

Part I

The Practice of “One Country, Two Systems”

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The Rule of Law Under “One Country, Two Systems”

INTRODUCTION

The transplant of English common law to, as well as the development of a set of legal institutions that supported the Rule of Law in, Hong Kong is one of the major legacies of British colonial rule in Hong Kong. When the Sino-British Joint Declaration was signed in 1984 and Hong Kong began to prepare itself for reunification with the motherland in 1997, there were concerns about the possible deterioration of standards of the Rule of Law and of civil liberties in Hong Kong after the handover. It was generally recognised that one of the crucial tests for whether the “One Country, Two Systems” (OCTS) model works would be whether the Rule of Law could be maintained in Hong Kong after 1997.

Paradoxically, the practice of OCTS is itself dependent on a particular kind of Rule of Law — that which is practiced with regard to the Basic Law of the Hong Kong Special Administrative Region (HKSAR) — the “mini-constitution” enacted by the National People’s Congress (NPC) of the People’s Republic of China (PRC) in 1990 that came into effect in 1997 as the constitutional instrument of the HKSAR of the PRC. Would the Basic Law, which embodies the grand promises made by the PRC Government in the text of the Joint Declaration regarding how the HKSAR would be administered, be faithfully implemented by the Chinese authorities? Would Hong Kong be able to practice autonomy (with “Hong Kong people ruling Hong Kong”) while evolving a higher degree of democracy than ever before, and ensure the protection of human rights and property rights under the Rule of Law? Would the Rule of Law continue to contribute to Hong Kong’s economic prosperity and continue to safeguard it as a free, pluralistic, and open society as well as an international city?

This chapter seeks to provide a basis for answering these questions by reviewing the legal and constitutional history of the HKSAR since its establishment in 1997. It focuses on what the author considers to be the most important events, cases, and developments, and divides the legal history of the HKSAR so far into four periods.

1997–1999: TRIAL AND ERROR, CONFRONTATION AND ADAPTATION

After the establishment of the HKSAR in July 1997, it was immediately plagued by two legal or constitutional problems regarding the interpretation of the Basic Law. The problems concerned the legality of the establishment of the

Provisional Legislative Council (PLC) in 1997, and the right of abode in Hong Kong of mainland-born children of Hong Kong residents. These issues were litigated all the way from the Court of First Instance to the Court of Appeal, and then finally to the Court of Final Appeal (CFA). On 29 January 1999, the CFA rendered its judgments in the cases of *Ng Ka Ling v Director of Immigration*¹ and *Chan Kam Nga v Director of Immigration*.² In retrospect, these were the most momentous decisions of the Hong Kong courts in the SAR’s early history.

Both *Ng Ka Ling* and *Chan Kam Nga* were cases litigated against the government with the support of legal aid by seekers of the “right of abode” in Hong Kong. The applicants were children of Hong Kong permanent residents, but they were born in mainland China. The children (some of whom were adults already), who did not have any right of abode in Hong Kong under pre-1997 Hong Kong law, claimed the right of abode in Hong Kong under the Basic Law³ which came into full force on 1 July 1997. They argued that the immigration legislation (passed by the PLC)⁴ that defined who would be entitled to such right (thereby excluding some of them from such entitlement) and regulated the procedures for migration to Hong Kong for settlement was invalid because it contravened the Basic Law. Two controversies stemmed from the CFA’s decisions in these two cases.

The first arose in the context of the CFA’s handling of the issue of the legality of the PLC. In *Ng Ka Ling*, the CFA, like the Court of Appeal below it in *HKSAR v Ma Wai Kwan*,⁵ had to deal with the question of the legality of the PLC, because it was argued that the immigration legislation passed by the PLC was invalid as the PLC itself was not lawfully established. The PLC was established by the Preparatory Committee for the HKSAR appointed by the NPC Standing Committee (NPCSC). It was argued that the PLC was not lawfully established as it was not provided for in the Basic Law. Since the Basic Law was enacted in 1990 on the assumption that there would be a political “through train” in the sense that the members of the pre-1997 legislature would

1. *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 (CFA).

2. *Chan Kam Nga v Director of Immigration* [1999] 1 HKLRD 304 (CFA).

3. Art. 24(2)(3) of the Basic Law.

4. Immigration Ordinance No. 2, 3 (1997) (amended 1997).

5. *HKSAR v Ma Wai Kwan* [1997] HKLRD 761 (CA), [1997] HKC 315. The court judgments in the cases discussed in this chapter are all available at the website of the Hong Kong Judiciary: <http://legalref.judiciary.gov.hk>.

become members of the first legislature of the HKSAR,⁶ there was indeed no provision for the establishment of the PLC (whose members were chosen by the 400-member Selection Committee for the first Chief Executive). The PLC was essentially a contingency measure to deal with the “derailing” of the through train as a result of political reforms introduced by Governor Chris Patten in the mid-1990’s which Beijing considered to be contrary to the Basic Law and to the understanding reached between the Chinese and British Governments in 1990 when the Basic Law was enacted.

While the CFA reached the same conclusion as the Court of Appeal in affirming the legality of the PLC, it attempted in its judgment to overrule the Court of Appeal’s ruling that Hong Kong courts had no jurisdiction to overturn acts of the NPC or NPCSC. The CFA stated in *Ng Ka Ling* that Hong Kong courts have the jurisdiction “to examine whether any legislative acts of the [NPC] or [NPCSC] are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent”.⁷ This immediately provoked a strong reaction from the mainland Chinese side,⁸ which led to the HKSAR Government’s surprise and unprecedented application to the CFA on 26 February 1999 requesting it to “clarify” the relevant part of its judgment. The CFA acceded to the request and stated that (1) the Hong Kong courts’ power to interpret the Basic Law is derived from the NPCSC under article 158 of the Basic Law; (2) any interpretation made by the NPCSC under article 158 would be binding on the Hong Kong courts; and (3) the judgment of 29 January did not question the authority of the

6. See the “Decision of the National People’s Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region”, enacted at the same time as and published with the Basic Law on 4 April 1990. The Decision is reproduced in Yash Ghai, *Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 2nd edition, 1999) 568–569.

7. *Ng Ka Ling* (N1), at 377.

8. In a highly publicised seminar reported in Hong Kong and mainland Chinese media on 7 February 1999, four leading Chinese law professors, who were also former members of the Drafting Committee for the Basic Law and the Preparatory Committee for the establishment of the HKSAR, attacked the statement. They suggested that it had the effect of placing Hong Kong courts above the NPC, which is the supreme organ of State power under the Chinese Constitution, and of turning Hong Kong into an “independent political entity”. After the HKSAR’s Secretary for Justice Elsie Leung’s visit to Beijing on 12–13 February 1999 to discuss the matter, it was reported that Chinese officials had criticised the statement as unconstitutional and called for its “rectification”. See generally J.M.M. Chan, H.L. Fu, and Y. Ghai (eds.), *Hong Kong’s Constitutional Debate: Conflict Over Interpretation* (Hong Kong: Hong Kong University Press, 2000) 73.

NPC or NPCSC “to do any act which is in accordance with the provisions of the Basic Law and the procedure therein”.⁹

The practical significance of the “clarification”,¹⁰ which is also a consequence flowing directly from the Basic Law itself, is that the Hong Kong courts’ power to interpret the Basic Law and to determine whether an act of any governmental authority is consistent with the Basic Law, albeit a real and important power, is nevertheless not an absolute one. It is not absolute because it is subject to the overriding power of the NPCSC. In the absence of an interpretation by the NPCSC, the Hong Kong courts have full authority to interpret the Basic Law on their own and to decide cases in accordance with their own interpretation, but once the NPCSC has spoken, the Hong Kong courts must comply. However, when can or will the NPCSC speak? This question was answered in the course of the second controversy flowing from the CFA’s decisions of 29 January 1999.

