

Hong Kong's Constitutional Journey: 1997- 2011

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Prologue

AT MIDNIGHT on 30 June 1997, the Hong Kong Convention Centre was flooded with political dignitaries, with the Prince of Wales leading the British delegation and President Jiang Zemin leading the Chinese delegation, all waiting eagerly but in entirely different moods to witness the handover ceremony of Hong Kong to China. As the Union Jack was lowered for the last time in Hong Kong, the 150 years of British reign over her last colony came to an end. The fading tune of *God Save the Queen* was soon followed by the marching trumpets of the PRC national anthem, and immediately the PRC flag was steadily and confidently hoisted, accompanied by the visibly smaller SAR flag which was raised at half a pace slower, thus marking the dawn of a new era for Hong Kong. The Hong Kong Special Administrative Region was born, with the relative position of the PRC flag and the SAR flag vividly and powerfully conveying the message that 'one country' comes before 'two systems' in the innovative constitutional arrangement of 'one country, two systems'.

I. A High Degree of Autonomy: The Arrangement of 'One Country, Two Systems'

1.1 The arrangement

Pursuant to the Sino-British Joint Declaration 1984, Hong Kong became a Special Administrative Region ('HKSAR') of the PRC on 1 July 1997.¹ It enjoys a high degree of autonomy except in foreign affairs and defence, and in areas which are the responsibilities of the Central People's Government.² It is vested with executive, legislative and independent judicial powers, including the power of final adjudication.³ The law in force before the changeover remains basically unchanged.⁴ National laws shall not apply to the HKSAR except those relating to foreign affairs and defence and they will only apply pursuant to a prescribed procedure.⁵ A

¹ For a detail description of the process of the transfer of sovereignty over Hong Kong, see J Chan, 'From Colony to SAR', in Johannes Chan and CL Lim (eds), *Law of the Constitution of Hong Kong* (Sweet & Maxwell, 2011), Ch 1.

² The Basic Law of Hong Kong ('BLHK'), articles ("arts") 13 & 14.

³ BLHK, art 2.

⁴ BLHK, art 8.

⁵ BLHK, art 18.

Court of Final Appeal has been established to replace the Privy Council, which was the highest court of appeal of the former colony.⁶ Fundamental rights and freedoms are protected.⁷ The prevailing social and economic systems remain unchanged. Socialist policies on the Mainland shall not apply to the HKSAR.⁸ It retains the status of a free port and a separate customs territory.⁹ It has its own independent finances and is allowed to continue to use its currency.¹⁰ It also enjoys varying degree of freedoms in concluding external relations, albeit in the name of 'Hong Kong, China'.¹¹ These policies, which shall remain unchanged for 50 years, are stipulated and elaborated in the Basic Law, the constitution of the HKSAR.¹² The Basic Law was promulgated by the National People's Congress in April 1990, and came into force on 1 July 1997.

1.2 Inherent Contradictions

While it is not uncommon to have more than one legal system within a single sovereign country,¹³ the co-existence of two systems that are vastly different in ideology and values will give rise to inevitable conflicts. On one side of the border there is a well-established common law system that rests upon individualism and the doctrine of separation of powers. On the other side of the border there is an emerging legal system that is partly based on socialist ideology, partly based on the civil law system and increasingly influenced by the common law system. It subscribes to the supremacy of the soviet and people democratic dictatorship, and operates largely on a central planning system. Thus, when the two systems meet, there are bound to be conflicts arising from a difference in culture, values, and systems., which difference is further complicated by an absence of clear demarcation of jurisdictions and the absence of any conflict resolution mechanism between the two systems.

II. Central-local Relationship

2.1 Competing for greater autonomy

The conflict between the two systems is best exemplified by the conflict over the interpretation of the Basic Law, which is simultaneously the constitution of the HKSAR and a piece of national law promulgated by the National People's Congress Standing Committee ('NPCSC'). Under Article 158 of the Basic Law, the power of interpretation of the Basic Law is

⁶ BLHK, art 82.

⁷ BLHK, chapter III.

⁸ BLHK, preamble.

⁹ BLHK, arts 114 & 116.

¹⁰ BLHK, arts 106 & 111.

¹¹ BLHK, art 116.

¹² BLHK, art 5.

¹³ Federal system is a prime example. For a good discussion of different models of autonomous system, see Marc Weller and Katherine Nobbs (eds), *Asymmetrical Autonomy and the Settlement of Ethnic Conflicts* (University of Pennsylvania Press, 2010).

vested in the NPCSC. Hong Kong courts can interpret any provision of the Basic Law as well. However, if the Court of Final Appeal finds it necessary to interpret any provision of the Basic Law which is an excluded provision, it shall refer the interpretation to the NPCSC before rendering its final judgment, and the interpretation of the NPCSC shall be binding on Hong Kong, except that previous judgments rendered shall not be affected. An excluded provision refers to those provisions concerning affairs which are the responsibility of the Central People's Government or the relationship between the Central Authorities and the HKSAR. In *Ng Ka Ling v Director of Immigration*,¹⁴ the Court of Final Appeal held that it is under a duty to refer a provision to the NPCSC for interpretation if (1) the provision concerned is an excluded provision ('classification test'); and (2) it is necessary to interpret the excluded provision as its interpretation will affect the judgment in the case ('necessity test'). In applying the classification test, if the scope of an excluded provision is qualified or affected by a non-excluded provision, the court will adopt a predominant test, namely, as a matter of substance which is the predominant provision that has to be interpreted in the adjudication of the case. In *Lau Kong Yung v Director of Immigration*,¹⁵ the Court of Final Appeal observed that it would have to re-visit these tests in light of the interpretation of the NPCSC reversing the decision of the Court in *Ng Ka Ling*. However, so far the court has not found an appropriate opportunity to review these tests. Instead, it continues to apply the classification test and the necessity test.¹⁶

The National People's Congress ('NPC') is the legislative assembly of the PRC. It comprises about 3,000 members and meets only once a year. In view of its size and the infrequency of its meeting, the NPC is largely a dignified ceremonial institution that mainly rubber-stamps decisions made elsewhere. When it is not in session, its power is vested in the NPCSC, which comprises about 180 members. In contrast to the Legislature in the common law system, the NPC can exercise legislative, executive and judicial functions. Its power to interpret law is based on both ideological premises and practical necessity. Ideologically, the power to make law is vested in the Supreme Soviet (the NPC), which represents the people, and the power to interpret law is a corollary power that flows from the power to make law. Practically, there is a need to maintain consistency. China has experienced the dark period of lawlessness during the Cultural Revolution. When it emerged from the Cultural Revolution in 1978 and began to rebuild the national legal system, a major challenge was to ensure consistency of interpretation of the law promulgated by the Central Government, given the vast geographical size of China and the varying quality of judicial and government personnel in different parts of the country. The power of the NPCSC to interpret law is a solution to address this problem. It is an efficient means to further clarify the scope of the law or to make supplemental provisions to

¹⁴ (1999) 2 HKCFAR 4.

¹⁵ (1999) 2 HKCFAR 300.

