

# “APRES MOI LE DELUGE”? JUDICIAL REVIEW IN HONG KONG SINCE BRITAIN RELINQUISHED SOVEREIGNTY

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## INTRODUCTION

One of the burning questions stemming from China's promise that the Hong Kong Special Administrative Region (HKSAR) would enjoy a "high degree of autonomy" is whether the HKSAR's courts would have the authority to review issues of constitutional magnitude and, if so, whether their decisions on these issues would stand free of interference by the People's Republic of China (PRC). The Sino-British Joint Declaration of 1984 promulgated in PRC law and international law a guaranty that implied a positive answer to this question: "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."<sup>1</sup> The PRC further promised in the Joint Declaration that the "[j]udicial power" that was to "be vested in the courts" of the SAR was to be exercised "independently and free from any interference."<sup>2</sup> The only limit upon the discretion of judicial decisions mentioned in the Joint Declaration was "the laws of the Hong Kong Special Administrative Region and [to a lesser extent] precedents in other common law jurisdictions."<sup>3</sup>

Despite these promises, however, most of the academic and popular discussion about Hong Kong's judiciary in the United States, and much of it in Hong Kong, during the several years leading up to the reversion to Chinese sovereignty, revolved around a fear about its decline after the reversion.<sup>4</sup> The

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1. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, U.K.-Ir.-P.R.C., §III. An English version can be found in *PUBLIC LAW AND HUMAN RIGHTS: A HONG KONG SOURCEBOOK* 45, 49 (Andrew Byrnes et al. eds., 1993).

2. *Id.* at 49-50.

3. *Id.* at 50.

4. Several scholars in the United States predicted the demise of judicial review in Hong

source of concern was China's lack of respect for judicial independence and its predisposition against courts as enforcers of rights. Litigants may not challenge the constitutionality of legislation or administrative acts in the courts of the PRC and, under the Administrative Litigation Law, may under only limited circumstances challenge the legality of administrative acts in PRC courts. Only the National People's Congress (NPC) may interpret the PRC constitution.<sup>5</sup>

Britain's relative lack of concern for the people of Hong Kong in the years leading up to the transfer of sovereignty only compounded these fears. The British officials who governed Hong Kong during the last two decades of British colonial rule over the city did little to ensure that the PRC would maintain the scope of judicial review present in Hong Kong at the transfer of sovereignty. Nor did the United Kingdom do as much as it might have to include Hong Kong residents in the negotiations about the terms of the transition of power. The few dozen locals who participated in drafting the constitution for Hong Kong after the transfer were known to be carefully chosen by China's leaders, who considered loyalty to Beijing to be the paramount qualification for participation. Members of Hong Kong's

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Kong after June 30, 1997. See Jared Leung, *Concerns Over the Rule of Law and the Court of Final Appeal in Hong Kong*, 3 ILSA J. INT'L & COMP. L. 843 (1997); Ann D. Jordan, *Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region*, 30 CORNELL INT'L L. J. 335 (1997); David A. Jones, Jr. *A Leg to Stand On? Post-1997 Hong Kong Courts as a Constraint on PRC Abridgment of Individual Rights and Local Autonomy*, 12 YALE J. INT'L L. 250, 286-91 (1987); Donna Lee, Note, *Discrepancy Between Theory and Reality: Hong Kong's Court of Final Appeal and the Acts of State Doctrine*, 35 COLUM. J. OF TRANSNAT'L L. 175 (1997). In her excellent studies of constitutional freedoms in the Hong Kong SAR, Frances H. Foster sounded a pessimistic note about their survival and suggested that the court system would not be an ideal place to launch defenses of those freedoms. See Frances H. Foster, *Translating Freedom for Post-1997 Hong Kong*, 76 WASH. U.L.Q. 113, 143-45 (1998); Frances H. Foster, *The Illusory Promise: Freedom of the Press in Hong Kong, China*, 73 IND. L.J. 765, 791-95 (1998).

For some English-language publications in the popular media that expressed fears about the fate of Hong Kong's judiciary after the retroversion, see Ute Dickerscheid, *Fears of Legal Vacuum in Hong Kong After 1997*, DEUTSCHE PRESSE-AGENTUR; Louise do Rosario, *No Appeal: Court Snagged Between Hong Kong and China*, Apr. 2, 1995, FAR EASTERN ECONOMIC REVIEW, May 18, 1995, at 22. Peter Stein, *Is China Backsliding on Hong Kong Court? Reports Indicate Beijing May Want Final Decisions to be Less Final*, ASIA WALL ST. J., May 5, 1995, at 1. Edward A. Gargan, *Hong Kong Fears Unraveling of Rule of Law*, N.Y. TIMES, May 7, 1997, at A1; William H. Overholt, *Twelve Tips for the Markets*, NEWSWEEK, May 19, 1997, at 48-50.

5. See Administrative Litigation Law of the People's Republic of China (adopted at the Second Session of the Seventh National People's Congress on April 4, 1989, promulgated by Order No. 16 of the President of the People's Republic of China on April 4, 1989, and effective as of October 1, 1990). English translation available in Volume 1 of LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS (compiled by the Bureau of Legislative Affairs of the State Council of the PRC, published by the China Legal System Publishing House, Beijing, July 1991), at 349-59.

Democratic Party in particular feared that, without the input of a more rights-conscious group of Hong Kong citizens, conditions were ripe for China to take the power to review governmental acts from Hong Kong's judiciary. These Democrats criticized even Governor Christopher Patten's pro-democracy government for caving in to China on the terms of the judicial review for Hong Kong courts that the PRC enacted in 1995.<sup>6</sup> One American law student concluded in a law review note that, with limitations on judicial review enacted in the Basic Law and in the Hong Kong ordinance establishing Hong Kong's Court of Final Appeal, China eviscerated judicial review.<sup>7</sup>

Contrary to these dire predictions, however, judicial review in Hong Kong did not disappear after its transfer to China. It survived the transfer, though with uncertainty about its parameters. Uncertainty about such parameters is not unusual in legal systems and does not itself diminish the health of judicial review in the HKSAR. In fact, a state of uncertainty can lead to a state of flux which provides opportunities to enlarge the scope of judicial review. Just like much of the rest of Hong Kong society, the judiciary stands at a juncture of great possibility for defining the boundaries of judicial review. Now embarked on its fourth year under Chinese rule, Hong Kong is being shaken to its foundations as evidenced by academic freedom being questioned in protests and in the press, the reputation of the Chief Executive and the courts coming under attack, and forty-seven people being stabbed or injured by fire in a riot staged by about twenty mainland Chinese in Hong Kong's Immigration Department after they were refused local identity cards.<sup>8</sup> The situation, because of the change it invites, can just as easily bode well as ill.<sup>9</sup> The key for the judiciary of Hong Kong, if it wants to help move the trajectory toward well and away from ill, is prudence in the exercise of its review power.<sup>10</sup>

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6. According to constitutional doctrine in the United States, judicial review is defined as the invalidation by courts of decisions of the Executive and Legislative branches of government which the courts deem to violate the United States Constitution. See GEOFFREY R. STONE, ET AL., *CONSTITUTIONAL LAW* 37 (3d ed. 1996); JOHN E. NOWAK AND RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1 (1995).

7. See Lee, *supra* note 4, at 195, 209-10.

8. See *Gang Stab Officials, Set Fire in HK Residency Row*, REUTERS NEWS SERVICE, Aug. 1, 2000.

9. Scholars continue to be pessimistic about the fate of judicial review in Hong Kong. See Mark Elliott and Christopher Forsyth, *The Rule of Law in Hong Kong: Immigrant Children, the Court of Final Appeal and the Standing Committee of the National People's Congress*, *ASIA PAC. L. REV.* (2000).

10. The notion that judicial prudence helps court systems to survive where the foundations of their power are shaky is expressed eloquently in the writings of W. Michael Reisman. See generally W. Michael Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 *YALE J. INT'L L.* 171 (1988). "[T]he tendency of the international legal system [is] to remain minimally relevant by accommodating to the unyielding realities of effective power." *Id.* Reisman appeals to the benefits of prudence also when advocating for restraint on the part of U.S. Federal Courts in

Judicial review in Hong Kong's British tradition encompasses three types of authority. One is the power to invalidate statutes because they conflict with the constitution. In colonial Hong Kong, courts could invalidate Hong Kong statutes if they contravened British legislation and constitutional law for Hong Kong, namely, the Letters Patent and the Orders in Council. In the HKSAR, there are potentially two types of constitutional issues, those arising under the PRC constitution and those arising under the Basic Law. Another kind of judicial review is the power to declare administrative acts either contrary to the enabling statute or unconstitutional. In colonial Hong Kong, courts exercised this power, and they continue to do so under Chinese rule. However, today this power is complicated by the two-tiered structure of government in the HKSAR, in which Hong Kong is subject to the administrative decisions of both a local administration and a national administration, and it is unclear whether Hong Kong courts may review PRC administrative acts. A third type of judicial review is the power to review acts in general, or in other words, the jurisdiction of the court.<sup>11</sup>

Under this scheme, courts reach the zenith of their powers when they invalidate statutes because this puts them on a virtually equal footing with the legislature. Likewise, in a legal system where the executive is primarily responsible for the bills that the legislature enacts, as is the case in Hong Kong, this scheme puts courts on a virtually equal footing with the executive.<sup>12</sup> The clearest gauge, then, of whether judicial review lost ground in Hong Kong under Chinese rule is whether the Hong Kong courts lost the power to declare statutes unconstitutional. This Article argues that Hong Kong courts have not lost the power to declare local statutes unconstitutional. Rather, at the start of the fourth year of the HKSAR, its courts enjoy power to invalidate statutes that is encumbered by few legal constraints.

This argument follows four lines of reasoning. First, the National People's Congress Standing Committee (NPCSC), when it handed down the June 26, 1999 interpretation of the constitutional provisions at issue in the landmark constitutional cases *Ng Ka Ling v. Director of Immigration*<sup>13</sup> and *Chan Kam Nga v. Director of Immigration*,<sup>14</sup> did not restore the portions of

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cases involving foreign affairs matters. See W. Michael Reisman, *Foreign Affairs and the Several States: Outline of a Theory for Decision*, AM. SOC'Y INT'L L. PROC. 182 (1977).

11. For a general description of the relationship between the judiciary and legislature in the United Kingdom, see A.W. BRADLEY, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 57-58 (10th ed. 1985), and for a general description of the difference between constitutional and administrative review, see *id.* at 6-10.

12. Bradley states that "the authoritative interpretation of that law is a matter for the courts....but in this task the judges must not seek to compete with the political authority of the legislature." *Id.* at 48.

13. *Ng Ka Ling, Ng Tan Tan (infants by their father and next friend Ng Sek Nin) v. Director of Immigration*, 2 HKCFAR 141 (HKSAR Court of Final Appeal, Jan. 29, 1999), available at [www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv\\_14\\_16\\_98.htm](http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_14_16_98.htm).

14. *Chan Kam Nga (an infant) & Others v. Director of Immigration*, 2 HKCFAR 82

the Hong Kong statute invalidated by the Court of Final Appeal for all affected parties. Thus, to the extent that this decision interfered with the Court of Final Appeal's power to invalidate local law, the degree of its interference was limited in its application. Second, the NPCSC did not nullify the power of Hong Kong courts to invalidate local statutes in that decision, nor did the Court of Final Appeal in its application of the decision nullify this power. While the NPCSC's decision restored the statute that the court declared unconstitutional, it refrained from vacating any of the court's language in these two opinions which asserted that the court had broad power to review constitutional issues.<sup>15</sup> Third, the Standing Committee decision did not necessarily set a precedent whereby constitutional review is not final in the HKSAR. Fourth, Hong Kong courts have not yet refused to take jurisdiction over any administrative act by either Hong Kong or PRC government bodies on the ground that these are acts of state which are not reviewable under Article 19 of the Basic Law. Therefore, the door is still open for Hong Kong courts to review the constitutionality not just of Hong Kong statutes but also of PRC statutes.

### I. THE INVALIDATION OF LOCAL LAW

Thus far, when the Hong Kong SAR courts have invalidated statutory provisions, they have done so without interference by the PRC, and the rulings remained effective for the parties to the instant case and, most likely, will remain effective for some of those similarly situated. Since Hong Kong returned to Chinese sovereignty, there have been three instances of a court in Hong Kong invalidating a local statute. In two of these instances, the Court of Final Appeal, in *Ng Ka Ling v. Director of Immigration*<sup>16</sup> and *Chan Kam Nga v. Director of Immigration*,<sup>17</sup> invalidated portions of an amendment to the Immigration Ordinance made nine days after the handover by the Provisional Legislative Council. Section 2AA of the No. 3 Ordinance required Mainland Chinese who claimed the right of abode in Hong Kong to enter Hong Kong pursuant to certain procedures carried out by Guangdong Provincial authorities, while another provision excluded from the right of abode those Mainlanders whose parent became a permanent resident of Hong Kong after the Mainlander's birth.

The basis for the court's invalidation of these statutory provisions was Article 24(2)(3) of the Basic Law of the HKSAR.<sup>18</sup> This constitutional

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(HKSAR Court of Final Appeal, Jan. 29, 1999).

15. See Elliott and Forsyth, *supra* note 9.

16. *Ng Ka Ling*, 2 HKCFAR 141.

17. *Chan Kam Nga*, 2 HKCFAR 82.

18. Zhonghua renmin gongheguo xianggang tebie xingzhengqu jibenfa [Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China], promulgated on April 4, 1990, *entered into force* on July 1, 1997, art. 24(2)(3), published in both Chinese

provision is ambiguous about the timing of when the parent of the Mainland Chinese person eligible for the right of abode in Hong Kong gained permanent resident status. It does not say when the child had to be born to permanent residents of Hong Kong in order to qualify as a permanent resident under Article 24(2)(3) of the Basic Law—before or after the parent acquired permanent resident status, or only after the parent acquired permanent resident status. Nor does this provision specify any procedures which these immigrants must follow in order to obtain their right of abode under Article 24(2)(3).

The court rejected the HKSAR government's argument that Article 22 of the Basic Law required the applicants for right of abode status to follow the statutory procedures. Article 22 states that people from Mainland China have to apply for entry through immigration authorities if they want to go to Hong Kong. Britain and China, before the handover, negotiated an agreement in which the PRC government only gives out 150 one-way "exit permits" per day.<sup>19</sup> That is one reason they are difficult to get. Therefore, there is a conflict between Article 22 and 24. Either Article 24(2)(3) takes precedence, and the applicants need not apply for one-way permits like anybody else, or Article 22 takes precedence and applicants must apply for a one-way permit like anybody else.<sup>20</sup>

The appellate court below accepted the government's arguments on both issues. The court thus linked Basic Law Articles 22 and 24(2)(3) and used this link to resolve the question of the immigration procedures against the children who were seeking the right of abode without one-way exit permits that were valid at the time that they applied to the Director of Immigration for the right of abode.<sup>21</sup> In the case involving applicants whose parent became a permanent resident of Hong Kong after the applicants' birth, Chief Judge Chan, in his intermediate-level appellate decision, determined that the Basic Law had to provide that eligible Mainlanders be born of a parent who already was a permanent resident of Hong Kong, because the intention of the ordinance could not have been that entire family trees would automatically gain permanent residency status. The example he used was of a 70-year-old man with seven sons (each of whom also has a son) who comes to Hong Kong legally and lives for seven years and then gains the permanent resident status. At that moment, all seven of his sons gain permanent resident status, and then

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and English by the One Country Two Systems Research Institute, Ltd., Hong Kong (1992). [hereinafter Basic Law].

19. Basic Law, art. 22.

20. Interview with Martin Lee Chu-ming, Barrister, Member of the Legislative Council, and President of the Democratic Party of Hong Kong, in the Democratic Party headquarters (July 28, 2000) (explaining the system of entry permits).

21. See *Cheng Lai Wah v. Director of Immigration, Ng Ka Ling, Ng Tan Tan v. Director of Immigration, Tsui Kuen Nang v. Director of Immigration, Yeung Ni Ni v. Director of Immigration*, 2 HKCFAR 4, 13-25 (HKSAR Court of Final Appeal, Apr. 2, 1998).

all seven of each of their sons gain permanent resident status. There are 1.6 million of these old men, according to Hong Kong government figures. Even if the figures are inflated, say by a factor of two, then there are still 800,000, and even if some of these permanent residents are in their forties and fifties, that is still a lot of people! Chief Judge Chan's rationale was that Hong Kong cannot house and school all of them. As for the argument about splitting the family, yes, it is sad, but it is not the ruling by the High Court that separates the permanent resident parent in Hong Kong from his or her children in the PRC. It is the parent's choice to split the family.<sup>22</sup>

The PRC did not intervene before the Court of Final Appeal issued its two rulings. Five months after the ruling, the NPCSC handed down a reinterpretation of the constitutional provisions at issue in those cases which restored those statutory provisions and essentially restored Chief Judge Chan's two rulings in the immigration cases. This reinterpretation left open, however, the question of who would be affected by that restoration. Specifically, which Mainlanders whose parent had achieved permanent resident status after their birth were now entitled to the right of abode, and which Mainlanders who had entered Hong Kong without going through the procedures set out in the Ordinance were now entitled to the right of abode? By leaving this question open, the NPCSC allowed at least a portion of the invalidation of the statutory provisions by the Court of Final Appeal to stand and left the decision about how much of the invalidation would stand up to authorities in Hong Kong.

Whoever decides the effect of the NPCSC's reinterpretations exercises much of the authority to invalidate Hong Kong's statutes. Although the NPCSC itself, in its reinterpretation, imposed a limitation on its application, it did so only in broad terms which left open further questions about its application. To date, the NPCSC has stayed out of the resolution of those questions and has left it to the Hong Kong government and courts to resolve them. Chief Executive Tung Chee-hwa took the early lead in setting out guidelines for the application of the reinterpretation, but even he appears to be leaving the application of his guidelines up to the courts of Hong Kong.

Which questions about the reinterpretation's application are being resolved by Hong Kong's courts? The overarching question is who are “the parties concerned with the relevant legal proceedings?”<sup>23</sup> This is the Hong

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22. See *Chan Kam Nga v. Director of Immigration* (HKSAR Court of Final Appeal, May 20, 1998) (on file with the author); Interview with Chief Judge Chan (July 25, 2000), *infra* note 49.

