

**The interpretation of the Hong Kong basic law by
the National People's Congress Standing Committee
(NPCSC): Will it weaken the judicial independence of the
courts of the Hong Kong special administrative region?**

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The Interpretation of the Hong Kong Basic Law by the National People's
Congress Standing Committee (NPCSC): Will it weaken the judicial
independence of the Courts of the Hong Kong Special Administrative
Region?

Submitted by Lau Wai Kam, Winnie

This thesis is submitted to fulfill the requirements
for the degree of Master of Philosophy in Law (MPhil)
at the University of Wolverhampton,

September 2014

Declaration

I declare that this dissertation is the product of my own work, that it has not been submitted before for any degree in any other university, and that all the research materials I have used or quoted have been indicated and acknowledged as complete references.

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Abstract

Hong Kong's retrocession to the People's Republic of China (PRC) in 1997 necessitated the establishment of a new constitutional order. It promised Hong Kong a high degree of autonomy under the model of 'One Country Two Systems'. This meant that the HKSAR would enjoy executive, legislative and independent judicial power. Since 1997, Hong Kong's legal system has comprised a mix of its 'mini-constitution, the Basic Law, and the English common law system.

The new constitutional order under the Basic Law has become the subject of heated debate. Since 1997, the NPCSC has on four occasions interpreted various articles of the Basic Law, sometimes with significant consequences for the local legal system. There have been arguments between legal professionals from Mainland China and Hong Kong over the NPCSC's interpretative power and authority to interpret the Basic Law.

Their differences of opinion are partly due to their two different legal systems and the vague wording of the Basic Law itself. Under the PRC's constitution, the NPCSC has the constitutional authority to modify or interpret the law. However, under Hong Kong's common law tradition, judges make interpretations of legislation, which then become part of the common law. The interpretive power vests in the court.

Problematically, the vaguely worded Basic Law vests interpretative power in both the NPCSC and the HKSAR courts. When a constitutional dispute occurs as to their power to interpret, there is moreover no effective dispute resolving mechanism. The disputes between the NPCSC and the Hong Kong Courts since 1997 means that there is a risk that rule of law and judicial independence have undermined. There is a clear lack of mutual trust between the two systems, and the model of 'One Country Two Systems' has become more difficult to manage and implement.

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List of Abbreviations:

Basic Law (BL)
Basic Law Consultative Committee (BLCC)
Basic Law Drafting Committee (BLDC)
Bill of Rights Ordinance (BORO)
Court of Appeal (CA)
Court of Final Appeal (CFA)
Court of First Instance (CFI)
Executive Council (ExCo)
Hong Kong Special Administrative Region (HKSAR)
Hong Kong Basic Law (HKBL)
Hong Kong Bill of Rights (HKBOR)
Independent Commission Against Corruption (ICAC)
International Covenant on Civil and Political Right (ICCPR)
International Covenant on Economic, Social and Cultural Rights (ICESCR)
Joint-Declaration (JD)
Joint Liaison Group (JLG)
Judicial Committee of the Privy Council (JCPC)
Judicial Review (JR)
Judicial Service Commission (JSC)
Legislative Council (LegCo)
National People's Congress Standing Committee (NPCSC)
National People's Congress (NPC)
New China News Agency (NCNA)
People's Republic of China (PRC)
Right of Abode (ROA)
Special Administrative Regions (SARs)
Supreme People's Court (SPC)
Supreme People's Procuratorate (SPP)

Chapter One

Introduction

1.1 Background

During the nineteenth century, China lost full sovereign rights over Hong Kong after the Opium Wars. It was forced to sign two unequal treaties - the Treaty of Nanking 1842¹, and the First Convention of Peking 1860²³. Under these two treaties, China was compelled to pay large indemnities, open its Chinese ports for foreign trade, and cede Hong Kong Island and the Kowloon Peninsula to Great Britain in perpetuity; under the Second Convention in 1898 the New Territories was leased to Great Britain for 99 years, expiring on 30 June 1997.

With the upcoming expiration of this lease, in 1982 the British Prime Minister, Margaret Thatcher, and Deng Xiaoping, the Chinese leader, began to hold negotiations about the transfer of sovereignty over Hong Kong. Both sides finally reached an agreement - the Sino-British Joint Declaration (JD) on the Question of Hong Kong⁴ - on 19 December 1984. The JD set out the basic policy regarding Hong Kong's future, and reinforced Hong Kong people's confidence in the territory's future prosperity and stability. It promised that 'Hong Kong shall enjoy a high degree of autonomy and shall be vested with independent judicial power including the final adjudication'⁵. It would retain the capitalist system and the 'British's common law

¹ The Treaty of Nanking (Treaty of Namjing) was signed on 29 August 1842 between Chinese and British governments. China agreed to open all her ports for foreign trade and to pay a compensation of \$21 million to Great Britain. The Inlands of Hong Kong were ceded to the Great Britain in perpetuity.

² The Convention of Peking was signed on 18 October 1860 between China and the Great Britain. China was to cede a part of Kowloon Peninsula to Great Britain in perpetuity.

³ The second Convention was signed on 9 June 1898 in Peking. A part of Hong Kong's territories were leased to the Great Britain for 99 years.

⁴ Joint-Declaration was signed on 19 December 1984 in Beijing between Chinese and British governments on the Question of Hong Kong and it came into effect from 27 May 1985.

⁵ Art. 1(2) of Annex I in the Joint-Declaration 1984 states that the HKSAR shall be directly under the authority of the Central People's Government on the PRC and shall enjoy a high degree of autonomy. Except for foreign and defence affairs which are the responsibilities of the CPG, the HKSAR shall be vested with executive, legislative and independence judicial power, including that of final adjudication. The CPG shall authorize the HKSAR to conduct on its own those external affairs specified in Section XI of this Annex.

legal system'⁶. The HKSAR courts would exercise 'judicial power independently and free from any interference'⁷.

On 4 April 1990, the Hong Kong Basic Law (BL) was enacted by the Seventh National People's Congress (NPC) in accordance with Article 31 of the Chinese constitution⁸. It came into effect on 1 July 1997, replacing the Letters Patent and the Royal Instructions as the mini-constitution of the HKSAR. Under the BL, the HKSAR can exercise 'a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication'⁹. 'The socialist system and policies shall not be practiced in the HKSAR'¹⁰. With the permission of Chinese officials, 'the law previously in force in Hong Kong shall be maintained'¹¹. This included the common law system and Hong Kong's existing Bill of Rights Ordinance (BORO), based on the International Covenant on Civil and Political Rights (ICCPR). However, the BL is described as a national law of the PRC and the overarching constitutional document of the HKSAR. That is to say, it has a higher status than any existing statute laws, including the BORO.

The policy of 'One Country Two Systems' was designed to achieve the peaceful reunification of China. The successful implementation of this system was based upon the guarantee of the 'High Degree of Autonomy' principle, set out in the JD, and the BL's promise of the preservation of the existing legal system. British colonial rule left behind a common law system. Common law refers to the system of jurisprudence based upon judicial precedent. Under the doctrine of judicial precedent, the lower

⁶ Art. 2(1) of Annex I in the Joint-Declaration 1984 states that after the establishment of the HKSAR, the laws previously in force in HK (i.e. the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, save for any that contravene the Basic Law and subject to any amendment by the HKSAR legislature.

⁷ Art. 3(2) of Annex I in the Joint-Declaration 1984 states that judicial power in HKSAR shall be vested in the courts of HKSAR. The courts shall exercise judicial power independently and free from any interference. Members of the judiciary shall be immune from legal action in respect of their judicial functions. The courts shall decide cases in accordance with the laws of the HKSAR and may refer to precedents in other common law jurisdictions.

⁸ Art. 31 of the Constitution of the PRC states that the state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions.

⁹ Art. 2 of BL.

¹⁰ Art. 5 of BL states that the socialist system and policies shall not be practices in the HKSAR, and the previous capitalist system and way of life shall remain unchanged for 50 years.

¹¹ Art. 8 of BL states that the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the HKSAR.

courts are bound to obey precedents established by the highest courts in the hierarchy. In Hong Kong, this means that decisions by the Court of Final Appeal (CFA) bind lower courts. It also has jurisdiction to review the validity of legislation.

On 1 July 1997, China took back the sovereignty of Hong Kong from Britain. The Chinese government promised to rule Hong Kong by implementing the principle of ‘One Country Two Systems’. China proposed to give Hong Kong people a relatively high degree of autonomy and hoped to reach a compromise as regards ‘Hong Kong people ruling Hong Kong’. Hong Kong’s capitalist economic system and ‘lifestyle’ of Hong Kong people were to remain unchanged for 50 years until 2047.

The 1997 handover was the completion of a process which began in 1982, when China and Britain started negotiations about the question of Hong Kong’s future. Through a series of talks, the Sino-British Joint-Declaration was drafted and signed in Beijing on 19 December 1984. This set out the basic policies regarding Hong Kong. As promised by the Joint-Declaration, a BL was drafted for the future administration of Hong Kong. The BL was finally adopted by the NPC as Hong Kong’s mini-constitution on 4 April 1990; enacted in 1997, it was superior to all other Hong Kong legislation. The key promises of the JD and the BL were to provide Hong Kong with a ‘High Degree of Autonomy’ and allow it to develop differently from mainland China under the ‘One Country Two Systems’ formula. This included preserving the common law legal system, the rule of law and judicial independence. These promises were intended to provide reassurance to Hong Kong citizens. However, during the BL drafting process, it was said that the wording of its various Articles was unclear, uncertain and vague. It did not clarify (i) the relationship between the Basic Law and the Chinese Constitution; (ii) the Question of a High Degree Autonomy; (iii) the Powers of Interpretation; (iv) the procedure for amendment of the BL; (v) the Question of National Laws; or (vi) the Issue of Human Rights.

1.2 The Birth of the ‘One Country Two Systems’ Policy

The idea of ‘One Country Two Systems’ was a fundamental national policy put forth by the Chinese communist leader, Deng Xiaoping, on 15 December 1978. The major purpose of the ‘One Country Two Systems’ policy was to accomplish the peaceful reunification of China by settling the sovereignty questions of Hong Kong, Macao and Taiwan, and to construct an open door policy¹². As a sovereign state, China could

¹² There were three important missions were proposed by the Deng Xiaoping at the Third Plenum of the Eleventh National party Congress Central Committee on 18 December of 1978 that China should take

exercise sovereignty and control over its administrative regions. Hong Kong became a Special Administrative Region in 1997 (the HKSAR). Under the ‘two systems’ formula, Mainland China would continue with its socialist system while Hong Kong, Macao and Taiwan could continue to maintain their capitalist systems¹³. This meant that the administrative regions could enjoy a high degree of autonomy, separate political and economic systems and their own way of life.

Primarily, the model of the ‘One Country Two Systems’ policy had been designed to resolve the sovereignty issue of Taiwan and achieve its peaceful reunification. As former Foreign Minister Qian Qichen revealed:

“Actually, the concept of “one country, two systems” was first initiated with regard to the question of Taiwan. The question posed was whether we should pursue here, and gobble up Taiwan, or under the so-called democracy and freedom of Taiwan and so gobble up the mainland. We believe neither is a desirable choice. We believe that this method is not right because it is not a matter of me swallowing you, or you swallowing me. Instead we chose the concept of “one country, two systems”.¹⁴

The Taiwanese government was led by the Kuomintang (the Chinese Nationalist Party) which retreated to Taiwan after Mao’s victory in the Chinese civil war in 1949; they declared Taipei as their provisional capital. The Taiwanese government set up a different political and legal system from that of mainland China. Over time, Taiwan developed a democracy, human rights and fundamental freedoms, guaranteed by the national constitution and multi-party cooperation. The Taiwanese could elect their own government and officials. Ever since 1949, the Taiwanese have sought to maintain Taiwan’s independence from mainland China, and at times the relationship between Taiwan and China has worsened as China has insisted that Taiwan’s

an active part in creating world peace, accomplishing peaceful national reunification and developing the ideology of the ‘Four Modernizations’ which included in agriculture, industry, science and technology, and the military.

¹³ The ‘One Country Two Systems’ concept was formulated to maintain the prosperity and stability of Hong Kong, Macao and Taiwan that ‘ Within a unified PRC, the Mainland practices socialism, while Hong Kong, Macao and Taiwan practice their existing capitalist systems. The purpose is to accomplish Hong Kong and Macao’s return for peaceful national reunification. (Publication:’ The Basic Law and Hong Kong- The 15th Anniversary of reunification with the Motherland’). http://www.basiclaw.gov.hk/en/publications/15anniversary_reunification/

¹⁴ Looking to the Future with Optimism, interview with Qian Qichen, South China Morning Post, 18 June 1997, at p. 11.

sovereignty belonged to China¹⁵ and sought to re-unify Taiwan with the Mainland. Over the past 50 years, Taiwan has been able to resist mainland aggression mainly because the United States and Taiwan signed a mutual defence treaty in 1954, under which the US provides military support if Taiwan comes under any attack. As Zhou Enlai pointed out:

“If we go on to liberate Taiwan now, we will engage with U.S. armed forces. It is not that we fear them. Rather, we have realized that this is a complicated issue. This is the external dimension of the [Taiwan] question. We are confronted with the United States. This has brought about an international dispute.”¹⁶

The social and working-class struggles inside China also had a significant domestic impact on China’s Taiwan policy. In addition, economic problems have remained a major obstacle to growth in China. Therefore, the Chinese government has expressed the hope that the Taiwan issue can be resolved through peaceful rather than military means.

China itself began to reform its economy in the late 1970s. On 15 December 1978, Deng Xiaoping announced major economic reforms and outlined the concept of the ‘Four Modernizations’, as applied to agriculture, industry, science and technology, and the military¹⁷. The purpose of the ‘Four Modernizations’ was to strengthen these four areas and achieve radical economic reform. China adopted an ‘Open Door’ policy to the outside world. China also sought to reunify Taiwan through discussion and peaceful negotiations. The following year, the Standing Committee of the National People’s Congress (NPCSC) issued a message to compatriots in Taiwan which declared that:-

¹⁵ As a scholar on China and member of the National Security Council staff in 1977-1980 wrote: “Many factors produced the change in U.S. Policy toward China and Taiwan in 1970s, some tactical, some strategic. The timing of the initial step was unquestionably related to the Vietnam War and the Sino-Soviet dispute. The second and third steps were facilitated by and partly a response to the Soviet expansion. But these were transitory considerations. From a longer-term perspective, America’s China policy of the 1950s and 1960s could not be sustained. It was based on American acknowledgment of an absurd claim. Taiwan was not, as it asserted, the government of mainland China. At the same time, China’s position was unrealistic. The People’s Republic was not the government of Taiwan. In fact, the two governments ruled different parts of Chinese territory, each asserting that it was the rightful authority for all of China, each denying the legitimacy of the other.” (Michael Oksenberg, “Taiwan, Tibet, and Hong Kong in Sino-American Relations,” in *Living with China*, edited by Eza Vogel (New York: W W Norton & Company, 1997)).

¹⁶ Diplomatic History Research Office of the PRC Foreign Ministry, Zhou Enlai Wajijiao Huodong Dashiji, 699-700.

¹⁷ The Third Plenary Session of the Eleventh Central Committee of the CPC was held in Beijing.

“State leaders would take present realities into account in accomplishing the great cause of reunifying the motherland, respect the status quo in Taiwan and the opinions of people from all walks of life there, and adopt reasonable policies and measures in settling the question of reunification so as not to cause the people of Taiwan any losses.”¹⁸

This was first time that China’s communist leaders announced in public the idea of ‘One Country Two Systems’. In 1979, Marshal Ye Jianying, Chairman of the NPCSC, clearly spelled out ‘nine principles’ to resolve the Taiwan’s issue, and how to implement the ‘One Country Two Systems’ policy. He proposed that:-

- China and Taiwan should cooperate with each other to achieve National reunification;
- The two sides would make arrangements to facilitate the exchange of mail, trade, air and shipping services, cultural and sports;
- After reunification, Taiwan could enjoy a high degree of autonomy as an SAR and could retain its armed forces. The Central Government would not interfere with local affairs on Taiwan;
- Taiwan’s current socio-economic system would remain unchanged;
- People from various circles in Taiwan might participate in running the state;
- When Taiwan's local finances were in difficulty, the Central Government might offer subsidies as appropriate;
- Taiwanese who wished to settle on the mainland, would have freedom of entry and exit;
- Taiwanese could invest on the mainland and their legal rights, interests and profits would be guaranteed; and
- China hoped through various channels to make proposals regarding other affairs of state.¹⁹

Under the nine-point principles China hoped to enable peaceful reunification between China and Taiwan, and advance mutual benefits, including the economic and trade cooperation.

On 11 January 1982, Deng Xiaoping introduced the idea of resolving the Taiwan issue

¹⁸ Beijing Review: Message to Compatriots in Taiwan, No. 1, 1979, 5 January 1979 at p16.

¹⁹ Beijing Review: Ye Jianying’s Nine Principles for the Peaceful Reunification with Taiwan (1981), 5.10.1981, at p. 10-11.

using the ‘One Country Two Systems’ formula. He said that:-

“The Nine-Point Proposal was put forward in the name of Vice-Chairman Ye, which in essence can be generalised as ‘One Country, Two Systems’. Two different systems are allowed to co-exist...By and large, the relevant policies may be applied not just to Taiwan, but also to Hong Kong.”²⁰

In 1997, the policy was applied to apply to Hong Kong by the Chinese leaders. Many saw it as an attempt to see whether the policy would work well in Hong Kong and, if so, whether it could then be applied to Taiwan. Under the ‘One Country Two Systems’ policy, Hong Kong would enjoy a high degree of autonomy; Hong Kong people would be ruling Hong Kong; and Hong Kong’s capitalist system and way of life would remain unchanged for 50 years.

In 1984, the Chinese and British governments signed the Sino-British Joint Declaration which showed that both governments had agreed their commitments made in the JD and were willing to implement the provisions set out in it. JD was an international agreement which could gain international recognition and attract more foreign investors. Article 2(1) of Annex I promised that:-

“After the establishment of the HKSAR, the laws previously in force in HK, (i.e. the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained...”

Article 3(2) of Annex I also promised that:-

“Judicial power in HKSAR shall be vested in the courts of the HKSAR. The courts shall exercise judicial power independently and free from any interference. Members of the judiciary shall be immune from legal action in respect of their judicial functions...”

These two provisions clearly declared that the common law and the judicial independence would be retained after 1997. As mentioned before, keeping the common law meant keeping judicial independence and the doctrine of the rule of law. The JD successfully retained a strong legal system in Hong Kong. Thus, Hong Kong

²⁰ Drafting and Promulgation of the Basic Law and Hong Kong’s Reunification with the Motherland, Chapter 1, at p. 9.

had a legal system wholly separate and distinct from China. The BL - particularly Articles 8²¹, 18 (1)²², 25²³, 35²⁴, 64²⁵, 80²⁶ and 83²⁷ - would work alongside the JD to guarantee of the rule of law and uphold judicial independence. These articles specifically preserved Hong Kong's previous common law system, which was well established during colonial times and included a set of rules that were used to administer society. The HKSAR courts are bound to apply the common law principle in deciding case and in interpretation of laws²⁸. What is more, these articles protect the rights of the individual and specify that everyone, including the HKSAR government, has to abide by the laws.

To preserve judicial independence, Articles 84²⁹, 85³⁰, 87(2)³¹, 88³² and 89(1)³³ of the

²¹ Art. 8 of BL states that the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the HKSAR.

²² Art. 18 (1) of BL states that the laws in force in HKSAR shall be this Law, the Laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region.

²³ Art. 25 of BL states that all Hong Kong residents shall be equal before the law.

²⁴ Art. 35(1) of BL states that Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.

Art. 35(2) of BL states that Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.

²⁵ Art. 64 of BL states that the Government of the HKSAR must abide by the laws and be accountable to the Legislative Council of the Region; it shall implement laws passed by the Council and already in force....

²⁶ Art. 80 of BL states that the courts of the HKSAR at all levels shall be the judiciary of the Region, exercising the judicial power of the Region.

²⁷ Art. 83 of BL states that the structure, powers and functions of the courts of the HKSAR at all levels shall be prescribed by the Law.

²⁸ Judge said, 'the courts in Hong Kong are bound to apply the common law in exercising their power of interpretation, as so authorized, accords with the Basic Law which provides for the continuation of the common law in the HKSAR. The Basic Law also provides that the courts in the HKSAR shall adjudicate cases in accordance with laws applicable in the Region which include the common law, and may refer to precedents of other common jurisdictions. (The Director of Immigration v. Chong Fung Yuen) FCAV No. 26/2000; (2001) 2 HKLRD 533; (2001) 4 HKCFAR 211.

²⁹ Art. 84 of BL states that the courts of the HKSAR shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions.

³⁰ Art. 85 of BL states that the courts of the HKSAR shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.

BL guarantee that judges are free to make their decisions independently and impartially, without interference. Judicial independence emphasizes that the right to independent and fair trial is an essential right respecting the rule of law, and ensures that judges have the ability to make decisions without any influence or fear. All proceedings are conducted in open court. The general public, individuals or media are allowed to attend court hearings. This brings greater transparency to the judicial process and makes it possible for the public to understand the court process. Furthermore, the appointment and removal of judges is under the Judicial Officers Recommendation Commission, whose team members include senior judges and experienced legal professionals. Article 89 of the BL also stipulates that:-

“A judge of a court of HKSAR may only be removed for inability to discharge his or her duties, or for misbehavior, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges.

The Chief Justice of the Court of Final Appeal of the HKSAR may be investigated only for inability to discharge his or her duties, or for misbehavior, by a tribunal appointed by the Chief Executive and consisting of not fewer than five local judges and maybe removed by the Chief Executive on the recommendation of the tribunal and in accordance with the procedures prescribed in this Law.”³⁴

The whole process of the appointment and removal of judges is independent and impartial and ensures that the judges’ decisions in court will not be influenced by anyone, including the HKSAR government or powerful people. Hong Kong also retains the separation of powers. That is to say, the executive, the legislative and the

³¹ Art. 87(2) of BL states that anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs.

³² Art. 88 of BL states that judges of the courts of the HKSAR shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.

³³ Art. 89(1) of BL states that a judge of a court of the HKSAR may only be removed for inability to discharge his or her duties, or for misbehavior, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges.

³⁴ Art. 89 of BL

judicial powers of government are separated in order to check the powers and avoid tyranny. This is supported by the Article 2 of the BL³⁵.

Article 1 of ICESCR and ICCPR also state that:-

“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”³⁶

However, the principle of self-determination did not apply to Hong Kong. The JD failed to mention clearly whether Hong Kong enjoyed a full degree of autonomy or whether this was only partial. Furthermore, the political status of Hong Kong was unclear under the JD. The concept of autonomy has been defined by Hannum and Lillich, as follows:-

“Autonomy is a relative term that describes the extent or degree of independence of a particular entity rather than defining a particular minimum level of independence that can be designated as the status of autonomy.”³⁷

Bernhardt also points out that:-

“...the essential element of autonomy is the granting of certain rights to a specific part of the State population, in view of its characteristics which differ from the majority of the population. Linguistic, cultural and ethnic minorities are the prototypes of entities which need protection...They are interested in excluding State and majority interference as far as their special background, tradition and way of life are concerned. Because a certain group is, and feels, different from the majority of the population, it longs for different rights.”³⁸

³⁵ Art. 2 of BL states that the NPC authorizes the HKSAR to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.

³⁶ <http://www2.ohchr.org/english/law/cescr.htm> (International Covenant on Economic, Social and Cultural Rights).

<http://www2.ohchr.org/english/law/ccpr.htm#part1> (International Covenant on Civil and Political Right).

³⁷ The Concept of Autonomy in International Law, October 1980, American Journal of International Law 74, at p. 858-889, 860.

³⁸ R. Bernhardt, ‘Federalism and Autonomy’, in Y Dinstein (ed), Models of Autonomy (London: New Brunswick, 1981) at p. 26.

Hannum and Lillich further argue that:-

“Autonomy and self-government are determined primarily by the degree of actual as well as formal independence enjoyed by the autonomous entity in its political decision-making process. Generally autonomy is understood to refer independence of action on the internal or domestic level, as foreign affairs and defence normally are in the hands of the central or national government, but occasional power to conclude international agreements concerning cultural or economic matters also may reside with the autonomous entity.”³⁹

Briefly, to be qualified as autonomous, Hong Kong should be administered by a locally elected body which enables all legislative decisions to be made independently. A local Chief Executive should be elected by voters. He/she should be responsible for leading, representing and administering Hong Kong in all matters. This is not the case in Hong Kong.

1.3 Differences between the mainland Chinese and Hong Kong legal systems and Ambiguities around the Power of Interpretation

The legal system in mainland China is different from that in Hong Kong. The Chinese legal system is based on socialism and the civil tradition rooted in Europe. It is based primarily upon codified laws written down within the legal system. There is a difference between the civil law tradition and the common law system regarding the interpretative power of the courts. According to the Article 67 (1) of the Chinese constitution, the NPCSC can interpret the constitution and supervise its enforcement⁴⁰. The NPCSC is China's top political advisory body rather than a court. The members of the NPCSC come from various social groups, raising concerns that they have insufficient legal qualifications, background and experience to resolve legal issues.

The legal system of Hong Kong is based on the English common law. Under this system, the judges have the authority to interpret the laws, can overturn decisions made by the lower courts, and call into question the legality of measures introduced by the legislature. Hong Kong's continued use of its previous common law legal system is guaranteed by JD and BL.

³⁹ The Concept of Autonomy in International Law, October 1980, American Journal of International Law 74, at p. 858-889, 860.

⁴⁰ Art. 67(1) of Chinese constitution 1982. <http://english.people.com.cn/constitution/constitution.html>

Unlike Hong Kong, mainland Chinese judges are not independent of the political system, and the courts do not have the ultimate power to determine whether legislation is constitutional. The power to interpret the law is vested in the legislative body, the highest of which is the NPCSC. Mainland courts show little independence and cannot review the validity of legislation and the legality of administrative acts. For Hong Kong, the concern is to preserve its common law system in the face of political and economic integration with the mainland and this kind of politico-legal system.

Since the transfer of sovereignty in 1997, the BL triggered a heated debate regarding who enjoys the power of interpretation of the BL. The crucial issue is whether the power of final interpretation shall be vested in NPCSC or HKSAR courts. After the handover, the Letters Patent and the Royal Instructions were replaced by the BL as the new mini-constitution of the HKSAR. This promised that Hong Kong shall enjoy a high degree of autonomy except in foreign and defence matters. It stated that the Court of Final Appeal (CFA) of the HKSAR shall be vested with independent judicial power, including that of final adjudication. The promise is, however, ambiguous. The drafting process of the BL did not elaborate the relationship between the Chinese constitution and the BL. It thus leads to disputes and conflicts between the NPCSC and the CFA regarding the power of interpretation of the BL.

In accordance with the Article 158 of the BL, the power of interpretation of the BL is basically divided between the NPCSC and the HKSAR courts. The NPCSC retains the power to interpret or amend the BL, and it is possible that the NPCSC can exercise its interpretative power to overturn the CFA's ruling.

Article 158(1)⁴¹ of the BL says that the power of final interpretation shall be vested in the NPCSC, but it does not spell out the legal basis of the NPCSC's power and places no restrictions of any kind on its interpretive power.

Article 158(2)⁴² clearly states that 'the NPCSC shall authorize the HKSAR courts to interpret on their own, in adjudication', guaranteeing the continuance of the common law system in which an independent judiciary exercises the power to interpret the law.

⁴¹ Art. 158 of BL.

⁴² Art. 158 of BL.

This emphasizes that Hong Kong shall preserve its previous legal system, something supported by Articles 8⁴³, 82⁴⁴, and 84⁴⁵ of the BL.

Article 158(3)⁴⁶ also says that HKSAR courts shall seek an interpretation of the relevant provisions of the BL from the NPCSC if the matters before the court concern foreign and defence affairs, which are the responsibility of the Central People's Government (CPG). This article does not mention clearly exactly what provisions may be decided by the HKSAR courts or what provisions the CFA should refer to the NPCSC. This has created uncertainty and ambiguity.

All this means that the CFA has the power to interpret legislation – including the BL - when adjudicating cases, except where the case concerns affairs which are the responsibility of the CPG – where it shall seek an interpretation of the relevant provisions from the NPCSC through the CFA. This implies that the HKSAR courts can interpret all laws except those concerning foreign affairs and defence, but there is no elaboration on exactly what matters constitute foreign and defence affairs. The BL does not mention which provisions may be interpreted by the HKSAR courts and which should be referred to NPCSC. Thus, some unforeseen operational difficulties have arisen between China and the HKSAR on this thorny issue of interpretation.

Since the establishment of the HKSAR, there have been four occasions on which the NPCSC has interpreted the BL, raising the suspicion that the NPCSC's behavior will adversely affect the continuation of the rule of law in Hong Kong and the independent judicial power of the HKSAR courts. The four occasions are:

- 1999 - The Right of Abode issue;
- 2004 - The timetable for Universal Suffrage for the Election of the Chief Executive in 2007 and the members of Legislative Council (LEGCO);

⁴³ Art. 8 of Basic Law states that the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the HKSAR.

⁴⁴ Art. 82 of BL states that the power of final adjudication of HKSAR shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal.

⁴⁵ Art. 84 of BL states that the courts of the HKSAR shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions.

⁴⁶ Art. 158 of BL.

- 2005 - The issue of the Term of a New Chief Executive after the resignation of the original Chief Executive; and
- 2010 - The Law on Sovereign Immunity.

The issue of the power of interpretation first came to the fore in 1999, when there was a dispute between the NPCSC and the CFA concerning the interpretation of the BL on the issue of right of abode⁴⁷ (ROA). The appellants were Chinese nationals born in mainland China. Their parents were already Hong Kong permanent residents at the time of their births. They entered Hong Kong from mainland China illegally before 1997 and reported to the Director of Immigration on 1 July 1997 to assert their right of abode (ROA), as derived from Article 24(2)⁴⁸ (3)⁴⁹ of the BL. Their appeals were finally granted by the CFA on 29 January 1999.

The CFA's ruling provoked heavy debate amongst the public⁵⁰, and between local and mainland legal scholars who argued⁵¹ that the ruling threatened China's sovereignty, violated the BL, and was an attempt to turn Hong Kong into an independent political entity. However, the CFA's ruling was later repudiated by the NPCSC in accordance with Article 158 (3)⁵² of the BL, holding that the interpretation of the CFA was inconsistent with the legislative intent. This NPCSC intervention came at the request of the HKSAR government. Since the CFA is the final appellate court of the HKSAR, its judgment is supposed to be final; no appeal is permitted and its judgment is binding on all lower courts, under the common law principle. However, the NPCSC's interpretation of the BL in this case said to have directly undermined the

⁴⁷ Ng Ka Ling and others v. Director of Immigration (1999) 1 HKLRD 315.

⁴⁸ Art. 24(2) of BL states that permanent residents of HKSAR shall be the six categories of persons.

⁴⁹ Art. 24(3) of BL states that permanent residents shall have the Right of Abode.

⁵⁰ Acting Chief Executive Mrs Anson Chan's Statement on 30 January 1999 says "I want to stress that any person without a Certificate of Entitlement illegally entering Hong Kong will be repatriated to the Mainland."

⁵¹ Press release in the New China News Agency on 6 February 1999, which is translated in fully by Johannes MM Chan in ed. 2000. Law Professor Xiao Weiyun and others, Why the Court of Final Appeal Was Wrong: Comments of the Mainland Scholars on the Judgment of the Court of Final Appeal, reprinted in Hong Kong's Constitutional Debate: Conflict Over Interpretation at p. 53, also see, Beijing University professor Xiao Weiyun, said the ruling in Ng Ka Ling was in direct opposition to the interest of Hong Kong residents and has hindered efforts to maintain stability and prosperity, see Rone Tempest, Hong Kong-Beijing Dispute Deepens China: Mainland Official Assails Ruling by Territory's Top Court, Los Angeles Times, 9 February 1999.

⁵² Art. 158(3) of BL states that if the SAR courts, in adjudicating cases, need to interpret the provisions of this law concerning affairs which are the responsibility of the CPG, seek an interpretation of the relevant provisions from the NPCSC through the CFA

HKSAR courts' power in adjudicating cases and adversely affected the prestige of the courts. The intervention seemed to backtrack on the guarantee in the 1984 JD⁵³ and the BL's promise⁵⁴ that the HKSAR courts would be independent.

Local legal scholars expressed the concern that the NPCSC's interpretation of the BL had violated the principle of judicial independence and the core value of the rule of law in Hong Kong, but mainland Chinese legal scholars took a different view. In their view, the autonomy of the HKSAR is not unlimited, and the NPCSC in this case simply exercised its constitutional power to interpret the laws and to avoid any constitutional conflict.

The dispute between these two schools of thought that began in this case in 1999 was to continue, and has often become confrontational. It has made Hong Kong people afraid that the independence of the judiciary is being undermined, that they will lose their individual rights, and that there will be a loss of confidence in Hong Kong's future. Hong Kong has become the leading international financial centre in Asia. Business confidence in Hong Kong bases on the existence of comprehensive laws and a transparent legal system. Failure to maintain the culture of the rule of law and judicial independence will significantly reduce investors' confidence in Hong Kong and will badly affect Hong Kong's economic future. The major purpose of this thesis is to explore what effect this 1999 and subsequent interpretations of the BL by the NPCSC have had on the Hong Kong legal system, whether they have undermined the rule of law and jeopardized judicial independence since 1997.

1.4 Judicial independence in Hong Kong

Judicial independence is important because it enables the courts and judges to protect individual rights against arbitrary state power and tyranny. Hong Kong has become a liberal society, albeit without democracy. Its residents enjoy several rights and freedoms not enjoyed by the population in mainland China. It is also a society based on the rule of law. Members of judiciary are separate from the Executive power, the Legislative power and the private sectors. Judges are impartial, resolving disputes

⁵³ Art. 3(2) of Annex I of JD states that judicial power in the HKSAR shall be vested in the courts of HKSAR. The courts shall exercise judicial power independently and from any interference...

⁵⁴ Art. 85 of BL states that the courts of the HKSAR shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.

based solely on facts and laws⁵⁵. As former U.S. Supreme Court justice Sandra Day O' Connor has said:

“Judicial independence allows judges to make decisions that may be contrary to the interests of other branches of government. Presidents, ministers, and legislators at times rush to find convenient solutions to the exigencies of the day. An independent judiciary is uniquely positioned to reflect on the impact of those solutions on rights and liberty, and must act to ensure that those values are not subverted.”⁵⁶

Judges enjoying complete independence have the ability to resist any external attack and political pressure in making their decisions. To maintain the integrity of the justice system and make sure that judges are not influenced easily by the government's undue influence and the other forces, it is also important not only that the judiciary acts independently but that the appointment and removal of skilled judges is also an independent process. Life tenure or a long-term appointment is a way to achieve the judicial independence. The guarantee of life tenure means that the judges will not be laid off due to the political reasons. A short term or limited term of office makes it more likely that judges will be open to political influence and/or corruption. In Hong Kong, an independent judicial commission is established for the appointment and removal of judges. The commission has to be independent and transparent in order to ensure that the appointment and removal of judges does not undermine the independence of the judiciary, and ensure that the appointment is conducted fairly regardless of race and religion. It sets out the criteria and method of appointing judges and the procedure for removal of judges from office. Judicial appointments and dismissals are not be affected by the executive power.

According to United Nations, Principle 1 of the Basic Principles on the Independence of the Judiciary states that:-

⁵⁵ Canadian Chief Justice Dickson wrote that, ‘The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the judicial system...the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them; no outsider-be it government, pressure group, individual or even another judge- should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.’ (Beauregard v. Canada (1986) 2 S.C.R, 56).

⁵⁶ Jeffrey Toobin, *the Nine-Inside the Secret World of the Supreme Court* (New York: Anchor Books, 2008) at 291; *Promoting an Independent Judiciary as a Rule of Law principle: A brief commentary on the Supreme Court of Pakistan* by Kamaal R. Zaidi, December 2008, at p. 4.

“The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”⁵⁷

A famous English judge said that:-

“Justice must be rooted in confidence. He was referring to the confidence litigants and the public must have that judicial decision-makers are impartial. Those who come before the courts must be certain that decisions made by those courts are not subject to outside influence. Judicial independence means that judges are not subject to pressure and influence, and are free to make impartial decisions based solely on fact and law. Judicial independence is often misunderstood as something that is for the benefit of the judge. It is not. It is the public’s guarantee that a judge will be impartial...”⁵⁸

In case of *Beauregard v. Canada*, Chief Justice Dickson wrote:-

“ The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system...the principle of judicial independence has been the complete liberty of individual judges to hear and decided the cases that come before them; no outsider-be it government, pressure group, individual or even another judge-should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.”⁵⁹

Judicial independence is supported by the Rule of Law and the system of Separation of Powers. The Rule of Law is a principle which provides that the rules are legally applied to a particular case without fear or favour. It also holds that no-one is above the law, that everyone is equal before the law, that no-one is punished unless found

⁵⁷ Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

⁵⁸ The top judges in British Columbia’s three courts are openly criticizing the province’s latest efforts at judicial reform, Saturday, March 17, 2012.

⁵⁹ *Beauregard v. Canada* (1986) 2 S.C.R., 56.

guilty by due process of law. The liberal concept of the Rule of Law, laid down by the Professor A.V. Dicey, is based upon three principles that:-

- “(1) Legal duties, and liability to punishment, of all citizens, is determined by the ordinary law and not by any arbitrary official fiat, government decree, or wide discretionary-powers;
- (2) Disputes between citizens and government officials are to be determined by the ordinary courts applying ordinary law; and
- (3) The fundamental rights of the citizens (freedom of the person, freedom of association, freedom of speech) are rooted in the nature law, and are not dependent on any abstract constitutional concept, declaration or guaranty.”⁶⁰

Dicey argues that all people are equal before law regardless of status or rank. There can be no punishment unless a person has violated the law. Everyone must obey the law and proper procedures must be respected. If government officials abuse their powers in carrying out a policy, any citizen can apply for judicial review of their acts. Through the judicial review, the person can sue the government for the infringement of his/her civil rights and freedoms. In the landmark US case of *Marbury v. Madison*, John Marshall, CJ, held that the US Supreme Court had the authority to declare the acts of Congress as an unconstitutional and void.

“It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each. If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.”⁶¹

The independence of the judiciary ensures that everyone shall be entitled to a fair and public hearing by independent and impartial judges according to the law. In the absence of an independent judiciary, judges will lack judicial accountability and lose the respect and trust of the citizens.

In Hong Kong, this principle is valued partly because of the reputation of officials in mainland China for the arbitrary exercise of power and corruption. The judicial

⁶⁰ Introduction to the study of Law of the constitution, by Professor A. V. Dicey, 1885.

⁶¹ *Marbury v. Madison* 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803).

independence of the Hong Kong courts is a part of the rule of law, and a protection against such an arbitrary exercise of state power.

Judicial independence is also guaranteed by the principle of the Separation of Powers. This emphasizes that the three branches of government, that is, the Executive, the Legislative and the Judiciary, are clearly separated from one another. Each branch has its own responsibilities and powers. The Executive branch has administrative and managerial duties for implementing and enforcing the laws which are written down by the Legislative branch. The duties and functions of the Legislative branch are primarily the making of laws and deciding the civilian and military budgets. The Judicial branch has responsibility for managing conflicts over interpretations of the law and for enforcing and applying the law. There is no concentration of power entirely in one place, avoiding any improper influence on the courts by the other authorities. The system of checks and balances between the three powers is essential for the rule of law, since it guarantees that no branch of government is much more powerful than the others, and cannot control the work of the other branches. Failure to maintain the separation of powers means that the government may become too strong and will not be effective in maintaining order. The purpose of the Separation of Powers is to prevent the concentration and abuse of power by any particular branch, and to provide checks and balances between these three branches. When a decision-making body accumulates too much power, it becomes a dictatorship or may be liable to bias and corruption. The concept of Separation of Powers laid down by Montesquieu holds that:-

“When the legislative and executive powers are united in the same person, or body, there can be no liberty because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner....if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.”⁶²

Preventing the government’s abuse of power also depends on a strong tradition of judicial independence and the rule of law.

⁶² Baronde Montesquieu, 1966, The Spirit of laws at 150.

Despite the 1997 handover to China, Hong Kong remains an open pluralistic society. The rule of law and the independence of the judiciary have become core social values. Its legal system is firmly based on the common law. It has an independent, fair and competent judiciary to interpret legislation and to apply the law. The judiciary is independent from the Executive and Legislative powers, judges deal with civil and criminal cases solely on the evidence which submitted by the interested parties, and the judge's decision is based upon the relevant laws. This guarantees that the individual's rights and freedoms are protected and preserved. An independent judiciary also resolves disputes between the executive and legislative branches and the general public. Judges ensure that the behavior of the executive and legislative branches complies with the BL and other specific laws. The government is expected to act in accordance with the law and with established procedures.

The rule of law in Hong Kong works together with the independence of the judiciary to promote the future of the Hong Kong legal system and maintain Hong Kong people's confidence after 1997. Furthermore, it is a pillar of the economic growth. Hong Kong is a leading financial centre in Asia. The certainty and predictability of the law are important in business transactions - these encourage businessmen to invest in Hong Kong and promote a good economic environment. They have confidence in developing their business in the HKSAR. If there is uncertainty and a lack of predictability, it is likely that they will not invest any money in Hong Kong's financial markets in future. Preserving Hong Kong's reputation and status means it is necessary to maintain a well-qualified independent judiciary and the rule of law. Disputes about the interpretation of the BL by the NPCSC threaten this situation, have led to public concerns about the rule of law and the judicial independence, making the impact of the NPCSC's decisions a question worth exploring.

