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**HUMAN RIGHTS IN CHINA
AND HONG KONG**

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Introduction

The legal protection of human rights in Mainland China differs very sharply from the legal protection of human rights in Hong Kong. The legal protection of human rights depends upon a variety of matters. They include a legal system under which a citizen has access to independent and impartial courts for the determination of his or her rights. Under such a system, judicial power is exercised by judges who have judicial independence. Absent such a system, there can be no secure protection and enforcement of human rights, even if those rights are proclaimed and ostensibly guaranteed by statute. Indeed, in the absence of such a system, there can be no assurance that the rule of law, as we understand it, will be observed.

CHINA

The People's Republic of China Constitution and the Judiciary

The Organic Law of the People's Courts in Mainland China, pursuant to the Constitution of the People's Republic, provides:

The people's courts shall exercise judicial power independently, in accordance with the provisions of the law, and shall not be subject to interference by any administrative organ, public organisation or individual.

This provision accords with the concept of judicial independence as it is understood in common law and civil law legal systems. It also reflects the Beijing Statement of the Principles of the Independence of the Judiciary in the Lawasia countries, affirmed by the Chief Justices of the region.

It must be recognised, however, that the PRC Constitution has been regarded as a political rather than a legal instrument. So far it has not been applied and enforced as a legal instrument having particular legal consequences.

The independence of the judiciary in the common law and civil law legal systems is inseparably linked to the doctrine of the separation of powers. That doctrine is a fundamental element in many constitutions, though the degree of separation varies from one constitution to another. Montesquieu thought that a separation of power was the key to stable constitutional government in England, though there is no constitutional guarantee to that effect. One consequence of a separation of powers is that it ensures that the courts will exercise judicial power and that their exercise of power will not be usurped or interfered with by any other branch of government. In this way, a separation of powers ensures the rule of law.

The Constitution of the People's Republic does not incorporate a separation of powers. The National People's Congress (NPC) is the highest organ of State power.¹ It is the Standing Committee of the NPC that is authorised to give binding interpretations of national laws rather than the Supreme People's Court.² The Supreme People's Court and the Procuratorate can give interpretations but it is the interpretations issued by the NPC Standing Committee that have paramount authority and are binding on the courts. There is in the Constitution of the People's Republic no precise counterpart to the three provisions in s. 72 of the Australian Constitution designed to protect the independence of Federal judges — appointment until the age of 70, salaries not to be reduced, and removal only by means of a Parliamentary address of both Houses of Parliament for proved misbehaviour or incapacity. These provisions ensure that the judges are not liable to have their appointment terminated or be otherwise penalised because they decide a case against the executive government. Security of tenure except for misconduct or incapacity and immunity from reduction of remuneration are essential conditions for the protection of judicial independence.

¹ PRC Legislation Law, arts. 42, 43.

² PRC Legislation Law, arts. 42, 43.

The relationship between the Courts and the Procuratorate

Not only does the Constitution of the People's Republic lack the protection afforded by s. 72, but also there are characteristics of the relationship between the Procuratorate and the Courts that are inconsistent with judicial independence. The Procuratorate's responsibilities include monitoring the court system. The Procuratorate investigates the judiciary for corruption and other offences. There is at each level of the court system a division of the Procuratorate with responsibility for monitoring the courts at that level. The problem is compounded by the fact that the Procuratorate has the responsibility for investigating and prosecuting crime. So it is a prosecuting authority before the Court which is subject to its supervision in other respects. There are signs that the powers of the Procuratorate vis-à-vis the courts are on the wane. The present position is, however, scarcely consistent with judicial independence as we understand it.

Improvement of the court system

I acknowledge that China has effected great improvements to its court system in the space of 15 to 20 years. Even as late as the early 1980s, China's court system was primitive. Justice was dispensed by shop, factory and community committees as well as courts. The judges were mainly former army officers who possessed very little in the way of legal qualifications that we would recognise. Nor were they independent.

Since then there has been considerable improvement. The courts have been given greater resources. They have been re-organised. The jurisdiction of the old committees has been to all intents and purposes eliminated. Younger and better qualified judges have been appointed, particularly to courts dealing with what is termed "economic cases". This term which does not exactly correspond with "commercial cases", though it would include such cases. In addition, the Government has recruited some able academic lawyers to senior positions in the judiciary.

