

- Annex I, Section I: 264
- Annex I, Section II: 4, 186
- Optional Protocol to the International Covenant on Civil and Political Rights (adopted by the United Nations General Assembly on 16 December 1966, entered into force on 23 March 1976) 999 UNTS 302: 472
- Treaty Establishing the European Community (Amsterdam, 2 October 1997) 37 ILM 56 (1998), Articles 226, 234: 408
- Treaty on the Functioning of the European Union (Lisbon, 13 December 2007) 2008 OJ (C115)1, Article 267: 408

Part 1

Introduction and Background to the Study

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Chapter 1

Concerns and Organization

Courts of the Hong Kong Special Administrative Region (HKSAR),¹ established under the Basic Law of the HKSAR,² face a number of unique challenges that stem from the nature of the Basic Law, a national law of the People's Republic of China (PRC) constituting the HKSAR.³ Like the two-faced Roman god Janus, the Basic Law has a duality in that it is law both in the jurisdiction that establishes it (China) and in the jurisdiction it establishes (Hong Kong).⁴ Because of this dual operability, it can be difficult to achieve common understanding in the two

¹ The Hong Kong Special Administrative Region was established, as of 1 July 1997, by the Decision of the National People's Congress on the Establishment of the Hong Kong Special Administrative Region (adopted at the Third Session of the Seventh National People's Congress on 4 April 1990) (see 29 ILM 1549 (1990)) in accordance with Article 31 of the Constitution of the People's Republic of China. This article empowers the state to establish special administrative regions when necessary, with the systems to be instituted therein to be prescribed by law enacted by the National People's Congress (NPC) in the light of specific conditions.

² ie the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (adopted at the Third Session of the Seventh National People's Congress on 4 April 1990; promulgated by Order No 26 of the President of the People's Republic of China on 4 April 1990), 29 ILM 1511-1548 (1990). Excerpts of the provisions of the Basic Law discussed in this book are collected in an appendix at the end of the book.

³ The NPC adopted at the time of its enactment of the Basic Law the Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (adopted at the Third Session of the Seventh National People's Congress on 4 April 1990) (see 29 ILM 1549 (1990)), which, upon making reference to Article 31 of the PRC Constitution, held that the Basic Law 'is constitutional as it is enacted in accordance with the Constitution of the People's Republic of China and in the light of the specific conditions of Hong Kong' and added that 'The systems, policies and laws to be instituted after the establishment of the Hong Kong Special Administrative Region shall be based on the Basic Law of the Hong Kong Special Administrative Region.'

⁴ Daniel Fung used the expression 'double life' to describe the duality; see Daniel Fung, 'The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China: Problems of Interpretation' (1988) 37 *International and Comparative Law Quarterly* 701-714 at 706.

jurisdictions, where the practitioners of law and politics differ in the way they understand and do things.

The challenges are concerned with adaptation.

Hong Kong received a common law legal system when it became a British colony in 1843. When Britain and the PRC negotiated the future of Hong Kong over a century later, one of the major issues discussed was the continuation of the pre-existing legal system. In the Sino-British Joint Declaration on the Question of Hong Kong 1984,⁵ the Government of the PRC declared that it would resume the exercise of sovereignty over Hong Kong on 1 July 1997 and that it would then apply to Hong Kong certain basic policies.⁶ These basic policies included the establishment of the HKSAR; the vesting of the HKSAR with executive, legislative and independent judicial power, including that of final adjudication; and the provision that the laws currently in force in Hong Kong would remain basically unchanged.⁷ These and other basic policies were intended to remain unchanged for fifty years and were later stipulated as part of the Basic Law,⁸ which became effective on 1 July 1997.

The Basic Law established the legal and judicial systems of the HKSAR. Under the Basic Law, the HKSAR is vested with independent judicial power, including that of final adjudication. The HKSAR courts exercise the judicial power of the HKSAR and adjudicate cases in accordance with the laws applicable in the HKSAR, which are the Basic Law, the laws previously in force in Hong Kong (which include the common law, rules of equity, ordinances, subordinate legislation and customary law), the laws enacted by the legislature of the HKSAR, and national laws listed in Annex III of the Basic Law. The power of final adjudication is vested in the Court of Final Appeal, which may as required invite judges from other common law jurisdictions to sit on the Court. The HKSAR courts are authorized by the Standing Committee of the National People's Congress (NPCSC) to interpret on their own, in adjudicating cases, the provisions of the Basic Law that are within the limits of the autonomy of the HKSAR. The HKSAR courts may refer to precedents of other common law jurisdictions. The HKSAR courts shall exercise judicial power independently, free from any interference.⁹

Judges and lawyers in Hong Kong, who have been trained in the common law, find themselves operating in a legal system still based in the common law. However, the HKSAR legal system is very much embedded within the legal system of Mainland China. The Mainland's legal system is based essentially on democratic centralism, socialist legality,¹⁰ and the Stalin Constitution,¹¹ but seems to be gradually re-adopting or re-connecting with the civil law tradition; it is a legal

⁵ ie 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 (19/12/1984), 1399 UNTS 33, 23 ILM 1366–1381 (1984).

⁶ *ibid.*, paragraphs 1, 3.

⁷ *ibid.*, paragraph 3(1), (3), with elaboration in *ibid.*, Annex, sections I, II.

⁸ *ibid.*, paragraph 3(12).

⁹ Basic Law, Articles 2, 8, 18, 19, 80–93, 158.

¹⁰ See Georg Brunner, 'The Functions of Communist Constitutions: An Analysis of Recent Constitutional Developments' (1977) 3 *Review of Socialist Law* 121–153; and Yash Ghai, 'Constitutions and Governance in Africa: A Prolegomenon', in Sammy Adelman and

system of its own Chinese characteristics. The present common law legal system of the HKSAR is a new order, constituted and maintained by the Mainland legal system through a number of channels. But those who emphasize the HKSAR's 'seamless transition' with a high degree of autonomy do not usually mention this fact.¹²

Concurrently, while the common law legal system continues, its dynamics have changed. The Basic Law is a written instrument constituting the systems of the HKSAR, establishing separately distinct governmental institutions to exercise specified governmental powers and functions,¹³ and authorizing the HKSAR courts to interpret its provisions. The courts are empowered to make and fill a special role in the exercise of judicial power, namely the constitutional jurisdiction over executive decision making and legislative law making. This jurisdiction is comprehensive and coextensive with the broad coverage of the Basic Law. The exercise of this jurisdiction brings unfamiliar questions and public controversies before the HKSAR courts. It also raises expectations, often illusive, on the part of the public about the competence of the HKSAR courts to hold the executive and legislative branches accountable. Moreover, this jurisdiction entails agenda setting and lobbying by political minorities through litigation strategies. Mainland Chinese legal scholars have contested the legality and legitimacy of this jurisdiction, both at the time of its inception and thereafter. Such objections have been sustained and unabated for over a decade and may have gained intensity recently. The courts of the Macao Special Administrative Region, which adjudicate cases under a similarly worded Basic Law of the Macao Special Administrative Region but following a different legal tradition, behave differently from the HKSAR courts. This difference may serve to fuel distrust, discontent or disapproval of the HKSAR courts' authority to exercise its 'constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law', and to determine 'questions of inconsistency and invalidity when they arise'.¹⁴

Abdul Paliwala (eds), *Law and Crisis in the Third World* (London: Hans Zell Publishers, 1993) pp 51–75, at pp 56–60.

¹¹ See Sophia Woodman, 'Legislative Interpretation by China's National People's Congress Standing Committee: A Power with Roots in the Stalinist Conception of Law' (Chapter 11), in Hualing Fu, Lison Harris, and Simon Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan, 2008) pp 229–241.

¹² See *HKSAR v Ma Wai Kwan David & Ors* [1997] 2 HKC 315, [1997] HKLRD 761, CA; *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117, CFA; *RV v Director of Immigration & Anor* [2008] 4 HKLRD 529, CFL. On the other hand, Chan CJHC (now Chan PJ) did note, with considerable foresight, in *Ma Wai Kwan David* (above) a potential tension inherent in the Basic Law by reason of it being an instrument drafted by individuals practising in the Mainland legal system for a special administrative region, whose continuing legal system was rooted in the common law legal system.

¹³ Basic Law, Article 2 and Chapter IV, with section 1 (The Chief Executive), section 2 (The Executive Authorities), section 3 (The Legislature), section 4 (The Judiciary).

¹⁴ As the Court of Final Appeal stated in *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4 at 25F–26G of the 'constitutional jurisdiction' of the HKSAR courts.

This book will examine the exercise of independent judicial power under the Basic Law by the HKSAR courts. It will address three concerns:

- the rise of the judiciary as an institution of government in the HKSAR, particularly through the acquisition of the constitutional jurisdiction and the competence of the Court of Final Appeal to police its power of final adjudication;
- the legal and political constraints of judicial power and the express and implied limitations to its exercise; and
- the relations the HKSAR courts have to maintain with other institutions of government within the HKSAR, and with the Central Authorities, in response to the various forces (including the public and civil society) that seek to influence the exercise of judicial power.

The exercise of independent judicial power in the HKSAR necessarily involves negotiating along two sets of different, interlinked and interacting relationships: the intra-SAR institutional relationships and the Central-SAR relationship. The individual perception and agenda of the institutions at the ends of each of these relationships create tensions. In resolving such tensions, the outer limits of the autonomy of the HKSAR and its 'high degree' are being charted and fathomed. And where the HKSAR courts are steering the course, they will from time to time sail between the Scylla of 'one country' and the Charybdis of 'two systems', practising imperfectly the founding principle of 'one country, two systems' prescribed by the Central Authorities for the HKSAR.

