HONG KONG'S CONSTITUTIONAL DEBATE

CONFLICT OVER INTERPRETATION

Edited by

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香港大學出版社
HONG KONG UNIVERSITY PRESS

Hong Kong University Press
14/F Hing Wai Centre
7 Tin Wan Praya Road
Aberdeen
Hong Kong

First published 2000
Reprinted 2001, 2009

13-ISBN 978-962-209-509-0
10-ISBN 962-209-509-7

Secure On-line Ordering
http://www.hkupress.org

Printed in Hong Kong by Corporate Press (HK) Ltd., Hong Kong, China

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Litigating the Basic Law:
Jurisdiction, Interpretation and Procedure

Yash Ghai

Introduction

The courts of the Hong Kong Special Administrative Region have already, in the short period since the change of sovereignty, played a crucial role in the enforcement and interpretation of the Basic Law. They have had to decide weighty matters such as the legality of the Provisional Legislative Council, the relationship of the Basic Law to the PRC Constitution, the scope of the application of mainland legislation in Hong Kong, the validity of rules governing disciplinary and other aspects of public service, the right of abode in Hong Kong of certain mainland residents, and the regime for the protection of rights and freedoms of Hong Kong residents. These issues have raised central questions about the autonomy of the HKSAR and the competence of the Central Authorities of the PRC over Hong Kong. They have also major consequences for the social and economic future of Hong Kong, particularly the decisions on the right of abode which affect the flow of migrants from the mainland. More specifically, the litigation on the Basic Law has raised questions about the place of law and legality in the mediation of the relationship between Hong Kong and the mainland, and the role of the courts in defining or sustaining that relationship. These are momentous matters, in a largely uncharted territory. Consequently it is not surprising that the constitutional role of the courts has given to great controversy.

The courts are likely to continue to have to deal with difficult and sensitive legal issues. Inevitably, the role of the courts has become politicized. The constitutional role of courts *is* political. But it is political in a principled way, that

is to say, that there are relatively clear rules about the process of adjudication, the sources of rules that courts may draw upon, and the manner of interpretation. Broad agreement on these procedural and substantive matters means both that the choice the courts have are circumscribed and that there is general acceptance of the value of the judicial process. Controversies about particular judicial decisions then signify an alert and engaged citizenry. They do not normally call in question the fundamental legitimacy of the judiciary. It is already evident that the judicial function is crucial to the maintenance of the principle of 'one country, two systems' which underpins the autonomy of Hong Kong and the rights and freedoms of its residents. The worrying aspect of the criticism made against the Hong Kong judiciary is that it represents an attack on the very legitimacy of the judicial role.

The primary purpose of this chapter is to suggest a constitutional basis for the role of courts which would minimize disputes about its legitimacy and at the same time provide rules and procedures for its exercise. The task is not easy, because the courts, just as the Basic Law, exist between two very different legal and political traditions. But I try to demonstrate that the constitutional basis, rules and procedures for the role of the judiciary follow ineluctably from the scheme and terms of the Basic Law and that they are an integral part of 'one country, two systems'. As background, I examine the difficulties that surround the judicial function in the HKSAR and the manner in which the courts have gone about their task so far. I analyse some controversies regarding the constitutional jurisdiction of courts and their approach to interpretation.

The Problem and the Context

It is sufficient to look at what the Basic Law is attempting to do to realize the problematic of the enterprise. The most intensive moral and ideological debate for the greater part of this century has been on the relative merits of capitalism and communism. Many conflicts and wars have waged between the two camps in competition for hegemony. For decades mind sets in China and Hong Kong were fashioned by this conflict and generated mutual miscomprehension and mistrust. The Basic Law aims to provide for the coexistence of capitalism and communism within one sovereignty through the doctrine of 'one country, two systems'. Tensions between communism in China and capitalism in Hong Kong (and more widely) as economic systems were somewhat muted by the early 1980s as China began its long march to marketization. Indeed it was this fundamental shift in Chinese economic policy that made possible the principles of 'one country, two systems'. Possibilities of overseas investment in China led to increasing integration of Hong Kong into the Chinese economy. Chinese enterprises also began to play an important

role in Hong Kong. Concerns about the coexistence or interaction of opposed economic systems had more or less faded by the time of the transfer of sovereignty.

Differences in legal approaches

However, concerns now arose about the autonomy of Hong Kong, not as a device to maintain its economic system, but to safeguard its way of life, to promote greater democratization and to protect rights and freedoms. In all these respects, the system in the mainland differed from Hong Kong's. Economic reforms in China had not sufficiently altered the state-administered nature of the economy, failing to provide an autonomous role for law and the legal system. The political system changed even less. It has retained all the characteristics of a Leninist state. It is based on the domination of the Communist Party. The function of state institutions, including the National People's Congress (NPC), formally the 'highest organ of state power', is to implement policies of the Communist Party, itself under the control of a small cabal. There is neither democracy nor a significant role for the law in the protection of rights. Courts enjoy little independence in political cases. Despite recent improvements, there is no rule of law as it is understood and supported in Hong Kong. [1]

There are differences, not only in the formal structures of law and constitution, those on the mainland inspired by communism and the civil law system, but also in the *use and purposes* of the law. We in Hong Kong are given to some exaggeration of the virtues, and the prevalence, of the rule of law here, but as compared with practices in the mainland, the contrast is indeed striking. In China the law does not, for most part, provide an autonomous framework for the relationship between the state and the people. Unlike as in Hong Kong, mainland courts cannot review the validity of legislation, and until recently could not review the legality of administrative acts. The practices of the law are subordinated to politics in a way that would be regarded as unacceptable in Hong Kong.

Hong Kong's system and practices of law are firmly entrenched in the Basic Law. The most comprehensive 'through train' applied to the legal system, particularly the judiciary. A high degree of judicial independence is guaranteed by the law. Judges from other common law jurisdictions are permitted to sit in its

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[1] See Yash Ghai, *Hong Kong's New Constitution Order: The Resumption of Sovereignty and the Basic Law* (Hong Kong: University of Hong Kong, 2nd ed, 1999) Chapter 3; Albert Chen, *Introduction to the Legal System of the People's Republic of China* (Singapore: Butterworths, 1992); and special issue of *China Quarterly* 141 (1995); Barrett McCormick, *Political Reform in Post-Mao China: Democracy and Bureaucracy in a Leninist State* (Berkeley: University of California Press, 1990).

highest court (article 82). There are administrative and professional resources to maintain the previous system of the law and courts. The legal system enjoys a great measure of public support.

Importance of legality

These differences in the systems of governance and the role of law might not have mattered so much if law were not central to the scheme of the Basic Law. The Basic Law is supreme law in the HKSAR and no law can contravene its provisions (article 11). The Basic Law itself is grounded in international law, as implementing China's obligations under the Sino-British Joint Declaration. It is also grounded in article 31 of the PRC Constitution which recognizes the need for, and authorizes, separate political, economic and legal systems for parts of China. There are severe limits to the amendment of the Basic Law. No amendment which derogates from the basic policies of the PRC regarding Hong Kong, as elaborated in the Joint Declaration, is permitted (article 159).

The Basic Law is the instrument for the protection of Hong Kong's autonomy. Extensive powers are vested in the institutions of the HKSAR, most of them to be exercised 'on their own'. The socialist system and policies are not to be practised in Hong Kong (article 5). There are severe limits on the application of national laws. Hong Kong courts can review Hong Kong legislation for conformity with the Basic Law and, logically, the mainland legislation for the same purpose. Restrictions on the amendment of the Basic Law reinforce the status of the Basic Law as an instrument of autonomy. Within certain limits, Hong Kong may decide for itself on the reform of its political institutions (Annex I, para 7, and Annex II, Part III). The importance of legality lies in the fact that systems of autonomy cannot be sustained without a strong underpinning of the law. In Hong Kong's case, there were also other reasons for insistence on a regime of legality — for links with the outside world, international economic relations, treaties with foreign states, and membership in international economic organizations depend on Hong Kong's autonomous status.

The Basic Law also provides a strong constitutional regime for the protection of rights and freedoms. In addition to those explicitly mentioned in the Law, it entrenches a number of international human rights instruments, particularly the International Covenant on Civil and Political Rights ('ICCPR'). No restrictions on rights and freedoms may be imposed which contravene these instruments (article 39). Access to courts for the protection of rights and redress against unlawful administrative acts is guaranteed (article 35).

Centrality of the judiciary

Given the adoption by the Basic Law of the common law in Hong Kong (article 8), the ultimate responsibility for the defence of legality may be deemed to fall on its courts. The independence of the judiciary is entrenched in the Basic Law (see articles 2, 85, 88, and 93).[2] The Central Authorities play no role in the appointment or dismissal of Hong Kong judges. Of all the key institutions, the legal system, and more specifically the judiciary, has so far escaped China's grasp.

The centrality of the role of courts for the defence of rights and autonomy has been enhanced by the absence of other institutions which might be expected to defend them. The executive of the HKSAR is effectively appointed by the Central Government (articles 45 and 48(5)). It has not stood up conspicuously for the defence of autonomy. In the first litigation on the Basic Law concerning the continuity of laws and courts (*HKSAR v Ma Wai Kwan David* [1997] HKLRD 761; [1997] 2 HKC 772, henceforth *Ma* with page references to the HKC report), the solicitor-general made wide-ranging representations to the Court of Appeal arguing for an extremely narrow view of autonomy, when the case could have been won on straightforward submissions on the effect of articles 8 and 18. His two central arguments were that the Hong Kong courts could not review any act of the PRC, which he called the 'sovereign' over Hong Kong, and secondly that there were no limits on the competence of the Central Authorities over Hong Kong, regardless of the Basic Law. In the adaptation of previous ordinances, the executive has likewise placed Central Authorities in a more privileged position than is justified by the express provisions of the Basic Law.[3] The government is perceived as doing little to assist Hong Kong residents who find themselves alleged victims of police or bureaucratic arbitrariness in the mainland. It has been criticized for not objecting to the 'extension' of the Chinese Criminal Code to residents of Hong Kong.[4] In

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[2] Jill Cottrell and Yash Ghai, 'The Politics of Judicial Independence in Hong Kong' in Peter Russell and David M O'Brien (eds), *Judicial Independence: Critical Perspectives from Around the World* (Charlottesville: University Press of Virginia, forthcoming).

[3] Section 66 of the Interpretation and General Clauses Ordinance was amended to extend the presumption against the non-application of legislation to the 'Chinese President, Central Authorities and subordinate organs of the Central People's Government exercising functions on its behalf' (Adaptation of Laws (Interpretative Provisions) Ordinance, 1998). This amendment was deemed to exempt the New China News Agency (Xinhua) from a large number of laws.

[4] Under the Basic Law, Chinese criminal law does not apply in Hong Kong. However, it may apply extraterritorially to Chinese nationals for offences under it committed abroad. When a Hong Kong resident (popularly known as 'Big Spender') was tried, convicted and executed for offences committed in Hong Kong, the Hong Kong government did not object or seek his rendition to try him in Hong Kong. 'Big Spender' had also committed offences in the mainland, and there was some confusion whether he was tried only for those offences, or the more serious ones he committed in Hong Kong. See H L Fu, 'The Battle of Criminal Jurisdictions' (1988) 28 HKLJ) pp 273–281.

short, its policies appear to show a greater concern to protect the sensitivities of mainland authorities than to protect the rights of its own residents. Indeed, it can justifiably be stated that so far the threat to the autonomy of Hong Kong has come not from the Central Authorities, but from the Chief Executive and his government.

The legislature of the HKSAR was custom designed to be ineffective.[5] It is only partially democratic, and so enjoys only limited legitimacy. The complex electoral system hinders the democratic mobilization of the people, and fragments and therefore weakens the impact of public opinion. The legislature has few powers of control and almost none of initiation. There is serious democratic deficit which puts the courts under some pressure to redress.

It is not surprising therefore that most contentious issues in Hong Kong's relationship with the Central Authorities have revolved around the law (like the legality of the Provisional Legislative Council, the trial in the mainland instead of in Hong Kong of 'Big Spender', the exemption of Chinese institutions from Hong Kong law, the decision not to prosecute personnel favoured by Beijing, the right of Central Authorities to control migration into the HKSAR, the 'sanctity' of the national flag in Hong Kong (discussed later in the chapter), the difficulties in agreeing on rendition arrangements between the mainland and Hong Kong; the role of Hong Kong deputies to the National People's Congress;[6] possible difficulties with the procedure and substance of Basic Law amendments; and the adoption of 'previous laws' by the NPC under article 160). There is a tendency to convert political and social issues into legal issues, due to the weakness of the political structure and the relative strength of the legal system. This is contrast with the approach in the mainland, where legal problems are converted into 'political' issues, due to the dominance of the Chinese Communist Party. By contrast, the matters which are directly mediated by the Hong Kong government with the Central Authorities, appear to have raised few difficulties. The ability of the Hong Kong legislature to propose legislation which might not be favoured by the Central Authorities is curtailed by rules restricting the right of its members to initiate legislative proposals without the permission of the Chief Executive (article 74).

The scheme of the Basic Law is thus likely to bring the judiciary into conflict with other public authorities in the HKSAR. It is also likely to bring it into conflict with the Central Authorities, especially if common law assumptions of judicial review extend to the entire scheme of the Basic Law. The law is deliberated by the

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[5] Ghai, (note 1 above) Chapter 7.

[6] The major issue has been the right of Hong Kong deputies to discuss Hong Kong matters in Beijing or in the NPC. The Chinese view is that Hong Kong matters should be discussed only in Hong Kong, to ensure its autonomy. See Ghai (note 1 above), pp 256–257.

courts in an open process. Unlike the executive, the courts cannot fudge issues; they have to decide disputes which are presented to them, and they have to do so in public and provide reasons and justifications for their decisions. Unlike secret political negotiations, awkward issues cannot so easily be ducked or fudged in a court (although as we shall see, the Court of Final Appeal did have to fudge a little in the 'clarification' case).