However, that is the exception rather than the rule. It is true to say that Mainland judges, with comparatively few exceptions, are not as well qualified as our own judges. It is difficult to ascertain the standard of education of Chinese judges. There are considerable variations, the younger judges being better qualified than the older judges. But the general level of education of Chinese judges is substantially lower than ours.

Strenuous efforts are being made to re-train judges. It is hoped that it will be possible to provide for Chinese judges to undergo a refresher course of, say, up to three months every three years. That is a mammoth undertaking, bearing in mind the size of the Chinese judiciary. All told we probably have 1000 judicial officers in Australia. China would have up to 100,000.

I have lectured in each of the past three years at the Chinese National Judges College in Beijing to groups of 100 judges approximately. I have been accompanied by a Federal Court judge, Justice Mathews or Justice Finkelstein. We lecture on topics such as judicial independence, criminal law and contract. Very few of the Chinese judges speak English who, with very few exceptions, discussion takes place through an interpreter.

Lectures have been given also by US, Canadian and European judges. The Canadians have a very active judicial enhancement program for Chinese judges which includes regular programs in Canada. The Federal Court of Australia also has a program but it is much smaller and more limited than the Canadian program.

Generally speaking, the judges who have undertaken these courses at the NJC are senior judges from the higher courts, many of them occupying positions in those courts.

Differences in judicial culture

We have had some useful discussions with Chinese judges. It is not easy to ascertain what the practice is on a given point in China. Whenever we ask a question about existing judicial practice, it emerges

that practices vary throughout China, particularly between advanced Economic Zones in the East and the hinterland. My impression is that about 35 per cent of the judges are females and that they are highly regarded. Chinese judges are interested in the common law legal system, though they regard our attitude to crime as absurd. For example, they think that we are pussyfooting with drug offences. In their eyes our penalties are too low. They impose the death penalty for serious drug offences and their view of serious offences is more expansive than ours. They also regard our conviction rate for offences charged as extremely low. Their own conviction rate is of the order of 97 per cent to 98 per cent. And this notwithstanding the introduction of a new Criminal Law Code which squarely places the burden of proof on the prosecution. However, the standard of proof is not very clearly articulated. Although they may say that the standard is similar to proof beyond reasonable doubt, in truth it seems to be no more than proof to the satisfaction of the tribunal.

In some important respects, the Chinese judicial culture is different from our own, particularly in relation to crime. For example, some Chinese judges seem to place considerable weight on the fact that the Procuratorate, the investigating and prosecuting arm of government, has investigated the matter and has brought the prosecution. I have heard it said "They must be satisfied that the defendant committed the crime". This attitude of mind reminds me of the favourable view that our judges often took of police witnesses in the early 1950s when I started practice at the Bar in Sydney. Just as that attitude has changed in Australia so the attitude in China is changing. Chinese judges tell me that criminal cases are dismissed on the ground that the prosecution has failed to discharge the burden of proof. But what percentage of prosecutions fail on this ground I have not been able to ascertain.

China has a new Contract Law which is more European in character than the common law of contract. Like Europe, all law is statutory. The statute does, however, place more emphasis on public interest exceptions and considerations than European law. In substance, Chinese contract law is not that dissimilar to our own. The economic judges to whom we lectured had little difficulty in understanding what we had to say about Australian contract law and in asking perceptive questions. My impression is that in areas of law which do not concern the State, its agencies and public authorities, Chinese judges are much more likely to conform to our expectations of judicial approach and standards. This is not surprising.

The status and remuneration of judges in Chinese society is low, very low, compared with Australian judges. That explains partly why the standard of education and the qualifications of judges in China has been low. And there have been problems of corruption as well as other forms of judicial misconduct which have been reported in Xinhua, the official Chinese newsagency.

The most fundamental problem is lack of judicial independence and the lack of an acceptance of the necessity of judicial independence, as we understand it. One observer told me that it will be 50 years before China can hope to attain judicial independence.

There are various obstacles to acceptance of judicial independence. First, there is the Communist philosophy of the all powerful State according to which the NPC is the highest organ of State power. There is also a view of the rule of law which differs from ours. The rule of law, in Chinese eyes, serves to strengthen State power rather than protect the individual and individual rights.

