full sovereignty.⁶⁶

To sum up, it seems that for a regional part of a unitary system, it is at least not scientific, nor is it appropriate, to say that it has its own constitution. In opposing to taking the Basic Law as the constitution of Hong Kong, the mainland scholars have always held the view that the constitution is the embodiment of state sovereignty and that under a unitary system state, there is only one sovereign, one constitution that embodies the sovereignty and one central government that exercises the highest power of the state.⁶⁷ From what is discussed above, it seems that they might have a point.

3.2 Has the adoption of OCTS turned China into a federal or quasi-federal system?

This is seemingly a much trickier problem. According to Wheare, the fundamental difference between a unitary and a federal constitutional order lies in here: in a federation the central

⁶² Peter W Hogg, *Constitutional law of Canada* (Scarborough, Ont: Carswell 1997) 108.

⁶³ It should be noted that Quebec does have its own Charter of Rights.

⁶⁴ The Spanish Constitution, s.137.

⁶⁵ *Ibid* Chapter 3.

⁶⁶ For an interesting study of those minority communities within the Spanish constitutional order, see generally Daniele Conversi, 'The Smooth Transition: Spain's 1978 Constitution and the Nationalities Question' (2002) 4 *National Identities* 223-244.

⁶⁷ This is a commonly shared view amongst the Chinese mainland's constitutional lawyers.

government and the governments of the constituent parts each have their own area of powers and exercise them without being controlled by the other; whereas in a unitary constitution, there is no such division of powers between the centre and its local governments, and the legislature of the whole country is supreme.⁶⁸ Wheare has been criticized for unduly stressing the separateness and distinct spheres of the central and regional authorities.⁶⁹ But as Hogg admits, his definition of federalism remains sound as far as the main features that reveal the difference between the two types of systems are concerned.⁷⁰ In other words, the crucial thing in distinguishing the two types of systems is to find whether there is such a division of powers between the centre and the local governments — the kind of division that *does not allow control or intervention from the other side of that division*. If there is such a division, it is a federal system; if not, it is a unitary one. It is not important as to where the dividing line is drawn, but whether it is drawn at all.

If we follow this line, then in order to answer the question this subsection title asks, this question must be asked and answered first: does the Basic Law 'divide' the area of powers between HKSAR and the Central Authorities, and does it divide powers in such a way that does not allow, say, control or intervention from the central government?

According to the Basic Law, the HKSAR is, first and foremost, an inalienable part of the PRC,⁷¹ and it is established as 'a *local administrative region*' of the PRC that comes directly under the Central People's Government.⁷² Read together, the subordination of the HKSAR to the Central Government seems sufficiently clear. But if we use sharpened awareness of words to sharpen our perception of law, as Austin reminds us that we should,⁷³ the particular choice of words of '*local*' and '*administrative*' to define the 'region' might have a lot more to add to the understanding of the subordinate status of the HKSAR. In the Chinese Constitution, the provinces, and the provinces-level metropolitan cities as well as the so called minority

⁶⁸ Wheare, *Modern Constitutions* 26-27.

⁶⁹ A H Birch, *Federalism, Finance and Social Legislation in Canada, Australia and the United States* (Clarendon Press 1955), quoted in Hogg 104.

⁷⁰ Hogg 104.

⁷¹ Basic Law Art 1.

⁷² Ibid Art 12.

⁷³ J L Austin, 'A plea for Excuses' (1966-1957) 57 *Proceedings of the Aristotelian Society* 8. Quoted in H.L.A. Hart, *The Concept of Law* (Clarendon Press 1961) 14.

nationalities autonomous regions, are all *local administrative* regions that come directly under the Central People's Government.⁷⁴ There is no division of power, of the kind that Wheare has in mind, between the Central Government and the local administrative regions. The principle of 'the people's democratic dictatorship'⁷⁵ upon which the new red state was founded might have made the thinking of such a division of powers sound not only wishful but funny. Not to mention the strict party central control (as a matter of fact, the most powerful man in a province is not the province' executive head but the party secretary who answers to the general party secretary in Beijing),⁷⁶ in all aspects of the administration of local provinces, central control and intervention are enormous. The five-year economic development plan that is adopted between each period of every five years is a good example. Moreover, provinces are allowed to make local legislation, but any provincial legislation, if found in conflict with NPCSC's legislation or the administrative legislation made by the Central Government, will be overridden or disapplied.⁷⁷ What '*local*' and '*administrative*' in the Basic Law mean has to be understood in this context.

Of course, as Xiao explains, although likewise coming directly under the Central People's government, the relationship between the HKSAR and the Central Government is fundamentally different from that between a province and the Central Government. Obviously, the differences lie in OCTS, under which the HKSAR has truly a different political, social and legal system and a genuine high degree of autonomy. In comparison to the powers a province in the mainland has, the high degree of autonomy the HKSAR enjoys is out of question. The HKSAR makes its own laws (apart from a few national laws applying to the region);⁷⁸ it has its own judicial system which decides all the cases in the region and no appeal whatsoever is to be made to the People's Supreme Court in Beijing;⁷⁹ it decides its

⁷⁴ PRC Constitution Art 110.

⁷⁵ Ibid Art 1.

⁷⁶ For a useful discussion of China as a Communist Party-State, see generally Cheng Li, 'China's Communist Party-State: The Structure and Dynamics of Power' in Williams A Joseph (ed), *Politics in China: An Introduction* (OUP 2010).

⁷⁷ There is no constitutional review in China. Not even the Constitution is judiciable. See generally 张千帆 Zhang Qianfan, *宪法学导论: 原理与应用 An Introduction to the Study of Constitutional Law: principles and applications* (法律出版社 Law Press China 2004). See also Thomas E. Kellogg, 'Constitutionalism with Chinese Characteristics?: Constitutional Development and Civil Litigation in China' (Indiana University Research Center for Chinese Politics & Business Working Paper #1).

⁷⁸ Art 2, 73 and Annex III.

⁷⁹ Art 2, 19 81.

own financial, economic, welfare, educational, etc., policies;⁸⁰ it levies taxes on its own and spends the money on its own and not a single penny is to be given to the Central Government;⁸¹ it issues its own currency;⁸² it issues its own passport and maintains its own immigration control;⁸³ it keeps its own police;⁸⁴ it has its own independent Commission Against Corruption and its own Commission of Audit,⁸⁵ et al. These and many other things, a provincial government in the mainland does not have the power to do.⁸⁶ Moreover, the Chief Executive of the HKSAR is, in a true sense, elected — though many people in Hong Kong have long been complaining that the elections are held within a small circle.⁸⁷ In the mainland, the provincial executive heads and party secretaries are often said (in official media) to have been ‘duly elected’ by the provincial People’s Congresses, but one might daresay that not even an ordinary Chinese man of ordinary wit would believe they are truly and duly elected, at least not in the democratic sense of that word.⁸⁸ To demonstrate the difference furthermore, one might note that not only the head of the HKSAR will never be a communist party secretary, as is the case in a province in the mainland, but even the Communist Party itself is not legally registered in Hong Kong.⁸⁹ This said, however, since the Chief Executive is held under the Basic Law to be responsible to the central government, he is thus in a way responsible to the Communist Party’s Politburo in Beijing. In that remote sense, the Chief Executive of the HKSAR is in quite the same position as a provincial party secretary is in.

⁸⁰ Chapter V and VI.

⁸¹ Art 106.

⁸² Art 111.

⁸³ Art 154.

⁸⁴ Art 14.

⁸⁵ Art 57, 58.

⁸⁶ For a more detail comparison between the powers the HKSAR has and a provincial administrative government in the mainland has, see Xiao 101-107.

⁸⁷ This has been a long time accusation by local pro-democracy groups and activists, which can often be seen or heard expressed in local mass media. But for further discussion on democracy in Hong Kong, see Chapter VII.

⁸⁸ It has been argued that provincial People’s Congresses have in the last quarter century undergone significant reforms and have thus ‘become more mature and independent-minded and more disposed to assert their power vis-à-vis the government, court, procuratorate and even the party’. See Ming Xia, *The People’s Congresses and Governance in China: Toward a network mode of governance* (Routledge 2008) 244. But it seems that, in discussing the institutionalization of the Provincial People’s Congresses, Xia did not seem to be fully aware of the fact that those provincial peoples’ congresses as well as the NPC are at the end of the day, party controlled.

⁸⁹ It is interesting to note that the newly sworn in (on 1 July 2012) Chief Executive, C Y Leung, has been accused by local pro-democratic activists as being ‘red’ and even an underground communist party member. The Apple Daily, a local popular newspaper whose hostile position towards Beijing is locally well known, announces that as Leung ‘ascends the throne’, OCTS ‘enters into a new phase’ or even it is the death of OCTS and the end of Hong Kong.

Academic studies have concluded that Hong Kong as an autonomous region has a much wider scope of power than a constituent state in any federation or any autonomous regions now existing in the world.⁹⁰ This seems largely true, but we are not going to go into much more detailed comparison. An example might help to show the point. Apart from the above mentioned independent economic powers (including the power to issue its own currency), a power that the HKSAR has but no other autonomies seem to have is that of final adjudication. For a devolved Scotland, for example, although it maintains a different legal system (including a different judicial system), the power of final adjudication in civil and devolution issues is not in the Scottish courts but in what is now the Supreme Court of the United Kingdom.⁹¹

But the above discussion has not yet fully answered the question of whether the Basic Law divides the power between the HKSAR and the central authorities in such the way as Wheare suggests would distinguish a federal system from a unitary one. For the matter here is not really about the scope of the HKSAR's power, but its nature.

The answer to that question of division of powers may be lying in Article 2 of the Basic Law which provides that the NPC *authorizes* the HKSAR to exercise a high degree of autonomy. The word 'authorizes' is crucial. Literarily speaking, to 'authorize' is to give the power or the permission needed for someone to do something, which, if done without prior authorization, would be illegal. In this sense, it seems that Article 2 can hardly take us anywhere save to conclude that Hong Kong's autonomy, regardless its degree, is essentially an authorized one. That is to say, the powers of the HKSAR are not inherent in the HKSAR but given by the central government. At least, this is the position that Beijing holds. As the Chairman of the NPCSC said at the 10th Anniversary of the promulgation of the Basic Law, the scope of the powers of the HKSAR 'is within the authorization of the NPC, no more and

⁹⁰ Yash Ghai, 'The Imperatives of Autonomy: Contradictions of the Basic Law' in Johannes Chan and Lison Harris (eds), *Hong Kong's Constitutional Debates* (Hong Kong Law Journal Limited 2005); See also 肖蔚云 Weiyun Xiao, *论香港基本法 On the Hong Kong Basic Law* (北京大学出版社 Beijing University Press 2003) 572.

⁹¹ See Constitutional Reform Act 2005, Section 40. For a brief description of the jurisdiction of the Scottish courts, see A W Bradley and K D Ewing, *Constitutional & Administrative Law* (15th edn, Pearson Education Ltd 2011) 381-384.

no less, though more power may be authorized if needed'.⁹²

One way to question that authorization of powers is not division of powers as Wheare has understood it is to see whether such authorization is rescindable. In the case of the Basic Law, it seems that it is, at least in pure theory. On the one hand, Article 5 provides that the previous capitalist system and way of life in Hong Kong *shall remain unchanged for 50 years*. What will happen after the span of 50 years (starting from 1 July 1997) ends? Deng once said that the OCTS policy would not change in the 50 years period, nor would it be necessary to change it after that. However, he then added, if changes were needed, they would only be made for the better.⁹³ But this is at best only a political guarantee. The Basic Law itself says nothing about the future after the promised 50 years. A literal reading of Article 5 certainly cannot exclude the possibility of change or even the abandonment of OCTS. On the other hand, as mentioned in the last section, the power to amend the Basic Law belongs to the NPC. Although the HKSAR is given a role to propose an amendment bill, it is up to the NPC to make the final decision on any amendments. It is true that there are Hong Kong delegates to the NPC. But not only they do not have sufficient votes to frustrate a NPC decision, their duty to the NPC is 'to participate in the management of state affairs' rather than to help the HKSAR government to govern Hong Kong.⁹⁴ In both senses, the final decision on any amendment to the Basic Law apparently does not need the consent of the HKSAR. Moreover, even within the 50 years period, the authorization of powers might be temporarily withheld or suspended, if the NPCSC declares a state of war or a state of emergency in Hong Kong. As provided in Article 18, in those circumstances, relevant national laws will be applied in the Region. In that case and to that extent, the effect is, of course, 'one country, one system'.

Only from the authorization perspective can we perhaps resolve the 'curious paradox' Ghai

⁹² The whole speech was published on People's Daily (China), 30 June 2007.

⁹³ Xiaoping Deng, *Selected Works of Deng Xiaoping*, vol III (Foreign Languages Press 1994) 81.

⁹⁴ Basic Law Art 21. In fact, due to the OCTS arrangement, Hong Kong delegates to the NPC are not even expected to comment publically on the Hong Kong government's affairs. See generally Fu Hualing and D W Choy, 'Of Iron or Rubber? People's Deputies of Hong Kong to the National People's Congress' in Fu Hualing, Simon Young and Lison Harris (eds), *Constitutional Interpretation in Hong Kong: The Struggle for Coherence* (Palgrave 2007); D W Choy and Fu Hualing, 'Small Circle, Entrenched Interest: The Electoral Anomalies of Hong Kong's Deputies to the National People's Congress' (2007) 37 Hong Kong LJ 579-604.

finds himself in.⁹⁵ In his efforts to identify the scope of autonomy that the HKSAR is promised to have, Ghai notices such a paradox: while the HKSAR has a wider scope of autonomy than other autonomous regions or a constituent state in a federation, its exercise of those autonomous powers will be subject to closer scrutiny and greater supervision than in elsewhere.⁹⁶ But looking from the angle of authorization, this paradox is quite possibly misconceived. With authorization, there certainly comes scrutiny or supervision from the authorizer, the greater scope of authorization, the greater scrutiny or closer supervision. There seems nothing paradoxical about that; rather it is a straightforward logic inherent in the nature of authorization. Thus, only if Hong Kong were to be taken as a 'constituent unit' of a 'federal China', and the Basic Law to be understood as dividing the powers between Hong Kong and the 'federal' central government, would then such scrutiny or supervision strike us as paradoxical.

Another difficulty that Ghai finds in identifying the scope the HKSAR's autonomy is the question of whether the HKSAR has the residual powers which have not been expressly provided in the Basic Law. This question had been discussed during the drafting of the Basic Law but had been dismissed by the mainland officials and academic commentators alike as irrelevant in Hong Kong's context.⁹⁷ Again, the main argument upon which the claim for residual powers was dismissed is that the HKSAR under the Basic Law is not a constituent state in a federation, and that only in a federal system that the constituent unit has the residual powers which are those it has not surrendered to the federal central government.⁹⁸ In the mainlanders' view, if one wishes to speak of residual powers, the truth is that all residual powers reside in the hands of the central authorities.⁹⁹ This might not sound very pleasant to many Hong Kong ears. But it is the very truth, unless the HKSAR were to be understood as a constituent unit in a federal China. The American Constitution is a typical federal system. Therefore in its 10th Amendment, it is expressly stated that residual powers belong to the people of each member state.¹⁰⁰ In contrast, under the devolution

⁹⁵ Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* 185.

⁹⁶ See *ibid*, Chapter 4; Xiao Chapter 4.

⁹⁷ Xiao 606.

⁹⁸ *Ibid*.

⁹⁹ *Ibid*.

¹⁰⁰ The 10th Amendment of the US Constitution.

arrangements in the UK, all matters that are not devolved to the devolved regions are ‘reserved matters’ of which the power to decide resides in Parliament at Westminster.¹⁰¹ Indeed, the Basic Law itself has clearly, if not quite expressly, stated that residual powers belong to the central government. In Article 20, it is provided that the HKSAR ‘may enjoy other powers granted to it’ by the Central Authorities.¹⁰² If the HKSAR were to have residual powers, this provision would be entirely redundant and utterly senseless at best, and fundamentally contradictory to the whole Basic Law scheme at worst. In practice, new powers have actually been granted to the HKSAR via Article 20.¹⁰³ Thus, not only in theory, but also in practice, the HKSAR does not have residual powers under the Basic Law. If it wants more powers, what it can do is just ask.

If the Basic Law only ‘authorizes’ a high degree of autonomy for the HKSAR, there is certainly not the kind of ‘division of powers’ between the HKSAR and the central government — the kind of division, as Wheare has understood it, that establishes a federal system. Of course, in defining the scope of the region’s autonomy, the Basic Law inevitably has to draw a line delineating what is within and what is beyond autonomy. However, this line is only there to demonstrate the scope of ‘authorization’; it does not exclude possible interference or control by the Central Authorities. Although it would be politically disastrous if the central authorities intervene with or control the affairs within the domain of the Region’s autonomy, in strictly legal terms, they can certainly do so if they feel necessary or compelled to. If we recall what is said in the Preamble, the Basic Law carries with it the expectation of ‘upholding national unity and territorial integrity’, as well as ‘maintaining the prosperity and stability of Hong Kong’. At the macro level of sovereignty, the ultimate responsibility over Hong Kong is on the shoulders of the communists in Beijing. If Hong Kong failed, shame would be on them, not the Hong Kong people. In that ultimate sense, it seems that the central authorities do have the moral and political obligation to interfere with Hong Kong’s

¹⁰¹ See for example The Scotland Act Schedule 5.

¹⁰² Basic Law Art 20.

¹⁰³ In 2006, the NPCSC made a Decision, which authorized the HKSAR to exercise jurisdiction over part of the Shenzhen Bay Port in the mainland, in the purpose of accelerating transport and customs clearance between Shenzhen and the HKSAR, so as to promote the interflow of people and economic and trade activities between the Mainland and HKSAR and to advance joint economic development of the two places. This arrangement is known as ‘一地两检’, literally translated, meaning ‘one place, two immigration controls’. See the Shenzhen Bay Port Hong Kong Port Area Ordinance (Cap 591), the Law of Hong Kong.

autonomous affairs when extremely necessary.¹⁰⁴ At the micro level, the central authorities surely retain the power to intervene through the interpretation of the Basic Law, for, as will be discussed in detail in next Chapter, the final power of interpretation of the Basic Law—not only the provisions relating to the central authorities responsibilities, but also the provisions conferring autonomy to the Region, is vested in the NPCSC.

By now, it seems sufficiently clear that the HKSAR is but an autonomous administrative region of a unitary China. China's unitary constitutional system has not been changed into a federal or quasi-federal one as the result of the adoption of OCTS in Hong Kong in 1997 (and later in Macau in 1999).¹⁰⁵ It follows that it is perhaps wrong, at least misleading, to take the Basic Law as the constitution of Hong Kong. For taking it as such may be tantamount to perceiving the OCTS arrangement as a federation rather than a framework which is in itself new and unique. But on the other hand, as we have shown in the previous section, the Basic Law does look like a constitution, and it may well be that it truly functions as such. Thus, it could be just as misleading to regard it, as many mainland scholars do, as merely an ordinary national law. With these two seemingly contradicting factors, we seem to find ourselves in a dilemma; we are left with the real difficulty: how to define the Basic Law?

4. The Basic Law: the PRC Constitution in Hong Kong

The innovativeness of the OCTS formula inevitably requires innovative constitutional arrangements. A piece of ordinary legislation may not be sufficient to serve this purpose. As there are clearly constitutional matters involved, there has got to be an instrument of constitutional nature to do this job. In this sense, the Basic Law, which positivizes OCTS into the basic rules according to which the HKSAR has been established and is expected to work, is undoubtedly a constitutional instrument. It has a distinctive constitutional nature, and for this reason, it cannot be regarded as merely an ordinary national law of the PRC. However, for the reasons discussed in the last section, it seems that neither should the Basic Law, in and of itself, be taken as the constitution of the HKSAR.

¹⁰⁴ A close example of this kind of interference was the Central Government's publically announced support for the HKSAR government's efforts to combat the financial crisis that swept Asia in 1997.

¹⁰⁵ For a further argument of this point, see Enbao Wang, *Hong Kong, 1997: The Politics of Transition* (Boulder 1995) 91-95.

A proper way to perceive the Basic Law is perhaps this: the Basic Law is the PRC Constitution *in* the HKSAR. This conception carries with it two interrelated dimensions: one is that the Basic Law operates in the HKSAR in the behalf of the national Constitution; the other is that it is not the Basic Law alone, but the Constitution with the Basic Law together that is the constitution of Hong Kong. Such a perception may appear somewhat anomalous, but arguably it has to be so given that OCTS itself is an unprecedented and creative constitutional arrangement. Seen in this way, at least the political and legal confusion that has been caused by the perception that the HKSAR might have its own constitution can be dissipated, while at the same time the constitutional nature of the Basic Law confirmed. We find no better analogy of this conception of the Basic Law than the Trinitarian theory in Christian theology where the God, the Son and the Holy Spirit are three but one.

The two dimensions of this proposition of the Basic Law can be further demonstrated by exploring the question of whether the PRC Constitution applies to the HKSAR. As with the residual power issue, the question was also debated during the drafting of the Basic Law. This question presumes such a dilemma: if the national Constitution is to apply to Hong Kong, then the socialist system entrenched in the Constitution will, as a matter of logic, be applicable to Hong Kong, which in turn will then make it impossible to maintain the previous capitalist system; if, on the other hand, the Constitution is not to be applied to Hong Kong, then the resumption of the exercise of sovereignty over Hong Kong is simply impossible, since the Constitution itself establishes and legitimizes the exercise of state sovereignty. Put it simpler, if the national Constitution is to apply in Hong Kong, then there will not be ‘two systems’; if it is not to apply, then there is no longer ‘one country’.

Many mainland scholars hold the view that the national Constitution ‘as a whole’—meaning demonstrating and exercising sovereignty — must apply to Hong Kong.¹⁰⁶ Some Hong Kong commentators also share this view.¹⁰⁷ But this ‘application as a whole’ argument would not make much sense if it remains unclear as to how or what part of the Constitution will

¹⁰⁶ Xiao 65-68.

¹⁰⁷ Ghai, *Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* 215.

actually apply to Hong Kong. To this, many mainland scholars submit that those provisions of the Constitution which provide for the socialist system are not applicable, while those provisions concerning state sovereignty, including for example, provisions concerning national defence and foreign affairs certainly are and must be. During the drafting of the Basic Law, it had been submitted that those PRC Constitution provisions that are applicable to the HKSAR should be listed in the Basic Law. But this idea was rejected, on the ground that it was considered as unnecessary and technically impossible to do so.¹⁰⁸ For the Hong Kong academics, on the other hand, a failure to make such a list amounts to leaving the question of the applicability of the PRC Constitution in Hong Kong unanswered, the consequence of which is to make it almost impossible to understand the true meaning of the Basic Law.¹⁰⁹

But if we take the Basic Law as the Constitution *in* the HKSAR, the issue of the applicability of the PRC Constitution in the HKSAR might be easier to understand. Taken as such, the Basic Law is a part of the Constitution—though a distinctive part, its meaning is not to be found if taken out of the context of the Constitution. Indeed, as stated in the Preamble of the Basic Law, the Basic Law was enacted pursuant to the national Constitution. The principle of ‘one country, two systems’ is embedded in Article 31 of the Constitution. But Article 31 itself does not provide in detail the social, political and legal systems to be practised in that region, hence leaving the degree of autonomy undetermined. Thus, by fulfilling what has been left open by Article 31, the Basic Law is in essence an implementation measure of Article 31. In this sense, as the logic may go, the Basic Law is not understandable if separated from the Constitution, in so much as Article 31 might not be understandable if without reading it together with other provisions of the Constitution.

It follows that the Basic Law cannot be self-contained; its true meaning can only be found when read with the Constitution. Ghai seems somewhat self-contradictory when he claims,

¹⁰⁸ Xiao 67-68. It might be argued that, as the American Constitution and the British devolution legislation demonstrate, it is indeed technically possible to list what powers belong to the central government and what are to be exercised by the states or the devolved regions. In a sense, the Basic Law itself is already such a list. But to list what provisions of the PRC Constitution are to be applied to the HKSAR is a somewhat more complex issue under the OCTS framework.

¹⁰⁹ Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* 215.

on the one hand, that the true meaning of the Basic Law is impossible to be identified if it is not clear what provisions of the Constitution applied to Hong Kong, and on the other, that the Basic Law is a self-contained instrument.¹¹⁰ Indeed many of the difficulties which Ghai has noted in his search for the true meaning of the Basic Law can be lifted, if the Basic Law is not to be read as a self-contained document but read with the national Constitution.

One of the things that Ghai finds particularly problematic in the understanding of the Basic Law is the introduction of the concept of sovereignty in the relations 'between China and Hong Kong'. 'Who is the 'sovereign', he asks, 'what is the content of this sovereignty', 'what precise relationship 'sovereignty' connotes or produces between Hong Kong and China', or, 'what does 'sovereignty' mean for the Basic Law?'¹¹¹ Indeed, one cannot find in the text of the Basic Law any straightforward answers to these questions. But by stating that the HKSAR is an inalienable part of China, that it is an administrative region coming directly under the Central Government, and that the power of interpretation of the Basic Law is vested in the NPCSC, the Basic Law apparently has dealt with the sovereignty issue, perhaps as much as the drafters had felt as necessary. Yet to answer Ghai's questions, one has to go from the Basic Law on to the PRC Constitution.

To explain it a bit further, if one wants to know what it means by saying that Hong Kong 'is an inalienable part of the People's Republic of China', then one has to find out in the Chinese Constitution what 'the People's Republic of China' is in the first place. Likewise, one has to go to the PRC Constitution to find out what 'coming directly under the Central People's Government' means, or indeed what the 'Central People's Government' is. As mentioned in the last subsection, only when one sees the fact that China is a communist party-state, then can he get the true picture of what OCTS in the HKSAR is. In other words, although the HKSAR practises the capitalist social system, it is nonetheless a part of a communist party-state; although it enjoys a high degree of autonomy, it is ultimately answerable to the Central Government, the leadership of which is, of course, communist. Truly, in normal circumstances, one would believe that the communist leadership in Beijing will not interfere

¹¹⁰ Yash Ghai, 'Litigating the Basic Law: Jurisdiction, Interpretation and Procedure' in Johannes MM Chan, H.L. Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (2000) 10.

¹¹¹ *Ibid* 11.

with the HKSAR's autonomous affairs. But this does not change any part of the constitutional status of the HKSAR at all: it is subordinate to the sovereign power in Beijing, politically and constitutionally.

There are many more provisions in the Basic Law where the exercise of sovereign power is involved, but the understanding of which cannot be complete without reference to the PRC Constitution. For example, although the Basic Law (through Article 158) makes it clear that the power to interpret the Basic Law is vested in the NPCSC, it does not prescribe what the NPCSC is and how it is going to exercise its interpretative power. The same difficulty lies also with the amendment power and its procedure (as mentioned in the last subsection). Furthermore, Article 15 provides that the Central Government shall appoint the Chief Executive and principal official of the HKSAR; Article 18 provides that the NPCSC may add to or delete from the list of national laws that shall be applied in the HKSAR, and that it may declare a state of war or a state of emergency in the Region. But neither of them provides alongside the respective provision how the Central Government or the NPCSC will exercise their respective powers. All these are of course not self-evident in the Basic Law; they have to be found in the national Constitution. By the way, even in the text of PRC Constitution itself, one may not find the specific procedures, if there is any at all, according to which the above mentioned sovereign powers may be exercised. This is perhaps one of the reasons why it had been considered technically impossible to list in the Basic Law what provisions of the national Constitution apply to the HKSAR. But if we read the Basic Law as part of the national Constitution, this does not seem to present any practical problems.

Another problem Ghai has presented is the absence in the Basic Law of an independent dispute settlement mechanism between the HKSAR and the central authorities.¹¹² In his research, he finds that in most autonomous arrangements, disputes of this kind are left to courts, a mechanism which ensures that each side gets a fair hearing and that decisions are unaffected by bias in favour of one or the other side.¹¹³ But under the Basic Law, as he rightly observes, disputes of this kind arising from the implementation of the Basic Law have

¹¹² Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* 186.

¹¹³ *Ibid.*

to be resolved through its interpretation by the NPCSC, a body, in his view, is 'as political and controlled as one can find'.¹¹⁴ Apparently, what worries Ghai is not that there is not a mechanism for settling disputes but that the dispute settling mechanism is not '*independent*'. There may be a point in his scepticism. But that exactly shows our point that the true meaning of the Basic Law can only be found if read with the national Constitution. Understood in this way, the problem for Ghai is perhaps not the impossibility of finding the true meaning of the Basic Law, but the undesirability of finding its true meaning with reference to the PRC Constitution.

On the same day when the Basic Law was promulgated, the NPC adopted a Decision announcing that the Basic Law was enacted pursuant to the Constitution and is therefore constitutional.¹¹⁵ This decision was made in response to the disputes arose during the drafting process of the Basic law on the question of application of the national Constitution in Hong Kong. Given that the Preamble of the Basic Law has already stated that this Law is enacted 'in accordance with the Constitution', this declaration of constitutionality seems somewhat redundant. It nonetheless helps to prove the proposition that the Basic Law, in any event, has to be read with the Constitution.

The proposition that the Basic Law is *the PRC Constitution in Hong Kong* is not complete without dealing with the mainland lawyer's view that the Basic Law is merely an ordinary national law. Their opposition to take the Basic Law as the constitution of the HKSAR on this basis is probably too technical to be convincing. No doubt, the fact that the Basic Law was enacted pursuant to the PRC Constitution indicates that the Constitution is the parent law to the Basic Law. But it does not necessarily follow that the Basic Law might not in and of itself be a constitution. Looking around the world, there are indeed constitutions which were made in pursuance to another constitution. As mentioned in the last subsection, many constitutions of former British Dominions were made by the UK Parliament pursuant to the British Constitution. Yet they were in and of themselves the Constitution of their respective countries. However, this analogy may seem inappropriate since Hong Kong's return to China is fundamentally different from those countries' independence from British rule. But

¹¹⁴ Ibid.

¹¹⁵ Decision of the NPC on the Basic Law of the HKSAR, adopted on 4 April 1990.

theoretically speaking, the point is that it is not impossible to enact a constitution for Hong Kong in pursuance to the Chinese Constitution, if some constitutional arrangements other than OCTS had been adopted for Hong Kong's return to Chinese rule. Indeed, what matters here is obviously not how the enactment was made, but for what purpose and into what political settings it was made.

Finally, it should be noted that a proper understanding of the nature of the Basic Law is crucial not only to its interpretation in general, but also in particular to the interpretation of its supreme status as prescribed by Article 12 of the Basic Law. Taken as *the PRC Constitution in Hong Kong*, the supreme status of the Basic Law in the HKSAR is fortified rather than in any sense demeaned.

Conclusion

If constitutional review is only necessary and possible when there is the positivization of a higher law which lays down the cornerstone of a constitutional order, then the CFA's assertion that the HKSAR courts have this power under the Basic Law is apparently legitimate, for the Basic Law is enacted as a higher law and is expected to function as such. The OCTS policies were only political promises before they had been transfigured or positivized into written rules as prescribed in the text of the Basic Law.

Nevertheless, it is not scientific, nor is it appropriate to call the Basic Law the constitution of Hong Kong. The very reason is because the HKSAR, under the OCTS arrangement is no more than an administrative region of the PRC which is a unitary system. The adoption of OCTS has not changed China into a federal or quasi-federal system. Thus, to take the Basic Law the constitution of Hong Kong is to confuse the constitutional relationship between the HKSAR and its motherland. The curious paradox Ghai thinks that he has discovered is essentially misconceived. What Ghai could sensibly feel curious about, though, is perhaps how Hong Kong could have been given such a wide scope of autonomous power by a communist central government who is devoted to practise 'people's democratic dictatorship'. But this is apparently a pure political question rather than a debatable legal one. Indeed, it is the nature of the power rather than the scope of power that determines Hong Kong's

constitutional status under the OCTS framework.

Nor is it appropriate to treat the Basic Law as an ordinary national law that is of the same constitutional status as other basic laws enacted by the NPC. A proper understanding of the Basic Law is perhaps that it is part of the PRC Constitution. The proposition that the Basic Law is not the constitution of the HKSAR, but the national Constitution *in* the HKSAR suggests that the working of the Basic Law has to be understood with reference to the PRC Constitution. In other words, under the OCTS framework, anything that concern 'two systems' has to be seen in the 'one country' context. This proposition of the nature of the Basic Law reinforces rather than weakens the supreme status of the Basic Law in the HKSAR. This said, however, the proposition that the Basic Law is *the national Constitution in the HKSAR* also suggests that, although the power of constitutional review as asserted by the CFA can be justified on the basis of the supremacy of the Basic Law, its scope has to be examined in the 'one country' context. In this sense, the issue of constitutional review by the HKSAR courts is not a matter solely within the SAR's jurisdiction; rather, it is in essence an inter-jurisdictional issue which also involves the authority of the sovereign, the NPCSC in particular. This will become clearer when we look at the power to interpret the Basic Law, to which, we shall now turn.

Chapter IV

The Interpretation of the Basic Law

Introduction

Like other constitutions, the implementation of the Basic Law ultimately depends on how it is interpreted. Questions such as what scope of autonomy the HKSAR enjoys, what the relationship between the HKSAR and the central authorities is, what rights and freedoms Hong Kong residents have, inter alia, will have to be determined by interpreting the relevant provisions of the Basic Law. As with other constitutions, many provisions of the Basic Law are framed in broad, principled and sometimes ambiguous terms. The uncertainties therein and other grey areas that might be discovered in the text of the Basic Law are likely to give rise to disagreements and disputes, the resolution of which necessarily ask for authoritative interpretation. If, as Kelsen says, it is the constitution that provides the grounding of authority for a whole legal system,¹ it is the interpretation of the constitution that sustains that grounding. Likewise, it is through interpretation that the American constitution has become a living instrument which is adaptable to changed times and circumstances.² The same may be said with and be expected of the Basic Law. However, whilst the common difficulties in interpreting a constitution experienced elsewhere may also arise in the interpretation of the Basic Law, the unique nature of the Basic Law will inevitably make its interpretation a unique course. In any event, the interpretation of the Basic Law is pivotal to the working of OCTS. Should the OCTS scenario twist and turn, to borrow the terminology of BBC's shipping forecast, from 'moderate and good' to 'occasionally poor', or vice versa, then the interpretation of the Basic Law would mostly likely be the centre of storm.

The purpose of the Chapter is therefore focused on the interpretation of the Basic Law. Two fundamental questions will be examined: who has the power and how to interpret it. Section 1 will discuss in general the interpretation scheme set out in the Basic Law. Section 2 carries on to examine more specifically the powers both the NPCSC and the HKSAR courts have to interpret the Basic Law. In section 3, the reference system established under the

¹ See our discussion of Kelsen in Chapter I.

² See our discussion in Chapter I.

interpretation scheme is to be discussed. And finally in section 4, the approach the CFA has established to the interpretation of the Basic Law shall be explored and discussed. It shall be concluded that while in theory, the HKSAR courts' power to interpret the Basic Law is a limited one, in reality it has been stretched almost to breaking point. Caution, realism and deference from the Hong Kong judiciary might be necessary so as to make OCTS workable.

1. The general scheme of interpretation

The scheme for the interpretation of the Basic Law is set out in Article 158. It is quite a lengthy provision, but for our purpose it is necessary to quote it in full (save for the use of abbreviations); it reads:

The power of interpretation of this Law shall be vested in the [NPCSC].

The [NPCSC] shall authorize the courts of the HKSAR to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

The courts of the [HKSAR] may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the [NPCSC] through the CFA of the Region. When the [NPCSC] makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the [NPCSC]. However, judgments previously rendered shall not be affected.

The [NPCSC] shall consult its Committee for the Basic Law of the [HKSAR] before giving an interpretation of this Law.

Three crucial points may be identified from this lengthy provision: (1) the power to interpret the Basic law is vested in the NPCSC; (2) the NPCSC *authorizes* the HKSAR courts to interpret, *on their own*, the provisions which are within the limits of the autonomy of the Region; (3) a mandatory reference system is established in respect to the HKSAR courts' interpretation of

other provisions which are not within the limits of the Region's autonomy.

The framing of Article 158 is the result of a painstaking bargain which reflected the fundamental jurisprudential clash between the two systems. Under the mainland legal system, the power to interpret laws, including the constitution, is vested with the national legislature—the NPCSC.³ This is known as 'legislative interpretation'.⁴ The Constitution does not grant the courts the power to interpret laws. But in a resolution adopted by the NPCSC in 1981 (the 1981 Resolution),⁵ it was provided that the People's Supreme Court and the Supreme People's Procuratorate could respectively or jointly interpret points of law arising from the concrete application of the law in the course of adjudication or prosecution. Interpretation by these two institutions is often referred to as judicial interpretation. Furthermore, it is also provided in the 1981 Resolution that the State Council and its departments may interpret points of law arising from the concrete application of the law in areas other than adjudicative and procuratorial work. This is known as executive or administrative interpretation. In 2000, the NPC enacted the Law on Legislation,⁶ in which the NPCSC's power to interpret laws is reaffirmed. According to this Law, the NPCSC can interpret laws in two kinds of circumstances: (a) where it is necessary to further clarify the concrete meaning of provisions in the law; or (b) where new circumstances have arisen after the enactment of a law, and it becomes necessary to clarify the basis for the application of the law.⁷ It is also expressly stated that the interpretation by the NPCSC has the same legal effect as law.⁸ Under both the 1981 Resolution and the Law on Legislation, it is clear that the interpretation by other bodies, including the Supreme Court, is subject to overruling by the NPCSC.⁹ But in reality, it seems that such overruling has never happened. In fact, there have

³ The PRC Constitution, Art 67.

⁴ For a very good discussion of the legislative interpretation approach adopted in the mainland and a comparison of it with the common law approach, see generally Albert H Y Chen, 'The Interpretation of the Basic Law — Common Law and Mainland Chinese Perspectives' (2000) 30 Hong Kong LJ 380-431; Yash Ghai, 'The Intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of Technique or Politics?' (2007) 37 Hong Kong LJ 363-406.

⁵ 全国人民代表大会常务委员会关于加强法律解释工作的决议 NPCSC's Resolution on Strengthening the Work of Interpretation of Laws, adopted in June 1981.

⁶ 中华人民共和国立法法 The Law on Legislation of the PRC, adopted in 2003.

⁷ Ibid Art 42.

⁸ Ibid Art 47.

⁹ Under the 1981 Resolution, it was provided that if conflicts arose between the interpretation by the Supreme Court and that by the Supreme Procuratorate, they should be reported to the NPCSC for interpretation and decision. Under the Law on Legislation it is provided (in Article 43) that several institutions including the Supreme Court may make a request to the NPCSC for an interpretation of law. For a further study of the system

only been a few occasions (which occurred only in recent years) where the NPCSC has actually exercised its power of interpretation.¹⁰ In contrast, a vast amount of judicial interpretation has been issued by the Supreme Court,¹¹ and most likely it is those judicial interpretations that are the working laws of the land.

Many mainland scholars and officials have always claimed that the Chinese system of legislative interpretation is congruent with the civil law tradition where it is also the legislature rather than the courts that interpret the laws and the constitution.¹² Ghai, however, vigorously disputes this claim. In his view, the Chinese legal system is rooted in Stalinist ideology imported from the former Soviet Union. Its legislative interpretation of law is therefore a Marxist approach, which is fundamentally different from the legislative interpretation adopted in traditional civil law jurisdictions, for theirs are based on the concept of democracy and separation of powers.¹³ Woodman agrees with Ghai in that the Chinese legal system 'comes from the legal order established under the Stalin regime to serve 'victorious socialism' and the fusion of powers in the Soviet state'.¹⁴ However, unlike many Hong Kong commentators, Woodman believes that the NPCSC's power to interpret law is a general power to make decisions rather than usurpation of Hong Kong's independent judicial power.¹⁵

But back in the history of the drafting of the Basic Law, it was exactly because of the concerns of the rule of law and judicial independence in Hong Kong that had provoked strong oppositions, from the Hong Kong members within the Basic Law Drafting Committee (BLDC) as well as from the general public in Hong Kong, to the proposed provision that the

of legislative interpretation in China, see generally Albert H Y Chen, *An Introduction to the Legal System of the People's Republic of China* (rev edn, Butterworths Asia 1998). For a discussion focused particularly on the Law on Legislation, see Li Yahong, 'The Law-making Law: A Solution to the Problems in the Chinese Legislative System?' (2000) 30 Hong Kong LJ 120-140.

¹⁰ 张千帆 Zhang Qianfan, *宪法学导论：原理与应用 An Introduction to the Study of Constitutional Law: principles and applications* (法律出版社 Law Press China 2004).

¹¹ Ibid.

¹² See generally 张志铭 Zhiming Zhang, '中国法律解释制度 The System of Interpretation of Laws in China' in Zhiping Liang (ed), *法律解释问题 Problems of Interpretation of Laws* (法律出版社 Legal Publication 1998).

¹³ Yash Ghai, 'The Political Economy of Interpretation' in Hualing Fu, Lison Harris and Simon N M Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan 2007) 125-127.

¹⁴ Sohpiea Woodman, 'Legislative Interpretation by China's National People's Congress Standing Committee: A Power with Roots in the Stalinist Conception of Law' in Hualing Fu, Lison Harris and Simon N M Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan 2007) 229.

¹⁵ Ibid 238.

power to interpret the Basic Law should be vested in the NPCSC.¹⁶ These concerns and the opposition are not difficult to be appreciated. For under Hong Kong's common law system, the power to interpret laws must be and can only be exercised by the courts. It is for the legislature to make laws but it is for the courts to interpret the laws. For lawyers of common law background, this is so basic and so fundamental that it is immediately beyond dispute.¹⁷ For many Hong Kong people, the legal profession in particular, there was not only a jurisprudential difficulty in accepting the NPCSC, a political body, as the final interpreter of the Basic Law. There had also been a deeply rooted fear and distrust that once the control of the supreme law of the HKSAR was put in the hands of the NPCSC, the protection of human rights in Hong Kong could hardly be guaranteed, and the promise of a high degree of autonomy for the Hong Kong might be easily forgotten. That fear and distrust was clearly expressed when one prominent local barrister, on commenting on the draft of the Basic Law, said that 'there is nothing to stop the [NPCSC] from exercising jurisdiction in relation to matters purely to internal to the HKSAR'.¹⁸

In contrast, for the mainland drafters, the power of the NPCSC to interpret laws was a fundamental constitutional principle which must also be applied to the Basic Law. In their view, the interpretation of the Basic Law embodied the exercise of state sovereignty over Hong Kong and therefore this power must be exercised by the central authorities. Moreover, it was also argued, though on a less grand plane, that since the Basic Law was a national law which would not only apply in the HKSAR but also in other parts of the country, the consistency of its interpretation could only be guaranteed by vesting the power of interpretation in the NPCSC.¹⁹

So there was the clash, jurisprudential as well as ideological. It is obvious that the two

¹⁶ This opposition was well known in the process of the Drafting of the Basic Law and also widely debated in Hong Kong during that period. Xiao also records this concern among the Hong Kong members of the Drafting Committee. See 肖蔚云 Weiyun Xiao, *一国两制与香港特别行政区基本法 One Country Two Systems and the Basic Law of the Hong Kong Special Administrative Region* (香港文化教育出版社有限公司 Educational and Cultural Press Ltd. 1990)222-225. For a good summary of the public's concern in this respect, see 黄江天 Jiangtian Huang, *香港基本法的法律解释研究 Interpretation of the Basic Law* (三联书店(香港)有限公司 Joint Publishing (HK) Co. Ltd 2007).

¹⁷ Peter Wesley-Smith, *An Introduction to the Hong Kong Legal System* (3rd edn, OUP 1998).

¹⁸ Denis Chang, 'In Search of Pragmatic Solutions' in Peter Wesley-Smith and Albert H Y Chen (eds), *The Basic Law and Hong Kong's Future* (Butterworths 1988) 273.

¹⁹ Xiao 224-227.

systems are fundamentally different in both respects. Yet they have to come together and work side by side with each other under the OCTS formula. To deny either side of the power to interpret the Basic Law would mean to negate the very fundamental fabric of its legal system. That in turn would mean the negation of the coexistence of two systems. According to Xiao, the final version of the interpretation scheme as it is now stipulated in Article 158 is a successful innovation that has solved this problem. More specifically, he explains, by vesting the power of interpretation in the NPCSC, Article 158 ensures the principle of 'one country', but by the NPCSC's authorizing the HKSAR courts to interpret the Basic Law, either 'on their own' or subject to the reference system, it accommodates the co-existence of two systems. In short, this is a paradigm example of maintaining the principle while allowing flexibility, a nutshell embodiment of 'one country, two systems'.²⁰ Ghai does not seem to disagree with Xiao in this regard, though he puts it slightly differently. In Ghai's view, '[n]owhere are the unique characteristics of the Basic Law... more evident than in its provisions for interpretation'.²¹

2. The power to interpret

As can be seen from the previous general description of the interpretation scheme, it is indeed a question of profound importance, theoretically and practically, to ask who has what power to interpret the Basic Law; a question that would quite easily puzzle common law lawyers who are not familiar with the Basic Law.