¹⁶ *Democratic Republic of the Congo v FG Hemisphere Associates LLC*, [2011] 4 HKC 151, paras 403-405 ('the Congo case').

enable the smooth implementation of the law.¹⁷ In this regard, the distinction between interpretation and amendment is very fine.¹⁸

Under Article 67 of the PRC Constitution and Article 158 of the Basic Law, the NPCSC has the power to interpret the provisions of the Basic Law. Under the common law system, the interpretation of law is the sole province of the judiciary, which alone can pronounce authoritative and binding interpretation in the process of judicial adjudication after a rational process of hearing and weighing carefully arguments from both sides. Under the PRC system, the NPCSC, which is a political organ, has the power to issue authoritative and binding interpretation of law which could in practice amount to an amendment of the law without going through the formal legislative process for amending law. When the two systems must interpret the Basic Law, conflicts regarding the independence of the judiciary and the integrity of the common law system are inevitable.

2.2 Four Interpretations of the NPCSC

2.2.1 The First Interpretation

The first occasion for interpretation of the Basic Law arose shortly after the changeover in *Ng Ka Ling v Director of Immigration*.¹⁹ Under the pre-1997 immigration law, children born to Hong Kong Permanent Residents ('HKPR') outside Hong Kong would not acquire a right of abode in Hong Kong. Under Article 24 of the Basic Law, these children, if of Chinese nationality, would fall within the definition of HKPR and hence enjoy a right of abode in Hong Kong. Many of these children came to Hong Kong legally as tourists and over-stayed, or simply came to Hong Kong illegally shortly before and after the changeover. They surrendered themselves to the immigration authorities after the changeover and demanded for an identity card showing their HKPR status. On 10 July 1997, when the figure of these children hit 5,000, the Legislature passed an emergency amendment to the Immigration Ordinance. The gist of the amendment was that any person who claimed to have a right of abode in Hong Kong must produce a certificate of entitlement, which could only be applied for outside Hong Kong. No certificate would be issued unless the applicants (almost exclusively from the Mainland) first secured an exit approval from the Security Bureau of the PRC. The constitutionality of this new requirement of a certificate of entitlement was challenged for being contrary to Article 24 of the Basic Law. In response, the Director argued that the certificate of entitlement system was justified by Article 22 of the Basic Law, which provided that people from other parts of China must apply for approval for entry into the HKSAR ('the immigration issues').

¹⁷ See the Opinion of Professor Lian Xisheng dated 10 August 1999, quoted by the Court of Final Appeal in *Director of Immigration v Chong Fong Yuen* (2001) 4 HKCFAR 211 at 221.

¹⁸ While this may provide a justification for the power of interpretation by the NPCSC in the early days of rebuilding the national legal system, the continued existence of this power in the 21st century has indeed been increasingly queried by Mainland scholars.

¹⁹ (1999) 2 HKCFAR 4.

The plaintiffs also mounted a more fundamental challenge. As a result of a breakdown in negotiation between China and the United Kingdom on the composition of the last Legislative Council before the changeover, the Chinese Government declared that it would appoint a Provisional Legislative Council on 1 July 1997 which, among its duties, would be responsible for forming the first Legislative Council of the HKSAR. The amendments to the Immigration Ordinance in 1997 were enacted by the Provisional Legislative Council. There was no provision for a Provisional Legislative Council in the Basic Law. Hence, the plaintiffs argued that the Provisional Legislative Council was unconstitutional, and therefore the laws that it purported to make were of no legal effect unless they could be upheld by the common law doctrine of necessity ('the constitutional issues').

The Court held that the certificate of entitlement scheme was unconstitutional as it has the effect of vesting in the Security Bureau of the PRC the power to determine who has the right of abode in Hong Kong. It also refused to refer a question of interpretation to the NPCSC on the ground that the predominant provision to be determined in this case was a provision within the internal autonomy of the HKSAR. The Government managed to secure the endorsement of the general public to invite the NPCSC to render an interpretation, which was given in June 1999 and which had the effect of reversing the judgment of the Court of Final Appeal. As a result of the NPCSC Interpretation, the Court of Final Appeal remarked in *Lau Kong Yung v Director of Immigration* that it would have to review the classification test, the necessity test and the predominant test. Professor Albert Chen of The University of Hong Kong argued forcefully that the court should apply the necessity test before the classification test because until it has been identified which provision needs to be interpreted, it is not possible to apply the classification test.²⁰ Instead, the Court, by developing the predominant test, held that the predominant provision to be interpreted was Article 24, which was not an excluded provision, and therefore it was not necessary to further consider the necessity test. While there is considerable force in Professor Chen's argument, the predominant provision test may simply be understood as the Court saying that it is unnecessary to interpret the non-predominant provision. Applying the necessity test first does not absolve the difficulty of applying the test. The problem in this case is that two provisions, one an excluded provision and one a non-excluded provision, are involved. One approach is that whenever an excluded provision is involved, then Article 158 is engaged. The obvious danger of such an approach is that the excluded provision may be of marginal relevance only. Thus the court will still have to develop a requirement of a real need to interpret the provision in applying the necessity test. The other approach is that adopted by the Court, namely, to determine the predominant provision to be interpreted.

²⁰ Albert Chen, 'The Court of Final Appeal's Ruling in the "Illegal Migrant" Children Case: A Critical Commentary on the Application of Article 158 of the Basic Law', in Johannes Chan, H L Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press, 2000), 113-141.

On the constitutional issue, the Court of Final Appeal held that as a piece of national law, the Basic Law bound the Central Government as well. The Provisional Legislative Council was appointed pursuant to a decision of the NPCSC, which was bound by the Basic Law. Thus, the Hong Kong Court had jurisdiction to consider if the decision of the NPCSC was consistent with the Basic Law. Given the limited function and duration of the Provisional Legislative Council, the Court further held that it fell within the ambit of the NPCSC's Decision and was hence constitutional. Nonetheless, the mere possibility of the Hong Kong Court reviewing the constitutionality of a Decision of the NPCSC, a power which even the People's Supreme Court does not enjoy, caused an alarm to the Central Government. As a result of immense political pressure, the Director of Immigration made an unprecedented application inviting the Court to clarify this part of its judgment. The Bar attempted unsuccessfully to intervene on the ground that the Court had no jurisdiction to entertain such an application once its judgment had been delivered and sealed. In a controversial judgment the Court made a clarification which had the virtue of not clarifying anything.

Despite the clarification, the judgment of the Court was effectively reversed by the Interpretation of the NPCSC. The Interpretation casts considerable doubt over the independence of the judiciary and the integrity of the common law system under the notion of 'one country, two systems'.

2.2.2 On Representative Government: The Second and Third Interpretations

The Second and Third Interpretations of the NPCSC have inflicted a different kind of wound. Both are related to the development of representative government in Hong Kong. The Basic Law has prescribed the composition and methods of formation of the first three Legislative Council, and a procedure for their amendments after 2007 'if there is a need' to do so. There are similar provisions for the selection of the Chief Executive of the HKSAR Government. In light of the strong public demands for the introduction of direct election by universal suffrage of the Chief Executive and the Legislative Council in 2007 and 2008 respectively, the NPCSC, in April 2004, decided, in the Second Interpretation, that the power to initiate any constitutional reform was vested in the NPCSC. The Chief Executive of the HKSAR should submit a report as regards whether there was any need to make an amendment, and the NPCSC should make a determination in light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress.²¹ It later decided that there was no need to make any amendment to then prevailing methods of selection of the Chief Executive in 2007 and the formation of the Legislative Council in 2008, and while the size of the Legislative Council might be enlarged in 2008, there should be an equal number of members returned respectively by geographical election and functional constituency election.²²

²¹ BLHK, art 45.

