憲法研討會:從比較角度看基本法的實施
Constitutional Law Conference on Implementation of the Basic Law : A Comparative Perspective

28 - 29 April 2000
Furama Hotel, Central

~ Programme ~

Day One (April 28, 2000)

8:45 am **Registration**

9:05 am **Welcoming Speeches**

Professor Y C Cheng, CBE, JP, Vice-Chancellor, University of Hong Kong

Ms. Elsie Leung, JP, Secretary for Justice, Hong Kong Special Administrative Region

9:25 am **Presentation of Souvenirs**

10:00 am **Session One: Approaches to Constitutional Interpretation and Litigation**

Moderator
Mr. Anthony Chow, President, The Law Society of Hong Kong

Speakers
Professor Paul Gewirtz, *Potter Stewart Professor of Constitutional Law and Director of The China Law Center, Yale Law School, USA*
"Illustrations of the Application of Different Theories of Constitutional Interpretation"

10:35 am *Tea Break*

10:55 am ***Professor David Beatty***, *Professor, Faculty of Law, University of Toronto, Canada*
"The Forms and Limits of Constitutional Interpretation"

Justice Lynn Smith, *Justice of the Supreme Court of British Columbia, Canada*
"Remedial Options in Constitutional Cases The Canadian Experience"

12:15 pm *Lunch*

1:30 pm **Session Two: Constitutional Review and Resolution of Constitutional Disputes**

Part One: Homegrown Constitutional Jurisprudence

Moderator:
Mr. Ronny Tong SC, Chairman, Hong Kong Bar Association

Speakers:
***Justice Yvonne Mokgoro**, Justice of the Constitutional Court of South Africa*
"Homegrown Constitutional Jurisprudence"

***Mr. Denis Chang** SC*
"Hong Kong Experience in Constitutional Litigation: The Right of Abode Cases"

***Mr. Andrew Bruce** SC, Senior Assistant Director of Public Prosecutions, Department of Justice, HKSAR*
"The Flag Case: A Short Reflection in the Presentation of the Case and Its Significance as a Piece of Constitutional Decision-making"

3:20 pm *Tea Break*

3:35 pm ***Part Two: Constitutional Review and Interpretation from Civil Law Perspective***

Moderator:
Ms. Priscilla Leung, Associate Professor, School of Law, City University of Hong Kong

Speakers:
***Professor Dr. Helmut Goerlich**, Dean of the Faculty of Law and Chair of Constitutional and Administrative Law, Constitutional History, Church and State, University of Leipzig, Germany*
"The Role of the Constitutional Court in the Resolution of Constitutional Disputes - A Critical Outline Guided by the German Example"

***Mr. Li Zaishun**, Secretary of the Committee for the Basic Law, NPCSC*
"The Legal Thoughts of the Hong Kong Basic Law and the Methods of its Proper Implementation - The Comprehensive Grasping of the "One Country, Two Systems" Concept is the Key to the Correct Implementation of the Hong Kong Basic Law"

5:00 pm *Close*

Day Two (April 29, 2000)

9:00 am **Commencement**

9:00 am **Session Three: Resolution of Disputes between the Central and Regional Governments**

Moderator:
The Hon. Margaret Ng, Legislative Councillor (Legal Functional Constituency)

Speakers:

Professor George Winterton, *Professor, Faculty of Law, University of New South Wales, Australia*
"Resolution of Commonwealth - State Disputes in Australia: Lessons for Hong Kong?"

Professor Albert Chen, *Dean of the Faculty of Law, University of Hong Kong and Member of the Committee for the Basic Law, NPCSC*
"Constitutional Interpretation: A Comparison of the Common Law and Mainland Approaches"

Professor Yash Ghai, *Sir Y K Pao Chair of Public Law, Faculty of Law, University of Hong Kong*
"Models in Autonomous Arrangements"

Mr. Robert Allcock, *Solicitor General (Ag), Department of Justice, HKSAR*
"Application of Article 158 of the Basic Law"

11:20 am *Tea Break*

11:40 am **Session Four: Panel Discussion on Constitutional Interpretation and Constitutional Review**

Moderator:
Mr. Andrew Byrnes, Associate Professor and Director of the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong

Discussants:
Mr. Robert Allcock, *Solicitor General (Ag), Department of Justice, HKSAR*

Professor Johannes Chan, *Head of the Department of Law, University of Hong Kong*

Professor Albert Chen, *Dean of the Faculty of Law, University of Hong Kong and Member of the Committee for the Basic Law, NPCSC*

Professor Peter Wesley-Smith, *Former Chair of Constitutional Law, Faculty of Law, University of Hong Kong*

1:00 pm *Lunch*

2:30 pm *Close*

Constitutional Law Conference on Implementation of the Basic Law: A Comparative Perspective
28 & 29 April 2000
Welcoming Speech by
Ms Elsie Leung, JP, Secretary for Justice, HKSAR

Professor YC Cheng, Distinguished Guests, Ladies and Gentleman,

I would like to welcome all of you to this important constitutional law conference organised jointly by the Faculty of Law of the University of Hong Kong and the Department of Justice of the Hong Kong Special Administrative Region.

This conference commemorates the 10th anniversary of the promulgation of the Basic Law. It provides a forum for constitutional law experts from many jurisdictions to address important constitutional issues. It will also enable lawyers and other interested parties in Hong Kong to consider our own constitutional developments from a comparative perspective. We are indeed very much honoured to have today constitutional experts from various jurisdictions to share with us their experience in constitutional interpretation and litigation.

The Basic Law – a unique document

The Basic Law, our constitutional instrument, was promulgated by the National People's Congress on 4 April 1990. It translates into domestic constitutional terms the commitment, under the Sino-British Joint Declaration, to ensure that the current social, economic and legal systems in Hong Kong will remain unchanged for 50 years under the principle of "one country, two systems".

The Basic Law is therefore a unique document with at least three dimensions: international, domestic and constitutional. This aspect has been well described by Chan CJHC in the first constitutional challenge since Reunification, *HKSAR v Ma Wai Kwan, David*[1]:

> "The Basic Law is not only a brainchild of an international treaty, the Joint Declaration. It is also a national law of the PRC and the constitution of the HKSAR. It translates the basic policies enshrined in the Joint Declaration

[1] [1997] HKLRD 761 at 772I-773B

into more practical terms. The essence of these policies is that the current social, economic and legal systems in Hong Kong will remain unchanged for 50 years. The purpose of the Basic Law is to ensure that these basic policies are implemented and that there can be continued stability and prosperity for the HKSAR. Continuity after the change of sovereignty is therefore of vital importance.

...

The Basic Law is a unique document. It reflects a treaty made between two nations. It deals with the relationship between the sovereign and an autonomous region which practises a different system. It stipulates the organisations and functions of the different branches of government. It sets out the rights and obligations of the citizens. Hence, it has at least three dimensions: international, domestic and constitutional. It must also be borne in mind that it was not drafted by common law lawyers. It was drafted in the Chinese language with an official English version but the Chinese version takes precedence in case of discrepancies. That being the background and features of the Basic Law, it is obvious that there will be difficulties in the interpretation of its various provisions."

Comparative Materials in Constitutional Interpretation

We are, however, not alone in facing the challenge of constitutional interpretation. I am sure that the experts speaking today will deal with this question in greater detail. But let me cite a few examples to illustrate the level of complexity that this question involves.

In the United States, for example, there have been a great number of constitutional cases and learned commentaries on the interpretation of the American Constitution in the last two hundred years. Over the last two decades, moreover, constitutional debate frequently has been characterized as one between originalism or interpretivism on the one hand and non-originalism or non-interpretivism on the other hand. Originalism concerns the view that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution." In contrast, non-originalism refers to the "contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document." [2]

---

[2] Erwin Chemerinsky, *Constitutional Law - Principles and Policies* (1997), at p.17

In Canada, it is well established that the language of the Constitution Act 1867 is not to be frozen in the sense in which it would have been understood in 1867. Rather, the language is to be given a "progressive interpretation" so that it is continuously adapted to new conditions and new ideas[3]. The principle of progressive interpretation may be compared with originalism, which focuses on the original understanding of a constitutional text.

In Australia, legal reasoning as the only proper approach for a court of law received great emphasis in the much celebrated decision of the High Court of Australia in the *Engineers' case (1920)*[4]. In recent years, however, there have been indications of a change of attitude and approach – a greater awareness by some judges of the role of the court and its relation to social and political change.[5]

The experience in these common law jurisdictions, as well as that of the civil law tradition, will provide very useful insight into the complicated question of constitutional interpretation. SAR courts are authorised by Article 84 of the Basic Law to "refer to precedents of other common law jurisdictions" in the adjudication of cases.

Purposive Approach and Home-grown Jurisprudence

While comparative materials are very helpful in Basic Law interpretation, we must keep in mind the differences in constitutional arrangements between the Basic Law and other constitutional instruments. The ultimate task of an interpreter of the Basic Law is to arrive at the meaning of the Basic Law, not any other constitutional provisions.

Interpretation of the Basic Law is complicated by the fact that it is a national law implemented in a common law system preserved under the Basic Law. The unique nature of the Basic Law is exemplified by Article 158 which sets out, in accordance with Article 67(4) of the PRC Constitution, that the power of interpretation of the Basic Law lies in the Standing Committee of the National People's Congress, which has authorized the courts of the HKSAR to interpret on their own the provisions of the Basic Law that are within the limits of the autonomy of the Region in adjudicating cases.

In this regard, it has been suggested, in the *David Ma* case, that the common

---

[3] Hogg, *Constitutional Law of Canada (updated to 1999)* at 57-8
[4] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129
[5] Zines, *The High Court and the Constitution* (1997), at p 425, 483

law principles of interpretation, as developed in recent years, are sufficiently wide and flexible to allow a purposive interpretation of the plain language of the Basic Law[6]. This purposive approach to constitutional interpretation has, in particular, been summarised by the Court of Final Appeal in the case of *Ng Ka Ling*[7]:

> "As is usual for constitutional instruments, [the Basic Law] uses ample and general language. It is a living instrument intended to meet changing needs and circumstances.
>
> It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument[8]."

Applying a purposive approach in developing our home-grown constitutional jurisprudence, the Court of Final Appeal has, in the recent flag desecration case, taken into full account comparative materials in the interpretation of the Basic Law. In that case, in holding that the restriction on freedom of expression imposed under the National and Regional Flag Ordinances is legitimate to protect societal and community interests, the Court of Final Appeal made reference to a number of democratic nations which have ratified the International Covenant on Civil and Political Rights, and which have enacted legislation that protects the national flag by criminalising desecration[9]. The Court also referred to the two American flag desecration cases,[10] and decisions and practices in overseas countries[11]. The SAR Government, for the first time, tendered evidence by way of a Brandeis Brief, which has been commonly deployed in constitutional cases in the United States and Canada.

---

[6] *HKSAR v Ma Wai Kwan, David,* ibid. at 803D per Mortimer V-P
[7] *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315
[8] *Ng Ka Ling v Director of Immigration,* ibid. at 339I-340B per Li CJ
[9] *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907, at 926F per Li CJ
[10] *Texas v Johnson* 491 US 397 (1989); *United States v Eichman* 496 US 310 (1990)
[11] Italy, Germany, Norway, Japan & Portugal, *HKSAR v Ng Kung Siu,* ibid. at 931D-932A per Bokhary PJ

These all point to the fact that the constitution is a living instrument, capable of meeting changing needs and circumstances. This was elegantly captured by Lord Sankey's metaphor of "a living tree capable of growth and expansion within its natural limits"[12].

We are at the beginning of the journey to develop our own constitutional jurisprudence. The experience from overseas jurisdictions will be very valuable to us, and will provide a fruitful source of inspiration for such development. We are fully aware, however, that we are faced with unique constitutional issues that may not have been encountered elsewhere. With a positive approach, and knowledge gained from other jurisdictions, there is no doubt that such issues can be resolved in a satisfactory manner under the principle of "one country, two systems". I am confident that the sharing of experience in constitutional interpretation and litigation from a comparative perspective in this conference will be a helpful step towards this end.

I would like to thank the speakers and moderators, and all of you who are participating in this conference. I would also like to express my gratitude for the hard work of the Faculty of Law of the University of Hong Kong in co-organising this conference. I hope you will all enjoy it. Thank you.

#17520 v3

[12] *Edwards v A.-G. Can.* [1930] AC 124, at 136, see Hogg, *Constitutional Law of Canada (updated to 1999)* at 33-17

憲法研討會: 從比較角度看基本法的實施
Constitutional Law Conference on Implementation
of the Basic Law : A Comparative Perspective

Approaches to Constitutional Interpretation: Comparative Perspective and Chinese Characteristics

Professor Paul Gewirtz

APPROACHES TO CONSTITUTIONAL INTERPRETATION: COMPARATIVE PERSPECTIVES AND CHINESE CHARACTERISTICS

Paul Gewirtz
Potter Stewart Professor of Constitutional Law
and Director, The China Law Center
Yale Law School

Outline

I What A Constitution Is

Theme. Constitutional interpretation depends centrally on what we understand a constitution to be.

A. The U.S. Constitution. Chief Justice John Marshall's Understanding

The U.S. Constitution is law
The U.S. Constitution is superior law
The U.S. Constitution is superior national law
The U.S. Constitution is adaptable

B The Hong Kong Constitution

What *is* the Basic Law?
What kind of superior law is it?
What kind of national law is it?
Does it embody international law obligations?

C. The PRC Constitution: Is it law?

II. Who Interprets The Constitution?

Theme: Institutional arrangements for interpreting the constitution shape the interpretations that are made.

A. The Role of Courts as Interpreters

B. Models: Supreme Court, Constitutional Court, and "Conseil"

C. The Role of Local Courts and National Courts in Interpreting National Law

D. Institutional Arrangements in Hong Kong and Beijing

The institutional interface between Hong Kong and Beijing

The role of the Hong Kong courts

Legislative interpretation of the Basic Law by the NPC Standing Committee

The issue of national supremacy and local finality
The issue of legislative, rather than judicial, interpretation
The role of the Basic Law Committee

Institutional possibilities for constitutionalism in Mainland China

III. Constitutional Interpretation And Politics

Theme: What is the proper relationship between courts that review constitutional questions and other branches of government?

A. The Distinctive Power of Courts in Constitutional Interpretation

B. The Legitimacy of Judicial Review of Constitutional Issues

The U.S. debate about the "countermajoritarian difficulty"of judicial review

The "countermajoritarian difficulty" as a problem deriving from the leeways that exist in interpreting constitutional provisions that are vaguely or generally phrased

The different spheres for judicial activism and judicial restraint

The relevance of this debate to Hong Kong

C. An assessment of recent cases from the U.S. and Hong Kong

The "assisted suicide" case in the United States
The "right of abode" and "flag desecration" cases in Hong Kong

憲法研討會: 從比較角度看基本法的實施
Constitutional Law Conference on Implementation
of the Basic Law : A Comparative Perspective

The Forms and Limits of Constitutional Interpretation

Professor David Beatty

TABLE OF CONTENTS

I. INTRODUCTION

In the last half of the twentieth century the rule of law emerged as one of the defining ideas in the political organization of the modern democratic state. During this period people all over the world came to insist that their governments had to respect a set of basic human rights of everyone who was affected by their rule. Rights - individual and collective, positive and negative, first, second and third generation - have become the dominant faith of our time. In this era, as in no other, country after country entrenched bills of rights into their constitutions at the moment of their liberation from arbitrary and despotic regimes. In the period following the second World War, and especially after the Berlin wall was torn down, there was virtually a revolution of rights. In Asia, Africa, Europe and the Americas, democracy came to be understood as more than merely majority rule.

This proliferation of constitutional bills of rights has had a profound effect on the institutional structures of government. In every country that has adopted a written bill of rights, the authority of judges has grown apace. Wherever bills of rights are written, judges are made their guardians. The assumption is courts are in the best position to protect these new entitlements because of their independence from the elected branches of government. The judiciary is expected to have a capacity for fairness and impartiality that the executive and legislature lack. Judges do not have the same personal stake as politicians in disputes about whether some government initiative is legitimate (constitutional) or not, or so it is thought.

As more and more courts have been given the responsibility of 'guarding' their countries' constitutions, a rich jurisprudence has built up that is ripe for comparative study. Lots of courts have had plenty of opportunities to offer their opinions,

often on the same or similar questions. Their judgments show how different courts think about rights and about how they should exercise their powers of review. Reading these cases gives you a good idea of what constitutional rights actually mean in practice and, at the same time, offers a new perspective on the larger political question of whether it really is compatible with democracy and majority rule to allow an unelected and unaccountable legal elite to review and overturn the acts and decisions of the other two, elected branches of government.

Anyone who is interested in discovering how judges have exercised their powers of review and defended the idea of human rights faces an initial problem of where to begin. The caselaw is large and there are numerous points of departure from which they might launch their inquiry. Cases that deal with the rights of people to live their lives according to their religious beliefs are one obvious possibility. Freedom of religion is the oldest of the internationally recognized human rights. Claims for the right to choose one's own spiritual path were at the centre of the earliest struggles against oppression and arbitrary rule. In 1791, the authors of the American Bill of Rights thought religious freedom was so fundamental to the liberty of the individual and to justice in their communities that they picked it to be the first guarantee in the first amendment they made to their constitution.

The American experiment was a bold and radical initiative. By making religious liberty a legally enforceable right, the Americans believed they could avoid the religious persecution and sectarian strife that has scarred all human history and, sad to say, has remained an open wound all over the world – witness Bosnia, India, Indonesia, Northern Ireland, Nigeria, Palestine and the Sudan – to this day. The Americans hoped that by making

courts responsible for resolving the most serious grievances of church/state relations, all the carnage and killing that has been carried out in the name of religion could be stopped. They thought reason and principle could strike a balance between the spiritual will of a community and the personal conscience of the individual that was just and fair to both.

Comparing the way people have been treated by different courts around the world when issues of religious freedom are at stake provides a good test of whether those who wrote the American constitution were justified in believing that the law is capable of providing an objective and impartial way of marking off the boundaries of church and state. In the minds of many people who have thought about it, the idea that there are neutral principles that can reconcile the spiritual and secular dimensions of human life is an illusion. Conventional wisdom has it that there is no disinterested perspective that is not embedded in and contaminated by some personal or political point of view. In the words of Stanley Fish, to even search for such a vantage point is to embark on "mission impossible." [1]

The jurisprudence that the courts have been writing, especially over the last fifty years, should be very helpful in deciding who is right. On several issues –such as the place of religion in public institutions like prisons or schools or in the delivery of medical services, or whether exemptions should be made to laws of general application like criminal codes – opinions have been written by a number of different courts. With a lot of jurists having reflected on these and other questions concerning church/state relations, it should be

---

[1] Stanley Fish, "Mission Impossible: Settling the Just Bounds Between Church & State", (1997) 97 Columbia Law Review, 2255; *The Trouble with Principle*, Chap. 9, Harvard 1999.

possible to say whether there is a universality to law that differentiates it from both politics and philosophy.

Even though there is enormous variation in the ways constitutional texts address issues of religious liberty and church-state relations, as one reads more and more cases in which courts have grappled with these questions, two dominant models or modes of analysis emerge. The first looks for all of the answers in the words of the text. It is all about interpretation from beginning to end. Many courts, particularly those with connection to Anglo-American law, have made use of this approach, but its champion is undoubtedly the U.S. Supreme Court.

Because constitutional texts tend to be written in a style that is sweeping and all encompassing (guaranteeing "life", "liberty", "equality", etc.) and do not speak directly to issues like school prayers or religious exemptions, judges who treat judicial review as an exercise in semantics, must have resort to legal 'dictionaries', or sources of meaning, to point them to the rule or definition that will settle each case. The sources of meaning that American judges rely on the most are the historical events and writings surrounding the entrenchment of the constitution and the reflections of those who preceded them on the Bench. When American judges are called on to explain how the words in the First Amendment to the U.S. Constitution, – that guarantee the "free exercise" of religion and enjoin Congress from promoting "an establishment of religion", – speak to specific issues like religious exemptions or school prayers, original understandings and the Court's earlier precedents are where they go for help. In their earliest decisions, when precedents were few or non-existent, the judges relied mostly on historical sources. That was certainly

true of its very first ruling on the religion clauses in *Reynolds v. U.S.*,[2] handed down over 120 years ago, when it validated a federal law that made bigamy, (which was an important part of the lives of adherents of the Church of Jesus Christ of Latter Day Saints) a crime. Over time, however, as more and more cases have been brought to the Court, its own prior rulings have come to play an increasingly dominant role on how the judges rule on issues like school prayers and religious exemptions.

The second way judges resolve questions about religious liberty and church/state relations is much more pragmatic and much less interpretive than the methodology the Americans prefer. Like the interpretive model, many courts have made use of this approach although some, like Germany's Constitutional Court, rely on it more consistently than others and indeed use it practically all the time. Although its analysis begins with and is grounded in the relevant constitutional text, sooner or later its focus shifts to the facts of the case and in particular to the details of the laws whose constitutional integrity has been attacked. Rather than supplying the judges with a definition or rule that categorically settles the outcome of a case, on the programmatic approach, the interpretive phase only identifies principles and criteria courts can use to evaluate the validity of the law and the rights and other interests it affects.

The principles test the ends and the means and the effects of whatever action of the state is being reviewed and they insist on a measure of proportionality between all three. In defining the parameters of religious liberty that are protected under its Basic

---

2 *Reynolds v. U.S.* 1878 S.C. 145.

Law, the German Court has said the state must strive to "reach an optimization of the conflicting interests" that are affected by the relevant law and avoid policies that are "excessive". On questions like the place of prayers in public schools, where it perceives that there is a conflict of competing rights at stake, the Court relies on a 'principle of practical concordance' according to which, "no one of the conflicting legal positions [is to] be preferred and maximally asserted, but all [are to be] given as protective as possible an arrangement."[3]

Even from such a skeletal description of the way the interpretive and pragmatic approaches work, it is apparent that they envisage radically different roles for the courts. The former conceives the process of review as an exercise in semantics in which judges are asked to elaborate and extend the meaning of the constitution. The latter looks to the courts to judge whether the justifications state authorities offer for the laws they enact meet basic tests of legitimacy that are immanent in all constitutional texts. When the decisions of the two courts are put side by side the differences are dramatic and stark. In reasoning and result these courts are at opposite ends of a spectrum. Where the Germans have ruled school prayers are permissible and religious exemptions may be required even in criminal laws, the Americans have said just the opposite.

---

3 *Classroom Crucifix* (1996) 93 BverfGE 1; translated and reproduced in part in Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, (2nd ed.).

II. INTERPRETIVISM

Lee v. Weisman [4] and *Oregon v. Smith* [5] are two relatively recent decisions of the U.S. Supreme Court that show off all of the characteristic features of the interpretive approach. In the lexicon of constitutional theorists both are pivotal cases. [6] Each deals with an aspect of religion – ceremonies and prayers – that lie at its core and both were regarded as precedent setting/shattering decisions when they were handed down. [7] In *Lee v. Weisman*, the Court was asked whether allowing a non-denominational, ecumenical, benediction and prayer to be said at the beginning of a high school graduation ceremony violated the first amendment's anti-establishment clause. In *Oregon v. Smith*, the issue was whether the members of the Native American Church who ingested peyote during certain spiritual ceremonies had a constitutional right to a religious exemption from a state law that made its possession a crime. In *Lee v. Weisman*, five judges thought the prayer violated the first amendment. Four disagreed. In explaining the reasons for their conclusion, three of the

---

4 *Lee v. Weisman*,505 U.S. 577 (1992).

5 *Oregon v. Smith* 496 U.S. 913 (1990).

6 Ronald Dworkin, *Laws Empire*, Harvard 1986, Chap. 2, p. 45; J. Habermas, *Between Facts and Norms*, M.I.T. Press, 1996, Chaps. 5 and 6.

7 *Oregon v. Smith*, in particular, attracted a lot of heat. See e.g., Michael McConnell, "Free Exercise Revisionism" . . . (1990) 57 University of Chicago, Law Review 1109; D. Laycock, "The Remnants of Free Exercise" [1990] Sup. Ct. Rev 1. A few commentators did endorse the decision, see W. Marshall, "The Case Against Constitutionally Compelled Free Exercise Exemption", (1990) 40 Case Western Res. Law Review 357, M. Tushnet, "The Rhetoric of Free Exercise Discourse" (1993) Brigham Young L. Rev. 117. For a critique of the Court's decision in *Smith* in conjunction with its ruling in *Lee*, see Suzanna Sherry, "*Lee v. Weisman*, Paradox Redux", (1992) Sup. Ct. Rev. 123.

five judges in the majority felt compelled to offer their own separate opinions. In *Oregon v. Smith* six judges voted to uphold the state's drug laws, three voted against. In this case one of the judges in the majority - Sandra Day O'Connor - wrote a separate concurring judgment with which the three dissenting judges were in substantial agreement except in the conclusion she reached!

The division of opinion among the judges in both cases centered on which source of meaning had priority over the others and what definitions they revealed. In *Lee v. Weisman*, the majority thought the Court's own prior rulings were "controlling" and "compelled" the conclusion that prayers had no place in the life of public schools. Justice Kennedy, who delivered the opinion of the Court, wrote that, "by any reading of our cases, the conformity required of the [dissenting] student[s] in this case was too high . . . to withstand the test of the Establishment Clause". He thought the prayer and benediction were especially improper because as a practical matter, "the state . . . has compelled attendance and participation in an explicitly religious exercise at an event in [which] the objecting student had no real alternative to avoid." Justices Blackmun and Souter agreed with Kennedy that the case could be disposed of on a straightforward application of the Court's own prior rulings but they wrote separate concurring opinions, which Justices Stevens and O'Connor also signed, to emphasize that on their understanding of the Court's past decisions, all school prayers violate the Establishment Clause because they constitute an illicit endorsement of religion whether or not anyone feels any pressure or coercion from the event.

Four justices - Scalia, Rehnquist, White and Thomas - voted to sustain the validity of the graduation prayer and their disagreement with their colleagues was both

nasty and profound. They condemned the majority's opinion as "incoherent" and one which made "interior decorating" look like a "rock hard science". Not only did they dispute the majority's reading of its earlier school prayer decisions, they even questioned the legitimacy of deciding the case on a jurisprudence which in their view had "become bedevilled (so to speak) by reliance on formulaic abstractions that are not derived from but positively conflict with our long accepted constitutional traditions." They argued that the meaning of the Establishment Clause should be determined "by reference to historical practice and understandings". They said the Court's interpretation should "comport with what history reveals was the contemporaneous understanding of its guarantees". On that test, because prayers and religious innovations had always played a part in government ceremonies and proclamations, they thought it was axiomatic that they should be permitted on this occasion as well.

Although the Court was badly fractured in *Oregon v. Smith*, the division of opinion was not as extensive or deep as it subsequently became in *Lee v. Weisman*. In *Smith* all of the judges were agreed that precedent, not history, was where the answer to the question - of whether the members of the Native American Church had a constitutional right to use peyote as part of their religious ceremonies - lay. Where they differed was in the principles and tests they thought the prior caselaw supplied.

Although Scalia's interpretation of the Establishment Clause fell one vote short in *Lee v. Weisman*, his reading of the caselaw on the free exercise clause appealed to four of his colleagues in *Oregon v. Smith* and his judgment was delivered as the opinion of the Court. As he read its earlier pronouncements, the Court had never said people's religious

beliefs could excuse them from obeying a law of general application that was binding on everyone else. Although he acknowledged there had been several occasions when the court required exceptions to be made to accommodate people's religious beliefs, he said they were different because they were not dealing with laws, like *Oregon's*, that made activities like the use of drugs criminal offenses for everyone in the state.

Sandra Day O'Connor and three justices who were widely regarded at the time as being the most liberal on the Court (William Brennan, Thurgood Marshall and Harry Blackmun) thought Scalia's interpretation of the Court's earlier exemption cases to be way wide of the mark. O'Connor accused Scalia of "dramatically depart[ing] from well settled First Amendment jurisprudence". Blackmun described the Court's opinion as "a distorted view" that "mischaracteriz[e]" the Court's precedents. As they read the Court's earlier interpretations of the "free exercise" clause, religious exemptions had to be written into state laws unless it could be shown that it was essential to some compelling state interest that they be applied and enforced in a uniform way. At the end of her judgment, O'Connor took a different view than her three liberal colleagues on whether the state could satisfy this test on the facts of the case and ended up voting with the majority to reject Smith's appeal for a religious exemption from Oregon's drug laws.

Lee v. Weisman and *Oregon v. Smith* are not atypical cases. Together they reflect almost all of the defining features of the large jurisprudence that has been written by the U.S. Supreme Court on the subject of religious rights. In addition to clearly conveying the preference of all of the judges for interpretive strategies to mark off the boundaries of church/state relations, *Lee v. Weisman* and *Oregon v Smith* highlight at least three other

characteristics that distinguish the American conception of the role of the Court and the process of constitutional review. First is the categorical, rule like quality of the rulings in the two cases. As in virtually all of its pronouncements on the nature and extent of religious freedom that is guaranteed by the First Amendment, the judgments in *Lee v. Weisman* and *Oregon v. Smith* are marked by very sharp, categorical distinctions and by very rigid and unbending rules. Laws that make it difficult or unlawful to practice some part of a religion (*Smith*) are judged by one set of rules; laws that force people to defer to religious ideas and practices to which they object, (*Weisman*) by another. The free exercise and establishment clauses are read as entirely discrete and separate parts of the constitution, that apply to different kinds of cases by means of very different rules. After *Lee v. Weisman*, the anti-establishment rule was the more rigorous of the two in protecting religious minorities against indirect as well as direct invasions of religious liberty and it superseded claims for accommodation under the free exercise clause. The latter, according to the majority opinion in *Smith*, only protected people against direct and intentional limitations of religious activity and is vulnerable to virtually any public purpose a government might choose to pursue.

The second feature of how the U.S. Supreme Court has approached the first amendment's guarantee of religious freedom that is highlighted in these cases is the way in which religious rights in the United States can and have shifted and evolved over time.[8] As both cases demonstrate, the historical record and the Court's own precedents are open to

---

[8] For an introduction to the evolutionary character of historical jurisprudence and its place in German constitutional law, see Ernst-Wolfgans Bockenforde, *State, Society and Liberty*, St. Martins Press, 1991 Chap. 1.

such radically different interpretations that settled meanings are never completely secure. Laments in dissenting opinions that the Court has "broken faith" with the understanding of the founding fathers and the communities they represented (as in *Lee v. Weisman*), or "distorted" the Court's own prior rulings (as in *Oregon v. Smith*), are common in the annals of American constitutional law. Competing interpretations and doctrines hold sway at different times and the scope of religious freedom ebbs and flows apace. Religious objections to having to salute the flag are rejected in one case and accepted in the next. [9] Funding educational programmes in parochial schools is proscribed on one occasion, endorsed on another. [10] A decision can become the leading precedent for a period of time and suffer a silent burial at a later date. [11] It is as if, to borrow Ronald Dworkin's provocative (and very interpretive) metaphor, in each era the Court writes a new chapter to a chain novel that has no apparent ending.[12]

The third, and for many the most striking feature of the way American judges think about religious freedom and the first amendment that is prominent in both *Lee v. Weisman* and *Oregon v Smith*, is its intensely personal character. Just as Justices Blackmun, Souter, O'Connor and Scalia all felt compelled to write separate concurring or dissenting opinions in either or both of these cases, virtually every judge who has sat on the U.S.S.C.

---

9 *Minersville School District v. Gobitis* 310 U.S. 586 (1940); *Board of Education v. Barnette* 319 U.S. 624 (1942).

10 *Aguilar v. Felton* 473 U.S. 402 (1985); *Agostini v. Felton* 521 U.S. 203 (1997).

11 *Lemon v. Kurtzman* 403 U.S. 602 (1971); *Lee v. Weisman*, supra note 4.

12 Dworkin, *Laws Empire*, supra note 6, Chap. 7.

has assumed (and in the case of Felix Frankfurter and William Brennan explicitly defended)[13] the constitutional authority to decide which definitions, doctrines, rules etc. to apply and, accordingly, what the parameters of religious freedom in America will be. Virtually every important ruling in the last fifty years is marked by the same multiplicity of opinions that were elicited in *Lee v. Weisman* and *Oregon v. Smith*. Together they confirm the empirical truth of Chief Justice Hughes' often quoted remark that, in the United States, "the constitution is what the judges say it is"!

Because there is more than one dictionary from which they can choose, each judge has an enormous discretion in defining which rights are protected in the first amendment and what the practical meaning of "state neutrality" in matters of religion will be. From *Lee v. Weisman* and *Oregon v. Smith*, and even more from the full jurisprudence on religious freedom of which they are a part, it is quite easy to construct different profiles for each of the judges who have sat on the Court. Some take the view that the proper way to read the religion clauses is to define the principles of state neutrality so that the elected branches of government have as much room to manoeuver as possible. On this view, short of malevolent acts of coercion or discrimination, politicians and their officials are given free reign to enact whatever laws they please, regardless of what impact they have on the lives of religiously minded people and the communities in which they live. Only the ends or objectives of the laws are assessed by the Court. No evaluation is made of the means - the

---

13 See, Frankfurter's judgment in *McGowan v. Maryland* 366 U.S. 420, 459 (1960); and Brennan's extra judicial reflections in "In Defense of Dissents", (1986) 37 Hastings L.J. 427.

particular program or policy instrument - that Governments choose to enact into law. This understanding of state neutrality has been favoured by a number of judges who have sat on the Court while William Rehnquist has been Chief Justice including Antonin Scalia, Clarence Thomas, Byron White and Rehnquist himself. In fact this is the definition they invoked in the opinions they wrote upholding the Government's initiatives in both *Smith* and *Lee*.

This minimalist definition of state neutrality contrasts sharply with the more robust reading that the Court generally gave to both the establishment and free exercise clauses when it was under the stewardship of Earl Warren and Warren Burger. This earlier interpretation, which implies much more stringent limitations on the ways Governments can act, has generally found favour with those justices who are inclined to a liberal conception of politics and the law. On this view, means as well as ends are scrutinized by the Court. William Brennan came to be one of the leading exponents of this more demanding understanding of state neutrality but others including Thurgood Marshall, Harry Blackmun, William Douglas as well as Warren and Burger followed more or less the same analysis. Today, Sandra Day O'Connor and David Souter, who have said that most endorsements of religion by the state will constitute invalid establishments[14] and that sometimes states must make exceptions for people on account of their religious belief,[15] come closest to this approach.

---

[14] *Lynch v. Donnelly* (1984) U.S. 668 and *Lee v. Weisman*, supra note 4.

[15] *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah* (1993) 113 Sup. Ct. 2217.

For a judge like Brennan, the religion clauses in the first amendment impose two independent but complimentary duties on Governments and their officials. Like Jefferson, Brennan believed the prohibition against "an establishment of religion" creates a virtually insurmountable wall of separation between the church and the state.[16] In addition, he thought that in order to respect each person's right to exercise their religious beliefs, the state is obliged to accommodate the choices and decisions of religiously minded people where it can do so without compromising its own interests and projects in any substantial way.[17] Thus, against the laissez-faire definition of state neutrality that the majority adopted in *Oregon v. Smith*, Brennan and his fellow liberals insisted that the state legislature should have granted the Native American Church an exemption from its law making any and all use of peyote a crime.