2.1 The NPCSC's general and final power of interpretation

What can be inferred from the provision that the power to interpret the Basic Law is vested in the NPCSC? It seems that there may at least be three. First, the NPCSC is the *grantee in the first place* of the power to interpret the Basic Law; it certainly has the power to interpret this Law. Secondly, the NPCSC's power of interpretation is general, meaning that it can interpret any provision of the Basic Law at any time it feels necessary. Third, the NPCSC's

²⁰ Ibid.

²¹ Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd edn, Hong Kong University Press 1999) 189.

interpretation is final. The first inference is sufficiently self-evident in Article 158 itself. The second and the third can be further supported by reading Article 158 of the Basic Law together with Article 67 of the PRC constitution, and further with the Legislation on Law as discussed above. Ghai seems to hold a similar view. As he understands it, the NPCSC's power to interpret the Basic Law 'covers all the provisions of the Basic Law, [and it] may be exercised in the absence of litigation.'²²

That the NPCSC's power to interpret the Basic Law is a plenary and free-standing one has been accepted and affirmed by the CFA. As we already learned, in the Clarification, the CFA admitted that the authority of the NPCSC to make an interpretation in accordance with Article 158 cannot be questioned.²³ Two months later in *Lau Kong Yung*²⁴ the CFA stated it even more clearly:

It is clear that the Standing Committee has the power to make the [1999] Interpretation. This power originates from Article 67(4) of the Chinese Constitution and is contained in Article 158(1) of the Basic Law itself. The power of interpretation of the Basic Law conferred by Article 158(1) is in general and unqualified terms.²⁵

and that

That power [of the NPCSC to interpret the Basic Law] and its exercise is not restricted or qualified in any way by Articles 158(2) and 158(3).²⁶

Counsel for the applicant in *Lau Kong Yung* argued that Article 158 imposes a constitutional restraint on the NPCSC's power and that this understanding accords with the high degree of autonomy accorded to the Region by the Basic Law.²⁷ The CFA rejected this argument, saying that this submission, 'if it were accepted, would deny the [NPCSC] of the power to interpret

²² Ibid 198.

²³ See our discussion in Chapter II.

²⁴ *Lau Kong Yung and others v The Director of Immigration* [1999] HKCFA 5; [1999] 3 HKLRD 778; (1999) 2 HKCFAR 300.

²⁵ Ibid para 57.

²⁶ Ibid para 58.

²⁷ Ibid para 56.

provisions in the Basic Law other than the excluded provisions'.²⁸ 'Such a limited power of interpretation', the Court added, 'would be inconsistent with the general power conferred by Article 158(1)'.²⁹

As can be expected, the CFA's position in *Lau Kong Yung* on the issue of jurisdiction of interpretation was not at all well received in Hong Kong, especially not by the legal profession. It was regarded as 'a major concession' or a 'retreat' as compared to its brave assertion in *Ng Ka Ling*.³⁰ Ghai submitted that the plenary and freestanding power of the NPCSC is 'the Achilles heel of Hong Kong's autonomy'.³¹ Denis Chang shared Ghai's metaphor as well as his conclusion that the overriding power of the NPCSC in this regard is a threat to Hong Kong's autonomy.³² More specifically, Chang was worried that the NPCSC's unqualified power to interpret the Basic Law, as defined by the CFA, if exercised without self-restraint, 'would be turned into a control of expedience, enabling it in effect to legislate directly for the HKSAR on matters which would otherwise have been left to the HKSAR to do on its own'.³³

2.2 The HKSAR courts' authorized power of interpretation

The HKSAR courts also have the power to interpret the Basic Law. They can interpret, *on their own*, the provisions of this Law which are within the limits of the Region's autonomy. They may also interpret other provisions which concern affairs that are the responsibilities of the Central Government, or concern the relationship between the HKSAR and the Central Authorities, but in this case their power of interpretation is subject to the reference system. In *Ng Ka Ling*, the CFA classified those provisions of the Basic Law which are *not* within the limits of the Region's autonomy as *excluded provisions* and those which they can interpret on their own as *non-excluded provisions*.³⁴ In other words, the HKSAR courts can virtually

²⁸ Ibid para 59. For the Court's classification of 'excluded provisions', see our discussion in next subsection.

²⁹ Ibid 59.

³⁰ Po Jen Yap, 'Constitutional Reivew under the Basic Law: The Rise, Retreat and Resurgence of Judicial Power in Hong Kong' (2007) 37 Hong Kong LJ 457.

³¹ Yash Ghai, 'The Imperatives of Autonomy: Contradictions of the Basic Law' in Johannes Chan and Lison Harris (eds), *Hong Kong's Constitutional Debates* (Hong Kong Law Journal Limited 2005) 40.

³² Denis Chang, 'The Imperatives of One Country, Two Systems' (2007) 37 Hong Kong LJ 361.

³³ Ibid 360.

³⁴ *Ng Ka Ling and Another v The Director of Immigration* [1999] HKCFA 72; [1999] 1 HKLRD 315; (1999) 2

interpret any provision of the Basic Law, albeit being in certain cases subject to the reference system.

What then is the relationship between the HKSAR courts' power of interpretation and the general and free-standing interpretative power of the NPCSC? The answer is perhaps again lying in the word 'authorize' as used in Article 158. As is made clear in Article 158, the HKSAR courts' power to interpret the Basic Law derives from the authorization of the NPCSC. It has been argued in Chapter II that with any authorization there may well be limits as to the scope of the authorized power as well as supervision from the authorizer. Likewise, as far as the interpretation of the Basic Law is concerned, there is a 'the authorizer and the authorized' relationship between the NPCSC and the HKSAR courts, the principle of judicial independence notwithstanding. Indeed, the CFA in *Ng Ka Ling* stated its position, without any difficulty, that Article 158 contains a constitutional authorization from which the HKSAR courts' power of interpretation stems.³⁵ Based on the premise of authorization, the Court in *Lau Kong Yung* therefore logically came to the understanding that the NPCSC's power of interpretation is a general and unqualified one, and correspondingly that of the HKSAR courts a limited and qualified one. It stated that Article 158(2) contains the authorization by the NPCSC to the courts of the Region,³⁶ and therefore,

The authority given by Article 158(2) to the courts of the Region stems from the general power of interpretation vested in the Standing Committee. Article 158(3) extends that authority but subject to a qualification requiring a judicial reference.³⁷

As such, the next question is how to understand that the HKSAR courts may interpret, 'on their own', the non-excluded provisions of the Basic Law. Despite the nature of 'authorization', the effect of the HKSAR being 'on their own' in interpreting those provisions of the Basic Law might have amounted to, as Ghai suggests, a *division* of the interpretative power between the NPCSC and the HKSAR courts as far as those provisions are concerned,

HKCFAR 4 para 88.

³⁵ See *ibid* para 81 and *Lau Kong Yung* para 55.

³⁶ *Lau Kong Yung* para 55.

³⁷ *Ibid* para 59.

the kind of division of power that excludes the intervention from the NPCSC.³⁸ But in Xiao's view, what 'on their own' means is no more than that 'the NPCSC usually will not intervene'.³⁹ That is to say, the NPCSC's power to intervene cannot be excluded, either in theory or in practice. In the absence from the NPCSC's intervention, however, as Xiao added, 'on their own' means in practice a 'complete power' of interpretation.⁴⁰

The CFA has held similar views to that of Xiao. In *Ng Ka Ling*, it said that the courts' power to interpret the Basic Law 'on their own' is an essential part of the high degree of autonomy granted to the Region, and that 'on their own' is to emphasize the high degree of autonomy and the independence of the judiciary.⁴¹ In *Lau Kong Yung*, the CFA went further and defined the term of 'on their own' as meaning no more than 'the absence of a duty to refer the provisions in question to the [NPCSC] for interpretation'.⁴² The Court's understanding of the phrase 'on their own' is obviously consistent with its understanding of the NPCSC's general power of interpretation, which it sees as plenary and freestanding. Thus, for the CFA also, the NPCSC's intervention cannot be excluded even when the HKSAR courts are *on their own* interpreting the excluded provisions, though in practice whether the NPCSC would do so and if it does, how it would be received by the public, is quite another matter.

One commentator, however, has argued that the excluded provisions are in fact subject matter limitations on the NPCSC's interpretive power.⁴³ In his view, once the NPCSC has authorized the HKSAR courts to interpret those provisions, it 'does not retain, or at least shall not exercise',⁴⁴ the power to interpret them. However, this argument seems to have blurred the line between whether the NPCSC has the power to interpret the excluded provisions and whether it shall exercise this power. It is not difficult to see that they are different things. Indeed, as this commentator rightly points out, the interpretative power of

³⁸ Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* 195.

³⁹ Xiao 225. 'Complete power' is a literal translation from the Xiao's Chinese expression of "全权". 许崇德 Chongde Xu, *港澳基本法教程 A Textbook on the Basic Law of Hong Kong and Macau* (中国人民大学出版社 Remin University Press 1994) 69.

⁴⁰ *Ibid.*

⁴¹ *Ng Ka Ling* para 81.

⁴² *Lau Kong Yung* para 58.

⁴³ Ling Bing, 'Subject Matter Limitation on the NPCSC's Power to Interpret the Basic Law' (2007) 37 *Hong Kong LJ* 619-646.

⁴⁴ *Ibid* 639.

the NPCSC and the HKSAR courts are ‘concurrent’ on the excluded provisions.⁴⁵ By ‘concurrent’, it is already clear that the NPCSC does retain the power to interpret the excluded provisions, though it might be expected not to exercise this power *concurrently* while a HKSAR court is interpreting the same provisions during adjudication. It could, for example, exercise its power *subsequently* to correct the court’s interpretation, should it consider necessary to do so.

In short, the HKSAR courts’ power to interpret the Basic Law comes from the NPCSC’s authorization. And with the NPCSC’s authorization comes its supervision, even when the HKSAR courts are to interpret the excluded provisions on their own. From the ‘two system’ perspective, the NPCSC’s overriding power in the Basic Law interpretation, even in regard to excluded provisions which concern matters within the autonomy of the Region, does appear fundamentally contradictory to the promise of high degree of autonomy itself, and it is no wonder that many Hong Kong commentators regard it as a threat and a damage to, as well as the Achilles heel of, Hong Kong’s autonomy. But from the ‘one country’ perspective, it seems also natural to argue that with authorization certainly comes supervision, and that if without the NPCSC’s retaining the power to intervene, if part of the Basic Law is totally left for the HKSAR courts to decide ‘*on their own*’ what it is, ‘autonomy’ could be easily turned into ‘self-determination’, which, in the mainland’s eye, is obviously not consistent with the principle of OCTS. That is perhaps why the NPCSC *authorizes* the HKSAR courts to interpret the Basic Law, rather than *divides* the interpretive powers between them. It is from this supervisory perspective that the relationship between the NPCSC and the HKSAR courts in respect of the interpretation of the Basic Law, in particular the interpretation of the excluded provisions, can be best understood. Seen as this, the NPCSC’s overriding power is probably the sword of Damocles, which is more of symbolic demonstration rather than pragmatic use.

2.3 The separation of final adjudication and final interpretation

It has become clear from the above discussion that the power to interpret the Basic Law is vested in the NPCSC; its power is general and unqualified. By contrast, the power of the HKSAR courts to interpret the Basic Law comes from the NPCSC’s authorization, and its

⁴⁵ Ibid.

interpretation may be subject to the NPCSC's overruling. Taking these two aspects together, a most significant feature of the entire interpretation scheme as established in Article 158 becomes clear; that is, the separation of the power of final interpretation from the power of final adjudication. Indeed, as Zhenmin Wang observes, this separation is a fundamental change to the legal system as a whole in Hong Kong.⁴⁶ As a matter of fact, in the pre-handover period, the Hong Kong courts did not have the power of final adjudication, but the power of interpretation and adjudication was vested in the same body—the judiciary, with the Privy Council at the top. In the post-handover era, the CFA is given the power of final adjudication, but under the Article 158 scheme, it does not have the power of final interpretation of the Basic Law, and the NPCSC's legislative interpretation becomes part of the HKSAR legal system.

Difficulties are apt to arise from this separation. The dilemma is that it is by this separation that Article 158 is intended to bring the two legal systems to work together. Wang tries to offer some encouragements by drawing on the British experience of legal integration with the EU, which, he thinks, 'has successfully resolves the conflicts between its common law and the European civil law'.⁴⁷ And he is optimistic that similar success can also be achieved between the HKSAR and the mainland under Article 158 of the Basic Law. His hope, however, is only supported with a teaching of Confucius, which he quotes as saying: 'Gentlemen always get along with each other without compromising their values and principles'.⁴⁸ Blessed are the two separate legal systems if they could live and walk together as such gentlemen.

3. The reference system

The reference system as established under Article 158 is aimed particularly at the interpretation of excluded provisions, i.e., those provisions that are not within the limits of the Region's autonomy, including but not limited to, provisions concerning affairs that are

⁴⁶ See generally Zhenmin Wang, 'From the Judicial Committee of the British Privy Council to the Standing Committee of the Chinese National People's Congress--an Evolution of the Legal Interpretive System after the Handover ' (2007) 37 Hong Kong LJ 605-618.

⁴⁷ Ibid 618.

⁴⁸ Ibid.

the responsibility of the Central Government, or concerning the relationship between the Central Authorities and the Region. According to Article 158, a reference to the NPCSC for interpretation is obligatory, if such provisions are at stake, and if the interpretation of such provisions 'will affect the judgments on the cases'. The CFA is the only court in the HKSAR that is entrusted with this power or, for that matter, the duty, to make a reference to the NPCSC. Moreover, a reference to the NPCSC shall be made before the HKSAR courts 'mak[e] their final judgments which are not appealable'. The reference system is apparently an important part of the whole interpretation scheme. But rather surprisingly, it was a decade and more after the implementation of the Basic Law before this system was used. And up to now, it has only been used once (the case in which this system was used will be discussed later). How this system should operate, what problems there are with it, what improvements (if needed) could be made, are questions that are still very much open for debate.

3.1 A comparison with the EU preliminary ruling procedure

It is said that the Basic Law reference system was modelled on the preliminary ruling procedure established in what is now the European Union (EU).⁴⁹ Under the EU preliminary ruling procedure, a court or a tribunal of a member state may request the European Court of Justice (ECJ) to make a decision on the interpretation of EU law.⁵⁰ In the EU legal system, the ECJ is conferred with a monopoly of interpretation on questions of Community law, and the preliminary ruling procedure is set up to secure the functioning of the EU legal system as a whole by avoiding the potential danger of the law not being applied uniformly in all member states.⁵¹ As one member of the BLDC later wrote, the drafting members found the EU preliminary ruling procedure 'inspiring' and 'worthy of consideration', because it was thought that the Central-HKSAR relationship was 'the same' as that between the EU and its member states, in that 'the power of interpretation and the power of final adjudication are

⁴⁹ Xu 69. See also Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* 200

⁵⁰ This jurisdiction of the ECJ was formerly provided in Article 177 of the EEC Treaty. It is now provided in Article 267 of the Treaty on the Functioning of the European Union. For a comprehensive discussion of the preliminary ruling procedure, see generally Damian Chalmers and Adam Tomkins, *European Union Public Law: Text and Materials* (CUP 2007) Chapter 7.

⁵¹ Carl Otto Lenz, 'The Role and Mechanism of the Preliminary Ruling Procedure' (1994) 18 *Fordham International Law Journal* 389.

not vested in the hands of one and the same institution'.⁵²

At first sight, the Basic Law reference system does look similar to the EU preliminary ruling procedure. First, the rationale behind both of them, as well as the purpose each of them is aimed to achieve, may be seen as by and large the same; that is, in case of conflict or uncertainty, the authoritative interpretation of the law (the Basic Law in Hong Kong's case and the EU law in EU's case) has to be made by the authority who has the final power to interpret it. The uniformity of the application of the law can only be guaranteed if there is such a conflict resolving mechanism. Secondly, in both cases, a reference is made from a domestic jurisdiction to another jurisdiction, by which the domestic jurisdiction is bound in one way or another. Thirdly, at more specific levels, a reference is made, in both the Basic Law reference system and the EU preliminary ruling procedure, when the necessity condition is met.⁵³ That is to say, when there is a need for an authoritative interpretation of the provisions of the law. Moreover, under the Basic Law reference system, a reference is always mandatory. There is also a similar mandatory element in the EU preliminary ruling procedure; the court of a Member State 'shall bring the matter before the [ECJ]', wherever questions are raised in a pending case, 'against whose decision there is no judicial remedy under national law'.⁵⁴ However, that last similarity is already revealing the differences between the two reference systems.

There are indeed substantial differences between them. First, the very thought that the Central-HKSAR relationship can be considered as the same as that between the EU and the Member States is perhaps already taking the risk of oversimplification. Although there is a point in saying that the similarity lies in the separation of final adjudication and final interpretation, the fundamental difference between the greater constitutional contexts each reference system is in might easily render that similarity insignificant. As mentioned in Chapter II, the CFA rejected the analogy of Hong Kong's relationship with the mainland to that between colonial Hong Kong and Westminster sovereignty. It would not be surprising if

⁵² 王叔文 Shuwen Wang, *香港基本法导论 Introduction to the Basic Law of the Hong Kong Special Administrative Region* 216-217.

⁵³ According to the Treaty, a court or tribunal of a Member State may, 'if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon'.

⁵⁴ The Treaty on the Functioning of the European Union, Art 267.

the CFA may also reject the analogy drawn from the EU-Member State relationship, simply because Hong Kong's relationship with the Central authorities in Beijing is fundamentally different from that between an EU member state and the EU. Secondly, the scope that each reference system covers is very different. Under the EU system, a reference to the ECJ for preliminary ruling may be made in regard of any EU law, be it the Treaty, or the acts or statutes of EU institutions.⁵⁵ But under the Basic Law system, a reference is only due if the *excluded* provisions are concerned. Thirdly, under the EU system, a national court may have discretion as to whether or not to make a reference, especially when the court is not 'the final resort' in national law.⁵⁶ Under the Basic Law system, no such discretion seems to exist. Finally and perhaps most strikingly, while the EU preliminary ruling procedure maintains operating within the judicial process (albeit cross jurisdictions), the Basic Law reference system straddles from the judicial process in Hong Kong to the legislative/political process in Beijing.⁵⁷

The last mentioned difference is indeed just a reflection of the fundamental difference between the OCTS constitutional order and that established in the EU. For the EU legal system, its effective functioning ultimately depends on the uniform application of the EU law, the effect of which is the integration and harmonization of various national legal systems and national laws. Thus, the preliminary ruling system is expected to work in an integration-oriented way. OCTS, on the other hand, is aimed to retain the sovereignty of 'one country' while maintaining the separation of the 'two systems'. Consequently, while there must be an area of interface of the two legal systems under OCTS, integration of them is certainly not the goal.⁵⁸ This wider constitutional background, plus the ideological difficulties underlying OCTS, perhaps explains why the EU preliminary ruling procedure has been in active use, whereas the Basic Law reference system had been left unused for a decade and more since the Basic Law came into force. In fact, as P. Y. Lo records,

⁵⁵ This is clear from Art 267 of the Treaty.

⁵⁶ See generally Anthony Arnall, 'The Use and Abuse of Article 177 EEC' (1989) 52 *The Modern Law Review* 622-639.

⁵⁷ Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* 203.

⁵⁸ See generally Yash Ghai, 'Litigating the Basic Law: Jurisdiction, Interpretation and Procedure' in Johannes MM Chan, H.L. Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (2000); Cora Chan, 'Reconceptualising the Relationship between the Mainland Chinese Legal System and the Hong Kong Legal System' (2011) 6 *Asian Journal of Comparative Law* 1-30.

the CFA has taken an uncompromisingly autonomy oriented approach toward the question of judicial reference, trying, on the one hand, not to be placed in a position to countenance the question, if possible, and tacitly resisting, on the other hand, the filling up of constitutional space by NPCSC interpretations, and the consequential snuffing out of its freedom to interpret the Basic Law.⁵⁹

3.2 The conditions upon which a reference is due

A literal reading of Article 158 seems to suggest that there are three conditions upon which a reference shall be made: (1) the need to interpret a certain provision of the Basic Law; (2) the provision to be interpreted is an excluded provision; (3) such interpretation will affect the judgment on the case. If anyone takes it for granted that these conditions seem plain enough, he will certainly be surprised by the CFA's articulation.

In *Ng Ka Ling*, the CFA, for the first time, faced the problem of whether to make a reference to the NPCSC. As mentioned in Chapter II, two Basic Law provisions were at stake in that case: Article 24 (2) (3) and Article 22 (2). Counsel for government submitted that Article 22 (2) was an excluded provision and therefore the Court should make a reference to the NPCSC for interpretation. As a general position, the Court admitted that it does have a duty of the CFA to make a reference to the NPCSC under Article 158 *if the conditions are met*;⁶⁰ more specifically, it also accepted that Article 22 (2) was an excluded provision.⁶¹ And yet, it came up with a decision that in this case, a reference was not due. The Court managed to come up with this decision by exploiting the conditions as stipulated in Article 158 upon which a reference shall be made.

According to the Court, a reference shall be made only if *two conditions* are satisfied:

- 1) First, the provisions of the Basic Law in question (a) concern affairs which are the responsibility of the Central People's Government; or (b) concern the relationship between the Central Authorities and the Region. That is, the excluded provisions. We shall refer to this as 'the classification condition'.

⁵⁹ P. Y. Lo, 'Rethinking Judicial Reference: Barricades at the Gateway?' in Hualing Fu, Lison Harris and Simon N. M. Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave 2007) 157.

⁶⁰ *Ng Ka Ling* para 83.

⁶¹ *Ibid* para 97.

(2) Secondly, the Court of Final Appeal in adjudicating the case needs to interpret such provisions (that is the excluded provisions) and such interpretation will affect the judgment on the case. We shall refer to this as ‘the necessity condition’.⁶²

The Court then stated that ‘it is for the CFA and for it alone’ to decide whether both conditions are satisfied.⁶³ In particular, it added, it is for the CFA, *not the NPC*, to decide whether a provision is an excluded provision for the reference purpose.⁶⁴ Save from noting that this understanding ‘is accepted by counsel for the applicants and counsel for the [government]’,⁶⁵ the Court did not offer any legitimacy for ousting the NPCSC totally. It might well be argued that whether, in a particular case, there is a need to interpret a particular provision of the Basic Law, is purely an adjudicating issue which of course should be decided by the court. However, the ousting of the NPCSC from the classification enterprise might not be as easily defended. It is quite plausible to argue that in determining whether a provision is an excluded or a non-excluded provision, the court will be defining what powers the HKSAR and the central authorities respectively have under the Basic Law. This is perhaps not a purely adjudicating issue, and if so, it can hardly be said that it should be decided by the CFA, and by it alone.

The CFA’s definition of the necessity condition may also be problematic. As noted in the beginning of this subsection, ‘the need to interpret’ and ‘the effect of such interpretation’ are two distinctive, though closely related, elements in Article 158. But the Court in *Ng Ka Ling* has apparently combined these two elements into its formulation of the necessity condition. At first thought, it seems that there is no serious problem with this combination, for whether there is the need to interpret a provision is ultimately related to, if not equivalent to, whether such interpretation will have any effect on the judgment of the case. Or, one might say that the effect of the interpretation on the case may be regarded as the condition to the need for such an interpretation.⁶⁶

⁶² Ibid para 89.

⁶³ Ibid para 90.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Denis Chang, ‘The Reference to the Standing Committee of the National People’s Congress under Article 158 of the Basic Law’ in Johannes MM Chen, H L Fu and Yash Ghai (eds), *Hong Kong’s Constitutional Debate*:

On further thought, however, it might be problematic not to distinguish ‘the need to interpret’ from ‘the effect of such interpretation’, for there might be a devil hiding in the details: what does it mean by ‘if the interpretation *will affect* the judgment’? The term ‘will affect’ is apparently vague. In any case, it is always a matter of degree; taken broadly, it could mean *any degree of effect*, either on the reasoning based on which the judgment is made or on the substantive content of the judgment itself. If perceived in this way, then the CFA is certainly under stricter obligation to make a reference. For those who tend to see things more from the ‘two systems’ angle rather than from the ‘one country’ position, this broad understanding of the term ‘*will affect*’ is unlikely to be welcomed. Denis Chang, for example, argues that the term ‘will affect’ is obviously stronger and stricter than ‘*may affect*’ or ‘*may arguably affect*’, and therefore only when the interpretation will have a *substantive effect* on the judgment, can it be said that the necessity condition is satisfied.⁶⁷

By a sweeping claim that whether the two conditions are met is for the CFA and for it alone to decide, the CFA has certainly kept the devil hiding behind the term of ‘will affect’ under its control. In fact, the Court in *Ng Ka Ling* did not attempt to articulate what effect the ‘will affect’ element may have on assessing the necessity condition. Nor does it seem that it has ever attempted to do so in later cases. Apparently, the Basic Law itself does not provide a test for such assessment either. If there are any grey areas in the Basic Law, this is, for sure, one of them. Interpreted narrowly, the CFA will have a greater room of manoeuvre when it comes to its duty of making a reference in accordance with Article 158; conversely, the Court’s room of manoeuvre is smaller. The tension arising from there may immediately be zoomed to a larger picture of the more politically sensitive issues of the degree of autonomy and judicial independence in the Region. Since the very reason to have a reference system is because the provisions needed to be interpreted in adjudication concern the responsibility of the Central Authorities or the relationship between the Central Government and the HKSAR (which the courts cannot interpret on their own), then it might be argued that the intent of the reference system is to limit the Court’s discretion in this regard rather than to give it a room of manoeuvre. If this understanding stands, it follows that the line to be

Conflict over Interpretation (Hong Kong University Press 2000) 143.

⁶⁷ *Ibid* 144.

drawn there should be between ‘to affect and not to affect’, rather than between, say, ‘may arguably affect’ and ‘may substantively affect’. If this is the original intent, then any attempt to exercise this limited interpretative power in a less limited way, is, strictly speaking, to transgress the autonomous line onto the ‘one country’ sphere.

As the classification condition is concerned, the difficulty is that the Basic Law itself does not list which are non-excluded provisions and which are excluded provisions; or, as Denis Chang puts it, they do not carry with them identity cards to that effect.⁶⁸ For Ghai, this is the very reason why it becomes extraordinarily difficult to establish the HKSAR courts’ interpretative jurisdiction.⁶⁹ In contrast to the necessity condition, the classification enterprise is more immediately concerned about identifying the demarcating line between the HKSAR’s autonomy and the reserved responsibilities for the central authorities. It would not be surprising that disputes as to which is or is not an excluded provision may arise in practical cases.

However, it is not unlikely that the difficulty in identifying an excluded or a non-excluded provision might have been overestimated. In many a case, it seems that there are clear-cut classifications in the Basic Law. For example, the defence and foreign affairs are clearly the responsibilities of the Central Government, as stated in Article 13 and 14 of the Basic Law. Provisions, such as Article 17 (which provides that all laws enacted by the HKSAR legislature must be reported to the NPCSC for record and for its examination), Article 18 (which provides that the NPCSC may decide which national law to be applied to HKSAR), and Article 19 (which provides that the courts of the HKSAR in adjudicating cases concerning any act of state, should, via the Chief Executive obtain a certificate from the Central Government), are apparently concerned with the relationship between the Region and the Central Authorities. Indeed, Article 158 itself undoubtedly deals with the Central-Regional relationship in the respect of interpreting the Basic Law. For one thing, those provisions do not need to carry with them an identity card to be recognized as an excluded provision.

⁶⁸ Ibid 143.

⁶⁹ Ghai, *Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* 203.

On the other hand, it may also be as easily distinguishable whether a provision deals with the autonomous issues and hence a non-excluded provision. For instance, one would find it indisputably clear that whether vehicles are allowed to enter a park in Hong Kong is purely a matter within the Region's autonomy. As mentioned in last Chapter, there are plenty of provisions in the Basic Law which stipulate that this or that policy shall be formed by the HKSAR on its own. Indeed, many of the Articles in Chapter V and VI of the Basic Law, which deal with economic affairs and education, science, culture, sports or religion, labour and social services, are obviously non-excluded provisions. For those provisions, it seems that they do not need an identity card either.

3.3 The predominant test

As a matter of fact, the Court in *Ng Ka Ling* did not give any guidance as to how to assess whether each of the two conditions it recognized for making a reference is satisfied. In a not readily recognizable way, it seems that the Court had played the game of changing the concept: instead of explaining the two conditions, it introduced the predominant test, according to which only when the predominant provision needed to be interpreted in a case is an excluded provision shall then a reference to the NPCSC be made.

In *Ng Ka Ling*, after stating the two conditions and claiming the CFA's sole power to decide whether they are met, the Court went on to say that 'if the classification is not satisfied, that would be the end of the matter', for in that case, the necessity condition is obviously not satisfied because the provision concerned would be a non-excluded provision.⁷⁰ Only when the two conditions are satisfied, the Court continued, is the CFA 'obliged' to make a reference to the NPCSC.⁷¹ So, the Court pointed out, 'the crucial question before us is what test the Court should apply in considering whether the classification condition is satisfied'.⁷²

The message seems unmistakable; the Court was going to establish a test on which to identify whether a certain provision is an excluded provision. For sure, one simply cannot

⁷⁰ *Ng Ka Ling* para 91.

⁷¹ *Ibid* para 93.

⁷² *Ibid* para 98.

decide whether the classification condition is satisfied without doing the classification itself. But the Court in *Na Ka Ling* did not seem to follow this straightforward line.

It began by saying that ‘in deciding what test to be applied in considering whether the classification condition is satisfied, a purposive interpretation has to be adopted’.⁷³ This is because, the Court explained, a provision of the Basic Law ‘must be interpreted in its context’ and the context ‘naturally’ includes other provisions which may be relevant, in a number of ways, to the construction of this particular provision.⁷⁴ For example, assuming provision X is a non-excluded provision, then its construction might be qualified by other provisions of the Basic Law and ‘the qualification may be by way of addition, subtraction or modification’.⁷⁵ ‘Or’, the Court added, other provisions ‘may lend colour to its meaning or provide a pointer to its construction’.⁷⁶ Upon this understanding, the Court rejected the suggestion submitted by counsel for government that so long as an excluded provision is so relevant, a reference should be made. It said that

such reference would withdraw from the jurisdiction of the Court the interpretation of a [non-excluded provision of the Basic Law] . In our view, this would be a substantial derogation from the Region’s autonomy and cannot be right.⁷⁷

So, the Court concluded, the test in considering whether the classification condition is satisfied is to ask this question and to find the answer to it:

As a matter of substance, what predominantly is the provision that has to be interpreted in the adjudication of the case? If the answer is an excluded provision, the Court is obliged to refer. If the answer is a provision which is not an excluded provision, then no reference has to be made, although an excluded provision is *arguably* relevant to the construction of the non-excluded provision even to the extent of qualifying it.⁷⁸

How then shall we identify whether or not the predominant provision needed to be interpreted is an excluded provision? The Court offered no guidance at all. In *Ng Ka Ling*, the

⁷³ Ibid para 101.

⁷⁴ Ibid 102.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid 103. Original emphasis.

Court simply asserted that Article 24 is a non-excluded provision. Although it accepted that Article 22 (4) is an excluded provision and is arguably relevant to the interpretation of Article 24 in this case, it said that the predominant provision to be interpreted in this case was Article 24, hence, no reference should be made.⁷⁹

Thus, although the predominant provision test was framed with the intention to settle the classification condition issue, it had failed at least as far as the classification itself is concerned. In a way, it seems to have ended up with tackling the necessity condition. Arguably, the Court's emphasis to pick out the predominant provision is the interpretation of the term '*will affect*' which is part of the necessity condition. Thus, it is not sufficient to satisfy the necessity condition if the interpretation of an excluded provision is merely relevant, but it has to be able to affect the judgment to be made predominantly so as to put the CFA in an obliged position to make a reference.

Whether the predominant test is to be understood as one for assessing the classification condition or as one, as argued above, for assessing the necessity condition, the real effect of the introduction of this test is that it significantly expands the room of manoeuvre for the CFA in facing its duty under Article 158 to make a reference to the NPCSC. The Court justified this test on the need for a purposive interpretation of the Basic Law (a question that we will come back to in next section), which requires that a construction of a particular provision must be done in context, taking into account its relevance with other provisions. As a general principle, this approach itself is perhaps universally applicable. But as the justification for introducing the predominant test into the reference system, it does not seem to be sufficient, for the adoption of the predominant test has effectively and substantively changed the meaning as well as the proposed functioning of Article 158. As Albert Chen points out, with the test, Article 158 could actually be reframed as this

If the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, *then, provided that such provisions are, as a matter of substance, the predominant provisions being*

⁷⁹ Ibid 106.

interpreted or applied in the case, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the NPCSC through the CFA of the Region. (The highlighted words are words added to the existing version).⁸⁰

Obviously, a reference system is fundamentally different with or without the predominant provision test. As Chen notes, the test is a 'mid-air structure' by which the Court had actually converted a test of 'what provision needs to be interpreted in this case' into a test of 'what predominant provision is going to be applied in this case', which are two different things.⁸¹ In Chen's view, under Article 158, what the court should do is to classify or determine whether any provision that needs to be interpreted is an excluded provision and whether the interpretation will affect the judgment. But by this test, what the court will do is to classify and determine whether the predominant provision to be interpreted is an excluded provision.⁸² That, in Chen's view, is a substantial derogation of the authority of the NPCSC in the name of safeguarding the Region's autonomy.⁸³ Ghai, in studying Article 158, observes that the Court can already conceivably 'oust' the NPCSC by playing with the difficulty in determining whether 'such interpretation will affect the judgment'.⁸⁴ If so, with the help of the predominant test, that conceivable mission seems much easier, for, as P.Y. Lo rightly points out, whether a provision is the predominant provision to be interpreted depends on one's view.⁸⁵

Given the enormous and obvious implications the predominant test bears, it can be strongly argued that had such a test been intended to be included in Article 158, the drafters of the Basic Law could have easily written this Article in the way as Chen has suggested. If it was not intended, then it is not unfair to say that the CFA had usurped a portion of power to interpret the Basic Law that had not been granted to it. That the Basic Law requires purposive interpretation cannot justify this. Moreover, the Court's introduction of the

⁸⁰ Albert H Y Chen, 'The Court of Final Appeal's Ruling in the 'Illegal Migrant's Children Case: A Critical Commentary on the Application of Article 158 of the Basic Law' in Johannes MM Chan, H L Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press 2000) 131.

⁸¹ *Ibid* 129.

⁸² *Ibid* 130.

⁸³ *Ibid*.

⁸⁴ Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* 191.

⁸⁵ Lo 160.

predominant test is apparently substantive interpretation of Article 158. If, as mentioned earlier in this subsection, Article 158 is an excluded provision, the Court should have referred it to the NPCSC for an interpretation, rather than single-handedly introduced into the reference system the predominant test.

After the *Ng Ka Ling* decision was handed down, the Court was criticized, among other things, for not having referred Article 22 (which the Court itself admitted is an excluded provision). As we learned in Chapter II, the NPCSC, upon the request of the Chief Executive, issued an Interpretation overruling the Court's interpretation of both Article 22 and 24 (2) (3). But in that Interpretation, nothing was mentioned about the Court's introduction of the predominant test. (Nor was anything mentioned about the Court's assertion of the power of constitutional review). With the benefit of hindsight, the NPCSC might probably find that it only hit the minor target, while having missed the big ones.⁸⁶ In *Lau Kong Yung*, the CFA expressed the view that it might need to re-visit the classification and necessity conditions and the predominant test in appropriate case.⁸⁷ But for the CFA, the appropriate case is yet to come.

3.4 Procedural uncertainties

The final thing to mention about the reference system is the lack of a clear and applicable procedure according to which the CFA submits a reference to the NPCSC. Article 158 merely states that a reference should be made through the CFA, i.e., the other courts of the Region are not qualified to make such a reference on their own. But how should the CFA do it? What materials should be attached to the reference? Should the CFA submit its opinion on the understanding of the provision in question when it makes a reference, or should it just submit a mere request per se? How should the NPCSC deal with the CFA's reference? Should it, for example, invite legal presentations from both parties involved in the specific case out of which the reference is made? Or should it even allow a certain role to be played by the

⁸⁶ In a speech by the Deputy Director of the Legislative Affairs Committee of the NPCSC, Qiao Xiaoyang, who later also assumed the office as the Chairman of the BLC, did say that the CFA was wrong for not having made a reference to the NPCSC. But Qiao was not saying anything about the predominant test, or the assertion of the power of constitutional review.

⁸⁷ *Lau Kong Yung* para 64.

CFA in framing an interpretation? All these are not clear in Article 158.

Moreover, there seems to be a big loophole in Article 158 concerning when the CFA should make a reference. According to Article 158, a reference should be made through the CFA *before* the HKSAR courts make their judgments *which are not appealable*. Surely, in most circumstances, a judgment by a lower court is always theoretically appealable but it can, as a matter of practice, be final, because no appeal is taken. In other words, what is theoretically appealable may end up being practically final. In such a case, the problem is that a reference which should have been made is not actually undertaken. What then is to make of the situation of this kind?

Ghai notices some of these problems.⁸⁸ In his view, when the CFA makes a reference, it is preferable that it submits not merely a request for interpretation but also its understanding of the meaning of the provision concerned. 'It is unfortunate that the NPCSC should not have the advantage of the considered analysis of the CFA'.⁸⁹ It might be added that if the CFA is allowed to submit its understanding and if the NPCSC is willing to consider it, it might lessen worries in the public mind that political interference may be put into Basic Law interpretation, which in turn may damage the rule of law in Hong Kong. As far as the loophole is concerned, Ghai suggests that it is preferable to provide that appeals should lie to the CFA in all instances where a question of the Basic Law arises.⁹⁰ In the case of a request for a NPCSC interpretation from a lower court, Ghai suggests that, for the benefit of order and coherence, the CFA should not act merely as a post office, but should take up a more substantive role as to be able to persuade or even order the lower court to withdraw a request for a NPCSC interpretation.⁹¹ For the same reason, one might add that the CFA should be able to persuade or even order the lower courts to make a request for reference.

3.5 The *Congo* case⁹²

⁸⁸ Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* 205-207.

⁸⁹ *Ibid* 205.

⁹⁰ *Ibid*.

⁹¹ *Ibid* 206.

⁹² *Democratic Republic of the Congo and Others v FG Hemisphere Associate LLC* [2011] HKCFA 43; [2011] 4 HKC 151.

After *Ng Ka Ling*, the CFA has been requested in another two cases to consider making a reference to the NPCSC. But it declined to act in one and did not deal with it in the other.⁹³ The *Congo* case is the first and up to now the only case in which the CFA has ever made a reference to the NPCSC.

The case involved a US vulture fund (FG Hemisphere) seeking to recover debts from the Democratic Republic of the Congo in the Hong Kong courts.⁹⁴ The Congo government submitted that it enjoyed absolute state immunity in Hong Kong and was immune from suit in a foreign court. Thus, the legal issue at stake was this: what doctrine of state immunity was adopted in the HKSAR—absolute immunity or restrictive immunity? In the CA, it was held that the restrictive doctrine had been incorporated into HK law through the common law. Thus, despite the fact that the PRC adopted the doctrine of absolute immunity, the restrictive doctrine applied in the HKSAR notwithstanding the PRC's position.

On further appeal to the CFA, the majority held that in order to ascertain which doctrine of state immunity was applied in the HKSAR, Articles 13 and 19 of the Basic Law needed to be interpreted. Article 13 provides that foreign affairs relating to the HKSAR are the responsibilities of the Central authorities. And Article 19 (3) provides that the HKSAR courts have no jurisdiction over acts of state (such as foreign affairs and defence), and that whenever questions concerning the fact of acts of state arise in the adjudication of cases, the courts shall obtain a certificate from the Chief Executive thereupon, and the Chief Executive, before issuing such a certificate, shall obtain a certifying document from the Central People's Government. The majority of the Court stated straightforwardly that these provisions were excluded provisions, because they concerned the management and conduct of foreign affairs and the relationship between the HKSAR and the Central Authorities.⁹⁵ Therefore, the Court, after making what it called a 'necessarily tentative and provisional' conclusion on the substantive legal points, decided to refer questions of interpretation of

⁹³ Lo 158.

⁹⁴ FG Hemisphere had brought arbitration proceedings in France and Switzerland. It was seeking to enforce those arbitral awards in the Hong Kong courts, on the basis that the Democratic Republic of the Congo had assets in Hong Kong.

⁹⁵ *The Congo case*.

the two Basic Law Articles to the NPCSC. As was stated:

- (a) The HKSAR cannot, as a matter of legal and constitutional principle, adhere to a doctrine of state immunity which differs from that adopted by the PRC. The doctrine of state immunity practised in the HKSAR, as in the rest of China, is accordingly a doctrine of absolute immunity.
- (b) There is no basis in law for holding that the 1st defendant (the Congo government) has waived its immunity before the courts of the HKSAR
- (c) Prior to rendering a final judgment in this matter, the Court is under a duty pursuant to Article 158(3) of the Basic Law to refer, and does hereby refer, the questions set out in Section G of this judgment to the [NPCSC], [because] Articles 13 and 19 [are excluded provisions], [and] the interpretation sought being necessary for the Court's adjudication of the present case⁹⁶

On the reference issue, it seems clear that the majority opinion in *the Congo case* was largely following the general approach adopted in *Ng Ka Ling*; that is whether the two conditions for making a reference could be satisfied. However, the Court did not articulate or develop that approach any further, for it was of the view that the *Congo case* was not an appropriate case to revisit the classification condition and the necessity condition and the predominant test as articulated in *Ng Ka Ling*. In regard to the classification condition, the majority in the *Congo case* held that the predominant test was of no relevance and there was no need to apply it, because both Article 13 and 19 (3) were excluded provisions, and the parties had no objection to this.⁹⁷ As for the necessity condition, the majority was equally straightforward. It said since the Congo government had not waived its immunity, the case could not be resolved without a determination of the questions of interpretation affecting the meaning of Articles 13 and 19 of the Basic Law. 'The necessity condition is therefore satisfied'.⁹⁸

Thus, many questions concerning the conditions for making a reference, which have been discussed in the previous subsection, remain unresolved. How to identify which provision of the Basic Law is an excluded provision? Is the predominant test legitimate? Is this test to be applied to assess the classification condition or is it in essence to be applied to assess the necessity condition? The majority opinion in the *Congo case* had left these theoretical

⁹⁶ Ibid para 183.

⁹⁷ Ibid para 403-405.

⁹⁸ Ibid para 406.

questions unsolved. In addition, there is still the bigger question. Is it, as stated in *Ng Ka Ling*, for the CFA and for it alone to decide whether the two conditions are met, even the NPCSC shall have no say as to whether or not a provision is an excluded provision? It is interesting to note that the Court in *the Congo case* neither affirmed nor denied that position held in *Ng Ka Ling*. In fact, it did not mention this point of the *Ng Ka Ling* position at all. A possible explanation is perhaps because the Court did not think this case was an appropriate case to revisit the classification condition and the necessity condition as well as the predominant test as articulated in *Ng Ka Ling*; such a revisit would certainly require a look at this position again, either to reaffirm it or to readjust it.

But the Court in *the Congo case* did make its own contribution to the reference system. That was in the procedural aspect. The Court clarified a number of issues which were of significant importance as to the practical functioning of the reference system.

First, it is the question of the subject of the reference. The Court said that the duty to make reference under Article 158 'is limited to questions of interpretation of the Basic Law identified in that provision'.⁹⁹ In other words, the Court is not referring the provision concerned to the NPCSC for a general interpretation, but what specific questions the Court has identified in that provision and seek interpretation from the NPCSC merely on those questions. Accordingly, the reference is a list of questions rather than a general request.¹⁰⁰

Secondly, it is the question of whether the CFA can give its view on the questions referred to

⁹⁹ Ibid para 407.