The Supreme People's Court is part court and part legislative or administrative institution. The Court is divided into divisions and hears appeals from other courts. It includes judges who have undoubted ability. On its legislative or administrative side, it issues opinions which are applied by the lower courts in the decision of cases. In China, consistently with the absence of a separation of powers, the distinction between legislation and interpretation is by no means clear. An interpretation issued by the Standing Committee may be legislative in effect, at least according to our standards.

Yet another problem of independence is the Chinese deep sense of moral obligation to one's own community and its institutions. There has been a sentiment that Chinese judges tend to favour their own province, city or the groups to which they owe their appointment or allegiance. Foreign plaintiffs have complained of the difficulty of securing a judgment in Chinese courts and of the even greater difficulty

of securing execution of a judgment at a later stage. This problem in China will decrease with the lapse of time.

The future

The Chinese authorities are, however, determined to improve the quality and the standards of the judicial system. They intend to publish reports of decisions which they acknowledge will expose judgments to overseas scrutiny and criticism. They are willing to run that risk because they believe it is necessary in order to enhance judicial standards. The authorities will continue to upgrade judicial qualifications in the hope that in commercial and other cases they can build a court system which is efficient and has the confidence of investors.

What effect such improvements will have on judicial independence remains to be seen. I would expect a culture of judicial independence to develop over time but it largely depends upon how China advances politically. The President of the People's Supreme Court strongly criticised Western judicial imperialism in an important speech some time ago. This speech might be taken as a criticism of judicial independence but, in China, one cannot be sure why a particular statement is made or what purpose is intended to be served by making it.

HONG KONG

The Basic Law of Hong Kong established the Hong Kong Court of Final Appeal (the CFA), the final court of appeal in the Hong Kong Special Administrative Region (the HKSAR). The Region is an unalienable part of the People's Republic of China (the PRC) (Basic Law, Art. 1). The Basic Law which is Hong Kong's Constitution, was enacted as a statute of the National People's Congress (the NPC), the "highest organ of state power" in the PRC (PRC Constitution, Art. 57). The Standing Committee is the permanent body of the NPC. The Joint Declaration, the Agreement between the United Kingdom and the PRC, which sets out the terms of China's resumption of the exercise of sovereignty over Hong Kong, provided for the enactment of the Basic Law.

The Basic Law confers on the HKSAR a high degree of autonomy in conformity with the concept "one country, two systems". The PRC considers itself to be a unitary state, despite the provisions in the PRC Constitution which enable the NPC to grant autonomy to a region, such as the HKSAR. So, the Basic Law delegates powers to the HKSAR. The Basic Law does not establish the HKSAR as a constituent element in a federation. What is remarkable is that the powers delegated to the HKSAR are far more extensive than the powers generally conceded to a constituent state or province in a classic federation, such as the United States, Canada, Australia and India.

The pre-existing laws in Hong Kong were continued by the Basic Law (art. 18). A very limited category of Mainland laws apply to Hong Kong (Basic Law, Annex III).

The Basic Law maintains the judicial system which existed when Hong Kong was a British colony, except for consequences arising from the establishment of the CFA. The "hand-over" terminated the final appeal from Hong Kong courts to the Privy Council. The jurisdiction formerly exercised by the Privy Council is in a broad sense now exercised by the CFA. The Court hears and determines appeals from the Court of Appeal (an intermediate appellate court) and the Court of First Instance which exercises both a civil and a criminal jurisdiction. The jurisdiction of the Court of First Instance is broadly similar to that of the Supreme Courts of the Australian States. Appeals lie as of right and by leave. Leave is granted by the Court of Appeal or by the Appellate Committee of the CFA, which consists of three judges of the CFA, if in the opinion of the Court granting leave "the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court for decision".³

³ Hong Kong Court of Final Appeal Ordinance, s 22(1) (b).

Article 19 of the Basic Law expressly provides that the courts of the HKSAR have no jurisdiction over acts of state such as defence and foreign affairs.

The Basic Law vests the power of final adjudication in the CFA (subject to Art. 158). The CFA may invite judges from other common law jurisdictions to sit on the Court (Art. 82). I am one of the invited judges. Under the Basic Law, only one foreign judge can sit on a case. The Court sits as a Bench of five judges.