In between these two extreme positions it is possible to find judges who craft their visions of state neutrality in matters of religion by borrowing bits from both. Some judges, who have been accused of being insensitive if not downright hostile, to religion have coupled the narrow, weak reading of the free exercise clause that Scalia and the Court favoured in *Oregon v. Smith* with Brennan's strict interpretation of the anti-establishment clause. On this approach, accommodating the religious beliefs of those adversely affected by some law or regulation is never required by the constitution and, coincidentally, state

---

16 *Aguilar v. Felton, Agostini v. Felton,* supra note 10.

17 *Oregon v. Smith*, supra note 5.

encouragement and support is almost never allowed. Felix Frankfurter[18] and Hugo Black[19] are two of the better known justices in America's legal pantheon who have been attracted to such an understanding of state neutrality and John Paul Stevens[20] who voted with the majority in both *Lee v. Weisman* and *Oregon v. Smith* continues to rely on it to this day.

Standing opposite Stevens, Black and Frankfurter was Potter Stewart who sat on the Court in the Warren-Burger years. His definition of state neutrality was based on a broad and expansive reading on the free exercise clause[21] and a correspondingly weak and relatively unconstraining interpretation of the anti-establishment rule[22] - just the reverse of theirs. As would be expected, this understanding tends to treat religious organizations and their members quite sympathetically and so receives their endorsement and applause.[23] On Stewart's interpretation, not only is the state required to grant exemptions to religiously minded people from laws that are especially burdensome for them when it can do so at little

---

18 *Minersville School District v. Gobitis*, supra note 9; *Everson v. Board of Education* 330 U.S. 1 (1946); *Board of Education v. Barnette* 319 U.S. 624 (1943); *McGowan v. Maryland* 366 U.S. 420 (1961).

19 *Everson v. Board of Education ibid.*; *Engel v. Vitale* 370 U.S. 421 (1962); *Braunfeld v. Brown* 366 U.S. 599 (1961).

20 *Lee v. Weisman* supra note 4; *Smith v. Oregon*, supra note 5; *Lee v. U.S.* 455 U.S. 263; and generally D. Laycock "Formal, Substantive and Disaggregated Neutrality towards Religion" (1990) 39 Depaul Law Review 993.

21 *Sherbert v. Verner* 374 U.S. 398 (1963); *Braunfeld v. Brown* , supra note 19.

22 *Engel v. Vitale*, supra note 19; *Everson v. Board of Education*, supra note 18; *McGowan v. Maryland*, supra note 18; *Schempp v. School District of Abington* 374 U.S. 203, 308.

23 M.A. Glendon and R.F. Yanes, "Structural Free Exercise" (1991) 90 Michigan Law Review 477.

or no cost but, in addition, it must make public spaces and institutions as accessible to religious organizations and their members as they are to secular groups.

III. PRAGMATISM

The idea that each and every member of a court has the authority to choose their preferred interpretive strategy and define for themselves the practical boundaries of religious freedom for their communities is not one that has found favour among those who have sat on the German Constitutional Court. Rather than each judge expressing his or her own personal opinion, more often than not, the Bundesverfassungsgericht speaks unequivocally, with an institutional voice. Moreover, when it addresses the issue of the right of religious minorities to be free from burdens imposed by the state, the German Court expresses itself in a very different way. Even though the Basic Law contains much more extensive references to the place of religion in the German state, comparatively little in any judgment is given over to the interpretation of the text, to historical analysis or to reviewing the Court's earlier decisions.

Not only does the text of the constitution figure less prominently in the judgments of the German Court, its method of interpretation is quite different as well. More emphasis is put on the words and structure of the document and especially on the purposes and values they express. Rather than looking to history and caselaw to pour meaning in the text, the German Court proceeds in a more purposeful and logical way. In its words, the meaning of religious liberty follows from putting "human dignity...[as]...the highest value

and [recognizing]...the free self-determination of the individual...as an important community value."[24]

Undoubtedly the most profound difference in the two approaches is that instead of looking to the constitutional document to provide definitive answers to hard practical questions like school prayers and religious exemptions, the Federal Constitutional Court deduces formal principles like 'practical concordance' from the text which it then uses to evaluate the relevant interests as impartially and objectively as it can. In sharp contrast to the American practice of analyzing positive (free exercise) and negative (anti-establishment) claims of religious freedom under separate parts or categories in the constitution, the German method is to rely on the same principles to evaluate and reconcile the competing interests at stake regardless of whether the claim is cast in positive or negative terms and regardless whether those defending the action of the state rely on the well being of the community at large or on the rights of some of its members. Practical, fact specific reasoning, rather than interpretive insight, is how the Germans decide whether someone's religious freedom has been violated or not.

In its *School Prayer* decision, the Constitutional Court recognized that both a positive freedom to publicly acknowledge one's religious beliefs and a negative freedom from being forced to defer to someone else's faith were at stake. The Court saw its task as having to strike a balance between the two. In a judgment that echoes many of the

---

[24] *Blood Transfusion*, (1971) 32 BverfGE 98, translated and reproduced in part in *Kommers*, supra note 3. See generally W. Brugger, "Legal Interpretation, Schools of Jurisprudence and Anthropology: Some Remarks From a German Perspective", (1993) 43 American Journal Comparative Law 395.

sentiments that were expressed by Antonin Scalia and the other three judges who dissented in *Lee*, the Court concluded that forcing dissenting pupils to abstain from school prayers would rarely put them "into an unbearable position as an outsider." Allowing the objection of a single dissenting pupil to automatically trump the rights of religious students to express their beliefs would be out of all proportion to the injury or harm involved. In the words of the Court: "An assessment of the conditions under which the prayer is to occur, the function the teacher has in connection with this exercise and the actual conditions in the school leads us to conclude that we need not fear discrimination against a pupil who does not participate in the prayer - at least not regularly."[25]

In its *Blood Transfusion* case the Court approached the conflict between the traditional goals of criminal law (retribution, rehabilitation and prevention of socially harmful behaviour) and the freedom of people to live their lives according to their religious beliefs in exactly the same way. The case arose when a person who was acting out of his religious beliefs was convicted of criminal negligence for allowing his wife to die when, following her instructions, he did not transfer her to a hospital when she was in need of a blood transfusion. On the facts of the case, everyone on the Court thought that labelling and treating the husband as a criminal would represent an "excessive social reaction" and a violation of his human dignity. As the Court explained: "Criminal punishment, no matter

---

25 *School Prayer* (1979) 52 BverfGE, translated and reproduced in part in *Kommers*, supra note 3..

what the sentence, is an inappropriate sanction for this constellation of facts under any goal of the criminal justice system. . ."[26]

The different methodologies that have been employed by the German and American Courts have led them to entirely different understandings of what it means for the state to remain neutral in matters of religion. In American constitutional law, neutrality is defined, for the most part, by the aims and objectives of the state. The anti-establishment clause rules out of order any religious purpose no matter how benign. By contrast, the only protection that is provided by the free exercise clause, as it was interpreted by the majority in *Smith*, is against laws and other state action that are deliberately aimed at restricting the practice of some act of religious faith.[27] After *Smith*, the rule of law in the United States is that in limiting the religious freedom of the American people, the (secular) ends of government justify virtually any means.

In Germany, the rules are completely different. As a practical matter, state neutrality can be defined by a single principle of proportionality or mutual toleration. The obligations it imposes on the state are both more nuanced and more demanding. On the question of how much religion should be allowed in public schools, the German conception of neutrality requires the state to 'balance' the affirmative freedom of worship with the negative freedom of those who are opposed to such public professions of faith. It must strive

---

26 *Blood Transfusion*, supra note 24.

27 *Church of the Lukumi Babalu Aye Inc.*, supra note 15.

to "preserve to the extent possible,"[28] all of the constitutional values and rights and try "to reach an optimization of the conflicting interests"[29] that are involved in each case. Applied to the criminal justice system, neutrality precludes the state persecuting people who commit punishable acts on the basis of their religious beliefs in those cases where "the use of society's harshest weapon" would represent "an excessive social reaction."[30]

Regardless of whether the Court is considering a claim to be free to follow the dictates of one's faith or to be free from orthodoxy and pressure to conform, the test is the same. Neutrality insists that whatever limitations or restrictions state authorities impose on the religious liberty of its people, whether intentional or inadvertent, the burdens must not be "excessive" or "unbearable". Whereas the two rules of neutrality that currently define the meaning of first amendment law focus primarily on the purposes that underlie the state action being reviewed, the German conception of neutrality is aimed much more at the efficacy of its means and the significance of its effects.[31]

Like *Lee v. Weisman* and *Oregon v. Smith*, the *School Prayer*, and *Blood Transfusion* cases provide a fair depiction of a larger jurisprudence that has been written by the German Constitutional Court on the question of religious liberty. Where the

---

28 *Classroom Crucifix*, supra note 3.

29 *School Prayer*, supra note 25.

30 *Blood Transfusion*, supra note 24.

31 The instrumental, means oriented character of the Court's approach is one of the defining features of the pragmatic method. See J. Habermas, *Between Facts and Norms* 1996, M.I.T. Press. See also T. Dewey, "My Philosophy On Law"; in *John Dewey, The Later Works*, Vol. 14, pp. 115-22; R. Posner, *Overcoming Law*, Harvard Press 1995.

approach of the Americans is almost exclusively interpretive and focused on the words of the constitution (as they have been elaborated in the Court's earlier opinions), the Germans are much more pragmatic and focused on the facts of the case. There are, of course, exceptions and variations in the jurisprudence of both courts. Historical inquiries and textual exegesis can play a role in the analysis of the Bundesverfassungsgericht and dissenting opinions appear with increasing frequency over the years. In ruling that state authorities could not hang crucifixes and crosses on its classroom walls, for example, the Court split 5:3.[32]

Equally, even though historical interpretation and doctrinal analysis are the methodologies favoured by the U.S. Supreme Court, in a number of its leading religious cases, including its seminal decision in *Reynolds v. U.S.* and its landmark ruling in *Lemon v. Kurtzman*,[33] the Americans have endeavored to evaluate the relative importance of the competing rights and freedoms at stake in a case by doing a kind of 'balancing' or 'cost/benefit' analysis. Indeed, in *Lee v. Weisman*, an important part of the disagreement between the majority and the minority was their differing assessments of how significant the profession of public prayers was to the students who wanted to include them in their graduation ceremonies and how coercive they were to those, like Deborah Weisman, who objected to their being said. Similarly, much of the division of opinion that fractured the Court in *Oregon v. Smith* centered on the differing assessments each of them made of the

---

32 *Classroom Crucifix*, supra note 3.

33 *Lemon v. Kurtzman*, supra note 11.

harm that would be suffered by the public at large if drug laws were required to make exceptions for those who used them in the practice of their religious beliefs.

IV. RELIGIOUS LIBERTY AND POPULAR SOVEREIGNTY

It is important to be conscious of the fact that the Americans and Germans do know something of each other's methods. Neither relies exclusively on one approach. Interpretation and pragmatic reasoning figure in the analysis of both. However, it would be just as wrong to exaggerate the similarities and overlap between the two courts as it would be to ignore them altogether. The fact is American and German jurists address issues like school prayers and religious exemptions in radically different ways. They contemplate judges engaged in quite different tasks and, as we have seen, ultimately they lead to opposing results.

Some people, like Stanley Fish, will be inclined to see the conflicting decisions of the Germans and Americans as hard evidence that should explode the myth that there are neutral principles of law that can reconcile the competing claims of church and state in a way that is impartial to both. From a sceptical perspective, these cases look like they confirm that law like politics is permeated by the culture to which it applies. They seem to show each court giving expression to different conceptions of neutrality that prevail in their corners of the world. Where the Americans give priority to the private space of spiritual peace and reflection over the public profession of faith, the ordering in Germany is just the reverse. Choosing between these competing conceptions of neutrality is just a matter of political culture and personal preference, not a question of right or wrong, not even of better or worse.

As plausible as the sceptical explanation of the American and German decisions on school prayers and religious exemptions first appears, it is not a good read of the cases. It focuses too much on the results and not enough on the processes of reasoning that led the courts to positions that are diametrically opposed. For the sceptical account to be credible, it must make a connection between the methods of analysis used by the two courts and the constitutions they oversee. To make the case that law is as subjective and culturally specific as politics, the sceptic must show that the two different styles of reasoning are themselves embedded in and give expression to the different constitutional values and foundations of each country.

The cases certainly establish that it is the interpretivism of the Americans and the pragmatism of the Germans that puts them on opposite sides of questions like school prayers and religious exemptions. What is missing is an argument linking them to the constitutional cultures of their countries. Sceptics need to demonstrate that the interpretivism of the Americans and the pragmatism of the Germans are the most suitable expressions of their countries' constitutional traditions and that is not an easy thing to do.

There is nothing in the words of either constitution which speaks to the methods of legal analysis their courts should employ. The sixteen words that make up the religion clauses of the first amendment say only that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The German Basic Law does speak at much greater length about relations between church and state. In addition to outlawing a state church and extensive provisions on the internal affairs and corporate status of religious organizations, the Basic Law guarantees, among other things: the

undisturbed practice of religion; religious instruction in public schools; conscientious objection to military service; Sunday as a day of rest; as well as freedom from discrimination on the basis of one's personal beliefs; but it too is silent on the analytical framework the court should use in addressing issues like school prayers and religious exemptions.

Without anything in the texts to assist them, sceptics will not find it easy to sustain the claim that interpretivism and pragmatism are indigenous to American and German legal cultures. Neither court gives reasons for their choosing the analytical frameworks they favour and the fact is it is very hard to think of any aspect of interpretivism that serves America's constitutional tradition better than the pragmatic approach. Even in terms of its own foundational ideals of popular sovereignty and religious liberty, pragmatism does a better job.

The interpretive approach has certainly not worked to the advantage of religiously minded people in the United States. As we have seen, together *Lee v. Weisman* and *Oregon v. Smith* allow Governments to act in ways that radically restrict the freedom of people to practice their religion. On the one hand, religious minorities, like the members of the Native American Church, have been told they have no cause to complain about laws that gratuitously (it turns out), interfere with the practice of their religion. On the other, the freedom of spiritually minded people to express their beliefs publicly and collectively and in all aspects of their lives has been radically restricted by the Court. As a practical matter, two hundred years after its entrenchment, the first amendment really only guarantees Americans

that they will not be subject to rules and regulations that deliberately burden or discriminate against them because of their religious beliefs.[34]

In *Oregon v. Smith*, the Court adopted the weakest possible definition of state neutrality. For a majority of the judges, the reference in the first amendment to "the free exercise" of religion only guarantees protection against laws that are enacted with the purpose of penalizing people on account of their religious beliefs. On this reading of the free exercise clause, only state action that gives expression to some hostile and malevolent intent fails the test. Laws passed for the general welfare of the community can override any free exercise claim even when it can be shown that the law is more restrictive and burdensome on the affected religious activities than it needs to be. In *Oregon v. Smith*, even though the members of the Native American Church were able to show that the federal government and twenty-three states had provided exemptions in their drug laws that allowed for the use of peyote in religious ceremonies, without any apparent adverse effect on the health and well-being of their communities, that was not enough to prove a violation of their first amendment rights. Even though Oregon's law constituted a gratuitous and arbitrary restriction of their religious freedom, it was allowed to remain on the books.

Compounding its evisceration of the free exercise clause, the Court's reading of the prohibition against "an establishment of religion" has radically restricted the spaces in which people can organize their lives by their religious beliefs. For most of the last half of this century in fact, the first amendment has been read to favour Jefferson's belief that

---

[34] *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, supra note 15, *McDaniel v. Platy* (1978) 435 U.S. 618.

the best way to guarantee religious liberty is to ensure the wall of separation between the church and the state is as "high and impregnable" as it can be.[35] The prohibition against "an establishment of religion" has been read by the Court to mean that not only can governments not exert the slightest degree of coercion on their citizens to recognize or defer to any spiritual practice or belief but, in addition, they must also be careful not to act in ways that could be seen as an endorsement by the state.[36] Any law that is enacted to support a religious interest or organization is at risk of being invalidated by the Court. The lesson of *Lee* is that even the most attenuated forms of pressure exerted by the state can flunk the test.

Together, the logic of *Lee v. Weisman* and *Oregon v. Smith* leaves religiously minded people and their communities isolated and exposed. Rather than providing a definition of state neutrality that fosters the expression of religious practices and ideas, the Court has read the first amendment to shrink the space in which a person's religious beliefs can govern how they conduct their lives.[37] In the Court's mind, neutrality not only requires religious organizations to be banished from almost all public places and causes that are connected to the state,[38] but also recognizes Governments having a broad

---

35 *McCollum v. Board of Education* (1947) 333 U.S. 203, 212; and see generally Tribe, *American Constitutional Law*, Foundation Press, 2nd ed., 14:7-14:11.

36 *Lynch v. Donnelly* (1984) 465 U.S. 668; *Alleghany County v. Greater Pittsburgh* A.C.L.U. (1984) 492 U.S. 57.

37 Stephen L. Carter, *The Culture of Disbeliefs*, 1993, Basic Books; Michel W. McConnell, "God is Dead and We Have Killed Him: Freedom of Religion in the Post Modern Age" (1993) Brig-Young U. Law Review 163.

38 *Lynch v. Donnelly*; *Alleghany County v. Greater Pittsburgh, supra* note 36.

authority to interfere in how these religious communities organize their affairs in private and at the margins of society.

Just how little protection religious liberty gets from the constitution in the United States is brought into sharp focus by comparing what the Constitutional Court has done for religiously minded people in Germany. German students can say prayers publicly and collectively in the regular course of a school day so long as they are ecumenical and non-sectarian and entail no legal coercion to participate. As well, people who run afoul of the criminal law on account of their adherence to some religious belief cannot be punished if it can be said that labelling them criminals "would represent an excessive social reaction [that is] violative of [their] human dignity."

The German cases show that people enjoy a greater measure of religious freedom when courts apply a principle of "practical concordance" to test the constitutional validity of whatever laws they are asked to review than when they do not. Had Oregon's law been tested against this principle, it is difficult to imagine how it could have survived. The fact the federal government and twenty-three states were able to provide an exemption in their drug laws to accommodate the religious use of peyote without compromising the welfare of their communities proves Oregon's law was excessive and so beyond its constitutional authority to enact.

The principle of "practical concordance" that the Germans use to draw the line between church and state is, in its own words, an "optimalization rule". In contrast with the one dimensional, all or nothing methodology of the Americans, the Germans assess the factual dimensions of both claims – the positive freedom asserted by those whose religion

calls for the public profession of their faith, and the negative freedom of those who object – so as to give both "as protective as possible an arrangement." Prayers that are ecumenical and non-sectarian, that do not impose "unbearable" burdens on dissenting students who seek to avoid them, and that will not lead to their being discriminated against as "outsiders", are judged to be consistent with the constitution while symbols like a crucifix or cross that are more overtly sectarian and more difficult to evade are not. [39]

In *Lee v. Weisman*, the U.S. Supreme Court did not undertake a detailed evaluation of the factual circumstances of either those who wanted to include a prayer in the graduation ceremonies or those who were opposed and religious liberty suffered as a consequence. Although all of the judges recognized the significance of the prayer to its supporters, only Antonin Scalia tried to get a real fix on exactly how serious a burden Deborah Weisman would have been obliged to bear had she been forced to witness the invocation. Both Anthony Kennedy and David Souter (in his concurring opinion) said the ecumenical, non-sectarian nature of the prayer had no bearing on their decision. In his judgement, Kennedy simply assumed that the offensiveness of the prayer to students like Deborah Weisman was equal to its significance for the Rabbi who offered it and those who regarded it as an expression of their recognition of divine authority.

Although there are not a lot of factual details reported in the case, what evidence is cited provides no support in equating the significance of the prayer to its supporters and the dissenters in this way. As Scalia pointed out, the only coercion dissenting

---

39 *Classroom Crucifix*, supra note 3.

students were made to endure was being forced to be tolerant and civil, sensitive to their fellow students whose understanding of life differed from their own. They were forced to stand; coerced into abstaining from conduct that would disrupt the proceedings. In the context of an auditorium in which everyone would, as a practical matter, show the same measure of respect, the possibility of suffering the additional harm of alienation or discrimination or conversion was virtually non-existent. Moreover, the fact Deborah Weisman did not object to the reference to a Supreme Being in the Pledge of Allegiance that immediately preceded the prayer, suggests whatever harm she suffered from being caught up in the event was virtually nil. Her own tolerance of the Pledge of Allegiance seems to provide the best evidence of how little she was affected by the two fleeting, ecumenical, references to God. From her own behaviour, it would be a stretch to say graduation prayers were as significant an event in the lives of dissenting students as they were for those who regarded them as "an essential and profound recognition of divine authority".

If Deborah Weisman's toleration of the reference to God in the Pledge of Allegiance is a fair measure of how deeply her objection to the prayer was felt, religious freedom was not well served by the Court's ruling. School authorities were instructed not to allow one group of students to engage in an activity which was, for them, of profound religious significance in order to spare others a measure of embarrassment and offense which, on the facts of the case, could only be characterized as marginal at most. Moreover, as students of American constitutional law will know, *Lee v. Weisman* is not an exceptional case. Among those who study the Court's first amendment jurisprudence there is a widespread feeling that, for the most part, the judges have trivialized the idea of religion. In

Stephen Carter's poignant turn of phrase, the Court has treated religion "like a hobby."[40] Indeed for some it is a jurisprudence that is marked by hostility and even bigotry.[41]

The failure of the interpretative approach to provide as much protection for religious liberty as a more pragmatic, fact specific analysis can guarantee is compounded by the very undemocratic character of its methodology and its rules. The way it has been practised by the Americans, interpretivism suffers a double disadvantage. It imposes very serious constraints on the scope of democratic politics without securing the same measure of religious freedom, as other courts, which address issues of church/state relations pragmatically, have been able to provide.

Undoubtedly the single most sweeping restriction that the interpretative method has imposed on the sovereignty of the American people to legislate their priorities and preferences into law is the rule (in the establishment clause) that makes practically all state support of religious institutions and events unconstitutional. All religious objectives, like those that motivated the graduation prayer, are absolutely proscribed. No matter how fundamental a community's spiritual beliefs are to its own self-understanding, it is an inviolate rule that they can play no part in the enactment of any law. The whole of their morality that is religiously inspired is put beyond the power of the people in defining the public character of the communities in which they live.

---

40 Stephen L. Carter, *The Culture of Disbelief* 1993, Basic Books.

41 Michael M. Connell, "Religious Freedom at a Crossroads", (1992) 59 U. Chicago Law Review 115.

In its focus on which purposes governments can lawfully pursue, the American rule on school prayer (and religious exemptions) contrasts sharply with Germany's pragmatic approach where more attention is paid to the means by which politicians and their officials put the policies that got them elected into law. In its explicit recognition of religious education being part of the normal curriculum in state schools, Germany's Basic Law rejects the idea that there is something intrinsically wrong with church and state sharing public space. In Germany, the question is not whether the state can show its support for religiously minded people and their institutions and ideas but how; what means are used and with what effects. The basic idea is that it is perfectly legitimate for governments and churches to establish co-operative relationships so long as it is done in a way that is sensitive to the interests of those who believe the jurisdiction of church and state extend to different spheres of authority and should be kept separate and apart.

Compared to the German rule, American's definition of state neutrality cuts deeply into the lawmaking powers of the people. Indeed, the incompatibility between interpretivism and the sovereignty of the people is actually much more pervasive than the rule that puts virtually all support for anything religious beyond the powers of the state. The most serious threat interpretivism poses for democratic forms of government lies in the method of reasoning on which it is based. Because each judge is able to pick and choose the dictionaries and sources of meaning from which their analysis proceeds, their personal philosophy concerning church/state relations, much more than the words of the constitution, determines which conception of neutrality will prevail in any case. Judges like Rehnquist, Scalia, Thomas and Robert Bork, whose political philosophy is populist and conservative,

are naturally inclined to look to historical sources and original understandings whereas more progressive judges like Brennan and Marshall look to underlying values and the Court's own earlier decisions that allow them to give larger and more liberal readings to the text.

Interpretivism sanctions a process of reasoning which puts each judge at the centre of the case and gives them unfettered discretion to chose which approach to take. Competing sources of meaning are considered equally legitimate and no one strategy has priority or takes precedence over the others.[42] Often, as we have seen, these conflicting techniques are applied simultaneously. The possibility that nine judges will find more than one principle of neutrality buried beneath the words of the text becomes a near certainty when the sources themselves, like history and doctrine are fraught with ambiguity and uncertainty. In *Lee v. Weisman*, it will be recalled, the Court was divided not only on whether an historical or doctrinal analysis should be applied in the case, but also on what the historical sources said.[43]

As a practical matter, interpretivism makes it easy for judges to rely on their own political and moral ideas in deciding whether any law or initiative proposed by the state is constitutional or not. It allows each judge to pick and choose which interpretive strategy to employ, and as we have seen, it also encourages playing fast and loose with the facts. In *Lee v. Weisman*, the majority was able to claim the significance of the prayer was

---

42 Philip Bobbitt, *Constitutional Fate: Theory of the Constitution*, Oxford 1982; *Constitutional Interpretation*, Blackwell 1991.

43 See also the dissenting opinion of Rehnquist C.J. in *Wallace v. Jaffree* 472 U.S. 38 (1985).

roughly equal for the two groups of students by ignoring the factual details of the prayer and ceremony that strongly suggested otherwise. In *Oregon v. Smith*, all the judges expressed the opinion that courts should not attempt to figure out how important a particular interest or activity that the law proscribes is to a religion and its adherents in deciding whether the impugned state action is constitutional or not.

In both cases, the Court defended its decision by hypothesizing potentially calamitous consequences that might transpire if it ruled the other way. In *Oregon v. Smith*, Scalia argued that the Court "would be courting anarchy" if it ruled in favour of Smith's claim for a religious exemption because it "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." In *Lee v. Weisman*, Anthony Kennedy invoked the "lesson of history" that any breach in the wall that separates church and state "may end in a policy to indoctrinate and coerce". Harry Blackmun warned that the mixing of government and religion could be a threat to both. In neither judgement was any evidence cited that would suggest such hypothetical horribles were likely to occur.

Interpretivism then, at least as it has been practised by the Americans, imposes virtually no constraints – no disciplining rules– on the discretion of judges to rely on their own political/moral theories to solve the hard, practical problems of church/state relations, like school prayers and religious exemptions, that come before the courts. This profoundly undemocratic characteristic of the interpretive approach, together with its failure to protect religious liberty in a meaningful way, makes it a very unsatisfactory method of judicial review. Compared to reasoning pragmatically, both in terms of respecting the

sovereignty of the people and protecting basic human rights, it is decidedly second best. Moreover, the failure of interpretivism can not be blamed on the Americans. The comparative advantages that pragmatism enjoys over its interpretive rivals holds true for every court that has the power to review the acts and decisions of the other two, elected branches of government.

V. RELIGIOUS LIBERTY FROM A COMPARATIVE PERSPECTIVE

The jurisprudence that has been written on the issue of religious freedom in other parts of the world is a mirror image of the German and American. When one looks beyond the rulings from Washington and Karlsruhe, one finds judges thinking along very similar lines no matter where they sit. Interpretivism and pragmatism dominate the analysis of religious rights wherever they arise. Sometimes judges openly debate the strengths and weaknesses of each. [44] In some cases, the answer is clear-cut and it does not matter which method is used. For example, regardless of whether interpretive or pragmatic strategies are employed, judges are unanimous that states can force children to undergo blood transfusions against their will and the wishes of their parents even when it is deeply offensive to their religious beliefs. [45] More often than not, however, it is of critical importance which approach is employed. Time and again, when judges differ on whether a semantic or pragmatic analysis is the best way to resolve a question of religious liberty, the cases show

---

[44] See for example *B.(R.) v. Children's Aid Society of Metropolitan Toronto* 122 D.L.R. (4th) 1 (1995); *Re J. (An Infant): B and B v. Director Social Welfare* [1996] 2 NZLR 134.

[45] *B.(R.) v. Chirdren's Aid Society ibid.*; *Re J. (An Infant), ibid*; *Jehovah's Witness v. Kings County Hospital* 390 U.S. 598 (1967).

that all of the relevant interests are better served when a majority of them undertake a close and careful evaluation of the facts than when they do not.

(a) SABBATARIAN LAWS

Challenges to "sabbatarian laws" that restrict ordinary, everyday activities, like shopping or driving, on days that for some are reserved for reflection and prayer, provide a clear example of the normative superiority of the pragmatic approach. Laws of this kind have been tested all over the world; in Canada, Ireland, Israel, Hungary, and South Africa as well as in the United States. To varying degrees, the Supreme Courts in the first three countries concentrated on the impact such laws had on different individuals and groups who were affected by their provisions and, as a result, were able to provide greater protection for religious liberty than the courts in the United States and South Africa who did not. Indeed, by using a principle of proportionality which (like the German's principle of "practical concordance") tries to maximize all of the interests at stake in a case, they were able to protect religious liberty in their communities without restricting the sovereignty of the people to express its collective identity in the laws it enacts to any significant degree.

The judgement of Aharon Barak, the President of Israel's Supreme Court (and no relation to Ehud Barak the military officer and politician who subsequently became Prime Minister) in *Lior Horev v. Minister of Communication/Transportation*, [46]

---

[46] Supreme Court of Israel, April 1997, translated and reproduced in part in *Global Constitutionalism: Religion* 1997, Yale Law School.

provides a dramatic example of the capacity of pragmatic reasoning to resolve highly charged political issues of church/state relations in a way that is equally sensitive to the interests of both. At issue was a Government regulation that would have closed a major artery running through the heart of Jerusalem – Bar Ilan Street – during the hours of prayer on the Jewish sabbath. The street ran through a number of orthodox neighbourhoods and the Government's hope was that a partial closing would be accepted as a compromise between the orthodox community who argued for a complete ban on all traffic for the duration of the sabbath and secular Israelis who insisted their mobility rights guaranteed them unimpeded access to the street seven days a week, twenty-four hours a day. The dispute was a "deep and bitter" one that divided the country and even spilled over into violence on the street. Neither side was satisfied with the Government's solution and the issue was referred to the seven judges who sat on Israel's Supreme Court.

Barak was very aware of the political dimension of the dispute but he insisted the Court could not concern itself with the general state of relations between the orthodox and secular communities. The issue in law was the authority of the relevant state official to enforce a partial closing on Bar Ilan Street. For Barak, the case was about reconciling the mobility rights of secular Israelis with the religious way of life of orthodox Jews on Bar Ilan Street, "plain and simple".

Barak refused to be drawn into a hypothetical discussion about how the Court's ruling in this case might affect future decisions by the Government to close other roads. He disagreed with three of his colleagues who voted to strike down the regulation because they thought it would act as a precedent for future closings. He thought "slippery

slope" arguments of this kind were "dangerous" because they were based on fears and speculation that had no basis in fact. As a pragmatist, he took the view that each road closing had to be judged on its own set of facts. The way he understood constitutional law, the legality of one road closing did not logically entail the closing of any others and, by a bare 4:3 majority, his views carried the day.

Barak began his judgement by looking at Israeli's Basic Law on Human Dignity and Freedom, to identify principles and a framework of analysis that would allow him to evaluate the conflicting claims of the two communities over the use of Bar Ilan Street in a way that would be even handed and fair to both. He read its declaration that Israel was a "democratic state" to mean that Governments could pass laws for the purpose of protecting the religious sentiments of their people so long as they did not entail any religious coercion and they respected a basic principle of proportionality or "toleration". "Toleration", he wrote, "is a basic value in every democratic conception. . . . It is crucial to a democracy based on pluralism."

It was this principle, rather than anything actually written in the Basic Law, that Barak used to evaluate the closing of Bar Ilan Street. First, he endorsed the idea of a partial closing. Stopping traffic during the hours of prayer was much more in keeping with the principle of toleration than either of the all or nothing (always open or closed all day) positions of the parties. During those periods of the day when prayers were being said, Barak accepted the claim of the orthodox community that the harm they would suffer from an unrestricted flow of traffic would be "harsh and bitter". It would, he said, constitute "a powerful contradiction to the peace and serenity" the orthodox communities sought for their

neighbourhoods to allow cars and other vehicles to drive past their places of worship when they were conducting their religious services. By comparison, the inconvenience most Israelis would suffer from being denied access to the street during such times would be trivial. Commuters who used the street as a thoroughfare would be obliged to take an alternative route which, Barak calculated, would add an additional two minutes to their trip. At least during the times when prayers were being said, the proportionalities – in the significance of the closing for the two communities – were clear.

Barak's ruling that a partial closing of the street was consistent with the Basic Law on Human Dignity and Freedom works to the clear advantage of religious freedom. It recognizes the right of the state to pass laws that protect and support religious communities and their way of life even to the point of overriding important human rights of others. It does not, however, ignore the interests of secular Israelis. Toleration required orthodox Jews to show the same measure of respect for the life choices of their secular countrymen that the partial closing guaranteed for them. Thus, according to Barak, not only did motorists have the right to use the street when prayers were not being said, but, those who actually lived in the orthodox communities had a right to drive to their homes at any time of the day. Because even a partial closing would constitute a much more significant interference in the lives of secular residents (and especially those who were handicapped in some way) than for those for whom the street was simply a preferred route of travel, Barak instructed the government to consider ways (such as permits) that would exempt them from the ban.

Barak's judgement provides a very clear example of how the principle of proportionality ("toleration") tests the aims and objectives governments pursue when they pass laws – like the traffic resolution in Jerusalem – in a way that allows religious liberty and popular sovereignty to flourish simultaneously. The Israeli state can pass laws for the purpose of protecting the spiritual freedom of religiously minded people so long as it shows an equal respect for those whose lives they burden the most. Except for its proscription of laws that are deliberatly aimed at restricting people's freedom to live their lives by their religious beliefs, proportionality leaves it to politics and the elected branches of government to decide what values and goals their communities will collectively embrace.

Barak's judgement shows, in a concrete case, what the principle of proportionality requires of sabbatarian laws in the objectives they pursue. Two other judgements, one rendered by the Supreme Court of Ireland (in *Quinn's Supermarkets*), [47] the other by Canada's highest court (in *Edwards Books*) [48], illustrate what constraints the principle imposes on the means – or policy instruments – governments may use when they are crafting policies on the sabbath and turning them into law. In both cases, the critical question was whether laws that restrict shopping on Sunday, or after certain hours on other days of the week, have to make exceptions for people whose religion demands they close their shops on another day when everyone else is open for business. Both courts said they

---

47 *Quinn's Supermarkets v. Attorney General* [1972] I.R. 1.

48 *Edwards Books & Art v. Queen* 35 D.L.R. (4th) 1 (1986).

did but the Canadians were badly split on the issue and almost half the judges would have upheld the law whether it contained an exemption or not.

In Ireland, no one doubted that some accommodation for people like retailers of kosher meat who remained closed all of Saturday was required. Everyone was agreed that, for as long its dietary rules remained "a strict commandment in the code of Jewish law", some exemption, allowing them to remain open after hours, was a must. Without some relief, the law would interfere with the freedom of the Jewish community to practice its religion by making it impossible to purchase kosher meat any time on Saturday without violating either the rules of their religion or the laws of the state. None of the judges thought complaints by non-Jewish butchers against allowing kosher shops to open after regular hours on Saturday evening could be sustained. To the contrary, they said such an exemption promoted equality between the two groups by relieving the Jewish retailers of the extra burden that the law's restriction on business hours imposed on them.