¹⁰⁰ In the *Congo case* the Court referred these questions to the NPCSC: (1) whether on the true interpretation of Article 13(1), the Central People's Government (CPG) has the power to determine the rule or policy of the PRC on state immunity; (2) if so, whether, on the true interpretation of Articles 13(1) and 19, the HKSAR, including the courts of the HKSAR: (a) is bound to apply or give effect to the rule or policy on state immunity determined by the CPG under Article 13(1); or (b) on the other hand, is at liberty to depart from the rule or policy on state immunity determined by the CPG under Article 13(1) and to adopt a different rule; (3) whether the determination by the CPG as to the rule or policy on state immunity falls within "acts of state such as defence and foreign affairs" in the first sentence of Article 19(3) of the Basic Law; and (4) whether, upon the establishment of the HKSAR, the effect of Article 13(1), Article 19 and the status of Hong Kong as a Special Administrative Region of the PRC upon the common law on state immunity previously in force in Hong Kong (that is, before 1 July 1997), to the extent that such common law was inconsistent with the rule or policy on state immunity as determined by the CPG pursuant to Article 13(1), was to require such common law to be applied subject to such modifications, adaptations, limitations or exceptions as were necessary to ensure that such common law is consistent with the rule or policy on state immunity as determined by the CPG, in accordance with Articles 8 and 160 of the Basic Law and the Decision of the NPCSC dated 23 February 1997 made pursuant to Article 160. Ibid para 407.

the NPCSC for interpretation. According to the Court, the language of Article 158 (3) 'plainly' permits the Court to do so.¹⁰¹ What Article 158 (3) precludes, the Court added, is 'the making of a final judgment' before a reference which shall be made is made.¹⁰²

Thirdly, it is the question of the channel through which the reference shall be submitted to the NPCSC. In this case, the Court said that the reference shall be passed 'by the Secretary for Justice (of the HKSAR) through the Office of the Commissioner of the Ministry of Foreign Affairs (OCMFA) to the NPCSC.'¹⁰³ However, the Court did not give any explanation of why this is the appropriate channel.

Fourthly, it is the question of whether any material should be attached to the reference, and if so, what kind of materials. In this case, the Court listed these documents to be passed through to the NPCSC alongside with the reference: (1) the reasons for judgment delivered in this case by the members of this Court; (2) the provisional orders of this Court; (3) the judgments of the CA in this case; and (4) the judgment of Reyes J in this case.¹⁰⁴ Although the Court did not explain why these materials were to be transmitted to the NPCSC, its consideration in this respect seems to be in accord with its position that the CFA can and should express its views on the questions to be referred to the NPCSC.

The Court's decision to make a reference to the NPCSC did not meet with much criticism, presumably because the two Basic Law Articles at stake are generally accepted as excluded provisions and it is obvious that they need to be interpreted to dismiss the case. Nor have there been many comments on the Court's contribution to the procedure that a reference shall be submitted to the NPCSC.¹⁰⁵ Albert Chen, however, notices that, as far as the reference issue is concerned, the significant feature of the *Congo* decision is that the Court not only decided to refer the relevant provisions of the Basic Law to the NPCSC for interpretation, but also expressed their own views on the substantive questions concerned

¹⁰¹ Ibid para 398.

¹⁰² Ibid para 398.

¹⁰³ Ibid para 408.

¹⁰⁴ Ibid para 408. The judgment of Reyes J was the judgment of the CFI.

¹⁰⁵ For a short summery of commentaries on the Congo case, see Albert H Y Chen, 'Focus the Congo Case' (2011) 41 Hong Kong LJ 369.

which had the effect of rendering a provisional judgment on the case.¹⁰⁶ As Chen understands it, nothing in Article 158 requests or invites the CFA to do so, but by actually doing so, the Court has set a precedent for future references.¹⁰⁷ While, as Chen observes, there is obviously the advantage in this approach in that the considered opinions of the HKSAR courts will be made known to the NPCSC, and hopefully may influence the NPCSC's interpretation,¹⁰⁸ the risk is that the Court's opinion might be rejected or overruled by the NPCSC, a result that is likely to do damage to the authority of the HKSAR courts. Thus, it seems that Chen is quite rightly being cautious in suggesting that the reference might just keep silent or remain neutral on how the excluded provisions are to be interpreted, for at the end of the day those provisions concern affairs that are the responsibilities of the Central Authorities.¹⁰⁹

Apart from what Chen has noticed, there are two other things that might also be problematic with the procedure of reference as established by the Court in the *Congo* case. First, on question of the subject of the reference, although there is nothing wrong in the Court's submitting the questions it posed in the interpretation of the provisions concerned, it might be wrong to understand that this is what Article 158 (3) requires. If, as the CFA in *Lau Kong Yung* admits, the NPCSC's power to interpret the Basic Law is a general and freestanding one, the NPCSC, in dealing with a reference made by the CFA, cannot possibly be limited by the questions the CFA has submitted. In other words, the NPCSC will not be merely following the CFA's baton; it may well take the chance to interpret the relevant provisions to clarify things it wishes to clarify, whether or not the CFA has asked a question on this particular thing notwithstanding.

Secondly, on the question of the channel through which a reference shall be submitted to the NPCSC, it is not clear whether the channel utilized in the *Congo* case — that is through the Secretary for Justice, to the OCMFA and finally to the NPCSC — is the norm or merely a convenience in this particular case. In this case, because foreign affairs are involved, it seems convenient to pass the reference through the OCMFA. But this is problematic either as a

¹⁰⁶ Ibid.

¹⁰⁷ Ibid 370.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

norm or as a convenience. The OCMFA is established in Hong Kong to deal with foreign affairs relating to Hong Kong. A reference by the CFA to the NPCSC is certainly not a foreign affair, although the case in which the reference is made may well involve foreign affairs. In this respect, the OCMFA should not play any role at all in the procedure of reference under Article 158 of the Basic Law. On the other hand, if the reason to pass the reference through the OCMFA is mainly because the case involves foreign affairs, then one might wonder what procedure shall be adopted if the next reference has to be made in a case that involves defence affairs. Shall it then be passed through the People's Liberation Army stationed in the HKSAR? It is publicly known in Hong Kong that there is a day to day official liaison channel between the HKSAR government and the Hong Kong and Macau Office of the State Council [HMO] in Beijing. One wonders why this channel was not used in the *Congo* reference. But apart from these potential problems, one thing in the procedure is particularly noteworthy. That is, the reference is given to the Secretary for Justice of the HKSAR as the first port of call. If one may infer any implication from there, it might be this underlying message: the CFA, even when carrying out a duty to make a reference to the NPCSC, is sensitive to avoid any direct contact with the NPCSC (which is so widely perceived as a political organ) so as to keep its image of judicial independence (in this regard, independent from the Central Authorities).

Finally, for the sake of completing the story, it is convenient to note that the NPCSC has, at the request of the Hong Kong CFA, given its interpretation in respect of Articles 13(1) and 19(1) of the Basic Law.¹¹⁰ The NPCSC confirmed the CFA's provisional decision. It confirmed that the doctrine or principle of absolute sovereign immunity applies in Hong Kong, as it does in the mainland. Shortly after the NPCSC issued its interpretation, the CFA handed down its final judgment in the *Congo* case, merely affirming the provisional judgment it had reached prior to the making of the reference.¹¹¹

4. The purposive approach to the interpretation of the Basic Law

¹¹⁰ See Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the HKSAR by the NPCSC , adopted on 26 August 2011. For an unofficial English version of the Interpretation, see <http://www.basiclaw.gov.hk/en/materials/index.html>, accessed in July 2012.

¹¹¹ *Democratic Republic of the Congo and Others v FG Hemisphere Associates LLC* [2011] HKCFA 67; [2011] 5 HKC 395.

In *Ng Ka Ling*, the CFA declared that a purposive approach should be adopted for the interpretation of the Basic Law. This is because the Basic Law is ‘an entrenched constitutional instrument’, which like other constitutional instruments, ‘uses ample and general language’ and is ‘a living instrument intended to meet changing needs and circumstances’.¹¹² This being the character of the Basic Law, the Court said,

The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps 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, context being of particular importance in the interpretation of a constitutional instrument.¹¹³

4.1 What is the purposive approach?

Needless to say, to apply a purposive approach, one needs to know what the general purpose of the Basic Law is and to be guided thereby. As the Court rightly points out, the purpose of the Basic Law is to establish the HKSAR as an inalienable part of the PRC under the principle of OCTS but with a high degree of autonomy.¹¹⁴ However, this general purpose is itself so broad and general that it might not offer much guidance in practical cases.

Thus, the CFA went on to give more guidance. First, as to the purpose of a particular provision, it may be ascertained ‘from its nature or other provisions of the Basic Law or relevant extrinsic materials including the Joint Declaration.’¹¹⁵ Secondly, as to the language of its text, ‘the courts must avoid a literal, technical, narrow or rigid approach.’¹¹⁶ The language must be interpreted in the context in which they are used. And the context of a particular provision is not only the Basic Law itself but may also be found in relevant

¹¹² *Ng Ka Ling* para 73.

¹¹³ *Ibid* para 74.

¹¹⁴ *Ibid* para 75.

¹¹⁵ *Ibid*.

¹¹⁶ *Ibid* para 76.

extrinsic materials. Traditions and common usage of the words might also give assistance in getting the meaning of the language used in the text of the Basic Law.¹¹⁷ Thirdly, as to those provisions concerning fundamental rights and freedoms, ‘the courts should give a generous interpretation...in order to give to Hong Kong residents the full measure of fundamental rights and freedoms so constitutionally guaranteed.’¹¹⁸

In establishing this purposive approach to the interpretation of the Basic Law, the Court in *Ng Ka Ling* did not refer to any precedents, home or abroad, for support. It would be perfectly legitimate if the Court had wished to do so, for the Basic Law not only maintains the laws previously in force in Hong Kong, including the common law,¹¹⁹ but also allows the HKSAR courts to refer to precedents of other common law jurisdictions.¹²⁰ Recalling that *Ng Ka Ling* was the first ever case the CFA heard, it is plausible to think that the Court, as the supreme court of the newly established constitutional order, was keen to make a fresh start in Hong Kong’s jurisprudence, to build up its own image and authority and to shape the constitutional role of the judiciary in the new constitutional order.

4.2 The legacy of the pre-handover jurisprudence

It is clear that the purposive approach adopted in *Ng Ka Ling* has its history in the pre-handover jurisprudence established in the judicial enforcement of the Bill of Rights 1991. A repeated position of the pre-handover courts on the implementation of the Bill of Rights is that a purposive approach should be adopted to the interpretation of the BORO so as to give Hong Kong people full measures of protection. In *Sin Yau Ming*,¹²¹ the CA, citing Lord Wilberforce in *Minister of Home Affairs v Fisher*¹²² for support, said that the Bill of Rights contained in the BORO was a constitutional document, the interpretation of which ‘calls for principles of interpretation of its own, suitable to its character’.¹²³ Thus, in the Court’s view, the approach to constitutional interpretation advocated by the Privy Council in *Fisher* should

¹¹⁷ Ibid.

¹¹⁸ Ibid para 77.

¹¹⁹ The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Art 8.

¹²⁰ Ibid Art 84.

¹²¹ *R. v Sin Yau Ming* [1991] HKCA 86.

¹²² *Minister of Home Affairs v Fisher* [1980] CA 319.

¹²³ *R. v Sin Yau Ming* para 61.

be adopted. That is, the Court quoted Lord Wilberforce again, a constitution calls for

a generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.¹²⁴

To press it further, the Court cited Lord Diplock in *Attorney General of the Gambia v Jobe*¹²⁵ as stating,

A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.¹²⁶

In addition, the Court in *Sin Yau Ming* also drew on other international and comparative jurisprudence on human rights to support this generous and purposive approach. It referred to authorities of the US Supreme Court, the Canadian Supreme Court, the European Court of Human Rights, as well the comments and decisions of the United Nations Human Rights Committee in its discussion of how permissible limitations on human rights should be ascertained, guided by the generous and purposive approach.¹²⁷ In many of the human rights cases in the post-handover era, the CFA frequently refers to the *Sin Yau Ming* decision as well as the foreign authorities referred to in that case.¹²⁸ There is therefore little doubt that, despite of the fact that the CFA in *Ng Ka Ling* did not refer to *Sin Yau Ming* or any foreign authorities, the purposive approach it adopted has its domestic as well as international background.

4.3 Purposive approach as the tune of interpreting the Basic Law

¹²⁴ Ibid para 128.

¹²⁵ *Attorney General of the Gambia v Jobe* [1984] AC 689.

¹²⁶ *R. v Sin Yau Ming* para 128.

¹²⁷ To mention just a few of the authorities the Court in *Sin Yau Ming* referred to: *Tot v. United States* (1943) 319 US 463, *Leary v. United States* (1969) 395 US 6, *Ulster County Court v. Allen* (1979) 442 US 140, (all these by the US Supreme Court) and *R. v. Oaks* [1986] 26 DLR (4th) 200 (by the Canadian Supreme Court). For a good comment on the pre-handover courts' reception of comparative jurisprudence, see generally Johannes M M Chan, 'Hong Kong's Bill of Rights: its reception of and contribution to international and comparative jurisprudence' (1998) 47 *International & Comparative Law Quarterly* 306-336.

¹²⁸ For our discussion of Hong Kong's jurisprudence on human rights, see Chapter VI.

It is said that the Court in *Ng Ka Ling* 'set the tune of interpreting the Basic Law'.¹²⁹ It seems very much so. Yet questions remain to be asked as to why it should be this tune, and whether and to what extent this tune fits the background settings of the Basic Law. That the Basic Law is the constitution of the HKSAR and a constitution should be interpreted as such seems somewhat sweeping, if the specific characteristics of constitutional order which the Basic Law has established are not taken into account.

At the very general level, one can hardly disagree that a purposive approach is necessary for the interpretation of a constitutional document such as the Basic Law. Indeed, purposive interpretation seems to have become a global trend in constitutional interpretation. As the President of the Supreme Court of Israel writes, 'objective purpose is most important', and the goal of interpretation is nothing but 'to achieve the purpose of law'.¹³⁰ In Justice Dickson's opinion, the proper approach to interpret the Canadian Charter is a purposive one, for the meaning of a right or freedom guaranteed by the Charter is to be ascertained by an analysis of the purpose of such a guarantee.¹³¹ In *Pepper v Hart*,¹³² the British Lords also accepted that a purposive approach is needed to interpret Acts of Parliament, though this case is perhaps better known for whether the courts can look into the *Hansard* reports to find out what the original intent of Parliament is. The European Court of Human Rights (ECtHR) has also affirmed the principle of dynamic interpretation of European Convention on Human Rights (ECHR), by stating that the ECHR is a 'living instrument' and that it should be interpreted in the light of 'present day conditions'.¹³³ More famously is perhaps the words of John Marshall in *McCulloch v Maryland* that 'we must not forget that it is a constitution we are expounding...., which is intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs'.¹³⁴

On the other hand, however, as Lord Mustill quite rightly pointed out, the benefits of a

¹²⁹ Johannes Chan, 'Basic Law and Constitutional Review: the First Decade' (2007) 37 Hong Kong LJ 420.

¹³⁰ Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) Preface xv.

¹³¹ *R. v. Big M Drug Mart Ltd.* [1985] 1 SCR 295 at 344.

¹³² *Pepper v Hart* [1993] AC 593. It should be noted that the purposive approach adopted by the British judges is more fully elaborated in *R v Director of Public Prosecutions, ex parte Kebilene and others*, [1999] All ER (D) 1170 and *Brown v. Stott*, 1 AC 681. This approach is also adopted in New Zealand; see the Interpretation Act 1999.

¹³³ *Tyrer v. the United Kingdom* 26 Eur Ct HR(serA) (1978) Para 183.

¹³⁴ *McCulloch v Maryland* 17 US 316 (1819) 407.

purposive approach are illusory, for the purpose which is used as a point of reference merely reflects the contention of one or other of the parties about what the words ought to mean.¹³⁵

For one thing, while a purposive approach certainly appears necessary, it standing alone as a grand theory is not sufficient in practical interpretation. Constitutional history has given birth to doctrines and theories on interpretation which not only vary from, but quite often conflict with one another. As the American experience shows, there are different approaches or methods for interpreting the US Constitution, among them are the six interpretative 'modalities' as summarized by Bobbitt Philip: originalism, textualism, structuralism, prudentialism, doctrinalism and the ethical approach.¹³⁶ They are equally necessary and legitimate. But standing alone, 'they assert nothing about the world'; rather, it is their standing together that constitute the American system of constitutional interpretation.¹³⁷

In that sense, there has never been a persistent and overwhelming consensus as to what particular approach is necessary for the interpretation of US constitution. In practice, it seems that the US Supreme Court has never claimed that a certain approach is necessary for the interpretation of the US Constitution. Instead, the Supreme Court is perhaps better seen as having set off and continuing in the way of exploring the un-chartered sea of interpreting the US Constitution. In a sense, it is due to the twists and turns in the Supreme Court's practical interpretations of the constitution that have inspired so many different theories on constitutional interpretation. In fact, instead of sticking to one particular approach, John Marshal in *McCulloch v Maryland* adopted all the six interpretative 'modalities' Bobbitt Philip has mentioned to justify the setting up of a national bank in a state.

So, when the CFA in *Ng Ka Ling* claimed that a purposive approach is necessary for the interpretation of the Basic Law, it is best understood that it did not exclude other possible approaches of interpretation. In fact, the Court was careful to make this clarification. It said

¹³⁵ *Chan Chi-bung v R* [1996] AC 442 at 452.

¹³⁶ Philip Bobbitt, *Constitutional Interpretation* (Blackwell 1991).

¹³⁷ *Ibid* 22.

that what it had set out as the approach to the interpretation of the Basic Law ‘cannot be and is not intended to be an exhaustive statement of principles the courts should adopt in approaching the interpretation of the Basic law’, and that in the future when questions of interpretation arise, the courts will develop principles as necessary to meet them.’¹³⁸

In Albert Chen’s view, the purposive approach advocated by the CFA could be developed into an appropriate approach for the interpretation of the Basic Law, if pursued with caution and supplemented with those technical means as the six modalities developed in the American context.¹³⁹ Simon Young, adopting the *Pepper v Hart* approach for the Basic Law, argues quite convincingly that a restricted form of original intent analysis is necessary in the interpretation of the Basic Law, especially taken into account of the different approaches to legal interpretation in the two legal systems.¹⁴⁰

Ghai is in no disagreement with the purposive approach either. But in his view, the inherent problems or difficulties in the interpretation of the Basic Law strongly demand a ‘*special and distinctive*’ approach to the jurisprudence and interpretation of the Basic Law, which must be capable of transcending the differences between the two legal systems which co-exist under the OCTS framework.¹⁴¹ To establish such an approach, the starting point is to recognize the underlying policies of the Basic Law, and thus to acknowledge its special and unique character. For Ghai, a suitable approach to the interpretation of the Basic Law must suggest ways to: (1) balance the sovereignty of the PRC with the autonomy of the HKSAR; (2) bring coherence to the various powers and functions of the HKSAR; and (3) allow for the capacity to respond to the changed conditions and circumstances in Hong Kong.¹⁴²

4.4 A purposive approach for the purpose of ousting the NPCSC?

Ghai has certainly made a very good point. A grand purposive approach without taking into

¹³⁸ *Ng Ka Ling* para 79.

¹³⁹ Chen, ‘The Interpretation of the Basic Law—Common Law and Mainland Chinese Perspectives’ 399.

¹⁴⁰ See generally Simon N M Young, ‘Legislative History, Original Intent, & Interpretation of Basic Law’ in Hualing Fu, Lison Harris and Simon N M Young (eds), *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* (Palgrave Macmillan 2007).

¹⁴¹ Ghai, *Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* 218.

¹⁴² *Ibid* 221.

account the unique character of the new constitutional order in the HKSAR might not fit. In light of Lord Mustill's insight—that the benefits of the purposive approach are illusory, such an approach might even be dangerous, because it might easily lead to judicial activism which in turn might cause a backlash from other branches of government within the HKSAR or from the NPCSC.

By claiming a purposive approach and thus setting the tune to the interpretation of the Basic Law, it is not unlikely that the CFA was hoping to play the key role in the evolving of this new constitutional order in Hong Kong. In other words, there might have been an attempt to expand judicial power under the disguise of pursuing the purpose. This would be a purely hypothetical submission, if one does not take into account of the inherent tensions in OCTS in general and the interpretation scheme of the Basic Law in particular. As the supreme court of the Region, the CFA has certainly been keen, from the very first case it heard, to portray itself as the guardian of the Basic Law, the guardian of the rule of law and the protection of human rights in Hong Kong, and the guardian of the Region's autonomy. But without the final power to interpret the Basic Law, it might have also felt a lack of competence to fulfil this role. Only by resorting to the general purpose of the Basic Law the CFA give itself a greater room of manoeuvre in such a peculiar situation.

In *Chong Fung Yuen*,¹⁴³ the CFA further developed the purposive approach in such a way that its attempt to expand its power of interpreting the Basic Law once again reached the breaking point. At issue in this case was Article 24(2) (1) which provides that Chinese citizens born in Hong Kong before or after the establishment of [the HKSAR] are permanent residents. The Immigration Ordinance as amended by the PLC provided in Paragraph 2(a) of Schedule 1 that for a Chinese citizen born in Hong Kong to be a permanent resident, one of his parents must have been settled or had the right of abode in Hong Kong at the time of his birth or at any later time. The respondent was born in Hong Kong after the establishment of the HKSAR, but at time of his birth, none of his parents was a Hong Kong permanent resident. The Director of Immigration therefore rejected the respondent's claim for the right of abode in Hong Kong. The respondent challenged that Paragraph 2(a) of Schedule 1 of the

¹⁴³ *The Director of Immigration v Chong Fung Yuen* [2001] HKCFA 48; [2001] 2 HKLRD 533; (2001) 4 HKCFAR 211.

Immigration Ordinance was inconsistent with Article 24(2) (1) of the Basic Law.

As mentioned in Chapter II, after the *Ng Ka Ling* decision, the NPCSC issued an Interpretation overruling the Court's interpretation of Articles 22(4) and 24 (2) (3). In that Interpretation, the NPCSC stated expressly that the legislative intent of the whole Article 24 (2) has been reflected in the Opinion issued by the Preparatory Committee in 1996 ('the legislative intent statement'). In that Opinion, it was stated that for a Chinese citizen born in Hong Kong to be a permanent resident, one of his parents must have been settled or had the right of abode in Hong Kong at the time of his birth or at any later time.¹⁴⁴ Now, Paragraph 2(a) of Schedule 1 of the Immigration Ordinance adopted the Preparatory Committee Opinion and the NPCSC stated that the legislative intent of Article 24 (2) (1) is reflected in this Opinion. There seems no case to challenge the constitutionality of this provision of the Immigration Ordinance.

But the CFA was not to follow this line. The Court refused to accept the part of the NPCSC's Interpretation (that the legislative intent of Article 24 (2) (1) was reflected in the Preparatory Committee Opinion) as binding. It said that in order to ascertain the legislative intent of a Basic Law provision, the common law approach should be adopted. It stated:

The courts' role under the common law in interpreting the Basic Law is to construe the language used in the text of the instrument in order to ascertain the legislative intent as expressed in the language. Their task is not to ascertain the intent of the lawmaker on its own. Their duty is to ascertain what was meant by the language used and to give effect to the legislative intent as expressed in the language. It is the text of the enactment which is the law and it is regarded as important both that the law should be certain and that it should be ascertainable by the citizen.¹⁴⁵

In this exercise of interpretation, the CFA pressed on, 'while the courts must avoid a literal, technical, narrow or rigid approach, they cannot give the language a meaning which the

¹⁴⁴ The Preparatory Committee was established in 1996 by the NPC, charged with the responsibilities of preparing the establishment of the HKSAR and prescribing the specific methods for forming the first government and the first legislative council. It was composed of both mainland and Hong Kong members, with no less than 50 per cent of the latter.

¹⁴⁵ *The Director of Immigration v Chong Fung Yuen* section 6.3.

language cannot bear'.¹⁴⁶ Extrinsic materials may be necessary to the interpretation of the Basic Law, but they should be limited to 'pre-enactment materials, that is, materials brought into existence prior to or contemporaneous with the enactment of the Basic Law'.¹⁴⁷ The Court was implicitly stating that Preparatory Committee Opinion was irrelevant because it was a post enactment material.

As to the NPCSC's 'legislative intent statement', the Court, in what seems quite a sweeping way, said that it 'did not contain any interpretation of Article 24(2) (1) which is binding on the courts in Hong Kong'.¹⁴⁸ In the absence of a binding NPCSC interpretation, the Court went on, the common law approach should be adopted in the interpretation of the provision.¹⁴⁹ In the Court's view, 'Article 24(2)(1) means what it says, that is, Chinese citizens born in Hong Kong before or after 1 July 1997, no more, no less'.¹⁵⁰ Its meaning 'is not ambiguous, that is, it is not reasonably capable of sustaining competing alternative interpretations'.¹⁵¹ Therefore the respondent's claim for permanent resident status should be upheld and the Director's appeal be dismissed.¹⁵²

It is interesting to note that from the CFI on through to the CA and further to the CFA, the pivotal question has all the way been whether Paragraph 2(a) of Schedule 1 of the Immigration Ordinance was compatible with Basic Law Article 24 (2) (1), but while all these courts upheld the respondent's claim, none of them expressly ruled the relevant provision of the Immigration Ordinance unconstitutional.

The CFA's decision in *Chong Fung Yuen* was again heralded as a triumphant come back from the retreat it made in *Lau Kong Yong*.¹⁵³ It reasserted the primacy of the common law principles in interpreting the Basic Law, and dispelled any doubt of the independence of the Court, especially doubts of the Court's resistance of possible interference from the NPCSC.¹⁵⁴

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid section 8.1.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid section 8.3.

¹⁵² Ibid section 9.

¹⁵³ Yap 462.

¹⁵⁴ Chan 417.

But the Court's refusal to accept the NPCSC's 'legislative intent statement' as binding is apparently problematic. As mentioned in Chapter II, under the Chinese legal system, the legislative approach is adopted in legal interpretation. An interpretation by the NPCSC therefore has the same binding effect as a statutory enactment. Thus, as Yap points out, there is no legal ground for the Court not to treat the NPCSC interpretation as legislation with all its provisions binding on the Court, but to treat it as a superior court judgment with only its ratio binding.¹⁵⁵ This, if it stands, is undoubtedly a serious misunderstanding of OCTS. Nonetheless, the practical effect is obvious. By distinguishing part of NPCSC's interpretation as ratio and other parts as obiter, the Court was seeking to bind the hands of the NPCSC. And there seems little doubt that it succeeded in doing so in *Chong Fung Yuen*. When the purposive approach is further added by such a *common law approach*, the combined effect cannot be anything but near total liberalism. The sense of ousting the NPCSC is not hard to feel.

After the decision in *Chong Fung Yuen* was handed down, The NPCSC, through its Working Committee on Legal Affairs, issued a press release, in which it was stated that the CFA's decision was 'not consistent' with the NPCSC's interpretation, and the NPCSC 'expressed concern' about the matter.¹⁵⁶ However, the NPCSC did not take further action; nor did it issue an interpretation to overrule the Court's interpretation of Article 24 (2) (1). That the NPCSC did not do so was seen by many as the 'utmost self-restraint' from the Beijing authorities.¹⁵⁷ But one might be tempted to think that the NPCSC might have chosen to do otherwise, had not the year in which the *Chong Fung Yuen* decision was handed down happened to be the year in which the Chief Executive election was due to take place. With the benefit of hindsight, one might suggest that the NPCSC should have overturned the CFA's interpretation, for, as will be discussed in Chapter VII, the CFA's decision in *Chong Fung Yuen* failed to see one of the purposes of Article 24 as a whole, which is, to control the population growth in Hong Kong, which is tiny in geographical terms, and this failure has not only caused serious social and economic consequences in Hong Kong but also aroused public

¹⁵⁵ Yap 462.

¹⁵⁶ The press release was widely reported by local newspapers of the day.

¹⁵⁷ Albert H Y Chen, 'Constitutional adjudication in post-1997 Hong Kong' (2006) 15 *Pacific Rim Law & Policy Journal* 650.

tensions between the HKSAR and the mainland.

Conclusion

Like all constitutions, the Basic Law necessitates interpretation. Under the Article 158 interpretation scheme, the final power to interpret the Basic Law is vested in the NPCSC, and the power of the HKSAR courts to interpret this Law derives from the NPCSC's authorization. In the sense and to the extent that it is an authorized power; the HKSAR courts are in a handicapped position in interpreting the Basic Law. The reference system established under Article 158 clearly shows the relationship between the HKSAR courts and the NPCSC. The separation of the power of final interpretation from the power of final adjudication also depicts the handicapped position the HKSAR courts are in; in fact, this separation marks a significant feature of the legal system in the HKSAR. However, by introducing the predominant test into the reference system, and by adopting the purposive approach (which is further supplemented by the common law approach), the CFA has attempted, and quite successfully, to expand the scope of its power to interpret the Basic Law and correspondingly to limit that of the NPCSC. This attitude of the Court is likely to cause tensions between the HKSAR and the central authorities.

The interpretation of a constitution, as Michael J. Perry observes, is both law and politics.¹⁵⁸ It should always look in two directions: looking backward towards the past for the intentions of the Framers, so that fidelity to the constitution can be maintained; looking forward towards the future, for the likely shape of the world in which the principles embodied in the constitution are to function so as to provide us with guidance.¹⁵⁹ To do so, it needs both creativity and compromise to interpret a constitution; no approach or combination of approaches can turn constitutional interpretation into an exact science or eliminate controversy about what the constitution, whether as text or text plus, means.¹⁶⁰ The interpretation of the Basic Law is certainly no less concerned with both law and politics, for, as Ghai rightly observes, the Basic Law aims to bridge and to provide for the coexistence of

¹⁵⁸ Michael J. Perry, *The Constitution in Courts* (OUP 1994) 7.

¹⁵⁹ *Ibid* 204.

¹⁶⁰ *Ibid*.

capitalism and communism within one sovereign state.¹⁶¹ Given the inherent difficulties embedded in OCTS, it is necessary to develop interpretative principles that not only fit with but also enhance the operation of this special constitutional order. Its interpretation should also look into both backward and forward directions.

The power of and the approach to constitutional interpretation are closely related to the power of constitutional review, although neither the power of interpretation itself nor the adoption of a certain approach can justify the power of constitutional review per se. In *Ng Ka Ling*, when the CFA asserted the power of constitutional review, it not only relied on the power it has to interpret the Basic Law, but also on the constitutional role the judiciary as a whole has to play in the political structure of the HKSAR, that is to check and balance other branches of government to 'ensure that they act in accordance with the Basic Law'.¹⁶² If the need for constitutional review can be justified on the supremacy of the Basic Law, whether or not this task should be carried out by the judges is another matter that needs to be justified otherwise. Do the HKSAR courts have the checking and balancing role to play in the HKSAR political structure, as the CFA so claimed? Does that role, if it exists, necessarily ordain the power for the courts to strike down legislation by the local legislature, or for them to declare acts of the central authorities invalid? To answer these questions, we need to look at the political structure of the HKSAR, to see if there are any checking and balancing mechanisms which may imply that power of constitutional review by the courts.

¹⁶¹ Ghai, 'Litigating the Basic Law: Jurisdiction, Interpretation and Procedure' 4.

¹⁶² *Ng Ka Ling* para 61.

Chapter V

The Political Structure of the HKSAR: Checks and Balances

Introduction

The Basic Law does not expressly confer on the judiciary the power of constitutional review. Thus, for the HKSAR courts to exercise this power, it needs to be justified by reasons and logic that can be properly inferred from the Basic Law. In the previous two Chapters, it has been argued that the supremacy of the Basic Law necessarily entails constitutional review. However, the question not yet answered is why this task should be carried out by the judges. This judicial role does not follow naturally from the supremacy of the Basic Law. Nor can it be necessarily be inferred from the power to interpret the Basic Law. It does not directly follow judicial independence either. Whether the courts have the power to strike down acts of other branches of government depends on whether the design of the whole political structure requires such a strong form of checks and balances from the judiciary. The question between constitutional review and judicial checks and balances is not a question of ‘chicken and egg’—where people do not know for sure which comes first. If the political structure does not require the judges to perform a strong form of checks and balances, it is simply unjustified for judges to do so.

So in this Chapter, the main task is to see whether the political structure of the HKSAR requires the judges to perform a role of strong checks and balances. Section 1 will look at the question of whether the HKSAR government is based on the doctrine of separation of powers or it is an executive-led system, a question that has long been disputed in Hong Kong. Section 2 continues to examine the political structure. It will be argued that the political structure in the HKSAR is neither simply based on separation of powers, nor is it merely an executive-led system; rather, it is a mixture of both. Section 3 will try to identify the constitutional role of the judiciary in this particular constitutional system. Judicial independence in the HKSAR will be discussed, for it is the precondition for any form of judicial checks and balances. This will be followed by an assessment of what kind of checks and balances the judiciary should play within the political structure of the HKSAR. This

Chapter will conclude with submissions on the justification of judicial constitutional review in Hong Kong: justification on the ground of checks and balances that the political structure requires.

1. Separation of powers or executive-led?

There have long been two opposing views on the political structure of the HKSAR. One argues that it is based on the principle of separation of powers.¹ The other insists that it is framed as an executive-led system, which, while allowing certain degree of checks and balances between the executive and the legislature, emphasizes coordination more than separation between them.² In the HKSAR government's own definition, the HKSAR political system is 'an executive-led system', where, 'the executive authorities and the legislature exercise their respective functions, complement each other, and operate with due checks and balances.'³

1.1 The separation argument

Those who hold the separation view may have this to say. First, the Basic Law provides that the HKSAR shall 'enjoy executive, legislative and independent judicial power'.⁴ In correspondence to these three powers, the Basic Law establishes a political structure in the HKSAR which includes the Chief Executive, the Executive Authorities (the Government), the Legislative Council (LegCo) and the Judiciary; that is, the three arms of government each having a distinctive sphere of powers and functions.⁵ According to the Basic Law, the legislature of the HKSAR is the LegCo, whose main function, as can be expected with any

¹ Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd edn, Hong Kong University Press 1999) 262, see also Peter Wesley-Smith, 'The Hong Kong Constitutional System: the Separation of Powers, Executive-Led Government and Political Accountability' in Johannes Chan and Lison Harris (eds), *Hong Kong's Constitutional Debates* (Hong Kong Law Journal Limited 2005) 3-4.

² 肖蔚云 Weiyun Xiao, *一国两制与香港特别行政区基本法 One Country Two Systems and the Basic Law of the Hong Kong Special Administrative Region* (香港文化教育出版社有限公司 Educational and Cultural Press Ltd. 1990) 158.

³ Constitutional Affairs Bureau, 'Legislative Council Panel on Constitutional Affairs : Relationship between the Executive Authorities and the Legislature' LC Paper No CB(2)900/06-07(01) , available at <http://www.cmab.gov.hk/en/legco/papers.htm>, accessed in July 2012.

⁴ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China Art 2.

⁵ Ibid, Chapter IV.

legislature, is to make and unmake laws.⁶ The Government, on the other hand, is charged with the executive responsibilities of, inter alia, formulating and implementing policies, conducting administrative affairs.⁷ As far as the separation of the judicial power is concerned, neither of the two opposing views denies it. And as shall be seen in the next section, judicial independence in the HKSAR is indeed guaranteed. Therefore, as the argument may go, there is a clear institutional separation, distributing different government functions to separate departments.

Secondly, there is also a clear separation of personnel between the legislative and the executive branches. The Chief Executive, who is the head of the Government, is elected by a different method from that used in electing the legislature.⁸ The principal officials are not elected, but nominated by the Chief Executive and appointed by the Central Authorities.⁹ Neither the Chief Executive nor his principal officials are entitled to sit and vote in the LegCo.¹⁰ This separation of persons resembles the kind of separation of powers adopted by the US Constitution, but differs from the British practice which fuses the legislative and executive powers by allowing the Prime Minister and his Cabinet members to sit and vote in Parliament — a practice seen by Bagehot as the ‘secret of success’ of the British Constitution. In Ghai’s view, that the Basic Law enshrines the separation principle is reflected in the separation of personnel.¹¹

Thirdly, the Basic Law also provides that the Government must be accountable to the LegCo.¹² As might be argued, this is the fundamental principle that governs the relationship between the executive and the legislature, and that it is a principle that is based on

⁶ Ibid Art 66, 73.

⁷ Ibid Art 62.

⁸ For the election methods for the Chief Executive and the LegCo, see respectively Annex I and Annex II of the Basic Law. Mainly, the Chief Executive is elected by an Election Committee which used to be composed of 800 members, but it was expanded to 1200 members in 2012. For the LegCo, the election method is one of a combination of direct and indirect elections. The specific method of selecting the LegCo has undergone some minor changes over the year. The LegCo used to be composed of 60 members. In 2008, half of the legislative members were returned by geographical constituencies on a one person one vote basis, the other half from what is known as functional constituencies (such as professions, labour, or unions) where there exists not only individual voters but also cooperate voters. In 2012, the total membership of the LegCo was increased to 70, but the ratio of directly and indirectly elected members remained unchanged.

⁹ Basic Law Art 48 (5).

¹⁰ Ibid Art 79 (4).

¹¹ Ghai 300.

¹² Basic Law Art.64.

separation of powers.

Fourthly, there are of course overlaps of powers. For instances, the executive authorities have the power to draft and introduce bills, make subordinate legislation;¹³ the executive subordinate legislation, however, is subject to legislative scrutiny;¹⁴ the Chief Executive has legislative powers too — he may issue executive orders,¹⁵ which, in accordance to a court decision, is in effect a law-making power.¹⁶ Moreover, the Chief Executive has the power to appoint and remove judges,¹⁷ but the appointment and removal of the judges of the CFA and the Chief Judge of the High Court needs to be endorsed by the LegCo.¹⁸ But, as the argument presumably will go, necessary overlaps do not negate the principle of separation of powers per se. Indeed, the American type of separation of powers, as Madison explains, is ‘connected and blended’, allowing each branch to have ‘partial agency in’, or ‘control over’ the acts of others.¹⁹ Overlaps are necessary, for, as Madison also points out, absolute separation is unworkable in practice.²⁰

In light of the above, there seems to be a good case to argue that the political structure of the HKSAR is based on the principle of separation of powers. Wesley-Smith’s view is representative. He submits:

it seems impossible to argue that the Basic Law does not clearly establish three separate branches of government each with specified powers in accordance with the separation doctrine. Thus the Legislative Council, no one else, shall be the legislature...with its function of enacting, amending and repealing law...The courts of the HKSAR, no one else, shall be the judiciary, exercising the judicial power...independently, free from interference. The government of the HKSAR, no one else, shall be the

¹³ Ibid Art 62 (5).

¹⁴ Ibid Art 62(5). According to local legislation, the executive authorities can exercise this power if it is authorized to do so in the parent legislation. If no prior consent has been given, the executive may still make the subordinate legislation it considers necessary, but has to seek subsequent approval by the LegCo. In both cases, the subordinate legislation has to be submitted before the LegCo, which may amend or repeal such legislation. In practice, however, the LegCo’s control over subordinate legislation, if not merely a matter of form, bears little weight, for the members of the legislature seldom shows any enthusiasm in scrutinizing those legislation. See The Interpretation and General Clauses Ordinance, Cap 1, The Law of Hong Kong, section 34.

¹⁵ Basic Law Art 48(4).

¹⁶ *Association of Expatriate Civil Servants of Hong Kong v Chief Executive of the HKSAR* [1998] 2HKC 138.

¹⁷ Basic Law Art 48 ((6).

¹⁸ Ibid Art 73 (7).

¹⁹ James Madison, *The Federalist Papers No. 47, 48*.

²⁰ Ibid.

executive authorities....formulating and implementing policies, conducting administrative affairs....²¹

1.2 The executive-led argument

Defenders of this argument often refer to Deng's remarks as an authority to demonstrate that it is not the original intent of the Basic Law to enshrine the western type of separation of powers. In a way of giving instructions, Deng once spoke to the BLDC that

the western style of separation of powers does not suit Hong Kong's special circumstances.²²

Given the Chinese political context against which the Basic Law was made, it is reasonable to suggest that Deng's instructions should not be ignored in the understanding of any original intent of the Basic Law in this regard. Since the western type of separation of powers had been excluded, then what model of political structure would suit Hong Kong? The National People's Congress system adopted in the mainland certainly would not do, simply because of the basic idea of OCTS.

According to Xiao, who was then the co-convener of the political structure subgroup of the BLDC, the designing the political structure of the HKSAR was guided by the spirit of the Joint Declaration and the principle of OCTS. More specifically, the political structure should be able to uphold national unity and territorial integrity as well as to implement a high degree of autonomy, while '*retaining certain effective things of the pre-1997 system*'.²³

Ji Pengfei, the director of the BLDC, in his overall report to the NPC on the completion of the drafting work, said that the design of the political structure of the HKSAR was

aimed at maintaining stability and prosperity in Hong Kong. (To achieve this), consideration must be given to the interests of different sectors of society and the structure must facilitate the development of the capitalist economy in the Region. While the part of the existing political structure proven to be effective

²¹ Wesley-Smith 3-4.

²² Xiaoping Deng, *Selected Works of Deng Xiaoping*, vol III (Foreign Languages Press 1994) 220.

²³ Xiao 134-140.

will be maintained, a democratic system that suits Hong Kong's reality should gradually be introduced.²⁴

That effective part of the pre-handover political system indicated by Ji and Xiao, as explained several years later by a senior NPCSC official, is 'mainly reflected in the executive-led government'.²⁵ Xiao himself made the same point in his academic writings.²⁶

Thus, in Xiao's view, the political structure of the HKSAR, having retained the merit points of the pre-handover system, is an executive-led system, which admits a certain degree of checks and balances between the executive and the legislature but emphasizes coordination more than separation between them. Wang Shuwen, also a drafting member and a professor in constitutional law, was of the same view.²⁷ Wang explained further that it was for the purpose of having an executive-led government that the Chief Executive is given a high status and equipped with enormous powers.²⁸ In Wang's view, the principle of executive-led government can stand side by side with the principle of the executive authorities and the legislature coordinating as well as checking each other, as well as the principle of judicial independence.²⁹

Albert Chen is one of those Hong Kong commentators who accept that the original intent of the Basic Law is indeed to have an executive-led government in the HKSAR. In Chen's view, this original intent is even clearer when one recognizes that the notion of executive-led government is closely related to affirming the Central Authorities' power over Hong Kong. To support this point, he quotes the former vice director of the HMO as saying that the political structure of the HKSAR 'must be executive-led', for 'not only this is a system proven to be effective, [but] the most important point is [that] only in an executive-led political structure

²⁴ 姬鹏飞 Ji Pengfei, 关于中华人民共和国香港特别行政区基本法（草案）及其有关文件的说明 Elaboration on the Basic Law of the HKSAR (draft) and Related Documents, 28 March 1990.

²⁵ The vice director of the Legislative Affairs Commission of the NPCSC, Li Fei, made this point in a public speech in Hong Kong on 8 April 2004. Li's speech was fully covered by local newspapers. Albert Chen also noted Li's point, see Albert H Y Chen, "Executive-Led Government', Strong and Weak Governments, and 'Consensus Democracy" in Johannes Chan and Lison Harris (eds), *Hong Kong's Constitutional Debates* (Hong Kong Law Journal Limited 2005) 9.

²⁶ Xiao 158. See also 肖蔚云 Weiyun Xiao, *论香港基本法 On the Hong Kong Basic Law* (北京大学出版社 Beijing University Press 2003) 1-14, 39-44.

²⁷ 王叔文 Shuwen Wang, *香港特别行政区基本法导论 An Introduction to the Basic Law of the Hong Kong Special Administrative Region* (rev edn, 中央党校出版社 Chinese Communist Party Central Party School Press 1997) 207.

²⁸ Ibid.

²⁹ Ibid.

can the Chief Executive be truly accountable to the Central Authorities.....Neither a system that is legislature-led nor a system of separation of powers can achieve this aim'.³⁰

There are provisions in the Basic Law that may show the original intent of an executive-led government. First, as mentioned just now, it is the executive authorities that draft and introduce bills. Therefore it is the Government that is the main initiator of legislation. Private bills are allowed only in very limited context and subject to strict restrictions.³¹ If the bill under debate in the LegCo involves the political structure of the Region, the LegCo members are even not entitled to propose amendment motions.³² Secondly, bills passed by the LegCo have to be signed and promulgated by the Chief Executive to become law,³³ and the Chief Executive can refuse to sign any bill which he considers incompatible with the overall interests of the Region.³⁴ Thirdly, the Basic Law establishes the Executive Council (ExCo), which the Chief Executive is constitutionally bound to consult before making important decisions like dissolving the LegCo, though he is not necessarily bound to accept the majority opinion of the Council.³⁵ The ExCo members are picked and appointed by the Chief Executive, and he can appoint LegCo members into the ExCo.³⁶ According to Xiao, the establishment of the ExCo and the inclusion of LegCo members are aimed at promoting coordination between the executive and the legislature, hence securing an executive-led government.³⁷

These provisions could give the impression that there might well be more fusion of powers rather than mere connections between the seemingly separate executive and legislative branches in the HKSAR. At least in two aspects — the initiation of legislation dominated by Government, bills need to be signed and promulgated by the Chief Executive to become law —the state of affairs in HKASR might look not far away from that in the UK, where, as L.S.

