

HONG KONG'S COURTS ARE LEARNING TO LIVE WITH CHINA

By Danny Gittings

July 2010

Hong Kong has a new Chief Justice. The end of August sees the retirement of Andrew Li, who has led Hong Kong's Court of Final Appeal since its creation on the night of the former British colony's return to China on July 1, 1997. His replacement will be Geoffrey Ma, who is being elevated from his position presiding over the court immediately below, Hong Kong's Court of Appeal.¹

Over the next three years, all three other permanent judges on Hong Kong's Court of Final Appeal will reach retirement age. That does not necessarily mean all three will immediately step down, since Hong Kong judges sometimes stay in office beyond their official retirement age.² It does, however, suggest that the coming years will see a wholesale change in the composition of a court that is often seen as playing a vital role in protecting Hong Kong's separate system and civil liberties.

Almost nowhere else in the world is it possible to find a territory that is not a country, yet has its own final appellate court. But that was a key part of the deal struck between London and Beijing in 1984,³ under which Britain agreed to restore Hong Kong to China in 1997, in return for generous promises about the high degree of autonomy Hong Kong would enjoy under a "one country, two systems" formula. These were subsequently written into a constitutional document known as the Hong Kong Basic Law. This serves as Hong Kong's highest law and has been repeatedly invoked by the Court of Final Appeal since 1997 to strike down actions of the Hong Kong government, and even other laws, which infringe on fundamental freedoms.

That explains the sense of concern in recent months—both locally and among some who watch events in Hong Kong from overseas—that the coming change of the guard in Hong Kong's highest court may weaken its commitment to defend civil liberties, especially in cases involving Beijing. Such concerns are heightened by the fact that almost the only judges with sufficient experience to fill the shoes of not just the outgoing Chief Justice, but also the other vacancies which will arise on the Court of Final Appeal over the next few years, are likely to come from the court immediately below.⁴

That court, the Court of Appeal, has a reputation for generally taking a more conservative stance than Hong Kong's highest court on human rights issues.

Geoffrey Ma Procrastinates

Take, for example, two famous cases involving the Falun Gong, the religious group banned in China but still legal in Hong Kong, which continues to infuriate mainland officials by staging public protests in the territory. In *HKSAR v Yeung May Wan* [2004]⁵, a panel of Court of Appeal judges headed by Chief Judge Ma (as Geoffrey Ma is known in that court) hesitated for more than a year before delivering judgment in a politically sensitive case involving 16 Falun Gong members who had been arrested while protesting outside the Chinese Central Government's Liaison Office in Hong Kong. That unprecedentedly long delay provoked expressions of international concern.⁶ When the Court of Appeal eventually did deliver a judgement, although it contained valuable passages on the importance of protecting fundamental freedoms, the Ma-led court upheld some of the convictions, despite conceding that the original arrests of the protests had been unlawful.

The contrast that sometimes exists between the two courts was demonstrated by how swiftly the Court of Final Appeal subsequently handled this case, delivering judgment within a month of its court hearing and quashing all remaining convictions against the Falun Gong protesters.⁷ Chief Justice Li was sharply critical of the lower court's "unacceptable" procrastination in deciding the case. He even expressed scepticism about Chief Judge Ma's explanation that the long delay had been caused by the need to wait for a decision in another case.⁸

In *Chu Woan Chyi v Director of Immigration* [2009]⁹, another court case involving Falun Gong protesters, a panel of Court of Appeal judges again headed by Chief Judge Ma accepted that the Hong Kong Government had failed to tell the truth about its reasons for barring four Falun Gong practitioners from Hong Kong, but nonetheless upheld the entry ban.

That case has been cited by some eminent lawyers in Hong Kong as an example of the new Chief Justice's more conservative approach to human rights issues than his predecessor.¹⁰ It is easy to see why such cases give rise to cause for concern. After all, if similar cases arise again in future, the new Chief Justice has already shown he might be inclined to take a different approach from the current Court of Final Appeal.