This controversy stemmed from the CFA’s interpretation of articles 24(2)(3) and 22(4) of the Basic Law, and its decision not to refer the latter to the NPCSC for interpretation even though it seems to be covered by under article 158(3) of the Basic Law.¹¹ The HKSAR Government estimated that the implementation of articles 24(2)(3) and 22(4) as interpreted by the CFA would mean that Hong Kong would need to absorb a migrant population from mainland China of 1.67 million in the coming decade.¹² In the government’s opinion, Hong Kong need not bear this burden because the CFA’s interpretation of the relevant Basic Law provisions was of dubious validity. On 21 May 1999, the

9. *Ng Ka Ling and Others v Director of Immigration* [1999] 1 HKLRD 577 (CFA).

10. Albert H.Y. Chen, “Constitutional Crisis in Hong Kong: Congressional Supremacy and Judicial Review” (1999) 33 *The International Lawyer* 1025; B. Ling, “Can Hong Kong Courts Review and Nullify Acts of the National People’s Congress?” (1999) 29 *Hong Kong Law Journal* 8.

11. Art. 158(3) of the Basic Law requires the CFA to refer to the NPCSC for interpretation of relevant Basic Law provisions “concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region”. See Albert H.Y. Chen, “*Ng Ka-ling* and Article 158(3) of the Basic Law” (2002) 5 *Journal of Chinese and Comparative Law* 222.

12. This figure is the sum total of 690,000 (being the “first generation” consisting of children of current Hong Kong permanent residents) and 980,000 (being the “second generation” consisting of children already born of the “first generation” who will be entitled to the right of abode after their parents — as members of the “first generation” — have migrated to Hong Kong and resided there for 7 years). See generally Ho-lup Fung, “The ‘Right of Abode’ Issue: A Test Case of ‘One Country, Two Systems’” in Y.C. Wong (ed.), “*One Country, Two Systems*” in *Crisis* (Lanham, Maryland: Lexington Books, 2004) 253–260; Anne S.Y. Cheung and Albert H.Y. Chen, “The Search for the Rule of Law in the Hong Kong Special Administrative Region, 1997–2003” in Y.C. Wong (*ibid.*) 61–96.

Chief Executive, Mr Tung Chee-hwa, despite strong opposition from certain sectors of the community, particularly the legal professional and pro-democracy politicians, requested the State Council to refer the relevant Basic Law provisions to the NPCSC for interpretation.¹³ The request was acceded to, and the NPCSC issued an interpretation on 26 June 1999.¹⁴ The NPCSC adopted the same interpretations as those adopted by the Court of Appeal before its decision was overturned by the CFA. The CFA's interpretations on these points were effectively overruled. In the text of its Decision, the NPCSC also pointed out that the litigation did involve Basic Law provisions concerning the Central Government's responsibility or the Central-HKSAR relationship that ought to have been referred to the NPCSC for interpretation by the CFA in accordance with article 158(3) of the Basic Law in the first place.

The reference to the NPCSC for interpretation was extremely controversial because there is nothing in the Basic Law which suggests that the executive branch of the HKSAR Government can request the NPCSC to interpret the Basic Law. Furthermore, the reference to the NPCSC was criticised as a self-inflicted blow to Hong Kong's autonomy, judicial authority, Rule of Law, and system for protecting individuals' rights.¹⁵ With respect, most of these criticisms cannot be sustained. First, as was acknowledged by the CFA in December 1999 in *Lau Kong Yung v Director of Immigration*,¹⁶ the NPCSC's power to interpret the Basic Law under article 158(1) of the Basic Law is a "free-standing" one, in the sense that it can be exercised at any time, even in the absence of a reference by the CFA in accordance with article 158(3) of the Basic Law. Any interpretation issued by the NPCSC, whether on its own initiative or upon

13. It should be noted that although art. 158(3) provides for reference by the CFA of a Basic Law provision to the NPCSC for interpretation in certain circumstances, art. 158 does not provide expressly that the HKSAR Government may request the NPCSC to interpret the Basic Law. Art. 158(1) does stipulate however that "[t]he power of interpretation of this Law shall be vested in" the NPCSC. See Albert H.Y. Chen, "The Interpretation of the Basic Law – Common Law and Mainland Chinese Perspectives" (2000) 30 *Hong Kong Law Journal* 380.

14. Government of the Hong Kong Special Administrative Region Gazette Extraordinary, Legal Supplement No. 2, 28 June 1999, p. 1577 (LN 167 of 1999).

15. See generally Chan, Fu, and Ghai (N8); Peter Wesley-Smith, "Hong Kong's First Post-1997 Constitutional Crisis" (1999) *LawAsia Journal* 24; Feng Ling, "The Constitutional Crisis in Hong Kong – Is It Over?" (2000) 9 *Pacific Rim Law and Policy Journal* 281; Yongping Xiao, "Comments on the Judgment on the Right of Abode by Hong Kong CFA" (2000) 48 *American Journal of Comparative Law* 471.

16. *Lau Kong Yung v Director of Immigration* [1999] 3 HKLRD 778 (CFA).

a reference by the CFA, is binding on the Hong Kong courts. Second, the CFA also acknowledged in *Lau Kong Yung* that since the preamble to the NPCSC interpretation of June 1999 suggests that a reference to the NPCSC for interpretation should have been made by the CFA in this case, it might be necessary for the CFA to re-visit in future the test (such as the “predominant provision” test) for determining when a reference should be made to the NPCSC. This means that the CFA implicitly conceded that it might have been a mistake for it to decide in *Ng Ka Ling* not to refer article 22(4) of the Basic Law to the NPCSC for interpretation. Third, it should be stressed that the parties to the litigation in the *Ng* and *Chan* cases were not affected by the NPCSC’s interpretation.¹⁷ This means that the interpretation only operates as a guide to Hong Kong courts on how to interpret the relevant Basic Law provisions in cases that come before the courts after the interpretation was made.

Although the 1999 NPCSC interpretation should not in itself, given the circumstances in which it was made, be regarded as a blow to Hong Kong’s Rule of Law or autonomy, the concern is valid that if the NPCSC were to exercise its overriding power to interpret the Basic Law frequently, the autonomy and authority of the Hong Kong courts in deciding cases on their own (at least in cases that touch upon an interpretation of the Basic Law) would be severely hampered. Fortunately, this has not happened. The NPCSC has practised self-restraint in exercising its power of interpretation of the Basic Law. Since its interpretation of 1999, only two other interpretations have been issued in the first decade of the twenty-first century – one in 2004 on the issue of political reform and democratisation in Hong Kong and the Beijing authorities’ role in the process,¹⁸ and one in 2005 on the issue of the term of office of the successor (to be elected in Hong Kong and appointed by Beijing) to Chief Executive Tung Chee-hwa who resigned in March 2005 before completing his second term of office of 2002–2007.¹⁹ The 2004 interpretation was issued on the NPCSC’s own initiative in the absence of any litigation on

17. This is provided for in art. 158(3) of the Basic Law and is also reiterated in the text of the NPCSC’s interpretation.

18. This chapter confines itself to the “Rule of Law issues” in post-1997 Hong Kong, while the issues of political reform, democratisation, and Beijing’s interventions in the process of constitutional reform in post-1997 Hong Kong are outside its scope. On the latter issues, see Chapter 2 of this volume.