²² See further below.

The Third Interpretation was prompted by the resignation of Mr C H Tung, the first Chief Executive of the HKSAR, who tendered his resignation half way in his second term of office. The issue was whether his successor should serve the remainder of the second term of office or whether he should serve a full term of 5 years. Prima facie, this was a relatively straight forward issue of statutory interpretation which could have easily been handled within the Hong Kong legal system. Indeed, an application for judicial review was lodged on 4 April 2005 inviting the Hong Kong court to interpret the relevant provisions in the Basic Law on this matter. However, at the invitation of the HKSAR Government, the NPCSC rendered its Third Interpretation on 26 April 2005 deciding that the succeeding Chief Executive should only serve the remainder of the term of his predecessor. The reason for the hurried interpretation was that the succeeding Chief Executive had to be selected by 10 July, and the judicial process would take a long time to conclude, thereby adversely affecting the administration and the normal operation of the HKSAR Government.

2.2.3 The Congo Case and its aftermath

On 26 August 2010, the NPCSC rendered its Fourth Interpretation on the Basic Law. This interpretation was different from the previous interpretations because there was a referral by the Court of Final Appeal for the first time. In *Democratic Republic of Congo v FG Hemisphere Associates LLC*,²³ the applicant attempted to enforce in Hong Kong two international arbitral awards against the Congo Government by asking the Hong Kong Court to direct a PRC state own enterprise to pay the fees it owed to the Congo Government under a mining agreement to satisfy the arbitral award. In defence, the Congo Government pleaded state immunity and argued that, as a sovereign government, it was immune from civil suit in Hong Kong. The Court of Appeal rejected this plea of absolute state immunity, holding that under the common law, state immunity would not apply if the act involved was a purely commercial act. The PRC Government submitted through the Secretary for Justice that the Central Government subscribed to the policy of absolute state immunity and that Hong Kong, being part of China, had to follow the same foreign policy. The Court of Final Appeal held, by a majority of 3 to 2, that the extent of state immunity fell within 'acts of state such as defence and foreign affairs' under Art 19(3) of the Basic Law and hence, under Article 158(3) of the Basic Law, it was bound to refer the relevant questions to the NPCSC for interpretation, including whether the HKSAR was bound to apply the rules or policies on state immunity as determined by the Central Government and whether the common law rule of restrictive state immunity was inconsistent with the Basic Law. A powerful minority judgment held that sovereignty was not invoked in this case as neither the PRC Government nor the PRC state owned enterprise was involved in the case. The issue was purely one of common law, and under the common law, a state enjoyed only restrictive state immunity. The minority further held that even if a state enjoyed absolute

²³ [2011] 4 HKC 151.

state immunity, it had waived its immunity by subjecting itself to the arbitration proceedings. On the minority view, this would be the end of the matter and there was no need to refer any question to the NPCSC for interpretation.

In its Interpretation, the NPCSC stated that the rules or policies on state immunity fell within the realm of foreign affairs of the state and the Central Government had the power to determine such rules or policies to be given effect uniformly in its territory, including the HKSAR. The determination of the rules or policies of state immunity was also 'an act of state such as defence and foreign affairs' within the meaning of Art 19(3) of the Basic Law and was hence outside the jurisdiction of the Hong Kong's courts. Therefore, when questions of immunity from jurisdiction and immunity from execution of foreign states and their property arose in the course of judicial adjudication, the Hong Kong courts must apply and give effect to the rules or policies on state immunity as determined by the Central People's Government and any common law principles were, to the extent of incompatibility with such rules or policies, not adopted as the laws of the HKSAR. Given the stances of the Ministry of Foreign Affairs that were expressed through the Secretary for Justice in the course of the legal proceedings in Hong Kong, the Interpretation came as no surprise.

While there is much to be said in favour of the powerful minority judgments, the majority cannot be faulted for its decision that this is a matter on foreign affairs which should be determined by the Central Government. Meanwhile, as the first referral from the Court of Final Appeal, it is significant that the Court has laid down the following procedural markers:

1. The Court will hear full submissions from the parties to the proceedings before it decides whether to make a referral.
2. In hearing submissions from the parties, the Court is prepared to consider any submission of the Central Government through the Secretary for Justice.
3. The Court frames the questions to be referred to the NPCSC for interpretation.
4. The Court renders its opinion, tentative in nature, on the substantive issues so that the NPCSC has the benefit of a considered judgment of the highest court of the HKSAR that is well versed in the common law approach.

2.2.4 From a royal edict to a constitutional convention

The interpretation of the Basic Law has become the natural battlefield for defining autonomy. In the first three incidents of interpretation of the Basic Law, the extent of autonomy is directly in issue. On the first occasion, it was done to address the difficult consequences arising from a decision of the Court of Final Appeal. This situation is not uncommon in many jurisdictions where the Government has to deal with a judicial decision that has unpalatable economic, social or political consequences. In a common law system, the usual manner of resolving this problem is to introduce new legislation or an amendment of the constitution as appropriate. The legislative process would allow the community through its elected representatives an opportunity to fully debate the issues. In the case of Hong Kong, the

power to amend the constitution lies in Beijing and not in Hong Kong. Taking a view that the Basic Law should not be lightly amended, the Central Government has resorted to the interpretation route to address this problem. As shown above, the first interpretation was done at the expense of the independence of the judiciary and at a great social cost.

On the second and third occasions of interpreting the Basic Law, the NPCSC conveys a loud and clear message that while prepared to tolerate a high degree of autonomy in internal affairs, Beijing, and not Hong Kong, is in control when it comes to the democratic development of the political process of Hong Kong. The Central Government is not content with just having a final veto power to disallow any proposed change to the method of formation of the Legislature or the selection of the Chief Executive, but it wants full control to decide whether any change is proposed in the first place.

The NPCSC is obliged, before exercising its power of interpretation, to consult the Basic Law Committee, which has served nothing more than a rubber stamp. With a highly asymmetrical power relationship, the NPCSC interpretations reaffirm that while Hong Kong enjoys a high degree of autonomy, the extent of autonomy rests on a rather precarious basis and lies at the pleasure of the Central Government.

Nevertheless, the process of interpretation has been subject to some refinements. In the first interpretation, the NPCSC just made the interpretation and announced it. In the second interpretation, some Mainland members of the NPCSC came to Hong Kong to explain the interpretation after it has been made. In the third interpretation, some Mainland members of the NPCSC met with some selected people and groups in Shenzhen before it made the interpretation. On the fourth occasion, the Court of Final Appeal developed some procedural requirements to minimize the occurrence of an arbitrary decision, and these procedures could have the potential of being developed into constitutional conventions governing judicial referral to the NPCSC. It was also encouraging to see that the Ministry of Foreign Affairs was prepared to take part in the Hong Kong proceedings, albeit indirectly, through the submissions of the Secretary for Justice to the Hong Kong courts, not only on the question of referral but also on the substantive merits of the case. Instead of just handing down a royal edict, the prospect of making the interpretation process more interactive and more participatory seems hopeful.

2.3 National Security: Art 23 legislation

National security is another controversial issue that may affect the extent of autonomy. For the Central Government, a major concern is that Hong Kong should not be turned into a counter-revolutionary basis that may threaten the authority or legitimacy of the ruling Government in the Mainland.