It is also part of Hong Kong's legal tradition that trials are open and decision-making is transparent, neither of which occur in mainland China. Justice, it is said, must not only be done but be seen to be done. An open and impartial hearing can achieve justice. Under the common law, justice system must be open and impartial. That is to say, disputes must be heard and decided by an independent judge in open court according to the law. This ensures that interest groups do not influence judges directly or indirectly. Judges are free to exercise their judicial powers without fear. Also, as the hearing will be held in open court, citizens and the media have the chance to monitor the courts. The media gives everyone the opportunity to know what happens

in the courts or to ask questions about the courts' ruling and procedures. In case of the *Queen and Mohamed Hashim Shamsudin*, the court held that:-

“It is a fundamental principle of the common law system that trials should take place in public, subject to the scrutiny not only of members of the public but also of the press. Although the courts have power to postpone publication, in whole or in part, of reports of proceedings for a specified period, such a ban on reporting, albeit temporary, is to be treated in a like manner to the courts' power to sit in camera, as an aspect of the general power to prevent publicity only in exceptional circumstances. The burden of establishing such exceptional circumstances lies upon those seeking an order restricting the fundamental principle of publicity.”⁶³

In exceptional situations, the disputes are heard in chambers (especially when they concern security issues, family matters, or complicated matters concerning privacy and confidentiality which it is inappropriate to disclose the information to the public). However, the open and impartial hearing is the norm. This increases public confidence in the courts. Conversely, failure to maintain an open and impartial hearing system may undermine public confidence in the courts and make the legal system 'secretive'.

1.5 The Objectives of the Research

The goal of this research is to identify how the problems that have arisen between the NPCSC and the CFA about the interpretation of the BL after 1997 have impacted on judicial independence in Hong Kong. It will explore the legal effect of the NPCSC interpretations of the BL to see whether it has had an adverse impact on the rule of law and judicial independence in Hong Kong. Hong Kong has become a part of China. It is important to discuss the relationship between the Central Government and the HKSAR to see if the BL has – or can - achieve the policy of 'One Country Two Systems'.

A constitution is a set of rules and principles on which a country is governed. If there is uncertainty about these rules or principles, disputes about the constitution must be resolved by the process of interpretation. The failure to establish and maintain a proper procedure for interpretation of the BL, it is argued, undermines the scope of

⁶³ *The Queen and Mohamed Hashim Shamsudin*, HCCC No. 262/1986, dated 14.1.1987; *Rv. M. H Shamsudin* (1987) HKLR 254.

Hong Kong's autonomy, contravenes the rule of law and affects the principle of judicial independence.

This research will explore the differences between the Hong Kong and mainland legal systems to understand how their differences have developed. It looks at the development of the post-1949 mainland legal system, and also examines the Hong Kong legal system from 1842-2013 to see how the Hong Kong courts developed the power to interpret the laws before 1997, as well as any perceived threats to the integrity of the Hong Kong legal system after 1997. It focuses on the controversial interpretative issues that have arisen since 1997 to analyze what problems have occurred and identify the extent to which the CFA does – or does not – continue to enjoy the power of final adjudication and final interpretation.

This research also explores the powers and functions of the HKSAR government. Since 1997, the Chief Executive of the HKSAR has submitted reports to the State Council and asked for the NPCSC to interpret the relevant provisions of the BL under Articles 43⁶⁴ and 48(2)⁶⁵. However, this has met with strong criticism from legal professionals and the public as being contrary to the rule of law and judicial independence.

I look at the JD and the BL themselves. These two documents provide the basic politico-legal and economic structure of post-1997 Hong Kong, but some of their articles are unclear and have created a host of controversial issues. Academic works on the issue of judicial independence since 1997 will be examined to elaborate on these.

Finally, this research will explore the principal controversial cases and the issues that they have given rise to since 1997, assessing their impact upon the independence of the HKSAR courts.

1.6 Methodology and Research Design

This research uses qualitative research methods, using mainly library-based research of journal articles, books, Government reports. The primary sources include treaties,

⁶⁴ Art. 43 of BL reads as 'the Chief Executive of the HKSAR shall be accountable to the Central People's government and the HKSAR in accordance with the provisions of this Law.'

⁶⁵ Art. 48(2) of BL reads as 'to be responsible for the implementation of this Law and other laws which, in accordance with this Law, apply in the HKSAR.'

cases, statutes, regulations, binding legal authorities, the Hong Kong Law Reports and court judgments; the secondary sources include academic discussions, opinion poll surveys and debates in the press.

1.7 Chapter Outline

This dissertation is divided into six chapters.

Chapter One provides a brief overview of the research questions, and the main controversies over the interpretation of the Basic Law.

Chapter Two gives an Introduction to the history of judicial independence in Hong Kong and the historical development of the colony, the laws of the colonial period, the system of colonial government and the judicial system. It also describes the development of the rule of law under the British and the enactment of the 1991 BORO and its impact.

Chapter Three is an introduction to the history of judicial independence in the PRC, and explores the various conceptions of the ‘rule of law’ and the ‘rule by law’ under Mao’s ideology to see whether the ‘rule of law’ and the judicial independence exist in China.

Chapter Four deals with Hong Kong’s retrocession to Chinese sovereignty in 1997. This examines the nature and scope of autonomy under the ‘One Country Two Systems principle’ and the ‘One Country Two Systems’ model itself to see whether it provides for the continuation of the ‘rule of law’ and judicial independence after 1997.

I explore the uncertainties and ambiguities of China’s commitment in the JD and the BL. I review the content of the JD to see how its promises have been implemented. I also discuss the nature and purpose of the BL. I also evaluate the importance of the power of interpretation and the scheme for interpretation under Article 158 of the BL.

Chapter Five explores the important cases decided by the HKSAR courts with regard to the interpretation of the BL since 1997.

Chapter Six is the conclusion of this thesis and addresses the impact of the re-interpretations of the BL since the handover to see whether these infringe the ‘rule of law’ and the independence of judiciary in Hong Kong.

Chapter Two

The History of the Political and Judicial Systems of Hong Kong

2.1 Introduction

In the early nineteenth century, the opium trade in China was a lucrative business. Western merchants tried to seek easy access to China's opium market through Hong Kong. British traders began importing opium from India and smuggling the drug into China. The Chinese government was concerned that the huge influx of opium into China would create social problems and tried to prevent the smuggling of drugs into China. The Chinese government banned the importation of opium into China and burned small quantities of opium. These actions prompted the First Opium War in 1841.

At the end of First Opium War, both countries signed a Treaty of Chuenpi on 26 January 1841. This was divided into two proclamations. The first proclamation was issued by Sir JJG Bremer and Captain Elliot on 1st February 1841¹; Captain Elliot made the second proclamation alone on 2nd February of same year². In May 1841, the dispute between China and Britain continued. The Treaty of Nanjing was signed on 29 August 1842³. China agreed to cede the Island of Hong Kong and to open five ports to Britain as free ports, and pay \$21 million in compensation⁴. China contested the validity of the treaty, and ever since has regarded the loss of Hong Kong as a national humiliation.

In 1856, Britain and France began a Second Opium War with China. It concluded with the Convention of Beijing, signed on 24 October 1860⁵ between China and

¹ These two proclamations are to be found in James William Norton-Kyshe: *The History of the Laws and Courts of Hong Kong from the Earliest Period to 1898* (1898), vol. 1, at pp 4-6.

² *Ibid* (footnote 1).

³ Article 3 of Treaty of Nanjing 1842 stated that it being obviously necessary and desirable that British subjects should have some ports whereas they may careen and refit their ships when required, and keep stores for that purpose, His Majesty the Emperor of China cedes to Her Majesty the Queen of Great Britain, etc, the Island of Hong Kong, to be possessed in perpetuity by Her Britannic Majesty, her heirs and successors, and to be governed by such laws and regulations as Her Majesty the Queen of Great Britain, etc, shall see fit to direct.

⁴ Article 7 of the Treaty of Nanjing 1842.

⁵ Article 6 of Convention of Beijing 1860 stated that with a view to the maintenance of law and order in and about the harbour of Hong Kong, His Imperial Majesty the Emperor of China agrees to cede to Her Majesty the Queen of Great Britain and Ireland, and to her heirs and successors, to have and to hold as

Britain. China was forced again to open further ports to foreign trade and the Kowloon Peninsula (south of Boundary Street) was ceded to Britain. Following European expansion into China in the late nineteenth century, Britain sought to expand its border around Hong Kong. The second Convention of Beijing was signed on 9 June 1898⁶, granting a 99-year lease of the New Territories. It was the expiry of this lease on June 30 1997 which forced Hong Kong's return to China. From 1841 to mid-1997, Hong Kong was formally under British control, except for the period 1941 to 1945, Hong Kong fell to the Japanese.

The main purpose of this chapter is to examine Pre-1997 Hong Kong under the British colonial rule. It will highlight some features of colonial rule such as the application of the common law, the system of colonial government, the judicial system and the enactment of the Hong Kong Bill of Rights Ordinance 1991, the rule of law and judicial independence.

2.2 The Early Colonial Period and the application of English common law

In 1843, the constitutional documents of the colony of Hong Kong were introduced. These included the Hong Kong Letters Patent and the Hong Kong Royal Instructions. Both of these documents were passed under the Great Seal of the United Kingdom. The main purpose of the Hong Kong Letters Patent was to provide general guidance on how to establish or implement regulations at all levels of government and to

a dependency of Her Britannic Majesty's Colony of Hong Kong, that portion of the township of Kowloon, in the Province of Kwang-tung, of which a lease was granted in perpetuity to Harry Smith Parkes, Esquire, Companion of the Bath, a member of the Allied Commission at Canton, on behalf of Her Britannic Majesty's Government, by Lan Tsang Kwang, Governor-General of the Two Kwang. It is further declared that the lease in question is hereby cancelled; that the claims of any Chinese to property on the said portion of Kowloon shall be duly investigated by a Mixed Commission of British and Chinese officers; and that compensation shall be awarded by the British Government to any Chinese whose claim shall be by the said Commission established, should his removal be deemed necessary by the British Government. (see. Hong Kong's New Constitutional Order, The Resumption of Chinese Sovereignty and the Basic Law, by Yash Ghai, 2nd Edition, Hong Kong University Press, 1997, at p. 505).

⁶ The Treaty of Convention of Peking 1898 stated that whereas it has for many years past been recognized that an extension of Hong Kong territory is necessary for the proper defence and protection of Colony, it has now been agreed between the Governments of Great Britain and China that the limits of British territory shall be enlarged under lease to the extent indicated generally on the annexed map. The exact boundaries shall be hereafter fixed when proper surveys have been made by officials appointed by the two Governments. The term of this lease shall be ninety-nine years. (see. Hong Kong's New Constitutional Order, The Resumption of Chinese Sovereignty and the Basic Law, by Yash Ghai, 2nd Edition, Hong Kong University Press, 1997, at p. 508).

provide the criteria for the establishment of the Governor⁷, the Executive⁸ and Legislative Councils⁹, the appointment of civil servants¹⁰ and the terms of the Governor and so on. It also conferred certain powers on the Governor, with the advice of the Legislative Council, to make or enact provisions for Hong Kong. The Hong Kong Letters Patent were supplemented by the Hong Kong Royal Instructions¹¹ issued on 6 April 1843 by the Royal Sign Manual. This set out certain legislative regulations on how Hong Kong was to be organized and governed. The exercise of legislative power and certain other government powers was explicitly defined by these two constitutional documents¹².

Before Britain acquired Hong Kong in 1841, its residents lived under Chinese law and customs. However, when Hong Kong became a British colony, the common law was applied to Hong Kong Island and, later, to Kowloon and the New Territories. The Convention of Chuenpi¹³ had consisted of two proclamations regarding the subjects of colonial laws. The first proclamation, made by Bremer-Elliott on 1 February 1841, stated that:-

“The Chinese inhabitants of Hong Kong...were free to exercise their religious rites, ceremonies, and social customs and ...that, pending Her Majesty’s pleasure, they would be governed according to the Chinese laws, customs, and usages by village elders, subject to the control of a British magistrate.”¹⁴

⁷ Article 1 of Letters Patent 1917 stated that there shall be a Governor and Commander-in-Chief in and over Our Colony of Hong Kong and its Dependencies. (see Constitutional and Administrative Law in Hong Kong, Peter Wesley-Smith, Longman Asia Limited, 1995 at p. 406).

⁸ Article 5 of Letters Patent 1917 stated that there shall be an Executive Council in and for the Colony...

⁹ Article 6 of Letters Patent 1917 stated that there shall be an Legislative Council in and for the Colony...

¹⁰ Article 14 of Letters Patent 1917 stated that the Governor may constitute and appoint such judges, Justices of the Peace and other public officers as may be lawfully appointed, all of whom shall, unless otherwise provided by law, hold their offices during Our pleasure.

¹¹ See Constitutional and Administrative Law in Hong Kong, Peter Wesley-Smith, Longman Asia Limited, 1995 at p. 415.

¹² Professor Yash Ghai has written: ‘ The major characteristic of colonial constitutions was that they provided the broadest of frameworks of the exercise of power. They were lacking in any normative rules and were weak on procedure. They were not the instruments through which one could raise profound questions of community morality and public interest or of the permissible use of state power. (Constitutional and Administrative Law in Hong Kong, Peter Wesley-Smith, 1994 at p. 48).

¹³ The Convention of Chuenpi was signed on 26 January 1841.

¹⁴ The full text of two proclamations are contained in Appendix IV of the Laws of Hong Kong; also see

The second proclamation (drafted by Elliot alone on 2 February 1841) stated that ‘British subjects and foreigners in Hong Kong would enjoy the protection of British Law.’ These two proclamations established a two-track legal system. This meant that the Chinese natives would be governed according to traditional Chinese laws and customs and that British subjects and foreigners would be subject to English law. English common law was, therefore, initially practiced alongside Chinese laws and customs (with the exception of torture).

The First Supreme Court Ordinance 1844¹⁵ (reworded by s. 5 of the Supreme Court Ordinance 1873) stipulated that:-

“Such of the Laws of England as existed when the Colony obtained a local legislature, that is to say, on the 5th day of April, 1843, shall be in force in the Colony, except so far as the said laws are inapplicable to the local circumstances of the Colony or of its inhabitants, and except so far as they have been modified by laws passed by the said legislature”.¹⁶

The said ordinance came into effect in 1844. The judges of the Supreme Court were empowered to put into practice English law as well as Chinese laws and customs simultaneously. This Ordinance was later replaced by s. 3 of the Application of English Law Ordinance 1966 which came into effect on 7 January 1966. This declared that English Law would be exercised within the Colony. It stipulated that:-

“The common law and the rules of equity shall be in force in Hong Kong, so far as they are applicable to the circumstances of Hong Kong or its inhabitants and subject to such modifications thereto as such circumstances may require.”¹⁷

The issue of which laws should apply remained, however, somewhat unsettled for some time in the early years. In 1850, the Governor, Sir George Bonham, declared

James William Norton-kyshe, *The History of the Laws and Courts of Hong Kong from the Earliest Period to 1898*, Vol. 1 at pp 4-6; *Constitutional and Administrative Law in Hong Kong*, Peter Wesley-Smith, 1987, vol. 1, pp 34-5.

¹⁵ Supreme Court Ordinance 1844 stated that ‘ the Law of England shall be in full force in the Colony of Hong Kong, except where the same shall be inapplicable to the local circumstances of the said Colony, or of its inhabitants, followed by various provisos’.

¹⁶ *The Sources of Hong Kong Law*, Peter Wesley-Smith, Hong Kong University Press 1994 at p. 90.

¹⁷ *The Sources of Hong Kong Law*, Peter Wesley-Smith, Hong Kong University Press 1994, at p. 91.

that as Hong Kong was a British colony it should be governed by English common law. All residents in Hong Kong irrespective of their races or cultures would function under the British common law system rather than the Chinese laws. The Common Law was based on a system of court decisions in previous cases, precedents which were binding on the lower courts and courts at the same level. The English also promised a legal system in which persons would receive a fair trial and have a right to legal representation. Though the legal system which developed was based on English common law, at Magistrates' level, Chinese customary law and practice was applied until the late twentieth century.

2.3 The System of Colonial Government

Hong Kong's political regime was executive-led. The Hong Kong Governor was appointed directly by the British government. He was the representative of the Queen in Hong Kong, enjoying executive and legislative powers, and was Commander-in-Chief of the armed forces. His powers were conferred on him under the Hong Kong Letters Patent and the Hong Kong Royal Instructions. He played a key role in the Executive Council and the Legislative Council as their President. The Governor (with the advice and consent of the Legislative Council) might make laws for the peace, order and good government of the Colony; he had the authority to appoint or remove Judges in the Supreme Court, and appoint or remove other public officers in different government departments¹⁸. He had a general duty to report certain matters to the British government and, as such, was responsible and liable to the British Parliament and Government¹⁹.

The colonial government was divided into three branches: the Executive Council (ExCo), the Legislative Council (LegCo) and the judiciary. There was no distinct separation of powers in the early system, no real system of checks and balances, and power was often concentrated in the hands of a small European elite. ExCo and LegCo cooperated with each other and members of these two councils were appointed by the Governor. No Chinese were appointed until 1877, when the Governor, Sir John Pope Hennessy, took the view that the Chinese people were being treated unfairly as second-class citizens. The Chinese population had increased and had played an important role in the colony's economic development. For these reasons, after 1880

¹⁸ By virtue of VII (1) and XIV (1) of the Hong Kong Letters Patent.

¹⁹ Article 105 of Colonial Regulation 1843.

the Governor appointed members of the local Chinese elites to top posts in the government.

The Executive Council (ExCo)

The Governor was the chairman of ExCo. The Governor-in-Council held all the executive power. Members of ExCo were not chosen directly by the citizens or by popular vote but were appointed by the Governor as ex-official members. They included the Chief Secretary, the Financial Secretary, and the Attorney General. Originally the most senior members were all Europeans. Other members included the chairman of Hong Kong and Shanghai Banking Corporation Ltd and the Jardine Matheson Group.

ExCo was an advisory body to the Governor. Its function was to assist the Governor in the implementation of policy and to draft policy proposals. According to the Hong Kong Royal Instructions, every member of ExCo had a legal obligation to support the Governor's decisions and was to subject to the convention of collective responsibility. The Governor had to discuss or consult with ExCo before taking any important decisions or proposing any bills to LegCo. This did not mean that he was bound by its advice or its decisions.

The Legislative Council (LegCo)

The Legislative Council was set up in 1843 under the Charter of Letters Patent. LegCo was made up of three ex-official members²⁰ to be appointed by the Governor. It was an advisory body to the Governor who was the chairman of it. The general functions of LegCo were to enact, amend or repeal local legislation, pass new ordinances and consider new bills. It vested with the power to examine and approve the annual budgets, taxation and public expenditure. In essence, however, there was no real separation of powers between the two councils, no checks and balances, only the power to monitor the Governor's performance.

Members of the Chinese elites were initially excluded from the highest levels of government in Hong Kong. Members of the European elite argued that Chinese

²⁰ The appointment of Official Members to be Legislative Council was announced by Governor Henry Pottinger in August 1843. The three Official Members were A.R. Johnston (a former Administrator of Hong Kong), J.R. Morrison (Chinese Secretary and Interpreter to the Superintendent of Trade) and William Caine (Chief Magistrate). (The First in Legislative Council History, Legislative Council Secretariat, FS27/12-13, at p.1).

people were incapable of proper political participation²¹. However, in the 1880s, it was realized that they played an important role in the development of the economy and in maintaining peace and order. Consequently, Mr Ng Choy (also known as Wu Tingfang), was nominated to LegCo by the Governor, Pope Hennessy, as an unofficial member; he also became the first Chinese magistrate in colonial Hong Kong. Ng Choy participated in the LegCo debates on the Tramways Bill and on the Banishment and Conditional Pardons Ordinance²². After 1880s, he would be followed by other members of the Chinese elites as unofficial members of ExCo and LegCo. These members had an important influence on the decision-making in the LegCo²³.

There was little change in the dominance of the elites until 1967, when there was a large-scale leftist riot in Hong Kong. Originally a minor labour dispute, the disturbances were taken advantage of by the communists to cause chaos against British colonial rule. There were fires in the streets and petrol bombings of some shops. A member of the press, Lam Bun, was one of several people killed.

Learning from this incident the government decided that the main trouble was due to poor communication between the government and the public and the lack of people's participation in politics. The Governor, Murray MacLehose, introduced political reforms to change the executive body and to develop more advisory and decision making bodies. In the 1970s, the Government also faced challenges from relatively high-inflation owing to the colony's rapid economic and population growth. Corruption was also rife in different governmental departments. This could lead to major social problems (such as crime) and drew public attention. The solution was to improve the institutions of governance and to increase public education. In 1974, the Independent Commission Against Corruption (ICAC) was established, led by a sole Commissioner. Its task was to investigate suspected corrupt public officials, such as Peter Fitzroy Godber.²⁴ In 1975, the courts heard the landmark case of *Peter Fitzroy*

²¹ It is difficult to feel satisfied that Mr Ng Choy, who has the plenty of ability, has the moral stability desirable in a magistrate, but it may be inferred that he is doing well, as if he had tripped in any way we should have heard a great deal about it. (Wu Tingfang 1842-1922, Reform and Modernization in Modern Chinese History, Linda Pomerantz-zhang, Hong Kong University Press 1992 at p. 63).

²² The Hansard of LegCo for the years 1880-1882.

²³ The Legislative Council with law-making power of the first time, Letters Patent was generally amended in 1888 which was required the Governor to enact laws not only the advice but also the consent of the Council (The First in Legislative Council History, Legislative Council Secretariat, FS27/12-13, at p.4)

²⁴ Godber was commissioner of the Royal Hong Kong Police Force and had been caught up in bribery scandal in 1973. He fled Hong Kong during the launching an investigation and later sent back to Hong Kong for trial. He served his prison sentence for 4 years finally.

*Godber*²⁵, a police chief superintendent accused of corruption involving over HK\$ 4.3 million in 1973. During the investigations, he succeeded in escaping Hong Kong by using his authority as a police officer. Later, he was brought back for trial. The court found him guilty of a conspiracy offence and accepting bribes and sentenced him to four years' imprisonment in 1975. Dealing with the case, the trial judge, Yang Ti-liang, came under the great pressure²⁶. He received a threatening letter stating that 'if he imposed a heavy sentence on Godber'²⁷ there would be consequences. However, he read out the letter in open court, regarding it as contempt of court. He ensured that the defendant had a fair trial in order to maintain judicial independence and the rule of law.

However, despite these 1970s reforms, there was never any possibility of democracy in Hong Kong. This was opposed by both the Chinese and British governments. As John Rear commented, before 1984²⁸:-

“Hong Kong is not a democracy. Power, both administrative and executive, is in the hand of civil servants who are in law primarily responsible, through the Governor, to the United Kingdom. The people of Hong Kong can neither appoint these public servants to office nor remove them.”

In 1984, after Britain and China signed the JD, the British acknowledged that there was insufficient democracy in the two councils. All executive powers were highly concentrated. In 1984, Hong Kong Government introduced a Green Paper²⁹ the major

http://en.wikipedia.org/wiki/Peter_Fitzroy_Godber

²⁵ Godber was commissioner of the Royal Hong Kong Police Force and had been caught up in bribery scandal in 1973. He fled Hong Kong during the launching an investigation and later sent back to Hong Kong for trial. He served his prison sentence for 4 years finally.

http://en.wikipedia.org/wiki/Peter_Fitzroy_Godber

²⁶ 'It was all because of the Godber case, he received anonymous letters uttering threats against him. He was under great public pressure. He was criticized for failing to mete out a heavy enough sentence...'.
(Memoirs of the Trial Judge).

http://www.icac.org.hk/new_icac/eng/cases/godber/godber.htm

²⁷ 'Shortly after the trial began, I received an anonymous letter with a note demanding that I impose a heavy sentence on Godber, or else something bad would happen to me...But for Mr Yang, a rational and fair trial was all that mattered...he just read it out in public, denouncing the act as a contempt of court' (Threatening Letters.) http://www.icac.org.hk/new_icac/eng/cases/godber/icac_leung_e.swf

²⁸ John Rear, 'One Brand of Politics in HK, edited by Keith Hopkins, Hong Kong Oxford University Press, 1971 at p. 55.

²⁹ Anti-British movement in Hong Kong was broken out in 1966 and 1967. The workers from leftist labour union rallied in the name of an anti-British and anti-imperialists movement. The riots caused a

purpose of which was to develop limited representative government in Hong Kong. It introduced indirect elections to LegCo in 1985³⁰. LegCo was composed of 12 members of the Electoral College Constituency and 12 members of the functional constituencies³¹. The Electoral College Constituency could cast votes for members of LegCo. These members consisted of the District Boards, the Urban Council and the Provisional Regional Council (i.e. government officials). The Functional Constituencies made up of various professional or special interest groups, namely, commerce, industry, the medical profession, the legal profession, educational institutions, the financial sector and labour organizations³².

In 1991, direct elections to LegCo were allowed. This increase in democratic participation was due to the pro-Democracy Movement in China in 1989. Under a one-person-one-vote system, 18 members were elected from nine geographical constituencies³³. In the 1995 Legislative Council Elections³⁴, 60 members elected by direct election, including 30 members of the functional constituencies, 20 members from the geographical constituencies, and 10 members from the Election Committee constituencies respectively³⁵. At the same time, the President of LegCo was also elected from amongst its members. It was the final election of the colonial era.

Originally, it was thought that the members of 1995 LegCo would stay in office after 1997 (the through-train) but in the event, this pre-1997 LegCo was replaced by China with the Provisional Legislative Council. After 1997, China kept the old executive-led system system – the government was not elected by the citizens under the one-

series of bombing in the streets. After this incident, Governor realized that it lacked of an effective communication between the government and the public. It was necessary to build an presenting advisory body at a local level. (Ambrose Yeo-chi King, “ Administrative Absorption of Politics in Hong Kong: Emphasis on the Grass Roots Level, “ in *Social Life and Development in Hong Kong*, eds, Ambrose Y. C. King and Rance P. L. Lee (The Chinese University Press, 1984), pp. 127-146, p. 138)).

³⁰ 1984 Green Paper: The Further Development of Representative Government in Hong Kong.

³¹ 1984 Green Paper: The Further Development of Representative Government in Hong Kong.

³² 1984 Green Paper: The Further Development of Representative Government in Hong Kong at para. 38.

³³ The First in Legislative Council History, Legislative Council Secretariat, FS 27/12-13, at p. 6.

³⁴ “The Legislature which was returned in October 1995 is a milestone in politics, being the first fully-elected legislature in the History of Hong Kong”, Legislative Council Annual Report 1995-1996.

³⁵ The First in Legislative Council History, Legislative Council Secretariat, FS 27/12-13, at p. 7.

person-one-vote system, an issue which since 1997 has become a matter of legal argument.

2.4 The Judicial System

In colonial times, the legal system of Hong Kong consisted of the Judicial Committee of the Privy Council, the Supreme Court, the Court of Appeal, the High Court, the District Court, the Magistracies and - from the 1970s onwards - a series of local Tribunals. Each court had a different jurisdiction.

The Judicial Committee of the Privy Council

The Judicial Committee of the Privy Council was the highest court of appeal for Hong Kong. Three or five judges sat in London to hear appeals from Hong Kong's Court of Appeal. Its jurisdiction conferred by the Judicial Committee Act 1833. It had unlimited jurisdiction to hear, and determine the appeal cases, but these cases had to satisfy two conditions before they could be brought to court: a claim had to be at \$500,000 or more, and/or the question of law involved had to be one of public importance. The Privy Council ceased to be the Court of Final Appeal for Hong Kong in 1997 and was replaced by the CFA.

The Supreme Court

The Supreme Court was established in 1844 under the First Supreme Court Ordinance. It had an unlimited jurisdiction over civil and criminal cases. Originally, it was presided over by a single judge known as a Chief Judge; after 1912, three judges sat on the bench. This court made up of the Court of Appeal and the High Court and was renamed the High Court after 1997. Its jurisdictions remained unchanged.

The Court of Appeal

The Court of Appeal was an appellant court which divided into three panels, the criminal, civil and family divisions. It dealt with appeal cases which came from the High Court, the District Court and other tribunals in relation to the civil and criminal cases. These courts usually sat with a panel of three judges including the Chief Justice, the Vice-President and a Justice of Appeal.

The High Court

The High Court mainly dealt with criminal, civil and judicial review cases. The trials were held before either a single judge or judge and jury.

In criminal proceeding, the High Court dealt with indictable offences transferred from the District Court and could hear all serious criminal cases, such as murder and rape. However, most criminal trials would be conducted with seven or nine jurors.

The High Court had unlimited jurisdiction over all civil matters, such as breach of contract and the personal injury cases. Normally, a single judge sat alone, except in defamation cases where he/she sat with a jury. It also heard and determined applications for judicial review and for habeas corpus.

Sometimes, these courts would deal with appeal cases from the Lands Tribunal, the Labour Tribunal or the Small Claims Tribunal. If the applicants disagreed with the tribunal's award or order they could seek leave to appeal in this court. Any appeal from the tribunals would normally be heard by a High Court Judge. If leave granted, a Judge of High Court would hear and determine the appeal in open court. If leave refused, no further appeal would be permitted to a higher level court.

After the handover, the High Court was replaced by the Court of First Instance, with the same functions and jurisdiction.

The District Courts

These courts would hear civil cases, including claims up to \$120,000, and criminal cases in which the maximum sentence was 7 years. Trials conducted before a judge sitting alone without jury.

The Magistracies

The Magistrates' courts dealt with less serious offences, such as traffic offences, shoplifting and common assaults. Trials would be dealt with by a legally-qualified Magistrate who sat alone without jury. The sentences involved a maximum penalty of 2 years and/or a fine up to a maximum of \$10,000.

Committal proceedings in respect of indictable offences would be conducted in these courts, which would then deliver them to the High Court for trial or sentence. If the defendant disagreed with the Magistrate's sentence, he/she could file an appeal to a higher court, inviting it to reverse Magistrate's decision.

The Juvenile Court

The Juvenile Court dealt with youth offenders or children under the age of 16. Generally, the trial conducted by a Magistrate sitting alone in Chambers with the parties concerned. He/she would consider the background report from the family or school when making a decision.

The Coroner's Court

The Coroner's Court was established in 1967 according to the Coroner Ordinance, Chapter 14. The mainly role of Coroner's Court was to inquire into reportable deaths to investigate any doubts in the matter and to make recommendations. Cases were reported to the Coroner by the police. In general, the case decided by a judge with five jurors.

The Other Tribunals

There were different tribunals operating within the legal system, such as the Small Claims Tribunal, the Labour Tribunal and the Lands Tribunal. These tribunals dealt with the cases involving minor contracts, breaches of employment contracts and legal disputes over land. The Small Claims Tribunal was responsible for money claims involving \$50,000 or less under the Small Claims Tribunal Ordinance, Chapter 338. The proceedings in the tribunal were conducted by an adjudicator. No person could be represented by the barrister or solicitor. The Labour Tribunal, founded in 1973 under the Labour Tribunal Ordinance, Chapter 25 dealt with claims arising from alleged breaches of employment contracts. The claim heard by a Presiding Officer who would determine the issue of quantum and the monetary claim. Legal representation was not allowed either for the claimant or the defendant. The Lands Tribunal was established in 1974 under the Lands Tribunal Ordinance. The function of the tribunal consists of making orders for residential premises, compensating persons whose land has been reduced in value by re-development by the government, determining appeals against decisions of the Commission of Rating and Valuation, and determining disputes arising from building management matters. The tribunal is presided over by a

Presiding Officer who is a judge of the District Court. He/she has the jurisdiction to admit or exclude evidence. Normally, he/she sat in court alone.

A person who dissatisfied with the decision of any of these tribunals could appeal to the High Court with the time limit.

The Power of Interpretation

Under the British colonial system, the power of interpretation of legal/legislative provisions was vested in the courts and LegCo. Interpretation was divided into constitutional interpretation and ordinary statutory interpretation. In regard to constitutional interpretation, the Hong Kong Letters Patent and the Hong Kong Royal Instructions were the main constitutional documents. They were amended or altered from time to time without any standard procedure. In general, the interpretation and amendment of the constitutions fell to the British monarchy through the Privy Council. Statutory interpretation is an important aspect of the common law. When legislation and case law are in conflict, the higher courts have the power to interpret the law and apply legislation to the facts of particular cases.

In the colonial period, Judicial Committee of the Privy Council was the highest courts for the colony. It was dealt with appeal cases from the Court of Appeal and its decisions would be binding on all lower courts. After the resumption of Chinese sovereignty, the constitutional documents of colonial times replaced by the Hong Kong Basic Law as the mini-constitution. The power of interpretation also altered. In accordance with Article 8³⁶ of the BL, the common law remains the basis of the post-1997 Hong Kong legal system. The CFA is now the highest court, replacing the Privy Council. It has been given the power to enforce and interpret the laws by virtue of the said article and under the common law system. However, this raises highly difficult legal issues upon which there is a dispute regarding the power of interpretation pursuant to the Article 158³⁷ of the BL. The said Article divides the power of

³⁶ Article 8 of BL stated that the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except any that contravene this Law, and subject to any amendment by the legislature of the HKSAR.

³⁷ Article 158 (1) of BL stated that the power of interpretation of this Law shall be vested in the Standing Committee of the NPC.

Article 158 (2) of BL stated that the Standing Committee of NPC shall authorize the courts of the HKSAR to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

Article 158(3) of BL stated that the courts of HKSAR may also interpret other provisions of this Law in

interpretation between two different bodies, that is, the NPCSC and the CFA. It does not clearly define the scope of the delegation or define the limits on the CFA's power. When the interpretative powers of these two authorities conflict, there is no system to deal with the controversy. After the handover, the common law tradition of interpretation by the courts and China's tradition of the NPCSC interpretation have frequently come into conflict with each other, starting with the Right of Abode case³⁸ in 1999. The main causes of the problem are the differences between the two legal systems, the vague terminology of the Basic Law, and the unclear relationship between Hong Kong and mainland China. This has had an impact on the power of final adjudication of the HKSAR courts, the rule of law and judicial independence.

The Appointment and Dismissal of Judges

The appointment and dismissal of judges in Hong Kong's colonial legal system was a matter for the Judicial Service Commission (JSC)³⁹. The members of JSC comprised the Chief Justice as chairman, the Attorney-General, and seven other members. Judges appointed⁴⁰ and dismissed⁴¹ under the Letters Patent and were independent of ExCo and LegCo. However, there was a strong criticism of the commission. Henry Litton commented that:-

“The position of the Attorney-General in the Judicial Service Commission is that of both advocate and judge; there is a commingling of roles as he puts forward the views of the executive arm of the government in relation to the appointment or renewal of magistrates' contracts, views which will carry great

adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from NPCSC...

³⁸ Ng Ka Ling & others v. Director of Immigration (1999) 1 HKLRD 315; (1999) 2 HKCFAR 4; FACV 14-16/1998.

³⁹ A person shall not be appointed to be a member of the commission if he is a member of the legislative council (see Judicial Service Ordinance).

⁴⁰ The Governor may constitute and appoint Judges, Justices of the Peace and other public officers as may be lawfully appointed, all of whom shall, unless otherwise provided by law, hold their offices during our pleasure (see Letters Patent XIV and Supreme Court ordinance s. 6(1)).

⁴¹ For removal of a judge requires inquiry and recommendation by a local tribunal, then reference to the Judicial committee, prior to dismissal by the Governor by instrument under the Public Seal (see Letters patent XVIA 6))

weight with other members, and then together with them, he decides the issue. An invidious task, and one which, although embodied in statute law in Hong Kong, offends such basic tenets of English law as that executive and judicial powers should be demonstrably separate and that no man should be a judge in his own cause.”⁴²

The Attorney-General was also a member of ExCo. Under the principle of judicial independence, it was inappropriate for him to participate in the judicial appointment process.

Judicial Review

In the 1980s, the Hong Kong legal system developed further with judicial review. One of the landmark cases was *Pham Van Ngo and 110 others*⁴³. On 21 April 1989, 113 Vietnamese refugees came to Hong Kong from Vietnam, intending to sail on to Japan. They asked for assistance from the Hong Kong government on 1 May, because the bilge pump on their boat did not work and water leaked into boat. They requested food and water and a boat repair. The Government agreed but broke its promise and the 113 Vietnamese were detained in Stanley Prison, a closed camp, for 18 months. Their lawyers argued that they had been deprived of their liberty without lawful justification and were being arbitrarily detained by the executive. One government official said that:-

“If these Applicants succeed, permission to stay would be refused and they would be removed to Vietnam. If they lose, they will be asked to go through the screening process (which will determine whether they are refugees or not). If they refuse, we will invite them once again and try and persuade them. If not, they would then be detained pending repatriation to Vietnam”⁴⁴.

Freeing the refugees and criticising the government, the judge emphasized that:-

⁴² The Judicial Service Commission and the Attorney General (1983) 13 HKLJ 129 at 131 (Henry Litton).

⁴³ *Pham Van Ngo and 110 others*, HCMP No. 3005/1990, 12.11.1990; (1991) 1 HKLR 499.

⁴⁴ *Pham Van Ngo and 110 others*, HCMP No. 3005/1990, at para. 57.

“[the] Judiciary is not only independent of the Government, it is strong enough to resist any attempt that the rule of law should be weakened”⁴⁵.

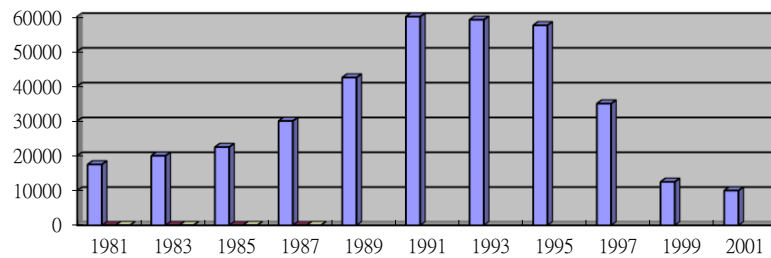
Judicial review cases such as these acted as a check on executive power, and maintained judicial independence. The judge in this case was able to maintain the independence of judiciary and to protect the rule of law.

2.5 The Hong Kong Bill of Rights Ordinance 1991

Before examining the enactment of the Bill of Rights Ordinance 1991 (BORO), it is necessary to understand the relationship between human rights and the rule of law. The rule of law requires that every citizen be governed by the law, rather than by arbitrary authority. To prevent the arbitrary use of power or illegal exercise of authority, an independent judiciary is essential to maintain the rule of law and protect human rights. Judged by international standards, the constitutional documents of colonial Hong Kong provided inadequate protection for civil liberties. In 1976, the UK Government had signed the International Covenant on Civil and Political Rights (ICCPR) which it applied to its dependent territories, including Hong Kong. To do this it had to incorporate the ICCPR into local law. Initially, the Hong Kong government did not implement the ICCPR, making it ineffective. However, following the June 4 1989 demonstrations in China, this changed. The Chinese army and security police stormed in Tiananmen Square and violently suppressed the demonstration. It is believed that hundreds were killed in this incident. Hong Kong people lost confidence in Hong Kong’s future and the protection of human rights under China after 1997.

Diagram 1: Emigration from Hong Kong between 1981 to 2002

⁴⁵ Pham Van Ngo and 110 others, HCMP No. 3005/1990, at para. 58.



V= Number of Emigrants

H=Year by Year

Source: Hong Kong Information Notes: Emigration – October 2002

The number of emigrants increased from 42,000 in 1989 to 60,000 in 1993. To restore confidence regarding the territory's future, the government had to find a way to guarantee that the human rights and freedoms would be protected up to and after 1997. On 16 March 1990, it issued a draft BORO⁴⁶. The purpose of the BORO was to guarantee the individual liberties of citizens under the constitution and to protect citizens from excessive government impingement on their rights. The BORO was modeled on the ICCPR and required that the ICCPR be incorporated into domestic legislation. Existing laws inconsistent with the BORO would need to be repealed.

The BORO was supported by both the JD and the BL. The JD provided that:-

“The provisions of ICCPR and ICESCR as applied to Hong Kong shall remain in force.”⁴⁷

In accordance with Article 39 of the BL:-

“The provisions of ICCPR and ICESCR...as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted

⁴⁶ Commentary on the Draft Hong Kong Bill of Rights ordinance 1990 (Government Printer, March 1990), Para. 7.

⁴⁷ Annex I, Chapter XIII of Joint Declaration 1984.

unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”⁴⁸

From these two articles, it was clear that all inhabitants in Hong Kong were entitled to enjoy fundamental rights and freedoms, such as Freedom of Assembly and Freedom of Protest. They also ensured that they would not be deprived of their basic rights without due process of law.

The Enactment of the Bill of Rights Ordinance 1991

The BORO incorporating the ICCPR was applied to Hong Kong in 1991. To achieve the purpose of the ICCPR, the BORO had to override all other laws in Hong Kong to ensure that it would not be overridden by statutory legislation or new laws made under the common law system. To support this principle, the Hong Kong Letters Patent provided that:-

“The Governor, by and with the advice and consent of the Legislative Council, may make laws for the peace, order and good government of the Colony.”⁴⁹

The existing laws, such as the Colonial Laws Validity Act 1865, also provided that:-

“All laws... have been enacted by the said Legislature... which have received the Assent of the Governor of the said Colony... be deemed to have been valid...”⁵⁰

These documents guaranteed these rights in specific contexts but were cancelled and replaced by the BL after 1997. At the time, Peter Wesley-Smith suggested that:-

- “(1) an Act of Parliament could declare that the Hong Kong Bill of Rights shall not be amended by the Hong Kong legislature or shall be amended only in some special manner or form;
- (2) Her Majesty the Queen could insert such provisions in the Letters Patent, the principal document in Hong Kong’s written constitution;

⁴⁸ Art. 39 of Hong Kong Basic Law.