19. Albert H.Y. Chen, “The NPCSC’s Interpretation in Spring 2005” (2005) 35 *Hong Kong Law Journal* 255.

the matter or any request for interpretation by the Hong Kong Government. The 2005 interpretation was issued at the request of the Hong Kong Government at a time when litigation (to challenge a bill introduced in the Hong Kong legislature on the Chief Executive's term of office) was pending but before a full trial in any court.

To conclude this section, it may be said that 1997–1999 was a period of initial trial operation for the Basic Law. The CFA's decisions on 29 January 1999 did precipitate two constitutional crises or “confrontations” between the legal orders of Hong Kong and of the PRC, one leading to the “clarification” by the CFA and the other leading to the June 1999 interpretation by the NPCSC. How the legal order of Hong Kong should position itself with regard to the power of the NPCSC was a fundamental problem raised by the 1997 handover. By the time of the CFA's decision in *Lau Kong Yung*, the Hong Kong courts led by the CFA had already adjusted themselves to this new constitutional order.

2000–2002: THE ELABORATION AND CONSOLIDATION OF THE REGIME OF RIGHTS

The CFA delivered its judgment in *Lau Kong Yung* on 3 December 1999. Later, on 15 December 1999, the same court rendered its decision in *HKSAR v Ng Kung Siu*,²⁰ which inaugurated what this author would classify as the second period of the legal history of the HKSAR. The developments in this period should be understood against the background of Hong Kong's pre-1997 regime of rights protection.

Hong Kong's pre-1997 constitution was contained in the Letters Patent issued by the British Crown.²¹ Before its 1991 amendment, Letters Patent provided only a crude and rudimentary written constitution for the colony. In particular, it did not contain any guarantee of civil liberties and human rights. In 1991, in an attempt to restore confidence in Hong Kong's future which had been deeply shaken by the Tiananmen incident of 4 June 1989, the Hong

20. *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 (CFA), (1999) 2 HKCFAR 442.

21. N. Miners, *The Government and Politics of Hong Kong* (Hong Kong: Oxford University Press, 5th edition, 1995) ch. 5; Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (Hong Kong: Longman Asia, 1995) ch. 2.

Kong Government passed the Hong Kong Bill of Rights Ordinance (BORO),²² incorporating into the domestic law of Hong Kong the provisions of the International Covenant on Civil and Political Rights (ICCPR) which had already been applied by the United Kingdom to Hong Kong on the level of international law since 1976. A corresponding amendment was made to the Letters Patent to give the ICCPR supremacy over laws enacted by Hong Kong’s legislature. Since 1991, the courts of Hong Kong have on such constitutional basis exercised the power of judicial review of legislation (striking down any existing law which was considered to fail to meet the human rights norms embodied in the Bill of Rights and the ICCPR), and developed a solid body of case law on the protection of human rights.²³ The era of constitutional adjudication thus began in Hong Kong.

Upon the establishment of the HKSAR in July 1997, the colonial constitution embodied in the Letters Patent lost its force. Article 8 of the Basic Law provides for the continued validity of the laws previously in force in Hong Kong except for any law that contravenes the Basic Law and subject to any amendment by the HKSAR legislature. Under article 160 of the Basic Law, the NPCSC may declare which of Hong Kong’s pre-existing laws contravene the Basic Law and cannot therefore survive the 1997 transition. Such a declaration was made by the NPCSC on 23 February 1997 in its “Decision on the Treatment of the Laws Previously in Force in Hong Kong”.²⁴ The Decision declared the non-adoption, *inter alia*, of three interpretative

22. Cap. 383, L.H.K. See generally R. Wacks (ed.), *Hong Kong’s Bill of Rights* (Hong Kong: Faculty of Law, University of Hong Kong, 1990); J.M.M. Chan and Y. Ghai (eds.), *The Hong Kong Bill of Rights: A Comparative Approach* (Hong Kong: Butterworths Asia, 1993); Peter Wesley-Smith, “Protecting Human Rights in Hong Kong” in R. Wacks (ed.), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992) ch. 1; Johannes M.M. Chan, *The Annotated Ordinances of Hong Kong: Hong Kong Bill of Rights Ordinance* (Hong Kong: Butterworths Asia, 1999).

23. Y. Ghai, “Sentinels of Liberty or Sheep in Wolf’s Clothing? Judicial Politics and the Hong Kong Bill of Rights” (1997) 60 *Modern Law Review* 459; Johannes M.M. Chan, “Hong Kong’s Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence” (1998) 47 *International and Comparative Law Quarterly* 306; A. Byrnes, “And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong’s Bill of Rights” in P. Alston (ed.), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press, 2000).

24. For an English translation of this Decision, see Albert H.Y. Chen, “Legal Preparation for the Establishment of the Hong Kong SAR: Chronology and Selected Documents” (1997) 27 *Hong Kong Law Journal* 419.

provisions in the Hong Kong BORO,²⁵ apparently on the ground that they purported to give the Ordinance a superior status overriding other Hong Kong laws, which is inconsistent with the principle that only the Basic Law is superior to other Hong Kong laws. Does this mean that the pre-existing regime of legal protection of rights in Hong Kong before 1997 would be dismantled or weakened? A negative answer has been revealed by various major judicial decisions in the second period of the post-1997 legal history of the HKSAR.

The CFA's decision in *Ng Kung Siu* is probably the most theoretically significant constitutional case on civil liberties and human rights in the early history of the HKSAR. In this case, the defendants had participated in a demonstration in Hong Kong for democracy in China during which they displayed a defaced national flag (of the PRC) and a defaced regional flag (of the HKSAR). They were subsequently charged with violations of section 7 of the National Flag and National Emblem Ordinance²⁶ and section 7 of the Regional Flag and Regional Emblem Ordinance. The sections provide for the offences of desecration of the national and regional flags and emblems.

The defendants were convicted by the magistrate; they were neither fined or imprisoned, but bound over²⁷ to keep the peace on a recognisance of HK\$2,000 for each of the two charges for 12 months. They successfully appealed against their conviction before the Court of Appeal.²⁸ The government appealed the case to the CFA, which rendered its judgment in December 1999.²⁹ The appeal was allowed by the CFA unanimously, and the impugned ordinances were upheld as constitutional and valid. The CFA pointed out that the national and regional flags are important and unique symbols of the nation and of the HKSAR, respectively. There are, therefore, societal and community interests in the protection of the flags. Such protection constitutes the objective behind the flag desecration laws. Such protection was held to fall within the concept of

25. The interpretative provisions concerned were sections 2(3), 3, and 4 of the BORO. For the effect of the non-adoption of these provisions, see Peter Wesley-Smith, "Maintenance of the Bill of Rights" (1997) 27 *Hong Kong Law Journal* 15; Johannes M.M. Chan, "The Status of the Bill of Rights in the Hong Kong Special Administrative Region" (1998) 28 *Hong Kong Law Journal* 152.

26. This section was largely reproduced from art. 19 of the PRC Law on the National Flag and art. 13 of the PRC Law on the National Emblem. Since 1 July 1997, these two PRC laws have been listed in Annex III to the Basic Law as mainland laws that are applicable to Hong Kong under art. 18 of the Basic Law.

27. For the practice of "binding over", see Wesley-Smith (N22) 26–27.

28. *HKSAR v Ng Kung Siu and Another* [1999] 1 HKLRD 783 (CA).

29. *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907, (1999) 2 HKCFAR 442.