That might be less significant were the new Chief Justice the only new face on the Court of Final Appeal. But when taken together with some of the other likely changes to the composition of the court over the next few years, it offers

the possibility—although it should be stressed only the possibility—of a broader shift in the inclination of Hong Kong’s highest court.

That is particularly true of the likely retirement of Justice Kemal Bokhary, easily the most liberal of the permanent judges on the Court of Final Appeal.¹¹ Justice Bokhary is sometimes described by legal scholars as the “conscience” of the Court of Final Appeal. It is a description which presumably infuriates the other judges, who may justly question why the court is seen as having only one conscience. Nonetheless few would dispute that, while the Li-led Court of Final Appeal may have a generally good track record as a whole in terms of defending fundamental freedoms, it is Justice Bokhary who has been at the forefront of trying to push the boundaries even further.

The Court's Conscience Dissents

Most famously, in *Ng Siu Tung v Director of Immigration* [2002],¹² he dissented from the Chief Justice and his other colleagues on the Court of Final Appeal, and tried to reverse the practical impact of a controversial ruling by China’s legislature two years earlier. That 1999 interpretation from the National People’s Congress Standing Committee had banned large numbers of children born in China to a Hong Kong parent from moving to the territory, despite an earlier court decision in their favour. Justice Bokhary sought to mitigate the effects of this ban by arguing that large numbers of the children involved still had a legally-enforceable “legitimate expectation” that they would be allowed to live in Hong Kong, based on promises made by Hong Kong officials. It was a view that the other judges on the Court of Final Appeal were only prepared to apply to a much smaller category of children.¹³

In *Leung Kwok Hung v HKSAR* [2005],¹⁴ a case involving an unauthorised street protest by one of Hong Kong’s most famous pro-democracy politicians, who is popularly known as “Long Hair,” Justice Bokhary held that the entire system which allows the police to restrict street protests violated human rights protected under the Hong Kong Basic Law.¹⁵ It was a view which, once again, found little support from other judges on the court—who were only prepared to rule in favour of Leung on one specific point.¹⁶

In both cases, Justice Bokhary’s dissents were better argued than, and are seen by many legal scholars as intellectually superior to, the more cautious judgments of the Chief Justice and the other judges on the court.¹⁷ But Justice Bokhary reaches retirement age in 2012. For all their many talents, it is difficult to see any of the judges likely to be elevated to permanent posts on the court stepping into his shoes as the “conscience” of the court.¹⁸

So it would be reasonable to expect that the coming change in the composition of Hong Kong's highest court may be accompanied by some change in its approach to deciding cases on human rights issues. It is important, though, not to exaggerate the extent of any such shift. After all, judges decide cases predominantly on the legal issues involved. In the common-law system, great reverence is paid to being consistent with previous decisions of the court—which, in this case, means the generally human-rights friendly body of jurisprudence built up by the Court of Final Appeal since 1997.

Remember also that, although the Ma-led Court of Appeal hesitated unacceptably long before deciding the politically-controversial case of *Yeung May Wan*, the decision—when it eventually came—was partly (although not entirely) in the Falun Gong protesters' favour. Indeed, Chief Judge Ma criticised the magistrate who originally convicted the protesters for making politically charged comments, including a suggestion that the Falun Gong were acting in a manner “disrespectful” of Chinese government officials stationed in Hong Kong.¹⁹

Principles Can Be Compromised

But the most important reason for believing that any change in the Court of Final Appeal's approach is likely to be incremental rather than abrupt is that if the “new” court occasionally chooses to compromise on legal principles in politically controversial cases, especially those involving Beijing, it will only be continuing a process that began more than a decade ago.

Retiring Chief Justice Andrew Li has been rightly lionised for establishing Hong Kong's Court of Final Appeal as a respected force within the common-law world, with a generally (note the qualification “generally”) impressive track record on human rights. Those are major achievements for which he deserves full credit. Indeed, it is difficult to find any public figure in Hong Kong as widely respected as the outgoing Chief Justice.