23. “Quanguo renmin daibaio dahui changwu weiyuanhui guanyu ‘Zhonghua renmin gongheguo xianggan tebie xingzhengqu jibenfa’ diershi’ertiao disikuan he diershisitiao dierkuan disanxiang de jieyi (cao’an) (1999 nian 6 yue 26 ri dijiujie quanguo renmin daibiao dahui changwu weiyuanhui dishici huiyi tongguo).” [Draft Interpretation of the Standing Committee of the National People's Congress Concerning the PRC Hong Kong Special Administrative Region Basic Law Article 22(4) and Article 24(2)(3)], (issued June 26, 1999, Tenth Meeting of the Ninth Plenary Session of the NPC Standing Committee), published online

Kong government's translation of the language used in the NPCSC reinterpretation to set out an exception to its application. This language translates as follows: "This interpretation does not affect the right of abode in the Hong Kong Special Administrative Region that [the] parties in [the] relevant lawsuits acquired pursuant to the judgments of the Court of Final Appeal in the relevant cases dated January 29, 1999."<sup>24</sup>

This language does not explicitly limit its exemption to the four litigants in *Ng Ka Ling* and the eighty-one litigants in *Chan Kam Nga*. The language possibly encompasses this narrow reading but also, given the absence of explicitly restricting language, possibly encompasses more than just the named litigants in those two cases. This ambiguity is present in the original Chinese as well as in my English translation and in the English translation used in the Hong Kong courts, which uses a passive tense to express the right that was acquired. The Chinese term "*youguan*" is used twice to refer to both the lawsuits connected to the parties whose right of abode is not abrogated by the NPCSC decision and to the two judgments whose interpretations of the Basic Law the NPCSC revised in its June, 1999, decision. The term "*suo*" follows the word for parties, "*dangshiren*," and the courts are translating this as "parties concerned in the relevant legal proceedings." The placement of "*suo*" here constructs a passive relationship between the litigation and the parties.

Given the legal system in which it must be interpreted, namely, the common law system of the HKSAR which incorporated on July 1, 1997 something of the socialist and civil law system of the PRC, the language "parties in the relevant lawsuits" raises particularly difficult questions about the application of the NPCSC reinterpretation because it means something quite different in a common law context than it does in a civil law context. In a common law system, the rulings of courts apply to all similarly situated parties. In civil law systems, they do not. Therefore, there are typically many more parties concerned with the outcome of a lawsuit in a common law court than in a civil law court. Common law judgments may be limited to just the parties named in the instant case, but this is the exception and must explicitly be declared by the ruling court or the court superior to it if the ruling is challenged on appeal. Legislatures in common law legal systems do not have the power to declare this type of limitation on court judgments. All the legislatures can do is pass legislation which contradicts the holding, and when they do that, it is up to the courts to apply the legislation. This raises

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in the *Jiujie quanguo renda changweihui dishici huiyi zhuanli baodao* [Special Report on the Tenth Meeting of the Ninth Plenary Session of the National People's Congress Standing Committee], available at <http://www.peopledaily.com.cn/>.

24. *Id.* The Chinese is "Benjieyi buyingxiang xianggang tebie xingzhengqu zongshen fayuanzhang 1999 nian 1 yue 29 ri dui youguan anjian panjue de youguan susong dangshiren suo jiede de xianggang tebie xingshengqu juliquan." *Id.* The English translation is my own. The words in brackets are possible but not necessary parts of the translation.



questions of retroactivity, which tend to be complex, and as courts wrestle their way through legislation, they almost never give any kind of retroactive application to such legislation.<sup>25</sup> Legislatures in the Anglo-American tradition rarely enact statutes with retroactive effect.<sup>26</sup>

According to pronouncements by the Chief Executive, a reading of the NPCSC language to cover more than just the named parties is warranted. The pronouncements indicate that the NPCSC decision does not affect either the parties in *Ng Ka Ling* and *Chan Kam Nga* or some other group of persons. The Chief Executive announced this policy on the day that the NPCSC released its decision to the public, as follows:

Secondly, to comply with the principle that judgments previously rendered by the Court of Final Appeal shall not be affected by an interpretation of the National People's Congress Standing Committee, we will allow persons who arrived in Hong Kong between July 1, 1997 and January 29, 1999, and had claimed the right of abode, to have their status as permanent residents verified in accordance with the CFA decision. It is estimated that there are about 3,700 people in this category.

Thirdly, for those who arrived after January 29, 1999, or I could put it in another way, thirdly, for any other persons, they will only be able to apply for the right of abode if they satisfy the terms of the interpretation given by the Standing Committee of the National People's Congress.<sup>27</sup>

The HKSAR government elaborated on this policy that day by asserting that 3700 people were exempted from the NPCSC reinterpretation.<sup>28</sup>

The Chinese version of the pronouncements, however, appears to make the timing of the claims important. The language which describes the people who are exempt from the decision's effect says that they are those who, between those dates, lodged claims for the right of abode in the relevant office in Hong Kong [*... zaigang bing zeng xiang dangju shengcheng yongyou*

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25. See WILLIAM N. ESKRIDGE, JR. AND PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 267-77 (1988).

26. See Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 50 *HASTINGS L.J.* 77 (1977).

27. Press Release, Hong Kong Special Administrative Region Government, Transcript of Media Session on NPCSC Interpretation of Basic Law (June 26, 1999), at [www.info.gov.hk/gia/general/199906/26/npc-e.htm](http://www.info.gov.hk/gia/general/199906/26/npc-e.htm).

28. See Press Release, Hong Kong Special Administrative Region Government, 3,700 ROA Claimants Not Affected by Interpretation (June 26, 1999), at [www.info.gov.hk/gia/general199906/26/0626179.htm](http://www.info.gov.hk/gia/general199906/26/0626179.htm)

*juliuquan de renshi.*”].<sup>29</sup> The relevant office is not specified, but the location of this office in Hong Kong is clear. So it must be an office of the Hong Kong government. What is less than crystal clear is whether the claimant must be physically present in Hong Kong to lodge such a claim. Nor does the pronouncement explain more generally what constitutes a lodging of the claim that satisfies the government’s criteria.

These pronouncements give rise to a number of questions of interpretation. The English version of these pronouncements made the time of arrival in Hong Kong the key evidentiary point and refrained from assigning significance to the timing of the claim. The Chinese language version assigned significance to the timing and possibly the location of lodging the claim. Therefore, one question is, did the pronouncement exempt from the reinterpretation any Mainlander who arrived before January 29, 1999 but lodged their application for right of abode status after that day, possibly even after the June 26, 1999 NPCSC reinterpretation. If no time limit was imposed on the filing of these applications, the figure 3700 is problematic because the number of claims with no time limit would always have the potential to grow. This possible inconsistency within the government’s pronouncement posed a question for subsequent resolution.

Another question that remained unanswered was why the Hong Kong government’s pronouncements excluded Mainlanders who had either arrived or lodged their claims between January 29 and June 26, 1999. If the decision of the NPCSC corrected an erroneous interpretation of Hong Kong’s constitution, but, according to the decision itself, would not be applied retroactively, in conformity with the provision at the end of paragraph 3 of Article 158 of the Basic Law, did this not exempt all Mainlanders who lodged their claims before the decision on June 26, 1999? If the Hong Kong government was attempting to meet reasonable expectations with these pronouncements about what the law in Hong Kong was, did it not make sense to exclude from the decision’s effect claims made before the law was changed?

Two days later, the government raised the issue of the timing of the claims and attempted to resolve it, but it did not address the question of why claims or arrivals between January 29 and June 26, 1999 were retroactively covered by the NPCSC decision. The government stated that the figure of 3700 referred to the number of people “set to gain the right of abode . . .”<sup>30</sup> implying that this number did not refer merely to the more narrowly defined group of those exempted from the reinterpretation, but to all entitled to gain the right of abode at that time. These people fell into three categories:

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29. Chen Weiwen et al v. The Director of Immigration at 39 (HKSAR Court of Final Appeal, July 11, 2000) (available only in Chinese) (on file with the author).

30. Press Release, Hong Kong Special Administrative Region Government, No Amnesty for Overstayers (June 28, 1999), at [www.info.gov.hk/gia/general/199906/28/0628238.htm](http://www.info.gov.hk/gia/general/199906/28/0628238.htm).

- those who were in Hong Kong between July 1 and 10, 1997, made right of abode claims, and have been covered by the Court of Final Appeal judgment on retrospectivity [that portion of *Ng Ka Ling* which invalidated the Immigration Amendments Ordinance provision for its retroactivity to July 1];
- those who were litigants themselves in respect of the two cases on which the Court of Final Appeal ruled on January 29, 1999; or
- those who are concerned parties to the legal proceedings of the aforesaid Court of Final Appeal cases by virtue of their claims for right of abode...laid whilst they were in Hong Kong with the Director of Immigration between July 11, 1997 and January 29, 1999.<sup>31</sup>

The government hereby solved two problems with the application of the NPCSC decision. It resolved the discrepancy in the Chinese and English versions of its June 26, 1999 pronouncement and determined that the timing of the filing of the claims was significant. The government also, presumably, recognized that portion of the ruling in *Ng Ka Ling* which invalidated that portion of the Immigration Amendments Ordinance enacted on July 11, 1999 which made it retroactive to July 1, and therefore, all applicants who lodged their applications between July 1 and July 11 were also exempt from the NPCSC decision.

In the same pronouncement, however, the government muddied the waters by suggesting that all applicants for right of abode who were similarly situated to those in *Ng Ka Ling* and *Chan Kam Nga* and who made their applications between July 1, 1997 and January 29, 1999 were exempt from the NPCSC decision. The government did not elaborate on the meaning of "similarly situated." Also in this pronouncement, the government added another wrinkle to the problem of applying the NPCSC decision which potentially shrunk the group which was exempt from it. It announced that it would not grant "amnesty" to mainland residents who are in Hong Kong illegally with expired entry permits, thereby possibly excluding such mainlanders who otherwise fell into one of the aforementioned three categories.<sup>32</sup> The issue that the pronouncement did not resolve was when the expiration of the entry permit was relevant to such an exclusion. All one-way permits issued by the Guangdong Province immigration authorities expire at some point. What if the applicant lodged the application for the right of abode

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31. *Id.*

32. *See id.*

before the permit expired, but was still waiting for the Hong Kong immigration authorities to issue a Permanent Resident's card when the permit expired?

Five months after the Chief Executive's pronouncements, in the Hong Kong Court of Final Appeal's first, and to date only, application of the NPCSC reinterpretation, *Lau Kong Yung and The Director of Immigration*,<sup>33</sup> the Court ruled on the question of whether to uphold the order to remove seventeen applicants for right of abode who had arrived in Hong Kong and claimed right of abode prior to the Court of Final Appeal's decision in *Ng Ka Ling*.<sup>34</sup> Not only did the court uphold the order, it also declined to set out any categories of applicant that are exempted from the reinterpretation. Instead, the court deliberately refrained from deciding the question of who was not affected by the reinterpretation. The Court did rule, however, that the reinterpretation has retroactive effect back to July 1, 1997, because "[i]t declared what the law has always been."<sup>35</sup> In both conclusions, the court accepted the arguments of the Hong Kong government, although it refrained from explaining some of the most important consequences of these arguments.<sup>36</sup> For example, the court did not square its recognition of retroactive effect with the last sentence of paragraph three of Article 158 of the Basic Law which says that NPCSC interpretations will have no retroactive effect. Nor did the court explain how its conclusion that the reinterpretation dated back to the formal institution of the right of abode could leave any parties exempt from it. If no parties were exempt, the court refrained from explaining how its ruling was consistent with the Chief Executive's pronouncement of June 26, 1999 or with the court's own ruling which indicated that the question of who was not affected by the reinterpretation was still alive.

The language used in the pronouncements of the Hong Kong government and in the December 3, 1999 ruling by the Court of Final Appeal kept in play the question of the retroactivity of the NPCSC decision. The government said no "amnesty" would be granted to illegal overstayers, and the Court of Final Appeal ruled that the NPCSC decision was good law in Hong Kong starting on July 1, 1997. And yet, according to the government pronouncement of June 28, 1999, three categories of mainland citizens are

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33. *Lau Kong Yung* (an infant suing by his father and next friend Lau Yi To) and 16 Others v. Director of Immigration, 2 HKCFAR 300 (HKSAR Court of Final Appeal, Dec. 3, 1999), available at [http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv\\_10\\_11\\_99.htm](http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_10_11_99.htm).

34. *Cheng Lai Wah v. Director of Immigration, Ng Ka Ling, Ng Tan Tan* (infants by their father and next friend Ng Sek Nin) v. Director of Immigration, *Tsui Kuen Nang v. Director of Immigration, Yeung Ni Ni v. Director of Immigration*, 2 HKCFAR 4 (HKSAR Court of Final Appeal, Apr. 2, 1998), available at [www.info.gov.hk/jud/guide2cs/html/cfa/judgmt/facv\\_14\\_16\\_98.htm](http://www.info.gov.hk/jud/guide2cs/html/cfa/judgmt/facv_14_16_98.htm).

35. *Lau Kong Yung*, 2 HKCFAR 300.

36. *See id.*

eligible for right of abode status, and these include "concerned parties to the legal proceedings of" *Ng Ka Ling* and *Chan Kam Nga*. In other words, parties who, because they did not comply with the procedural requirements of the Provisional Legislature's amendments in July of 1997 to the Immigration Ordinance or because their parent gained permanent resident status after their birth, are *not*, according to the NPCSC decision, entitled to right of abode status. All of this would seem to add up to a partial retroactivity of the NPCSC decision, but the extent of this retroactivity remained unclear.

These are the pronouncements thus far made by the highest court and the executive on the question of to whom the NPCSC decision applies, and they raise questions about which parties are exempt. Taking advantage of the lack of resolution of such questions, and of the generous grant of legal aid assistance by the Hong Kong government, between June 26, 1999 and May, 2000, 5308 people applied to the Court of First Instance for judicial review of actions taken by the Director of Immigration,<sup>37</sup> and slightly over 100 people petitioned the High Court to invalidate the Immigration Department's deportation orders and rejection of their applications for right of abode.<sup>38</sup> The courts in both sets of cases dismissed the applications using a narrow reading of the NPCSC's limiting language.

The applicants in the Court of First Instance were represented by ten selected from the pool of 5308. The ten representatives spanned the gamut of five fact patterns, each differing as to when the applicant arrived in Hong Kong. Some applicants arrived before July 1, 1997, the effective date of the Amendment to the Immigration Ordinance which imposed procedural requirements on those seeking right of abode under Article 24(2)(3). Some arrived after that date but before the date on which the Provisional Legislative Council actually passed that legislation. Yet others arrived after that date but before the *Ng Ka Ling* decision was handed down, while still others had entered Hong Kong for the first time after January 29, 1999, but had written either the Director of Immigration or the Legal Aid office or both during the period from July 1, 1997 to January 29, 1999 about their right of abode in Hong Kong under Article 24 of the Basic Law. In a lengthy written opinion, unusually long even for a Hong Kong appellate court, the Court of First Instance disagreed with the applicants' argument that they had reasonably presumed that *Ng Ka Ling* and *Chan Kam Nga* applied to all Mainland residents attempting to gain the right of abode in Hong Kong under Article 24 of the Basic Law and fairly relied upon statements by the HKSAR government both to the applicants individually about applying for right of abode and to the

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37. *Ng Siu Tung and others v. Director of Immigration; Li Shuk Fan v. Director of Immigration; Sin Hoi Chu and 42 Others v. Director of Immigration*, 1999 HCAL 81 (HKSAR Court of First Instance, June 30, 2000) (on file with author).

38. *Chen Wei wen et al. v. The Director of Immigration*, Hong Kong High Court (HKSAR Court of Final Appeal, July 11, 2000) (available only in Chinese) (on file with author).

public that the judgments in *Ng Ka Ling* and *Chan Kam Nga* would be implemented.<sup>39</sup> The court concluded that the limiting clause in the NPCSC decision exempted only the named parties in those cases and others whose names were known to the Director of Immigration as applicants for right of abode or legal aid whose applications were denied pending the resolution of the two cases.<sup>40</sup> To get to this conclusion, the court relied heavily on the Court of Final Appeal's declaration in *Lau Kong Yung and The Director of Immigration* that its constitutional interpretations in *Ng Ka Ling* and *Chan Kam Nga* were never good law. The court seemed to presume that this reasoning took care of the problem of why the Hong Kong government's pronouncements excluded Mainlanders who had arrived and/or lodged their claims between January 29 and June 26, 1999,<sup>41</sup> but it did not. The court did not explain which other applicants known to the Director of Immigration were exempt. This problem was not explicitly raised here, but it lurked in the background and could be raised in subsequent litigation.

The court further decided that the applicants' expectation of universal application of the two cases was not legitimate. In reaching this conclusion, the court opined broadly on the effect of judicial decisions in Hong Kong's common law system. The court adopted a narrow view of this effect when it stated that, "[a]s a matter of law, non-parties can only take the benefit of these judgments if they can point to an agreement that they would be treated as parties, or if they can rely upon a legitimate expectation that they would be so treated."<sup>42</sup> The court also disagreed with the applicants' argument that they had the expectation that "anyone whose circumstances fell within the law as that law was, by the Court of Final Appeal, determined to be, would be treated accordingly."<sup>43</sup> The court did not reconcile this position with the doctrine of *stare decisis*, which permits, to varying degrees in common law systems, all similarly situated parties to take advantage of a judicial ruling. By avoiding this problem, the Court of First Instance left open a means of challenging its application of the NPCSC reinterpretation of June 26, 1999.

The applicants appealed, and on December 11, 2000 the High Court of Appeal dismissed them. To reach its result, the High Court followed the lead of the lower court and relied on the statements from *Lau Kong Yung* that the NPC Standing Committee has unfettered power to interpret the Basic Law, power derived from the PRC Constitution and reflected in Paragraph 1 of Basic Law Article 158, and that a result of this power is to bind all Hong Kong courts to the interpretations of the Basic Law by the NPC Standing Committee as if the interpretation had been made on July 1, 1997. The High Court did not delve into the problems of retroactivity or *stare decisis*, possibly

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39. See *Ng Siu Tung*, 1999 HCAL 81 at 57-60, 78-99.

40. See *id.* at 63-65.

41. See *id.* at 92.

42. *Id.* at 75.