The author's career and experiences as a practising barrister (which includes several appearances before the Court of Final Appeal)¹⁵ and as council member of the Hong Kong Bar Association representing the Bar Association in public affairs forums (which includes attending consultation sessions of the Government and the Legislative Council [LegCo] of the HKSAR)¹⁶ have combined to produce an outlook that, in addition to the theoretical and doctrinal appreciation of the subject matter by virtue of one's learning, involves the practical and tactical at the coalface of litigation. Thus, this study of the exercise of independent judicial power by the HKSAR courts, particularly the Court of Final Appeal, acknowledges the realities of constitutional adjudication. While questions of legality ought to be approached in a principled manner in accordance with a true understanding of the law, adjudication admits the self-conscious making of choices for consequential, prudential, pragmatic or strategic reasons.

¹⁵ The author has been in private practice as a barrister in Hong Kong since 1993. He has appeared before the Court of Final Appeal in *HKSAR v Ng Kung Siu & Anor* (1999) 2 HKCFAR 442, CFA; *Lau Cheong & Anor v HKSAR* (2002) 5 HKCFAR 415, CFA; *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248, CFA; and *Vallejos & Anor v Commissioner of Registration* [2013] 4 HKC 239, CFA.

¹⁶ The author has been a member of the Council of the Hong Kong Bar Association between 1995 and 1997, 2001 and 2005, and 2006 and 2012, and in 2013. He has served as the chairman of the Bar Association's special committee on constitutional affairs and human rights since 2008.

This book is organized into six parts. Part 1 introduces the concerns and scope of study of the book and sets the context of the analysis that follows by discussing the provisions of the Basic Law and the underlying but competing and contested principles of 'one country, two systems', 'high degree of autonomy', 'executive-led government' and 'separation of powers'.

Part 2 traces the development of the constitutional jurisprudence of the HKSAR courts from the point of inception in 1997 to the recent turning points in early 2013. Cases across this sixteen-year time span are discussed in chronologically arranged chapters, each seeking to highlight the particular resonance the adjudications have with current events. The constant and continuing theme underlying the cases examined—of individuals seeking judicial review of administrative and legislative decision making—is highlighted as a matter of historical fact with a view to detailed elucidation in the parts that follow.

Part 3 considers the independent judicial power, including the power of final adjudication, granted to the HKSAR courts and looks at how the Court of Final Appeal has, in a succession of judgments, asserted jurisdiction to review all decision making for conformity with the Basic Law. The normative value of the supremacy of the Basic Law is thereby turned into the practical power of supremacy of the HKSAR courts. Although the assertion of 'constitutional jurisdiction' in *Ng Ka Ling & Ors v Director of Immigration*¹⁷ was not a complete success,¹⁸ the comparatively muted reaction of the co-ordinate institutions of the HKSAR and their subsequent acquiescence, co-operation and even collaboration have allowed further elaboration of the judicial power of the HKSAR courts. This elucidation of judicial power has included pronouncing on invalidity under the previous legal order,¹⁹ declaring on questions of constitutionality in the absence or on the assumption of decision-making,²⁰ and discovering the subset of implied judicial power with respect to remedies.²¹ The Court of Final Appeal has even successfully claimed *kompetenz-kompetenz*²² to police against 'disproportionate'

¹⁷ *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA.

¹⁸ See *Ng Ka Ling & Ors v Director of Immigration (No 2)* (1999) 2 HKCFAR 141, where the Court of Final Appeal, in the light of the reaction of Mainland legal scholarship to its assertion of constitutional jurisdiction to examine whether legislative acts of the NPC or the NPCSC are inconsistent with the Basic Law and to declare them unconstitutional to the extent of any inconsistency, issued a judgment to clarify that it could not 'question the authority of the Standing Committee to make an interpretation under Article 158 of the Basic Law' and could not 'question the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedures therein' (142D–E).

¹⁹ See *Solicitor v Law Society of Hong Kong (Secretary for Justice, intervener)* (2003) 6 HKCFAR 570, CFA; and *HKSAR v Lam Kwong Wai & Anor* (2006) 9 HKCFAR 574, CFA.

²⁰ See *Leung TC William Roy v Secretary for Justice* [2005] 3 HKC 77, [2005] 3 HKLRD 657, CFI (affirmed on appeal in *Leung v Secretary for Justice* [2006] 4 HKLRD 211, CA).

²¹ See *HKSAR v Lam Kwong Wai & Anor* (2006) 9 HKCFAR 574, CFA.

²² The concept of *kompetenz-kompetenz* was used by the German Federal Constitutional Court (*Bundesverfassungsgericht*) to describe the determination of whether a judicial

encroachment of its power of final adjudication.²³ Justifications for these expansive moves, largely based on the 'common law context'²⁴ and the Hong Kong legal tradition are examined against several factors. First, the theoretical or doctrinal possibilities of political and constitutional systems are analysed. Second, comparison is made to the practices of the courts of the Macao Special Administrative Region, which operate under a legal system in the continental civil law tradition on the basis of a similarly worded constitutional instrument, the Basic Law of the Macao Special Administrative Region.²⁵ Finally, Mainland Chinese scholarship is considered, especially the recent surge of comments concomitant with the increasingly attentive, if not interventionist, policy of the Central Authorities towards the HKSAR and its autonomous institutions,²⁶ disputing the legality and the legitimacy of judicial review of legislation in Hong Kong.

Part 4 addresses the intra-SAR relationships the HKSAR courts have with other institutions of government under the Basic Law. This part begins with a look at the record of institutional compliance with judicial declarations of invalidity, an exercise that underscores both the claim of the futility and illusiveness of duty of the HKSAR of enforcing the Basic Law and the necessity of co-operation of the executive and legislative institutions in making judicial enforcement a reality. A subtle mutual co-operation, co-ordination and regulation between the executive, legislative and judicial branches of government must exist for effective governance, though not necessarily in the sense promoted by the Central

authority has 'jurisdiction to give a binding ruling on the extent of one's jurisdiction', so that if it could make a binding decision (that no one else can legitimately challenge) on whether it has the authority to make a binding decision on a question before it, then it would be said to have *kompentenz-kompentenz*: Trevor Hartley, *Constitutional Problems of the European Union* (Oxford and Portland, OR: Hart Publishing, 1999) pp 152–153. This concept has also been applied in the context of international tribunals (where it has usually been described as *compétence de la compétence*); see Abdul Koroma, 'Assertion of Jurisdiction by the International Court of Justice' in Patrick Capps, Malcolm Evans, and Stratos Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Oxford and Portland, OR: Hart Publishing, 2003) pp 189–198 at p. 192 and also in the context of arbitral tribunals (see *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763, UK3C). See also PY Lo, 'Master of One's Own Court' (2004) 34 *Hong Kong Law Journal* 47–65.

²³ *Solicitor v Law Society of Hong Kong (Secretary for Justice, intervener)* (2003) 6 HKCFAR 570, CFA; and *Mok Charles Peter v Tam Wai Ho & Anor (Secretary for Justice, intervener)* (2010) 13 HKCFAR 762, CFA.

²⁴ See Anthony Mason, 'The Role of the Common Law in Hong Kong', in Jessica Young and Rebecca Lee (eds), *The Common Law Lecture Series 2005* (Hong Kong: Faculty of Law, University of Hong Kong, 2006) pp 3, 5, 7.

²⁵ For an unofficial English translation of the Basic Law of the Macao Special Administrative Region of the People's Republic of China (adopted at the First Session of the Eighth National People's Congress on 31 March 1993; promulgated by Order No 3 of the President of the People's Republic of China on 31 March 1993), see http://bo.io.gov.mo/bo/i/1999/leibasica/index_uk.asp.

²⁶ See Cheng Jie, 'The Story of a New Policy', *Hong Kong Journal* (July 2009) at: http://www.hkjournal.org/archive/2009_fall/1.htm (last visited on 28 March 2011).

Authorities in the case of the Macao Special Administrative Region.²⁷ The courts' understanding of the burden accompanying a successfully asserted 'constitutional jurisdiction' is discussed in relation to the recognition and incorporation into the adjudicatory process of various limitations and reservations over the exercise of the power to declare a constitutional invalidity. There are four such approaches and each occupies a chapter:

- The first is the continuing and increasing relevance of the related doctrines of justiciability and the political question.²⁸ The continuing relevance of the common law doctrine of justiciability to a legal system that adopts constitutionalism or fundamental/human rights adjudication is questioned. However, certain provisions of the Basic Law that reserve competences in the specific subject matters of foreign affairs and defence to the Central Authorities²⁹ may have transformational implications; that is, turning the doctrine of justiciability into a necessary implication upon the true extent of the constitutional jurisdiction of the HKSAR courts. Similarly, by inquiring into the constitutional rationales for having a political question doctrine, the relevance of elements of that doctrine to the structure and institutional scheme envisaged under the Basic Law is pursued with a view to propose the incorporation of some but not all of such elements as a logical interpretive incident of the constitutional jurisdiction of the HKSAR courts.
- The second relates to the uses put before the HKSAR courts of the language of deference in a number of rulings on the constitutional validity of legislation,³⁰ which include fundamental or human rights adjudications³¹ as well

²⁷ See Ji Pengfei, 'Explanations on "The Basic Law of the Macao Special Administrative Region of the People's Republic of China (Draft)" and Its Related Documents (Addressing the First Session of the Eighth National People's Congress on 20 March 1993)' (1993) *Gazette of the Standing Committee of the National People's Congress* 229–235.