The participation by foreign judges in the work of the Court has recently been the subject of debate in the media. It has been suggested that foreign judges may not be familiar with conditions in Hong Kong. This suggestion has been countered by the Secretary for Justice who sees the participation by foreign judges as a positive benefit for Hong Kong.⁴

The Basic Law sets up a legislature (the Legislative Council), a very powerful executive (which is not subject to the control of the Legislative Council) and the judiciary. The election of members of the Legislative Council is not fully based on the principle of all members being elected by universal and equal suffrage. The United Nations Human Rights Committee has made this point, suggesting that there has been a non-compliance with Art. 25 of the International Covenant for the Protection of Civil and Political Rights (“the ICCPR”).

The Basic Law contains express guarantees of a number of fundamental rights. In addition, Art. 39 of the Basic Law provides:

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. (emphasis supplied)

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

Article 39 has been implemented by the Hong Kong Bill of Rights Ordinance.

The Basic Law also contains provisions which protect the judicial independence of the judges and maintains the basic procedures regulating due process (including trial by jury) previously applied in Hong Kong. The right to a fair trial without delay and the presumption of innocence are expressly guaranteed (Art. 87). Judicial appointments are made by the Chief Executive on the recommendation of an independent commission composed of judges, legal practitioners and current persons from other sectors (Art. 88). A judge may only be removed for inability to discharge his or her duties, or for misbehaviour, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice and consisting of no fewer than three local judges.

The Preamble to the Basic Law recites that the PRC decided that upon China’s resumption of the exercise of sovereignty over Hong Kong, the HKSAR would be established and that under the principle of “one country, two systems”, the socialist system and policies would not be practised in Hong Kong.

Article 8 of the Basic Law provides:

The law previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administration Region.

⁴ See Cliff Buddle, “Judges who ‘drop in’”, *South China Morning Post*, 9 March 2001.

The Article preserves the common law but in what state or condition is a matter that is yet to be explored in detail.

But for one fundamental departure, the judicial system in Hong Kong is substantially similar to the judicial system in common law jurisdictions like Australia, New Zealand and Canada. Court procedures and the style of oral argument would be familiar to an Australian lawyer. More use is made of written argument than is the case of the High Court of Australia.

Article 158 of the Basic Law marks the difference between the CFA and the judicial system of the HKSAR on the one hand, and their counterparts in other common law jurisdictions on the other. The Article begins by vesting the power of interpretation of the Basic Law in the Standing Committee of the NPC. The Article then states that the Standing Committee of the NPC shall authorise the courts of the HKSAR “to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region”.

Then follows the third paragraph of the Article which is in these terms:

The courts of the [HKSAR] may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the NPC through the [CFA] of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

Article 158 contains three novel elements, viewed from a common law perspective. First, the power of interpretation is vested not in the courts (Mainland or Hong Kong) but in the Standing Committee of the NPC. Secondly, the Article states that the Standing Committee “shall authorise” the courts of the Region “to interpret on their own, in adjudicating cases, the provisions of this law which are within the limits of the autonomy of the Region”. The third paragraph authorises the courts also to “interpret other provisions of the Basic Law”. But the latter authority is subject to the important limitation that if there is a need to interpret provisions of the Basic Law concerning affairs which are the responsibility of the Central Authorities or concerning the relationship between the Central Authorities and the HKSAR, the HKSAR courts, before delivering an unappealable judgment, shall seek an interpretation of the relevant provisions from the Standing Committee of the NPC. Thirdly, such an interpretation when given is binding on the courts.

Under Art. 158, the Standing Committee is obliged to consult the Committee on the Basic Law of the HKSAR before adopting an interpretation under Art. 158(3). This Committee comprises six mainland members and six Hong Kong members. The Committee prepares a report for the Standing Committee.

In *Ng Ka Ling v Director of Immigration*,⁵ the first important case on the Basic Law to come before the Hong Kong Court of Final Appeal, it was contended that provisions of the Immigration (Amendment) Ordinance (No. 3) were in conflict with Art. 24. Article 24 guarantees the right of abode in Hong Kong to those born outside Hong Kong to a parent who was a permanent resident of Hong Kong. It was argued that Art. 24 should be read down by reference to Art. 22 which requires that people entering Hong Kong from the Mainland have exit approval from the Mainland authorities. The Ordinance provided in effect that all persons (including those seeking to exercise a right of abode under the Basic Law) entering from the Mainland must have Mainland exit approval. Article 22 is within Ch. II of the

⁵ (1999) 2 HKCFAR 4.