43. *Id.* at 76. See generally *id.* at 70-147.

because the *Lau Kong Yung* court and counsel to the applicants in the instant case focused upon the reliance by the applicants on statements by the Director of Immigration that they would enjoy the benefits of the litigation in *Ng Ka Ling* and *Chan Kam Nga* without being selected as the actual litigants in those cases, and that the Director would abide by the Court of Final Appeal's ruling in those cases.<sup>44</sup> In fact, the High Court seemed to leave even the issue of reliance up to the Court of Final Appeal. In the words of Judge Mayo, "I leave it to others to decide whether in those circumstances [where the applicants were not permitted to join in the *Ng Ka Ling* or *Chan Kam Nga* litigation] the applicants could really be said to have been treated unfairly."<sup>45</sup>

In the same ruling, the High Court addressed the question of which people were exempted from the NPC Standing Committee's reinterpretation by the Chief Executive's press release issued the day of that reinterpretation. The court concluded that, despite its ambiguities on this point, the press release did not exempt the applicants because the Chief Executive's policy on the right of abode, as expressed in that press release and others, was to require that, regardless of when they arrived in Hong Kong, the applicants had to make their original claim in Hong Kong to the Director of Immigration or to the Immigration Department while physically themselves in Hong Kong, even though the Director of Immigration had told them to return to the Mainland to make their claims.<sup>46</sup> The court's reference to the government's policy stopped short of characterizing it as aimed at staving off as long as possible the immigration of Mainland Chinese with the right of abode into Hong Kong, but this seems to have been the rationale that supported the court's conclusion on this point. The court also left unexplained why it was not unfair to not exempt these applicants: "I leave it to others to decide whether, in those circumstances, those persons whose cases fall on the wrong side of the policy can really be said to have been treated unfairly."<sup>47</sup> The High Court likewise concluded that its applicants, who also had arrived in Hong Kong for the first time after *Ng Ka Ling* and *Chan Kam Nga*, did not fall under the exemption stated in either the NPCSC decision or the Hong Kong government's pronouncements. The court ruled that all of the applicants fell outside the exemption because they arrived for the first time in Hong Kong *either* after the January 29, 1999 decisions by the Court of Final Appeal *or* the NPCSC decision of June 26, 1999. The court used a public policy basis for its conclusion. The court reasoned that to read the exemption to include these Mainlanders was to invite chaos into Hong Kong. Although the court acknowledged that applicants did not feel that the law was applied equally, it determined that the applicants must understand that, in the implementation of

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44. *Id.* at 6-7, 16-20, 47-55.

45. *Id.* at 20.

46. *See id.* at 22-25.

47. *Id.* at 27.

policies, some people get more rights and benefits than others and mistakes are made, especially in democratic, open societies.<sup>48</sup>

Both decisions are being appealed and will reach the Court of Final Appeal within a year or so. What is more, in July, 2000, Mainland children were still filing claims alleging that they arrived in Hong Kong before the handover, between July 1, 1997 and January 29, 1999; others claimed that they arrived between January 29, 1999 and June 26, 1999; and still others that they arrived after June 26, 1999. How will Hong Kong's courts decide these claims? The First Instance Court's decision of May, 2000, and the High Court's decision of June, 2000, do not constitute authority sufficiently conclusive to predict dismissal of these claims by the Court of Final Appeal, most obviously because the Court of Final Appeal is not bound by these lower court decisions. But do they suggest such an outcome? At the moment, predicting the outcome is difficult.

According to the author of the intermediate-level appellate opinion in *Ng Ka Ling*, Patrick Chan, Chief Judge of the Hong Kong High Court and appointee to the Hong Kong Court of Final Appeal, even he did not know in July, 2000, more than half a year after the Court of Final Appeal application of the NPCSC decision, what remained of the ruling in *Ng Ka Ling*. He concluded that both the parties to the instant case and some future parties are exempt from the restoration of the statute. As to which parties are affected by the NPCSC decision, Chief Judge Chan had a sense of who they were, but seemed open to further clarification. "It's very doubtful that people arriving after *Ng Ka Ling* benefit [from the court's invalidation of the immigration statute]," he said, because they were not parties to the judgment.<sup>49</sup> In Chief Justice Chan's analysis, the validity of the claims depends on both when the claims were filed and when the applicants arrived in Hong Kong. He said that those who arrived after June 26, 1999, the date of the NPCSC decision, or who filed their claim after that date have no chance of being granted permanent resident status. However, Chief Justice Chan acknowledged that those parties who arrived before *Ng Ka Ling*, but filed their claims between *Ng Ka Ling* and the NPCSC decision are tough to figure out. Chief Justice Chan believed it could take a couple of years for all of these claims to wind their way through the courts.<sup>50</sup>

Then there is the question of which parties are similarly situated to those in *Ng Ka Ling*. In that case, the petitioner was a child from Mainland China who did not have a valid one-way permit issued by immigration authorities in Guangdong Province and affixed with "a certificate of entitlement." This documentation was required by the amendments to the Immigration Ordinance

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48. See Chen Weiwen, et al. v. Director of Immigration, at 51-52 (HKSAR Court of Final Appeal, July 11, 2000) (available only in Chinese) (on file with author).

49. Interview with Patrick Chan, Chief Judge of the Hong Kong High Court, in chambers (July 25, 2000).

50. See *id.*



which the Provisional Legislature passed on July 11, 1999 and made retroactive to July 1, 1999.<sup>51</sup> Do "similarly situated parties" extend to parties similar to those in the companion case to *Ng Ka Ling, Chan Kam Nga v. Director of Immigration*, in which the Court of Final Appeal ruled on the same day, those whose parent became a permanent resident of Hong Kong after his or her birth? Do "similarly situated parties" extend to those who are citizens of Mainland China who were born in Hong Kong but whose parents are not permanent residents of Hong Kong? The First Instance Court in *Ng Siu Tung* decided that "similarly situated parties" do not benefit from the Court of Final Appeal's invalidation of the statutory provisions, except for those who had filed claims in Hong Kong before that invalidation.<sup>52</sup> But the First Instance Court's ruling does not bind the court that will decide this issue on final appeal. So this aspect of the reach of the NPCSC decision is currently unsettled in Hong Kong law.

Still unresolved is the question of whether the NPCSC decision's favorable reference to an interpretation of Article 24(2)(1) of the Basic Law by the Preparatory Committee, a body formed by the PRC government in 1996 and chaired by then PRC Foreign Minister Chen Qichen, is tantamount to making that interpretation binding on the Hong Kong courts. In *obiter dicta* in that decision, the NPCSC stated that the report of the Preparatory Committee's understanding of those portions of Article 24 not involved in *Ng Ka Ling* or *Chan Kam Nga*, which involved just the timing of the birth and the permanent resident status of the parent, was right.

Litigation which raises this question is currently winding its way through the Hong Kong courts. The decision of the High Court in *Chong Fung Yuen v. Director of Immigration*,<sup>53</sup> announced on July 27, 2000, refused to adopt the interpretation of the Basic Law Article 24(2)(1) set out by the Preparatory Committee in its report before the handover. The applicant in this case was a child born in Hong Kong of a Mainland Chinese married couple while in Hong Kong on a two-way permit, which is easier to get and less desirable than the one-way permit and lets people stay in Hong Kong indefinitely and travel to other countries. When the permit expired and the couple faced deportation, they returned to the Mainland and left their child in

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51. See Immigration (Amendment) Ordinance (No. 5), Bill 1997, Part IB, Provisions Relating to Permanent Residents Under Paragraph 2(c) of Schedule 1, 2AA. The section entitled "Establishing Status of Permanent Resident Under Paragraph 2(c) of Schedule 1, Section (1)(a)" states: "A person's status as a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(c) of Schedule 1 can only be established by his holding of—(a) a valid travel document issued to him and of a valid certificate of entitlement also issued to him and affixed to such travel document."

52. *Ng Siu Tung, et al. v. The Director of Immigration*, 1999 HCAL 81 (HKSAR Court of Final Appeal, June 30, 1999) (on file with the author).

53. *Chong Fung Yuen* (an infant by his grandfather and next friend Chong Yiu Shing) v. Director of Immigration, 2001-1HKC 359, 1999 HKC Lexis 156 (Court of First Instance, Dec. 24, 1999).

Hong Kong with the grandfather. Does the baby have permanent resident status? The court ruled yes, under Basic Law Article 24(2)(1), thereby invalidating a provision in the Hong Kong Immigration Ordinance which required parents of Mainland children born in Hong Kong to be "settled or [to have] a right of abode in Hong Kong."<sup>54</sup>

The government of Hong Kong, who argued on behalf of the Director of Immigration, was afraid that Mainland Chinese would all have their children born in Hong Kong and would get two-way permits for that purpose. But Martin Lee says that only a few thousand came to Hong Kong to give birth over the last few years. The decision is important, Lee concludes, because it refuses to give effect to the language in the NPCSC decision which approves of the Preparatory Committee's interpretation of all of Article 24(2).<sup>55</sup> By refusing to agree with the government that the favorable reference to the Preparatory Committee's interpretation in the NPCSC decision was binding on Hong Kong courts, the Hong Kong High Court narrowed the scope of the NPCSC decision and reduced its impact on all issues related to the Mainland Chinese claiming right of abode under Article 24(2). This comes out in the following language from the court's opinion: "it is quite clear that the [NPCSC decision] was made pursuant to the 'Motion Regarding the Request for an Interpretation of Article 22(4) and Article 24(2)(3)...' and its binding effect is confined to the interpretation of these specific provisions of Article 22 and Article 24(2)(3)."<sup>56</sup>

The result in this case revolved around the legislative intent behind Basic Law Article 24(2), with both sides bringing conflicting evidence of legislative intent to bear on the question of whether the drafters of Article 24 intended that the parents of Mainland Chinese children born in Hong Kong be permanent residents of Hong Kong.<sup>57</sup> Legislative intent was not only a crucial part of this High Court decision, but its importance has grown as the right of abode cases made their way through the Hong Kong courts during the last three years. According to Martin Lee, when Article 24 was drafted, it was an attempt to define who is a Hong Kong citizen. The drafters' principal concern was to get people to come back to Hong Kong. It was drafted during the mid 1980s, when Hong Kong residents were fleeing to Australia and Canada in the wake of a free-falling Hong Kong dollar and a loss of confidence in Hong Kong's future under Chinese rule. The drafters were thinking of births in

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54. Hong Kong Immigration Ordinance, Sched. 1, ¶ 2(a) (amended July 16, 1999).

55. Martin Lee admits that he is in the same position as the baby because he was born while his mother was a tourist in Hong Kong. Lee's younger brother falls under paragraph 2 of Article 24. By illustrating the provisions with examples from his own family, Lee gives a sense of solidarity with the Mainland Chinese and a sense of how privileged current permanent residents of Hong Kong are—they are here because of accidents of timing, not because they are superior to Mainland Chinese. See Interview with Martin Lee, *supra* note 20.

56. On-line opinion of Hon. Leung, JA, at 23.

57. See on-line opinion of Hon. Mayo, VP, at 14, 20-21. [hereinafter Hon. Mayo].

Canada and Australia, not Mainland China.<sup>58</sup> The Preparatory Committee, however, a decade later, started to worry about Article 24, fearing that Mainland Chinese might invoke it and flood into Hong Kong. The Preparatory Committee then wrote in a report its understanding of all the parts of Article 24.<sup>59</sup>

How have the courts thus far resolved the problem of the effect of illegal entry on claims of right of abode? From the High Court's discussion in *Chong Fung Yuen*, it did not appear that the Hong Kong government argued that the baby has no permanent resident status simply because Article 24(2)(1), as supplemented by paragraph 2 of Schedule 1 of the Immigration Ordinance as amended in July of 1997, does not apply to those who are in Hong Kong illegally. The baby's parents overstayed the period allowed by their two-way permit, although that period had not yet expired when their baby was born. Although the government referred to the applicant's parents as "illegal immigrants," the government focused its arguments on how to correctly interpret Article 24(2) and the NPCSC decision of June 26, 1999 to read an additional requirement into Article 24(2)(1),<sup>60</sup> and this differs from arguing that illegal entry into Hong Kong precludes permanent resident status under Article 24(2).

However, the Hong Kong government could argue this distinction at some future, more opportune moment. Perhaps that moment will come in the appeal to the Court of Final Appeal of *Chong Fung Yuen* which, Martin Lee predicts, Minister of Justice Elsie Leung will surely authorize. Martin Lee disagrees on principle with the approach of denying right of abode to those who illegally immigrated to Hong Kong, saying that even if Mainland Chinese who are otherwise entitled to permanent resident status under Article 24 enter illegally, they are still entitled to become permanent residents — he likened it to breaking into one's own house. You go in because you have a right to. Therefore you should not be prosecuted for burglary if you smash a window simply because you left your only key locked inside your house.<sup>61</sup>

In sum, questions about the application of the NPCSC decision, which nullified the only attempts so far by the Hong Kong Court of Final Appeal to invalidate local statutory provisions, are not fully resolved, and to the extent that they are resolved, much of the invalidation of local law remains in effect. What is more, many of the unresolved issues are left to the courts of Hong Kong. The NPCSC has not attempted to resolve any of the questions of the application of its decision to reinterpret the Court of Final Appeal's interpretation of Article 24(2) of the Basic Law.

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58. See Ronald Skeldon, *Emigration and the Future of Hong Kong*, 63 PAC. AFF. 500-523 (1990-1991).

59. Interview with Martin Lee, *supra* note 20.

60. See Hon. Mayo, *supra* note 57, at 3.

61. See Interview with Martin Lee, *supra* note 20.

## II. THE CONSTITUTIONAL AUTHORITY FOR INVALIDATING LOCAL STATUTES

The Basic Law gives Hong Kong's courts the power to interpret and review the constitutionality of statutes. The Court of Final Appeal on January 29, 1999 broadly construed this power. In its decision of June 26, 1999, the NPCSC did not declare that Hong Kong's courts lack the power to invalidate local statutes, nor did the Court of Final Appeal in its application of the decision in December of 1999 nullify this power. While the NPCSC decision restored the statute that the Court of Final Appeal had declared unconstitutional five months earlier, it refrained from vacating any of the court's language which asserted that it had broad power to review constitutional issues.<sup>62</sup> Neither the NPCSC, the Hong Kong government, nor the courts of Hong Kong, have in any other way nullified this power. As a testament to this state of judicial review in Hong Kong, at the end of July, 2000, Chief Judge Patrick Chan, author of the intermediate appellate opinion which was essentially restored by the NPCSC decision, believed that the language in *Ng Ka Ling* interpreting broadly the Hong Kong courts' power to interpret and review the constitutionality of statutes was still good law.<sup>63</sup>

It is well known in the legal community of Hong Kong that the Basic Law explicitly provides for constitutional review by local courts of statutes. The Basic Law, Article 158, provides: "The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of the Law which are within the limits of the autonomy of the Region."<sup>64</sup>

This language sets out the jurisdiction of Hong Kong courts to interpret the Basic Law and frames it in terms of an authority delegated by the NPCSC. "Shall authorize" is ambiguous in the sense that it could refer either to a future act of delegation separate from the enactment of the Basic Law or to a mandatory delegation which is accomplished with the enactment of the Basic Law. The Chinese term, *caiquan*, has no verb tense and so might be translated as "hereby authorizes." This reading makes sense, since the NPCSC was instrumental in the enactment of the Basic Law. Among other things, the NPCSC submitted the final draft of the Basic Law to the plenary NPCSC for its formal enactment.<sup>65</sup> Petitioners in *Ma Wai Kwan* raised the argument about verb tense with respect to the "shall adopt" in Article 18, and the High Court, after examining the NPCSC Decision of February 23, 1997, which

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62. See Elliot and Forsyth, *supra* note 9, at 3.

63. Interview with Chief Judge Patrick Chan, *supra* note 49.

64. Basic Law, art. 158, ¶ 2.

65. See Ji Pengfei, *Explanations on "The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (draft)" and Its Related Documents, in THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA 71-78 (1992).*

adopted the laws previously in force in Hong Kong, summarily dismissed the argument.<sup>66</sup> Such language has not been interpreted otherwise by the Court of Final Appeal.

Article 158 of the Basic Law further provides that Hong Kong courts may not interpret the Basic Law that concerns issues "which are the responsibility of the Central People's Government [of the PRC], or concerning the relationship between the Central Authorities and the Region."<sup>67</sup> The Hong Kong courts must, before they issue any final judgments which require the resolution of such issues, request an interpretation by the NPCSC of the relevant constitutional provision. The 1995 agreement between the PRC and the United Kingdom also provides an interpretation process which set up a Court of Final Appeal in Hong Kong to replace the Privy Council in London as the court of last resort for cases that come up through the Hong Kong courts.

So far, no Hong Kong court has requested an interpretation, even though courts have over a dozen times since the transfer of sovereignty interpreted provisions of the Basic Law. The Hong Kong High Court in *HKSAR v. David Ma Wai Kwan* faced a case of constitutional magnitude within days of the birth of the HKSAR. Although this case is hailed as the first landmark constitutional case of the HKSAR because it considered challenges to the validity of the common law legal system and the provisional legislature of Hong Kong, the High Court did not request an interpretation from the NPCSC of the constitutional provisions it interpreted to reach its judgment. Handing down its judgment on July 29, 1997, the High Court in *Ma Wai Kwan* grappled with the momentous process of interpreting for the first time the Basic Law's provisions on the very structure of Hong Kong's legal system, with the attendant risk of provoking a constitutional crisis. It expedited an interlocutory appeal in order to rule that the common law had survived the handover and that the Provisional Legislative Council, the body selected by a group of delegates approved by Beijing to replace the elected Legislative Council of Hong Kong at midnight of June 30, 1997, was validly constituted.<sup>68</sup>

The other cases in which the Hong Kong courts interpreted the Basic Law between July 1, 1997 and January 29, 1999 dealt with freedom of speech or immigration law. The editor of the *Oriental Daily News* raised freedom of speech as a defense against his conviction of contempt of court for printing editorials which threatened to "punish" and "wipe out" Hong Kong judges and referred to them as "dogs and bitches," "street rats," "scumbags," "British white ghosts," "white-skinned judges," "pigs," "centipedes," and "yellow-skinned canine adjudicators," and described them as being sexually deficient

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66. *HKSAR v. Ma Wai Kwan and Others*, at 12-14 (HKSAR Court of Final Appeal, July 29, 1997) (on file with author).