²⁸ For earlier discussions, see Albert Chen, 'The Concept of Justiciability and the Jurisdiction of the Hong Kong Courts' (1997) 27 *Hong Kong Law Journal* 387–390; Benny Tai, 'The Jurisdiction of the Courts of the Hong Kong Special Administrative Region', in Alice Lee (ed), *Law Lectures for Practitioners 1998* (Hong Kong: Hong Kong Law Journal, 1998) pp 65–117; Po-jeen Yap, 'Interpreting the Basic Law and the Adjudication of Politically Sensitive Questions' (2007) 6 *Chinese Journal of International Law* 543–564.

²⁹ Basic Law, Articles 13, 14, 19. See further *FG Hemisphere Associates LLC v Democratic Republic of the Congo & Ors* [2010] 2 HKC 487, [2010] 2 HKLRD 66, CA; *Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC* [2011] 5 HKC 151, CFA; *C & Ors v Director of Immigration & Ors* [2013] 4 HKC 563, CFA.

³⁰ For recent discussions, see Cora Chan, 'Judicial Deference at Work: Some Reflections on *Chan Kin Sum* and *Kong Yun Ming*' (2010) 40 *Hong Kong Law Journal* 1–14; and Cora Chan, 'Deference and the Separation of Powers: An Assessment of the Court's Constitutional and Institutional Competences' (2011) 41 *Hong Kong Law Journal* 7–25.

³¹ Illustrative examples include *HKSAR v Ng Kung Siu & Anor* (1999) 2 HKCFAR 442, CFA; *Lau Cheong & Anor v HKSAR* (2002) 5 HKCFAR 415, CFA; *Leung TC William Roy v Secretary for Justice* [2005] 3 HKC 77, [2005] 3 HKLRD 657, CFI (affirmed on appeal in *Leung v Secretary for Justice* [2006] 4 HKLRD 211, CA); *Dr Kwok Hay Kwong v Medical Council of Hong Kong* [2008] 1 HKC 338, [2008] 3 HKLRD 524, CA; and *Fok Chun Wa & Anor v Hospital Authority & Anor* [2012] 2 HKC 413, CFA.

Chapter 14

The Jurisprudence that Constitutes the Claim and Initial Observations

This part of the book seeks to establish, discuss and assess the implications of two propositions. The first is that the HKSAR courts have claimed for themselves the power to review the validity of legislation, thereby asserting supremacy over co-ordinate institutions of the HKSAR under the Basic Law on constitutional interpretation, which has henceforth been consolidated through expansive jurisprudence of judicial power. The second is that this claim rests on vulnerable foundations and has been successful only because the co-ordinate institutions accepted and continue to accept the claim. The vulnerability is assessed by reference to the preference of the courts of the Macao Special Administrative Region, as indicated in their judgments, to not assert the power of judicial review of legislation and also to the recent and perhaps organized outpouring of Mainland Chinese scholarship critical of the HKSAR courts' jurisprudence of judicial review of legislation.¹ Defensive positions are put forward while noting the essential 'political' support of the co-ordinate institutions of the HKSAR.

It is necessary to begin the discussion with an examination of the relevant jurisprudence of the HKSAR courts to support the first portion of the first proposition: That the HKSAR courts *claim for themselves*, in the assertive sense and not the affirmative sense, the power to review the validity of legislation against the co-ordinate institutions of the HKSAR under the Basic Law, namely the executive authorities and the legislature.

The Court of Final Appeal stated its 'position as to the constitutional jurisdiction of the courts in the [HKSAR]' in its first judgment of the *Ng Ka Ling* case

¹ At the invitation of Vice-President Xi Jinping, senior figures involved in the drafting and implementation of the Basic Law of the HKSAR and Macao SAR and in the establishment of the two SARs attended a seminar on 'Hong Kong and Macao Issues' that took place on 3 July 2008 in Beijing. Professor Xu Chongde of the Remin University of China proposed during the seminar, inter alia, that the academia in Mainland China should introduce promotion and education about 'one country, two systems' and the two Basic Laws and that law schools in higher education institutions should have courses on the Basic Laws. Vice-President Xi expressed the view that research on the theory of 'one country, two systems' should be strengthened; see 'Professor Xu Chongde Attended "Seminar on Hong Kong and Macao Issues" at the Invitation of Comrade Xi Jinping' (9 July 2008) at: <http://www.calaw.cn/article/default.asp?id=1066> (last visited on 9 April 2013).

on 29 January 1999 before any discussion of the substantive issues therein.² The Court of Final Appeal did so at a time of expectation, Chief Justice Andrew Li having stated on behalf of the Judiciary at the ceremony of the opening of the legal year on 11 January 1999 (which was in the middle of the oral hearings in the *Ng Ka Ling* case) that its mission was to 'maintain an independent and competent judicial system which upholds the rule of law, safeguards the rights and freedoms of the individual and commands domestic and international confidence'.³ The means to do so was to be the constitutional jurisdiction, which was made explicit by the transliteration of its equivalent Chinese expression, namely 'jurisdiction obtained by virtue of the constitution' (憲法賦予法院的司法管轄權).⁴

The constitution spoken of in relation to the constitutional jurisdiction is the Basic Law. The Court of Final Appeal outlined the constitutional jurisdiction in thirteen paragraphs. Of these paragraphs, two were devoted to the jurisdiction, which the court considered *undoubted*, to review legislation of the HKSAR and acts of the executive authorities of the HKSAR.⁵ The remaining eleven paragraphs explained the controversial jurisdiction to examine and determine the validity of legislative acts of the NPC and its Standing Committee and to declare whether they were consistent with the Basic Law.⁶ In respect to the latter, the judgment of the Court of Appeal in *Ma Wai Kwan David*,⁷ which took a limited view that the HKSAR courts did not have such jurisdiction, generated debate over the (in)security of the rule of law in Hong Kong.⁸

² *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA at 25F-G.

³ See 'The Chief Justice's Address at the Opening of the Legal Year' (11 January 1999) (available at: http://www.judiciary.gov.hk/en/other_info/speeches/legal_yr_cj99.htm) (last visited on 25 March 2011).

⁴ *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA at 64I.

⁵ *ibid.*, at 25G-J. No point was taken, whether before the Court of Final Appeal or the Court of Appeal and the Court of First Instance below, that the HKSAR courts may not adjudicate on the validity of legislation on the ground of inconsistency with the Basic Law. Keith J, hearing the right of abode cases at first instance, assumed the jurisdiction to review legislation for incompatibility with the Basic Law and held that the definition of the relationship between parent and child in paragraph 1(2) of Schedule 1 to the Immigration Ordinance (Cap 115) was incompatible with Article 24(2), paragraph (3) of the Basic Law to the extent that it prevented certain children born out of wedlock from acquiring the right of abode in Hong Kong. Then Keith J said: 'To use the language of Art. 11 of the Basic Law, I declare that it contravenes the Basic Law'; see *Cheung Lai Wah (an infant) & Ors v Director of Immigration* [1997] 3 HKC 64, CFI at 92A-C. Thus Yash Ghai described that the HKSAR courts 'have assumed, without argument, that the HKSAR courts have the jurisdiction to determine the constitutional validity of laws, relying on art. 11 of the Basic Law. They have struck down legislative provisions which contravene the Basic Law'; see Yash Ghai, *Hong Kong's New Constitutional Order* (2nd edn) (Hong Kong: Hong Kong University Press, 1999) p 181.

⁶ *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA, at 26A-28C.

⁷ *HKSAR v Ma Wai Kwan David & Ors* [1997] 2 HKC 315, [1997] HKLRD 761, CA.

⁸ See, for example, Yash Ghai, 'Dark Days for Our Rights', *South China Morning Post* (30 July 1997); Johannes Chan, 'The Jurisdiction and Legality of the Provisional Legislative Council' (1997) 27 *Hong Kong Law Journal* 374-386; Albert Chen, 'The Concept of

This chapter proposes to closely examine and to doubt the *undoubted*. Because what was unquestioned at the time of the Court of Final Appeal hearing turns out on closer examination to be based upon reasoning with forking routes and shifty foundations and to resemble essentially a 200-year-old doctrinal myth.

The Court of Final Appeal stated firstly that by virtue of Articles 19(1) and 80 of the Basic Law, the HKSAR courts exercise the independent judicial power granted to the HKSAR under the Basic Law.⁹ What follows is the statement that will be closely examined and it is proper to reproduce it here in full:

In exercising their *judicial power* conferred by the Basic Law, the courts of the Region have a *duty to enforce and interpret that Law*. They *undoubtedly* have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a *matter of obligation, not of discretion* so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency. Although this has not been questioned, it is right that we should take this opportunity of stating it unequivocally. In exercising this jurisdiction, the courts perform *their constitutional role* under the Basic Law of acting as a *constitutional check on the executive and legislative branches of government* to ensure that they act in accordance with the Basic Law.¹⁰ (emphasis supplied)

This statement is reinforced, several paragraphs further, by consistent emphasis on the role of the HKSAR courts under the Basic Law, which again is reproduced in full:

The Basic Law is a national law and is the constitution of the Region. Like other constitutions, it distributes and delimits powers, as well as providing for fundamental rights and freedoms. *As with other constitutions, laws which are inconsistent with the Basic Law are of no effect and are invalid*. Under it, the courts of the Region have *independent judicial power within the high degree of autonomy conferred on the Region*. It is for the courts of the Region to determine questions of inconsistency and invalidity when they arise.¹¹ (emphasis supplied)

It can be readily observed that the Court of Final Appeal's statements above on the role of the HKSAR courts under the Basic Law made no express reference to textual commands and requirements in any provision of the Basic Law. The Court of Final Appeal referred to Articles 19 and 80 of the Basic Law vesting the HKSAR courts with the independent judicial power of the HKSAR, including the power of final adjudication. However, the citation of articles of the Basic Law in the Court of Final Appeal's judgment did not include Article 11(2), which provides that 'No law enacted by the legislature of the Hong Kong Special

Jurisdiction and the Jurisdiction of the Hong Kong Courts' (1997) 27 *Hong Kong Law Journal* 387-390; Yash Ghai, *Hong Kong's New Constitutional Order* (2nd edn) (Hong Kong: Hong Kong University Press, 1999) pp 178-182, 305-308.