Basic Law dealing with the relationship between the Central Authorities and the HKSAR, whereas Art. 24 appeared on its face to be a provision within the Region's autonomy.

Because Art. 22 is an excluded provision (withdrawn by Art. 158 from interpretation by the CFA) the question was whether it should be referred to the Standing Committee for interpretation. The Court declined to take this course on the ground that the predominant provision to be interpreted was Art. 24 and it was not excluded by Art. 158. The Court went on to hold that the Ordinance was invalid, a result which generated apprehensions in Hong Kong about the level of immigration from the Mainland to Hong Kong. These apprehensions were reinforced by the Court's concurrent decision in *Chan Kam Nga v Director of Immigration*⁶ that the restriction in the Immigration (Amendment) Ordinance (No. 2) confining entry to permanent residents in category 3 of Art. 24 to those born of a parent who was a permanent resident of Hong Kong at the time of birth was invalid. The Court held that a child born to a parent who subsequently became a permanent resident had the right of abode in Hong Kong.

Another important question that arose in *Ng Ka Ling* was whether the NPC statute that established the Provisional Legislative Council (PLC), which had enacted the Immigration (Amendment) Ordinance, was ultra vires the Basic Law. The Basic Law did not provide for a Provisional Legislative Council. The Court held against ultra vires on the ground that the establishment of the PLC was not inconsistent with the Basic Law. In so doing, it upheld its capacity to review legislative acts of the NPC and the NPC Standing Committee for consistency with the Basic Law and to declare invalid a law which was inconsistent with the Basic Law. This aspect of the Court's judgment generated controversy, notably in the Mainland. The NPC is the highest organ of State power under the Constitution of the PRC.

The controversy led to an application by the HKSAR Government on 26 February 1999 for a clarification of the judgment.⁷ The application for a clarification of the relevant part of the Court's judgment, which was opposed by the Hong Kong Bar Association, was itself seen as bringing into question the rule of law in Hong Kong. The Court made a statement at the conclusion of the hearing of the motion in which it acknowledged that the judgment was not intended to question the authority of the NPC and the Standing Committee "to do any act which is in accordance with the provisions of the Basic Law and the procedure therein". The Court also acknowledged that an interpretation made by the NPC Standing Committee would be binding on the courts of Hong Kong. The clarification accorded with the judgment itself.

Concerned by the prospect that there might be a large number of immigrants from the Mainland exercising a right of abode, the HKSAR Government sought an interpretation on 21 May 1999 from the Standing Committee overruling the Court's judgment except in its application to the cases in which judgment had been delivered. On 26 June 1999, the Standing Committee issued an Interpretation the effect of which was considered by the CFA in *Lau Kong Yong v Director of Immigration*.⁸

The Interpretation stated that the relevant words in Art. 22(4) mean:

People from all provinces, autonomous regions, or municipalities directly under the Central Government, including those persons of Chinese nationality born outside Hong Kong of Hong Kong permanent residents who wish to enter the [HKSAR] for whatever reason, must apply to the relevant authorities ... for approval in accordance with relevant national laws and administrative regulations and must hold valid documents issued by the relevant authorities before they can enter the [HKSAR].

The Interpretation continued by stating that category (3) in Art. 24(2) granted the right of abode to persons born of Chinese citizens in categories (1) (being those born in Hong Kong) and category (2) (those who have ordinarily resided in Hong Kong for a continuous period of not less than seven years)

⁶ (1999) 2 HKCFAR 82.

⁷ (1999) 2 HKCFAR 141.

⁸ (1997) 3 HKLRD 778.

provided that the parent or grandparent fulfilled the relevant requirement at the time of birth of the person claiming to be in category (3). The Interpretation asserted that the legislative intent as stated together with the legislative intent relating to all other categories in Art. 24(2) had been reflected in the “Opinions on the implementation of the Basic Law ...” adopted by the Preparatory Committee for the HKSAR of the NPC. The Interpretation then instructed the courts of the HKSAR to adhere to the Interpretation.