Courts are seen as the domain of liberal barristers well versed in the intricacies of the common law. Many of these lawyers and the groups they support, inclined towards democratic politics, and frustrated by the inability to use the political system, have turned to courts. The extensive scope, loose drafting and ambiguities of the Basic Law provide plenty of opportunities for challenges to executive and legislative acts. The international community seems to pay excessive attention to any hint of the breach of the rule of law. 'Globalization' and the imperative of Hong Kong's integration in the world economy increase the importance of 'legality' and seem to protect the judiciary in the discharge of its functions.

Hong Kong's legal system, based on the common law, appears to be impenetrable to the Chinese. The high priests of the system are tuned in to the niceties of western procedures instead of the more flexible standards of Chinese law. The two legal systems have very different traditions, styles of interpretation, and the capacity for accommodation to political pressures. As mentioned earlier, the presence of a strong legal system in Hong Kong tends to convert contentious matters into legal issues, while China prefers political solutions in which it has the upper hand. Courts thus find themselves in the front line, in the defence of the Basic Law as they perceive it.

Perhaps the fundamental difficulty for and about the judiciary lies in different concepts of the role of the courts on the mainland and Hong Kong. In Hong Kong, courts are separate from and independent of the executive and the legislature. It is their responsibility to review the validity of legislation and executive acts. A judgment adverse to the government is not regarded as a challenge to its legitimacy or the right to rule. In China, courts follow Party directives in appropriate cases and cannot refuse to enforce a law because it might be considered to contravene the Constitution. There seems to be insufficient appreciation among mainland officials and lawyers as to the bounds within which Hong Kong courts have to make decisions. The courts have little choice about what is litigated, and are compelled by the generally accepted notions of the responsibilities of common law judges to adjudicate disputes brought before them in accordance with the law, albeit that the law is frequently flexible, based on legal submissions made by parties before them.

For the most part these differences do not matter. The Basic Law provides for

the separation of the legal systems of Hong Kong and the mainland. They operate in different spheres. In that sense the system is not based on legal pluralism. Of course judicial decisions in Hong Kong, made in accordance with the common law traditions within the area of the region's autonomy, may have repercussions on or for the mainland. But for the most part, these have so far been unproblematic. Difficulties arise in areas of the interaction or interface of the two legal systems. A brief review of the interface will serve to illustrate some difficulties.

The legal interface

The principal area of legal interface is the application of mainland laws in Hong Kong. The scope of the application, which is rather restrictive, as well as the modality of application, is specified (article 18).[7] Another possible area of interface, the relationship between the Basic Law and the PRC Constitution, is not so clearly specified. Indeed it is not specified at all (except somewhat obliquely in a Decision of the NPC which locates the authority for Basic Law in article 31 of the Constitution and declares the Basic Law 'constitutional').[8] The resulting uncertainty has a major consequence for deciding how 'self-contained' is the Basic Law as the constitutional framework for Hong Kong and its relationship with the Central Authorities, including the question as to how far the Central Authorities, particularly the NPC, are bound by the Basic Law. A further area, so far unexplored, is the examination by the NPCSC of legislation passed by the HKSAR legislature in fields which are the responsibility of the Central Authorities or cover the relationship between them and the HKSAR (article 17). The two legal systems interface in the area of mutual legal assistance (article 95), which covers matters like the mutual recognition of judicial and arbitral awards, the securing of evidence in the other jurisdiction, servicing of documents, and the transfer of fugitive offenders. The procedural and substantive provisions of article 159 dealing with the amendment of the Basic Law represent a potentially troublesome instance of interface. Article 160, which enabled the NPCSC to exclude previous laws from application after 1 July 1997, is another example. (A further example, although less legal than political, is the membership of Hong Kong deputies in the NPC, and their role in Hong Kong or in relation to Hong Kong affairs, article 21).

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[7] Mainland laws are 'confined to those relating to defence and foreign affairs as well as other matters outside the autonomy of the Region as specified by this Law'. A mainland law may be extended to Hong Kong only after consultation with the Committee for the Basic Law and the government of the HKSAR. Once extended, it is added to Annex III. It is given effect to in Hong Kong either through promulgation or local legislation.

[8] Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China 4 April 1990.

Finally, and perhaps mostly importantly for our present purposes, is article 158 which establishes the scheme for the interpretation of the Basic Law. It divides the responsibility for interpretation between NPCSC and Hong Kong courts, leaving the adjudication of cases entirely to the Hong Kong courts. Within the framework of overarching powers of the NPCSC to interpret any provision of the Basic Law, it authorizes the Hong Kong courts to interpret any provisions during adjudication. However, the court from which no further appeal is possible cannot interpret provisions dealing with the responsibilities of the Central Authorities or the relationship between them and the HKSAR (which the Court of Final Appeal has designated 'excluded provisions'). If the interpretation of an excluded provision will 'affect' the judgment, then that court must ask the NPCSC to provide an interpretation of the provision and then apply it in adjudicating the case.

Difficulties of the interface

Most of these provisions have given rise to difficulties. Doubts about the continuity of laws provoked a major crisis. There continue to be doubts about how self-contained the Basic Law is as instrument for the government of Hong Kong. The constitutional jurisdiction of the Hong Kong courts, and how it affects the power of the NPCSC, is a matter of controversy. There seems to be less than full agreement on restrictions on the application of national laws. Little progress has been made in mutual legal assistance, whether in the gathering of evidence, enforcement of judgments and arbitral awards or rendition of fugitive offenders. Apart from the precise formulation of the provisions dealing with interface there are obvious causes of confusion and disagreement. The interface is between two very different legal systems, in conceptualization, values and modalities, and it is no matter of surprise that genuine misunderstandings arise. This particular difficulty is compounded by the lack of knowledge of lawyers belonging to one system of the other system — and the suspicion of motives that have attended expressions of contrary views.

Even more problematic has been the introduction of the concept of 'sovereignty' in the relations between China and Hong Kong, first presented in court by the government in *Ma*. It has become a refrain in most subsequent constitutional cases. But various questions remain unclear: who is the 'sovereign', the PRC or the NPC; what is the content of this sovereignty; how is 'sovereignty' related to the PRC Constitution; and what precise relationship 'sovereignty' connotes or produces between Hong Kong and China (the government and the Court of Appeal in *Ma* took this to mean almost as if Hong Kong were a colony of China). More fundamentally for our purposes, what does 'sovereignty' mean for the Basic Law and the jurisdiction of courts? Some reversal of judicial attitudes took place after

Ma; but lip service continues to be paid to it, even when the courts are involved in fudging or evading its implications — or resorting to sovereignty to sustain propositions that others regard as violation of sovereignty.

Dealing with the interface

Finally, I turn to the procedural and institutional framework for dealing with these instances of legal interface. The general rule seems to be that when the interface concerns a matter within the autonomy of Hong Kong, it is left to the Hong Kong courts. When it concerns a responsibility of the Central Authorities or the relationship between them and Hong Kong, it is left to the NPCSC (this follows from articles 17, 18 and 158; for a detailed discussion, see Ghai, pp 206–207). But this neat division is not always followed. The NPCSC has overriding powers of interpretation affecting any provision of the Basic Law (article 158(1)). The notion of interpretation by the NPCSC is broad and may extend to the modification of the law, thus blurring the distinction between the more formal processes of amendment under article 159 and the less controlled way of change through interpretation. Further, under article 160, the NPCSC has the power to decide which of the previous laws, even if within autonomy, may be declared inapplicable after 1 July 1997 for incompatibility with the Basic Law. On the other hand, Hong Kong courts may also interpret excluded provisions (and may in some cases do so finally, since while its decision may be appealable to a higher court, no appeal may in fact be taken, as in *Ma* itself).

We thus have a somewhat unsatisfactory situation of bifurcation of function and methods. Some provisions are interpreted following the common law method through the agency of the courts. Others are determined by a more political process using presumably Chinese law methods. This is not calculated to produce coherence in the system or predictability about future outcomes.

To some extent, these difficulties of interface are intended to be overcome or minimized through the establishment of the Committee for the Basic Law ('CBL') which acts in an advisory capacity to the NPCSC (see NPC Decision of 4 April 1990 and articles 17, 18, 158 and 159 of the Basic Law). The CBL consists of six mainlanders and six Hong Kong residents. The NPCSC has to consult the CBL before rejecting an ordinance of the LegCo (article 17), adding or deleting a national law applicable to Hong Kong under Annex III (article 18), interpreting the Basic Law (article 158) or amending it (article 159). In that regard the role of the CBL might be regarded as quasi-judicial. However, its members have been quite outspoken in their criticism of judicial decisions, including those of the Court of

Final Appeal ('CFA'), and doubts have been expressed about their impartiality and thus the qualifications to provide independent advice to the NPCSC. Moreover, few rules of procedure for the conduct of its functions have been established, and an interim assessment must be that the CBL has not played (or has not been called upon to play) the role of a body which provides a bridge between the two legal systems and assists in the interface between them.

Some other difficulties in the management of the interface might be mentioned briefly. There is no common acceptable tribunal to decide the disputes arising from the interface. This is not only because of differences in style and approach of the two systems, but also because of the widespread feeling in Hong Kong that if the Central Government takes a position, it would be automatically endorsed by the NPCSC. Nor is there any forum for deciding disputes between the HKSAR government and the Central Government, for at the moment it seems inconceivable that these would be litigated. Moreover, there is no direct way in which the Central Authorities can enforce their authority in Hong Kong; it is done through instructions to the Hong Kong government (e.g. article 48(8)). This puts a particular strain on the Hong Kong government and also tends to force it into litigation against private groups in Hong Kong to uphold what it considers are the rights of the Central Authorities (when it might otherwise not have decided to prosecute or appeal against acquittal, as in cases involving public order or the flag). Equally, it might feel obliged to undertake acts designed to uphold 'sovereignty'. In both these instances, in most federal or autonomous systems, the defence of national interests would be the responsibility of the central institutions themselves. Nor have Hong Kong residents any access to national institutions for redress when their complaints may in effect be about national laws or policies, or when regional courts or other institutions refuse to assume jurisdiction. In the result, the management of centre-region relations has become central to the operation of the interface, building an unnecessary and unprofitable bias.

Some commonly acceptable way to deal with these and other difficulties at the interface must be found. I deal with this issue in the conclusion of this chapter after I have examined the record of Basic Law litigation and the problems that have become obvious.

Issues in Litigation on the Basic Law

Jurisdiction of the HKSAR Courts

There may have been doubts among some mainland lawyers as to whether judicial review of any kind would be permissible under the Basic Law, on the basis that

the Basic Law, being Chinese law, must be subject to Chinese legal principles.[9] But there had not been much doubt among Hong Kong lawyers that the HKSAR courts would have the jurisdiction to review the legislative and executive acts of the HKSAR. Hong Kong courts had a similar jurisdiction during the colonial period, although there was rather limited scope for review under the Letters Patent which served as its internal constitution. However, after the ICCPR was entrenched in the Letters Patent, there were a large number of cases in which courts had to review the constitutionality of laws and policies.[10] Important principles for judicial review of constitutional instruments began to be developed through these cases. In the very first constitutional law case (*Ma)* in July 1997, Court of Appeal assumed the jurisdiction to review them without any objection from the government.

The solicitor-general readily conceded this jurisdiction (as mentioned by Nazareth VP in *Ma* at 351D). Nazareth VP, however, doubted whether this jurisdiction could be based on article 158 as stated by the solicitor-general, which the judge said appeared to be a 'bare power' to interpret, and preferred to rest jurisdiction on article 19(2).[11] Likewise there was no argument on jurisdiction to review Hong Kong legislation in the Court of First Instance in *Cheung Lai Wah v Director of Immigration* [1997] 3 HKC 64 (henceforth *Cheung Lai Wah, CFI*) and there is no reference to the issue in Keith J's judgment. Nor on appeal did any of the judges in the Court of Appeal refer to the issue (*Cheung Lai Wah v Director of Immigration* [1998] 1 HKC 617, henceforth *Cheung Lai Wah CA*). The Court of Final Appeal in *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 (henceforth *Ng Ka Ling CFA*) refers briefly to article 19(1) and article 80 (which says that the courts of the Region at all levels shall be the judiciary of the Region exercising the judicial power of the Region). The constitutional jurisdiction can also be founded on the basis of the common law that is applied in Hong Kong and on article 158. While Nazareth VP is correct in saying that the power to interpret does not imply the power of judicial review, given the history of the common law and the reasoning in *Marbury v Madison* (5 US 137 (1803)), the common law position would seem to be that courts have that jurisdiction since they would have

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[9] Zhou Wei, 'The Sources of Law in the SAR' in P Wesley-Smith (ed), *Hong Kong's Transition: Problems and Prospects* (Hong Kong: Faculty of Law, the University of Hong Kong, 1993).

[10] Johannes Chan, 'The Hong Bill of Rights 1991–1995: A Statistical Overview' in G Edwards, and J Chan (eds), *Hong Kong's Bill of Rights: Two Years Before 1997* (Hong Kong: Faculty of Law, the University of Hong Kong, 1996).

[11] Articles 19 (1) and (2) read as follows: 'The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication. The courts of the Hong Kong Special Administrative Region 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 shall be maintained.'

to decide on whether to enforce the Basic Law or some legislation that may be inconsistent with it.[12]

Whether Hong Kong courts can review mainland laws applying in Hong Kong has been more controversial. The issue arose in *Ma* because the justification for the legality of the Provisional Legislative Council were decisions of the NPC and bodies operating under its authority. The solicitor-general challenged the authority of regional courts to examine acts of the national government. His argument was based on the specific provisions of the Basic Law as well as general principles under which regional courts purport to operate. The specific argument was that article 19 restricted the courts to the same jurisdiction as on 1 July 1997. As the Hong Kong courts could not then review British legislation or British ministerial acts, they cannot now review the acts of the new sovereign, the PRC or its highest organ of state power, the NPC. The more general arguments were that regional courts could not review acts of the 'sovereign' and that in federal system regional or state courts cannot question national laws. No authorities covering the first proposition precisely were advanced by the solicitor-general (as Nazareth VP pointed out at 351–353). No authorities at all were presented on the other two points (at least as appears from the judgments).