⁹ *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA at 25G-H.

¹⁰ *ibid.*, at 25G-J.

¹¹ *ibid.*, at 26D-F.

Administrative Region shall contravene this Law', and to which the courts below alluded.

The Court of Final Appeal sought to impress by this manner of presentation that the constitutional jurisdiction of the HKSAR courts arises from and is part and parcel of the independent judicial power (including the power of final adjudication) vested in them under the Basic Law, forming part of the high degree of autonomy of the HKSAR. This impression rests on two assumptions, one about the content of judicial power in general and the other about the role of courts in the specific context of a constitutional setting, since there is no provision in the Basic Law similar to Article 81 of the Constitution of Japan¹² that unequivocally provides for the Supreme Court of Japan as the institution to rule on the constitutionality of laws, orders, regulations and penalties.¹³

And if we add back into consideration Article 11(2) of the Basic Law and Article 158(2) and (3) of the Basic Law, by which the NPCSC authorized the HKSAR courts to interpret the Basic Law in the adjudication of cases (subject to the matter of final interpretation as provided for in Article 158(3)), there is still no specific textual command or requirement for judicial review of legislation; these provisions do not by themselves provide for a particular role to be played by the HKSAR courts in respect to them or their operation under the Basic Law. How they are to be operated in fact is very much an appreciation on the part of the judges of the HKSAR of how they would like to shape the judicial power granted to their courts. The appreciation entailed a choice.

That choice initiates the second observation. The Court of Final Appeal, like the lower courts from *Ma Wai Kwan David* onwards, read the Basic Law as the constitution of the HKSAR.¹⁴ While the combination of Article 11(2) of the Basic Law and Articles 18¹⁵ and 84¹⁶ of the same surely entail a normative hierarchy of laws in the adjudication of cases, there is a difference between applying a law of a higher normative order in the adjudication of the particular case to reach the proper disposition of the case in accordance with the applicable law and declaring at the conclusion of the adjudication a legislation invalid to the extent of the

¹² See also Articles 107 and 111 of the current Constitution of the Republic of Korea, which provide for the constitutional review of a law by the Constitutional Court at the request of the courts in relation to an issue at trial, and for the final review of the constitutionality or legality of administrative decrees, regulations or actions by the Supreme Court, when the constitutionality or legality of these measures is at issue in a trial.

¹³ See Norikazu Kawagishi, 'The Birth of Judicial Review in Japan' (2005) 5 *International Journal of Constitutional Law* 308–331.

¹⁴ See *HKSAR v Ma Wai Kwan David & Ors* [1997] 2 HKC 315, [1997] HKLRD 761, CA at 324A–D, 773A–C.

¹⁵ Article 18 of the Basic Law provides that the laws in force in the HKSAR shall be the Basic Law, the laws previously in force in Hong Kong (ie those provided for in Article 8 of the Basic Law) and the laws enacted by the legislature of the HKSAR.

¹⁶ Article 84 of the Basic Law provides that the HKSAR courts shall adjudicate cases in accordance with the laws applicable in the HKSAR as prescribed in Article 18, which are the said laws in force in the HKSAR, and a finite number of national laws of the PRC applicable to the HKSAR through listing in Annex III of the Basic Law.

inconsistency with a law of a higher normative order in enforcement of the latter law. The duty the Court of Final Appeal placed upon the HKSAR courts was to enforce the Basic Law as constitutional law, following interpretation by the courts, so that the courts assume the role of determining and declaring the prescribed consequence of inconsistency of legislation with the provision(s) of the Basic Law, namely invalidity to the extent of the inconsistency. The HKSAR courts are to have this role just as courts under *other*, unspecified, *constitutions* have.

The Court of Final Appeal asserts that the exercise of the HKSAR courts' constitutional jurisdiction fulfils 'their constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law'. Courts acting as a constitutional check on the other branches of government arguably go beyond their exercising of jurisdiction over all cases in the HKSAR, adjudicating them in accordance with the laws applicable to the HKSAR. They take a certain role in the constitutional order in the HKSAR under the Basic Law. Yash Ghai acknowledges that the Court of Final Appeal has 'proclaimed the establishment of a new constitutional order, to be drawn from the four corners of the Basic Law, with autonomy as the centrepiece'. The assertion by the Court of Final Appeal of 'the width of autonomy and the breath of its own jurisdiction' in the *Ng Ka Ling* judgment indicates 'its intention to supervise the proper and lawful implementation of the Basic Law. . . . Given rules, which have hamstrung the effectiveness of the Legislative Council as a law making and supervisory body, this activist role by the judiciary will fill in the gaps in the accountability of the HKSAR political system (thus filling to some extent the democratic deficit of the HKSAR)'.¹⁷ In simple terms, David Feldman sums up the interpretive strategy of a tribunal deciding that it has the power to review executive and legislative acts against the jurisdiction's constitutional document. The tribunal's understanding of 'the principles underpinning the entire structure' set up by the constitutional document will colour its determination:

If the tribunal considers that the constitution embodies the rule of law, that the rule of law demands that a public body should not be free to extend its own powers indefinitely through its own (mis)interpretation of the constitution, and that the tribunal's role (or one of its roles) is to uphold the constitution, it is likely to conclude that it has power to conduct constitutional review of executive and, perhaps, legislative acts.¹⁸

Constitutional supremacy has become judicial supremacy. Construing the Basic Law, the HKSAR courts have acquired the power of judicial review of legislation for themselves. Later on, the Court of Final Appeal simply refers to the interpretation of the Basic Law as 'a matter for the courts',¹⁹ a claim not dissimilar

¹⁷ Yash Ghai, 'Commentary' [1999] 1 HKLRD 360.

¹⁸ David Feldman, 'Factors Affecting the Choice of Techniques of Constitutional Interpretation', in Ferdinand Melin-Soucramanien (ed), *L'interprétation constitutionnelle* (Paris: Dalloz, 2005) pp 119–138 at p 132.

¹⁹ See *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, CFA; *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, CFA.

to that made by the United States Supreme Court in *Cooper v Aaron*,²⁰ enunciating from the Supremacy Clause in Article VI of the Constitution of the United States of America and the earlier judgment of *Marbury v Madison*²¹ 'the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system'.²²

²⁰ See *Cooper v Aaron* 358 US 1 (1958), US SC. This similarity with American 'strong' judicial review was known to Mainland scholarship. For example, Dong Maoyun, a professor of law at Fudan University, and two of his students published a book on the 'Courts System' of the HKSAR in 2010. They observed that the judicial review of legislation undertaken by the HKSAR courts, though not coming within the classic notion of constitutional review, was shockingly similar to the American approach of constitutional review; see Dong Maoyun, Du Junyi and Li Xiaoxin, *The Courts System of Hong Kong SAR* (Beijing: Commercial Press China, 2010) p 275.

²¹ *Marbury v Madison* 5 US (1 Cranch) 137 (1803), particularly Chief Justice Marshall's statement at 177 that: 'It is emphatically the province and duty of the judicial department to say what the law is.'

²² *Cooper v Aaron* 358 US 1 (1958), US SC at 18. The unanimous United States Supreme Court then exclaimed that: 'No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it', referring to the oath under Article VI of the Constitution of the United States of America. cf Basic Law, Article 104. Yet, as Vicki Jackson noted, *Cooper v Aaron* involved the Supreme Court's exposition of federal constitutional law against state disobedience, as opposed to the federal judicial department seeking to prevail its views over the federal political departments; see Vicki Jackson, 'The Binding Effect of Constitutional Interpretation: A View from the United States', in Ferdinand Melin-Soucramanien (ed), *L'interprétation constitutionnelle* (Paris: Dalloz, 2005) pp 219–232. cf Larry Alexander and Frederick Schauer, 'On Extrajudicial Constitutional Interpretation' (1997) 110 *Harvard Law Review* 1369, counselling for general official obedience to the Supreme Court's constitutional decisions, which would perform the necessary function of co-ordinating and settling constitutional issues.

Chapter 15

Mainland Scholarship Questions HKSAR Judicial Review of Legislation

Mainland scholarship has cautioned against the HKSAR courts' interpretation of the Basic Law of the HKSAR. Zhang Youyu, a member of the Basic Law Drafting Committee, wrote in 1988 that the Basic Law would be:

... legislation enacted pursuant to the PRC Constitution, and the Basic Law is not in and of itself a 'constitution'. Although the Basic Law will have the highest legal effect among Hong Kong's laws, it will neither be constitutional in character, nor, in any way, be placed on an equal plane with the PRC Constitution. ... Hong Kong will enjoy a high level of autonomy, but only by virtue of the exceptional status conferred on it by the PRC Constitution and not by any inherent power it possesses.