³⁰ Chen 10.

³¹ Basic Law Art. 74. According to Article 74, private bills are not allowed if they relate to (1) public expenditure; (2) political structure and (3) the operation of the government. Private bills relating to government policies may be introduced if a written consent of the Chief Executive is obtained.

³² The Interpretation of the NPCSC of Article 7 of Annex I and Article III of Annex II to the Basic Law of the HKSAR, adopted by 6 April 2004. For an unofficial English version of this Interpretation, see http://www.basiclaw.gov.hk/en/materials/doc/2004_04_06_e.pdf, accessed in July 2012.

³³ Basic Law Art 48 (3), 76.

³⁴ Ibid Art 49.

³⁵ Ibid Art 54, 56.

³⁶ Ibid Art 55.

³⁷ Xiao 42.

Amery observed

[t]he function of legislation....has always been predominantly exercised by Government....The main task of Parliament is...not to legislate or govern, but to secure full discussion and ventilation...., as the condition of giving its assent to Bills...³⁸

But as we shall see shortly, the reality in the HKSAR is by far different.

1.3 Executive-led: flawed in design and futile in practice

Defenders of the executive-led argument might have, perhaps quite convincingly, proved that it is the original intent of the Basic Law drafters to establish an executive-led government in the HKSAR. But they might have overlooked the need for effective institutional arrangements to put the concept of executive-led into practice. And the reality has turned out that the executive-led design has largely not been played out.

As Wesley-Smith argues, if the meaning of 'executive-led' is to be understood as the kind of effective governance under the colonial system where the governor had complete control of the legislative apparatus, or in the Westminster-model systems where the Prime Minister commands a majority support in Parliament, the Basic Law design can hardly achieve it.³⁹ For the Basic Law implements neither the colonial gubernatorial nor the strict Westminster model, and the Chief Executive can never be confident that his legislative program will always pass through the LegCo.⁴⁰ Lau Siu-kai shares similar view and he recognizes that for the executive-led government to be realized, the Chief Executive and his team 'must have reliable and stable support from a strong governing coalition', so that the Chief Executive 'can effectively handle the LegCo'.⁴¹

In Regina Ip's view, under the present system, it is practically impossible for the Chief Executive to have any real control of the LegCo. This is because there is a 'fundamental flaw'

³⁸ L.S. Amery, *Thoughts on the Constitution* (OUP 1953) 12

³⁹ Wesley-Smith 5.

⁴⁰ Ibid 5.

⁴¹ Lau Siu-kai, 'An Executive-led Political System: Design and Reality' in Lau Siu-kai (ed), *Hong Kong's Blue Print for the 21st Century* (Hong Kong University Press 2000) 9-13.

in the design of the Basic Law, which is the lack of institutional arrangements through which the Chief Executive could do so.⁴² More specifically, Ip further explains, there is no organic link between the executive and legislative branches of the government, without which the executive government is actually crippled in imposing its policy agenda.⁴³ As Ip also notices, in a fully democratic system of government, it is the political parties that play the key role in forming and sustaining the government in office and hence securing executive dominance. But this is also lacking in Hong Kong.⁴⁴

As a matter of act, local legislation has prohibited the Chief Executive from having any affiliations to political parties.⁴⁵ This organic separation from political parties indeed puts the Chief Executive in a totally different and much more difficult position from that a British Prime Minister or an American President is normally in—stable and guaranteed support in Parliament or Congress by his own political party (or sometime coalition of parties). With seemingly enormous powers but without guaranteed parliamentary support, the Chief Executive and his government have to struggle to gather votes with every single piece of legislation. This is now becoming increasingly difficult.⁴⁶ Not only because the LegCo is often divided, hence making it more difficult for the Government to strike deals with different political parties (or groups). But more significantly, the so called ‘pan-democratic camp’, whose members occupy more than one third of the LegCo seats,⁴⁷ has assumed the opposition role. It is publicly known that the pan-democratic camp has long been condemning the current Chief Executive electoral method as a small-circle election, manipulated by the hands in Beijing. As such, they feel that there is little chance for a pan-democratic political leader to reach the top office of the Region. Frustrated by this prospect, they feel there is no need to cooperate, nor to bargain or compromise with the Government.

⁴² Regina Ip, 'Hong Kong: A Case Study in Democratic Development in Transitional Societies' in Annex 16 of the LC paper (No. CB (2) 900/06-07 (01) by the Constitutional Affairs Bureau of the HKSAR. See <http://www.cmab.gov.hk/upload/LegCoPaper/ca0123cb2-900-1-e.pdf>, accessed in July 2012.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Once a candidate for the Chief Executive post is duly elected, he or she is required to make a public declaration, to the effect that (1) he or she is not a member of any political party; and (2) once appointed as the Chief Executive, will not become a member of any political party; or do any act that has the effect of subjecting himself to the discipline of any political party, during his term of office as the Chief Executive. See Chief Executive Election Ordinance (Cap 569), The Law of Hong Kong, Section 31.

⁴⁶ The recent (May 2012) filibustering on the government bill which proposes that lawmakers who resign midterm cannot stand in a by-election within six months is a good example. This filibustering event is widely covered by local mass media.

⁴⁷ In the current (2008-2012) LegCo, the so called pan-democratic camp has 23 out of the total 60 seats.

What they are mostly concerned about is to show the electorate that they are sticking on the political stance on which they have been elected, so that they will be elected again on the same stance at next election.⁴⁸ What the Chief Executive or the Government wants is none of their business.

Indeed, as Ip rightly points out, given this ‘highly robust, assertive and autonomous legislature’, the executive-led system as intended by the Basic Law drafter is almost a fiction.⁴⁹ As she writes:

Little did the [Basic Law drafters] realize that once democratization of the legislature had gone underway and the executive stripped of direct control over the legislature, government by perpetual intensive lobbying, horse-trading and playing one political party or grouping off another would make ‘executive-led’ government a non-starter.⁵⁰

That the executive-led system has largely failed is admitted by the HKSAR government. In the second report of the Constitutional Development Task Force (CDTF) (which was set up in 2004 to deal with issues relating to the democratic developments in Hong Kong⁵¹), it is said

in reality, the executive authorities and the legislature are respectively taken up by people of different backgrounds and perspectives; the executive authorities and the legislature often are able to “regulate” (i.e. to act as a mutual check) but are not able to “co-ordinate” (i.e. to fully complement) each other. Furthermore, under the present system, the Chief Executive does not have established support in the Legislative Council. This has had an adverse effect on the executive-led system and administrative efficiency.⁵²

2. An uneasy blend of democracy and authoritarianism

⁴⁸ This point is clearly expressed by one of the pro-democratic activists, Lee Cheuk-yan, in his opinion submitted to the Commission on Strategic Development. See LC paper (No. CB (2) 900/06-07 (01) by the Constitutional Affairs Bureau of the HKSAR, annex 1. See <http://www.cmab.gov.hk/en/legco/papers.htm>, accessed in July 2012.

⁴⁹ Ip .

⁵⁰ Ibid.

⁵¹ The establishment of the CDTF was announced in the Chief Executive’s policy address 2004. It is led by the Chief Secretary for Administration. Its tasks are to examine in depth the relevant issues of principle and legislative process in the Basic Law relating to constitutional development, to consult the relevant departments of the Central Authorities, and to gather the views of the public on the relevant issues.

⁵² The Second Report of the CDTF para 3.27. See <http://www.cmab.gov.hk/cd/eng/legco/index.htm>, accessed in July 2012.

The reality has led to the current cry for faster democratic development in Hong Kong.⁵³ Fuller democracy, say, the realization of ‘one person one vote’ in the election of the Chief Executive, will certainly enhance the legitimacy of the Chief Executive’ governance. But the development of democracy is unlikely to alter the fabrics of the relationship between the executive and the legislature, as is now provided in the Basic Law. For any alteration to that effect, amendments to the Basic Law are inevitable. In that sense, democratization is not necessarily the ultimate cure. But this is not our immediate concern. For our present purpose, the reality mentioned above provides evidence that while defenders of the executive-led argument might have proved that it is the original intent of the Basic Law to establish an executive-led government in the HKSAR, they now have difficulty to defend it in reality. On the other hand, however, the failure of the executive-led system does not mean that the separation argument stands out winning.

It seems that, neither the separation argument nor the executive-led argument, each standing alone, sufficiently reveals the true nature of the political structure of the HKSAR.

According to Ghai, the political structure in the HKSAR is ‘an uneasy blend of democracy and authoritarianism’.⁵⁴ That is to say, there are in the overall political structure of the HKSAR not only democratic elements such as separation of powers, but also authoritarian elements cloaked with a more neutral term as ‘executive-led’ government. In this sense, Xiao’s definition of the HKSAR political structure is in essence the same with Ghai’s, albeit in different terms. For Xiao, as mentioned above, the political structure in the HKSAR is executive-led where the legislature and the executive *cooperate with and check and balance* against each other. Some of those who hold the executive-led argument might have overlooked the checks and balances part as described by Xiao. Authoritarianism and democracy, executive-led and checks and balances, they are seemingly contradictory to each other. However, they are not necessarily unmixable. The UK’s political system was once famously described by Lord Hailsham, a former Lord Chancellor, as ‘elective dictatorship’.⁵⁵ It

⁵³ This development will be discussed in more detailed in Chapter VII.

⁵⁴ Ghai 300.

⁵⁵ Quoted in Hilaire Barnett, *Constitutional & administrative Law* (8th edn, Routledge 2011) 119. According to Lord Hailsham, the British government, once elected, is able to behave like a dictator owing to the weakness of

is possible that the Westminster type of executive-led government was what the drafters of the Basic Law had in mind in framing an executive-led system for the HKSAR.

That the political structure in the HKSAR is such an uneasy mixture is particularly clear in the constitutional role of the Chief Executive, an examination of which might clarify much confusion in understanding the checks and balances between the executive and the legislature.

2.1 The dual constitutional role of the Chief Executive

The striking feature of the constitutional role of the Chief Executive is its dual capacity as the head of the Government on the one hand and the head of the Region on the other.⁵⁶ In the former capacity, the Chief Executive must be held accountable to the LegCo,⁵⁷ but in the latter, the Chief Executive represents the Region and thus shall be accountable to the Central Government and the Region.⁵⁸ For want of a shorter phraseology, this dual capacity of the office of the Chief Executive might be referred to as the dual CEship. The dual CEship, as one commentator rightly observes, is likely to put the holder of the office in a ‘thankless position’, where he or she is ‘constantly pulled in opposite directions when the two ‘masters’ clash’.⁵⁹

It is because of the dual CEship that the executive-legislative relationship in the HKSAR is most unclear and often easily blurred. To begin with, the use of the term ‘Chief Executive’ as the title for the highest public office in the HKSAR is somewhat ambiguous and misleading, for the Chief Executive is not merely ‘executive’ but, in two important ways, legislative as well. First, as mentioned above, the executive government is the main source of legislation initiatives. In that sense, the Chief Executive, as the head of the executive government, is the chief legislation initiator. Secondly, bills passed by the LegCo needs to be signed and promulgated by the Chief Executive to become law, and he may prevent bills from becoming

Parliament.

⁵⁶ Basic Law Art 60.

⁵⁷ Ibid Art 64.

⁵⁸ Ibid Art 43.

⁵⁹ Kit Poon, *The Political Future of Hong Kong: Democracy within Communist China* (Routledge 2009) Introduction xviii.

law by using his veto. In this sense, the Chief Executive is seemingly the supreme legislator in the HKSAR.

While the Chief Executive as the chief legislation initiator may be easily identified as a blending of the executive and the legislative powers, the Chief Executive as the supreme legislator might not be identified as such. The key question to be answered here is in which CEsip the Chief Executive exercises this legislative power. Is he acting as the head of the executive government and thus checking and balancing the legislative power? Or, is he acting as the head of the Region and therefore should be held accountable to the Region and the Central Authorities, and not to the LegCo?

A sketchy comparison between the exercise of similar powers by the British Monarch and the US President might throw some light on the understanding of the case of Hong Kong's Chief Executive. As is well known, in the UK, bills passed by Parliament require the royal assent to become law. But the royal assent is merely titular and formal, though symbolically important. Parliament can take pride that whatever it duly passes is surely to become law. Thus, in substance, one might say that the Queen has no role in law-making. But in form, it is the Queen in Parliament that makes and unmakes law. Therefore, it does not matter whether one sees it from practice or from theory, one thing is certainly clear with the royal assent: it is part of the legislative process.

Whereas in the US, a bill passed by the Congress also needs to be approved by the president to become law. The President may sign it, veto it, return it to Congress, or let it become law without presidential signature, or at the end of a session, pocket-veto it.⁶⁰ There is no difficulty to see that the power of the American President's approval of bills is substantive rather than symbolic as is the case with the royal assent in the UK. But unlike the British royal assent which is the final part of the legislature's own legislative process, the American president's approval of bills, including the veto, is, as explained by Hamilton, an *executive check* on the legislative power.⁶¹ In other words, the presidential approval of bills is an

⁶⁰ The United States Constitution Art I, Section 7. Pocket veto means that if the president takes no action on the bill for ten days after Congress has adjourned their second session, the bill dies.

⁶¹ Alexander Hamilton, *The Federalist Papers No.68*.

executive intervention into the legislative process. Obviously, this executive check fits with the doctrine of separation of powers that underpins the American Constitution.

In the HKSAR, the Chief Executive's approval of bills is more like the substantive power of the American President than the formal and symbolic power of the British Queen. Like the American President, the Hong Kong Chief Executive, by virtue of the power of veto given to him, may examine the content of legislation and block a bill from becoming law if considered incompatible with the overall interests of the Region. Unlike the American President, whose exercise of the power of veto seems to be subject to no specific written restrictions, the Hong Kong Chief Executive is subject to the 'overall interests' condition. However, the Hong Kong Chief Executive's control over legislation might still seem stronger than that of the US President, for in Hong Kong, a bill cannot become law unless and until it is signed and promulgated by the Chief Executive; the signature of the Chief Executive is a 'must' in Hong Kong, as is royal assent is a 'must' for bills passed by the UK Parliament to become law. But in the US, the signing of the president is only an option, for a bill passed by Congress may still become law if the President does not sign it, so long as he does not return it to Congress within ten working days. In addition, In the HKSAR, if a bill is returned to the LegCo but is passed again without any amendment, and the Chief Executive may still refuse to sign it, and he then can dissolve the legislature to end the conflict between him and the legislature.⁶² This power to dissolve the legislature, in face of conflict in the law-making process, is not available to the American President, but was (before 2011) to be found effectively in the hands of a British Prime Minister.⁶³

Thus, the signing and vetoing power given to the Chief Executive under the Basic Law with regard to legislation bears the procedural feature of the British Queen's royal assent on the one hand, but the substantial scrutiny of legislation as that of American President on the other. It is, so to speak, the 'British Queen and the American president combined' at that particular point.

⁶² Basic Law Art 50.

⁶³ The British Prime Minister's discretion over the dissolution of Parliament is now abolished as the result of the Fixed Term Parliament Act 2011. Under the Act, parliamentary elections must be held every five years, beginning in 2015. Thus, Parliament dissolves automatically at a certain day before the polling day, and Parliament cannot otherwise be dissolved. See Section 3 (1) (2) of the Act.

Given that the Chief Executive's power to sign and promulgate laws is as much a procedural '*must*' as that of the British Queen's royal assent, it is perhaps more accurate to perceive the Chief Executive's power to approve bills as part of the legislative process, where the Chief Executive himself plays a legislative role as the British Queen does, rather than an executive role asserting check on the legislative power as the American president does.

Moreover, as has been mentioned, the Chief Executive can only refuse to sign a bill when he considers the bill to be incompatible with 'the overall interests of the Region'. Obviously, a judgment of this nature should be made in the capacity of the CEship as the head of the Region, rather than as the head of the executive government. In other words, in signing or refusing to sign a bill, the Chief Executive is making or unmaking law in his capacity as the head of the Region, rather than checking and balancing the legislative power as the head of the executive government.

Ghai seems to have got very close to this point when he realizes that the LegCo is not 'the sole law-making body' in present Hong Kong.⁶⁴ But in making this point, he is more concerned about the constitutional restrictions on the legislative power rather than about the nature of Chief Executive's role in legislation.⁶⁵ To the contrary, Ghai suggests that it is not necessary to make such a subtle distinction of the powers given to the Chief Executive, because, in his view, the powers of the executive government are ultimately exercised at the discretion and direction of the Chief Executive.⁶⁶ We think, as we have shown, quite otherwise. It is quite possibly the failure to make such a distinction that causes much of the confusion in understanding Hong Kong's present political system in general and the executive-legislative relationship in particular. Indeed, the duality of the CEship lies at the heart of the whole political system. Only when we come to a better understanding of when the Chief Executive is accountable to whom, can we then have a clearer idea of how the whole political system in Hong Kong works. Many of the 'oddities and contradictions', which Ghai sees existing in the political system in Hong Kong,⁶⁷ may be explained, if not always

⁶⁴ Ghai 281.

⁶⁵ Ibid.

⁶⁶ Ibid 274.

⁶⁷ Ibid.

fully, by reference to the duality of the CEship. Indeed, the question of whether the present political system in Hong Kong is based on separation of powers or whether it is an executive-led system, owes an explanation of the duality of the CEship.

2.2 Limited and weak checks and balances

If the above conception of the Chief Executive role in the legislative process stands, then it follows that the relationship between the LegCo and the Chief Executive bears a dual character as well. In so far as the initiative stage of legislation is concerned, the relationship between them is part of the overall executive-legislative relationship. However, as the final sphere of the legislative process — when a bill is finished with the LegCo and submitted to the Chief Executive to sign — is concerned, their relationship shifts to that of an interrelationship of two legislative bodies within the whole law-making process. Hence, the checks and balances between them at this stage are no longer those between the legislative and the executive, but a kind of self-scrutiny within the legislative power itself. On each front, it seems that the Basic Law allows only limited and weak checks and balances on the Chief Executive.

In other countries, the scrutiny within the legislative power is often set up by dividing the legislature into two houses. In Hong Kong, the bicameral system is not adopted.⁶⁸ There is, however, one specific occasion where it does work in a way similar to the two-house formula. That is when it comes to voting on a private bill, where there can be said to have certain degree of self-scrutiny within the LegCo.⁶⁹ Otherwise, in terms of the vast majority of bills which are introduced by the Government, the two-house formula of self-scrutiny within the LegCo is lacking. Therefore, it is plausible, and indeed desirable, that the power of the Chief Executive to sign or refuse to sign a bill passed by the LegCo takes over the self-scrutinizing role. In so doing, however, the Chief Executive is scrutinizing legislation not as if he were a co-equal house of the legislature, but in his capacity as the head of the Region and

⁶⁸ Basic Law Art 66.

⁶⁹ Different from bills introduced by the Government, the passage of which needs only the simple majority of votes of the LegCo members present in meeting, a private bill will be voted separately by two groups of LegCo members—those returned by functional constituencies and those returned by geographical constituencies, and a simple majority vote of each group is required to secure its passage, thus giving each group a *de facto* power of veto over the other. See *ibid* Annex II.

thus over and above the LegCo. It follows that in exercising this scrutinizing power, the Chief Executive is and should be held responsible to the HKSAR Region and the Central Authorities, rather than to the LegCo.

Accordingly, the measures provided in the Basic Law that regulates the Chief Executive's power in this regard should be understood as constitutional limits on his capacity as the head of the Region rather than that as the head of the Government. That is to say, those limits are not part of the checks and balances in the executive-legislative relationship at the Regional level, but part of the Region-Central relationship. This can be seen more clearly in the provisions in the Basic Law which concern the resignation and impeachment of the Chief Executive.

Under the Basic Law, the Chief Executive *must resign* in three circumstances, two of which are related with the situation where the Chief Executive has dissolved the LegCo. The Chief Executive may dissolve the LegCo in two circumstances: (1) if he refuses to sign a bill passed by LegCo and returns the bill in question to the LegCo for reconsideration, and if the LegCo passes the original bill again, the Chief Executive has either to sign it or to dissolve the LegCo;⁷⁰ (2) if the LegCo refuses to pass a budget or any other important bill introduced by the Government, the Chief Executive may dissolve the LegCo.⁷¹ The Chief Executive must resign if the newly elected LegCo (1) passes the original bill again,⁷² or still refuses to pass the original bill.⁷³

It is clear that there is a mechanism of checks and balances between the LegCo and the Chief Executive. But in neither of these two circumstances is the LegCo given a positive role to play. Instead, as Ghai understands it, the very threat of dissolution may already serve to ensure compliance by the LegCo members.⁷⁴ The lack of initiative on the part of the LegCo in this regard significantly weakens the sense that the LegCo could actually hold the Chief Executive to account even in the event of serious conflict between them.

⁷⁰ Ibid Art 49.

⁷¹ Ibid Art 50.

⁷² Ibid Art 52 (2).

⁷³ Ibid Art 52 (3).

⁷⁴ Ghai 294.

The LegCo does seem to have a more positive role to play in the procedure to impeach the Chief Executive. According to the Basic Law, the Chief Executive may be impeached on the ground that there is a 'serious breach of law or dereliction of duty' by the Chief Executive and he refuses to resign.⁷⁵ If one-fourth of all the members of the LegCo jointly initiate a motion charging the Chief Executive of these offences, the impeachment procedure begins. If the LegCo passes the motion, it will then give a mandate to the Chief Justice of the CFA to form and chair an independent committee to investigate into those charges. If the committee comes up with a decision that such charges stand, then the LegCo may pass a motion of impeachment of the Chief Executive. But that motion is not final, it has to be reported to the Central Government for decision.⁷⁶

The device of impeachment is also found in the American Constitution, of which Congress can avail itself to remove the President from office.⁷⁷ This is a legislative power, or a legislative check and balance on the executive power.⁷⁸ In Hong Kong, although the impeachment procedure is initiated by the legislature, the legislature does not control the whole process. Furthermore, unlike in the US where the outcome of the trial by the Senate is final, the Hong Kong LegCo's decision on impeachment is not — it has to be reported to the Central Government to decide. Thus, it seems clear that the impeachment procedure is not a measure by which to hold the Chief Executive accountable to the LegCo, but to hold him accountable to the Region and to the Central Government.

In reality, no attempt has ever been made to impeach a Chief Executive. In 2005 the first Chief Executive Tung Chee-hwa resigned during his second term of office. He resigned all out of a sudden and merely for personal reasons. It was said that he actually resigned due to pressures from the Central Government.⁷⁹ This episode nicely demonstrates that in holding the Chief Executive (especially in his capacity as the head of the Region) to account, it is

⁷⁵ Basic Law Art 73 (9).

⁷⁶ Ibid Art. 73 (9).

⁷⁷ The US Constitution Art II, Section 4.

⁷⁸ Laurence H Tribe, *American constitutional law* (Foundation Press 2000) 289-296.

⁷⁹ There was no lack of implications to this point in local mass media coverage of Tung's resignation. See for example Carrie Chan, 'Tung Resigns', *The Standard*, (2 March 2005).

indeed the Central Government, not the LegCo, who plays the key role.⁸⁰

Nor does it seem that the LegCo and Chief Executive can effectively hold the Chief Executive (in his capacity as the head of the executive government) to account. Under the Basic Law, the Government must be accountable to the LegCo in these four fields: to implement laws passed by the legislature; to present regular policy address to the legislature; to answer questions in the legislature; and to obtain approval of the legislature for taxation and public expenditure.⁸¹ It is not clear how the LegCo can hold the executive to account, for example, in terms of implementing the laws. It would be easier to imagine that the executive is held accountable — to the rule of law, not to the legislature — if its implementation of the laws is challenged in court. The policy address is presented to the LegCo by the Chief Executive. The LegCo will have a debate over it and ask the Chief Executive questions in relation to it. But at the end of the day, the LegCo will pass a motion on whether or not it should ‘thank’ the Chief Executive for that address.⁸² One would be very optimistic, if not naïve, to believe that the LegCo is actually holding the Chief Executive to account when it considers whether or not to thank him for the policy address.

Finally, it should be mentioned that the LegCo is weak in holding the Chief Executive and his team to account in that it lacks of the weapon of confidence vote. In the UK, Parliament may effectively hold the government to account by a vote of want of confidence. But this is not available in Hong Kong, either against the Chief Executive or against the principal officials. This measure was ruled out during the drafting of the Basic Law, on the ground that it would produce frequent changes of government and thus not good for maintaining economic prosperity and social stability in Hong Kong.⁸³ Theoretically, given the Chief Executive and

⁸⁰ However, it is not clear in the Basic Law by what way or in what kind of procedure that the Central Government may hold the Chief Executive to account.

⁸¹ Basic Law Art 64.

⁸² According to the rules of procedure of the LegCo, at a meeting not less than 14 days after the Chief Executive has presented a Policy Address to the Council, a motion may be moved for an address of thanks to the Chief Executive for his address. See Rules of Procedure of the Legislative Council of the HKSAR, amended to 13 May 2011. The practice of a thanks-motion was first introduced in 1968.

⁸³ 肖蔚云 Weiyun Xiao, '香港特别行政区政治体制中的几个主要法律问题 On Several Main Issues Concerning the Political System of the Hong Kong Special Administrative Region Under the Basic Law' (1990) 4 *中国法学 Journal of Chinese Law* 4-10. In reality, however, there had been a few occasions in Hong Kong when a motion of no confidence was cast against a particular principal official in the LegCo. In 1999, the former Secretary of Justice, Elsie Leung, was the first principal official against whom a vote of no confidence was cast in the LegCo.

the principal officials are ultimately appointed by the Central Government, a vote of want of confidence is apparently at odd with the appointment arrangement.

In all, the HKSAR LegCo is weak in holding the executive and the Chief Executive to account. There is more blending than separation of powers in terms of legislation. The dual capacity of the CE-ship makes this blending much tilted to the advantage of the executive branch and to the Chief Executive. The lack of the measure to hold the executive to account by vote of want of confidence and the difficulty in forcing the Chief Executive to resign or to impeach him, adding together, gives no impression that the LegCo can effectively be checking and balancing the executive and the Chief Executive. Surely, the LegCo can ultimately check the executive by blocking legislation. But frequent reference to this last resort already implies the ineffectiveness of the checks and balances mechanism. And even this last resort is hampered by the Chief Executive's power to dissolve the LegCo.

2. 3 Summary reflections

The political system of the HKSAR is perhaps more accurately described as the Chief-Executive-led rather than executive-led. It follows neither the American form of presidential government nor the British model of parliamentary-executive government. In fact, it is a mixture of both.

Indeed the duality of the CEship asks not for separation but for concentration of powers. It asks for a degree of concentration that would ensure the whole machinery produces the kind of executive-led effect as the British parliamentary system does or the pre-handover 'gubernatorial system' did. The Hong Kong Chief Executive is as much an executive head as a US president in the US constitutional order, but he is more of a law-maker than the US president is. The Hong Kong Chief Executive is also more of a real law-maker than the British monarch is in the sense that, while he can say 'no' to a bill passed by the legislature, the British Queen is usually bound to say 'yes'. In a sense, the duality of the CEship could make the Chief Executive almost as much a dictator as the colonial governor could be. Yet he is not as much a real dictator as the governor actually was: he is elected, the governor was not; he, as the head of the Government, is held accountable to the legislature, whereas the governor

himself was the legislature. Although elected, however, the Chief Executive has to be appointed by the central government and thus held accountable to it. In this specific point, the Chief Executive is not in much a different position as the colonial governor was in. Indeed, as Ghai recognizes, the political structure of the HKSAR is an uneasy blend of democracy and authoritarianism.

3. The constitutional role of the judiciary

What then is the appropriate role of the judiciary in such a constitutional system? There is no doubt that the proper role of the judiciary in a certain constitutional system has to be examined in the context of that system of which the judiciary is a part. In Hong Kong's case, the first thing to see is whether in this uneasy blend of democracy and authoritarianism there is guaranteed judicial independence.

3.1 Judicial independence

The independence of the judiciary is a common characteristic shared by western democratic constitutions. It emphasizes that judicial power should be separated from other governmental powers, and that it should be exercised independently, free from interferences from other branches. The separation of judicial power is of course the precondition on which judicial independence can exist and be possibly maintained. Measures to secure judicial independence usually include the arrangements for judicial appointments, tenure, salary and immunity. These guarantees (save that of legal immunity) are basically material, but they provide a strong sense of security which is, by human nature, the need for and the yeast to freedom of will. No one has spoken more powerfully than Alexander Hamilton on the importance of these material guarantees. 'Next to permanency in office', he said, 'nothing can contribute more to the independence of judges.....'; and further he added, '[i]n the general course of human nature, *a power over a man's substance amounts to a power over his will*'.⁸⁴

The principle of judicial independence is enshrined in the Basic Law. As general principles,

⁸⁴ Alexander Hamilton, *The Federalist Paper*, No. 78. Original emphasis.

the Basic Law provides that the HKSAR shall exercise a high degree of autonomy with independent judicial power, including that of final adjudication,⁸⁵ and that the courts of the HKSAR 'shall exercise judicial power independently, free from any interference.'⁸⁶ As one commentator notes, while the repletion here may reflect poor draftsmanship of the Basic Law, it does also reflect the NPC's determination to uphold judicial independence in the HKSAR.⁸⁷

On the more specific plane, the Basic Law also adopts a number of specific measures regarding the arrangements for the appointment and removal of judges, the security of salary and other benefits, and the immunity from legal action. Under the Basic Law, judges shall be appointed by the Chief Executive on the recommendation of an independent commission,⁸⁸ but the appointments of the Chief Justice of the CFA and the Chief Judge of the High Court shall need the approval of the LegCo and should be reported to the Central Authority for record.⁸⁹ Judges in Hong Kong do not enjoy life tenure. But they may only be removed for inability to discharge judicial duties or for misbehaviour.⁹⁰ As to what may amount to disability and misbehaviour, the Basic Law does not provide specific guidelines, nor does there appear to have emerged in Hong Kong's common law jurisprudence any criteria for such a judgment. But the Basic Law does prescribe a procedure, which itself being akin to a judicial process, for the investigation and determination of these two circumstances.⁹¹ In the UK, judges of the higher courts enjoy office during 'good behaviour' and are only removable by an address of both Houses of Parliament. In their case, what may amount to a breach of 'good behaviour' is not clearly defined either. Nevertheless, such a constitutional guarantee is said to be sufficient and effective, simply because no English judge has been so removed over the centuries.⁹² In Hong Kong, no judge has ever been removed due to disability or misbehaviour. So, the lack of definition or standards in this regard does not seem to be a real threat.

⁸⁵ Basic Law Art 2.

⁸⁶ Ibid Art 85.

⁸⁷ Berry F.C. Hsu, 'Judicial Independence under the Basic Law' (2004) 34 Hong Kong LJ 281.

⁸⁸ Basic Law Art 88.

⁸⁹ Ibid Art 90.

⁹⁰ Ibid Art 89.

⁹¹ Ibid Art 89.

⁹² Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights; A critical introduction* (5th edn, OUP 2009) 58-59.

Another important issue which is somewhat overlooked in the discussion of judicial independence in Hong Kong is the possibility of positive legislation to alter the scope of judicial power. According to the Basic Law, the structure, powers and functions of the courts in the HKSAR at all levels shall be prescribed by law.⁹³ Theoretically, therefore, the scope of judicial power could be altered by the legislature. But unless in clearly necessary and legitimate circumstances it is unlikely that the legislature will do so. In the UK, the principle of parliamentary supremacy would allow Parliament to enact laws to exclude judicial jurisdiction in some type of cases.⁹⁴ The US Constitution also provides that Congress may regulate the jurisdiction of the Supreme Court.⁹⁵ But in neither the UK nor the US had it appeared that this possibility of legislative alteration of the scope of judicial power would practically undermine judicial independence. Nor perhaps should the similar Basic Law provision be seen as a potential threat to judicial independence in the HKSAR.

In a Chief Justice's address in 2010, the status quo of judicial independence in the HKSAR was stated in highly celebrated terms:

It is now over 12 years since Hong Kong entered the new constitutional order as part of China under the principle of "one country, two systems". During this period, judicial independence has been universally recognised and accepted to be of pivotal importance to Hong Kong. The constitutional guarantees for an independent Judiciary have been fully implemented.⁹⁶

What is most precarious about judicial independence is perhaps the lack of the final power to interpret the Basic Law. As discussed in Chapter IV, interpretation of the Basic Law by the courts of the HKSAR is always subject to overruling by the NPCSC. Thus although all cases in Hong Kong will be decided by Hong Kong courts, hence complete judicial independence regarding to adjudication, judicial independence in the HKSAR is, however, not complete in terms of the interpretation of the Basic Law. This 'China-link' makes judicial independence in

⁹³ Basic Law Art 83.

⁹⁴ In theory Parliament has the power to do so. See Loveland 58-59. But since *Anisminic Ltd. V. Foreign Compensation Commission* [1969]2 AC 147, it seems that the courts have always been vigilant in protecting their scope of power, thus defending judicial independence.

⁹⁵ The US Constitution Art III, Section 2.

⁹⁶ Chief Justice's speech at Ceremonial Opening of the Legal Year 2010, see <http://www.info.gov.hk/gia/general/201001/11/P201001110174.htm>, accessed in July 2012.

Hong Kong a more subtle and sensitive issue than in other jurisdictions.

3.2 Judicial checks and balances on other branches of government

Judicial independence is undoubtedly the precondition for the courts to assert any degree of real checks and balances on other branches of government. But judicial independence itself does not necessarily imply the power of constitutional review whereby courts can strike down the acts of the legislature or the executive. In the US, judicial constitutional review is asserted and often defended on the need for checks and balances implicit in the doctrine separation of powers. And for this purpose, the judiciary must have, as Hamilton put it, 'complete independence'.⁹⁷ In the UK, the fusion of powers between the legislative and executive was more vibrant than the separation between them in the pre-HRA era. One therefore might submit that judicial independence in that UK context was to ensure the rule of law rather than to check and balance.

As discussed in the previous two sections, the political system in the HKSAR is a 'blend of democracy and authoritarianism', i.e., a mixture of separation of powers and executive dominance. In this political structure, checks and balances between different arms of government have not been ruled out, but it seems that only a limited degree of checks and balances is regarded as desirable. This being the case, it is not immediately clear if the role of the judiciary includes the jurisdiction of constitutional review.

It could be argued that since the checks and balances between the executive and legislative, as discussed above, are intended by the Basic Law to be limited and weak, there does not seem to be a strong need for the courts to exercise the power of constitutional review, if the purpose of this kind of review is to police the boundaries between these two arms of government. Furthermore, since it is the Chief Executive who, in his capacity as the head of the Region, signs a bill passed by the LegCo and then promulgates it as law, does it not imply that he is the person who takes care of the constitutionality of any enactments in the first place? Does it not also suggest that, if the courts are to review the constitutionality of legislation, they are not policing the relationship between the executive and the legislature,

⁹⁷ Alexander Hamilton, *The Federalist Paper No 78*.

but policing the self-scrutiny within the legislative process? Still, given the Chief Executive in this capacity is held accountable not to the legislature, but to the Central Government and the Region, how far can the courts go in that direction?

On the other hand, it could also be argued that to the extent that the political structure of the HKSAR does embed a degree of checks and balances between the legislature and the executive, it may well be argued that, at least to the extent of those embedded checks and balances, it is legitimate for the courts to police the boundaries between them via the exercise of the power of constitutional review. The questions raised in the previous paragraph are perhaps more closely related to the issue of the scope of constitutional review rather than the issue of the justification for constitutional review.

Conclusion

The judicial role in a certain political system has to be examined in the context of that system. The political structure of the HKSAR as defined in the Basic Law is intended to implement the principle of OCTS. It seems quite plausible that the drafters of the Basic Law had indeed intended to establish a system which may ensure executive dominance, while allowing a certain degree of checks and balances between the legislature and the executive. On closer look, it becomes clearer that the political system in the HKSAR follows neither the American model nor the Westminster model, but has some similar bits with each of them. It has the elements of separation of powers, but it intends to establish an executive-led government. Hence, it is in essence an uneasy blend of democracy and authoritarianism. The dual capacity of the constitutional role of the Chief Executive reveals this nature.

In such a political system, the checks and balances between the legislature and the executive are limited and weak. Consequently, it may well be argued that there is not a strong need for the courts to police the boundaries between these two arms of government. However, it cannot be denied that to the extent that this system does allow certain checks and balances between the legislature and the executive, it is, at least to that extent, legitimate that the courts see to it that there is no encroachment by the executive into the legislature or vice versa. In other words, since the entire political system in the HKSAR is a blend of democracy

and authoritarianism, judicial constitutional review in the HKSAR may well be justified on the grounds of democracy, but at the same time, may not be justified on the authoritarian part. As many things under OCTS may seem paradoxical, so does the issue of the justification of judicial constitutional review. However, once this power has been established, it is sure to push the working of the whole political system towards the democratic direction. And the repeated use of this power will enhance its legitimacy.

Moreover, it is obvious that the question of the constitutionality of legislation does exist in the implementation of the Basic Law, for the Basic Law expressly provides that no law enacted by the legislature shall contravene the Basic Law. Given that it is for the courts to apply the laws, and that the courts do have the power to interpret the Basic Law, it is most appropriate that the task of constitutional review should be taken up by the courts, unless and until the Basic Law provides expressly otherwise. The fact that the Basic Law guarantees judicial independence makes the judges better positioned to do this job.

However, as shall be seen in the next Chapter, the constitutional role of the judiciary as a check on the other two branches of government to ensure that they act in accordance with the Basic Law, as claimed by the CFA in *Ng Ka Ling*, has been played out mainly not to police the boundaries between the legislature and the executive, but to safeguard human rights protection from governmental encroachments. In this sense, the democracy part of the HKSAR political system, understood as including not only separation of powers but also the rule of law and the protection of fundamental rights, provides a legitimate basis for the courts to scrutinize acts of both the legislature and the executive in the way of constitutional review.

Chapter VI

Human Rights and Constitutional Review in Hong Kong

Introduction

There are apparently two fundamental relationships in a democratic constitutional order: one is the relationship between different branches of government and the other that between the state and its citizenry. While the former may be formalized in different models, the latter is often regulated through certain measures to protect fundamental rights and freedoms. In many written constitutions, that measure is the entrenched bill of rights. A bill of rights, it is widely realized, not only affects the distribution of power amongst state institutions but also changes the relationship between individuals and the state.¹

The relationship between different branches of government in the HKSAR has been discussed in the last Chapter. In this Chapter, we shall look at the human rights aspect of the new constitutional order in Hong Kong. As shall be seen, in Hong Kong today, the Basic Law guarantees the protection of a wide range of fundamental rights and freedoms. More significantly, there has been a robust judicial enforcement of these rights, which, as many others do, takes the form of constitutional review. And there has also been an overwhelming public support of the judicial exercise of this power.² Yet, as has been made clear in the beginning, the text of the Basic Law does not grant the judiciary this authority. So the main purpose of this Chapter is to continue our effort to look for its justification, focusing on the human rights perspective. Section 1 will look at the rights regime under the Basic Law in general. Section 2 will examine the entrenchment of rights in Hong Kong. Section 3 will discuss the question of the existence of entrenched rights as the basis for constitutional review. In section 4, we shall move from theory to practice. The courts' practice of constitutional review in the human rights field will be examined. The point to be made is that should there be any doubt of the justification for constitutional review under the Basic Law, the repeated and robust exercise of this power by the judges may have sufficiently

¹ Joseph Raz, 'Rights and Politics' (1995) 71 *Indiana Law Journal* 42.

² See generally Johannes MM Chan, HL Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press 2000); See also a collection of articles on '10 years of the Basic Law', (*Hong Kong Law Journal*, vol.37, part 2, 2007).

legitimized it anyway.

1. Who has what rights?

The Basic Law devotes a whole Chapter on 'Fundamental Rights and Duties of the Residents',³ which lists a number of fundamental rights and freedoms Hong Kong people are entitled to enjoy, including, for example, the right to be treated equally before the law,⁴ the right to vote and to stand for elections,⁵ the freedom of speech, of press, of association and assembly,⁶ the right against arbitrary or unlawful arrest, detention or imprisonment,⁷ the freedom of religious belief,⁸ the right to access to the courts,⁹ the right to raise a family freely,¹⁰ and so on. But as Ghai notes, provisions of rights and freedoms are not limited in that particular Chapter, but 'are spread throughout the Basic Law'.¹¹ Thus, such rights as the right to a fair trial and various economic and cultural rights are to be found elsewhere in the Basic Law.¹² In a sense, the Basic Law itself is a Bill of Rights.

Yet one has to look beyond the Basic Law. For the Bill of Rights contained in the BORO is another important source of rights. While most of the rights and freedoms listed in the Bill of Rights have their parallels in the Basic Law, there are rights in the Bill of Rights that are not to be found in the Basic Law and vice versa.¹³ This overlapping landscape of rights was

³ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Chapter III.

⁴ Ibid Art 25.

⁵ Ibid Art 26.

⁶ Ibid Art 27.

⁷ Ibid Art 28.

⁸ Ibid Art 32.

⁹ Ibid Art 35.

¹⁰ Ibid Art 37.

¹¹ Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd edn, Hong Kong University Press 1999) 423.

¹² Many of the legal rights are to be found in Section 4 'The Judiciary', Chapter IV; the economic and cultural rights are to be found in Chapter V and VI of the Basic Law.

¹³ Examples of rights only to be found in the Bill of Rights include the right to a lighter penalty (BORO Art 12 (1)), prohibition against imprisonment for inability to fulfil contract (BORO Art 12 (1)). Examples of rights to be found in the Basic Law not in the Bill of Rights include the right of abode in Hong Kong (Basic Law, Art 24), the freedom to travel and to enter and leave Hong Kong (Basic Law, Art 31), the right to compensation for lawful deprivation of property (Basic Law, Art 105). Such rights listed in the Bill of Rights as the right to bail (BORO, Art 5 (3)) the right to a public hearing (BORO, Art 10) and the right to compensation for unlawful arrest or detention and miscarriage of justice (BORO, Art 5(5)) are not found in the Basic Law either, but arguably they may have been covered by the more sweeping provision in the Basic Law that 'in criminal and civil proceedings...the principles previously applied to Hong Kong and the rights previously enjoyed by the parties to proceedings shall be maintained' (Basic Law Art 87).

noticed by the CFA in *Gurung Kesh Bahadur v. Director of Immigration*,¹⁴ where it helpfully pointed out that the rights to be enjoyed by Hong Kong people may be provided for (i) in both the Basic Law and the Bill of Rights; or (ii) only in the Basic Law and not in the Bill of Rights; or (iii) only in the Bill of Rights but not in the Basic Law.¹⁵ In the Court's view, the rights found only in the Basic Law were 'created by the Basic Law'.¹⁶

Thus, as Simon Young observes, the CFA in *Gurung* had actually defined *two categories of Basic Law rights*: 'exclusive Basic Law rights' (which are found only in the Basic Law) and 'parallel Basic Law rights' (which are not only found in the Basic Law but with a parallel in the Bill of Rights).¹⁷ In Young's view, this categorization exercise is 'flawed', because the rights in the two instruments are often cast in very different language.¹⁸ However, if we recognize that there are indeed distinctive rights in the Basic Law that are not to be found in the Bill of Rights, such a categorization does seem to make sense. As we shall see shortly, the purpose of the Court's categorization is to further the argument that exclusive Basic Law rights may be subject to a different limitation analysis.

Nevertheless, putting the Basic Law and the Bill of Rights together, it can be said that the fundamental rights and freedoms guaranteed by the Basic Law regime covers most, if not all, of the fundamental rights and freedoms that are provided in international human rights covenants and are found being protected in other democratic societies. This guarantee to protect fundamental rights and freedoms is an important aspect of the OCTS framework. As the CFA has reiterated over and over again, these rights and freedoms 'lie at the heart of Hong Kong's separate system'.¹⁹ Truly, as Ghai echoes, it is the different perceptions and practices of human rights that distinguish Hong Kong sharply from its motherland.²⁰ In order to better understand this aspect of OCTS, we need to face further specific questions: who is entitled to enjoy these rights and freedoms; are the rights and freedoms subject to limitations?

¹⁴ *Gurung Kesh Bahadur v. Director of Immigration* [2002] HKCFA 30; [2002] 2 HKLRD 775; (2002) 5 HKCFAR 480 (CFA).

¹⁵ *Ibid* para 26.

¹⁶ *Ibid*. Emphasis added.