All three judges accepted the solicitor-general's propositions (albeit Nazareth VP with some reservations). The solicitor-general's propositions had little support in the law. I criticized the decision in the *SCMP* the following day (29 July 1997) and in the second edition of my book (Ghai, pp 307–308). The colonial analogy seemed particularly inappropriate since it completely ignored the purpose and status of the Basic Law. The constitutional relationship between China and Hong Kong was a matter of domestic law and radically different from that between the UK and the colony of Hong Kong. The court provided no guidance on the nature of the sovereignty, which presumably resides in the constitution. It ignored the various restrictions that the Basic Law placed on the law-making powers of the NPC in relation to Hong Kong. 'Sovereign' shades off from being the PRC to being the NPC (as in Chan CJHC's discussion at 342 C). Nazareth likewise talks at one point of the sovereign 'via the NPC'; at other times of the NPC as the sovereign (352F). There is no clear discussion of what the 'sovereign' is or of the PRC Constitution as it relates to sovereignty. It is not only 'laws' of the NPC that the courts cannot question; it is also other acts and resolutions, including 'ratification' of decisions of subordinate bodies (343 I).

Colonial courts in fact had jurisdiction to review imperial acts and decisions, only Acts of Parliament being immune due to the peculiar rule of parliamentary

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[12] See discussion in Ghai (note 1 above), p 305.

supremacy, and even they not immune if they went beyond the jurisdiction acquired by the Crown in relation to the colony.[13] Finally, there is no general constitutional principle that regional or provincial courts cannot review national laws. Provincial courts in Canada have from the earliest days of the federation reviewed the validity of federal laws (*Valin v Langlois* (1879) 3 SCR 1, and state courts in Australia have long been authorized to review federal laws in Australia.[14]

The implications of *Ma* were serious. It meant that there would be no real protection for autonomy or for rights of residents (other than the self-restraint of the NPC). There would be no way to ensure 'boundaries' between Hong Kong and the mainland. Unlike other systems of autonomy, if regional courts lacked jurisdiction, one cannot go to national or federal courts. In any case, there would be no way to challenge mainland laws or acts, for the court was not saying merely that it had no jurisdiction, but also that the mainland can do anything.

These judicial attitudes were perhaps understandable in the circumstances of the case — the authority of the NPC being challenged within a week of the transfer of sovereignty on a most difficult and sensitive issue. However, the courts began to resile from the extreme position taken in *Ma*. The opportunity for this arose in the case on the right of abode. The issue this time was less the direct application of Chinese law, but the compatibility with the Basic Law of a Hong Kong law (the Immigration (Amendment) (No. 3) Ordinance (1997) which purported to give effect to some of its consequences). The applicants argued that the restriction imposed by the Ordinance, that an exit permit from the mainland authorities was necessary for the entry of those mainland residents who qualified for the right of abode in Hong Kong under article 24(2)(3) breached the Basic Law. Similar, but general, restrictions on entry into Hong Kong from the mainland are also specified in Chinese law.

While accepting that mainland laws were not to be applied in Hong Kong (other than under article 18, which was not the case with the Chinese law requiring exit permit for settlement in Hong Kong), the government argued that mainland laws could not be ignored either. As summarized by Keith J in his judgment, the government's position was that if 'the laws of mainland China restricted the number of its nationals who could settle in Hong Kong, it would be wrong for laws to be enacted in Hong Kong for entry into Hong Kong which would be inconsistent

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[13] See authorities cited in Ghai (see note 1 above) pp 307–308. For critiques of the *Ma* decision, see Yash Ghai, 'Dark Days for Our Rights', *SCMP* 30 July 1997 and Johannes Chan, 'The Jurisdiction and Legality of the PLC' (1997) 27 HKLJ 374–387. In an expert opinion which was filed by the plaintiffs in the *Cheung Lai Wah* case, I criticized *Ma* at length.

[14] P H Lane, *A Manual of Australian Constitutional Law*, (NSW: Law Book Co, 6th ed, 1995), p 16.

with the laws of mainland China on the topic' (*Cheung Lai Wah CFI* 83H). Effectively, this position was no different from the government's position in *Ma,* i.e. that a Chinese law could override the Basic Law. Keith J found this argument unattractive, as it would have meant that 'people who were accorded the right of abode in Hong Kong by virtue of article 24 needed the permission of the Chinese authorities before they could enjoy that right . . . The implementation of article 24(2)(3) would therefore be in the hands of the Chinese authorities' (83B-C). He concluded on this point, 'The HKSAR may be "an inalienable part of the People's Republic of China", but the "high degree of autonomy" in its affairs which the HKSAR is to enjoy would be undermined. Where does this leave the principle of "one country, two systems?" ' (83D). However, he upheld the restrictions in the Ordinance on the basis that these were authorized by article 22 (4) of the Basic Law which states that 'For entry into the HKSAR, people from other parts of China must apply for approval . . .' Thus a direct 'challenge' to the authority of the Chinese legislature was averted, but an indication of a more robust judicial attitude towards the enforcement of the Basic Law was flagged.

When the case reached the Court of Appeal, Chan CJHC said that his analogy in *Ma* with colonial courts might not have been entirely appropriate. 'It may be that in appropriate cases . . . the HKSAR courts do have jurisdiction to examine the laws and acts of the NPC which affect the HKSAR for the purpose of, say, determining whether such laws or acts are contrary to or inconsistent with the Basic Law which is after all not only the constitution of the HKSAR, but also a national law of the PRC' (*Cheung Lai Wah* CA 395C).

The Court of Final Appeal, when it considered the case, stated the principle in the most general and emphatic terms. It asserted the jurisdiction of the HKSAR courts to review any legislative acts of the NPC or NPCSC for consistency with the Basic Law and to declare them invalid if found to be inconsistent. Indeed they have a duty to do so. The CFA was careful to justify its conclusion by reference to the act of the NPC, the 'sovereign', in enacting the Basic Law which vested the courts with this jurisdiction.

The CFA reached its decision, first, by a declaration of a general constitutional principle, and secondly, by reference to specific provisions of the Basic Law. The general principle is one that it claims applies to all constitutions — that laws inconsistent with it are void and of no effect, and that it is for the courts to determine questions of inconsistency and invalidity (thus ignoring a fundamental principle of Chinese constitutional law excluding judicial review). In the case of the Basic Law, it is the regional courts which have been given that responsibility, for provisions within the autonomy of the HKSAR (articles 19(1) and 80). This responsibility extends to the review of acts of the NPC or its Standing Committee.

Such jurisdiction also follows from the fact that the purpose of the Basic Law is to implement China's basic policies regarding Hong Kong as formulated in the Joint Declaration, and from article 159(4) which prevents any amendment of the Basic Law which violates a basic policy (*Ng Ka Ling CFA* 337J–338A).

The CFA rejected the analysis of article 19(2) by Court of Appeal in *Ma*, which read the reference to 'restrictions on jurisdiction imposed' by previous legal system and principles, as extending to the acts of the NPC the immunity against challenge to acts of the British Parliament. This restriction was specific to the rule of the common law regarding the supremacy of Parliament in Hong Kong and could not be carried over to 'the new order' (339A). Having assumed jurisdiction, it went on to decide that the right of abode under article 24(2)(3) was not qualified by article 22 (which applied to those mainlanders who did not have the right of abode). Therefore the Chinese law requiring exit permits for those with the right of abode could not be enforced in Hong Kong and the Ordinance which applied that restriction was unconstitutional.

This robust and clear statement of its jurisdiction got the CFA into trouble with those who thought that it had defied the authority of the NPC and set itself above the 'sovereign'. Its judgment was criticized by Hong Kong deputies to the NPC and both Hong Kong and mainland members of the Basic Law Committee. Four leading Chinese lawyers called the decision 'wrong'. In a most unusual procedure, the government asked, and the Court agreed, to 'clarify' the part of its judgment which related to the NPC and its Standing Committee. The Court 'clarified' its judgment thus:

> The Court's judgment 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 *(Ng Ka Ling v Director of Immigration (No 2)* (1999) 2 HKCFAR 141 at p 142).

In Hong Kong at least the 'clarification' was generally seen as an act necessary to placate the mainland authorities rather than as an exercise in elucidation. It did not appear detract from the Court's conclusions in the original judgment. The authority of the NPCSC to interpret the Basic Law (presumably under article 158(1)) was not an issue in the case. As discussed below, what was at issue was whether the Court was required to refer article 22 to the NPCSC for an interpretation under article 158 (3). The Court's decision, for complex reasons mentioned later, that it did not have to refer the matter to the NPCSC, was less contentious (or perhaps not noticed or understood) than the ruling that Hong Kong courts could review

and, if necessary, refuse to apply mainland legislation if inconsistent with the Basic Law. On the latter point, the Court's position was reaffirmed, albeit in more palatable language. Its alleged acceptability to the Central Authorities might mean that they now acquiesced in the Court's assertion of its broad constitutional jurisdiction.

Subsequent litigation suggests that this may not be the proper way to interpret the reaction of the Central Authorities. In *HKSAR v Ng Kung-Siu* [1999] 1 HKLRD 783, the Court of Appeal declared invalid section 7 of the National Flag and National Emblem Ordinance 1997 which criminalized the conduct of defacing the national flag, for incompatibility with the freedom of expression guaranteed by the ICCPR under article 39 of the Basic Law. Although this too was a local ordinance implementing national legislation, it differed from the immigration ordinance in that the national legislation it implemented is extended to Hong Kong through the mechanism of article 18 and appears in Annex III. Several 'supporters' of the Central Authorities attacked the judgment on the grounds that the Court failed to appreciate that it was in fact striking down national legislation, and implied that it had no authority to do so. From the perspectives of the CFA decision in *Ng Ka Ling,* it would seem not to matter whether the mainland legislation is applied directly, through promulgation or local legislation. The criticism of the Court of Appeal must spring from the view that the Hong Kong courts cannot review mainland legislation. If so, it would seem that despite the reception accorded the CFA clarification, there is in fact no consensus on the constitutional jurisdiction of the courts as elaborated by the CFA.

The exercise of constitutional jurisdiction

Even given the undoubted constitutional jurisdiction of courts, the question as to the basis on which it should be exercised has given rise to some controversy. Two specific kinds of criticism has been made of the way in which the courts have exercised the jurisdiction. The first, in relation to *Ma,* is that the court decided more than it had to. The second, in relation to *Cheung Lai Wah,* is that the court should have exercised self-restraint in the exercise of its undoubted power.

In *Ma* the court went beyond what was strictly necessary as it could have disposed of the case as to continuity of the common law without having to determine the legality of the Provincial LegCo. All the judges recognized that they could have stopped after the analysis of articles 8, 18 and 160. Gladys Li, representing the applicants, had drawn attention to the dangers of 'unnecessary ruling'. Nevertheless the court went on to determine the other questions. It was that excursus that led the court into highly controversial statements as to its constitutional jurisdiction and the 'sovereignty' of the NPC. The court's justification was that

these additional issues had been extensively argued before it and that its determination would provide alternative grounds for its decision should it be that its views on articles 8 and 160 were erroneous. More substantively, the court justified the additional justification on the grounds of the importance of the issue, particularly the validity of the Provincial LegCo. For example, Nazareth VP said that it 'would not be in the public interest' to decline to deal with it for that would suppress a potential opportunity for the question to be expeditiously resolved by the CFA and the Standing Committee of the NPC, if it comes to that' (349H).

At that time it was assumed that the views of the court on these additional issues were *obiter*, that is not strictly binding on courts in the future (this was recognized expressly by Chan CJHC and Nazareth VP (353B), and designated so in the two law report series). However, when the legality of the Provisional LegCo was raised in the Court of First Instance in *Cheung Lai Wah*, Keith J held that he was bound by *Ma* but allowed submissions on the issue to be filed for arguments in the CA. To complete the story, the CA held that its ruling on legality was not *obiter*, as it was an essential ground for its decision, and nor was it *per incuriam* (that is, given in ignorance of a binding decision or statute). It was bound by its earlier decision in accordance with the rules governing the use of precedents. When the matter reached the CFA, that court upheld the validity of the Provisional LegCo (although not on the grounds that the NPC as 'sovereign' could do anything, one of the CA grounds, but because it was justified by the terms of the Basic Law and associated Decisions of the NPC, which was also one of the CA reasons).

It has also been suggested by Professor Albert Chen ((in this volume) that the CFA, in the right of abode case, went beyond what was strictly necessary for its decision. It would seem that the CFA could have disposed of the case without getting into the questions of its constitutional jurisdiction over mainland legislation by relying on the retrospectivity point, having decided that the amendments to the immigration ordinance could not be applied retrospectively. He has in fact used this point to argue, perhaps in order to defuse controversy, that its ruling on jurisdiction over NPC acts was *obiter* and therefore did not constitute the rationale of the judgment. The CFA itself could have avoided controversy by restricting itself to the specific retrospectivity point (although it is hard to see how it could have evaded the issue of the relevance of the mainland exit permit laws).

There are good reasons, according to constitutional theory, why the courts should deal with only those issues which are strictly necessary to dispose of the case. Constitutional cases raise complex and sensitive issues of the relationship between the major organs of the state, the legislature, executive and the judiciary, which generally cause controversy. In Hong Kong, there is the additional complication of the relationship of the SAR to the Central Authorities, which is

deemed to require sensitive handling. Declarations of broad principles may limit the room for political negotiations or compromise, and thus weaken the political process. They pose serious problems about the legitimacy of judicial review of decisions made by bodies more democratically constituted. The more the number of issues the court takes on, the greater the chances of error. Legal argument may have focused on key points, leaving others less than fully canvassed. Judicial decisions are best when they are made in the context of specific facts, and the larger the issues, the less the judgment is disciplined by real controversy and contention. Judicial errors cannot be easily corrected since constitutional amendment is a difficult process.

However, it is necessary to locate these arguments in the Hong Kong situation. A new constitutional order came into force on the transfer of sovereignty. In many important ways it was dramatically different from the previous regime. Various aspects of the new order were not clear, particularly the relationship between the Basic Law and the PRC Constitution, and the powers of the NPC over Hong Kong. The Basic Law lay at the interface of the Chinese and common law traditions, the former ill understood in Hong Kong. The disagreements between the UK and China in the dying years of the transition had led to legal 'short cuts' and produced additional uncertainties, including the very status of the first legislature. It was in this context that the challenge regarding the continuity of the legal system was posed on the first day when 'courts' purporting to be HKSAR courts sat after the transfer of sovereignty.