67. Basic Law, art. 158, ¶ 2.

68. *Ma Wai Kwan and Others*, at 12-14 (HKSAR Court of Final Appeal, July 29, 1997) (on file with the author).

and plagued with "ringworm, scabies and syphilis."<sup>69</sup> The Court of First Instance, the Court of Appeals, and the Court of Final Appeal all concluded that Article 27 of the Basic Law, which provides for the rights of freedom of speech, press and publication, did not set these out as unlimited rights, and that the editorials in question did not constitute expression that was protected under that provision of the Basic Law or the corresponding provision of the Hong Kong Bill of Rights.<sup>70</sup> The reasoning of the Court of First Instance was the most fully expressed of the three courts that entertained this issue:

Article 27 is in Ch III of the Basic Law, which is headed 'Fundamental Rights and Duties of the Residents.' Thus, Art. 27 merely identifies a particular group of fundamental rights and freedoms which the Basic Law guarantees. It does not purport to prevent the enactment of restrictions on those rights. The effect of Art. 39 [of the Basic Law] is to permit restrictions on the rights protected in Ch III, provided that those restrictions are provided by law (for example, Article 16(3) of the Bill of Rights) and are compatible with various international instruments, including the International Covenant on Civil and Political Rights.<sup>71</sup>

In several immigration cases during the period between July, 1997, and January, 1999, the Hong Kong courts issued decisions which included, if not turned on, interpretations of several articles of the Basic Law, yet no request for an interpretation of those provisions by the NPCSC were made. The Court of Final Appeal in July, 1998, in a challenge by Vietnamese refugees to their detention in Hong Kong, established that *habeas corpus* was consistent with Articles 28 and 41.<sup>72</sup> The *Ng Ka Ling* and *Chan Kam Nga* cases came up through the courts at this time, in a consolidated appeal of four cases of PRC children trying to obtain permanent residency status in the HKSAR under provisions of the Basic Law. The Court of Appeal ruled that two immigration ordinances did not violate the Basic Law in the sense that they were enacted by a validly constituted legislature, even though that legislature was not

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69. This description comes from the Court of Appeal in *Wong Yeung Ng v. Secretary for Justice*, 1999-2 HKC 24 (HKSAR Court of Final Appeal, Feb. 9, 1999), and the Court of First Instance in *Secretary for Justice v. Oriental Press Group Ltd. & Ors.*, 1998-2 HKC 627, 1998 HKC LEXIS 83, at 41-71 (HKSAR Court of First Instance 1998).

70. *Wong Yeung Ng v. Secretary for Justice*, 1999-2 HKC 24 (HKSAR Court of Appeal, Feb. 9, 1999); *Wong Yeung Ng v. Secretary for Justice*, 1999-3 HKC 143 (Appeal Committee of the Court of Final Appeal, June 23, 1999); *Secretary for Justice v. Oriental Press Group Ltd & Ors.*, 1998-2 HKC 627, 1998 HKC LEXIS 83, at 109-16 (HKSAR Court of Final Appeal, June 30, 1998).

71. *Oriental Press Group Ltd. & Ors.*, 1998 HKC LEXIS 83, at 110-11.

72. *See Thang Thieu Quyen & Ors v. Director of Immigration & Anor*, 1998-3HKC 247 (HKSAR Court of Final Appeal, July 23, 1998).

elected in conformity with the provisions for electing the legislature in the Basic Law.<sup>73</sup>

The Court of Final Appeal's decision in *Ng Ka Ling* issued on January 29, 1999 was the most ambitious exercise of judicial review power in at least the first four years of the HKSAR. Despite interpreting three constitutional provisions to arrive at its ruling, the court did not request an interpretation of those provisions from the NPCSC. After this decision, it was as if the floodgates opened to constitutional issues in the Hong Kong courts. Until then, the only constitutional issues heard were in the first instance trial of the Oriental Press Group's free speech case and in several immigration cases. Thereafter, litigants invoked the Basic Law in their arguments not only about immigration and in two appellate airings of the Oriental Press Group's case, but also about voting rights issues, a property issue of constitutional magnitude, and criminal law issues. In none of these cases did the courts request an interpretation from the NPCSC.

Two voting rights cases came before the Hong Kong courts after January, 1999. In each, the plaintiff was a life-long resident of a village in the New Territories and claimed that a village rule prohibiting him from running for elected office or from voting in village-wide elections contravened Article 39 of the Basic Law and was therefore unlawful. In both cases the court agreed, reasoning that Article 39 incorporated Article 25 of the International Covenant of Civil and Political Rights into Hong Kong law and bestowed a broad "right to take part in the conduct of public affairs. There can be no doubt that the election or choice of a village representative is a public affair."<sup>74</sup>

Between January, 1999, and June, 1999, two criminal defendants raised a creative constitutional argument in an attempt to avoid conviction at the trial level. In both cases, the defendants argued that Articles 28 and 87 of the Basic Law and Article 5 of the Hong Kong Bill of Rights Ordinance changed the scope of intent sufficient to prove murder such that the evidence in each case was insufficient to convict or sentence the defendant. In each case, the court disagreed with the argument that the transfer of sovereignty changed the common law requirement of intent for murder in this way and its interpretation of the Basic Law was a part of its basis for rejecting the argument.

In one of these cases, the defendant argued that these provisions, plus Article 8, narrowed the scope of intent to include only the intent to kill or the intent to perform an act that endangers life, thereby excluding the additional

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73. See *Cheung Lai Wah v. Director of Immigration*; *Ng Ka Ling & Anor v. Director of Immigration*; *Tsui Kuen Nang v. Director of Immigration*; *Yeung Ni Ni v. Director of Immigration*, 2 HKCFAR 4 (HKSAR Court of Appeal, Apr. 12, 1998).

74. *Chan Wah v. Hang Hau Rural Committee & Anor* 1999-2 HKC 160 (HKSAR Court of First Instance, Mar. 12, 1999). The other voting rights case is *Tse Kwan Sang v. Pat Heung Rural Committee*, 1999-3 HKC 457 (HKSAR Court of First Instance, June 29, 1999).

basis for common law murder, intent to cause grievous bodily harm, which was part of the law of colonial Hong Kong. The court reasoned that the Basic Law provision in Article 8 that the common law be maintained, combined with the language in Article 87 that the principles undergirding criminal proceedings before the transfer "shall be maintained," left no doubt that the substantive law of murder had not changed simply by virtue of the transfer of sovereignty.<sup>75</sup>

In the other case, the defendant argued that these provisions made arbitrary and unlawful punishment a sentence of life in prison for murder upon proving intent to cause really serious harm. Here the court determined that Articles 28 and 87 did not change the common law of murder to render life imprisonment unconstitutional for this type of murder conviction. Before it reached this conclusion, the court emphasized that "if any of those provisions have the effect of changing the common law, then it is open to a court to declare the law as it finds it after the change."<sup>76</sup>

In a consolidation of several appeals before the Lands Tribunal of Hong Kong from administrative decisions which set real estate tax rates owed by private owners of land to the government, the meaning of the term in Article 121 of the Basic Law "rateable value" was at issue. The tribunal considered two possible interpretations of the term, namely its "liability sense" and its "quantum sense." The former referred to the formula for calculating rates provided in the Government Rent (Assessment and Collection) Regulation of June 6, 1997, which was based on the last rate paid. The latter referred to the use by landlords and tenants, when they litigated claims before this tribunal, of rateable values as evidence of the going rate for rent. This latter sense was open to construction by the court and not constrained by the statute. The tribunal adopted this interpretation in order to avoid the absurd result that lands that had never been taxed, such as land newly slated for development, could never be taxed.<sup>77</sup>

The High Court in *Chong Fung Yuen v. Director of Immigration* interpreted Basic Law Article 24(2)(1) in order to reach its judgment dismissing the appeal and leaving intact the lower court's judgment that the applicant qualified for the right of abode under that provision, despite a local statutory requirement which disqualified the applicant. The court rejected the argument that the interpretation of the NPCSC issued on June 26, 1999 controlled the court's interpretation of Article 24(2)(1). The Director of Immigration did not argue that the court should request another interpretation

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75. See *HKSAR v. Chan Chui Mei*, 1999-3 HKC 502, 1999 HKC LEXIS 57 (HKSAR Court of First Instance, June 11, 1999).

76. *HKSAR v. Pun Ganga Chandra & Ors.*, 1999-2 HKC 579, 1999 HKC LEXIS 16, at 7 (HKSAR Court of First Instance, June 1, 1999).

77. See *Agrila Ltd. & Ors. v. Commissioner of Rating and Valuation*, 1999-2 HKC 168, at ¶¶ 1, 2, and 20 (Lands Tribunal, Mar. 30, 1999).



from the NPCSC.<sup>78</sup> Neither the High Court in this appeal, nor the First Instance Court below, requested an interpretation of Article 24(2)(1).<sup>79</sup>

One explanation for why no courts in Hong Kong below the Court of Final Appeal have requested an interpretation is that the courts see such requests as appropriately made only by the Court of Final Appeal. Although neither the Basic Law nor the Court of Final Appeal Ordinance single out the Court of Final Appeal as the only court in Hong Kong to receive interpretations from the NPCSC, the administrative head of Hong Kong's High Court interprets paragraph 3 of Article 158 as singling out the Court of Final Appeal for one of two types of interpretations from the NPCSC. According to Chief Judge Chan, there are two kinds of requests that Hong Kong can make to the PRC, those where only the Court of Final Appeal can make the request, and those where anyone can make the request.<sup>80</sup> The former kind of request for an interpretation of the Basic Law is governed by the requirements set out in paragraph 3 of Article 158. These requests occur: (1) in adjudicating cases, (2) regarding affairs that involve the PRC or the relationship between the PRC and Hong Kong, (3) where the interpretation affects the judgment, and (4) the request is made before the final judgment. The specification that the request be made before the judgment limits this type of request to the Court of Final Appeal, according to Chief Judge Chan. Chief Judge Chan therefore concludes that he could not have made this kind of request because only the Court of Final Appeal could have made it.<sup>81</sup> This position solidifies the power of Hong Kong courts below the Court of Final Appeal to invalidate local statutes.

Why did the Court of Final Appeal not request an interpretation in *Ng Ka Ling*? Albert Chen, member of the Basic Law Committee and Dean of the Hong Kong University Law Faculty, notes that there is a "loophole" in the Basic Law about what should be done when the Court of Final Appeal fails to "strictly follow the review procedures" outlined in paragraph 3 of Article 158 for requesting an interpretation.<sup>82</sup> Both Dean Chen and Martin Lee agree that the Court of Final Appeal in *Ng Ka Ling* should have asked the NPCSC for an interpretation of Article 22(4) because it dealt with the relationship between Hong Kong and the PRC central government and because a

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78. See High Court of the Hong Kong SAR, Civil Appeal No. 61 of 2000 (on appeal from HCAL 67/1999) (Judges Mayo, Leong, Rogers, July 27, 2000) (page 9, online pagination) (argument by Mr. Fok, attorney for the appellants).

79. See *Chong Fung Yuen v. Director of Immigration*, 2000-1 HKC 359, 1999 HKC LEXIS 156, at 19-20 (HKSAR Court of First Instance, Dec. 24, 1999). Attorney Fok made the same argument before the lower court, also refraining there from arguing that the court should request an interpretation from the NPCSC.

80. Interview With Chief Judge Chan *supra* note 49.

81. See *id.*

82. Interview with Dean Albert Chen, Hong Kong University Faculty of Law (July 27, 2000).

determination of Article 22(4) was central to the judgment in that case. Dennis Chang QC, on behalf of the applicants in *Ng Ka Ling*, argued that Article 24 was the predominant provision in the case and that it was about purely Hong Kong matters, namely about receiving people into Hong Kong. The applicants conceded, however, that Article 22 dealt with the PRC-Hong Kong relationship but said that this Article played merely a minor role in this case. As Martin Lee explains, the Court of Final Appeal bought that argument and used it to decide that it need not seek an interpretation of either Article 22 or Article 24.<sup>83</sup> But, Dean Chen maintains that there is no such theory about major or minor provisions in the Basic Law, and the Hong Kong government should have argued this in *Ng Ka Ling*.<sup>84</sup> Martin Lee concurs with this conclusion and explains that as soon as the court was faced with deciding whether it was Article 24 or Article 22 which controlled, Article 22 became central to the outcome. The logical argument, in Lee's view, is that both Articles 22 and 24 needed an interpretation from the NPCSC because to figure out a conflict between the two, in other words to determine which one to refer to in this case, you need to interpret both. Lee believes it is illogical to argue that either Article 22 or Article 24 is of greater importance.<sup>85</sup> Both Articles are of equal importance because they conflict.<sup>86</sup>

According to Martin Lee's account, it would appear that the Court of Final Appeal and the Hong Kong government were both swayed by the applicants' specious argument on this point. Lee explains that the Hong Kong government's position at the start of the appeal (it was a Friday) was that the court should refer both Article 22 and Article 24 to the NPCSC.<sup>87</sup> Both English and Chinese newspapers criticized the government's position. This pressure caused the government to retract its position and defer to the Court of Final Appeal to decide whether to refer. When the *Ng Ka Ling* hearings resumed, the court asked the government to clarify the government's position on this—is it that we should decide to interpret Articles 22 and 24, or should we decide whether to interpret Articles 22 and 24? The government said that its position was that it was for the Court of Final Appeal to decide whether it should interpret the Articles. Dennis Chang, the applicants' counsel, agreed.<sup>88</sup>

Martin Lee maintains that the Court of Final Appeal should have left it at that.<sup>89</sup> The court should have followed this course, agreed to by both parties. Dennis Chang should have left it at that, because the government conceded his position. Nonetheless, Chang continued to argue the point and offered a reason for the court to decide that it had the power to decide whether

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83. See Interview with Martin Lee *supra* note 20.

84. See Interview with Dean Albert Chen, *supra* note 82.

85. See Interview with Martin Lee, *supra* note 20.

86. See *id.*

87. See *id.*

88. See *id.*

89. See *id.*

to interpret the Articles. Chang argued that all of Chapter III's Fundamental Rights provisions are purely Hong Kong law, including Article 24. Therefore, the court should not refer any of those Basic Law Provisions up to the NPCSC. However, he argued that the court should refer Article 22 to the NPCSC because it deals with conditions for Mainlanders to enter Hong Kong. Chang concluded that the court must decide which article is of paramount importance. Unfortunately, in Martin Lee's view, the Court of Final Appeal adopted this approach.<sup>90</sup>

Also unfortunate in Lee's eyes the Court of Final Appeal in *obiter dictum* overruled *Ma Wai Kwan*, because the applicants appealed the *obiter dictum* in that case that stated that the courts of Hong Kong do not have the jurisdiction to query acts of the sovereign.<sup>91</sup> But the Court of Final Appeal did not have to do this, because it was irrelevant to the holding in the case. It was this that angered Beijing, not the interpretation of Articles 22 and 24(2), Lee maintains. The Xinhua news service translated these paragraphs of the judgment into Chinese but did not get it exactly right and sent it to Beijing before the written judgment was issued by the court. This prompted the reinterpretation of the NPCSC.<sup>92</sup>

Notwithstanding any circuitousness or fortuitousness in the process which led to the NPCSC's reinterpretation, there appears to be a consensus among the leading jurists of Hong Kong that the Court of Final Appeal did not have the authority to invalidate those portions of the local immigration statute that it found contrary to Article 24. While the Court might have reached its conclusion under only slightly different circumstances, such an invalidation overreached its authority under Article 158 because Article 24, and Article 22 for that matter, covers the immigration of Mainland Chinese to Hong Kong. What could fall more clearly within the category of "concerning the relationship between the Central Authorities and the Region?"<sup>93</sup>

The fact that the NPCSC might very likely have left untouched the Court of Final Appeal's invalidation of portions of the local immigration statute shows that there is room in Hong Kong for a clever branch of government to assert itself and thereby stretch the boundaries of its authority, and that the courts are not left out of this. The events that led to the NPCSC's decision also show that the NPCSC's authority to issue interpretations of Hong Kong's Constitution does not necessarily encroach upon the judicial review power of Hong Kong's courts. In the case of *Ng Ka Ling*, the Court of Final Appeal invalidated the statutory provisions without interference from the NPCSC. It

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90. See *id.* See also *Ng Ka Ling, Ng Tan Tan (infants by their father and next friend Ng Sek Nin) v. Director of Immigration, Tsui Kuen Nang v. Director of Immigration, Director of Immigration v. Cheung Lai Wah*, 2 HKCFAR 4 (HKSAR Court of Final Appeal, Jan. 29, 1999), available at [http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv\\_14\\_16\\_98.htm](http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_14_16_98.htm)

91. See *Ng Ka Ling, Ng Tan Tan*, 2 HKCFAR 4.

92. See Interview with Martin Lee, *supra* note 20.

93. Basic Law, art. 158.

was only after the court's judgment that the interpretation undid that invalidation. So, the power of the NPCSC here weakened not the power of the Hong Kong court to invalidate statutes, but rather it weakened the finality of such decisions.

Despite the concerns by some jurists both in Hong Kong and abroad,<sup>94</sup> it is settled in Hong Kong law that the NPCSC has the authority to issue interpretations after Hong Kong judgments. The NPCSC in its reinterpretation stated that it was acting pursuant to Article 67 paragraph 4 of the PRC Constitution and Article 158 paragraph 3 of the Basic Law.<sup>95</sup> The Court of Final Appeal accepted in its December 3, 1999 decision applying the NPCSC's reinterpretation that the Chief Executive of Hong Kong acted pursuant to Articles 43 and 48(2) of the Basic Law when he requested that the State Council of the PRC involve the central government of the PRC.<sup>96</sup> The Court of Final Appeal has not yet explained the relationship between the PRC Constitution and the Basic Law as sources of authority for reinterpretations of the Basic Law, nor has it squared Basic Law Article 158 with Articles 43 and 48(2) on the question of the Hong Kong government seeking reinterpretations. Nor has the highest court of Hong Kong elaborated on paragraph 1 as a basis for NPCSC's reinterpretations given the provision in paragraph 3 of Article 158 of the Basic Law which provides for NPCSC interpretations before the Hong Kong courts have issued their final judgments and the lack of provision for reinterpretations in the other parts of Article 158.

Chief Judge Chan could elaborate on paragraph 1 of Article 158 as a basis for NPCSC reinterpretations, however, he has not yet done so in a ruling. However, Chief Judge Chan finds in paragraph 1 of Article 158 a separate kind of interpretation which the NPCSC may issue, a kind that may be issued anytime, even outside the confines of adjudication and concludes that the procedure for this interpretation is not as clear as that for the first type of request, that made by the Court of Final Appeal, yet, he finds its existence to be "quite clear."<sup>97</sup> This type of interpretation coincides with the continental concept that the maker of the law is the ultimate interpreter of the law. This paragraph of Article 158 is not the common law system, he concludes. He suggested that the NPCSC decision of June 26, 1999 handed down this second type of interpretation.<sup>98</sup>

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94. Both Martin Lee and Albert Chen raised concerns about the lack of legal authority for the NPCSC decision. British jurists Mark Elliott and Christopher Forsyth conclude that the Basic Law does not provide any authority for the NPCSC to reinterpret the Court of Final Appeal's interpretations of the Basic Law. See Elliott and Forsyth, *supra* note 9, at 19-20.

95. See Special Report, *supra* note 23.

96. See *Lau Kong Yung v. Director of Immigration* (HKSAR Court of Final Appeal, Dec. 3, 1999) at 10, available at [www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv\\_10\\_11\\_99.htm](http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_10_11_99.htm) (on file with author).