Article 23 of the Basic Law provides that 'Hong Kong shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from

conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies'. There is no national security law as such in Hong Kong, although some of these activities are already prohibited by Hong Kong law. In late 2002, the Government proposed to introduce legislation to implement Article 23. The proposal immediately sparked off strong opposition from many quarters, worrying that the proposed legislation has gone well beyond the existing law and could be used as a means to suppress any dissenting views. Those who supported the proposed legislation argued that no country could afford not to have national security law, and reiterated the threat that Hong Kong could be exploited as a counter-revolutionary basis. Those who opposed the proposed legislation criticized the draconian nature of the proposals, and argued that the existing law was more than adequate to protect national security. A highly influential group known as Article 23 Concern Group, which comprised four former chairpersons of the Hong Kong Bar Association, was formed and soon became the figurative leaders of the opposition. The Government's case was not helped by its refusal to publish a White Bill for public consultation (as it perceived the call for a White Bill was nothing more than a delaying tactic by the opposition) when there was no urgency for the Bill, and its insistence to push through the legislation, believing that it had sufficient votes at the Legislative Council to secure its passage.

On 1 July 2003, instead of celebrating the 7th anniversary of the resumption of sovereignty of Hong Kong, about 500,000 people went to the street to demonstrate against, among other things, the proposed national security law. The "SARS epidemic attacks" and the economic depression were among the contributing causes for this large scale demonstration. Despite the large turnout in the demonstration, the Government still decided to push through the legislation until James Tien, chairman of the Liberal Party, resigned from the Executive Council shortly after the demonstration and indicated that his party would not support the proposed legislation. By then the Government had to accept that it would not have sufficient votes in the Legislative Council to secure the passage of the bill, and as a result it withdrew the bill.

While the withdrawal of the national security bill was heralded as a victory of the people's power, the victory was ephemeral. The real issue surrounding Art 23 is not whether Hong Kong is under any threat of activities that may endanger national security, but how far the Central Government is prepared to tolerate Hong Kong as a basis for all kinds of 'politically undesirable activities' against the Central Government.

III. Internal Autonomy

3.1 The Development of Constitutionalism

Once we move away from central/local relationships, Hong Kong does enjoy a high degree of internal autonomy (except in the area of democratic development, which will be addressed below). In a common law system like Hong Kong, the courts, and particularly the

Court of Final Appeal, play a pivotal role in constitutional development. Space constraints will not permit a full analysis of the role of the courts in constitutional development. This section will focus on a few recent decisions that have a bearing on the autonomy of Hong Kong.

3.2 Independence of the Judiciary

An independent judiciary lies at the heart of the common law system and the rule of law. For political reasons,, it was inappropriate to retain the Judicial Committee of the Privy Council as the court of final appeal for Hong Kong after the changeover. Hence, the Basic Law provides for the establishment of the Court of Final Appeal, which may invite judges from other common law jurisdictions to serve on the Court. Upon its establishment, the first Chief Justice set up a panel of overseas judges, and established a convention that there will be an overseas judge in every substantive appeal. Hong Kong is fortunate to have the service of some of the most distinguished jurists in the common law world. Their extensive knowledge and experience have enriched the jurisprudence of the Hong Kong courts, and their stature and undoubted impartiality have strengthened the credibility and reputation of the Court of Final Appeal and the judiciary of Hong Kong. Independence of the judiciary is further buttressed by various systemic guarantees in the Basic Law, including the system of appointment, promotion and removal of judges.

As discussed above, the First Interpretation of the NPCSC posed one of the first major challenges to the independence of the judiciary in Hong Kong. There were concerns that a political organ can easily reverse the considered judgment of the Court of Final Appeal. There were also concerns whether as a result a judge would always have to look over his shoulder to take into account how his decision would be received by the Central Government. In *Chong Fung Yuen v Director of Immigration*, the Court dispelled such concerns by emphasizing the independent judicial power and its exclusive role of interpreting the law, subject only to the limit on the court's jurisdiction.²⁴ It was held that these principles flow from the doctrine of separation of powers; they are the basic principles of the common law that have been preserved and maintained in Hong Kong by the Basic Law. The Chief Justice further explained this common law approach to interpretation as an objective process that is not influenced or dictated by the intent of the lawmaker or by any extrinsic factors other than the intent of the legislature as expressed through the language of the legislation.²⁵

'The courts' role 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*. Their task is not to ascertain the intent of the lawmaker on its own. Their duty is to ascertain *what was meant by the language used* and to give effect to *the legislative intent as expressed in the language*. It is the text of the

²⁴ (2001) 4 HKCFAR 211 at 223.

²⁵ Ibid.

enactment which is the law and it is regarded as important both that the law should be certain and that it should be ascertainable by the citizen.’ (italics original)

In the same case, the Court tried to minimize the influence of the NPCSC by labeling the process as a legislative process no different from other legislative processes.²⁶ Subject to any constitutional constraint, the legislature is free to reverse a judgment of the court that the legislature considers unacceptable politically, socially or economically. This phenomenon is a consequence of a separation of powers, and the check against legislative abuse lies in the representative legislature. Thus, if necessary, the constitution can be amended. The only difference is that the Basic Law can be amended or ‘interpreted’ in a way that is not familiar to the common law system, but this is a political fact that has to be acknowledged, if not accepted. The Court, however, would not pay heed to how the legislature or the NPCSC would react to its judicial interpretation, for otherwise the independence of the judiciary would have been compromised.

In *Chen Li Hung v Ting Lei Miao*, the Court faced the highly political issue of recognition of Taiwan as a political entity.²⁷ The issue is whether the Hong Kong court should recognize and give effect to a bankruptcy order made by the Taiwan court in Hong Kong, given that the Taiwanese Government was not recognized by the PRC Government. The Court held that the order would be given effect in Hong Kong as the rights covered by the order were private rights, that giving effect to such order accorded with the interest of justice, the dictates of common sense and the needs of law and order, and giving the order effect would not be inimical to the sovereign’s interests or otherwise contrary to public policy. It drew a distinction between recognition of a usurper or rebellious regime and giving effect to the order of a court with de facto power without de jure authority. Quoting from Lord Donaldson MR that ‘it is one thing to treat a state or government as being “without the law” but quite another to treat the inhabitants of its territory as “outlaws” who cannot effectively marry, beget legitimate children, purchase goods on credit or undertake countless day-to-day activities having legal consequences,’²⁸ the Court steered skillfully and carefully between law and politics and was prepared to come to a pragmatic decision in accordance with justice and common sense by avoiding high level politics, even when its decision was to be founded upon on a single dictum of Lord Wilberforce in a case of forty years of age.²⁹ Lord Cooke found that, as an overseas judge, he might have a particular role to play. He summed up succinctly the sentiment and approach of the Court in his separate concurring judgment:

²⁶ While this explanation of distancing the NPCSC Interpretation from the judicial process helps preserve the independence of the judiciary, it does not work well in the case of judicial referral. For more detail, see J Chan, ‘Basic Law and Constitutional Review’ (2007) 37 HKLJ 407 at 415-419; J Chan & C L Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell, 2011), paras 2.077-2.090, 10.061-10.063 and 16.017-16.022.

²⁷ [2000] 1 JKC 461.

²⁸ *GUR Corp v Trust Bank of Africa Ltd* [1987] 1 QB 599 at 622.