⁴⁹ Article 7 (1) of Hong Kong Letters Patent 1917.

⁵⁰ Article 7 of Colonial Laws Validity Act 1865 and also see http://www.legislation.gov.uk/ukpga/1865/63/pdfs/ukpga_18650063_en.pdf.

(3) Perhaps a local ordinance could entrench itself or another ordinance; whether this is a genuine possibility will be discussed in moment.⁵¹

The Chinese Government argued that the BORO was unnecessary- existing laws and the BL were already able to provide rights with adequate protection⁵². Article 13 of the JD stated that:-

“...The HKSAR shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong... The provisions of ICCPR and ICESCR as applied to Hong Kong shall remain in force.”⁵³

And Article 39 of the BL stated that:-

“ICCPR and ICESCR shall be implemented through the laws...and the rights and freedoms enjoyed by Hong Kong residents shall not be restricted.”⁵⁴

However, Professor Albert Chen pointed out that:-

“Both Annex I of the JD and Article 39 of ICCPR fail to give any indication of how article 39 of ICCPR is to be complied with after 1 July 1997.”⁵⁵

There was a lack of detailed information as to how to resolve human right issues when they arose. The relationship between the BORO and the BL was unclear. The Chinese government further argued that the BORO, coming into effect in 1991, raised questions as to whether it contravened the BL and could have a higher legal status than other laws. Professor Johannes Chan commented ⁵⁶that the position of the

⁵¹ Hong Kong's Bill of Rights (Problems & Prospects), Peter Westley-Smith, at p. 59, Faculty of Law University of Hong Kong 1990.

⁵² A Comparative Perspective on the Bill of Rights, at p. 2, Johannes Chan and Yash Ghai, Butterworths Asia 1993.

⁵³ Art. 13 of Annex I of the Sino-British Joint Declaration 1984.

⁵⁴ Art. 39 of BL.

⁵⁵ Hong Kong Human Rights issues prior to 1997, Asian Human Rights Commission, published October 1992 at p. 11.

⁵⁶ The Hoang Kong Bill of Rights: A comparative Perspective on the Bill of rights, by Johannes Chan, Butterworths Asia, 1993.

BORO was supported by Article 3(2) of the JD and Article 8 of the BL. Article 3(2) of the JD provided that:-

“The HKSAR will be directly under the authority of the Central People's Government of the People's Republic of China. The HKSAR will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government.”

And article 8 of the BL provided that:-

“The laws previously in force in Hong Kong... shall be maintained except for any that contravene this law.”⁵⁷

Both Articles guaranteed that the BORO could work together with the BL; it would not contravene the BL. Professor Johannes Chan further commented that:-

“The BORO may require any modification must follow a special procedure, such as a two-thirds majority of the legislature or through a referendum, but did not follow this method cannot be modified it...The BORO has also indirectly cause higher than other legal position...known as procedural entrenchment.”⁵⁸

To avoid any arguments, the Government adopted that the BORO by adding it into the Letters Patent as part of the constitution. The Letters Patent were amended and read as follows:-

“No law of Hong Kong shall be made after the coming into force of the Hong Kong Letters Patent 1991 (No 2) (8 June 1991) that restricts the rights and

⁵⁷ Art. 8 of BL stated that: “The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.”

⁵⁸ See. J Chan “The Bill of Right does not contravene the Basic Law” (1991) 176 Hong Kong Economic Journal Monthly 54-58.

Entrenchment simply means any constitutional mechanism which makes some laws immune to repeal by the usual legislative formula of a simple majority vote in the commons and the Lords plus the royal assent. In principle, a particular political value might be either a substantive or procedural entrenchment. (Constitutional Law, Administrative Law, and Human Rights, A critical introduction, Ian Loveland, at p. 35, Sixth Edition, Oxford University Press 2012).

freedoms enjoyed in Hong Kong in a manner which is inconsistent with (ICCPR) as applied to Hong Kong.”⁵⁹

The main purpose of the amendment was that any new laws made by the legislature after 8 June 1991 had to be consistent with the BORO. Consequently, the draft bill was submitted to the LegCo for examination and approval on 25 July 1990 and the Bill of Rights Ordinance Cap. 383 came into effect on 8 June 1991. The BORO divided into three parts⁶⁰. Part I was Preliminary. It consisted of Interpretation, Effect on pre-existing legislation, interpretation of subsequent legislation, Public emergencies and the remedies for contravention of Bill of Rights. Part II was the BORO. There are 23 articles regarding basic rights, such as right to life and no slavery or servitude, rights of person deprived of their liberty, freedom of thought, conscience and religion, freedom of opinion and expression, right of peaceful assembly, freedom of association, equality before and equal protection of law, etc. Part III was exceptions and savings.

The Government made a reservation to certain provisions and six ordinances incompatible with it had to be suspended for a year. The six ordinances were the Immigration Ordinance, the Independent Commission against Corruption Ordinance, the Prevention of Bribery Ordinance, the Societies Ordinance, the Police Force Ordinance, and the Crimes Ordinance. In addition, there were a number of ordinances, including the Public Order Ordinance, Cap. 245 which violated Part III of the BORO in relation to public meetings and processions. It stated that organisers of any public meetings and processions needed to apply for a license, which reflected a restriction on their right of peaceful assembly. This was amended⁶¹ and repealed in 1995⁶². However, the Chinese government opposed the amendment⁶³ on the grounds that the

⁵⁹ Article VII (3) of the Letters Patent, L.N. 226 of 1991.

⁶⁰ http://www.hkhrm.org.hk/english/law/eng_boro3.html (Full text of Hong Kong Bill of Rights Ordinance).

⁶¹ These amendments should (a) remove the requirement for licensing of public processions; (b) specify clear and valid grounds for prohibiting public meetings and processions; and (c) simplify and rationalise procedures for the public to follow in respect of such events. (LC Paper No. LS21/00-01, Annex B at p. 2).

⁶² A Note on Provisions relation to the regulation of public meetings and public processions in the Public Order Ordinance (Cap. 245), LC Paper No. LS 21/00-01.

⁶³ The British side have disregarded repeated declarations on a matter of principle by the Chinese government and went ahead to formulate a Bill of Rights ordinance that will be detrimental to the execution of the Basic Law of HKSAR. On this, the Chinese side expresses regret and reserves the right to review all currently implemented Hong Kong legislation, including the Bill of Rights. (see Wu Jianfan, Lawful Measures, Window, 10 November 1995 at pp 26-28)

amendment was made by UK government unilaterally, and that the BORO's claim to enjoy a higher status than other laws in Hong Kong was inconsistent with the BL. It prohibited any such bill from coming into effect after 1997⁶⁴ under Article 160 of the BL⁶⁵. It also added Articles 2(3)⁶⁶, 3⁶⁷ and 4⁶⁸ of the BORO.

The Impact of Bill of Rights Ordinance

The BORO had an effect on Government policy and on the courts. It was designed to protect the rights of the individual and to bind on the Government and public authorities to ensure fair and equal treatment. This resulted in an increase in challenges to Government decisions by judicial review. The courts' caseload increased rapidly from 46 judicial review cases in 1991, 77 cases in 1992, 56 cases in 1993, 43 cases in 1994, to 25 cases in 1995, the total number of cases being 247 cases. Ordinary citizens fought for their rights through judicial review. The figures are as follows.

Diagram 2: Number of Bill of Rights cases (June 1991 to December 1995)

⁶⁴ See Wu Jianfan, Lawful Measures, Window, 10 November 1995 at p. 26.

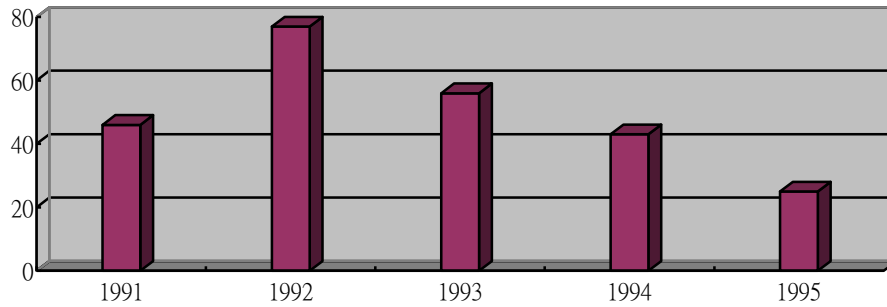
⁶⁵ Art. 160 of BL stated that Upon the establishment of the HKSAR, the laws previously in force in HK shall be adopted as laws of the Region except for those which the NPCSPC declares to be in contravention of this Law. If any laws are later discovered to be in in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law.

⁶⁶ Article 2(3) of the BOR stated that in interpreting and applying this Ordinance, regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong, and for ancillary and connected matters.

⁶⁷ Article 3 of the BOR stated that Effect on pre-existing legislation:-

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

⁶⁸ Article 4 of the BOR stated that all legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong.

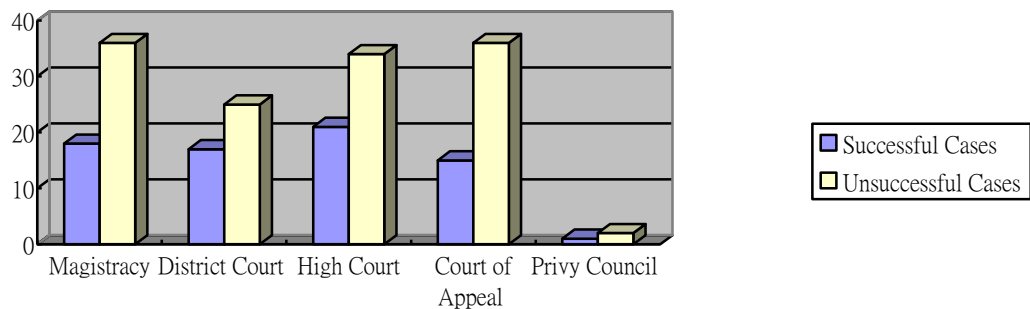


Source: Hong Kong's Bill of Rights: Two Years before 1997, George Edward and Johannes Chan, Faculty of Law, University of Hong Kong 1995 at p.38

The diagram shows the first five years of cases in relation to the BORO. The number dramatically increased in the first six months in 1991, with the largest number of cases in 1992 (77 cases). Challenges to government increased quickly but dropped slightly in 1995 (25 cases).

Diagram 3: The number of cases at different court levels (June 1991 to December 1995)

Diagram 3 shows the number of cases at different court levels from June 1991 to December 1995 (18 successful cases and 36 unsuccessful cases in the Magistracy; 17 successful and 20 unsuccessful cases in the District Court; 21 successful and 34 unsuccessful cases in the High Court; 15 successful and 36 unsuccessful cases in the Court of Appeal; and 1 successful and 2 unsuccessful cases in the Privy Council)



Source: Hong Kong's Bill of Rights: Two Years before 1997, George Edward and Johannes Chan, Faculty of Law, University of Hong Kong 1995. At p. 43.

The diagram shows that there were more unsuccessful than successful cases at the different court levels regarding BORO's issues. As a result of the increase in caseloads, average waiting times for trial grew.

The Challenge to Government

The enactment of the BORO created new opportunities for people to challenge the Government. Judges in the courts had the ultimate authority to declare a law passed by LegCo unconstitutional. The BORO increased pressure on the Government from the community to make laws compliant with the BORO.

One case which challenged government came about in 1995, when Vietnamese boat people⁶⁹ challenged the Government's detention of them pending confirmation of their refugee status under the Article 5(1) of the BORO. If the Vietnamese boat people had been identified as not having refugee status, the Government would have a duty to help repatriate them. All the Vietnamese migrants were detained in closed camp, pending their removal to Vietnam under the 13D (1) of the Immigration Ordinance, Cap. 115⁷⁰. However, the Vietnamese migrants applied to the court for a habeas corpus order, claiming that they had been detained in a closed camp for a long period and that their detention was unlawful. The Judicial Committee of the Privy Council ruled that the Commissioner of Immigration had the authority to detain them within a reasonable time, but further detention was not permitted and was unlawful. It based this decision on common law principles rather than the BORO. That is to say, the common law played an important role in protecting human rights where the BORO did not achieve what was required.

The Challenge to the Courts

The legal system in Hong Kong followed the English common law. Common law based upon previous court decisions and precedents. Everyone was equal before the laws and courts. This means that everyone has the right to a fair and public hearing (natural justice). The protection it gave people was similar to the provisions in the BORO, which put an emphasis on individual rights - everyone was entitled to a fair and public hearing by an independent tribunal⁷¹. In the leading case of *Re v. Sin Yau Ming*, Silke V-P stated that:-

⁶⁹ Tan Te Lam v. Superintendent of Tai A Chau Detention Centre (1996) 6 HKPLR 13.

⁷⁰ 13D (1) of Immigration Ordinance, Cap 115 stated that any resident who arrives in HK not holding a travel document...may, whether or not he has requested permission to remain in HK, be detained under the authority of the Director in such detention centre as an immigration officer may specify pending a decision to grant or refuse him permission to remain in HK or, after a decision to refuse him such permission, pending his removal from HK...

⁷¹ Article 10 of the BORO stated that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law,

“We are no longer guided by the ordinary canons of construction of statutes nor with the dicta of the common law inherent in our training. We must look, in our interpretation of the Hong Kong Bill, at the aims of the Covenant and give full recognition and effect to the statement which commences that Covenant. From this stems of the entirely new jurisprudential approach to which I have already referred.”⁷²

This confirmed that the BORO played a major role in judicial decision making and that it had a higher status than other laws in Hong Kong.

In the case of *R v. Town Planning Board*⁷³, the Board gazetted 16 outline zoning plans on 24 December 1993. The applicant affected by the new plans and lodged a written statement of objection to the board. In the first meeting, the applicant was notified by the Board of the hearing but at subsequent hearings, the Board refused the application of objection in the absence of the applicant. The applicant filed a Notice of Application for Leave to apply for judicial review on 2 September 1995, based on the rules of natural justice⁷⁴ and the BORO⁷⁵. The court ruled that the application could be refused subject to the common law on 8 June 1996.

The Increase in Legal Aid Costs

The commencement of the BORO substantially increased litigation in respect of individual rights. In the *Tan Te Lam case*⁷⁶, the applicants were detained in a closed reception centre and were unemployed. Legal aid was granted. Such litigation sometimes involved complex legal arguments and the appointment of expensive

everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

⁷² (1992) 1 HKCLR 127, 124.

⁷³ *R v. Town Planning Board, ex parte Real Estate Developers Association* (1994) 4 HKPLR 194; (1995) 5 HKPLR 261; (1996) 6 HKPLR 179.

⁷⁴ The Natural Justice means that in *Wiseman v. Boreman* (1971) AC 297 where at p. 310 Lord Guest said:- “ It is reasonably clear on the authorities that where a statutory tribunal has been set up to decide final questions affecting parties’ rights and duties, if the statute is silent upon a question, the court will imply into the statutory provision a rule that the principles of natural justice should be applied.”

⁷⁵ Article 10 of the BOR stated that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

⁷⁶ *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre*, (1996) 6 HKPLR 13.

senior council was required. Applicants might also appeal to a higher court when dissatisfied with the courts' decisions. According to Diagram 3 above, the unsuccessful cases outnumbered the successful cases at different court levels. Litigation costs increased.

After the enactment of the BORO, all rights and freedoms contained in the BORO were applied without discrimination. This enabled people to go against the government and public authorities. It increased the caseload of the courts and the legal aid costs.

2.6 Conclusion

Under British rule, Hong Kong had a well-established legal system based on English common law. The rule of law was further enshrined through the enactment of the Bill of Rights Ordinance 1991. This protected human rights. An independent judiciary upheld the rule of law and ensured that the law was properly applied. Judicial independence was a key check the power but its future became uncertain after 1997.

Chapter Three

Judicial Independence in Modern China

3.1 Background

1949 to 1956

Modern China founded in 1949 by Mao Zedong, who believed that the establishment of socialism required the centralization of power.¹ Chinese law is a mixture of civil law and socialist law and in the early years of Mao's rule, it emphasized the people's justice and people's participation in the administration of 'people's justice'. Mao's early political agenda included building a socialist legal system and developing the socialist democracy. He began by enacting new laws in place of the old laws of Imperial and Republican China. The first constitution of the PRC was promulgated in 1954. It established the system of government, including the National People's Congress and the Standing Committee, People's Procuratorate, the Legislative System and the Administrative divisions. In this system, the central government was superior to all other departments. The NPC and its Standing Committee were established as the highest bodies of state power with the power to draft the Constitution, the Criminal and Civil Codes, an Administrative Law, Local Laws and Regulations. In this first stage, law and lawyers were seen as an important part of the new system of government.

1957-1965

In this period, Mao considered law to be bourgeois and only necessary in capitalist society. Professor Albert Chen has commented that "the infant legal system established by the People's Republic of China (PRC) in the 1950, modeled largely on soviet norms, instruction and practices."² Mao believed that a legal system would restrict the powers of the Chinese Communist Party. He advocated 'rule by law', meaning that the government would use law to govern a society. Law was an

¹ Mao Zedong said: Ours is a country in which small-scale production and the patriarchal system prevail, and taking the country as a whole there is as yet no democratic life; consequently, this state of affairs is reflected in our Party by insufficient democracy in Party life. This phenomenon hinders the entire Party from exercising its initiative to the full. Similarly it has led to insufficient democracy in the united front and in the mass movements. (In his report to the Sixth Plenary Session of the Sixth Central Committee of the Party).

² Albert Chen, *An Introduction to the Legal system of the People's Republic of China*, 3rd edition, LexisNexis Butterworths 2004.

instrument of government. He increased the centralization of power within the party and focused the entire society on economic development. To achieve government aims, the Party issued Regulations whose enforcement fell to officials as well as street level and work-unit level cadres.

In 1956, Mao advocated what was known as ‘the Hundred Flowers Movement’ under which he invited members of society to air their opinions about government policy. This encouraged non-party people and intellectuals to speak out regarding government policies and existing problems. However, in 1957, he then purged these critics during an Anti-Rightist movement. People who had been critical of the regime were labeled ‘Rightists’ and persecuted. They included all intellectuals as well as members of the government bureaucracy, lawyers and the judiciary. Consequently, a number of lawyers and members of judiciary were purged by the Communist Party. The independent judicial system was replaced by a Party Committee at national level and People’s Committees at local level, administering ‘justice’ according to political rather than legal criteria. Those who administered ‘justice’ were non-lawyers, usually officials, workers and street level committees. In 1957, the Chinese legal system was almost destroyed. The courts were put under the control of the military and members of judiciary were purged by the Communist Party.

1966 to 1976

In 1966, Mao further embarked on the Cultural Revolution. Mao alleged that bourgeois elements had infiltrated all aspects of Chinese society and the government, damaging Communism. To protect the socialist system it was necessary to purge them and eliminate capitalist influences through violent class struggle.³ Over the next ten years, 60 million people were killed and millions lived in poverty. Those purged or attacked included those in the legal profession, students and scholars. In what are now called the ‘ten years of turmoil’ the legal system and legal education in the universities came to a standstill. This period of turmoil only ended when the army assumed control in the 1970s. In short, under the Chinese communist government led by Mao there was no law.

³ Those representatives of the bourgeoisie who have sneaked into the Party, the government, the army, and various spheres of culture are a bunch of counter-revolutionary revisionists. Once conditions are ripe, they will seize political power and turn the dictatorship of the proletariat into a dictatorship of the bourgeoisie. Some of them we have already seen through; others we have not. Some are still trusted by us and are being trained as our successors, persons like Khrushchey for example, who are still nestling beside us. Party committees at all levels must pay full attention to this matter. (Mao’s Last Revolution, by Roderick MacFarquhar and Michael Schoenhals, Cambridge, MA: The Belknap Press of Harvard University Press, 2006 at p. 47)

1977 to Present

After Mao's death in 1976, the Communist Party leadership was assumed by Deng Xiaoping. He considered law to be useful to maintain social stability and promote economic development. In 1978, he made a famous declaration that "there must be laws for people to follow; these laws must be observed; their enforcement must be strict; and law-breakers must be dealt with."⁴ After the 'ten years of turmoil' the idea of a return to law and order was popular. Deng believed that a well-functioning legal system under Party control could achieve the goal of rule-making and policy development. He began to carry out the 'Two-Hands' policy⁵.

Deng intended to develop China economically and promoted the Four Modernizations in major cities. The goal of the Four Modernizations was to expand rural income and establish direct foreign investment in mainland China. Thus, reform focused on the modernization of agriculture, industry, science and technology. The aim was to develop China into a modern industrial country. However, there were some followers of Mao (known as 'Leftists') who saw this as capitalist and wished to restore the old rules of the Mao era. Over the following years, Deng had to battle with this group to achieve his aims. He was eager to establish a highly institutionalized legal system and began to re-build it in 1979 with the first Criminal Law and the Criminal Procedure Law. More laws followed over the next decades, along with university legal education and a private legal profession. In short, the goal of the Chinese legal reform was to aid economic reform but since China had no trained lawyers (except those persecuted during the Cultural Revolution) this was difficult. The reforms had no clear direction and there were inefficiencies in the legal system, such as continued political control and a lack of predictability. Moreover, law was still seen as an instrument of government. Zhang Youyu, an influential jurist, spelt out this view:-

“Socialist democracy and the legal system (*fazhi*, sometimes translated as rule of law) are inseparable; both of them are (to be used) to consolidate socialist economic bases and to enhance socialist development. At present, they are

⁴ Communiqué of The Third Plenary Session of the Eleventh Central Committee of the CPC, supinate 45, at 574.

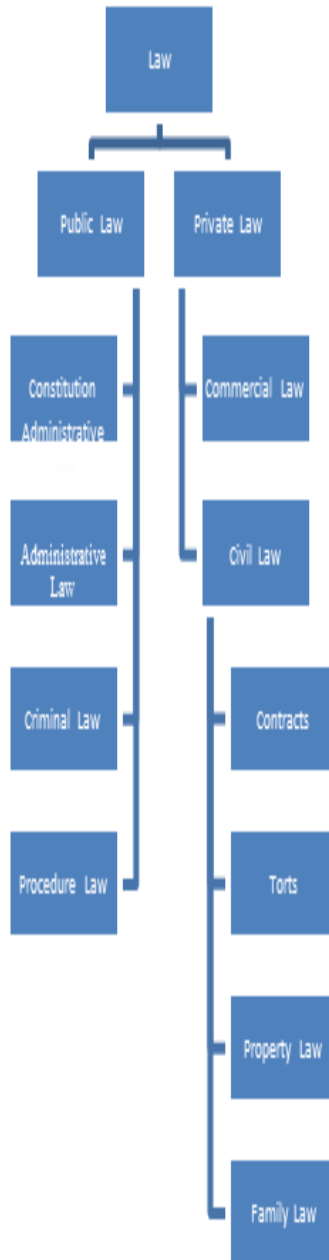
⁵ “The economy must be developed and the legal system must be strengthened” (Twang Jiafu: On the rule of law (no. 2 1996) *Studies in Law (Faxue Yanjiu)*3, at 7)

powerful tools for promoting the Four Modernizations. Neither of them is an end but both of them are means.”⁶

In 1954, 1975 and 1978, China promulgated three different constitutions. In 1982, China drafted its first post-Mao Constitution. This describes China as ‘a socialist state’. The Constitution became the highest law of the state and must be obeyed by all citizens and governmental organizations. It was enacted and can be amended by the National People’s Congress. It sets out general principles, the fundamental rights and duties of citizens, and the structure of the state, including provisions about the national flag. The preamble stresses that the new democratic revolution led by Mao has achieved its goals of overthrowing imperialism, feudalism and bureaucratic capitalism. However, it still stresses the role of democratic dictatorship by the working classes.

In addition to the Constitution, the Chinese legal system is made up of Public Law and Private Law. Public Law covers the Constitution, Administrative Law, Criminal Law, and the Criminal Procedure Law. Private Law consists of Commercial Law and Civil Law, such as Contract, Tort, Property Law and Family Law (see Diagram 4 below).

⁶ Zhang Youzu on strengthening the socialist legal system, first published in (no. 6, 1981) social sciences in China. (Beijing, Press of the Masses, 1984 at 41 reprint).



Source: Criminal Law of the People’s Republic of China (Adopted by the Second Session of the Fifth National People’s Congress on July 1, 1979 and amended by the Fifth Session of the Eighth National People’s Congress on March 14, 1997).

The PRC’s Criminal Law⁷ says that it protects persons from being harmed by another person and punishes people for committing crimes⁸. The Civil Law mainly governs

⁷ Criminal Law of the People’s Republic of China (Adopted by the Second Session of the Fifth National People’s Congress on July 1, 1979 and amended by the Fifth Session of the Eighth National People’s Congress on March 14, 1997).

⁸ Article 2 of Criminal Law of PRC states that the tasks of the Criminal Law are to use punishment struggle against all criminal acts to defend national security, the political power of the people’s

the relationship between individuals or organizations⁹. Laws are enacted and amended by the NPC; the NPCSC is authorized to propose and carry out these amendments during the closing session of the NPC. The NPCSC also has the power to enact Regulations, such as those covering Environmental Protection and Trademark Law.

Administrative Law¹⁰ is part of Public Law. It mainly deals with the nature of administrative decisions and provides more efficient legal protection of citizens and legal persons¹¹. It is also the body of law used to monitor the work of government decision making¹². The law allows the putative plaintiff to take concrete action against the Central government. The scope of action includes administrative punishment and administrative coercive measures. Such matters are dealt with by the local People's Courts but these cannot review administrative legislation.

In addition to the above there are also Local Laws and Regulations. These are enacted and amended by the local authorities in accordance with the state constitution. Local People's Congresses and other organs must report any local laws or changes to laws to the NPC and NPCSC after enacting them. Since the major purpose of these laws and Regulations is to deal with the local disputes, they can be implemented and administered at the local level.

A substantial part of China's law consists of autonomous and specific regulations, administrative rules and international treaties. Autonomous and Specific Regulations are enacted and amended by the authorities of autonomous region, which need to report such changes to the NPCSC. These laws must not contradict the state

democratic dictatorship, and the socialist system; to protect state-owned property and property collectively owned by the laboring masses; to protect citizens' privately owned property; to protect citizens' right of the person, democratic rights, and other rights; to maintain social and economic order; and to safeguard the smooth progress of the cause of socialist construction.

⁹ Article 2 of Civil Law of PRC states that it shall adjust property relationships and personal relationships between civil subjects with equal status, that is, between citizens, between legal persons and between citizens and legal persons.

¹⁰ Administrative Law of PRC (Passed on 4 April 1988 by the Second Session of the Seventh National People's Congress, promulgated on 4 April 1989 and effective as of 1 October 1990).

¹¹ Article 1 of Administrative Law of PRC states that this law is enacted on the basis of the constitution in order to ensure the proper and timely hearing of administration cases by People's courts, to protect the lawful interests of citizens and legal persons and other organization and to safeguard and supervise the exercise of functions according to the law by administrative authorities.

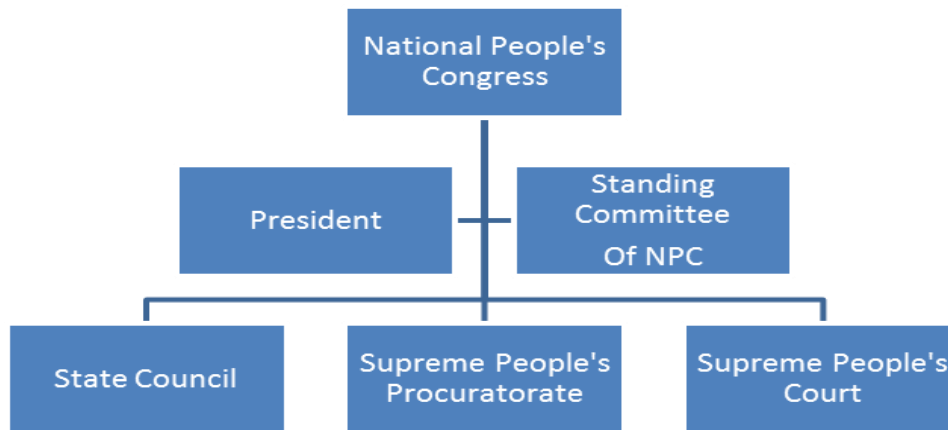
¹² Article 2 of Administrative Law of PRC states that where citizens and legal persons or other organizations which consider that specific acts of administrative authorities or their personnel have infringed their lawful interests, they shall have the right to institute proceedings in the People's Court.

constitution. Administrative rules are a set of documents which set up the relevant provisions and the formal administrative guidelines for the use of government departments.

International treaties are entered into by State according to international law. As a party to such a treaty, the Chinese State is bound by international agreements.

3.2 The System of Central Government

Diagram 5 below shows the system of Central government currently practiced in China:



Source: The Law Library of Congress

The National People's Congress (NPC) is the supreme organ of state power in the PRC¹³. Members of NPC include senior officials from the provinces, the autonomous regions and the Central Military Commission¹⁴. There are around 3000 members, all elected for a five-year term¹⁵. Meetings of the NPC are annual¹⁶.

The NPC has the authority to make significant political decisions at the national level. Under the PRC constitution, a two-thirds majority is required to amend or enact the

¹³ Article 57 of Constitution of PRC 1982.

¹⁴ Article 59 of Constitution of PRC 1982.

¹⁵ Article 60 of Constitution of PRC 1982.

¹⁶ Article 61 of Constitution of PRC 1982.

constitution¹⁷ and other laws¹⁸. Apart from this, it can approve the appointment or removal of senior officials of the State Council and approve draft resolutions.

The NPCSC is a permanent body of the NPC and consists of 150 members, including a Chairman, the Vice-Chairmen and the Secretary-General¹⁹ elected by the NPC. The NPCSC meets every two to three months. The NPCSC is the highest legislative body of the state. It can interpret, enact or amend the constitution and regulations²⁰, and has the authority to amend or supplement the laws when the NPC is not in session²¹.

In accordance with the 1982 Constitution of PRC and the BL, the NPCSC is not merely a legislative body but has the power of final interpretation. Article 67(4)²² states that ‘the NPCSC exercises its functions and powers to interpret laws’. Article 158(1)²³ states that ‘the power of interpretation of this Law shall be vested in the NPCSC’.

The President of the PRC

The President is the Head of the PRC. He elected by the NPC and assisted by a Vice-President. He can issue special presidential decrees and declare a state emergency if there is a threat to the safety of the country.

The State Council

The State Council is the highest executive organ of state power²⁴ and administration. It is composed of the Premier, the Vice-Premiers, the State Councilors.²⁵ The term of

¹⁷ Article 62 of Constitution of PRC 1982.

¹⁸ Article 7 of Legislation Law of PRC states that the NPC and its Standing Committee exercise the legislative power the State. The NPC enacts and amends basic Law governing criminal offences, civil affairs, the State organs and other matters.. The Standing Committee of the NPC enacts and amends laws other than the ones to be enacted by the NPC, and when the NPC is not in session, partially supplements and amends laws enacted by the NPC, but not in contradiction to the Basic principles of such laws.

¹⁹ Article 65 of Constitution of PRC 1982.

²⁰ Article 67 of Constitution of PRC 1982.

²¹ Article 67(3) of Constitution of PRC 1982.

²² Article 67 (4) of Constitution of PRC 1982.

²³ Article 158(1) of Hong Kong Basic Law.

²⁴ Article 85 of Constitution of PRC 1982.

membership of the State Council is five-years and no-one is allowed to serve more than two consecutive terms²⁶.

The State Council is the one of the legislative bodies of the NPC. It can draft and promulgate regulations and the administrative rules²⁷. It also has executive powers in relation to proposing draft bills and has the power to draw up plans and agendas. All proposals and bills are submitted to the NPC and its Standing Committee for deliberation. It is also legally responsible for conducting or concluding politically binding commitments with the other states, such as international treaties or agreements.

The Supreme People's Procurator ate (SPP)

The Supreme People's Procuratorate consists of fifteen functional departments, a political work department, a retiree bureau and five subordinate institutions. It is a law supervision organ and an independent state agency with the right of prosecution. In all criminal cases, it can exercise its powers to prosecute or arrest criminal offenders, and use its power to supervise the work of local procurator rates to ensure that they are implementing state laws. It also has a power to supervise the judiciary. The SPP reports to the NPCSC and annually presents a work report to the NPC giving an overview of the prosecution system.

The Supreme People's Court (SPC)

The Supreme People's Court is the highest judicial organ in Mainland China. The President of the SPC is elected by the NPC for a five-year term; other judicial officials are also appointed by the NPCSC. This means that they are not politically independent. They must be members of the Communist Party. The SPC has jurisdiction over trials and courts in accordance with the PRC's constitution. It supervises the works of the People's Courts and the SPC at lower levels, including trials; it can direct judgments in the trial of politically sensitive cases, and issue statements for the guidance of lower courts and judges. The President and Vice-President of local judicial committees must also be members of the Communist Party.

²⁵ Article 86 of Constitution of PRC 1982.

²⁶ Article 87 of Constitution of PRC 1982.

²⁷ Article 89 of Constitution of PRC 1982.

In addition, the Adjudication Committee is established in the courts. The members of the committee consist of the President and Vice-President of the court, who must be Communist Party members, as well as the heads of the court's tribunals. The Committee is responsible for criminal cases involving political dissidents and serious threats to national security. During the Committee's meetings, the procurator summarizes the case, reporting its main facts. Most of these are kept as state secrets. The case is heard by the members in private. This had led to concerns about a lack of transparency in the judicial process.

The Legislature and the Legislative Process

The most important legislative power in China is held by the NPC and its Standing Committee. Under the present system, legislative power can be divided into five branches, namely, the NPC and the NPCSC, the State Council, the Local Authorities National People's Government and the People's Government Congress of autonomous regions. Each of these branches has a specific function and there are limitations on its powers.

The legislative process is the procedure by which a draft bill or proposal is considered and passed into a formal law. The process has a number of specific steps. Normally, citizens do not have the right to submit draft bills or participate bill drafting. In accordance with Article 12 of Legislation Law of PRC, the following organizations have the power to submit draft bills:

- The Presidium of the NPC;
- The Standing Committee of the NPC;
- The State Council;
- The Central Military Commission;
- The Supreme People's Court;
- The Supreme People's Procuratorate ; and
- The special committees of the National People's Congress.

The Legislative process is generally divided into four main stages, that is, Motion, Examination/Discussion, Voting and Promulgation. When a draft bill or proposal is formally submitted to the NPC by the various delegations and the relevant special committees, the Presidium of the NPC shall decide whether or not to place it on the agenda of a plenary session. If a draft bill has been submitted and placed on the agenda, it will proceed to the second stage. The purpose of the bill will be explained

by the submitting party during the NPC's meeting. The NPC delegates then have the opportunity to discuss the bill. After amendments and discussion, the law committee will obtain the opinion of the delegates and the bill will go to the Presidium for voting. This is by a modified version of majority voting. Finally, the bill will be passed and promulgated by the NPC.

3.3 The Judicial System in Modern China

China's judicial system is divided into three parts, that is, the People's Courts, the People's Procuratorate and the Public Security Organs. The three branches have parallel powers under the Chinese constitution and are authorized to exercise judicial powers and cooperate with other branches. The People's Courts are responsible for conducting investigations and the administration of adjudications. The legal proceedings in the People's Courts adopt a system of 'Four levels hierarchy and Two instance of Trial'. This means that People's Courts consist of four levels, that is, Local People's courts at various levels; Military courts; other special People's Courts; and the Supreme People's courts. The Local People's Courts are divided into Primary People's Courts, Intermediate People's Courts and Higher People's Courts²⁸. The 'Two instance of Trial' means that a case will be heard in the Local People's Courts in two stages, of which the second level will be the final judgment.

All cases heard in the People's Courts are in theory open to the public²⁹, except those involving state secrets or those deemed unsuitable for public hearing. Normally, cases in the People's Courts will be tried by a collegial panel³⁰ which is composed of three judges, or two judges and a people's assessor. If they fail to reach a unanimous verdict, a majority verdict of the Bench will be acceptable.

In addition, People's Courts are required to set up Adjudication Committees or Judicial Committees³¹. The main duty of the committees is to sum up the judicial experience and to discuss important or difficult cases and other issues relating to judicial work.

²⁸ Article 2 of the Constitutional and the Organic law of the People's courts of 1979 as amended in 1983.

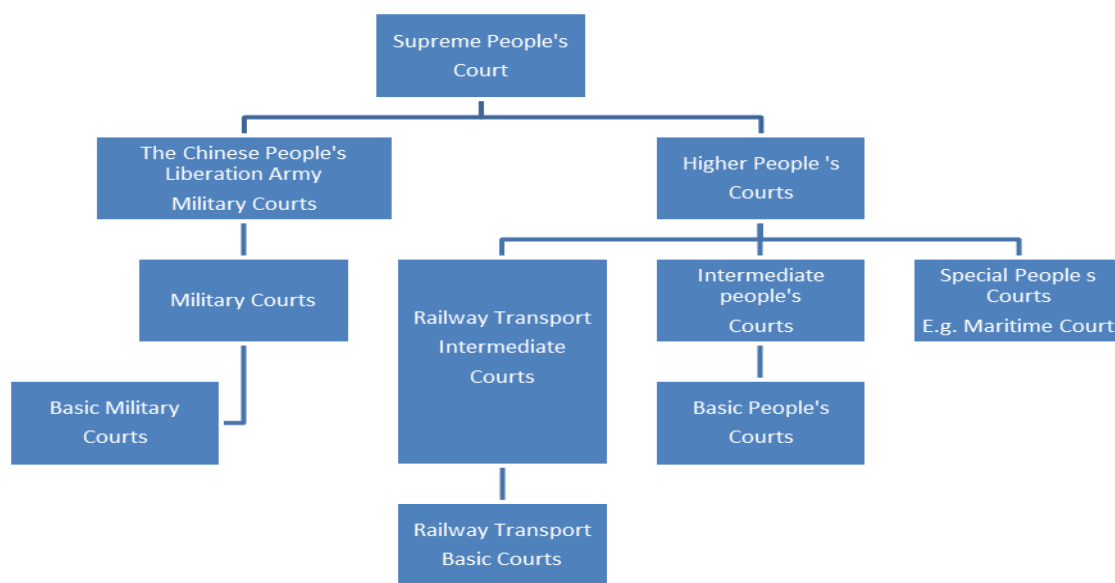
²⁹ Article 7 the Constitutional and the Organic law of the People's courts of 1979 as amended in 1983.

³⁰ Article 9 states that the people's courts adopt the collegial system in the administration of justice.

³¹ Article 10 of the Constitutional and the Organic law of the People's courts of 1979 as amended in 1983.

The members of Adjudication Committees and members of the local courts are appointed and removed by the Standing Committees of the Local People’s Congresses at the same level. The members of the Supreme People’s Courts are appointed or removed on the recommendation of the President of the Supreme People’s Court.

Diagram 6 below shows the organization of the People’s Courts in the PRC.



Source: The Law Library of Congress

Each court listed above has different duties and responsibilities under the Organic Law of the People's Courts of the PRC. Their duties and roles are as follows:

The Supreme People’s Court

The Supreme People’s Court is the highest court in the judicial system and is located in Beijing. Its panel consists of three judges sitting in the criminal division, civil division and economic division respectively. The President of the Supreme People’s Court is appointed or removed by the NPC and the NPCSC and is directly responsible to these two organizations.

The Supreme People’s Court conducts trials of civil cases, criminal cases and economic cases, and has the authority to make judicial interpretations³² on questions

³² Article 32 of the Organic law of the People’s courts of 1979 as amended in 1983.

concerning the application of laws, and to specify the meaning of these interpretations. It will hear appeal cases and prosecution protest cases from the Higher People's Court and the Supreme People's Procuratorate. Death penalty review cases are submitted by the Higher People's Court³³. It can review all death sentences and can overturn the sentence or stay the execution. In addition, it supervises the judicial work of the Local People's Courts and Special People's Courts.

The Higher People's Courts

A Higher People's court is composed of a President, Vice-President and judges³⁴ sitting in a criminal division, civil division and an economic division³⁵. Higher People's Courts are located in the provinces, autonomous regions and municipalities.

The Higher People's Court can deal with cases of first instance, appeals against judgment and death penalty review cases from the Intermediate People's courts or lower levels, as well as hearing protest cases from the Procuratorate. For death sentences, it will return the case to the Supreme People's Court for a final decision.

Intermediate People's Courts

The Intermediate People's Court is composed of a President, Vice-President and judges³⁶. These courts are established at the regional and provincial levels and cover criminal, civil and economic cases. They can hear appeals from a lower court, such as the Basic People's Courts, and are able to make a re-trial order if an error is found.

Basic People's Courts

The Basic People's Courts are the lowest level in the judicial system. They are generally established in municipal districts and autonomous counties. They deal with minor criminal and civil cases at first instance. They have a general jurisdiction to set up tribunals, depending upon the local conditions and population size, and direct the

³³ Article 12 of the Organic law of the People's courts of 1979 as amended in 1983 states that Death sentences shall be submitted to the Supreme People's Court for approval, except for the one imposed in accordance with laws by the Supreme People's Court.

³⁴ Article 26 (1) of the Organic law of the People's courts of 1979 as amended in 1983.