Zhang took pains to clarify that the Basic Law would be legislation as envisaged in Article 31 of the PRC Constitution; that the process of the drafting of the Basic Law was for the enactment of legislation by the NPC; and that calling the Basic Law Hong Kong's 'little Constitution' was 'quite inappropriate'.¹

Another drafter of the Basic Law of the HKSAR, Dorothy Liu Yiu-chu raised the question of review of validity of legislation during the drafting process. She asked 'who should have the power to review the validity or "constitutionality" of SAR legislation?' Liu characterized as simplistic the view that since the courts in Hong Kong could decide whether legislation enacted in Hong Kong was *ultra vires* the Letters Patent, the courts of the HKSAR are to be vested with the power to review the 'constitutionality' of legislation enacted by the legislature of the HKSAR. Bearing in mind the comprehensive provisions of the Basic Law on fundamental rights and on the relationship between the Central Authorities and the HKSAR, as well as the vesting of the power of final adjudication with the HKSAR courts, Liu states that:

It would be strange to implement the 'one country, two systems' policy by giving SAR courts the power of final adjudication over disputes which concern the 'constitutionality' of SAR legislation and affect the relationship between the Central Government and the SAR. It would amount to establishing the

¹ Zhang Youyu, 'The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and Its Essential Contents and Mode of Expression' (1988) 2 *Journal of Chinese Law* 5–19.

Chapter 32

The Challenge of the 'Second Founding'

32.1 The Basic Law as 'Constitution-making by Outsiders'

The Basic Law was adopted by the NPC following a drafting process under the leadership of and dominated by the Central Authorities. The original language of the Basic Law is Chinese as it was used in Mainland China during the nascent process of law making following the adoption of the Opening and Reform Policy. Some provisions of the Basic Law, including those concerning fundamental rights, bear a similarity with the corresponding provisions in the PRC Constitution.¹

Discussing ancient constitutional designs, Adriaan Lanni and Adrian Vermeule have drawn attention to a feature in ancient constitution making that is unfamiliar to modern understanding, namely constitution making by 'outsiders', though their focus was not on 'cases of constitutions involuntarily imposed on a polity by a foreign power; we have in mind only situations in which citizens voluntarily invite a foreigner to draft their constitution for them'.² Notwithstanding the differences in context with the drafting process of the Basic Law,³ Lanni and

¹ See Article 25 of the Basic Law (with Article 33 of the PRC Constitution), Article 26 of the Basic Law (with Article 34 of the PRC Constitution), Article 27 of the Basic Law (with Article 35 of the PRC Constitution), Article 28 of the Basic Law (with Article 37 of the PRC Constitution), Article 29 of the Basic Law (with Article 39 of the PRC Constitution), Article 30 of the Basic Law (with Article 40 of the PRC Constitution), Article 34 of the Basic Law (with Article 47 of the PRC Constitution), Article 63 of the Basic Law (with Article 131 of the PRC Constitution), Article 77 of the Basic Law (with Article 75 of the PRC Constitution), and Article 85 of the Basic Law (with Article 126 of the PRC Constitution).

² Adriaan Lanni and Adrian Vermeule, 'Constitutional Design in the Ancient World' (2012) 64 *Stanford Law Review* 907-949.

³ Hong Kong residents were invited to participate in the Basic Law Drafting Committee to constitute slightly less than half of its membership and asked to contribute to rounds of consultation organized by the locally formed Basic Law Consultative Committee. On the other hand, the 'outside-ness' of the Central Authorities is mitigated by the established basic policies of PRC regarding Hong Kong. Yash Ghai had indicated that the PRC 'regarded the institutional question as more critical than the devolution of powers. This is contrary to the experience of other autonomy systems where there are long and difficult negotiations about the division of powers but relatively little about

Vermeule's elaboration of implications of an outside founder for constitutional interpretation makes interesting reading, for, as they point out that this makes, in principle, the laws of that outside founder a relevant legal source. '[The] state of [the law of the outside founder] could be probative to show how outside founders understood the meaning of legal terms or to uncover their unstated assumptions about how constitutions work'.⁴

The institutions of the HKSAR after the establishment of the Special Administrative Region of the PRC have practised a different approach. Applying a 'general theme of continuity' underlying the Basic Law,⁵ including with respect of the legal system,⁶ the HKSAR courts have adopted a 'common law approach' to interpreting the Basic Law, as an implication from the separate legal system in the HKSAR based on the common law.⁷ This has largely meant eschewing sources of laws of the PRC,⁸ as well as matters of guidance on the 'legislative intention' of provisions of the Basic Law. Other institutions of the HKSAR have followed.⁹ The institutional understanding of the Basic Law has been shaped and

institutions—indeed the autonomous region is generally left to draft, adopt and amend its own constitution'; see Yash Ghai, 'Putting the Cat among the Pigeons: The Politics of the Referendum' (2004) 34 *Hong Kong Law Journal* 433–449 at 446. Johannes Chan referred to the Central Authorities' overriding concern for stability and prosperity, and their efforts to maintain the latter 'by consolidating the capitalist system, and this is translated into the provision of a privileged and preferential status for the business sector . . . Rightly or wrongly the central government believes that a market economy can be separated from the political system. Hence the Joint Declaration and the Basic Law contain elaborate provisions for preserving the economic system but few regarding the political system. In short, "One Country, Two Systems" is really about "One Country, Two Economic Systems". The prevailing discourse is one of "stability and prosperity". Hong Kong is portrayed as an economic entity, and aspirations for democracy are dismissed by the central government as a more or less emotional response to economic failures'; see Johannes Chan, 'Asymmetry in the Face of Heavily Disproportionate Power Relations: Hong Kong', in Marc Weller and Katherine Nobbs (eds), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts* (Philadelphia: University of Pennsylvania Press, 2010) pp 121–147 at pp 134–136.

⁴ Adriaan Lanni and Adrian Vermeule, 'Constitutional Design in the Ancient World' (2012) 64 *Stanford Law Review* 907–949.

⁵ See *HKSAR v Ma Wai Kwan David & Ors* [1997] HKLRD 761, [1997] 2 HKC 315, CA; *Secretary for Justice v Lau Kwok Fai Bernard* (2005) 8 HKCFAR 304, CFA; *The Catholic Diocese of Hong Kong v Secretary for Justice* [2007] 4 HKLRD 483, CFI; *Luk Ka Cheung v Market Misconduct Tribunal* [2009] 1 HKC 1, [2009] 1 HKLRD 114, CFI; *Kong Yunming v Director of Social Welfare* [2009] 4 HKLRD 382, CFI.

⁶ See *Solicitor (24/07) v The Law Society of Hong Kong* (2008) 11 HKCFAR 117, CFA at [8].

⁷ See *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA; *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, CFA.

⁸ References to the PRC Constitution had been selective and formalistic, involving acknowledgements of the constitutional source of the powers of interpretation and amendment of the Basic Law.

⁹ The only exception appears to be in March 2005 when the Secretary for Justice changed the expressed and common law based view of the HKSAR Government on the term of office of the new Chief Executive elected to fill a casual vacancy in the office of the

maintained by the HKSAR courts, as discussed above. This includes the power of judicial review of legislation of the HKSAR, the requirement of justification from the government for restricting fundamental rights, the according of deference to the legislature or the administrative policy or decision-maker in proportionality analysis, remedial innovations, and the criteria for referring a provision of the Basic Law for interpretation by the NPCSC. The accretion of judgments of the HKSAR courts constructing the Basic Law, it can be said, has amounted to a 'second founding' of the systems of the HKSAR on the basis of the common law and comparative jurisprudence.

32.2 The 'Second Founding' of the HKSAR by the Judicial Construction of the Basic Law

The Court of Final Appeal began the process of judicial construction in *Ng Ka Ling & Ors v Director of Immigration*¹⁰ with its characterization of the Basic Law as 'an entrenched constitutional instrument to implement the unique principle of "one country, two systems"'. Its purpose 'is to establish the [HKSAR] being an alienable part of the [PRC] under the principle of "one country, two systems" with a high degree of autonomy in accordance with China's basic policies regarding Hong Kong as set out and elaborated in the Joint Declaration'. The Court of Final Appeal attributed to the Basic Law the 'usual' circumstances of constitutional instruments: 'it distributes and delimits powers, as well as providing for fundamental rights and freedoms . . . it uses ample and general language. It is a living instrument intended to meet changing needs and circumstances'.¹¹

The Court of Final Appeal turned to the principles of interpretation of the Basic Law and adopted a purposive approach, saying that this 'is generally accepted . . . in the interpretation of a constitution' and is necessary 'because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context', which 'is to be found in the [instrument] itself as well as relevant extrinsic materials'.¹²

Chief Executive, in favour of the views advocated by several Mainland Chinese legal scholars. This led to an outcry of the Hong Kong legal community over infiltration of Mainland Chinese interpretation methodologies; see Lin Feng and P Y Lo, 'One Term, Two Interpretations: The Justifications and the Future of Basic Law Interpretation' (Chapter 7), in Hualing Fu, Lison Harris and Simon Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (New York: Palgrave Macmillan, 2007) pp 143–155.

¹⁰ ie *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA.

¹¹ *ibid*, at 26D, 28D–H.

¹² *ibid*, at 28D–I.

Following the NPCSC Interpretation of 26 June 1999 regarding Article 22(4) and Article 24(2), paragraph (3) of the Basic Law, in which it was stated that the legislative intent of 'all other categories of Art 24(2) . . . have been reflected' in a set of opinions adopted by the Preparatory Committee for the HKSAR in 1996 on the implementation of Article 24(2), the Court of Final Appeal was asked in *Director of Immigration v Chong Fung Yuen*¹³ to take into account this post-enactment extrinsic material in the interpretation of Article 24(2), paragraph (1).