Yet any complete assessment of the Li-led Court of Final Appeal should also consider the other side of the picture. For all the impressive judgments in numerous human-rights cases, it should not be forgotten that his court was also responsible for two dreadful judgments in which the Chief Justice and his colleagues compromised to avoid confrontations with Beijing at significant cost to Hong Kong's autonomy and, to a lesser extent, safeguards against restrictions on human rights.

To understand the extent of these compromises, which continue to have important implications today, it is necessary to go back to the case which

preceded them, *Ng Ka Ling v Director of Immigration* [1999].²⁰ Undoubtedly the most famous case ever decided by the Court of Final Appeal, it provoked the only major confrontation to date between the court and Beijing.

The immediate cause for that confrontation was a brief assertion in *Ng Ka Ling* that Hong Kong courts have the jurisdiction to invalidate any actions in breach of the Hong Kong Basic Law by Chinese authorities, specifically the National People's Congress and its Standing Committee. The case serves as a classic example of how judge's comments can prove far more significant than the decision itself (since the point was not necessary to decide it), the court's claim to such powers provoked virulent attacks from Chinese scholars and officials. The confrontation was only resolved when the court compromised by acceding to a Hong Kong Government request to reopen this part of its judgment and elaborate on it in more conciliatory language, in a supplementary judgment known as *Ng Ka Ling (No. 2)*.²¹ That compromise attracted criticism at the time, since courts do not normally reopen judgements except in extraordinary circumstances such as fraud.

“To many observers the clarification is a sign showing that the Court is unable to withstand political pressure and is prepared to take a political course which has flimsy legal ground and which is beyond the role of the Court,” commented Professor Johannes Chan in a book published in 2000.²² Professor Chan, a prominent human-rights lawyer, is now Dean of the Faculty of Law at the University of Hong Kong. Such criticism was relatively muted since the elaboration had little legal significance, simply rephrasing in more conciliatory language what the court said in its original judgment.²³ The same, however, cannot be said of the court's next compromise in the face of pressure from Beijing.

Beijing Gets to Re-interpret the Law

The Hong Kong Government decided it was unable to cope with the practical consequences of the court's original judgment in *Ng Ka Ling* and the closely related case *Chan Kam Nga v Director of Immigration*,²⁴ which interpreted the Hong Kong Basic Law in a way that would have potentially allowed more than one million children born in China to move to Hong Kong. So, after the case was over, it asked the National People's Congress Standing Committee to issue a fresh interpretation of the relevant provisions in the Hong Kong Basic Law that effectively negated important parts of both judgments.

That prompted lawyers for the children to challenge the Standing Committee interpretation as in breach of the Hong Kong Basic Law. At issue was Article 158(1), a loosely worded provision which gives the Standing Committee power

to interpret the Hong Kong Basic Law without making clear precisely when this power can be exercised. In this case, the issue could easily have been resolved on narrow grounds as one of the main points of contention was a provision on China's undisputed right to control the entry of mainlanders into Hong Kong.²⁵ Since this particular issue probably should have been referred to the Standing Committee before judgment was delivered in the *Ng Ka Ling* case,²⁶ it would have been easy (and far less controversial) for the Court of Final Appeal to have decided the case on the narrow basis that the Standing Committee had the power to issue this particular interpretation.