²⁹ *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 954.

‘Viewing the case from a different perspective, the issue is essentially between the Taiwan creditors on the one hand and Mr Ting, Madam Chen and Mr Chan on the other. It is not an issue with which national politics have any natural connection. They should not be allowed to obtrude into or overshadow a question of the private rights and day-to-day affairs of ordinary people. The ordinary principles of private international law should be applied without importing extraneous high-level public controversy.’³⁰

3.3 Human Rights

The most significant contribution of the Court of Final Appeal lies in the area of human rights. On the one hand, the Court soon established its reputation as a liberal court, and on the other hand, it has displayed great sensitivity in balancing competing demands and values in the community. In *Leung Kwok Hung v HKSAR*, the Court of Final Appeal set out the approach as such:³¹

‘It is well established in our jurisprudence that the courts must give such a fundamental right [to freedom of peaceful assembly] a generous interpretation so as to give individuals its full measure. On the other hand, restrictions on such a fundamental right must be narrowly interpreted. Plainly, the burden is on the Government to justify any restriction. This approach to constitutional review involving fundamental rights, which has been adopted by the Court, is consistent with that followed in many jurisdictions. Needless to say, in a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed on them.’

Applying this approach, the Court has in the past decade laid down many enlightened and interesting decisions, trying to safeguard cherished fundamental rights and freedoms on the one hand and to recognize the complexity of modern life and governance on the other. Thus, the Court has struck down statutory provisions reversing the onus of proof in criminal prosecution,³² provisions imposing a blanket restriction on legal representation in disciplinary proceedings,³³ unreasonable restrictions on advertising by the medical profession,³⁴ a provision empowering the police to prevent the holding of a public assembly on the vague ground of *ordre public*,³⁵ provisions introducing a blanket regime to authorize covert surveillance,³⁶ various gender-based discriminatory sexual offences,³⁷ sexually discriminatory restrictions on the right

³⁰ [2000] 1 HKC 461 at 478.

³¹ (2005) 8 HKCFAR 229, para 16.

³² *Hung Chan Wa v HKSAR* (2006) 9 HKCFAR 614.

³³ *Lam Siu Po v Commissioner for Police* (2009) 12 HKCFAR 237.

³⁴ *Kwok Hay Kwong v Medical Council* [2008] 3 HKLRD 524.

³⁵ *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229.

³⁶ *Leung Kwok Hung v Chief Executive of the HKSAR* [2006] HKEC 816

³⁷ *Leung v Secretary for Justice* [2006] 4 HKLRD 211.

to elect village representatives in the indigenous villages in the New Territories,³⁸ and provisions denying prisoners' right to vote while serving prison sentence.³⁹ In a celebrated decision it held that, given the justification of free speech, the defence of fair comment in defamation was not defeated by the mere presence of malice.⁴⁰ In another important decision, the Court suspended a declaration of unconstitutionality for 8 months to give time to the Government to introduce necessary remedial legislation.⁴¹ At the same time, it upheld the controversial flag discretion offences,⁴² the broadcasting licensing regime,⁴³ the school-based management system,⁴⁴ differential hospital charges for obstetrics services in public hospitals between Hong Kong Permanent Residents and non-Hong Kong Permanent Residents,⁴⁵ and the 7-year residence requirement for Comprehensive Social Welfare Assistance.⁴⁶

3.4 Equality and Non-discrimination

Common law is weak in offering protection against discriminatory practices. If the discriminatory practices are undertaken by a public authority, public law may offer some protection. However, if the discriminatory measures are taken by a private body, the sacrosanct notion of freedom of contract will leave the victim of discrimination with little remedies. In this regard, both the legislature and the court have made major inroads in cutting through the abyss of freedom of contract by offering innovative protection and remedies.

When the Bill of Rights was introduced for the first time into Hong Kong domestic law the general principle against discrimination, the anti-discriminatory provisions were opposed by the private sector on the ground that discrimination was such a complex area that it should only be introduced with an elaborate legislative regime carefully balancing the rights and responsibilities of the people affected and should not be introduced as a vague general principle.⁴⁷ Ironically, when the Government proposed to introduce detailed legislation on this subject a few years later, the proposal was opposed by more or less the same group on the ground that discrimination was best combated by education and not by legislation, and that

³⁸ *Secretary for Justice v Chan Wah* (2000) 3 HKCFAR 459.

³⁹ *Chan Kin Sum v Secretary for Justice* [2009] 2 HKLRD 166.

⁴⁰ *Cheng Albert v Tse Wai Chun Paul* [2000] 3 HKLRD 418.

⁴¹ *Koo Sze Yiu v Chief Executive HKSAR* (2006) 9 HKCFAR 441. See also Andrew Li, 'Reflections on the Retrospective and Prospective Effect of Constitutional Judgments', in Jessica Young and Rebecca Lee (eds), *The Common Law Lecture Series 2010* (University of Hong Kong, 2011), 21-55 and Johannes Chan, 'Some Reflections on Administrative Law Remedies' (2009) 39(2) HKLJ 321-337.

⁴² *Ng Kung Siu v HKSAR* [1999] 3 HKLRD 907.

⁴³ *Secretary for Justice v Ocean Technology Ltd* [2009] 3 HKLRD F1.

⁴⁴ *Catholic Diocese of Hong Kong v Secretary for Justice* [2011] HKEC 1350.

⁴⁵ *Fok Chun Wa v Hospital Authority* [2010] HKEC 713 (CA)(judgment of the CFA pending)

⁴⁶ *Kong Yunming v Director of Social Welfare*, CACV 185/2009 (17 Feb 2012) (on appeal to CFA).

⁴⁷ See . A London silk was engaged by the banking sector to argue how undesirable it would be to introduce a general principle of non-discrimination in the Bill of Rights. See Andrew Byrnes, 'The Hong Kong Bill of Rights and Relations between Private Individuals', in Johannes Chan and Yash Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths, 1993), Ch 5, at 83-88.

legislation would impose undue financial burden on the business sector. When the Government showed no intention to introduce legislation, the Hon Anna Wu decided to introduce by way of a private member bill a comprehensive non-discrimination bill. This bill put strong pressure on the Government, which eventually agreed, as a compromise, to introduce, not a comprehensive bill, but a bill to prohibit discrimination on the ground of sex and disability. The Sex Discrimination Ordinance and the Disability Discrimination Ordinance, followed later by the Family Status Discrimination Ordinance and Race Discrimination Ordinance, were introduced, alongside the establishment of the Equal Opportunities Commission. While these statutes do not cover the full range of discrimination, they do provide a useful statutory framework that begins to change public attitude and practices.

Mere difference in treatment is not discrimination. It is only when the difference in treatment cannot be justified that it becomes discrimination.⁴⁸ In deciding whether the difference in treatment can be justified, the court considers whether the difference in treatment is rationally related and proportionate to the objectives to be achieved. Thus, the court held that an exclusion of the male, but not the female, non-indigenous spouse of an indigenous inhabitant of the New Territories from the election for the village representative was unjustifiable and hence discriminatory.⁴⁹ It also found different age requirements for consent to buggery among males and sexual intercourse between male and female unjustified.⁵⁰ The most controversial case is probably *Equal Opportunities Commission v Director for Education* where the court held that preferential treatment in favour of male students in the allocation of secondary school places was unjustified and discriminatory, partly on the ground of failure of the Government to produce evidence that boys were late bloomers and partly that the system had been in operation for more than 20 years and could not be regarded as a temporary remedial measure.⁵¹

3.5 Social and Economic Rights

While the courts have a fairly good record in protecting civil and political rights, they have a mixed record in relation to social and economic rights. In *Chan To Foon v Director of Immigration*,⁵² the applicants invoked the right to family life under the International Covenant of Civil and Political Rights (ICCPR,) the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of Children (CRC) in support of a claim that the mother enjoyed a legitimate expectation to remain in Hong Kong and live with her minor

⁴⁸ *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335.