The Court of Final Appeal underlined in its judgment in *Director of Immigration v Chong Fung Yuen* its 'common law approach' to interpreting the Basic Law, as an implication from the separate legal system in the HKSAR based on the common law and the doctrine of the separation of powers. The Court of Final Appeal highlighted that its role in interpreting the Basic Law is to construe the language used in the text of the instrument, in the light of its context and purpose, in order to ascertain 'the legislative intent as expressed in the language' (original emphasis).¹⁴ The Court of Final Appeal reinforced its assertion that interpreting the Basic Law is an objective exercise. Materials extrinsic to the Basic Law, whether pre- or post-enactment, cannot affect interpretation where the courts conclude that language construed in the manner above is clear. The Court of Final Appeal thus categorically rejected the suggestion that some extrinsic materials may have such force that the Court would, on the basis of such materials, depart from the clear meaning of the language of the Basic Law and give the language a meaning which the language could not bear.¹⁵ The Court of Final Appeal then held that the statement in the NPCSC Interpretation of 26 June 1999 'cannot affect the clear meaning of art. 24(2) (1) properly reached, applying the common law approach . . . In conformity with the common law, the Court is unable, on the basis of the statement in question, to depart from what it considers to be the clear meaning of art. 24(2) (1) in favour of a meaning which the language cannot bear'.¹⁶

The Court of Final Appeal's exposition of the common law approach of interpreting the Basic Law achieved the objective of enhancing judicial independence in the HKSAR. The NPCSC may not, short of adopting an interpretation of a provision of the Basic Law, control the objective exercise of interpretation by the HKSAR courts of provisions of the Basic Law through exposition or signposting on the side of perhaps subjective 'legislative intent'.¹⁷ The Court of Final

¹³ ie *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, CFA.

¹⁴ *ibid.*, at 223H-I.

¹⁵ *ibid.* 223F-225B.

¹⁶ *ibid.* 233F-H.

¹⁷ Simon Young contrasted the approaches of the Court of Final Appeal and the NPCSC in interpreting the Basic Law, see Simon Young, 'Legislative History, Original Intent, and the Interpretation of the Basic Law' (Chapter 1), in Hualing Fu, Lison Harris and Simon Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (New York and Basingstoke: Palgrave Macmillan, 2008) pp 15-32. As to Mainland scholarship on how the NPCSC had interpreted the Basic Law, see Chen Sixi, 'Legal Interpretation, Decision Making by Law to Guarantee Correct Application of Basic Law'

Appeal had declined to listen to any advice from the NPCSC, for the sake of the autonomy of the HKSAR.¹⁸

The denial on the part of the Court of Final Appeal of instructional and probably also doctrinal influences from the 'other' or 'national system' under the 'one country, two systems' principle underlying the Basic Law in the interpretation of this constitutional document of the HKSAR can be read as consistent with the judicial reluctance, discussed in Part 5 of this book, to make references of provisions of the Basic Law for interpretation by NPCSC. The HKSAR courts shall have, as far as they can, control over the interpretation of all the provisions of the Basic Law, even if it has meant preferring a particular methodology in the interpretation of the Basic Law.¹⁹

This non-reception of Mainland Chinese legal influence on the part of the Court of Final Appeal contrasts significantly with the court's reception of international, regional and comparative jurisprudence in the course of building up of its fundamental rights jurisprudence under Chapter III of the Basic Law. In *Shum Kwok Sher v HKSAR*,²⁰ Sir Anthony Mason NPJ stated for the Court of Final Appeal that:

In interpreting the provisions of chap. III of the Basic Law and the provisions of the Bill, the Court may consider it appropriate to take account of the established principles of international jurisprudence as well as decisions of international and national courts and tribunals on like or substantially similar provisions in the ICCPR, other international instruments and national constitutions.²¹

(2007) 66 *China Law* 16-18 (Chinese), 92-96 (English); Jiang Shigong, 'Textualism, Structuralism and Originalism: The Art of "Legal Interpretation by the Standing Committee of the NPC"' (2007) *Social Sciences in China*, Issue 5, 143-159; Yao Guojian, 'On the Influence of the Common Law over the Implementation of Hong Kong Basic Law—From the Perspective of the Differences in the Method of Interpretation of Laws between Mainland China and Hong Kong' (2011) 29(4) *Tribune of Political Science and Law* 62-73 at 69-70.

¹⁸ The Court of Final Appeal's common law approach of interpreting the Basic Law may also entail the downplaying of its statement in *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA at 28I that '[assistance] can also be gained from any traditions and usages that may have given meaning to the language used', since reference to these matters may provide a portal to the Mainland Chinese linguistic and legal traditions and usages.

¹⁹ For discussions of the various methodologies and perspectives of constitutional interpretation by common law jurisdictions, see Albert Chen, 'The Interpretation of the Basic Law—Common Law and Mainland Chinese Perspectives' (2000) 30 *Hong Kong Law Journal* 380-431; Paul Gewirtz, 'Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics' (2001) 31 *Hong Kong Law Journal* 200-223.

²⁰ ie *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381, CFA.

²¹ *ibid.*, at [59].

Apart from the General Comments²² and views²³ of the United Nations Human Rights Committee, which is the treaty body of the ICCPR,²⁴ the HKSAR courts have also considered judgments of the European Court of Human Rights and the erstwhile House of Lords,²⁵ both of which interpret and apply the European Convention on Human Rights.²⁶ Further, the HKSAR courts have considered the judgments of final appellate courts of overseas jurisdictions enforcing a constitutional bill of rights, particularly the Privy Council,²⁷ the Supreme Court of Canada, the Constitutional Court of South Africa, the Supreme Court of India and the United States Supreme Court. On some occasions, even judgments of the German Federal Constitutional Court (Bundesverfassungsgericht)²⁸ and the Inter-American Court of Human Rights²⁹ have been considered—the provision

²² The general comments the Human Rights Committee may adopt on thematic issues, more particularly the committee's interpretation of the provisions of the ICCPR. See ICCPR, Article 40.

²³ The views adopted by the Human Rights Committee in considering individual communications of claims of violation by a state party of a right under the ICCPR pursuant to the Optional Protocol to the International Covenant on Civil and Political Rights (adopted on 16 December 1966) 999 UNTS 302.

²⁴ Article 39 of the Basic Law provides for the continuing in force of the provisions of the ICCPR as applied to Hong Kong and for restrictions to rights and freedoms of HKSAR residents to be prescribed by law and not to contravene those provisions of the ICCPR.

²⁵ In 2009, the judicial functions of the House of Lords were taken over by the Supreme Court of the United Kingdom. It should be noted that the Human Rights Act was enacted in 1998, primarily to give effect in the United Kingdom to rights and freedoms guaranteed under the European Convention on Human Rights. Section 2(1) of the Human Rights Act provides that a court or tribunal in the United Kingdom determining a question which has arisen in connection with a Convention right must take into account the jurisprudence of the European Court of Human Rights, the decisions of the European Commission of Human Rights and the decisions of the Committee of Ministers, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

²⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950) 213 UNTS 221.

²⁷ The Judicial Committee of the Privy Council, sitting in London, hears appeals by way of special petitions, from a slowly dwindling number of British Commonwealth countries and British overseas territories, including Mauritius, Jamaica, Belize, Dominica, Cayman Islands, British Virgin Islands, Bermuda, Jersey, and Gibraltar. Many of these countries and territories either have a written constitution or a bill of rights.

²⁸ See *HKSAR v Ng Kung Siu & Anor* (1999) 2 HKCFAR 442, CFA, where the Court cited the Flag Desecration Case, BVerfGE 81, 278 (1990), as well as *Re Paris Renato* (1988), a judgment of the Corte Suprema di Cassazione, Italy to show how other ICCPR state parties reasoned against flag desecration. Similarly, in *Leung Kwok Hung & Ors v HKSAR* (2005) 8 HKCFAR 229, CFA, the Court cited the Brokdorf Atomic Power Station Case, BVerfGE 69, 315 (1985) and the Mutlagen Military Depot Case, BVerfGE 73, 206 (1986) in considering the validity of the prior notification regime for public meetings and processions.

²⁹ See *HKSAR v Ng Kung Siu & Anor* (1999) 2 HKCFAR 442, CFA, where Advisory Opinion No OC-6/86 (1986) was considered when elucidating the meaning of public order (*ordre public*) in human rights instruments.

in Article 84 of the Basic Law that the courts may refer to precedents of other common law jurisdictions viewed more as confirmation than as constraint.

The Court of Final Appeal has, in the course of its first several adjudications, constitutionalized the Basic Law, adopted the common law approach of interpretation of the Basic Law, eschewed Mainland Chinese influence on interpretation of the Basic Law by the HKSAR courts, blocked judicial access to the Mainland legal system, and referred to international, regional and comparative jurisprudence in the enforcement of fundamental rights guaranteed under the Basic Law, taking cues from common law and Western jurisdictions and treaty systems, such as the introduction of proportionality analysis and constitutional remedies. Last but not least, as discussed in Part 3 of this book, the Court of Final Appeal transformed the principle of supremacy of the Basic Law over legislation into the judicial agenda of action to review legislation in enforcement of the Basic Law to check the executive authorities and the legislature of the HKSAR. In these ways, the Court of Final Appeal reconstructed the Basic Law according to the court's own perception of it as a judicially enforceable constitutional document of a common law jurisdiction, protecting fundamental rights of residents and safeguarding the autonomy of the HKSAR.