The only difference among the judges was how extensive the exemption should be. Four of the five judges who sat on the case thought the exemption that was contained in the law – which allowed Jewish butchers to remain open extra hours every day of the week – was broader than it needed to be. They said that if the purpose of the law was to alleviate the burden that the law (indirectly) imposed on the religious freedom of the Jewish community, a dispensation that was limited to Saturday evening would do the trick. On their view of the facts, there was no evidence to suggest "the free practice of the Jewish religion" would be hampered in any way by requiring kosher shops to keep the same trading hours as everyone else every other day of the week.

The ruling by Ireland's Supreme Court that sabbatarian laws must make appropriate exemptions for those for whom their impact is especially severe illustrates again how judges who reason pragmatically test both the means and the ends of the laws they are asked to review. The Irish simply required their trading laws to make the same measure of accommodation that the Germans said was essential to the validity of school prayers. It seems like an easy case and yet other courts, including the American and Canadian Supreme Courts, have not found it so straightforward. The Americans in fact have taken the position that sabbatarian laws in the United States do not have to contain exemptions for people whose religion requires them to observe a day of rest on some other day of the week. [49] In *Edwards Books*, the Canadians openly debated and ultimately rejected the position of the Americans but the Court was badly split and almost half of the judges who sat on the case would have upheld the Government of Ontario's *Retail Business Holidays Act* whether it contained an exemption or not.

In fact, most of the judges who have sat on Canada's highest court have shown themselves to be very ambivalent about whether the principle of proportionality should be used to test the constitutionality of the country's "Sunday shopping" laws and if so how rigorously it should be enforced. In its seminal ruling on the Federal Government's *Lord's Day Act*, the Court showed a strong preference for the American approach of definitional solutions and the categorical rule against states showing any encouragement or

---

[49] *Braunfeld v. Brown* 366 U.S. 599 (1961); *McGowan v. Maryland* 366 U.S. 420.

support for religion. In *R. v. Big M Drug Mart Ltd.* [50], the Court never even entertained the idea that laws that were passed for religious purposes might be constitutional if they could meet the proportionality test.

Moreover, in its subsequent review of Ontario's *Retail Business Holidays Act*, that was passed for the purpose of providing retail workers with a common day of rest and recreation with their families, almost no one on the Court was inclined to follow the example of the Irish and subject the particular exemption that was chosen by the Government to a strict and searching review. Except for one judge – Bertha Wilson – everyone on the Court thought judges should not substitute their opinions for those of the legislators as to the place at which the line should be drawn. They said that to insist that Sunday shopping laws be drafted to minimize the burdens they impose on people who celebrate their sabbath on some other day of the week was an "excessively high standard" for governments to have to meet.

In the end, however, by a slim 4:3 majority, the Court decided not to go all the way with the Americans and held that, even though judges should generally defer to the legislature's policy choices in its design of such laws, some minimum exemption for religious minorities who were especially burdened by restrictions on Sunday shopping was required. They pointed out that if the purpose of the law was to ensure retail workers had time with their families, it would be punitive, if not perverse, to force family run businesses, that operated without any outside help and that remained closed on some other day of the

---

50 *R. v. Big M. Drug Mart* 18 D.L.R. (4th) 321 (1985).

week, to stay shut on Sundays as well. No purpose of the law would be served by such an insensitive, heavy-handed approach. The failure to provide an exemption for such enterprises would interfere with their religious liberty in ways that were gratuitous and unnecessary. The only way retailers who closed on some other day of the week could enjoy a level playing field with their competitors would be to defy the laws of their religious faith and remain open on the day that was supposed to be set aside for reflection and prayer.

The difference between the Canadian and American Supreme Courts on the issue of religious exemptions in Sabbatarian laws is not huge. The two courts have more in common in how they approach questions of church/state relations than they have understandings and ideas that set them apart. Still, in insisting on the necessity of some exemption in sabbatarian laws of this kind, the Canadians do guarantee a measure of protection for religious liberty that in the United States is vulnerable to the vagaries and vicissitudes of politics and popular opinion. The comparison between the two courts shows that even when it is only embraced tentatively and cautiously, pragmatism is able to remedy the most blatant forms of arbitrary treatment by the state in a way that a semantic and deferential analysis of the issues does not.

Canadian judges are not alone in looking to the experience of the Americans when it comes to decide whether a piece of sabbatarian legislation is constitutional or not. The South Africans also relied heavily on the jurisprudence of the U.S. Supreme Court in the case of *Lawrence, Negal and Solberg v. The State*[51] when they were

---

51 *Lawrence, Negal and Solberg v. The State* [1997] 4 S.A.L.R. 1176.

asked to review the validity of a liquor law that prohibited the retail sale of beer and wine (except in restaurants) on Sundays, Good Friday and Christmas day. Indeed, the interpretive approach of the Americans proved to be decisive in the South African Constitutional Court's disposition of the case.

All nine judges who heard he case recognized that, in limiting the restriction on the sale of beer and wine to days that are religiously significant only to Christians, adherents of other religions could reasonably feel that the state was treating their beliefs as second class. Four of the nine, however, said there was nothing they could do. Led by Arthur Chaskalson, the President of the Court, these four took an avowedly interpretative approach. They read Article 14 of the South African Constitution the same way Anthony Kennedy understood the establishment clause in *Lee v. Weisman,* as only protecting people's religious beliefs against coercive acts of the state. Thus, even though they recognized its symbolic discrimination, because the law did not force anyone to embrace or forego any religious belief, they refused to intervene. Chaskalson's definition of Article 14 was ultimately rejected by a majority of his colleagues but his views still carried the day because two other judges (Albie Sachs and Yvonne Mokgoro), who thought the constitution did protect people against laws that were discriminatory as well as those that were overtly coercive, were also of the view that the state's objectives in reducing opportunities for alcohol abuse were so important to the welfare of the community that whatever discriminatory messages were latent in the law would just have to be endured. They thought the case came down to weighing the "symbolic effect of religious favouritism against the very palpable and quite terrible consequences of alcohol abuse." Adopting the perspective of

the "reasonable South African . . . who is neither hypersensitive nor overly insensitive" to the beliefs of non-Christians, Sachs and Mokgoro had no doubt that, in a contest of this kind, the state's interest "in encouraging temperance on these particular days [was] a powerful and legitimate one.". . . . that ought to prevail.

Kate O'Regan disagreed with both Chaskalson and Sachs and she wrote a dissenting opinion for herself and two of her colleagues. O'Regan took a very close look at the facts of the case and came to the conclusion that singling out Christian holy days for special treatment was inequitable and unfair. For O'Regan, the decisive fact in the case was the glaring inconsistency in the way the government pursued its objectives. Although she was prepared to accept that the purpose of the law - regulating alcohol consumption - was a valid one, she would not "weigh [it] heavily for the purposes of proportionality" because the government made no effort to extend the law to Saturdays or other secular holidays when the risks of alcohol abuse were just as high. Even though she recognized the infringement of religious liberty that was effected by the law was not 'severe or egregious', the government's behaviour was arbitrary and discriminatory nonetheless.

The fact that serious issues of religious freedom were not at stake in *Lawrence, Negal & Solberg v. The State* does not affect its significance jurisprudentially. The division of opinion within the South African Court is actually a replay of everything we have seen so far. The contrast between the judgements of O'Regan and Chaskalson prove, one more time, that judges can guarantee a greater measure of neutrality in relations between church and state when they organize their analysis around the principle of proportionality and play close attention to the facts of a case than when they try to solve such issues with

semantic solutions, categorical injunctions and absolute, inviolate rules. Even if the discriminatory character of the liquor law were purely symbolic, O'Regan was able to deal with it in a way that, on his interpretive understanding of judicial review, Chaskalson was powerless to redress.

When O'Regan's judgement is read alongside Albie Sachs' concurring opinion, it also shows how analyses that are focused on the facts of a case have an empirical grounding that is lacking when judges base their opinions on their own sense of priorities. The difference in their two judgements lies in their assessment of the government's interest in minimizing the occasions on which people might be inclined to drink excessively. Where Sachs thought the consequences of alcohol abuse were 'grave' and could amount to a 'serious menace', O'Regan argued that the government's own action in failing to extend the restriction on retail sales to Saturdays and other secular holidays demonstrated that the state did not regard the public interest in controlling drinking on such occasions to be nearly so significant. O'Regan's judgement can claim to be based on an objective assessment of the facts of the case in a way that Sachs's can not. Where she insisted the state must be held to its own evaluation of its interests, Sachs would substitute his personal concerns about drinking on holidays and weekends for the government's very partial, almost cavalier attitude towards the issue.

The debate between Chaskalson, O'Regan and Sachs shows judges in South Africa are as divided on the question of how one should analyze questions of church/state relations as their counterparts in Canada and the United States. Indeed one can find similar divisions of opinion within almost every court that has ever been asked to protect

someone's religious liberty from what they allege are arbitrary and discriminatory acts of the state. As one moves beyond cases dealing with laws that limit people's activities on the sabbath, it is common to find judges on the same court drawing the line between church and state in different places essentially because of the different methodologies and different processes of reasoning they employ. Some courts show a tendency to favour one approach, other courts the other, but in almost all cases, there is a vocal minority expressing its dissent. It is, in fact, quite exceptional to find decisions like those of the German Constitutional Court, in which a single opinion is able to attract the unqualified support of everyone on the Bench.

(b) RELIGION AND MORALITY IN PUBLIC PLACES

The conflicting opinions that exist within and between courts as to the best method of resolving questions about religious freedom provide more hard data that lends itself to comparative analysis. The rights of people to proselytize,[52] for example, or refuse medical treatment for themselves and their families,[53] or claim public support for religious

---

52 *Cantwell v. Connecticut* 310 U.S. 296 (1940); *Murdoch v. Pennsylvania* 319 U.S. 105 (1943); *Prince v. Massachusetts* 321 U.S. 158 (1943); *Heffron v. Iskon* 452 U.S. 640 (1981); *Rev. Stanislaus v. State (Madhya Pradesh)* A.I.R. 1977 S.C. 908; *Chan Hiang Leng Colin et al. v. Minister for Information* (1997) 2 BHRC 129; *Kokkinakis v. Greece* (1993) 17 E.H.R.R. 397; *Young v. Young* 108 D.L.R. (4th) 192 (1993); *Roy Murphy v. Independent Radio and Television Commission* [1998] 2 ILRM 360 (Ireland). For an illuminating treatment of the issue in post communist Russia, see Harold J. Berman "Freedom of Religion in Russia" (1998) 12 Emory International Law Review 313.

53 *B.(R.) v. Children's Aid Society*, supra note 44; *Re. J. (An Infant)* supra note 44; *Jehovah's Witness v. King's County Hospital*, supra note 45; *Hoffman v. Hoffman* (1993) 17 EHRR 292; *Nishida v. Japan* (1963) 17 Keisha 4 p. 303, translated and reproduced in part in Itoh and Beer, *The Constitutional Caselaw of Japan* 1961-70, University of Washington Press.

schools that have been accredited by the state,[54] have all been tested in a number of courts and the judges have displayed the same diversity of opinion on these issues as they have to laws that restrict people's liberty on the sabbath. On each of these questions, judges have started a global conversation about the scope and limits of religious freedom with colleagues on their own courts and beyond. Within this large and growing body of caselaw, the European Court of Human Rights and the Supreme Court of Japan have each issued a pair of rulings, on the question of when people can legitimately complain about governments that support or promote particular moral or religious points of view, that are particularly revealing.

The European Court of Human Rights and the Supreme Court of Japan are both mature, well established courts. Each has exercised the powers of judicial review for half a century. However, even though both of them have addressed this issue more than once, neither has been able to get everyone to agree on what the right answer is or even how best to proceed. The judges on the European Court of Human Rights have shown a strong preference for the interpretive approach and definitional solutions of the Americans but in each case there is always someone who dissents. Support for semantic and pragmatic modes of analysis is more evenly divided on the Supreme Court of Japan. Textual exegesis and

---

[54] *Agostini v. Felton* 521 U.S. 203 (1997); *A.G. (Victoria) Ex rel Black v. CTH* (1981) 55 ALJR 154; *In Re Gauteng School Education Bill* (1996) 3 S.A. 165; *Campaign to Separate Church and State v. Minister of Education* (1998) 2 ILRM 81; *Resettlement of Church Property* (Hungary) [1994] 1 E.E.R.R. 57; *Interdenominational School* (1975) 41 BverfGE 29, translated and reproduced in part in Kommers, supra note 3; *Adler v. Ontario* 140 D.L.R. (4th) 385 (1996); *St. Stephen's College v. University of New Delhi* (1991) Supp. 3 S.C.R. 121.

practical realities have both played an important part in its thinking on the extent to which the state could support events like a Shinto ground breaking ceremony, or the enshrinement of a serviceman, that have a clear religious dimension to them.

The opposing inclinations within and between these two courts confirms that people are better protected from conformism and orthodoxy when judges reason pragmatically, and pay close attention to the facts of a case, than when they devote all of their attention to the words of the text and impose solutions as matters of definition. They show that judges who reason pragmatically get the better of the debate even when their opinions fail to carry the day. Indeed, even when the two approaches come to the same conclusion, 'pragmatic' judges are able to offer an explanation that shows religiously minded people more respect than the reasons that are given by their 'interpretive' colleagues.

The injustice and arbitrariness of the interpretive approach is especially evident in the way the European Court of Human Rights spoke to parents in Denmark and Greece who objected to their children having to take part in activities and be exposed to ideas that were antithetical to their religious beliefs. In the first case, *Kjeldsen, Busk and Madsen v. Denmark*[55], objection was taken to a compulsory course in sex education and in the second, *Valsamis v. Greece*[56] to a regulation that required all students to take part in a national parade honouring the country's past. In both cases, the Court's response was based entirely on the way it read the relevant articles and protocols of the European Convention of Human Rights.

---

55 *Kjeldsen, Busk* and *Madsen v. Denmark* (1976) I E.H.R.R. 711.

56 *Valsamis v. Greece* (1996) 24 E.H.R.R 294.

In *Kjeldsen*, and again in *Valsamis*, the Court interpreted the requirement in Article 2 of Protocol #1, - that the state must respect the rights of parents to ensure the education of their children conforms to their own "religious and philosophical convictions", - to mean only that states are forbidden from trying to "indoctrinate" their people. "That," said the Court, "is the limit that must not be exceeded." The way they understood the Convention, once a member state points to a legitimate (viz, non-indoctrinating) purpose that is served by the law, that is the end of the case. Because there was no evidence that the objective of either the Danish or Greek Governments was to indoctrinate students about sexual practices or with patriotic fervour, both cases were thrown out of court. Like the conservative wing of the U.S. Supreme Court, the way the European Court of Human Rights defined the principles of neutrality was extremely deferential and partial to the state.

Not all of the judges who sat on these cases, however, were adverse to holding the governments involved to a more demanding standard of neutrality. Like their counterparts in Karlsruhe, Dublin and Jerusalem, these judges were interested not only in the ends of the laws they were asked to review but in their methods and effects as well. In *Kjeldsen*, Judge Verdross disputed the narrow reading the majority gave to the Convention. He said the regulation did violate the complainants' right to their religious liberty because, unlike their own children, other students who attended private schools were only required to study the biology of sex and were excused from having to learn about its psychological and sociological dimensions. Like O'Regan in *Solberg*, Verdross held the state to its own standards and ruled that if the government could carve out an exemption for religiously

minded students in private schools without compromising its educational goals, there was no reason for it not to show the same measure of respect for students in the public system.

In *Valsamis*, two members of the Court, Justices Vilhjalmsson and Jambrek, took issue with the majority's finding that there was nothing in the purposes or arrangements of the parade that could offend the Valsamis family's pacifist convictions and religious beliefs. They said the Court had a duty to accept the Valsamis's perception of the parade unless it could be shown to be "unfounded and unreasonable." They rejected the argument that the state could justify its position on the basis of its authority to educate its citizens about the collective memory and historical accomplishments of their country because they said they school authorities could have achieved these objectives within the regular curriculum and in a way that would not have offended the Valsamis's religious beliefs.

In both cases, religious liberty was sacrificed and the court's neutrality compromised because most of the judges paid no attention to, and in *Valsamis* actually distorted, the facts. In *Valsamis*, the Court took the unprecedented step of not accepting the factual basis of Victoria Valsamis's claim that, as a Jehovah's Witness, participation in the parade would offend her pacifist beliefs. Without any suggestion that her beliefs were "unfounded and unreasonable," it simply substituted its own perception of the significance of the parade and disclaimed any authority to consider whether the school authorities could have taught the students everything they needed to know about their country's past in regular courses in the curriculum.

In *Kjeldsen*, because of the very narrow reading it gave to the words of the Convention, the Court ignored the most pertinent fact of the case and the religious liberty of a small group of fundamentalist Christians was needlessly compromised as a result. The Court never called on the Danish Government to explain why it was necessary that all public school students receive instruction in every aspect of sex education when, simultaneously, it exempted religiously observant students who attended private schools from those parts of the curriculum that offended them most. Except for Verdross, none of the judges pressed the government to explain how extending the same accommodation to public school students that it recognized for those who attended private schools could compromise its educational objectives in any way. Having satisfied themselves that no attempt at indoctrination was involved, they were prepared to validate the glaring inconsistency in the Government's treatment of the two groups.

In contrast with the judges in Strasbourg, when Japan's Supreme Court has been asked to mark off the limits of legitimate state support for particular moral or religious events and ideas, it has not shown the same strong preference for one approach. In its seminal ruling on the propriety of a municipal government making a small ($60. U.S.) financial contribution to help defray the costs of a Shinto ground breaking ceremony, (celebrated to mark the beginning of construction of a public gymnasium) that had a clear religious element, the Court took a very practical approach. [57] Even though the words of

---

[57] *Kakunaga v. Sekiguchi, (Shinto Ground Breaking)* (1977) 31 Mishu 4, 533, translated and reproduced in part in Itoh and Beer, *The Constitutional Caselaw of Japan* 1970-90, 1996 University of Washington Press.

Article 20 of the constitution explicitly required the state to "refrain from ... any ... religious activity," and the historical understanding seemed to call for the strictest separation of church and state, a large majority ruled that reality and common sense argued otherwise. Some connection between the spiritual and secular was unavoidable. Like their Irish brethern, the majority pointed out that if the state did not permit religious activities in public institutions (such as prisons), or help support artistic treasures owned by religious groups, that would be discriminatory and inconsistent with the guarantee of religious liberty in Article 20. In the result, the Court read the prohibition against the state having "any" contact with religion to mean only linkages which "exceeded reasonable limits".

In determining whether the government's support for the Shinto ground breaking ceremony met the constitutional principle of reasonableness or not, the Court demonstrated the same concern for the facts and details of the case that the German Court showed in its *School Prayer*, and *Blood Transfusion* decisions. "The place of the conduct, the average person's reaction to it, the actor's purpose in holding the ceremony, the existence and extent of religious significance, and the effect on the average person," the Court said, "are all circumstances that should be considered to reach an objective judgement"... In the circumstances of the case, the majority was of the opinion that even though the ceremony "was undoubtedly . . . of a religious nature", it was not prohibited by the constitution because most people, including those on the city council who voted for the expenditure, regarded it as a purely secular ritual dedicated to the safe construction of the gymnasium and without any religious significance whatsoever.

Several of the judges who sat on the *Shinto Ground Breaking* case favoured a more categorical rule of strict separation between church and state. They doubted that a standard of reasonableness could be applied in an objective and neutral way. Like the Americans, these justices were more inclined to read the words in Article 20 with an eye to history than with a concern for the practical realities of the case. For them, the disastrous consequences that followed the elevation of Shintoism as the established religion of the Japanese state meant no entanglement, however innocent, could be allowed. Even though they recognized that the ceremony had as much or more secular significance as religious, they thought that the only way of not sliding down the slippery slope connecting the relatively innocuous support of the ground breaking ceremony and the creation of a quasi-religious state, was by drawing a very bright line in the jurisprudence and defining the principle of neutrality in absolutely rigid, categorical terms.

Chief Justice Fujibayashi issued a separate dissenting opinion in the *Shinto Ground Breaking* case in which he stressed the sense of alienation and isolation non-adherents feel whenever the state shows a preference for one particular religion, no matter how fleeting or small. In his mind, the fact that those who opposed the ground breaking ceremony were being "hypersensitive" did not affect the result. Like Anthony Kennedy, he thought the right of non-adherents to be free from such state imposed anxiety and stress was absolute, paramount, and immune to any compromise or qualification.

Fujibayashi's categorical ruling against any state support of anything religious lacks the impartiality and neutrality of the majority's judgment because of its very selective treatment of the facts. Like the U.S. Supreme Court's analysis of school prayers,

Fujibayashi ignored the interests of everyone connected with the event except those who objected to it. The majority took account of all of the relevant interests involved in the case and religious liberty was better protected in the end. Instead of a rule outlawing all governmental support of religion, the Court was open to church and state joining in a project like a ground breaking ceremony, which served both of their interests, so long as it did not impinge too deeply on the lives of those who were offended by any linkage between the two.

Eleven years after its decision in the *Shinto Ground Breaking* case, the Supreme Court of Japan was asked whether the state went too far when officials in the Ministry of Self-Defence Forces helped to facilitate a religious service in which the soul of a serviceman who died while on duty was enshrined and this time a majority of the judges favoured an interpretive analysis to settle the case.[58] They said that having one's religious peace of mind disturbed by the religious activities of others was not a legal interest that was protected by the constitution and so the serviceman's widow who had objected to the ceremony had no cause to complain. Several concurring opinions were written by other members of the Court including two by Atsushi Nagashima and Toshio Sakaue. They thought that the widow's peace of mind did fall within the constitutional guarantee of religious freedom but that it had to be set alongside and evaluated against the wishes of the deceased's father and siblings whose religious beliefs inclined them to favour the ceremony. Only one judge, Masami Ito was of the opinion that the Government's involvement in the enshrinement was improper and, like Fujibayashi in the *Shinto Ground Breaking* case, he

---

58 *Japan v. Nakaya (The Service Enshrinement Case II)* (1988) 42 Minshu 5 277, translated and reproduced in part in Itoh and Beer (*ibid.*).

read the words of the constitution as requiring "a perfect separation of religion from the state."

The diversity of opinion among the judges who sat on the *Serviceman Enshrinement* case provides a particularly striking contrast between the semantic and pragmatic models of judicial review. Both the majority and Justice Ito in dissent based their decisions on very narrow and conflicting interpretations of Article 20 of the Japanese Constitution and on very partial and incomplete evaluations of the facts. Like the European Court of Human Rights in *Valsamis*, the majority simply rejected the factual basis of the widow's claim and asserted that the general public would not have regarded the government's actions as encouraging or discouraging religious freedom in any way. Justice Ito came to exactly the opposite conclusion because not only did he accept the widow's evidence that she was offended by the state's support of a religious ceremony that was antithetical to her own, he effectively ruled that hers was the only relevant interest in the case. Neither judgement provides a satisfactory resolution of the issue because both fail to take seriously the views of everyone who had an interest in the ceremony. Justice Ito's reading of the constitution, like Fujibayashi's, takes no account of the religious liberty of the serviceman's father and siblings. On his interpretation, their religious choices were completely ignored and shown not a whit of respect.

The majority's ruling was equally arbitrary because it refused to accept the undisputed evidence of the widow that the state's endorsement of the enshrinement of her dead husband's soul was offensive to people like her who held different religious beliefs.

Even if its decision could be shown to be a fair resolution of the case, there was nothing in their judgement, which would make the widow feel that her religious beliefs were taken seriously by the Court. By contrast, Justices Nagashima and Sakaue, who came to the same conclusion as the majority, explained to the widow that even though they recognized that her religious peace of mind was worthy of constitutional protection against incursions by the state, the beliefs of the deceased's father and siblings had to be considered as well. Rather than telling her that the discomfort and disturbance to her peace of mind were not significant enough to be protected by the constitution, they said she must recognize that the religious beliefs of her in-laws were entitled to the same protection and respect as she claimed for herself.

The *Service Enshrinement* case shows that even when interpretive and pragmatic approaches to questions of church/state relations lead to the same result, judges who stick to the facts of the case are able to show more respect for the religious liberty of people who seek their protection than their colleagues who try to draw answers directly from the words of the text.[59] The case provides another powerful example of the normative

---

[59] Another case in which judges who reasoned pragmatically were able to show more respect for the beliefs of a religious minority than their colleagues who followed an interpretive approach, even though they reached the same result, is the decision of the Supreme Court of Canada in *Re B.(R.) v. Children's Aid Society*, supra note 45. All seven judges thought the state acted constitutionally when it authorized the medical authorities to give a child a blood transfusion over the objections of the parents. In explaining the reason for their decision, four judges said the religious freedom that was protected by the Charter did not include the right of parents to make medical decisions for their children according to their religious beliefs if it threatened their well being. Three other judges spoke more directly to the parents and explained that even though their religious liberty must include their right to choose medical treatments for their

superiority of the pragmatic approach. It continues and extends the pattern that has run through all of the cases we have considered so far and more cases could be added to the list.

On issues like the right of religiously inspired people to seek converts to their faith,[60] or refuse medical treatment for themselves and their family,[61] or claim public support for the non-religious education they provide in their schools,[62] the same story is repeated again and again. Judges who base their decision on an evaluation of all of the relevant interests in a case are consistently better able to protect religious liberty in the aggregate and in a way that respects the sovereignty of the people to express itself democratically than their colleagues who devote all of their energies divining final answers from the text.

Students of comparative constitutional law will want to study these cases carefully. All of them make for interesting reading. The U.S. Supreme Court, for example, has analyzed people's right to proselytize as a matter of free of speech rather than religious liberty and, as a consequence, has been much more pragmatic in its analysis of the limits of legitimate state regulation than other courts who have had occasion to address the issue.[63] At the other end of the spectrum, Singapore's Court of Appeal has denied that

---

children, in the circumstances of this particular case, that right had to be weighed against and ultimately give way to the independent right (to life) of their child.

60 Supra note 52.

61 Supra note 53.

62 Supra note 54.

63 *Cantwell v. Connecticut*; *Heffron v. Iskon*, supra note 52.

proportionality even exists as an independent principle of judicial review and, as a result, has upheld a ban on the distribution of religious material, including the Bible, by an International Student's Association, on the ground the latter's refusal to do any national service was a threat to the security of the country.[64] Other cases, including several on school funding[65] as well as a ruling by Spain's Constitutional Court on the obligation of the state to provide medical treatment that is consistent with a person's religious beliefs or pay its financial equivalent,[66] provide an insight into the way the two different models of review address claims for positive, social and economic rights. The school funding cases provide a window on claims for group rights as well. In all of these cases, however, the comparative advantages of the pragmatic approach re-assert themselves and no matter whenever one stops reading the cases the question remains as to what one should make of this jurisprudence that judges have been writing on contemporary issues of religious liberty and church/state relations all over the world. What are the lessons to be learned from this collection of legal opinions and where do we go from here?

---

64 *Chan Hiang Leng Colin et al. v. Minister for Information*, supra note 52.

65 Supra note 54.

66 *Amezqueta v. Health Service of Navarre*, Judgment 166/96, October 28, translated and reproduced in part in *Global Constitutionalism* supra note 46.

VI. REVELATIONS

For many judges, a radical rethinking about the role of the third branch of government is in order. The idea that courts can effectively protect human rights by spinning meanings out of the words of constitutional texts is not tenable any more. The cases show religious liberty is best protected and democracy most respected by the courts when they move past the interpretive phase of the process of review and take a close, hard look at the facts. On the pragmatic approach, the interpretation of constitutional texts is mostly a formality. The pragmatic judge reads the words of a constitution simply to find the principles of proportionality that distinguish laws that respect people's basic human rights from those that do not. That is all that that textual exegesis can and should be expected to do. It is in the application of these principles where the real work of the judge takes place. The golden rule of interpretation for the pragmatist is to read the words of a constitution in the way that maximizes the rights and freedoms it guarantees. A judge who has mastered the comparative caselaw on religious liberty ought never to interpret a constitution in a way that excludes consideration of the interests of those who are adversely affected by whatever law or other act of state is before the court.

Every other (historical, doctrinal, philosophical, etc.) interpretive strategy risks violating the rule of constitutional supremacy by validating laws that limit people's rights and freedoms needlessly and/or in ways that are out of all proportion to the good they achieve. That is precisely what happened when the U.S. Supreme Court, South Africa's Constitutional Court and the European Court of Human Rights did not read the relevant texts as broadly and inclusively as possible. Because they chose to interpret the

guarantees of religious liberty they were responsible to protect more narrowly than the words allowed, laws and regulations that transparently failed to satisfy the requirements of proportionality were certified as being constitutionally correct. Each of these courts allowed arbitrary and discriminatory acts of the executive and legislature to take precedence over the most basic rules of constitutional law, rather than the other way around. Because of the interpretive strategies they employed, all of them inverted the rule of constitutional supremacy and stood it on its head.

For teachers and students of constitutional law, a parallel shift in orientation and understanding needs to take place. From the beginning, the conventional understanding has been that judicial review is all about giving meaning to constitutional texts and comparatively little thought has been given to the idea that the principal task of the third branch of government is to test the ends and the means of the laws and other acts of the state against a basic principle or metric of proportionality. Almost all of the writing in constitutional law assumes that judges should rely, to the extent they can, on interpretive strategies to distinguish laws that are constitutional from those that are not. Debates tend to focus on which sources of meaning - historical records, judicial precedents, ordinary understandings, or political theory - judges should consult. Calls for courts and commentators to concentrate on the facts of each case are not non-existent, but they are comparatively rare.[67]

---

[67] But see, Cass Susstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, 1999 Harvard University Press; and Richard Posner, "Against Constitutional Theory" (1998) 73 N.Y.U. Law Review.

The very uneven performance of the courts in their protection of religious liberty tells us we need to learn more about the pragmatic approach, about its methods and about the values it promotes. To get a better understanding of what it means to think about judicial review as a principled evaluation of how laws reconcile the conflicting interests they affect, rather than an exercise of textual exegesis, it would help to focus on cases where judges are naturally inclined to reason pragmatically and where interpretive questions rarely come into play. Cases on gender equality are one obvious possibility. All constitutions either explicitly or by judicial definition proscribe laws that discriminate on the basis of sex. Studying cases like these would give us a better sense of how the pragmatic method works in practice and whether the neutrality of its method holds true outside the domain of religious rights.

For example, in most of the cases we have encountered so far, when judges did examine the impact of a law on the different interests it affected, they were able to maintain a neutral vantage point because they could rely on the parties' own evaluations of how significant the law was to them. The closing of Bar Ilan street was typical. There was no need for Barak to second-guess what a two minute detour meant for the average Israeli compared to the significance of a tranquil environment for orthodox Jews during their prayers on the sabbath. So too Antonin Scalia and Kate O'Regan could take Deborah Weisman and the South African state, respectively, at their word. But what happens if they can't? What do judges do when, as in the *Serviceman Enshrinement* case, someone's perspective is thought to be "hypersensitive" and unreasonable? What then? How can judges claim their decisions are objective and neutral in cases of that kind?

Concentrating on cases in which judges evaluate the validity of a law by testing both its ends and its means against a principle of proportionality will also give us a better sense of how compatible such a conception of judicial review is with the sovereignty of people to govern themselves democratically. We have seen 'pragmatic' judges tend to concentrate on the means rather than the ends of the laws they are asked to review. Except for laws that deliberately aim at coercing people in their religious beliefs, legislatures are given free reign to pursue whatever objectives got them elected, including supporting religious interests and groups, so long as it is done in the appropriate way. But how far does this deference extend? On complex issues of social policy like the role of women in the military, for example, does pragmatism instruct the judge to defer to the government's choice of means as well? Do claims that would have significant implications for the public treasury if they were successful also warrant a more deferential standard of review?

Comparative research of this kind presents exciting possibilities. For lawyers who are trained in the common law, it is natural to anticipate that reading cases on issues like gender discrimination will also shed light on the normative premises that underlie the pragmatic approach and the principle of proportionality on which it is based. Studying constitutional caselaw comparatively offers the opportunity of building law's own self-understanding into a coherent and credible theory of judicial review. Proceeding by induction can show us what it is about the entrenchment of constitutional rights and the process of judicial review that distinguishes constitutional democracies at the end of the millennium from rival forms of government that are predicated on values other than the protection of human rights and the rule of law. We should learn whether the empowerment

of the courts over the last fifty years is as significant a development in the evolution of democratic forms of government as the enfranchisement of women was almost one hundred years ago.

憲法研討會: 從比較角度看基本法的實施
Constitutional Law Conference on Implementation
of the Basic Law : A Comparative Perspective

Remedial Options in Constitutional Cases: The Canadian Experience

Justice Lynn Smith

Precis of

REMEDIAL OPTIONS IN CONSTITUTIONAL CASES: THE CANADIAN EXPERIENCE *

Paper Presented at Hong Kong

Constitutional Law Conference on Implementation of the Basic Law: A Comparative Perspective

The Honourable Madam Justice Lynn Smith
Supreme Court of British Columbia

April 28, 2000

INTRODUCTION

The ***Canadian Charter of Rights and Freedoms*** came into effect in 1982, bringing newly-entrenched constitutional rights into the Canadian environment: political and civil rights (to freedom of religion, expression, assembly and association); democratic rights; mobility rights; legal rights, including the right not to be deprived of liberty or security of the person without due process, not to be subjected to unreasonable search or seizure, not to be arbitrarily detained or imprisoned, the right not to be subjected to cruel and unusual treatment or punishment, the right to counsel, and fair trial rights; equality rights; rights of aboriginal peoples; and language rights. For the past 18 years the courts have been essaying the novel tasks of interpreting those rights, attempting to pour content into the grand language of the document; and of making the content meaningful by developing effective remedies for those who establish that their rights have been violated.

The ***Charter*** contains two provisions that have the effect of continuing to recognize legislative supremacy: s. 1, which guarantees the rights subject to reasonable limits prescribed by law that are demonstrably justifiable in a free and democratic society; and s. 33, which allows governments to pass legislation notwithstanding most provisions of the ***Charter***. The courts, however, have set a fairly onerous standard to be met before infringing provisions will be saved by s. 1. Further, the governments have almost uniformly decided to forebear from resorting to the s. 33 "override" and instead to revise legislation, bringing it into conformity with the constitution as interpreted by the courts. Nevertheless the

---

* The full paper will be made available after the conference.

advent of constitutional rights has brought much discussion and sometimes concern about the role of the courts into the national political and legal discourse.

CONSTITUTIONAL REMEDIES IN CANADA

Importance of Remedial Provisions

Without effective remedies, a constitution is mere words on paper, creating empty promises that, unfulfilled, lead to cynicism and civic decay. Thus, while much of the jurisprudence and academic discussion in Canada has centered around the definition of the rights and the circumstances in which limitations on them will be permitted by virtue of s. 1, arguably the most important ***Charter*** jurisprudence is that which deals with remedies.