⁴⁹ *Secretary for Justice v Chan Wah* (2000) 3 HKCFAR 459.

⁵⁰ *Leung v Secretary for Justice* [2006] 4 HKLRD 211.

⁵¹ [2001] 2 HKLRD 690

⁵² [2001] 3 HKLRD 109 at 131–134. See also *Chan Mei Yee v Director of Immigration* [2000] HKEC 788; *Mok Chi Hung v Director of Immigration* [2001] 2 HKLRD 125. For a useful commentary, see Carole Petersen, “Embracing Universal Standards? The Role of Human Rights Treaties in Hong Kong’s Constitutional Jurisprudence”, in Hualing Fu, Lison Harris, and Simon Young (eds), *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* (New York, Palgrave MacMillan, 2007), pp 33-53.

children, as did the rest of the family members. The court held, following *Chan Mei Yee v Director of Immigration*,⁵³ that while ratification of a treaty might give rise to a legitimate expectation, such legitimate expectation would be defeated by the express reservations in the ICCPR and the CRC in relation to the stay of illegal immigrants in Hong Kong. There was no similar reservation in the ICESCR, but Hartmann J held that the ICESCR was promotional and aspirational in nature and thus could not create legally enforceable obligations. This conclusion is odd, as the claimant was relying on virtually the same right in both the ICCPR and the ICESCR. It would be difficult to support a conclusion that the right to family life under the ICCPR is justiciable whereas the same right under the ICESCR is merely aspirational. The judgment attracted strong criticism from the Committee on Economic, Social and Cultural Rights. In its Concluding Observation on the Initial Report of the Hong Kong Special Administrative Region, the Committee, in an unusually strong language, “regrets” the view taken that the ICESCR was merely “promotional” or “aspirational” in nature. It reiterated that such views were “based on a mistaken understanding of the legal obligations arising from the Covenant”, and reminded the Government that “the provisions of the Covenant constitute a legal obligation on the part of the State parties”. The Committee “urges the Government not to argue in court proceedings that the Covenant is only ‘promotional’ or ‘aspirational’ in nature”.⁵⁴ In its Reply, the Government stated, in a half-hearted manner, that “we note the Committee’s observation that the Covenant is not merely “promotional” or “aspirational” in nature and accept that it creates binding obligations at the international level.”⁵⁵

The first generation of social and economic right cases were mostly related to the right of abode and immigration matters. Given the small vicinity, dense population and economic success of Hong Kong, which attracts a lot of economic migrants, it is understandable that the courts have not been very sympathetic to any argument that may weaken immigration control. These cases were further complicated by the presence of a reservation clause in the ICCPR and the Bill of Rights that essentially exempts from their scrutiny all immigration decisions governing the entry into, stay in and departure from Hong Kong. The second generation of social and economic rights cases, which began to appear after 2006, went beyond immigration matters. While the court was prepared to take social and economic rights more seriously at this stage, it was reluctant to interfere with executive decisions or legislative choices by adopting a wide margin of appreciation or invoking the doctrine of due deference, and more recently, by adopting a lower level of intensity of review.⁵⁶

⁵³ [2000] HKEC 788.

⁵⁴ UN Doc E/C.12/1/Add 58, paras 16 and 27 (11 May 2001).

⁵⁵ Para 2.11-2.12, 2nd Periodic Report of the HKSAR Government.

⁵⁶ See *Kong Yunming v Director of Social Welfare* [2009] 4 HKLRD 382 (CFI); *Catholic Diocese of Hong Kong v Secretary for Justice* [2007] 4 HKLRD 483 (CFI). See also Cora Chan, ‘Judicial Deference at Work: Some Reflections on Chan Kin Sum and Kong Yun Ming’ (2010) 40 HKLJ 1.

Deference is a controversial if not also a dangerous concept.⁵⁷ In a system subscribed to the doctrine of separation of powers, there would be areas which are within the exclusive domain of the three branches of Government. The court, in exercising its judicial power, should not sidestep into the shoes of the Executive. *Wednesbury* unreasonableness is a classic example where the court tries to confine merits review to the more extreme cases. The doctrine of proportionality requires the court to exercise a heightened degree of scrutiny when human rights are at stake. The doctrine of deference tries to put a brake to aggressive judicial review on merits. It is traditionally justified either on democratic grounds, namely that court lacks the mandate and legitimacy to second guess the wisdom of a democratically elected body, or on the ground of a lack of expertise and information. While these are powerful justifications, the risk is that whenever the doctrine of deference is invoked, it usually results in a rather loose standard of review, and the court fails to consider the justifications at all. It has been less of a problem in civil and political rights, where the court stressed that that ‘deference must not be carried to the point of relieving the government of the burden which a constitution places upon it demonstrating that the limits it has imposed on guaranteed rights a reasonable and justifiable.’ However, the same degree of vigilance is not seen in social and economic rights.

In *Kong Yunming v Director of Social Welfare*, the issue was whether the introduction of an eligibility requirement of 7-year residence violated the right to social welfare of Hong Kong Residents (who were granted a right to enter Hong Kong for settlement but not yet acquired the status of Hong Kong Permanent Residents), contrary to Article 36 of the Basic Law. Both the Court of First Instance and the Court of Appeal emphasized that it would be slow to enter into questions concerning the allocation of scarce resources; an issue that is inherent in the adjudication of social and economic rights.⁵⁸ Stock JA pointed out that Article 36 of the Basic Law did not specify any particular type or level of social welfare. Article 145 further provides that the Government can, “on the basis of the previous social welfare system”, formulate policies on the development and improvement of this system in light of economic conditions and social needs. Thus, the Court of Appeal concluded that the determinations of appropriate kinds of social welfare would be a matter for the Executive Government. The Court of First Instance suggested that the Court should give deference to the decision of the Executive Government and should not interfere with its decision unless its decision was discriminatory. While Stock JA preferred not to adopt the notion of deference, the learned judge held that the court would adopt a low level of intensity of review in matters involving Government policy on allocation of resources. Lam J, in his concurring judgment, went further to hold that the Court would not intervene unless the decision of the Government was *Wednesbury* unreasonable, a test which has long been abandoned in human rights cases. The level of judicial scrutiny is so low that the effect of the judgment would render the right to social welfare nothing more than

⁵⁷ See Jeffrey Jowell, ‘Judicial Deference: Servility, Civility or Industrial Capacity’ [2003] Public Law 492-601; T R S Allan: A Critique of “Due Deference, ‘Human Rights and Judicial Review [2006] 63 Cambridge Law Journal 671-695

⁵⁸ CACV 185/2009 (17 Feb 2012).

rhetorical. While it is not argued that the court should step into the shoes of the Executive Government, it must be remembered that it is for the court to determine legality, and it is not easy to determine legality without scrutinizing the justifications put forward by the Government in restricting fundamental rights, whether civil and political or social and economic in nature.