¹⁷ Simon N M Young, 'Restricting Basic Law Rights in Hong Kong' (2004) 34 Hong Kong LJ 119.

¹⁸ *Ibid* 124.

¹⁹ *The Gurung case* para 3.

²⁰ Ghai 401.

1.1 The categorization of Hong Kong residents

The Basic Law provides a subtle and sophisticated categorization of Hong Kong residents and prescribes correspondingly that certain rights are only available to a particular category of people. According to the Basic Law, individuals in Hong Kong are divided into two broad categories: residents and non-residents (for example visitors). Under these two broad categorizations, residents are further divided into permanent residents and non-permanent residents, and permanent residents into Chinese nationals and non-Chinese nationals. Furthermore, the Chinese-nationals-permanent-residents are distinguished between those who have a right of abode in a foreign country and those who do not.²¹

According to the Basic Law, there are rights available only to Hong Kong residents, for example, the freedom to travel and to enter or to leave the Hong Kong Region.²² Among Hong Kong residents, rights entitlement may also vary, depending on one's resident status. The right to vote and to stand for election, for example, is only available to permanent residents.²³ But the right to be elected as a delegate to the NPC is only available to Chinese nationals.²⁴ If one wants to be elected as the Chief Executive, as the Chairman of the LegCo, or to be appointed as the Chief Justice of the CFA, he or she must be a Hong Kong permanent resident who is also a Chinese national and who has no right of abode abroad.²⁵

In addition, the Basic Law distinguishes 'the indigenous inhabitants of the New Territories' from other Hong Kong residents and provides specifically that their 'lawful traditional rights and interests' should be protected.²⁶ This particular categorization might well suggest that the Basic Law also has some emphasis on certain group rights. But other categorizations of residents do not seem to bear the implication on group rights and collective interests as the

²¹ Basic Law Art 24.

²² Ibid Art 31.

²³ Ibid Art 26. This right is subject to further qualifications: (1) one needs to be a permanent resident of Chinese nationality to stand in the election of the Chief Executive (Art 44); and (2) the number of seats in the Legislature which may be taken by non-Chinese permanent residents is limited to no more than 20% per cent of the total membership (Art 67).

²⁴ Ibid Art 21.

²⁵ Ibid Art 44, 71, 90.

²⁶ Ibid Art 40. According to Ghai, 'the traditional rights and interests' relate to questions of land, building of 'small houses' by male descendants, exemption from rates for rural houses and certain burial and funeral rights. See Ghai 425.

Canadian Charter does.²⁷ In Hong Kong, for historical reasons as well as for practical purpose, the Basic Law provides that both English and Chinese are the official languages in the HKSAR.²⁸ But the linguistic right in Hong Kong does not seem to be regarded as a group right as it is in Canada, and it is by far less sensitive than it appears to be in Canada.

It is noticeable, however, that the differences in the rights enjoyment driven by the categorization of residents are mainly related to political rights, except in the case of the indigenous inhabitants of the New Territories. Otherwise, as Ghai notes, the rights under the Bill of Rights are in principle available to all persons present in Hong Kong including residents and visitors.²⁹ Limitations on such political rights as the right to stand in national elections are common practice all over the world.³⁰ Therefore, the categorization of Hong Kong residents and the exclusion of certain rights from a certain categorization are well-justified and do not run counter to the general principle of equality before the law.

1.2 The scope of rights: permissible limitations in general

The Basic Law does not define the rights and freedoms it enshrines. The rights listed in the Bill of Rights, in contrast, are defined in relatively greater detail, though overall still being broad and principled. This kind of generalization of rights formulation is, however, common practice in written constitutions. Thus, in Hong Kong as in other common law jurisdictions, the scope of each entrenched right is ultimately to be defined through judicial interpretation. Justice Bokhary PJ in *Leung Kwok Hung & Others v. HKSAR*,³¹ in his dissenting opinion, made the point of taking the rights 'beyond the legislature's power to undo'.

The Basic Law's reach....'extends beyond preserving old rights and includes conferring new ones'....the

²⁷ For a discussion of the Canadian group rights and collective interests, see David M. Beatty (ed), *Human Rights and Judicial Review, a Comparative Perspective* (Martinus Nijhoff Publishers 1994).

²⁸ Basic Law Art 9.

²⁹ Ghai 425.

³⁰ The American Constitution, for example, provides that one has to be over the age of 30, has become a US citizen for over 9 years and a resident of the particular state to be qualified for the a seat in the Senate (art.1). It also provides that anyone, if not born in the US or has not become a US citizen, or under the age of 35 and has not been residing in the US over 14 years, is not qualified to stand in the presidential election (art. 2). Likewise, in the UK, there are similar qualifications to stand in parliamentary elections, and of course, anyone who is not qualified in such elections has no chance to get to the prime-ministership.

³¹ *Leung Kwok Hung & Others v. HKSAR* [2005] HKCFA 41; [2005] 3 HKLRD 164; (2005) 8 HKCFAR 229 (CFA).

Basic Law's greatest contribution to human rights is to their enforcement rather than to their content....Entrenched constitutions like the Basic Law does not subscribe to [the] belief [that a government with a majority ought to be able to push any measure through Parliament]. Basic Law rights and freedoms are beyond our legislature's power to undo.³²

But in Hong Kong as in elsewhere, no rights may be seen as absolute. Limitations are permissible under certain circumstances. The real difficulty in rights discussion is therefore not the enumeration of rights, but the limitations permissible. Although most rights and freedoms in the Basic Law are framed in unqualified language, it is clear from Article 39 (2) of the Basic Law that all the rights and freedoms enjoyed by Hong Kong residents may be restricted, subject to two conditions: prescribed by law and not being in contravention with the ICCPR and ICESCR as applied to Hong Kong. Article 39 (2) reads:

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

In a way Article 39 (2) resembles the general limitation in the Canadian Charter.³³ In the Bill of Rights, there is no such a general limitation clause. Many of the rights and freedoms listed therein are attached separately with the specific grounds on which they may be subject to restriction. Typical is the provision on the right of peaceful assembly. Article 17 of the BORO (which corresponds to Article 21 of the ICCPR) provides that the right of peaceful assembly shall be recognized and that

No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in 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.

However, judicial interpretation of the rights has relied on both Article 39 (2) and the specific limitation grounds in the Bill of Rights in reviewing whether a limitation imposed on a

³² Ibid para 157.

³³ The Canadian Charter of Rights and Freedoms, S 1. It provides that 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

certain right can be justified. This trend of judicial reasoning is becoming more and more obvious. In *Leung Kwok Hung* for example, where the right to peaceful assembly was at stake, the CFA recognized that even such a fundamental right as the freedom of expression is not an absolute but may be subject to restrictions.³⁴ The Court then went on to examine what limitations were permissible on the right of peaceful assembly in this case, by relying on not only Article 39 (2) of the Basic Law but also Article 17 of the BORO.

Without exception, one daresay, whenever a limitation imposed on a certain entrenched right is at stake, the court will have to resort to Article 39 (2), at one point or another, in its scrutiny of the justification for limitation. In this sense, Article 39 (2) does seem to function as a general limitation clause applying to all rights and freedoms, either found in the Basic Law or in the Bill of Rights. The specific limitation grounds attached to certain rights listed in the Bill of Rights may therefore be regarded as the extended version of Article 39 (2) applying to those particular rights. To test this point, it might even be argued that, had there not been the provision of Article 39 (2) in the first place, the limitations the Bill of Rights imposes on a seemingly unqualified Basic Law right might well be challenged as unconstitutional.

However, the reading of Article 39(2) as a general limitation clause seems to have been partly rejected by the CFA in *Gurung*. According to the Court, since the exclusive Basic Law rights are additional rights ‘created by the Basic Law’ — additional to the rights contained in the ICCPR as applied to Hong Kong, Article 39 (2) of the Basic Law does not apply to them because what Article 39 (2) requires is that restrictions on rights and freedoms must not contravene ‘the ICCPR as applied to Hong Kong’.³⁵ However, the Court said that

it does not follow that rights found only in the Basic Law can be restricted without limitation provided the restrictions are prescribed by law. The question of whether rights found only in the Basic Law can be restricted and if so the test for judging permissible restrictions would depend on the nature and subject matter of the rights in issue. This would turn on the proper interpretation of the Basic Law and is

³⁴ The CFA referred to its earlier decision where this point had been made. See *HKSAR v Ng Kung Siu and Another* [1999] HKCFA 10; [1999] 3 HKLRD 907; (1999) 2 HKCFAR 442 (CFA) para 45.

³⁵ *The Gurung case* para 28.

ultimately a matter for the courts.³⁶

That is to say, the exclusive Basic Law rights require an autonomous restriction analysis. Strictly speaking, as far as the categorization between exclusive Basic Law rights and parallel Basic Law rights stands, it is certainly logically sound to argue that they might be subject to differing treatments requiring permissible limitations. However, a new question arises as to how the autonomous restriction analysis is to be developed. As we shall see in the third section of this Chapter, judicial elaboration of constitutional permissible limitations has been mainly on parallel Basic Law rights. What autonomous restriction analysis is required for exclusive Basic Law rights remains unclear. While the trend of internationalization in regard to parallel Basic Law rights is obvious and perhaps even understandable because of their connection with the ICCPR, the same approach towards exclusive Basic Law rights might well be questionable, simply because they are purely Basic Law rights. However, given the Court's established approach to giving the Basic Law a generous and purposive interpretation, one might envisage that the courts would be more than willing to give the exclusive Basic Law rights no lower protection than the parallel Basic Law rights. Only time can tell what peculiar difficulties will arise in this respect. For one thing, with the Court's categorization and introduction of different limitation analysis to each categorization in *Gurung*, the definition and scope of some rights in the Basic Law become less clear. In law, it is often said, context is everything. So is the case with the scope of rights.

1.3 The obligation clause

The question of who has what rights under the Basic Law cannot be fully answered without a look at the obligation clause — Article 42 of the Basic Law, which provides that 'Hong Kong residents and other persons in Hong Kong shall have the obligation to abide by the laws in force in the [HKSAR]'. This clause stands out somewhat dazzlingly from amidst the provisions of rights and freedoms.

As Johannes Chan understands it, the obligation clause reflects the socialist ideology of rights, which, in stark contrast to the traditional western perception that certain rights are

³⁶ Ibid.

inherent in the nature of human beings, perceives rights as granted by the state.³⁷ That there exists such ideological difference in the perception of human rights between China and the west world is, unfortunately, undeniable. The concept of human rights, writes an expert on the ICCPR, is that they 'belong to any individual as a consequence of being human, independently of acts of law', and that '[i]n stating the existence of human rights, we state that every human being, simply because he or she is a human being, is entitled to something.'³⁸ Whereas in China, as Louis Henkin observes, 'benefits and privileges are denominated rights and granted so far as conducive to, or at least consistent with, the needs of socialism as the authorities perceive them.'³⁹ Yet, it is not only the country's proclaimed commitment to Marxist-Leninist-Maoist thoughts which is to blame, but there are cultural and historical elements. Henkin explains:

Traditional China, too, did not emphasize the individual and individual rights. The contours of individuality, of the individual's proper domain and where it met another's, were not clearly marked. One's individuality, one's rights moreover, were not to be flaunted or asserted. The ideal was harmony and the individual's place and role were to conform to that harmony. There was a belief that at the bottom the interests of all individuals harmonized rather than conflicted, and that institutions should reflect and seek that commonality of interests.⁴⁰

It would not be surprising at all if such ideological difference had had its impact on the drafting of the Basic Law, since 36 out of the total 59 drafting members were from the mainland, most of whom, presumably, were Communist Party members. However, according to Xiao, one of the drafting members, any concern of adverse impact might be unnecessary. For in his view, if compared to the dozens of obligations the PRC Constitution imposes on the Chinese citizens, the fact that there is only one single clause in the Basic Law prescribing only such a general obligation as 'to abide by the laws' shows not the least intention of imposing the socialist perceptions of rights on the Hong Kong people, but the spirit of

³⁷ Johannes Chan, 'Protection of Civil Liberties' in Peter Wesley-Smith and Albert Chen (eds), *The Basic Law and Hong Kong's Future* (Butterworths 1988) 199.

³⁸ Marek Piechowiak, 'What are Human Rights? The Concept of Human Rights and Their Extra-legal Justification' in Rajjia Hanski and Markku Suki (eds), *An Introduction to the International Protection of Human Rights* (2nd, rev ed edn, Institute of Human Rights, Abo Akademi University 2000) 3.

³⁹ Louis Henkin, *The Age of Rights* (Columbia University Press 1990) 172.

⁴⁰ *Ibid* 173.

implementing ‘two systems’ under the prerequisite of ‘one country’.⁴¹ To a western lawyer, however, as Johannes Chan insists, duties are just another way of looking at rights. There is therefore not much sense to talk about duties independently of rights; nor does the acceptance of it by itself impose any real obligation.⁴²

Apart from, yet in relation to, the obligation clause, the impact of socialist ideology of rights on the drafting of the Basic Law might also be discerned in the way the rights are formulated in the Basic Law. Under the Basic Law, rights are mostly formulated as *posited* rights. That is, they are rights *recognised* by positive law. This is in immediate contrast to the US Constitution whereby the protection of fundamental rights is guaranteed not by stating that citizens have a certain right, but more importantly, by expressly limiting Congress’ law-making competence in prohibiting the free exercise of the right.⁴³ A positive statement that a citizen ‘*has*’ a right, as Donnelly submits, may carry with it the implication that ‘one would be able to enjoy the right only at the discretion of the state’, and as such, the claim to have a right would be easily overridden by political and economic considerations.⁴⁴ This is perhaps why some people genuinely fear that there is hidden danger in the Basic Law that Hong Kong people’s rights and freedoms might be manipulated and encroached upon by positive governmental actions. Chan, for example, was once gravely concerned that such danger is in the Basic Law wherever it is provided that rights and freedoms are only protected ‘*in accordance with law*’ (e.g. Article 26). Such a formula, he argued, is not a mere problem of phraseology, but would imply that fundamental rights and freedoms would be left at the mercy of the legislature, with no restriction on the enactment of draconian laws at all.⁴⁵

But as we shall see in the third section, the vigorous exercise of constitutional review by the courts acting as the guardians of rights has certainly swept away the kind of fear that Chan once had. And as far as our research reaches, we have yet to locate any single instance where the obligation clause has been referred to by the courts in the interpretation of rights.

⁴¹ 肖蔚云 Weiyun Xiao, *一国两制与香港特别行政区基本法 One Country Two Systems and the Basic Law of the Hong Kong Special Administrative Region* (香港文化教育出版社有限公司 Educational and Cultural Press Ltd. 1990) 129.

⁴² Chan 199.

⁴³ See for example, US Constitution, Amendment I.

⁴⁴ Jack Donnelly, *The Concept of Human Rights* (Croom Helm Ltd 1985) 81.

⁴⁵ Chan 208.

After a decade and a half of implementation, the obligation clause is very likely among the very few Basic Law provisions that have not been touched upon in courts. If there had been any socialist ideological influence in the drafting of the Basic Law, this influence seems to have long gone with the wind. Chan himself, writing in the tenth anniversary of the implementation of the Basic Law, admits that 'the promise of a high degree of autonomy has been largely kept as the Central Government has exercised great restraint in not interfering with the domestic affairs of Hong Kong, save in the area of democratic development.'⁴⁶ What Chan identifies now is no longer an ideological problem, but a practical one — the politicization of the judicial process. As he points out, with the exercise of constitutional review, 'many cases with political overtones are increasingly brought before the Courts. If this trend continues and if the judiciary is unable to meet the expectations of the people, the rule of law in Hong Kong will be undermined.'⁴⁷

2. The entrenchment of rights in the HKSAR

By definition, entrenchment refers to the degree of difficulty with which a law can be amended. In the words of Joseph Raz, a constitution is entrenched if its amendments are legally more difficult to secure than ordinary legislation.⁴⁸ Moreover, entrenchment is also measured from the judicial enforcement perspective. For some, a constitution is not entrenched if judges are not given the power to strike down laws that are found contrary to the constitution. This is sometimes referred to as 'judicial entrenchment'.⁴⁹ A full entrenchment of rights is therefore the constitutional position in which rights are not only embedded in the higher law — which might referred to as 'positive entrenchment', but also judges are allowed to strike down primary legislation on the ground of its inconsistency with the rights guaranteed in the higher law — which might referred to as 'judicial entrenchment'.

2.1 Models of entrenchment in comparison

⁴⁶ Johannes Chan, 'Basic Law and Constitutional Review: the First Decade' (2007) 37 Hong Kong LJ 407.

⁴⁷ *Ibid.*

⁴⁸ Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Larry Alexander (ed), *Constitutionalism, Philosophical Foundations* (CUP 1998) 152.

⁴⁹ John Wadham and Francesca Klug, 'The 'Democratic' Entrenchment of a Bill of Rights: Liberty's Proposals' [1993] *Public Law* 579-588.

According to these twin standards, the American Bill of Rights is regarded as fully entrenched.⁵⁰ So it can be said of the rights embedded in the German Basic Law,⁵¹ the South African Bill of Rights,⁵² or indeed many of the post-World War II written constitutions which include a bill of rights and which give judges the authority to set aside legislation found to be inconsistent with the constitution.⁵³ Second to this model of full entrenchment is the Canadian Charter of Rights and Freedoms, which is regarded as 'semi-entrenched', because of the compromise in the Notwithstanding clause to reconcile the principle of parliamentary supremacy with the judicial power to strike down primary legislation.⁵⁴ Further down on the route is the newly developed British model of entrenching rights through the enactment of the HRA 1998, whereby, as discussed in Chapter I, the British judges are given the power to review the compatibility of primary and subordinate legislation with Convention rights, but not the power to strike down any primary legislation which is found to be incompatible with Convention rights. As such, the HRA is seen by some as the 'third wave' or the third type of entrenchment.⁵⁵

In contrast to all the above models, the New Zealand Bill of Rights is an example of non-entrenchment.⁵⁶ The New Zealand Bill of Rights is intended to be only an interpretative statute; it requires that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred

⁵⁰ Ibid.

⁵¹ Dieter Grimm, 'Human Rights and Judicial Review in Germany' in David M. Beatty (ed), *Human Rights and Judicial Review, a Comparative Perspective* (Martinus Nijhoff Publishers 1994).

⁵² Sydney Kentridge QC, 'Lessons from South Africa' in Basil S. Markesinis (ed), *The Impact of the Human Rights Bill on English Law* (OUP 1998).

⁵³ For an invaluable discussion of the birth and development of constitutional review in major western jurisdictions as well as the birth and development of constitutional review in former communist countries in Europe, see Wojciech Sadurski (ed), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in post-Communist Europe in a Comparative Perspective* (Kluwer Law International 2002); For a comparative study of constitutional review in countries like Germany, Italy, Canada, Japan, see Beatty (ed).

⁵⁴ Wadham and Klug 579.

⁵⁵ Francesca Klug, 'The Human Rights Act—A 'Third Way' or 'Third Wave' Bill of Rights' (2001) *European Human Rights Law Review* 361-372.

⁵⁶ For an excellent discussion on the constitutional status of the New Zealand Bill of Rights, see Lord Cooke of Thorndon, 'Mechanism for entrenchment and protection of a Bill of Rights: the New Zealand experience' (1997) *European Human Rights Law Review* 490-495; See also Andrew S. Butler, 'Interface between the Human Rights Act 1998 and other enactments: pointers from New Zealand' (2000) *European Human Rights Law Review* 249-279.

to any other meaning.⁵⁷ New Zealand judges cannot strike down such legislation.⁵⁸

2.2 A hybrid model of entrenchment in Hong Kong

In general, the entrenchment of rights in Hong Kong seems to have followed the American type of full entrenchment. Not only the Basic Law, the supreme law of the Region, enshrines a wide-ranging scope of fundamental rights and freedoms, but also the Hong Kong courts have, at least since *Ng Ka Ling*, vigorously enforced those guaranteed rights and freedoms by way of constitutional review. So the 'positively entrenched rights plus judicial review of legislation' effect that can be found in the American context is equally obvious in Hong Kong.

On a closer look, however, we might find that, at least in pure theory, the entrenchment of rights in Hong Kong is not as full as that in the US. That is due to the difference in judicial authority in interpreting their respective constitution. In the US, the Supreme Court has the last word on the interpretation of the American Constitution. And by virtue of the common law doctrine of *stare decisis*, the Supreme Court's interpretation is generally adhered to in the next like case. In this sense and to this extent, the American Constitution is pretty much what the judges say it is. In Hong Kong, however, although the CFA has the final word on adjudication, it does not have the final word on the Basic Law interpretation.⁵⁹ Nevertheless, the Hong Kong CFA's interpretation of the Basic Law, if not overridden by NPCSC, is to prevail and binding on lower courts. In this sense and to that extent, it can also be said that the Basic Law is pretty much what the judges say it is. However, in theory, the Basic Law is *ultimately* what the NPCSC says it is.

Johannes Chan once took issue with this structural design, and went further as to say that

⁵⁷ The New Zealand Bill of Rights, Art 6.

⁵⁸ See the New Zealand Bill of Rights, Art 4. However, it has been noted that on occasions, the New Zealand Supreme Court's application of the Bill of Rights has been more assertive than merely interpretative. In the *Baigent's* case ([1994] 3 NZLR 667) decided in the 1990s, the New Zealand Supreme Court created a new public law remedy for a breach of the Bill of Rights, though the Bill of Rights itself lacks a remedies clause. According to Lord Irvine, this decision shows that the New Zealand Supreme Court has taken an activist step: it refused to take the Bill of Rights as "no more than legislative window dressing", but has instead taken it upon the courts to act as the ultimate guardians of individual rights and freedoms. For a good discussion of the development in New Zealand, see Lord Irvine, 'Activism and Restraint: Human Rights and the Interpretative Process' (1999) 4 *European Human Rights Law Review* 366.

⁵⁹ For the discussion on the interpretation of Basic Law, see Chapter IV.

the Hong Kong legal system maintained by the Basic Law is not a self-contained system, but a 'crippled' or a 'lame duck' one.⁶⁰ In his view, without a self-contained legal system where the judges have the final word on constitutional interpretation, the protection of human rights in Hong Kong is 'nothing but an illusion'.⁶¹

In a sense, the CFA's lack of final authority in interpreting the Basic Law makes the entrenchment of rights in Hong Kong appear, though in a curious way, more like the Canadian semi-entrenched model. In Canada, as in the US, the Supreme Court has the final power of constitutional interpretation. But with the help of the notwithstanding clause, Canadian Parliament may still enact a law of its choosing regardless of Charter rights provisions. This, the American Congress cannot do. That is to say, in Canada legislative supremacy hangs above the entrenched rights. Although in practice, the notwithstanding clause has rarely been used⁶² — a fact that has led commentators to the conclusion that the Canadian model of judicial constitutional review is as strong as and essentially indistinguishable from the paradigmatic example of the United States,⁶³ the theoretical possibility of legislative supremacy trumping positively entrenched rights is always there insofar as the notwithstanding clause remains in its constitutional place. It is because of this special constitutional design, which is sometimes referred to as the 'quintessential Canadian Compromise',⁶⁴ that it is strongly insisted that the Canadian type of judicial review is in essence different from and weaker than that of the US, and that in Canada, unlike in the US, there is de facto legislative, not judicial, supremacy.⁶⁵

⁶⁰ Chan, 'Protection of Civil Liberties' 229-230.

⁶¹ Ibid.

⁶² Roland Penner, 'The Canadian Experience with the Charter of Rights: Are There Lessons for the United Kingdom?' [1996] *Public Law* 110. As it is noted, the Notwithstanding Clause has only been used by the government of Quebec in two occasions. The Federal Government has never used it. Instead of relying on the Clause, the Federal Government has preferred to ask Parliament to amend legislation to bring it into conformity with the Charter as interpreted by the court's decisions. But according to one Canadian commentator, the notwithstanding clause has been used more often than generally appreciated — it has been used sixteen times between 1982 and 2001. See Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter' (2001) 44 *Can Public Admin* 255.

⁶³ Janet Hiebert, 'Parliamentary Bill of Rights: An Alternative Model?' (2006) 69 *Modern Law Review* 7-28; See also Stephen Gardbaum, 'Reassessing the new common wealth model of constitutionalism' (2010) 8 *International Journal of Constitutional Law* 167-206.

⁶⁴ Frank Iacobucci, 'Judicial Review by the Supreme Court of Canada under the Canadian Charter of Rights and Freedoms: the First Ten Years' in David M. Beatty (ed), *Human Rights and Judicial Review, a Comparative Perspective* (Martinus Nijhoff Publishers 1994) 106.

⁶⁵ Gardbaum 179.

In not a very remote sense, there is also similar theoretical possibility of legislative supremacy trumping judicial protection of rights in the present Hong Kong's constitutional design. This is again due to institutional arrangements that the power of final interpretation of the Basic Law is vested with the NPCSC and the power of amending the Basic Law in the hands of the NPC. Thus, at least in theory, judicial protection of fundamental rights may be 'trumped' if the NPCSC interprets the Basic Law in a different way from the courts have understood it. In practice, however, given the Chinese government's reiterated determination to make OCTS a success,⁶⁶ and given the growing awareness of human rights protection in contemporary China,⁶⁷ it is hard to imagine any specific circumstance in which the power of interpretation or amendment will be exercised specifically to dwarf human rights protection in Hong Kong. Nevertheless, in pure theory, it must be admitted that the entrenched rights under the Basic Law are, ultimately, subject to legislative supremacy in Beijing. Like it or not, this is the case de jure as well as de facto under OCTS. If, in the Canadian case, Parliament's overriding power by virtue of the notwithstanding clause cannot be treated as purely formal,⁶⁸ the same can be said of the overriding power rested in the NPCSC.

But this comparison should not be taken too far. There are two reasons. One is that whilst the Canadian Charter embraces the notwithstanding clause, there is no equivalent in the Basic Law. The other, and perhaps more significantly, is that the NPCSC, though having the power of final interpretation of the Basic Law, is in a complete different constitutional position in regard to Hong Kong in general and the Hong Kong judiciary in particular, as compared to the constitutional position the Canadian Parliament is in in regard to its law-making capacity and its relationship with the judiciary. The Canadian notwithstanding clause

⁶⁶ Xiaoping Deng, *Selected Works of Deng Xiaoping*, vol III (Foreign Languages Press 1994). See also 李后 Hou Li, *百年耻辱史的终结 — 香港问题始末* (*The End of a Hundred Years Humiliation: the history of the Hong Kong Question*) (中央文献出版社 Central Party Literature Press 1997).

⁶⁷ China signed ICESCR in 1997 and ICCPR in 1998. China issued its first White Paper on Human Rights Protection in China in 1991 and it seems that ever since then a White Paper on Human Rights is published each year. Some of them (Chinese version) are available at <http://www.scio.gov.cn/zfbps/rqbps> (visited in January 2012). In 2009, the Chinese Government issued 'The National Human Rights Action Plan 2009-2010 (《国家人权行动计划(2009-2010年)》) — the first ever National human rights action plan issued by the Chinese Government. The entire action plan (Chinese version only) is available at <http://www.humanrights.cn/cn/zt/tbbd/zt009/index.htm>, visited in January 2012. For a useful introduction to human rights protection in modern China see Albert H Y Chen, 'Human Rights in China: A Brief Historical Review' in Raymond Wacks (ed), *Human Rights in Hong Kong* (OUP 1992).

⁶⁸ Gardbaum 180.

works within a singular constitutional system; it is a compromise between legislative supremacy and judicial supremacy within the constitutional system which effectively establishes co-equal branches of government. The power of Basic Law interpretation, shared by the Hong Kong courts and the NPCSC, is a compromise between two different systems. In addition, the NPCSC cannot interpret Hong Kong's local legislation, nor can it legislate for Hong Kong in matters that fall within the scope of the Region's autonomy. Thus, if local legislation is interpreted as breaching the Basic Law rights, the NPCSC cannot override a Hong Kong court's' decision, unless it considers the interpretation of the Basic Law, not the interpretation of the relevant local legislation, is wrong.

From the perspective of judicial enforcement, rights-entrenchment in Hong Kong under the Basic Law is apparently in a stronger form than that in the UK. This is true in that while the Hong Kong judges can strike down an ordinance which they find inconsistent with the Basic Law, their counterparts in the UK cannot strike down a parliamentary Act which they find incompatible with Convention rights. By the same token, it can be said that the form of rights-entrenchment in Hong Kong is even stronger than that in New Zealand, where the Bill of Rights serves only an interpretative purpose. Nevertheless, there may be one thing in common. The model of rights entrenchment adopted in the UK, in New Zealand as well as in Canada, shares a common feature, i.e. 'a formative legislative power to have the final word on what the law of the land is by ordinary majority vote'.⁶⁹ Hong Kong may find itself in very much the same position. The Hong Kong courts' power to enforce the positively entrenched rights may be subject to the final power of interpretation of the Basic Law which lies in the hands of the NPCSC in Beijing. In that sense and to that degree, the Hong Kong judges may also find themselves also operating under the principle of parliamentary sovereignty, albeit of another type.⁷⁰

It has been submitted that while the American type of full entrenchment renders a typical

⁶⁹ Ibid.

⁷⁰ Lo Shiu Hing argues that the Basic Law demonstrates the principle of "parliamentary sovereignty" with Chinese characteristics, and that the HKSAR is characterized by this Chinese style of parliamentary sovereignty. See Lo Shiu Hing, 'Governing Post-Colonial Hong Kong and Political Decay' in S G Rioni (ed), *Hong Kong in Focus: Political and Economic Issues* (Nova Science Publishers Inc 2002) 122. See also H L Fu, 'Supremacy of a Different Kind: The Constitution, the NPC and the Hong Kong SAR' in Johannes Chan, H L Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press 2000).

‘constitutional bill of rights’, the Canadian, the British or the New Zealand’s model, which is referred to as the ‘new Commonwealth model’ for the same features they share in upholding parliamentary sovereignty, offers a ‘parliamentary bill of rights’.⁷¹ In light of this, what can we make of Hong Kong’s rights entrenchment under the Basic Law? From the similarities and differences we have discussed above, the rights entrenchment in Hong Kong under the Basic Law seems to present neither a typical constitutional bill of rights, nor a typical parliamentary bill of rights. It has a bit of both: it is a hybrid type of entrenchment.

2.3 The constitutional status of the Bill of Rights in the post-1997 era

The discussion on the entrenchment of rights in the HKSAR cannot be complete without a look at the constitutional status of the Bill of Rights 1991 in the post-1997 era. As noted in Chapter II, the Bill of Rights was in effect entrenched under the pre-handover constitution. As the result, judges in Hong Kong were given, for the first time in history, the power of constitutional review, though not in name.⁷² Moreover, as Ghai observes, the Bill of Rights had a curious constitutional position in the pre-handover history; though enacted as ordinary ordinance, its real effect was ‘a substitute for democracy’ ‘superimposed on the colonial-authoritarian system’.⁷³ Here, the question is what constitutional status of the Bill of Rights in the post-1997 era is in; is it entrenched under the Basic Law?

In February 1997, as part of the preparation for the establishment of the HKSAR, the NPCSC adopted the Decision on the Treatment of the Laws Previously in Force in Hong Kong (the 1997 NPCSC Decision),⁷⁴ in which it was decided, *inter alia*, that the two sections of the BORO (sections 3 and 4) were not to be adopted as the laws of the HKSAR, because they purported to give the BORO a superior status over other Hong Kong laws and hence inconsistent with the Basic Law. Otherwise, however, the BORO including the Bill of Rights

⁷¹ See generally Hiebert and Gardbaum.

⁷² See our discussion in Chapter II.

⁷³ Yash Ghai, ‘Sentinels of Liberty or Sheep in Wolf’s Clothing? Judicial Politics and the Hong Kong Bill of Rights’ (1997) 60 Mod L Rev 459. Direct election was first introduced to the election of the legislature in 1991, but only 12 out of the total 60 seats were directly elected that year.

⁷⁴ The Decision of the NPCSC on the Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the HKSAR, adopted on 23 February 1997. For an unofficial English translation of the Decision, see Albert H Y Chen, ‘Legal Preparation for the Establishment of the Hong Kong SAR: Chronology and Selected Documents’ (1997) 27 Hong Kong LJ 419-424.

survived the handover. In addition, the NPCSC also declared that various amendments to certain laws which were made by the pre-handover legislature to achieve conformity with the Bill of Rights were repealed. So when the HKSAR was established, the pre-amended versions of those provisions in the relevant laws were restored.⁷⁵

As Ghai understands it, the effect of the NPCSC's Decision had 'water[ed] down' the Bill of Rights.⁷⁶ It seems that he is technically right as far as the higher status the BORO purported to claim is concerned—the express abandonment of sections 3 and 4 shows NPCSC's clear intention to strip the BORO off its de facto higher status which it enjoyed under the pre-handover system.

Nevertheless, people continue to think of the Bill of Rights differently. A symbolic view among the academics is that the Bill of Rights is 'in effect entrenched' under the Basic Law.⁷⁷ Albert Chen observes that '*the operative force*' of the BORO remains practically unchanged despite of the NPCSC's Decision.⁷⁸ On several occasions, the CFA has also stated expressly that the Bill of Rights contained in the BORO is entrenched under the Basic Law.⁷⁹ Such a perception of the constitutional status of the Bill of Rights, especially when taken by the judiciary, seems to be flying in the face of the NPCSC's Decision. Curiously enough, the NPCSC does not seem to have been disquieted by this development; nor has there been any attempt by the NPCSC to defend its 1997 Decision against practical or potential derogation therefrom.

Thus it seems that the de facto entrenched status of the Bill of Rights which it attained before the handover had been smuggled through into the new constitutional order. The strategy has been successful, because, as mentioned in Chapter II, the amendment to the

⁷⁵ For example, the provisions concerning public meetings and assemblies contained in Public Order Ordinance (Cap 245, The Law of Hong Kong).

⁷⁶ Ghai, 'Sentinels of Liberty or Sheep in Wolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights' 459.

⁷⁷ See for example Richard Swede, 'One Territory-Three Systems? The Hong Kong Bill of Rights' (1995) 44 *International & Comparative Law Quarterly* 358-378.

⁷⁸ Albert H. Y. Chen, 'Constitutional Adjudication in post-1997 Hong Kong' (2006) 15 *Pacific Rim Law & Policy Journal* 656.

⁷⁹ See for example, *Ng Kung Siu; Shum Kwok Sher v HKSAR* [2002] HKCFA 27; [2002] 2 HKLRD 793; (2002) 5 HKCFAR 381 (CFA); *Swire Properties Ltd and Others v Secretary for Justice* [2003] HKCFA 48; [2003] 2 HKLRD 986; (2003) 6 HKCFAR 236.

Letters Patent, which produced the effect of entrenching the Bill of Rights in the pre-handover constitutional order, was modelled on Article 39 (1) of the Basic Law. Thus, it was hoped that similar effect would stem from Article 39 (1). Article 39 (1) reads:

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.⁸⁰

In recalling the history of the Hong Kong's Bill of Rights, Jayawickrama, an active figure in advocating the Bill, reflected on the tactic and strategy by which the Bill of Rights became entrenched under the pre-handover constitutional framework and its 'unintended or unanticipated' effect on the status of the Bill of Rights in the post-handover constitutional order. He wrote:

While this constitutional amendment (to the Letters Patent)....makes no reference whatsoever to the Hong Kong Bill of Rights Ordinance, its effect is almost certainly to entrench not only that Ordinance....but also the Civil Covenant...Since this amendment was modelled on Article 39 of the Basic Law....so as not to offend the Chinese authorities who had declared in unequivocal terms their opposition to an entrenched Bill of Rights, this far-reaching effect was possibly not intended or anticipated by the *governments* concerned.⁸¹

Neither does Article 39 (1) of the Basic Law make a reference to the Bill of Rights. But it is not a long logical line to go through to reach the conclusion that the Bill of Rights contained in the BORO is in effect, or indirectly, entrenched by virtue of Article 39 (1). For since the BORO is the local legislation made to implement the ICCPR as applied to Hong Kong, and since it has been adopted as the law of the HKSAR (albeit the exclusion of the two sections), the Bill of Rights contained therein is therefore recognized by the Basic Law as part of the guarantees it provides in protecting individual rights. If, given the NPCSC's Decision, it is technically difficult to admit that the Bill of Rights itself is entrenched, it is equally difficult to

⁸⁰ Emphasis added.

⁸¹ Nihal Jayawickrama, 'The Bill of Rights' in Raymond Wacks (ed), *Human Rights in Hong Kong* (OUP 1992) 76. Emphasis added. It might be inferred from the emphasis that there is an understatement of the embarrassing position the Chinese Government would find itself in to reconcile its opposition to an entrenched Bill of Rights and the practical effect of Article 39 (1) of the Basic Law.

insist that the rights and freedoms contained in the Bill of Rights are not positively entrenched — such a denial would hardly reconcile the recognition of the rights and freedoms contained in the Bill of Rights and the guarantees Article 39 (1) provides. Indeed, as one commentator observes, the HKSAR courts have been using ‘the ICCPR as applied to Hong Kong’ in Article 39 (1) and the Bill of Rights interchangeably, as if they are synonyms.⁸²

Thus, it seems that the Bill of Rights contained in the BORO has also obtained a de facto entrenched position under the Basic Law. However, as shall be seen in the next section, the somewhat curious or ambiguous link between Article 39 and the rights contained in the Bill of Rights may from time to time give rise to peculiar difficulties in, for example, defining what rights are enshrined in the Basic Law, and in particular, in constructing what restrictions may be imposed on those rights.

3. Rights-based justification for constitutional review

Notwithstanding the difficulties in defining who has what rights under the Basic Law and the somewhat curious position of the Bill of Rights, one thing unquestionably clear is that there are positively entrenched rights under the Basic Law. Given the supremacy of the Basic Law in the Region, given the universal trend of human rights protection, there is clearly both positive and normative basis for rights-based constitutional review in the HKSAR. The constitutional guarantee of judicial independence in Hong Kong, the strong tradition of rule of law, together with the built-in checks and balances in the HKSAR’s political structure, albeit a limited and weak one, and the power of the courts to interpret the Basic Law, constitute a strong support for the courts to exercise this important constitutional power.

However, it must be noted that although the positive entrenchment of a bill of rights provides the legal basis for rights-based constitutional review, it does not necessarily follow that where there is such an entrenched bill of rights there must be the practice of constitutional review. As it is noted, the Constitution of the former Soviet Union had a Bill of Rights, but there had not been established the practice of constitutional review to protect

⁸² Young 122.

those rights.⁸³ Constitutional review has not yet emerged in modern socialist China either, although its 1982 Constitution also claims supremacy over the land and also pledges to protect many a fundamental right as the freedom of expression, of association, of press, inter alia.⁸⁴ In Hong Kong's neighbouring Macao, where the general policy of OCTS is also practised, and where there are also positively entrenched rights in Macao's Basic Law, which also claims supremacy in the region just as the Hong Kong's Basic Law does, rights-based constitutional review was yet to emerge.⁸⁵

The American Supreme Court Justice, Antonin Scalia, speaking extra-judicially when reflecting on the nature and importance of constitutional guarantees of rights, said that '[t]he significance of a constitutional bill of rights should not be exaggerated', and that

If the organs of government (legislature, executive and judiciary) can readily disregard the Bill of Rights, it is nothing but a paper guarantee—at best the expression of an aspiration, and at worst a false certificate of liberalism.⁸⁶

The former British Lord Chancellor, Lord Irvine, made a similar point. After comparing the UK's HRA operated under legislative supremacy and the American Bill of Rights operated under constitutional supremacy, he had this to say:

Context is equally central to....the protection...[of] fundamental rights.....The practical capacity of a written constitution to protect human rights is ultimately dependent upon the broader context within which it exists: 'If the judges are not prepared to speak for it, a constitution is nothing'. It is the willingness of American judges to give practical effect to the Bill of Rights which has turned an aspirational text into

⁸³ Antonin Scalia, 'Federal Constitutional Guarantees of Individual Rights in the United States of America' in David M. Beatty (ed), *Human Rights and Judicial Review, a Comparative Perspective* (Martinus Nijhoff Publishers 1994) 89.

⁸⁴ For a discussion of the so-called issue of 'judicialization of the Chinese Constitution', see 张千帆 Zhang Qianfan, *宪法学导论: 原理与应用 An Introduction to the Study of Constitutional Law: principles and applications* (法律出版社 Law Press China 2004) Chapter II.

⁸⁵ In Macau, which is another Special Administration Region established under the same concept of OCTS, the practice of constitutional review has not yet emerged, though there are enormous similarities between Macau's Basic Law and the Basic Law of Hong Kong. For a discussion of this point, see generally Judith R. Krebs, 'Comment, One Country, Three Systems? Judicial Review in Macau after *Ng Ka Ling*' (2000) 10 *Pacific Rim Law & Policy Journal* 111-146.

⁸⁶ Scalia 89.

enforceable law.⁸⁷

The development of constitutional review in Hong Kong offers a fine elaboration in support of these views. Indeed, it was very much due to the Hong Kong judges' being 'prepared to speak for' the Basic Law, in particular the Basic Law rights, that constitutional review in Hong Kong had not only come into existence, but also flourished. The fact that there is no express authority in the text of the Basic Law makes the judges' readiness to do so even more significant. When John Marshall asserted the power of constitutional review in *Marbury v Madison*, he was accused of 'usurpation'.⁸⁸ In Hong Kong, the usurpation accusation was never loudly voiced. Had there been usurpation, the repeated and vigorous exercise of constitutional review in the past decade and more, with no express opposition from the Beijing authorities, in particular the NPCSC in whose hands lies the final power of Basic Law interpretation, might have irreversibly legitimized it.

4. Rights-based constitutional review in Hong Kong: practice and principles

4.1 An overview

The general attitude of the Hong Kong courts towards the protection of fundamental rights and freedoms is markedly demonstrated in the generous and purposive approach the CFA had introduced to the interpretation of the Basic Law. As discussed in Chapter IV, this approach was introduced in *Ng Ka Ling*, and has been followed with great enthusiasm especially in human rights cases. In *Leung Kwok Hung*, the CFA summarised what it deemed as Hong Kong's '*established jurisprudence*'; that is,

the courts must give ...a fundamental right a generous interpretation so as to give individuals its full measure....On the other hand, restrictions on such a fundamental right must be narrowly interpreted.⁸⁹

⁸⁷ Lord Irvine, 'Sovereignty in Comparative Perspective: Constitutionalism in Britain and America' (2001) 76 *New York University Law Review* 21-22. See also Anthony King, *The British Constitution* (OUP 2007). He quoted Sir Stephen Sedley, 'The Sound of Silence: Constitutional Law without a Constitution' (1994) 110 *Law Quarterly Review* 270-291.

⁸⁸ See our discussion in Chapter I.

⁸⁹ *Leung Kwok Hung* para 16.

Indeed, intense constitutional litigation took place after the *Ng Ka Ling* decision,⁹⁰ and the courts, the CFA in particular, repeatedly exercised the power of constitutional review. Thus, the ‘paparazzi’ type of pursuit of a judge was held to be out of the ambit of freedom of press;⁹¹ the displaying of a defaced PRC national flag or a defaced HKSAR flag in a procession was held to be within the meaning of freedom of expression, but was nevertheless unlawful in Hong Kong’s specific time, space and circumstance;⁹² the protest to the Central government in Hong Kong by the Falun Gong activists was held lawful, although the sect itself had been outlawed in the mainland;⁹³ the use of foul language by a taxi driver on service was not protected by the guarantee of freedom of expression, because taxi drivers ‘represent...at street level’ Hong Kong’s reputation;⁹⁴ the discrimination in the consent to sexual intercourse between homosexuals and heterosexuals was held unconstitutional;⁹⁵ the discrimination between indigenous inhabitants of the New Territories and non-indigenous inhabitants in regard to their rights to vote and to stand as candidates in the local village elections was held unconstitutional.⁹⁶ In addition, judicial constitutional review has also been invoked in an instrumental way to frustrate the government’s economic and social development programs;⁹⁷ a Hong Kong scenario which may well bring us back to the memory of the notorious American experience in the *Lochner* era.

A repeated judicial statement in those constitutional decisions is that the courts are the guardians of rule of law, of human rights and of the high degree of autonomy of the HKSAR. But this role was not, and perhaps will never be, easily played out. Even in retrospect, the scene is in every sense no less dramatic. When the *Ng Ka Ling* decision was handed down, it was immediately celebrated as a major victory for the rule of law in Hong Kong—the CFA

⁹⁰ For a very useful review of constitutional adjudication in the post-1997 era (up to 2005), see generally Chen.

⁹¹ *Albert Cheng and Another v Tse Wai Chun Paul* [2000] HKCFA 35; [2000] 3 HKLRD 418; (2000) 3 HKCFAR 339 (CFA).