In Canada, there are several factors which have shaped the development of a fairly robust set of remedial options: (1) a tradition of judicial review of governmental action, (2) a federal system in which courts have long reviewed the constitutionality of legislation for compliance with the constitutional division of powers, (3) provision for references by governments to the courts regarding the constitutionality of legislation, (4) national adherence to international instruments requiring the provision of remedies for infringements of certain rights, and (5) most importantly, two sections (one in the ***Charter***, one in the ***Constitution Act, 1982***) that grant remedial power to the courts.

The first can be called the "supremacy clause". Section 52 (1) of the ***Constitution Act, 1982*** states:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The second is the remedy clause in the ***Charter*** itself, which reads:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied, may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Remedies Under the Supremacy Clause

If a challenger has succeeded in satisfying a court that a law infringes a ***Charter*** right, and the government has failed to satisfy the court that the infringement constitutes a reasonable limit demonstrably justifiable in a free and democratic society, a range of remedies is possible:

1. ***striking down*** the law that is inconsistent with the Constitution;

2. ***severing*** the part of the statute that is inconsistent with the Constitution and striking down only that part;

3. ***reading in*** words to the statute in order to make it consistent with the Constitution;

4. ***reading down*** the statute in such a way that it is consistent with the Constitution;

5. allowing a ***constitutional exemption*** where the application of a statute makes it inconsistent with the Constitution.

In addition, the courts have also developed the practice of granting one or more of these remedies but ***suspending implementation*** for a period of time in order to allow the provincial legislature or the federal Parliament to act.

In selecting the appropriate remedy, in particular in determining whether legislation should be struck down or, instead, remedied by reading in provisions that make it constitutional, courts are to be guided by two principles: respect for the role of the legislature, and respect for the purposes of the ***Charter***. The remedies of severance or reading in will be warranted only in the clearest of cases. Factors to be considered when determining the appropriate remedy are:

1. the precision with which the remedy can be stated;

2. the budgetary implications;

3. the effect the remedy would have on the remaining portion of the legislation;

4. the significance or long-standing nature of the remaining portion;

5. the extent to which a remedy would interfere with legislative objectives.

These principles have been set out by the Supreme Court of Canada in the leading cases on remedial options: ***Schachter v. Canada***, [1992] 2 S.C.R. 679 and ***M. v. H.***, [1999] 2 S.C.R. 3.

Remedies under s. 24(1) of the Charter

Both "defensive" and "affirmative" remedies are available. Examples of "defensive" remedies are orders to stay proceedings, to dismiss a charge, to quash a search warrant, or to enjoin an act. "Affirmative" remedies include mandatory injunctions, orders for the return of property, declarations, and damages.

"Defensive" remedies such as stays of proceedings have been frequently used.

As for the "affirmative" remedies, declaratory relief has been preferred to injunctive relief. Although damages are available in appropriate cases as a remedy for violations of constitutional rights, they have been awarded infrequently in Canada.

Exclusion of Evidence under s. 24(2) of the Charter

The Canadian courts have developed an elaborate jurisprudence regarding the circumstances in which, as a result of a violation of an accused person's ***Charter*** rights, evidence will be excluded at his or her trial. The rationale for exclusion of the evidence is not so much to deter police misconduct (as in the United States) but to protect the reputation of the administration of justice. The person seeking to exclude the evidence has the burden of proof, on a civil standard, to show that the admission of the evidence would bring the administration of justice into disrepute. Where evidence would not have existed but for a ***Charter*** violation (such as a confession made where there has been a denial of the right to counsel), it is usually excluded on the ground that its admission would make the trial unfair, and unfair trials reflect badly on the reputation of the justice system. On the other hand, where the evidence existed independently, and would have been discovered in any event, without the ***Charter*** violation, it will usually be admitted.

CONSTITUTIONAL REMEDIES AND THE ROLE OF THE COURTS

The granting of remedies for constitutional violations frequently leads to expressions of concern about the courts "usurping" the legislative role. This is particularly acute where the violations relate to unpopular minorities and the remedies have the appearance of re-drafting legislation. In some recent cases the Supreme Court of Canada has advanced a spirited defence of the courts' role. In ***Vriend v. Alberta***, [1998] 1 S.C.R. 493, the Court stated:

(1) The Canadian people, through their elected representatives, chose a redefinition of our democracy under which the legislative and

executive branch must respect the newly conferred constitutional rights and freedoms. The remedial powers given to the courts under s. 24 of the ***Charter*** and s. 52 of the ***Constitution Act, 1982*** require the courts to scrutinize the work of the legislature and executive in the interests of the new social contract and as trustees of the rights.

(2) Courts are independent from the executive and legislative branches. Therefore, citizens can generally look to the courts to make reasoned and principled decisions according to the dictates of the constitution. In doing so, courts are not to second-guess the legislatures and executives and to make what **they** consider to be the proper policy choice. They are to respect the legislative and executive role while they uphold the constitution.

(3) Mutual respect among the branches is necessary and is supported by the wording of the ***Charter*** and by the existence of the s. 33 override clause. In addition, s. 1 is meant to ensure respect for legislative action and the collective or societal interests represented by legislation. Most importantly, in fashioning the appropriate remedy the court must be respectful of the legislative role.

(4) The ***Charter*** has fostered a more dynamic interaction among the branches of government -- a "dialogue". Each of the branches is made somewhat accountable to the other. This enhances, not detracts from, the democratic process.

(5) The concept of democracy is broader than the notion of majority rule. Dickson C.J.C. in ***R. v. Oakes***, [1986] 1 S.C.R. 103 wrote:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."

(6) If legislators or the executive fail to take democratic values and principles under the ***Charter*** into account, courts should stand ready to intervene. It is not undemocratic for judges to intervene when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the ***Charter***.

CONCLUSION

The crafting of effective constitutional remedies is a challenging task in any society, but there is no point in having a constitution unless this task is attempted. Canadian courts' development of sometimes creative remedial options has been a crucial feature of ***Charter*** jurisprudence. Having only recently acquired a constitutional bill of rights, Canada has been able to benefit from the experience in other jurisdictions, such as the United States and the countries covered by the European Convention. At the same time, the circumstances in each society are unique. The creation of remedies that will be effective and enforceable depends upon an understanding of local circumstances, knowledge of the international and comparative context and recognition of the importance of meaningful constitutional rights and freedoms.

HOMEGROWN CONSTITUTIONAL JURISPRUDENCE : THE CASE OF SOUTH AFRICA

Justice Yvonne Mokgoro

I. Introduction

By the nineteenth century, international law had developed the doctrine of legitimate "humanitarian intervention"[1], where states had committed atrocities which hocked the conscience of humanity."[2] Subsequent, to the First World War, the idea of modern international human rights instruments as treaties between states, guaranteeing to protect the rights of their own citizens had begun to germinate.[3] Around the same time, the seeds for international collaboration in specific humanitarian areas had been sown (e.g., the abolition of the international slave trade and national slavery). The rise of legal positivism with its strict application of the doctrine of national sovereignty continued to question the legitimacy of humanitarian intervention in the treatment of people by their own governments. However, following the atrocities and human tragedies of the late 1930s and 1940s, including those in Nazi Germany and apartheid South Africa the strict application of the doctrine of national sovereignty seemed absurd. Thus after World War II intergovernmental organizations such as the United Nations coordinated the adoption of international conventions such as the Universal Declaration of Human Rights.

Today there is little argument against the principle that a state's treatment of its citizens is subject to international scrutiny. Further it is generally accepted that domestic

---

[1]Paul Sieghar, The International Law of Human Rights p 12.

[2]Id.

[3]Id at 13.

laws and practices of states within their own jurisdictions may be measured in terms of international standards and enforced through international pressure

While it may be correct to say many subjects would question the legitimacy of their municipal laws in terms of international law standards, it is also a truism that subjects will often question the legitimacy of the laws in terms of the personal justice they derive from them — where justice must be seen to be done. They often feel the need to own the legal system, identify with it because it serves their needs and interests socially, politically or economically Thus, while it is important that international constitutions are in harmony with international standards, it is also vital to develop national constitutional values which are legitimate in the eyes of the people so that they see the constitution and the laws that derive from it as their own.

This presentation will examine the nature, role and development of a Constitution as the basic law in the legal order of a nation-state. It will proceed to question the interpretative and independent function of the judiciary in shaping the development of a homegrown basic law in the context of relevant social, political and economic circumstances. The evolving constitutional order in South Africa with particular aspects to be highlighted will serve as a case in point.

II. The Constitution as basic law: its genesis, purpose and application

Broadly defined, a constitution is a country's basic law.[4] It is a guiding document that prescribes the principles by which a nation chooses to live by. In the post-Cold War era constitutional principles are typically based in fundamental human rights notions.[5] In the

---

[4]Norman Redlich, Understanding Constitutional Law, p. 1.

[5] This has not always been the case. Apartheid was implemented under a

American context, the notion of constitutionalism is more restricted in the sense that it refers mostly to the limitations placed on governmental action. The United Kingdom, unlike other modern democracies, has no written constitution. It has an omnicompetent parliament with the power to pass any law and does not recognize, even in theory any higher legal order in terms of which acts of parliament could be invalidated and still relies on the common law as a source for rights protection. Different to countries in the civil law tradition, "it makes no fundamental distinction as regards rights or remedies between 'public law' governing the actions of the State and its agents and 'private law' regulating the relationships between private citizens with one another..."[6] Through the development of the common law and specific statutory enactments, specific rights with their remedies are provided for.

In generic/global terms, a constitution is a blue-print of intra-governmental relations, setting forth the general parameters of executive, legislative and judicial powers. It also embodies the fundamental rights granted to individuals under the law.

In the South African context, the interim Constitution[7], said to be the product of a political settlement after successful multi-party negotiations, was intended to govern the transition from a legal order of apartheid injustice to a constitutional order characterised by human rights.[8] Its underlying philosophy drew on the Western tradition and standard constitutionalism, but was primarily conceived as a "bridge" from the nation's segregated past to its future of peaceful coexistence. The purpose of this interim Constitution was no less

---

constitutional order. In the United States, the internment of Japanese-Americans was allowed despite the existence of a libertarian Bill of Rights.

[6]See S.H. Baily, et al, Civil Liberities: Cases and Materials, 3rd ed, p. 1).

[7]Constitution of the Republic of South Africa Act 200 of 1993.

[8]Mokgoro, The Customary Law Question in the South African Constitution, Saint Louis University Law Journal 41:1279.

than to provide for the transformation of society through constitutional supremacy, and the values of equality, human dignity, non-racialism and non-sexism. The spirit of the transition of South African society, based on the new constitutional order is reflected in the words of the epilogue to the interim Constitution:

> ...a historic bridge between the past of deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex

The final Constitution,[9] adopted in 1996, re-affirms this same vision of a new South Africa.

Looking to the South African example, a constitution is undoubtedly a historical milestone.[10]

Its creation and articulation is rooted in the national aspirations of the people it is meant to serve. Often born out of struggle against oppression and for a new found freedom, the expression of the content of that freedom will necessarily be based in what are now considered international constitutional principles. Although international human rights law influence how we conceptualize our relationship with the state and other citizens, and how we visualize our freedom, in formulating our constitutions, we are bound to give voice to the hopes of the average citizen for whom a new constitutional order is generally intended to protect. The multi-party negotiating process that led to the interim South African Constitution, riddled with

---

[9]Constitution of the Republic of South Africa Act 108 of 1996.

the hard task of having to meet the varied interests of a deeply divided society, was often described as a document of compromises and understandably, so criticized by some. It is, however, regarded the world over as "a miracle", deserving of international emulation.[11] Among South Africas, it enjoys wide support and legitimacy, underscoring its timelessness.

The next phase of constitutionalism, often regarded as the one which determines the efficacy of the basic law, is the realization of those shared aspirations it reflects. Towards this end, a constitution may be regarded as an institution. It is fundamentally a normative system against which state actions are to be measured. The South African Constitution is indeed a normative document capable of institutionalization. It consists of detailed provisions laying out the specific content of 34 fundamental rights.[12] It marks with similar detail the establishment and authority of state branches and organs. Moreover, the Constitution contains guidelines for its application. It is correct, therefore, for the Constitution to be treated as the supreme law of the land, as a guide for the limitations on the exercise of state power, but also as a model of values to be implemented in a fair and consistent manner.[13] Generally, constitutional rights empower citizens prejudiced by laws or executive decisions to demand that the state justify its actions.[14] Likewise, constitutional rights serve to ensure that the state performs its duties according to the values embodied in the basic law. In South

---

[10]Id.

[11]Theuns Eloff, The Process of Giving Birth in the Birth of a Constitution (ed. Bertus de Villiers, p. 19

[12]Constitutionalism and the New SA Constitution, 56-58.

[13]Etienne Mureinik, A Bridge to Where? Introducing the Interim Bill of Rights, South African Journal on Human Rights 10:31, p. 32.

Africa the Constitution places a duty on every citizen to perform duties and responsibilities of citizenship.

However, the effectiveness of such guarantees is not automatic. Guaranteed protection is largely dependent on the integrity of the institutions which apply the basic law, and ultimately on the determination of the people to maintain such protections.[15] Normally the power to interpret the rights set forth in the constitution is vested in the judiciary. It is also the judiciary, at the trial, appellate and constitutional level, which will determine the proper scope, extent and limitations of constitutional rights and their relationships with each other. This is a significant aspect of homegrown jurisprudence, to which I focus on below.

In South Africa, the Constitutional Court as the court of final instance in all constitutional matters, is charged with the duty to ensure the implementation of the basic law, and in turn, the values that it espouses.[16] It is therefore incumbent on the judiciary to develop the overriding standards against which government and sometimes individual actions are to be evaluated.[17] This lays at the feet of the judiciary the awesome responsibility/power to interpret the content of that normative system and its justifiable limitations.[18] It is the judiciary's domain to oversee the new constitutional dispensation. In today's South Africa, that means the judiciary is, at least partly, obligated to give meaning and substance to the

---

[14]Id.

[15]Baily above note [x] at p 1.

[16]See section 7 of the South African Constitution.

[17]See section 8(2) of the South African Constitution.

[18]This secondary duty of the judiciary is unique to several constitutions, including the South African Constitution. Section 36 of the Bill of Rights provides:

transformation of the society.

Before 1994, judicial review in South Africa was subordinated to legislative supremacy Founded on the Westminister constitutional model, the legal system was based on the doctrine of parliamentary sovereignty. [19] Under this system, wide regulatory powers were transferred to the executive and the court's were precluded from deciding the validity of legislation.[20]

Parliament could make any encroachment it pleases upon the life, liberty and property of any individual subject to its sway. It was the function of the courts to enforce parliament's will.[21] The ultimate danger was that the system allowed government virtual impunity in exercising state power. Indeed the restrictions on judicial independence and impartiality facilitated apartheid injustice.

The minimalist role allocated the judiciary under the old SA system raises an important question about the relationship between the judicial function and democracy. First, it is necessary to specify what independence the judiciary realistically holds. The judiciary is branch of government. Judicial decision-making is an exercise of governmental power. The executive enables the judiciary by distributing resources to the courts and appointing judges to the bench. Nevertheless, in order to protect the fundamental rights of persons and fulfill what is now an international constitutional obligation, the judiciary is expected to be ideologically impartial and act independently from the other branches of government. During the last phase of apartheid rule the nexus between government and the courts was

---

[19]See Pius Langa, Legal Visions — South Africa in the 21st Century.

[20]Id

[21]Hugh Corder Law and Social Practice.

debated at great length. For some, the absence of [official rules ?] subordinating the judiciary to the executive was proof of the formal independence of the courts.[22] Others considered judicial service under the apartheid regime to evince a propensity for collusion Along this thinking, a campaign was launched demanding the resignation of "moral judges" [23] The moderating response to this campaign was that judges should continue to serve justice, but not apartheid law.[24] That is, the judiciary was urged to reject absolute legalism for a principled position grounded in the common law tradition.[25]

The questions whether or not judges should serve on the bench, whether or not the common law is the appropriate vehicle for change, and whether or not judicial action collides with racist politics/policies have been muted in South Africa and in many young democracies. The general issue of the role of the judiciary, however, remains pertinent. Reviewing history and drawing on conventional constitutional wisdom, we can abstract a constitutional formula. Even if we substitute parliamentary sovereignty for constitutional supremacy and institute a democratic constitutional order supported by a bill of rights.[26] More internal considerations are required to grow a nationally-rooted jurisprudence.

A homegrown jurisprudence requires a responsive judiciary when interpreting the constitution. The primary role of the courts in this respect is to develop a jurisprudence that

---

[22]Law and Social Practice.

[23]Id.

[24]Id.

[25]Id.

[26]See e.g. Hugh Corder Law and Social Practice.

responds to the needs of society. A homegrown jurisprudence is thus a contextualized jurisprudence. Before elaborating this delicate point further, I would like to address the option of constitutional amendments, in response to changing societal needs.

Is a homegrown constitutional jurisprudence dependent on the will of the legislature or the function of the courts, or both? As mentioned earlier, a constitution is an expression of national aspirations. In South Africa, a diverse group of deliberated and adopted the Constitution. It is now the role and function of an independent and impartial judiciary to interpret, apply and oversee the implementation of the constitutional vision. This must be done according to the text of the document and the circumstances implicated by the dispute. But then society is not static. There may exist exceptional circumstances that may require that a substantive constitutional amendment be considered — technical amendments may be unavoidable. But the basic structures and premises of the Constitution must be preserved and amendments must be subject to special procedural safeguards.[27]

III. Judicial Independence and Contextualized Jurisprudence

The South African experience is an instructive illustration of the issues courts may face in attempting to carve out an indigenous jurisprudence from a divisive past. The complex global demands within which the nation-state now operates further complicates the prospects of an internal approach to constitutional law. Many jurisdictions still find analysis in the adjudication process unnecessary. For the rest, they are confronted with the task of balancing a global identity and the particular, and often divergent, needs of national inhabitants.

---

[27]See first certification judgement.

A post-colonial jurisdiction would undertake this balancing act while also grappling with effects of historical repression and international hierarchies. Moreover, judges are obligated to make decisions free from ideological positions, to divorce themselves from personal beliefs and act in an objective manner. South Africa provides but one example of a judiciary facing these challenges.

The operative provisions of the South African Constitution allows for particularized analysis with due regard to universal norms of democracy and freedom. A brief review of these provisions reveals the breadth of factors to be considered in constitutional adjudication.[28] To begin with, section 8 governs the application of the Constitution. In significant part, this section subjects all law, including the common law, to constitutional scrutiny and enjoins the Court to develop Constitutional causes of action and remedies where legislative gaps exists. The section also subjects persons, natural and juristic to the Bill of Rights in the Constitution. The horizontal application of the Constitution may be described as progressive law. It acknowledges that in South Africa in "modern day reality ...in many instances the abuse of power is perpetrated less by the State and more by private individuals against other individuals."[29] Finally, no branch of government or state actor is exempt from upholding the Bill of Rights. These three aspects of the constitutional application doctrine reaffirm the supremacy of the Constitution and broaden the protections afforded under its umbrella.

---

[28]The operative sections are those contained in the Constitution of 1996.

[29]DuPlessis v De Klerk at para 154 Madala J dissenting. The dissenting opinion of Madala J is now accounted for in the final Constitution which allows for the application of the Bill of Rights to private persons, in certain circumstances.

The Constitution also widens the concept of standing beyond its common law boundaries. Section 38 allows the following persons to approach a court alleging the violation of a fundamental right: (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members. The overall impact of this section is to widen access to the courts in procedural terms, an issue of great resonance in South Africa. Subsection (d) — allowing anyone acting in the public interest to bring an action alleging the violation of a constitutional right — is most unprecedented, but its actual implication is still to be determined.

The next operational provision in the South African Constitution deserving of highlighted attention is the interpretation clause. When interpreting the Bill of Rights, the courts are to follow a two-pronged paradigm of analysis. First, the court must decide whether a constitutional right has been violated. Second, the court must decide whether or not that violation is justifiable in terms of the limitations clause in Section 36. I deal with importance of the second prong below. As to the general constitutional prescription of interpretation, a court or other tribunal must consider "the values that underlie an open and democratic society..." Additionally, a court must consider international law and may do so foreign law, in terms of Section 39(1), which forms part of what is termed the interpretation clause.

The Constitution of South Africa, drafted towards the end of the twentieth century thus draws definition and sustenance from modern rights discourse. The interpretation clause claims the Constitution's plural heritage and identifies South Africa as a global participant. Its

qualified reference to foreign law, as opposed to its reference to international law, correctly requires caution in looking to external jurisprudence [30]

The limitation clause, mentioned above as constituting the second interpretative prong of rights analysis under the Constitution, presents the greatest opportunity for courts to shape a homegrown constitutional order. The Constitution provides that rights in the Bill of Rights may only be limited in terms of a law of general application and only in certain circumstances.[31] This limitation clause requires that the state, or other challenged party, justify the limitations it places on fundamental rights according to the set criteria listed in section 36. It is not for the challenger to show that there is no justification for the limitation. The requirement that the limitation of rights be justified allows for balanced consideration of competing demands and interests. This second test of invalidity may accommodate potentially competing demands that a society of diverse historical experiences and values like that in South Africa may place on a constitutional dispensation. It also provides a framework within which courts may develop constitutional norms that are responsive to the needs of a

---

[30]See S v Makwayane.

[31]Section 36 of the Constitution. The full section provides:

> (1) The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

South African society.[32]

The complex interpretative function required of the South African courts when deciding constitutional questions compounds the challenges facing judges. A leading case example of these challenges and their potential to grow a socially responsive jurisprudence is *State v Makwanyane*,[33] where the Constitutional Court unanimously held that the death penalty was unconstitutional and invalid in the new constitutional order.

The death penalty is the ultimate criminal punishment a state may impose. Its application or abolition evokes extreme passion and opinion in nearly all people world-wide. For historical reasons, it is particularly so in South Africa. As was noted by the Court:

> Opinions regarding the death penalty differ substantially. There are those who feel that the death penalty is a cruel and inhuman form of punishment. Others are of the opinion that it is in some extreme cases the community's only effective safeguard against violent crime and that it gives effect in such cases to the retributive and deterrent purposes of punishment.[34]

Because the drafters of the Constitution deliberately omitted express reference to the legality of the death penalty, it was left to the Constitutional Court to interpret the Constitution and decide whether the punishment was consistent with it.

In finding that the death penalty was an invalid violation of the right to life, dignity,

---

[33]1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC).

[34]Id at para 23 (quoting the Minister of Justice).

and the right not be subjected to cruel, inhuman or degrading treatment or punishment, the Court followed its interpretative mandate by reviewing international law and then considering foreign law. It however noted that "[c]omparative 'bill of rights' jurisprudence will no doubt be of importance, particularly in the early stages of transition when there is no indigenous jurisprudence in this branch of the law on which to draw."[35] The Court emphasized, however, that the Constitution requires that rights be construed with "due regard to our legal system, our history and circumstances and the structure and language of our own Constitution."[36]

The limitation clause, which requires the state to justify its unconstitutional action, was applied by the Court with due regard to the social, economic, and political circumstances related to the death penalty in South Africa. Under the interpretative framework permitted by the Constitution, and relying on empirical evidence relevant to crime and punishment in South African society, the Court noted the political and prejudicial application of the death penalty based on race, poverty and chance. It discussed the indegency of a majority of accused and their inability to afford legal representation, of choice and the risk of ineffective assistance by pro deo counsel. It weighed the pressing need to deter and prevent violent crime in South Africa against the profound and socially engineered poverty that drives some to seek relief in proceeds of crime which often leads to violence.

---

[35]The comparative law analysis of capital punishment in open and democratic societies included the jurisprudence of several developed countries and newly emerging democracies. The Court discussed in particular the legality of the death penalty in Canada, Germany, Hungry, India, Tanzania, and the United States, as well as in international and European community law.

[36]S v Makwayne above note [56] at para 36.

The Court declined to construe prevalent public opinion as decisive of the issue Instead it held that its interpretative role was to protect the Constitution. It recognized tha majority public opinion may well favour capital punishment, but found that:

> [t]he very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those entitled to claim this protection include the social outcasts and marginalized people of our society."[37]

In my own concurrence, it was pointed out that enduring values of a community are not the same as fluctuating public opinion,[38] and that common values in South Africa, can form a basis upon which to develop a South African human rights jurisprudence. The task before South Africa is to undo the structures of exclusion upon which the apartheid system was based. This task demands that in balancing interests under the limitation clause, value judgements must be accounted for.[39] Locating commonly-held values depends on civil society to canvass various sectors of society, and to formulate the appropriate values. The generous standing requirements under the Constitution, combined with amicus submissions, allows ample room for the judiciary to entertain values and needs shared by those marginalized by the former system. Universal values held in democratic and open societies can act as a guard against

---

[37]Id at para 88.

[38]Id at para 305.

[39]*S v Makwanyane* at para 304.

undue subjectivity in the application of community values.[40] They give effective guidance; however, indigenous value systems are a premise from which we need to proceed...[41]

The imperativeness of an independent judiciary in ensuring the rule of law may still be preserved within a contextualized analysis that accounts for social, economic and political realities, as well as indigenous values. Accounting for circumstance is different from bowing to political or other pressures. A strong-minded judge with propensities is not necessarily a biased judge. Rather, judicial independence depends on the personal ethics and intergrity of the sitting judge to approach disputes with an open mind and give due consideration to all arguments presented. The Constitutional Court upheld these reasonable positions and found that it is appropriate for judges to bring their own life experiences to the adjudication process.[42] Thus enabling the potential for a legitimate home-grown jurisprudence.

IV. Value-Orientated Jurisprudence and Customary Law

In conclusion, a discussion of South Africa's Constitution is not complete without including indegenous African custom and tradition as factors which play a role.in the shaping of a new constitutional value system. In South African jurisprudence there is no single interpretation of the concept of customary law. It generally consists of a cumulation of legislative enactments and judicial pronouncements on African custom and tradition. Because it is based in social practices, customary law should respond to a society's

---

[40]Id.

[41]Id.

[42]President of the RSA v South African Rugby Football Union, 1999 (4) SA 147.

contemporary needs and values and thus, reflect the social evolution of that community. The codification and centralized control of customary law during the colonial and apartheid periods however, stagnated its development. The modification of customary law was placed solely in the hands of parliament and specialized courts which excluded the authorities, and lacked wider involvement of communities who are subject to customary law. Furthermore, the significant failure of past customary law legal policy to keep abreast with social reality resulted in the sharp dichotomy between African custom as law and African custom as social practice. It also entrenched patriarchal male power and authority over the family to the exclusion of women, and its application to contemporary rural communities has caused much hardship, particularly for women. Its application in its codified carnation often undermines the integration of its jural communities people into the modern economy and social systems, resulting in wide-spread practices with discriminatory impact. Nevertheless, customary law remains a governing institution in rural communities and a reality in South African law. Because of its continued profound impact on peoples lives, the multi-party negotiations concluded that its continued application must be protected in the new Constitutional since it cannot simply be wished away. How courts will balance the apparent tensions between a patriarchal system of law and a Bill of Rights with equality as a basic value will form profound aspects of a homegrown jurisprudence in South Africa.

HONG KONG EXPERIENCES IN CONSTITUTIONAL LITIGATION:-

Some Reflections on The Leading Right of Abode Cases

Denis Chang S.C.

OUTLINE OF TALK

1. Declaration of Interest as lead Counsel for the Applicants in **Ng Ka Ling** (1999) 2 HKCFAR 4 and **Lau Kong Yung** (1999) 2 HKCFAR 300 among other right of abode cases and in **Ng Siu Tung** & 5307 Others HCAL No. 81 of 1999 provisionally scheduled for hearing before Stock J. around mid-May 2000.

2. **Ng Ka Ling** and **Chan Kam Nga** & Others [1999] HKLRD 304 revisited.

3. The controversy over constitutional jurisdiction which led to **Ng Ka Ling** (No. 2) [1999] 1 HKLRD 577.

4. The Chief Executive's Report to the State Council dated 20 May 1999 Seeking Assistance from the CPG in Solving Problems Encountered in the Implementation of the Basic Law [expressed to be made under BL 43 and 48(2)].

5. The Interpretation of 26 June 1999 and the Explanatory Note by Qiao Xiaoyang, Deputy Secretary of the Legislative Affairs Commission, NPCSC admissible under **Pepper v. Hart**.

6. Has the Interpretation negated **Chan Kam Nga** and taken the heart out of Ng Ka Ling ? - a critique of **Lau Kong Yung**.

7. Is Interpretation necessarily incompatible with the CFA's "predominant provision" test in **Ng Ka Ling** ? Or with the Core Right?

8. What questions are left outstanding by Lau Kong Yung ? - the likely issues in **Ng Siu Tung**.

9. "One Country, Two Interpretations" ? To avoid confusion of systems, should not there be one set of principles - the common law principles? See Stock J's decision in **Master Chong Fung Yuen** HCAL 67/1999 cf. CA's decision delivered on 12 April 2000 in **Fateh Muhammad** CACV 272/99 and Keith JA's remark in Court of First Instance in same case reported [1999] 3 HKLRD 199 at 213.

[See Appendix for Questions]

HONG KONG EXPERIENCES IN CONSTITUTIONAL LITIGATION: THE RIGHT OF ABODE CASES

DENIS CHANG S.C.

Appendix

1. Has the NPCSC's Interpretation of 26 June 1999 taken the heart out of **Ng Ka Ling** (1999) 2 HKLRD 315 ?

2. Has the CFA in **Lau Kong Yung** (1999) 2 HKCFAR 300 conceded more than what is required by the NPCSC's Interpretation ?

3. In particular, would the NPCSC be acting consistently with the autonomy-scheme of the Basic Law if it had professed (which it did not) to interpret a provision which was within the limits of the HKSAR's autonomy ?

4. Is the Interpretation necessarily incompatible with "the Core Right" ? Should the CFA not have construed it in manner which would as far as possible make it compatible with "the Core Right" in accordance with principle of "generous" interpretation which it had affirmed in **Ng Ka Ling** ?

5. On the BL 158 reference issue, is there anything left of the CFA's "substance" or "predominant provision" test ?

6. Is the case of **Master Chong Fung Yuen v. Director of Immigration** HCAL 67/99 (2000) 1 HKC 359 (Stock J., 24/12/99) correctly decided when it affirmed that common law principles of interpretation are applicable ?

7. In particular was Stock J. right in refusing to allow the PC's Opinions, the Working Report, the NPC Resolution or the reference in the

NPCSC's Interpretation to the PC's Opinions to affect what he held was the plain meaning of BL 24(2)(1) ?

8. If we are to avoid a confusion of systems or the prospect of having "One Country, Two Interpretations" should not there be one set of principles and would not the common law principles be applicable in the light of BL 8, 18, 81, 82, 84, 87, 92 ? [NB: BL 87 says: "In criminal or civil proceedings in the HKSAR, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained..."].

9. Rogers J.A. in **Fateh Muhammad** CACV 272/99 (CA) suggested that the reference in the NPCSC's Interpretation to the PC's Opinions might fall into the category of "persuasive obiter dicta" ? Is that correct ?

10. What issues were left outstanding in **Lau Kong Yung** and which are included in **Ng Siu Tung & 5307 Other Applicants HCAL No. 81**?

憲法研討會: 從比較角度看基本法的實施
Constitutional Law Conference on Implementation
of the Basic Law : A Comparative Perspective

The Flag Case: A short reflection on the presentation of the case and its significance as a piece of constitutional decision-making

Mr. Andrew Bruce, SC

The Flag Case:

A short reflection on the presentation of the case and its significance as a piece of constitutional decision-making

by

Andrew Bruce, SC*

It is in the nature of life as an advocate that this is the first time I have actually sat down and reflected on the sequence of litigation and court decisions which is collectively known in Hong Kong as the Flag Case.[1] I appeared for the prosecution at every stage of the proceedings.[2] That my perspective on this case is unique cannot be doubted. I am less convinced that it is the *best* perspective. Allowing for those limitations, I propose to look at the case in two different ways: first as a piece of constitutional litigation and second on the constitutional and human rights implications of the case.

These two perspectives sound different. As you will soon see, they are closely intertwined. One thing these perspectives have in common is that they are *my* perspectives.

My initial reaction to the title of this session *Homegrown Constitutional Jurisprudence* caused me a degree of discomfort. Was there a hint of post-colonial cringe in that title, perhaps implying that the imported stuff was better? If there is, the cringe is misplaced. One of the conclusions that I will seek to draw in this paper, using the flag case as an example, is that there is not a lot

---

* Andrew Bruce, SC graduated in Arts (1974) and Law (1977) from the Australian National University. He is admitted to practise law before the Supreme Court of South Australia, High Court of Australia and the High Court of Hong Kong. He presently holds the title of Senior Assistant Director of Public Prosecutions in the Prosecutions Division of the Department of Justice, having joined the Hong Kong Government's legal service in 1982. He is the author of *Criminal Procedure: Trial on Indictment* and the volume on Criminal Law and Procedure in *Halsbury's Laws of Hong Kong* and is, with Gerard McCoy QC, the author of Bruce & McCoy's *Criminal Evidence in Hong Kong.* He was appointed Senior Counsel for Hong Kong in 1996. This paper should in no way be taken as necessarily representing the views of the Government of the Hong Kong Special Administrative Region.

1 The decisions are reported as *Ng Kung-siu & Anor v HKSAR* [1999] 1 HKLRD 783, 2 HKC 10 (Court of Appeal) and *HKSAR v Ng Kung-siu & Anor* [1999] 3 HKLRD 907, [2000] 1 HKC 117 (Court of Final Appeal). [1999] 2 HKC 10 also reports the decision of the magistrate.

2 As leading counsel in all but the hearing before the application for leave to appeal before the Appeal Committee of the Court of Final Appeal and the substantive hearing before the Court of Final Appeal.

wrong with the homegrown product and, in deed, there is a good deal that is right.

We in Hong Kong have had entrenched human rights for just under 10 years now. In that period, a wide variety of legislation and acts of the executive have been placed under scrutiny by an independent judiciary. Some legislation and some executive acts have survived that scrutiny. Some have not. What has happened is that over that time we have built up a pretty robust human rights jurisprudence.

It is interesting to trace the content of that jurisprudence. Many of the decisions in the early days borrow heavily from overseas jurisprudence – especially that from places which have their own brand of entrenched human rights. However, even in those early Hong Kong cases it is recognised that the terms of the imported product may have been apt for the place in which it was written but may not be apt for Hong Kong. Over time, as the number of Hong Kong decisions grew, adapted and apt for our time and place, the reference to the imported product appears to have changed in nature. You see the principles there but most critically you also see the principles applied in a manner which recognises that while the principles are essentially universal, the resolution of cases on specific facts and circumstances does not necessarily require only one outcome.

That is not to say that results of Hong Kong cases are significantly different to decisions on similar issues in other places. Indeed, what has struck me is the remarkable similarity. My own theory is that this is because we share the same core commitment to human rights as those other places and only the detail varies.

That is not to say that we no longer need the imported product. It will always provide an intriguing combination of reality check and source of inspiration for many years to come. However, we will view it with a growing self-confidence, considering it with a critical eye and in the knowledge that no place and no-one has a monopoly of wisdom in the human rights field.

Perhaps the Flag Case demonstrates the points I have just made better than most.