³⁵ Article 26 (2) of the Organic law of the People's courts of 1979 as amended in 1983.

³⁶ Article 23(1) of the Organic law of the People's courts of 1979 as amended in 1983.

work of the People's Mediation Committees. These are composed of five to eleven members.

The Other Special People's Courts

Special People's Courts are composed of the Maritime Courts, Military Courts and Railway Transport Courts. The Maritime Courts are mainly responsible for disputes regarding damage caused by vessels. The Military Courts deal with military offences and judge the most serious offences within the defense forces. The Railway Transport Courts are responsible for managing the Metro, train and electric railways and for any loss of property belonging to a railway transport enterprise.

The Appointment and Removal of Judicial Officers

Judicial Officers in China are appointed and removed by the NPC and the NPCSC³⁷. Each court consists of a President, Vice-President and judges, who will serve a maximum of two consecutive five-year terms. To be eligible as a judge in the People's Courts³⁸ legal qualifications are not required. To be appointed or admitted as a judge, a person must take the public examinations³⁹ and undergo a strict appraisal⁴⁰

³⁷ Article 11 of Judges Law of the People's republic of China (Adopted on July 1, 1995 and revised in 2001).

³⁸ Article 9 (6) of Judges Law of the People's republic of China (Adopted on July 1, 1995 and revised in 2001), stating that a judge must possess the qualifications to have worked for at least two years in the case of graduates from law specialties of colleges, or universities or from non-law specialties of colleges or universities but possessing the professional knowledge of law; or to have worked for at least one year in the case of Bachelors of law; those who have Master's Degree of Law or Doctor's Degree of Law may be not subject to the above mentioned requirements for the number of years set for work.

The judicial personnel who do not possess the qualifications as provided by sub-paragraph (6) of the preceding paragraph prior to the implementation of this Law shall receive training so as to meet the qualifications as provided by this Law within a prescribed time limit. The specific measures shall be laid down by the Supreme People's Court.

³⁹ Article 12(1) Persons to be appointed judges or assistant judges for the first time shall be selected through public examination and strict appraisal, from among the best qualified for the post, and in accordance with the standards of having both ability and political integrity. (Judges Law of the People's republic of China (Adopted on July 1, 1995 and revised in 2001)).

⁴⁰ Article 21, The appraisal of judges shall include their achievements in judicial work, their ideological level and moral characters, their competence in judicial work and their mastery of law theories, their attitude in and style of work. However, emphasis shall be laid on the achievements in judicial work;

Article 22, The results of the annual appraisal shall fall into three grades: excellent, competent and incompetent. The result of appraisal shall be taken as the basis for award, punishment, training, dismissal of a judge, and for re-adjustment of his or her grade and salary. (Judges Law of the People's republic of China (Adopted on July 1, 1995 and revised in 2001)).

in order to be deemed to have suitable academic qualifications. Judges are appointed on the basis of their experiences as a judicial office and other skills. They are not required to have a legal background or an understanding of basic legal principles. The Supreme People's Court provides judges with judicial training⁴¹ and assistance, and since 1985 and 1997, the State Judges' Institutes have trained senior judges. These Institutes offer part-time or full-time courses to judges and promote effective judicial training for judges at different levels. Recently, the Supreme People's Court has tried to improve the professionalism of judges through a relevant training programme,⁴² and to improve the quality of the selection and appointment of judges through recruitment examinations. It has increased the maximum number of judges to be appointed in different courts, but it at the same time has raised the quality of judges as a whole.

However, there is no an independent agency to monitor judicial appointments and judicial conduct. The right of appointment and removal is in the hands of the NPC and the NPCSC. These are state political bodies whose members are members of the Communist Party. They have no legal background. Senior judges must be Communist Party members. Thus, politics can compromise the independence of the judiciary. The recruitment examination for judges⁴³ is also usually administered by the President of the Supreme People's Court. He/she can control the length and scope of any examinations. Different standards affect the overall standard of judges. In addition, the appraisal required for judicial appointment under Article 21⁴⁴ is an ideological level and moral character appraisal. As this shows, there is no separation of powers between the executive division, legislative division and judicial organs.

⁴¹ The Judicial Studies Training Program is a unique collaboration between the UK and the Supreme People's Court to provide training for Chinese judges. The training aims to further the Chinese judges' understanding of advance specialist areas of law and legal culture...Our project aimed to improve the professionalization of judges in China by drawing a clear difference between the role and status of judges, and the administrative and support staff in the court system. (Improving Professionalism among China's Judges), 13 January 2012.

⁴² The judicial training program for judges and court officials under the theme of 'Improvement of Judicial Fairness' hosted in Beijing on 20 May 2013.

⁴³ Article 12(1) Judges Law of the People's republic of China (Adopted on July 1, 1995 and revised in 2001).

⁴⁴ Article 21, The appraisal of judges shall include their achievements in judicial work, their ideological level and moral characters...(Judges Law of the People's republic of China (Adopted on July 1, 1995 and revised in 2001)).

3.4 The Legal Profession

Under Mao, the legal profession was systematically purged and, in the Cultural Revolution, it was dismantled. Since 1978, however, the Chinese government has implemented an ‘Open-door’ policy, restored the judicial system, and begun to train lawyers. The first Provisional Regulations on Lawyers was promulgated in 1980⁴⁵ and later replaced by the Law on Lawyers of 2007⁴⁶.

Initially, lawyers were defined as State legal workers⁴⁷. This meant that they were owned by the state and had to support the socialist system⁴⁸. However, in 1985, the system changed. Lawyers in different major cities and autonomous regions (and the Special Economic Zones) were permitted to run private law firms⁴⁹. All applications to establish a private law firm had to be submitted to the Judicial administration Department under the State Council for approval⁵⁰. The number of practicing lawyers increased as a result.

To be qualified as a lawyer in the PRC today, potential candidates have to fulfill certain qualifications. The legal professional examination is divided into the unified national judicial examination and an appraisal. The examination is conducted annually. Candidates have to pass the unified national judicial examination and have completed a full year’s internship at a law firm⁵¹, or otherwise acquire the necessary

⁴⁵ Provisional Regulations on Lawyers of the People’s Republic of China, adopted by the 15th Session of the Standing Committee of the 5th National People’s Congress on August 26, 1980.

⁴⁶ The Law of the People’s Republic of China on Lawyers, revised and adopted at the 30th Meeting of the Standing Committee of the Tenth National People’s Congress of the People’s Republic of China on October 28, 2007, is hereby promulgated and shall go into effect as of June 1, 2008.

⁴⁷ Article 1 of Provisional Regulations on Lawyers states that lawyers are the state’s legal works and function to give legal assistance to the state agencies, units of enterprises and institutions, social groups, the people’s communes, and the citizens in order to ensure the correct implementation of law and protect and interests of citizens.

⁴⁸ Article 1 of Law of the People’s Republic of China on Lawyers 2007.
http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471604.htm

⁴⁹ Article 14(1) of Law of the People’s Republic of China on Lawyers 2007.
http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471604.htm

⁵⁰ Article 14(4) of Law of the People’s Republic of China on Lawyers 2007.

⁵¹ Article 5 of Law of the People’s Republic of China on Lawyers 2007 states that a person who intends to apply for the legal practice of a lawyer shall meet the following conditions:

- (1) Upholding the Constitution of the People’s Republic of China;
- (2) Having passed the unified national judicial examination;
- (3) Having completed a full year’s internship at a law firm; and

legal knowledge. They are subject to an appraisal by the Judicial Administration Department under the State Council before obtaining its approval⁵².

Briefly, the main duties of a lawyer are to advise clients in civil and criminal cases, administrative cases and to participate in mediation⁵³. In addition, they can draft up the pleadings for litigants. They are not allowed to conduct their own investigations in criminal cases or engage in cross-examination of prosecution witnesses. Failing to execute their duties will result in punishment by the Judicial Administration Department; their behavior – including their political behavior - is supervised by that department⁵⁴, which may withdraw a lawyer’s license to practice if he/she is deemed ‘unfit’ on professional or ideological grounds.

(4) Being a person of good character and conduct.

For a person who applies for the legal practice of a lawyer, the lawyer’s qualification certificate he obtained before the unified national judicial examination is instituted shall be equally effective as the qualification certificate obtained after passing the unified national judicial examination.

⁵² Article 8 of Law of the People’s Republic of China on Lawyers 2007 states that a person applying to practice as a full-time lawyer who had acquired an undergraduate education in an institution of higher learning or an education at a higher level, who has worked for at least 15 years in the fields of the profession where persons providing legal service are lacking, or who has a senior professional title or has attained an equivalent professional level and acquired the necessary legal knowledge of the profession shall be subject to appraisal by the judicial administration department under the State Council before obtaining its approval. The specific measures therefor shall be formulated by the State Council.

⁵³ Article 28 states that a lawyer may engage in the following business:

- (1) Accepting authorization by natural person, legal persons or other organizations to act as legal counsel;
- (2) Accepting authorization by a party involved in a civil or administrative case to act as agent ad litem and participate in the proceedings;
- (3) Accepting authorization by a criminal suspect involved in a criminal case to provide him with legal advice and represent him in filing a petition or charge, applying for bail for an arrested criminal suspect, accepting authorization by a criminal suspect or defendant or appointment by a people’s court to act as defender, or accepting authorization by a private prosecution in a case of private prosecution or by victim involved in a case of public prosecution or by his close relatives to acts as agent ad litem and participate in the proceedings;
- (4) accepting authorization to act as agent in filing petitions in all types of litigation;
- (5) accepting authorization to participate in mediation or arbitration;
- (6) accepting authorization to provide non-litigation legal services; and
- (7) answering inquires regarding laws and serving as scrivener of litigation documents and other documents concerning legal matters.

⁵⁴ Article 52 states that the judicial administration departments of the people’s governments at the county level shall exercise routine supervision over and administration of the legal practice of lawyers and law firms, and order them to solve the problems discovered in the course of inspection; and they shall, in a timely manner, conduct investigation of the complaints lodged by parties. Where a judicial administration department of the people’s government at the county level considers that a lawyer or law firm should be given administrative penalty for an illegal act committed, it shall submit a proposal to such an effect to the judicial administration department at a higher level.

3.5 Comparison of the Legal System of China and Hong Kong

Hong Kong is one of the Special Administrative Regions (SARs) of China. Unlike other SARs, it has its own legal system and practices the common law. Here, I look at the differences between the two systems in terms of Sources of Law, Executive, Legislature, Judicial System, and the Legal Profession.

1. Sources of Law

The legal system of modern China is based on civil law derived from Roman law. There is a written constitution based on legal principles and a set of rules. The laws consist of a constitution, laws (Codes), administrative laws, local laws and regulations, and international treaties. Hong Kong's legal system is based on English common law. Under the common law system, judges have the authority to make law through statutory interpretation. The lower courts are bound to follow the precedents set by the higher courts. One of the basic characteristics of the common law is that it is unwritten and un-codified.

Hong Kong's constitution in the colonial era consisted of two documents, the Hong Kong Letters Patent and the Hong Kong Royal Instructions. Both documents set out the general principles and regulations governing Hong Kong. The legal system includes the common law, rules of equity, Ordinances, subordinate legislation and customary law. After the transfer of sovereignty, the concept of 'One Country Two Systems' was implemented which means that Hong Kong can continue to practice its own economic system, capitalism⁵⁵. The BL came into effect 1 July 1997 to replace the Hong Kong Letters Patent and Hong Kong Royal Instructions as the mini-constitution. Any laws inconsistent with the BL will be declared invalid. Under the BL, all the laws previously in force in Hong Kong shall be maintained⁵⁶.

2. The System of Government

In current China, the system of government is a unitary system characterized by a high level of centralization. This means that the central government holds all the

⁵⁵ Article 5 of BL states that The socialist system and policies shall not be practiced in HKSAR, and the previous capitalists system and way of life shall remain unchanged for 50 years.

⁵⁶ Article 8 of BL states that the laws previously in force in HK, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of HKSAR.

political power. The NPC is the highest organ of the state power.⁵⁷ It has the authority to make important executive and political decisions. The political system is without checks and balances. Hong Kong is totally different. The executive, legislative and judiciary departments are kept separate from each other. Although the present HKSAR government is not elected by one-person-one-vote, its powers and functions are monitored by the other branches.

3. Legislative Departments and the Legislative Process

The legislative power of China is divided between the NPC and its Standing Committee, the State Council, the Local Authorities and the People's Congresses of the autonomous regions. The NPC and its Standing Committee exercise the greatest lawmaking powers and can amend the state constitution and other laws. The legislative process is divided into four stages, namely, Motion, Examination/Discussion, Voting and Promulgation.

In Hong Kong by contrast, it is LegCo which makes the laws of the HKSAR⁵⁸. LegCo also has the power to amend or repeal laws⁵⁹. Before a bill becomes an Ordinance, it will go through three stages (known as three readings). First of all, the government officials or members of LegCo will propose a bill. This is published in the Government Gazette. During LegCo meetings, the LegCo Secretary reads out the short title of the bill to formally start the first reading. Then, the motion of the bill will be made by the parties concerned, who will explain the purpose of the bill in the second reading. Normally, a House Committee will consider whether a Bill Committee will be set up or not. If it is unnecessary for the bill committee to be established, the bill will then be debated and voted on at the second reading. The third reading occurs after the bill is referred to the House Committee after amendment. It will be submitted to the HKSAR government for signature, published in the Gazette and reported to the NPC for the record.

4. The Judicial System

⁵⁷ Article 57 of Constitution of PRC 1982.

⁵⁸ Article 66 of BL states that LegCo shall be the legislature of the Region.

⁵⁹ Article 73(1) of BL states that Legislative Council of HKSAR shall exercise their powers and functions to enact, amend or repeal laws in accordance with the provisions of the law and legal procedures.

In China, the People's Courts are responsible for conducting investigations and the administration of the adjudications. A case coming before the People's Courts for the first time will be tried by a collegial panel composed of the three judges, or two judges and a People's Assessor. The Adjudication Committees or Judicial Committees discuss important judicial issues and handle sensitive cases. Judicial independence does not exist. The judges' decision-making is affected by political bodies such as the NPC and its Standing Committee.

Hong Kong on the other hand has retained its common law legal system. The judiciary is independent and separate from other branches of government. Judges' decisions cannot be influenced by the executive and legislative councils. Hong Kong judges are nominated for appointment by an independent statutory body known as the Judicial Officers' Recommendation Commission. The CFA can invite overseas judges to sit on the CFA according to article 82 of the BL. Under the common law system and the BL⁶⁰, judges have the authority and duty to make new law based on the principle of deciding cases, and have the power to interpret laws. In some criminal cases, judges sit with a jury. Normally, a civil case will be heard by the single judge, except in the CFA and the CA. Five and three judges sit on the CFA and the CA respectively.

5. The Legal Profession

As shown above, to become a lawyer in China, candidates must show that they have passed the unified national judicial examination with a full year's internship at a law firm⁶¹ or that they have acquired the necessary legal knowledge of the professions to be appraised by the judicial administrative department under the State Council⁶². After completing all these requirements, lawyers are able to engage in private practice.

In general, there are three kinds of law firms in China, that is, the partnership law firm, the sole partnership law firm and the state law firm. A partnership law firm has three or more partners who have at least three years of experience in the profession. The partners will be held liable for the partnership's debt⁶³. In sole partnership law firm,

⁶⁰ Article 158 (3) of Basic Law.

⁶¹ Article 5 of Law of the People's Republic of China on Lawyers 2007.

⁶² Article 8 of Law of the People's Republic of China on Lawyers 2007.

⁶³ Article 15 of Law of the People's Republic of China on Lawyers 2007 states that for the establishment of a partnership law firm, in addition to meeting the conditions prescribed in article 14 of this law, there shall be three or more partners, and the persons who intends to establish such a firm shall

the lawyer will have at least five years of experience in the profession and have unlimited liability⁶⁴. The state law firm is funded by the State. Lawyers run their business completely independently and undertake the liability with the entire assets⁶⁵.

In Hong Kong, lawyers can be divided two types, namely, solicitors and barristers. To be eligible as a lawyer, candidates have to complete both courses of the undergraduate degree in laws and postgraduate certificate in laws. Those who want to become a solicitor are required to practice in a law firm as a trainee on a two-year contract. If the training is completed subject to the approval of Law Society, they can apply for admission as a solicitor in the High Court.

Barristers are required to practice in a Chambers for one-year as a pupil⁶⁶ and sit for the barristers' qualifying examination; they may then apply for admission as a barrister in the High Court⁶⁷.

After becoming a solicitor, a lawyer can start his/her own business alone as a sole practitioner or enter into a partnership with two or more partners. The types of legal services a solicitor provides will depend upon the type of practice they work in. They will provide legal advice to their clients on particular legal issues and are responsible for contacting an appropriate barrister. Solicitors have the duty to act as a notary to properly perform oaths/affirmations, and can act as a civil celebrant of marriage in Hong Kong.

Most barristers are self-employed, working as part of a Chambers. Barristers are professional advocates who deal with the case on behalf of client and give specialist

a lawyer with at least three years of experience in the profession. A partnership law firm may be established in the form of general partnership or in the form of specialized general partnership. The partners of such a law firm shall, in accordance with law, bear liability for the debts of the law firm in conformity with the form of partnership.

⁶⁴ Article 16 of Law of the People's Republic of China on Lawyers 2007 states that for the establishment of a sole partnership law firm. In addition to meeting the conditions prescribed in Article 14 of this Law, the person who intends to establish such a firm shall be a lawyer with at least five years 'experience in the profession. He shall bear unlimited liability for the debts of the firm.

⁶⁵ Article 20 of Law of the People's Republic of China on Lawyers 2007 states that a law firm established with the funds of the State shall go about its business independently pursuant to law and shall undertake the liability for its debts with its entire assets.

⁶⁶ S. 10 of the Barristers (Qualification for Admission and Pupilage) Rules, Cap. 159AC, Law of Hong Kong.

⁶⁷ S. 2(2) of the Barristers (Admission) Rules, Cap. 159AC, Law of Hong Kong.

advice on complex legal issues. Most barristers will not have direct contact with the client until instructed through a solicitor.

3.6 Conclusion

Under the leadership of the Communist Party, the rule of law and the legal system remain weak in China. Even though China has established laws, weak enforcement remains a problem and corruption problems have increased, further weakening the judicial system. There is lack of strong and transparent laws, whilst laws are generally ignored by offenders and lawmakers alike. Sometimes, high-ranking officials in the central bureaucracy use their powers to influence the decision of judges. Judges do not have enough professional knowledge to handle legal disputes and China's legal education does not meet international standards. There is no an independent committee to monitor judicial appointments or judicial conduct. Judicial independence does not exist in China

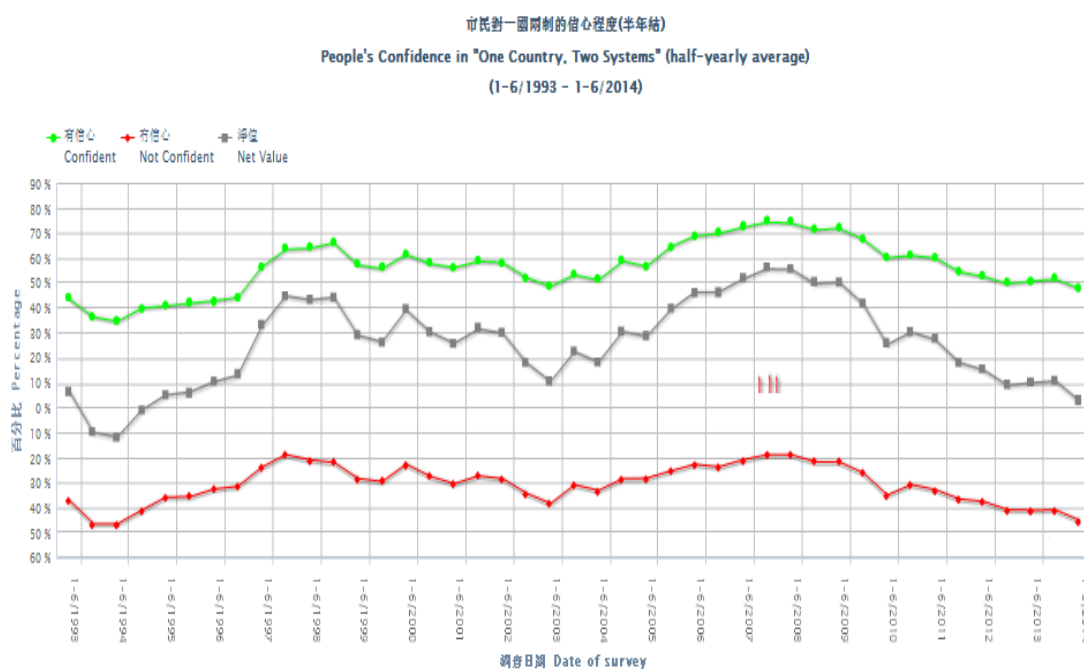
Chapter Four

The 1997 Retrocession of Sovereignty

4.1 The Legal System Post-1997

When China resumed sovereignty over Hong Kong in 1997, some Hong Kong people were worried about their personal rights and freedoms. It was unclear whether the Rule of Law and Judicial Independence could be protected and maintained after handover. Other countries around the world were also very concerned about how the BL would be implemented and how China would govern Hong Kong. Many lacked confidence in the ‘One Country Two Systems’ model. The diagram below shows how Hong Kong people’s confidence in ‘One Country Two Systems’ formula has changed over time.

Diagram 7



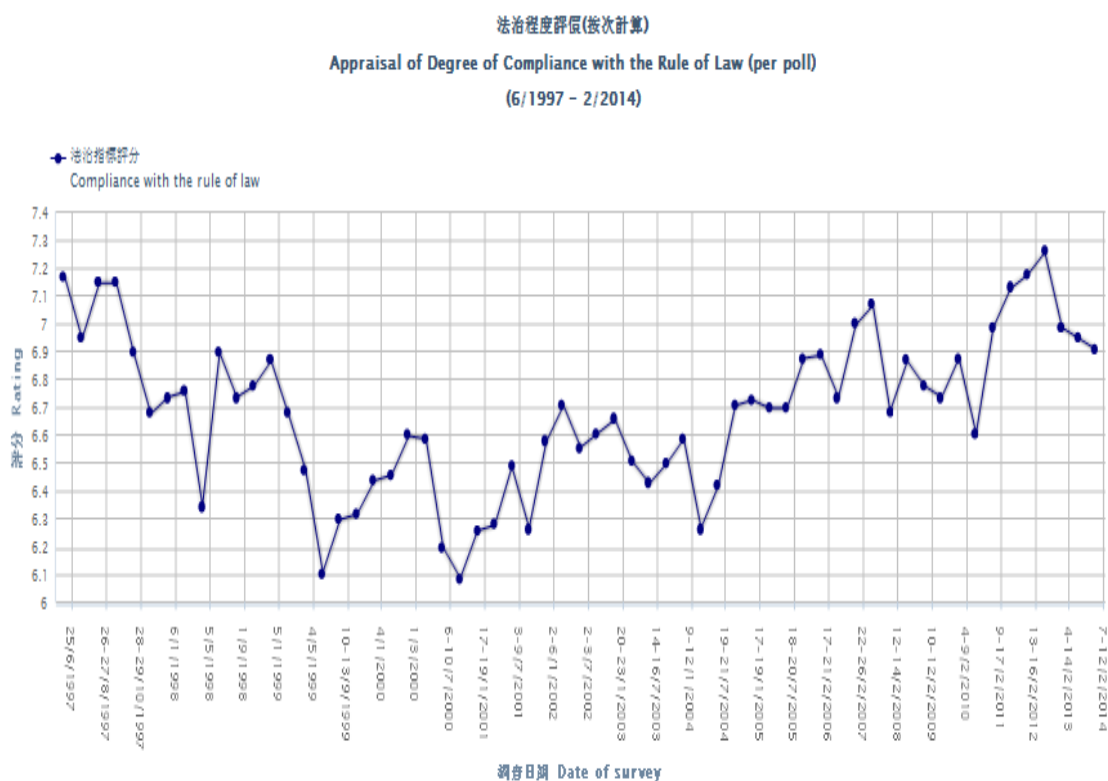
Source: People’s Confidence in “One Country, Two Systems” –half-yearly average (25.3.2014) (HKU Pop Site-Public Opinion Programme, The University of Hong Kong). <http://hkupop.hku.hk/chinese/popexpress/trust/conocts/index.html>

In 1993, confidence in the ‘One Country Two Systems’ was extremely low. In 1997 and 2008, people had high levels of confidence (64 per cent and 74.6 per cent respectively). But in 2014, it fell to 48.2 per cent, probably because of the Chinese

government's interference with Hong Kong's internal matters and worries people's personal right and freedoms.

The diagram below shows people's views as to whether Hong Kong is still governed according to the rule of law (10=absolutely yes; 0=absolutely no; 5=half-half).

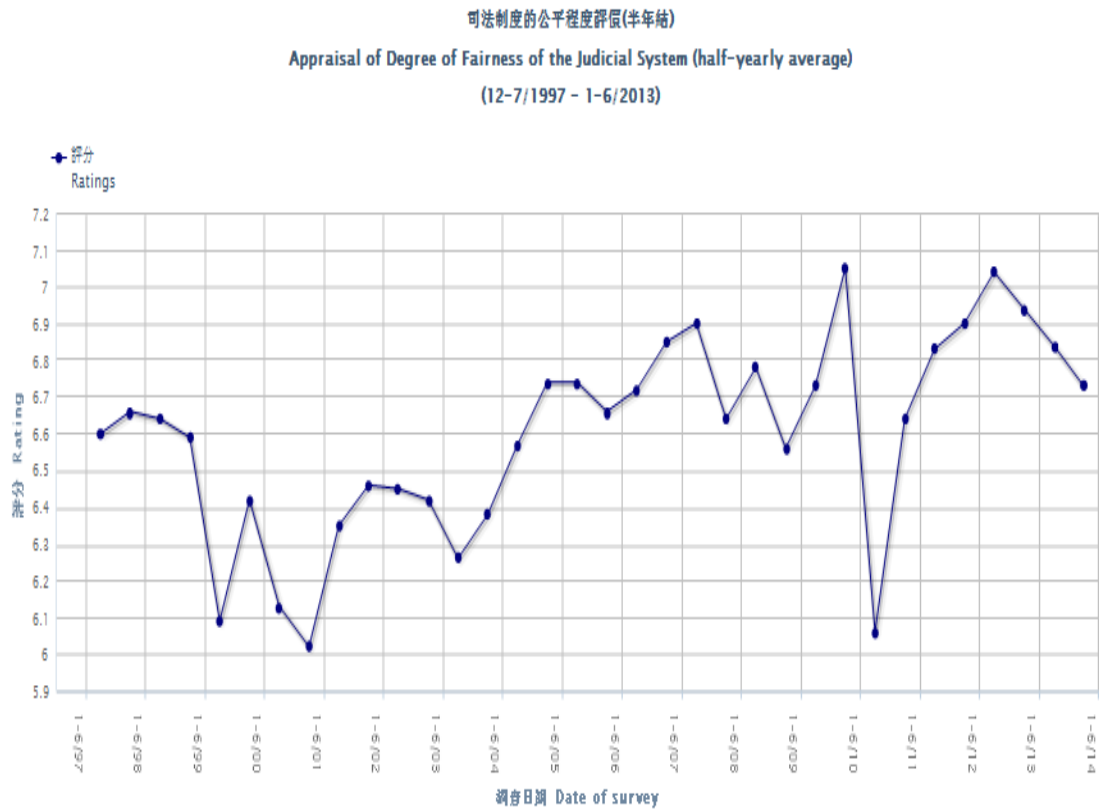
Diagram 8



Source: *Appraisal of Degree of Compliance with the Rule of Law – half-yearly average (HKU Pop Site-Public Opinion Programme, The University of Hong Kong).*
<http://hkupop.hku.hk/english/popexpress/judiciary/socq44/index.html>

In 1997, confidence stood at 6.97; by 2012 this was 7.26 and in early 2014, it stood at 6.97. The rating for the rule of law after 1997 shows that Hong Kong citizens are confident in the survival of the rule of law and the independence of the judiciary. As the two diagrams below show, people have still trust in the fairness and impartiality of the judicial system. (0-10 is the scale of evaluation of the fairness and impartiality of the judicial system. 10 is absolutely fair and impartial, 0 is absolutely unfair and not impartial, and 5 is half-half). In 1997, the fairness of Hong Kong judicial system was rated at 6.6; in 2007, this stood at 6.9; and in 2014 at 6.73.

Diagram 9



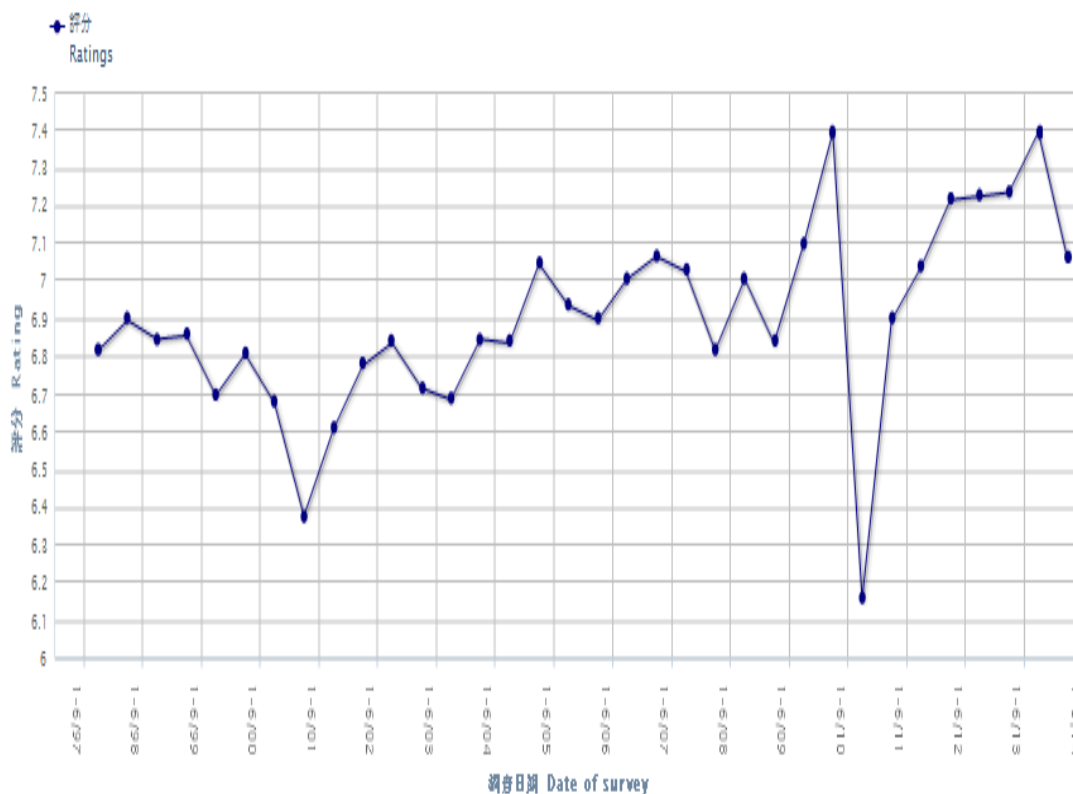
Source: *Appraisal of Degree of Fairness of the Judicial System (HKU Pop Site-Public Opinion Programme, The University of Hong Kong).*

<http://hkupop.hku.hk/english/popexpress/judiciary/socq55/halfyr/datatables.html>

The following diagram shows the perceived impartiality of the courts. This figure stood at 6.82 in 1997, 7.03 in 2007 and 7.06 in 2014. What this shows is that the public's confidence in the impartiality of the courts has grown compared to 1997. People have greater confidence that courts are truly fair and impartial.

Diagram 10

法庭的公正程度評價(半年結)
Appraisal of Degree of Impartiality of the Courts (half-yearly average)
(12-7/1997 - 1-6/2013)



Source : Appraisal of Degree of Impartiality of the Courts (HKU Pop Site-Public Opinion Programme, the University of Hong Kong).
<http://hkupop.hku.hk/english/popexpress/judiciary/socq56/halfyr/datatables.html>

However, in 2010, the public's confidence in the impartiality of the judiciary was shaken by a case in which it seemed that the courts were favoring people from wealthy backgrounds. The case involved the niece of a CFA judge, Amina Marian Bokhary. After a motoring collision with a bus, she attempted to leave the scene and was stopped by the police. She also assaulted the police officer. She received a non-custodial sentence in the Magistracy. The public view was that she should have received a heavier sentence as she had previous convictions, but that she had been spared such a sentence because of her background and connections. She was subsequently sentenced to six weeks' imprisonment after an appeal by the Department of Justice. The case raised questions about how far Hong Kong courts still stuck to the fundamental principle that everyone was equal before the law.

The Sino-British Joint Declaration 1984

On 8 March 1972, the PRC leadership wrote a letter to the United Nations Special Committee on Colonialism stating that China hoped to remove both Hong Kong and Macau from the list of Colonial territories. The letter reads as follows:-

“...The settlement of the questions of Hong Kong and Macau is entirely within China’s sovereign right and does not at all fall under the ordinary category of colonial Territories...the Chinese Government has consistently held that they should be settled in an appropriate way when conditions are ripe...”¹

On 29 March 1979, Britain first discussed with China the expiry in 1997 of the New Territories lease during Governor MacLehose’s visit to Beijing. In that meeting, the Governor indicated that investors in Hong Kong were worried whether the land leases could be renewed after 1997. Uncertainty meant that investors would lose confidence in Hong Kong’s future². Britain hoped to continue to administer Hong Kong after 1997. Deng Xiaoping stated that China had sovereignty over Hong Kong and that a negotiated settlement agreement must be based upon the premise that the colony was part of China³. He asked the Governor to tell investors to “put their hearts at ease”⁴. He confirmed that China would recover the whole of Hong Kong after 1997.

In 1981, a working group was founded by the Liao Chenzhai, the director of the Xinhua News Agency and its members⁵, to look into more detailed policies to resolve the Hong Kong’s issue. The working group collected details opinions from influential Hong Kong people. Liao’s group then made recommendations to the Central Government for further consideration⁶. Liao’s group proposed three basic principles

¹ United Nations Document A/8723 (Pt 1) Annex I (GAOR, 27th Sess, Suppl 23).

² See p. 22 of the fall of Hong Kong: China’s Triumph & Britain’s Betrayal, revised and updated, by Mark Roberti, 1996.

³ Hong Kong An Appointment with China, Steve Tsang, 1997, by I.B. Tauris & Co, Chapter 5 at p. 88.

⁴ Mark Roberti 1996:23 and also see Hong Kong Journal “Looking Back: How London and Beijing Decided The Fate of Hong Kong, by Frank Ching, April 2010”.

⁵ The members of the working group came from the Hong Kong and Macao Affairs Office of the State Council and Xinhua Hong Kong.

⁶ Underground Front: The Chinese Communist Party in Hong Kong, by Christine Loh, Hong Kong University Press 2010, at p. 136.

towards Hong Kong. These were: (i) maintaining the stability and prosperity of Hong Kong; (ii) keeping Hong Kong as a free port and a functioning economy; and (iii) the previous systems would remain in force⁷. This proposal was adopted by Deng as fit for Hong Kong's future. Later, the leadership established a five-man group, chaired by Lu Ping, the director of the Hong Kong and Macau Affairs of the State Council of the PRC, to figure out the detailed plan for Hong Kong's future. This set out 12 principles for the negotiation agenda in 1982. In January 1982, Sir Humphrey Atkins, Lord Privy Seal, visited Beijing. He hoped to convince the Chinese government to accept Britain's offer to administer Hong Kong after the handover. PRC leaders made it clear that China would resume sovereignty over Hong Kong together with the administration of Hong Kong and would set up the basic policies for Hong Kong's future. Hong Kong would enjoy a high degree of autonomy after 1997, keep its capitalist system and current way of life unchanged for 50 years after the resumption of sovereignty.

In September 1982, Prime Minister Margaret Thatcher visited Beijing. Talks developed in two-phases and there were twenty-two rounds of talks, between September 1982 and September 1984. The Sino-British negotiations divided into two groups - the British side and the Chinese side. The British representatives were led by Margaret Thatcher⁸, and the Chinese representatives were headed by Deng Xiaoping⁹. There were no Hong Kong representatives at the negotiations due to objections from the Chinese side. Lord Brockway noted this, the House of Lords:-

“If there was no public consultation on the question of Hong Kong through democratic channels in Hong Kong, It was difficult to reinforce Hong Kong people's confidence in the future of Hong Kong.”¹⁰

Lord Noble replied that “He had maintained a close contact with different agencies and knew more about Hong Kong from the official reports which were issued by the

⁷ Underground Front: The Chinese Communist Party in Hong Kong, by Christine Loh, Hong Kong University Press 2010, at p. 136.

⁸ The members included Sir Richard Mark Evans, Sir Percy Cradock and Sir Edward Youde.

⁹ The members included Zhao Ziyang, Zhou Nan and Lu Ping.

¹⁰ “Lord Brockway rose to ask Her Majesty's Government whether they will appoint a Royal Commission to survey the unique social and political problems of Hong Kong and to make recommendations regarding its future”. (HL Deb 24 February 1981 vol. 417 cc1032-50, HK (Hansard 24 February 1981)- Hansard 1803-2005).

<http://hansard.millbanksystems.com/lords/1981/feb/24/hong-kong>

Hong Kong government.”¹¹ Actually, no records were provided in relation to public opinion or consultations.

First - Phase Talks:

The first-phase of negotiations ran from September 1982 to June 1983. This phase agreed on the agenda for ongoing talks and the procedure for implementing the agreement. Britain suggested that it continue to administer Hong Kong beyond 1997, and indicated that Britain was willing to exchange sovereignty over Hong Kong in return¹². Thatcher further stated that ‘confidence and prosperity of Hong Kong depended on British administration’.¹³ On the Chinese side, Deng Xiaoping, stated that:-

“To maintain Hong Kong’s prosperity basically depends upon our proposals that China will adopt the policies that are fit for Hong Kong after she resumes the exercise of sovereignty over Hong Kong. Hong Kong’s current political and economic systems and even most of its laws can remain unchanged. Certainly, some should be revise and reformed. Hong Kong will still maintain its capitalist system. Many present systems that are suitable should remain unchanged.”¹⁴

Deng did not accept her offer and stated that the three unequal treaties were invalid. The British side insisted that the three treaties were still in force under International Law¹⁵. Three key issues were said to affect Hong Kong’s development in the future,

¹¹ The Lord Noble said that I have received many communications from the different organizations, have met their deputations when they have come to this country, and have learned much from the official reports which the Hong Kong Government have issued. I pay my tribute to their factual information. (HL Deb 24 February 1981 vol. 417 cc1032-50, HK (Hansard 24 February 1981)-Hansard 1803-2005).

¹² In her memoirs, Thatcher explained that her aim was to ‘exchange sovereignty over the Island of Hong Kong in return for continued British administration of the entire colony well into the future’ (Margaret Thatcher, *The Downing Street years*, New York, NY: HarperCollins Publishers, 1993, at p 259).

¹³ Margaret Thatcher, *The Downing Street Years*, New York, NY: HarperCollins Publishers, 1993, at p. 261.

¹⁴ *Drafting and Promulgation of the Basic Law and Hong Kong’s Reunification with the Motherland*, at p. 10.

¹⁵ She said: The three treaties on Hong Kong are legally binding international agreements. You should not tear them up. If you think these treaties are invalid, we can sign a new treaty, a new unequal treaty (Lu Ping, “Reflection on Sino-British negotiations”, in *Bainian Xiaoping (In Memory of The 100 Anniversay of Xiaoping’ Birth)*, Beijing: Xin Shijie Press, 2004, p. 76.)

namely, “the question of sovereignty, how China would maintain Hong Kong’s stability and prosperity after 1997, and how the two leaders could achieve appropriate cooperation to avoid the uncertainty and major disturbances during the transition period”¹⁶. The Chinese position was that “China would recover not only the New Territories but also Hong Kong Island and Kowloon”.¹⁷

Both leaders held five rounds of talks between October 1982 and February 1983. No satisfactory answer was found. The two leaders made a joint statement saying that “their common aim was to maintain Hong Kong’s stability and enhance prosperity”¹⁸.

The British government had little or no bargaining power in the negotiations because China was the largest food supplier to Hong Kong, and Hong Kong had to rely on China for 70-80 per cent of its water supply. In any conflict, China could simply turn off the water. China also enjoyed a military advantage and could easily take Hong Kong back by force. In the eyes of the Chinese leaders, Hong Kong had been ceded to Britain under three unequal treaties which were a ‘national humiliation’. “Hong Kong was part of China”¹⁹. Every nation had a right to govern itself internally. Without the right to govern the traditional concept of sovereignty was empty²⁰. Thus, if the administrative powers were still led by British, China might lose the sovereignty over Hong Kong forever.

After a series of negotiations, the British finally gave up the idea of administering Hong Kong after 1997, recognized that China had sovereignty over Hong Kong, and had accepted China’s policy towards Hong Kong. In a letter to Chinese Premier Zhao Ziyang, Prime Minister Thatcher stated that:-

¹⁶ Mark Roberi 1996: 48-49.

¹⁷ On the question of sovereignty, China has no room for maneuver. To be frank, the question is not open to discussion. The time is ripe for making it unequivocally clear that China will recover Hong Kong in 1997. That is to say, China will recover not only the New Territories but also Hong Kong Island and Kowloon. (see Deng Xiaoping “ Our Basic Position on the Question of Hong Kong, People’s Daily Online, 24.9.1982).