Views may legitimately differ as to how the Court of Appeal, which became seized of the issue through a special reference from the lower court, should have dealt with the case. The argument for taking on the whole raft of issues was the desirability of clarifying difficult and controversial issues. Even if the case could be disposed of by the interpretation of a few articles on continuity, there would sooner or later be another challenge to the legality of the Provisional LegCo and the laws it had purported to make. Public interest might suggest clarification now, especially if the matter were taken on appeal to the CFA and the NPCSC. The contrary arguments were that it was unnecessary to take on all the issues. Even if the court was concerned to establish the legality of the Provisional LegCo, it could have done that consistently with the terms of the Basic Law (as the CFA did) and should not have gone on to declare that the NPC was sovereign and thus not only outside its jurisdiction but also beyond any limitation of its powers. It was clear to the Court from the statements of counsel for the applicants that they had neither the knowledge of this specialized part of the law nor the inclination to canvass the range of arguments that these broader issues raised. Ms Gladys Li and her associates did argue these points, as part of the plaintiff's team, after their offer to act as

amici curiae, in which capacity they would have been able to provide greater assistance, was rejected by the Court.[15] Unfortunately, they had little time to prepare their arguments.

As Nazareth VP recognized, the case raised questions of Chinese law which neither the counsel nor the court were able to deal with. He appreciated that the case had not been fully argued; there was no detailed review of the PRC Constitution; and his own decision was 'not a concluded view' (353B). In the end, many points of Chinese law were glossed over, or rather, an uninformed view was taken of them. On the evidence and argument before it, the court was unable to decide whether a resolution of the NPC necessarily had the force of law, whether it could delegate all its powers to subordinate bodies, and what the procedures for, or the effect of, ratification of the decision of a subordinate body were. If its view as to the overarching powers of the NPC were sustained, there would remain a large number of uncertainties as to these issues, causing serious confusion. These difficulties were brought on the court by the judges themselves, in their refusal to accept proper *amicus* representation. Despite Hong Kong's rather unusual legal regime and the exceptional circumstances of the case, it provides a good illustration of the dangers of the assumption by the court of these numerous and wide-ranging issues.

Whether the CFA was equally mistaken in taking on the range of issues it did (including the status of the Provisional LegCo) is less obvious. While it is true that the case could have been substantially disposed of through the holding on retrospectivity, this would have been unsatisfactory since it would not have dealt with the major issues raised in the litigation, and these would have come up before the courts again almost immediately. Unlike the CA in *Ma*, the CFA had the advantage of detailed and complex arguments in, and decisions of, the CFI and the CA. The CFA had probed counsel searchingly on the wider issues (which counsel Denis Chang called the 'waterfront', as indicating a range of issues, see Chang in this volume). Various aspects of the CA decision in *Ma* had created controversies; there had ensued considerable scholarly and professional commentaries. Some key issues concerning constitutional litigation had already identified themselves. This was the first opportunity for the CFA to pronounce on them. Few points of Chinese law were directly in issue. The transfer of sovereignty had been accomplished smoothly. It must have been clear to the CFA that constitutional litigation was likely to continue, even speed up, and that some guidance should be offered on principles and procedures. It saw and took the opportunity to lay down the broad outlines of the parameter for Basic Law litigation.

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[15] Johannes Chan, 'Amicus Curia and Non-Party Intervention' (1997) 27 HKLJ 391–404.

The second aspect of the exercise of undoubted jurisdiction is connected with a set of ideas like the political question or judicial self-restraint that suggests that in some instances the court should decline to take jurisdiction. There is no general agreement on the basis of the political question.[16] Several explanations have been offered. One basis of the refusal to take jurisdiction would be that the kind of issues that are raised are not amenable to legal determination, as they do not depend on rules or principles. Instead they are more suitable for resolution by the political process. Such self-restraint might be motivated also by respect for the authority of other institutions, particularly the legislature enjoying democratic legitimacy. Or the court may be unable to fashion an appropriate remedy (as was thought for a while in the US in regard to the redrawing of electoral boundaries when they were in violation of equality provisions).

The view that the CFA in *Ng Ka Ling*, and the CA in *Ma*, should have declined jurisdiction has been advanced by Professor Albert Chen as a way to minimize conflict between the courts and other authorities, including the Central Authorities.[17] This has seldom been the basis for 'political question', for abstension on this ground would amount to an abdication of the court's constitutional responsibilities.[18] Since the classical statements of judicial self-restraint or the political question doctrine were propounded, there has been considerable move away from the doctrine. Courts are now more willing to take on jurisdiction, in part because other institutions often enjoy less legitimacy than courts. Sometimes it is only by court intervention that a modicum of legality can be preserved (as in *coup* cases in several common law and other jurisdictions in recent years).[19] In Hong Kong, this point is particularly pertinent since neither the Hong Kong executive or legislature is fully elected.

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[16] Laurence Tribe, *American Constitutional Law* (Maneiola, NY: The Foundation Press, 2nd ed, 1988), pp 96–107.

[17] His views on the CFA appear in this volume and those on the CA in 'Constitutional Jurisdiction and Justiciability' (1997) 27 HKLJ 387–390.

[18] Tribe has suggested that the ultimate test in 'political question' doctrine is 'whether it is possible to translate the principles underlying the constitutional provision at issue into restrictions on government or affirmative definitions of individual liberty which courts can articulate and apply', op cit, p 98. He also says that an 'issue is political not because it is one of particular concern to the political branches of government but because the constitutional provisions which litigants would invoke as guides to resolution of the issue do not lend themselves to judicial application' (p 99).

[19] In a series of cases in the last 20 years, common law courts have even pronounced on the validity of *coups*, and enunciated principles under which they would uphold the acts of an unlawful government, which include that the acts must be essential to maintain public order or security and that the government must take speedy action to restore the state to a democratic order. See the authorities cited in Yash Ghai, 'Back to the Basics: The Provisional Legislature and the Basic Law' (1995) 25 HKLJ 2–6.

Moreover, there is little prospect that the political process in Hong Kong will solve the issues the courts were dealing with. The legislature has no effective powers to initiate legislation, while the executive finds it hard to muster majority support in the legislature. Nor does there seem to be an adequate mechanism to deal with the Central Authorities on issue arising out of the scope or protection of Hong Kong's autonomy, an additional element of the Hong Kong political system. In the circumstances, the courts may feel that far from standing aloof from these controversies, they have to fill in the vacuum. Nor could it be said that there were no rules or principles relevant to these cases which were unsuitable for judicial adjudication. It may be that due to the peculiarities of 'one country, two systems', some judicial self-restraint may be helpful when the Central Authorities are likely to be upset at the result — but it equally be argued that the Central Authorities should also be educated into the imperatives of the common law which applies in Hong Kong by virtue of the Basic Law.

Interpretation

There is remarkable unanimity among the judiciary and the parties who have appeared before it on the approach to the interpretation of the Basic Law. It follows from the designation of the Basic Law as a constitutional instrument. The approach is that of a purposive interpretation. This has become standard orthodoxy. It is interesting to note, however, that in *Ma,* Chan CJHC saw considerably greater complexity in the Basic Law. He identified three dimensions of the Basic Law: (a) its international provenance as implementing the Joint Declaration; (b) its character as national (Chinese) law; and (c) as the constitution of HKSAR, which also regulates its relationship with the 'sovereign'.

In identifying the three dimensions of the Basic Law (which he described as 'international, domestic and constitutional'), Chan CJHC saw correctly the complexity of the regime of the Basic Law and its implications for the rules of interpretation. He also pointed out that the Basic Law was not drafted by common law lawyers and that its original text is Chinese. However, he did not fully spell out the implications of his analysis. (Nor is it realistic to regard the Basic Law as a pure product of Chinese law despite its enactment by the NPC. Common lawyers from Hong Kong, and it would seem from the British government, played a key role, and many common law concepts are used in the Basic Law, e.g. 'the right of abode', as acknowledged both by the Court of Appeal and the Court of Final Appeal in *Cheung Lai Wah* cases). His remarks were made in the context of the claim by the solicitor-general that a generous and purposive approach should be adopted in the interpretation of the Basic Law since it is a constitutional document. In Chan

CJHC's view, given the complex nature of the Basic Law, 'the generous and purposive approach may not be applicable in interpreting every article of the Basic Law'. That approach was appropriate in the present case 'which involves the constitutional aspect of the Basic Law' (324C). It is not clear whether he would regard the 'generous and purposive' approach unsuitable for all provisions concerning the international and domestic aspects of the Basic Law, or how one is to divide specific provisions of the Basic Law into these different aspects. But at least one implication of his analysis might be that as regards the relationship of the HKSAR with the mainland (the 'domestic' aspect), the generous and purposive approach is not always suitable. The question as to what approach is more appropriate was not dealt with. (Chan CJHC was later in *Cheung Lai Wah* to make use of the distinction between the international and the constitutional to exclude the rule that agreement among the treaty parties can be the basis for its interpretation, and used its constitutional character to found a strong case for rights at 649–650.)

Nor did he discuss the implications of its drafting by non-common law lawyers: does it mean that the common law should not be applied in interpreting it; or not to those parts which are 'domestic', i.e. the relationship between Hong Kong and mainland. Chan CJHC was quite right to point to the complexity of the Basic Law, but if the implication is that different parts of it need different styles and approaches of interpretation, there is danger of some lack of coherence or fit between its different provisions. He found some support from Nazareth VP who expressed some doubt whether the common law rules and technique of interpretation was the correct approach for the interpretation of Chinese law. Referring to the question whether the establishment of the Provisional Legislative Council was sanctioned by NPC Decisions, he said, 'For Hong Kong common law courts, this is not an easy question. It is one that involves interpretation of Chinese law to produce a construction that properly viewed must be made in accordance with Chinese law' (but went on to say that it was valid even by applying common law principles at 356 D). Further, discussing the effect of the ratification by the NPC of the decision of the Preparatory Committee to set up the Provisional Legislative Council, Nazareth VP remarked, 'It has to be said that it would be regarded as deficient if judged purely upon common law norms. But we are here not dealing with a common law legislature or even a common law jurisdiction; nor in my view could it be right to approach the matter with traditional common law methods and precedents of legislative ratification in mind' (357H). However, he felt comfortable using the purposive approach ('one of the well-recognised methods of common law construction') as that seemed to accord with the approach under Chinese law, which called for broad policy and principles 'in terms of which the PRC instruments are formulated and drafted and their constitutional nature' (356 EF).

Mortimer VP, however, was less troubled about using common law methods, noticing a growing convergence between the common law and Chinese law approach to interpretation. He said, 'The common law principles of interpretation, as developed in recent years, are sufficiently wide and flexible to purposively interpret the plain language of this semi-constitutional law. The influence of international covenants has modified the common law principles of interpretation.' (364 DE). While recognizing that the Basic Law is Chinese law, Mortimer VP stated that it 'falls initially to be interpreted by the Hong Kong courts used to interpreting laws passed in the common law tradition, applying common law principles. No doubt, from time to time, difficult questions of interpretation will arise, but not, it seems to me, from any inherent difficulty arising between the two traditions'. By adopting a broad and generous approach, relying on principles and eschewing authorities, the CFA was perhaps also signalling that its approach is not very different from the civil law (which presumably underlies the Chinese approach).

Subsequent judicial decisions have not referred to the complexity of the Basic Law. The theme has been the purposive approach, which the Court of Appeal endorsed (Chan CJHC considering that for the specific issues before the Court in *Ma* a purposive approach was appropriate). The purposive approach was endorsed by Keith J in *Cheung Lai Wah,* and the Court of Appeal affirmed it on appeal.

As with Chan CJHC in *Ma*, the CFA also, in *Ng Ka Ling*, started its discussion of the approach to the interpretation of the Basic Law by an examination of its status and character, as 'an entrenched constitutional instrument to implement the unique principle of "one country, two systems" '. It noted the 'ample and general language' of the Basic Law, 'as is usual for constitutional instruments'. 'It is a living instrument intended to meet changing needs and circumstances' (although it could of course be argued that the Basic Law is an extremely conservative document which aims to freeze 'previous' systems, particularly economic and social systems, as copiously noted by the Court of Appeal in *Ma*).

For these reasons and because a constitution 'states general principles and expresses purposes without condescending to particularity and definition of terms', a purposive approach should be adopted (339J-40 A). The true meaning of the instrument must be ascertained from the purpose of the instrument and its provisions as well as the language of the text in the light of the context. The consequence of adopting a purposive approach, according to the CFA, is the avoidance of 'a literal, technical, narrow or rigid approach'. The CFA judgment represents a very strong endorsement of the purposive approach.

In the Court of Appeal, particularly in Mortimer VP's judgments, the purposive approach is often paired with the 'generous approach'. As authority, a statement

by Lord Diplock in *Attorney-General of Gambia v Jobe* [1984] AC 689 at 700 and Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319 at 328 are frequently cited (see e.g. *Ma* 364 G–365A). It is not clear from the Court of Appeal decisions how the two criteria are connected, nor are there many instances of the 'generous' approach. At first instance, in *Cheung Lai Wah*, Keith J said that since article 22(4) seeks to control the entry into Hong Kong of persons in mainland China, a purposive construction of article 22(4) requires it to be construed as applying even to persons who enjoy the right of abode in Hong Kong, thus denying a 'generous' interpretation to them even though they had satisfied the test of permanent residency under article 24(2)(3).

It was left to CFA to clarify the distinction between provisions which guarantee rights and other provisions. It lays down a 'generous' approach for rights, but merely a purposive approach for others. It thus considers that rights which are attached to the status of a permanent resident, including those connected with the right of abode, merit a generous interpretation but the rules which define the entitlement to permanent residency as requiring a merely purposive approach (340H). Its own judgment provides a good example of the use of, and the distinction between, the two criteria. Its emphasis on, and frequent use of, the ICCPR and article 39 of the Basic Law illustrates its view that provisions on rights should be given a generous interpretation. According to the CFA distinction, Keith J was incorrect in *Chan Kam Nga* in saying that he would have been willing to give a generous interpretation to article 24(2)(3), i.e. to hold that a person's parent must have been a resident at his/her birth, if it had been established that this was the intention of the drafters or the NPC.