Instead in *Lau Kong Yung v Director of Immigration* [1999],²⁷ the Court of Final Appeal chose to issue an unnecessarily broad judgment that went much further in deferring to Beijing. Rather than simply conclude that this particular interpretation was lawful, the Li-led court held that there were no restrictions of any kind on the Standing Committee's interpretative powers, even if it chose to use these to interfere in matters which should normally be left for Hong Kong to decide on its own. That sweeping conclusion (which went far beyond what was necessary to decide the case) has proved deeply damaging for Hong Kong's autonomy, paving the way for a second interpretation three years later in which the Standing Committee seized control of decisions on changes to the election system for the Legislative Council.²⁸ This was in violation of the original wording of the Hong Kong Basic Law which makes it clear that, after 2007, such matters should be for Hong Kong alone to decide.²⁹ It was the constraints imposed by this 2004 interpretation, which has been twice used to stipulate severe restrictions on any changes to the electoral system, which did so much to aggravate the debate on political reform in Hong Kong this year.³⁰

Thanks to some excellent research by Professor Ling Bing of the Chinese University of Hong Kong, we now know that the court's concession of such unlimited powers to the Standing Committee in *Lau Kong Yung* went not only beyond what was intended by the drafters of the Hong Kong Basic Law but even the powers that the Standing Committee has claimed for itself. It was, in short, an example of the "pre-emptive cringe," where a concession is made which has not been explicitly demanded, and far from the Li-led court's finest hour.³¹

The same is true of a second judgment by the court—only two weeks later—in another politically sensitive case involving Beijing. In *HKSAR v Ng Kung Siu* [1999],³² the Court of Final Appeal departed so radically from its usual approach of taking an expansive approach towards human rights protection that those of us who teach the Hong Kong Basic Law repeatedly have to remind our students to treat this case as an exception to the court's generally positive track record in human rights cases.

Should the Flag be Sacrosanct?

It should be acknowledged that *Ng Kung Siu* involved a difficult issue which courts in the U.S. and many other countries have also struggled with: To what extent is it permissible to restrict personal freedom in order to protect the national flag as a symbol of the nation? Two pro-democracy protesters had desecrated the Chinese flag as part of a protest against the Beijing government in violation of a Hong Kong law, which is a local version of one of the few Chinese national laws applied in Hong Kong.³³ They successfully appealed against their convictions to the Court of Appeal (this was before Geoffrey Ma's appointment to that court),³⁴ provoking outrage from some Beijing loyalists.

However the Court of Final Appeal averted another confrontation with Chinese central authorities by reversing the Court of Appeal decision and reinstating the convictions. Once again the Li-led court could have reached this decision on much narrower grounds, since the lower courts had overlooked some important legal issues. Equally, drawing on the sharply-divided jurisprudence of the U.S. courts (which ultimately, but narrowly, chose to decide flag desecration cases the other way),³⁵ the court could have chosen to treat protection of the national flag as a special case, which falls just within the permissible restrictions on human rights.

Instead, in a politically flavoured judgment which saw the Chief Justice quote from a speech by then Chinese President Jiang Zemin, the court held that restrictions on even the most fundamental freedoms could be justified whenever they are necessary in the interests of society as a whole.³⁶ This, as Audrey Eu, a lawyer for one of the defendants and now one of Hong Kong's most prominent pro-democracy politicians, unsuccessfully sought to argue, drives a major hole through the human-rights protections that form such an important part of "one country, two systems"—since it could potentially be used to justify all kinds of restrictions on civil liberties.³⁷ It is, however, to the court's credit that this has not happened since then. Instead, as memories of the 1999 confrontation with Beijing faded away, the Li-led court reverted to a generally more robust approach in protection of human rights.³⁸

Note that, in both these politically charged cases, the decision of the court was unanimous. Even Justice Bokhary, the most liberal member of the court, did not dissent, although he was clearly troubled by the decision in *Ng Kung Siu*, delivering a separate judgment in which sought to justify the decision on much narrower grounds that would make it more difficult for the case to be used as a precedent for other restrictions on human rights.³⁹