¹⁸ “Today the leaders of both countries held far-reaching talks in a friendly atmosphere on the future of Hong Kong. Both leaders made clear their respective positions on the subject. They agreed to enter talks through diplomatic channels following the visit with the common aim of maintaining the stability and prosperity of Hong Kong.” (see the joint statement between Margaret Thatcher and Deng Xiaoping on 24 September 1982).

¹⁹ Hong Kong An Appointment with China, Steve Tsang, 1997, by I.B. Tauris & Co, Chapter 5 at p. 88

²⁰ Mark Roberti 1996:71-72.

“... provided that an agreement can be reached between the two sides on administrative arrangements for Hong Kong to guarantee the future prosperity and stability of Hong Kong and is acceptable to the British Parliament and to the people of Hong Kong as well as to the Chinese Government, I would be prepared to recommend to the Parliament that sovereignty over the entire Hong Kong would be returned to China.”²¹

The two governments finally reached a draft agreement²² on Hong Kong’s future. The draft agreement promised that the whole of territory of Hong Kong would revert to China in the year 1997. The result was the JD on the Question of Hong Kong.

Second- Phase Talks:

On 12 July 1983, both countries started the second-phase of negotiations in Beijing. Twenty-two round of talks would take place from July 1983 to September 1984. The purpose of these negotiations consisted of changing the text of the agenda. The agenda included three topics, namely, (1) the question of sovereignty over Hong Kong, (2) the administration’s issues affecting the territory after 1997, and (3) the administration of the affairs of the territory during the fifteen-year transition period²³.

In this second phase of negotiations, the two states expressed different views on the question of Hong Kong. The British government still insisted that it could continue to administer Hong Kong after handover and maintain the prosperity in Hong Kong, but this was rejected by the Chinese leaders, who reiterated that that China could recover Hong Kong unilaterally before 1997. However, having reached an agreement in April 1984, the Chinese government suggested that a Joint Liaison Group (JLG) be established for liaison, consultation and the exchange of information on how to implement the JD, and to ensure a smooth the transfer process. The Chinese government hoped to monitor the Government of Hong Kong during the transitional period via the JLG. The British government was afraid that the establishment of JLG would reduce the pre-1997 Hong Kong Government to a lame duck. Nevertheless, the JLG ²⁴was set up in 1985 and continued until it concluded its work on 1 January 2000.

²¹ Publication: “The Basic Law and Hong Kong-The 15th Anniversary of Reunification with the Motherland”, Sino- British Negotiations and the Sino-British Joint Declaration at p. 12.

²² 26 September 1984, Government Printer, Hong Kong.

²³. Mark Roberi 1996: 48-49.

²⁴ The members of Chinese side included of Ke Zaishuo, Guo Fengmin, Zhao Jihua, Wang Guisheng and Wu Hongbo. On the English side, the groups were formed by the D.C. Wilson, R.J. T. McLaren, A.

Whilst the two countries were still in negotiations²⁵ and before the JD became legally binding, some issues arose over its contents. China unilaterally proposed a 12- point plan²⁶ on 27 June 1984. This stated that Hong Kong would:

- preserve its capitalist system;
- endure as a free port and a financial centre;
- retain foreign exchange;
- not be run by emissaries from Beijing;
- have a government elected by local inhabitants, who should be patriots;
- run its own affairs except in matters such as defense and foreign affairs;
- retain the freedom to participate in international activities;
- issue its own travel documents;
- preserve its present legal system, except where this worked in conflict with Chinese sovereignty, and establish the final court of appeal;
- be responsible for its own law and order;
- tolerate political activities to a certain degree; and
- have its own social reforms.

The 12-point plan did not provide much detail. There was no formal procedure for the resolution of disputes in case of conflict related to the Articles of the JD. There was no mention of the scope of basic human rights and freedoms. The plan was set out by China unilaterally, by the Lu Ping, the director of the Hong Kong and Macau Affairs of the State Council of PRC together with the two members from Xinhua Hong Kong, without consulting either the British government or Hong Kong public opinion. The Chinese leaders had instructed the Chinese negotiating team to draft the plan without going through too much detail. They hoped it would come into effect by the end of September 1984. Some high-ranking Chinese officials such as Li Xiannian, a senior leader who headed the Party's Foreign Affairs leading Small Group, objected to the idea that Hong Kong would preserve capitalist ideals:

“He felt that permitting a capitalist enclave to continue within the PRC would leave the communist revolution incomplete. He also worried that it might become the first step towards the restoration of capitalism. Others suggested

C. Galsworthy, H. L. Davies and Alan Paul.

²⁵ For details of the negotiations, see *Hong Kong Appointment with China*, I.B. Tauris, London, New York 1997, Chapter 2.

²⁶ *Hong Kong's New Constitutional Order (The Resumption of Chinese Sovereignty and the Basic Law)*, 2nd edition, 1997, by Yash Ghai, Hong Kong University Press, chapter 2, at p. 49-50.

exploring the option of turning Hong Kong into a socialist society.”²⁷

In response to its argument, Deng Xiaoping replied that:-

“The PRC had both a HK problem and Taiwan problem, the only way out was to seek a peaceful resolution by implement the idea of ‘One Country Two Systems’.”²⁸

It was apparent that the Chinese leader hoped to maintain Hong Kong as a stable and prosperous place after 1997, an idea finally supported by these officials.

Britain proposed setting up a working group to discuss Beijing’s 12-point plan. It offered comments on the 12-point plan in order to help the Chinese understand how Hong Kong’s current system worked. It also carried out preparatory work to identify the best way of improvement. It was also expected that the plan would be submitted to Parliament for debate before it was signed. The British government expressed its views that:-

“...this represents a certification by the negotiators that it represents accurately the outcome of the negotiations. However, as is normal with international agreements negotiated between nations there is no realistic possibility of amending the text. The agreement must be taken as a whole... there is no possibility of an amended agreement. The alternative to acceptance of the present agreement is to have no agreement. In this case the Chinese government has made it plain that negotiations could not be reopened and that it would publish its own plan for Hong Kong.”²⁹

The Chinese and British Ministers finally signed the Joint- Declaration on 19 December 1984 and exchanged the agreement in Beijing on 27 May 1985. The 12 points of China’s unilateral plan were later contained in Article 3 of the JD as 12 paragraphs. Under the JD, Britain agreed that the whole of Hong Kong would return to China after the 30 June 1997. Britain would be responsible for maintaining Hong Kong’s economic prosperity and social stability in the transitional period. China would resume the exercise of sovereignty over Hong Kong with the effect from 1 July

²⁷ A Modern History of Hong Kong, Steve Tsang, by I.B. Tauris & Co Ltd, 2004, at p. 217.

²⁸ Ibid, footnote 43.

²⁹ Autonomy and Protection of Fundamental Rights in the Hong Kong Special Administrative Region, edited by Dr Wong Yun-Bor, NexisNexis, 2007 at p. 104

1997; its basic policies towards Hong Kong were set out in the JD. In addition, China would cooperate with Britain during the transitional period.

The PRC's basic principles regarding Hong Kong were stated in Annex I of the JD. These provided that (1) China had to establish the HKSAR; (2) People in Hong Kong would enjoy a high degree of autonomy, except in foreign and defence affairs; (3) the HKSAR would enjoy executive, legislative and independent judicial power, including that of final adjudication; (4) the Government would be composed of local inhabitants; (5) the Chinese socialist system would not be practiced in Hong Kong; and (6) the previous capitalist system and the existing life-style would remain unchanged for 50 years.

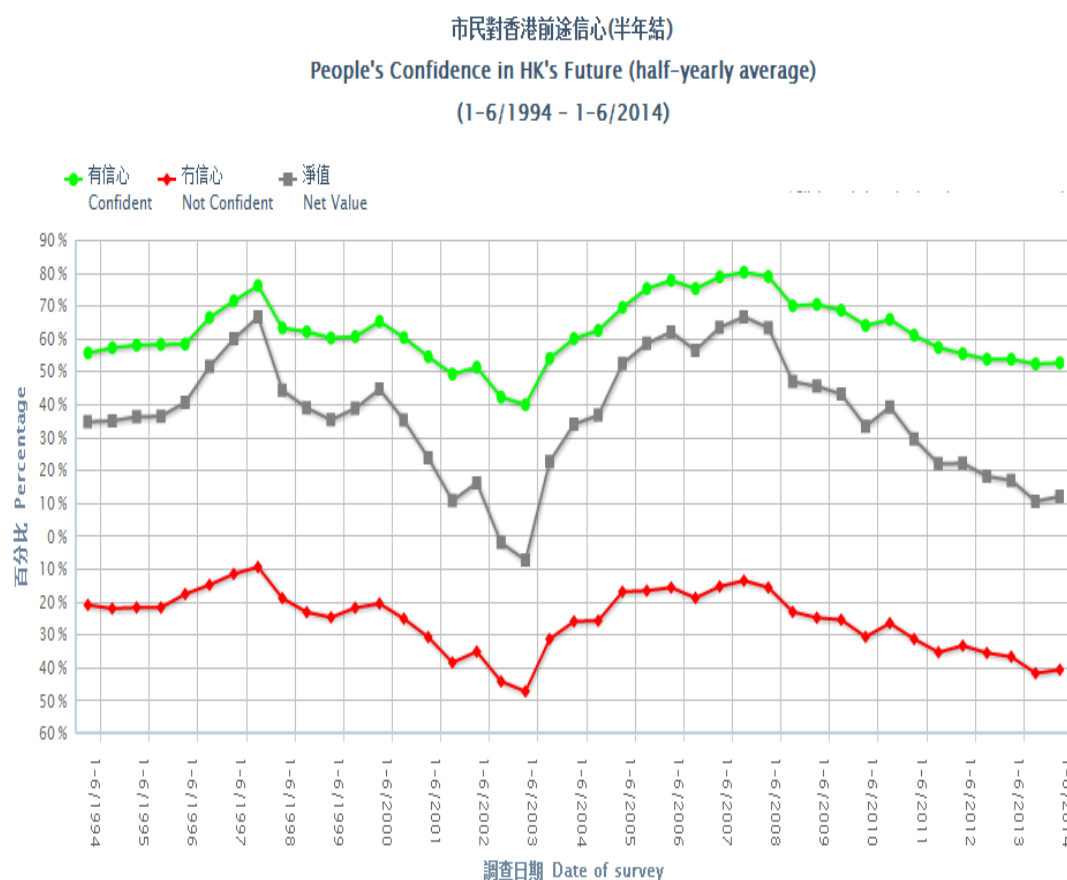
Under Annex II of the JD, the JLG was mainly responsible for conducting consultations in relation to the implementation of the JD locally, and for exchanging information on the implementation of the agreement. It needed to deal with specific matters relating to the transfer of government in 1997.

Confidence and Clarity

Three senior Hong Kong legislators, including Chung Sze-Yuen, Lydia Dunn and Lee Quo-Wei, had visited Beijing in June 1984 to discuss Hong Kong's issue with the Deng Xiaoping, and told him that Hong Kong people were deeply worried about Hong Kong's future³⁰. After JD, confidence in Hong Kong's future slightly improved, as the statistics below indicate. The JD was a valid international treaty and recommended by the Prime Minister, Margaret Thatcher. It would promote future stability and prosperity, reducing worries about Hong Kong's future.

³⁰ Chung Sze-yuen, Xianggang Huigui Licheng: Zhong Shiyuan Huiyilu (Hong Kong's Journey to Reunification: Memoirs of Sze-yuen Chung), Hong Kong: The Chinese University of Hong Kong Press, 2001, p.76

Diagram 11



Source: *People's Confidence in Hong Kong's Future, Public Opinion Programme, The University of Hong Kong.* <http://hkupop.hku.hk/english/popexpress/index.html>

In January 1994, 56 per cent of respondent expressed confidence in Hong Kong's future and 12 per cent expressed non-confidence. People still had confidence in the future for Hong Kong. In December 1997, this figure rose to 70.8 per cent, with only 10 per cent of respondents expressing non-confidence.

After the signing of the JD, there continued to be a level of uncertainty about the relationship between China and Hong Kong. The JD promised that China would not intervene with the internal affairs of Hong Kong, but it never mentioned how governing power would be exercised in the region, or under what circumstances China would exercise its powers. It seemed, for example, that China retained the authority to alter decisions made by the Hong Kong government, whilst any decisions or changes made by the Hong Kong government had to be reported to China for the record. Second, the JD gave no indication of whether the power of interpretation with regard to local laws would be vested in China or in the HKSAR courts. It was unclear whether or to what degree China had the authority to exercise influence over the

decisions of the HKSAR courts.

Third, the JD promised that residents in Hong Kong had the right to self-administration and that China would allow more democracy than had been introduced under the British. It also promised that the Chief Executive and the members of legislature would be elected locally. However, there were no provisions for the holding of referendums and no detailed schedule for elections.

A fourth criticism was that Hong Kong people had never been given the opportunity to participate in the discussions of the JD.

Further, there was no guarantee that everyone would have an equal opportunity to participate in future elections.

Nor was there any indication of how judicial independence would be protected, or how the main rights and freedoms contained in JD would be protected.

However, one year after the JD, the Chinese government announced its plans for drafting the BL. There were generally two types of committees to deal with the work. These were, the BL Drafting Committee (BLDC) and the BL Consultative Committee (BLCC). The BLDC was established on 1 July 1985 and was responsible for the drafting work. It was composed of 59 members: 36 from mainland China³¹ and 23 from Hong Kong. They were appointed by the NPCSC. The chairperson of the BLDC was Ji Pengfei, the director of the Hong Kong and Macau Affairs Office (HKMAO). In general, the Hong Kong members were selected from the elite, wealthy and

³¹ BLDC members included:

Ji Pengfei, the chairman of the BLDC and the former director of the State Council's Hong Kong and Macau Affairs Office;

There were eight deputy directors of the BLDC, four from the mainland and the rest from Hong Kong, namely, Xu Jiatun, the mainland vice-chairman and director of the New China News Agency (NCNA) in HK; Wang Han Bin, secretary-general of the Chinese National People's Congress; Hu Sheng, director of the Party History Research Centre of the Central Committee of the Chinese Communist Party; Fei Xiaotong, an anthropologist; Four Hong Kong deputy directors were entrepreneur T K Ann, banker David Li and shipping magnet Sir Y K Pao and Fei Yimin, the publisher of Ta Kung Pao; (Emily Lau, "The Early History of the Drafting Process", in Peter Wesley-Smith and Albert Chen, eds., *The Basic Law and Hong Kong's Future*, Hong Kong Butterworths, 1988, at pp. 90-91).

The secretary-general included Li Hou, a member of the Chinese Communist Party and the vice director of China's Hong Kong and Macau Affairs Office. The two deputy secretary-general were Lu Ping, the vice-director of China's Hong Kong and Macau Affairs Office and Mao Junnian, the vice-director of the NCNA in HK (*Basic Law, Basic Questions* (Hong Kong: Review Publishing Co, 1988), Appendix D, p.165.)

influential people in business; they were nominated by China's unofficial embassy in Hong Kong, the New China News Agency Hong Kong Branch (NCNA). In addition, China appointed two Democrats, Martin Lee and Szeto Wah, to the committee, but in 1989, they were expelled following their support for the Tiananmen Square demonstrations. The BLCC was established on 18 December 1985 with 180 members from different sectors of Hong Kong society³². The BLCC was responsible for collecting a variety of opinions from local people about the drafting of the BL and for simplifying the analysis of detailed information. The BLCC also provided information and analysis to the BLDC and assisted the BLDC in the organization of its work.

These two committees not only increased the level of public participation in drafting and consultation about the BL, but also enhanced public trust in the future Hong Kong political system. However, it could be argued that the Committees included an imbalance between pro-China and pro-democracy members. The pro-China members filled many key positions in the two committees, whilst the pro-democracy members did not have the chance to participate in the drafting and consultation process.

Most of the Hong Kong members were from the industrial bourgeoisie and the billionaire elite, many of whom sided with China in order to protect their interests after 1997. The committee members were political appointees, yet the BL was a constitutional document which should have been drafted by legal experts. The selection of members lacked specific procedures and they were chosen without the transparency. The pro-China faction held the majority in the two committees, making voting unfair. In the committees, all the decisions had to be approved by a two-thirds majority vote. The pro-China faction could easily ensure decisions in China's favour and turn down those tabled by the pro-democracy members. Key positions were held by pro-China members such as Ji Pengfei, the former director of the State Council's Hong Kong and Macau Affairs Office and Xu Jiatusun, director of the New China News Agency (NCNA) in Hong Kong. They lacked political neutrality and made their decisions in China's interests.

Some people sat on both committees, giving China greater control over the drafting of the BL. In response to pro-democracy objections to these overlapping appointments, a pro-China member of the BLCC said that:-

³² The BLCC members comprised the industrial and business sector, the Financial sector, the Legal profession, Professionals, the Media, Labour and grassroots associations, Foreigners. The members aged from 22 to 80. (Chinese Communists and Hong Kong Capitalists:1937-1997, edited by Cindy Yik-Yi Chu, Palgrave Macmillan, 2010, at p. 75).

“The approach of some Hong Kong people is counterproductive because they do not understand that communication with China requires a special finesse. These people have no experience in communicating with China. For instance, when they discuss the feasibility of adapting a particular political model for Hong Kong with the Chinese side, they often use threats and cite the public opinion card, saying that if China does not accede to their demands, the Hong Kong people will emigrate. This is not the correct approach to communicate with China...”³³

In reply, a member of LegCo said that: -

“The BLCC Secretary-General, Leung Chun-ying, has the right to participate in the New Hong Kong Alliance, but his remarks may be regarded as the opinions of the BLCC. Therefore, which organization does Mr Leung represent? His participation in the New Hong Kong Alliance generates some misunderstanding.”³⁴

Overlapping appointments meant that a member might support a proposal in one committee because he/she had drafted it in another committee. In some instances, he/she held the controlling vote needed to pass the bill. However, in the eyes of the Chinese government, the arrangement for the appointment of these members in the committees was legitimate. All members were selected and appointed by the NPC³⁵. They were also responsible to and reported back to the NPC.

There was little public consultation about the drafting of the BL. Local-grassroots people could not participate and when Martin Lee and Szeto Wah were excluded there was no pro-democracy voice. Xu Jiatun said that:-

“Patriotism is a sacred conviction and an admirable sentiment ... we should not

³³ Personal Interview with Leung Chun-ying, November 29, 1988. *Asian Journal of Public Administration*, vol. 14 No. 1 (June 1992):3-24.

³⁴ Personal Interview with Lee Wing Tat, October 25, 1989, chairman of the Kwai Tsing District Board (1988-91) and presently a directly-elected member of Legislative Council. *Asian Journal of Public Administration*, vol. 14 No. 1 (June 1992):3:24.

³⁵ In the first meeting of BLDC, Ji Pengfei, director of the PRC state council's HK and Macau Affairs Office, said: 'The Basic Law Drafting Committee is the working organ established by the National People's Congress for drafting the Basic Law of HKSAR; it is responsible to the National People's Congress, and when the National People's Congress is not in session, it is responsible to the Standing Committee of the National People's Congress'. (The other Hong Kong Report 1990, by Richard Y C Wong and Joseph Y S Cheng, The Chinese University of Hong Kong 1990, at p. 32)

allow any turbulence, divisions and confrontation, but should strive for a healthy way to move forward. Hong Kong compatriots and people should comprehend this feeling...It is unfortunate that there are (people) building (their) political influence; appearance of conflicting camps; odds between one individual and another; confrontations between one group and another as a result of the debate (on political reform).”³⁶

The Chinese government’s appointment of pro-China members and the Hong Kong elite to these working groups was one strategy to take control of the political and legal institutions in Hong Kong after 1997. This has been called the ‘Political Absorption of Economics’.³⁷ The Hong Kong elite members assisted the Chinese government in performing political tasks in order to enhance their future business and political opportunities in the HKSAR and mainland China.

After the 4 June 1989 crackdown, Hong Kong people began to doubt Hong Kong’s future under the ‘One Country Two Systems’ formula. People expressed their dislike towards the Chinese government and worried about whether the post-1997 HKSAR government would still be able to maintain the two different systems between China and Hong Kong. They lost confidence in the Chinese government. According to an opinion survey reported in the South China Morning Post, 70 per cent of 600 respondents expressed a lack of confidence that the BL would ensure the implementation ‘One Country Two systems’ policy as promised by Beijing³⁸.

The Process of Drafting the BL

The first draft of the BL was launched on 26 April 1988 for public discussion³⁹; the second draft was issued in February 1989⁴⁰. All the draft articles had to be approved by a qualified majority of two-thirds of the members of the BLDC. It was submitted

³⁶ SCMP, 2 September 1987, p. 2

³⁷ Administrative Absorption of Politics in HK: Emphasis on the Grassroots level Asian Survey, Vol. 15, No. 5 May 1975, pp 422-439.

³⁸ A Rough Road Ahead, Publication Date:3.1.1990, by Chen Wen-Tsung. Taiwan information. <http://taiwaninfo.nat.gov.tw/fp.asp?xItem=103048&CtNode=124>

³⁹ The Draft Basic Law of the HKSAR of the People’s Republic of China (for Solicitation of Opinions) (April 1988).

⁴⁰ The Draft Basic Law of the HKSAR of the People’s Republic of China, February 1989.

to the NPCSC for approval. The BL was formally enacted in 1990⁴¹.

In the course of drafting the BL, a number of Articles remained unclear⁴². First of all, the relationship between the BL and the Chinese Constitution was unclear and ambiguous. The draft BL stated that:-

“The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in light of specific conditions.”⁴³.

Members of LegCo⁴⁴ argued that if Article 31⁴⁵ of the PRC Constitution was a Chinese constitutional document and was accepted as having supremacy over the local laws the question arose: If there was any conflict between the HKSAR BL and Chinese constitution, would the Chinese constitution apply to HKSAR after 1997? Article 31 only stated that ‘the state might establish special administrative regions when necessary’. There was no indication of the correct relationship between the BL and Chinese constitution. The Chinese constitution was the highest law, superior to other local laws in China. The central government had the ultimate power to interpret or amend the constitution⁴⁶ and to supervise the enforcement of the constitution⁴⁷. What would happen if local laws, regulations or decisions contravened the constitution? Would they be annulled by the NPC⁴⁸?

It was also uncertain whether national laws would apply to Hong Kong. National laws adopted by the NPC were the highest laws of China. Hong Kong’s legal system was based on common law jurisdiction. What would happen if there were a conflict

⁴¹ The Basic Law of the HKSAR of the People’s Republic of China, HK:BLCC, April 1990 (Final Version).

⁴² Hong Kong Legislative Council, 31 May 1989.

⁴³ Article 31 of PRC Constitution 1982; Hong Kong Legislative Council, 31 May 1989.

⁴⁴ Hong Kong Legislative Council, 31 May 1989, (Andrew Wong).

⁴⁵ Article 31 of the 1982 constitution of the PRC: The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s Congress in the light of specific conditions.

⁴⁶ Article 62 (1) of the PRC Constitution 1982.

⁴⁷ Article 62 (2) of the PRC Constitution 1982.

⁴⁸ Article 67(8) of the PRC Constitution 1982.

between local and national laws? The BL worked as a mini-constitution of the HKSAR, a region of China. It was the supreme law of the region but its power was conferred by the Chinese government. In the hierarchy of Chinese society, it was simply an ordinary law, subordinate to the Chinese constitution.

Chinese law provided Hong Kong with a high degree of autonomy in all matters after 1997 but it was unclear what role the Chinese government would play as regards HKSAR law, and whether (or which) Chinese laws would apply in Hong Kong. Martin Lee proposed that ‘SAR BL should specify which parts of the Chinese Constitution would or would not apply to Hong Kong’⁴⁹ but his proposal was rejected by the BLDC, which held that ‘only the NPC had the power to decide what parts of the Chinese constitution would apply to HK’⁵⁰.

The issue of high degree of autonomy was also a matter of heated debate in the BLDC’s meeting. Exactly how much autonomy would Hong Kong enjoy after 1997? The answer to this question depended on how much power would be delegated to Hong Kong by the Central government. Article 3 (2) of the JD states that:-

“The HKSAR will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People’s Government.”

The JD drew a clear line between China and Hong Kong - all internal matters of the HKSAR would be dealt with locally, whereas foreign and defence affairs were the main responsibility of the Central government. Apart from this, there were no details about Hong Kong’s ‘high degree’ of autonomy. As Lo Shiu-Hing’s comments:-

“The JD not only reduced the autonomy of the Hong Kong government, but also the bargaining power of Britain vis-à-vis China. Lo concludes that the Joint Declaration made it difficult for the Hong Kong government to prevent China from intervening in Hong Kong affairs.”⁵¹

⁴⁹ Basic Law, Basic Questions, The Debate Continues, William McGurn, Review Publishing Co. Ltd, 1988 at p. 48.

⁵⁰ Hong Kong’s New Constitutional Order, The Resumption of Chinese Sovereignty and the Basic Law, 2nd Edition, Yash Ghai, Hong Kong University Press 1997, at p.62.

⁵¹ Lo, op. cit., p.120

How far the JD might lead to a reduced ‘high degree of autonomy’ remained unknown. In the draft BL, China emphasized that it was a sovereign state and had absolute sovereign powers in the region.

“The HKSAR was authorized by the Central government to exercise a high degree of autonomy in accordance with the provisions of this Law and to enjoy executive, legislative, and independence judicial power, including that of final adjudication”.⁵²

But what kind of autonomy did China give? There was no mention in the draft of the CE and/or members of LegCo being elected through direct elections. Without such an arrangement, there was no guarantee of direct elections.

Articles 16⁵³, 17⁵⁴, 18⁵⁵ and 169⁵⁶ of the draft BL also created many opportunities for the Central government to intervene in the internal affairs of Hong Kong, meaning that the relationship between China and Hong Kong was still unclear and ambiguous. China was a sovereign state. It was the highest power in the HKSAR. Hong Kong was just a special administrative region. It did not have any authority to deal with matters regarding the Central government’s public authority. The BLDC simply suggested that Hong Kong had more power to control its own internal matters.

The power of interpretation of the BL was another very important issue.

⁵² Article 2 of the draft Basic Law (The Hong Kong Basic Law, Blueprint for Stability and Prosperity under Chinese Sovereignty, Ming K Chand and David J Clark, at p. 65)

⁵³ Article 16 of the draft Basic Law states that the HKSAR is vested with legislative power. Laws enacted by the legislature of the HKSAR shall be reported to the Standing Committee of the National People’s Congress for the record...If the NPCSC...considers that any law of the Region is not in conformity with this Law or legal procedures, it may return the law in questions for reconsideration or revoke it...(The Hong Kong Basic Law, Blueprint for Stability and Prosperity under Chinese Sovereignty, Ming K. Chan and David J. Clark, at p. 67-68)

⁵⁴ Article 17 of the draft Basic Law states that laws, enacted by the NPC...which relate to defence and foreign affairs..., are outside the limits of the high degree of autonomy of the HKSAR, shall be applied ... by legislation on the directives of the State Council...(The Hong Kong Basic Law, Blueprint for Stability and Prosperity under Chinese Sovereignty, Ming K. Chan and David J. Clark, at p. 68)

⁵⁵ Article 18 of the draft Basic Law states that SAR courts shall have no jurisdiction over cases relating to defence and foreign affairs, which are the responsibility of the Central People’ Government...(The Hong Kong Basic Law, Blueprint for Stability and Prosperity under Chinese Sovereignty, Ming K. Chan and David J. Clark, at p. 69)

⁵⁶ Article 169 of the draft Basic Law states that the power of interpretation of this Law is vested in the Standing committee of the NPC.... (The Hong Kong Basic Law, Blueprint for Stability and Prosperity under Chinese Sovereignty, Ming K. Chan and David J. Clark, at p. 85)

Constitutional interpretation was the process by which the HKSAR courts could exercise their power to interpret and apply the provisions of the BL in an appropriate case. It was essential that the legal rules be drafted in conformity with the rule of law and international obligations. But in China, laws were made by the NPCSC, which also held the power to interpret the law, including the state constitution. The NPCSC was a political body likely to interpret the law very differently from an independent legally-trained judiciary of the common law tradition. Annexes 1(1) and (3) of the JD state that:-

“Article 1(1): The Hong Kong Special Administrative Region ...shall enjoy a high degree of autonomy. Except for foreign and defence affairs which are the responsibilities of the Central People's Government, the Hong Kong Special Administrative Region shall be vested with executive, legislative and independent judicial power, including that of final adjudication.

Article 1(3): After the establishment of the Hong Kong Special Administrative Region, the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the vesting in the courts of the Hong Kong Special Administrative Region of the power of final adjudication...

Judicial power in HKSAR shall be vested in the courts of HKSAR. The courts shall exercise judicial power independently and free from any interference.”⁵⁷

Under the JD, independent judicial power and the power of final adjudication would be vested in the HKSAR courts. It was also indicated that the former judicial system in Hong Kong would be maintained. By contrast, there was no indication of the power of the NPCSC to interpret any provisions in Hong Kong, and the Hong Kong government did not have the power to require NPCSC to interpret the law. But Articles 169 and 170 of the draft BL proposed that:-

“Article 169 states that the power of interpretation of this Law shall be vested in the NPCSC

When the NPCSC makes an interpretation of a provision of this Law, HKSAR courts, in applying that provision, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

⁵⁷ Annexes 1(1) and 1(3) of the Joint Declaration 1984.

The HKSAR courts may interpret the provisions of this Law in adjudicating cases before them. If a case involves an interpretation of the provisions of this Law concerning defence, foreign affairs and other affairs which are the responsibility of the CPG, the courts of the Region, before making their final judgment on the case, shall seek an interpretation of the relevant provisions from the Standing Committee of the NPC.

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

Article 170 states that the power of amendment of this Law is vested in the NPC. The right to propose amendments to this Law vests with the NPSCS, the State Council and the HKSAR. Amendment proposals from the HKSAR shall be submitted to the NPC by the delegation of the Region to the NPC after obtaining the consent of two-thirds of the deputies of the Region to the NPC, two-thirds of all the members of the legislature of the Region and the Chief Executive of the Region....”⁵⁸

It was argued that the power of interpretation and amendment would be vested in the NPC. Since Hong Kong followed the English common law tradition in which the courts had the power of final interpretation, there was a contradiction between the different systems which remained unresolved by the BL.

The relationship between China and Hong Kong was therefore still unclear in the BL. In addition, it did not provide any particular procedure for local officials to amend the BL.

Martin Lee argued that the power of interpretation of the BL would be vested in the HKSAR courts, not the NPCSC⁵⁹. The final power of interpretation of the BL was within the limits of the autonomy of the Region, delegated to the HKSAR courts by the NPCSC⁶⁰.

⁵⁸ The Hong Kong Basic Law Blueprint for Stability and Prosperity under Chinese Sovereignty, edited by Ming K Chan and David J Clark, Hong Kong University Press 1991, at p. 85.

⁵⁹ The Hong Kong Basic Law Blueprint for Stability and Prosperity under Chinese Sovereignty, edited by Ming K Chan and David J Clark, Hong Kong University Press 1991, at p. 110.

⁶⁰ The Draft Basic Law of the HKSAR of the People’s Republic of China (for Solicitation of Opinions) (August 1988).

Another conflict arose in relation to residual power. Residual powers are powers given to a state and regional government. However, these powers are not spelled out in the national's constitution. There are two broadly different views of exactly which powers are given by the constitution. In a Federal system, the residual powers were not specifically stated in the constitution. In principle, for example, the members of UN are sovereign states and residual powers are given by the sovereign states to the federal governments. That is to say, the federal government would enjoy separate and independent powers. Under a unitary system of government, there is no residual power. China is a unitary system in which the central government holds all the power. Hong Kong was part of China and China had promised that Hong Kong would enjoyed a high degree of autonomy under the 'One Country Two Systems'. Hong Kong had special status that was a different from Mainland people, but under the BL the division of powers remained unclear. Article 3(2) of the JD states that:-

“... The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government.”⁶¹

But there was a conflict with the Article 19 of the draft BL. Article 19 of the draft BL states that:-

“HKSAR may enjoy other powers granted to it by the NPC, the NPCSC or the State Council.”⁶²

It appeared that Hong Kong might exercise those powers given or delegated by the Central government. This conflicted with the JD's promise of a high degree of autonomy.

The draft BL failed to clarify the whole residual power issue. Szeto Wah, the member of BLDC, proposed an article to the effect that 'Hong Kong would be given authority over all powers not specifically vested in the Central Authorities'⁶³. However, his

⁶¹ Article 3(2) of the Joint-Declaration 1984. <http://www.cmab.gov.hk/en/issues/jd2.htm>

⁶² The Draft Basic Law of the HKSAR of the People's Republic of China (for Solicitation of Opinions) (April 1988); The Hong Kong Basic Law Blueprint for Stability and Prosperity under Chinese Sovereignty, edited by Ming K Chan and David J. Clark, Hong Kong University Press 1991, at p. 69.

⁶³ Hong Kong's New Constitutional Order, The Resumption of Chinese Sovereignty and the Basic Law, 2nd Edition, edited by Yash Ghai, Hong Kong University Press 1997, at p. 62.

proposal was objected to by Wu Jianfan⁶⁴, the Chinese legal expert and the member of BLDC. He argued that ‘the vesting of residual powers in Hong Kong was inconsistent with its status as a local administration region and with the unitary nature of the Chinese state’⁶⁵. It was thus unclear how much (if any) residual power existed in Hong Kong.

The JD recognized two international covenants of Human Rights and these were incorporated in the BORO. But the draft BL did not provide detailed information on the scope of the human rights. Professor Albert Chen has argued that:-

“The fundamental rights in Chapter 3 of the BL are not well-defined and lack any specification... several rights are put in one article without any specification of the conditions to realize those rights.

All the rights in Chapter 3 of the BL are only entitled to Hong Kong Residents, so the basic rights of the non-residents in Hong Kong will not be guaranteed by the BL after 1997.”⁶⁶

The BL did not give any details about how in future fundamental rights and freedom would be implemented in Hong Kong. Being enacted in accordance with Article 31 of the Constitution of PRC, it also set out the basic policies of China regarding Hong Kong residents, but not for non-residents. Hence, it was still unclear whether the

⁶⁴ Wu Jianfan adopted the view that there was no question of residual power as to the HKSAR and the Basic Law should not include any provisions in this point. Wu justified the decision as follows:-

‘It (the question of residual powers) implicates China’s state system, especially the nature and status of special administrative regions, and the origins of power, as well as a whole series of other critical issues. Therefore, we must adopt a prudent attitude toward this issue. The question of residual powers usually exists in countries with a federal system...China’s situation is different. China does not have a federal system, but has a unitary system. A locality’s powers are not inherent in themselves, but are conferred by the state. Neither before nor after the establishment of the HKSAR does it possess independent sovereignty. The HKSAR’s high degree of autonomy is conferred by the state through the Basic Law, and it cannot enjoy powers that were never conferred. So how can there be any residual powers? If one insists that there were residual powers, then these powers can only belong to the Central Government and not to the HKSAR’. (Wu Jianfan, ‘Several Issues concerning the Relationship between the Central Government of the People’s Republic of China and the HKSAR’ *Journal of Chinese Law*, vol.2, No. 1 Spring 1988, at pp73-74; *The Draft Basic Law of Hong Kong: Analysis and documents*, edited by Hungdah Chiu, at p. 17).

⁶⁵ *Hong Kong’s New Constitutional Order, The Resumption of Chinese Sovereignty and the Basic Law*, 2nd Edition, edited by Yash Ghai, Hong Kong University Press 1997, at p. 62.

⁶⁶ *Hong Kong Human Rights issues prior to 1997*, Asian Human Rights Commission, published October 1992 at p. 11.

BORO would apply to Hong Kong after 1997. Articles 38 and 39 of the draft BL state that:-

“Article 38 states that the provisions of the “International Covenant on Civil and Political Rights” and the “International Covenant on Economic, Social and Cultural Rights” as applied to Hong Kong shall be implemented through legislation by the HKSAR.

Article 39 states that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless prescribed by law. But such restrictions shall not go beyond the necessity for the maintenance of national security, public order, public safety, public health, public morals and for the safeguarding of the rights and freedoms of other persons.”⁶⁷

There was a clear difference from the JD which said that ‘the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force’⁶⁸. The JD did not say that the exercise of these powers should be adopted and amended by the LegCo. It was explicitly stated that the powers had to be directly applied to residents without legislation by the HKSAR.

From the point of view of Chinese group in the BLDC, these two covenants were an international treaty, whereas the BL was based on the Chinese constitution. There was no precedent for these covenants to be directly enforceable in China. The Hong Kong group on the BLDC suggested that the problem should be dealt with by the HKSAR court under the common law tradition.

After the Tiananmen Square protests of 1989 and the role of the PLA in crushing the protests, the debate on Articles 13⁶⁹, 17⁷⁰ and 22⁷¹ of the draft BL became more

⁶⁷ The Hong Kong Basic Law, Blueprint for Stability and Prosperity under Chinese Sovereignty, edited by Ming K. Chan and David J Clark, Hong Kong University Press, at p.72-73.

⁶⁸ Annex I of Joint-Declaration 1984.

⁶⁹ Articles 13 of the draft Basic Law states that :-

- (i) The Central People’s Government is responsible for the defence of HKSAR
- (ii) Military forces sent by the Central People’s Government to be stationed in the HKSAR for defence shall not interfere in the local affairs of the Region. The government of HKSAR may, in times of need, request the Central People’s Government for assistance from the garrison in the maintenance of public order and disaster relief.
- (iii) Apart from abiding by nationwide laws, members of the garrison shall also abide by the laws of HKSAR.

heated in Hong Kong. As regards Article 13 (military forces stationed in Hong Kong for defence) there was a question as to whether there was any policy or law governing the members of military when they committed a crime in Hong Kong. Second, the public wanted clarification about the provisions that ‘in case of emergency, the HKSAR government would issue the directive’ to call in the PLA and call a state of emergency. Reassurance was sought as to in what circumstances the HKSAR government had authority to make emergency directives. Because China had become suspicious of Hong Kongers support for the June 1 1989 protestors, it inserted a new clause, namely, Article 23, into the draft BL which was intended to restrain anyone from attempting to subvert the CPG. This article was aimed at pro-democracy organizations. After 1997, the HKSAR government attempted to pass this Article in LegCo but failed.

The BLDC did suggest that the two covenants⁷² stated in JD would remain in force after 1997, and that a BORO would be set up before 1997. Thus, the BORO came into effect on 8 of June 1991 and the ICCPR was formally applied to Hong Kong through existing laws. Arguments began about whether the BL had a lesser legal status than the BORO.

4.2 The Establishment of the Court of Final Appeal

The Court of Final Appeal (CFA) was established to replace the Privy Council as the highest appellate court in the HKSAR after 1997. The establishment of the CFA was subject to the JD’s cornerstone promise that judicial autonomy and the BL would continue to be upheld. Articles 3(2) and 3(3) of the JD stated that:-

(iv) All expenses for the garrison shall be borne by the Central People’s Government. (The Hong Kong Basic Law, Blueprint for Stability and Prosperity under Chinese Sovereignty, edited by Ming K Chan and David J. Clark, Hong Kong University Press 1991, at p. 67.)

⁷⁰ Article 17 of the draft Basic Law states that...Except in cases of emergency, the State Council shall consult the Committee for the Basic Law of HKSAR and the government of HKSAR issuing the above-mentioned directives. If the government of HKSAR fails to act in compliance with the directives given by the State Council, the State Council may decree the application of the above-mentioned law in HKSAR. (The Hong Kong Basic Law, Blueprint for Stability and Prosperity under Chinese Sovereignty, edited by Ming K Chan and David J. Clark, Hong Kong University Press 1991, at p. 68)

⁷¹ Article 22 of the draft Basic Law states that the HKSAR shall prohibit by law any act designed to undermine national unity or subvert the Central People’s Government. (The Hong Kong Basic Law, Blueprint for Stability and Prosperity under Chinese Sovereignty, edited by Ming K Chan and David J. Clark, Hong Kong University Press 1991, at p. 70).

⁷² Two international covenants include The International Covenant on Civil and Political Rights and the International Covenant, on Economic, Social and Cultural Rights.

“3(2) -...The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government.

3(3) - The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged.”

Article 2 of the BL states that:-

“The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.”

Both measures promise confidence in autonomy and the judicial independence. The BL stipulates that a CFA shall be established in HKSAR⁷³. Before the establishment of the CFA there was an initial controversy as regards the number of foreign judges who could sit on the CFA and its power of final interpretation and adjudication. Two agreements dealt with the CFA - the 1991 agreement⁷⁴ and the 1995 agreement⁷⁵ respectively.

First Agreement of the British and Chinese sides on the CFA: the 1991 Agreement

The 1991 agreement concerned the composition of the CFA. It was set to comprise the Chief Justice (who must be a Chinese national⁷⁶), three Permanent Judges and a

⁷³ Art. 81 of BL states that the CFA, the High Court, district courts, magistrates' courts and other special courts shall be established in the HKSAR. The High Court shall comprise the Court of Appeal and the Court of First Instance....

⁷⁴ 1991 agreement in the Sino-British Joint Liaison Group (JLG) on the composition of the CFA (CFA), a text of the agreement has not been published.

⁷⁵ The agreement between the British and Chinese sides on the Question of the CFA in Hong Kong at para. 3, (JLG 9 June 1995).

⁷⁶ Art. 90 (1) of BL states that the Chief Justice of the CFA and the Chief Judge of the HC of the HKSAR shall be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country.

judge either from another common law jurisdiction or a retired Hong Kong Appellate Judges (this was known as 4:1 formula). According to the JD⁷⁷ and Article 82 of the BL:⁷⁸

“Judges may be recruited from other common law jurisdictions ... the CFA may as required invite judges from other common law jurisdictions to sit on the CFA.”