The litigation of human rights cases

It is very easy for people to either overlook or forget that human rights cases are not like some moot problem or exam question set in a Bachelor of Laws course. These so-called 'human rights' cases have real facts and real evidence and involve real people. In the context of criminal proceedings, one category of the real people involved are the accused who face a real conviction with a real sanction and real consequences at the end of the case. After the trial of such a case there may be appeals. Those have to proceed according the to rules of procedure.

Some of what happened in the Flag Case must be understood against that background.

One of the important consequences of human rights cases against this background is that our laws of procedure often impose real limits on what can

be litigated and what can be decided. The Flag Case is, in some respects, an example of this. Did it define the whole scope of the right to freedom of expression? No. Did it even decide the full scope of ordre public as a justification for restrictions on freedom of expression? No. (That said, let there be no doubt, in answer to the question "will the decision profoundly affect those two issues beyond the narrow boundaries the case at bar?" the answer is, of course, a resounding "yes" .)

Ideally, when you get the brief to prosecute a case which has an obvious human rights content you should approach it in exactly the same way as you would approach the prosecution of a charge of shop-lifting or an indictment for murder. In theory, the human rights component of a case is simply part of the law that has to be applied to the facts to produce an outcome. In reality that is simply not the case. The Flag Case was certainly never going to be a simple criminal case, not least because from the outset it was pretty obvious that what the two accused were proved to have done would provoke a prosecution which would result in a challenge the constitutional validity of the National Flag and Emblem Ordinance and the Regional Flag and Emblem Ordinance.[3]

So what facts did we have to deal with?

On 1 January 1998, a demonstration was organised by the Hong Kong Alliance in Support of the Patriotic Democratic Movement in China. The demonstration consisted of a public meeting and a public procession from Victoria Park to the Central Government Offices of the Hong Kong Government at Lower Albert Road. The public meeting and the public procession were both lawful and orderly.

During the public procession, the Respondents were seen carrying in their hands and waving in the air along the route what appeared to be a defaced national flag and a defaced regional flag. At the end of the procession, they tied those two objects to the railings of the Central Government Offices. The Police seized the two objects.

Both flags had been extensively defaced. As to the national flag, a circular portion of the centre had been cut out. Black ink had been daubed over the large yellow five-pointed star and the star itself had been punctured. Similar damage appeared on the reverse side. Further, the Chinese character "shame" had been written in black ink on the four small stars and on the reverse side, a black cross had been daubed on the lowest of the four small stars.

The essence of the relevant provision of the National Flag and Emblem Ordinance provides:[4]

> A person who desecrates the national flag .... by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence.

The terms of the offence in relation to the regional flag are the same.[5]

---

3 For brevity I will refer to them collectively as the Flag Ordinances.

4 section 7 of the National Flag and National Emblem Ordinance (No. 116 of 1997)

5 section 7 of the Regional Flag and Regional Emblem Ordinance (No. 117 of 1997)

Preparation for constitutional proceedings – some fundamentals

Even at the stage of advice on the police file, interesting issues arose. First, these provisions were only enacted in 1997 and this was the first case involving these provisions. Second, the penal provisions were based on Chinese legislation. Third, and perhaps most intriguingly, the terms of the Chinese legislation appeared to bear a remarkable similarity to US flag desecration legislation.

As with all criminal cases, it was necessary to identify:

- the conduct which might make up the offence; and
- the state of mind, if any, that the prosecution had to prove.

The critical issue in the present case was that the prosecution could not prove that an act of *physical* desecration of the flags took place in public. There could be no doubt that at some stage there had been acts of physical desecration. Thus the meaning of 'publicly desecrates' was critical. Was it limited to physical acts of desecration or was there something more to the concept of desecration? There is a traditional tendency to interpret criminal statutes in the narrowest possible way.[6] The narrowest possible construction on this aspect of the penal provisions of the Flag Ordinances would render liable only those who could be proved to have perpetrated an act of *physical* desecration in public. If that was right then there was, arguably, no case. However, the view was formed that, given the purpose of the statute, it was absurd to limit 'desecration' to acts of physical desecration. An examination of the Chinese text strongly reinforced the view that the notion of desecration extended to non-physical acts of desecration in public. Thus the conduct we could prove in this case fell within the penal provisions.

The problem with this is that the wider the scope of the criminal offence the greater the difficulty in justifying the restriction it imposes on the freedom of expression.

The fact that there was, at least in theory, a narrow construction of the legislation, rather demonstrates an important point about constitutional litigation which must never be forgotten: tactical and strategic decisions taken (or not taken) early on in the proceedings can have real significance later on. One of the basic disciplines of a criminal lawyer is to look at a statute to see if it covers the conduct alleged against the accused. It has always amazed me that the narrower construction of the statute was never advanced by the defence either at trial or on appeal to the Court of Appeal. The point was taken for the very first time in the substantive hearing of the appeal to the Court of Final Appeal. The timing gave the prosecution the immense tactical advantage of being able to characterise the argument as the last gasp of the desperate.[7] Such a course always runs the risk of detracting from (or

---

6 Such a tendency is more the stuff of legend (or, at its kindest, legal history) than the actual law. Modern law mandates a purposive construction: section 19, Interpretation and General Clauses Ordinance, Cap 1.

7 It is not the first time this has been done. In *Ming Pao Newspapers Ltd & Others v A-G of Hong Kong* [1996] AC 906 which is one of leading cases in the Commonwealth on

distracting from) your other main arguments not least because here is this little criminal law point punctuating debates of high constitutional purpose.

Proceedings before the magistrate

The proceedings before the magistrate were done by way of agreed facts. I decided to tender the video tapes which had been taken of the demonstration. There was good and bad for the prosecution in those tapes. The bad was that the conduct of the accused in waving these desecrated flags caused absolutely no violence or any reaction which amounted to a breach of the peace. The good part of the videos for the prosecution was that there were a number of people with placards expressing strong political opinions and they were freely and peacefully doing so. We used this at all levels of the proceedings to bolster the argument that no one was trying the restrict the content of expression but simply the mode. This helped our argument that it was a very narrow restriction.

Although (with appropriate modesty) I rate my skills as a cross-examiner pretty highly, there was no person in the magistrates court more relieved than I when the defence announced the accused would not testify. I had NO idea how I was going to cross-examine and I was anxious to keep this as a criminal trial rather than a political platform. I have to confess that of all the moments of anxiety in the case, this for me was the worst.

The argument before the magistrate focussed on the public order justification with less emphasis on ordre public. One of the arguments I used in addition to this was that in striking the balance between the right to freedom of expression and the need for public order one had to look at Hong Kong's values and Hong Kong's history. This plainly resonated with the learned magistrate in his decision. An example of this was his reference to the poem, later turned into a song (血染的風采)The Glamour of the Blood which is, of course, a deeply emotional song about the importance of the Chinese flag. The magistrate made the point that the fact that it is sung with equal fervor by all sides in China and, given the content of the poem, underlined the importance of the flag. The accused were duly convicted.

---

freedom of expression, the true *ratio* of the decision of the Privy Council is that on the conduct proved by the prosecution did not amount on offence. This fundamental point was never taken by the Appellant at any stage. It was first raised by one of the members of the Privy Council hearing the appeal. One of my abiding memories of this case (I was junior counsel for the Respondent) is the anxiety which counsel for the Appellant had in embracing this point because, if valid it would end his client's criminal liability BUT it might have the effect of preventing the matter being resolved as a freedom of expression case. (In the result the matter was resolved on the criminal law point but the Privy Council went on the rule on the freedom of the press issue. The interesting irony of that is that the accused was held not to be criminally liable for its conduct and the Privy Council resolved the freedom of expression point in favour of the Attorney General.)

The Court of Appeal

The Government lost in the Court of Appeal. I ran the ordre public argument a little harder before the Court of Appeal although a major focus remained on a justification based on public order. The ordre public argument relied heavily on the dissenting judgments in the decision of the US Supreme Court in *Texas v Johnson.*[8] The passion in both minority and majority judgments in that case is very powerful. I thought that the approach of the minority would resonate with the Court of Appeal as much as if not more than the magistrate. I could not have been more wrong. The Court of Appeal held that the Government had not justified the restriction on freedom of expression. To the extent that *Texas v Johnson* resonated at all, it was in relation to the judgment of the majority. The reasoning of the Court of Appeal really came to this: if this sort of law was not necessary in colonial times, why it is necessary now? A good deal of our case – especially before the Court of Final Appeal – was that this view rather missed the point.

The good side of losing

Although this might sound perverse, in many ways, at least from an advocate's point of view, the decision of the Court of Appeal was the best thing that could have happened to the Government's case. It forced a ground-up re-evaluation of our case and, in particular, the method of presenting it. New counsel was briefed above and below me.[9] We looked at flag desecration laws in other countries.[10] We put together a Brandeis Brief.

The constitutional argument aside, at least for me the most interesting part of the case was the preparation of the bundle of materials which we perhaps presumptuously called the Brandeis Brief. This 'Brief' was a reflection of the principal focus of our strategy before the Court of Final Appeal. This strategy was much more values driven: "what is necessary and what meets the balance is very much a matter of the values of our community." The focus was also very much more on ordre public which is itself very values driven.

The Brandeis Brief – the theory

The ascertainment of facts necessary to determine the constitutionality of legislation is treated by the courts as something very different from facts which are necessary to determine liability as between the parties to proceedings. Although the jurisprudence is not settled, such an inquiry

---

8 (1989) 491 US 397.

9 Gerard McCoy, QC to lead and Kenneth Chow (also from the private bar) as junior counsel.

10 I had not challenged the assertion by the accused in the Court of Appeal that there were no such laws. I did this because I did not think it mattered because what really mattered was OUR response to our situation, constitutional historical and otherwise. With the perfect vision that hindsight provides this demonstrates the need for those involved in preparing constitutional litigation to look widely. Had I realised the range and nature of the laws on flag desecration in other countries, perhaps I would have seen the persuasive potential of such material.

appears to differ from the ordinary rules of evidence both in terms of the rationale for admission and the mode of receiving such evidence. In some of the jurisprudence, material thus received is treated as a species of judicial notice. However, it appears that some material received and considered is almost certainly outside the traditional scope of judicial notice and rests on the basis that courts, or at least ultimate appellate courts were engaged in the process of constitutional interpretation. The material which might be received under this heading is probably wider than what are sometimes rather grandly termed the *traveaux preparatoires* and is certainly wider than the material permitted in the construction of an Ordinance under the *Pepper v Hart* principles.[11] Material submitted in this manner has sometimes been labeled a 'Brandeis Brief'.[12]

The need for facts to be established in cases in which legislation was challenged on constitutional grounds was recognised in Hong Kong in *R v Sin Yau-ming* where Silke V-P, addressed the issue as follows:[13]

> The onus is on the Crown to justify. It is to be discharged on the preponderance of probability. The evidence of the Crown needs to be cogent and persuasive. The interests of the individual must be balanced against the interests of society generally but, in the light of the contents of the Covenant and its aim and objects, with a bias towards the interests of the individual. Further the aims of the legislature to secure the residents of Hong Kong free from the depredations of this trade must be respected.

The facts in issue in *R v Sin Yau-ming* were concerned with the daily drug intake of drug addicts which was directed to whether certain impugned legislation was a justified derogation to a right guaranteed under Article 11 of the Bill of Rights. Significantly, evidence was actually called in that case. A perhaps less technical view of what needs to be established was taken in *A-G v Lee Kwong-kut* [1993] AC 951, 974-975. There the issue was less controversial in the sense that Lord Woolf held that it was not necessary for the prosecution to establish the necessity for drugs confiscation legislation.

The need for reference to material which, for example forms the background to the enactment of legislation subject to constitutional challenge has been recognised a number of Commonwealth decisions. In *Pillai v Mudanayke & Ors*,[14] the Privy Council endorsed as 'the correct view' the need for reference to reports such as those from parliamentary commissioners and 'of such other facts as must be assumed to have been within the contemplation of the legislature when [the legislation the subject of the constitutional challenge] were passed.' The Supreme Court of Canada has also admitted evidence outside the scope of that required to determine the issues between litigants in constitutional cases under the Canadian Constitution and the British North America Act, 1867. In litigation under the British North America Act, 1867, there were a series of challenges to the constitutionality of legislation which was sought be justified upon the basis

---

11 *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.

12 This term probably derives from the use by such material by Louis Brandeis in support of his submissions in *Muller v State of Oregon* (1908) 208 US 412. For another example of the use of the 'Brandeis Brief' in the context of litigation before the US Supreme Court, see *Kahn v Shevin* (1974) 416 US 351.

13 [1992] 1 HKCLR 127, 145,

14 [1953] AC 514, 528.

that it was for the peace, order and good government of Canada. In *Reference Re Anti-Inflation Act* [15] the Supreme Court of Canada admitted and considered material comprising policy speeches, statistical data, the opinion of a professor of economics and a reply by the Governor of the Bank of Canada. The materials were received and considered not as to the construction of the impugned statute but rather as to what Laskin CJC termed the Act's "constitutional characterisation, what was it directed to and was it founded on considerations which would support its validity under the legislative power to which it was attributed."[16] Laskin CJC was careful to avoid stating a rule for admissibility in specific or hard and fast terms, preferring to simply say that it should be admitted "in appropriate cases".[17] In *Reference Re Residential Tenancies Act*, [18] the impugned legislation was Provincial legislation and affected in a fundamental way the relation between landlord and tenant. Both before the court below and the Supreme Court, Law Reform Commission Reports and a Ministerial Green Paper on policy options in the subject area were considered. Dickson J for the Court held that they were admissible for the purpose of determining the constitutionality of legislation because that "process joins logic with social fact and the authority of precedents".[19] His Honour observed:

> A constitutional reference is not a barren exercise in statutory interpretation. What is involved is an attempt to determine and give effect to the broad objectives and purpose of the Constitution, viewed as a 'living tree'. Material relevant to the issues before the Court and not inherently unreliable or offending against public policy should be admissible, subject to the proviso that such extrinsic materials are not available for the purpose of aiding in statutory construction.

It is to be noted that the Supreme Court in both *Reference Re Anti-Inflation Act*, and *Reference Re Residential Tenancies Act* held that the process of receiving such evidence should be court-controlled.[20]

The High Court of Australia has also recognised that facts needed to determine the constitutionality of legislation have a very special place and require special treatment. Facts which are required for the judicial determination of the validity of legislation are not matters which depend on the parties which institute the litigation which gives rise to the issue. The proof or establishment of such facts and their treatment once proved or established is to be distinguished from those facts which establish a right or liability as between parties.[21] In *Gerhardy v Brown* Brennan CJ summarised the position in Australia as follows:

> There is a distinction between a judicial finding of a fact in issue between parties upon which a law operates to establish or deny a right or liability and a judicial determination of

---

15 (1976) 68 DLR (3d) 452.

16 (1976) 68 DLR (3d) 452, 467.

17 (1976) 68 DLR (3d) 452, 468.

18 (1981) 123 DLR (3d) 554.

19 (1981) 123 DLR (3d) 554, 561.

20 *Re Anti-Inflation Act* (1976) 68 DLR (3d) 452, 468; *Reference Re Residential Tenancies Act* (1981) 123 DLR (3d) 554, 562. See also: *Morgentaler et al v R* (1988) 44 DLR (4th) 385.

21 *Breen v Sneddon* (1961) 106 CLR 406, 411; followed in *Gerhardy v Brown* (1984-85) 159 CLR 70, 141-142. See also *South Australia v Tanner* (1988-89) 166 CLR 161, 179.

> the validity or scope of a law when its validity or scope turns on a matter of fact. When a court, in ascertaining the validity or scope of a law, considers matters of fact, it is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties. The validity and scope of a law cannot be made to depend on the course of private litigation. The legislative will is not surrendered into the hands of the litigants.[22]

The foregoing decisions probably establish the following:

(1) Facts and information for the purpose of determining whether a law is consistent with the Basic Law may be received and considered by at least the Court of Final Appeal when it is charged with the task of determining such an issue. Examples of the kind of material that might be received includes historical material on the formation of the constitutional instrument, the legislative history of the local Ordinance and the like. The principle may also extend to courts other than the Court of Final Appeal when undertaking such a task.

(2) Such facts and information are to be distinguished from that required to establish or refute liability in a cause of action or criminal matter.

(3) The establishment of such facts and information does not necessarily depend on the parties although the court may look to the parties for assistance and require them to provide such assistance. In this regard the Court may give directions about the establishment of such facts.

(4) The establishment of such facts and information need not be upon the basis of the ordinary modes of proof in judicial proceedings and need be established to a standard which the Court finds convincing.

(5) A party to the proceedings must be given a reasonable opportunity to present contrary or different facts and information.

(6) The reception and means of proof of such facts is a matter very much subject to the control of the Court.

Plainly the Brandeis Brief is not going to be appropriate or necessary or of assistance in every constitutional or human rights case. In some ways, what we did was a first for Hong Kong.[23] There are no rules or precedents.

The issues we had to face in the preparation of this 'Brandeis' brief were really twofold:

- selection of material; and
- presentation of material

The difficulty in selecting material in the Flag Case was heightened by the fact that the idea for the brief came from the Court during the leave stage and thus at all stages a dominant concern in the selection and presentation of the material was the issue of whether we had addressed the Court's wishes because as Brennan CJ makes plain in the passage cited above this is a

---

22 See also: *Levy v Victoria* (1997) 189 CLR 579, 146 ALR 248.

23 There have been attempts to tender materials to the courts of Hong Kong before. However, I am not aware of any case in which it has hitherto been done on the scale attempted in the Flag Case.

matter that goes beyond the interests of the litigants in a particular case. With the benefit of hindsight, I think we could have prepared a better brief. The material we submitted was bulky. Some of it linked in really well with our written case and oral submissions. Some didn't connect as well as it should have. The 'Brief' could have been briefer. Maybe in a perfect world we could have rendered the material into a more digestible form. The trouble with material like this there is never enough and there is always a risk that there is too much. What was satisfying was just how much of the material the Court adverted to.

I think for the future there would be profit in this being a very much more court controlled matter. My guess is that in the Flag Case the Court was content to let the parties assist as they thought best.

The Constitutional and Human Rights implications of the Flag Case

The second perspective I wish to consider is the constitutional and human rights perspective. I strongly believe that this sequence of litigation demonstrates that human rights and, in particular freedom of expression, are very much alive in Hong Kong.

The first thing to consider is the process. At each stage, from magistrate to Justice of Appeal to Chief Justice, the rulings were clear, principled statements of the issues, the law and the conclusion which each level of court thought appropriate. With one exception, the submissions on both sides to each level of court were clear, principled and both broad and deep in terms of coverage and content. In particular, the oral submissions before the Court of Final Appeal rank as some of the best appellate advocacy I have ever seen (that includes, as a piece of advocacy, submissions from the unrepresented Ng Kung-siu).[24] From my perspective as advocate, taken as a whole, I cannot imagine how a court could have received more assistance from the parties to the proceedings. The Court as it left the court room having announced it would reserve its decision could not have left that court room not understanding in detail and with precision, the position of the parties.

Of course it is one thing to have good submissions. Submissions are just a means of assisting a court in the process of resolving an issue that it faces. Both judgments delivered by the Court of Final Appeal concentrate on one main issue: had the Government justified the limit imposed on freedom of expression by the Flag Ordinances? The only other issue dealt with was the criminal law point to which I have earlier referred, i.e. the meaning of 'publicly desecrates'.

In the assessment of the decision I am, to say the least, a little diffident about expressing my views. This is simply because there is a danger in any professional advocate being too bound up with the cause he has pleaded.

Starting with the small matters, the somewhat curt dismissal of the criminal law point rather belied the difficulty of the point. In a perfect world, I would have wished to see some principled discussion of the point.

---

[24] I did not have a speaking role.

Next point, in terms of size, concerns the "Brandeis Brief". The Court referred to the material in the brief without any reference to the legal issues involved. Is this really a species of judicial notice or is there something greater at stake? Perhaps the reason why there was no discussion is that the Respondents did not oppose the consideration of the material in the brief. The reason I respectfully criticise the Court in this regard is that it does nothing to identify the ground rules (if any) for future uses of such material. However, being fair, it is hard to criticise our ultimate appellate court for not making any detailed comment on the principles governing the reception of such material since the US Supreme Court did not do so in its first recorded use of the Brandeis Brief.[25]

The decision on the constitutionality of the Flag Ordinances was, in the end, a values-driven decision. The reasoning of Li CJ[26] can best be seen the following passages at almost the end of the judgment:[27]

> As concluded above, by criminalising desecration of the national and regional flags, the statutory provisions in question constitute a limited restriction on the right to freedom of expression. The aims sought to be achieved are the protection of the national flag as a unique symbol of the Nation and the regional flag as a unique symbol of the Hong Kong Special Administrative Region in accordance with what are unquestionably legitimate societal and community interests in their protection. Having regard to what is only a limited restriction on the right to the freedom of expression, the test of necessity is satisfied. The limited restriction is proportionate to the aims sought to be achieved and does not go beyond what is proportionate.
>
> Hong Kong is at the early stage of the new order following resumption of the exercise of sovereignty by the People's Republic of China. The implementation of the principle of "one country, two systems" is a matter of fundamental importance, as is the reinforcement of national unity and territorial integrity. Protection of the national flag and the regional flag from desecration, having regard to their unique symbolism, will play an important part in the attainment of these goals. In these circumstances, there are strong grounds for concluding that the criminalisation of flag desecration is a justifiable restriction on the guaranteed right to the freedom of expression.
>
> Further, whilst the Court is concerned with the circumstances in the Hong Kong Special Administrative Region as an inalienable part of the People's Republic of China, the Court notes that a number of democratic nations which have ratified the ICCPR have enacted legislation which protects the national flag by criminalising desecration or similar acts punishable by imprisonment. These instances of flag protection indicate that criminalisation of flag desecration is capable of being regarded as necessary for the protection of public order (ordre public) in other democratic societies.
>
> Accordingly, section 7 of the National Flag Ordinance and section 7 of the Regional Flag Ordinance are necessary for the protection of public order (ordre public). They are justified restrictions on the right to the freedom of expression and are constitutional.

These words come after a careful recitation of the constitutional principles and a pioneering discussion – at least for an ultimate appellate court in the common law world[28] - of ordre public. It is interesting that although the Appellant's submissions were cast in terms of this being a value-driven

---

25 *Muller v State of Oregon* (1908) 208 US 412.

26 With whom Litton & Ching PJJ and Mason NPJ agreed.

27 [1999] 3 HKLRD 907, 926.

28 The other one is our own Court of First Instance in *Secretary for Justice v Oriental Press Group Ltd* [1998] 2 HKLRD 123, [1999] 2 HKC 24.

issue, the only use of "value" or "values" in the decision of the majority is right at the end of a passage quoted by Li CJ earlier in his judgment.[29]

I suspect that the range of other countries which in some way criminalised flag desecration made the decision easier because it could then be said that there is a range of acceptable outcomes and it is for each jurisdiction to settle its own laws in this regard. In the end I think that this is a value-driven decision. Essentially the Court is saying that Hong Kong's values are such that this very limited restriction on freedom of expression is justified.

There is nothing wrong with the Court not saying the decision is value-driven. If the Court had denied that this was the position then other considerations might follow. The realities of human rights litigation is that where there are two or more possible conclusions which are at least respectable, then values will almost inevitably resolve the matter.

This is so even where a protected right has only an implied scope for justification such as the presumption of innocence.[30] There, the touchstones of justification are whether the impugned legislation is rational and proportionate. (It is a bit more complicated than that. This is the short-hand version.) Even if rationality has some test based in some form of immutable logic (I, for one, strenuously doubt that) proportionality has to be values-based.

What is also interesting is the reference to ordre public as a justification not being fixed. Li CJ noted that "the concept must remain a function of time, place and circumstances."[31] While this does not carry with it an invitation to make a weekly challenge to the constitutionality of the Flag Ordinances, it may suggest that what was justified in 1999 may not be at some other time. It also carries with it the implication that what we in Hong Kong consider to be our ordre public and thus worth protecting at the price of some diminution of freedom of expression may not be what other places consider worth protecting.

My own view is that ordre public will always remain a very difficult and challenging justification to run.

There can be little doubt that the decision in the Flag Case will have far-reaching effect far beyond the narrow *ratio* that the Flag Ordinances are constitutionally valid. My guess is that as a *method* of approach it will stand as a guidepost for a long time. In the specific area of freedom of expression it sets in post-colonial stone the high value we as a community place on freedom of expression. In this case, the Court did not distinguish between kinds of speech. The Canadian authorities make this distinction, putting matters such as political, artistic and scientific expression on a much higher plane and deserving of a much higher level of protection than, say, for example commercial speech (e.g. advertising in relation to products which are dangerous). On any view, what was at issue in the Flag Case was political speech and it will only be in the context of attempts to restrict commercial

---

29 [1999] 3 HKLRD 907, 924.

30 See *R v Sin Yau-ming* [1992] 1 HKCLR 127.

31 [1999] 3 HKLRD 907, 925.

speech that the Court might be asked to assign different values to different forms of speech.

There will doubtless be those with different values who will disagree with the conclusion of the Flag Case. That is their privilege. I doubt whether there will be many who would disagree with the mode of reasoning. The reaction to the decision so far is perhaps best exemplified by an article by Margaret Ng.[32] Her article recognised that there was, in reality, a choice between two respectable alternatives faced by the Court. She clearly favoured the choice not taken by the Court and her criticism of the decision is based on that position.

What I have tried to do in this paper is give us a quick tour of one example of recent homegrown jurisprudence known as the Flag Case. This particular homegrown product clearly connects with jurisprudence and scholarship in Hong Kong and elsewhere. It is a principled review of the position against the background of the facts and issues as they were litigated. For my money, this compares well with the imported product and has the advantage of being adapted to our own circumstances by reference to functions of time, place and circumstances. Maybe this is too bold but I end with a fundamental truth about Hong Kong. Over time we export more than we import.

---

32 Margaret Ng *Dangers of Saluting the Flag* South China Morning Post 24 December 1999. Ms Ng is a practising barrister, journalist and member of the Hong Kong Legislative Council. She has a keen interest in and has written extensively on human rights issues.

憲法研討會: 從比較角度看基本法的實施
Constitutional Law Conference on Implementation
of the Basic Law : A Comparative Perspective

The Role of the Constitutional Court in the Resolution of Constitutional Disputes - a critical outline guided by the German Example

Professor Dr. Helmut Goerlich

Helmut Goerlich, Leipzig, Germany

The Role of the Constitutional Court in the Resolution of Constitutional Disputes - a critical outline guided by the German Example

A paper presented at the Conference on Constitutional Interpretation and Constitutional Review to celebrate the tenth Anniversary of the Hong Kong Basic Law at Hong Kong, April 28-29, 2000

I. Introduction

Germany has a federal structure. In this paper I speak of "federal" or "federation" for the national government and of "state" or "states" for the regional governments.

The German Federal Constitutional Court (Court) is without a predecessor in its broad jurisdiction and history in Germany. The Court is separate institution from the five federal supreme courts in civil, criminal, administrative, tax, labour law and social security matters. It deals only with questions of constitutional law. It is divided into two senates. Although the two senates deal with different aspects of the Constitution and decide matters within its jurisdiction independently of each other, in case of difference between the two on any constitutional issue they can meet in a joint panel.

The Court performs several unique and important functions. Firstly, the Court interprets and enforces citizens' basic and other constitutional rights. Secondly, it resolves disputes between the other branches of the federal government. Thirdly, it has the power to review the constitutionality of legislation, including the review of recent, so to speak "fresh" legislation. Fourthly, the Court is the protector of the rights of the states in their relation to the federal government. Fifthly, it performs the functions of an arbitrator or mediator in case matters cannot be settled down through political process. Sixthly, the Court has developed aspirations to protect the basic structure of the Constitution from interventions by supra-national European law and institutions. Finally, it also reviews the old-pre-constitution law, enacted before the Constitution came into force in 1949 if the validity of such law is doubtful and relevant for decision in a pending matter. This aspect of the Court's function also applies to the pre-unification laws of the German Democratic Republic which may be found conflicting with the inalienable standards of the Basic Law. The Court has to perform this task even though the period of transition has already expired.

All these functions of the Court in the resolution of constitutional disputes result in a specific unavoidable and intrinsic mixture of constitutional policies and law in Germany. It is different from any other system of this kind. It proves the enormous meaning of a living constitution in a modern society and a state based on this kind of constitution. The Court's interpretation gives life to the Constitution. A living constitution is what its interpreter says it to be. Its interpretation has a binding force.

This is laid down in paragraph 31 of the statute on the Federal Constitutional Court[1]. Firstly, this provision says that the branches of the federal government are bound by decisions of the Court. Secondly, the decisions are binding on the parties to the dispute. And thirdly, if the Court holds a statute unconstitutional the decision of the Court has the same effect as a statute and must be published in the federal official gazette in the same way as a statute. The publication includes only that part of the decision of the Court, which holds a particular provision of the statute unconstitutional and not the reasons for such decision. For that and other reasons, which are based on the role of the Court in the German legal system, having the authority to lay down law binding only on the parties to the dispute, the reasons given by the Court for its decisions are not binding. This, at least, is the dominant and, in my view, the correct understanding of the role of the Court.[2]

For that reason an interpretation given by the Court does not block future perspectives for a new interpretation unknown at the time of a particular decisions. Constitutional adjudication, therefore, remains open to all possible arguments of constitutional interpretation. Under the impact of such arguments the Court may even give up its position based on an earlier reasoning as well as its decision based on such reasoning.[3] This is consistent with the ground rule that the parties of a dispute are bound by the decision and not by the reasoning. Of course, for a full judicial review in constitutional matters, interpretation is one of the necessary instruments. But the Court does not have a monopoly on constitutional interpretation in the exercise of its powers and functions. Free debate and academic research remain, as they were, the basis for the interpretation by the Court. The

---

[1] See that statute as amended in the shape of the publication of August 11, 1993 - in the Federal Gazette - Bundesgesetzblatt I p. 1473; and as amended last time in July 16, 1998 (Bundesgesetzblatt I p 1823)

[2] This question arose when the second senate of the Court tried to bind government to its interpretation of the goal of reunification which was in the preamble of the Basic Law up to the unification, see 36 BVerfGE 1, 3 and 40 BVerfGE 88, 93 in another case; and this happened again, when the second senate tried to make binding its interpretation of the circumstances under which abortions might be allowed, see 88 BVerfGE 203, 251 seqq. and on the other hand 98 BVerfGE 265, 296 seqq.; also, there is a debate, if the first senate is obliged to ask for a decision of the the joined panel of both senate if it differs from reasonings of the second senate, for instance in the case of 96 BVerfGE 375, 403; and in the same volume p. 409 seqq., referring to the question, if the birth of an undesired child can be seen as damage in the sense of law; for a decision of the joined panel see 54 BVerfGE 277, 285 seqq.

[3] As the Court did from time to time, see recently 99 BVerfGE 1, 8 seqq.; earlier 92 BVerfGE 91, 107 seq.; 70 BVerfGE 242, 249; 33 BVerfGE 199, 2o4; 39 BVerfGE 169, 181 seqq.;65 BVerfGE 179, 181

Court is one of the most alert public bodies to take note of the academic discussions and publications in the performance of its functions.

One of the goals of this paper is to clarify and emphasise the difference between the interpretation and the decision of the Court. It will follow a slightly different course of more details on this aspect, leaving aside minor functions of the Court such as in the area of international law and some other disputes.

II. Access to the Constitutional Court

The exercise of its functions by the Court depends on the access to it. Access in Germany is extremely broad and wide open.[4]

Access to the Court may be had: (1) on complaints by the individuals against the violations of their basic and other constitutional rights; (2) on requests from other courts if such court considers that a law whose constitutional validity is relevant to its decision in a pending case[5] as to be incompatible with the constitution; (3) on reference from the other branches of the federal government in disputes about their rights and duties; (4) on requests by the Federal Government, a State Government or one third of the members of the Federal Parliament, in cases of doubt about the constitutionality of a Federal or State statute, including the ratification of treaties; (5) on requests by the governments of more than one States in case of constitutional disputes about their rights and duties; and (6) on request by the municipalities or local governments in case of invasion of their constitutional guarantees.

This listing does not contain all possibilities of access[6], but it shows, that the court can be involved in any political conflict if that conflict at one edge or end results in legislation or

---

[4] The different possibilities of access mentioned in the text are listed in Art. 93 and Art. 100 of the Federal Constitution. The order is changed as to the frequency of the types of cases; some variations are completely omitted because they are of less relevance. For the text of the articles of the Basic Law see the extract in the Appendix I in M. P. Singh, German Administrative Law in Common Law Perspective, 1st Ed. Heidelberg et al. 1985 pp. 158 seqq.; a second edition of this book is forthcoming; or look at the official translation of The Basic Law of the Federal Republic of Germany, published by the Press and Information Office of the Federal Government, Berlin 1998; or in the internet http://www.uni-wuerzburg.de/law/gm0000 .html

[5] This device is not dealt with furthermore in this paper because it does not have its footing in "constitutional disputes" but is a mean to concentrate the decisions in constitutional questions at a Constitutional Court, caused by some distrust in the ability of other courts to handle constitutional questions properly, a distrust one does not find, for instance, in the United States; but in France, proposals have been made to write such a device into law as to increase the functions of the Conseil constitutionel

[6] For an older oversight as far as the review of laws is concerned, see J. Ipsen, Constitutional Review of Laws, on: Ch. Starck (Ed.), Main Principles of the German Basic Law, Baden-Baden 1983, pp. 1o7 seqq.

questions of law enforceable. Since there are almost no constitutional conventions in the British sense[7] most political questions boil down to legal questions of enforceable law. Therefore, the wide range of possibilities of access implies a wide range of involvement of the Federal Constitutional Court in the life of the society and its governments on federal and states' level.[8]

III. Constitutional Disputes Resolved by the Court

1. The Court and the binding of the Constitution as Law in Action

As already mentioned, unlike the Common Law countries, the tradition to handle constitutional problems by means of constitutional conventions does not exist in Germany. The Constitution as a written document is binding as any other law. Moreover, the Constitution is the supreme law of the land - superior to any other rules of law. This high ranking position of the Constitution in the hierarchy of laws is limited only by the supra-national law of the European Community. The general rules of public international law as such are part of the domestic law of the land and binding internally without transforming and hereby enforcing legislation. The extent to which European Law can override the basic structures of the constitution is not completely clear.

Apart from that for the first time in the constitutional history of Germany the constitution, which constitutes the state and its government, also regulates all legal business. It also changes many political and social questions into questions of law. Therefore, the number of constitutional disputes has increased enormously. The constitutional theory as taught at the faculties of law, is widely replaced by the rulings of the Court, which have become the bases of all learning in the constitutional law. The theory, therefore, does not guide the branches of the government any more as it did in earlier. It merely provides to the courts a playground for observations and discussions.