Unlike the purposive approach, the generous approach seems to depend less on the intention of the legislature than on the desirability of protecting rights as the constitutional duty of court (although presumably this presumption would be overruled by a clear contrary legislative intention). The different use of the 'generous' test by the CFA on the one hand and lower courts on the other, is evident from the fact that contrary to the CFA, the latter upheld the requirement of the exit permit. Although these courts may not have always given a generous interpretation to human rights provisions, it should be noted that they have applied the ICCPR in interpreting Basic Law provisions. For Keith J held that children born out of wedlock were also entitled to the benefit of article 24(2)(3) as that interpretation facilitated the reunion of families, an object of the ICCPR. In this he was supported by the CA, although it did not support him when he extended the same reason to hold that a child was entitled to the right of abode even if his or her parent was not a permanent resident at the time of the child's birth (but it tried to justify its decision on the basis that it was not a narrow interpretation of article 24(2)(3) but the decision

of the parent to leave the child behind in the mainland which was responsible for splitting up the family).

The essence of the purposive approach is to give effect to the intention of the legislature, even if this is achieved by disregarding the literal meaning of the terms of the legislation (through what is called a 'strained' meaning).[20] Courts have provided some guidance on how to find the purpose of Basic Law provisions. The place is to start with the plain meaning of the words. But this test is less simple that it sounds. For example, Chan CJHC said in *Chan Kam Nga* that 'the court should give as much effect as possible to the plain wording of the provision *bearing in mind the intention of the Basic Law*' (754E) (emphasis added). In the same case Mortimer VP said, 'The first task is to decide whether the words of the article bear a clear and plain meaning which involves neither *anomaly nor absurdity*. If that is so, that meaning must prevail and it is unnecessary to fall back upon other aides to construction' (764I) (emphasis added). Without being purposive, assistance as to the meaning of an expression can be gained from 'any traditions and usages' that may have given to the language used (CFA in *Ng Ka Ling*) (presumably in the way it referred for the definition of right of abode to the meaning given in *DPP v Bhagwan* [1972] AC 60 at 74B). The 'problematic' of plain meaning is obvious from the fact that Keith J and the Court of Appeal in *Chan Kam Nga* on the one hand and Bokhary PJCFA, (speaking for the CFA) on the other, reached opposite conclusions by relying on the 'plain' meaning.

The courts have had therefore to rely on other resources to assist in giving a meaning to expressions. The most obvious of these would be the *travaux preparatoires*. However, judges have had to confront the fundamental factor that the most authoritative guide to intention, the records of the Basic Law Drafting Committee, are not in the public domain and appear to be covered under Chinese secrecy law. An attempt to introduce the intention of the Drafting Committee through an affidavit of a member (Professor Xu Chongde), based in part on his recollections of the views of fellow members, was effectively rejected by Keith J in *Cheung Lai Wah, CFI* (85G-I). He also rejected the submission by Denis Chang, counsel for applicants, that there were no contemporary records linking articles 22 and 24. 'The fact is that there are no *travaux preparatoires* in the conventional sense, and I have therefore to construe art 22(4), 24(2)(3) as I find it — using such legitimate aids to construction as are available to me' (86B).

In the absence of 'best evidence' (as it were), courts have made heavy use of the Joint Declaration as the essential purpose of the Basic Law is the implementation

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[20] See F Bennion, *Statutory Interpretation* (London: Butterworths, 3rd ed, 1997), pp 731–750.

of China's basic policies as stated in the Declaration. This purpose of the Basic Law is acknowledged in the Preamble to the Basic Law. The courts have looked to the Joint Declaration both to find the purposes of the Basic Law and the intentions behind specific provisions. It was used in *Ma* to confirm the conclusion that the previous laws were to have effect after 1 July 1997. Even greater reliance was placed on it by Keith J at first instance and on appeal by the Court of Appeal in *Cheung Lai Wah* to determine the relationship between articles 22(4) and 24(2)(3). He said, 'Two points can be made. First, that provision appears in the same section of the Joint Declaration as the categories of persons who were to enjoy the right of abode in Hong Kong. That suggests a connection between the two provisions when they were reproduced, albeit in different chapters, in the Basic Law. Secondly, the provision in the Joint Declaration itself is consistent with the idea that persons in mainland China who wish to exercise their right of abode in Hong Kong by descent must obtain a one-way exit permit first, because there was a quota system for the issue of one-way permits in operation in 1984 when the Joint Declaration was signed'(85DE).

However, it was held in *Chan Kam Nga v Director of Immigration* [1998] 1 HKC 16 at page 24 by Keith J (CFI) that the Joint Declaration would be of little assistance when the Basic Law merely reproduced its language (implying that it would be different if there were *travaux preparatoires* which explained the meaning of expression as used in the Joint Declaration). Courts have not yet had to confront the situation where the Basic Law deliberately departed from the Joint Declaration.[21]

How else is the purposive approach to be applied? One way is to read the particular article or provision in its context. In *Ma,* Chan CJHC said that 'a provision cannot be read in isolation but must be considered in the light of the rest of the Basic Law . . . It cannot be construed to have a meaning which is inconsistent with the other articles relating to the adoption of the existing laws and legal system' (326 CD). The CFA also emphasized the importance of the context, meaning that a provision must be read together with other provisions, and thus finding the context from the Basic Law itself. Nazareth VP put the matter even more broadly in *Ma* when he stated that . . . 'any ambiguity would have to be resolved by reference to the Basic Law as a whole, and beyond that to its genesis and even to the constitution of the PRC' (346H).

Using what purport to be similar approaches, judges have reached different conclusions. In the *Ma* case, for example, the Court of Appeal considered that the fundamental purpose of the Basic Law was 'continuity' of Hong Kong's previous systems of law and economy. ('The purpose of the Basic Law is to ensure that

[21] For an account of these differences, see Ghai (note 1 above), pp 67–69.

these basic policies are implemented and that there can be continued stability and prosperity of the HKSAR. Continuity after change of sovereignty is therefore of vital importance.' (p 322))

The theme of continuity also influenced it in deciding that the provision regarding the exit permit was valid as the practice of exit permits had existed before the change of sovereignty. In neither of these cases did it pay any attention to the other purposes of the Basic Law, autonomy and the protection of rights. This was particularly obvious in its discussion of article 19(2) (when it held that the provision that the restrictions on the jurisdiction of the HKSAR courts is the same as before to exclude jurisdiction over acts of the NPC by analogy with act of the UK Parliament) which could be described as 'literal, technical, narrow or rigid'. The CFA, on the other hand, identified autonomy and rights as the central purposes of the Basic Law. Accordingly, they reached different conclusions on the constitutional jurisdiction of the HKSAR courts and on the scope of the right of abode under article 24(2)(3). The CFA relied, *inter alia*, on article 39 with its entrenchment of the ICCPR, to establish the context.

It is obvious from the above discussion that courts assume wide discretion when they apply the purposive rules. It is up to them to decide what the purpose of the legislation is. They may use a variety of sources to reach this conclusion and ignore evidence they label unsatisfactory. The discretion is particularly extensive if they are no or no reliable *travaux preparatoires*. They are willing to ignore the plain meaning of the legislation if they think that it is not in accordance with what they formulate as the purpose of the law (for a striking example, see *Launder v The Secretary of State* 1998 (House of Lords) unreported). This wide-ranging (and somewhat freewheeling) approach is bound to make judicial decisions controversial, even though the ultimate purported justification for it is that it gives effect to the intention of the legislature. An example is the application of the purposive approach by the CFA in reaching its decision whether to make a reference to the NPCSC for the interpretation of article 22(4) (discussed below).

Status of Joint Liaison Group 'Agreements'

The courts have rejected interpretations of the Basic Law based on agreements between the UK and China in the Joint Liaison Group(JLG).[22] The principal

[22] The Joint Liaison Group, consisting of representatives of the UK and the PRC, was established by the Sino-British Joint Declaration (Annex II) principally to consult on the implementation of the Declaration and to discuss matters relating to the smooth transfer of government in 1997. The Annex says that the JLG 'shall be an organ for liaison and not an organ of power' (para 6).

agreement concerns the interpretation of article 24(2)(3) to the effect that the right of abode is granted only to that child of a parent who is a permanent resident at the time of the birth of the child. All judges have rejected the relevance of the agreement to interpretation even if they reach the same conclusion themselves, as the Court of Appeal did. It was rejected first by Keith J in *Chan Kam Nga* [1998] 1HKLRD 142, on two grounds. First, that the agreement was reached well after the promulgation of the Basic Law (probably towards the end of 1993). Second, there was no evidence that the interpretation represented the intention of Basic Law drafters or the NPC.

In the CA, Chan CJHC (758–9H) provided a detailed rationale. He rejected the argument that the agreement, representing a revision of the Joint Declaration, was binding. He held first that the interpretation is not a matter of revising treaties or of reading into them what they do not expressly or by necessary implication contain, or of applying a result contrary to the letter or spirit of the treaty's text. Under article 31 of Vienna Convention on the Law of Treaties, a subsequent agreement may, not must, be taken into account. Secondly, the Joint Declaration was now transformed into a constitution, and it was necessary, while interpreting the Basic Law, to recognize not only its international but also its constitutional and domestic dimensions, citing in particular Lord Wilberforce on the importance of rights. He said that 'if the international treaty has become a part of domestic law, and in this case also a national law, then before this variation can take effect, it must be reflected by an amendment to the national and/or domestic laws. Nothing short of an amendment to the Basic Law can suffice to bring in any variation to the international treaty which it reflects' (759A). He also said that the fact that it was 'thought necessary to reach a subsequent agreement suggests that the parties accepted that the wording of article 24(2)(3) may not bring out what they now intend it to mean' (759 E).

Moreover, in his view, the agreement was probably *ultra vires* the JLG, which was only an 'organ of consultation'. Its records are confidential, which in this case were revealed by the government. The 'idea of having to seek the consent of the JLG to reveal some but not all of its deliberations and/or conclusions in order to assist in the construction of the provisions of the Basic Law is not acceptable. As Miss Li [counsel for applicants] says, it is not right that the government can pick and choose as to what sort of documents it thinks is useful or helpful to the construction of the provisions of the Basic Law. How can then lawyers advise their clients? How can the court properly interpret the Basic Law? Are the courts limited to looking at materials which the government says and what the JLG agrees are relevant to the interpretation of the Basic Law and not others? It is therefore clearly not right to rely on the confidential materials from JLG meetings to assist

in the construction of the Basic Law' (759 G-I). His reasoning was endorsed by the CFA, which also advanced the suggestion that the basis of the agreement may have been pragmatism, rather than interpretation (354FG).

How far can the court take consequences into account?

Lay criticism of the courts, particularly the CFA, in the right of abode case has centred on the failure to take into account the consequences of the decision. The more liberal the interpretation of article 24(2)(3), the more the number of people who would come, or at least be entitled to come, to Hong Kong in an unregulated way, adding to pressure on social services and increasing unemployment. Keith J at first instance and other judges in the CA did in fact consider consequences, under a canon of construction which says that if a particular result produces 'anomalies', the legislature cannot have intended that consequence. Keith J held that to interpret article 24(2)(3) to restrict the right of abode to a person whose parent was a permanent resident at the time of his or her birth produced the anomalous result of splitting families. On appeal, Chan CJHC (in *Chan Kam Nga* 757H) agreed with Keith J that the consequence of construing the provision in a particular way must be considered in order to avoid anomalies. However, in his view the consequences to consider are not only to those persons concerned 'but also to the whole community'. If an interpretation would produce 'serious and unexpected consequences' for society, 'it would demonstrate that particular construction is unlikely to be the one intended by the drafter of the legislation'. He considered that Keith J had underestimated the consequences of his interpretation — thousands of people born in the mainland would one day become permanent residents of HKSAR 'just as one person say in his late 70s has managed to become a Hong Kong permanent resident by staying here for a continuous period of seven years down the road' (the Chief Judges's misunderstanding of this point was exposed by Bokhary PJCFA in *Chan Kam Nga v Director of Immigration* (1999) 2HKCFAR 82). He was willing to accept the requirement of deferred entry as justified even without article 22(4). He was even more explicit in *Cheung Lai Wah,* when he stated if all eligible persons came at once, it would create 'chaos' and there would be considerable strain on community's resources. He thought that there would be little point in admitting the children 'if they have problems with accommodation or housing' (634 C-G).

The clearest example of a court taking consequences into account is the decision of the CFI by Yeung J in *Lau Kong Yung and others v Director of Immigration* (HCAL 21/99) when he refused to grant a stay of execution of the expulsion order to persons claiming that they were entitled to the right of abode. He described in

graphic and apocalyptic terms the consequences for Hong Kong of the admission of a large number of migrants from the mainland as the basis for his decision. He said, 'An unverified, unplanned and unregulated large influx of new immigrants to Hong Kong will be an unbearable burden in terms of education, medical facilities, housing and general social welfare arrangements. It may "sink" Hong Kong . . .' (p 30 of typescript).

The CFA did not discuss the social consequences of its decision in *Ng Ka Ling*. During the hearing, it had tended to discourage arguments on this point. One difficulty it may have had in dealing with it was the absence of any reliable statistics or other information which could have enabled an assessment of consequences. None was provided by the government. Counsel for children had affidavit evidence of the demographic growth in Hong Kong, which pointed that without immigration, its population would not grow.

The scope that a court has for taking social consequences into consideration depends on the specific issue before it — particularly whether the provision in question is in the nature of a standard or a rule. The former permits greater flexibility. Thus the court would have little choice if the issue was the incidents of the right of abode, but more discretion as to which category of children was entitled to the right of abode. There is, correctly, considerable hesitation in qualifying constitutional rights with regard to social consequences, unless such consequences are a part of the structure of the right itself (as for example the restrictions on the freedom of speech in the interests of national security). The strong version of the rule of law says that the law must be applied regardless of social consequences, to avoid the danger that politics might replace legal principles as the decisive factor.