On the whole, the courts have adopted a fairly liberal approach towards the protection of civil and political rights. They have adopted a sensible and pragmatic approach that tries to secure a fair balance among competing interests with a bias in favour of individual rights and freedoms. Yet, they have been more cautious and conservative in relation to economic, social and cultural rights. While such caution may be understandable, the prevalent wisdom in international human rights jurisprudence is that while there are some differences between these two sets of rights, the differences are more apparent than real in most cases, as the classification of these rights are not water-tight and the scope of many rights overlap with one another.⁵⁹ The distinction may be further blurred when rights such as the right to family life is to be found in both ICCPR and ICESCR. There are some indications that the court may be prepared to take social and economic rights more seriously in the future, while at the same time affording the Government a fairly wide margin of appreciation on the basis that social and economic rights involve the allocation of resources, which is something that falls outside the competence of the judiciary. The full extent of this approach is yet to be tested, as after all, very few rights are free in that sense that their protection would not involve resources. While the court has advised against adopting the doctrine of deference, the current stage of jurisprudence seems to be a matter of semantics than substances in that the term 'deference' merely replaced by a different formulation of a low level of scrutiny. The difficulty is that a low level of scrutiny will easily result in a failure to exercise any meaningful judicial scrutiny of executive or legislative decisions. It is not easy to draw the dividing line, and one can only await further authoritative guidance from the Court of Final Appeal. Here the courts will enter into the difficult task of determining complex questions of fact, degree and value. At this stage, a more promising and practical approach towards litigating social and economic rights would be to rely on alternative, more conventional grounds such as the right to equality before the law, although the Court is right that social and economic rights encompass more than a right not to be discriminated against in their enjoyment.

IV. Democratic Development in Hong Kong

4.1 Democratic Development

Another litmus test of autonomy would be the extent of self-government in Hong Kong. Article 68 of the Basic Law stipulates that the Legislative Council of the HKSAR 'shall be constituted by election'. The method for forming the Legislative Council shall be specified in the

⁵⁹ For example, the right to self-determination and the right to family exist in both ICCPR and ICESCR. The right to strike and the right to form trade union are found in the ICESCR, which may also form part of the right to freedom of expression and peaceful assembly and the right to association.

light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage. The composition of the second and third terms of the Legislative Council is stipulated in Annex II of the Basic Law, which further provides that if there is a need to amend the method of formation of the Legislative Council after 2007, such amendments must be made with the endorsement of a two-third majority of all the members of the Legislative Council and the consent of the Chief Executive, and the amendments shall be reported to the NPCSC for the record.

The democratic movement in Hong Kong gathered momentum after the massive demonstration in July 2003 leading to the withdrawal by the Government of the controversial national security bill. There were strong public demands for a fully elected Legislative Council in 2008. In April 2004, the NPCSC decided on its own motion in its second interpretation that the power to initiate any democratic reform was vested in the NPCSC, reminding the people of Hong Kong that there could not be any constitutional reform without the consent of the Central Government. The NPCSC laid down a procedure that the Chief Executive of the HKSAR shall submit a report regarding whether there is any need to make an amendment to the provisions of Annex II, and the NPCSC shall make a determination in light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. On the basis that there was no consensus in Hong Kong on the abolition of functional constituency election, the NPCSC subsequently decided that there was no need to change the method of formation of the Legislative Council in 2008. Minor changes to increase the number of directly elected seats were permissible, provided that the proportion between the members returned respectively by geographical election and functional constituency election should remain unchanged.

The Constitutional Task Force of the HKSAR Government conducted further public consultations on the further reform of the Legislative Council in 2008, resulting in the publication of its Fifth Report in October 2005. It proposed, among other things, that the membership of the Legislative Council be expanded from 60 to 70. Half of the ten new seats would be returned by geographical direct election, and the remaining half would be returned by election among members of the District Councillors, who themselves were returned by both geographical election and appointment by the Government. The pan-democrats argued that the appointed District Councillors (about 20% of all District Councillors) should be excluded from the electoral college of District Councillors, and that the Government should provide a timetable and roadmap for the introduction of universal suffrage. The negotiation broke down, and the proposal was narrowly defeated as the Government was unable to secure a two-third majority of the members of the Legislative Council to endorse the proposal – a move that sharply divided the pan-democrats and the pro-establishment forces and reinforced the suspicion and distrust of the Central Government towards the pan-democrats in Hong Kong.

Having lost the battle for introducing direct election in 2008, the pan-democrats shifted their focus to demand for direct elections of both the Legislative Council and the Chief Executive

in 2012. Further consultations were carried out in Hong Kong. Under Article 45 of the Basic Law, the Chief Executive was selected by an Election Committee, which was supposed to be a broadly representative body comprising members from four major sectors.⁶⁰ Similar to the arrangement in Annex II for the Legislative Council, Annex I of the Basic Law provides that if there is any need to change the method for selecting the Chief Executive after 2007, such amendments shall be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, except that, unlike the case for Legislative Council, such amendments shall be reported to the NPCSC for approval and not just for record. The Election Committee was criticized for its unrepresentativeness, as their members are drawn from elite groups that resemble the functional constituency election.

In December 2007, the NPCSC rejected the claim for direct election in 2012, but it laid down a timetable that the Chief Executive would be returned by direct election in 2017, and the Legislative Council could be returned by direct election thereafter, which means 2020 at the earliest. While this may still be disappointing to many pan-democrats who had been campaigning for direct election since the 1980s, the NPCSC decision at least set down clearly the direction and the time frame to reach the destination.

In 2009, the Government published a further consultation document on the selection of the Chief Executive and the Legislative Council in 2012. It revived the defeated reform package in 2005 with two amendments, namely that the appointed District Councillors would be excluded from the electoral college as previously demanded by the pan-democrats, and the reduction in size of the Election Committee responsible for the election of the Chief Executive. This time the pan-democrats split among themselves. The more radical faction insisted on the abolition of functional constituency election in 2012, and attempted to force a de facto referendum with a few directly elected members resigning from the Legislative Council and successfully getting re-elected in a by-election on a single-issue platform of direct election of both the Chief Executive and the Legislative Council in 2012 – a controversial move which antagonized the Central Government. The moderate faction preferred to conciliate with a hope to entering into a more constructive dialogue with the Central Government on the details of implementing the NPCSC's decision in 2009. With the support of the moderate faction, the proposal was able to secure the necessary majority at the Legislative Council.

While the roadmap to full democracy has been drawn, there are still a number of unsettled issues. As far as the Chief Executive is concerned, the NPCSC has decided that the Chief Executive will be returned by universal suffrage in 2017. The challenge for the Central

⁶⁰ For the second term onward, the Election Committee comprises 800 members, a quarter of which comes from each of the four sectors of (1) Industrial, commercial and financial sectors; (b) professions; (c) Labour, social services, religious and other sectors; and (d) members of the Legislative Council, representatives of district-based organizations, Hong Kong deputies to the NPC, and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference.