The 'other' or 'national' system has noticed the above developments. Part 3 of this book has set out the representative Mainland academic literature questioning the legality and legitimacy of the power of judicial review of legislation as well as the judicial activism in the HKSAR. Having foreign judges in the Court of Final Appeal and the HKSAR courts has been considered a 'great mistake'.³⁰ Elsie Leung has pointed to 'anomalies' occurring if one insists on interpreting the Basic Law made under the PRC legal system according to the common law only.³¹ Shiu Sin-por has been concerned that the assumption by the Judiciary of a political role has not been accompanied by adjustments in the 'method for producing judges'. In the circumstances, Shiu believes that judges in the Judiciary, lacking in experience in interpreting a constitution but having to 'choose among conflicting social values and balance between individual rights and social interests', have been prone to make mistakes in assessing social consequences of constitutional adjudication. Given that the judicial system of the HKSAR is independent from the national system, judging in the HKSAR should involve considering 'national and overall social interests', matters that Shiu believes the HKSAR judges have been ill-equipped to handle.³² Shiu warns:

³⁰ See Cheng Jie, 'The Story of a New Policy', in *Hong Kong Journal* (July 2009) at: http://www.hkjournal.org/archive/2009_fall/1.htm (last visited on 28 March 2011).

³¹ Elsie Leung, 'Submission to the Meeting of Panel on Administration of Justice and Legal Services on 27 November 2012' (20 November 2012) (LC Paper No CB(4)180/12-13(01)) at: <http://www.legco.gov.hk/yr12-13/english/panels/ajls/papers/aj1127cb4-180-1-e.pdf> (last visited on 8 December 2012).

³² Shiu Sin-por, 'The Impact of a Written Constitution on Hong Kong's Previous Judicial System', in *Seminar on Review and Prospect of the Basic Law: Collection of Papers 2007* (Hong Kong: One Country Two Systems Research Institute, 2010) pp 242-264, at pp 256-262.

Hong Kong is now faced with a strange situation. On the one hand, due to social pressure and self-restraint of the Central Authorities, the NPCSC's power of interpretation has been repressed. The Central Authorities has repeatedly stated that the interpretation mechanism is only a last resort. Nevertheless, the Hong Kong Court of Final Appeal has been responding to the society's litigations, and has been making many amendments and supplements to the Basic Law through constitutional review. The Court of Final Appeal's rulings may not necessarily [be] consistent with the Central Authorities' understanding of the Basic Law. The situation will not be sustainable if this development is allowed to be continued.³³

Solutions involving action on the part of the Central Authorities have been proposed in some of the papers, the most pointed of them being the Dong and Zhang article. Interpretations by the NPCSC on Articles 84 and 160 of the Basic Law have been touted as the means to curb the excesses of the HKSAR courts, to put right the relationship between the Central Authorities and the HKSAR, and to restore the political system of the HKSAR to a supposedly original design of 'executive-led' or 'executive dominance'. If these steps were to be taken, it is of no exaggeration to view such a broad move by the Central Authorities as a 'second resumption of exercise of sovereignty'.

Although this author has endeavoured in Part 3 of this book to reveal and rebut the fallacies and inadequacies of the Mainland academic literature, principally the Dong and Zhang article, the fact remains that the arguments from this Hong Kong legal practitioner have to be heard and accepted by the power holders in the Central Authorities, many of whom are in fact most likely to hold court in the company of scholars whose mission is to further the integration project that is implicit in the dialectics of 'one country, two systems'. Accordingly, the maintenance of peace in an asymmetrical power relationship involves both persuasion and delaying tactics that appeal to practical interests and political costs.

32.3 *Ng Ka Ling Vanishing?*

The inquiry of this book has begun with the Court of Final Appeal's judgment in *Ng Ka Ling & Ors v Director of Immigration*.³⁴ Judicial power to engage in review of legislation of the HKSAR and of legislative acts of the NPC/NPCSC affecting Hong Kong on consistency with the Basic Law has been asserted as part and parcel of a constitutional jurisdiction that is to be exercised as 'a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency', and have 'the duty to declare invalidity' of the legislative acts of the NPC/NPCSC, as 'the courts of the Region have a duty to enforce and interpret that Law'.³⁵ The Court of Final Appeal has claimed for the HKSAR courts

³³ *ibid.*, at p 263.

³⁴ *ie Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA.

³⁵ *ibid.*, at 25G–26A.

the power to engage in constitutional judging to safeguard the Basic Law and the autonomy it vests with the HKSAR. The findings of the substantive parts of this book tend to chip away the majesty of the above claims.

Part 3 of this book shows that while the power of the HKSAR courts to review legislation of the HKSAR can be sustained on the basis of the Basic Law, it remains vulnerable to NPCSC interpretation, presumably a blunt instrument of 'coercive' constitutional convergence.³⁶ This vulnerability, it must be accepted, exists as a possible incident of the exercise of the plenary power of the NPCSC to interpret the Basic Law from the beginning, even though the matter has gone unnoticed generally thus far.³⁷ Governmental acceptance in the HKSAR of the exercise of judicial power over legislation as 'game resource' or part of the processes of governance in the SAR is of vital significance.³⁸ The Chief Executive promotes Hong Kong's attractiveness as an international financial centre in Asia by reference to, among other favourable features, Hong Kong's common law legal system 'based on the English system and underpinned by an independent judiciary',³⁹ and has taken great pains to stress that the HKSAR Government respects judicial independence and the right of residents to apply for judicial review 'and has been handling applications for judicial review 'in full accordance with the law'.⁴⁰ The Secretary for Justice has elaborated further, saying that one of the reasons for the confidence of the international business community in the legal system of the HKSAR is 'the comprehensive human rights protection under the Basic Law' and that the courts' adjudication of judicial reviews based on the rights provided for in the Basic Law 'demonstrates vividly the effectiveness of the Basic Law in protecting the rights as well as the integrity of our courts

³⁶ The expression of 'coercive constitutional convergence' is borrowed from Rosalind Dixon and Eric Posner, 'The Limits of Constitutional Convergence' (2011) 11 *Chicago Journal of International Law* 399–423, which describes 'coercion theories' of constitutional convergence about countries trying 'to compel other countries to change their constitutional norms' through threats, bribery and 'more intangible risks to reputation'.

³⁷ The acceptance by the Court of Final Appeal in *Lau Kong Yung & Ors v Director of Immigration* (1999) 2 HKCFAR 300 of the plenary power of the NPCSC to interpret the Basic Law would have made clear this vulnerability as a reasonable implication. Benny Tai has indicated that the Court of Final Appeal had since the right of abode saga 'to adjudicate under a potential threat that its decisions might trigger another interpretation by the NPCSC and would be overruled'; see Benny Tai, 'Basic Law, Basic Politics: The Constitutional Game of Hong Kong' (2007) 37 *Hong Kong Law Journal* 503–578 at 561.

³⁸ See, again, Benny Tai, 'Basic Law, Basic Politics: The Constitutional Game of Hong Kong' (2007) 37 *Hong Kong Law Journal* 503–578 at 551–552.

³⁹ See 'CE's speech at HK-GD Business Conference in New Delhi' (27 October 2010) at: <http://www.info.gov.hk/gia/general/201010/27/P201010270212.htm> (last visited on 5 June 2011). See also 'Speech by CE at "Think Asia, Think Hong Kong" Symposium in New York' (11 June 2013) at: <http://www.info.gov.hk/gia/general/201306/11/P201306110782.htm> (last visited on 2 August 2013).

⁴⁰ See 'Statement by Chief Executive's Office' (25 May 2011) at: <http://www.info.gov.hk/gia/general/201105/25/P201105250274.htm> (last visited on 5 June 2011).

in adjudicating over difficult cases of constitutional significance'.⁴¹ While these government statements might be seen as based on practical considerations, they contribute to positive understanding and support of the present state of affairs. Nevertheless, conditions may change and the HKSAR courts' current state of confidence and prestige is not a given. Favourable dynamics must be fostered and maintained.

Part 4 of this book highlighted judicial moves that can be perceived as having been designed to or may be mobilized to moderate, substantively and procedurally, any impression of activism on the part of the HKSAR courts. They may be flexible measures aimed at making judicial review of legislation palatable to the political departments of the HKSAR, thus heading off any moves towards intervention. Procedural calibrations raise the threshold of access to application for judicial review and reduce the room for discretionary admission of cases on judicial review of legislation. Only well-prepared cases can surmount the threshold, which interacts in tandem with the merits criterion for legal aid. The introduction of proportionality analysis serves as a reputable and manageable standard in adjudications involving 'value judgments', allowing the courts to present justification and reasoning for the practical outcome in a concrete case 'in the form of a linear argument' from the text of the Basic Law towards the 'conclusions for public consumption'.⁴² Voicing respect or deference to the 'proper role' of the legislature or the administrative policy maker on the part of the courts satisfies those who are concerned that the judiciary is deciding on questions of legality without regard to the reasoning adopted by the decision maker. In substance and actual operation, the according of deference has gone further, with the courts demanding only relevant factors to be taken into account and even becoming prepared to countenance a wide range of reasoning for legislative or executive decision making, thus undermining the requirement of justification from the decision maker. The latest incident along this line of development appears to have gone further, as the Court of Appeal has agreed to a submission of supposed framers' intention that the legislature of the HKSAR has, under the Basic Law, the power to define, refine, elaborate and adapt an expression in a provision of the Basic Law to meet ever-changing needs of society, so long as the legislative measure does not 'go outside' the central characteristic of that expression.⁴³ The evidence simply does not allow one to dismiss the cases in question as mere incidents of inconsistency; they must be seen as part and

⁴¹ See 'Speech by SJ at a Luncheon in Kuala Lumpur' (25 November 2011) at: <http://www.info.gov.hk/gia/general/201011/25/P201011250173.htm> (last visited on 5 June 2011). See also 'Speech by Secretary for Justice at Hong Kong Association Forum in London' (27 September 2013) at: http://www.doj.gov.hk/eng/public/pr/20130927_pr1.html (last visited on 24 October 2013).