Reference to the NPCSC under article 158

Article 158 provides for a division of responsibilities between the HKSAR courts and the NPCSC regarding interpretation. The first paragraph gives the NPCSC the power to interpret the Basic Law. The second paragraph authorizes the HKSAR courts to interpret, on their own in adjudicating cases, provisions within the autonomy of the Region. The third paragraph gives the courts power to interpret all provisions in the course of litigation, subject to one exception. When the case reaches the court from which there is no further appeal, that court cannot interpret certain provisions but must refer them to the NPCSC and then apply that interpretation to the facts of the case.

A reference must be made if two conditions are met. The first is that the provision in question concerns the responsibilities of the Central People's Government or the relationship between the Central People's Government and the

HKSAR, which the CFA called 'excluded provisions' ('the classification test'). The second condition is that the interpretation of such a provision 'will affect the judgment on the case' ('the necessity test'). A reference to the NPCSC is on the interpretation of an excluded provision, not of other provisions which may also be relevant to the decision.

Arrangements under article 158 were a compromise between principles of different constitutional systems, the Chinese which vested the powers of interpretation in the legislature and the common law which vested this responsibility in the courts. These variations reflected profound differences of the philosophy of political organization and control. The right of abode case in the CFA was the first to raise the question of the reference to the NPCSC. Previously all the formal rulings on the Basic Law had been made by the HKSAR courts, and a measure of 'common law-ness' had developed about the interpretations. Contrary to expectations, the government did not ask the CFA to refer the interpretation of article 22(4) to the NPCSC, although at the same time it argued that as an excluded provision, the article should be interpreted by the NPCSC.

The CFA dealt with the reference provisions of article 158 in an interesting and imaginative way. The CFI and the CA had held that article 22(4) qualified the right of abode of persons on the mainland who became permanent residents under article 24(2)(3). On that basis they decided that the requirement of an exit permit was justified. The government relied on this reasoning in the CFA. It would therefore seem obvious that an interpretation of article 22(4) would 'affect' the judgment. Indeed, it could be argued that its interpretation was essential to the decision. If so, according to article 158(3), the CFA could not make that interpretation but had to refer it to the NPCSC.

However, the CFA did not follow this course. It said first that it is for the CFA 'and for it alone' to decide whether a reference to the NPCSC should be made. This is an emphatic way of restating the position in article 158. Relying on the article again, it stated the two tests, of classification and necessity, which must be satisfied before a reference should be made. However, it then advanced a further proposition. Invoking a 'purposive' approach, it found the purpose of article 158(2) and (3) was to vest responsibility in Hong Kong courts to interpret all provisions of the Basic Law, except that the CFA could not interpret the excluded provisions. It said that a provision has to be interpreted in its context, which may be supplied by other provisions (344 F). If a provision within autonomy is affected by an excluded provision, the Court will not refer the excluded provision to the NPCSC because it would in fact deprive the Court of jurisdiction over the autonomy provision. What the Court had to interpret was the 'predominant' provision. If that predominant fell within autonomy, then it was the responsibility and duty of the Court to interpret it even if an excluded provision was relevant to its interpretation.

This purposive interpretation is not without force and attraction. However, it seems to go against the plain meaning of article 158(3). Until the case reached the CFA, arguments had proceeded on the basis whether article 22(4) qualifies article 24(2)(3), which would seem to require an interpretation at least of article 22(4), although it may also involve an interpretation of article 24(2)(3). The fallacy in the reasoning of the Court may well lie in its view that there is one 'predominant' provision requiring interpretation. In fact more than one provision may require interpretation. The CFA gives little guidance on how one determines what is the 'predominant' provision. Moreover, it could be said as well for the NPCSC,[23] whose role is to manage the boundary between the HKSAR and the Central Authorities, that it may interpret a provision within autonomy if it is connected to an excluded provision. It should also be noted that the reference of article 22(4) to the NPCSC does not prevent the CFA from interpreting article 24(2)(3), which has many aspects to it.

It is not my purpose here to analyse the Court's decision on this point. This volume contains a fascinating exchange between Albert Chen, who thinks that the CFA erred in not making a reference to the NPCSC, and Denis Chang, who justifies the approach of the CFA. What I propose to do, in the next section, is briefly to examine some difficulties inherent in article 158(3) which may help to explain, if not necessarily justify, the purposive approach adopted by the CFA.

The scheme of article 158

There are several problems with the scheme of article 158. It is a compromise between the approaches of two legal systems. More accurately, it provides for the sequential application of these approaches. This bifurcation of systems is a major weakness. In litigation, the interpretation is first made by Hong Kong courts applying the common law rules. If a reference is necessary, the NPCSC presumably applies Chinese rules. It is here that the analogy with the European Union breaks down. When a case is referred to the European Court of Justice, the approaches and rules of procedure and interpretation are largely similar to that of the national legal system from which the reference is made. The Court of Justice is staffed by judges who are well trained and experienced in the law. Proceedings are held in open, and parties are represented by lawyers of their choice. Arguments are based on legal principles and statutory provisions, trying where possible to build on common values. Decisions are based on and justified by reference to the law.

In short, there is a kind of continuity. Unfortunately in article 158 there is

[23] Ghai (see note 1 above), p 206.

discontinuity. The theatre of the NPCSC is fundamentally different from that of the Hong Kong courts. Its members are not legally qualified. It would apply a different approach to interpretation. The very concept of interpretation, authorizing major additional stipulations, is different. There are few procedures for interpretation by the NPCSC; nor has it, apparently, adopted any rules so far. No provisions exist for legal representation. The NPCSC is too large a body to be able to engage seriously with legal argumentation and conclusions. It is correctly perceived to be a political body under the control of the Central Government and the Communist Party. It is to be advised by the Committee for the Basic Law. Unfortunately several of its members have made public, and often aggressive, statements, criticizing judicial decisions on which they might have to advise the NPCSC, without hearing the parties or perhaps even analysing the judgments. Consequently the CBL has lost much credibility. Proceedings in the NPCSC thus seem to be a total negation of the principles and procedures in judicial proceedings.

Another problem with article 158 is that if it were followed literally, it would be difficult to make an interpretation as the relevant provision may have to be dealt with in isolation from other connected provisions. In the EU system, the Court of Justice interprets all the provisions of the European Union law, treaties as well as directives and regulations. In other words, it is responsible for an entire system of law. Article 158 requires the CFA to interpret only some provisions of the Basic Law and the NPCSC others. Yet it may happen that neither set of provisions can be interpreted without the context of other provisions, and indeed some, at least tentative, interpretation of those provisions. Yet that is not strictly possible, unless one resorts to some device like that of the 'predominant' provision employed by the CFA.

A further difficulty is that two tribunals will apply different rules of interpretation. The coherence of the Basic Law would be adversely affected if one set of provisions is interpreted using common law principles and the other Chinese legal principles. It is also further worth noting that unlike the NPCSC under article 158(1), the European Court cannot interpret a provision on its own, but has to wait for a reference from national courts.

The operation of article 158 is complicated by an ambiguity in the meaning of 'interpretation' when referring to the powers of the NPCSC. There seems to be little agreement among Chinese law experts as to whether the NPCSC may extend or in other ways alter the scope of the provision (as might be implied in the 1981 NPCSC resolution on an Improved Interpretation of the Law).[24] There have been

[24] Paragraph 1 says that where the limits of articles of laws and decrees need to be further defined or additional stipulations need to be made, the NPCSC 'shall provide interpretations

few interpretations by the NPCSC (indeed the experts do not agree on how many). The Basic Law impliedly restricts the scope of interpretation, for it contains another provision which deals expressly with the amendment of the Basic Law in which the power of the NPC to amend articles implementing the basic policies of the PRC regarding Hong Kong is restricted (article 159, discussed later). However, the NPCSC interpretation of the Chinese Nationality Law in the context of article 24 of the Basic Law which was made in May 1996 contained additional stipulations and in practice recognized the status as Chinese nationals of those persons who, in accordance with the Nationality Law, should have lost it due to the acquisition of a foreign nationality.[25]

Thus the schizophrenia which lies at the heart of article 158 aggravates other problems of the scheme of interpretation and can be the source of confusion and conflict.

Status of Basic Law and its relationship to the PRC Constitution and Laws

Neither the Basic Law nor any other instrument specifies the constitutional status of the Basic Law or its relationship to the PRC Constitution. Uncertainties on these points have complicated litigation on the Basic Law. They have been discussed in the section on 'jurisdiction' above (although connected, the question of jurisdiction is different from that of hierarchy of laws). There are also at least two further chapters in this volume which examine aspects of this matter (see chapters by H L Fu and Bing Ling). I provide here merely the manner in which the Hong Kong courts have engaged with these issues (which point does not feature in these chapters since they deal primarily with the perspectives from mainland law and theory).

Some Chinese scholars had preferred not to regard the Basic Law as a constitution because the HKSAR was not a state and its powers were delegated from PRC through what was ordinary legislation under the PRC system.[26] At least

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or make stipulations by means of decrees'. For analysis of this Resolution and the difficulties in adhering to it, see Kong Xiaohong, 'Legal Interpretation in China' (1991) 6 Connecticut Journal of International Law 491–506. She mentions the increasing role of the Supreme People's Court in providing what amount to legislative interpretation, despite the lack of powers to do so. She also says that a 'clear distinction between the legislative power and interpretative power of the Standing Committee cannot be made' (p 504). See also the chapter by Wen Hongshi in this volume.

[25] See Ghai (note 1 above), pp 169–70. Mr Lu Ping, then head of the HKMAO of the State Council justified the results on the basis of a 'flexible interpretation'.

[26] This view was early and clearly expressed by a mainland Basic Law drafter, Professor Zhang Youyu when he wrote that 'it is necessary to understand that the Hong Kong Basic Law will

as far Hong Kong courts are concerned, its status is a key question for their approach to its interpretation depends on this. The common law has adopted broader and more purposive approaches to the interpretation of constitutional instruments (as Hong Kong did in regard to the Bill of Rights Ordinance) than to ordinary legislation.

What the Basic Law does make clear is that the Basic Law prevails over any Hong Kong law inconsistent with it (article 11 (2)). It cannot be amended except following a special procedure and some provisions cannot be altered at all (article 159). These provisions are not consistent with the Basic Law being ordinary legislation. The Basic Law also contains provisions on the application of national law in the HKSAR (article 18). National laws can only be applied to Hong Kong if they relate to defence and foreign affairs 'as well as other matters outside the limits of the autonomy of the Region as specified by this Law' (article 18(3)). A national law can be extended to Hong Kong only after the NPCSC has consulted with the Committee for the Basic Law and the HKSAR government. Even then national laws are applied directly but must be implemented through local promulgation or legislation. Applicable national laws are listed in Annex III.

Not surprisingly, Hong Kong courts (and scholars) have taken a different view on the status of the Basic Law from that of some mainland scholars. Chan CJHC said in *Ma*, 'The Basic Law is the constitution of the HKSAR. It is the most important piece of law in the land' (325H). This position has been endorsed by all the courts and the approach to interpretation based on that status.

However, there has been considerable uncertainty on the implications of this status for the relationship of the Basic Law to the PRC Constitution and mainland legislation. In *Ma,* Chan CJHC referred to national and international aspects of the Basic Law, but did not elaborate on their consequences. These dimensions have seldom been far from the sight of the courts. The use of the Joint Declaration as an authoritative guide to the intention behind Basic Law provisions has already been discussed. Courts have frequently referred to the Basic Law as national law. Sometimes this has been done to emphasize that the authority for it and consequently of the jurisdiction of courts which comes from the 'sovereign' (as with the CFA in *Ng Ka Ling*). At other times, it has been used to establish hierarchy, and the ultimate source, of laws.

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be legislation enacted pursuant to the PRC Constitution, and the Basic Law is not in and of itself a "constitution" ', in '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 5–19, at p 7.

It was this latter view that dominated the analysis of the CA in *Ma*. For example, despite proclaiming the constitutional status of the Basic Law, Chan CJHC went on to hold that the 'Sovereign' can do any act and the courts cannot ever question them (35C). In this way he minimized the status of the Basic Law so far as the relationship with the mainland was concerned. The CA tended to regard the Basic Law as just another national law. Nazareth VP said, 'If any inconsistency arises between the Basic Law and the Decisions in relation to the formation of the first Legislative Council, clearly the latter as the more specific (and later in respect of 8 August 1994 Decision) must prevail' (356A). The consequences of Chan CJHC's view on jurisdiction and Nazareth VP's on parity of the Basic Law with other national laws was in effect to give the latter superiority over the Basic Law. However, *Ma* is not a good case for assessing judicial statements on the rules for the application of mainland legislation, since the CA also held that the decision on the establishment of the Provisional LegCo was compatible with and made within the framework of the Basic Law and associated NPC Decisions. Nor was its conclusions based on a detailed analysis of the PRC Constitution, but on colonial analogies and vague notions of 'sovereignty'. In any case, as has been mentioned above, attitudes on the relationship between the Basic Law and national laws changed when the courts dealt with *Cheung Lai Wah*.

In the section on 'Jurisdiction', I have demonstrated how Keith J at first instance and the CA, particularly Chan CJHC, began to express doubts about the correctness of *Ma* as regards the supervening power of mainland legislation. They examined more closely its consequences for the integrity and enforcement of the Basic Law, and were inclined to the view that mainland laws which were inconsistent with the rights of Hong Kong residents could not be enforced in Hong Kong. But it was unnecessary for them to decide the question since they found enough justification for the exit permit (on which point the mainland law was relevant in the case) in article 22(4) of the Basic Law itself. The CFA faced the question in a different context, for it held that article 22(4) was not relevant to article 24(2)(3). It concluded that in these circumstances mainland legislation could not be enforced in Hong Kong. It placed its ruling on a broad basis: any mainland law inconsistent with the Basic Law or its procedure could not be enforced in the HKSAR.