97. See Interview with Chief Justice Patrick Chan, *supra* note 49.

98. See *id.*

This second type of interpretation is important in evaluating the argument of the *Ng Ka Ling* applicants that paragraphs 2 and 3 abrogated the NPCSC's right to interpret the Basic Law. Article 158 paragraph 1 provides "additional machinery" with which the NPC can respond to courts rather than passing another ordinance to invalidate a Hong Kong court decision.<sup>99</sup>

This reading of Article 158, by the administrative head of the penultimate court of Hong Kong, is similar to an argument about the power of the NPCSC to override Hong Kong court decisions that is gaining currency among top judges and lawyers. It is an argument which advances an implication of the severability of paragraphs 1 and 3 of Article 158 of the Basic Law. This implication is that PRC legal concepts can and should be introduced into Hong Kong through the regular process of adjudicating cases.

Martin Lee believes that this type of argument contravenes the structure and legislative intent of the Basic Law.<sup>100</sup> Lee is responsible for the Annex in the Basic Law listing exhaustively the PRC laws which apply to Hong Kong. The provisions in Article 18 which set out the procedures for introducing PRC law into Hong Kong are also there because of Lee's insistence. Secretary for Justice Elsie Leung was the first one who ignored these provisions and argued that PRC concepts should be introduced into Hong Kong. "It's very dangerous," Lee warns about this argument, because these concepts are opposed to the concepts in the common law and because this argument introduces uncertainty since Leung's meaning is unclear.<sup>101</sup> Justice Leung argues that the Basic Law is an "interface," Lee points out. It must mean only that the PRC system—"their system"—is coming into "ours," he said.<sup>102</sup> This includes philosophy. Secretary Leung believes that Hong Kong lawyers and judges should study the PRC constitution so they can better interpret the Basic Law. What this means is totally unclear, Lee laments. What PRC laws, other than those in the Annex and those introduced using the procedures in Article 18, which have not been used yet, apply to Hong Kong? Hong Kong needs certainty and predictability, Lee maintains.<sup>103</sup> His implication, then, is that the argument that HKSAR constitutional law is fundamentally PRC law is destabilizing.<sup>104</sup>

Lee's position on this is consistent with Lee's efforts while drafting the Basic Law to minimize the impact of the new sovereign. Lee was responsible for introducing the Court of Final Appeal to Hong Kong, and the Court of Final Appeal seemed to be a link to the world outside China to counter the link to China that was being strengthened with the change of sovereignty. The Court of Final Appeal, with its guaranteed number of judges from common

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99. *See id.*

100. *See* Interview with Martin Lee, *supra* note 20.

101. *Id.*

102. *Id.*

103. *See id.*

104. *See id.*

law countries, seemed to be a way to maintain the common law and protect it against some kind of encroachment by Chinese law.<sup>105</sup>

So far, the Hong Kong courts have rejected this argument about the usefulness of PRC law when interpreting the Basic Law of the Hong Kong SAR. In *Chong Fung Yuen v. Director of Immigration*, the most important constitutional case in the Hong Kong courts in 2000, for example, the attorney for the Director of Immigration argued that:

there were a number of interfaces between the Hong Kong Law and the Laws of the People's Republic of China and when this was taken in conjunction with the very definite opinion given by Professor Lian there were clearly grounds to support his contention that the additional requirements laid down in para. 2(a) of the Schedule to the Immigration Ordinance were in conformity with Article 24(2)(1) of the Basic Law.<sup>106</sup>

The gist of Professor Lian Xisheng's (of the Chinese University of Politics and Law in Beijing) argument was that the drafters of the Basic Law could not have meant to grant right of abode in Hong Kong to all Mainland Chinese born in Hong Kong. The High Court concluded that it could "not consider that much assistance can be derived from this" argument about legislative intent.<sup>107</sup> In even more dismissive language, the court stated that "[i]t is apparent from these Articles [18, 19, 8] that the scope for the application of the National Laws of the People's Republic of China is severely circumscribed."<sup>108</sup>

There is much at stake in this issue of how far PRC law intrudes into HKSAR law. Yet, it is not true that PRC law would exert only a cabining effect on judicial review in Hong Kong. There are protections within PRC law of the autonomy of Hong Kong's judicial system. While the PRC Constitution does not invest judges with the power to interpret the PRC Constitution<sup>109</sup> and effectively precludes them from it by investing the NPCSC with this power,<sup>110</sup> it opens the door to excluding Hong Kong judges from this

105. See *id.* Lee's experience in this drafting process is documented in MARK ROBERTI, *THE FALL OF HONG KONG: CHINA'S TRIUMPH AND BRITAIN'S BETRAYAL* 141-77, 199-200, 204, 215-17 (1994).

106. *Chong Fung Yuen (an infant by his grandfather and next friend Chong Yiu Shing) v. Director of Immigration*, 2001-1HKC 359, 1999 HKC LEXIS 156 (HKSAR Court of First Instance, Dec. 24, 1999).

107. *Chong Fung Yuen v. Director of Immigration*, 2000-1 HKC at 10 (HKSAR Court of Final Appeal, Civil Appeal No. 61, July 27, 2000) (on appeal from HCAL 67/1999).

108. *Id.* at 16.

109. XIANFA arts. 123-128 (1982). For an English-language version of the Constitution of the People's Republic of China, see *supra* note 1, at 147-48.

110. See *id.* art. 67. For an English-language version of this, see *supra* note 1, at 136.

limitation providing for "systems" in SARs to be established within the PRC.<sup>111</sup> There is nothing in the PRC Constitution which defines the parameters of judicial review in the HKSAR left undefined by the Basic Law, but the elaboration of the constitution's "systems" in the "one country, two systems" formula in the Sino-British Joint Declaration and the Basic Law suggests that the constitutional arrangement between the NPCSC and the PRC courts does not fully apply to the division of powers between the NPCSC and the HKSAR courts.

The argument about the independence of paragraphs 1 and 3 of Basic Law Article 158 from one another supports the conclusion that the second part of the *Ng Ka Ling* decision, the part that invalidates the immigration statute, is no longer good law. Chief Judge Chan arrived at this analysis by applying the last line of paragraph 3 of Article 158. It seems the NPC is overriding *Ng Ka Ling* with legislation, Chief Judge Chan maintains, except that the last line of paragraph 3 provides that any such overriding does not affect prior judgments.<sup>112</sup> It would appear, then, that Judge Chan reads Article 158 as making it easier for the NPCSC to override Hong Kong court decisions. The NPCSC does not have to go to the trouble of passing legislation.

This reading of Article 158 overcomes the problem that neither the PRC Constitution, nor the Joint Declaration, nor the Basic Law provides for the PRC central government to intervene in a Hong Kong court decision after it has been handed down. This interpretation of Article 158 also overcomes the additional problem that Article 158 of the Basic Law contains two passages which might prohibit the NPC Standing Committee from issuing its interpretations to Hong Kong courts after they hand down their final judgments. One such passage in the Article directs the Hong Kong courts to seek such interpretations "before making their final judgments," while the other assures that "judgments previously rendered shall not be affected."<sup>113</sup>

This reading of Article 158, in which paragraphs 1 and 3 are separate from one another, appears to have been adopted by the Court of Final Appeal and the NPCSC. In *Lau Kong Yung*, the Court of Final Appeal in December, 1999, stated that the "power [in Article 158 (1) to make the Interpretation] and its exercise is not restricted or qualified in any way by Articles 158(2) and 158(3)."<sup>114</sup> The NPCSC did not assert that paragraphs 1 and 3 must be read as independent from one another, but its decision of June 26, 1999 cited Article 158 paragraph 1 as a source of its authority to issue the decision, and

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111. See *id.* arts. 31 and 62(13). For an English-language version of this, see *supra* note 1, at 129, 134-35.

112. See Interview with Chief Justice Patrick Chan, *supra* note 49.

113. These are some of the problems raised by Elliott and Forsyth in their recent article. See Elliott and Forsyth, *supra* note 9, at 11-13.

114. *Lau Kong Yung v. Director of Immigration*, 2 HKCFAR 300 (HKSAR Court of Final Appeal, Dec. 3, 1999), available at [www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facy\\_10\\_11\\_99.htm](http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facy_10_11_99.htm). at 13-14.

it further stated that the Court of Final Appeal did not comply with Article 158 paragraph 3 when it failed to request an interpretation of Article 22 and 24.<sup>115</sup>

This reading of Article 158 paragraph 1 as independent from paragraph 3 solidifies the position of the NPC as an interpreter of Hong Kong law applied in Hong Kong. Even though the Court of Final Appeal and the NPCSC appear to have adopted it, however, this reading does not diminish the power of Hong Kong courts staked out in *Ng Ka Ling* to be an interpreter of Hong Kong law in Hong Kong. This is because no law since then has whittled down that portion of *Ng Ka Ling*.

This broad role for Hong Kong courts in the interpretation of Hong Kong's constitution appears to remain intact to the present day. The NPC Standing Committee's interpretation of Article 22(4) and Article 24(2)(3) of the Basic Law appeared calculated to reverse the judgment in *Ng Ka Ling*. In this interpretation the Standing Committee cited Articles 67 and 158 of the Basic Law as the source of its authority to issue this interpretation but did not interpret those provisions to explain why. The gist of its interpretation was that it does not matter if the offspring of permanent residents of Hong Kong are born before or after the handover. When they are born, at least one parent must be a permanent resident of Hong Kong.<sup>116</sup> While the NPCSC decision restored the statute that the court declared unconstitutional, it refrained from vacating any of the court's language which asserted that it had broad power to review constitutional issues.<sup>117</sup> The interpretation did not include an extensive elaboration on the judicial review authority of the Hong Kong Court of Final Appeal or of all of the Hong Kong courts. It was prefaced by the following language: "The Court of Final Appeal did not rely on Paragraph 3 of Article 158 of the Basic Law and request the NPC Standing Committee to produce an interpretation . . . ."<sup>118</sup> This language maintains only that in this particular ruling, the Court of Final Appeal was not constrained by the limits placed upon its review power, but the language does not set out an explanation of this constraint.

On January 29, 1999, for the first time, the Court of Final Appeal of the Hong Kong SAR ruled on the question of which issues Hong Kong courts could consider independently, and which issues they could consider with guidance from the NPC Standing Committee. This set of rulings, in three consolidated appeals brought by *Ng Ka Ling* and others, ended the constraint of local judicial authority beyond that sanctioned by the sovereign. The ruling accomplished this by pronouncing any act of the PRC that affected Hong Kong as justiciable in Hong Kong courts.<sup>119</sup>

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115. See Special Report, *supra* note 23.

116. *Id.*

117. See Elliott & Forsyth, *supra* note 9.

118. Special Report, *supra* note 23.

119. See *Ng Ka Ling, Ng Tan Tan (infants by their father and next friend Ng Sek Nin) v. Director of Immigration, Tsui Kuen Nang v. Director of Immigration, Director of Immigration*



The court used language that presented the broadest possible reading of the authority given to Hong Kong judges in that positive law. The court stated that:

It is for the courts of the Region [SAR] to determine questions of inconsistency [with the Basic Law] and invalidity when they arise. It is therefore for the courts of the Region to determine whether an act of the National People's Congress or its Standing Committee is inconsistent with the Basic Law.<sup>120</sup>

Not only did the court claim jurisdiction for all Hong Kong courts over acts of the NPC, but it claimed this right exclusively when conformity with the Basic Law was at issue. While the court does not explicitly state that the NPC Standing Committee does not have the authority to determine whether its acts conform to the Basic Law, this is the implication of the double use of "[I]t is [therefore] for the courts . . ." <sup>121</sup> Furthermore, the court claimed for itself the sole power to determine when an interpretation from the NPCSC is needed: "In our view, it is for the Court of Final Appeal and for it alone to decide, in adjudicating a case, whether both conditions [that the provisions concern the two excluded categories in Article 158 and that the interpretation of these provisions affect the judgment] are satisfied."<sup>122</sup>

The rationale for this assertion was that Article 31 of the PRC Constitution, empowering the NPC to set up Special Administrative Regions, provided the Hong Kong courts with the authority for this type of review, and that Article 158 of the Basic Law emphasized the independence of Hong Kong courts by using the words "on their own."<sup>123</sup> The court proceeded to fill in some of the gaps in the law on judicial review. The Court of Final Appeal specified that the limits placed upon it in Article 158 applied to only itself because of the words "final judgments." The court stated that it must seek an interpretation from the NPCSC only when the issue fell into one of the two categories set out in Article 158 and, then, only when that issue affected the outcome of the case; that it alone determined when an issue fell into one of those categories; and that it submitted for an interpretation to the NPCSC only the provisions of the Basic Law that the court had determined fell into one of those categories, "not the question of interpretation involved generally."<sup>124</sup> In

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v. *Cheung Lai Wah* (an infant suing by her father and next friend *Cheung Miu Cheung*), 2 HKCFAR 141 (HKSAR Court of Final Appeal, Jan. 29, 1999), available at [http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv\\_14\\_16\\_98.htm](http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_14_16_98.htm).

120. *Id.* at 21 (online pagination).

121. *Id.*

122. *Id.*

123. Basic Law art. 158.

124. *Id.*

other words, not only were all other issues in the case, even those necessary for reaching a decision, not covered by the interpretation, but even those provisions of the Basic Law which the NPCSC interpreted for the court had to be applied to the issues by the court itself.<sup>125</sup>

The Court of Final Appeal here interprets several provisions in Article 158 to fill in the gaps in a way that maximizes the jurisdiction of the Hong Kong courts over constitutional issues. "[F]inal judgments," for example, need not mean only Court of Final Appeal cases. It could mean, alternatively, *all* courts before they issue their final judgments, that is anything immediately appealable. This is the common law definition of finality, which the court chose not to read into Article 158.

In sum, then, the broad powers to invalidate statutes, which the Court of Final Appeal staked out for all Hong Kong courts in *Ng Ka Ling*, remain good law. The Basic Law gives Hong Kong's courts the power to interpret and review the constitutionality of statutes. The Court of Final Appeal on January 29, 1999 broadly construed this power to include the invalidation of statutes. In its decision of June 26, 1999, the NPCSC refrained from vacating any of the court's language which asserted that it had broad power to review constitutional issues and legislation. Neither the NPCSC, the Hong Kong government, nor the courts of Hong Kong, have in any other way nullified this power.

### III. THE FINALITY OF HONG KONG COURTS' INVALIDATION OF LOCAL STATUTES

The Standing Committee decision did not necessarily set a precedent for procedures which undermine the finality of constitutional review in the HKSAR. One reason is that the process by which the Hong Kong government obtained the decision is not, in all likelihood, going to be a regular one. Another reason is that the procedures for requesting an interpretation of Hong Kong's constitution from the PRC's legislature are not yet formulated. Without further definition of the procedure for requesting an interpretation, it is premature to argue that the process significantly undermines the finality of the constitutional review of the courts of Hong Kong.

Albert Chen, a member of the Basic Law Committee that advised the NPCSC when it issued its decision of June 26, 1999, states in no uncertain terms that the interpretation issued by the NPCSC is a rare occurrence. The Basic Law Committee is authorized by the Basic Law to consult with the NPCSC when it formulates its constitutional interpretations under Article 158. Dean Chen also emphasizes that the Basic Law Committee is different from the Law Lords, the body that arrives at the judicial decisions of the House of Lords in the United Kingdom, in that it is not a regularly meeting body. It is

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125. *See id.* at 16-23.

only under extremely rare circumstances that the Basic Law Committee meets, Chen says, or needs to consult with NPCSC, when such an issue arises. So far, the Basic Law Committee has met only once, to consult on the *Ng Ka Ling* case. What is more, Dean Chen maintains, the Hong Kong government decided that such a request to the NPCSC will only occur under exceptional circumstances. Secretary of Justice Elsie Leung announced this before a session of the Legislative Council in early March, 1999,<sup>126</sup> and both she and Albert Chen spoke to that effect at a conference in Hong Kong on the PRC Constitution in December, 1999. Chen's words were:

I think this case is not a precedent for the proposition that the Standing Committee should and can intervene on any matter of interpretation of the Basic Law in which it is alleged that the courts of Hong Kong, including the Court of Final Appeal, have misconstrued the original intent.<sup>127</sup>

Secretary Leung's words on the subject at the conference were, "Time and again we have said the Government is not going to press for interpretations lightly, nor is the Standing Committee going to exercise the power lightly."<sup>128</sup>

There is room for interpretation in these remarks, about how rare an occurrence NPCSC reinterpretations might be. Martin Lee does not believe that these statements, and the others on the subject made by officials of the Hong Kong government, are explicit enough to reassure the Hong Kong courts that the government will rarely request reinterpretations after the judgments of the Court of Final Appeal. After the NPCSC decision, Martin Lee pressed Ministry of Justice Elsie Leung and Hong Kong Chief Executive Tung Chee Hwa to say publically that it was a rare situation, so that judges would not feel the Sword of Damocles hanging over them, to put the judges back into the frame of mind to do justice. Lee has been pressing the United States government to talk to Tung Chee Hwa to persuade him to announce that it is a rare situation. Lee does not believe that Justice Leung and Chief Executive Hwa have done so, however. He maintains that, "so far, all Leung and Tung have said is that they won't do it too often."<sup>129</sup>

If Hong Kong government pronouncements do not reassure the courts and the citizens of Hong Kong that the Hong Kong government will rarely seek an interpretation of the Basic Law by the NPCSC, the lack of any defined procedure for such a move should help reassure them of this. While the

126. See Interview with Dean Albert Chen, *supra* note 82.

127. Cliff Buddle, *Intervention will be Rare: NPC Adviser*, SOUTH CHINA MORNING POST Dec. 6, 1999, at 1. For another of Secretary Leung's statements on the rarity of NPCSC interpretations of the Basic Law, see *Hong Kong Insists it Will Maintain Judicial Independence*, DEUTSCHE PRESSE-AGENTUR, Jan. 17, 2000.

128. *Id.*

129. Interview with Martin Lee, *supra* note 20.

authority of the NPCSC to issue its decision has been set out by the NPCSC in its decision, the NPCSC issued its decision outside of any process outlined in law. Albert Chen supports this view when he maintains that there is no provision in the Basic Law for the government to request such intervention.<sup>130</sup> The lack of specified procedures means that the decision did not go very far toward setting a precedent for future reinterpretations by the NPCSC. Why should a lack of process keep the procedural slate clean, rather than itself constituting a simple process to be followed in the future? It is because the Hong Kong courts and the NPCSC were in the middle of defining the procedures for NPCSC interpretations when the NPCSC issued its decision, and the courts plan to resume their working out of the procedures after the right of abode cases are all adjudicated.