More than a decade later, it is now generally accepted in Hong Kong that the court's judgment (including Justice Bokhary's reluctant assent) was at least partly a political compromise, aimed at avoiding another confrontation with Beijing. Take, for instance, these comments by Professor Chan, in an article reflecting on the 10th anniversary of the Hong Kong Basic Law in 2007: "This cautious attitude may be understandable at a time when the relationship between the Court and the NPCSC was rather uneasy, if not tense and when mutual trust was at its lowest. The Court needed time to re-build the trust and to search for a new balance between aligning itself as a court of final adjudication and respecting the sovereignty of the Central Government in exercising the power of final interpretation of the Basic Law."⁴⁰

Others have been blunter. Po Jen Yap, an assistant professor at the University of Hong Kong's Faculty of Law, has suggested the court cannot be "blind to the political consequences of its decisions" and that it is only natural for the judges to be "willing to permit lapses of legal logic and reasoning" in some particularly sensitive cases.⁴¹

Since those dark days in late 1999 when the Court of Final Appeal resorted to a "pre-emptive cringe," the Li-led court has clearly recovered its nerve. Occasionally, it has even defied Beijing once again, although in a more carefully calibrated manner than in *Ng Ka Ling*.⁴² As a result, it is not surprising to see the outgoing Chief Justice receive such well-deserved accolades upon his retirement.

Nonetheless the compromises made in those two cases should not be forgotten. Looking forward, there is an important lesson from the court's decisions in *Lau Kong Yung* and *Ng Kung Siu*. If even all the members of a Li-led court (including Justice Bokhary, perhaps the most liberal judge we are ever likely to see sitting on the Court of Final Appeal) were willing to make such damaging concessions in order to avoid another confrontation in China, it shows that no court in Hong Kong can ever be entirely blind to the political realities that exist under "one country, two systems."

The new Chief Justice may slightly accelerate that process, although given the way the judicial system functions any changes are likely to be gradual. But, even if he does, Chief Justice Ma (as he will soon be known) will only be continuing a process that began more than a decade ago—when the Hong Kong courts first began learning how to live with China.

Danny Gittings is a barrister and program director at the College of Humanities and Law in the University of Hong Kong's School of Professional

and Continuing Education. He is co-editor of "Introduction to Crime, Law and Justice in Hong Kong" (Hong Kong University Press, 2009).

¹ Ma's title is Chief Judge of the High Court, which comprises not only the Court of Appeal (where he sits as a Justice of Appeal) but also the court immediately below, the Court of First Instance.

² Under s14(2)(a) Hong Kong Court of Final Appeal Ordinance (Cap 484), the term of office of a permanent judge of the Court of Final Appeal may be extended a maximum of two times beyond his retirement age, on each occasion for a period of three years.

³ This was the Sino-British Joint Declaration on the Question of Hong Kong. The importance of China's concession of the power of final adjudication to Hong Kong is evident from the fact that it is mentioned in the 3rd of the 12 Basic Policies of the PRC Regarding Hong Kong in Article 3 of the main text of the Joint Declaration.

⁴ Under s12 of the Hong Kong Court of Appeal Ordinance, it is also possible for judges to be appointed directly to the Court of Final Appeal from the Court of First Instance or from among the ranks of those barristers in practice in Hong Kong with at least 10 years experience. This is very unusual, although a rare exception was the appointment of Andrew Li directly from practice as a barrister to the post of Chief Justice in 1997.

⁵ [2004] 3 HKLRD 797

⁶ See, for example, the British Government's *Six-monthly Report on Hong Kong* (January-June 2004) at para 71. Also Cliff Buddle, *Is justice delayed justice denied to Falun Gong* 16 (South China Morning Post, July 25, 2004).

⁷ *HKSAR v Yeung May Wan* [2005] 2 HKLRD 212

⁸ This was *HKSAR v Leung Kwok Hung* [2004] 3 HKLRD 729. Although this case also involved the right to protest, the legal issues involved were very different. As a result, Chief Justice Li concluded that "the reason given is not objectively a sufficient justification for the delay."