Article 82 of the BL states: -

“The power of final adjudication of the HKSAR shall be vested in the CFA of the Region, which may as required invite judges from other common law jurisdictions to sit on the CFA.”

The Sino-British Joint Liaison Group (JLG) had decided unilaterally to establish the court after 1997 without taking into account the views of the public or local professionals. The 1991 agreement led to claim that it was inconsistent with the JD⁷⁹ and the BL⁸⁰. The decision of the JLG was criticized by Sir William Wade, he said that:-

“The agreement reached by the JLG on the composition of the CFA is contrary to the JD and the BL and is constitutionally invalid; the CFA itself should be allowed to determine the number and identity of foreign judges to sit as temporary members.”⁸¹

It was argued that Article 82 of the BL provided that ‘the CFA might invite overseas judge (in the plural) to sit on the CFA’. This article did not impose restrictions on the number of foreign judges able to sit on the CFA. Sir William Wade was further commented that: -

⁷⁷ Article 3(3) of Annex I of Sino-British Joint Declaration 1984.

⁷⁸ Art. 82 of BL

⁷⁹ Article 3(3) of Annex I of Joint-British Declaration 1984.

⁸⁰ Art. 82 of BL

⁸¹ International Commission of Jurists (ICJ), Countdown to 1997: Report of a Mission to Hong Kong (Geneva:ICJ, 1992) 91; and also see Hong Kong’s CFA: The Development of the Law in China’s Hong Kong, edited by Simon N. M. Young and Yash Ghai, Cambridge University Press 2014, at p. 127.

“While I see the force of the argument based on the use of the word judges in the plural in Article 82 of the BL, I do not think that it is conclusive, since it would be natural to use the generic plural so as to leave the number of overseas judges open, to be prescribed by a further law under Article 83, and the plural need not necessarily mean a plurality on any one occasion. Article 82 being framed in general terms, is capable of a range of interpretations from unlimited discretion at one end of the scale to a 4:1 ratio at the other. All these interpretations could arguably be said to be in accord with the BL.”⁸²

Opponents (including the Hong Kong Bar Association and the Law Society of Hong Kong) had argued that ‘when the CFA was set up, it should have more flexibility to invite overseas judges to sit on it’⁸³ and the autonomy of the CFA to decide on overseas judges. A restriction on the number of overseas judges meant that judicial independence and the rule of law would be undermined⁸⁴. China opposed to the formula of 3:2 and argued that ‘if we did not endorse the JLG formula of 4:1, then after 1997, China could enact a law to set up a CFA for Hong Kong’⁸⁵. Frank Ching argued that:-

“The setting up of a CFA in Hong Kong was to provide for continuity in the legal system and the rule of law even while ending the link to the Privy Council, ensuring the territory’s stability. The provision for overseas judges to serve on the CFA was clearly intended to lend that court greater stature, so that domestic and foreign investors would continue to have confidence in the judicial systems, thus ensuring the territory’s prosperity. That being the case, too great a restriction on the court’s right to invite overseas judges – both when they might be invited and how many might be invited – would work against giving the court

⁸² Give the CFA a Chance, by Simon Ip, Hong Kong Lawyer June 1995, at p.19.

⁸³ Simon Ip stated that when the CFA in Hong Kong is set up, it should have more flexibility to invite overseas judges to sit on it than has been agreed by the British and Chinese Governments, and such flexibility should be in accordance with the Joint Declaration and the Basic Law, (Hong Kong Legislative Council, 4 December 1991 at p. 928).

⁸⁴ It would be perfectly possible that no overseas judge would sit on a case, the autonomy of the CFA to decide on overseas judges would be undermined, and the independence of the members would not be adequately secured (A legal opinion by Sir William Wade, the eminent public lawyer in Cambridge, substantially supported the position of the profession, 24 October 1991).

⁸⁵ WU Jianfan, a Mainland member of the Basic Law Drafting Committee, Hong Kong Legislative Council 4 December 1991, at p. 930.

the independence it is meant to enjoy and could, in fact, detract from the territory's stability and prosperity.”⁸⁶

The Hong Kong government finally submitted the draft bill to LegCo for an approval, but LegCo rejected it. The majority decided that the agreement was in contravention of the JD and the BL and finally, the draft bill was stayed.

Second Agreement of the British and Chinese sides on the CFA: the 1995 Agreement

There was a deadlock amongst the British and Chinese sides regarding the CFA for several years. Establishing the CFA before 1997 was already subject to a tight schedule, made worse because of the failure to reach a consensus on the CFA's composition and the method of appointment of CFA judges in the 1991 agreement. It was not until 1994 that the Hong Kong government restarted the CFA negotiations with China. A draft bill had been sent to the Chinese side, the Hong Kong Bar Association and the Law Society of Hong Kong respectively, for consultation before it was submitted to LegCo. This was known as the 1995 agreement and it was hoped the draft bill could be completed before a new legislature was elected in 1995.

The draft bill proposed by the Hong Kong government was as follows:-

- “(1) The HKSAR should enjoy an independent judicial system and power of final adjudication;
- (2) The CFA should consist of the Chief Justice, 3 Permanent Judges, and Hong Kong and overseas non-permanent judges, the hearing panel should be 5 judges;
- (3) Permanent judges shall be chosen from the HC or legal professionals and local non-permanent judges shall be chosen from retired Justices of Appeal;
- (4) CFA judges are to be appointed by the Chief Executive on the recommendation of an independent commission;
- (5) The retirement age of the permanent judges should be set at 65 with the extension the terms of office no more than twice for 3 years each time;
- (6) Other than acts of state, the jurisdiction of the Court of Final Appeal is that of the highest adjudicatory body in Hong Kong...certificates must be obtained by the Court of Final Appeal from the CE in respect of acts of state, and in respect of the BL, seek interpretation from the NPCSC where it must

⁸⁶ Frank Ching, The Vienna convention on the Law of Treaties and the Joint Liaison Group's Agreement on Hong Kong's CFA, a paper presented at a Zonta Club Forum on the CFA, 21 October 1994. (A comment on the Joint Declaration and the CFA agreement).

rule on provisions concerning matters that are the responsibility of the CPG or in respect of the relationship between the Central Authorities and the Region;

(7) Trial procedure should be dealt with in accordance with the present practice of HK;

(8) The CFA shall be established on 1 July 1997.”⁸⁷

The 1995 agreement caused new controversies about the CFA’s jurisdiction, including regarding acts of state such as defense and foreign affairs, and the method of appointment of CFA judges. The draft bill was rejected by the Hong Kong Bar Association on the grounds that it was inconsistent with the JD and the BL, but the Law Society suggested adopting the 4:1 formula. The Chinese side argued about the CFA’s jurisdiction and the method of the appointment of CFA judges, arguing that the HKSAR courts had no jurisdiction to determine matters such as acts of state. Article 19(3) of the BL provided that:-

“The HKSA courts have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the CE on questions of facts concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases...”

According to Professor ECS Wade:-

“Act of state means an act of the Executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown.”⁸⁸

Act of state include the declaration of war and peace, and the making of treaties⁸⁹.

⁸⁷ Hong Kong’s CFA: The Development of the Law in China’s Hong Kong, edited by Simon N. M. Young and Yash Ghai, Cambridge University Press 2014, at p. 131-134.

⁸⁸ ECS Wade, ‘Act of State in English Law: Its Relations with International Law’ (1934) 15 Brit YB Int’l L 98, 103. See Lord Mackay of Clashfern (n 6) para 370A.1.

⁸⁹ Act of State as a defence against a British subject, as J.G. Collier puts that ‘What is really being argued in one situation is that the plaintiff cannot sue because he has no cause of action which can be entertained by the court; he can only base his claim, upon the act of state itself, and such a claim is beyond the court’s jurisdiction. The plaintiff here is trying to use the act of state a sword. In the other situation, the plaintiff has a cause of action which is within the court’s province, but the Crown is pleading the act of state as a defense. Here the Crown is using the act of state as a shield. (Cambridge Law Journal, 26, 1 April 1968, pp. 102-130).

Martin Lee argued that:-

“In the common law, “acts of state” refer only to things such as declaring war or making treaties- and the core principle is that it may never be used by the sovereign against its own citizens...As the Court will not be set up before 1997, it is likely that China will interpret the jurisdiction over acts of state in such a way that Hong Kong people will never be able to challenge the government. This rips the rule of law into shreds, since the entire basis for the rule of law is that the government is subject to the law just as ordinary citizens are. The HKSAR government overnight gains a power it never had even under the colonial government: the power to act with impunity.”⁹⁰

The courts had no jurisdiction to determine acts of state, but it was understood that whether an act was an act of state was still a decision for the courts. In practice, there was some confusion as to the definition of an act of state among the Chinese side. Under the common law principle, executive power is exercised by the sovereign state in respect of another state exercising the same power. It also remained unclear whether, as regards an act of state, the interpretation of the law would be vested in the region’s courts⁹¹. This was known as residual power.

As regards the recruitment of the CFA judges, it was argued that this was not included under Article 90 of the BL⁹² in the draft bill⁹³. This Article provided the method of the appointment or removal of a CFA judge. If China interfered with a judicial appointment this would be a direct challenge to the independence of judiciary and would cause further damage to people’s confidence and the court’s credibility.

The British and the Chinese sides eventually reached a consensus on 9 June 1995

⁹⁰ The China Quarterly 2000, v. 161 at p. 231-232; Martin Lee, ‘Courting disaster’, SCMP, 14 June 1995 at p. 19.

⁹¹ In *Nissan v. Attorney-General* (1968), it was for the court to decide whether the executive acts in question were really acts of state. (The China Quarterly, 2000, v.161, at p. 232, Cambridge University Press)

⁹² Article 90(1) of BL states that the CJ of the CFA and the CJ of HC of SAR shall be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country. Article 90(2) of BL states that in the case of the appointment or removal of judges of the CFA and the CJ of the HC of HKSAR. The CE shall obtain the endorsement of the LegCo and report such appointment or removal to the NPCSC for the record.

⁹³ South China Morning Post, 17 March 1995 at p. 1.

pursuant to the five-point agreement,⁹⁴ and the draft bill was submitted to LegCo on 26 July 1995. Both sides agreed that the CFA would be established before 1997 under the s. 4 of Hong Kong Court of Final Appeal Ordinance, Cap 484,⁹⁵ and would replace the PC as a highest appellant court of the HKSAR after 1997.

The CFA was formally established on 1 July 1997. It mainly hears appeals from the CA and the CFI in both civil and criminal matters. The powers of the CFA are listed in s. 17 of Hong Kong CFA Ordinance (Cap. 484)⁹⁶ and Article 82 of the BL.⁹⁷ There is a difference between the PC and CFA regarding the powers of final adjudication. In principle, the decision of the PC on non-Hong Kong appeals (UK appeal cases) did not bind the lower courts in Hong Kong prior to 1 July 1997, but the CFA's decisions⁹⁸ are binding on all the lower Courts in Hong Kong. In addition, the CFA is able to deal with disputes where the quantum of losses is about \$ 1 million or more, as opposed to the PC threshold (\$500,000).

The establishment of the CFA was important. Without it, there would have been a judicial vacuum after 1997. Its creation meant that Hong Kong had a good judicial

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- (1) The British side agreed to amend the suggestion made by the Preliminary Working Committee;
 - (2) The Chinese side agreed to give up its demand for legislative provisions on a post-verdict remedial mechanism;
 - (3) The British side agreed that the CFA ordinance had been included the Article 19 of BL that CFA shall have no jurisdiction over acts of state;
 - (4) The Chinese side agreed to support the legislative procedures of the CFA before the end of July 1995;
 - (5) The team designate would be responsible for the formation of CFA on 1 July 1997 in accordance with the BL and the CFA ordinance.
- (The Politics of the Debate over the CFA in Hong Kong, Lo Shu Shing, *The China Quarterly*, 2000, v. 161 at p. 224-225; *The Hong Kong's CFA: The Development of the Law in China's Hong Kong*, Simon N. M Yeung and Yash Ghai, Cambridge University Press 2014 at p. 134)

95 Jurisdiction of Court

- (1) The Court shall have the jurisdiction conferred on it under this Ordinance and by any other law.
- (2) The Court shall have no jurisdiction over acts of state such as defence and foreign affairs.
- (3) The Court shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state whenever such questions arise in the adjudication of cases, and that certificate shall be binding on the Court.
- (4) Before issuing such a certificate the Chief Executive shall obtain a certifying document from the Central People's Government

96 Cap. 484 of Hong Kong CFA Ordinance.

97 Art. 82 of BL: The power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the CFA of the Region, which may as required invite judges from other common law jurisdictions to sit on the CFA.

98 *A Solicitor v. Law Society of Hong Kong*, reported at (2008) 2 HKLRD 576.

system attractive for the foreign investors and which would increase public confidence in the local system.

4.3 The CFA's Power of Final Interpretation and Adjudication after 1997

(1) The Power of Interpretation and Adjudication before the Handover

Generally, Britain had no single document which set out the state constitution. It had an unwritten constitution. Under the concept of Parliamentary Sovereignty, Parliament was the supreme legal authority in the UK and had the right to make or unmake any laws for colonial Hong Kong in all matters⁹⁹. Hence, the courts could not strike down legislation or overrule the legislation of Parliament.

The situation in Hong Kong was quite different. Hong Kong had a written constitution, namely, the Letters Patent and the Royal Instructions, which had superior legal status over other legislation in Hong Kong. Neither the colonial courts or LegCo were empowered to examine an Act of Parliament or amend this written constitution.

Before 1997, under the English legal system, the PC was the highest court of appeal for Britain and the Hong Kong and its decisions were binding upon all lower courts. The power of interpretation and amendment of the constitution (the Hong Kong Letters Patent and the Royal Instructions) lay with the Judicial Committee of the Privy Council (JCPC), which also held the final adjudicative power. Hence, no Hong Kong court could examine the power of interpretation of the JCPC or overrule its decisions¹⁰⁰

Prior to 1997, the Supreme Court of Hong Kong could declare a legislative provision ultra vires in some situations if it violated the Letters Patent or the Royal Instructions. In the case of *Rediffusion (Hong Kong) Ltd v. Attorney General of Hong Kong*¹⁰¹, the

⁹⁹ AV Dicey said that parliament is sovereign and can make or unmake any law on any subject whatsoever. (Introduction to the Study of the Law of the Constitution (London: Macmillan, 10th ed 1961), pp39-40, AV Dicey).

¹⁰⁰ Peter Wesley-Smith ed, at 51 (Hong Kong:Faculty of Law, University of Hong Kong, 1993).

¹⁰¹ *Rediffusion (Hong Kong) Ltd v. Attorney General* (1970) AC 1136 at 1157.

Plaintiffs sought a declaration that it would be unlawful for LegCo to pass a Bill and an injunction to restrain members of the council from passing it. The Court held that any bill passed by LegCo which was repugnant to an English Act of Parliament applicable to Hong Kong was ultra vires and would be declared invalid. In this case, the PC accepted that the Hong Kong Supreme Court had jurisdiction to decide whether or not it was lawful for LegCo to submit a bill to the Governor for approval. That was to say, the colonial courts could hear and determine cases that challenged the power of the legislature or executive. This is what is known as judicial review.¹⁰² If the authorities' exercise of their powers was inconsistent with the Letters Patent or Royal Instructions, the courts could exercise their judicial powers to declare the power invalid.

After the enactment of the BORO on 8 June 1991, the annual number of judicial review cases grew dramatically. Essentially, the BORO was an attempt to limit the power of the Legislature and Executive to protect individual rights and liberties. Its power was conferred on it by the Letters Patent. It stood above other local legislation and if any provisions were inconsistent with it, they would be declared invalid.

In case of *R v. Sin Yau Ming*¹⁰³, the defendant was charged with the possession of dangerous drugs for the purpose of trafficking. There was sufficient evidence beyond a reasonable doubt that the defendant would commit an offence. He claimed that these charges were in breach of the Article 11 (1) of the BORO which held that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. The court allowed his appeal.

In the case of *R v. Chan Chak Fan & another*¹⁰⁴, the defendants were charged with being members of the crew of a ship which had entered Hong Kong with an unauthorized entrant on board. The court dismissed their appeals, the judge arguing that:-

“The Letters Patent entrench the Bill of Rights by prohibiting any legislative inroad into the International Covenant on Civil and Political Rights as applied to

¹⁰² Judicial Review defines as the power of courts to review decisions of another department or level of government. Form of appeal from an administrative body to the courts for review of either the findings of fact, or of law, or of both. May also refer to appellate court review of trial court or of an intermediate appellate court. (see Black's Law Dictionary (Abridged 6th Ed. 1991), at. p 566).

¹⁰³ *R v. Sin Yau Ming* (1991) 1 HKPLR 88.

¹⁰⁴ *R v. Chan Chak Fan & another* CACC 329/1993; (1994) 4 HKLPC 115.

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

As these two cases show, the colonial courts had jurisdiction to interpret the law if it was inconsistent with the BORO and the constitution. There was no doubt that the colonial courts were able to handle human rights issues regarding the BORO or that judicial interpretation was vested in the colonial courts. In *Chan's* case might be construed as confirming the colonial courts' legality and' powers as detailed in the Letters Patent.

After the establishment of the BORO, people concerned about their individual rights and liberties were no longer silent. Apart from this, under the British legal system, laws were developed from case law as well as legislation. Where these were in conflict with each other, the courts had an absolute power to interpret the law and apply the legislation to the facts of each case based on precedent. Hence, the colonial courts had the jurisdiction to interpret the law and strike down laws. However, they did not have the ultimate authority to interpret the law nor the power of final adjudication, because the final appellate court (the PC) lay outside Hong Kong.

(2) The CFA's Power of Final Interpretation and Adjudication under the New Regime

After the resumption of sovereignty by China, the PC was replaced by the CFA as the highest court of appeal of the HKSAR. During the negotiations on the settlement of the Hong Kong both Britain and China had agreed that:-

“The HKSAR will be vested with executive, legislative and independent judicial power, including that of final adjudication...”¹⁰⁵

“After the establishment of the HKSAR, the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the vesting in the courts of the HKSAR of the power of final adjudication.”¹⁰⁶

Hong Kong people thus expected that the CFA had the power of final interpretation

¹⁰⁵ Article 3(3) of Joint Declaration 1984.

¹⁰⁶ Article 3(1) of Annex 1 in the Joint Declaration 1984.

and adjudication, especially since under the common law, interpretation of the constitution can be made by a judge in court. He/she has authority to make decisions about certain issues; final adjudication is the final judgment, the ruling determined by a judge on the question of law. His/her decision will be final. On this view, no court was able to overrule the decision of the final court of appeal. The CFA's decisions would be final.

But a problem arose because the full text of the BL was enacted pursuant to Article 31 of the Chinese constitution. Judges in China have no authority to interpret the law or to implement the state constitution. All such interpretative powers are in the hands of the NPCSC. The two different legal systems seemed to conflict with each other, with the possibility that the CFA would be deprived of its power of final interpretation and adjudication. The BL replaced the Letters Patent and the Royal Instructions as the constitutional documents of Hong Kong. Article 11(1) stated that 'no law enacted by the legislature of the HKSAR shall contravene this Law'¹⁰⁷. The BL had a higher status than other laws in Hong Kong. Any law inconsistent with the BL would be declared void.

Hong Kong also enjoyed independent judicial powers, including that of the final adjudication. Articles 8¹⁰⁸, 18(1)¹⁰⁹ and 81(2)¹¹⁰ of the BL retained customary law and the principles of the common law. From this, it was thought that judges were able to interpret statute law if it was unclear or vague, using common law principles. As we have seen, before the handover, Hong Kong courts had done this and had examined the validity of the law, and declared legislative provisions *ultra vires*. It was thought that the CFA, as the HKSAR's highest appellate court, would still have the power of final interpretation and adjudication after 1997. Articles 2¹¹¹, 19(1)¹¹², and 80¹¹³ of the

¹⁰⁷ Art. 11 of BL.

¹⁰⁸ Art. 8 of BL states that the laws previously in force in Hong Kong, that is, the common law, rules of equity ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this law, and subject to any amendment by the legislature of the HKSAR.

¹⁰⁹ Art. 18(1) of BL states that the laws in force in the HKSAR shall be this Law, the laws previously in force in HK as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region.

¹¹⁰ Art. 81(2) of BL states that the judicial system previously practised in HK shall be maintained except for those changes consequent upon the establishment of the CFA of the HKSAR.

¹¹¹ Art. 2 of BL states that the NPC authorizes the HKSAR to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.

¹¹² Art. 19(1) of BL states that the HKSAR shall be vested with independent judicial power including

BL vest independent judicial power - including that of final adjudication - in the HKSAR courts. That is to say, independent judicial interpretive power is vested in the judiciary.

This retention of judicial independence was seen as important to the future of the HKSAR. The HKSAR courts have adopted a flexible approach to the judicial reviews of legislation. Two cases confirm the CFA's powers of interpretation and adjudication, these are the case of *Ma Wai Kwan David* and *Ng Ka Ling* respectively. In the case of *HKSAR v. Ma Wai Kwan David & others*, the Chief Judge of Court of Appeal said that:-

“Regional courts have no jurisdiction to query the validity of any legislation or acts passed by the sovereign. There is simply no legal basis to do so..... The PRC is the Sovereign of the HKSAR. Under its Constitution, the NPC is the highest organ of state power. Together with its Standing Committee, they exercise the legislative power of the PRC..., I take the view that the HKSAR courts do have the jurisdiction to examine the existence (as opposed to the validity) of the acts of the Sovereign or its delegate.”¹¹⁴

The CJ in this case confirmed that it could not examine the power of sovereign but it still had jurisdiction to examine the existence of the sovereign's act. In the case of *Ng Ka Ling & others v. Director of Immigration*, the Chief Justice of the CFA said that:-

“In exercising their judicial power conferred by the BL, the courts of the Region have a duty to enforce and interpret that Law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the BL and, if found to be inconsistent, to hold them to be invalid. ...In exercising this jurisdiction, the courts perform their constitutional role under the BL of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the BL.”¹¹⁵

that of final adjudication.

¹¹³ Art. 80 of BL states that the courts of the HKSAR at all levels shall be the judiciary of the Region, exercising the judicial power of the Region.

¹¹⁴ *HKSAR v. Ma Wai Kwan David & others*, CAQL1/1997; (1997) HKLRD 761.

¹¹⁵ *Ng Ka Ling & others v. Director of Immigration*, FACV 15/1998; (1999) 1 HKLRD 315; (1999) 2 HKCFAR 4.

The CFA confirmed that the HKSAR courts had jurisdiction to examine whether legislation enacted by the legislature or acts of the executive of the Region were consistent with the BL. However, the HKSAR courts had qualified powers to interpret the BL either under the BL or using the common law principle of statutory interpretation.

But the BL itself was unclear. Articles 19(3)¹¹⁶ and 158 (3)¹¹⁷ restrict the CFA's power of interpretation and divide interpretive power between the NPCSC and the HK SAR courts. Article 19(1) of the BL clearly says that HKSAR courts shall have no jurisdiction over the 'Acts of State'. These include foreign and defence matters such as declaring war or signing an international treaty. It is accepted that the regional courts do not have jurisdiction over such matters¹¹⁸. Under the 'One Country Two Systems', China is a sovereign state, whereas Hong Kong is a special administrative region of China. Where there is a conflict between Chinese law and the BL it is uncertain whether the HKSAR courts can exercise their power to deal with such conflict. According to the common law principle, the courts do have jurisdiction to examine 'Acts of State' to determine whether they are justifiable.

Under Article 158, the power of interpretation is divided between the NPCSC and the HKSAR courts. The main difference between them is that NPCSC has the power to interpret laws according to Article 67(4) of the Chinese constitution. Its power is

¹¹⁶ Art. 19 (3) of BL states that the courts of the HKSAR shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.

¹¹⁷ Art. 158(3) of BL states that the courts of the HKSAR may also interpret other provisions of this Law in adjudication cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's congress through the CFA of the Region....

¹¹⁸ The US Supreme Court said " Executive decisions as to foreign policy is political, not judicial, such decisions are wholly confided by our constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the judiciary has neither aptitude, facilities, nor responsibility, and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. (Chicago and Southern Airlines v. Waterman S.S Corp. 333 U.S. 111 (1948)).

extended to the BL, which is a national law. In addition, Article 158(1) provides that the power to interpret the laws shall be vested to the NPCSC¹¹⁹.

In case of *The Director of Immigration v. Chong Fung Yuen* the court confirmed that:-

“The Standing Committee has made an interpretation of the BL pursuant to its power under Article 67(4) of the Chinese Constitution and art. 158 of the BL, the courts in Hong Kong are under a duty to follow it. The Court so held in *Lau Kong Yung* where the Court stated that the Standing Committee's power of interpretation of the BL under art. 158(1) originating from the Chinese Constitution "is in general and unqualified terms". In particular, that power of the Standing Committee extends to every provision in the BL and is not limited to the excluded provisions referred to in art. 158 (3).”¹²⁰

It is clear that NPCSC can exercise the power of interpretation regarding the BL, in accordance with the Chinese constitution and Article 158 (1) of the BL. It is questionable whether the NPCSC's power of interpretation is limited to external affairs or whether it covers both internal and external affairs. The details of these matters are still uncertain and remain at issue.

In Hong Kong, the interpretation power of the BL is conferred by article 158 (2) (3)¹²¹ and by traditional common law principles. Article 158 (2) of the BL provides that:-

“The NPCSC shall authorize SAR courts to interpret on their own, in adjudicating cases,...limits of the autonomy of the Region.”

Article 158 (3) provides that:-

“The SAR courts may also interpret other provisions of this Law in adjudicating cases. However, if SAR courts ...need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government...SAR courts shall, before making their final judgments which are not appealable, seek an interpretation ...from NPCSC.”

¹¹⁹ Art. 158(1) of BL stated that the power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.

¹²⁰ *The Director of Immigration v. Chong Fung Yuen*, FACV No. 26/2000, at para. 6.2; (2001) 2 HKLRD 533; (2001) 4 HKCFAR 211.

¹²¹ Art. 158(2) (3) of BL.

There is no doubt that the power to interpret the BL can be exercised by the HKSAR courts in the course of litigation under Article 158(2) but it is difficult to determine the matters are related to Hong Kong under Article 158(3). The question is how do the HKSAR courts exercise constitutional jurisdiction?

Article 158 is a complex provision which raises legal issues in relation to the power of interpretation. First of all, the interpretive power may be exercised by the NPCSC at any time under the Article 158(1). Chinese judges are unable to challenge legislation or an act of government even if it is inconsistent with the Chinese constitution. Historically, Hong Kong judges have had the authority and duty to interpret the law if it is inconsistent with the BL using judicial review. As things stand, both systems are supposed to work together to interpret the same Article. This gives the NPCSC the chance to interfere with the judicial independence of Hong Kong.

Article 158(3) also requires that in matters which are the responsibility of the CPG, the CFA must seek an interpretation of the provisions from the NPCSC. Problems arise when the CFA considers that it has the ultimate power to enforce and interpret that laws, and chooses not to seek an interpretation from the NPCSC. The possibility then arises that the NPCSC may decide to exercise its power to re-interpret the Article. If it does this, this will deprive the CFA of its power and will violate the rule of law.

4.4 Conclusion

The BL is not only purely domestic legislation in Hong Kong, but also a min-constitution and superior to all other laws here. Hong Kong has also retained its common law system so that the major sources of laws in Hong Kong now are the BL and the common law. As mentioned before, the BL is created in accordance with the Chinese constitution but the common law is created by judges through precedent and statutory interpretation. Judges have the authority and duty interpret the law. However a crucial problem is that the power of interpretation is divided between the NPCSC and the CFA. This has given rise to a number of controversial issues regarding to the power of interpretation of the BL in recent years. I explore these problems in the next chapter.

Chapter Five

Cases Regarding the Interpretation of the Basic Law since 1997

5.1 Introduction

After the transfer of sovereignty, the major sources of law in Hong Kong were the BL, the common law, National Law and Laws enacted by the HKSAR. The BL is not simply a domestic law of Hong Kong, but also a ‘mini-constitution’, and as such is superior to all other legislation, including the Hong Kong Bill of Rights (HKBOR). Thus, no laws enacted by the HKSAR shall contravene the BL¹. Under the BL, ‘all the laws previously in force in Hong Kong shall be maintained except for any that contravene the BL and subject to any amendment by the HKSAR legislature.’² Thus, the BL is the main constitutional document for post-1997 Hong Kong.³

The BL was vague and abstract during its drafting and did not clarify certain fundamental legal issues. As a result, the BL has given rise to the constitutional arguments and the controversial questions. For example, the Members of the BLDC had to request a clarification on the relationship between the BL and the Chinese constitution, because they were concerned about how much mainland Chinese law would apply in Hong Kong. In the years following 1997, the NPCSC has also caused controversy by issuing, on four occasions, its own interpretation of the BL. These four occasions concerned (i) the 1999 Right of Abode Controversy; (ii) the 2004 debate about pace of democratic development in Hong Kong, especially as regards the adoption of Universal Suffrage for the 2007 election of the Chief Executive and the 2008 LegCo Election; (iii) the 2005 question dispute about the Term of Office to be assumed by a new Chief Executive; and (iv) the 2011 Congo Case, this last being the only occasion on which the CFA itself sought an NPCSC interpretation.

¹ Art. 11 of BL.

² Art. 18 of BL.

³ David Clark opines that the Basic Law is not a constitution: Since China is a unitary state, there is and can be only one constitution in China, the Constitution of 1982. While constitutive of the major organs of government, and while it lays down the major policies to be followed by the future SAR, the Basic Law is an enactment of the (National People’s Congress). As such it may be changed by the same body. (The Basic Law: One Document, Two systems, in Ming K Chan and David J Clark (Eds), HK University Press, 1991 at p.41).

These interpretations of the BL by the NPCSC have caused a series constitutional arguments between the NPCSC and the HKSAR courts, and a keen debate between mainland and Hong Kong scholars. They each have different theories and approaches to legal interpretation, thus leading to different results. Up to the present moment, the conflict has not stopped. This chapter discusses the most significant cases regarding the interpretation of the BL since 1997. These reveal what the HKSAR courts' powers of interpretation and final adjudication are.

HKSAR v. Ma Wai Kwan David & Others

The BL was first challenged in the 1997 case of *HKSAR v. Ma Wai-Kwan, David & others*⁴. The defendants were involved in a criminal trial before the Court of First Instance (CFI), charged with conspiracy to pervert the course of public justice in 1995. Significant constitutional issues were raised by counsel appearing for the defendants. These involved whether,

- “(1) The common law offence of conspiracy to pervert the course of public Justice survived the change of sovereignty;
- (2)The respondents were liable to answer to the original indictment.”⁵

The defendants contended that the common law had not survived the change in sovereignty on 1 July 1997. Under Article 160 (1) of the BL⁶, the laws previously in Hong Kong remained through an act of adoption either by the NPCSC or the Legislature of the HKSAR. That was to say, for the common law to come into force after 1997, it was necessary for either body to take an affirmative or positive act of adoption. The defendants argued that the HKSAR courts had the power to interpret the BL and examine any legislative acts or any acts passed by the NPCSC to see if such acts were inconsistent with the BL according to the Article 3(2)⁷(3)⁸ of the Joint Declaration (JD).

⁴ HKSAR v. Ma Wai Kwan David & others (1997) HKLRD 761; CAQL1/1997.

⁵ HKSAR v. Ma Wai Kwan David & others, CAQL1/1997, at p. 4

⁶ Art. 160(1) of BL states that upon the establishment of the HKSAR, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or ceased to have force in accordance with the procedure as prescribed by this Law.

⁷ Art. 3(2) of Joint-Declaration states that the HKSAR will be directly under the authority of the

On appeal, the CA affirmed that ‘the laws previously in force in Hong Kong, including the common law, it became the laws of the HKSAR after 1997.

The CA further held that the HKSAR courts had no jurisdiction to examine the consistency of any legislative acts or any acts passed by the NPCSC⁹. The HKSAR courts’ power was limited by a sovereign state pursuant to Article 19 (2)¹⁰ of the BL. However, the HKSAR courts could examine the existence of those authorities’ decision or resolution¹¹. To justify its decisions, the CA pointed out that the NPCSC was the highest organ of the PRC with the power to interpret the constitution and supervise the Hong Kong legislature. Just as before 1997 the HKSAR courts could not challenge the validity of any Acts of Parliament, so after 1997 there was no legal basis to challenge the laws and the acts of the NPCSC. Parliament was a law-making body under the UK constitution that enacted or repelled any law either in Britain or Hong Kong. Thus, it was impossible to challenge to the validity of the Act of Parliament. However, Professor Johannes Chan, the University of Hong Kong, commenting on the *Ma* case stated that ‘Parliament was free to legislate for a colony.

Central People’s Government of the People’s Republic of China. The HKSAR will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People’s Government.

⁸ Art. 3(3) of Joint-Declaration states that the HKSAR will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in fore in Hong Kong will remain basically unchanged.

⁹ The Court of Appeal held that:-

“The HKSAR courts cannot challenge the validity of the NPC Decisions or Resolutions or the reasons behind them which set up the Preparatory Committee. Such decisions and resolutions are the acts of the Sovereign and their validity is not open to challenge by the regional courts...Nor, in my view, can the HKSAR courts examine why the Preparatory Committee set up the Provisional Legislative Council in exercising the authority and powers conferred on its by the NPC to carry out the Sovereign’s decisions and resolutions.”

(HKSAR v. Ma Wai-kwan David & others,(Reservation of Question of Law No. 1/1997) at p. 24)

¹⁰ Art. 19(2) of BL: SAR courts shall have jurisdictions over all cases in the Region, except that the restrictions on their jurisdictions imposed by the legal system and principles previously in force in Hong Kong shall be maintained.

¹¹ The Court of Appeal held that:-

“SAR courts should have the power to examine (1) whether there was any NPC decisions or resolution setting up or authorizing the setting up of the Preparatory Committee, (2) whether there was any Preparatory Committee decision or resolution setting up the Provisional Legislative Council, (3) whether the Preparatory Committed had in fact set up the Provisional Legislative and whether this Provisional Legislative Council was in fact the body which was set up pursuant to the decisions or resolutions of the NPC and the Preparatory Committee.”

(HKSAR v. Ma Wai-kwan David & others,(Reservation of Question of Law No. 1/1997) at p. 24-25)

It was not bound by the Letters Patent of Hong Kong or any Hong Kong legislation... On the other hand, there was no rule that a regional or colonial court could not question the legality of a national law.¹² Moreover, the 1991 BORO provided that Hong Kong citizens enjoyed civil rights and the right to a fair trial against abuse of power by the executive authorities. This was known as judicial review. In the case of *R v. Sin Yau Ming*¹³, the CA had confirmed that the HKSAR courts *did* have jurisdiction to examine legislation that was inconsistent with the BORO, which meant that before 1997, the Hong Kong courts *could* examine the abuse of discretionary power by the executive authorities.

The CA's decision in the *Ma* case was criticized on the basis that it weakened this judicial power¹⁴ and actually created a chance for the NPCSC to exercise more influence on Hong Kong's internal affairs. Professor Yash Ghai, of the Law Faculty at the University of Hong Kong, argued that 'The decision was ominous and potentially threatening; the very status of the BL as a constitutional document had been undermined.'¹⁵ The BL¹⁶ had promised that Hong Kong would enjoy a high degree of

¹² The doctrine of supremacy of Parliament means that Parliament is free to legislate for a colony. It was not bound by the Letters Patent of Hong Kong or any Hong Kong legislation. Under the Colonial Laws Validity Act, an Act of Parliament will prevail if it is inconsistent with any domestic or prerogative legislation. In other words, the fact that a colonial court cannot challenge the legality of a British Act has nothing to do with its colonial status. It is entirely due to the British constitutional theory of supremacy of Parliament. (The Jurisdiction and Legality of the Provisional Legislative Council, 27 Hong Kong LJ 374, at 378 (1997), Johannes Chan)

On the other hand, there is no rule that a regional or colonial court cannot question the legality of a national law. Indeed, under British rule the Hong Kong courts could challenge the legality of an Act of Parliament, at least in certain specific areas after the promulgation of the Hong Kong (Legislative Powers) Orders 1986 and 1989 pursuant to the Hong Kong Act 1985, which authorized the Hong Kong Legislature to repeal applicable British Acts in certain areas. It follows therefore that if local legislation in these areas was in conflict with a British Act applicable to Hong Kong, the courts had to give effect to the local legislation. (The Jurisdiction and Legality of the Provisional Legislative Council, 27 Hong Kong LJ 374, at 378 (1997), Johannes Chan).

¹³ *R v. Sin Yau Ming*, CACC 289/1990.

¹⁴ 'The rule of law is seriously endangered by the exercise of legislative power by a body without legal basis and by a judiciary with little commitment to defend liberties and laws against the central authorities. the weakening of the judiciary and the improper constituted legislature have also left the executive subject to few checks, leaving it to restrain itself if it chooses to do so'. (Hong Kong Human Rights Monitor, the first casualties of the handover- deteriorating legal and institutional safeguards of human rights, October 1997 at p. 3)

¹⁵ See Yash Ghai, "Dark Day for Our Rights," South China Morning Post, 30 July 1997, at p. 17.

¹⁶

Art. 12 of BL states that the HKSAR shall be a local administrative region of the PRC, which shall enjoy a high degree of autonomy and come directly under the CPG.

Art. 13(1) of BL states that the CPG shall be responsible for the foreign affairs relating to the HKSAR.

autonomy except in defence and foreign affairs. However, CA's decision deprived the HKSAR courts of their interpretative power. Yet Article 2 of the BL had promised that the 'HKSAR could exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication'¹⁷. The doctrine of separation of powers was also incorporated into the BL such that the HKSAR government was divided into three branches (Executive, Legislative and Judicial). The judicial branch was responsible for hearing and deciding all cases and had the authority to interpret the law and determine if any laws came into conflict with the BL. The continuance of English common law was guaranteed by Articles 8¹⁸ and 18 (1)¹⁹ of the BL respectively. In addition, according to Articles 19(1) (2)²⁰, 80²¹ and 158 (2) ²² of the BL, the HKSAR courts were permitted to exercise independent judicial power, including that of final adjudication. Judicial power or constitutional authority was vested in courts and 'adjudication was a legal process by which judges were able to express legal analysis and legal rights'²³.

Therefore, judges could adjudicate disputes on what the law was and how the law should be interpreted. This meant that the HKSAR courts had the authority to adjudicate cases and interpret any laws inconsistent with the BL. If, however, interpretations provided by the NPCSC were to be regarded as final, the HKSAR courts would be without any final interpretative power. The rule of law could not be maintained.

¹⁷ Art. 2 of BL.

¹⁸ Art. 8 of BL states that the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained....

¹⁹ Art. 18(1) the laws in force in the HKSAR shall be this Law, the laws previously in force in HK as provided for in Article 8 of this Law, and the laws enacted by the Legislature of the Region.

²⁰ SAR courts shall be vested with independent judicial power, including that of final adjudication. SAR courts shall have jurisdiction over cases in the Region...

²¹ SAR courts at all levels shall be the judiciary of the Region, exercising the judicial power of the Region

²² The NPCSC shall authorize the courts of the HKSAR to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

²³ Adjudication is interpretation. Adjudication is the process by which a judge comes to understand and express the meaning of an authoritative legal text and the values embodied in that text. Interpretation whether it be in law or literary domain is neither a wholly discretionary activity nor a wholly mechanical activity. It is a dynamic interaction between reader and text and meaning a product of that interaction. It is an activity that affords a proper recognition of both objective and subjective dimensions of human experience....(Owen M Fiss, "Objectivity and Interpretation" (1982) 34 (4) Stanford Law Review 739-763, 739)

In sum, the CA's ruling in the *Ma* case contradicted the promise of the JD and the BL that Hong Kong enjoyed a high degree of autonomy and independent executive, legislative and judicial power, at the same time preserving the English common law. The CA's ruling drew attention to the some of the problems of having two different systems work together in Hong Kong. Hong Kong had no mechanism to interpret the BL or deal with the relationship between China and Hong Kong.

Ng Ka Ling & others v. Director of Immigration

Over the past 15 years, the HKSAR courts have played an important role in maintaining judicial accountability and handling many constitutional matters as these two different systems have come into conflict with each other. In 1999, an issue arose concerning several the rights of abode (*ROA*) cases. The appellants in these *ROA* cases came before the courts to challenge the law that limited their rights to reside in Hong Kong. A heated debate followed in Hong Kong.