Chief Judge Chan said that in 1998, seven months or so after the handover, he went to Beijing to visit the NPC Secretariat, and while he was there he saw a draft of the procedures for referring an issue up to the NPCSC, which four judges from Hong Kong had drafted. Chief Judge Chan said the people there were quite open about it, saying they would probably approve it, if only the judges told them what kind of case they had in mind. The delegation from Hong Kong could not tell them what kind of case these rules would first be applied to because the immigration cases were just beginning to wind their way through the courts. At that point these types of cases had either been tried at the first instance level or were about to be tried. Therefore, the Hong Kong judges put the procedural rules aside. The judges did not want to work them out while the immigration cases were pending because they were afraid the public or the international human rights advocates would use it against them, perhaps by claiming that the courts were developing the procedural rules at that time in order to try to influence the outcome of the immigration cases. Judge Chan figures that the immigration cases will take about one more year to complete their course through the Hong Kong courts. Then the Hong Kong judges will settle the procedural rules for referring a case.<sup>131</sup>

Basic Law Committee member Anthony Neoh informed the author eleven months after the handover that the Chief Justice of the Court of Final Appeal of the HKSAR had already decided that the parties who bring cases to that Court which potentially raise constitutional questions will each have a chance to frame the questions. The court will then accept or reject the framing of the questions. If it accepts a constitutional framing of the questions, the court then either passes them up to the NPCSC or rejects both parties' framing and frames its own questions to pass up to the NPCSC. The parties might have a chance to present arguments on those questions before

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130. See Interview with Dean Albert Chen, *supra* note 82.

131. See Interview with Chief Judge Patrick Chan, *supra* note 49.

the questions are sent up.<sup>132</sup> There has not yet been an opportunity to try out this process. *Ng Ka Ling* came the closest to providing such an opportunity, except that the court decided not to pass anything up to the NPCSC.

The Basic Law envisions the Basic Law Committee as a source of legal advice when the National People's Congress of China hands down interpretations of the Basic Law for application in the Hong Kong courts as issues involving the PRC central government arise in adjudication. The Basic Law Committee does not communicate with Hong Kong courts, but instead it advises the NPCSC, which itself communicates binding government interpretations under Article 158 to the courts, or, Article 19 certificates to the courts through the Hong Kong government. The Basic Law itself does not set out the procedures that the NPC and the Committee will follow in such circumstances, and no procedures have yet been worked out. In 1998, Anthony Neoh envisioned the Basic Law playing the role played by the Law Lords Committee of the House of Lords in London. This Committee hears oral argument from the parties, decides the issues, then refers an opinion to the House of Lords, which then issues a judgment using the opinion as its rationale. He also hoped the hearings would be public, involve oral and written evidence, and be held in a courtroom setting.<sup>133</sup>

According to Albert Chen's description of the process by which the NPCSC decision of June 26, 1999 was created, Anthony Neoh's vision has not been realized. The process by which a bill is prepared was more legislative than judicial, says Chen. The NPCSC Legislative Affairs Commission prepared the draft of the decision. The Basic Law Committee discussed it, amended it in minor ways, detailed changes to the wording, and prepared a report on the legal issues which it sent to the plenary Standing Committee. The Standing Committee then adopted the draft but did not necessarily accept all the amendments.<sup>134</sup>

Even something as fundamental as the nature of the Basic Law Committee and the NPCSC when it is rendering interpretations of the Basic Law remains unsettled. Just as the Privy Council and House of Lords are really judicial bodies despite their location within Britain's Parliament, so too could the NPCSC play a judicial role even while located within the PRC's legislature. Former Legislative Counselor Christine Loh says that no one knows yet whether the NPCSC will be acting primarily as a court or a legislature when it issues its interpretations of the Basic Law.<sup>135</sup> There is little evidence that the NPCSC and the Basic Law Committee will function like judicial bodies when they issue interpretations of the Basic Law pursuant to a request by the Court of Final Appeal. When asked the question directly,

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132. See Interview with Anthony Neoh, Hong Kong (June 4, 1998).

133. See *id.*

134. See Interview with Dean Albert Chen, *supra* note 82.

135. See Interview with Christine Loh, Legislative Council Offices, Hong Kong (July 20, 2000).

Albert Chen asserts that the Basic Law Committee is unlike the House of Lords' Law Lords Committee in that it rarely meets. The Basic Law Committee is not a judicial body, mainly because it hears no evidence and does not draft opinions. The Basic Law Committee merely takes the draft given it by the NPCSC and makes recommendations for editing the draft.<sup>136</sup> Nor did the NPCSC function like a court when it prepared the decision it issued on June 26, 1999. The NPCSC heard no arguments from parties, and it included little reasoning in its decision.

Some prominent jurists in Hong Kong, including Legislative Council member Margaret Ng, feared in 1997 that the Basic Law Committee would become a shadow constitutional court, preempting the paramount judicial authority of the Court of Final Appeal. Such a role is problematic because the Basic Law does not explicitly make the decisions of the Basic Law Committee subject to precedent or any kind of due process.<sup>137</sup> If the fear of a supreme but extra-legal judicial entity were to bear itself out, then Beijing would have created a kind of adjudication supervision committee for all the courts of Hong Kong. All courts in the PRC have attached to them such committees, whose purpose is to advise judges on the correct results in cases in light of the current policy of the Chinese Communist Party. It would appear that, at least at the end of the third year of the HKSAR, this fear has not yet been realized.

Both Dean Chen and Chief Judge Chan said that the Basic Law Committee did advise the NPCSC before it handed down its interpretation of June, 1999, but that the Basic Law Committee has not done anything else yet. Because the Basic Law Committee has not worked with the Court of Final Appeal yet (and it has not consulted with any Hong Kong court), no one knows the procedures yet. Chief Judge Chan thinks that the Court of Final Appeal will submit to the Basic Law Committee the Court of Final Appeal's summary of the facts, the issue(s) for interpretation, the possible outcomes, and the parties' submissions. Judge Chan is not sure in particular about whether the several different outcomes will indeed be presented, but he thinks that the Basic Law Committee prefers this because there are only a few lawyers on the twelve-member Basic Law Committee. The three of the six Hong Kong members who are lawyers are Albert Chen, Senior Counsel Anthony Neoh,<sup>138</sup> and former Barrister Maria Tam. Five of the six PRC members have some legislative drafting experience, but none of them are judges. The fact that not all the Basic Law Committee members are lawyers means, according to Albert Chen, that the committee's role is more legislative than judicial. The Basic Law Committee could not follow judicial

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136. See Interview with Dean Albert Chen, *supra* note 87.

137. See Margaret Ng, *A Threat to the Basis of our Autonomy*, SOUTH CHINA MORNING POST, July 25, 1997, at 19.

138. The title of Senior Counsel is the new term in the HKSAR for the former status of Queens Counsel. This is the loftiest status for a lawyer in Hong Kong.

procedures, maintains Chen, in part because its members are not judges.<sup>139</sup>

Martin Lee sees the process of seeking an interpretation to be wide open, but permanently so, and in a way that maximizes the authority of the NPCSC to issue interpretations. The Court of Final Appeal accepted in its application of the NPCSC decision of June 26, 1999 that the court may request a reinterpretation at any time. A reinterpretation after trial contravenes the last sentence of paragraph 3 of Article 158, which says there will be no retrospective effect of NPCSC interpretations, but if paragraph 1 is freestanding, then the last sentence of paragraph 3 is nullified. Lee disagrees, however, with the reading of paragraphs 1 and 3 as severable and instead believes that these paragraphs refer to one another. According to Lee, the detail in paragraphs 2 and 3 elaborate on paragraph 1. The first paragraph is only introductory and is consistent with the PRC Constitution, which states that the power to interpret is "vested in" the PRC. The first paragraph of Article 158 is not free standing, but merely states a fact, a preexisting fact, a fact that existed before the Basic Law. "If paragraph 1 were free standing, why would you need paragraph 2?" Lee asks. Martin Lee laments that despite the logic of this, the Court of Final Appeal accepted that paragraph 1 is free standing in its application of the NPCSC's June 26, 1999 decision.

Legislative intent has played an increasingly important role in the right of abode cases, and it might play an important role in the resolution of the procedures for the NPCSC interpretations. The whole question, says Lee, for the PRC drafters, was how the NPCSC's power to interpret should be implemented or applied. Lee explained that the PRC drafters of Article 158, of whom he was one, decided that they did not want the Hong Kong courts to refer to the NPCSC in all issues that arise in Hong Kong courts, simply because the NPCSC would not have time to issue interpretations for all the issues that arise.<sup>140</sup>

Notwithstanding this legislative deference to practical constraints on the NPCSC, the drafters responded differently when Lee raised three questions with the PRC government about the NPCSC's power to issue interpretations. Lee asked who can request an interpretation, which Articles of the Basic Law could be the subject of such requests, and when may such requests be made? The PRC drafters responded that "everybody" may apply for an interpretation. They added, however, that the NPC need not accede to it, but if *Ng Ka Ling* applies, they surely will, concludes Lee sardonically. He believes that this type of open-ended formal equality in practice benefits just the powerful. As to which Articles may be interpreted by the NPCSC, the PRC drafter said "all." As to when, the PRC drafters said before, during, and

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139. See Interview with Chief Judge Patrick Chan, *supra* note 60. See also Interview with Dean Albert Chen, *supra* note 82.

140. See Interview with Martin Lee, *supra* note 20.

after trial.<sup>141</sup> If this legislative history is used to formulate the procedures for the NPCSC's interpretations, then the NPCSC might become quite an active interpreter of the Hong Kong Basic Law. It is even possible to fit the June 26, 1999 decision into these loose parameters, and thus it could become a precedent.

This legislative history may not influence the procedures as much as the current political climate in Hong Kong will. The Hong Kong government has since the drafting of Article 158 made promises that it will rarely request an interpretation from the NPCSC, and that the NPCSC will rarely issue an interpretation. These promises put pressure on the leading judges of Hong Kong who will work out the procedural rules with the NPCSC to create constraints on the NPCSC that will limit its discretion in the process of issuing interpretations.

Article 158 itself affords the creators of the procedures a great deal of freedom, even while the text of this provision does not reflect much of the discussion of its drafters, as recounted by Martin Lee. Apart from specifying the need to request "an interpretation" from the NPCSC, Article 158 provides merely that the courts of the HKSAR interpret "the provisions of this [Basic] Law which are within the limits of the autonomy of the Region."<sup>142</sup> There is nothing explicit in the Basic Law which prohibits Hong Kong courts from determining whether the instant case calls for an interpretation of the Basic Law from the NPC Standing Committee. Nor is there anything explicit in the relevant Basic Law provisions which limits the Hong Kong courts' power to review any issue where the courts deem that no intervention of this type is needed. There is nothing that prohibits the Hong Kong courts from independently receiving constitutional questions as framed by the parties, or from recasting them themselves, and then engaging in *de novo* analysis and applying, with completely unfettered discretion, the provisions of the Basic Law that the court finds relevant to the instant issue. The language of the 1995 agreement on the Court of Final Appeal does not add detail to the procedure set out in the Basic Law, nor does it outline a different role for the Court of Final Appeal and the rest of the Hong Kong courts in this respect.

The promises of the Hong Kong government and the Basic Law Committee, combined with the imminent development of procedures for NPCSC interpretations of the Basic Law, go a long way toward ensuring that the Standing Committee's adjustment of the Court of Final Appeal's invalidation of local law did not set a precedent for procedures which undermine the finality of constitutional review in the HKSAR. Without further definition of the procedure for requesting an interpretation, it is premature to argue that the process takes away review power from the courts of Hong Kong.

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141. *See id.*

142. Basic Law, art. 158.



#### IV. THE SCARCITY OF LAW LIMITING THE HONG KONG COURTS' INVALIDATION OF PRC STATUTES

While courts reach the zenith of their review power when they invalidate statutes, local courts exercise even more power when they invalidate national statutes rather than local statutes. The question of whether Hong Kong courts can invalidate the statutes of the PRC is, at least for the moment, settled in Hong Kong law. The Court of Final Appeal's only treatment of this question was discussed in *Ng Ka Ling*. The court stated in no uncertain terms that Hong Kong courts have this power. This statement came in dicta because the court did not address this question in ruling on that case. The NPCSC gave this statement its tacit approval, however, by refraining from overruling it in its June 26, 1999 decision, which corrected the court's interpretations of Basic Law Articles 22 and 24 found elsewhere in the *Ng Ka Ling* opinion. The relevant language in *Ng Ka Ling* is as follows:

What has been controversial is 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 invalidity if inconsistency is found. It is right that we should take this opportunity of stating so unequivocally.

It is for the courts of the Region [SAR] to determine questions of inconsistency [with the Basic Law] and invalidity when they arise. It is therefore for the courts of the Region to determine whether an act of the National People's Congress or its Standing Committee is inconsistent with the Basic Law. . . .<sup>143</sup>

The "act" referred to in *Ng Ka Ling* is any national statute of the PRC. The court refers to the legislature of the PRC, not to its administrative agencies, which fall under the leadership of the State Council. This dicta can be used to justify the argument that Hong Kong courts may invalidate PRC statutes for their failure to comply with Hong Kong's constitution. This review power would make them almost as powerful as state courts in the

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143. *Ng Ka Ling, Ng Tan Tan v. Director of Immigration; Tsui Kuen Nang v. Director of Immigration; Director of Immigration v. Chueng Lai Wah*, 2 HKCFAR 141 (HKSAR Court of Final Appeal, Jan. 29, 1999).

United States, which can declare federal statutes invalid because they do not conform to the United States Constitution.<sup>144</sup>

So far no Hong Kong court has invalidated a PRC statute. There appears to be no limit so far, however, to the discretion of the Hong Kong courts in applying PRC laws which do not mention Hong Kong. A notable example of this appeared in February, 1999, when the Hong Kong Court of Final Appeal reviewed a decision by the Court of Appeal in which both courts applied the Arbitration Rules of the PRC's international arbitral body and the PRC Civil Procedure Law without any guidance from the PRC in the form of a certificate or an interpretation.<sup>145</sup>

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144. State courts have invalidated federal laws. An example of one such decision which was denied certiorari by the United States Supreme Court is *In re Bridget R. v. Cindy R.* 41 Cal. App. 4th 1483 (1996) (finding that The Indian Child Welfare Act of 1978 could not, under the Fifth, Tenth, and Fourteenth Amendments to the United States Constitution, "invalidate a voluntary termination of parental rights respecting an Indian child who is domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or political relationship with their tribe." *Id.* at 1492.) Another example, which was reversed by the United States Supreme Court, 494 U.S. 715, is *Committee on Legal Ethics of the West Virginia State Bar v. Triplett*, 378 S.E.2d 82 (W. Va. 1988) (Supreme Court of Appeals of West Virginia found that federal limits on attorneys' fees in black lung cases violated the due process clause of the Fifth Amendment to the United States Constitution).

State supreme courts have applied federal law when reviewing a state administrative action. In the early 1920s, Congress amended the federal Judicial Code to withdraw federal law and jurisdiction from cases of workmen's compensation claims by longshoremen. Challenges by insurance companies to two such workmen's compensation claims reached state supreme courts, that of Washington and that of California, on the ground that the state administrative agency's award was not valid because states had no jurisdiction to award workmen's compensation, notwithstanding the amendment to the federal statute. One court annulled the award in question and the other affirmed the trial court's dismissal of the claim. See *Washington v. W.C. Dawson & Co.*, 211 P. 724 (Wash. 1922); See also *James Rolph Co. v. Indus. Accident Comm'n of Cal.*, 220 P. 669 (Cal. 1923). The United States Supreme Court affirmed both decisions. See 264 U.S. 219 (1924).

State courts have also interpreted the United States Constitution to determine whether Congress could authorize institutions chartered by the state to transform themselves into federally chartered institutions. In *State ex rel. Cleary v. Hopkins Street Bldg. & Loan Ass'n*, 257 N.W. 684 (Wis. 1934), *aff'd* by the United States Supreme Court in *Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315 (1935), the Wisconsin Supreme Court decided that Congress could not authorize Savings and Loan Associations chartered by the State of Wisconsin to transform themselves into Federal Savings and Loan Associations.

State courts have decided that union dues violated the First and Fifth Amendments to the United States Constitution. See, e.g. *Int'l Ass'n of Machinists v. S.B. Street*, 108 S.E.2d 796 (Ga. 1959), *rev'd* by the United States Supreme Court in *Int'l Ass'n of Machinists v. S.B. Street*, 367 U.S. 740 (1961).

145. See *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.*, 2 HKC 205 (HKSAR Court of Final Appeal, Feb. 1999).

While the law in Hong Kong currently provides for its courts to invalidate PRC statutes if in their application in Hong Kong they run counter to the Basic Law, some leading jurists in Hong Kong see a change in the law on this interpretation in Hong Kong's future. Such a change, if it is ever introduced, will probably not occur until after the right of abode litigation has finished winding its way through Hong Kong's courts, however, simply because of the bad press this change would get and the instability this might cause. The right of abode litigation, with its pendulum swings between giving the right to and then taking it away from the same Mainlanders, has chipped away at the public's faith in its court system and in its new legal system. The Court of Final Appeal would not risk adding to this loss of faith until the confusion about the constitutional dimensions of the right of abode has subsided. In fact, the furor aroused by the right of abode cases might itself reduce the likelihood that the Court of Final Appeal or the NPCSC will explicitly deny that Hong Kong courts can legally invalidate PRC statutes.

The law which might support such a change can be found in the High Court's opinion in *Ma Wai Kwan*, a landmark constitutional case upholding the validity of the Provisional Legislature and the continuation of the common law in Article 19 of the Basic Law and in the act of state doctrine. As shown in this final section, if any of these potential sources of authority for rejecting the power of Hong Kong courts to invalidate PRC statutes is invoked by the Court of Final Appeal or the NPCSC, it will not likely go far to constrain the review power of Hong Kong courts.

### *HKSAR v. Ma Wai Kwan*

The Court of Final Appeal's dicta that Hong Kong's courts have the authority to invalidate PRC statutes reversed the dicta by the High Court in *HKSAR v. Ma Wai Kwan* on this point. The High Court concluded that the Hong Kong courts do not have jurisdiction over questions about the compliance of any act by the PRC with the Basic Law. The relevant language was:

[R]egional courts have no jurisdiction to query the validity of any legislation or acts passed by the sovereign. There is simply no legal basis to do so. It would be difficult to imagine that the Hong Kong court could, while still under British rule, challenge the validity of an Act of Parliament passed in U.K. or an act of the Queen in Council which had effect on Hong Kong.<sup>146</sup>

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146. *HKSAR v. Ma Wai Kwan and Others* at 23 (HKSAR Court of Final Appeal, July 29, 1997) (on file with author).