⁴² See David Feldman, 'Factors Affecting the Choice of Techniques of Constitutional Interpretation', in Ferdinand Melin-Soucramanien (ed), *L'interprétation constitutionnelle* (Paris: Dalloz, 2005) pp 119–138 at p 122.

⁴³ See *Vallejos v Commissioner of Registration* [2012] 2 HKC 185, CA at [68] (per Cheung CJHC, Tang and Stock VPP agreeing). On final appeal, the Court of Final Appeal did not find it necessary to comment on this submission, having accepted another submission stemming from the presentation of identical contextual matters that the true and

parcel of a judicial approach that has tended to maintain the traditional mode of supervisory judging.

The development of remedies appears to present a similar story. Legislation is either modified judicially by way of 'remedial interpretation' or left to the legislature to amend within a specified time under a judicially imposed liability shield. There is deference to the legislative or executive decision maker in the formulation of the response to a finding of inconsistency with the Basic Law. Adjudication with a certain regard to the legislature and the executive authorities, including at least instances of 'second guessing' the investigated party, is not only comity with but also co-operation among the co-ordinate branches of government in the HKSAR for the overall governance. The fundamental of constitutional judging, the obligation to strike down legislation upon finding of inconsistency with the Basic Law, once pronounced in the *Ng Ka Ling* case, has been left resting at a distance, if not allowed to atrophy over time.⁴⁴

On the other hand, Part 5 of this book considers judicial countermeasures that act more robustly against actual or perceived intervention into what is truly the common law judge's domain, namely the interpretation of the Basic Law. The Court of Final Appeal has thus far played a relatively successful game to prolong the time before which the common law based legal system of the HKSAR will become voluntarily linked to the socialist legal order of the PRC, through its interpretation of Article 158 of the Basic Law and restrictive reception of the NPCSC Interpretation of 26 June 1999. Some dexterous moves and posturing have been involved, the motivation being the preservation of the common law character of the judicial and legal systems and the retention of room for the conduct of interpretation of particular provisions of the Basic Law in Hong Kong. In this context, the autonomy of judges in interpreting as many provisions of the Basic Law as possible is of paramount importance, as the tangled reasoning of the Court of Final Appeal in the *Ng Ka Ling* case for the construction of the 'predominant provision test' indicates. The series of cases discussed in Part 5, and particularly in Chapter 27, indicate, however, a slow but constant slide towards submissive reconsideration that makes each new step one of trepidation and careful measurement. The making of a judicial reference is a watershed event. The judicial system of the HKSAR and the legal system of Mainland China become conjoined. HKSAR courts are no longer to be regarded as outside the PRC system but as PRC courts.⁴⁵ It is a result internal in the logic of that case, underlining as it must, a duty on the part of the Court of Final Appeal to make a reference when the criteria are met.⁴⁶

proper interpretation of the provision of the Basic Law in question was such that the legislative measure sought to be impugned was consistent and constitutional; see *Vallejos & Anor v Commissioner of Registration* [2013] 4 HKC 239, CFA at [83]–[85], [89], [90].

⁴⁴ See Adrian Vermeule, 'The Atrophy of Constitutional Powers' (2012) 32 *Oxford Journal of Legal Studies* 421–444.

⁴⁵ The HKSAR courts are thus caught in the NPCSC dominant 'Self-Referential Loop'; see Denis Chang, 'The Imperatives of One Country, Two Systems: One Country before Two Systems?' (2007) 37 *Hong Kong Law Journal* 351–362 at 361.

⁴⁶ See *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA at 30A–B. Twelve years later, the Court of Final Appeal decided, by a majority (Chan and Ribeiro

32.4 Internationalizing Jurisprudence

Maintenance of the identity of the HKSAR courts as common law courts, notwithstanding their theoretical and/or practical linkage with the PRC's socialist legal order, requires continuing interaction with other common law jurisdictions. The borrowing and importing of law from abroad has not been something new for a small jurisdiction like Hong Kong, whose common law began as the common law of England, subject to modification due to the local circumstances of Hong Kong or its inhabitants.⁴⁷ The common law in Hong Kong has developed in reference to persuasive authorities from the House of Lords and the Privy Council decisions on non-Hong Kong appeals.⁴⁸ As for the situation after the resumption of the exercise of Chinese sovereignty, Chief Justice Andrew Li summed up the great benefit of comparative jurisprudence to the HKSAR courts as follows:

After 1 July 1997, in the new constitutional order, it is of the greatest importance that the courts in Hong Kong should continue to derive assistance from overseas jurisprudence. This includes the decisions of final appellate courts in various common law jurisdictions as well as decisions of supra-national courts, such as the European Court of Human Rights. Compared to many common law jurisdictions, Hong Kong is a relatively small jurisdiction. It is of great benefit to the Hong Kong courts to examine comparative jurisprudence in seeking the appropriate solution for the problems which come before them.⁴⁹

Sir Anthony Mason NPJ, writing extra-judicially, explained further that apart from the continuum of evolutionary development of the common law that Hong Kong judges partake by referring to judgments from other common law jurisdictions, the international law dimension of human rights protection and

PJJ and Sir Anthony Mason NPJ, Bokhary PJ and Mortimer NPJ dissenting, that the *Ng Ka Ling* criteria for judicial reference were met in *Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC* [2011] 5 HKC 151 (8 June 2011) respecting questions of interpretation affecting the meaning of Articles 13 and 19 of the Basic Law (see [403], [406]) and four questions were referred (see [407]). Two years afterwards, the Court of Final Appeal classified Article 158 of the Basic Law, which concerns the interpretation of the Basic Law by the HKSAR courts, as an excluded provision in *Vallejos & Anor v Commissioner of Registration* [2013] 4 HKC 239, CFA at [110]. In the next appropriate case, the Court of Final Appeal would have to seek an interpretation from the NPCSC of Article 158 to resolve a question as to that provision's interpretation, such as on the binding force of the NPCSC Interpretation of 26 June 1999, and be bound by the resultant interpretation of the NPCSC.

⁴⁷ See the Supreme Court Ordinance 1844 (15 of 1844) section 3 and later, the Application of English Laws Ordinance (Cap 88) section 3 (not adopted as a law of the HKSAR by the NPCSC).

⁴⁸ For an account on the doctrine of precedent applicable in Hong Kong before 1 July 1997, see *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117, CFA at [6]–[15] (per Li CJ).

⁴⁹ *ibid* [16].

the practical approach of reading judgments from abroad for 'judicial wisdom' (ie to appraise the choices made in other jurisdictions) carries added attraction. Sir Anthony writes:

It is important that the [Court of Final Appeal's] decisions should be seen to conform to internationally accepted judicial standards. Indeed, for Hong Kong there is a double attraction: Hong Kong's reputation as an international financial centre depends upon the integrity and standing of its courts. Further, in the context of Hong Kong's relationship with the central government in Beijing, it is important that the decision of the Hong Kong courts reflect adherence to the rule of law in accordance with internationally adopted judicial standards.⁵⁰

It thus behoves the courts and judges of the HKSAR to be 'internationalist', exposing themselves to developments in constitutional judging, human rights protection and the common law abroad. Such a process of exposure, reference and adoption can be beneficial in engendering a convergence with the broad range of common law jurisdictions conducive to endorsement and sharing of values and approaches.⁵¹

There have indeed been continuous interchanges between Hong Kong judges and fellow judges overseas.⁵² The Chief Justice has, apart from joining his fellow chief justices in regional conferences,⁵³ attended the annual Global Constitutionalism Seminar at Yale Law School to compare notes with supreme

⁵⁰ Anthony Mason, 'The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong' (2007) 37 *Hong Kong Law Journal* 299–317 at 302–303. Mason considered countervailing considerations against adopting solutions based on comparative law, including political differentiations, doctrinal differences, historical, social and cultural contexts of the home jurisdiction, and policy factors, as well as practical constraints in the adjudicative process which may lead to a selective approach and the inability to conduct a comprehensive survey of the topic and highlighted the tensions in the United States and Australia over using international and comparative law and legal materials in the interpretation of their respective national constitutions.

⁵¹ See Rosalind Dixon and Eric Posner, 'The Limits of Constitutional Convergence' (2011) 11 *Chicago Journal of International Law* 399–423, discussing 'superstructure', 'learning' and 'competition' theories of constitutional convergence. Dixon and Posner, though noting that each of these theories had limitations, considered that increased interaction, if successful in promoting similarity in policies and values, may lead to similar constitutional norms.

⁵² Face-to-face meetings of judges, serving as opportunities to exchange experiences and ideas, have become frequent and institutionalised since the 1990s. See Anne-Marie Slaughter, 'Judicial Globalization' (1999–2000) 40 *Virginia Journal of International Law* 1103–1124 at 1120–1123.

⁵³ A regular conference of chief justices in the region is the Biennial Conferences of Chief Justices of Asia and the Pacific, organized by the Judicial Section of the Law Association for Asia and the Pacific (LAWASIA), held in conjunction with LAWASIA Biennial Conferences. Hong Kong hosted the 2007 Biennial Conference.