The *ROA* cases arose because it is common for Hong Kong people (especially men) to go to mainland China to marry and have a family. To enter Hong Kong, these children, Chinese residents, had to apply for a one-way permit from mainland China. With this they had the right to land in Hong Kong but not to stay as a permanent resident. After the handover, many of those who wished to immigrate to the HKSAR from the mainland thought the system would be totally different, and that they would be able to come to Hong Kong easily. They formed this opinion because of the JD and Article 24 (2) of the BL. However, these two documents did not provide detailed information about the *ROA*. Part XIV in Annex I of the JD stated that:-

“All Chinese nationals who were born or who have ordinarily resided in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region for a continuous period of 7 years or more, and persons of Chinese nationality born outside Hong Kong of such Chinese nationals.”²⁴

And according to Article 24 (2) of BL provides that:-

“The permanent residents of the HKSAR shall be:

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

²⁴ The Joint Declaration 1984 Part XIV in Annex I <http://www.cmab.gov.hk/en/issues/jd3b.htm#abode>

- (2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the HKSAR;
- (3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2).²⁵

These two documents seemed to create more chances for Chinese residents to qualify as Hong Kong permanent residents. However, the government argued that an influx of Chinese immigrants would create a heavy burden on Hong Kong's medical, education, housing and social benefits systems. To tackle the problems, it sought to amend the Immigration Ordinance or the BL to prevent certain categories who otherwise qualified for permanent residency in Hong Kong. The Immigration (Amendment) (No. 2) (No. 3) Ordinance 1997 had been enacted by the Provisional Legislative Council on 1 July and 10 July 1997 respectively. Several amendments to the Nos. 2 & 3 were made including the following:-

The Immigration (Amendment) (No. 2) Ordinance 1997 stated that:-

“2. Permanent resident of the Hong Kong Special Administrative Region

A person who is within one of the following categories is a permanent resident of the Hong Kong Special Administrative Region -

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

²⁵ Article 24(2) of Basic Law <http://www.basiclaw.gov.hk/en/basiclawtext/index.html>

(d)-(f)...”²⁶

The Immigration (Amendment) (No. 3) Ordinance 1997 stated that:-

“(1) A person’s status as a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(c) of Schedule 1 can be established by his holding of -

- (a) a valid travel document issued to him and of a valid certificate of entitlement also issued to him and affixed to such travel document;
- (b) a valid HKSAR passport issued to him; or
- (c) a valid permanent identity card issued to him.”²⁷

The new amendments were different from the promises made in the JD and the BL. They prevented the arrival of several categories of immigrants. For that reason, Chinese immigrants felt that the amendments deprived them of their rights and thus brought a claim for judicial review (JR) against the Immigration Department in the CFI. More heated debate followed. The main controversy centered on a case involving Mainland-born children who had the legal right to reside in Hong Kong. In 1999, appellants in two appeals, *Chan Kam Nga & 80 others v. Director of Immigration*²⁸ and *Ng Ka Ling & others v. Director of Immigration*²⁹ claimed that they had the *ROA* in Hong Kong under Articles 24(2)(3) of the BL³⁰. The appellants were born outside Hong Kong but their parents were Chinese immigrants and had settled in Hong Kong for more than 7 years. Under the BL, the appellants were eligible to enter Hong Kong. However, the Immigration Department denied their status under the Immigration (Amendment) (No. 2) (No. 3) Ordinance 1997. They applied for JR to challenge the Director of Immigration’s decision in the CFI³¹. Keith

²⁶ Immigration Ordinance, Chapter 115.

²⁷ Immigration Ordinance, Chapter 115, s2AA(1)(2).

²⁸ *Chan Kam Nga & 80 others v. Director of Immigration*, (1999) 1 HKLRD 304; (1999) 2 HKCFAR 82; FACV 13/1998.

²⁹ *Ng Ka Ling & others v. Director of Immigration*, (1999) 1 HKLRD 315; (1999) 2 HKCFAR 4; FACV 14-16/1998.

³⁰ Art. 24(2) (3) of Basic Law states that “ The permanent residents of the Hong Kong Special Administrative Region shall be persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2)”.

³¹ *Cheung Lai Wah and others v. Director of Immigration*; Reported in (1997) HKLRD 1081; HCAL

J dismissed the application of all appellants except one who was born out of wedlock. The appellants then appealed against this dismissal on the grounds that the Immigration (Amendment) (No.2)³²(No.3)³³ Ordinance 1997 was unconstitutional under Article 24³⁴of the BL. The Immigration Department appealed against Keith J's ruling in the CFI³⁵ about the birth out of wedlock case. Chan, Chief Justice in the CA, dismissed the appeals by both parties. The appellants then appealed to the CFA against the CA's decision. The issues arising in this appeal were:-

- (1) Whether the CFA has the jurisdiction to interpret the relevant provisions of the BL in adjudicating these cases or is bound to seek an interpretation of such provisions from the NPCSC pursuant to Article 158 ("the reference issue");
- (2) Whether the No 3 Ordinance introducing the scheme is constitutional and, if not, the extent to which the No 3 Ordinance is unconstitutional ("constitutionality of the No 3 Ordinance issue").
- (3) Whether section 1(2), the retrospective provision in the No 3 Ordinance, deeming it to have come into operation on 1 July 1997, is constitutional ("the retrospectively issue");
- (4) Whether para 1(2)(b) of Schedule 1 introduced by the No 2 Ordinance is constitutional. The effect of this provision is that where a child is born out of wedlock, the relationship of parent and child is taken to exist between father and child only if the child is subsequently legitimated by his parents' marriage but not otherwise ("the birth out of wedlock issue");
- (5) Whether the Provisional Legislative Council was a legally constituted body ("the Provisional Legislative Council issue"). If not, it would follow that the No 3 Ordinance enacted by that body would be unconstitutional.³⁶

On 29 January 1999, the CFA held that the appellants had the right of abode in Hong Kong under the law, regardless of whether their parents were permanent residents of

Nos. 68,70,73/1997, Keith J at 9.10.1997.

³² Immigration Amendment (No. 2) Ordinances 1997 requires that they are entitled to the right of abode only if the child's parents already had the right when child was born within the marriage.

³³ No. 3 Ordinance requires mainland residents claiming a right of abode through their parents to apply for a Certificate of Entitlement.

³⁴ Art. 24 of BL

³⁵ Ng Ka Ling and others v. Director of Immigration; Reported in: [1998] 1 HKLRD 772.

³⁶ FACV No. 14-16 of 1998, para. 57, 29.1.1999.

Hong Kong when the children were born. The amendments No. 2 and part of No. 3 of the Immigration Ordinance were declared to be inconsistent with Articles 24 (2) (3) of the BL and were thus unconstitutional.

After the CFA's judgment an argument ensued as to whether the HKSAR courts had the power to invalidate the legislature of the Region, the acts of the executive authorities of the Region, or the NPC's decision, if they found any of these were inconsistent with the BL³⁷. Heated arguments followed between Hong Kong and mainland China legal scholars. The courts faced a great challenge their jurisdiction and their power to interpret the BL. The dispute aroused widespread concern in Hong Kong society and in other parts of China. Some legal scholars and legal professionals³⁸ from the Hong Kong Bar Association supported the judgment and saw it as a victory for judicial independence and the rule of law under the 'One Country Two Systems'.³⁹

The case established that the HKSAR courts had final jurisdiction on constitutional matters. Since the CFA was the highest appellate court in Hong Kong its decision would be final and binding of all lower courts under the common law system.

However, on 6 February 1999, four legal experts⁴⁰ from Mainland China issued a statement in which they strongly opposed to the judgment, claiming that if everyone

³⁷ "In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that Law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and if found to be inconsistent, to hold them to be invalid.

...the jurisdiction of the courts of the Region to examine whether any legislative acts of the National People's Congress or its Standing Committee (which we shall refer to simply as "acts") are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. In our view, the courts of the Region do have this jurisdiction and indeed the duty to declare the invalidity if inconsistency is found." (FACV Nos 14-19/1998, at paras. 61-62, dated 29.1.1999)

³⁸ Martin Lee commented that 'it preserves the high degree of judicial autonomy that was promised to HK...The judgment is an important sign that HK courts are functioning independently.(Democratic Party welcomes Court Ruling Establishing Right to Strike Down SAR and Central Government Actions as Unconstitutional, Democratic Party, 29 January 1999)

³⁹ However, one must not lose sight of the immense importance of the Judgment for the confirmation and preservation of the rule of law and judicial independence in Hong Kong and affirmation of Hong Kong's high degree of autonomy under the Basic Law (The Hong Kong Bar Association 5 February 1999, Hong Kong's Constitutional Debate: Conflict over Interpretation at p. 229).

⁴⁰ Professor Xiao Weiyun of the Faculty of Law at Beijing University said that:-

"CFA's constitutional jurisdiction in the judgment was in conflict with the principle of One Country Two Systems. One country was premise of the Basic Law. HKSAR was an inalienable part of the People's Republic of China. It was a local administrative region directly under the Central people's

living in mainland China enjoyed the *ROA*, this would increase the long-term economic burden on HKSAR society. If the HKSAR courts had the power to challenge the NPCSC's status, this would challenge the principle of 'One Country Two Systems'. On 26 February 1999⁴¹, the Secretary for Justice sought clarification from the CFA in the *Ng* judgment. The issue was the NPCSC's power of interpretation and the court's power to declare an NPCSC's act void if it found it inconsistent with the BL. The clarification was as follows:-

“The jurisdiction of the courts of the Region to examine whether any legislative acts of the NPC or its Standing Committee (which we shall refer to simply as "acts") are consistent with the BL and to declare them to be invalid if found to be inconsistent. In our view, the courts of the Region do have this

Government. It was on this basis that the NPC conferred on the SAR a high degree of autonomy. Such special status of the SAR meant that the CFA of the SAR could not have the power to review and declare invalid the legislative act of the NPC and its Standing Committee...

The jurisdiction of the CFA was not unlimited. The Basic Law provided that Hong Kong shall be vested with independent judicial power, including that of final adjudication. Art. 19 imposed restrictions on the jurisdiction of the SAR courts, the restrictions on their jurisdiction imposed by the legal system and principles previously in force in HK shall be maintained. It further stated that the SAR courts had no jurisdiction over acts of state such as defence and foreign affairs. These restrictions included a restriction not to challenge the legislative acts of the state organ of the highest authority, and the SAR courts had no jurisdiction over these acts.”

Professor Shao Tianren, part-time professor of the Beijing University said that:-

“It enjoyed constitutional jurisdiction, the CFA had, in terms of power relationship, put itself above the NPC and its Standing Committee, and in terms of jurisdiction, extended its jurisdiction to Beijing...the jurisdiction of the CFA was derived from sovereignty, and therefore it could declare invalid the legislative act of the state organ of the highest authority of the country. This effectively transformed Hong Kong into an independent polity.”

Professor Wu Jianfan of the Legal Research Centre of the Social Science Academy of the PRC said that:-

“Art. 19 of the BL maintained the restrictions on the jurisdiction of the SAR courts imposed by the legal systems and principles previously in force in Hong Kong. These restrictions included the principle that the courts could only apply, but not challenge, the law. They also included a restriction that the courts of a local administrative region could not challenge the legislation of the Central Government... CFA to review the law and the legislative act of the NPC and its Standing Committee was a direct violation of art. 19 of the BL.”

Professor Xu Chongde of the People's University said that:-

“Art. 22(4) of the Basic Law provided that for entry into the HKSAR, people from other parts of China must apply for approval. It is beyond dispute that this provision concerned the relationship between the Central Government and the SAR.”

(Hong Kong's Constitutional Debate: Conflict over Interpretation at p. 54); a press release (issued by the New China News Agency on 6 February 1999).

⁴¹ The Secretary for Justice sought clarification on 26 February 1999.

jurisdiction and indeed the duty to declare the invalidity if inconsistency is found.”⁴²

The HKSAR government and mainland legal scholars heavily criticized that part of the judgment which stated that the CFA had jurisdiction over Acts of State.

The Hong Kong Bar Association argued that the wrong procedure was invoked by the HKSAR government. It stated that:

“The Bar has serious doubts as to whether there is jurisdiction for the CFA to clarify any matter after a judgment has been delivered. Under our system, a Court is *functus officio* in these circumstances, meaning it has completely performed its function and hence no longer has any jurisdiction to re-open and examine its judgment once delivered.”⁴³

Under the common law system, the courts have no jurisdiction to amend judgments and orders, though there is an appropriate procedure⁴⁴ to deal with slip ups. No proper procedure was used by the HKSAR government. As a result, the government’s action harmed the prestige of the CFA and confused the parties concerned.

Later, the CFA clarified its judgment on 26 February 1999 as follows:-

“The courts’ judicial power derived from the BL. Article 158(1) vests the power of interpretation of the BL in the Standing Committee. The court’s jurisdiction to interpret the BL in adjudicating cases is derived by authorization from the Standing Committee under Articles 158(2) and 158(3). In our judgment on 29 January 1999, we said that the Court’s jurisdiction to enforce and interpret the BL derived from and is subject to the provisions of the BL which provisions include the foregoing.

⁴² FACV Nos. 14 -16 of 1998, para. 62, 29.1.1998.

⁴³ Bar Statement on Government’s Application to CFA, Hong Kong Bar Association 24 February 1999.

⁴⁴ Halsbury’s Laws of England (4th ed), Vol 26, p279, para 556

“As a general rule, except by way of appeal, no court, judge or master has power to rehear, review, after or vary any judgment or order after it has been entered either in an application made in the original action or matter or in a fresh action brought to review the judgment or order....but it is subject to a number of exceptions, for example, clerical error or an error arising from an accidental an accidental slip”

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 accept that it cannot question, the authority of the NPC or the Standing Committee to do any act which is in accordance with the provisions of the BL and the procedure therein."⁴⁵

On 20 May 1999⁴⁶, Chief Executive Tung Chee-Hwa stated that the CFA's judgment could increase by at least 1.67 million the numbers eligible for *ROA* in Hong Kong, and would have an adverse effect on Hong Kong's social resources. It was necessary, he argued, for the government to seek interpretation from the NPCSC of Articles 22 (4)⁴⁷ and 24(2)(3)⁴⁸ of the BL. However, his behavior drew strong criticism from legal professionals and the public as contrary to the rule of law and undermining the judicial independence of the HKSAR courts.

The government went ahead and an interpretation of the BL was made by the NPCSC on 26 June 1999⁴⁹, subject to the request of the HKSAR government. The NPCSC

⁴⁵ Ng Ka Ling v. Director of Immigration (No. 2)(1999) 2 HKCFAR 141 at p.142.

⁴⁶ Chief Executive's report to State Council (Report on Seeking Assistance from the Central People's Government in Solving Problems Encountered in the Implementation of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China) 20 May 1999 <http://www.basiclaw.gov.hk/en/basiclawtext/index.html>

⁴⁷ Art. 22(4) of BL stated that 'For entry into the HKSAR, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of Region.

⁴⁸ Art. 24(2)(3) stated of BL that Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2)

⁴⁹ NPC clarified the two articles were as follows:-

Art. 22(4): "For entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval"

Art. 24(3): "persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2)" mean both parents of such persons, whether born before or after the establishment of the Hong Kong Special Administrative Region, or either of such parents must have fulfilled the condition prescribed by category (1) or (2) of Article 24(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at the time of their birth.

The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and

stated that the new interpretation would not affect the outcome in the *Ng* case, but would become a reference for the future. The NPCSC claimed that the CFA had failed to seek interpretation under Article 158(3)⁵⁰ of the BL, that it had challenged the NPCSC's decision and the principle of 'One Country Two Systems. In addition, it stated that the CFA's interpretation was inconsistent with legislative intent i.e. that for a person to qualify under Article 24(2)(3) of the BL, at least one of their parents must be a Hong Kong permanent resident at the time of their birth.

The interpretation of the NPCSC caused a heated debate. The CFA had stated that it did not need to seek an interpretation from the NPCSC, and that the articles referred to could be dealt with through the courts. There was also much criticism of the HKSAR government for seeking the interpretation of Articles 43⁵¹ and 48(2)⁵² of BL.

The main issue was whether the HKSAR courts had the power to interpret the BL. The exercise of interpretive power was divided between the NPCSC and the HKSAR courts. Article 43 of the BL stated that the HKSAR CEO had a duty to the NPCSC but there was no indication that he had the power to reverse the CFA's judgment or to seek an interpretation from the NPCSC directly. Article 48(2) of the BL provided that the HKSAR CEO should assist the courts to enforce their judgments and/ or carry out new laws smoothly. It was never mentioned that he could exercise a power to interpret or amend the BL. He was the head of the HKSAR government and was responsible for implementing the BL and administering Hong Kong. He should exercise his powers to safeguard the principle of rule of law and respect judicial independence in Hong Kong. To amend the BL, he/she would need to fulfill the requirements of Article 159 of the BL, which stipulated that:-

“The power to propose bills for amendment to this Law shall be vested in the NPCSC, the State Council and HKSAR. Amendment bills from HKSAR shall

24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Tenth Session of the Standing Committee of the Ninth National People's Congress on 26 June 1999) <http://www.basiclaw.gov.hk/en/basiclawtext/index.html>

⁵⁰ Article 158(3) of Basic Law states that CFA has a duty to seek an interpretation from NPC if the matter which are the responsibility of Central government or concerning to relationship between the Central authorities and the region

⁵¹ Art. 43(2) of BL stated that the Chief Executive of the HKSAR shall be accountable to the CPG and the HKSAR in accordance with the provisions of this law.

⁵² Art. 48(2) of BL stated that to be responsible for the implementation of this Law and others laws which, in accordance with this Law, apply in the HKSAR.

be submitted to the NPCSC by the delegation of the Region to the NPCSC after obtaining the consent of two-thirds of the deputies of the Region to the NPCSC, two-thirds of all those members of the Legislative Council of the Region, and the Chief Executive of the Region.⁵³”

According to the above Articles, the HKSAR’s CEO had no authority to set aside the CFA’s judgment or interpret the BL. He did nothing to fulfill Article 159 of the BL, that is, to obtain a two-thirds of LegCO.

Article 158 of the BL deals with the power of interpretation, it stated:-

- “(1) the power of interpretation of this Law shall be vested in NPCSC;
- (2) the NPCSC shall authorize the SAR courts to interpret on their own.;
- (3) the SAR courts may also interpret other provisions of this Law in adjudicating cases...”⁵⁴

Under Article 158(2) of the BL, the HKSAR courts were authorized to interpret the law. However, the ultimate power of interpretation of the BL was vested in the hands of the NPCSC under the art. 158(1).

But the HKSAR courts had the jurisdiction to review executive acts and interpret the BL under Article 158(3) of the BL. This article was still ambiguous. It left ample room for flexible interpretation. Professor Yash Ghai argued that ‘the scheme of the BL is likely to bring the judiciary into conflict with local and central authorities.’⁵⁵ There seemed to be a clear division of responsibility between the NPCSC and the HKSAR courts – Article 158 (3) seemed to maintain the boundaries of the CFA’s power of interpretation and protect the NPCSC’s power, but in practice the words used in this article competed against each other.

In *Ng* case, the CFA decided not to refer the relevant provision to the NPCSC on the understanding that the HKSAR courts had the power of jurisdiction over the issue. In doing so, the CFA did not intend to put itself above the NPCSC or create a power to oppose the NPCSC. It simply acted as an independent judiciary maintaining the spirit

⁵³ Art. 159 of BL.

⁵⁴ Art. 158 of BL.

⁵⁵ Yash Ghai, ‘Litigating the BL: Jurisdiction, Interpretation and Procedure, in J Chan and Y Ghai (eds) Adjudication and Interpretation of BL.

of the rule of law in the HKSAR and ensuring the supremacy of law. In case of *Marbury v. Madison*⁵⁶, US Supreme Court ruled that the exercise of judicial power was not bound by an act of Congress that was repugnant to the constitution. Under common law system, courts have that jurisdiction to decide on whether to enforce the Laws or some legislation that may be inconsistent with it.

However, the request to the NPCSC from the HKSAR government for an interpretation deprived the courts of their judicial power and broke the rule of law.

Legal proceedings in the *ROA* cases concluded in 1999 but many constitutional issues remained unresolved.

Director of Immigration v. Chong Fung Yuen

In 2001, another case provoked further debate. This was the case of the *Director of Immigration v. Chong Fung Yuen*⁵⁷. The Respondent was a Chinese citizen born in Hong Kong on 29 September 1997. His parents were not permanent residents of the HKSAR. It was claimed that he was a permanent resident according to Article 24 (2) (1)⁵⁸ of the BL and had the *ROA*. The Director of Immigration rejected his application under 2(a)⁵⁹ of schedule 1 of the Immigration Ordinance, Cap. 115. On 20 July 2001, the CFA dismissed the Director's application and stated that the Respondent had the *ROA* in Hong Kong.

After the *Chong* case, many Mainland pregnant women attempted to enter Hong Kong to give birth because their children would be entitled to the *ROA*. This influx of pregnant mainland women caused a hospital bed shortage for local pregnant women and provoked local anger. The HKSAR government came under immense pressures and adopted a series of measures to prevent non-local pregnant women coming to Hong Kong to give birth. These measures did not solve the problem. The only method

⁵⁶ *Marbury v. Madison* 5 US 137 (1803)

⁵⁷ *Director of Immigration v. Chong Fung Yuen*, Reported in : (2001) 2 HKLRD 533; (2001) 4 HKCFAR 211.

⁵⁸ Art. 24(2)(1) stated that the permanent residents of HKSAR shall be Chinese citizens born in HK before or a after the establishment of the HKSAR.

⁵⁹ A Chinese citizen born in Hong Kong before or after the establishment of the HKSAR if his father or mother was settled or had the right of abode in HK at the time of the birth of the person or at any later time.

to solve it completely, it was a proposed, was to amend Article 159(2) of the BL, and it was proposed to make a request for interpretation from the government to the NPCSC again. The procedure for amending the law was too complicated – a request to the NPCSC was seen as being quicker. Otherwise, the government would need to obtain the consent of two-thirds of the deputies in the NPCSC and of all the members of the LegCo.

Since 1997, there has been another right of abode issue, caused by the domestic helpers, created a huge controversy about constitutional interpretation. In 2012, in case of *Vallejos Evangeline Banoao also known as Vallejos Evangeline B. & another v. Commissioner of Registration & another*⁶⁰, the applicants were born in the Philippines in 1952 and had worked in Hong Kong as foreign domestic helpers for more than 22 years. They claimed that they had satisfied the requirement set out in Article 24(2)(4)⁶¹ of the BL to qualify as permanent residents of the HKSAR. The Director of Immigration rejected the application on the grounds that they did not meet the requirement in section 2(4)(a)(vi)⁶² of the Immigration Ordinance (Cap 115).

When the case came before the CFI, the court ruled that s. 2(4)(a)(vi) of Immigration Ordinance, Cap 115 was inconsistent with Article 24(2)(4) of the BL and was unconstitutional⁶³. However, the applicants' claim finally failed in CA⁶⁴. Later, the issue of *ROA* for foreign domestic helpers (FDH) was dealt with by the CFA. The Department of Justice (DOJ)⁶⁵ used the FDH case to seek interpretation from the

⁶⁰ HCAL 124/2010, 30 September 2011.

⁶¹ Art. 24(2)(4) of BL stated that The permanent residents of HKSAR shall be:-

(4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in HK for a continuous period of not less than seven years and have taken HK as their place of permanent residence before or after the establishment of HKSAR.

⁶² s.2(4)(a)(vi) of the Immigration Ordinance, Cap.115 stated that 'For the purpose of this Ordinance, a person shall not be treated as ordinarily resident in HK...

(vi) while employed as a domestic helper who is from outside Hong Kong;...'

⁶³ *Vallejos Evangeline Banano, also known as Vallejos Evangeline B v. Commission of Registration and another*, HCAL No. 124/2010, dated 3.9.2011.

⁶⁴ *Vallejos Evangeline Banano, also known as Vallejos Evangeline B v. Commission of Registration and another*, CACV No. 204/2011, dated 28.3.2012.

⁶⁵ DoJ invites the CFA to consider seeking the NPCSC's interpretation under BL 158(3) to clarify the

NPCSC under Article 158(3) to resolve the problem of non-local pregnant women coming to Hong Kong to give birth and obtain the *ROA* for their children. The DOJ wished to use the case to obtain a reversal the court's ruling in the case of *Chong Fong Yuen*⁶⁶. The DOJ's strategy was criticized as damaging the rule of law and disturbing judicial independence in Hong Kong. Judicial independence is an important ingredient of Hong Kong society and also lies at the heart of a well-functioning judiciary. The DOJ's attempt to challenge the judicial system or attack fundamentally judicial independence threatened the rule of law and judicial independence. Critics stated that Hong Kong's rule of law faced a storm of unprecedented ferocity⁶⁷.

In accordance with Article 158 (3) of the BL, to seek an interpretation of the relevant provisions from the NPCSC, three necessary conditions need to be fulfilled:

- “(1) it is a matter which are the responsibility of Central Authority or concerning the relationship between the Central Authorities and the Region.
- (2) there is a particular case being heard, courts seek an interpretation from NPCSC before making their final judgments.
- (3) any request for the interpretation has to be made by the CFA.

In addition, the NPCSC should consult its Basic Law Committee of the HKSAR before giving an interpretation of this Law under Article 158(4) of the BL.

legal effect of the 1999 Interpretation because this is a relevant issue which needs to be resolved in the present case. The penultimate paragraph of the 1999 Interpretation stated that the legislative intent of all categories of BL 24(2) has been reflected in the "Opinions on Implementation of Article 24(2) of the Basic Law of the HKSAR of the PRC" adopted by the Preparatory Committee of the HKSAR in 1996. The legal status of the 1999 Interpretation and the 1996 Opinions of the Preparatory Committee and their binding effect therefore involve complex legal issues. If such issues can be clarified, DOJ considers that the clarification can facilitate a proper interpretation of the right of abode for all categories of persons under BL 24(2) including FDHs.

(SJ on foreign domestic helper's case, press release 13.12.2012).

⁶⁶ Director of Immigration v. Chong Fung Yuen, Reported in (2001) 2 HKLRD 533; (2001) 4 HKCFAR 211.

⁶⁷ A retiring top judge had warned that Hong Kong's rule of law is clouded by “ a storm of unprecedented ferocity” saying voices disrespecting the city's autonomy are growing louder and louder, 25-10-2012, RTHK English News.

The case lodged by the foreign domestic helpers came under Article 24(2)(4)⁶⁸ of the BL. The case did not concern defence or foreign affairs, so there was no excuse for the Central authorities to get involved into the domestic affairs of Hong Kong. HKSAR court had its own constitutional duty to enforce and interpret the BL under the common law system.

The DOJ's behavior in this case received much criticism by different legal professionals. Professor Johannes Chan pointed out that 'if the CFA refused to seek an interpretation from the NPCSC, it would put Hong Kong and China in opposing positions. Or if the CFA decided not to seek the interpretation from them, the HKSAR government again sought for it, there was no doubt that it would be more serious impacts on the judicial system'⁶⁹. On 25 March 2013, the CFA held dismissed the appeal and the request for an interpretation from the NPCSC was finally rejected⁷⁰.

HKSAR v. Ng Kung Siu & Another

In 1984, the British and Chinese governments agreed that the ICCPR would be applied to Hong Kong after 1997. This was reflected in the JD and Article 39 of the BL. The BORO 1991 incorporated the ICCPR into Hong Kong laws. All existing laws inconsistent with the BORO were repealed.⁷¹ The BORO not only established judicial review in the HKSAR courts, but placed a judicial check on the power of the executive. Human rights protection enshrined in the BL and the BORO, set out the fundamental rights of Hong Kong citizens. The two cases below challenged the validity of these two documents and again raised the question of the relationship of the sovereignty of the state - after handover, the Chinese government repealed parts of the BORO, claiming that it had a higher status than the BL, which could not be

⁶⁸ Art.24(2)(4) provided that persons not of Chinese nationality who have entered HK with valid travel documents, have ordinarily resided in HK for a continuous period of not less than seven years and have taken HK as their place of permanent residence before or after establishment of the HKSAR.

⁶⁹ Appledaily 2012-12-14.

⁷⁰ FACV 19/2012, 25.3.2013.

⁷¹ Court of Appeal confirmed that 'The Letters Patent entrench the Bill of Rights by prohibiting any legislative inroad into the International Covenant on Civil and Political Rights as applied to Hong Kong. The Bill is the embodiment of the covenant as applied here. Any legislative inroad into the Bill is therefore unconstitutional, and will be struck down by the courts as the guardians of the constitution.' (R v. Chan Chak Fan (1994) 3 HKC 145)

permitted. Professor Johannes Chan argued however that ‘the BORO did not contravene the BL’.⁷²

The case of *HKSAR v. Ng Kung Siu & another*⁷³ arose from a public demonstration in Hong Kong on 1 January 1998. Both defendants carried defaced national and regional flags from Victoria Park to the Central Government Offices. They were arrested and charged with desecrating both flags under section 7 of the National Flag Ordinance and the Regional Flag Ordinance⁷⁴. Both respondents were convicted in the Magistracy. On appeal, these convictions were quashed. The prosecution then appealed to the CFA against the CA’s decision. In the CFA appeal, the defendants argued that Articles 27⁷⁵ and 39⁷⁶ of the BL clearly stipulated that Hong Kong residents enjoyed the freedom of procession, of demonstration and freedom of expression. However, the defendants convictions were re-instated by the CFA on the grounds that there were limitations on the individual’s right to freedom of expression made necessary to achieve a legitimate objective, in this instance the re-union of China and the HKSAR⁷⁷

The case of *HKSAR v. Leung Kwok Hung & 4 others*⁷⁸ also involved freedom of expression. In June 2011, the HKSAR government submitted a Resignation Council (Amendment) Bill to LegCo. The purpose of the bill was to restrict a resigning member of LegCo from standing in a by-election. The by-election was criticized as a

⁷² (1991) 176 Hong Kong Economic Journal Monthly 54-58.

⁷³ *HKSAR v. Ng Kung Siu & another*; Reported in: [1999] 3 HKLRD 907; (1999) 2 HKCFAR 442; FACC4/1999.

⁷⁴ Section 7 provided that a person who desecrates the regional flag or regional emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and is liable:-

(a) On conviction on indictment to a fine at level 5 (i.e \$50,000) and to imprisonment for 3 years; and

(b) On summary conviction to a fine at level 3 (i.e. \$10,000) and to imprisonment for 1 year.

There is a provision similar to that in the National Flag Ordinance that a copy of the regional flag is taken to be a regional flag for the purposes of the Ordinance. (FACC 4/1999, at para. 22)

⁷⁵ Art. 27 of BL stated that Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.

⁷⁶ Art. 39 of BL stated that the provisions of the ICCPR...as applied to HK shall remain in force and shall be implemented through the laws of HKSAR.

⁷⁷ FACC 4/1999, at para. 60.

⁷⁸ KCCC 3676/2011, 20.3.2012

waste of public money. The bill suggested instead the creation of a new seat in the geographical constituencies to replace the by-election. The defendants in the case felt that the bill was depriving citizens of their right to vote.

Later, public consultation about the bill was conducted by the HKSAR government. The defendants interrupted a forum to express their opinions. They were charged with disorderly conduct in a public place and criminal damage. The magistrate held that they were guilty of these charges. In response to this judgment, Human Rights Watch criticized as improper the arrangements made by the forum and argued that the authorities should bear considerable responsibility for the conflict⁷⁹. The defendants later appealed to the CFI against the magistrate's decision. All defendants were acquitted except *Leung*, whose sentence was reduced from two months to one month.

Universal Suffrage for the Election of the Chief Executive in 2007 and the Legislative Council (LEGCO) in 2008

In 2003, the SAR government announced that it had a constitutional duty to enact legislation mandated by Article 23⁸⁰ of the BL. Article 23 concerned national security and limited the rights and freedoms enjoyed by the Hong Kong residents. In addition, it imposed disproportionate restrictions on freedom of speech and expression. It was clear that this article would prevent people from expressing their views and adversely affect fundamental individual rights.

The HKSAR government attempted to pass Article 23 but finally stepped down after people took to the streets in protest on 1 July 2003. It was estimated that over 500,000 people took to the streets to oppose Article 23. The HKSAR government had underestimated the level of public anger over the issue. After the anti-Article 23 rallies, the government called for an urgent meeting to deal with the issue and proposed amendments to Article 23⁸¹. Consequently, the Bill failed to pass into the

⁷⁹ http://rthk.hk/rthk/news/expressnews/20120320/news_20120320_55_827333.htm

⁸⁰ Article 23 of BL stated that the HKSAR shall enact laws on its own to prohibit act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political establishing ties with foreign political organizations or bodies.

⁸¹ Chief Executive's transcript on Basic Law Article 23 (5 July 2003). SAR government decided to introduce further amendments as follows:

- (1) Delete the provision regarding a local organization subordinate to a mainland organization which has been proscribed by the Central Authorities.
- (2) Introduce "public interest" as a defense for unlawful disclosure of certain official information, in

law on the Second Reading because the CE no longer had enough votes to push through the Bill through LegCo⁸².

In the same year, thousands of people took to the streets to protect and request a timetable for the introduction of universal suffrage. The Chief Executive, (except the first CE⁸³) was elected by a 800-member Election Committee together with an Appointing Committee. In 1996⁸⁴, the first Chief Executive was elected by a 400-member Selection Committee. Pro-democratic members of LegCo believed that Universal Suffrage was needed to maintain the rule of law in Hong Kong and protect human rights. In 1995, the United Nation Human Rights Committee said⁸⁵ that the LEGCO functional constituency elections did not meet the requirement of Articles 2 (1)⁸⁶, 25⁸⁷ and 26⁸⁸ of the ICCPR, and that this form of election should be abolished

order to protect and alleviate the concerns of the public, particularly those of the media.

- (3) Delete the provision which confers on the police a power to search without court warrant in the exercise of their emergency investigation powers.

⁸² Chief Executive's transcript, Press Release, 9.7.2003.

(<http://www.info.gov.hk/gia/general/200307/09/0709268.htm>)

⁸³ At the Third Session of The Seventh NPC on 4 April 1990 (Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the HKSAR, it revealed that the first-term of CE was selected by a 400-member selection committee.

⁸⁴ Decision of the NPC on the Method for the formation of the first government and the first Legislative Council of HKSAR, adopted at the third Session of the Seventh National People's Congress on 4 April, 1990.

⁸⁵ The Committee is aware of the reservation made by the United Kingdom that article 25 does not require establishment of an elected Executive or Legislative Council. It however takes the view that once an elected Legislative Council is established, its election must conform to article 25 of the Covenant. The Committee considers that the electoral system in Hong Kong does not meet the requirement of article 25, as well as articles 2 [on non-discrimination], 3 [on gender equality] and 26 [on equal protection of the law] of the Covenant. It underscores... the concept of functional constituencies, which gives undue weight to the views of the business community. Discriminates among voters on the basis of property and functions. This clearly constitutes a violation of articles 2, paragraph 1, 25(b) and 26. it is also concerned that laws depriving convicted persons of their voting rights for periods of up to 10 years may be a disproportionate restriction of the rights protected by article 25... The committee recommends that immediate steps be taken to ensure that the electoral system be put in conformity with article 21, 22 and 25 of the Covenant. (see U.S. Senate Committee on Foreign Relations Hearing on "Democracy In Hong Kong". 4 March 2004.

⁸⁶ Article 2(1) of ICCPR reads as Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁸⁷ Article 25 of ICCPR reads as Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal

and replaced by a Universal Suffrage system.

Hong Kong's functional constituency elections were an unfair and unacceptable system. The members of functional constituencies were professionals and special interest groups. Only members of the functional constituencies were qualified to be nominators in the election of the Chief Executive. The abolition of the functional constituencies was necessary if democracy was to be developed in Hong Kong in the future.

Hong Kong's electoral system remains partly democratic. The vast majority of Hong Kong people are eager to develop democratic institutions in the future and support universal suffrage. They expected that both the election of the Chief Executive in 2007 and of LegCo in 2008 would be by Hong Kong people via one-person-one-vote direct elections. They believed that a democratic political system could protect their basic human rights and freedom, promote local autonomy and protect judicial integrity. Various democratic parties began to request a timetable for universal suffrage from the HKSAR government and claimed that there was needed to hold democratic elections in accordance with Articles 45⁸⁹ and 68⁹⁰ of the BL.

Even though it was enshrined in the BL, Hong Kong did not enjoy universal suffrage. It is believed that Central government did not intend to allow Hong Kong to have democracy, on the basis that it would damage Hong Kong's and China's economy once introduced. In 2003, the argument focused on when and how the Chief

suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the elections;

(c) To have access, on general terms of equality, to public service in his country.

⁸⁸ Article 26 of ICCPR reads as All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁸⁹ Article 45(2) of BL stated that the method for selections the Chief Executive shall be specified in the light of the actual situation in HKAR and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with the democratic procedures.

⁹⁰ Article 68(2) of BL stated that the method for forming the Legislative Council shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.

Executive and LegCo should be elected by universal suffrage by virtue of Articles 45⁹¹ and 68⁹² of the BL.

These articles did not lay out the schedule for choosing a new Chief Executive. On 26 April 2004⁹³, the NPCSC refused to consider Hong Kong people's expectation for Universal Suffrage and ruled out general elections in 2007 and 2008.

The amendments provided that:-

1. The phrases “subsequent to the year 2007” and “after 2007” stipulated in the two above-mentioned Annexes include the year 2007;
2. ...“if there is a need” to amend the method for selecting the Chief

⁹¹ Article 45 of the Basic Law states that: -

“The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government. The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures. The specific method for selecting the Chief Executive is prescribed in Annex I: Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region”.

⁹² Article 68 of the Basic Law also states that: -

“The Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election. The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage. The specific method for forming the Legislative Council and its procedures for voting on bills and motions are prescribed in Annex II: Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures”.

⁹³ NPCSC Decision on issues concerning the methods for selecting the Chief Executive of the Hong Kong Special Administrative Region in 2007 and for forming the Legislative Council in 2008 on 26 April 2004.

Executives for the terms subsequent to the year 2007 or the method for forming the Legislative Council... they may be amended or remain unamended;

3. ...any amendment must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive and shall be reported to the Standing Committee of the National People's Congress for approval...;
4. If no amendment is made to the method for selecting the Chief Executive, the method for forming the Legislative Council...Annex I will still be applicable to the method for selecting the Chief Executive ...Annex II will still be applicable to the method for forming the Legislative Council⁹⁴

The further amendments provided that:-

1. The election of the third Chief Executive of the Hong Kong Special Administrative Region to be held in the year 2007 shall not be by means of universal suffrage. The election of the Legislative Council of the Hong Kong Special Administrative Region in the fourth term in the year 2008 shall not be by means of an election of all the members by universal suffrage....;
2. ...the principle of gradual and orderly progress may be made to the specific method for selecting the third Chief Executive of the Hong Kong Special Administrative Region in the year 2007 and the specific method for forming the Legislative Council of the Hong Kong Special Administrative Region in the fourth term in the year 2008...⁹⁵

⁹⁴ The Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Eighth Session of the Standing Committee of the Tenth National People's Congress on 6 April 2004.) Instrument 18.
<http://www.basiclaw.gov.hk/en/basiclawtext/index.html>

⁹⁵ Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the HKSAR in the Year 2007 and for Forming the Legislative Council of the HKSAR in the Year 2008 (Adopted at the Ninth Session of the "Standing Committee of the Tenth National People's Congress on 26 April 2004) Instrument 19.
<http://www.basiclaw.gov.hk/en/basiclawtext/index.html>

Hong Kong Human Rights Monitor criticized the decision of the NPCSC, claiming that “Universal Suffrage is betrayed”⁹⁶. The Democratic Party was deeply concerned that the interpretative powers of those provisions by the NPCSC would affect the scope of Hong Kong’s autonomy (Art. 2)⁹⁷ and control the constitutional development of the HKSAR. This interpretation of the law was extraneous and irrelevant to the power of the HKSAR courts but affected the political system and human rights. Pan-democrat groups argued that the NPCSC had exercised its power to interfere in Hong Kong’s autonomy again.

The Term of the New Chief Executive in 2005

In 2005, there was a different dispute over the office of Chief Executive. This concerned the term of the New CE to be served by the Chief Executive after the original Chief Executive, Tung Chi Hwa, resigned on 10 March 2005 – his term of office should have run until 2007. There were two different views on the length of term which should be served by the incoming CE. The Pan-democratic camp and local legal professionals argued that the term should follow Article 46⁹⁸, which says that the term of office of the Chief Executive of the HKSAR shall be five years. By contrast, legal experts from the mainland argued that the term of the next elected CE should be the remainder of the term of the original CE. The BL did not mention whether a CE replacement should serve the remaining term or not.

On 12 March 2005⁹⁹, the HKSAR government decided that the new CE would serve the remainder of the original term and indicated that the mainland experts had given good advice. On 15 March 2005¹⁰⁰, Ms Elsie Leung, Secretary for Justice, told legislators in a LEGCO meeting that the HKSAR government made this decision. On 6 April 2005¹⁰¹, acting Chief Executive Donald Tsang sought an interpretation from

⁹⁶ HKHRM statement: Universal Suffrage is betrayed on 26 April 2004.

⁹⁷ The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.

⁹⁸ Art. 46 of BL stated that the term of office of the Chief Executive of the HKSAR shall be five years, He or She may serve for not more than two consecutive terms.

⁹⁹ Statement by the Secretary for Justice on the Term of the New Chief Executive on 12 March 2005.

¹⁰⁰ Statement by the Secretary for Justice on the Term of the New Chief Executive on 15 March 2005.

¹⁰¹ Why the government must seek an Interpretation of BL 53(2) from the NPCSC by Elsie Leung, Secretary for Justice on 6 April 2005.

the Standing Committee subject to the Articles 45¹⁰² and 53¹⁰³, and on 27 April 2005, the NPCSC ruled that under Annex 1 of the BL, the new Chief Executive should serve the remaining term of the previous CE, i.e. 2 years not 5.

In support of her argument, Leung cited two authorities¹⁰⁴ as the leading works on common law statutory interpretation. These included *Francis Bennion's Statutory interpretation*: -

“The sole object in statutory interpretation is to arrive at the legislative intention.”¹⁰⁵

It was argued that the legislation was ambiguous. It was necessary to consider what was intended purpose of the legislation when the legislation was passed. Discovering the purpose at the time of the legislative process could help determine the intended meaning of the law. In the case of *Director of Immigration v Chong Fong-yuen*, the CFA had ruled that, in ascertaining the legislative intention of the BL, the courts should act as follows:-

“Their duty is to ascertain what was meant by the language used and to give effect to the legislative intent as expressed in the language....Whilst the courts must avoid a literal, technical, narrow or rigid approach, they cannot give the language a meaning which the language cannot bear. ...To assist in the task of interpretation of the provision in question, the courts consider what is within the

¹⁰² Art. 45 of BL states that the specific method for selecting the Chief Executive is prescribed in Annex I: “Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region”.