The main change, however, lies in the application and relevance of all the clauses of the Constitution to the disputes. Therefore, even in a changing environment, which

---

[7] For the German perception of such conventions see K.-U. Meyn, Die Verfassungskonventionalregeln im Verfassungssystem Grossbritanniens, Goettingen 1975

[8] This has caused an ongoing debate how to react to the caseload, compare recently G. Roellecke, Ueberlastung einer Spitze in der Demokratie, in: 51 Neue Juristische Wochenschrift 1998, pp. 1462 seqq.; for similar problems on the European level see H. Roesler, Zur Zukunft des Gerichtssystems der EU, in: 33 Zeitschrift fuer Rechtspolitik 2000, pp. 52 seqq.

characteristically is described as one of a state withdrawing from a lot of areas, the Constitution enjoys enormous binding force.[9] It has, as far as the Constitution as a whole is concerned, its basis in Art. 20 of the Basic Law, which makes the Constitution binding not only on the executive and the judiciary but also on the legislature. As far as the human and civil rights are concerned its basis is in Art. 1, sect. 3, which makes the basic rights binding all branches of government. Finally, Art. 19, sect. 4 and Art. 93 sect. 1 paragraph 4 a of the Basic Law grant full judicial review in terms of access to a court and the special remedy of complaints on constitutional grounds before the Court.

2. The Constitution as Fragmented Set of Principles and Rules to Circumscribe Powers and Rights

To justify the rigorous binding force of the constitutional law, in the early years of adjudication it was claimed that the Basic Law provides an order of values to be understood as an almost complete and well-structured system of such values.[10] To some extent, as expressed in the basic rights cases, the Court seemed to follow that perception of the Basic Law.[11]

Later the Court avoided to accept that such an order of values existed in general, for instance in the area of economic legislation establishing workers participation on the board of industrial companies in a broader way. It argued that the protection of economic rights is not established in a way that implies a particular objective order and, on the other hand, does not allow freedom of legislation. The Court specially stated that in view of their history the basic rights are primarily the subjective rights of the individual. They create an objective order only to reinforce that function and not to replace it by a structure of objective norms which is independent from the original and lasting meaning of those rights.[12] The Court has not yet given up this position.[13] The idea that the Constitution is a complete systematic body of law has thus been abandoned.

The Court views the Constitution as binding and self-executing. But it also admits that it provides fragmentary rules resulting from historical experience. These rules must be

---

[9] See K. Hesse, Grundzuege des Verfassungsrechts der Bundesrepublik Deutschland, 20th Ed. 1995, Reprint 1999

[10] See, among other publications of the author, G. Duerig, Der Grundrechtssatz von der Menschenwuerde, 81 Archiv des oeffentlichen Rechts 1956, p. 117 seqq.

[11] For instance an impression given by the reasoning in 6 BVerfGE 32, 41 and 7 BVerfGE 198, 204 as in other cases

[12] See 50 BVerfGE, 290, 337

[13] On the contrary, the Court repeated such basic arguments, see, for instance, 61 BVerfGE 82, 100 and 68 BVerfGE 193, 205

supplemented and complemented by adjudication step by step. They are never complete and final. Even if there is no formal amendment of the Constitution to justify an addition by interpretation, this is lawful and a proper function of constitutional adjudication. The judicial review thus enables the Court to react to the new challenges of reality and to new dangers to given powers and rights without a formal amendment of the Constitution by the political process.[14]

The above feature of the Constitution also results in an open structure of constitutional law. Changes in life can be assimilated by such an open structure. This does not mean an absence of clear norms in the Constitution. Rights and powers are defined by text, history and precedents. But in new situations a new impact by constitutional law is possible. And, in an open structure of this kind, the democratic legislation of the government has its prerogative as it ought to have in a democratic republic. This is so because in a democratic structure the first interpreter of the constitution is always a body elected by the people, especially the legislature. The rule of law as put forward by courts and democratic principles are kept in a proper balance that way. Otherwise, the balance would skip in favour of the judiciary and its adjudication. This would not only destroy that balance but also contravene the basic principles of the constitution. That would convert the constitutional adjudication into a matter of politics, which, in a narrow sense, it is not. Such adjudication must follow constitutional law, not political decisions, about questions that may be reasonable and wise to enact or to do as an administrative action. Constitutional adjudication can only state the constitutional frame within which judgements result into enactments and decisions.

3. The Court and the Basic Rights Disputes

An aspect of this constitutional frame is the basic rights of the individual, most efficiently protected in the sphere of the personal life and personal activities. As personal rights these rights have the most intense binding force. This force has, at least in the post war Germany, its prime base in the human and civil rights. This is the result of the historical experience of the years between 1933 and 1945. This experience has changed the attitude towards constitutional law, legal doctrine and court rulings as to those rights. As

---

[14] A good example of this development is the change in the functions of the Conseil constitutionel in France, see H. Goerlich, Verfassungspolitik und Modernitaet in Frankreich dargestellt am Conseil constitutionel, Leipzig 1995; also see P. Langeron, Frankreich - eine verfassungsrechtliche Anomalie?, in: 51 Juristenzeitung 1996, pp. 170 -175; and St. Bauer, Verfassungsgerichtlicher Grundrechtsschutz in Frankreich, Baden-Baden 1998; the Italian situation is similar to the German setting, compare J. Luther, Die italienische Verfassungsgerichtsbarkeit, Baden-Baden 1990

explained elsewhere,[15] these rights are not anymore - as they had been for a long period in German constitutional history - just aims to be reached by legislation.[16] They are self-executing in the sense of a binding and immediately applicable content, which can be referred to by the individual entitled to a right. Therefore, violations or alleged violations of such rights may be the cause for complaints presented to the Constitutional Court under Art. 93 I, no. 4a of the Basic Law. It provides that the Court decides the complaints that can be brought by anybody with the allegation that his or her basic or other constitutional rights have been violated by a public authority.

The Court has not only spelled out such rights as subjective rights of the individual but also has developed devices to protect them by restrictions to their lawful infringement by statute, statutory rules or bylaws, acts of the administration or judicial proceedings and rulings of the courts. These restrictions of the infringement of such rights were indicated, for example, in Art. 1, III, Art. 19 II and Art. 79 III of the Basic Law,[17]and in different well worded clauses added to several rights which where written into the Constitution. Some rights have their limits only in the constitution itself. Rights, which the legislature cannot restrict, are guaranteed only in the frame of the Constitution, not as absolutes. As the Constitution is a document, which is in harmony with itself, its parts and its whole have to be interpreted coherently and harmoniously. The underlying assumption is that the constitutional text contains a coherent message as law. This idea of coherence does not exclude the other idea that the Constitution as a historic document is fragmentary and, therefore, must have an open structure.

The Court, though protected by certain procedural devices from being flooded by such complaints, has an enormous caseload to handle. Further, the Court is enabled to participate in almost any field of law or life, on the plea of some constitutional aspects to be dealt with, which requires constitutional disputes to be resolved. This development, of course, depends on the scope of such rights, which is broadly defined by its substantive interpretation. A broad interpretation increases the number of cases to be decided on merits by the Court. Also, a broad interpretation requires, for example, other public

---

[15] Compare H. Goerlich, Fundamental Constitutional Rights: Content, Meaning and General Doctrines, in: U. Karpen, (Ed.), The Constitution of the Federal Republic of Germany, Baden-Baden, 1988, pp. 45 - 66; and, K. Hesse, Bedeutung der Grundrechte, in: Benda/Maihofer/Vogel (Eds.), Handbuch des Verfassungsrechts, 2nd Ed., Berlin 1994, pp. 127 seqq.; for an isolated presentation of questions of constitutional interpretation in general, see, Ch. Starck, Constitutional Interpretation, in: Ch. Starck, Ed., Studies in German Constitutionalism, Baden-Baden 1995, pp. 47 seqq.

[16] For a slow way of change in doctrine without putting aside old principles see the French development, compare St. Bauer, Verfassungsrechtlicher Grundrechtsschutz in Frankreich, Baden-Baden 1998

[17] Art. 1 III says that all branches of government shall be bound by the basic rights, Art. 19 II states that in no case the essence of basic rights may be affected; Art. 79 III lays down inalienable basic standards of the Basic Law which cannot be taken away by amendment, including Art. 1 which does not only include the dignity of man, but also in its paragraph 3 the binding force of basic rights.

interests to be taken into consideration. Therefore, it may be argued that a narrow interpretation sometimes will result in a more effective protection of the individual by those rights and in the less constitutional disputes to be resolved by the Court.[18]

The Court has not always followed that insight. Therefore, one can find an enormous amount of adjudication by it dealing in detail with questions of very specific character such as between the tenants and the landlords drawing arguments from the rights in the Constitution.[19]

The work of the Court will further increase if the access and appeals to other courts of specific areas of law within the federal jurisdiction is cut back. Such cut back will cause an increase in constitutionally founded complaints about the - often just supposed - violations of the basic rights of the individual. This phenomenon could be observed from the basic procedural changes made in several procedural codes. These changes were undertaken to cut back the caseload of lower and higher courts other than constitutional courts. But they resulted in an increase in the caseload of the top level courts at the national level, specially of the Federal Constitutional Court.

4. Judicial Review of recent Legislation on the Request of the Federal or State Governments or the Federal Parliament

Another device which intensifies the involvement of the Court in the politics of law is the challenge to any new Federal or State statute by the Federal or a State Government or one third members of the Federal Parliament on grounds of its constitutionality under Art. 93 I, no 2, of the Basic Law. This device which may be availed of any time after the enactment has come into force and continues to be so, invites to use the Court to continue the politics of law after enactment, on the spot, under the heading of constitutional politics.

This way the Court turns into the position of a third chamber of the legislature. However, the Court is a court and not a legislative chamber.[20] The impression of a third chamber is caused by the fact that quite often the Court is required to test the validity of a statute immediately after its enactment before it has really been applied by the administration. Therefore, the Court rules without any case before it. In such exercise doubts about the

---

[18] See Dissenting Opinion by now retired Justice D. Grimm in 80 BVerfGE 137, 164 seq., and Reprint of 1999 of now retired Justice K. Hesse (as note 9) p. 183 seq.

[19] Compare, for instance, 89 BVerfGE 1, 5 seqq.

[20] See R. Smend, Das Bundesverfassungsgericht (1962), in: by the same author, Staatsrechliche Abhandlungen, 3d Ed. Berlin 1994, p. 581 seqq.; also K. Hesse, Verfassung und Verfassungsrecht, in: Benda/Maihofer/Vogel, (Eds.), Handbuch des Verfassungsrechts, 2nd Ed., Berlin 1994, pp. 3 seqq.

small democratic basis of the Court, which is an elite panel of a small number of lawyers or jurists appointed by the Federal President after election by a majority of two thirds of the upper chamber of the Federal Parliament, become evident. This is especially so because the challenge of unconstitutionality is raised after enactment of law. It is different from France where the Conseil constitutionel renders judgement before enactment, sitting to judge draft legislation on its constitutionality.

In Germany, the danger of an expanding activity of the Constitutional Court in this area is that it will loose its neutral and distant role as part of the judiciary. The remedy against the abuse of its functions in this area is that the Court must give a narrow ruling confined only to the constitutional issue as such. The Court, especially its second panel, has not always used this device. The imprudence of the Court in this regard is clearly visible in the second ruling on abortion laws, which comprises reasonings on the merits extending over one hundred pages and some added dissenting opinions.[21] The wider the Court's reactions are expressed in broad reasons the more it participates in the political debate and enters more into the shallow waters of uncertainty, factual judgements, prognosis and points of view. Such waters are not the open seas where the Constitutional Court as a "fleet in being"[22] can protect the republic against constitutional turmoil and disorder.

5. Disputes about the Rights and Duties of the branches of the Federal Government or any of its parts

More traditional is the resolution of constitutional disputes about the Rights and Duties of the other branches of Government as conceived in Art. 93 I no. 1 of the Basic Law. This device may be used to redefine the functions of the machinery of government by redefining the coordination of its parts. This is one of the areas of the traditional adjudication concerning the State, i.e. the "*Staatsgerichtsbarkeit*" in Germany, which is necessary to avoid breakdowns or irreconcilable conflicts resolved by acts of doubted legality. The resolution of such conflicts deals not with subjective rights but with competence, with responsibility and with jurisdictions.

The Court here has emphasised the need for jurisdictions, which are adequate to the functions of an organ or branch of government as the Constitution perceives them and

---

[21] Compare 88 BVerfGE 202, 251-337 and 338 seq.; the fact that the French Conceil constitutionel frequently rules in very narrow ways protects itself against a switch in its role in the legislative process.

[22] For a report of changing functions of the German Constitutional Court see K. Hesse, Verfassungsrechtsprechung im geschichtlichen Wandel, in: 50 Juristenzeitung 1995, pp. 265 - 273; also by the same author, Stufen der Entwicklung der deutschen Verfassungsgerichtsbarkeit, in: 46 Jahrbuch des oeffentlichen Rechts 1998, pp. 1 -23

appropriate to the subject matter which is at stake.[23] The democratic structure of government must also be respected. Therefore, basic decisions like the use of nuclear power as a major resource of energy, the establishment of possible participation in chemical warfare, the location of missiles on the territory able to carry nuclear weapons, the participation of German military in peacekeeping forces located in foreign territory for use as ground, naval or air forces, etc must be made by parliamentary decree, not just by executive decision of the government.[24] This way an unwritten and previous to action existing jurisdiction of the most democratic branch of the government in basic questions of the public good as well as in foreign and military affairs is established. This was done not by amendment of the Basic Law but by adjudication of the Court.

Constitutional interpretation, therefore, is the basis of major adjustments of a written constitution to the needs of the day. It guarantees that the political process, including all political parties, has to be involved in major decisions with the expectation of taking a stand in such matters. This way a purely result oriented approach for the opposing parties is impossible. They have to make up their minds in advance. This changes the behaviour in the political process and reinforces the democratic legitimacy of such basic and critical political decisions which are to be found.

Again, in the process of government and its constitutional setting, the Court for a while seemed to emphasise the predominance of executive power in certain areas. But it always combined this with checks and balances by the legislature.[25] Recently, however, the Court has re-emphasised the need of full judicial review, especially if rights of the individual are concerned.[26] Therefore, a general tendency towards a stronger position of the executive can no more be stated. But still the interpretation has a major say in what might be the proper way to look at the constitutional framework if hard cases arise.

6. The Defence of "States' Rights"

A traditional area of State courts - *"Staatsgerichtsbarkeit"* - in a federal setting is the defence of the positions of parts in relationship to the whole. Therefore, Art. 93 I, no. 3 of

---

[23] For an overview see H. Schulze-Fielitz, in: H. Dreier, Grundgesetz, Commentary, Vol. 2, Tuebingen 1998, No 66 and passim to Art. 20 (Rechtsstaat - rule of law) p.159 seq.

[24] See 49 BVerfGE 89, 124 seqq.; 53 BVerfGE 30, 55 seqq; 68 BVerfGE 1, 130 seqq.; 77 BVerfGE 170, 222 seqq.; 90 BVerfGE 286, 381 ff.

[25] For an older assessment see W. Fiedler, The Strengthening of the Executive Power in the Contemporary Constitutional System, in: Ch. Starck (Ed.), Rights, Institutions and Impact of International Law according to the German Basic Law, Baden-Baden 1987, pp. 95 seqq.

[26] See referring to professional education and full judicial review of access to professions 84 BVerfGE 34, 45 seqq., earlier relating to pornography and art 83 BVerfGE 130, 138 seqq.; also 88 BVerfGE 40, 56

the Basic Law provides proceedings to resolve such conflicts, mainly to defend the jurisdiction of the states and to define their responsibility to implement Federal laws. The latter is necessary because in Germany the Federal Government ordinarily does not have own administrative bodies and agencies to enforce federal law, but this, in the regular situation, is done by the agencies of the states.

This has led to well-known decisions, which force the state as part of the federation to obey federal law as it is on the books without claiming any discretion in the way it should be applied.[27]

Another area of interpretation is about the adjudication on constitutional law when it has to be determined, in the sense of Art. 72 II of the Basic Law in its recent redrafting, under what circumstances national legislation is needed to establish equivalent living conditions all over Germany, to safeguard the maintenance of legal and economic unity and to protect national interests. This clause, slightly changed in its text because of difference in the living conditions in the former East and West Germany, has so far been interpreted mainly by the "political" branches of government as a matter of their discretion. This way the courts, especially the Federal Constitutional Court, have been kept out from this matter.[28] If these circumstances are lacking the states, as always, have a say, especially in the area of public safety and cultural matters, which are reserved to the states. Until today, as already mentioned, the Court assumes that the evaluation of the need of federal action is a political value judgement. If the Court starts to protect the states and their jurisdictions more effectively, adjudication will chose a different interpretation.
The situation is similar to that in the European Communities where a general idea of "subsidiarity" has not reached the status of a principle of law, which can be handled by the European Court of Justice in favour of the member states of the Community.

Further, the jurisdictions of state and federal constitutional courts must be coordinated. While traditionally the federal human and civil rights as applied in the setting of the federal laws were enforced only by the Court and not by the state constitutional courts, recently the Berlin state constitutional court has ruled that it is free to use the federal rights to check the application of federal law by the state courts and agencies.[29] Thus, the state level will

---

[27] Compare, for instance, 81 BVerfGE 310 and 84 BVerfGE 25

[28] See for an interpretation of the old adjudication and documentation the - by amendment - new version of that clause of the Basic Law and for old decisions R. Stettner, No 12 to Art. 72 in: H. Dreier, Ed Grundgesetz, Commentary, Vol. II , Tuebingen 1998, p. 1351 seqq.; for recent cases stating the discretion for the legislature, as assumed for the old version of Art. 72 II, see, for instance, 78 BVerfGE 249, 270 and 67 BVerfGE 299, 327

[29] Berlin VerfGH Decision of Jan. 12, 1993 - VerfGH 55/92, and Decision of Dec. 23, 1992 - VerfGH 38/92 - both reported in: 46 Neue Juristische Wochenschrift 1993, pp. 515, 527 and 513, 514 the case of Mr. Honecker

be on the scene where the safeguards of human and civil rights will be in action if this view will prevail. One must, of course, keep in mind that a state constitutional court, which wants to differ from the Federal Constitutional Court in a specific question, would need to refer such question to the Federal Constitutional Court, as Art. 100 III of the Basic Law shows referring to the situation of uniform clauses in state and federal constitutional law containing civil or human rights.[30] Such a development would lead to a more comfortable situation for the Federal Constitutional Court because its enormous case-load in this area will be shared by several state constitutional courts.

7. Resolution of Federal-State Conflicts - the Court as Mediator

In several areas of law the Court frequently performs the function of a *de-facto mediator.* This is the case, for example, in conflicts about the reasonable equalization of the disparate financial capacities of the states by a readjustment or different distribution of public revenue between the States and the Federation or between the Federation, the States and the municipalities. This is also the case in the area of law of telecommunications, radio and television.

The Court is approached to perform the role of de-facto mediator by using different proceedings, which need not to be explained here. Basically in this role the Court produces results similar to that of political processes, which could not be reached by the other branches of the government. Therefore, in the application of the principles of constitutional law the Court produces political decisions. The Court has to resolve these constitutional disputes because the corner stones of the playground of the political game in this areas are laid down in the Constitution, such as in the provisions of the tenth part of the Basic Law dealing with financial matters concerning revenue and its allocation, or, in a quite similar way, in Art. 5 of the Basic Law, dealing - among other rights - with free speech and free reporting in radio and television. In both areas a complicated bargaining process between the several states has to result in interstate treaties which govern as law the respective matters.

Sometimes the Court avoids conclusive decisions in such mediating rulings, throwing back the ball into the political playground. This happened recently in questions of the

---

[30] For a discussion of this see K. Hesse, (in: Juristenzeitung, quoted note 22) at p. 269; Art. 100 III of the Basic Law says, that if a constitutional court of a state, in interpreting the Basic Law, proposes to deviate from a decision of the Federal Constitutional Court or the constitutional court of another state, it shall obtain a decision from the Federal Constitutional Court. For a cooperation between state constitutional courts and the federal level see also 99 BVerfGE 1, 8 seqq., giving up earlier adjudication; also see 96 BVerfGE 345, 363 seqq.

reasonable equalisation by an adjustment in the allocation of public revenue between the states.[31] The Court here avoided a straight decision on the point and asked the participants in such deals to first settle the reasonable principles of such equalisation. It happened earlier and frequently in the area of broadcasting law. In this area the Court always mainly insisted that the relevance of the means of communications to the free flow of information and for the free exchange of opinions as a main precondition of democratic structures must be taken into account. The Court also insisted that a basic level of access to radio and television for all inhabitants everywhere in the country and at very low costs must be provided by public broadcasting. Private stations, on the other hand, need not satisfy these conditions, they may be expensive as pay tv, or they may offer a program which is specifically attractive for customers from businesses, who want to present advertisements, which often implies a low level of quality of the program as such. These concepts, which are under different factual conditions open to changes of any kind, have to be respected by any statuary order in this field created by interstate treaties or by legislation as such.[32]

8. Clearance of Political Processes: Nemo iudex in propria causa

Similar mediation takes place as far as the law dealing with political parties and their campaign finances is concerned. The main reason for involving the Court as mediator de facto is that the political parties would act as judges in their own case if they would come to results in legislation. Therefore, they need the guideline by a distant and neutral mediator to supervise the political process of elections and rules of internal processes of decision-making within the several parties. Thus, from time to time, the Court hands down rulings in this area, including election matters.[33]

---

[31] See BVerfG Judgement of Nov. 11, 1999 - 2 BvF 2 and 3/98, 1 and 2/99 reported in: 115 Deutsches Verwaltungsblatt 2000, pp 42 - 51; for a critical evaluation of this decision compare H. H. Rupp, Laenderfinanzausgleich, in: 55 Juristenzeitung 2000, p. 269 seqq.; also, B. Pieroth, Die Mißachtung gesetzter Maßstaebe durch das Maßstaebegesetz, in: 53 Neue Juristische Wochenschrift 2000, p. 1086 seq.; the most impressing recent publications in this area are St. Oeter, Integration und Subsidiaritaet im deutschen Bundesstaatsrecht, Tuebingen 1998, and St. Korioth, Der Finanzausgleich zwischen Bund und Laendern, Tuebingen 1997; for an evaluation see S. Ruppert, Endstation Einheitsstaat?, in: 18 Rechtshistorisches Journal 1999, p. 50 seqq.

[32] Compare early 12 BVerfGE 205 seqq.; recently 90 BVerfGE 60 seqq.; 97 BVerfGE 228, 252 seqq.; for an overview see A. Hesse, Rundfunkrecht, 2nd Ed., Muenchen 1999, p.46 seqq.

[33] For an overview see Ph. Kunig, Parteien, u. H. Meyer, Demokratische Wahl und Wahlsystem, and, by the same authors, Wahlgrundsaetze und Wahlverfahren, in: Isensee/Kirchhof (Eds.), Handbuch des Staatsrechts, Bd. II, 2nd Ed., Heidelberg 1998, §§ 33, 37, 38, pp. 103 seqq., 249 seqq., 269 seqq.; and D. Grimm, Politische Parteien, in: Benda/Maihofer/Vogel (Eds.), Handbuch des Verfassungsrechts, 2nd Ed. Berlin et al. 1994, pp. 599 seqq.

Recently, this could be shown, when it became known to the public that one of the major parties did not obey the obligations to make public its accounts, assets, sources and funds, as required by Art. 21 I 3 of the Basic Law. Also, this implied violations of Art. 21 I 2 of the Basic Law, which requires the internal organisation of parties to conform to democratic principles. Both clauses are linked to each other; especially, since financial favours from the top of the parties can not be used to influence internal voting behaviour within the party if the finances are made public. There are problems if the sanctions of the law on political parties don't disturb the fair competition between the different parties. It looks likely that such questions will be brought before the Federal Constitutional Court. Then the Court again will have to take up its role as mediator. This is so because the political parties to some extent are not able to be the judge in one's own cause, making law in the legislature to control its behaviour. Therefore, in these matters, as in some others, the Court here has a necessary atypical function in the game.

Besides, on application the Court has to deal with the unconstitutionality of parties and ban on them from participation in the political process, as provided in Art. 21 II of the Basic Law. Art. 21 II says that parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or to abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional, and, that the Court shall rule on the question of their constitutionality.

The "free democratic basic order" is defined by the Court as a legal system presupposing the exclusion of any violent or arbitrary state power, a rule of law based on the principle of self-determination of the people, the application of democratic majority rule, and the protection of freedom and equality. The fundamental principles of the free democratic basic order are at least: the respect for human rights as embodied in the fundamental rights of the Basic Law of Germany, above all the respect for the right to free personal development, the right to life, the sovereignty of the people, the separation of powers, the responsibility of the government, the legality of the administration, the independence of the courts, majority rule, the guarantee of a multi-partystate, the equality of opportunity for all political parties, and the right to form and exercise an opposition.

Parties have been banned twice in the constitutional history of post war Germany, in 1952 a radical right wing party and in 1956 the communist party. In both cases the Court used the just quoted definition of the "free democratic basic order", as mentioned in the Basic Law, without deducing it from principles or in another way.[34] In both cases it has been

[34] See 5 BVerfGE 85, 140 seqq. and 2 BVerfGE 1, 13 seqq. also for the quoted definition of the "free democratic basic order"; for an analysis of the concept to incorporate an inalienable basic structure in a constitution see D. Conrad, Limitations of Amendment Procedures and the Constituent Power, and by the

doubted if it was wise to ban these minority parties by court ruling and not to leave their fates to the ballot. But the Court had no discretion in the matter and was bound by strict law to act when the application of the Federal executive was on its table. Today the successor of the United Socialist Party of the German Democratic Republic of East Germany is participating in elections.

The ban on private associations, other than political parties, is imposed not by the Court but by the respective secretaries of state of the federation or the several states in charge of internal affairs, depending where the association is active. The decision of the secretary of state can be challenged in the administrative courts. If they uphold the administrative decision, a complaint in the Federal Constitutional Court is possible which has never happened so far. Associations can only be banned if the aims or activities contravene criminal laws, or if the aims or activities are directed against the constitutional order or the concept of international understanding, as Art. 9 II of the Basic Law states.

Also individuals can be deprived of certain civil rights, as Art. 18 of the Basic Law indicates, even though such proceedings in the history of the Basic Law in the last fifty years never took place.
Art. 18 says that whoever abuses the freedom of expression, the freedom of teaching, the freedom of assembly, the freedom of association, the privacy of correspondence, posts and telecommunications, the rights of property or the right of asylum in order to combat the free democratic basic order shall forfeit these basic rights, and that the forfeiture and its extent shall be declared by the Court.

The main problem about the interpretation of this clause is the meaning of a free democratic basic order. The Court has, in its decisions banning parties, defined what it is. But the Court did not explain how it reached the definition. As will be shown at the end of this paper, this requires a combined effort of constitutional interpretation and constitutional theory.

9. Protection of Local Government

An example of a step by step stricter interpretation of a clause of the Basic law is Art. 28 II 1 of the Basic Law. Art. 28 II 1 says that local government basically has unlimited jurisdiction except to the extent it is granted to the states or the federation. Historically this

---

same author, Constituent Power, Amendment and Basic Structure of the Constitution, a Critical Reconsideration, both in: D. Conrad, Zwischen den Traditionen (Ed. by J.Lütt and M.P.Singh), Stuttgart 1999, pp. 47 seqq., 87 seqq., dealing with Art. 79 III of the Basic Law of Germany.

clause was looked at as a description, which had to be implemented by statutes on local government. The Court in this matter realised that this guarantee possesses a similar structure as civil rights. Firstly, it led to the interpretation that this clause guarantees a subjective right to be claimed by local authorities under Art. 93 I no 4 b of the Basic Law in proceedings before the Federal Constitutional Court. Secondly, this has the impact that the legislation infringing that guarantee has to obey certain principles of proportionality which means that the justification for taking away some function from the local level has to be relatively well founded, and, that considerable functions have to remain at the local level. This way the guarantee does not loose its relevance and the political process has to prove the taking away any jurisdiction from the local level has to obey strict requirements of justification.[35] Thirdly, interpretations come to the result, that the recently added sentence in Art. 28 II 3 of the Basic Law guarantees also the financial basis for local autonomy. Art. 28 II 3 says that the guarantee of self-government extends to the bases of financial autonomy, and that these bases include the right of municipalities to a source of tax revenues based on economic ability and the right to establish the rates at which these sources shall be taxed. But the reach of this new clause seems not to be completely well established. Even in the traditional area of planning it is not yet clear what increasing meaning has to be given to the autonomy of local government.[36]

On the other hand, in the area of local autonomy so far constitutional adjudication has avoided to establish unwritten principles for the protection of local government, such as the principle of "subsidiarity". This would mean that if a task can be done on a lower level of government it should be taken care of on this level and not above. Such a principle is to be found in church law and in the law of the European Community even though in the context of the latter it seems not to be very effective. As a matter of constitutional interpretation, such unwritten general principles should be avoided. For they will cause problems of interpretation since they have no footing in the text, tend to expand in an uncontrolled manner and create obstacles to an open end along with strict interpretation of the law as it is.

10. The Court and the Unification

---

[35] Compare 79 BVerfGE 127, 147 et passim; for a complete outline see E. Schmidt-Assmann, The Constitution the Requirements of Local Autonomy, in: Ch. Starck (Ed.), New Challenges to the Basic Law, Baden-Baden 1991, pp. 167 - 190

[36] See H. Goerlich, Planungsrecht und Planungshoheit der Gemeinden - Verfassungsrechtliche Grundlagen und praktische Folgerungen -, in: H. Lilie (Ed.), Recht und Rechtsverwirklichung nach dem Umbruch, Koeln et al. 1999, pp. 9 - 46

A more recent field of constitutional interpretation got created after the unification of divided Germany. In the former German Democratic Republic (GDR) very different legal structures had been established. The unification treaties left quite a number of questions open. As in the years after the establishment of the Court, when old law not abolished by the allies after 1945 was claimed to be valid, the Constitutional Court had to cope with an increasing caseload. Principles of interpretation had to be developed to find out what parts of the law of the old regime survived, being not as outrageously different from our western law as to be completely incompatible with the Basic Law. Also, more simple questions had to be answered if acts by the Supreme Command of the Soviet Forces in Germany up to 1949 could be measured by the standards of the present Constitution. This raises questions of intertemporal law. It also relates to the fact that written law has its limits in time, defined by enactment and its expiration. On the other hand "old" cases and cases out of a different jurisdiction decided in the time between these two points in time can not be completely untouched by the present law which is valid.

This complicated and touchy situation had to arise because in the central and eastern Europe the changes in the system of government were not reached by a straight forward revolution which claimed to follow only and alone its new law. But these processes of transition though politically quick, as legal process they were slow and open to the compromise with the past and its law.[37]

Therefore, the art of interpretation in constitutional adjudication had and has to resolve remaining conflicts of laws. This is the case, for example if the old proprietors of land want return of their land taken by authorities in the former GDR; or if a criminal court has to decide a case of a border guard of the former GDR who illegally shot a person crossing its border.[38] Also, it is the case if conflicts arise on what level of government - local, state or private - should a public service be allocated.[39] In this matter if there were no constitutional adjudication the machinery of legislation would need to take the whole of the burden on its shoulders and the unrest in society would be greater. Therefore, to have the ping-pong

---

[37] More recently, the Court started to question the different level of the welfare state in former East and former West Germany under the light of equality, see BverfG Judgement of March 14, 2000 - 1 BvR 284 and 1659/96 -

[38] See for questions of applicability of the property clause and its principles of compensation to acts of East Germany or Soviet agencies in East Germany 84 BVerfGE 90, 126; 94 BVerfGE 12; 95 BVerfGE 267. 307, 97 BVerfGE 89, 100; for cases of criminal law, concerning the excessive or regular use of firearms as ordered against Germans on the border between the two Germanies 95 BVerfGE 96, 127 seq. under aspects of nulla poena sine lege; and for the secret agents of the East German state being sentenced, see 92 BVerfGE 277, 316 seqq.; for other areas of this kind see 100 BVerfGE 1, 59, 104 and 138 as far as retirement payments are concerned; and for cases of dismissal of employees for political reasons 94 BVerfGE 140; 96 BVerfGE 152, 171 and 189.

[39] See C. Danker, Privatisierung versus Rekommunalisierung. Die Treuhandanstalt/BvS im Konflikt bei der Vermoegensaufteilung ehemals volkseigener Wirtschaftsbetriebe, Diss. iur. Halle 2000

between legislation and courts on one side and the Federal Constitutional Court on the other implies an effect of delay in the process of deciding such conflicts which will create an easier appeasement of such conflicts in the society as a whole. This delay has been called the katechontic function of procedures of law.[40]

11. The Court, Inalienable Standards of the Basic Law and the European Community

The European Court of Justice located in Luxembourg has held that European Community Law applies in its entirety to the member states of the European Community.[41] The German Constitutional Court has, however, held that it can check whether the European Community Law satisfies the inalienable standards of the Basic Law laid down in Art. 79 III.[42] Art. 79 III says that certain amendments of the constitution are inadmissible, especially the amendments that would abolish the division of the Federation into states, their participation on principle in the legislative process and the principles laid down in Art. 1 and Art. 20, which include the dignity of the human being, human rights, the rule of law and some other principles of law and government. The Court also assumes that it can check whether the European Community Law which can be made only after the consent of the member states, is based on and has obtained such consent.[43] Finally, the Court assumes a structure of cooperation between itself and the European Court of Justice to promote the adjustment of inalienable standards of national constitutional law and the constitutional structures, which are the basis of the European Community.[44]

The scope and meaning of the co-operation is, however, unclear. Moreover, and more importantly, now this is one of the basic assumptions of the law of the European Community that it is the supreme law of the Community as a whole and, therefore, national

---

[40] See, as to administrative law, B. Schlink, Die Bewaeltigung der wissenschaftlichen und technischen Entwicklungen durch das Verwaltungsrecht, in: 48 Veroeffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 1990, pp. 235 seqq., 259 seq.

[41] Case 6/64 (1964) ECR 585; Case 106/77, Simmenthal (1978) ECR 629

[42] 37 BVerfGE 271, 279 - Solange I -; 73 BVerfGE 339, 375 seqq.. - Solange II -

[43] 89 BVerfGE 155, 187, 209 seqq.

[44] The most recent comment on matters of such cooperation, see from the European bench G. Hirsch, Dezentralisierung des Gerichtssystems der Europaeischen Union?, in: 37 Zeitschrift fuer Rechtspolitik 2000, pp. 57 seqq.; and, also recently, P.Funk-Rueffert, Kooperation von Europäischen Gerichtshof und Bundesverfassungsgericht im Bereich des Grundrechtsschutzes, Berlin 1999; for another outline of cooperation promoting the harmonization of standards see J. Delbrueck, Human Rights and International Constitutional Cooperation, in: Ch. Starck (Ed.), New Challenges to the German Basic Law, Baden-Baden 1991, p. 191 seqq.

constitutional law looses relevance with the growth of the European law above and beyond the nation state and its law.[45]

It is unclear if there was need for the German Court to take steps to save certain standards of the Basic Law. Moreover, it is doubtful if there is still any need of national judicial review of European Community Law by inalienable national standards. This is because the common constitutional traditions and principles, which are shared by all member states of the Community, admit interpretation in accordance with the national basic standards of one another and the European standards. This approach of interpretation is laid down in Art. 288 II of the Treaty of the European Community coming from the original treaty of Rome, and Art. 215 II, dealing with questions of liability of the Community and its employees.[46] Similarly, this also applies to the area of human rights, since the European Community refers to them in Art. 6 of the treaty of the European Union, which is binding and is to be applied by the European Court of Justice. Art. 6 I and II of the treaty of the European Union says that the Union is based on the principles of liberty, democracy, respect to human rights and basic liberties and the rule of law, principles which are common to all member states. The Union also respects the basic rights, as they are guaranteed in the European Convention for the Protection of Human Rights and Basic Liberties as signed in Rome on November 4, 1950 and as they result out of the constitutional principles which the member states as general principles of the Community Law have in common. This is subject to judicial review which Art. 46 (d) of the treaty of the European Union states for Art. 6 II of that treaty. And now, the political branches of the European Union work on their own Declaration of Rights of the European Union being binding on the European Communities as well. This seems to be necessary because under international law the European Union and the European Communities cannot sign the European Convention on Human Rights and Basic Liberties because they are not states.