⁹ [2009] 6 HKC 77

¹⁰ See, for example, the comments of Ronny Tong, SC cited in Patsy Moy, *New chief justice gives oath on lawyer wife* (Hong Kong Standard, April 9, 2010)

¹¹ It should, however, be noted that there is also one non-permanent judge sitting on the Court of Final Appeal in any case. This fifth member of the court is usually drawn from a panel of distinguished retired judges from other common-law jurisdictions (in practice, only the United Kingdom, Australia and New Zealand), and can bring another liberal voice to the court in some cases.

¹² [2002] 1 HKLRD 561

¹³ For an excellent account of this case, see Christopher Forsyth and Rebecca Williams, *Closing Chapter in the Immigrant Children Saga: Substantive Legitimate Expectations and Administrative Justice in Hong Kong* (2002) 10(1) APLR 29

¹⁴ [2005] 3 HKLRD 164

¹⁵ Under the Public Order Ordinance (Cap 245), Hong Kong Police must be notified in advance of any public protest involving at least 30 people, and have certain powers to ban or restrict such protests.

¹⁶ This was striking from the ordinance two ill-defined words, which the court held gave the police excessive discretion to restrict public protests. However, as Professor Yap notes, "The practical benefits of this decision to potential demonstrators are minimal, especially since the Commissioner retains a host of at-large broad powers to prohibit or restrain the organisation of public processions in Hong Kong" (see Po Jen Yap, *Constitutional Review under the Basic Law: The Rise, Retreat and Resurgence of Judicial Power in Hong Kong*, (2007) 37 HKLJ 449, 466).

¹⁷ See, for example, Albert HY Chen, *Constitutional Adjudication in post-1997 Hong Kong* (2006) 15 PACRLPJ 627, 671 and Janice Brabyn, *Leung Kwok Hung and Others Through the Hong Kong Courts* (2006) 36 HKLJ 83.

¹⁸ One liberal judge on the Court of Appeal, Justice Hartmann, who has recently been appointed to a panel of non-permanent judges for the Court of Final Appeal, has been mentioned by some commentators as a possible counterweight to the more conservative inclinations of the new Chief Justice. However it is difficult to

give much credence to this argument since, as a non-permanent Hong Kong judge on the Court of Final Appeal, Justice Hartmann is only likely to be called to hear the occasional case (in practice, when one of the permanent Hong Kong judges is not available).

¹⁹ *Yeung May Wan* (see note 50 at 817

²⁰ [1999] 1 HKLRD 315

²¹ [1999] 1 HKLRD 577

²² “What the Court of Final Appeal Has Not Clarified in Its Clarification: Jurisdiction and Amicus Intervention,” in Chan, Fu & Ghai (eds.) *Hong Kong’s Constitutional Debate: Conflict over Interpretation*, (Hong Kong University Press, 2000) at page 180.

²³ The court simply acknowledged it would be bound by any action of the National People’s Congress and its Standing Committee “which is in accordance with the provisions of the Basic Law,” but carefully avoided saying anything further about what it would do about actions that breach the Hong Kong Basic Law.

²⁴ [1999] 1 HKLRD 304

²⁵ Article 22(4) of the Hong Kong Basic Law requires that “people from other parts of China must apply for approval” to enter Hong Kong, and that those wishing to settle in Hong Kong must obtain approval from Chinese authorities.

²⁶ Under Article 158(3) of the Hong Kong Basic Law, the Court of Final Appeal is required to refer to the National People’s Congress Standing Committee issues involving the interpretation of any Hong Kong 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.” Although Article 22(4) clearly falls into this category, in *Ng Ka Ling* the court managed to avoid referring it to the Standing Committee by controversially concluding that it was not the “predominant provision” at issue in this case.

²⁷ [1999] 3 HKLRD 778

²⁸ In *Interpretations of Clause 7 of Annex I and Clause 3 of Annex II Of the Basic Law of the Hong Kong Special Administrative Region* (6 April 2004), the Standing Committee added a requirement that it must approve whether “there is a need” to make changes to the electoral systems for both the Chief Executive and the Legislative Council before the process of making such changes can even begin in Hong Kong.