⁹² *Ng Kung Siu*.

⁹³ *Yeung May-wan v HKSAR* [2005] HKCFA 24; [2005] 2 HKLRD 212; (2005) 8 HKCFAR 137 (CFA).

⁹⁴ *HKSAR v Tsui Ping Wing* [2000] HKCFI 1410 (CFI).

⁹⁵ *Secretary for Justice v Yau Yuk Lung Zigo and Another* [2007] HKCFA 50; [2007] 3 HKLRD 903; (2007) 10 HKCFAR 335 (CFA).

⁹⁶ *Secretary for Justice v Chan Wah and Another* [2000] HKCFA 43; [2000] 3 HKLRD 641; (2000) 3 HKCFAR 459 (CFA).

⁹⁷ See the so called *Link-Reit* case (*Lo Siu Lan v Hong Kong Housing Authority* [2005] HKCFA 46; [2005] 3 HKLRD 257; (2005) 8 HKCFAR 363). The Housing Authority (which provides public rental housing for more than 30 per cent of the population) planned to sell its retail and carpark facilities to a unit trust (Link REIT) to be listed on the Hong Kong Stock Exchange, so as to raise money for the purpose of providing more and better public rental housing. It was however blocked and delayed by a pensioner, who was a tenant of public rental housing, by seeking judicial review of the Housing Authority’s decision.

was applauded for the courage it showed in standing up against the central authorities. But when the CFA made the Clarification in the aftermath of *Ng Kg Ling*, many saw it as a kowtowing to Beijing. And when the CFA in *Lau Kong Yung* admitted that the NPCSC's power to interpret the Basic Law is general and free-standing, it was seen as a total surrender to Beijing. But then the CFA was heralded again for making a triumphant resurgence in *Chong Fung Yuen*.⁹⁸ However, as shall be seen in Chapter VII, it is the CFA's interpretation of the Basic Law in *Chong Fung Yuen* that has caused serious social and political problems in Hong Kong itself and between the HKSAR and the mainland.

Several things might be summed up. First, if it is not without ground to accuse judges exercising constitutional review under the Basic Law of usurpation — because there is no express authority in the text of the Basic Law, then the repeated and vigorous exercise of this grand power by the Hong Kong courts (the CFA in particular) may have effectively vindicated the usurpation itself.⁹⁹ The fact that the central authorities, the NPC and the NPCSC in particular, have never expressly negated the HKSAR courts' practice of constitutional review, might have been taken as a sovereign acquiescence in this respect.¹⁰⁰

Secondly, there may well be the question of judicial activism stemming from the vigorous exercise of judicial constitutional review and its possible negative impacts. In the pre-handover judicial enforcement of the Bill of Rights, the Hong Kong courts were once warned by the Privy Council to keep in 'realism and good sense' and 'in proportion', so as not to turn the Bill of Rights into 'a source of injustice'.¹⁰¹ After that, the pre-handover courts had once retreated from being 'more activist' in the beginning to subsequently leaning towards restraint.¹⁰² In the post-handover era, the Hong Kong courts are completely independent as far as adjudication is concerned. Their interpretation of the Basic Law might be overturned by the NPCSC, but the NPCSC did not, and is not allowed to, take over the judicial

⁹⁸ For a good summary and analysis of these points, see generally Po Jen Yap, 'Constitutional Reivew under the Basic Law: The Rise, Retreat and Resurgence of Judicial Power in Hong Kong' (2007) 37 Hong Kong LJ 449-474.

⁹⁹ Just as Black spoke of the case of judicial review in America. See our discussion in section 2, Chapter I and footnote 65.

¹⁰⁰ Chen 675.

¹⁰¹ *Attorney-General v Lee Kwong-kut* [1993] AC 951, per Lord Woolf.

¹⁰² Johannes M M Chan, 'Hong Kong's Bill of Rights: its reception of and contribution to international and comparative jurisprudence' (1998) 47 *International & Comparative Law Quarterly* 311.

supervision role which the Privy Council had had in the Hong Kong judicial system. Should judicial activism become a real problem in the HKSAR, there seems to be no solution except for the courts, the CFA in particular, to change course. So far, however, as Chen finds, the courts in the post-1997 era have 'by no means been conservative', nor, however, have they been 'radically liberal'.¹⁰³ But as Chan admits, constitutional review may well lead to the politicization of the judiciary, which might endanger the rule of law in Hong Kong.¹⁰⁴

Thirdly, one thing that stands out markedly in the development of human rights jurisprudence in Hong Kong is the heavy reliance on and vast import of comparative human rights materials and concepts from other jurisdictions.¹⁰⁵ This learning attitude, it is said, is not only understandable but 'should only be welcomed', given 'Hong Kong is a latecomer to the world of constitutional interpretation and judicial review'.¹⁰⁶ It is also hoped that in such a way, Hong Kong will not only quickly catch up with international human rights protection standards but also make its own contributions.¹⁰⁷ Thus, those basic principles of constitutional review adopted in other jurisdictions, such as the principle of rationality, the test of proportionality, have been introduced into Hong Kong's human rights jurisprudence.¹⁰⁸ Meanwhile, however, the Hong Kong courts have also been by and large mindful of local circumstances when taking in comparative materials. In *Wong Yeung Ng*,¹⁰⁹ the court chose the narrower concept of contempt of court adopted in New Zealand case law rather than the more liberal concept adopted in Canada.¹¹⁰ And it did so because of considerations of 'the local circumstances of Hong Kong', which, the CA said, included, the relatively small size of Hong Kong's legal system, the ease of communication within local population, the '*special importance*' in maintaining people's confidence in Hong Kong legal

¹⁰³ Chen 675-676.

¹⁰⁴ Chan, 'Basic Law and Constitutional Review: the First Decade' 407.

¹⁰⁵ See generally Sir Anthony Mason, 'The Place of Comparative Law in the Developing Jurisprudence on the Rule of Law and Human Rights in Hong Kong' (2007) 37 Hong Kong LJ 229-318. See also Chan.

¹⁰⁶ Chen 675-678.

¹⁰⁷ Chan 306-336. See also Denis Chang, 'Has Hong Kong Anything Special or Unique to Contribute to the Contemporary World of Jurisprudence?' (2000) 30 Hong Kong LJ 347-350. Chang noted the CFA's decision in *Cheng v Tse Wai Chun* ([2000] 3 HKRD 418) as Hong Kong's unique contribution. In that decision, the CFA redefined the meaning of the 'malice' in the common law of defamation to give the defence of 'fair comment' a more generous interpretation.

¹⁰⁸ Mason 311.

¹⁰⁹ *Wong Yeung Ng v. Secretary for Justice* [1999] HKCA 382; [1999] 2 HKLRD 293 (CA).

¹¹⁰ Chen 659.

system under the OCTS framework.¹¹¹

4.2 Constitutional requirements for permissible limitations

One of the core issues with rights-based constitutional review is whether restrictions on rights can be justified. It is therefore normal for courts to develop certain standard tests by which to measure the restrictions and the justifications behind them. In Hong Kong, the CFA has stated that to justify any restriction on a fundamental right, two constitutional requirements must be met: the ‘prescribed by law’ requirement and the necessity requirement. The CFA elaborated these two requirements mostly comprehensively in *Leung Kwok Hung*.¹¹² It should be noted, however, the development of these two requirements may be traced back as early as to the pre-handover judicial enforcement of the Bill of Rights.¹¹³

4.2.1 The ‘prescribed by law’ requirement

This requirement is expressly spelled out in Article 39 (2) of the Basic Law, where it provides that no restriction on fundamental rights and freedoms should be imposed ‘*unless prescribed by law*’. In *Shum Kwok Sher*, the CFA said that the expression of ‘prescribed by law’ used in the Basic Law mandates the principle of legal certainty, which has been widely recognized in international human rights jurisprudence.¹¹⁴ The Court also noted that this principle has been incorporated into Hong Kong’s Bill of Rights.¹¹⁵ In the Court’s opinion, in order to satisfy this principle, certain requirements must be met. Here, the Court imported the ECtHR’s test as enunciated in *Sunday Times v United Kingdom*;¹¹⁶ that is, the relevant law must be certain and adequately accessible. The ECtHR was quoted as stating

First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his

¹¹¹ *Wong Yeung Ng* para 54.

¹¹² For a useful discussion of the *Leung Kwok Hung* case through the Hong Kong courts, see Janice Brabyn, ‘Leung Kwok Hung and Others through the Hong Kong Courts’ (2006) 36 Hong Kong LJ 83-116.

¹¹³ In the early leading case on the Bill of Rights, *R v Sin Yau Ming* [1992] 1HKCLR 127.

¹¹⁴ *Shum Kwok Sher* para 60.

¹¹⁵ *Ibid.*

¹¹⁶ *Sunday Times v United Kingdom* (1979) 2 EHRR 245 (ECtHR).

conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.¹¹⁷

In *Leung Kwok Hung*, the CFA reiterated its position in *Shum Kwok Sher* and developed it further. According to the Court, while there is inevitably a tension between requiring a law to be formulated with sufficient precision and the desirability of avoiding excessive rigidity in the law, but in any case, the appropriate level of precision must depend on the subject matter of the law in question.¹¹⁸ In the Court's view, in constitutional adjudication where the subject matter involves fundamental rights and freedoms, a greater degree of certainty is needed than in other fields of law. Thus, the Court rejected the argument that a law permitting restrictions on fundamental rights and freedoms was sufficiently certain 'unless it is hopelessly vague'.¹¹⁹

The general position of the majority opinion in *Leung Kwok Hung* on the principle of legal certainty was reinforced strongly and further developed by Justice Bokhary PJ, though in his dissenting opinion. With in-depth research into other jurisdictions, Justice Bokhary PJ spoke with force and passion that legal certainty is indispensable to the rule of law, and that it rejects vague laws which offend important values, trap the innocent, and inhibit the exercise of constitutional rights and freedoms;¹²⁰ it is not hostile to purposive statutory interpretation and it does not take away the flexibility needed to do justice.¹²¹ On the other hand, he said that uncertainty runs counter to the courts' duty to ensure the enjoyment of rights and freedoms in full measure.¹²² Thus, the guarantee of certainty is 'the guarantee of all the other guarantees'.¹²³ Mindful of the inherent tension between sufficient precision and excessive rigidity, Justice Bokhary PJ insisted that although great precision may not always be possible, 'some precision' is needed. In his view, this could always be achieved if the legislation is backed by a 'freedom-friendly standard of reference'.¹²⁴ As a principle, he

¹¹⁷ *Shum Kwok Sher* para 63.

¹¹⁸ *Leung Kwok Hung* para 28.

¹¹⁹ *Ibid* para 191.

¹²⁰ *Ibid* para 154. Justice Bokhary referred to the American Justice Marshal J in *Grayned v City of Rockford* 408 US 104 (1971).

¹²¹ *Ibid* .

¹²² *Ibid* para 161.

¹²³ *Ibid* para 172. Justice Bokhary referred to the British Law Lord Lord Steyn in *Ahnee v Director of Public Prosecutions* [1992] 2 AC 294.

¹²⁴ *Ibid* para 182. Original emphasis.

concluded that '[i]f a freedom is not an absolute one, then it may be governed. Even so, it will not be a freedom governed by men or women. It will be....governed by law....Powers to restrict fundamental rights or freedoms must therefore be clearly and carefully circumscribed'.¹²⁵

As a general principle underpinning the rule of law, it cannot be doubted that the principle of legal certainty must also be observed in constitutional adjudication, not only in scrutinizing restrictions on fundamental rights. But there remains the question of judicial subjectivity in determining whether a law is sufficiently certain. With great respect, one might think that those powerful statements of Justice Bokhary all boil down to one assertion — that judges are to have greater say than they normally claim to have on what the law is when fundamental rights and freedoms are at stake, for at the end of the day, it is ultimately up to judicial interpretation as to whether the level of precision of a statute has been 'appropriate' for the subject matter it deals with.

4.2.2 The necessity requirement

This requirement is nowhere to be found in the Basic Law. But is undoubtedly a clear mandate in the Bill of Rights, where, for some rights and freedoms, it is expressly provided that any restriction thereon 'must be necessary in a democratic society' and 'in the interests of' some specified public good, such as 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'.¹²⁶ In *Leung Kwok Hung* the CFA implicitly stated that any restriction on a fundamental right must be 'necessary in a democratic society'.¹²⁷

As to what can be deemed as necessary, the CFA reiterated its position in *Ng Kung Siu*, that the word 'necessary' should be given its ordinary meaning and that it should not be substituted by such a notion as 'pressing social need'.¹²⁸ This definition is in striking contrast

¹²⁵ Ibid para 192.

¹²⁶ See for example, Article 17 of the BORO.

¹²⁷ *Leung Kwok Hung* para 30.

¹²⁸ *Ng Kung Siu* para 57. This definition of 'necessary' could be traced back to early cases on the Bill of Rights, including *Tam Hing Yee v Wu Tai Wai* [1992] 1 HKCLR 185 and also adopted in *Ming Pao Newspapers Ltd* and in *Wong Yeung Ng*.

to other jurisdictions. For example, in Strasbourg's jurisprudence, the adjective 'necessary' 'is interpreted as being not as strong as 'indispensable', nor as flexible as such expressions as 'admissible', 'useful', 'reasonable, or desirable' would entail.¹²⁹ Here, it is implicit that something more than the ordinary meaning of the word 'necessary' is needed. In Canada, as articulated in *Oakes*,¹³⁰ what is necessary has to be defined against 'pressing and substantial' need.

Arguably, the notion of pressing social need might imply a higher threshold of what could be deemed as necessary and hence stricter judicial scrutiny. Chan and Ghai seem to share this view. In discussing the experience of the Hong Kong Bill of Rights, they said that in general, all limitation clauses 'must be narrowly construed', and that restrictions on fundamental rights and freedoms should only be upheld where there was 'a pressing social need'. Referring to a case where the Court rejected to substitute the ordinary meaning of 'necessary' for 'a pressing social need',¹³¹ Chan and Ghai submitted that the court's prohibition of a judgment debtor from leaving Hong Kong, could hardly stand if tested against 'a pressing social need'. Had the Court considered the extensive international and comparative law on limitation clauses, they argued, the Court would have found that the standard of scrutiny adopted at the international level is much higher and stringent than the one applied by the Court in this case.¹³² That the notion of 'pressing social need' implies a higher level of judicial scrutiny is clear in both the Strasbourg and Canadian case law.¹³³

However, it does not necessarily follow that the exclusion of the notion of 'pressing social need' from the formulation of the necessity requirement would mean that the courts would adopt a looser scrutiny on restrictions on rights. Rather, it could be understood as leaving the judges with greater room for subjectivity: it might give judges a leeway to go in either direction — for stricter or looser scrutiny, depending on how the judges feel like it in the context of concrete cases.

¹²⁹ See the ECHR's opinion in *Handyside v the United Kingdom* (1976) 1 EHRR 737.

¹³⁰ *R. v. Oakes* [1986] 1 SCR 103, at 138-139, per Dickson J.

¹³¹ *Tam Hing Yee v Wu Tai Wai*, [1992] 1 HKCLR 185 (CA).

¹³² Johannes Chan and Yash Ghai, 'A Comparative Perspective on the Bill of Rights' in Johannes Chan and Yash Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths 1993) 18-20.

¹³³ See generally Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008-2009) 47 *Columbian Journal of Transnational Law* 73-165.

In regard to the notion of a democratic society, the CFA in *Leung Kwok Hung* said that the general definition developed by the international legal experts on the ICCPR should be adopted in Hong Kong. According to what is known as the Siracusa Principles,¹³⁴ a democratic society is a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human rights, its specific model of democracy notwithstanding.¹³⁵ By this definition, Hong Kong is certainly a democratic society, since both the ICCPR and ICESCR, which converted the Declaration into multilateral treaties, apply to Hong Kong. Again, it is plausible to argue that by adopting such a broad definition of a democratic society, the Court had expanded its room for manoeuvre in applying the necessity requirement. For, if a narrower definition is adopted, Hong Kong in its current situation might not be recognized as a democratic society, since neither the Chief Executive nor the LegCo is elected on a 'one person one vote' basis. Presumably, this would not only make the application of the necessity requirement a much more complex exercise, but might also substantially narrow the scope of permissible limitations on rights. By adopting a broad definition of a democratic society, the courts would be more flexible in dealing with these difficulties depending on the context in which they arise.

These two conceptual clarifications have in a sense narrowed down a little bit as to what may be seen as necessary in Hong Kong. But that is not enough, more specific measurements are needed to make the necessity requirement practically applicable. The thrust of the necessity requirement is to be revealed by the adoption of the proportionality test.

4.2.3 The proportionality test

Looking across jurisdictions in which the proportionality test is adopted, it is clear that a fully developed form of the test normally consists of four elements: (1) whether the measure is to pursue a legitimate purpose (legitimacy); (2) whether the means adopted is suitable to the

¹³⁴ The Principles are named after the author, who made these statements on the concept of 'public order (ordre public)' as used in the ICCPR. See M Nowak: *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 379.

¹³⁵ *Leung Kwok Hung* para 32.

end pursued; (suitability); (3) whether the measure does more harm to the right at stake than necessary; and (4) proportionality balancing in the strict sense. But as recent research concludes, although proportionality analysis has become a prominent feature of global constitutionalism, judges in every system tend to 'shape it, with use, to their own purposes'.¹³⁶

The Hong Kong courts have imported the proportionality test from other jurisdictions.¹³⁷ But they have also tried to apply it in Hong Kong's own context and to develop it with, say, some Hong Kong characteristics.

In *Leung Kwok Hung*, the CFA noted that the use of the proportionality test 'is consistent with the approach to constitutional review in many jurisdictions', and that although formulated differently, the nature of this test 'is essentially the same across the jurisdictions'.¹³⁸ While the first part of this statement may be taken as a matter of fact, which may therefore justify, at least partly, the use of the test in Hong Kong's constitutional adjudication, the second part might be a bit problematic. As academic discussions in other jurisdictions show, there is a growing alertness on the potential incompatibility of the application of the test of proportionality with the protection of rights.¹³⁹ In fact, in *Oakes*,¹⁴⁰ where the Canadian proportionality test was formulated, the Chief Justice was explicit that the nature of the test 'will vary depending on the circumstances'.¹⁴¹

Nevertheless, the CFA in *Leung Kwok Hung* was keen to formulate the proportionality test in Hong Kong's own context. Addressing in the context of the right of peaceful assembly which was at stake in this case, the Court said that

it is of critical importance to bear in mind that the legitimate purposes for restriction of this right have

¹³⁶ Sweet and Mathews 162.

¹³⁷ See generally Anthony Mason, 'The Place of Comparative Law in the Developing Jurisprudence on the Rule of Law and Human Rights in Hong Kong' (2007) 37 Hong Kong LJ 299-318.

¹³⁸ *Leung Kwok Hung* para 34.

¹³⁹ It is argued that there can be two conceptions of proportionality (state-limiting and optimizing) which respectively reflects two different conceptions of rights: rights as trumps or rights as shields. The nature of the test is fundamentally different between the two conceptions. See Alison Young, 'Proportionality is Dead: Long Live Proportionality' (A seminar in the Law School of Durham University, Jan 17, 2012).

¹⁴⁰ *R. v. Oakes* [1986] 1 SCR 103 (Can.),

¹⁴¹ *Ibid* para 138.

been set out in the relevant constitutional text. It must be emphasized that the legitimate purposes specified in Article 21 of the ICCPR are the only legitimate purposes. *This list is exhaustive*. There cannot be a restriction for any other purposes. This is in contrast to constitutional instruments where the test for restriction is formulated only as a general formula, for example, by reference to what is necessary in a democratic society, without any specification of the purposes that may legitimately be pursued by a restriction.¹⁴²

Seeing the list of legitimate purposes on which a right or a freedom may be restricted as *exhaustive*, the CFA apparently adopted a more or less mechanical approach to the legitimacy issue which normally needs to be solved at the first step of the proportionality test in other jurisdictions. Indeed, the Court even went further as to say that the first of the three stage test adopted by the Privy Council in *De Freitas v Minister of Agriculture*¹⁴³ — whether the legislative objective is sufficiently important to justify limiting fundamental rights — was an ‘extra requirement’ which was appropriate in the British context but ‘unnecessary’ in Hong Kong’s context,¹⁴⁴ simply because the relevant constitutional instrument in the UK ‘prescribed only the general formula of the grounds on which a right may be limited’, while in Hong Kong, the right of assembly was only to be limited on an exhaustive list of specified grounds.

Thus, the Court said that in Hong Kong’s context, the proportionality test as to be applied to the right of peaceful assembly should be formulated in these terms:

(1)the restriction must be rationally connected with *one or more of the legitimate purposes* and, (2)the means used to impair the right of peaceful assembly must be no more than is necessary to accomplish the legitimate purpose in question.¹⁴⁵

In other words, the test to be applied in Hong Kong, at least in the case of the right of peaceful assembly, is a two stage test which consists of only two subtests: rationality and minimum impairment. This is apparently a simplified version of proportionality test, as

¹⁴² *Leung Kwok Hung* para 35. Emphasis added.

¹⁴³ [1999] 1 AC 69. In this case, the Privy Council adopted a three stage test: ‘whether: (1)the legislative objective is sufficiently important to justify limiting a fundamental right; (2)the measure designed to meet the legislative objective are rationally connected to it; and (3)the means used to impair the right or freedom are no more than is necessary to accomplish the objective’.

¹⁴⁴ *Leung Kwok Hung* para 37-38.

¹⁴⁵ *Ibid* para 36. Emphasis added.

compared to the fully developed ‘standard form’ of proportionality test, or to the test adopted by EHtRC at Strasbourg and by the Canadian Supreme Court. What is particularly lacking in Hong Kong’s formulation of the test is not the legitimacy inquiry, but the ‘proportionality balancing in the strict sense’, which is the last and crucial stage of the test in other jurisdictions. Nowhere in *Leung Kwok Hung* did the CFA explain why this step is not necessary in Hong Kong’s context. Nor did it seem to have engaged in the strict sense proportionality balancing. As far as our research has reached, no explanation regarding this point has ever been given in subsequent cases. It is perhaps yet another aspect that shows either the special feature or the immaturity of Hong Kong’s version of proportionality test.

4.2.4 Permissible limitation analysis in *Leung Kwok Hung*

Although the above discussion has made frequent references to *Leung Kwok Hung*, it is perhaps still necessary to explore a bit further to see how the CFA applied its formulation of the ‘prescribed by law’ requirement, the necessity requirement and the proportionality test in this case.

At issue in *Leung Kwok Hung* was the Police Commissioner’s discretion to object to or impose conditions on peaceful assembly—a discretionary power conferred on the Commissioner by the Public Order Ordinance (POO),¹⁴⁶ which shall be exercised ‘if he reasonably considers that the objection or imposition of conditions is necessary in the interests of national security or public safety, or public order (ordre public) or the protection of the rights and freedom of others.’¹⁴⁷ It was challenged that this discretionary power was unconstitutional. To deal with this challenge, the Court said the main question to be answered was whether the Commissioner’s discretion for the purpose of ‘public order or ordre public’ satisfied the two constitutional requirements for restriction.¹⁴⁸

In considering whether the requirement of ‘prescribed by law’ was satisfied, the Court started by making an ‘essential’ distinction between the use of the concept of ‘public order

¹⁴⁶ The Law of Hong Kong, CAP 245.

¹⁴⁷ POO S 14 (1) and 15 (2).

¹⁴⁸ *Leung Kwok Hung* para 66.

or ordre public’ at the constitutional level and its use at the statutory level.¹⁴⁹ According to the Court, used at the constitutional level, this concept, like other constitutional norms, is ‘usually and advisedly expressed in relatively abstract terms’, which is all fine and well and ‘must be accepted’ as such.¹⁵⁰ In the Court’s view, the concept of ‘public order or ordre public’ used in the Bill of Rights operates at constitutional level, because of Article 39 (2) of the Basic Law.¹⁵¹ Therefore, although it is ‘imprecise’ and ‘elusive’ concept, the application of which ‘must remain a function of time, place and circumstances’, its use at the constitutional level (i.e. in the Bill of Rights) not to be challenged.¹⁵² In other words, the requirement of legal certainty is not to be applied to the concept of ‘public order or ordre public’ used in the Bill of Rights.

However, if the concept is used at the statutory level, the Court continued, it must be subject to ‘different considerations’.¹⁵³ The Court was of the view that the POO, by conferring a statutory power on the Police Commissioner on the basis of public order (ordre public) and by providing that the meaning of this expression is to be interpreted in the same way as under [the ICCPR] as applied to Hong Kong, had through ‘an unusual technique’ ‘incorporat[ed] the ICCPR into a statute.’¹⁵⁴ This being the case, the Court was implicit that the use of the concept in the POO was to be interpreted at the statutory level, in which case, the requirement of ‘prescribed by law’ would come into play. As the Court stated:

A statutory discretion conferred on a public official to restrict a fundamental right must satisfy the constitutional requirement of ‘prescribed by law’. Such a discretion must give an adequate indication of the scope of the discretion with a degree of precision appropriate to the subject matter. *The public official is part of the executive authorities which of course stand in a fundamentally different position from that of an independent Judiciary.*¹⁵⁵

From what is quoted here, it seems rather clear that in considering whether or not the Commissioner’s discretion met the ‘prescribed by law’ requirement, the Court had two main

¹⁴⁹ Ibid para 67.

¹⁵⁰ Ibid para73.

¹⁵¹ Ibid para 68.

¹⁵² Ibid.

¹⁵³ Ibid para76.

¹⁵⁴ Ibid 55.

¹⁵⁵ Ibid para76.

concerns in mind: what the scope of the discretion is and who is to exercise it. Whilst the concern about the scope of the discretion is clearly related to the principle of legal certainty, the emphasis on the ‘fundamentally different position’ the executive authority is in as compared to that of the Judiciary appears a bit divorced from the application of the ‘prescribed by law’ requirement. What might be inferred from here is perhaps the Court’s emphasis on the increased risk of executive encroachment into fundamental rights when a discretionary power conferred on the executive is vague in scope. This in turn may reinforce the necessity and desirability of applying the ‘prescribed by law’ requirement.

A bit surprisingly, however, the Court’s reasoning following the above quoted statement was short and the conclusion straightforward. The Court seemed to have taken ‘time, place and circumstances’ into consideration, because it did take note of the infinite varieties of situations which may arise in public assemblies and hence the importance of giving the Commissioner ‘a considerable degree of flexibility’ to deal with them. With this passing consideration, the Court concluded that even taking this into account,

the Commissioner’s discretion to restrict the right of peaceful assembly for the *statutory purpose* of ‘public order (ordre public)’ *plainly* does not give an adequate indication of the scope of that discretion. This is because of the *inappropriateness* of the concept taken from the ICCPR as the basis of the exercise of such discretionary power vested in the executive authorities.¹⁵⁶

The fact that the POO does not define the scope of ‘public order (ordre public)’ but only gives a direction as to how it should be interpreted may well support the Court’s view that it ‘*plainly* does not give such an adequate indication’. But the Court did not see it in this way. For the Court, the discretionary power failed the ‘prescribed by law’ requirement because of the *inappropriateness* of basing this power on the concept of public order (ordre public) taken from the ICCPR. With respect, the Court’s reasoning here is not very clear. It could have elaborated the inappropriateness further so as to show why the ‘prescribed by law’ requirement was not satisfied. Short of this, the Court’s application of the requirement of ‘prescribed by law’ had left these practical questions open: (1) what degree of precision might be accepted as adequate or appropriate to the subject matter at stake (in this case the

¹⁵⁶ Ibid para 77. Emphasis added.

right of peaceful assembly) and, (2) how to assess whether or not the required adequateness or appropriateness has been achieved. Without some reasoning and analysis at these substantive levels, or without establishing some form of criteria in these regards, it leaves a great room for judicial subjectivity. Consequently, the requirement of ‘prescribed by law’ might well be transformed into ‘prescribed by judges’ and the claim for greater legal certainty translated into a claim for a greater judicial say in legislation in the disguise of interpretation.

Nevertheless, the CFA, with Justice Bokhary PJ dissenting, held that the Commissioner’s discretion to restrict the right of peaceful assembly for the statutory purpose of public order (ordre public) ‘falls foul of the constitutional requirement of ‘prescribed by law’ and was therefore unconstitutional.¹⁵⁷ Just as it had been creative in the distinction between constitutional/statutory use of the concept of ‘public order (ordre public)’, the majority opinion gave a creative remedy to this unconstitutionality—to sever¹⁵⁸ public order from ‘public order (ordre public)’, with the left over ‘public order’ confined in the law and order sense. The Court said briefly that this meaning of public order is ‘sufficiently certain’ and therefore it satisfied the ‘prescribed by law’ requirement. Thus, the Court affirmed that, as far as the requirement of ‘prescribed by law’ is concerned, the Commissioner’s discretion to restrict the right of peaceful assembly for the purpose of public order (in the law and order sense) was constitutionally valid.¹⁵⁹

The Court then proceeded to examine the Commissioner’s discretion against the necessity requirement. Interestingly, the Court did not deal with the Commissioner’s original discretionary power which was challenged in the case; instead, it *only* dealt with the Commissioner’s discretionary power as revised by the Court itself, which it had already affirmed as constitutionally valid.

At the first step, the Court had no difficulty in finding that the rationality subtest was

¹⁵⁷ Ibid.

¹⁵⁸ The CFA supported the severance solution by referring to the Privy Council’s authority in *Attorney-General for Alberta v Attorney-General for Canada*, [1947] AC 503, which had been followed by the Privy Council itself in Hong Kong related cases (including *Attorney-General v Ming Pao Newspapers Ltd* [1996] 3 WLR 272) and by the CFA itself in *Ng Ka Ling*. See *ibid* para 84-85.

¹⁵⁹ *Ibid* para 82-83.

‘obviously satisfied’: the POO incorporated the constitutional purpose of public order, and the statutory discretion conferred on Commissioner to regulate peaceful assembly was therefore ‘of course rationally connected’ with that purpose.¹⁶⁰

At the second step, the Court engaged in more subtle and concrete considerations. The Court said that in order to determine whether the Commissioner’s discretionary power satisfied the necessity requirement, the following matters must be taken into account: (1) the government’s positive duty to ensure lawful assembly to take place peacefully; (2) the limited scope of the statutory regulation scheme;¹⁶¹ (3) traffic conditions and crowds control; (4) the Commissioner’s duty in relation with his discretionary power: if he is going to object to or impose conditions on a proposed procession, he must give reasonable reasons within reasonable time limit, and in doing so, (5) the Commissioner, in exercising his discretion ‘must apply the proportionality test’;¹⁶² (6) the Commissioner’s discretionary decision is ultimately subject to judicial review.¹⁶³ Having taken into account all these matters, the Court found that the Commissioner’s discretionary power as revised by the Court itself was a limited one and was ‘no more than is necessary’, because, on the one hand, the discretionary power helped to enable Government to fulfil its positive duty, and on the other, it was constrained by the proportionality test and furthermore, the Commissioner’s decision would be subject to judicial review.¹⁶⁴ Thus the Court held that the revised Commissioner’s discretionary power, i.e., to restrict the right of peaceful assembly for the purpose of public order (in the sense of law and order) passed the proportionality test and therefore satisfied the constitutional necessity requirement.¹⁶⁵

Finally, the CFA in *Leung Kwok Hong* accepted as a general principle that in applying the two constitutional requirements to any restriction on an entrenched right, in particular when deploying the test of proportionality which forms the core of the necessity requirement, ‘a

¹⁶⁰ Ibid para 36.

¹⁶¹ The statutory scheme the POO enacted is limited to the regulation of public processions consisting of more than 30 persons on a public high way or thoroughfare or in a public park. See POO S14, 15.

¹⁶² The POO does not expressly require or imply that the Commissioner should apply the proportionality test in his decisions as to whether or not to object to or impose conditions on public assembly. The Court’s opinion here has been interpreted as ordering the Commissioner to do so.

¹⁶³ *Leung Kwok Hung* para 92.

¹⁶⁴ Ibid para 94.

¹⁶⁵ Ibid.

proper balance' should be struck between the interests of society on the one hand and the right at stake on the other.¹⁶⁶ But lacking the subtlety of proportionality in strict sense, it is difficult to see how the courts, in applying the proportionality test to evaluate the necessity requirement, may play this art of balancing.

Conclusion

The protection of human rights is a fundamental principle enshrined in the Basic Law. Under the Basic Law regime, Hong Kong residents enjoy a wide scope of fundamental rights and freedoms. The Bill of Rights 1991, having been adopted as the law of the HKSAR, further widens the scope of rights that Hong Kong residents are entitled to enjoy. Whilst the rights and freedoms provided in the Basic Law are entrenched, by virtue of the higher law status of the Basic Law, the rights contained in the Bill of Rights 1991 are also in effect entrenched via the provision of Article 39 (2) of the Basic Law. However, the entrenchment of rights in Hong Kong is not complete in that, at least in pure theory, there is always the possibility of the NPCSC's legislative supremacy trumping the entrenchment of rights in the Basic Law, because it is the NPCSC, not the highest court in the HKSAR — the CFA, that has the final power to interpret the Basic Law. In this sense and to this extent, the entrenchment of rights in the HKSAR represents neither a typical constitutional bill of rights nor a typical parliamentary bill of rights; it is indeed a hybrid type of entrenchment. This is a particular feature of human rights constitutional protection in the HKSAR.

The guarantee to protect human rights does not necessarily provide the legal basis for constitutional review. That basis remains solely in the supremacy of the Basic Law. It is only when rights are positively entrenched, or in Cappelletti's words, positivized as the higher law, then they form part of the material supremacy of the constitution, hence becoming the legal basis of constitutional review. That explains why an un-entrenched bill of rights like that of the New Zealand does not lead to the birth of constitutional review in that country. This said, however, it must be noted that the guarantee to protect human rights contributes greatly to the normative basis for rights-based constitutional review. That is to say, if it is the higher law status of the constitution makes constitutional review scientifically necessary, it is

¹⁶⁶ Ibid para 35.

the need to protect human rights that makes constitutional review morally desirable. Since the Basic Law is the supreme law of the HKSAR, and since it guarantees the protection of human rights, there is therefore not only the positive basis but also the normative basis for constitutional review in the HKSAR.

Should there still be any doubt of the justification for constitutional review under the Basic Law — doubts arising from the mere fact that the Basic Law does not expressly provide for this power, the Hong Kong courts' repeated and robust exercise of this power has the effect of practically legitimizing it. Constitutional review in Hong Kong in the post-1997 era has mainly happened in the human rights field. The courts have adopted a generous approach to the interpretation of the Basic Law provisions which concerns the fundamental rights, so as to give Hong Kong residents full measure of protection of their rights and freedoms. Consistent with this general approach is the establishment of the two constitutional requirements upon which permissible limitations on rights are to be scrutinized. In developing the human rights jurisprudence in Hong Kong, the Hong Kong courts have been enthusiastic about comparative materials on constitutional interpretation and adjudication. Constitutional principles like the test of proportionality have been imported into Hong Kong's jurisprudence. In this learning process, the Hong Kong courts have been, on the one hand, mindful to take into consideration of the particular circumstances in Hong Kong, and on the other, keen to forge constitutional interpretation principles in a way that will give the judges greater room of manoeuvre. Greater flexibilities in this respect may be desirable from practical perspective, given the early stage of Hong Kong human rights jurisprudence and the inherent complexities and tensions within the OTCS framework; they might, however, also lead to judicial activism which might endanger the working of the constitutional system under OTCS.

Chapter VII

Constitutional Review and the Working of ‘One Country, Two Systems’

Introduction

In the final Chapter, we are going to examine the scope of constitutional review under the Basic Law by looking into this question: how does the practice of constitutional review fit with the unique constitutional framework of OCTS? In other jurisdictions, the power of constitutional review suffers from the democratic defect which Alexander Bickel once famously depicted as the counter-majoritarian difficulty.¹ Although it is now generally recognized that the counter-majoritarian attack was somewhat misconceived because of its misconception of the American democracy as simply majority rule,² it nevertheless is an undeniable fact that there are inevitably tensions within a constitutional system when the unelected judges strike down decisions taken by the elected bodies. In this sense, there is undoubtedly a democratic difficulty — if the phrase of ‘counter-majoritarian’ difficulty is not preferred — with judicial constitutional review. How is this ‘democratic difficulty’ to be assessed in Hong Kong, where the power of constitutional review is also exercised by judges who are not elected? In addition, given the uniqueness of the OCTS arrangements, is there any additional difficulty that Hong Kong judges may face when they exercise the power of constitutional review? What then is the role of the judiciary, the CFA in particular, in preserving the workability of the OCTS framework? We shall discuss these questions in turn.

1. ‘Democracy and Distrust’ in Hong Kong

The democratic justification issue with judicial constitutional review has never aroused much concern in Hong Kong. Chen once noted, in a passing way, that the Bickelian counter-majoritarian difficulty was irrelevant to colonial Hong Kong, but he also predicted that it was bound to arise when democracy in Hong Kong advanced to a fuller form under the Basic

¹ Alexander M. Bickel, *The Least Dangerous Branch; The Supreme Court at the Bar of Politics* (The Bobbs-Merrill Company, INC. 1962) 14.

² There is an abundant literature in this respect. For a useful summary, see Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton University Press 1996).

Law.³ A recent study does look into this question in more detail.⁴ It examines the political institutions of the LegCo and the Chief Executive and finds neither of them being democratic, simply because the existing election methods are not based on universal suffrage. Without going further to discuss what the case will be after universal suffrage is realized in these two elections, an aim which is promised in the Basic Law,⁵ the research concludes that there does not exist in the present Hong Kong's constitutional order the counter-majoritarian difficulty and that it is the lack of this difficulty, plus the existence of a pro-rights culture, that justify judicial constitutional review in Hong Kong.⁶

To better appreciate the democratic issue with constitutional review in Hong Kong, a brief description of the democratic development in Hong Kong is necessary. Democracy in Hong Kong came late and slow. Hong Kong did not have its first taste of democracy until the mid-1980's when the British began to prepare their withdrawal from the territory. In 1985, indirect elections on the basis of functional constituencies were introduced in selecting 12 out of the total 56 seats to the LegCo. In 1991, direct elections were introduced and it produced 18 out of the total of 60 members of the LegCo. In 1995, the total members elected by the functional constituencies were increased to 30 and that by direct election to 20. Meanwhile, of course, Hong Kong people under the British rule had no say whatsoever in who should be the governor of the territory. That was a matter of her Majesty's prerogative power, conventionally exercised by her civil servants in her behalf.⁷

Under the Basic Law, democracy is promised but also framed to suit the pragmatic circumstances of Hong Kong. Articles 45 and 68 of the Basic Law prescribe respectively that the Chief Executive and the LegCo are to be selected through local elections and that 'the ultimate aim' is elections by 'universal suffrage'. The Basic Law does not set a date as to when this ultimate aim shall be accomplished. But in Annexes I and II, which set out the

³ Albert H Y Chen, 'The Interpretation of the Basic Law — Common Law and Mainland Chinese Perspectives' (2000) 30 Hong Kong LJ 420.

⁴ See Ng Hon-wah, 'Counter-majoritarian difficulty? : constitutional review: Singapore and Hong Kong compared' (DPhil thesis, The University of Hong Kong 2010).

⁵ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China Art 45, 68.

⁶ Hon-wah 249.

⁷ On the development of the political and electoral system in the pre-handover Hong Kong, see generally Lo Shiu-hing, *The Politics of Democratization in Hong Kong* (Macmillan Press 1997); Alvin Y So, *Hong Kong's Embattled Democracy* (John Hopkins University Press 1999).

respective election method for the Chief Executive and the LegCo, it precludes changes to these election methods before 2007. What may happen 'subsequent to 2007'? As 2007 drew nearer, the pressure for greater democratic reform kept building momentum.

On July 1 2003, a mass protest involving half a million people took place in Hong Kong. One of the things the protesters demanded was universal suffrage to be adopted in electing the Chief Executive and the LegCo. They saw the coming Chief Executive election in 2007 and the LegCo election in 2008 the right time to achieve what the Basic Law calls 'the ultimate aim'.

The NPCSC saw otherwise. On 4 of April 2004, out of its own initiative, the NPCSC issued an Interpretation⁸ of Article 7 of Annex I and Article 3 of Annex II whereby the process for changing the respective election method is provided. Both of the processes begin with this same condition: '*If there is a need to amend...*'. The NPCSC interpreted that in order to determine whether there is such a need, the Chief Executive shall submit a report to the NPCSC who then, after examining the former's report, shall decide on the matter. If the NPCSC agrees that there is the need, then the reform processes as prescribed in the Annexes can be kicked off. Otherwise, the status quo is maintained. The NPCSC justified its action on the grounds that 'the development of the political structure in the HKSAR is a matter that relates to the implementation of the Basic Law, the relationship between the Central Authorities and the HKSAR, the interests of various strata and sectors of the community, and the long term prosperity and stability of Hong Kong'.⁹ Critics have opposed to this Interpretation; they criticized the NPCSC for 'add[ing] new requirements' to the amending process as prescribed in the Annexes and was therefore a grasp of power for 'complete control over initiating change'.¹⁰

On 26 April 2004, the NPCSC, after closed door examination of the Chief Executive's report

⁸ The Interpretation by the NPCSC of Article 7 of Annex I and Article III of Annex II of the HKSAR Basic Law, issued on 6 April 2004. For an unofficial English version see <http://www.basiclaw.gov.hk/en/materials/index.html>, accessed in July 2012.

⁹ See Qiao Xiaoyang's speech at the NPCSC meeting, widely reported in local newspaper of the day.

¹⁰ Michael C. Davis, 'Interpreting Constitutionalism and Democratization in Hong Kong' in Hualing Fu, Lison Harris and Simon N.M. Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan 2009) 79.

as required by the Interpretation, issued a Decision,¹¹ stating, *inter alia*, that neither the election for the Chief Executive nor that for the members of the LegCo, in 2007/2008 respectively, would be done by universal suffrage. This Decision seems to have followed the Chief Executive's suggestion which he made in his report that the pace of democratic reform in the Region 'should not be too fast' and that caution should be taken so that any reform would not have any adverse economic effect.¹²

Thus the fight for 'double universal suffrage' — which had later become some kind of political catchphrase — carried on. To cut it short, the NPCSC finally agreed, in 2007, by another Decision upon another report submitted by another Chief Executive, that universal suffrage can be adopted in the Chief Executive Election in 2017 and indicated that universal suffrage can also be adopted in the LegCo election thereafter.¹³ However, 'double universal suffrage' still remains a much disputed issue in current Hong Kong politics, though the main concern has shifted from the question of 'when' to that of 'how'. Most controversial of all is the issue of whether the functional constituencies (which the Central Authorities seem to be keen in keeping them) can co-exist with universal suffrage. It is now not at all clear how this and many other controversies concerning the details of putting the warranted 'double universal suffrage' in place will be sorted out. The fact is that the fight for full democracy in Hong Kong is still very much on-going.¹⁴

We have tried to describe the democratic development in Hong Kong as briefly as possible. The point is, however, while the major concern in Hong Kong has long been the difficulty of

¹¹ Decision of the NPCSC on Issues Relating to the Methods for Selecting the Chief Executive of the HKSAR in the Year 2007 and for Forming the Legislative Council of the HKSAR in the Year 2008, adopted on 26 April 2004. For an unofficial English version see <http://www.basiclaw.gov.hk/en/materials/index.html>, accessed in July 2012.

¹² For the Chief Executive's report and other relevant documents, see www.cmab.gov.hk, accessed in July 2012.

¹³ Decision of the [NPCSC] on Issues Relating to the Methods for Selecting the Chief Executive of the HKSAR and for Forming the Legislative Council of the HKSAR in the Year 2012 and on Issues Relating to Universal Suffrage. For an unofficial English version see <http://www.basiclaw.gov.hk/en/materials/index.html>, accessed in July 2012.