It should be noted that the mainland law was not applied to Hong Kong in accordance with article 18 of the Basic Law. This fact weighed heavily with the CFA. It said that this article 'restricting the application of mainland laws is essential to the implementation of the "one country, two systems" principle.' Would the CFA decision also apply to the mainland law which was extended to Hong Kong in accordance with article 18? It was not long before this question confronted the courts. It was dealt with by the CA in the flag case (*Ng Kung Siu*). As has been

mentioned in the 'Jurisdiction' section, the CA held that the provisions of the National Flag and Emblem Ordinance could not violate article 39 of the Basic Law which, via the ICCPR, protected the freedom of expression.

The case proceeded on the basis that the legislation was local, and the Court's attention seem not to have been drawn to the fact that it was in fact implementing through a local ordinance national laws which were applied to Hong Kong in accordance with article 18. Should that make any difference? On principle, it would seem that it should make no difference. Article 11(2), which establishes the supremacy of the Basic Law, applies to all laws enacted by the legislature of the HKSAR.

Would it have mattered if the national law had been applied by promulgation (i.e. by its gazettal by the Chief Executive)? In principle it should not matter (although laws applied by promulgation may not regarded as 'laws enacted by the legislature of the HKSAR'). This would provide an arbitrary basis for the Chief Executive to bypass important safeguards provided by the Basic Law. In fact, the need for the scrutiny of such laws is even more compelling for it has not been reviewed by the Hong Kong legislature. It may also be that the provision for application of national laws through an ordinance is established for instances where it is necessary to give jurisdiction to Hong Kong courts and to provide for penalties, for mainland legislation extended to Hong Kong would not have provisions for the jurisdiction of Hong Kong courts. In any case, in the flag case, what was involved was a restriction on the rights of Hong Kong residents and was thus caught by article 39, which establishes a broad principle, which would cover mainland applied laws. It provides that these restrictions shall not contravene the provisions of , *inter alia*, the ICCPR.

The question of the application of national law raises another issue that was canvassed by the government in the CFI in *Ng Ka Ling*. Geoffrey Ma, representing the government, argued that it would be wrong to ignore mainland laws, even though not applicable in Hong Kong. 'If the laws of Mainland China restricted the number of its nationals who could settle in Hong Kong, it would be wrong for laws to be enacted in Hong Kong for entry into Hong Kong which would be inconsistent with the laws of Mainland China on the topic' (83A). He put the point more strongly in the CA. 'The HKSAR, being part of the PRC, albeit having a different system, should recognize and respect the laws of the sovereign. Any Hong Kong law calling for compliance with PRC laws cannot be regarded as unconstitutional' (636–637). This point was dealt with on the basis of the incompatibility of national laws with the Basic Law, as it should have been in the facts of the case. However, it may be argued (as Albert Chen does in his contribution on article 158 in this volume) that as in federal systems, 'the full faith and credit'

type provision requires constituent units to recognize the laws of other units, similarly Hong Kong courts should enforce mainland laws. This misconceives the nature of 'full faith and credit' clauses. It also misconceives the relationship of the HKSAR to the mainland, at least as far as questions of jurisdiction are concerned. Hong Kong is a separate jurisdiction, and the entire scheme of the Basic Law and much other legislation is based on the cardinal fact. The position of Chan CJHC in *Cheung Lai Wah* comes close to this view when he said that no restrictions could be imposed on the right of abode on the 'ground that the HKSAR should recognise and respect the immigration laws of the Sovereign'. In his view, the position was no different than when a person with a right of abode enters Hong Kong who may have left another country unlawfully — it was no business of Hong Kong immigration authorities to inquire into that matter (635 I). He also said, 'While it is accepted that the PRC immigration laws should be recognised and respected, I do not think that this alone can justify the deferment of the exercise of the right of abode which is clearly conferred on that person under the Basic Law' (637C). The CFA said that mainland laws requiring exit permits for mainland residents 'of course are and remain fully enforceable on the Mainland. But that cannot provide a constitutional basis for limiting rights conferred by the Basic Law.' (348B) The Court did not discuss the confusion, not to say the clash, that would result from two opposed laws applying to the same situation (see also Chen in this volume on article 158).

An Assessment of the Role and Approach of the Courts

In the short period since the transfer of sovereignty, HKSAR courts have elaborated on many aspects of the Basic Law. They have helped to sharpen its contours. After some initial misgivings, they have treated the Basic Law not only as the instrument which regulates the structures of and relationship between public institutions and protects the rights of Hong Kong residents, but also governs China's relationship with Hong Kong. They have resisted attempts to infuse mainland law into the region except through the gatekeeping mechanism of the Basic Law. They have attempted to treat the Basic Law as a self-contained document for the governance of Hong Kong. They have tried to introduce some order and coherence into the legal system despite conflicting doctrines of jurisdiction and application of laws. They have done this through assuming a wide constitutional jurisdiction and adopting the purposive approach to interpretation.

The previous section has examined some of the techniques that courts have used to achieve these results. They have used the common law method and rules of interpretation, despite claims that since the Basic Law is Chinese law, it should

be interpreted using Chinese rules. There is some uncertainty as to what the Chinese rules are (I discuss below some of the interpretations of the NPCSC which does not seem to show any method). They have used the English text of the Basic Law as the primary text (although the more authentic version is the Chinese). In *Ma* the CA adopted the position that if the English text was clear, it was unnecessary to refer to the Chinese text. For example Chan CJHC, recognizing that the Chinese text was quite clear in making clear that previous laws were adopted without further formality, said, 'However, I do not think it is necessary to rely on the Chinese text at all. The English text is already quite clear and without ambiguity.' (328A) This statement might be implied as saying that one starts with the English text and goes to the Chinese only if there is ambiguity. In fact, a provision might be quite clear in English, yet different from the Chinese. It is the Chinese text which prevails.

Another technique is the insistence that to be applicable in Hong Kong, Chinese laws must conform to the Basic Law. The courts have ignored agreements reached between the old and the new sovereigns in the JLG. They have placed a special emphasis on rights, and used the ICCPR to achieve coherence in the legal system. Likewise they have used the concept and scope of Hong Kong's autonomy. They have applied restrictive rules for reference to the NPCSC for interpretation. Particularly interesting is the way the courts have tried to bring some order into NPCSC Decisions which amount to the interpretation of the Basic Law. I discuss only one Decision, but similar criticism of lack of clarity or doubtful legality can be made against the interpretation of the Chinese Nationality Law in relation to article 24 or on the validity of the Provisional LegCo.

In February 1997, the NPCSC, acting under article 160, made a Decision adopting previous laws, declaring some laws invalid, and providing some rules for the adaptation of laws. It is probable that the NPCSC went beyond its remit in doing so, which was merely to declare laws which were inconsistent with the Basic Law and so not to be adopted on 1 July 1997, rather than to adopt laws. In his discussion in *Ma* of the NPCSC Decision, Chan CJHC thought that the NPCSC was not intending to 'adopt' previous laws, but merely to make clear which laws are to be adopted, and to declare those which are invalid (328). It seems more like that the NPCSC was intending to 'adopt'. Chan CJHC did realize this, for he said that this adoption is not 'strictly speaking' necessary (328G). Again contrary to what he said about the assumption in the Reunification Ordinance, that Ordinance takes the view that the laws have been adopted by the NPCSC Decision. Its preamble states, 'NPCSC, in exercising its powers under Art 160 of the Basic Law on 23 February 1997, resolved which of the laws previously in force in Hong Kong are to be adopted as the valid laws of the HKSAR and the principles upon which those laws should be construed and adapted.' (346B)

The court has had to ignore a decision of the NPCSC or give it a particular slant in order to maintain the integrity or cohesion of the legal system, e.g. in its view of what the NPCSC decision under article 160 was doing, or its analysis of the effect of NPCSC repeal of the Application of English Law Ordinance. Chan CJHC said that the Ordinance was not only no longer necessary, but 'it also contravenes the Basic Law by its incorporation of imperial acts' (329C). In fact, many other ordinances incorporate parts of 'imperial acts' — if they were all deemed to be void now, there would be a serious 'vacuum' which the court was so afraid of.[27]

Similarly in the court's decision on the cut off date for the reception of 'previous laws', the court ignored the view of the NPCSC, implicit in the article 160 Decision, and explicit in the statements of its legal advisers, that the cut off date is 1984, the signing of the Joint Declaration (329 G). More accurately, the Chinese view is that the laws which are adopted are those which were in force on 30 June 1997, but only those laws which do not represent important departures from the law as in 1984 ('current laws will remain basically unchanged', article 3(3) of the Joint Declaration).[28] The repeal of the amendments to the Public Order or Societies Ordinances by the NPCSC was justifiable only on this interpretation. However, this formulation will raise uncertainty in the law, and so the court essentially ignored it.

The courts have been criticized by some for using the very techniques that have helped to give coherence to the Basic Law. The critics see in the refusal to enforce Chinese laws which are not in accordance with the Basic Law as defiance of the NPC. Similarly they interpret the rejection of JLG agreements as an insult to the 'sovereign' as they also interpret in similar terms the CA decision in the flag case. Likewise the attempt to establish the self-contained character of the Basic Law has been interpreted as a refusal to accept the supremacy of the Chinese Constitution. Courts have been criticized for applying common law and not Chinese rules of interpretation.

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[27] Following the NPCSC Decision, the Reunification Ordinance added s 2A(a)(e) to the Interpretation and General Clauses Ordinance as follows: 'provisions applying any English law may continue to be applicable by reference thereto as a transitional arrangement pending their amendment by the Hong Kong Special Administrative Region through the legislation thereof, provided they are not prejudicial to the sovereignty of the People's Republic of China and do not contravene the provisions of the Basic Law'.

[28] For an elaboration of this argument, see Yash Ghai, 'The Basic Law and the Bill of Rights Ordinance: Complementaries and Conflicts' (1995) 1 Journal of Chinese and Comparative Law 30–71.

Thus the approach that some commentators have warmly welcomed have been severely criticized by others. This is not a satisfactory basis for the litigation of the Basic Law. Consequently, it would be advisable to establish ground rules which enjoy general legitimacy. At the same time, these rules should be consistent with the purposes of the Basic Law and the intentions of those who designed the principle of 'one country, two systems'. It is to that enterprise that I now turn.

The Way Forward: The Ground Rules for the Approach to the Basic Law

The above analysis has attempted to identify issues that have caused difficulties in finding an acceptable framework for Basic Law litigation. The fundamental question is whether the Basic Law is a self-contained and exclusive instrument for the governing of Hong Kong and regulating its relationship with the Central Authorities. By 'self-contained' I do not mean that it has no relation to the PRC Constitution or that one does not need to turn to that constitution for the composition or procedures of institutions; but it does mean that it is the Basic Law which provides the essential framework for the relationship between the Central Authorities and the HKSAR and for the application of laws in Hong Kong.

Other issues flow from the acceptance of the Basic Law as self-contained. How far does the national Constitution override the provisions of the Basic Law? Can mainland laws apply in Hong Kong outside the framework of the Basic Law? Are the applicable mainland laws bound by the terms of the Basic Law, particularly as regards the rights and freedoms of Hong Kong residents? Have Hong Kong courts jurisdiction over all questions of the application of laws in Hong Kong, even if the law is enacted by the NPC? Other questions are connected but flow less directly from it. Should courts apply common law principles or Chinese rules in interpreting the Basic Law, for a self-contained character would suggest the common law since the underlying basis of the legal system is the common law? How should the role of the NPCSC under articles 17, 18 and 158 be conceived — in terms of common law notions of interpretation or Chinese? If the Basic Law were to be seen as a self-contained document, it may be that the role of the NPCSC and the methods it uses for performing that role should follow more closely general judicial principles practised in Hong Kong and less the Chinese methods. A self-contained Basic Law would also provide a framework and a method for dealing with the difficult and emotive issue of 'sovereignty' which at one level seems to undermine the very foundations of the Basic Law and 'one country, two systems'.

I realize that it is not easy to find agreement on these issues, and thus on the fundamental question of the character of the Basic Law. But some agreement is

essential, if we to avoid endless disputes and quarrels, protect the judiciary from unnecessary and unproductive controversies, and lay a proper foundation for the development of constitutional jurisprudence.

It is my argument that the acceptance of the largely self-contained character of the Basic Law is a prerequisite for that success. I realize that it would be unusual in constitutional arrangements for autonomy that the document which serves as the constitution of a region should enjoy this self-contained character. But there are good reasons why this is so in the case of the Basic Law. Unlike other systems of autonomy, 'one country, two systems' is based on the co-existence and separation of two economic, social, political and legal systems within one sovereignty. There are huge elements of discontinuity between these systems. This is well reflected in the constituent documents: the Basic Law is incompatible with large sections of the PRC Constitution. I mention only a few examples. The Preamble of the Constitution says that the basic task of the nation is to build socialist modernization, through people's democratic dictatorship and under the leadership of the Communist Party (a principle which is enshrined in article 1). Several articles entrench essential elements of a socialist economy. The judiciary comes under the supervision of the NPC and does not enjoy the degree of institutional and functional independence of a common law judiciary. No one suggests that when the Basic Law conflicts with these provisions it is invalid. Nevertheless, it has been argued that various constitutional provisions overrule the Basic Law and operate in Hong Kong despite their inconsistency with it. But those who argue like this have not provided any criteria to distinguish constitutional provisions which prevail over the Basic Law from those which give way to it. The very fact that there is no easy way to do so is strong evidence that the Basic Law, with its detailed provisions, is intended to be self-contained.

The maintenance of 'one country, two systems' requires a continuous separation of the systems. There cannot, however, be a total separation and the Basic Law provides several points of intersection or interface. As I have indicated, it is these points of interface that have caused particular difficulties. It is vital therefore that the instances of interface should not be multiplied, but held to those specified in the Basic Law. The Basic Law is generally quite specific on many of these points of interface, such as the scope and modality of the application of national laws, the scheme for the interpretation of the Basic Law, and Hong Kong's external affairs powers. At other points it is not so clear, such as the relationship of the Basic Law to the national Constitution or laws, or the powers of the NPC in Hong Kong. I suggest that these points become clear once we accept that the Basic Law was conceived of as providing a self-contained scheme for regulating the relationship between Hong Kong and China, and that in most essentials, it is a different scheme

from that which is used for regional autonomous arrangements within the mainland. The scheme does not require the application of Chinese laws other than in accordance with the Basic Law or the use of Chinese principles to interpret the Basic Law. Even the vexing problem of 'sovereignty' is susceptible to an explanation consistent with the self-contained character of the Basic Law.