²⁹ The original wording of Clause 3 of Annex II only requires the approval of any changes by two-thirds of the Legislative Council, consent of the Chief Executive and reporting to the Standing Committee *for the record* (italics added). There is no requirement for Standing Committee approval.

³⁰ Using the new power it had asserted under the 2004 Interpretation, the Standing Committee issued Decisions in 2004 and 2007 requiring that any changes to the electoral system must ensure that half the seats in the Legislative Council continue to be filled through functional constituency elections. This infuriated the pro-democracy camp, which wants to see early progress towards the abolition of functional constituencies and led to the defeat of the Hong Kong Government’s proposals for changing the electoral system for the 2008 polls. A similar defeat of proposals for changing the electoral system for the 2012 polls was only averted by a last minute compromise, which greatly expanded the electoral base of five functional constituencies.

³¹ Professor Ling explains that, in its three interpretations of the Hong Kong Basic Law since 1997, the Standing Committee has never suggested that it is interpreting provisions which it believes fall within Hong Kong’s autonomy (although, in some cases, the Standing Committee’s view of which provisions fall within Hong Kong’s autonomy differs considerably from the generally-accepted view on this point in Hong Kong). See *Subject Matter Limitation on the NPCSC’s Power to Interpret the Basic Law*, (2007) 37 HKLJ 619.

³² [1999] 3 HKLRD 907

³³ S7 of the National Flag and National Emblem Ordinance (No. 116 of 1997), which implements in Hong Kong the Law of the PRC on the National Flag and the Law of the PRC on the National Emblem, and makes it a criminal offence to desecrate the Chinese national flag, punishable by a fine or prison sentence of up to fine.

³⁴ *HKSAR v Ng Kung Siu* [1999] 1 HKLRD 783

³⁵ See *Texas v Johnson* 491 U.S. 397 (1989) and *United States v Eichman* 496 US. 310 (1990), both U.S. Supreme Court cases on flag desecration decided by 5-4 majorities.

³⁶ *Ng Kung Siu* (see note 32) at 922-925. The court did this by taking an extremely broad view of the meaning of *ordre public*, an ill-defined concept which is a permissible restriction on freedom of expression in international human-rights covenants incorporated into the Hong Kong Basic Law. The court explained this justified restrictions on civil liberties, where these are, “necessary for the protection of the general welfare or for the interests of the collectivity as a whole.”

³⁷ *Ibid* at 933, where Justice Bokhary summarises Eu’s argument and expresses some sympathy with it.

³⁸ For example the freedom of assembly cases of *Yeung May Wan* (see note 5) and *Leung Kwok Hung* (see note 14) mentioned earlier in this article.

³⁹ *Ng Kung Siu* (see note 32) at 927-933. While ultimately siding with the other judges on the court, Justice Bokhary stressed his belief that banning desecration of the Chinese flag fell at the very edge of permissible restrictions on freedom of expression—so that any attempt to extend this ban into other areas would be unconstitutional.

⁴⁰ Johannes Chan, *Basic Law and Constitutional Review: The First Decade*, (2007) 37 HKLJ 407. Professor Chan notes that Justice Bokhary “could have easily delivered a dissenting judgment, especially in light of the marginal majority of 5 to 4 in the relevant US jurisprudence,” but nonetheless chose not to do so.

⁴¹ Yap, *Constitutional Review under the Basic Law* (see note 16) at 474.

⁴² See, for example, *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533. In this case, the Court of Final Appeal reiterated its belief that the Standing Committee has an unrestricted power to interpret the Hong Kong Basic Law. However it then refused to apply the interpretation issued by the Standing Committee in 1999, on the grounds that this case involved a different sub-section of the provision in the Hong Kong Basic Law that had been at issue in the 1999 interpretation.