“public order (*ordre public*)” as used in the ICCPR. It was held that the court below adopted too narrow a conception of “public order (*ordre public*)”.³⁰

The next questions for the CFA were whether the flag desecration laws impose restrictions on the freedom of expression, and, if so, whether such restrictions can be justified on the ground that they are necessary for the protection of “public order (*ordre public*)” and proportionate to the objective sought to be achieved (and thus not excessive). This is the application of the principles of rationality and proportionality well-established in human rights jurisprudence elsewhere and already introduced into Hong Kong since 1991. The CFA held that flag desecration is indeed “a form of non-verbal speech or expression”,³¹ and the impugned laws do constitute a restriction thereon. However, the court pointed out that the restriction is a limited one, because while one mode of expression is prohibited, the same message which the actor wants to express can still be freely expressed by other modes.³² It was therefore concluded that the “necessity” and “proportionality” tests had been satisfied.³³

Although the CFA’s actual decision in *Ng Kung Siu* was to uphold the flag desecration law, the approach and mode of reasoning adopted by the CFA in this case have had far-reaching positive implications for the regime of rights protection in post-1997 Hong Kong. The case demonstrates that the operative force of the Bill of Rights and the ICCPR, and the Hong Kong courts’ power to review the constitutionality of Hong Kong legislation on human rights grounds, and, if necessary, to strike down such legislation, have survived the non-adoption (by the NPCSC) of the relevant provisions in the Hong Kong BORO as mentioned above. In fact, the HKSAR courts may review whether any legislative or executive action in Hong Kong violates the human rights guaranteed by chapter III of the Basic Law or by the ICCPR (the applicable provisions of which have, as mentioned above, been reproduced in the BORO) which is given effect to by article 39 of the Basic Law. Article 39 has

30. Both the English and French expressions appear in the text of art. 19 of the ICCPR. In its judgment, the court below (the Court of Appeal) referred to two decisions of the American Supreme Court — *Texas v Johnson* 491 U.S. 397 (1989) and *United States v Eichman* 496 U.S. 310 (1990) — in which the criminalisation of flag desecration was found to violate the “free speech” clause in the U.S. Constitution and is, therefore, unconstitutional. Both cases were decided by a majority of 5 to 4 in the Supreme Court and were extremely controversial in the United States.

31. *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442, at 455.

32. *Ibid.*, 456.

33. *Ibid.*, 460–461.

been interpreted to mean that the relevant provisions of the ICCPR have the same constitutional force as the Basic Law itself, thus overriding laws that are inconsistent with these provisions.

We now turn to two other cases decided in 2000–2002 that demonstrate the vitality of judicial protection of human rights in post-1997 Hong Kong. *Secretary for Justice v Chan Wah and Tse Kwan Sang*³⁴ concerns the system of local village elections in the New Territories. Some of the residents of the villages of the New Territories are known as “indigenous inhabitants” or “indigenous villagers”,³⁵ defined as descendants through the male line of residents in 1898 of villages in the New Territories.³⁶ The rules governing the election of village representatives in most villages in the New Territories limited the right to vote and the right to stand as candidates to indigenous inhabitants. In the *Chan* case, Chan and Tse were non-indigenous inhabitants of the villages in which they lived. They challenged the electoral rules as discriminatory in denying them their right to take part in the conduct of public affairs under article 21(a) of the Bill of Rights (article 25 of the ICCPR).

In the final judgment delivered in December 2000, the CFA held that the impugned electoral rules in this case imposed unreasonable restrictions on Chan’s and Tse’s right to take part in the conduct of public affairs through freely chosen representatives. In response to this ruling, the government subsequently reformed the village election system by introducing legislation providing for a dual system in which each village would elect two village representatives, one serving only the indigenous inhabitants and the other all the villagers.³⁷

The *Chan* case concerns discrimination on the basis of origin or status, while the next case concerns gender discrimination. In *Equal Opportunities Commission v Director of Education*,³⁸ the Equal Opportunities Commission challenged the Education Department’s policy regarding the system of allocation of secondary school places to students completing primary school education. The effect of the operation of this system was that with regard to a

34. *Secretary for Justice v Chan Wah and Tse Kwan Sang* [2000] 3 HKLRD 641 (CFA), (2000) 3 HKCFAR 459.

35. See the Government Rent (Assessment and Collection) Ordinance, Cap. 515, L.H.K.

36. 1898 was the year in which the British colony of Hong Kong — then comprising Hong Kong Island and the Kowloon Peninsula — was expanded in size to include the New Territories north of Kowloon.

37. See the Village Representative Election Ordinance, Cap. 576, L.H.K. (Ordinance No. 2 of 2003).

38. *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690 (CFI).

boy and a girl who had equal academic merits (as measured by scores), the boy stood a better chance of being admitted to his preferred secondary school than the girl. The policy was based on findings that girls’ academic achievements (as measured by scores) at the time of completion of primary education were, on average, higher than boys’, presumably because of a faster pace of intellectual development at that age (though boys typically caught up later). The policy was designed to ensure a more balanced ratio between male and female students in the elite schools (i.e., schools to which admission is most competitive).

The Court of First Instance of the High Court³⁹ held that the Education Department’s policy is discriminatory against female students and the discrimination fails to be justified by any of the reasons advanced by the Department. Referring to article 25 of the Basic Law, article 22 of the Hong Kong Bill of Rights, the Sex Discrimination Ordinance, and the Convention on the Elimination of All Forms of Discrimination Against Women which was extended to Hong Kong in 1996, the court stressed that the right to equal treatment free of sex discrimination in this case is an individual’s fundamental right, and cannot be easily subordinated to considerations of “group fairness”⁴⁰ or the interest in achieving a better balance in schools between boys and girls. Any restriction of the girls’ right in this case must pass the stringent standards of scrutiny of the “proportionality test”⁴¹ in order to be justified. After examining the government’s arguments and the evidence submitted by it, the court held that the impugned scheme of allocation of school places fails to pass this test. As a result, the Education Department changed its original policy.

Both the *Chan* case and *Equal Opportunities Commission* case concern matters of public policy; their ramifications extend far beyond the individual litigants or complainants in the cases. They demonstrate the increasingly significant role of the courts in Hong Kong in shaping social policy and in promoting social reform by employing jurisprudential concepts — in these two cases, the right to the equal protection of the law without discrimination.

The three cases above elucidate the structural components of the post-1997 regime of rights protection in Hong Kong, namely article 39 of the Basic Law, the ICCPR, and the BORO. However, the significance of rights-conferring provisions in the Basic Law other than article 39 should not be ignored. After

39. The case was not appealed to any higher court.

40. Para. 80 of the judgment.

41. Para. 121 of the judgment.

the Basic Law came into effect in 1997, the grounds on which legislative and executive actions may be challenged by way of judicial review have actually been broadened. After 1991 but before 1997, it was possible to launch such a challenge on the basis of the provisions of the BORO, which are identical to those provisions of the ICCPR that are applicable to Hong Kong. After 1997, a challenge may still be launched on this basis, but in addition a challenge may also be based on other provisions of the Basic Law, particularly those which confer rights that are not expressly or adequately provided for in the ICCPR, such as the right of abode or the freedom to travel.⁴²

Indeed, 2000–2002 may be described as a period of elaboration and consolidation of the regime of rights in the HKSAR. The CFA's decision in *Director of Immigration v Chong Fung Yuen*,⁴³ another landmark case decided in this period, also marks such consolidation. In this case, the issue was whether, as a matter of interpretation of article 24(2)(1) of the Basic Law, the right of abode in Hong Kong vests in children born in Hong Kong to Chinese parents who are not Hong Kong residents but who are mainlanders visiting Hong Kong temporarily or illegally staying in Hong Kong. On a literal interpretation of article 24(2)(1), such children are Hong Kong permanent residents and enjoy the right of abode. However, the Preparatory Committee for the HKSAR in 1996 suggested otherwise when it issued an opinion on the implementation of article 24. In the NPCSC's interpretation of June 1999, it stated, *inter alia*, that the Preparatory Committee's 1996 opinion "reflected" the "legislative intent" behind article 24(2) of the Basic Law. The question for the CFA in *Chong Fung Yuen* was whether it should follow the views of the Preparatory Committee in this regard.