The statement of the court referred to Hong Kong courts as "regional courts" and was couched in language about the courts prior to the handover because the court was voicing its acceptance of the Solicitor General's arguments on the question of whether the court could review the constitutionality of the NPC's decision to approve the Provisional Legislature. The Solicitor General maintained that no colonial, federal, or "confederal" system permits regional courts' authority over the acts of the federal government. He also argued that the Basic Law did not permit the scope of judicial review in Hong Kong to expand after the handover, and that the scope before the handover had not extended to challenges against any act of Great Britain.<sup>147</sup>

Chief Judge Chan, the principal author of the *HKSAR v. Ma Wai Kwan* opinion, still believes that Hong Kong courts cannot invalidate PRC legislation. In that opinion, he stated that parties can challenge two kinds of NPC acts, that is, the existence of the NPC act, and the contents of the act. In a subsequent case, Judge Chan set out that parties can also, on rare occasions, challenge the NPC act as inconsistent with another act, including the Basic Law. For example, if the NPC did not follow its procedures and it affects Hong Kong. On the other hand, he explained, courts that do not affect Hong Kong "are none of [the Hong Kong courts'] business." Similar to the United States, federal laws can't be challenged in state courts, only in federal courts. To challenge a PRC act or law, one must go to a PRC court. Hong Kong colonial courts could not challenge English Parliament and, likewise, "municipal courts cannot challenge the ultimate source . . . . It's common sense."<sup>148</sup>

This position, arrived at three years after *HKSAR v. Ma Wai Kwan*, seems to be the culmination of much reasoned reflection about the issue. Judge Chan admitted ten months after he handed down the judgment in that case that his interpretation in that opinion of the scope of judicial review in Hong Kong was incorrect. Judge Chan seemed open to the notion that Hong Kong courts could review the effects of PRC acts in Hong Kong, although he indicated that there was no immediate plan at that time by the courts to alter the position on judicial review taken in *Ma Wai Kwan*. The doctrine of *stare decisis* prevented the Hong Kong courts from changing the interpretation. Judge Chan explained that he ruled the way he did because the NPC had issued a decision "before the Basic Law came into law" that there would be no "through-train." This was the "context" in which he reached his decision.<sup>149</sup> The "through-train" was the term used for the continuation in

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147. For example, see the Solicitor General's brief in *HKSAR v. Ma Wai Kwan and Others*, argued in the Hong Kong SAR High Court, July 22-23, 1997 (on file with the author), at 17-19; and the Solicitor General's reply brief in *HKSAR v. Ma Wai Kwan and Others*, argued in the Hong Kong SAR High Court, July 22-23, 1997 (on file with the author), at 1-3.

148. Interview with Chief Judge Patrick Chan, *supra* note 49.

149. See Interview with Chief Judge Patrick Chan, Hong Kong (June 3, 1998). Chief

office of the members of Hong Kong's Legislative Council, who were all elected to four-year terms in 1995 and, therefore, were due to serve the second half of their terms after the handover.<sup>150</sup>

Yet, even Chief Judge Chan's position in 1998 on *Ma Wai Kwan* was consistent with the Solicitor General's argument largely adopted by the High Court in that opinion to justify its dismissal of the challenge to the validity of the Provisional Legislature. The argument went as follows. Article 68 of the Basic Law provided for election of the first Legislature without requiring democratic elections, while Annex II did not specify the method for the formation of the first Legislative Council. Although a decision issued by the National People's Congress did specify the method for its formation, it also specified an arrangement mutually agreed upon by China and the United Kingdom but from which British Governor, Christopher Patten, had deviated. Since Article 159 of the Basic Law made it impossible to amend the Basic Law before the handover, the Preparatory Committee to which the NPC had delegated the task of setting up the selection process for the first legislature of the HKSAR had no choice but to form an interim legislature outside the bounds of the Basic Law. The 1990 National People's Congress Decision gave the Preparatory Committee the power to do whatever necessary to form the new SAR government.<sup>151</sup>

A key ramification of this argument is that it avoided classifying the establishment of the Provisional Legislature as an "act of state" and therefore bypassed any interpretation of Basic Law Article 19. Article 19 provides for review by Hong Kong courts of "acts" except for "acts of state such as those involving defense or foreign affairs."<sup>152</sup> One reason for avoiding Article 19 might have been to preclude the need for the Hong Kong government to request a certificate from the PRC central government, which it would have had to do if the court had determined that the establishment of the Provisional Legislature had been an "act of state."

*Ma Wai Kwan* might have chilled the use of the Act of State doctrine and the invocation of Article 19, at least temporarily. No Hong Kong court has since agreed with any litigant that the issue raised involved anything classified as an act of state. In contrast to the dozen or so cases which have, through the first half of 2000, called upon the Hong Kong courts to interpret the Basic Law, the act of state doctrine in 1999 and 2000 appears to be on the wane from its earlier life in colonial Hong Kong. No litigants raised the issue between January, 1999, and January, 2000, and in one case which

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Judge Chan made a similar statement to journalist Cliff Buddle, in *Mainland Laws May be Open to HK Challenges*, SOUTH CHINA MORNING POST, May 21, 1998, at 2 and the SOUTH CHINA MORNING POST editorialized on it at 18.

150. See Interview with Chief Judge Patrick Chan, *supra* note 149.

151. See HONG KONG SPECIAL ADMINISTRATION REGION, SUBMISSIONS, at 19-24; HONG KONG SPECIAL ADMINISTRATION REGION, REPLY BRIEF, at 4-8.

152. Basic Law, art. 19.

presented an argument similar to that in the colonial case of *Ku Chu Chun v. Ting Lei Miao*,<sup>153</sup> the doctrine made no appearance, nor did any certificate from the government appear.<sup>154</sup>

### *Basic Law Article 19*

There is no explicit reference made to the act of state doctrine in Article 19, yet jurists have vigorously debated this proposition.<sup>155</sup> The provision for a "certificate" from the PRC central government to be handed to the courts by the Hong Kong government is reminiscent of the mechanism for substituting the British government's "fact of state" for the court's discretion in the UK. The Hong Kong courts apply the facts in this certificate to the instant case in order to decide issues related to defense or foreign affairs. The qualifier "foreign affairs" might be construed as a reference to the act of state doctrine, but for its accompaniment by "defense" and "such as" both of which expand the scope of this exemption beyond what would be recognizable as the act of state doctrine. Thus, despite the qualifier "foreign affairs," the phrase "acts of state" may not be a reference to the narrow English, American, or international doctrines, but a generic term that carries no meaning beyond the words themselves.<sup>156</sup> Even Professor Wang Guiguo, who asserts that the drafters of the Basic Law "directly borrowed [the phrase] from the common law," does not conclude from this that interpreters of the phrase should limit themselves to the common law doctrine.<sup>157</sup>

If "acts of state" in Article 19 does not import the British doctrine into HKSAR law, it sets out a broader limitation on judicial review. The words "such as" in Article 19 that immediately follow "acts of state" and immediately precede "defense and foreign affairs" obscure the meaning of this category of issues that Hong Kong courts must decide with a certificate from Beijing, because they make two readings possible. Either this category is limited only to "defense and foreign affairs," or it includes other, unspecified issues. The Chinese version, which uses the words *guofang, waijiao deng* ["national defense, foreign affairs, etc."], does not diminish the ambiguity.

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153. *Ku Chu Chun v. Ting Lei Miao*, 1998-3 HKC 119, 1998 HKC LEXIS 95 (HKSAR Court of Final Appeal, July 2, 1998).

154. *See CEF New Asia Co. Ltd v. Wong Kwong Yiu John*, 1999-3 HKC 1, 1999 HKC LEXIS 28 (HKSAR Court of Appeal June 8, 1999).

155. *See, e.g., Lee supra* note 4; Wang Guiguo, *A Comparative Study on the Act of State Doctrine—With Special Reference to the Hong Kong Court of Final Appeal*, in *LEGAL DEVELOPMENTS IN CHINA: MARKET ECONOMY AND LAW 249-93* (Wang Guiguo and Wei Zhenying eds., 1996).

156. *See* Interview with Wang Chenguang, faculty of law City University of Hong Kong, May, 1998.

157. *See* Guiguo, *supra* note 155, at 275.

There are other problems with the meaning of Article 19. It does not specify whether the "acts of state" exempted from judicial review might range from a lower level administrative decision all the way up to the enactment of a statute, an omission which, if filled in with all of these types of acts, similarly expands the scope of this exemption beyond that of the act of state doctrine. The procedures for requesting a certificate under this provision remain unclear. Accordingly, it is very difficult to discern the meaning of Basic Law Article 19.

Martin Lee, who helped draft Article 19, believes that municipal courts do have the right to review federal law and, in this way, squarely disagrees with Patrick Chan that municipal courts cannot challenge the source. Lee said "if you know they are wrong and inconsistent with the Basic Law, how can you be bound by it?"<sup>158</sup> Lee, who is also responsible for the provisions in Basic Law Articles 8 and 18 providing for the continuation of the common law and for the procedures in Article 18 for introducing PRC laws into Hong Kong, believes that Article 19 is "a time bomb." PRC drafters of the Basic Law asked Lee if there were any issues that fell outside the jurisdiction of Hong Kong courts. Lee gave them materials on the British acts (he used the plural) of state doctrine, but he said to the PRC side, "don't worry if you don't understand it, just don't say anything about it in the Basic Law because Article 18 already says that the common law continues." The PRC voiced concern that Hong Kong courts could get it wrong. Lee said, either Hong Kong has the right of final appeal or it does not (obviously meaning that Hong Kong courts cannot then, by definition, "get it wrong").<sup>159</sup>

But the PRC side would not relent, Lee recounts. So Lee tried to find a way to include the complicated act of state doctrine in the Basic Law. In Lee's original draft, Article 19 did not give the Hong Kong courts jurisdiction over acts of state. Then, in addition to British doctrine, there are "facts of state." As for facts of state, if anything like this should emerge, courts ask for a certificate from the executive which is binding on the courts. In the wake of Martin Lee's protests over the events in Tiananmen Square in 1989, he was removed from the drafting team. In his absence, the remaining drafters added two things to Article 19 that Lee considers unfortunate. Lee does not know if their addition was deliberate or not. The two phrases were "...such as defense and foreign affairs," and "on questions of fact concerning acts of state." The latter addition mixed up "acts of state" with "facts of state," he laments. He also saw to his dismay that Article 19 provided that the PRC central government, not the Hong Kong Executive, will issue a certificate.<sup>160</sup>

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158. Interview with Martin Lee, *supra* note 20.

159. See *id.* Lee told a journalist in Toronto six months earlier that Article 19 was a "ticking time bomb." Gord Barthos, *Chipping at Hong Kong's Liberty*, THE TORONTO STAR, Jan. 28, 2000.

160. See Interview with Martin Lee, *supra* note 20.

From Martin Lee's explanation of the drafting of Article 19, the effect of the two additions was to broaden "facts of state" too far to retain its original sense. Lee explains the confusion this way. In the British version of "acts of state," there is no certificate. Courts just decide whether there has been an act of state, and if so, they do not take jurisdiction over the issue. Acts of state doctrine is "limited," he said. An example might be a declaration of war or the signature of treaties. The court decides whether there is an act of state. It does not need evidence to arrive at this. It is a matter of law, not fact. If the court finds an act of state, it will not try the case. It is the court's right, not discretion, to decide whether there is an act of state. No one can stop the court from ruling if the court decides there is no act of state. Facts of state, on the other hand, require evidence in the form of a certificate from the executive (not from historians, for example, he said). For example, in 1990 whether Argentina was an enemy of Britain. The "fact of state" may not have anything to do with any act of state.<sup>161</sup>

"Fact of state" is narrower than "act of state" and involves less discretion for courts. Lee finally agreed that act of state in Chinese, in a generic sense, independent from the British doctrine, encompasses all government acts and, therefore, is much broader than the fact of state doctrine. When asked if it becomes a blanket sovereign immunity, he said yes, "a hole, but how big?"<sup>162</sup>

Lee also gave two examples of how Article 19 could take jurisdiction away from Hong Kong courts in cases over which they would have jurisdiction under the British version of act of state doctrine. In one example, the Bank of China gets a loan of \$100 million from the Bank of America in Hong Kong for the Three Gorges Dam. The contract is signed in Hong Kong. The Bank of China does not pay it back. The Bank of America sues the Bank of China in Hong Kong court because the loan was taken out in Hong Kong. The Bank of China argues that the Hong Kong court has no jurisdiction because what it did in taking out the loan for the Dam project was an act of state. In the second example, the People's Liberation Army [PLA] arrests a Hong Kong citizen in Hong Kong and takes the citizen into the PRC. Because the PLA did it, this citizen when he sues the PLA in a Hong Kong court might hear from the PLA in response that what it did is an act of state such as "defense," since anything the PLA does is by definition a matter involving the defense of China.<sup>163</sup>

One final problem with Article 19, according to Lee, is that it was written into the Court of Final Appeal Statute, the Hong Kong ordinance enacted under the supervision of then-Governor Christopher Patten. This is problematic because it raises a question about whether the Act of State

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161. *Id.*

162. *Id.*

163. *See id.* Lee gave similar examples to a journalist in Toronto six months earlier. *See* Barthes, *supra* note 159.



doctrine applies in Hong Kong. So "Patten sold us down the river twice," Lee concluded.<sup>164</sup>

But it is up to the courts of Hong Kong to decide whether there is an act of state. The certificate that the PRC central government could hand down in such cases could tell the Hong Kong courts how to decide particular issues in pending cases, and even decide for the Hong Kong courts whether some of the facts of the case constituted an "act of state." But such certificates need not stop the courts from adjudicating these cases. There is nothing in Article 19 that prevents the courts of Hong Kong from deciding how to apply the certificates—how broad a scope to give them in the pending case.

### *Act of State Doctrine*

Even if the act of state doctrine makes a comeback in Hong Kong, it will not likely do much to prevent Hong Kong courts from invalidating PRC statutes. A variety of doctrines call upon judges in the English system to refrain from reviewing certain issues, most notably "political" ones.<sup>165</sup> As one of these, the act of state doctrine applied a narrow sovereign immunity to set out what courts could not review and implied that virtually all else was reviewable. The doctrine, as summarized in the leading treatise on the common law, imposed a broader limitation on judicial review than the limitation imposed by the United States' act of state doctrine, which immunized foreign governments from United States' court jurisdiction as to acts by those governments in their home territories, but not to their extraterritorial activities.<sup>166</sup>

The British version of the act of state doctrine nonetheless excluded very little from consideration. Under that version, courts decline to review causes of action brought by aliens in which the alleged tort or breach of contract or infringement of property rights was performed by the British Crown outside the "dominions of the Crown" pursuant to "an exercise of political power." Although in several cases a British court recognized an act of state where a British subject sued for redress from the consequences of an act of state committed outside British territory,<sup>167</sup> the doctrine generally leaves to judicial review those acts of the Crown which affected British subjects or

164. Interview with Martin Lee, *supra* note 20.

165. For an example of a court applying the political question doctrine to limit the issues it reviewed, see *R v. Minister of Agri. Fisheries and Food*, Queen's Bench Division (Crown Office List), CO/1132/92 (Nov. 11, 1994).

166. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) is the leading case. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 509 (50th ed., 1998).

167. See *Attorney-General and Nissan (House of Lords)* A.C. 179, 191-205 [1970]; *Salig Ram (Rajah) v. Secretary of State for India in Council* (1872) L.R. Ind. App. Suppl. 119, 126, 127; *Doss v. Secretary of State for India in Council* (1875) L.R. 19 Eq. 509, 532-533; *Cook v. Sprigg* [1899] A.C. 572, 576, 577; *West Rand Central Gold Mining Co. v. The King* [1905] 2 K.B. 391, 393, 408.

which were "taking[s] of possession by the Crown under colour of a legal title."<sup>168</sup> "[F]riendly aliens resident within British territory" were treated as British subjects for the purpose of applying the doctrine, thereby narrowing the scope of the doctrine, while "British protected persons in British protectorates or British protected states" were treated as aliens for the purposes of applying the doctrine, thereby slightly expanding the scope of the doctrine. A significant sign that overall the doctrine imposed narrow limits on judicial review, however, was the fact that it was left to the courts to decide whether the act of state doctrine applied.

The malleability of the act of state doctrine weakens its power to constrain the discretion of judges. It is created by a series of common law judicial opinions which lack coherence when viewed as a package. According to British jurist Michael Singer, in an exhaustive study of the doctrine, or to inferences which can be drawn from his study, the doctrine's origin,<sup>169</sup> theoretical basis, and development are all plagued by serious ambiguities. It is unclear, for example, whether sovereign immunity, or a foreign affairs power growing out of constitutional sources, or a royal prerogative, or some kind of agency theory underpins the doctrines.<sup>170</sup> Nor is there agreement on how many strands of the doctrine exist, as is demonstrated by the debate over this question described in Singer's study,<sup>171</sup> and by the differing descriptions of it by English jurists.<sup>172</sup> The nature of act of state cases remains a puzzle. Singer asserts that such cases are primarily "contractual disputes,"<sup>173</sup> while, in my view, the issues seem remarkably similar to those found in eminent domain cases. It is unclear under which circumstances the state acts prevent a court from inquiring into the act and what effect the doctrine has on the court once invoked. Does it, in the words of some dicta on the matter, "prevent the courts from having cognizance of"<sup>174</sup> the state's act in question? If so, this makes little sense because the court's discretion is limited to the

168. See *Attorney-General and Nissan (House of Lords) A.C. 179, 191-205 [1970]*; *Salig Ram (Rajah) v. Secretary of State for India in Council (1872) L.R. Ind. App. Suppl. 119, 126, 127*; *Doss v. Secretary of State for India in Council (1875) L.R. 19 Eq. 509, 532-533*; *Cook v. Sprigg [1899] A.C. 572, 576, 577*; *West Rand Central Gold Mining Co. v. The King [1905] 2 K.B. 391, 393, 408*.

169. See Michael Singer, *The Act of State Doctrine of the United Kingdom: An Analysis, With Comparisons to United States Practice*, 75 AM. J. INT'L L. 284 (1981).

170. See *id.* at 284-86.

171. See *id.* at 285.

172. The prominent English jurist and expert on Hong Kong law, Peter Wesley-Smith sets out seven different strands of the doctrine. See CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG 91-92 (2d ed. 1994).

173. See Singer, *supra* note 168, at 283.

174. The language is taken by Singer from an argument by the British Crown in *Nissan [1970] A.C.* at 188D-E.

extent that it is forced to take cognizance of the act by adopting a particular interpretation of it.<sup>175</sup>

Another way the act of state doctrine does little to constrain judicial discretion is in the role played by "facts of state." Whether or not a court decides that the doctrine applies, anything which the executive branch of the government deems to be a "fact of state" which is relevant to the instant case is supposed to be decided by the government instead of by the court. The learned restatements of this doctrine lack a description of the process by which courts apply the doctrine, and it is in this process that the constraint of the doctrine breaks down.<sup>176</sup> Nowhere is it required that a judge request from the government a certificate of any fact, nor, once given such a document, is the judge's process of applying it to the facts of the case regulated by a prescribed procedure.