This is another indicator that in the long run the national constitutional courts in the European setting will loose their outstanding position. They might gain again under the idea of subsidiarity, which is stated in Art. 5 II of the treaty of the European Community and in Art. 6 III of the treaty of the European Union. This is the case if subsidiarity will start to be a concrete and effective principle of law. For - as in a federal structure - the national courts will then regain some relevance they tend to loose now. Since subsidiarity implies

---

[45] This is the assumption for a long time already, compare H. P. Ipsen, Europaeisches Gemeinschaftsrecht, Tuebingen 1972, pp. 255 seqq.; and by the same author, Europaeisches Gemeinschaftsrecht in Einzelstudien, Baden-Baden 1984, pp. 207 seqq., 227 seq. and 231 seq.

[46] For the interpretation of that clause, see Th. Oppermann, Europarecht, 2nd Ed., Muenchen 1999, pp. 185 seqq.; and R. Streinz, Europarecht, 4th Ed., Heidelberg 1999, pp. 118 seqq.

respect for the national, regional and local level of identity this should favour such a development.

The interpretation of the principle of subsidiary suffers from certain difficulties. It assumes that what can be done on a lower level of government ought to be done on that level. And, what needs to be done at the upper level ought to be done at that level. It depends on the general judgement as to where to allocate what tends to be a political judgement with some connotations of law in it. Similar problems arise if - as in Germany - there is an open clause in the constitution to divide the legislative competence in a federal state, a clause which refers to needs and goals as Art 72 II of the Basic Law, mentioned earlier. And in general, where goals, needs and means are the tools to define jurisdiction, the courts have problems acting on the edge of political discretion and principles of strict interpretation to be applied in defining jurisdictions. That is why in this area normally substantive matters are used lawfully to define who has to or may be free to do what.[47] But this wise idea in some sections of national constitutional law and quite often in European Law has not been followed.

12. Constitutional Interpretation, Constitutional Disputes and the Court as Interpreter, Mediator and Judicial Body

After all, constitutional interpretation, which is the basis of the rulings of the constitutional court, deeply depends on a perspective of principles that must be followed. Such principles can be found in the view of law as a growing body of rules, which tends to harmonize its details as part of a whole. Also, interpretation can be viewed as an instrument to pursue the goal of compatibility of results without betraying basic norms of right and jurisdiction. This way constitutional interpretation is a toy of constitutional craftsmanship as it is shown in action on the bench of a constitutional court, which has the power of full judicial review. Such a court may be forced to add other functions, as for example, of a mediator if the political machine of government fails to work. But in all its functions such a body of learned men depends on their wisdom in law, its interpretation and politics.

It can be shown from different jurisdictions that the constitutional courts start to act in methodologically similar situations. Normally there is no notion of the supremacy of the constitutional law. It has to be established. This can more easily be done if in a country there is a history of conflicting laws to be brought into relationship with one another, as for

---

[47] See Ch. Degenhart, No 51 to Art. 70 of the Basic Law, in: Sachs (Ed.), Basic Law - Commentary, 2nd Ed., Muenchen 1999, p. 1384 seq.

example, feudal and church law, written and some sort of common law, federal and state law, local practices and modern statutes. In such situation there is need to find an answer to the question as to which law prevails. Here the ideas of autonomy, of self-determination and local jurisdiction are relevant. Then, there is the notion of binding force, often taken from foreign examples of legal structures, and so especially in the context of modern law, which supposedly is binding and enforceable by state force. These modern aspects in specific cases might be combined with foreign influences like after the war in Germany when the idea of full judicial review which has had its place in German history up to the middle of the nineteenth century[48] returned to the country in the new coat of the demands of American lawyers, quite often lawyers bearing German names and being of German émigré origin.

Further, after the war under the impact of racism and the holocaust, the binding force of constitutional law safeguarding human dignity and human rights seemed a bulwark against such outbursts of cruelty. Therefore, even judicial activism had its day to introduce a legal framework for a more humane and more egalitarian society. Even today, after one half of a century, the methods developed to carry out such activism by court rulings remain a part of the arsenal of the courts. Nevertheless, some dangers are to be met if constitutional courts go too far in participating in politics.

A more moderate role has been accepted in recent years by the Court in several areas, especially if the Court de facto acts as mediator. Here, the Court only give some hints and establishes some cornerstones for the actors on the scene who have to complete the political game of choice and compromises.

The constitutional courts have even a more restricted role if they act as genuine parts of the judiciary and decide classical cases to define rights and to determine powers. In such a case the constitutional courts like other courts normally tend to narrow their rulings and reasoning even if in the background there is a whole concept of the area of law considered by the judges as the framework in which later decisions of other cases have to fit in.

13. Constitutional Interpretation and Constitutional Adjudication

Constitutional adjudication, as all other law determined by courts and not by some abstract authority of state, depends deeply on a procedural perspective.

---

[48] Compare then drafted constitutional law as explained in J.-D. Kuehne, Die Reichsverfassung der Paulskirche, 2nd Ed. Neuwied 1998, pp. 344, 347 seq.

In the beginning of the constitutional adjudication in Germany this perception of constitutional law was not yet predominant. Therefore, the earlier concepts of appropriate methods to determine the law were still governed by views and models as to how to handle questions of substance. Easily this concept can develop a procedural side.

This was the case when earlier concepts of harmonization of conflicting norms or interests behind them in the sense of "*praktische Konkordanz*" - practical concordance - were developed.[49] A similar idea is the basis of the concept of "*schonender Ausgleich*" - carefully balanced settlement - developed by another scholar.[50] The idea in these suggestions is that such conflicts have to be resolved so that both the norms and, therefore, both the interests have some say in the result of coordinating them by interpretation so that neither side vanishes.

Quite the same happened, when the principle of proportionality was spelled out by different scholars who made it applicable in a lot of different fields of constitutional and administrative law.[51]

The basis of this academic endeavour was the adjudication of the courts. This adjudication used a principle of administrative law, according to which if the state intervenes, it must use the most modest means to reach the ends to be followed in the public interest. This choice, the assumption was, would take private interests, which are protected by law, into account and also in the most appropriate way.

This concept transformed into constitutional law and into labour law, where case law prevails, intensified the role of the respective constitutional adjudication. Because on this level the courts gained a say what constitutionality is appropriate as far as given law is concerned or as to what the law should be if there is no written law. This way, on the one hand, courts gained influence. On the other hand they also gained a lot of responsibilities as to the facts underlying the then necessary judgements. These judgements, as can easily be seen, then require expertise and prognostic capabilities as to what results the choices made will have in the future. These judgements are not left to the more democratic and, in this sense, political branches of government. In the result, even the privileged position of the elected legislature may be endangered. Therefore, sometimes the Federal

---

[49] See K. Hesse (as noted note 9) pp. 28, 142 et passim; and H. Zwirner, Politische Treupflicht des Beamten (1956), Baden-Baden 1987, p. 233 seq.
[50] Compare P. Lerche, Uebermass und Verfassungsrecht (1961), 2nd. Ed., Koeln et al. 1999 p. 125 ff.
[51] L. Hirschberg, Der Grundsatz der Verhaeltnismaessigkeit, Goettingen 1981; and as the latest short overview with a bibliography in note 1, see P. Lerche, as the previous footnote, pp. VII in his "Remarks to the New Edition" of his book being a classical work

Constitutional Court hesitated, especially if legislation reviewed seemed to be experimental, to get into the matter immediately and left it to the legislature to reshape its legislation.[52] Again, this may end in a procedural perspective and appropriate devices of this kind to safeguard proportionality of state action.

Similar problems may arise in the context of European Law where the means and the ends are the common frame of judicial review. This might even be more so, if the already mentioned principle of subsidiarity in European Law is going to gain the status of a legal principle underlying full judicial review. And it is supposed to be such a principle. Then procedural ways out of a too intense review by the courts might be reasonable, similar to the ways the German Federal Constitutional Court avoided so far to put its guess as a binding judgement on the table to replace the judgement of the federal legislature what needs or has to be enacted as federal law and not on the state level, when interpreting the already mentioned Art. 72 II of the Basic Law. In Germany, the participation of the states of the federation in federal legislation in the upper house of parliament may ease the problem.

Still on substance Friedrich Mueller construed a theory of how to establish norms of constitutional law out of the tools the constitutional lawyer has.[53] Firstly, there is a written text, the "norm text". Secondly, there is a field of factual settings where this text might have some relevance, the area of the norm. Thirdly, to combine text and area with the help of both one has to find out what program of a binding content might be underlying the text under the given circumstances and with respect to other future, older or parallel cases to be decided. This program has to be open-ended and future oriented because one never knows what cases will arise. And, this open structure has to be because constitutional law is to last for long, for different societies or at least a society, which changes in history and might be very different. So, there is already some historical, social and last but not the least the procedural notion in that perspective. This, even though it is still on the footing of the "hermeneutical" approach of interpretation which had entered legal methodological thought, coming from Hans Georg Gadamer and others in that Kantian, hermeneutical or even critical tradition.[54]

Substance oriented approach later attempts to clarify what a constitutional lawyer does have to take into account the additional view of legal terms and purposes and ends of

---

[52] See 50 BVerfGE 290, 332 seqq.
[53] F. Mueller, Normstruktur und Normativitaet, Berlin 1966, and by the same author, (R. Christensen, Ed.), Juristische Methodik, 7th Ed., Berlin 1997
[54] See H. G. Gadamer, Wahrheit und Methode (1960), 2nd Ed., Tuebingen 1965; in legal methods see, for instance, J. Esser, Vorverstaendnis und Methodenwahl, 1st Ed., Frankfurt am Main 1970

law.[55] This view had its predecessors in those colleagues who had early argued that legal methods not only follow ends but also consider means and by this approach rely on an intense factual consideration of the consequences of the alternatives in deciding a legal question.[56]

But quite a long time ago, the procedural side of the constitutional law was the starting point of a theory how to find out what the law is.[57] This theory presupposes that full judicial review and written law do not suffice to provide certainty what the law might be. On the contrary, proceedings may end up in an unexpected edge of law. Some safety mainly results just by using cases which have been decided as guidelines, not only in the sense of precedents or "stare decises" but also in the sense of an evaluation of the increasing number of cases decided. Nevertheless, very often uncertainty might remain and the situation of uncertainty for the parties might be - as in any other case of law - like the uncertainty on the high seas. For the bench and the advocates the uncertaity might be somewhat different but not so different as to be at ease with it. This theory, therefore, works with the assumption that the law basically is a sequence of hypothetical assumptions and only the process of trial and error can prove as to what could be the right hypothesis of the constitutional maxim to be applied to the case. This view is very close to the critical scientific theory represented by Sir Karl R. Popper.[58] An approach of trial and error implies a permanent process of finding out what the law is. Stability in this concept is only given as long as an assumption of what the law is not shaken by reasonable new assumptions of what the law could be.

Others have put forward that a proper view of the modern constitution is also to view at it as a set of procedural structures. Besides substantial protections for rights and powers such procedures allow the full perception of how such a legal structure supposes to enable to handle uncertainty as well as abuse of power and social conflicts.[59] An understanding of rights of the individual as to this approach does not imply necessarily that complaints could always be brought forward claiming a right to be violated by any act referring to it. For instance the right to vote might be concerned with a loss of sovereignty in the European

---

[55] G. Haverkate, Normtext - Begriff - Telos, Zu den drei Grundtypen des juristischen Argumentierens, Heidelberg 1996

[56] See, for instance, K. J. Philippi, Tatsachenfeststellungen des Bundesverfassungsgerichts, Ein Beitrag zur rational-empirischen Fundierung verfassungsrechtlicher Entscheidungen, Koeln et al. 1971;, also H. Goerlich, Wertordnung und Grundgesetz, Kritik einer Argumentationsfigur des Bundesverfassungsgerichts, Baden-Baden 1973, pp. 184 seq.

[57] M. Kriele, Theorie der Rechtsgewinnung (1967) 2nd Ed., Berlin 1976

[58] See K. R. Popper, The Logic of Scientific Discovery (1959), London 1968; and, by the same author, Conjectures and Refutations (1963), London 1969

[59] For instance H. Goerlich, Grundrechte als Verfahrensgarantien, Ein Beitrag zum Verstaendnis des Grundgesetzes fuer die Bundesrepublik Deutschland, Baden-Baden 1981, pp. 371 seq.

Union. But this does not necessarily mean that the citizen can complain lawfully because such violation might not touch his right to vote immediately and at present.[60]

And, more modern perspectives view at law, including constitutional law, as an autopoietic system, which by a system of procedures recreates itself all the time, perpetuating its purposes and structures.[61] There is some truth in the observation that law as a social phenomenon and at the same time as an intellectual way of thinking cannot be abolished easily. It takes a long period of lawless government to get rid of it. And if so it soon is replaced by some substitute. And, even then law returns as economic and social needs create a demand for it. Then law turns out again as a quite often self-recreating structure, even if it almost seemed to be abolished.

The most recent development in discussions on interpretation of constitutional law centres on questions of adequate functioning of government. This way interpretation returns to the point where questions of a basic theory are raised. This is the case, because adequacy of functions is not only determined by practical requirements, but also by theoretically defined views as to what ought to be.[62] In this sense constitutional theory is demanded to provide the frame for constitutional interpretation and adjudication. This way the academic research gains more relevance than it seemed to have in a system of full judicial review.[63]

As mentioned earlier the term "free democratic basic order" of the Basic Law has been interpreted by the Constitutional Court just by defining it, without a proper line of arguments. In a combination of constitutional interpretation and constitutional theory this could be done. In this context an interpretation using functional and theoretical approaches can help a lot. This could be shown in the discussion of other issues of interpretation as well.

Therefore, constitutional law as an academic discipline gains weight in the fields of research. But it depends on the preparedness of the scholar to enter into a functional discussion of purposes not only with the help of sociology or administrative sciences but also with the help of political philosophy, constitutional history and philosophy as such. This way traditional disciplines will come back into the scene without being pushed aside

---

[60] This is seen differently in 89 BVerfGE 155, 171 seqq.
[61] See recently G.-P. Callies, Prozedurales Recht, Baden-Baden 1999, relying - inter aliis - on G. Teubner, Das Recht als autopoietisches System, Frankfurt am Main, 1989, and other publications of this author
[62] For an excellent outline of this approach in the area of administrative law and organization, see, Th. Gross, Das Kollegialprinzip in der Verwaltungsorganisation, Tuebingen 1999, S. 200 seqq.
[63] See M Morlok, Was heisst und zu welchem Ende studiert man Verfassungstheorie?, Berlin 1988, p. 168 seqq.

by more modern approaches of the social sciences. This can be observed in the discussions about the changes in administrative law in Germany.[64]
Of course, constitutional law does not govern social change or major transitions. But it stabilizes a situation when the major economic and political decisions are reached.[65] Then it enables to reorganize continuity and expectations, rights and jurisdictions as to guarantee the functioning of the whole.

At least, all mentioned theories on constitutional interpretation created an inventive atmosphere. Law is able to adjust. So is constitutional law. For instance, if the state is vanishing from the scene or privatizing activities, law remains present. Firstly, it remains on the place as a set of rules for autonomous actors of the game. Secondly, it remains present because the remote state with its public law turns out to be present as a phoenix rising out of the ashes being the supervisor and safeguard to guarantee minimal standards of fairness, access or "must carry" rules and "natural justice" or "due process". These standards are partly an offspring of constitutional law. So, constitutional law and constitutional adjudication are back on the scene, even where the state seemed to vanish.

IV. Conclusion

The German example gives a full perspective of the theme. This is so even if there are some critical remarks to be made about this example. In any case interpretation and judicial review are preconditions for the growth of constitutional law in a given frame of government. Without interpretation by professionals and without adjudication by learned judges, constitutional law remains very often only a photograph of the moment in history when it was enacted.

The role of the constitutional courts, therefore, is to develop the given constitution as an outstanding organ of the living body of law of a given society and its successors. This will remain so, even if national constitutional law and its courts loose some functions, mainly because of somewhat vanishing of the nation states in the modern world. This is not the case only because of the European integration under the European Community, but also because of the retreat by the state, which takes place internally. If the state leaves more

---

[64] See the series of volumes edited by E. Schmidt-Assmann and W. Hoffmann-Riem, for instance, by the same editors, Effizienz als Herausforderung an das Verwaltungsrecht, Schriften zur Reform des Verwaltungsrechts, Vol. 5, Baden-Baden 1998

[65] See H. Schulze-Fielitz, Die deutsche Wiedervereinigung und das Grundgesetz - Zur Theorie und Praxis von Verfassungsentwicklungsprozessen, in: K. Harms el al. ed., Verfassungsrecht und Verfassungspolitik in Umbruchsituationen, Baden-Baden 1999, pp. 65 - 116

and more activities to an enlarged and augmented private sector, the state is pulling back into the role of a supervisor behind the scenes. Unchanged constitutional courts still resolve conflicts and determine disputes, by rulings based on constitutional interpretation as a matter of lawful constitutional government which itself is governed by law and not by men.

憲法研討會: 從比較角度看基本法的實施
Constitutional Law Conference on Implementation
of the Basic Law : A Comparative Perspective

The Legal Thoughts of the Hong Kong Basic Law and the Methods of its Proper Implementation - The Comprehensive Grasping of the "One Country, Two Systems" Concept is the Key to the Correct Implementation of the Hong Kong Basic Law

Mr. Li Zaishun

The Comprehensive Grasping of the "One Country, Two Systems" Concept is the Key to the Correct Implementation of the Hong Kong Basic Law

By LI Zaishun
Secretary of the Committee for the Basic Law of the Hong Kong Special Administrative Region

It has been whole 10 years since the Hong Kong Basic Law was adopted at the Third Session of the Seventh National People's Congress of the People's Republic of China on the 4th April 1990, and it has been nearly three years since the implementation of the Hong Kong Basic Law commenced on the 1st July 1997, when Hong Kong reverted to Chinese rule. How does one conduct an overall assessment of the implementation of the Hong Kong Basic Law? There are certainly both positive and negative aspects. The positive aspects are mainly as follows: firstly, with China's resumption of the exercise of sovereignty over Hong Kong, there has been a strengthening of awareness in identifying with our country on the part of the people of Hong Kong and the Special Administrative Region Government. Secondly, owing to the Central Government's strict compliance of the "one country, two systems" guiding principle, there has been the genuine realization, after Hong Kong's reversion to Chinese rule, of "the system remaining unchanged, Hong Kong people ruling Hong Kong, and Hong Kong enjoying a high degree of autonomy." One should be able to see that the Hong Kong Basic Law is among the best laws enacted and implemented in a most satisfactory manner by China. To a developing nation that is gradually heading towards the rule of law, it represents a full manifestation of the high degree of respect and importance that the government and people of China attach to the Hong Kong Basic Law and their earnestness and determination in the strict implementation of this Law. Thirdly, confidence in the guiding principle of "one country, two systems" and in the Hong Kong Basic Law on the part of Hong Kong and the international community has been fundamentally established. This is paramount and of supreme significance.

As the reverse side of the issue and the natural course of development, one should not avoid mentioning the fact that certain people still do not have sufficient confidence in the Hong Kong Basic Law, that there have been different understandings of or even controversies over certain issues, and that such differences will continue to emerge and exist for a long time.

1. The Complex Nature of the Implementation of the Hong Kong Basic Law

The enactment of the Hong Kong Basic Law was an unprecedented legislative task. The novelty of its legislative topics, the stringency of its legislative procedures, the lengthiness of its legislative time, the extensiveness of the

consultations, and the massiveness of the manpower input were rarely witnessed in China's legislative work. On the one hand, such arduousness illustrated the high degree of importance that China placed in the enactment of the Hong Kong Basic Law. On the other hand, it indicated that the legislative task was considerably complex and strenuous.

The implementation of the Hong Kong Basic Law is even more complex and strenuous than its enactment. This is determined by the special features of the Hong Kong Basic Law and the uniqueness of the Hong Kong issue.

Firstly, the Hong Kong Basic Law is a special type of law. This Law has integrated the collective wisdom of the legal sector and other sectors of China and Hong Kong, and it, in a legal way, fully and precisely manifests the guiding principle of "one country, two systems" and splendidly coordinates two systems and two kinds of legal tradition. Yet the enactment of the Hong Kong Basic Law can only resolve legislative issues concerning the "one country, two systems" principle and is unable to wholly resolve problems in its implementation. The reasons are as follows: 1. The internal and inherent conflicting natures of the two ideological and legal systems are seriously antagonistic to one another, which makes genuine unity very difficult to achieve; 2. The Hong Kong Basic Law being a broad legal framework, many of its provisions are outlines and principles. As a result, specific problems are bound to continuously appear; 3. As the situation changes, new scenarios and problems will arise, and such scenarios and problems may not have been considered at the time of enactment of the Hong Kong Basic Law.

Secondly, there are marked differences between the entities implementing the Hong Kong Basic Law. The two different systems have generated two different ideologies. Hong Kong was under British colonial rule for one hundred and fifty years and was imbued with capitalist education. The people of Hong Kong and the people of Mainland China have vastly different understandings of and different attitudes towards politics, economics, law, culture and sense of values. In terms of legal thinking, while China belongs to the continental system, the common law system is in force in Hong Kong. There are apparent differences and even antagonisms in legal viewpoint and way of thinking between these two major legal systems. Hence, in the implementation of the Hong Kong Basic Law, solutions must first be found to resolve conflicts in the way of thinking between these two major entities of law implementation.

Thirdly, Hong Kong is a special international city. Hong Kong's special nature lies in the maintenance, under Chinese sovereignty, of its previous system and its close connection with the international community. The fact that the Hong Kong issue has always been under the international community's scrutiny is both

advantageous and disadvantageous to the implementation of the Hong Kong Basic Law. The advantageous factor is that China, as an important member of the international community who has always attached great importance to her obligations as a nation and its international reputation, would certainly take into consideration the opinions voiced by the countries concerned and the international community. There are two disadvantageous factors. Firstly, certain western countries treat Hong Kong as an international asset, internationalize the Hong Kong issue, and indirectly negate China's sovereignty over Hong Kong. This is firmly opposed by China. China deems Hong Kong quite a special international city but opposes the western world's interference in China's internal affairs and the internationalization of Hong Kong and the Hong Kong issue. Secondly, certain western countries have, for a long time, considered Hong Kong as a base for opposing the Chinese socialist system. This is something that China resolutely does not permit. Since Hong Kong has been dragged into such struggles in the international community, the Hong Kong issue has become increasingly complicated.

2. The Implementation of the Hong Kong Basic Law is Inseparable from the "One Country, Two Systems" Concept

" One country, two systems" means the presence of two systems within one country. In the context of the Hong Kong issue, it means the People's Republic of China's resumption and possession of sovereignty over Hong Kong; and, following the Chinese government's resumption of the exercise of sovereignty over Hong Kong, it will not implement the socialist system and policies in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life will remain unchanged for 50 years.

In international law, Hong Kong's reversion to Chinese rule is simply the Chinese government's resumption of the exercise of sovereignty over Hong Kong. However, the differences in social system between China and Hong Kong and even Britain rendered the resolution of this issue quite complicated. Considering such an historical and actual situation, Mr. Deng Xiaoping creatively proposed the "one country, two systems" guiding principle, which became the basic principle in China and Britain's resolution of the Hong Kong issue. Mr. Deng Xiaoping's proposal of the "one country, two systems" principle to resolve the Hong Kong issue was both a pragmatic decision and a creative concept. In China's historical situation then, the proposing of the idea of Hong Kong's system remaining unchanged after the resumption of the exercise of sovereignty required sufficient political standing, wisdom and courage. According to China's traditional political standpoint, it was absolutely unacceptable to permit Hong Kong to continue adopting a capitalist system under the sovereignty of socialist China. Owing to that, the resolution of the Hong Kong issue would become even more complicated,

and the extreme scenario of forceful resumption might take place, in which case the situation would be very adverse indeed. One could say that China and Britain's smooth resolution of the Hong Kong issue was attributable to the great concept of the "one country, two systems" principle. When we commemorate the Hong Kong Basic Law, we should first commemorate the great concept of the "one country, two systems" principle and further cherish and give importance to this basic guiding principle for resolving the Hong Kong issue.

One should note that the "one country, two systems" concept originated from the Taiwan issue rather than the Hong Kong issue and was subsequently adopted to resolve the Hong Kong issue and the Macau issue. While Hong Kong and Macau have smoothly reverted to the motherland, the Taiwan issue is grim. While we oppose the independence of Taiwan and uphold the principle and standpoint of "one China", we should actually exercise greater political creativity and show greater sincerity and patience for peaceful resolution. That is the greatest inspiration that the smooth resolution of the Hong Kong and Macau issues should bestow upon us.

The "one country, two systems" concept was the basic guiding principle in Sino-British negotiations on the Hong Kong issue and that of the enactment of the Hong Kong Basic Law. The "one country, two systems" concept is the central idea of the Hong Kong Basic Law and penetrates each and every provision of that Law.

The provisions on "one country" in the Hong Kong Basic Law are primarily manifested in the following aspects: 1. The administrative dependence relationship: Article 1 of the Basic Law clearly prescribes: "The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China." Article 10 prescribes that Hong Kong should display the national flag and national emblem of the People's Republic of China. Article 12 prescribes: "The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government." 2. The Central Government's diplomatic and defence powers: Article 13 prescribes that the Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region, and Article 14 prescribes that the Central People's Government shall be responsible for the defence of the Hong Kong Special Administrative Region. 3. The power to enact, amend and interpret the Hong Kong Basic Law: according to sovereignty principles and the provisions of the Sino-British Joint Declaration, the power to enact the Hong Kong Basic Law shall be vested in the National People's Congress. Article 159 of the Hong Kong Basic Law prescribes that the power of amendment of this Law shall be vested in the National People's Congress. Article 158 prescribes that the power of

interpretation of this law shall be vested in the Standing Committee of the National People's Congress. At the same time, Article 17 prescribes that the Standing Committee of the National People's Congress has the power to accept for record and return laws enacted by the legislature of the Hong Kong Special Administrative Region. 4. The Central Government's power to appoint principal officials in Hong Kong: such power is clearly defined in the provisions concerned in Article 15 and Chapter IV of the Hong Kong Basic Law. Articles 44 and 61 prescribe that the Chief Executive and principal officials of the Hong Kong Special Administrative Region shall be Chinese citizens who are residents of Hong Kong. 5. All powers of the Hong Kong Special Administrative Region originating from the State's authorization: Article 2 of the Hong Kong Basic Law prescribes: "The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication." Paragraph 3 of Article 13 prescribes: "The Central People's Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with this Law." Article 20 prescribes: "The Hong Kong Special Administrative Region may enjoy other powers granted to it by the National People's Congress, the Standing Committee of the National People's Congress or the Central People's Government." 6. The power to participate in the management of state affairs: Article 21 of the Hong Kong Basic Law prescribes: "Chinese citizens who are residents of the Hong Kong Special Administrative Region shall be entitled to participate in the management of state affairs according to law." The above-mentioned provisions illustrate China's exercise of sovereignty over Hong Kong and Hong Kong being an inalienable part of China.

The provisions on "two systems" in the Hong Kong Basic Law are primarily manifested in the following aspects: 1. A high degree of autonomy: according to Articles 2, 16, 17 and 19 of the Hong Kong Basic Law, the Hong Kong Special Administrative Region shall, in accordance with the provisions of this Law, exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication. 2. Hong Kong people ruling Hong Kong: Article 3 prescribes: "The executive authorities and legislature of the Hong Kong Special Administrative Region shall be composed of permanent residents of Hong Kong in accordance with the relevant provisions of this Law." According to Articles 44 and 61, the Chief Executive and principal officials shall be permanent residents of Hong Kong who meet certain requirements. 3. The legal system remaining unchanged: Article 8 prescribes: "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region." In accordance with

paragraph 2 of Article 18, national laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed in Annex III to this Law had to undergo strict procedures and, in terms of legal nature, comprise laws relating to the sovereignty of the State. So far, there are only 11 laws listed in Annex III. 4. Adequate protection for the existing democratic rights and freedoms enjoyed by Hong Kong residents: there are clear provisions in that respect in Article 4 and Chapter III of the Hong Kong Basic Law. 5. The systems of private ownership of property and the free economy remaining unchanged: Article 6 prescribes: "The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with the law." Chapter V contains special provisions on economic issues. 6. Hong Kong's financial independence: according to Articles 7 and 106 of the Basic Law, Hong Kong shall enjoy financial independence, and its land, resources and revenues shall be used exclusively for its own purposes and shall not be handed over to the Central People's Government, and the Central People's Government shall not levy taxes in Hong Kong. The above-mentioned provisions indicate that under the principle of "sovereignty", Hong Kong's previous system shall basically remain unchanged, and the State has vested a high degree of "administrative power" in the Hong Kong Special Administrative Region.

The implementation of the Hong Kong Basic Law is also an entirely new legal implementation. There is no experience or lessons of success or failure to learn from. We can only feel our way as we move ahead. Feeling our way as we move ahead does not denote a lack of direction. For issues that are clearly defined in the Hong Kong Basic Law, the provisions should be adhered to. For practical issues that are not clearly defined or new issues, resolution should be sought in conformity with the "one country, two systems" principle. Hence, the four words "one country, two systems" will always be the guiding thought of the Hong Kong issue. In the implementation of the Hong Kong Basic Law, this thought should be resolutely and thoroughly put into practice. Deviation from this thought will result in the failure to find consensus, and no resolution is possible.

3. It is Necessary to Correctly Understand and Handle Five Major Relationships

The satisfactory implementation of the Hong Kong Basic Law is determined by whether the "one country, two systems" guiding principle is wholly grasped and correctly applied. Taking into consideration the actual state of the implementation of the Hong Kong Basic Law, it is necessary to understand and properly handle the following five major relationships:

(1) The relationship between "one country" and "two systems"

The controversy in public opinion is always about which between "one country" and "two systems" is of primary importance and which is of secondary importance. In my opinion, there is little actual meaning in arguing about this issue. The four words "one country, two systems" are written together and should not be separated. "One country" and "two systems" should be of equal importance, and neither should be cast aside. However, if it is really necessary to give them priority, then "one country" should certainly precede "two systems".

"One country" is a sovereignty issue. Mr. Deng Xiaoping said: "The sovereignty issue is not an issue that can be discussed." This has consistently been the standpoint of the Chinese people and government. In resolving the issue of Hong Kong's reversion and in the process of the implementation of the Hong Kong Basic Law, this fundamental standpoint would not change. As for the actual manner of the realization of sovereignty, such an issue could be discussed and was of considerable flexibility. For instance, judicial jurisdiction is a significant issue in the sovereignty of the state. The Basic Law's provision for Hong Kong's entitlement to final adjudication actually represents authorization from the state for Hong Kong to exercise this power, which concerns the sovereignty issue.

In the implementation of the Hong Kong Basic Law, "one country" should first be upheld to protect the sovereignty of the state. In Hong Kong's case, the Hong Kong Basic Law should be wholly rather than superficially enforced. There should be recognition of and respect for the state's power over sovereignty, and one should not merely emphasize "two systems" while omitting "one country." Since Hong Kong's reversion to the motherland, the broad masses of people who love China and Hong Kong have acquired a strong awareness of reversion and patriotic zeal. In this main trend, mistaken inclinations should be prevented and corrected; for example, love for our country and love for Hong Kong are made antagonistic towards each other. Those who love their country are labelled "pro-China elements", "traitors to Hong Kong", and there are also those who are deemed to "oppose everything connected to China", i.e., irrespective of whether the issue concerned is right or wrong, everything agreed by the Central Government is opposed. These are not constructive ways and are seriously detrimental to the correct implementation of the Hong Kong Basic Law.

"Two systems" represents the manner in which China administers Hong Kong and is aimed at continuing adopting the capitalist system and way of life in Hong Kong and safeguarding "Hong Kong people ruling Hong Kong" and "a high degree of autonomy".

Whether "two systems" can be carried out properly is primarily the responsibility of the Mainland. The Hong Kong Basic Law is implemented in the region of Hong Kong but is applicable on a nationwide scale. It is imperative for

the Mainland to respect Hong Kong's capitalist system and way of life and also "Hong Kong people ruling Hong Kong" and "a high degree of autonomy." Firstly, the Central People's Government should abide strictly by the Hong Kong Basic Law. While underlining the sovereignty principle, it should fully respect Hong Kong's power in terms of a high degree of autonomy. At the same time, since local powers provided by the law are not to antagonize the powers of the central authorities, the Central Government should exercise self-restraint and employ its powers prudently in resolving specific problems or new issues. Secondly, the departments, provinces, autonomous regions and municipalities under the Central People's Government are not to interfere in the Hong Kong Special Administrative Region's administration of its own affairs in accordance with the provisions of the Basic Law. Up till now, the Central Government and the departments concerned have been trying their best to avoid interference and have not interfered in the affairs administered by Hong Kong in conformity with the Law.

(2) The relationship between the Hong Kong Basic Law and other laws

i. The relationship between the Hong Kong Basic Law and the Constitution of the People's Republic of China

The Constitution is the fundamental main law of the State. Although the Chinese Constitution, as an entirety, is not implemented in Hong Kong, it is still applicable and effective in Hong Kong. The reasons are as follows: firstly, the provisions on the "one country, two systems" concept in Article 31 of the Chinese Constitution are the basis for Hong Kong's continuing adopting the capitalist system following its reversion to the motherland. Secondly, even though the Constitution's provisions on the establishment, functions and powers of state organs and national flag, national emblem and capital are not compulsorily implemented in Hong Kong, such provisions should still be effective in Hong Kong. Thirdly, the socialist system and policies are not applicable to Hong Kong, but Hong Kong is not to oppose the Constitution's provisions governing China's state system, which is generally socialist. That Article 23 of the Hong Kong Basic Law requires Hong Kong to enact laws on its own is a concrete manifestation of such an idea.

On the subject of how the relationship of effect between the Hong Kong Basic Law and the Chinese Constitution should be handled, it is clearly prescribed in Article 11 of the Hong Kong Basic Law: "In accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law." This provision

connotes on two levels. Firstly, Hong Kong's system and policies shall be based upon the Hong Kong Basic Law and not the Chinese Constitution, for Article 31 of the Constitution is a special provision, and the effect of special provisions surpasses that of general provisions, as is China's legislative practice. Secondly, legally, it should not be simply assumed that the effect of the Hong Kong Basic Law surpasses that of the Chinese Constitution, for Article 31 of the Chinese Constitution is the basis of the provisions in Article 11 of the Hong Kong Basic Law, whose power originates from the provisions of the Constitution.