The CFA's judgment in this case was an emphatic statement that when Hong Kong courts interpret the Basic Law, they should adopt the common law approach to interpretation, and do not need to resort to or otherwise take

42. For example, in *Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, which reached the CFA in July 2002, Bahadur, a citizen of Nepal living in Hong Kong as a non-permanent resident, successfully asserted his freedom to travel which was held by the CFA to include the right to re-enter Hong Kong after traveling. The CFA reiterated the approach it stated in previous cases that the rights and freedoms guaranteed by the Basic Law should be given a generous interpretation "whilst restrictions to them should be narrowly interpreted" and that "these rights and freedoms lie at the heart of Hong Kong's separate system" under OCTS. For a commentary on this case and its significance, see Simon N.M. Young, "Restricting Basic Law Rights in Hong Kong" (2004) 34 *Hong Kong Law Journal* 109.

43. *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533 (CFA).

into account any principle or norm of the mainland legal system. Applying the common law approach to interpretation in this case, the CFA held that there was only one possible answer to the legal question raised: the child concerned was entitled to the right of abode in Hong Kong. The CFA did not attach any weight to the passage in the June 1999 interpretation by the NPCSC suggesting that the Preparatory Committee’s opinion reflected the legislative intent behind article 24 of the Basic Law. The CFA stressed that the June 1999 interpretation was an interpretation only of articles 22(4) and 24(2)(3) of the Basic Law. It was not an interpretation of article 24(2)(1) of the Basic Law, which was the provision being interpreted in the *Chong Fung Yuen* case. In the absence of any binding interpretation by the NPCSC of article 24(2)(1), the CFA was free to interpret it on its own, applying the common law approach to interpretation.⁴⁴

The case aroused public concerns about pregnant women from the mainland coming to Hong Kong to give birth to their babies. The concerns proved to be justified; in the next few years following the CFA’s decision in the *Chong* case, increasing numbers of pregnant women from the mainland visited Hong Kong in order to give birth, thus constituting a great strain on Hong Kong’s hospitals. In 2007, administrative measures were adopted to reduce the influx.

2003–2004: THE ARTICLE 23 SAGA

The next period of the HKSAR’s legal history was dominated by ten months of drama which culminated in a march of an estimated half a million people in the streets of Hong Kong Island, one of the greatest events in the political, legal, and social history of Hong Kong which also changed the course of PRC policy towards the HKSAR. The drama had a specifically legal theme — namely, the implementation of article 23 of the Basic Law.⁴⁵

44. In a very unusual manner not seen since the constitutional crisis of February 1999, Beijing reacted publicly to the decision. On 21 July 2001, the morning immediately following the day of the CFA’s decision, a spokesman of the Legislative Affairs Commission of the NPCSC in a widely reported press statement pointed out that the CFA’s decision in *Chong Fung Yuen* was “not consistent” with the NPCSC’s interpretation and “expressed concern” about the matter. However, apart from this terse statement, no further action on the matter was taken by Beijing. In particular, no interpretation on the issue was issued by the NPCSC. See generally Albert H.Y. Chen, “Another Case of Conflict Between the CFA and the NPC Standing Committee?” (2001) 31 *Hong Kong Law Journal* 179.

45. H.L. Fu, C.J. Peterson, and S.N.M. Young (eds.), *National Security and Fundamental Freedoms: Hong Kong’s Article 23 Under Scrutiny* (Hong Kong: Hong Kong University Press, 2005).

Article 23 of the Basic Law requires the HKSAR to “enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government”. It also deals with issues of State secrets and the activities of foreign political organisations in Hong Kong. Many of the issues raised by article 23 are considered to be politically sensitive. Ever since the Basic Law was enacted in 1990 and brought into effect in July 1997, there had been anxiety over the implementation of article 23.

It was therefore understandable that the publication of the Consultation Document on *Proposals to Implement Article 23 of the Basic Law*⁴⁶ by the HKSAR Government on 24 September 2002 caused much public anxiety as to whether the Hong Kong or Beijing Government had a sinister intention of curtailing human rights in Hong Kong and extending mainland standards regarding matters such as subversion or the theft of State secrets to Hong Kong. During the three-month consultation period for the legislative proposal, public opinion in Hong Kong was sharply divided. The debate was at times impassioned, and demonstrations were organised by both supporters and opponents of the proposal.

The consultation period ended in December after a demonstration of nearly 60,000 people against the legislative proposal on 15 December 2002. In response, the government amended the proposal by giving several major “concessions” on its substance,⁴⁷ but rejected the call for a White Bill – a bill published for public consultation but not yet introduced into the Hong Kong Legislative Council (LegCo). The National Security (Legislative Provisions) Bill, designed to implement article 23 of the Basic Law, was introduced into the legislature in February 2003.

In my opinion,⁴⁸ the proposed reforms in the bill regarding treason and sedition demonstrated that the article 23 exercise was not primarily intended to make Hong Kong’s laws more draconian. Instead, it was an exercise intended to review and reform the existing law in light of the principles enshrined in article 23 of the Basic Law, and to remove repressive laws that Hong Kong

46. For further discussion of the issues by the author, see Albert H.Y. Chen, “Proposals A Credit to ‘1 Country, 2 Systems’” (7 October 2002) *China Daily (Hong Kong edition)* 3–4; Albert H.Y. Chen, “Will Our Civil Liberties Survive the Implementation of Article 23?” (November 2002) *Hong Kong Lawyer* 80–88.

47. On 28 January 2003, the government published the multi-volume *Compendium of Submissions* and announced nine sets of clarifications or modifications of the original proposal.

48. Albert H.Y. Chen, “How Hong Kong Law Will Change When Article 23 of the Basic Law Is Implemented” (2003) 33 *Hong Kong Law Journal* 1.

had inherited from its colonial era which are now out-of-date and inconsistent with progressive notions of human rights. Regarding subversion and secession, the bill did not import the relevant mainland laws and standards to Hong Kong, and creatively designed legislative models for these two crimes that would be unique to the HKSAR. For State secrets, the proposed amendments to the Official Secrets Ordinance were not unreasonable and were basically consistent with the spirit of OCTS. The most controversial provisions in the bill related to “proscribed organisations”. The bill proposed a set of amendments to the Societies Ordinance to the effect that in a situation where a local organisation (a) has the objective of engaging in or (b) has committed or is attempting to commit treason, secession, subversion, sedition, or spying, or (c) is “subordinate to” an organisation in mainland China which has been proscribed by the Central Authorities’ open decree for reasons of national security, the HKSAR’s Secretary for Security may proscribe the local organisation “if he reasonably believes that the proscription is necessary in the interests of national security and is proportionate for such purpose”. Part (c) of the proposal aroused much public opposition.

After the bill was introduced into LegCo in February 2003, a Bills Committee under LegCo was set up to examine the bill. During the Bills Committee’s deliberations, the government agreed to some amendments. However, critics said that the amendments were insufficient, and in any event the government’s timetable of passing the bill in LegCo’s week-long meeting beginning on 9 July did not allow sufficient time for deliberation. Meanwhile, the onslaught of severe acute respiratory syndrome, or atypical pneumonia (SARS) in March 2003 distracted public attention from the bill. There was therefore little understanding of the bill on the part of members of the public in Hong Kong. As Hong Kong began to recover from the SARS crisis in June, opponents of the bill woke members of the public up to the fact that the bill was to be pushed through LegCo in early July.