Government is how far it is prepared to tolerate a genuine election, where the outcome of will be unpredictable. The only way to ensure a predictable result is to impose restrictions on the nomination process so that only candidates acceptable to Beijing could pass through the nomination process. The details of the nomination process are still to be worked out. As far as the Legislative Council is concerned, the Central Government has not committed itself to a definite date for direct election, save that this could not happen before the direct election of the Chief Executive in 2017. At present half of the Legislative Council is returned by functional constituency election. Debates are still ongoing as to whether functional constituency election is consistent with election by universal suffrage, and whether there are ways to preserve functional constituency election such as having a system of two votes for every eligible elector. Apart from the vested interests of the functional constituencies to prolong their influence in the political process, any reform is plagued by the deep-seated mutual suspicion between the Central Government and the pan-democrats, even when the moderate faction of the pan-democrats have taken the initiative to attempt to mend the relationship.

V. Reflections on the Future

Hong Kong was promised a high degree of autonomy. This chapter attempts to analyse this promise in light of central-local relationship, internal autonomy on protection of fundamental rights and freedoms, and development of representative government. On the whole, in the last 15 years, this promise has by and large been fulfilled. There is little interference from the Central Government in relation to internal affairs of Hong Kong, save in the area of democratic development. Fundamental rights and freedoms are upheld. Independence of the judiciary has been maintained, and the courts have lived up to the expectation of being liberal and vigilant in safeguarding fundamental rights and liberties. There are inherent problems with the model of 'one country, two systems', notably in the demarcation of jurisdiction between the Central Government and the HKSAR. Thus, it is not surprising that in the early days, the court tried to push the extent of its jurisdiction, albeit with limited success. The precise boundary is still fluid, and could only be worked out with the passage of time. There are also systemic conflicts, arising from the co-existence and interaction of two different legal systems and legal cultures. In the recent *Congo* case, the Court of Final Appeal tried to lay down constitutional conventions to streamline the process of judicial referral to the NPCSC for interpretation of the Basic Law. This laudable attempt to reduce the arbitrariness of the process may shed light on a new direction of development in this asymmetrical model of autonomy.

The picture is less promising in the area of democratic development. The pace of democratic development was tightly controlled by the Central Government. With a well-established legal system, a high level of education, a high level of civic consciousness, a large and stable middle class, an affluent economy, a highly efficient society, a clean civil service and a relatively stable political environment, Hong Kong has all the necessary attributes to allow universal suffrage. Yet until now, half of the members of the Legislative Council are not elected

by universal suffrage, and the Chief Executive is still elected by a small privileged group. A major breakthrough was made in December 2007 when the NPCSC decided that the Chief Executive would be elected by universal suffrage in 2017 and the same for the Legislative Council thereafter. Yet many people are skeptical if there would be genuine election by universal suffrage, and such concern is supported by at least three reasons. First, a lot of details are still to be worked out, such as the nomination process for the Chief Executive and the future role of functional constituencies, if any, in the Legislative Council. Apart from tightly controlling the pace of democratization in Hong Kong, the Liaison Office of the Central Government in Hong Kong has played an active role in coordinating the pro-establishment/pro-China candidates in various elections of the District Council and Legislative Council in the past. In the election of the Chief Executive in 2012, the Liaison Office of the Central Government even adopted a high profile in lobbying members of the Election Committee at the final stage of the election.⁶¹ There is no reason to believe that the Central Government will be indifferent to the outcome of the election whatever the system of election is, or will refrain from exerting influences if not interference until its wishes are honoured. Secondly, Hong Kong has suffered from an awkward political system in that those in power do not have popular mandate and those having popular mandate have no chance to be in power. This has resulted in a rather strenuous relationship between the Legislature and the Executive Government in the past; and loose political coalitions has not proved to work. One of the solutions is to develop party politics, which is in any event necessary for universal suffrage. Yet, there is a strong degree of mutual distrust between the democratic camp in Hong Kong and the Central Government, which will in turn provide a strong incentive for the Central Government to interfere with any election to prevent the democratic camp from gaining control of the Legislature or the Executive Government.

This leads to a more fundamental issue on the different understanding of autonomy between the Central Government and the people of the HKSAR. As perceptively pointed out by Professor Albert Chen, the pro-democrats understand autonomy as a Western liberal concept under which the people of Hong Kong should be allowed to freely elect their own Legislature and Chief Executive, and that the Central Government should leave Hong Kong alone as long as it stays within the Basic Law.⁶² In contrast, Beijing's understanding of autonomy is that democratization in Hong Kong is acceptable only if it will result in 'patriots ruling Hong Kong'. The concession by the Central Government is that Hong Kong will be ruled by Hong Kong people, not by cadres sent from Beijing, but these 'Hong Kong people' have to be those who enjoy the trust and confidence of the Central Government, and not merely the trust and confidence of the people of Hong Kong. Therefore, full democracy will only be allowed if such full democracy will produce a legislature and a government dominated by 'patriots'. Before the social and political conditions in Hong Kong reach that point, democracy in Hong Kong will only be a contrived form

⁶¹ The Election Committee comprises 1,200 members.

⁶² Albert Chen, 'Development of Representative Government', in Johannes Chan & C L Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell, 2011), Ch 8, at paras 8.081-8.086.

of democracy, or 'semi-democracy' as Professor Chen describes it, where free election is permitted only among candidates who are acceptable to the Central Government.

Another ideological concern of the Central Government is that freedom and liberty in Hong Kong are tolerated only to the extent that Hong Kong will not become a counter-revolutionary basis that may threaten the legitimacy or authority of the Central Government. Hong Kong is only a city in China, albeit an important global financial centre. It has an important role to play in the economic reform in China. The Central Government is pleased to see economic growth in Hong Kong. Democratic development is seen as a necessary means to maintain stability and prosperity of Hong Kong, that is, democracy is perceived as a means to maintain economic success and should never threaten the thriving economy of Hong Kong which is seen to be supported by the successful business sector. Therefore, the design of the political system is heavily tilted in favour of the business sector, whereas democracy is associated with a welfare state that will pull back economic development. In the final analysis, to the Central Government, 'one country, two systems' means nothing more than 'one country, two economic systems'.

At the same time, the role of Hong Kong in the development of China has changed over time. It was intended to be a showcase for Taiwan, but the significance of Hong Kong in this respect has diminished over time, especially after Kuomintang, which has adopted a more conciliatory approach towards the Mainland, has regained power in Taiwan. In contrast, Hong Kong becomes increasingly important in the overall strategic development in China. In the early days after the handover, Hong Kong was left out of the national strategic development plan. In 2010, Hong Kong was for the first time included in the national strategic development plan and was designated to play a prominent role as a leading international financial centre and to lead the development in this regard in the Pearl River Delta Region. This news is good for Hong Kong as it is becoming important to China on its own right, providing that it is able to continue to play a leading economic and financial role and to maintain its competitive edges in the rapid economic development in China. At the same time, as the economic power and global influences of China continue to grow, the success of Hong Kong is increasingly attributed by some quarters close to the Central Government to the benevolence of the Central Government and no longer to the legal system and the core values of Hong Kong. It has been said that Hong Kong can only maintain its status as an international financial centre so long as the Central Government wishes it to be. Such attitude appears to be gaining ground as China becomes more confident of herself after the global financial crisis in the early 2010s when China played a pivotal role in curbing a global currency crisis. Such emerging phenomenon, which may be described as a success without an anchor in core values, is a problem that China has to face in her economic and social development and may, if it is allowed to grow unchecked, ultimately destroy the very concept of 'one country, two systems' itself.