¹⁰³ Art. 53 states that in the event that the office of Chief Executive becomes vacant, a new Chief Executive shall be selected within six months in accordance with the provisions of Article 45 of this Law. During the period of vacancy, his or her duties shall be assumed according to the provisions of the preceding paragraph.

¹⁰⁴ Department of Justice responses to Law Society, press release on 1 April 2005.

¹⁰⁵ Elise Leung cited Lord Denning’s criticism that ‘[European judges] adopt a method which they call in English by strange words- at any rate they were strange to me – the schematic and teleological method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose... behind it. When they come upon a situation which is to their minds within the spirit- but no the letter- of the legislation, they solve the problem by looking at the design and purpose of the legislature-at the effect it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with his situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly’. Francis Bennion's *Statutory Interpretation*, a Code (4th ed, 2002).

Basic Law, including provisions in the Basic Law other than the provision in question.”¹⁰⁶

Critics argued that the interpretation by the NPCSC on the proper term of office of the CE was an intrusion into the HK legal system and the ‘One Country Two Systems’ principle, and that it undermined the rule of law. The HKSAR government’s decision to seek an interpretation by the NPCSC was criticized by Legislative Councilors, the Hong Kong Bar Association and others. The Hong Kong Bar Association stated that the HKSAR government should not have sought an interpretation: -

“We fully acknowledge the NPCSC’s power to interpret the Basic Law, (but) the Bar is extremely disappointed with the circumstances which led to the request for an interpretation of Article 53 of the Basic Law by the NPCSC...We believe the matter is best left to the Court and therefore the Court should not be deprived of the chance to adjudicate on the matter.”¹⁰⁷

The Congo Case

Another constitutional issue arose again in 2011. The issue involved Hong Kong’s policy on state immunity. This was the first time that the CFA itself took the initiative to seek an interpretation from the NPCSC. In 2011, the CFA heard a case involving two states, namely the Democratic Republic of Congo (DRC) and China concerning an international agreement for a large-scale development project in Congo.¹⁰⁸ In the 1980s, Energoinvest, a Yugoslav company, entered into an agreement with the DRC to finance the cost of work in the Congo, namely a hydroelectric facility and high-tension electric transmission lines. The agreement contained ICC arbitration clauses. The Congo later defaulted on its repayment obligations. Energoinvest obtained two arbitral awards which were later purchased by FG Hemisphere Associates LLC (FG), an American company. In 2008, the China Railway parent and another Mainland company, Sinohydro Corporation Ltd, entered into a cooperation agreement with the Congo. Under the agreement, the Congo offered mining rights to China Railway and the Congo paid US\$221 million by the China Railway subsidiaries as part of the entry

¹⁰⁶ *The Director of Immigration v. Chong Fung Yuen*, reported in [2001] 2 HKLRD 533; (2001) 4 HKCFAR 211.

¹⁰⁷ Statement of the Hong Kong Bar Association, issued on 14 April 2005.

¹⁰⁸ *Democratic Republic of the Congo and others v. FG Hemisphere Associates LLC*, Reported in (2011) 14 HKCFAR 95; FACV 5/2010, 8.6.2011.

fee for the mining project in the Congo. Later, Energinvest applied to the CFI to have these fees paid as payment of the two arbitral awards. The CFI dismissed FG's application with costs¹⁰⁹. The CA reversed the CFI's decision¹¹⁰.

The case then proceeded to the CFA on the grounds that it involved a core question of law regarding the issue of state immunity. The question was whether state immunity was an absolute immunity or whether it was a restrictive immunity. The further question was whether the HKSAR courts were entitled to apply absolute or restrictive immunity? Were the HKSAR courts bound by sovereign immunity like China or was it bound to restrictive immunity under the common law. Another case, the *Cristina (1938)*¹¹¹, concerned a vessel possessed by the Spanish government. On 14th July 1937, the defendant (the Spanish Government) took possession of the *Cristina*, a ship flying the Spanish flag which was owned by the plaintiffs, a Spanish company carrying on the business of ship-owners at Bilbao. The vessel was to be used for non-commercial transactions. Lord Atkin and Lord Wright held that, based on the general principles of international law, a sovereign state was immune from the jurisdiction of the courts in another sovereign state. The DRC also requested that the CFA seek a re-interpretation of Articles 13(1)¹¹² and 19(3)¹¹³ of the BL.

Before the CFA judges could reach their ruling, China's Foreign Ministry issued three letters¹¹⁴ to different level of courts in Hong Kong. These stated Beijing's diplomatic stance on foreign affairs, that it was to enjoy the state immunity from suit, so that no foreign governments could be sued in the region's courts. The three letters set out for the courts China's current stance on foreign policy, especially the third OCMFA

¹⁰⁹ FG Hemisphere Associates LLC v. Democratic Republic of the Congo and others; [2009] 1 HKLRD 410; HCMP 928/2008, 12.12.2008.

¹¹⁰ FG Hemisphere Associates LLC v. Democratic Republic of the Congo and others, [2010] 2 HKLRD 66; CACV 373/2008, 10.2.2010.

¹¹¹ The *Cristina* (1938) AC 845; 1 All E.R. 719.

¹¹² Art. 13(1) of BL stated that the Central People's Government shall be responsible for the foreign affairs relating to the HKSAR.

¹¹³ Art. 19(3) of BL stated that the courts of HKSAR shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.

¹¹⁴ FACV No. 5-7/2010, paras 44,46 & 211., dd 8.6.2011.

letter¹¹⁵. China implied that the HKSAR courts were bound to apply a policy similar to China's stance on foreign affairs. These letters threatened to deprive the CFA of its interpretative power. If the CFA recognized that the Congo did not enjoy absolute immunity, China would interfere in Hong Kong's internal affairs and interpret the relevant provisions on its own, seriously harming judicial independence in Hong Kong.

On 8 June 2011, by a 3-2 majority verdict, the appeal dismissed and the CFA decided to seek a re-interpretation of Articles 13(1)¹¹⁶ and 19(3)¹¹⁷ of the BL from the NPCSC. On 30 June 2011¹¹⁸, the CFA sought an interpretation of the relevant provisions from the NPCSC in accordance with Article 158(3) of the BL. The NPCSC would be asked to determine four questions¹¹⁹ regarding state immunity and the relevant provisions.

¹¹⁵ The 3rd OCMFA Letter:

1....Therefore, the application in the HKSAR of a principle of state immunity that is not consistent with the position of China would obviously prejudice the sovereignty of China....

4. ...If the principle of 'restrictive immunity', which is not consistent with the principled position of the state on absolute immunity, were to be adopted in the Hong Kong Special Administrative Region, the states concerned may possibly adopt reciprocal measures to China and its property (which are not limited to the Hong Kong Special Administrative Region and its property), thus threatening the interests and security of the property of China abroad, as well as hampering the normal intercourse and co-operation in such areas as economy and trade between China and the states concerned.

5. The international community has been supporting the economic development of impoverished states and the improvement of the livelihood in these states through debt relief initiatives and assistance schemes.... certain foreign companies have acquired the debts of impoverished African states and profited from claiming those debts through judicial proceedings, thus adding to the financial burden of these impoverished states and hampering the efforts of the international community in assisting these states. (FACV No. 5-7/2010, para 211).

¹¹⁶ Art. 13(1) of BL provided that the CPG shall be responsible for the foreign affairs relating to the HKSAR.

¹¹⁷ Art. 19(3) of BL provided that the courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.

¹¹⁸ The Explanations on the Draft Interpretation of para 1, Article 13 and article 19 of the Basic Law of HKSAR of the People's Republic of China by the Standing Committee of the National People's Congress (Instrument 22). <http://www.basiclaw.gov.hk/en/basiclawtext/index.html>

¹¹⁹ The effect of the Interpretation is to answer the four questions referred by the Court as follows:

As to question (1): that on the true interpretation of Article 13(1), the CPG has the power to determine the rules or policies of the PRC on state immunity to be given effect uniformly in the territory of the People's Republic of China ("PRC").

As to question (2): that on the true interpretation of Articles 13(1) and 19, the courts of the HKSAR

This was first time the CFA had sought an interpretation. The NPCSC made the re-interpretation of the BL on 24 August 2011¹²⁰ in response to this request. The CFA's decision to execute its right to seek legal interpretation from the NPCSC, deprived it of its powers of final interpretation of the BL under Articles 19(1)¹²¹ and 80¹²² of the BL.

Moreover, the three-letters mentioned above were clearly intended to influence the decision of the court, directly affecting judicial independence in Hong Kong and Hong Kong's high degree of autonomy.

5.2 Conclusion

After the transfer of sovereignty, China has on several occasions interfered in the internal affairs of Hong Kong. Hong Kong is facing many problems and challenges, including the re-interpretation of the BL, human rights issues, problems with the political system and arguments about the scope of its autonomy. Controversial issues have arisen. This is because the BL is still unclear and ambiguous. In the *Ma* case, the CA's ruling highlighted the confusion in the division of interpretative powers between the two systems. It did not clarify the relationship between China and Hong

must apply and give effect to the rules or policies on state immunity determined by the CPG and must not depart from such rules or policies nor adopt a rule that is inconsistent with the same.

As to question (3): that the words “acts of state such as defence and foreign affairs” in Article 19(3) of the Basic Law include the determination by the CPG as to rules or policies on state immunity.

As to question (4): (i) that according to Articles 8 and 160 of the Basic Law, the laws previously in force in Hong Kong shall be maintained except for any that contravene the Basic Law; (ii) that according to paragraph 4 of the Decision of the SCNPC dated 23 February 1997 made pursuant to Article 160, laws previously in force which have been adopted as the laws of the HKSAR shall be applied as from 1 July 1997 subject to such modifications, adaptations, limitations or exceptions as are necessary to bring them into conformity with the status of Hong Kong after resumption of by the PRC of the exercise of sovereignty over Hong Kong, and to bring them into conformity with the relevant provisions of the Basic Law; (iii) that accordingly, the laws previously in force in Hong Kong relating to the rules on state immunity may continue to be applied after 1 July 1997 only in accordance with the aforesaid requirements; (iv) that in consequence, the laws previously in force concerning the rules on state immunity as adopted in the HKSAR must be applied as from 1 July 1997 subject to such modifications, adaptations, limitations or exceptions as are necessary to make them consistent with the rules or policies on state immunity that the CPG has determined. (Instrument 22).

¹²⁰ Instrument 22 above.

¹²¹ Art. 19(1) of BL stated that HKSAR shall be vested with independent judicial power, including that of final adjudication.

¹²² Art. 80 of BL stated that The courts of the HKSAR at all levels shall be the judiciary of the Region, exercising the judicial power of the Region.

Kong but deprived the HKSAR courts' power to interpret the law. Furthermore, it diminished the prestige of the HKSAR courts and broke the 'One Country Two Systems' principle.

In the ROA cases, the CFA gave a judgment which was overruled by the NPCSC. This – and the HKSAR government's decision to seek such an interpretation - infringed on judicial independence and raised the issue of confrontation between the NPCSC and the HKSAR courts. The *flag* case also restrained or restricted an individual's liberty. The successful implementation of human rights obligations requires that the rule of law is upheld. The rule of law is a system of rules that can restrict discretionary power. Since 1997, China has infringed existing constitutional principles and the rule of law, undermining the autonomy of the HKSAR courts and judicial independence.

Chapter Six

Conclusion

Since 1997, Hong Kong has been governed according to the principle of ‘One Country Two Systems’, proposed by Deng Xiaoping. This means that Hong Kong will retain its capitalist system and have a high level of autonomy; the promise was of ‘Hong Kong people ruling Hong Kong’. The policy of ‘One Country Two Systems’ was enshrined in the BL. As mentioned in the previous chapter, however, the BL remains unclear and has given rise to several controversial issues, including the re-interpretation of the BL, the *ROA* case and the deprivation of fundamental human rights. The constitutional disputes are mainly due to the unsuccessful implementation of the ‘One Country Two Systems’ policy, the interaction of the two different legal systems, the vague terminology of the BL, the unclear relationship between China and Hong Kong, and the incompetence of the government in dealing with these disputes. These ambiguities and the vague terminology of the BL have led to a constitutional crisis. Hong Kong does not have a mechanism to resolve the relevant legal issues. It has become more difficult to maintain the rule of law and judicial independence.

The interpretations of the BL by the NPCSC have provided a channel for the exercise of greater influence by China over the Hong Kong legal system. Hong Kong people worry about China’s interference in Hong Kong’s local affairs, especially about how this affects their high degree of autonomy, fundamental human rights and freedoms, the power of final adjudication of HKSAR courts, the independence of the judiciary and the rule of law. Hence, they have gradually lost confidence in Hong Kong’s future.

6.1 The Power of Interpretation of the Basic Law

The constitutional arrangements of Hong Kong are enshrined in the BL. Under the BL, the ‘One Country Two Systems’ principle is implemented in Hong Kong. This allows Hong Kong to maintain its existing capitalist system and preserves the English common law system. But it is unclear who has the power to interpret and amend the BL. On the exercise of interpretative power, a formal procedure is set out in Article 158 of BL. But Article 158 is an extremely complicated provision. Under this article, the interpretative power shall be vested in the NPCSC and the HKSAR courts. As Sir Anthony Mason has said:-

“... a link between the courts of the Region and the institutions of the People’s Republic of China is required. In a nation-wide common law system, the link would normally be between the regional courts and the national constitutional courthowever, there are not only two different systems, but also two different legal systems. In the context of “one country, two systems”, art.158 of the BL provides a very different link. That is because the article, in conformity with art.67 (4) of the PRC Constitution, vests the general power of interpretation of the BL, not in the People’s Supreme Court or the national courts, but in the NPCSC.”¹

According to Article 158 (1), the interpretative power vests in the NPCSC but the HKSAR courts are authorized by the NPCSC to interpret the law under Article 158(2), and Article 158 (3)² except the external matters such as defence and foreign affairs. Actually, Article 158 gives rise to uncertainties and confusion. Hong Kong exercises a high degree of autonomy and enjoys executive, legislative and independent judicial power (except in foreign matters) under the policy of ‘One Country Two Systems’. If the CFA has no power to interpret the BL at all, it means that Hong Kong has in effect to adopt the Chinese legal system instead of common law tradition. Under the common law system, independent and impartial courts play an important role. They ensure that the laws are being applied in particular cases properly. Hence, the courts have the power of interpretation, including that of final adjudication. The CFA is the final appellant court of the HKSAR. The power to seek interpretation vests in the CFA.

However, the NPCSC stresses that it has the power to interpret the law under Article 67(4)³ of the PRC constitution. This article has been adopted by the NPCSC as a national law of China. However, Article 18(2) of the BL says that ‘national laws shall not be applied in the Region’. In addition, the NPCSC is a political authority in China and the procedure for interpretation of laws is based upon political procedures. The NPCSC is a political not a judicial body. Its intervention in the internal affairs of

¹ Lau Kong Yung (1993) 3 HKLRD 778 at 820.

² Article 158 (3) provides that the SAR courts may also interpret other provisions of this Law in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the CPG or concerning the relationship between the Central Authorities and the Region, and if such judgment will affect the judgment on the cases, the court of the Region shall, before making their final judgment which are not appealable, seek an interpretation of the relevant provisions from the NPCSC...

³ Art. 67(4) of the PRC Constitution states that the NPCSC exercises the functions and powers to interpret statutes.

Hong Kong undermines judicial independence and the principle of ‘One Country Two Systems’.

Who has the power to interpret the Basic Law?

The Chinese government has exercised its power to interpret the BL for four times since 1997, namely, in the ROA case, on the timetable for Universal Suffrage for the election of the Chief Executive in 2007 and the members of the Legislative Council in 2008, the Term of a New Chief Executive after the resignation of the original Chief Executive in 2005, and the Law of Sovereign Immunity in the 2010 *Congo* case. The first interpretation of the BL concerned the CFA’s decision in the *Ng Ka Ling* case. After the handing down of the judgment, different scholars from the two systems engaged in heated arguments. Mainland scholars argued that the judgment was inconsistent with the BL because it challenged the NPCSC’s acts and undermined the principle of ‘One Country Two Systems’. On 20 May 1999⁴, the HKSAR government sought an interpretation of the BL from the NPCSC since it had a legal obligation to report disputes or matters of public interest to the NPC under Articles 43⁵ and 48(2)⁶ of the BL. The second interpretation of the BL occurred in 2003. Democracy activists had by this time begun to fight for universal suffrage in the 2007 and 2008 elections. Article 45 of the BL states that:-

“The Chief Executive of HKSAR shall be selected by election or through consultations held locally...The ultimate aim is the selection of the CE by universal suffrage...”⁷

The BL promised Hong Kong a high degree of autonomy, including universal suffrage in local elections. The HKSAR government had not announced any timetable for implementing universal suffrage and the timetable for its introduction was still uncertain. To avoid controversial public debate, the NPCSC made an interpretation of

⁴ The Chief Executive’s Report to the State Council concerning the Right of Abode, 20.5.1999.

⁵ Art. 43 of BL states that:-

The Chief Executive of the HKSAR shall be the head of the HKSAR and shall represent the Region;
The Chief Executive of the HKSAR shall be accountable to the Central People’s Government and the HKSAR in accordance with the provisions of this Law.

⁶ Art. 48(2) of BL states that to be responsible for the implementation of this Law and other laws which, in accordance with this Law, apply in the HKSAR.

⁷ Art. 45 of BL.

the relevant article on its own on 6 June 2004. It was clear that the NPCSC was not going to allow Hong Kongers one man one vote for the Chief Executive elections in 2007. The interpretation gave rise to the claim that the NPCSC's interpretation had undermined the autonomy of Hong Kong.

The third interpretation of the BL occurred in 2005, when the CE resigned from his current post citing personal reasons. An argument arose as to whether the new CE should serve the remainder of the original CE's term of office or serve a new five-year term. Article 46 of the BL states that:-

“The term of office of the Chief Executive of HKSAR shall be five years. He or she may serve for not more than two consecutive terms.”⁸

The Basic Law gave no indication as to whether the replacement CE should serve a two-year term or a full five-year term after the resignation of former CE. The Pro-China camp claimed that the new CE should simply finish up the remaining two years of the former CE's term. In contrast, the Pro-democracy camp argued that he should serve the full five-year term. Eventually, the HKSAR government sought an interpretation from the NPCSC on 6 April.

The CFA's Power of Interpretation

In *Ng's* case, it was doubted whether the HKSAR courts had jurisdiction to interpret both Articles 22 and 24 of the BL or whether the CFA should have sought an interpretation from the NPCSC under Article 158 (3) of the BL. Under Article 158(3), the CFA should seek an interpretation from the NPCSC if the matters were the responsibility of the NPC. It is not clearly explained whether the issue under Articles 22 and 24 were the responsibility of the NPC. On the other hand, where the CFA did not seek an interpretation from the NPCSC, it was free to make its own interpretation according to the BL or the common law. Article 82 states that ‘the power of final adjudication of HKSAR shall be vested in the CFA’ and Article 158 (2) provides that ‘the CFA can deal with the case on its own’. These two articles clearly express the view that the CFA has the power to interpret the law. According to the common law principle, Sir Anthony Mason says:-

⁸ Art. 46 of BL.

“The power of adjudication (including the power of final adjudication) of disputes in accordance with legal norms is exercised by independent and impartial courts...the exercise of that power involves the authoritative interpretation and application of the law...or judge-made law...a judicial question which only the judicature has the power to decide finally and conclusively...is a fundamental element in the rule of law.”⁹

The CFA thus had the power of judicial interpretation, conferred on it by the BL and the common law principle.

Mason further concluded that:-

“Article 158(1), by vesting a free standing power of interpretation of the *BL* in the Standing Committee, marks departure from the separation of powers, in particular from the principle that independent and impartial courts are the institutional authority which interprets and applies the law; a court of final appeal with the power of final adjudication being the ultimate authority in that respect. The vesting of the power of binding interpretation of the *BL* in the Standing Committee enables a body external to the courts to impose its interpretation on the courts of the Region and, to that extent, limits what would otherwise be the power of final interpretation of the CFA.”¹⁰

It was true that the interpretative power of the BL vested in the NPCSC under the Article 158 (1) but it was limited by the Article 158 (3).

Ma CJ held that the CFA has a duty to make a reference under Article 158(3) of the BL if two conditions are satisfied:-

- (a) “the classification condition”: if the provisions of the BL in question
 - (i) concern affairs which are the responsibility of the Central People’s Government; or
 - (ii) concern the relationship between the Central Authorities and the HKSAR (provisions in (i) and (ii) being referred to as “the

⁹ The Rule of Law in the Shadow of the Giant: The Hong Kong Experience, The Hon Sir Anthony Mason AC KBE, Sydney Law Review 2011 (Vol 33:623).

¹⁰ The Rule of Law in the Shadow of the Giant: The Hong Kong Experience, The Hon Sir Anthony Mason AC KBE, Sydney Law Review 2011 (Vol 33:623) at p. 628.

excluded provisions”);

(b) “the necessity condition”: if the CFA in adjudicating the case needs to interpret the excluded provisions and the interpretation will affect the judgment on the case.¹¹

He further said that:-

“The seeking of an interpretation from the NPCSC in these circumstances is mandatory and it is the responsibility of the CFA. It is part of the Court’s ‘constitutional jurisdiction’”¹²

The NPCSC’s Power of Interpretation

As regards the power of the NPCSC, Article 67(4) of the PRC constitution states that the NPCSC is the highest organ of state power and enjoys supreme power to pass legislation. It can interpret any legislation and has the power to challenge any other state organ.

As mentioned above Article 67(4) was a national law and it is inappropriate to apply it to the HKSAR.

The NPCSC has the general power to interpret the BL under Article 158 (1). The power of interpretation of the BL shall be vested in the NPCSC, but Article 158 (3) states that ‘the NPC shall be responsible for the foreign affairs of Hong Kong’. The disputes which arose after 1997 were however domestic disputes between the two systems.

Articles 2, 19(1), 82, 85 and 158(2)(3) of the BL enable the HKSAR courts to interpret other provisions of the BL in adjudicating cases and to enjoy a high degree of autonomy. It seemed to promise that the power of interpreting the BL was vested in the CFA. The CFA only has to submit a judicial reference to the NPCSC for interpretation where the three criteria established under Article 158(3)¹³ apply. Even

¹¹ Vallejos Evangeline Bano, also Known as Vallegjos Evangeline B v. Commissioner of Registration and another, FACV Nos 19 & 20 of 2012, 25 March 2013, at para. 105 (5); [2013] 2 HKLRD 533; (2013) 16 HKCFAR 45.

¹² FACV Nos 19 & 20 of 2012, 25 March 2013, at para 103 (4).

¹³ Art. 158(3) of BL states that is the provisions concerns affairs, which are the responsibility of the NPC or the relationship between the Central Authorities and the HKSAR; such interpretation will affect

then, under Article 159 (2) of BL, the NPCSC is required to obtaining the consent of two-thirds of LegCo and the CE. If it is no judicial reference from the CFA, under the common law and the BL the judges would still be able to interpret the law. However, the HKSAR government has sought interpretations from the NPCSC in under Articles 43 and 48(2) of the BL - or the NPCSC has interpreted on its own under Article 158 (1). The main purpose of these re-interpretations of the BL is to support the HKSAR government - that is, for political reasons rather than legal reasons. This undermines the independence of the judiciary and has had a negative impact on the HKSAR's autonomy and the rule of law.

6.2 The Impact of the NPCSC's Interpretation of the Basic Law

The ambiguous articles set out in the BL and these incidents of the re-interpretation have given rise to a heated debate between scholars of the two different systems. Mainland legal scholars and local scholars have different conceptions of interpretation, as revealed in the various cases discussed above. Some argue that if China interferes in this way with local affairs, it will affect the HKSAR's high degree of autonomy, deprive people of their human rights, undermine the power of final adjudication of the HKSAR courts, break the rule of law and infringe judicial independence.

On the other hand, those in favour of these re-interpretations of the BL say that this shows that the BL is flexible. Seeking an NPCSC interpretation has the obvious advantage of being a quicker and simpler the procedure for changing the law than amending the BL interpretation under the Article 159 (2)¹⁴.

The Effects of a High Degree of Autonomy

After the handover, there was an opportunity for the HKSAR government to show the world that Hong Kong enjoyed a high degree of autonomy under Articles 3(2)(3) of the Joint-Declaration¹⁵ and Article 2 of the BL¹⁶. Hannum and Lillich point out that:-

the judgment in the case; and the court's final judgment is not appealable.

¹⁴ Art. 159 (2) of BL provided that the power to propose bills for amendments to this Law shall be vested in the Standing Committee of the National People's Congress, the State Council and the HKSAR. Amendment bills from the HKSAR shall be submitted to the NPC by the delegation of the Region to the NPC after obtaining the consent of two-thirds of the deputies of the Region to the NPC, two-thirds of all the members of the Legislative Council of the Region and the Chief Executive of the Region.

¹⁵ Art. 3(2) of the Joint-Declaration 1984 provides that the HKSAR will be directly under the authority of the CPG. The HKSAR will enjoy a high degree of autonomy, except in foreign and defence affairs

“Autonomy and self-government are determined primarily by the degree of actual as well as formal independence enjoyed by the autonomous entity in its political decision-making process. Generally autonomy is understood to refer to independence of action on the internal or domestic level as foreign affairs and defence normally are in the hands of the central or national government, but occasionally power to conclude international agreements concerning cultural or economic matters also may reside with the autonomous entity.”¹⁷

To fulfill the principle of autonomy, Hong Kong was permitted internal self-government and an independent judicial system. However, the Hong Kong CE is elected by an unrepresentative election body and appointed by the NPC, is responsible to the NPC, and carries out the instruction of the NPC. Pursuant to Article 158(2)¹⁸ of the BL, the HKSAR courts are authorized by the NPCSC to interpret the BL on their own, but the NPCSC has used its authority to interpret the law directly, and the CE has invited it to do so. This has had an adverse influence on the high degree of autonomy of Hong Kong.

The Deprivation of Human Rights

Human Rights are commonly understood as those rights and fundamental freedoms that all human being are equally entitled to, including freedom of expression and equality before the law. John Locke said that:-

“People have rights, such as the right to life, liberty, and property, that have a foundation independent of the laws of any particular society...that men are naturally free and equal as part of the justification for understanding legitimate political government as the result of a social contract where people in the state

which are the responsibilities of the CPG.

Art. 3(3) of Joint-Declaration 1984 provides that the HKSAR will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in HK will remain basically unchanged.

¹⁶ Art. 2 of BL provides that the NPCSC authorizes the HKSAR to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.

¹⁷ Hurst Hannum and R Lillich, ‘The Concept of Autonomy in International Law’, AJIL, Vol 74, ISS 4 (Oct 1980) at p. 860.

¹⁸ The NPCSC shall authorize the courts of the SAR courts to interpret on their own, in adjudicating cases, the provisions of this Law which are within limits of the autonomy of the Region.

of nature conditionally transfer some of their rights to the government in order to better ensure the stable, comfortable enjoyment of their lives, liberty, and property. Since governments exist by the consent of the people in order to protect the rights of the people and promote the public good, governments that fail to do so can be resisted and replaced with new governments.”¹⁹

In Hong Kong, Article 39 of the BL provides that:-

“The provisions of the ICCPR, the ICESCR, and International Labour Convention applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”²⁰

In the *R v. Sin Yau Ming*, Silke, V-P held that:-

“In my judgment, the glass through which we view the interpretation of the Hong Kong Bill is a glass provided by the Covenant. We are no longer guided by the ordinary canons of constructions of statutes nor with the dicta of the common law inherent in our training. We must look, in our interpretation of the Hong Kong Bill, at the aims of the Covenant and give full recognition and effect to the statement which commences that Covenant. From this stems the entirely new jurisprudential approach to which I have already referred.”²¹

In some circumstances, Hong Kong persons have been deprived of their personal liberty by the use of arbitrary powers, exercised through improper procedures or unlawful arrests. Such persons can (and have) sue the government for the infringement of his/her civil rights and freedoms using judicial review. In the *ROA* case in 1999, Article 24(2)(3)²² of the BL provided that Chinese citizens who qualified for permanent residence in Hong Kong and were eligible for settling down

¹⁹ 1689, *Two Treatises of Government*, P. Laslett (ed.), Cambridge: Cambridge University Press, 1988.

²⁰ Art. 39 of BL.

²¹ *R.v Sin Yau Ming*, CACC No. 289/1990, 30.9.1991 at p. 17.

²² Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2).

in Hong Kong. CFA held that Amendment (No. 2) (No. 3) of Immigration Ordinance were inconsistent with Article 24(2)(3) of the BL. The HKSAR government ignored the CFA's judgment, infringing the Chinese citizens' human rights.

Undermining the Power of Final Adjudication of the HKSAR courts

The power of final adjudication is a key part of the legal system. Judicial powers shall normally be vested in courts under the common law system and the BL. Under the common law principle, 'the exercise of the power of final interpretation by the courts is a fundamental element in the rule of law, the power shall be vested in another body destructive of the rule of law'²³.

In Hong Kong, judges have the authority to judicially interpret the law during proceeding, including the power of final adjudication subject to the Article 19(1)²⁴ and 158(3) of the BL. However, when the defendants in the *Ma* case challenged the survival of the English common law after 1997, the legality of the Provisional Legislative Council (PLC) and the jurisdictions of the HKSAR court, the CA, whilst affirming that the laws previously in force in Hong Kong, including the common law, had been adopted as the laws of the HKSAR, that the PLC was lawfully established, stated that the HKSAR courts had no jurisdiction to examine the consistency of any legislative acts or any acts passed by the NPCSC²⁵.

In the absence of proper procedures and mechanisms for dealing with the vague terms of BL, the NPCSC has the opportunity to interfere in our domestic affairs and the relationship between China and Hong Kong is getting worse. In the absence of the rule of law, there are no binding laws or rules to define what is or is not a fair trial.

²³ The Rule of Law in the Shadow of the Giant: The Hong Kong Experience, The Hon Sir Anthony Mason AC KBE, Sydney Law Review 2011 (Vol 33:623), at p. 625.

²⁴ Art. 19(1) of BL provides that the HKSAR shall be vested with independent judicial power, including that of final adjudication.

²⁵ The Court of Appeal held that:-

"The HKSAR courts cannot challenge the validity of the NPC Decisions or Resolutions or the reasons behind them which set up the Preparatory Committee. Such decisions and resolutions are the acts of the Sovereign and their validity is not open to challenge by the regional courts...Nor, in my view, can the HKSAR courts examine why the Preparatory Committee set up the Provisional Legislative Council in exercising the authority and powers conferred on its by the NPC to carry out the Sovereign's decisions and resolutions."

(HKSAR v. Ma Wai-kwan David & others,(Reservation of Question of Law No. 1/1997) at p. 24)

This undermines the power of final adjudication of the HKSAR courts and limits their ability to check the exercise of arbitrary power.

Infringing the Rule of Law

The HKSAR government has a positive duty to step in to ensure that human rights and freedoms are protected and promoted. If the HKSAR government itself has breached these rights, set out in the BL, CE will be liable to compensate individuals for this breach. The rule of law is defined by Lord Bingham as follows:-

“All person and authorities within the State...should be bound by and entitled to the benefit of laws publicly made taking effect (generally in the future) and publicly administered by the courts.”²⁶

In general, the rule of law requires a stable system with clear legal norms. Laws should not be obscure. There should be a right to a fair trial. Judicial independence should be respect by everyone, including the HKSAR government.

I have argued that the NPCSC interpretations of the BL contradict the rule of law. The interpretation of the BL sought by the HKSAR government is subject to political elements.. Likewise, the NPCSC is a highest organ of state. It is not a court of final adjudication. Hence, the interpretation of the law by the NPCSC breaks the rule of law.

Does the NPCSC’s interpretation of the Basic Law infringe the Independence of the Judiciary in Hong Kong?

Judicial independence is associated with the rule of law and the separation of powers. According to Karlan “Judges must be both free from certain kinds of pressures or influences and free to envision and realize certain goals.”²⁷ The Courts are responsible for resolving disputes between states and individuals or between different branches of government. Judges exercise their judicial duties to rule against the government’s

²⁶ Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 6-7; *The Rule of Law in the Shadow of the Giant: The Hong Kong Experience*, The Hon Sir Anthony Mason AC KBE, *Sydney Law Review* 2011 (Vol 33:623), at p. 624.

²⁷ See Pamela S Karlan, ‘Two Concepts of Judicial Independence’, *Southern California Law Review*, v 72 no2/3 (Jan/Mar 1999) at p. 535-558.

abuse of power. They are independent from any improper influence, including political influences.

When the CFA handed down its judgment in the *Ng* case, the HKSAR government failed to implement the CFA's judgment. It intended to get the judgment reversed by the NPCSC. However, its behavior breached of the rule of law, the high degree of autonomy and the judicial independence. Margaret Ng, a local legal scholar, said:-

“You call this an exercise in interpretation. We cannot agree. Articles 22(4) and 24 of the BL have already been interpreted by the CFA. What you are seeking is clearly of the same provisions to be interpreted again by the NPCSC. This is a reinterpretation. You should call a spade a spade.”²⁸

The government submitted a report to the NPCSC on the grounds that the CFA's interpretation was not consistent with the legislative intent of the relevant provision, claiming that it was under a legal obligation to ensure that the law is lawful. This was contrary to the common law view based largely on judge-made law. Under the common law, where there was some ambiguity or vagueness in the words of the statute, it was left to the judges to resolve the matter. As the US Supreme Court has explained:

“[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”²⁹

[w]hen the words of a statute are unambiguous, then, this first canon is also the last: `judicial inquiry is complete. Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another.”³⁰

A re-interpretation of the BL by the NPCSC would affect the judicial interpretative power of the CFA and the common law system. In addition, the government sought assistance from the NPCSC under Article 67(4) of the PRC constitution. This article

²⁸ An Open Letter to the Security for Justice, Margret Ng and others, 7 June 1999.

²⁹ *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992)

³⁰ *Estate of Bell v. Commissioner*, 928 F.2d 901, 904 (9th Cir. 1991).

vested interpretative power in the NPCSC, but it raised considerable doubts about the BL. The BL was the HKSAR's main constitutional document. It stipulated that the power of interpretation belonged to the NPCSC and the HKSAR under Article 158. If the common law was incorporated into the national law, it would put the CFA in a worse position and undermine the 'One Country Two Systems' formula.

6.3 The Major Causes of the Disputes

Pre-1997, the legal system in Hong Kong was principally based on English common law and Hong Kong had a well established rule of law, transparent regulations and an independent judiciary. After handover, Hong Kong retained its common law system. The "One Country Two Systems" principle means that there are two distinct legal systems, namely, the common law and socialist civil law systems. The two systems are in conflict and inconsistent. The NPC is an organ of supreme power. Its duties and responsibilities consist of formulation of laws and the power of law enforcement. The judicial branch cannot make any legislation through court proceedings and has no powers of judicial interpretation. This is a significant difference between these two legal systems.

Most Chinese judges are elected from amongst the military or court clerks. They are poorly qualified legally. They do not have the authority to interpret the laws. If Articles are unclear, the NPCSC will interpret the law. Under the common law system, judge in Hong Kong are appointed by an independent's Judicial Studies Board. They have a duty to enforce and interpret the laws when Articles are ambiguous. In the case of *Pepper v Hart (1993) AC 593*, Lord Griffiths said that:-

“If the language proves to be ambiguous...if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. ”

Hence, it understood that the courts are vested with the authority to interpret the law and clarify any vague terms and concepts. They can look into the legislative materials to ascertain the purpose and background of legislative enactments. This information can help them to identify and understand how to implement and resolve any vague

words. But in China, the NPCSC has the final authority to interpret the laws and does so without the guidance of any such legal principles. This becomes a problem for interpreting the BL. First of all, it is necessary to clarify whether the Chinese constitution will apply in Hong Kong. If so, it needs specific every detail in applying the Chinese constitution. Unfortunately, Hong Kong does not have any constitutional mechanism to resolve disputes or access to any documents from the legislative or drafting stage of the BL to assist with its interpretation.

The legal relations between the two systems are also different and separated. Hong Kong bases upon the English common law and mainland China belongs to the civil law tradition. The two major legal traditions are quite different as regards legal principles and legal reasoning (Chinese judges do not give reasons).

Hong Kong has no mechanism to deal such differences and issues. One possible solution is that China and Hong Kong make a clear distinction between their roles and responsibilities. Although the NPCSC has the authority to interpret the laws under the Article 158(1), it does not mean that the NPCSC should always exercise its power to interfere in Hong Kong's internal affairs. Internal affairs should be left to the HKSAR courts to deal with. Hong Kong judges are well-trained and highly qualified. They have accumulated the knowledge and experience to resolve the issues. Such a move would guarantee judicial independence in Hong Kong and also maintain the rule of law. Furthermore, it would avoid conflicts between the NPCSC and the HKSAR courts.

Mutual trust is also of utmost importance for the justice system. In the legal system, mutual trust is vital. Hence, it is necessary to form a constitutional committee to handle constitutional issues between Hong Kong and China. The members of the committee should be legal experts from China and Hong Kong. They have different legal backgrounds and work in different legal environments but this will enable them to hammer out the disputes.

Such a committee can act as a Mediator when disputes and be responsible for collecting the opinions of the general public so as to fully reflect public opinion to the NPCSC, achieving better communication between the two legal systems.

The Basic Law Committee has primary responsibility for implementing the Basic Law in Hong Kong but is unsuitable as a mediator because its members are pro-Beijing loyalists accountable to the NPC, who perform a political function.

On 6 October 2012, Elsie Leung, a member of the Basic Law Committee, criticized the judges in the *Ng Ka Ling* case:

“She said that the legal profession in Hong Kong, including judges, had a poor understanding of and misunderstood the Central-HKSAR relationship and further said that if the judges had the correct and necessary understanding, mistakes would not have been made.”³¹

In response to Elsie Leung’s statement, the HKBA replied that:-

“It is well-established that the interpretation of BL in the HKSAR is a task entrusted by BL to the Courts of the HKSAR and to be exercised independently. The HKBA re-iterates that Judicial Independence is an indispensable and most important facet of the application and adherence of the Rule of Law in Hong Kong. The Judiciary of the HKSAR is locally and internationally renowned, recognized and respected for its independence, integrity, ability, credibility and transparency. Any act which interferes, or which may be perceived as interfering, with the independence of the Judiciary in Hong Kong must be viewed with great circumspection even if otherwise within the letter of the law.”³²

On 5 November 2012, Alan Woo, a chairman of Basic Law Research Center, said that “The judge should not hold foreign nationality.”³³ In response to this, Rimsky Yuen, the Secretary for Justice said that:-

“Article 92 of BL, judges and other members of the Judiciary of HKSAR shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions. Article 82 also provides that the CFA may as required invite judges from other common law jurisdictions to sit on the CFA. Article 90 stipulates that the CJ of CFA and HC shall be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country”...Any proposal to impose nationality or

³¹ The Legal Challenges since the Handover, in the auspices of the Institute of Social Science of the Hong Kong College of Technology, Ms Leung Oi-sie, Elsie, 6 October 2012.

³² Statement of the Hong Kong Bar Association, 10.10.2012.

³³ Basic Law which power and balance, Alan Hoo, Senior Council, 5.11.2012.

residence requirements would unduly restrict the pool of talents that can be appointed as judges.”³⁴

An independent expert or experts could also be appointed by the courts to resolve the legal issues. It is a separate panel like an international tribunal. The persons could be selected from other common law countries, should have a legal background and a high level of expertise. Alternatively, retired judges could be appointed to work independently since they have the professional skills and knowledge to solve the issues.

6.4 The Future of Hong Kong

Hong Kong remains an executive-led government. The CE and the pro-Beijing loyalists hold power in ExCo and the LegCo. Hong Kong people are eager to democratically elect a government through one-person-one-vote but the situation is not optimistic. However, the timetable for universal suffrage in Hong Kong will begin in 2017/2020. The NPC insists that the candidates for election as CE must be patriotic and accountable to the NPC. A White Paper issued by the PRC’s State Council in June 2014 also described Hong Kong judges as ‘administrators who had to be patriotic’ i.e loving the country and loving the communist party. There is nothing in the judicial oath requiring a Hong Kong judge to be patriotic but patriotism is regarded as the compulsory responsibility of mainland judges, who are not expected to be neutral and impartial.

Hong Kong people became concerned that the White Paper would undermine judicial independence and the principle of ‘One Country Two systems’. In response the Hong Kong Bar Association said,

“The HKBA repeats that respect for the rule of law (as understood in Hong Kong and the community of civilized nations) means far more than merely “Doing things according to law” or “Governing according to law”. It includes proper self-restraint in the exercise of power in a manner which gives proper weight and regard to the importance of the independence of the judiciary”³⁵.

³⁴ Statement by Secretary for Justice, 6 November 2012.

³⁵ White Paper on the Practice of “One Country, Two Systems” Policy in the Hong Kong Special Administrative Region, Hong Kong Bar Association, 11.6.2014.

Hong Kong lawyers, legal scholars and law students took part in a silent march, in which they all wore black, against the White Paper. They were demonstrating their support for judicial independence. The legal system in Hong Kong today has been interfered with by the Central government so much that it is difficult for judicial independence to survive.

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