On 1 July 2003, a hot summer day which was also a public holiday marking the 6th anniversary of Hong Kong’s return to China, half a million Hong Kong residents took to the streets to demonstrate against the article 23 legislative exercise and to express other grievances against the Tung Chee-hwa administration that had accumulated since the 1997 handover. Opponents of the bill immediately demanded that it be shelved and planned to organise a rally of tens of thousands surrounding the LegCo building on 9 July if proceedings on the bill were to go ahead on that day. The government finally decided to postpone the bill — the decision came 3 hours after the Liberal Party on the evening of 6 July withdrew from the “governing coalition” of political

parties in protest against the Tung administration's original decision on 5 July to adhere to the 9 July deadline for the passage of the bill.⁴⁹ On 17 July 2003, Chief Executive Tung Chee-hwa announced that the government would re-open public consultation on the bill to ensure that its content would receive broad public support before it was passed into law. However, in an about-turn on 5 September 2003, Tung announced that the bill was to be withdrawn from LegCo. Since then, the implementation of article 23 has been shelved indefinitely.

In the circumstances, the government's decision to postpone the National Security Bill was to be welcomed.⁵⁰ It would be a flagrant violation of the democratic principle of law-making for a government or legislature to enact a controversial law hastily in the face of extremely strong public opposition. On the other hand, it should also be recognised that article 23 of the Basic Law does impose a legal obligation on the HKSAR Government to enact laws on the matters covered by the article. This constitutional duty cannot be abdicated indefinitely. Article 23 will therefore return one day to the agenda of the HKSAR Government.

2005–2010: ACTIVE EXERCISE OF JUDICIAL POWER

The fourth period of the HKSAR's legal history saw the further consolidation of the regime of rights that was elucidated in the second period as discussed above, as well as the further strengthening of the role of the courts as the guardians of constitutional rights in the HKSAR. The NPCSC's second and third interpretations of the Basic Law in 2004 and 2005 (on the mechanics of further democratisation and on the term of office of the Chief Executive as mentioned above) did not have an adverse impact on the position of the courts. Unlike the first interpretation, they were not targeted at any judicial decision in Hong Kong and did not detract from the authority of the Hong Kong courts. Indeed, the

49. On 5 July, the government also announced three major "concessions" on the content of the bill: deletion of the provision on the power to proscribe a local organisation that is subordinate to a mainland organisation proscribed on the mainland; introduction of a public interest defence in the State secrets law; and deletion of the provision on the police's power to search without a warrant.

50. Albert. H.Y. Chen, "Hong Kong's Political Crisis of July 2003" (2003) 33 *Hong Kong Law Journal* 265.

courts in this fourth period exercised their power as actively as, or even more so than, ever before. Four leading cases are discussed below as examples.

The first case is *Yeung May-wan v HKSAR*,⁵¹ concerning the prosecution of Falun Gong protesters in 2002, in which the police resorted to the law of obstruction of public places⁵² in dealing with demonstrators. The case arose from a small-scale demonstration staged by 16 Falun Gong activists⁵³ outside the entrance to the Liaison Office of the Central People’s Government in Hong Kong on 14 March 2002. Since the number of demonstrators was small, there was no need under the Public Order Ordinance to notify the police in advance or to comply with procedural requirements which are only applicable to assemblies involving more than 50 persons or processions involving more than 30 persons. After the protesters refused to leave despite repeated police warnings, the police arrested them. There was some physical violence during and after the arrests. The protesters were charged with obstruction of a public place and of obstructing or assaulting police officers in the execution of their duty. After a 27-day trial in August 2002, the protesters were convicted by the magistrate who imposed fines ranging between HK\$1,300 and HK\$3,800 on them. They appealed to the Court of Appeal, which gave judgment in November 2004.⁵⁴ The appeal against conviction for obstruction of a public place was successful, although the appeal against conviction on the other charges failed. In an unanimous decision, the Court of Appeal held that due regard to the protection of the right of assembly should be given in applying the law of obstruction of public places. It overturned the conviction for obstruction on the ground that the magistrate failed to address sufficiently whether the manner in which the protesters exercised their right of assembly was so unreasonable as to constitute an unlawful obstruction. The defendants appealed further to the CFA against the conviction on the other charges.

The appeal was successful. On 5 May 2005, the CFA⁵⁵ unanimously held that the arrest of the defendants had been unlawful, since the police officers

51. The citations of the Court of Appeal’s and the CFA’s decisions in this case are provided below.

52. See the Summary Offences Ordinance, sections 4(28) and 4A.

53. For Falun Gong in Hong Kong, see Albert H.Y. Chen and Anne S.Y. Cheung, “Debating Rule of Law in the Hong Kong Special Administrative Region, 1997–2002” in R. Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France, and the U.S.* (London: Routledge, 2004) 261–262.

54. *HKSAR v Yeung May Wan* [2004] 3 HKLRD 797 (CA).

55. *Yeung May Wan v HKSAR* [2005] 2 HKLRD 212 (CFA).

who carried out the arrest were not able to satisfy the court that they had reasonable grounds for suspecting that the defendants had committed the offence of obstruction of a public place. The court stressed that the offence was not constituted by mere obstruction; the use of the public place or highway must be unreasonable, otherwise there could be a lawful excuse for the obstruction, in which case no offence had been committed. The court held that in determining what is unreasonable use of the pavement or lawful excuse, the defendants' right to peaceful assembly and demonstration should be given due weight. The court further held that the defendants in the present case could not be convicted for obstructing or assaulting police officers in the execution of their duty even though physical resistance was involved. Since the arrest was unlawful, the police officers were not actually acting in the due execution of their duty when they encountered resistance from the defendants. It was also pointed out that citizens have a right to use reasonable force to resist an unlawful arrest and detention. In this case and in the related case of *Leung Kwok Hung v HKSAR*,⁵⁶ the CFA stressed the importance of the constitutional right to freedom of peaceful assembly and demonstration which is guaranteed by the Basic Law, the Hong Kong Bill of Rights and the ICCPR. The decision in the Falun Gong case testifies to the equality of all before the law, so that Falun Gong members, though persecuted in the mainland, are accorded the right to demonstrate directly in front of the Liaison Office of the Central Government in Hong Kong. The landmark decision epitomises the vibrancy of the life of the law and the spirit of human rights in Hong Kong and reveal the deeper meaning of OCTS.

The second case, *Leung Kwok Hung and Koo Sze Yiu v Chief Executive of the HKSAR*,⁵⁷ is probably the most important constitutional law case in this fourth period of the HKSAR's legal history, because it led to a comprehensive legislative overhaul of the existing law on the relevant issues. The issues concern covert surveillance conducted by law enforcement officers on suspected criminals. Covert surveillance activities include wire-tapping of phones, interception of postal communications, and covert sound or video recording of people's conversations or activities. The legal basis for covert surveillance first came under critical scrutiny in two criminal cases in the District Court in 2005. It was pointed out that the existing practice

56. *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229.

57. The citations of the courts' decisions in this case are provided below.

was probably a violation of article 30 of the Basic Law, which protects the “freedom and privacy of communication” and permits interception of communication only if it is done “in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences”. Also relevant is article 17 of the ICCPR, which prohibits “arbitrary or unlawful interference with ... privacy, family, home or correspondence”. To plug the legal loophole, the Chief Executive in August 2005 promulgated the Law Enforcement (Covert Surveillance Procedure) Order (“the 2005 Order”).⁵⁸

Leung and Koo, two political activists who claimed that they had been targets of covert surveillance, brought an action before the court to challenge the constitutionality of the practice of covert surveillance. They were successful before the Court of First Instance, which delivered judgment on 9 February 2006.⁵⁹ The court held that both section 33 of the Telecommunications Ordinance (which dealt with wire-tapping) and the 2005 Order were unconstitutional: the former created a power of interception of communications without adequate legal safeguards against its abuse, and the latter failed to comply with the procedural requirements of article 30 of the Basic Law.