The Preparatory Committee was established pursuant to a 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 Administration Region.⁹ The Committee, on 10 August 1996, issued a document entitled “Opinions of the Preparatory Committee for the Hong Kong Special Administration Region of the National People’s Congress on the implementation of Art. 24(2) of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China”, a document subsequently referred to in a Working Report submitted by the Committee to the NPC and approved by it in 1997.

The Standing Committee’s Interpretation excited much discussion and raised questions about the rule of law and judicial independence in Hong Kong. Readers who wish to examine the primary documents and the range of views expressed should consult Johannes M.M. Chan, H.L. Fu and Yash Ghai (eds), *Hong Kong’s Constitutional Debate: Conflict over Interpretation*.¹⁰

In *Lau Kong Yung*, the CFA rejected an argument that the Standing Committee could only give an interpretation under Art. 158 on a judicial reference by the Court in connection with an excluded provision in the Basic Law. The Chief Justice pointed out (at 798) that the power of interpretation originates in s. 67(4) of the Chinese Constitution and that it is conferred by Art. 158(1) in general and unqualified terms. It is therefore not to the point that the Basic Law does not expressly authorise the HKSAR to request an interpretation from the Standing Committee. As I noted in that case (at 820), the Basic Law brings about a conjunction of a common law system under a national law within the larger framework of Chinese constitutional law and that is a fundamental aspect of the concept of “one country, two systems”.

The Interpretation also indicated, in its preamble, that the Court should have referred the interpretation of Art. 22 in *Ng Ka Ling* to the Standing Committee. That view was relied upon in a subsequent immigration case *Director of Immigration v Chong Fung Yuen*.¹¹ In that case, the HKSAR submitted that the Court should refer the interpretation of the Art. 24(2)(1) provision in the Basic Law to the Standing Committee. Article 24(2)(1) includes in the permanent residents of the HKSAR “(1) Chinese citizens born in Hong Kong before or after the establishment of the [HKSAR]”. The character of Art. 24(2)(1) is that of a provision defining one category of permanent resident with the right of abode. Having regard to its character, the Court held that the provision does not concern affairs which are the responsibility of the Central People’s Government or the relationship between the Central Authorities and the Region. Accordingly, it was a provision within the Region’s autonomy and was not an excluded provision. Consequently a judicial reference to the Standing Committee was not required. In reaching this conclusion, the Court rejected the Government’s submission that the test whether a provision is an excluded provision is the factual determination of the substantive effect of its implementation. Accordingly, it was for the Court itself to interpret Article 24(2)(1).

In its approach to the interpretation of Art. 24(2)(1), the Court noted that the courts in Hong Kong exercise independent judicial power under the Basic Law (Arts. 2 and 80). Subject to Art. 158, the interpretation of laws is a matter for the courts. This principle is a basic principle of the common law which is in turn preserved by the Basic Law. The Chief Justice declared that the Court’s role

⁹ For the text of the Decision as well as of the Basic Law and other relevant documents, see Yash Ghai, *Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*, Hong Kong, Hong Kong University Press, 2nd ed, 1999, pp 568-569.

¹⁰ Hong Kong, Hong Kong University Press, 2000.

¹¹ FACV No. 26 of 2000 (Court of Final Appeal, 20 July 2001).

under the common law in interpreting the Basic Law is to construe the language used in the text of the instrument in order to ascertain the legislative intent as expressed in the language ... not to ascertain the intent of the lawmaker on its own ... The language is considered in the light of its context and purpose.

On that approach, the meaning of Art. 24(2)(1) was clear: it contained no qualifications which would preclude Chinese citizens born in Hong Kong before or after 1 July 1997 from having the right of abode. As the words were clear, then meaning could not be affected by extrinsic materials such as the Preparatory Committee's opinion which issued some time after the enactment of the Basic Law as the Interpretation of the Standing Committee of 26 June 1999 was not an interpretation of Art. 24(2)(1). It related to Arts. 22(4) and 24(2), (3), it was not binding under Art. 158 in relation to Art. 24(2)(1).

The decision in *Chong Fung Yuen* demonstrates the impact of Art. 8 of the Basic Law which preserves and maintains the common law. It enabled the Court to apply common law rules of construction to the Basic Law. Those rules had the effect of excluding extrinsic material in the form of the opinion of the Preparatory Committee.

On the day after judgment was delivered in *Chong Fung Yuen*, a spokesperson for the Legislative Affairs Commission of the Standing Committee stated that the decision was not consistent with the Standing Committee's Interpretation. There have been no subsequent developments.