There are several reasons why the only way to sustain 'one country, two systems' is to accept the self-contained character of the Basic Law. Hong Kong's autonomy cannot be secure unless there is a limit to the interventions of the Central Authorities in the region; these limits are defined in the Basic Law. Hong Kong's relationship with foreign states and international economic organizations, such as trade agreements, role in international economy, and mutual judicial assistance, is predicated on the premise of that autonomy. Internally, the operation of its economy depends on the separation of its legal and monetary/fiscal systems from those in the mainland. Rights guaranteed to Hong Kong depend on a distancing of mainland laws and attitudes towards the relationship between state and citizens. Hong Kong's systems also require constitutional jurisdiction in the courts, as an essential foundation for the Rule of Law. In other words, autonomy requires the acceptance of different philosophies, methods of governance, and a regime of laws. It is only on the premise of a self-contained Basic Law that autonomy is secure.

This 'functional' reason for this character of the Basic Law is supported by ample empirical and doctrinal evidence. What I have called in my book the twin foundations of the Basic Law, the Joint Declaration and article 31 of the PRC Constitution, both provide support for its self-contained character and a system substantially different from that on the mainland. Article 31 gives maximum flexibility to the NPC in designing special administrative regions — the systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions. When Peng Zhen, Vice-Chairman of the Constitution Revision Committee, presented the draft 1982 Constitution to the NPC, he emphasized the flexibility that it gave the national authorities in providing a suitable system for Taiwan within the PRC. He assured Taiwan that it could, among other things, retain its social and economic systems, way of life and its economic and cultural relations with foreign countries for ever.[29] Such systems could surely only survive if the most fundamental principles of Chinese constitutional system were not applied in the relationship of the Central Authorities to Taiwan. In this context, it is instructive to compare the scope and

[29] Peng Zhen, Report on the Draft of the Revised Constitution of the People's Republic of China, 5th Session of the 5th National People's Congress on 26 November 1982, reprinted in *The Laws of the People's Republic of China 1979–82* (Beijing: Foreign Languages Press, 1994), pp 414–415.

structure of autonomy for ethnic regions on the mainland with that of Hong Kong's. The former is severely limited in terms of policies and the scope for opting out of the fundamentals of the PRC system. None of the restrictions imposed on the autonomy of these regions apply to Hong Kong.[30]

The second foundation of the Basic Law is the Joint Declaration. Little needs to be said about the imperative of autonomy and the protection of Hong Kong's separate systems for the realization of its objectives. Indeed, the courts have frequently used the elaboration of China's basic policies regarding Hong Kong in the Declaration to resist the encroachments of mainland laws. This is quite a separate point from the place of treaties in the PRC constitutional or legal system. It is a strong indication of the intention to provide a self-contained system for Hong Kong. Both article 31 of the national constitution and the Joint Declaration are premised on the assumption that 'one country, two systems' would not be squeezed into the framework of the PRC constitutional, political and economic systems; but would in fact be liberated from them.[31]

There is also evidence that this high degree of autonomy and the existence of separate systems were not seen to compromise Chinese sovereignty. Peng Zhen said that while China would never waver on the principle of safeguarding its sovereignty, unification and territorial integrity, 'we are highly flexible as regards specific policies and measures and will give full consideration to the realities of the Taiwan region and the wishes of the people and of all quarters in Taiwan, (pp 414–415). He thus envisaged the possibility of fundamentally different systems in a special administrative region from that on the mainland within one sovereignty. The point becomes clear when we examine the Basic Law. In it are all the manifestations of Chinese sovereignty that the NPC thought was necessary to preserve a unified state. In explaining the Basic Law and related documents to the NPC, Ji Pengfei, the Chairman of the Drafting Committee, said that the draft Basic Law 'contains both provisions embodying the unity and sovereignty of the country and provisions empowering the Special Administrative Region with a high degree of autonomy in the light of Hong Kong's special circumstances'.[32] He then lists

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[30] See discussion in Ghai, (note 1 above), pp 115–123.

[31] Support for this conclusion is also to be found in the last paragraph of the Preamble of the Basic Law which discloses the intention that Hong Kong would be governed in accordance with the Basic Law, and article 11(1) which, invoking article 31 of the PRC Constitution, says that 'the systems and politics practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedom of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this law'.

[32] Reprinted in *The Basic Law of the Special Administrative Region of the People's Republic of China* (Beijing: Foreign Languages Press), p 173.

the powers of the Central Authorities in the HKSAR as specified in the Basic Law, including defence and foreign affairs; these are 'indispensable to maintaining the state sovereignty' (p 172). He also examines the provisions of article 23 which, *inter alia*, require the HKSAR to enact legislation to prohibit acts of secession, treason, sedition, or subversion against the Central People's Government, protect state secrets, and disallow contacts with foreign political bodies. He then concludes, 'These stipulations are entirely necessary for maintaining the state sovereignty, unity and territorial integrity . . .' (p 172). It is thus clear from these statements that the Basic Law itself protects state sovereignty and the role of the Central Authorities necessary for that sovereignty. It is not necessary to go to any other document for implications for Hong Kong of national sovereignty.

It is also obvious from statements by Peng and Ji that they make a distinction between sovereignty as a manifestation of the external statehood of China, as indicating its independence and territorial integrity, and the internal organization of the state. In granting Hong Kong's high degree of autonomy in a legislative document which has special characteristics, China is acknowledging that so far as internal state powers are concerned, they can indeed be divided spatially. Indeed, no system of autonomy can function without some modification or fudging of the internal aspect of sovereignty. It makes less and less sense these days to talk of internal sovereignty as states have been redesigned to cope with problems of size, ethnicity, or regional cooperation. The Basic Law acknowledges this fact for China. China was prepared even to make concessions on external sovereignty for it accepted that the ICCPR and other human rights instruments could continue to apply to Hong Kong, including its reporting obligations. At that time such obligations to the international community for aspects of internal conduct would clearly have been seen by China as a breach of state sovereignty.

Many internal aspects of the Basic Law also recognize its special status. It is the only Chinese legislation (apart from another Basic Law, that for the special administrative region of Macau) which provides for its own rule for amendment, instead of relying on the provisions for the legislative process in the national Constitution (article 159).[33] It is the only law, along with the Macau Basic Law (including even the Constitution) some provisions of which cannot be amended at all, not even by the NPC. Other special features include that only in special administrative regions do regional courts have the powers of final adjudication

[33] I am indebted to H L Fu for this information. See his paper, 'The Form and Substance of Legal Interaction between Hong Kong and Mainland China: Towards Hong Kong's New Legal Sovereignty' in R Wacks (ed), *The New Legal Order in Hong Kong* (Hong Kong: Hong Kong University Press, forthcoming).

(article 2). Regional courts also have the power of interpretation and in the course of litigation, the role of the NPCSC is quite restrictive. It is only in special administrative regions that the NPCSC cannot amend regulations which it considers unconstitutional. In Hong Kong, the NPCSC can declare regional laws void only if they pertain to matters within the responsibilities of the Central Authorities or their relationship to the HKSAR under the Basic Law, not if they are against the national Constitution (article 17). The NPCSC exercises no control over regional legislation which is on areas within regional autonomy. It is only in special administrative regions that non-Chinese nationals have the right to vote and stand for public office. Foreign lawyers may be appointed to the judiciary (article 92) and foreign judges are authorized to be members of the Court of Final Appeal (article 82). Hong Kong's legal system is based on the common law, fundamentally different from the mainland legal system. Nowhere else is the application of national law so restricted. Hong Kong is allowed extensive external affairs powers, and may be a separate member of numerous international organisations like the WTO and the Asian Development Bank (see generally Chapter VII of the Basic Law). Hong Kong has a separate currency (article 111) and a separate fiscal and tax system (articles 108 and 110). It is a separate customs territory (article 116).

All these are evidence as well as manifestation of the separate constitutional and political system of Hong Kong. They are also evidence of the self-contained character of the Basic Law. Their logic is obvious: these systems cannot persist unless Chinese sovereignty is significantly limited in the application to Hong Kong. They have fundamentally qualified the previous nature of the PRC constitutional and political system in its application to Hong Kong, and in due course to other special administrative regions. It make little sense to look at individual provisions of the Chinese constitution to establish untrammelled 'sovereignty' over Hong Kong. These provisions must be read, and qualified, in the light of all the factors outlined above, which constitute the essential elements of 'one country, two systems'. Whatever the intention or expectations behind specific provisions, a new constitutional order has arisen from the principles and objectives of 'one country, two systems', particularly as expounded in the Joint Declaration. It is their logic that must be the guide to the approach as well as the interpretation of the Basic Law. It is well recognized that we must employ legal creativity in conceptualizing and implementing the Basic Law. It is not very creative to say that Chinese rules (including 'sovereignty') must apply to all of the Basic Law, or even to those provisions which fall within the responsibility of the Central Authorities, or their relationship to the HKSAR. For these provisions must be construed within the the framework of 'one country, two systems'.

A parallel, despite other significant differences, may suitably be drawn from

the experience of the UK, whose constitutional system was long based on the principle of parliamentary supremacy. However, as the UK became gradually integrated into the European Union, under which the Union law prevails over national laws, the reality of the fundamental change that this has brought to the principle of parliamentary supremacy began to sink. That a fundamental change had indeed taken place was recognized by the House of Lords in *R v Secretary of State for Transport exparte Factortame Ltd (No 2)* [1991] AC 603. Lord Bridge accepted that by joining the Europe Community and by the 1972 Act, whereby the UK joined the European Community, it accepted limitation of its sovereignty. Referring to the clear understanding that the supremacy of the European Community was well established under treaties and the jurisprudence of the European Court of Justice when the UK joined the Community, he said, 'Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of UK statute law which failed to implement Council directives [i.e. European law], Parliament has always loyally accepted the obligation to make appropriate and prompt amendment' (at p 659).

Judicializing article 158

Even if it is generally accepted that the Basic Law is self-contained, and all the consequences for court's constitutional jurisdiction and application of laws that I have suggested flow from it, it may not fully deal with the problem of article 158. That article divides interpretation powers between the NPCSC and the Hong Kong courts. When a question of a Basic Law provision arises in the course of litigation, the final court has to refer to the NPCSC the interpretation of excluded provisions. The NPCSC also has general powers of interpretation outside the context of litigation. I have outlined above (see section on 'The scheme of article 158') the difficulties inherent in the article and suggested that these difficulties could explain the reluctance of the CFA to make a reference in *Ng Ka Ling*. A reference to the NPCSC cannot be avoided forever; indeed it may become necessary soon. It is essential to find some way to maintain coherence in the Basic Law jurisprudence, threatened by the application of rules of different legal systems to different provisions of the same document, and determinations by bodies constituted, one on the principles of a court and the other of a legislature.

The way is the judicialization of article 158. The components of judicialization would include the following. First, it must be accepted, as a matter of convention,

that the NPCSC will not undertake an interpretation under its general powers. Secondly, it must be accepted that when the NPCSC exercises its power of interpretation on reference from Hong Kong, the term 'interpretation' is understood in the common law sense of explaining the meaning of an expression rather than adding fresh stipulations. Otherwise article 159 which restricts amendments to the Basic Law and provides a clear procedure for amending, would be breached. Thirdly, some committee of the NPCSC must make a recommendation to it as to the interpretation. That committee should have rules for the hearing of arguments by the parties to the case, if desired through legal representatives. The Basic Law gives Hong Kong residents the right to a fair hearing for the protection of their rights (article 35). A detailed dossier should be provided by the CFA (or whatever is the highest court on that matter) to the NPCSC, containing a statement of the issues and of Hong Kong law in so far as it is relevant to the interpretation. The NPCSC must give reasons for its decision, by an analysis of the law. This will not only remove any lingering suspicion of arbitrariness in the process but also provide guidance for the future. Judicial reasons form an important basis for predicting future outcome and are invaluable to legal practitioners, administrators and others. That leaves the role of the Committee for the Basic Law which was seen as a body to bridge the two legal systems as they impinged on a case and to provide advice to the NPCSC. Unfortunately, the CBL has lost considerable credibility. Its members have made several public interventions attacking the courts or their decisions when it seemed likely that the matter may end up in the NPCSC (or indeed they have even asked the NPCSC to intervene in the matter). With one or two exceptions, they do not base their criticism on analysis of the law. No litigants would have confidence in their impartiality or competence under these circumstances. The CBL is too valuable a body to be jettisoned like this. It is necessary to establish rules which recognize the quasi-judicial role of its members, restricting their public utterances on matters in which they would have to give advice to the NPCSC.

Concluding Remarks

Through an analysis of Basic Law litigation and the controversies surrounding it, I have tried to suggest a framework for the future. I have also tried to demonstrate that the framework is drawn from the Basic Law and the intentions of its drafters and more particularly, of those Chinese leaders who conceived the imaginative but difficult concept of 'one country, two systems'. I realize that, nevertheless, not all of the principal protagonists in the debates on this matter will accept my analysis or framework. I would welcome reasoned responses to it. The way to move forward is through informed and rational discourse. This book has been planned with that

aim in mind. As a first step, we need to move away from the silly polarity that has boxed people in two antagonistic camps, and labelled them as 'pro'- and 'anti'-China. Such labelling has made it very difficult to have a meaningful debate on these fundamental questions, for there is a tendency to look to the person's motives (or more likely, imagined motives) and ignore the actual argument. It is also the case that too many statements are made without an analysis of the law. The mainland and Hong Kong have a common interest in finding a suitable approach to Basic Law questions. 'One country, two systems' is an important aspect of PRC's foreign and domestic policy and its success is central to China's scheme for Greater China. It is essential to find a legal basis for that success instead of dissipating energies in polemics.