What is most interesting and significant about the court’s decision is that the court did not declare (as the litigants requested) that the impugned legislative provision and order should be immediately regarded as invalid and void, which is what would normally be the case when a law is determined by the court to be unconstitutional. Instead, the court agreed to the request by the lawyers acting for the government⁶⁰ in this case to suspend the effectiveness of the declaration of invalidity for six months, and held that the impugned legislative provision and order may still be regarded as temporarily valid during this six-month period. The purpose of this arrangement was to give the government time to propose and enact new legislation to replace the defective laws challenged and held to be unconstitutional in this case. The court recognised that this arrangement was an exceptional course of action for the court, but declared that the court in exercise of its inherent jurisdiction had the power to make this arrangement. For if law enforcement agencies were to suddenly lose their powers of conducting covert surveillance, this would be tantamount to “an

58. The order was promulgated under art. 48(4) of the Basic Law.

59. *Leung Kwok Hung and Another v Chief Executive of the HKSAR*, HCAL 107/2005 (9 February 2006).

60. They relied strongly on the Canadian case of *Manitoba Language Rights* [1985] 1 SCR 721.

amnesty for conspirators”⁶¹ and “would give rise to the probability of danger to Hong Kong residents, disorder by way of a threat to the Rule of Law and deprivation to Hong Kong residents generally”.⁶²

The decision of the Court of First Instance was affirmed on appeal to the Court of Appeal.⁶³ The further appeal to the CFA was also unsuccessful.⁶⁴ However, unlike the courts below it, the CFA drew a distinction between granting a declaration of temporary validity (for six months) with regard to the impugned laws and suspending (for six months) the declaration of invalidity of such laws. The CFA only agreed to grant the latter remedy in this case. In the event, the government did comply with the six-month deadline for introducing new legislation to regularise the practice of covert surveillance in Hong Kong. The Interception of Communications and Surveillance Ordinance was passed by LegCo at around 2 a.m. on 6 August 2005 after a 58-hour marathon debate which started on 2 August. More than 200 amendments proposed by the “democrats” were voted down by pro-government legislators, although some other amendments proposed by them had been incorporated into amendments proposed by the government and were adopted.

In the *Leung Kwok Hung* case, the courts refrained from immediately outlawing the practice of covert surveillance even though the existing legal basis for it was found to be defective, and gave the government and legislature a “grace period” of six months to rectify the legal situation. This seems to reflect an attitude of judicial restraint. However, insofar as the remedy granted by the court in this case is innovative, unprecedented in the legal and constitutional history of Hong Kong, and represents a breakthrough in the creative fashioning of judicial mechanisms to deal with novel situations, it may also be considered an example of judicial activism. Judicial activism is further demonstrated by the next two cases discussed.

In *Leung T C William Roy v Secretary for Justice*,⁶⁵ Leung, the applicant for judicial review, was a homosexual aged 20 at the time he brought this action before the court. He challenged the constitutionality of certain provisions in the existing criminal law on the grounds that they were discriminatory on the basis of sex or sexual orientation and violated the constitutional rights to equality and

61. Para. 159 of the judgment.

62. Para. 165 of the judgment.

63. *Leung Kwok Hung and Another v Chief Executive of the HKSAR*, CACV 73/2006 (10 May 2006).

64. *Koo Sze Yiu and Another v Chief Executive of the HKSAR* [2006] 3 HKLRD 455 (CFA).

65. *Leung T C William Roy v Secretary for Justice* [2006] 4 HKLRD 211 (CA).

privacy. The main provision that was controversial in this case was section 118C of the Crimes Ordinance, which provided that if two men committed buggery with each other and one or both of them were under the age of 21, then each of them was guilty of a criminal offence the maximum punishment for which would be life imprisonment. Both the Court of First Instance and the Court of Appeal held that this provision was unconstitutional and invalid, because it discriminated against male homosexuals and the government was not able to give good reasons to persuade the court that the discrimination or differential treatment was justified. The impugned provision was discriminatory against male homosexuals because under Hong Kong’s existing law, in the case of consensual sexual intercourse between heterosexuals, no criminal liability exists so long as both parties are above the age of 16. Thus, homosexual males between the age of 16 and 21 were discriminated against.

This case has been controversial as it involved the judiciary stepping into the domain of social or sexual morality and overturning a law (made by the legislature) reflecting what was supposed to be the moral standards of the community. It may be questioned whether judges in Hong Kong may legitimately set the behavioural norms for the community in this regard. However, the court’s decision may be defended on the ground that one of the legitimate functions of the constitutional review of laws by the courts is to protect the fundamental rights of minorities against oppressive or unjust laws enacted by a legislature that represents only the views or interests of the majority in society. In any event, the *William Roy Leung* case underscores the increasingly important role played by the courts in Hong Kong society during the fourth period of the SAR’s legal history.

While the above case concerns homosexuals’ rights, the next case concerns prisoners’ rights. In *Chan Kin Sum v Secretary for Justice*,⁶⁶ the applicants applied for judicial review to challenge the constitutionality of provisions in the Legislative Council Ordinance which disenfranchised persons otherwise eligible to vote in the LegCo election who were in prison serving a sentence or who had been sentenced to imprisonment but had not yet served their sentence. The applicants based their arguments on provisions on the right to vote in the Basic Law and the Hong Kong Bill of Rights (which reproduces the relevant provisions in the ICCPR),⁶⁷ as well as case law in favour of prisoners’

66. *Chan Kin Sum v Secretary for Justice* [2009] 2 HKLRD 166 (CFI).

67. Art. 26 of the Basic Law; art. 21 of the Hong Kong Bill of Rights; art. 25 of the ICCPR.

right to vote from the Canadian Supreme Court, European Court of Human Rights, Australian High Court, and Constitutional Court of South Africa. The Court of First Instance of the High Court of Hong Kong held that while the right to vote is not an absolute right and may be subject to reasonable restrictions, such restrictions should be subjected to rigorous judicial scrutiny as the right to vote belongs to the category of rights “of high constitutional importance”⁶⁸ and “is without doubt the most important political right”.⁶⁹ It was held in this case that the restrictions failed to pass the “proportionality test”, and that the government was not able to provide convincing arguments and evidence to justify the “general, automatic and indiscriminate restrictions”⁷⁰ on prisoners’ right to vote imposed by the impugned legislation. The relevant statutory provisions were therefore declared unconstitutional. Following the precedent established by the covert surveillance case mentioned above, the court granted a temporary suspension order regarding the declaration of unconstitutionality so as to give the government and the legislature time (until the end of October 2009) to amend the existing law.⁷¹

On 24 June 2009, the Hong Kong LegCo enacted the Voting by Imprisoned Persons Ordinance, which essentially removes all restrictions or disqualifications relating to prisoners’ right to register as voters and to vote in all elections in Hong Kong – not only LegCo elections, but also elections for the District Councils and for village representatives. The new ordinance also goes beyond what was required by the court in the *Chan Kin Sum* case by removing the provisions in the existing law on the disenfranchisement of those convicted of election-related offences for three years after conviction. The *Chan Kin Sum* case is thus another illustration of the potency of constitutional judicial review in the HKSAR and the role of the judiciary in safeguarding minorities’ rights. It also furnishes yet another example of how judges in Hong Kong have been receptive to international and comparative jurisprudence on civil and political rights, and have been ready and willing to bring Hong Kong’s law in line with the more “progressive” jurisdictions overseas. As noted in a government document quoted in the judgment in the *Chan* case, a total

68. Para. 154 of the judgment.

69. Para. 164 of the judgment.

70. Para. 164 of the judgment.

71. For the judgment relating to the temporary suspension order, see *Chan Kin Sum v Secretary for Justice*, HCAL 79/2008 (11 March 2009) (CFI).

ban on voting by prisoners is still practiced in many states of the United States, Japan, Singapore, and Malaysia.⁷²

CONCLUSION

How should we understand this 13-year period of constitutional and legal history of the HKSAR? From the perspective of the Rule of Law, the following general observations may be made.