In another decision,¹² delivered at the same time, the Court by majority decided that Chinese citizens born on the Mainland, adopted there in accordance with Mainland law by parents one of whom was at that time a permanent resident of Hong Kong, were not permanent residents of Hong Kong. They did not fall within Art. 14(2)(3) which confers permanent residence on persons of Chinese nationality born outside Hong Kong of permanent residents in categories (1) and (2). The decision turned on the meaning of the words "born of" and the status of the parent at the time of birth. In this case, the Court again rejected the Director of Immigration's argument that Art. 24(2)(3) was an excluded provision and declined to refer its interpretation to the NPC Standing Committee.

The majority considered arguments based on Art. 19(1) of the Hong Kong Bill of Rights. The Article incorporates Art. 23(1) of the ICCPR in these terms:

The family is the natural and fundamental group of society and is entitled to protection by Society and the State.

The Court accepted that Art. 19(1) and the domestic law relating to adopted children were part of the relevant context and that the Court must take account of the principles, first, that the family being the natural and fundamental group of society is entitled to protection, and, second, that the adopted child is as much a part of the family of the adoptive parents as a natural child would be. The context and Art. 19(1) could not, however, overcome the plain and unambiguous meaning of the words "born of", understood in the light of the Standing Committee's Interpretation.

The third decision¹³ related to Art. 24(2)(4) of the Basic Law which confers permanent residence on:

Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region.

Mr Muhammad had lived in Hong Kong since the 1960s but his time in Hong Kong included his imprisonment in Hong Kong from 27 April 1994 to 27 February 1997 when he served a sentence for

¹² *Tam Nga Yin v Director of Immigration*, 20 July 2001.

¹³ *Fateh Muhammad v Commissioner of Registration*, 20 July 2001.

conspiracy to utter forged bank notes and conspiracy to deliver counterfeit banknotes. The Court held unanimously that the period of imprisonment could not be counted as ordinary residence in Hong Kong with the result that Mr Muhammad could not establish a period of continuous residence for not less than seven years.

From the perspective of international human rights jurisprudence, the CFA's most significant decision has been the flag desecration case, *HKSAR v Ng Kung Siu*.¹⁴ In that case, the Court upheld the validity of Hong Kong legislation making desecration of the national flag and the Hong Kong regional flag criminal offences. The issue was whether the legislation was an invalid restriction of the freedom of expression which is guaranteed by the Basic Law, the Hong Kong Bill of Rights and Art. 19 of the ICCPR. In reaching its conclusion, the Court held that the legislation fell within the *ordre public* exception to freedom of expression. As already mentioned, Art. 39 of the Basic Law expressly refers to the ICCPR. The view taken by the Court was not dissimilar to that taken by the minority in the US Supreme Court in the closely divided decisions of *Texas v Johnson*¹⁵ and *United States v Eichman*.¹⁶ The Court held that the restrictions imposed by the legislation on freedom of expression are legitimate, reasonable and proportionate having regard to the public interest and public order and in the light of the importance of the flag as a symbol in the early stages of Hong Kong's status as a Special Administrative Region in the People's Republic.

One point that should be made about the Basic Law cases in the CFA is that, although the HKSAR is a party, the PRC is not joined as a party. It was not a party in *Ng Ka Ling* where the validity of the NPC statute setting up the Legislative Council was under challenge. The explanation for this is no doubt to be found in Chinese constitutional law where a challenge to the validity of a law made by the highest organ of the state, at least in a Provincial court, is in all probability unknown. Whatever the explanation may be, the intersection between the two legal systems is fraught with questions which have not been fully explored.

The Secretary of State for Foreign and Commonwealth Affairs presents to the United Kingdom Parliament every six months a report on the implementation of the Sino-British Joint Declaration. The Declaration led to the handover in 1997. These reports, while drawing attention to matters which have generated controversy, such as the right of abode cases and the seeking of an interpretation by the HKSAR Government from the Standing Committee, have continued to assert confidence in the integrity and independence of the judicial system and the maintenance of the rule of law in Hong Kong.

¹⁴ [2000] 1 HKC 117.

¹⁵ (1988) 491 US 397.

¹⁶ (1989) 496 US 310.