¹⁴ This period of constitutional development in Hong Kong has been well documented. See generally Albert H. Y. Chen, 'The Basic Law and the Development of the Political System in Hong Kong' (2007) 15 *Asia Pacific Law Review* 19-40; Albert H. Y. Chen, 'A New Era in Hong Kong's Constitutional History' (2008) 38 *Hong Kong LJ* 1-14; Albert H. Y. Chen, 'The Fate of the Constitutional Reform Proposal of October 2005' (2005) 35 *Hong Kong LJ* 537-543; Albert H. Y. Chen, 'The Constitutional Controversy of Spring 2004' (2004) 34 *Hong Kong LJ* 215-226; Albert H. Y. Chen, 'Constitutional Developments in Autumn 2009' (2009) 39 *Hong Kong LJ* 751-766; Simon N M Young, 'Can Functional Constituencies Co-exist with Universal Suffrage?' in Johannes Chan and Lison Harris (eds), *Hong Kong's Constitutional Debate* (Hong Kong Law Journal Limited 2009).

gaining democracy in the first place, the question that judicial constitutional review might counter democracy may appear, to many, as utterly irrelevant. In other words, when there is lack of democracy, there is no real question of judicial constitutional review being anti-democratic. Instead, when judges strike down acts of the LegCo or the Chief Executive, neither of which is generally perceived as wholly democratic, there may well be a gain of democracy — by the courts' upholding the rule of law and protecting human rights, both of which are basic credentials of democracy. Indeed, as Chen noted, it was very much due to the lack of democracy that had prompted public support in favour of judicial constitutional review in the pre-handover era.¹⁵ In the new constitutional order, as Chen also observed, although the counter-majoritarian difficulty is bound to arise when democratization in Hong Kong advances to a fuller form, the public will still support a vigorous judiciary exercising the power of constitutional review, because of

the fear in the Hong Kong community that Chinese sovereignty over Hong Kong may lead to a deterioration in human rights, democracy and the rule of law [in Hong Kong].¹⁶

In the days running up to the transfer of sovereignty, a judge, speaking extra-judicially to a public audience, did not hide that fear and distrust; he remarked:

To the extent that Hong Kong and its people have enjoyed rights typical of a western democracy, it has been because its lawmakers have been ultimately beholden to the democratically elected Parliament at Westminster, its Governor appointed by the elected government of the United Kingdom and its courts subject to the judges in the Privy Council, most of them Englishmen. When these vital underpinnings are removed, it is not self-evident (either in law or in practical politics) that the notions of fundamental rights which have accompanied the people of Hong Kong will long survive their passing.¹⁷

There is therefore a Hong Kong version of 'Democracy and Distrust' which entails examining judicial constitutional review against democracy in Hong Kong's context. For Ely, democracy in the form of majority rule cannot be trusted in protecting minority rights. Judicial review of majority-made legislation therefore allows the minority, who are often disadvantaged in a

¹⁵ Chen 419-420.

¹⁶ Ibid 424.

¹⁷ Michael Kirby, 'Human Rights: The Role of the Judge' in Johannes Chan and Yash Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths 1993) 248.

popular democracy, to gain real and substantial participation in the decision-making process. Understood in this way, judicial review is both participation-oriented and representation-reinforcing and is therefore ultimately democratic.¹⁸ In other words, instead of having the counter-majoritarian difficulty, judicial review is democratically justified exactly for its being counter-majoritarian. The distrust Ely has recognized in the American context certainly also exists in Hong Kong, for there are indeed minorities in the mainly Chinese community. And if the counter-majoritarian justification stands, it may also be applied to Hong Kong's case. But as the 'fear' Chen notices implies, in Hong Kong, it is not the distrust with the ruling majority (if it ever exists) within the Region, but the distrust with the ruling power outside of the Region that justifies — in the sense of gaining public support — judicial constitutional review.

Even after full democracy — by the standard of achieving the 'double universal suffrage' — is achieved, it is unlikely that the 'fear' Chen has noticed may be totally cast out. The 'fear', as a form of expressing the inherent tensions within OCTS, will remain there as long as the framework itself remains, and might well get worse when tensions arise and grow between the two systems. Out of doubts and fears, as the logic may go, the public will continue to expect the independent judiciary, which is the least-central-controlled institution within the HKSAR establishment,¹⁹ to protect them from interference from the Central Authorities. They are, therefore, less concerned about whether democracy within the Region is hampered when the unelected judges strike down decisions made by the elected legislature or the Chief Executive. In their eyes, one might assume, the democratic deficit of judicial constitutional review is a far less dangerous evil.

Furthermore, democracy in Hong Kong, even after the 'double universal suffrage' has been achieved, is never likely to become a 'full' one, by any modern western standard. And this prospect alone might well cause Hong Kong people to remain as indifferent as they have been to the democratic justification of judicial constitutional review. As discussed in Chapter V, the political structure in the HKSAR is essentially 'an uneasy blend of democracy and

¹⁸ Chen 87.

¹⁹ Yash Ghai, 'Litigating the Basic Law: Jurisdiction, Interpretation and Procedure' in Johannes MM Chan, H.L. Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (2000) 7.

authoritarianism'. It concentrates more than separates power. The legislature is weak in checking and balancing the executive government. This overall constitutional design remains as such regardless how the legislature or the Chief Executive is elected. The realization of the 'double universal suffrage' will not change the respective role of the LegCo and the Chief Executive, nor will it change the basic working of the whole system. In accordance with the Basic Law, a Chief Executive elected through universal suffrage still has to be appointed by the Central Government, and continues to be held accountable not only to the Hong Kong region but also to the Central Government. A fully elected legislature may still be dissolved by the Chief Executive; its duly passed bills still cannot become law if the Chief Executive refuses to sign them. A law made by a fully elected legislature, signed by a fully elected Chief Executive, may still be invalidated by the NPCSC in accordance with and subject to Article 17 of the Basic Law. All in all, a fully democratic Hong Kong still remains under the sovereign rule of a Communist motherland that adheres not to western type of democracy but to its own version of 'people's democratic dictatorship'.²⁰

There is one more thing that also proves the pragmatic attitude of Hong Kong people towards the democratic justification of judicial constitutional review. As in many other jurisdictions, Hong Kong judges are not elected. But unlike many of them, in every case that the CFA hears and decides, there is a part to be played by a non-permanent justice from outside Hong Kong, the appointment of whom requires no connection whatsoever of his or her justiceships with Hong Kong.²¹ She or he may or may not know Hong Kong before coming to sit on the CFA bench, but together with their bench colleagues, they play an active part in shaping Hong Kong's society. The invitation of expatriate justices to sit on the highest bench of the judiciary is surely extraordinary,²² although expressly allowed by the Basic Law.²³ And in practice, this arrangement is more of a welcome than a worry.²⁴ Thus, in Hong Kong, not only judges are not elected, but some of them are aliens. One might therefore reasonably question, in particular when these alien judges taking part in striking down

²⁰ Kit Poon, *The Political Future of Hong Kong: Democracy within Communist China* (Routledge 2009). The phrase 'people's democratic dictatorship' appears in the Chinese Constitution (Article 1).

²¹ See the Court of Final Appeal Ordinance.

²² There are a few other examples though; The Constitutional Court of Bosnia and Herzegovina is one. See a blog article by Nedim Kulenović, Faculty of Law, University of Sarajevo, posted at www.comparativeconstitutions.org, accessed in June 2012.

²³ Basic Law Art 82.

²⁴ Johannes Chan, 'Basic Law and Constitutional Review: the First Decade' (2007) 37 Hong Kong LJ 420.

legislation, not only the democratic issue, but the notion of ‘Hong Kong people ruling Hong Kong’ itself.²⁵ Yet, Hong Kong people seem quite happy with all these. One might find it hard to appreciate this unless some reference is made again to the ‘fear’ that Chen had noticed.

So, unlike in the US, where, as Bickel saw it, judicial review of legislation came into existence as an deviant evil in the American democracy, which was too late to get rid of and was therefore needed to be tempered to fit with the American democratic system,²⁶ judicial constitutional review in Hong Kong began to emerge and came to be accepted and supported by the local community to compensate for the lack of democracy. Even when democratization in Hong Kong advances to a fuller form — after the ‘double universal suffrage’ being put in place, the authoritarianism elements in the fabric of the political set-up of the HKSAR may still render a sense of lack of democracy. The fears, the doubts and the distrust that had generated public support of judicial constitutional review are unlikely to be cast out and therefore will continue to generate such support. Judicial constitutional review itself may be undemocratic, but it works to pay off the structural democratic defects. It is therefore democratically justified, not because the tensions between the judiciary and the elected bodies so often seen in other jurisdictions have been miraculously solved in Hong Kong, but merely because it is pragmatically needed.

2. The scope of constitutional review in Hong Kong: special limits

Notwithstanding the pragmatic general support, the Hong Kong courts’ jurisdiction of constitutional review is, at least in theory, by no means a free-standing one. It is instead in several ways limited. On the one hand, the general judicial jurisdiction is limited under the Basic Law. Although the Basic Law provides that the Hong Kong courts shall have jurisdiction over ‘all cases in the Region’, it then subjects it to ‘the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong’.²⁷ Moreover,

²⁵ It is the important role the CFA plays in the new constitutional order that this is questionable with regard to Hong Kong people ruling Hong Kong. In contrast, while the Basic Law allows foreign nationals to take up civil service posts, principal officials have to be Chinese nationals. The Basic Law also allows foreign nationals to be elected as LegCo members, but they need to be Hong Kong permanent residents as well and the total numbers of such members are capped by not exceeding 12 per cent of the total membership.

²⁶ Bickel 14.

²⁷ See our discussion in Chapter II.

the Basic Law also excludes acts of state such as defence and foreign affairs from the Hong Kong courts' jurisdiction.²⁸ If questions of fact concerning such acts of state arise in the adjudication, the courts are required to obtain a certificate from the Chief Executive and shall be bound by it. Accordingly, such state acts as defence and foreign affairs are not reviewable by the Hong Kong courts.²⁹

On the other hand, there are more specific limits on the Hong Kong courts' jurisdiction which are closely related to the limited power granted to them in the interpretation of the Basic Law. Since the final power to interpret the Basic Law is vested in the NPCSC — and the CFA in *Lau Kong Yung* acknowledged that the NPCSC's power of interpretation is a free-standing one, a Hong Kong court's invalidation of an ordinance for its inconsistency with the Basic Law may always be overruled by the NPCSC if it considers the court's interpretation of the Basic Law as wrong. This happened in the *Ng Ka Ling*, the very first case the CFA asserted the jurisdiction of constitutional review. That the NPCSC may do so was reiterated in the NPCSC's response to the CFA's decision in *Chong Fung Yuen*. The overriding supervision of the NPCSC, it is said, might provide a 'chilling effect' on judges giving meaning to the Bill of Rights or the Basic Law; an effect that might restrain them from robust orders against the government.³⁰

2.1 Are national laws applied to Hong Kong or the acts of NPC or NPCSC reviewable by the Hong Kong courts?

It remains highly controversial whether they are. In *Ng Ka Ling*, the CFA asserted that the Hong Kong courts had this jurisdiction. In practice, however, not only had this assertion provoked strong reaction from Beijing, which in turn led to what many commentators referred to as a constitutional crisis,³¹ but also the CFA's justification for this particular jurisdiction was far from being well established.³² After *Ng Ka Ling*, the only case where the

²⁸ Basic Law Art19.

²⁹ In the *Congo* case, the CFA has confirmed this view.

³⁰ Kirby 246.

³¹ See generally Johannes MM Chan, H L Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press 2000). See also Ling Bing, 'Can Hong Kong Courts Review and Nullify Acts of the National People's Congress Analysis' (1999) 29 Hong Kong LJ 8-15.

³² See our discussion in Chapter II.

CFA faced a challenge to the constitutionality of a national law (implemented in Hong Kong via local legislation) was *Ng Kung Siu*. In this case, the CFA upheld the constitutionality of the impugned law. But as Chen observed, the CFA had ‘acted strategically’ ‘from a political point of view’.³³ Had it ruled the law to be unconstitutional, there would probably have been another constitutional crisis. Should similar cases appear before the CFA again, it is not difficult to perceive the huge political pressure on the court if it were going to rule a national law applied to Hong Kong as unconstitutional. As noted in Chapter II, many mainland lawyers hold the view that the CFA’s claim to have the power to review the acts of the Central Authorities amounts to the CFA putting itself above the sovereign (thus, as the argument goes, putting ‘two systems’ above ‘one country’), which, if stands, is of course theoretically unsustainable and practically unacceptable.

2.2 The Article 17 question

Article 17 of the Basic Law provides that the [HKSAR] shall be vested with legislative power, and that

Laws enacted by the legislature of the [HKSAR] must be reported to the [NPCSC] for the record. The reporting for record shall not affect the entry into force of such laws.

If the [NPCSC], after consulting the Committee for the Basic Law of the [HKSAR] under it, considers that any law enacted by the legislature of the Region is not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region, the Standing Committee may return the law in question but shall not amend it. Any law returned by the [NPCSC] shall immediately be invalidated. This invalidation shall not have retroactive effect, unless otherwise provided for in the laws of the Region.

According to Article 17, it is implicit that the NPCSC, upon receiving the laws reported for record from the HKSAR, shall examine their constitutionality against the excluded provisions of the Basic Law. This, as a mainland commentator observes, is a special arrangement of

³³ Albert H Y Chen, 'Constitutional adjudication in post-1997 Hong Kong' (2006) 15 *Pacific Rim Law & Policy Journal* 663.

constitutional review under the Basic Law, which is to be exercised by the NPCSC.³⁴ Ghai apparently shares a similar view. In his understanding, the validity of a law vis-à-vis the excluded provision is for the NPCSC to determine, while its consistency with non-excluded provisions shall be decided by the Hong Kong courts.³⁵ Viewed as such, Article 17 does have the effect of limiting the reach of constitutional review by the Hong Kong courts.

Thus, if a law is not returned by the NPCSC, it can only mean that it has passed the NPCSC's constitutionality scrutiny, insofar as its connection with the *excluded* provisions of the Basic Law is concerned. Strictly speaking, of course, the constitutionality of such a law vis-à-vis the *non-excluded* provisions is not part of the NPCSC's scrutiny and thus remains open to future challenge. However, as far as the excluded provisions are concerned, the question is whether such a law is still subject to review by the Hong Kong courts. Does the NPCSC's decision not to return a law have any legal effect at all? If it does, it then should be binding, and the constitutionality of such a law vis-à-vis the excluded provisions should not be subject to a second guess by the HKSAR courts. If the HKSAR courts subsequently review such a law and declare it unconstitutional vis-à-vis the excluded provisions, their decision is not only flying in the face of, but in fact overruling, the NPCSC's views, implicit in its 'not-to-return' decision, that a 'not-returned' law is in conformity with the excluded provisions. For the NPCSC, as can be seen from the previous discussion, this is apparently unacceptable.

But in practice, it is inevitable that a law not returned by the NPCSC may be challenged for its consistency with the Basic Law, either vis-à-vis the excluded provisions or the non-excluded provisions. No one can stop litigants from doing so. And once challenged, the courts are due to hear them. So, the difficulty stemming for Article 17 is this: if a 'not-returned' law is challenged for its constitutionality vis-à-vis the excluded provisions, what then is the court going to do? If the court is to take the NPCSC's decision not to return a law as having binding effect, it seems that it might have no other options apart from either refusing to examine its constitutionality, or merely upholding its constitutionality, simply

³⁴ 王振民 Zhenmin Wang, '论全国人大常委会对特区的违宪审查权 The Power of the NPCSC to Examine the Constitutionality of the Special Administrative Regions' Laws' (2005) *港澳研究 Hong Kong and Macao Studies* 55.

³⁵ Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd edn, Hong Kong University Press 1999) 193.

because the NPCSC has examined it and has upheld it as constitutional. But if any court in Hong Kong adopts this approach, it would surely find itself being accused of kowtowing to Beijing at the expense of judicial independence in Hong Kong. Yet, if it is to review and declare a law as unconstitutional vis-à-vis the excluded provisions, not only its decision is most likely to be overruled by the NPCSC (unless of course the NPCSC were willing to change its mind), but more problematically, the court's exercise of the power of constitutional review in this particular context might itself be challenged as unconstitutional.

Of course, whether there is what we call 'the Article 17 question' ultimately depends on the classification of the excluded and non-excluded provisions of the Basic Law. As discussed in Chapter III, although the CFA in *Ng Ka Ling* made the conceptual distinction between excluded provisions and non-excluded provisions, it remains literally unclear as to which category a certain provision belongs. Nor has the NPCSC, on the other hand, ever attempted to classify Basic Law provisions accordingly. The uncertainties in this respect further complicate the matter. The uncertainties here may well give the HKSAR courts greater room for manoeuvre. For the NPCSC, letting the Hong Kong courts to second guess its 'not to return decision' is perhaps not a big deal, for at the end of the day, the CFA is obliged under Article 158 to make a reference to the NPCSC if at issue are excluded provisions.

In the actual operation of the Article 17, another thing which is also unfortunately very unclear is whether or not the NPCSC does *really* examine the constitutionality of the reported laws and if it does, in what way and by what procedure. What is clear, however, is that the NPCSC never makes a formal reply to the HKSAR upon the receipt of the laws reported by the HKSAR. Nor has it ever made any statement upon the constitutionality of the reported laws vis-à-vis the excluded provisions. The BLC has a role to play in the implementation of Article 17.³⁶ But its meetings are held behind closed doors and it is therefore not publicly known if it had ever advised the NPCSC on the constitutionality of the HKSAR laws in accordance with Article 17. If, one might say, there is a loophole in the NPCSC's constitutionality control pursuant to Article 17, the Hong Kong courts might feel justifiably obliged to step in to fill it. If, one might even think, the BLC works in a way close to that in which the UK Parliament's Joint Committee on Human Rights scrutinizes the

³⁶ For the role of the BLC, see footnote 45, Chapter III.

compatibility of bills with Convention rights, there might well be a stronger case to argue against subsequent constitutional review by the Hong Kong courts after the NPCSC's 'not to return decision' is made.

2.3 The Article 160 question: the laws previously in force in Hong Kong

Section 1 of Article 160 provides that

Upon the establishment of the [HKSAR], the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the [NPCSC] declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law.

As mentioned in the last Chapter, the NPCSC exercised the power Article 160 grants to it in February 1997. It issued a Decision in which 14 previous Ordinances in their entirety and other 10 Ordinance in parts were declared as being inconsistent with the Basic Law and thus were not adopted as the laws of the HKSAR. In the view of some mainland commentators, the adoption of the 1997 NPCSC Decision was a 'comprehensive constitutional review' exercised by the NPCSC of the laws previously in force in Hong Kong.³⁷

Now the question arises. Since 'the laws previously in force' had been comprehensively reviewed by the NPCSC for their consistency with the Basic Law, are they still subject to review by the Hong Kong courts?

In Ghai's view, no matter how the date — by which to define the word 'previously' — is to be fixed,³⁸ the fact that 'the laws previously in force' had been examined by the NPCSC does not mean that any such law not identified by the NPCSC as not in conformity with the Basic Law is given 'a clean bill of health', for Article 160 itself does not preclude the possibility of any

³⁷ Wang 62.

³⁸ There had once been different academic views on the question of the date the word 'previously' is pointing to; some suggested that it should be the date when the Sino-British Joint Declaration was signed, others argued that it should be the date of 1 July 1997 when China actually took over Hong Kong. See Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* 375-379.

previously in force law being later discovered to be inconsistent with the Basic Law.³⁹ There is certainly a sound point in Ghai's argument. Moreover, nothing in the 1997 NPCSC Decision seems to suggest that the NPCSC's examination of the previously in force laws was thoroughly complete. Nor does it say that the list of non-adoptive laws therein provided is exhaustive. In theory, therefore, at least as far as the laws not particularly identified by the NPCSC as inconsistent with the Basic Law are concerned, they may still be subject to future constitutionality challenge.

That said, however, it should also be recognized that there is a strong presumption behind the 1997 NPCSC Decision that all previously in force laws that had been adopted as the laws of the HKSAR as the result of the Decision should be taken as *prima facie* consistent with the Basic Law, for otherwise, they should not have been adopted as the laws of the HKSAR in the first place. If this presumption stands, it follows that whenever previously in force laws are later challenged for their consistency with the Basic Law, due weight has to be given to the NPCSC's Decision. To this extent, the 1997 NPCSC Decision is also a limit on the reach of the power of constitutional review by the Hong Kong courts.

Moreover, according to Article 160, if any of the previously in force laws are later found to be inconsistent with the Basic Law, they should be 'amended or cease to have force in accordance with the procedure as prescribed by this Law'. It is not immediately clear what the 'procedure' therein referred to is. In Ghai's view, if questions concerning the validity of a previous law arises, it may have to be dealt with under Article 158, according to which the Hong Kong courts may still review its constitutionality, at least vis-à-vis the non-excluded provisions of the Basic Law.⁴⁰ However, reliance on Article 158 only leads to a discovery of an inconsistency, whereas the procedure Article 160 refers to seems to be applied only after such a discovery is made. In *HKSAR v Hung Chan Wa and another*,⁴¹ the CFA held this view. It said that the words 'shall be amended' and 'shall cease to have force' in Article 160 connote a legislative procedure, for 'the courts do not amend laws' and a law ceases to have effect

³⁹ Ibid 193.

⁴⁰ Ibid 193.

⁴¹ *HKSAR v Hung Chan Wa and Another* 2006] HKCFA 85; [2006] 3 HKLRD 841; (2006) 9 HKCFAR 614 (CFA).

only ‘when the legislature repeals it’,⁴² and that the discovery of inconsistency only ‘marks the commencement of the [legislative] process’.⁴³ As such, it then follows that, as far as the laws previously in force are concerned, the courts can only ‘*identify*’ whether or not they are consistent with the Basic Law, and in the case of inconsistency, they do not have the power to *invalidate* them.

If that understanding is correct, then the Court’s interpretation of the Article 160 in *Hung Chan Wa* apparently limits the courts’ jurisdiction of constitutional review when it comes to the laws previously in force in Hong Kong. But it seems that the Court was not quite aware of this implication. In *Hung Chan Wa*, the Court was invited to engage in what is known as ‘prospective overruling’, by which the Court should make an order to limit the retrospective effect of its judgment. The request for a prospective overruling was made by the government, on the ground that Article 160 ‘applies to a court judgment holding a law previously in force to be in contravention of the Basic Law and establishes that such a judgment only has prospective effect’. It is in answering the question of whether Article 160 applies to the judicial procedure (about which, the Court said that under the common law, a judgment determining a legal question operates retrospectively as well as prospectively⁴⁴) that the Court made the point that the procedure Article 160 refers to is a legislative one.

In another CFA decision two years earlier, the Court’s position towards the laws previously in force seems totally different and more radical. In *A Solicitor v the Law Society of Hong Kong and Another*,⁴⁵ which we will have more to say in the next section, the Court not only invalidated a law previously in force, but actually took on the power to decide which law was or was not ‘*in force*’ previously, a power which, the reading of Article 160 would suggest that belongs to the NPCSC. In *Hung Chan Wa*, there was no mentioning of *A Solicitor*. Perhaps for the Court, the issues in the two cases are not related. But for the matter of the laws previously in force in Hong Kong, it seems that they are. The Court’s jurisprudence on this matter of law, as demonstrated by the two decisions, is somewhat self-contradictory.

⁴² Ibid para 13.

⁴³ Ibid.

⁴⁴ Ibid para 11.

⁴⁵ *A Solicitor v the Law Society of Hong Kong and Another* [2003] HKCFA 14; (2003) 6 HKCFAR 570; [2004] 1 HKLRD 214 (CFA).

2.4 The counter-Beijing difficulty

If we may paraphrase Alexander Bickel's charge against American judicial review as a 'counter-majoritarian' difficulty, the lack of final authority on the interpretation of the Basic Law in general and the questions stemming from Articles 17 and 160 in particular may well amount to a 'counter-Beijing' difficulty, which the Hong Kong courts have to face when exercising the power of constitutional review. The 'counter-Beijing' difficulty is both legal and political. From the legal perspective, potential conflicts in the interpretation of the Basic Law between Hong Kong courts and the NPCSC seem unavoidable, since they adopt respectively a fundamentally different approach to constitutional interpretation—the common law approach by the Hong Kong courts and the legislative approach by the NPCSC. But whenever there is such a conflict, it has to be the view of the NPCSC that will prevail, simply because it has the last word on the Basic Law. Under OCTS, any such constitutional/legal conflict is easily translated into political conflict, as demonstrated in the aftermath of the *Ng Ka Ling* decision. While the Hong Kong courts will surely not interpret the Basic Law by speculating how the NPCSC would interpret it, they nevertheless have to always keep in mind that whether their interpretation of the Basic Law will stand depends ultimately on the will of the NPCSC.

That the 'counter-Beijing' difficulty exists in the Hong Kong courts' exercise of constitutional review under the Basic Law is, at least partly, nicely spelt out in *Ng Kung Siu*, where, as Chen was quoted above as saying, the CFA had 'acted strategically' 'from a political point of view'. At issue in this case was the displaying of a defaced national flag in a public procession, and the constitutionality of a local legislation⁴⁶ which implemented the national flag and emblem law was challenged. The CFA held unanimously that the law was constitutional, on the ground that the restriction criminalizing desecration of the national and regional flag imposed on freedom of expression was not 'wide' but a limited one, because it banned one mode of expression and did not interfere with the person's freedom to express the same

⁴⁶ Section 7 of the National Flag and National Emblem Ordinance (No. 116 of 1997) and Section 7 of the Regional Flag and Regional Emblem Ordinance (No. 117 of 1997).

message by other modes.⁴⁷ In his concurring opinion, Justice Bokhary PJ, however, quoted the American Justice Kennedy in *Texas v. Johnson*⁴⁸ (the American flag burning case where the relevant state statute was held unconstitutional) as saying,

The hard fact is that sometimes we must take decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.⁴⁹

Has there been expressed any distaste in the decision that the Court in *Ng Kung Siu* 'must make'? This is not a matter of our concern. But what can be inferred from Justice Bokhary PJ's 'hard case' statement is at least the shadow of the 'counter-Beijing difficulty'.

3. The role of the judiciary in preserving OCTS: activism or restraint?

The assertion and the exercise of constitutional review have undoubtedly enlarged the role of the Hong Kong judiciary in operating, developing and preserving the OCTS constitutional order. It gives the judges a much greater say in interpreting the Basic Law. In the absence of a NPCSC interpretation, the Basic Law is actually what the CFA says it is. The vague and abstract concepts and principles prescribed in the Basic Law are to be fleshed out by the judges' filling in the gaps and clarifying the ambiguities. On the other hand, when legislation is struck down for its inconsistency (in the judges' understanding) with the Basic Law, there is inevitably a substitution of the legislative decision with a judicial choice of values and sacrifices, which is in fact, as Justice Holmes put it, 'interstitial legislation'.⁵⁰ The greater say in the interpretation of the Basic Law is therefore a greater part the courts are to engage in politics, though in the name of law. In other words, the Hong Kong judges do not 'simply adjudicate';⁵¹ in fact, they also govern.

⁴⁷ *HKSAR v Ng Kung Siu and Another* [1999] HKCFA 10; [1999] 3 HKLRD 907; (1999) 2 HKCFAR 442 (CFA) para 44.

⁴⁸ 491 US 397 (1988).

⁴⁹ *Ng Kung Siu* para 85.

⁵⁰ Quoted from Edwin F Albertsworth, 'Interstitial legislation by United States' Supreme Court in its Application of Federal Employer's Liability Act ' (1933) *19 American Bar Association Journal* 377.

⁵¹ In his ceremonial opening of the legal year of 2010, the former Chief Justice of the CFA, Andrew Li said that, in exercising the power of constitutional review, the courts are 'simply adjudicating' whether they decide in

It is apparently because of the enjoyment of the power of constitutional review that the courts have proudly been claimed as the guardians of the Region's autonomy, of the rule of law in Hong Kong and of the liberties and freedoms of Hong Kong people. Speaking at the ceremonial opening of the legal year of 2010, the former Chief Justice of the CFA, Andrew Li, reiterated that since the Hong Kong' system involves checks and balances between the Executive, the Legislature and the Judiciary, the role of the independent judiciary in Hong Kong is

to ensure that the acts of the Executive and the Legislature comply fully with the Basic Law and the law and that our fundamental rights and freedoms, which are at heart of Hong Kong's system, are fully safeguarded.⁵²

The claim of the guardianship role is not uncommon where there is a written constitution with an entrenched bill of rights. But the playing out of the guardianship role raises the question of when, and to what extent, the courts should intervene in policy making. As Lord Irvine said:

the more keenly it is felt that the judges are guardians of fundamental rights who serve a central role in ensuring accountable government, the more likely they are to take an interventionist approach, broadly reading the rights themselves while narrowly construing any provisions which appear to inhibit their application.⁵³

A court that is likely to take an interventionist approach is equally likely to be seen as an activist court. The debate over judicial activism and restraint is, as an American commentator noted, as old as modern republicanism itself.⁵⁴ Although the general meaning of the terms 'judicial activism' and 'judicial restraint' is commonly understood, there is obviously no standard definition of what they are. Writing on judicial activism in America,

favour of or against the executive or the legislature. See www.info.gov.hk/gia/general/201001/11/P201001110174 , visited in February 2012

⁵² Ibid.

⁵³ Lord Irvine, 'Activism and Restraint: Human Rights and the Interpretative Process' (1999) 4 *European Human Rights Law Review* 354.

⁵⁴ Richard E. Levy and Robert L. Glicksman, 'Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions' (1989) 42 *Vand L Rev* 347.

Tushnet notes that there is a 'baseline problem' for measuring activism.⁵⁵ Nevertheless, it has been concluded that there are at least five types of activism: (1) striking down arguably constitutional actions of other branches; (2) ignoring precedent; (3) judicial legislation; (4) departures from accepted interpretive methodology; (5) result-oriented judging.⁵⁶ A study of the ECJ's jurisprudence shows that there is yet another form of judicial activism: the Court takes on powers that originally did not belong to it.⁵⁷

Despite the difficulties in defining what activism or restraint means, it is an acknowledged principle that they should be defined and examined in the context of the political system in which the courts operate.⁵⁸ Time, space and circumstances may also have to be taken into account. What amounts to activism in one jurisdiction might not be regarded as such in another; activism at one time in a same jurisdiction might not be condemned as such at another.

Having these thoughts in mind, we shall now proceed to consider whether or not the Hong Kong courts, the CFA in particular, have been activists and what, if any, adverse effects activism may have had on the working of the OCTS framework.

3.1 Activism or restraint in Hong Kong: an overview

There has been quite a lot of literature on the record of the CFA's performance in the first decade and more of the Hong Kong's new constitutional era. But few seem to have accused the CFA of being activist. Two commentator's views seem representative of the overall assessment of the Court's performance. Chen thinks that the CFA, after searching for a decade, has found the golden middle way: in adjudicating the rights of the Hong Kong people, the CFA has been neither radically liberal nor conservative; in tackling the

⁵⁵ Mark Tushnet, 'The United States of America' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (OUP 2007) 416.

⁵⁶ Keenan D. Kmieciak, 'The Origin and Current Meanings of "Judicial Activism"' (2004) 92 Cal L Rev 1463-1475.

⁵⁷ See generally Donna Starr-Deelen and Bart Deelen, 'The European Court of Justice as a Federator' (1996) *Publius: The Journal of Federalism* 81-97; Henri de Waele, 'The Role of the European Court of Justice in the Intergration Process: A Contemporary and Normative Assessment' (2010) 6 *Hanse Law Review* 3-26.

⁵⁸ David F. Forie, 'Introduction' in David F. Forie (ed), *The Supreme Court in American Politics: Judicial Activism vs Judicial Restraint* (D. C. Heath and Company 1972) 1.

relationship with the Central Authorities, it has been 'neither too proud nor too humble'.⁵⁹ Yap argues, slightly differently, that instead of there being a consistent pursuing of a path of 'moderate liberalism', the CFA has been politically pragmatic: it always defers to the Central Authorities when it comes to the validity of NPCSC decisions or national laws; it often gives much latitude to the legislature or the executive when it comes to preservation of peace and order in the Region; only when there is neither NPCSC nor domestic law and order implications is the Court more 'aggressive' in intervening and advancing the development of human rights in Hong Kong.⁶⁰

On the whole, these observations may be right in the sense that the CFA has not always been activist. Whilst the CFA in *Ng Ka Ling* may strike some as an activist (especially in the eyes of the mainland authorities and legal experts), there are indeed cases where the CFA did show a certain degree of restraint. *Lau Kong Yung* and the flag desecration case are often referred to as examples of restraint (though critics condemned these decisions as undermining judicial independence and human rights protection in Hong Kong.)⁶¹ Restraint may also be seen in *Koo Sze Yiu v the Chief Executive of the HKSAR*.⁶² Here, the CFA declared the executive order issued by the Chief Executive to serve as 'legal procedures' according to which to authorize covert surveillance 'unconstitutional', because it viewed that such an order, being an executive one, did not meet the requirement of 'prescribed by law'.⁶³ However, instead of striking down the executive order right out of hand, the Court decided to suspend its declaration of unconstitutionality so as to give the government time to make

⁵⁹ Chen, 'Constitutional adjudication in post-1997 Hong Kong' 629.

⁶⁰ Po Jen Yap, 'Constitutional Review under the Basic Law: The Rise, Retreat and Resurgence of Judicial Power in Hong Kong' (2007) 37 Hong Kong LJ 450-457.

⁶¹ Wacks, for example, took the view that the court's decision in flag desecration case was a setback for the protection of human rights in Hong Kong. See Raymond Wacks, 'Our Flagging Rights' (2000) 30 Hong Kong LJ 3.

⁶² *Koo Sze Yiu v the Chief Executive of the HKSAR* [2006] HKCFA 75; [2006] 3 HKLRD 455; (2006) 9 HKCFAR 441 (CFA).

⁶³ On 27 June 1997 the Interception of Communications Ordinance (Cap 532) (IOCO) was passed, in which a statutory scheme was provided for the prohibition of any interception of communication by post or telecommunications save where such interception was authorised by the order of a High Court judge. But the scheme never came into force because s. 1 (2) of the IOCO provides that "[t]his Ordinance shall come into operation on a day to be appointed by the Governor by notice in the Gazette". But such a day was never appointed neither prior to or after the handover. On 5 August 2005, with a view to coping with this problem by way of an interim measure pending corrective legislation, the Chief Executive published an executive order meant to serve as a set of 'legal procedures' for the purposes of art. 30 of the Basic Law, which provides that the freedom and privacy of communication of Hong Kong residents shall be protected by law, and that no department or individual shall infringe this freedom and right of privacy except 'in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences'.

corrective legislation.⁶⁴ More examples can be added to this list of restraint, but the point has been made.

In examining activism and restraint in Hong Kong, the ‘baseline’ difficulty which Tushnet refers to appears even more troubling. The non-existence of the counter-majoritarian difficulty in Hong Kong, coupled with the fears of ‘one country’ interfering into ‘two systems’, might well encourage the courts to take a more interventionist approach. On the other hand, the existence of the ‘counter-Beijing difficulty’ certainly suggests, if not dictates, that restraints need to be demonstrated in certain time, space and circumstances.

Sir Anthony Mason, the CFA non-permanent justice, was clearly aware of the challenging position the Hong Kong judges are in as compared to other common law jurisdictions. He opined in a CFA decision that

In a nation-wide common law legal system, the link would normally be between the regional courts and the national constitutional court or the national Supreme Court. Here, however, there are not only two different systems, but also two different legal systems.....Article 158 of the Basic Law provides a very different link.⁶⁵

The ‘very different link’ Article 158 provides, as noted in Chapter III, is a compromise which seeks to achieve at once two opposite aims — unifying while separating; a compromise that requires the balancing of activism and restraint. As Yap notes, being part of the link, the Hong Kong judges face a ‘jurisprudential conundrum’, which pulls them in opposite directions: to preserve judicial independence in Hong Kong whilst ‘quelling any concerns from the Mainland that Hong Kong [might become] another ‘renegade province in the South’.⁶⁶ Thus, if they are ‘too aggressive’, they might incur a backlash from the Centre, usually in the form of a NPCSC interpretation or, in extreme case, even an amendment of the Basic Law; if, on the other hand, the courts are ‘too indulgent’ on the HKSAR government,

⁶⁴ The Court imported this constitutional remedy in particular from the Canadian Supreme Court’s decisions in *R v. Swain* ([1991] 1 SCR 933) and *R v. Feeney* ([1991] 1 SCR 933). The Court had also considered the alternative of making a temporary validity order, but ruled it out because it accepted the view that such an order might still give the Government a shield from legal liability, whereas the suspension remedy would not have this effect.

⁶⁵ *Lau Kong Yung and others v The Director of Immigration* [1999] HKCFA 5; [1999] 3 HKLRD 778; (1999) 2 HKCFAR 300 para 159.

⁶⁶ Yap 473.

then ‘the Basic Law would be reduced to a mere hollow shell that only protects constitutional rights on paper but not in practice’.⁶⁷

It is perhaps the ‘very different link’ (which creates the ‘jurisprudential conundrum’) that makes judicial activism a relatively more sensitive issue in Hong Kong, because judicial activism might easily be translated into political disputes. And for this reason, we think that an examination into the activist part of the CFA is necessary.

3.2 Judicial legislation

As mentioned in Chapter I, across common law jurisdictions, the fact that judges do make laws seems to have been increasingly recognized. This being the fact, there seems to be no case to argue against judicial activism in the form of judicial legislation. However, since, under a constitutional system where at least some degree of separation of powers is involved, it is the province of the legislature to legislate and the province of the judiciary to interpret, it is equally undeniable that judicial legislation encroaches on the province of the legislature. Thus, the balanced view is perhaps to perceive judicial law-making as only a minor part of the role the judiciary plays in making the whole constitutional system work — necessary but not to be overplayed. From this perspective, it is possible to accept judicial law-making while refusing judicial activism in the form of judicial legislation. In other words, it is ultimately a matter of degree. The doctrine of deference created and exercised by the English judges is, in our view, the proper way in which judges can have it both ways: to engage in law-making but to refrain from overplaying it.

In Hong Kong, it seems that there has been some degree of judicial activism in the form of ‘judicial legislation’. Most notably, the series of the CFA’s decisions in the right of abode cases has had significant impact on the government’s immigration policy and the Immigration Ordinance has been amended accordingly. Other examples include the CFA’s decision in *Chan Wah*⁶⁸ where the CFA held that the impugned electoral rules violated the

⁶⁷ Ibid.

⁶⁸ *Secretary for Justice v Chan Wah and Another* [2000] HKCFA 43; [2000] 3 HKLRD 641; (2000) 3 HKCFAR 459 (CFA).

appellants' right to equality and non-discrimination. As the result of this decision, the government had to introduce, through legislation, a comprehensive reform of the village election system.⁶⁹ In another case which was decided by the CFI, the government's original scheme of allocation of school places was ruled as breaching the right to equality and non-discrimination.⁷⁰ Thus, the original scheme was forced to be abandoned and a new policy introduced. As Chen rightly observes, these decisions demonstrate the increasingly significant role of the courts in Hong Kong in shaping social policy.⁷¹

More striking than the outcome is perhaps the way in which the CFA exercised the power of constitutional review that indeed gives us a strong impression that it is legislating rather than interpreting. In *Ng Ka Ling*, for example, the CFA not only ruled certain parts of the Immigration law unconstitutional, but also took the trouble to spell out how those parts of the law should be amended. This is how the Court's ruling was given: we [the Court] grant the following declarations and relief:

- (1) A declaration that the following parts of the Immigration Ordinance (Cap. 115) and Regulations (Cap. 115, Sub. Leg.) are null and void and are excised therefrom:
 - (a) The words "subject to s.2AA(2)" in s.2A(1)
 - (b) The words in s.AA (1)(a) other than the following words:.....⁷²

Here, what the Court regarded as 'relief' might well strike many as sheer legislative amendments. We do not have to probe into what these sections of the Ordinance are about to make this point. It suffices to note that this type of words-excising exercise in regard with a piece of legislation is often expected to be seen in the legislative chamber rather than in a courtroom. Moreover, as we all know, an ordinary judicial 'relief' is usually granted to, thus will only be binding on, the parties involved. But the CFA's 'relief' in *Ng Ka Ling*, had its ruling of constitutionality of those provisions of the Immigration Ordinance not been overruled by the NPCSC, would certainly have been transferred into the statute book and thus would go beyond the parties involved and be binding on the general public. Indeed, this was what

⁶⁹ See the Village Representative Election Ordinance, Cap576, The Law of Hong Kong.

⁷⁰ *Equal Opportunities Commission v Director of Education* [2001] HKCFI 880; [2001] 2 HKLRD 690 (CFI).

⁷¹ Chen, 'Constitutional adjudication in post-1997 Hong Kong' 675.

⁷² *Ng Ka Ling and Another v The Director of Immigration* [1999] HKCFA 72; [1999] 1 HKLRD 315; (1999) 2 HKCFAR 4 para 172.

happened in *Leung Kwok Hung*,⁷³ where the French phrase '*ordre public*' was excised from the impugned provision of the POO so as to make the remaining part of the provision stand constitutionally. The LegCo subsequently amended the POO, deleting the French phrase just as the Court had said; there was no challenging but only rubber-stamping.

Some might argue that there is nothing wrong for the Court to grant such relief. They might remind us that the English judges, for example, in implementing the HRA, might also 'read in' or 'read down' a provision of an Act of Parliament so as to reach an interpretation thereof which then leads to relief for the litigant. Such 'reading-in' or 'reading-down', as the argument presumably may go, is an exercise no more different from the Hong Kong judges' words-excising exercise. It is certainly true that the English judges do sometimes read in or read down a parliamentary provision to give it a compatible interpretation with the requirements of Convention rights. In *Ghaidan*,⁷⁴ for instance, the provision of the Rent Act which entitles a person who had lived with the original tenant 'as his husband or wife' to succeed to a statutory tenancy was 'read in' to mean '*as if they were* living as husband and wife'. However, compared to the Hong Kong judges words-excising exercise, the English judges at least, and quite wisely so, formulate their 'reading in' or 'reading down' in a more interpretation-like rather than legislation-like way. They would say that a provision could be read as meaning something different from the plain meaning of the words in that provision. They would not try to rewrite the legislation by expressly changing the black letters of the legislation — by adding or deleting words to or from an existing provision of law, as the Hong Kong judges had done. Even so, the judicial 'reading in' and 'reading down' has also been accused of legislating rather than interpreting. This being the case, it seems that the Hong Kong judges doing the words-excising exercise are equally, if not more, guilty of rewriting the law.

To press the comparison a bit further, judicial legislation in the UK is theoretically always under control and hence its potential threat to the working of the whole constitutional system less worrying. Constrained by the principle of parliamentary sovereignty, whatever

⁷³ *Leung Kwok Hung & Others v. HKSAR* [2005] HKCFA 41; [2005] 3 HKLRD 164; (2005) 8 HKCFAR 229 (CFA).

⁷⁴ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [2004] 3 All ER 411.

the judges have read in or read down is ultimately subject to Parliament's will. In theory, at least, Parliament has the last word on whether the impugned legislation needs to be amended and if so, how. Although in practice, it has seldom happened that Parliament has rejected any judicial 'reading in' or 'reading down' interpretations, and although many of the incompatibility declarations have been followed up by parliamentary revisions of the relevant legislation,⁷⁵ these does not amount to a break-down of the parliamentary sovereignty principle. In so far as this fundamental principle is not shaken at its root, judicial legislation is always open to parliamentary tempering and supervision. Even if the judges have interpreted in a legislating way, Parliament is always able to enact new legislation which replaces the judicial interpretation which may otherwise have remained as effective judicial legislation. In this sense, even though some might also feel that Parliament is no more than rubber-stamping what the judges have said, it could be said that judicial activism in the sense of judicial legislation does not pose practical danger to the effective working of the political system itself. For some, judicial legislation (including the declaration of incompatibility) works to promote constitutional dialogue between the judiciary and the other branches of government; it therefore complements rather than substitutes for Parliamentary legislation.⁷⁶

In contrast, judicial legislation in Hong Kong is under no similar control, at least not within the HKSAR's own political machinery. And as a result, judges are likely to 'run wild'.⁷⁷ The political system in the HKSAR, as we saw in Chapter V, is anything but legislative supremacy. The legislature is constitutionally unable to supervise judicial legislation as the British Parliament is able to. Not surprisingly, the courts' amendments (in the disguise of 'relief') to existing laws are eventually transferred into the statute book, and the courts' rulings on matters concerning public policy are surely to be followed up by the government's overall change of policy so as to meet the courts' requirements. This 'habitual obedience' is very often presented as respecting the rule of law. As the result, while the courts can exert checks and balances on positive legislation, there is no counter-checking and counter-balancing on

⁷⁵ Ian Leigh and Roger Masterman, *Making Rights Real; The Human Rights Act in its First Decade* (Hart Publishing 2008) 113-114.

⁷⁶ For this view, see for example, Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2008).

⁷⁷ I borrow this term from Cappelletti who criticised the ECJ as being an excessively activist judiciary. See Mauro Cappelletti, 'Is the European Court of Justice "Running Wild"?' (1987) 12 *European Law Review* 3-17.

the legislation made by the courts. As shall be seen shortly in a case study, even when it is generally believed that the courts have erred, the legislature or the government seem completely impotent to repair the situation through positive legislation. This is the real danger of judicial legislation in Hong Kong. In the US, unpopular judicial decisions may be countered by the state legislatures or Congress 'routinely enact[ing] laws that conflict with, or at least are strongly in tension with, constitutional rulings by the Supreme Court'.⁷⁸ In Hong Kong, this strategic legislative check and balance on the judiciary is either never thought of or is likely to be disposed of as utterly unthinkable.