First, autonomy, the Rule of Law, human rights, and civil liberties have successfully been practiced in the HKSAR under the constitutional framework of OCTS and on the basis of the Basic Law. Both the people of Hong Kong and the international community would appreciate that the Central Government in Beijing has indeed respected the high degree of autonomy of the HKSAR, and has not interfered with the SAR Government’s policy-making and policy-implementation activities.⁷³ The common law-based legal system, judicial independence, and the tradition of the Rule of Law have continued to flourish in post-1997 Hong Kong. As promised by the Sino-British Joint Declaration, the “lifestyle” of the people of Hong Kong has remained unchanged. The level of protection of human rights and civil liberties has not dropped as some had feared before 1997.

Second, the three interpretations of the Basic Law by the NPCSC and the legislative exercise to implement article 23 of the Basic Law were indeed among the most significant legal events in this period. They were highly controversial. The article 23 incident shook the whole of Hong Kong society. However, the power of the NPCSC to interpret the Basic Law is an integral part of the new legal order of post-1997 Hong Kong. It has been built into the structural design of the Basic Law itself. Each of the three interpretations has its own rationale and justification; none may be regarded as an arbitrary or irrational exercise of power by the NPCSC. The power of the Hong Kong courts to try and decide cases has been left intact. The government’s intention

72. Para. 45 of the judgment.

73. I do not consider the interventions by the NPCSC in 2004 on the question of political reform and democratisation an interference with the autonomy of the HKSAR. The Basic Law establishes a particular political system in Hong Kong and authorises the government under this political system to exercise autonomy. The autonomy of Hong Kong is the autonomy of the government under this political system to govern Hong Kong. Such autonomy does not include the autonomy to change the political system itself.

with this exercise was not to curtail human rights and civil liberties in Hong Kong. However, the trauma of this legislative exercise was the result of the convergence of various circumstances, including the hasty legislative process, the lack of a White Bill for prior consultation, the failure of communication between the government and the people, the incidence of SARS, the economic downturn, and the accumulated social dissatisfaction with the Tung administration over the years.

Third, in the post-1997 era, the courts of Hong Kong have flourished as the guardians of the Rule of Law, constitutionalism, human rights, and civil liberties. Increasing numbers of major issues of social and public policy have been litigated in the courts, as members of the public become more aware of the possibilities of judicial review of governmental and legislative measures and more conscious of their rights. The discourse of the law has become more powerful than ever before in Hong Kong society. At the same time, the courts have been careful not to over-extend their jurisdiction in a manner that would upset the delicate balance of judicial, executive, and legislative powers in the HKSAR and the even more delicate power relationship between the HKSAR courts and the Central Authorities in Beijing. As I have written elsewhere:

[C]onsidering the inevitable tensions that inhere in the constitutional experiment of [OCTS], the record of the Hong Kong courts in dealing with these challenges has thus far been positive. The judiciary, led by the [CFA], has chosen the middle path⁷⁴ or the “golden mean”⁷⁵ between confrontation with and subservience to Beijing, and between judicial activism and judicial restraint. In tackling their relationship with Beijing, the courts have adopted an approach that may be described — in a phrase translated from the Chinese — as “neither too proud nor too humble” (*bukang bubei*). In the domain of human rights, the tenor of the courts’ decisions may be described as moderately liberal — neither radically liberal nor conservative ... such a middle path is indeed appropriate in the context of Hong Kong under [OCTS].⁷⁶

74. [footnote from the original text quoted here] In the language of Chinese philosophy, such a middle path may be called *zhongyong zhidao*. *Zhong Yong* (Book of the Mean) is one of the “Four Books” in the Confucian classics. See generally Yu-Lan Fung, *A Short History of Chinese Philosophy* (New York: The Free Press, 1966).

75. [footnote from the original text quoted here] As discussed in Aristotle’s philosophy.

76. Albert H.Y. Chen, “Constitutional Adjudication in Post-1997 Hong Kong” (2006) 15 *Pacific Rim Law and Policy Journal* 629–630.

Fourth, more than a decade after the handover, the linkage between the legal systems of Hong Kong and mainland China has remained weak and loose. The level of judicial cooperation between the two jurisdictions is still lower than that between Hong Kong and many other jurisdictions overseas, particularly common law jurisdictions. This is because of the huge differences between the two legal systems and the political sensitivity of some issues of judicial assistance, such as extradition or rendition. In this regard, what I wrote on the fifth anniversary of the HKSAR remains true even today:

The constitutional and legal design of [OCTS] is such that the points of contact and interface between the two systems are few, and in the overwhelming majority of cases and circumstances, the two systems operate autonomously without any interaction with one another. ... The looseness of the connection between the two systems (at least from the legal point of view) is exemplified by the fact that despite the long negotiations between the [HK]SAR Government and Beijing on a possible rendition agreement on fugitive offenders, no agreement has yet been reached, and neither side sees the matter as a pressing one.⁷⁷

There are some signs in recent years of increasing cooperation between the two legal systems, although such developments have not expanded significantly the interface between the two legal systems which is still kept to a minimum. July 2006 saw the conclusion between the two sides of a judicial cooperation agreement known as the “Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of Hong Kong SAR Pursuant to the Choice of the Court Agreement between Parties Concerned”.⁷⁸ In October 2006, the NPCSC passed a Decision authorising the HKSAR authorities to exercise jurisdiction in a port control zone located in a spot in Shenzhen where there would be “co-location” of immigration and customs officers of both the mainland and Hong Kong sides to facilitate travel between Hong Kong and Shenzhen on the

77. Albert H.Y. Chen, “The Constitution and the Rule of Law” in S.K. Lau (ed.), *The First Tung Chee-hwa Administration: The First Five Years of the Hong Kong Special Administrative Region* (Hong Kong: Chinese University Press, 2002) 85–86.

78. The Arrangement was implemented in Hong Kong by the Mainland Judgments (Reciprocal Enforcement) Ordinance (Ordinance No. 9 of 2008, Government of the Hong Kong Special Administrative Region Gazette).

new Shenzhen-Hong Kong Western Corridor.⁷⁹ On the basis of the NPCSC's Decision, legislation to implement the co-location scheme was enacted by LegCo in Hong Kong in April 2007.⁸⁰

As mentioned in the introduction to this chapter, the successful practice of OCTS actually depends on the practice of a kind of Rule of Law relating to the Basic Law of the HKSAR. Given the low level of the Rule of Law in the PRC as of 1984, to have faith then in the successful implementation of OCTS after 1997 was to take a leap in the dark. Even thirteen years ago, it was still unknown whether the OCTS model would work from a legal and constitutional perspective. The past thirteen years have been a learning experience for all who have a stake in the success of the model. By trial and error, episode by episode, sometimes painful, sometimes joyful, we have gradually mastered the legal art of the practice of OCTS. Tuition fees have been paid; lessons have been learned; history has been written. It is a history that the people of Hong Kong have participated in making; a history that we can justifiably feel proud of; and a history that inspires confidence about ourselves, faith in our partners, and hope for the future.

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