In his erudite discussion of the doctrine, Peter Wesley-Smith concludes that "[i]ntergovernmental acts of state are normally accompanied by a declaration or statement made by the Crown, in the form of an Order in Council or Proclamation, or for the purpose of particular judicial proceedings, an 'executive certificate.'"<sup>177</sup> Even this procedure has exceptions. If a certificate or Order in Council is lacking, "a colonial ordinance might be accepted as an authoritative statement by the Crown as to a matter of state."<sup>178</sup> And if all three are lacking, "the judicial approach to a matter of state will be determined by purely factual considerations."<sup>179</sup> This means that, as Wesley notes, "a certificate act of state is simply unchallengeable evidence, but not the sole kind of evidence, of an intergovernmental act of state."<sup>180</sup> In other words, judges may exercise the full extent of their discretion in determining the nature of an act of state even where the government has issued a certificate or enacted a law on the subject. The relevance of the document or law to the facts of the case needs to be determined, and the judge is free to do this as he sees fit.

The process leaves a great deal of discretion to the court to decide when to invite the government to decide a fact of state, and even when the court does do this, the government's response may leave open the central question for the court to decide. The court may or may not request a document, such as a certificate issued by the Foreign and Commonwealth Office or an Order in Council issued by the Privy Council or a statute, from the government articulating the fact of state. In the absence of such a document, the court may look at whatever evidence it chooses, and the court is free to determine a decision on any issue which is not expressly answered in the document.

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175. See Singer, *supra* note 168, at 288.

176. See 18 HALSBURY'S LAWS OF ENGLAND 725-30 (4th ed. 1977).

177. See Singer, *supra* note 168, at 99.

178. *Id.* at 100.

179. *Id.* at 100.

180. *Id.* at 101.

Whether or not it receives explicit guidance from the government, the court is constrained only to the extent that the common law constrains judicial discretion when it applies the fact of state to the facts of the instant case. So, according to the leading treatise on the subject, although the court in effect takes judicial notice of the fact of state by treating that information as

. . . conclusive, the court retains the discretion to select the relevant aspects of the fact of state that binds the court, and the court is free to ignore the fact of state in cases where what is involved is the construction of some term in a commercial document, or an Act of Parliament.<sup>181</sup>

One example of the broad discretion enjoyed by British courts when applying certificates is on issues involving the recognition of foreign governments by the British government. The standing to sue or be sued is such an issue. As of 1980, the British government ceased to supply courts with certificates which clearly stated whether it recognized a particular government. Courts were free—indeed were forced—to decide on their own whether the British government recognized the government which was a party in a case before it. The parties were free to supply the court with evidence about the dealings between the British government and the government in question, from which the court could draw to arrive at such a decision.<sup>182</sup>

The act of state doctrine leaves British courts free to review acts of the United Kingdom's government inside the "dominions of the Crown," or where those acts involved British citizens. One case where both elements were present was *Commissioners of Crown Lands v. Page*,<sup>183</sup> in which two prominent British subjects, Lady Handley Page and Sir Frederick Handley Page, leased land in London from the Commissioners of Crown Lands in 1937, only to have the British government reclaim possession of the land in 1945 pursuant to the Emergency Powers (Defense) Act and the Supplies and Services (Transitional Powers) Act. The Court of Appeal dismissed an appeal from a judgment which held that "the requisitioning of the premises did not constitute an eviction" which would release the tenants from paying rent after the requisition. Before reaching its decision to dismiss, however, the court reviewed the government's reclamation of the land and applied landlord-tenant law because it governed evictions. So safely within its review power was the court, it did not once invoke the act of state doctrine in order to determine whether it had the power to review the case.<sup>184</sup>

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181. HALSBURY'S LAWS OF ENGLAND, *supra* note 176, at 1420.

182. *See* Ting Lei Miao v. Chen Li Hung & Anor., Hong Kong High Court, 1997-2 HKC 779; 1997 HKC LEXIS 108 at 19-22 (HKSAR Court of Final Appeal).

183. *Comm'rs of Crown Lands v. Page* [1960] 2 All Eng. Rep. 726, 726-36.

184. *See id.*

It is no small gauge of the uncertainty surrounding the act of state doctrine in Hong Kong that the Solicitor General of the HKSAR and one of Hong Kong's foremost constitutional law scholars squarely disagreed about whether judges immediately after the handover had more or less power to review PRC acts than they did before. The first Solicitor General of the Hong Kong SAR, Daniel Fung, argued before the Court of Appeal on July 22, 1997 that courts in Hong Kong before the handover did not have the power to review any acts of the United Kingdom or to interpret the Letters Patent and the Royal Instructions, which made up the written portion of the Constitution of the United Kingdom. Yash Ghai, by contrast, argued that the Hong Kong courts could and did interpret these constitutional documents.<sup>185</sup>

The Hong Kong colonial courts did not set out the act of state doctrine limiting their power of review. The case law does not settle questions such as, were the UK government's acts within Hong Kong considered acts within the "realm" of the UK and therefore beyond the reach of the act of state doctrine? Were Hong Kong residents considered "friendly aliens resident within British territory" and therefore treated as British subjects for the purpose of applying the doctrine? Or were they considered "British protected persons in British protectorates or British protected states" and therefore treated as aliens for the purposes of applying the doctrine?

Because of ambiguities in Basic Law Article 19 and its incorporation into the Court of Final Appeal Statute, the force of the British act of state doctrine on the HKSAR courts is unclear. If, because the Basic Law provides for the continued force of colonial Hong Kong law, including the common law,<sup>186</sup> the procedures used in the Hong Kong colonial courts for reviewing the constitutionality of sovereign acts continues to exert precedential force upon the HKSAR courts, then the act of state doctrine might continue to be the central determinant of which sovereign acts Hong Kong judges could review and which acts they could not. Colonial doctrines, being similar to British ones on the subject, also serve as a possible source of borrowing by HKSAR judges and PRC law makers.

If so, Hong Kong judges are free to review PRC acts unless they find them to be "acts of state" or are handed a certificate from the Hong Kong government stating any facts that the courts had to judicially notice. On the three occasions where the courts in colonial Hong Kong reviewed acts of the Crown, they exercised quite a bit of discretion in arriving at their decisions. The certificate process did not bind the Hong Kong courts in these cases, and although the courts applied the act of state doctrine, the doctrine did only a little more to tie the hands of the courts than what a statute or a judicial precedent routinely does to guide the judicial process. Therefore, these cases

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185. See YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER 284 (1997) (explaining that Hong Kong SAR courts have more power to review than did Hong Kong colonial courts).

186. See Basic Law, arts. 8, 18.

could provide legal authority for broad discretion in the event that Hong Kong courts are faced with a question about the constitutionality or the legality of a PRC administrative act.

In one of these three cases, the Supreme Court of Hong Kong was asked to review the validity of a contract between Civil Air Transport and Central Air Transport Corporation, an aircraft company owned at the time of the signing by the Republic of China, but owned at the time of the litigation by the People's Republic of China. The Chinese company raised the issue of sovereign immunity in the Court of First Instance when the Civil Air Transport Company applied for an appointment of receivers for the assets of the Central Air Transport Corporation. The Hong Kong Court of Appeal reviewed the issue of whether the People's Republic of China was protected by sovereign immunity from any obligations a court might find it owed under the contract. The court then applied to the British government for answers to questions agreed to by the parties pertaining to whether the UK had recognized the new government of China. The answers stated that the British government recognized the "Central People's Government" of the People's Republic of China as "de facto ruler of large portions of China." Applying this, the court took as valid all the acts by the PRC government that attempted to assert control over the assets of the aircraft company which were located in Hong Kong and were the subject of the contract. This presumption of validity did not stop the court, however, from carefully inquiring into those acts to ascertain whether the PRC government was in possession of the assets that were the subject of the suit. The court set these facts out in detail, even to the extent of summarizing the extensive witness testimony that had been collected. The courts considering this case did not, however, request or receive a certificate which set out any "fact of state" as to whether the PRC government validly owned the assets in question. The courts resolved this issue on their own by applying "principles" set out in the case law cited by the parties to the facts developed by the evidence brought by the parties.<sup>187</sup>

In *Fung Yuen Mui v. Chan Kam Yee*, the Hong Kong High Court, without the benefit of a certificate from the Crown, effectively invalidated a British decree which applied to Hong Kong. The court considered the validity of two conflicting Crown laws, a British decree, or "Order in Council," which provided for Chinese jurisdiction over a portion of Hong Kong known as the Kowloon Walled City, and a British treaty with China which extended British jurisdiction over that area. The court decided that the treaty trumped the decree because "it was an agreement between China and Great Britain whereas the Order in Council was only a unilateral declaration by Great Britain."<sup>188</sup>

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187. See *Civil Air Transp. Inc v. Chennault & Anor*, 1950 HKC LEXIS 3, at 23-24, 40, 1946-1972 HKC 18 (HKSAR Court of Final Appeal May 13 1950); *Civil Air Transp. Inc. v. Central Air Transp. Corp.*, 2 All E.R. 733 (P.C. 1952).

188. *Fung Yuen Mui v. Chan Kam Yee*, 1991-1 HKC 462, 1991 HKC LEXIS 383

A third request to the colonial Hong Kong courts to review an act of a sovereign occurred just three months before the handover and raised the issue of the role of the court in applying a certificate when the certificate does not clearly state the fact which is central to the case. In *Ting Lei Miao v. Chen Li Hung & Anor*,<sup>189</sup> the certificate stated that the UK did not recognize Taiwan as a state and that the UK had minimal dealings with Taiwan. The certificate did not answer the central issue in the case, which was whether Hong Kong courts could recognize the decisions of Taiwan's courts. Counsel argued that British policy permitted the court in such a situation to look at a wide range of evidence, apart from the certificate, in order to determine the fact in question. The High Court disagreed, stressing the limited role of the court in such a situation, yet it went ahead and decided the issue without guidance from the Foreign and Commonwealth Office.<sup>190</sup>

Before the handover, the Hong Kong courts also interpreted provisions of UK treaties without the benefit of certificates from the UK government. Extradition cases provided occasions for this type of review. In such cases, the language of the relevant extradition treaty did not dispose of the issue before the court, and so the court had to exercise discretion in its reading of the treaty and its application of it to the issue.<sup>191</sup>

Another branch of Hong Kong common law promoted judicial review of the sovereign's laws with the dictum that for statutory language to limit judicial review it had to be expressed clearly and comprehensively. The Hong Kong courts applied this doctrine to UK statutes as well as to local ones. In *Chan Yik Tung v. Hong Kong Housing Authority*, the Hong Kong High Court interpreted a UK housing statute's provisions on judicial review in such a way as to invalidate their limiting effect on the Hong Kong courts. In doing so, the court used strong language to set out this dictum: "Section 19(3) of the Housing Ordinance is merely a partial exclusion clause. Irrespective of the nature of the partial exclusion, no court should stand by and allow an attempted encroachment on its power of review unless it is restrained by an unassailably appropriate ouster clause."<sup>192</sup>

In addition to review of UK laws in Hong Kong courts before the reversion to Chinese sovereignty, courts reviewed the constitutionality of acts of the Hong Kong colonial government, whose Governor was appointed by the

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(HKSAR Court of Final Appeal Mar. 1, 1991).

189. *Ting Lei Miao v. Chen Li Hung & Anor.*, Hong Kong High Court, 1997-2 HKC 779, 1997 HKC LEXIS 108 at 19-22 (HKSAR Court of Final Appeal).

190. *See Ting Lei Miao v. Chen Li Hung & Anor.*, Hong Kong High Court, 1997-2 HKC 779, 1997 HKC LEXIS 108 at 19-22 (HKSAR Court of Final Appeal).

191. *See Choi Sze Yuen v. Gov't of the United States*, 1992 HKC LEXIS 962, 1992 HKCU 189 (HKSAR Court of Appeal June 10, 1992); *Fchoi Sze Yuen v. Gov't of the United States*, 1992 HKC LEXIS 954, 1992 HKCU 181 (HKSAR Court of Appeal June 10, 1992).

192. *Chan Yik Tung v. Hong Kong Housing Authority*, 1989 HKC LEXIS 467 (HKSAR Court of Final Appeal, Dec. 11, 1989).

Queen through the Prime Minister. One example of judicial review of an act of the Hong Kong government against the Letters Patent was *Ho Po Sang v. The Director of Public Works & Kwong Siu Kau*, in which the Hong Kong Court of Appeal held that, in the absence of legislation to this effect, Article XIII of the Letters Patent did not provide for the delegation of the Governor's authority to the Director of Public Works to lease Crown lands.<sup>193</sup> Although this is considered a landmark case in Hong Kong and is frequently cited, later courts did not restrict themselves so narrowly in their interpretation of other provisions of the Letters Patent. A later court decided that Article XIV of the Letters Patent provided for the delegation by the Governor of Hong Kong to the Chief Justice the power to appoint magistrates to the Hong Kong bench. Here, the court exercised broad discretion in interpreting this constitutional provision. It adopted a "generous and purposive" approach to interpreting the provision, one which required going beyond the plain meaning of the text and into the realm of what is practical in the administration of Hong Kong's government. One of the authors of the opinion concluded that:

it is not possible to read Article XIV...without the necessary implication of a power to delegate because the Governor cannot possibly, personally, appoint and dismiss etc. the entire public service of Hong Kong, if he is to have time to do anything else. We understand that there are approximately 190,000 civil servants at present in Hong Kong.<sup>194</sup>

This local case law carved out a broad role for Hong Kong's colonial courts to review government acts and to interpret constitutional documents and laws of Hong Kong's sovereign. Hong Kong courts not only interpreted UK constitutional documents, treaties, and statutes on their own without any guidance by the government tailored to the instant case, but they also exercised discretion in the application of certificates from the UK government.

In sum, three possible sources of constraint on the power of Hong Kong courts to invalidate PRC statutes will not likely constrain this power. *Ma Wai Kwan* seems to have chilled the use of the act of state doctrine and the invocation of Article 19, at least temporarily. Article 19 is so difficult to read that it almost defies interpretation, and therefore Hong Kong courts, which have never ruled on anything pursuant to Article 19, have an incentive to continue to find ways around it. The act of state doctrine never did much in colonial Hong Kong to constrain the discretion of judges, and if it is revived, there is little reason to believe it will exert more constraining force upon the courts. The upshot of all this, then, seems to be that Hong Kong courts will

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193. *Ho Po Sang v. Director of Public Works*, 1959 HKLR 632.

194. *Attorney General v. Chiu Tat-Cheong*, 2 HKLR 84, 96, 100 (1992).



continue for some time to possess the power to invalidate PRC statutes. This power is not precluded by law and is explicitly set out in the part of *Ng Ka Ling* that remains good law.

### CONCLUSION

In the HKSAR, Hong Kong courts may invalidate local and PRC statutes at least insofar as they apply to Hong Kong and violate the Basic Law. Questions arising out of the application of the NPCSC decision, which nullified the only attempts so far by the Hong Kong Court of Final Appeal to invalidate local statutory provisions, are not fully resolved, and to the extent they are resolved, they leave some of the invalidation of local law in effect. What is more, much of the resolution of these questions is left to the courts of Hong Kong. The NPCSC has not interfered in the working out of any of the questions of the application of its decision to reinterpret the court of Final Appeal's interpretation of Article 24(2) of the Basic Law.

This power to invalidate statutes is final except insofar as the Court of Final Appeal decides it will not be, or if the Hong Kong government and the NPCSC repeat the unusual move of reinterpreting a Hong Kong ruling. The promises of the Hong Kong government and the Basic Law Committee, combined with the imminent development of procedures for NPCSC interpretations of the Basic Law, go a long way toward ensuring that the Standing Committee's adjustment of the Court of Final Appeal's invalidation of local law did not set a precedent for procedures which undermine the finality of constitutional review in the HKSAR. Without further definition of the procedure for requesting an interpretation, it is premature to argue that the process takes away review power from the courts of Hong Kong.

In the HKSAR, the parameters of judicial review are in flux, but being in flux, opportunities present themselves to address in the Hong Kong courts the question of who has the authority to determine the parameters. This is an important way in which China's ingenious experiment with "one country, two systems" is being put to the test. And thus far, most of the working out of these parameters has proceeded without interference by the NPCSC or the Hong Kong government. The NPC has refrained from enacting, pursuant to its constitutional power to establish the "system" within an SAR, a statute which clarifies the boundaries of Hong Kong's judicial review, and from amending the Basic Law pursuant to the procedures in Article 159 of the Basic Law. The PRC Constitution invests the sole power to interpret it in the NPC, but the Basic Law gives a "high degree of autonomy to Hong Kong" and invests in its judges the power to interpret the HKSAR's constitution as to issues that fall within that autonomy. During the first three years of the SAR, Hong Kong's courts have exercised their powers of review autonomous from the PRC government. The June 26, 1999 decision by the NPC Standing Committee does not prohibit the Hong Kong Court of Final Appeal from further defining in its next decision its authority if the appropriate issue

presented itself, much the same way it did in *Ng Ka Ling*. Both the NPCSC and the Court of Final Appeal, of course, are limited by what is already specified in the Basic Law. Even an amendment of the Basic Law by the NPC is limited by the provision that such amendments may not "contravene the established basic policies of the People's Republic of China regarding Hong Kong."<sup>195</sup>

Given the relative lack of interference in the working out of the scope of the judicial review power of the Hong Kong courts, the long swing of the pendulum between *Ma Wai Kwan* and *Ng Ka Ling* shows that the Hong Kong courts have, since the handover, struggled to determine the scope of something that carries with it a great load of significance for the legal system of Hong Kong, and indeed, all of China. In grappling with the momentous process of interpreting for the first time the Basic Law's provisions on judicial review, and with the attendant risk of provoking a constitutional crisis, the Hong Kong appellate courts have looked to the extreme ranges of review powers afforded to Hong Kong judges in the Joint Declaration and the Basic Law and flip-flopped several times on their interpretations of the constitutional right of abode provisions. If the Court of Final Appeal had not reversed the position of the High Court on the power to review acts of the sovereign, and done so with such strong language setting out the broadest possible power of judicial review, the NPCSC probably would not have issued its only constitutional interpretation to date. The language the court used to revisit the constitutional scope of its review power twelve months later suggests that the NPCSC interpretation taught the Court of Final Appeal to be more prudent in the exercise of its review power.

Despite all of this movement, however, these review powers remain as full as they were before the British relinquished sovereignty over Hong Kong. The dire predictions of judicial review leaving Hong Kong with the sailing of the *Royal Britannia* at midnight on June 30, 1997 have not yet come true.

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195. Basic Law, art. 159.