Apart from judicial self-correction, the only way that unpopular judicial legislation in Hong Kong may be overruled, if necessary, is to resort to the NPCSC who has the last word on the interpretation of the Basic Law. But the political costs are high. Due to the 'fears and distrusts' that the central authorities may interfere with Hong Kong's domestic affairs through exercising the power of interpretation, neither the Chief Executive nor the NPCSC itself is willing to resort to this final rescue unless they feel compelled to. Moreover, although the NPCSC has the power to interpret any provision of the Basic Law, it is generally expected that it shall not overrule an interpretation of a non-excluded provision by the Hong Kong courts, since it has authorized the Hong Kong courts to interpret those provisions on their own. One may quite safely say that unless in extreme cases, an overruling of such an interpretation is very unlikely. This being the case, it seems that judicial legislation via the interpretation of the non-excluded Basic Law provisions is practically subject to no control, no checking and balancing whatsoever. Thus, the more active the CFA is, the greater danger there will be of de facto judicial supremacy in Hong Kong.

3.3 Taking the Basic Law out of the NPCSC

Apart from judicial legislation, we may also see an activist CFA in its attempts to take on new

⁷⁸ F. Andrew Hensick, 'Rethinking the Presumption of Constitutionality' (2010) 85 Notre Dame L Rev 1466. The author noted examples of various state laws authorising the death penalty after the Supreme Court's ruling in *Furman v Georgia* (408 U.S. 238 (1972)), the federal law (The Flag Protection Act of 1989) against flag burning following *Texas v Johnson* (491 U.S. 397 (1989)), the federal restriction on indecent communication over the internet following *Sable Communications of California, Inc. v FCC* (492 U.S. 115 (1989)).

powers by 'taking the Basic Law out of the NPCSC'.⁷⁹ In fact, this point has been touched upon in our earlier discussions (in Chapter IV as well as the second section of this Chapter). Here we need only to re-present and further elaborate some of the things the CFA had done as evidence of activism.

The first thing to be re-presented is the Court's introduction of the predominant provision test into the reference system according to which the CFA should seek an interpretation from the NPCSC. As argued in Chapter IV, under the reference system as stipulated in Article 158 of the Basic Law, whenever an excluded provision is involved, the CFA should make a reference to the NPCSC. But with the predominant provision test, the Court will only make a reference to the NPCSC when the predominant provision to be interpreted in the case at hand is an excluded provision. This has already limited the scope the reference system designed to cover. What is more, the Court has meanwhile claimed that it is for the courts, and for them only, to decide which provision is the predominant one that needs to be interpreted in a particular case.

Clearly, there is nothing in Article 158 about a predominant provision test as the basis of the operation of the referral system. This is a sheer judicial creation which expands the courts' power in the interpretation of the Basic Law while limiting that of the NPCSC. What the CFA has done here is similar to the ECJ's introduction of the principle of the supremacy of EU law and the principle of horizontal effect, by which the ECJ elevated itself as the motor of European integration.⁸⁰ If the ECJ's doctrinal creation carries 'an indelibly activist mark',⁸¹ so does the Hong Kong CFA's introduction of the predominant provision test. What is different, interestingly, is that while the ECJ's activism is driven towards 'integration' and 'harmonization' (of law within the EU), the Hong Kong CFA's activism is geared to keep the 'separation' and 'segregation' of Hong Kong from the other system practised in the mainland, or in the Court's vision, to guard Hong Kong's autonomy.

The second example of the CFA grasping power is the adoption of the 'common law

⁷⁹ P.Y. Lo, 'Rethinking Judicial Reference: Barricades at the Gateway?' in Hualing Fu, Lison Harris and Simon N. M. Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave 2007).

⁸⁰ Starr-Deelen and Deelen 81.

⁸¹ Waele 5.

approach' towards an interpretation of the Basic Law issued by the NPCSC. As discussed in Chapter IV, the CFA in *Chong Fung Yuen* adopted this approach to reinterpret the NPCSC's Interpretation of Articles 22 (4) and 24 (2) (3) of the Basic Law to the effect that part of the NPCSC's interpretation was treated as an unbinding common law dictum. Thus, the Court has managed to put its common law approach over the NPCSC's legislative approach to the interpretation of the Basic Law and in this way it has in effect further limited the NPCSC's power of interpretation while expanding its own.

Finally, we should mention the CFA's approach to the issue of 'the laws previously in force in Hong Kong'. As mentioned in the previous section, by virtue of Article 160, the power to decide which previously in force law shall be adopted as a law of the HKSAR belongs to the NPCSC, and subsequent discovery of any previously in force law being inconsistent with the Basic Law 'shall be amended or cease to have effect' in accordance with the procedures prescribed by the Basic Law. In *Hung Chan Wa*, the CFA made it clear the procedure referred to in Article 160 was a legislative one. As such, and given the fact that the NPCSC in its 1997 Decision had made a comprehensive review of the laws previously in force in Hong Kong, it seems to follow naturally that should any previously in force law, which had not been declared by the NPCSC as inconsistent the Basic Law and which had therefore been adopted as the laws of the HKSAR, be subsequently challenged for their constitutionality, it should be examined against the Basic Law.

But in *A Solicitor* the CFA took a very different line. In *A Solicitor*, section 13 (1) of the Legal Practitioners Ordinance (LPO), which is known as the 'finality provision' because it provides that appeals under the LPO shall lie to the CA and that the decision of the CA on such an appeal shall be final, was challenged for its consistency with the Basic Law. Now, as a matter of fact, this law had been in the Hong Kong statute book long before the handover, and it had not been repealed nor had it been declared as invalid by a pre-1997 court decision. Nor did the NPCSC in its 1997 Decision declared the LPO (in its entirety or the finality provision in particular) as inconsistent with the Basic Law. Thus, it follows logically that, as a previously in force law, it had been adopted as part of the laws of the Region. The challenge to its validity or constitutionality, one would think, should be entertained by squaring it with the Basic Law. But the CFA did not follow this line. Instead, it said that the first question to be dealt

with was to ascertain whether the finality provision was a previously '*in force*'⁸² law. The Court said, by virtue of the Basic Law provisions, it was obvious that 'a law which was previously not *in force* does not qualify' as part of the laws previously *in force* in Hong Kong'. For this reason, the Court added that the words 'in force' must be given their proper meaning'. In other words, for the Court, what was 'previously in force' is not to be treated as a matter of historical fact, but as a matter of current interpretation, and the interpretation is to be done by the CFA.

More surprisingly, the Court went on to examine the validity of the finality provision against the Colonial Laws Validity Act, the Judicial Committee Acts⁸³ and Orders in Council⁸⁴ which regulated Hong Kong's appeal to the Privy Council in pre-handover time — all of these laws had ceased to apply to Hong Kong as of 1 July 1997, and declared that the finality provision 'was and remained absolutely void and inoperative'.⁸⁵ As such, the Court said, it was not a law 'previously *in force*' within the meaning of the Basic Law and thus would have no effect on 1 July 1997. Having reached this conclusion, the Court said that it was 'strictly unnecessary' to decide whether the finality provision was consistent with the Basic Law.⁸⁶ It nevertheless went on to decide it, because it regarded it as 'an issue of considerable importance'.⁸⁷ It held that the finality provision, should it be a valid law, would constitute a 'further limitation' on the CFA's appeal jurisdiction, which was absolute and failing the test of proportionality.⁸⁸ It therefore ruled that the finality provision was inconsistent with the Basic Law and was unconstitutional and invalid.⁸⁹ In the end, the Court said that 'although the validity of the finality provision had to be tested against different instruments before and after 1 July 1997, that is, the Colonial Laws Validity Act and the Basic Law respectively, the same result is reached'.⁹⁰

⁸² *A Solicitor* para 12. The Court's own emphasis.

⁸³ The Judicial Committee Act 1833 and the Judicial Committee Act 1844 which established the Privy Council to entertain appeals from colonial courts.

⁸⁴ According to the Judicial Committee Act 1833, Orders in Council may be made for regulating appeals from a particular jurisdiction. The Order in Council of 1909 and The Order in Council of 1982 were made to regulate appeals from Hong Kong.

⁸⁵ *A Solicitor* para 20.

⁸⁶ *Ibid* para 24.

⁸⁷ *Ibid*.

⁸⁸ *Ibid* para 39. It is interesting to note that the Court applied the test of proportionality to define the scope of its power.

⁸⁹ *Ibid* para 41.

⁹⁰ *Ibid*.

Technically, as one commentator noted, the CFA might have been right in the conclusion that the finality provision was invalid under the Colonial Laws Validity Act, but its power to make such a declaration is to be questioned. How can it 'declare a law whose validity was preserved by the Basic Law inconsistent with a defunct foreign statute, no longer in force in Hong Kong after the handover'?⁹¹

There is indeed a serious constitutional problem here. By the CFA's approach, all pre-handover enacted laws could be examined against the Colonial Laws Validity Act and other British laws applied to Hong Kong before determining whether they were previously *in force*. In this way, the Court had in fact grasped the power to determine what the previously in force laws were, a power which does not belong to it but to the NPCSC. Thus, not only the NPCSC's 1997 Decision has in effect been rendered largely meaningless, but more seriously, the 'ceased to apply' British Laws were resurrected and to be applied by the Court to determine which was or was not a previously in force law. It would not be too strong to say that this is not only usurpation of power but a denial of the transfer of sovereignty. Indeed, *A Solicitor* is a strange decision, and the Court's reasoning very much strangled. Nothing similar was found in later judicial decisions. One would therefore assume that it was a mistaken exception, not a rule. Otherwise, it would not be surprising that the NPCSC might have to take action to right the CFA's wrong.

3.3 The adverse effects of activism: a case study

Wherever it is the order of the day, judicial activism tends to have a significant impact on the working of the constitutional system. In the US, the activist Warren Court had been criticized for having 'wrought more fundamental changes in the political and legal structure of the United States... since the Marshall Court'.⁹² Moreover, as critics of the Warren Court's activism also protested, even if the outcomes of some of the Court's decisions had been desirable, the Court was nevertheless not the proper institution to initiate them. By those

⁹¹ Yap 468.

⁹² Phillip Kurland, 'The Supreme Court 1963 Term, Forward: Equal in Origin and Equal in Title to the Legislative and Executive Branches of Government' (1964) 78 Harv L Rev 143.

activist judgments, the Court had in fact not only transgressed into the province of the legislature, but assumed the illicit role of a super legislature.⁹³ Similar criticisms have been launched against the activism displayed by the ECJ.⁹⁴

In Hong Kong, the adverse effects of the two forms of activism we have mentioned above can be examined by a case study. At the time of writing (in the spring of 2012), a political crisis between Hong Kong and the mainland is creating mounting pressure on the authorities across the border. The crisis involves pregnant women from the mainland entering Hong Kong to give birth to their babies.⁹⁵ The very cause of this tension is the CFA's ruling in *Chong Fung Yuen*, where the Court, ignoring the NPCSC's statement on the legislative intent behind Article 24 of the Basic Law, ruled that Chinese citizens born in Hong Kong are entitled to the right of abode in Hong Kong, regardless of whether or not their parents are Hong Kong permanent residents. As the result, an increasingly large number of mainland pregnant women are now coming to Hong Kong, legally and illegally, to give birth to their children.⁹⁶ They are not only taking advantage of the Court's decision to obtain a Hong Kong permanent resident status for their children, but also escaping from the 'one family, one child' policy in the mainland. In the local Chinese media these children are referred to as '双非'(Shuang-fei) children—meaning that both of their parents are not Hong Kong permanent residents. For our purpose they will hereinafter be referred to as the 'BPnPR children'.

The pressure of the 'BPnPR children' problem is more immediately felt on the Hong Kong side. Local medical resources, including the number of labour-wards, doctors, midwives and

⁹³ J. Skelly Wright, 'The Role of the Supreme Court in a Democratic Society-Judicial Activism or Restraint?' (1968) 54 *Cornell Law Review* 1.

⁹⁴ See for example Starr-Deelen and Deelen.

⁹⁵ This tension has dominated local mass media headlines in the Spring of 2012. On 1 February 2012, a local newspaper, (苹果日报, The Apple Daily), published a full-page advertisement titled 'We the Hong Kong people are fed up' (香港人受够了), where it insulates mainland people as 'locusts' and calls for an amendment to Article 24 of the Basic Law so as to stop mainland pregnant women from coming to Hong Kong to give birth to their babies. The advertisement immediately stirred up strong resentment from people in the mainland. Bloggers pasted posts saying that if it had not been the mainland 'Abba' supplying food and water for the 'son', Hong Kong could have been dead long ago. (This fireback from the mainland was reported by the Apple Daily itself). The tension was further worsened when later on, in a live television talk-show, a professor from Beijing University was heard of calling Hong Kong people as 'dogs'.

⁹⁶ It was reported that more than 32 thousand such babies were born in 2010, amounting to 40 per cent of the year's total number of new born babies in Hong Kong, and the number was 50 times more than the number of such babies born in Hong Kong in the year when *Chong Fung Yun* decision was handed down. See 成报社评 (Singpao Editorial), '解决'双非'问题政府必须早抉择' (Urgent government decision needed to tackle the BPnPR children issue), 成报 (Singpao), 01/02/12.

nurses, are limited to cope with this large influx of mainland pregnant women. More significantly, the large increase of the 'BPnPR children', as they are entitled to right of abode in Hong Kong, also poses great pressures on other social resources and public services in Hong Kong, like public housing, school places and general welfare. If it was first an immigration problem, it has now certainly turned into a social, economic, legal as well as a political one.

The HKSAR government is currently taking some administrative measures to stop mainland pregnant women from entering into Hong Kong to give birth to their babies.⁹⁷ It has also asked the mainland authorities to help. The neighbouring Guangdong Province has thus also taken actions to crack down on agencies which help pregnant women traveling into Hong Kong. Although these executive measures from both sides of the border are having some real effect in reducing the number of mainland pregnant women coming into Hong Kong, a view widely held by the general public is that they are not the ultimate cure to the ill. It is clear to many that as long as the 'BPnPR children' are entitled to a Hong Kong permanent resident status, there are always the temptation and motivation for mainland pregnant women to manage to enter into Hong Kong, one way or another.⁹⁸ In the words of the former Secretary for Justice, Elsie Leung, the 'BPnPR children' problem is a legal one which can only be solved through legal means.⁹⁹

Apparently, as the root of the issue lies in the CFA's interpretation of Article 24 (2) (1) of the Basic Law, any legal means to solve the problem necessarily requires overturning that interpretation. As can be anticipated, there are three possible ways of achieving this. One is for the NPCSC to issue an interpretation, the second is for the NPC to amend the relevant article of the Basic Law, and the third is for the CFA to correct its own wrong. But views differ fundamentally as to which is the appropriate way to go.

⁹⁷ These measures include tightening immigration check point control, doubling the hospital fee for mainland pregnant women and prosecuting illegal agents who help the mainland pregnant women enter Hong Kong. The authority is now considering further administrative measures to prohibit all public hospitals from accepting mainland pregnant women, and to narrow the ratio for private hospitals to take in mainland pregnant women.

⁹⁸ There is an agreement between Hong Kong and the mainland which permits mainlanders to make individual travel (自由行) to Hong Kong. This agreement makes it more difficult to refuse granting a travel permit to, for example, a woman in her early pregnancy.

⁹⁹ See 文汇报 (Wenweipao), '梁爱诗倡特首提请释法' (Elsie Suggests NPCSC interpretation), 10/03/12.

The former Secretary for Justice is among the many that are in favour of a NPCSC interpretation. The Hong Kong delegates to the NPC, when attending the once-in-a-year NPC assembly, made the same suggestion to the NPC.¹⁰⁰ But it seems that the NPCSC is not willing to issue an interpretation, at least not out of its own initiative; nor does the HKSAR government appear to be willing to seek an NPCSC interpretation. For the NPCSC, it may well take the position that it had actually interpreted Article 24 (2) (1) in the 'legislative intent statement'. A NPCSC 'own-initiative' interpretation, which if merely repeats what it had previously said, as some may say, is but self-inflicted damage to its own authority.¹⁰¹ Thus, the Chairman of the BLC, Qiao Xiaoyang, is reportedly saying that, should there be a need for a NPCSC interpretation, it would be most preferable if the CFA make a reference in accordance with Article 158 of the Basic Law.¹⁰² As for the HKSAR government, the Secretary for Constitutional Affairs has spoken publicly that the government 'still respects' the CFA's decision in *Chong Fung Yuen* and that 'it will only act in accordance with law'.¹⁰³ The Secretary for Justice, on the other hand, has publicly warned that great caution must be taken in considering an NPCSC interpretation, for it may endanger the rule of law in Hong Kong.¹⁰⁴ What is more, at the same time when this debate was gaining heat, Hong Kong held the election for a new Chief Executive, who will take office on 1 July this year.¹⁰⁵ The incoming change of government thus makes it even more unlikely for the government to seek a NPCSC interpretation, at least not in a near future. The new Chief-Executive-elect reportedly said that although a NPCSC interpretation is an option, it is 'the water too far away to quench the fire near at hand'.¹⁰⁶

The solution of amending the Basic Law is supported by those who had always supported

¹⁰⁰ The Hong Kong delegates' suggestion was widely covered in local media.

¹⁰¹ Rita Fan, a NPCSC member, former Chairperson of the LegCo, holds this view. See 成报 (Singpao), '遏止「双非」孕妇涌港 应先由港自行解决' (It should be first of all up to Hong Kong itself to stop the mainland pregnant women from coming into Hong Kong), 12/03/12.

¹⁰² See 星岛日报 (Singtao), '乔晓阳敲定不修法处理双非' (Qiao Xiaoyang decides not to amend the Basic Law to deal with the 'BPnPR children' problem), 07/03/12.

¹⁰³ See 新报 (Hong Kong Daily News), '林瑞麟：尊重 2001 年庄丰源案判决 内地妇来港产子减两成' (Stephen Lam : Government respects *Chong Fung Yuen* 2001; Mainland pregnant women coming to Hong Kong to give birth to their babies decreased by 20 per cent), 11/03/12.

¹⁰⁴ See 成报 (Singpao), '遏止「双非」孕妇涌港 应先由港自行解决' (It should be first of all up to Hong Kong itself to stop the mainland pregnant women from coming into Hong Kong), 12/02/12.

¹⁰⁵ The election was held on 25 March 2012.

¹⁰⁶ See 新报 (Hong Kong Daily News), '香港小中国大, 双非多资源少' (Small Hong Kong, big China, lots of BPnPR children but limited resources), 31/01/12.

the CFA's ruling and interpretation in *Chong Fung Yuen*. For them, the meaning of Article 24 (2) (1) is clear and unambiguous and the CFA in *Chong Fung Yuen* had rightly interpreted it according to its plain meaning. Thus, a NPCSC interpretation would only twist the already clear meaning and would amount to a serious damage to the authority of the CFA and the rule of law in Hong Kong. If, they argue, the Article is no longer applicable to the changed circumstances, the ideal solution is to amend it. They argue further that since there is now general consensus that the 'BPnPR children' should not be entitled to a permanent resident status, it would not be controversial to amend the Basic Law to this effect.¹⁰⁷ But this option seems to have already been ruled out by the Beijing authorities. Qiao Xiaoyang has again spoken publicly that it is not appropriate to resolve the 'BPnPR children' problem through amending the Basic Law.¹⁰⁸ Beijing authorities have long been reiterating the position that, for the sake of maintaining the authority of the Basic Law, amending it is a serious matter that should not be taken lightly. More practically, one might think that once the window for amendment is open, different appeals may come rushing in – appeals such as speeding up the 'double universal suffrage' democratization process, which the authorities might find it difficult not to consider, but hard to agree on or compromise with. Having these in mind, one would daresay that there is not even the slightest chance to solve the 'BPnPR children' problem through amending the Basic Law.

The third alternative, which Qiao Xiaoyang is also quoted as saying as being 'relatively feasible', is for the CFA to 'correct' its own ruling.¹⁰⁹ But will the CFA deem its decision in *Chong Fung Yuen* as a wrong that needs to be righted? Even assuming that the Court is likely to be influenced by public opinion and thus be willing to overrule its own decision, which is nothing unusual in the common law tradition, the Court simply cannot act unless and until there is a concrete case put before it. It would be difficult to imagine any of those pregnant women or their children being willing to file a case against themselves, i.e. to get rid of what they had wanted in the first place. Supporters of this option have suggested that the

¹⁰⁷ The Democratic Party Chairman 何俊仁 and vice Chairwoman 刘慧卿 (both are Legislative members) have reportedly expressed these views. See for example, 明报 (Mingpao), '行政措施若难阻双非 范太吁考虑释法' (Administrative measure can hardly solve the BPnPR children, Rita Fan suggests NPCSC interpretation), 31/01/12.

¹⁰⁸ See 文汇报 (Wenweipao), '乔晓阳: 不宜修改《基本法》' (Qiao Xiaoyang: amending the Basic Law is not an good idea), 08/03/12.

¹⁰⁹ Ibid.

government could refuse to issue birth certificates to the new born 'BPnPR' babies so as to induce judicial review.¹¹⁰ But as supporters of the amending option protested, should government act in this way, it would certainly be abusing the judicial process.¹¹¹ Given that the government 'still respects' the *Chong Fung Yuen*, it seems very unlikely that it would be willing to follow this suggestion.

So, while all the three solutions seem equally possible in theory, none seems available in practice. A LegCo member has come up with a fourth solution. It is reported that he intends to submit a private member bill to amend the Immigration Ordinance so as to implement the legislative intent of Article 24 (2) (1) as stated by the NPCSC and in this way, to disentitle the 'BPnPR children' from the right of abode in Hong Kong.¹¹² Two local barristers have expressed opposing views on this solution. One supports it and thinks that it is even a better solution than seeking a NPCSC interpretation; the other is against it for he thinks that this solution does not respect the CFA's ruling and is counter-rule-of-law. The latter also holds the view that the CFA's interpretation of Article 24 (2) (1) simply cannot be overturned by local legislation.¹¹³ The legislator himself is not sure whether such a private bill, which according to Article 74 of the Basic Law requires the 'written consent of the Chief Executive', might be approved by the government.¹¹⁴

At the time of writing, it is not at all clear how the 'BPnPR children' issue will be resolved.¹¹⁵ Nor is it clear how long it will take. To the extent that there is a stagnation of the state of affairs, the OCTS machinery does not seem to be working properly. On the one hand, the other branches within the HKSAR government are seemingly impotent to take action—

¹¹⁰ Ibid. 谭惠珠 (Maria Tam), a former Basic Law drafter and currently a member of the BLC, holds this view.

¹¹¹ 张达明 (Eric TM Cheung), a Hong Kong University associate professor in law, expressed this view. See 信报 (Hong Kong Economic News), '乔晓阳: 终院可「自我纠正」'(Qiao Xiaoyang: CFA could correct its own wrong), 09/03/12.

¹¹² See 明报 (Mingpao), '王振民, 陈弘毅: 京不会主动释法' (Wang and Chen: Beijing would not go for an own-initiated interpretation), 13/03/12.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Note: by the time when this thesis is submitted (at the end of September 2012), there is not yet any clear sign of how this matter will be solved. The newly elected Chief Executive, CY Leung, and his team were sworn in on 1 July 2012. The new Secretary for Justice Rimsky Yuen told reporters several days after taking office that the Government would come up with a solution within three months. He said that he could not give a blank cheque promise not to seek NPCSC interpretation, and that amending the Basic Law is the last option to go for. See 明报 (Mingpao), '袁国强: 解决双非不贸然释法' (Rimsky Yuen: An NPCSC interpretation should not be rashly sought for to solve the 'BPnPR children' issue), 08/07/12.

action without inviting the intervention of the NPCSC — to repair the damage the CFA's decision has done. This has worrying implications, especially if, as the CFA in *Chong Fung Yuen* insisted, the right of abode issue is regarded as solely within the Region's autonomy. If domestic affairs cannot be settled domestically, one surely will question whether the HKSAR government is workable. On the other hand, the power of the NPCSC to give a final and authoritative interpretation on any provision of the Basic Law would suggest that there should not be any deadlock in the implementation of the Basic Law. But in the present case, the NPCSC is seemingly unwilling to issue an interpretation unless asked to. This attitude of the NPCSC thus throws the ball back to the side of the court of the HKSAR. But neither the HKSAR government nor the CFA appears willing to make such a request. The self-restraint on the part of the NPCSC would normally have been welcomed, but in this particular case, this self-restraint seems at best a bit out of touch with the reality, at worst shrinking from its supervision responsibilities.

However, if anyone is to blame, it has to be the CFA. The serious social adverse consequence of the *Chong Fong Yuen* decision speaks for itself that the Court's common law reading of Article 24 (2) (1) of the Basic Law might have unfortunately been wrong and that the Court could have decided the case differently. Yet, if this is a wrong, it could have been avoided, had the Court been more prudential towards policy making and less confrontational to the NPCSC's interpretative power. What we might learn from this case study is perhaps that Hong Kong may also need a deference jurisprudence¹¹⁶ which must take into account of the time, space and circumstances factors which distinguish present Hong Kong from its past and from other jurisdictions.

Conclusion

Constitutional review by ordinary courts tends to provoke tensions between the elected branches of government and the unelected judiciary. This is the democratic difficulty with judicial constitutional review, a difficulty once referred to as the counter-majoritarian

¹¹⁶ It seems that some kind of deference is emerging in the Hong Kong courts' jurisprudence. See generally Cora Chan, 'Deference and the Separation of Powers: An Assessment of the Court's Constitutional and Institutional Competences' (2011) 41 Hong Kong LJ .

difficulty. In Hong Kong, this difficulty seems quite irrelevant. Instead, it has been due to the lack of democracy that judicial constitutional review in Hong Kong has gained the public's support. Lying behind this development are perhaps the deep rooted fears and distrust of the all mighty sovereign power devoted to communism crashing the cherished values of, say, freedom, the rule of law and the protection of human rights, preserved under the capitalist system in Hong Kong. As long as there remain the tensions between the two fundamentally different systems, there will remain those fears and distrust. And people may well keep on laying their trust in the independent judiciary more than in anyone else in speaking up for the Basic Law. Judicial constitutional review is seemingly undemocratic. But in Hong Kong, it seems that judicial constitutional review works to off-set the structural democratic deficits; it is therefore democratically justified in a pragmatic way.

The Hong Kong courts' jurisdiction of constitutional review, however, is a limited one. At the general level, the lack of the final power to interpret the Basic Law means that, at least in theory, the outcome of constitutional review by the HKSAR courts is always subject to or can be overruled by the interpretative supremacy vested in the NPCSC. The CFA's adjudication of any individual case will be final; its interpretation of the Basic Law, however, is not; nor, it follows, is the CFA's ruling on the constitutionality of a law vis-à-vis the Basic Law. At the micro level, there remain huge theoretical uncertainties as to whether the HKSAR courts have the justification in reviewing the constitutionality of sovereign acts or the national laws applied to Hong Kong. Practically, the political pressures in those hard cases may be so huge that the judges may feel better to take decisions which they do not like. Moreover, there are the Article 17 and Article 160 questions from which further limitations on the courts' jurisdiction may stem. Given all this, there is indeed a counter-Beijing difficulty with judicial constitutional review in Hong Kong, in both legal and political senses.

Nonetheless, the assertion of the power of constitutional review has greatly enlarged the courts' role in the working of the OCTS framework. In the absence of the NPCSC's intervention, the Basic Law is practically what the judges say it is. With the power of constitutional review comes the question of judicial activism. The HKSAR courts, the CFA in particular, may also be seen as being engaged in activism when they give relief by not only holding a law unconstitutional but also actually rewriting the law or when they try to dilute

the binding effect of a NPCSC interpretation. The recent scenario of the ‘BPnPR children’ issue in Hong Kong nicely demonstrates the adverse effects judicial activism has on the working of the OCTS framework. The OCTS design is unique, but the tensions inherent are great. Sensible judicial restraint seems to fit better with OCTS. In developing Hong Kong’s own constitutional jurisprudence, the Hong Kong courts have been enthusiastic about comparative materials. Perhaps a lesson of the Thayerian clear-mistake rule or the British doctrine of judicial deference could help to build a more sustainable empire of constitutional review in Hong Kong.

Conclusion

A decade and more after the Chinese resumption of sovereignty over Hong Kong, the *Fortune* magazine, which published the fortune telling by Louis Kraar in 1995 predicting the death of Hong Kong, admitted that it got it wrong. It went on to acknowledge that, Hong Kong, after its return to China in July 1997, not only survived but thrived under the OCTS framework.¹ Chris Patten, the last governor of Hong Kong, in an interview with Phoenix Satellite TV (Hong Kong) in 2012, said that the past decade had proved that the principle of OCTS could work and indeed the implementation of OCTS had been a success.² In the latest six-monthly report on Hong Kong, the UK government concluded that

in general, “One Country, Two Systems” principle enshrined in the Joint Declaration continues to work well and that the rights and freedoms guaranteed in the Joint Declaration have been respected.³

However, there had been, and most likely will still be, twists and turns, in the implementation of the unique constitutional framework of OCTS, given its inherent tensions. OCTS ingeniously accommodates communism and capitalism. But the two fundamentally different ideologies can hardly be a merry couple together. The first constitutional crisis in the post-1997 era broke out shortly after the handover. The very cause of the crisis was the CFA’s assertion in *Ng Ka Ling* of the power of constitutional review under the Basic Law.

But nowhere in the text of the Basic Law is it expressly provided that the courts have this power. Like John Marshall in *Marbury v Madison*, the CFA in *Ng Ka Ling* might also be accused of usurpation. Otherwise, the power of constitutional review under the Basic Law has to be justified in the principles and the spirit of the Basic Law. The CFA in *Ng Ka Ling* attempted to justify its assertion of constitutional review on the grounds that the Basic Law is the constitution of Hong Kong and that the independent judiciary has a constitutional role

¹ Xin Dingding, 'Reports of Hong Kong's 'death' greatly exaggerated' *China Daily (Hong Kong Edition)* (Hong Kong June 8, 2012).

² Max Kong, 'One country, two systems' a success' *China Daily (Hong Kong Edition)* (Hong Kong August 7, 2012).

³ Government Report, *Six-monthly Report on Hong Kong: 1 July – 31 December 2011* (Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, February 2012, 2012), see <http://www.fco.gov.uk/resources/en/pdf/publications/annual-reports/hong-kong-report-jul-dec-11>, accessed in July 2012.

in checking the other branches of government, and indeed the central authorities, to ensure that they act in accordance with the Basic Law. Does this justification stand? And if it does, what then is the scope of the power of constitutional review under the Basic Law?

History may be relevant but does not necessarily provide the answers to these questions. In Hong Kong, constitutional review did not exist in its long pre-handover history. But history made a significant turn in 1991 when the Hong Kong Bill of Rights was enacted, by the way of incorporating the ICCPR as applied to Hong Kong into domestic legislation. The Bill of Rights 1991 gave the Hong Kong judges a new interpretative power which was in essence, though not in name, a power of constitutional review. Truly, constitutional review had emerged in Hong Kong as part of the Bill of Rights jurisprudence. But, of course, that part of the pre-handover history cannot answer the question of whether the HKSAR courts have the power of constitutional review under the Basic Law. Hong Kong was given a fresh start under the OCTS arrangements. Although many things, including the legal system previously in force in Hong Kong, have been maintained intact, OCTS is a new and fundamentally different constitutional order which makes present Hong Kong constitutionally different from what it used to be under the British rule. Thus, nowhere but in the Basic Law can the answer to this particular question possibly be found.

Constitutional review has become an eminent feature of modern constitutionalism throughout the world. How this practice is justified elsewhere is surely to throw light on how it can be justified in Hong Kong under the Basic Law. In the case like Hong Kong, where the power of constitutional review is exercised by the judges sitting in the ordinary courts, an enquiry into its justification has two main questions to answer: why is constitutional review necessary, and why should this task be entrusted to the judges?

The theories of Kelsen and Dworkin are authoritative, though in seemingly opposing ways, in explaining the necessity of constitutional review. According to Kelsen, a state is a legal order in a hierarchical structure and the constitution is the highest law of that hierarchy. The function of the constitution is to provide the grounding of validity. It follows logically that any law inconsistent with the constitution should be null and void. Constitutional review is therefore an absolute necessity, for without it the authority of the constitution cannot be

upheld. In contrast, Dworkin, in accordance to his theory of law as integrity, advocates a moral reading of the constitution. Dworkin's moral reading of the constitution is centrally rights-based. According to Dworkin, rights exist outside of the written law and precede the interest of majority. As such, a right is and must be a trump over political and social considerations. For Dworkin, it is very much the nature of rights and the trumping power inherent in rights that provide the basis for constitutional review. If Kelsen's pure law or scientific justification of constitutional review is purely positive, Dworkin's moral-reading justification is by and large a normative one.

However, neither the Kelsenian nor the Dworkinian justification for the necessity of constitutional review, each standing alone, seems sufficient. As has been argued, law has two faces, one looking to the real world and the other the ideal world. A strict separation between positivism and the normative conception of law is perhaps not helpful. Whilst the positivists may have difficulties in answering the question of whether an unjust law is law, the normative theorists may have difficulties in explaining why what is law here is not law there and why within the same legal system some laws do have higher legal effects than others. It may be that the question 'what is law?' is better understood if law is perceived as the coin that has two sides, one positive and the other normative. If so, it may well be submitted that the true justification for the necessity of constitutional review has two aspects: positive and normative; it is not 'either, or', but both.

This seems to be the core argument of the comparative lawyer Mauro Cappelletti. In Cappelletti's view, the institution of modern constitutional review represents a synthesis of the seemingly contradictory schools of thoughts (positive and natural law). For Cappelletti, a written constitution is the positivization of the higher principles and values and constitutional review is the necessary means in guaranteeing these enshrined principles and values. As Cappelletti understands it, the making of modern constitutions marks the beginning of the age of constitutional justice, which combines the form of legal or positive justice and the substance of natural justice. Accordingly, the constitution is a higher law not only in the positive sense but also in the normative sense. And it is in this understanding of the supremacy of the constitution that lies the true justification for constitutional review. The development of constitutional review in the US and more recently in the UK may prove

the soundness of Cappelletti's theory.

However, Cappelletti's 'positivization of higher law' theory does not answer the question of who should be entrusted to the task of constitutional review. As a matter of fact, there are different models of constitutional review throughout the world. In the US, constitutional review is known as judicial review because it is done in the ordinary courts. In European countries like Austria, Germany or Italy, constitutional review is exercised by the special tribunal of the constitutional court. Thus, the American model is decentralized and the continental European model is centralized. In the UK, constitutional review under the HRA is yet a third model. While the UK courts play an important role in scrutinizing legislation for their compatibility with Convention rights, they do not have the final word on the validity of the repugnant legislation; that final word remains in Parliament. Indeed, what model of constitutional review is appropriate is a prudential matter to be decided in the context of a particular constitutional order.

The justification for judicial constitutional review, as the American experience shows, seems to be a two-fold one. On the one hand, the principle of separation of powers inserted with the mechanism of checks and balances gives the judiciary a constitutional role to check and balance other branches of government, so as to ensure that they act in accordance with the constitution. On the other hand, there needs to have a final arbiter in the interpretation of the constitution and the courts are most appropriate for this task. Without an authoritative final arbiter, as Learned Hand points out, the whole system based on separation of powers simply will not work, if not collapses.

The nature of constitutional review is not merely interpretative but also legislative. As such, and especially in jurisdictions where this awesome power is exercised by the judges, there is always the danger of judges stepping in the shoes of the legislature. The fact that judges are unelected and unaccountable to anyone makes this judicial intervention all the more problematic. It is not overstating to say that judicial activism may lead to judicial supremacy. If judicial constitutional review is justified on separation of powers, abuse or misuse of the power of constitutional review, which leads to judicial supremacy, is likely to endanger the workability of the whole system, if not to make it collapse. Lest this may happen, due judicial

deference seems desirable. The Thayerian advice that judges should only intervene when there is a clear mistake, though advocated a century and more ago, is still of great value today. The British doctrine of judicial deference, most clearly demonstrated in the HRA jurisprudence, as Lord Irvine puts it, shows a healthy and pragmatic perception of the role of the judiciary. Lord Hoffman sums up with genuine insight: restraint is the courts' source of power.

Those are food for thought. In short, it is considered that the justification of constitutional review under the Basic Law in Hong Kong may be assessed in light of these theories. While Cappelletti's 'positivization of higher law' theory, understood in light of Kelsen's positive and Dworkin's normative conception of the constitution, provides the theoretical framework to analysis the necessity of constitutional review under the Basic Law, the principle of separation of powers which allows checks and balances amongst different departments of government, in light of the American experience, is the test against which to examine the question why it should be the judges to exercise the power of constitutional review under the Basic Law. As the scope of constitutional review in Hong Kong is concerned, the Thayerian clear-mistake rule and the British doctrine of judicial deference may be lessons that the Hong Kong courts should take in playing their role in preserving the workability of the OCTS machinery.

Based on this theoretical framework, the justification and scope of constitutional review under the Basic Law can be found. The Basic Law is the constitutional instrument that legalizes, or in Cappelletti's word, positivizes the OCTS policies. Given the HKSAR is an inalienable part of the PRC, whose constitution is a unitary system, it might be inappropriate to call the Basic Law *the constitution of Hong Kong*. The often used terminology which describes the Basic Law as a semi-constitution is somewhat misleading too. A better understanding of the nature of the Basic Law is perhaps that it is *the PRC constitution in Hong Kong*. That is to say, the Basic Law is the transfiguration or the agent of the PRC constitution in Hong Kong. It is not the Basic Law alone, but the Basic Law supported by the PRC constitution, that is the real constitution that governs the HKSAR. In this sense, the Basic Law is certainly not self-contained; instead, it has to be read with the PRC constitution to be properly understood.

However, no matter how one perceives of the nature of the Basic Law, one thing that is absolutely clear, and which is also expressly stated in the text of the Basic Law, is that the Basic Law is the highest law in the HKSAR. This supremacy of the Basic Law, in light of Kelsen's theory, immediately suggests the need for constitutional review. Moreover, the Basic Law not only legalizes the OCTS political policies but also enshrines the guarantees to protect fundamental rights and freedoms. Thus a Dworkinian moral reading of the Basic Law also justifies the necessity of constitutional review under the Basic Law. Applying Cappelletti's theory, it can be said that the Basic Law marks the beginning of the age of constitutionalism in Hong Kong, though a kind of constitutionalism with Hong Kong's characteristics. Constitutional review is therefore not only positively but normatively necessary. Without the means of constitutional review, the guarantees of a high degree of autonomy, the preservation of the rule of law and the protection of human rights would be no more than a piece of paper. In short, the supremacy of the Basic Law, seen in both its positive and normative perspectives, is the sole legal basis upon which the authority of constitutional review rests. Thus, in principle, the CFA's assertion of the power of constitutional review on the ground that the Basic Law is the constitution of Hong Kong is justified.

Like other constitutions, the Basic Law needs to be interpreted to be applied in concrete cases. While the interpretation of the Basic Law does not necessarily suggests constitutional review, constitutional review is obviously impossible if without the power of interpretation. The scheme of interpretation established by the Basic Law is a unique one. It provides that the power to interpret the Basic Law belongs to the NPCSC. It then also provides that the NPCSC authorizes the HKSAR courts to interpret the Basic Law. The HKSAR courts' power of interpretation under this scheme is different, depending on what kind of Basic Law provisions are at stake. Indeed nowhere than in the interpretation scheme that the tensions between the two systems co-existing under one country are more obvious. Although constitutional review can be justified on the supremacy of the Basic Law, the fact that the final power of interpretation is vested in the NPCSC shows that constitutional review in Hong Kong is a handicapped jurisdiction. In other words, constitutional review under the Basic Law is an inter-jurisdictional issue; it involves not only the operation of the Hong Kong legal

system, but also the legal system in the mainland.

That the Hong Kong courts have been granted the power to interpret the Basic Law has partly provided the justification for the courts to carry out the task of constitutional review. But the question of why it should be the judges to decide on the constitutionality of acts by other branches of government has to be further answered by exploring the political system of the HKSAR, so as to see whether there is a built-in checks and balances system which justifies this role of the judiciary. The political structure in the HKSAR is not based on separation of powers. Instead it was originally designed to be an executive-led one, which, however, has so far not really played out in reality. A sophisticated perception of the HKSAR political structure is perhaps that it is in essence a system which blends authoritarianism and democracy. Despite of these different perceptions of the HKSAR political structure, there are two things which are generally recognized: the system allows a certain degree of checks and balances between the legislative and the executive branches, and judicial independence is guaranteed under the Basic Law. Thus, the CFA's justification of constitutional review on the ground that the judiciary has a constitutional role in checking other branches of government can also stand.

Should there still be any doubt of the justification of constitutional review under the Basic Law, the robust and repeated exercise by the courts since *Ng Kg Ling* has had the effect of legitimizing it through practice. Intense constitutional litigation had taken place in the first decade of the HKSAR. And the courts had been frequently called upon to examine the constitutionality of local legislation. The courts have adopted a generous approach to the interpretation of the Basic Law, especially when at stake are provisions which concern fundamental rights and freedoms. This is aimed to give Hong Kong residents full measure of protection of their rights and freedoms. The CFA has also established two constitutional requirements by which permissible restrictions on entrenched rights are to be scrutinized. The test of proportionality has also been imported into Hong Kong's jurisprudence. In developing these constitutional principles, the CFA is keen to leave judges with greater room of manoeuvre. This may be desirable from practical perspective, given the early stage of Hong Kong human rights jurisprudence and the inherent complexities and tensions within the OTCS framework. However, if over exploited, it might also lead to judicial activism which

might endanger the working of the constitutional system under OTCS.

Constitutional review in the HKSAR does not seem to have the democratic difficulty, once known as the counter-majoritarian difficulty. This is because Hong Kong was not in the past, and is not now, a democracy by western standards. Nor perhaps will there ever be full democracy in Hong Kong, for the nature of the political system, which is an easy blend of authoritarianism and democracy, is not to be fundamentally changed by the development of democracy. Ironically, it is the lack of democracy that has generated public support for the independent judiciary to play the role as the guardian of the Basic Law, of the rule of law, of the protection of human rights in Hong Kong. However, there may well be what might be called as 'the counter-Beijing difficulty' which the Hong Kong courts have to face in exercising the power of constitutional review. The counter-Beijing difficulty is both legal and political.

Nonetheless, there is no doubt that the assertion of the power of constitutional review has greatly enlarged the judicial role in the working of the OCTS framework. In the absence of NPCSC intervention, the Basic Law is actually what the judges say it is. Judicial activism is not a hypothetical danger in present Hong Kong. de Tocqueville once observes that hardly a political question arises in the United States that is not converted into a legal question and taken to the courts for decision.⁴ This seems very much the case now in the HKSAR. If, as Straus observes, a written constitution, after having been in operation for a while, is apt to become just a part of the unwritten constitution which composes of precedents, practices and understandings that grow up over time,⁵ it is not exaggerating to say that in Hong Kong, after more than a decade of the implementation of the Basic Law, it is now the judge-made unwritten Basic Law that really governs. These trends, however, might stretch the counter-Beijing difficulty to breaking point.

The workability of the OCTS framework ultimately depends on the interpretation of the Basic Law. Like other constitutions, the Basic Law is not the end, but a means to the end. Neither is constitutional review the purpose, but a tool to the purpose. While constitutional

⁴ Alexis de Tocqueville, *Democracy in America* (New American Library 1956) 246.

⁵ David A. Strauss, 'Constitutions, Written and Otherwise' (2000) 19 *Law & Philosophy* 452.

review based on the supremacy of the Basic Law is justified and necessary, its exercise should always be guided with sense and sensibility. It should be used to maintain the system and to allow it to grow rather than to break it. The role of constitutional review as checking and balancing other branches of government to ensure they act in conformity with the Basic Law can be viewed as the braking system of an automobile; it is necessary to make the whole machinery work, but it is only used to prevent the machinery from possible derail or fall-over; it is part of the machinery itself, but it is an '*independent*' sub-system that works counter to the driving force. To call for a workable government is therefore not to deny the power of constitutional review, but to call for caution not to abuse or over-use it. In Justice Jackson's words, this is an 'actual art' which needs good balancing.⁶ This perception of the role of constitutional review certainly calls for the greatest judicial restraint possible, both in Hong Kong and perhaps in elsewhere as well.

⁶ *Youngstown Sheet & Tube Co. v Sawyer* 343, US 579 (1952).

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