Judging from the content and nature, the Hong Kong Basic Law is a piece of constitutional law, and there are some who figuratively call it Hong Kong's "mini - constitution". This is not groundless. Accurately speaking, the Constitution of the People's Republic of China should be considered Hong Kong's "major constitution" and integrated organically with the Hong Kong Basic Law to jointly form the constitution of Hong Kong.

There are some in Hong Kong who say that Hong Kong still has room for the enactment of a constitution. This is actually a negation of the Chinese Constitution and a negation of the sovereignty of the State and is absolutely wrong.

ii. The relationship between the Hong Kong Basic Law and other laws of Hong Kong

The Hong Kong Basic Law is a constitutional legal document and has constitutional effect. Hong Kong's laws that were previously in force and legislative and judicial activities thereafter should consider the Hong Kong Basic Law as the standard of the highest effect.

Article 8 of the Hong Kong Basic Law prescribes that the laws previously in force in Hong Kong shall not contravene the Hong Kong Basic Law, and that those that contravene the Basic Law should not be maintained. Regarding how laws previously in force that contravene the Basic Law should be dealt with, according to Article 73 and Article 160, such laws should be amended or cease to have force in accordance with the procedure prescribed by this Law. At the establishment of the Hong Kong Special Administrative Region, it was the Standing Committee of the National People's Congress that declared the effectiveness of Hong Kong's laws that were previously in force. On the 23rd February 1997, the "Decision on Treatment of the Laws Previously in Force in Hong Kong" was adopted at the Twenty Fourth Session of the Standing Committee of the Eighth National People's Congress. This task has been completed. After the establishment of the Hong Kong Special Administrative Region, the legislature of the Hong Kong Special Administrative Region is the

organisation that amends laws previously in force and declares the cessation of effect thereof.

Article 11 of the Hong Kong Basic Law prescribes that no law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law.

The Hong Kong Basic Law should be considered as the highest judicial basis in the course of judicial adjudication, and judges are not to supercede the Hong Kong Basic Law with the legal concepts of equity or the western concept of "legislation by judges."

(3) The relationship between the common law system and the continental law system

Regarding legal origins, Hong Kong practises the British common law system, and China practises the continental law system. There are fundamental differences between the two main legal systems in terms of legal thinking, law composition, and principles and ways to handle legal issues.

Let us first consider the legal origins of the Hong Kong Basic Law. Is it purely based upon the common law system or the continental law system, or does it embody both systems? My conclusion is that the Hong Kong Basic Law is a law that is primarily based upon the legal thinking of the continental law system while absorbing that of the common law system. The main reasons are as follows: firstly, the power to enact and amend this Law is vested in the National People's Congress, which represents legislation by the State rather than by Hong Kong. Secondly, according to Article 158 of that Law, the power of interpretation of that Law shall be vested in the Standing Committee of the National People's Congress. At the same time, it vests the courts of Hong Kong with considerable power of judicial interpretation when adjudicating cases. This tallies entirely with the manner of legal interpretation under the continental law system. Thirdly, this Law is a statute law and shall not be contravened by any other laws enacted by Hong Kong. The form of its effect is different from common law traditions. Fourthly, China's legislative practices have been adopted in the stylistic rules and layout and manner of illustration of this Law. Certainly, this Law absorbed a great deal of common law thinking during the drafting process, and there is evidence of the common law system throughout the provisions. Therefore, one should not simply consider it as a law based purely on the continental law system.

The analysis of the legal origins of the Hong Kong Basic Law is beneficial to comprehending, from a correct standpoint and angle and with correct thinking and logic, the provisions and the spirit behind the provisions of the Hong Kong

Basic Law. This is especially important to the judges in the courts of Hong Kong. If one puts the Hong Kong Basic Law entirely in the context of common law logic or continental law logic, there will be conflict in legal understanding. In implementing the provisions on the Central Government's administration of affairs and the relationship between the Central Government and Hong Kong, Hong Kong has to go beyond purely common law thinking and consider issues more from the angle of continental law thinking. In handling provisions on affairs within Hong Kong's autonomy, the Mainland should respect and employ common law thinking. From a practical viewpoint, the Mainland's understanding of Hong Kong law and legal thinking is better than Hong Kong's understanding of Chinese law and legal thinking. Some people in Hong Kong often only have superficial knowledge of the Hong Kong Basic Law.

(4) The relationship between domestic law and international law

Firstly, the Hong Kong Basic Law is a domestic law. According to the Sino-British Joint Declaration on the Question of Hong Kong, the Hong Kong Basic Law was defined as both a treaty obligation and a treaty right. As a treaty obligation, this Law is required to be a strict manifestation of the provisions of the Sino-British Joint Declaration and is not to deviate from treaty principles. As a treaty right, it is a domestic law which was enacted and will be implemented independently without being subject to external interference at will.

Western countries have transferred their struggles in social system, ideology and sense of values to Hong Kong. Their using Hong Kong as a topic for elaboration or their "elaborating on topics" in Hong Kong will harm Hong Kong severely.

(5) The relationship between change and unchange

"The Hong Kong legal system remaining unchanged" is a concept in principle and does not denote that Hong Kong law will remain totally unchanged. In the process of Hong Kong's development, the various legal and administrative systems should be continuously developed and perfected. The legislature of Hong Kong may make changes thereto through legislation. Yet such changes must not contravene the provisions of the Hong Kong Basic Law.

In upholding the stability of the Hong Kong Basic Law, the possibility of prompt amendments when necessary should not be ruled out. Of course, the amendment of the Hong Kong Basic Law should be in strict adherence to statutory procedures and is not to contravene the basic guiding principle of "one country, two systems".

4. The Legal Interpretation of the Hong Kong Basic Law

Legal interpretation is an extension of legislative powers and a major activity in law implementation. It is of crucial significance to law implementation in a correct manner.

(1) The issue of legal interpretation of the Hong Kong Basic Law has always been an issue of great concern

In the process of drafting the Hong Kong Basic Law, there was considerable contention among the various sectors in Hong Kong on the vesting of the power of interpretation. Such contention involved different social systems and legal traditions and the relationship between the Central Government and the Hong Kong Special Administrative Region. At that time, there were three viewpoints:

There were those who felt that the power to interpret law should be fully vested in Hong Kong courts. According to the common law theory and practice, judges adjudicating cases were empowered to interpret legal provisions relevant to the cases. Since Hong Kong's legal traditions were to be preserved and since Hong Kong was to be entitled to the power of final adjudication, Hong Kong courts should have the power of interpretation when handling cases involving the provisions of the Basic Law, and the Court of Final Appeal should have the highest interpretation power.

There were also those who believed that it was possible to share the power of law interpretation, i.e., such a power could be jointly exercised by the Standing Committee of the National People's Congress and the Hong Kong Special Administrative Region. According to the division of functions and powers of the Central Government and the Hong Kong Special Administrative Region, provisions governing defence, diplomacy and affairs pertaining to the relationship between the Central Government and Hong Kong should be interpreted by the Standing Committee of the National People's Congress, and provisions concerning affairs within Hong Kong's limits of autonomy should be interpreted by Hong Kong courts.

Furthermore, there were those who were of the opinion that when the cases of final adjudication handled by Hong Kong courts involved the provisions of the Hong Kong Basic Law, then the Standing Committee of the National People's Congress should be requested to make interpretations prior to adjudication. Such a viewpoint was based upon the European Community's practice in law interpretation. They felt that in the handling of cases, Hong Kong courts should be in a position to interpret fundamental Basic Law provisions within the limits of

Hong Kong's autonomy and those relating to defence, diplomacy and other central administrative affairs, but if cases for final appeal involved the interpretation of the Basic Law, then the Standing Committee of the National People's Congress should be asked to provide a guiding interpretation before final adjudication.

Repeated amendments ultimately resulted in Article 158 of the Hong Kong Basic Law, which generally established the vesting of the power of interpretation of the Hong Kong Basic Law in the Standing Committee of the National People's Congress and, at the same time, vested the requisite power of interpretation in Hong Kong courts in their adjudication of cases. However, there was certain restriction in terms of limits or procedure in interpretation by Hong Kong courts.

On the 26th June 1999, Article 22(4) and Article 24(2)(3) of the Hong Kong Basic Law were interpreted at the Tenth Session of the Standing Committee of the Ninth National People's Congress. The issue of legal interpretation of the Hong Kong Basic Law became a focus in the implementation of the Hong Kong Basic Law.

(2) The power of interpretation and the process of interpretation of the Hong Kong Basic Law

On the subject of the interpretation of the Hong Kong Basic Law, there are clear provisions in Article 158 of that Law. The provisions illustrate the principles of protecting the sovereignty of the State, the constitutional principles and also the concrete application, from Hong Kong's actual situation, of the "one country, two systems" guiding principle in legal interpretation.

i. The power of interpretation of the Hong Kong Basic Law is vested in the Standing Committee of the National People's Congress

According to Article 158(1) of the Hong Kong Basic Law, "The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress." This provision indicates that the Standing Committee of the National People's Congress has the power of interpretation of all the provisions of the Hong Kong Basic Law, including those within Hong Kong's limits of autonomy.

The provision on vesting the Standing Committee of the National People's Congress with the power to interpret the Hong Kong Basic Law underwent comprehensive consideration:

Firstly, it concerns requirements regarding the sovereignty of the State. The content of the provisions of the Hong Kong Basic Law not only pertains to affairs within Hong Kong's limits of autonomy but also represents legal provisions

on the State's exercise of sovereignty over Hong Kong and how sovereignty would be exercised. Legal interpretation, as an extension of legislative power, is, like legislative power and amendment power, a requirement of the sovereignty of the State and an assurance of the exercise of sovereignty. It is necessary for the State to retain the power of legal interpretation.

Secondly, it concerns requirements regarding China's constitutional principles. According to the provisions of China's Constitution and its legal interpretation traditions, the Standing Committee of the National People's Congress is vested with the power to interpret Chinese laws, and local organisations are not entitled to such a power. The Hong Kong Basic Law being a nationwide law, it is not reasonable for it to be interpreted by Hong Kong courts.

Thirdly, it concerns the absence of interference in the cases adjudicated by Hong Kong courts. Hong Kong courts have the power of adjudication and final adjudication. In interpreting the Basic Law, the Standing Committee of the National People's Congress is merely interpreting the original meaning of the legal provisions and does not apply it in the context of actual cases, and the interpretation does not affect the previous judgments rendered by the courts on the cases concerned. This represents full respect for Hong Kong courts' power of adjudication.

ii. Authorizing Hong Kong courts to interpret provisions within the limits of autonomy

Article 158(2) of the Hong Kong Basic Law prescribes: "The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region."

This provision fully respects common law judicial traditions. According to China's system of legal interpretation, the Supreme People's Court is the only court to exercise the power of judicial interpretation, and local people's courts at all levels are not vested with the power of judicial interpretation.

That provision denotes that courts at all levels in Hong Kong, when handling cases involving provisions in the Hong Kong Basic Law within the limits of Hong Kong's autonomy, may interpret the Law on their own and do not have to ask the Standing Committee of the National People's Congress for an interpretation. At the same time, this power of interpretation has already been automatically obtained according to the legislative authorization of the Hong Kong

Basic Law, and it is not necessary to undergo further authorization by the Standing Committee of the National People's Congress.

iii. Restrictions on Hong Kong courts in the interpretation of other provisions

Article 158(3) of the Hong Kong Basic Law prescribes: "The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying these provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected."

Since the adjudication of the Hong Kong Court of Final Appeal has the legal effect of final adjudication, the provisions in the Hong Kong Basic Law on seeking, before final adjudication, an interpretation from the Standing Committee of the National People's Congress of the provisions beyond the limits of autonomy of the Special Administrative Region are aimed at preventing negative legal consequences and effects arising from inconsistency between the interpretation made by Hong Kong and that made by the Central Government.

Regarding the effect of the interpretation of the Hong Kong Basic Law by the Standing Committee of the National People's Congress, this provision clearly prescribes: "When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying these provisions, shall follow the interpretation of the Standing Committee." Here, "interpretation of the Standing Committee" does not merely mean interpretation of the Standing Committee of the National People's Congress sought by the Hong Kong Court of Final Appeal but also includes interpretations that the Standing Committee of the National People's Congress takes the initiative to furnish. The effect of the interpretation of the Hong Kong Basic Law by the Standing Committee of the National People's Congress contains the inherent connotations of the power of interpretation and is also an intrinsic and requisite requirement of the power of interpretation.

iv. Consulting the Committee for the Basic Law of the Hong Kong Special Administrative Region

Article 158(4) of the Hong Kong Basic Law prescribes: "The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law." This is a requisite procedure in the interpretation of the Hong Kong Basic Law by the Standing Committee of the National People's Congress. That Committee comprises six members from the Mainland and six members from Hong Kong. Members from Hong Kong had to be co-nominated by the Chief Executive, the Legislative Council President and the Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region, and the nominations had to be submitted to the Standing Committee of the National People's Congress for appointment. Hence, requiring the Standing Committee of the National People's Congress to consult that Committee when exercising the power to interpret the Hong Kong Basic Law is aimed at enabling the interpretation of the Standing Committee of the National People's Congress to reflect Hong Kong's public opinion as much as possible and ensuring the correct implementation of the Hong Kong Basic Law.

(3) Interpretation by the Standing Committee of the National People's Congress will not damage Hong Kong's rule of law

On the 26th June 1999, the Standing Committee of the National People's Congress exercised the power of interpretation for the first time. Article 22(4) and Article 24(2)(3) of the Hong Kong Basic Law were interpreted at the Tenth Session of the Standing Committee of the Ninth National People's Congress.

The interpretation on that occasion caused considerable doubt, anxiety and contention. Certain people in Hong Kong and overseas criticised the legal interpretation by the Standing Committee of the National People's Congress for "damaging Hong Kong's rule of law."

In fact, the viewpoint that the legal interpretation by the Standing Committee of the National People's Congress would damage Hong Kong's rule of law was primarily a mere abstract concept and a simple conclusion based on common law logic and was not founded on the basis of a comprehensive and in-depth legal study of the Hong Kong Basic Law.

1. Interpreting the Hong Kong Basic Law is a function and power of the Standing Committee of the National People's Congress. According to Article 158(1) of the Hong Kong Basic Law, the Standing Committee of the National People's Congress has the power to interpret any provision of the Hong Kong

Basic Law. Hence, the interpretation on that occasion was an exercise of function and power and did not represent the overstepping of authority to interfere in the adjudication of cases by Hong Kong courts.

2. The interpretation was made in the situation where both the procedure and substance of the legal interpretation made by the Hong Kong Court of Final Appeal were both inappropriate. On the 29th January 1999, the judgment made by the Hong Kong Court of Final Appeal involved the interpretation of Article 22(4) and Article 24(2)(3) of the Hong Kong Basic Law. In terms of procedure, regarding the provisions on affairs administered by the Central Government and the relationship between the Central Authorities and Hong Kong, the Court of Final Appeal of Hong Kong did not seek an interpretation from the Standing Committee of the National People's Congress, as required by Article 158(3) of the Hong Kong Basic Law; as a matter of substance, the interpretation provided by the Court of Final Appeal was not in accordance with the original legislative intention.

In my opinion, whether the interpretation made by the Court of Final Appeal was in accordance with the original legislative intention was an issue concerning different understandings of law. According to China's legislative interpretation practice, legal interpretation by the Standing Committee of the National People's Congress did not necessarily follow the literal meaning; interpretations could be expanded or narrowed down to tally with the original legislative intention then. Hence, it was natural for the two parties to have different understandings. As to the procedures for adjudication by the Hong Kong Court of Final Appeal, Article 22(4) of the Hong Kong Basic Law is apparently within Chapter II, which defines the relationship between the Central Authorities and the Hong Kong Special Administrative Region and is obviously a provision pertaining to the relationship between the Central Authorities and Hong Kong. As for the original legislative intention of Article 24(2)(3), that subject was explained in the report prepared by the Preparatory Committee for the Hong Kong Special Administrative Region of the Standing Committee of the National People's Congress, and that report was adopted by the National People's Congress. According to Chinese legal practice, it already has the nature of a legal interpretation. The interpretation provided by the Hong Kong Court of Final Appeal involved the negation of the above-mentioned document and actually affected the relationship between the Central Authorities and Hong Kong. Therefore, the Hong Kong Court of Final Appeal should have sought, prior to adjudication, an interpretation from the Standing Committee of the National People's Congress. That the Hong Kong Court of Final Appeal did not request the Standing Committee of the National People's Congress to provide an interpretation was apparently a violation of Article 158(3) of the Hong Kong Basic Law.

When commenting on whether Hong Kong's rule of law would be damaged, what criteria were we to abide by? Did the act of observing the Hong Kong Basic Law damage Hong Kong's rule of law or did the act of violating the Hong Kong Basic Law damage Hong Kong's rule of law? Had the Court of Final Appeal, in making adjudication, abided strictly by the procedures prescribed by the Hong Kong Basic Law, there would not have been legal interpretation by the Standing Committee of the National People's Congress.

3. The interpretation on that occasion was procedurally legal. The contention regarding the procedure for interpretation mainly revolved around the question of whether or not the Chief Executive was empowered to put forward to the State Council a proposal for seeking legal interpretation by the Standing Committee of the National People's Congress. The Hong Kong Basic Law does not have clear provisions in that respect, but it definitely requires the Chief Executive to be responsible for implementing the Hong Kong Basic Law and be responsible towards the Central People's Government and the Hong Kong Special Administrative Region. Hence, the Chief Executive naturally had the power to seek assistance from the State Council when he encountered problems that he was unable to resolve in the process of implementing the Hong Kong Basic Law.

4. The interpretation on that occasion was due to the urgency of the situation, and the Central Authorities' exercise of power was cautious. Even though the judgment rendered by the Hong Kong Court of Final Appeal was inappropriate, the Central Authorities, to prevent unnecessary controversy, asked Hong Kong to seek a way to resolve the issue on its own. Yet Hong Kong was unable to resolve those legal issues by itself and did not have the means to accommodate the 1,600,000-odd additional residents that the judgement could bring. Some people proposed the amendment of the Hong Kong Basic Law. That was something deemed truly unacceptable by the Central Authorities. In that situation, the only solution was legal interpretation.

Why was there disagreement on the amendment of the Hong Kong Basic Law? There were four main reasons. Firstly, there had to be stability in the Hong Kong Basic Law, and it could not be amended at will. Secondly, the procedure for amending the Hong Kong Basic Law was quite stringent. Since the National People's Congress was convened only once a year, prompt action could not be taken. Thirdly, the legal problem had been caused by the failure on the part of the Hong Kong Court of Final Appeal to handle matters strictly in accordance with the Law, and it would be mistaking wrong for right if the Law had to be amended because of that. Fourthly, using interpretation as a solution was legally justifiable and entirely in conformity with the provisions of the Hong Kong Basic Law.

From this incident of legal interpretation by the Standing Committee of the

National People's Congress, I feel that importance should be given to the following issues:

1. There should be an in-depth study of the Hong Kong Basic Law. For instance, procedural issues such as legal interpretation and issues in respect of Hong Kong courts' power of constitutional review should be clearly defined.

2. Legal exchange between Hong Kong and the Mainland should be strengthened, and consensus should be enhanced.

3. The Central Authorities should be prudent in exercising the power of interpretation and consider appropriate ways when exercising this power. For example, it is best for interpretation not to involve actual cases, or there will be unnecessary misunderstanding, doubt and anxiety.

4. Hong Kong should learn and apply the Basic Law properly and must not deviate from it.

5. There should be confidence in Hong Kong's prosperity and stability

I believe that there are the following four major assurances to Hong Kong's prosperity and stability.

1. The continuation of the existing capitalist system in Hong Kong is beneficial to China's smooth resumption of sovereignty over Hong Kong, and a prosperous and stable Hong Kong that has close ties with the international community is entirely in accordance with the fundamental interests of the Chinese people, including Hong Kong people. China shall not change and shall not find it necessary to change Hong Kong's administrative system, which has already been proven to be sound. That is an internal assurance for the continued prosperity and stability of Hong Kong.

2. The Sino-British Joint Declaration on the Question of Hong Kong is an external assurance of Hong Kong's previous system remaining unchanged.

3. The Hong Kong Basic Law is Hong Kong's legal assurance.

4. The honour bestowed by China's political leaders is Hong Kong's political assurance.

With the above-mentioned four major assurances, Hong Kong will surely become the flagship and epitome of the "one country, two systems" concept and a

gateway of civilization to the world, and Hong Kong's future will surely shine even brighter.

全面把握“一國兩制”思想是正確實施《香港基本法》的關鍵

李再順
香港特別行政區基本法委員會秘書

1990年4月4日，中華人民共和國第七屆全國人民代表大會第三次會議通過了《香港基本法》，至今已是整整十個年頭；1997年7月1日香港回歸以後，《香港基本法》開始實施，至今也已近三年。如何對《香港基本法》的實施情況作一個總體評價呢？當然有好和不好兩個方面。好的方面主要有：一是中國對香港恢復行使主權，香港人民和特區政府對國家的認同意識得到增強。二是中央政府嚴格按照“一國兩制”的方針，香港回歸以後，真正實現“制度不變、港人治港、高度自治”。應當看到，《香港基本法》既是中國制定得最好的法律之一，也是實施得最好的法律之一。對于一個正在逐步走向法治的發展中國家來說，充分體現出中國政府和人民對《香港基本法》的高度尊重與重視以及嚴格實施這部法律的誠意與決心。三是香港以及國際社會對“一國兩制”方針和《香港基本法》的信心已經從根本上樹立起來。這是主要的，也是至關重要的。

毋庸諱言，作為事物的另一個方面及其發展的必然性，一些人對香港基本法》仍然信心不足，對有些問題存在不同認識甚至爭議，而且這種分歧今後還將不斷出現和長期存在。

一、實施《香港基本法》的複雜性

制定《香港基本法》是一項前所未有的立法工作，其立法課題之新、立法程序之嚴、立法時間之長、徵求意見之廣以及投入人力物力之多，在中國立法工作中是少見的。一方面說明了中國對制定《香港基本法》的高度重視，另一方面也說明了這項立法工作相當複雜、相當艱難。

與制定《香港基本法》比較，實施《香港基本法》更加複雜、更加艱難。這是由《香港基本法》的特點以及香港問題的特殊性決定的。

其一，《香港基本法》是一部特殊類型的法律。這部法律凝聚了中、港兩地法律界和各界人士的集體智慧，用法律形式把“一國兩制”方針全面准確地體現出來，把兩種制度形以及兩種法律傳統很好地協調起來。但是，《香港基本法》的制定，只是解決了“一國兩制”的立法問題，并不能全部解決法律實施問題。這是因為：1、兩種制度形態和法律類型的內在的和固有的矛盾性是非常對立的，很難真正統一起來；2、《香港基本法》是一部框架性的法律，許多規定都是相當粗線條的、原則性的，具體問題會不斷出現；3、隨著形勢的變化，會出現一些新情況、新問題，這些新情況新問題可能是制定《香港基本法》時未曾考慮到的。

其二，《香港基本法》的法律實施主體之間有很大差異性。兩種制度形態產生了兩種思想形態，香港在英國殖民統治之下長達一個半世紀，長期以來接受資本主義教育，香港人民和中國內地人民在政治、經濟、法律、文化以及價值觀念等方面的認識和態度都有很大不同。表現在法律思想方面，中國是大陸法系，香港是普通法系，兩大法系之間的法律觀點及思想方法顯著不同甚至根本對立。因此，實施《香港基本法》首先還面臨著如何解決兩大執法主體之間的思想方式矛盾。

其三，香港是一個特殊的國際性城市。香港的特殊性，是其在中國的主權下，保持原有的制度，保持與國際社會的緊密聯系。香港問題始終受到國際社會的高度關注，這對于正實施《香港基本法》既是有利因素，也是不利因素。有利因素是，中國作為一個國際社會的重要成員，對于國家義務和國際聲譽一向都是非常重視的，在香港問題上當然會考慮有關國家和國際社會的聲音。不利因素有兩方面：一是，有些西方國家把香港視為國際資產，把香港問題國際化，間接地否定中國對香港的主也權，這是中國堅決反對的。中國認為，香港是一個比較特殊的國際性城市，但反對西方干涉中國內政，把香港和香港問題國際化。二是，一些西方國家長期以來把香港當作反對中國社會主義制度的基地，這是中國堅決不允許的。國際間的這種斗爭把香港牽涉進來，香港問題也因此更加複雜。

二、實施《香港基本法》更離不開“一國兩制”思想

“一國兩制”是指一個國家，兩種制度。具體到香港問題，是指中華人民共和國收回和擁有香港的主權；中國政府收回香港主權以後，在香港特別行政區不實行社會主義制度和政策，保持原有的資本主義制度和生活方式，五十年不變。

香港回歸，在國際法上是單純的中國政府恢復對香港行使主權問題。但是，由于中國與香港以及英國的社會制度不同，使得解決這個問題複雜化。考慮到這樣一種歷史和現實情況，鄧小平先生創造性地提出了“一國兩制”的方針。這個方針成為中英兩國解決香港問題的基本原則。鄧小平先生提出“一國兩制”解決香港問題，既是實是求是的抉擇，更是一個創造性的構想。在中國當時的歷史條件下，提出在香港收回主權後制度不變，是極其需要有足夠的政治威望、智慧和勇氣的。按照中國傳統政治觀點，允許在社會主義中國主權下的香港繼續實行資本主義制度，是絕對無法接受的。那樣一來，解決香港問題豈不是就會更加複雜化，甚至可能出現武力收回的極端情況，局面肯定會很糟糕。可以說，有了“一國兩制”的偉大構想，才有中英對香港問題的順利解決。我們記念《香港基本法》，應當首先記念“一國兩制”這個偉大構想，更加珍惜和重視這個用來解決香港問題的基本方針。

值得一提的是，“一國兩制”構想的最早提出還不是從香港問題開始的，是從台灣問題開始的，後來被首先用來解決香港和澳門問題。現在，香港和澳門已經順利回歸，台灣問題卻形勢嚴峻。我們在反對台灣獨立、堅持“一個中國”原則立場的同時，確實還需要發揮更大的政治創造性，顯示更大的和平解決的誠意與耐心。這也是順利解決香港和澳門問題應當帶給我們的最大啟示。

“一國兩制”是中英關于香港問題談判的基本方針，也是制定《香港基本法》的基本方針。“一國兩制”思想是《香港基本法》的中心思想，貫穿于該法的每個條文。

《香港基本法》關于“一國”的規定主要體現在以下方面：1、行政隸屬關系。該法第一條明確規定：“香港特別行政區是中華人民共和國不可分離的部分。”第十條規定，香港特別行政區應當懸挂中華人民共和國國旗、國徽。第十二條規定：“香港特別行政區是中華

人民共和國的一個享有高度自治權的地方行政區域，直轄于中央人民政府。”2、中央政府的外交和防務權。第十三條規定了中央人民政府負責管理與香港特別行政區有關的外交事務，第十四條規定了中央人民政府負責管理香港特別行政區的防務。3、制定、修改和解釋《香港基本法》的權力。根據主權原則和《中英聯合聲明》規定，《香港基本法》的立法權屬于全國人民代表大會。《香港基本法》第一百五十九條規定，該法的修改權屬于全國人民代表大會。第一百五十八條規定，該法的解釋權屬于全國人民代表大會常務委員會。同時，第十七條還規定了全國人民代表大會常務委員會對香港特別行政區的立法機關制定的法律有接受備案權和發回法律權。4、中央政府對香港主要官員的任命權。這一權力在《香港基本法》第十五條和第四章的有關條文中都有明確規定。第四十四條、第六十一條還規定了香港特別行政區行政長官和主要官員由香港居民中的中國公民擔任。5、香港特別行政區的任何權力都來自于國家權力的授權。《香港基本法》第二條規定：“全國人民代表大會授權香港特別行政區依照本法的規定實行高度自治，享有行政管理權、立法權、獨立的司法權和終審權。”第十三條第三款規定：“中央人民政府授權香港特別行政區依照本法自行處理有關的對外事務。”第二十條規定：“香港特別行政區可享有全國人民代表大會和全國人民代表大會常務委員會及中央人民政府授予的其他權力。”6、參與國家事務管理權力。《香港基本法》第二十一條規定：“香港特別行政區居民中的中國公民依法參與國家事務的管理。”上述規定，都體現出中國對香港行使國家主權，香港是中國不可分離一部分。

《香港基本法》對“兩制”的規定主要表現在：1、高度自治。根據《香港基本法》第二條、第十六條、第十七條、第十九條等規定，香港特別行政區依法實行高度自治，享有行政管理權、立法權、獨立的司法權和終審權。2、港人治港。第三條規定：“香港特別行政區的行政機關和立法機關由香港永久性居民依照本法有關規定組成。”根據第四十四條、第六十一條規定，行政長官和主要官員都是在具備一定條件的香港永久性居民中產生。3、法律制度不變。第八條規定：“香港原有法律，即普通法、衡平法、條例、附屬立法和習慣法，除同本法相抵觸或者經香港特別行政區的立法機關作出修改者外，予以保留。”根據第十八條第二款規定，全國性法律除列于本

法附件三者外，不在香港特別行政區實施。列于本法附件三的法律，要經過嚴格的程序，在法律性質上只包括涉及國家主權的法律，至今，列于附件三法律僅有 11 件。4、香港居民原有的民主、自由權利得到充分保障。《香港基本法》第四條和第三章對此作了明確規定。5、私有財產制度和自由經濟制度不變。第六條規定："香港特別行政區依法保護私有財產權。"第五章還對經濟問題作了專門規定。6、香港財政自主。根據基本法第七條和第一百零六條等條文的規定，香港的財政保持獨立，土地、資源和財政收入全部用于自身需要，不上繳中央人民政府，中央人民政府不在香港徵稅。以上規定，說明在"主權"原則下，香港原有制度基本不變，國家授予香港特別行政區高度的"治權"。

實施《香港基本法》也是一項全新的法律實踐。在此之前，沒有任何成功或者失敗的經驗教訓可以借鑒，我們只能摸索前進。摸索前進不等于沒有方向：《香港基本法》有明確規定的，應當遵循規定；對于沒有明確規定的具體問題或者新出現的問題，應當遵循"一國兩制"的方針求得解決。因此，"一國兩制"四個字始終是香港問題的指導思想，在實施《香港基本法》中要堅決貫徹這個思想；偏離這個思想，我們就會找不到共識，任何問題都無法解決。

三、要正確認識和處理好五大關系

能否實施好《香港基本法》的關鍵是能否全面把握和正確運用"一國兩制"的方針。結合當前實施《香港基本法》的實際，要正確認識和處理好以下五大關系：

（一）"一國"與"兩制"的關系

輿論總在爭論："一國"與"兩制"哪個是第一位，哪個是第二位？我想，爭論這個問題沒有多大實質意義。"一國兩制"這四個字是寫在一起的，不要割裂開來："一國"與"兩制"應當是同時并舉，不可偏廢。但是如果一定要排出個先後順序，當然是先有"一國"，後有"兩制"。

"一國"是主權問題。鄧小平先生說過："主權問題不是一個可以討論的問題"。這是中國人民和政府的一貫立場，在解決香港回歸問題和實施《香港基本法》過程中，這個根本立場不會改變。至

于實現主權的具體形式，則是可以討論的，有一定的靈活性。比如，司法管轄權是國家主權的一個重要內容，香港基本法規定香港享有司法終審權，實際上是用國家授權的形式，具體由香港行使這項屬于國家主權性質的權能。

實施《香港基本法》首先必須堅持一國，保障國家主權。對香港而言，應當全面而不是片面地執行《香港基本法》，要承認和尊重國家主權權力，不能只講“兩制”而不講“一國”。香港回歸後，廣大愛國愛港人士有了強烈的回歸意識和愛國熱情。在這個主流下，要防止和糾正一些錯誤的傾向，比如，把愛國與愛港完全對立起來，誰要是愛國，誰就被稱為“親中”、“賣港”；或者“逢中必反”，不論是非，只要是中央政府贊成的他就反對。這些都不是建設性的做法，對于正確實施香港基本法是非常有害的。

“兩制”是中國以什麼方式來管理香港的問題。就是要在香港繼續實行資本主義制度和生活方式，保障港人治港和高度自治。

能否真正實行好“兩制”，主要責任在內地。《香港基本法》在香港地區實施，但適用于全國范圍。內地必須尊重香港的資本主義制度和生活方式，尊重“港人治港”和“高度自治”。首先，中央人民政府要嚴格遵守《香港基本法》，在主權原則下，應當完全尊重香港高度自治的權力。同時，因為法律上規定的地方權力是不能對抗中央權力的，在解決具體問題或者新問題時，中央應當自我約束，謹慎用權。其次，中央人民政府所屬各部門、各省、自治區、直轄市均不得干預香港特別行政區根據香港基本法規定自行管理的事務。到現在為止，中央政府及有關部門是盡量避免、也沒有干預香港依法自行管理的事務的。

（二）《香港基本法》與其他法律的關系

1、《香港基本法》與《中華人民共和國憲法》的關系

憲法是國家的根本大法，中國憲法作為一個整體雖不在香港實施，但對香港應當是適用的、有效的。這是因為：第一，中國憲法第三十一條關于“一國兩制”的規定，是香港回歸後繼續實行資本主義制度的依據。第二，憲法規定的國家機構的設置和職權，以及國旗、國徽、首都等，雖不一定要在香港實施，但對香港應當是有效力的。第三，社會主義制度和政策不適用于香港，但是香港不能反對憲法規

定的中國在整體上是社會主義的國家制度。《香港基本法》第二十三條規定要求香港自行立法也是這個思想的具體體現。

對如何具體處理《香港基本法》與中國《憲法》的效力關系，《香港基本法》第十一條有明確規定："根據中華人民共和國憲法第三十一條，香港特別行政區的制度和政策，包括社會、經濟制度，有關保障居民的基本權利和自由的制度，行政管理、立法和司法方面的制度，以及有關政策，均以本法規定為依據。"這一規定有兩層含義：一是香港的制度和政策要以《香港基本法》為依據，不以中國憲法為依據，因為憲法第三十一條是特別規定，特別規定的效力高于一般規定，這是中國的立法習慣；二是在法律形式上不能簡單地認為《香港基本法》的效力高于中國憲法，因為《香港基本法》第十一條規定的依據是中國憲法第三十一條，其權力來源于憲法規定。

從內容和性質上看，《香港基本法》是一部憲法性法律，有人形象地稱之為香港的"小憲法"，這是不無道理的。確切地說，《中華人民共和國憲法》還應當是香港的"大憲法"，與《香港基本法》的有機結合，共同構成香港的憲法。

有的香港人士稱，香港還有制憲空間。這其實是對中國憲法的否定，也是對國家主權的否定，是極其錯誤的。

2、《香港基本法》與香港其他法律的關系

《香港基本法》是一部憲法性法律文件，具有憲法性效力。香港的原有法律、今後立法以及司法活動，都應當以《香港基本法》作為最高效力准則。

根據《香港基本法》第八條規定，香港原有法律不得與《香港基本法》相抵觸，如果相抵觸的，不應當保留。關于如何處理相抵觸的原有法律，根據第一百六十條第七十三條規定，應當依照法定程序修改或者停止使用；香港特別行政區成立時，宣布香港原有法律有效的機構是全國人民代表大會常務委員會，1997 年 2 月 23 日第八屆全國人大常委會第二十四次會議通過《關于處理香港原有法律的決定》，這項工作現在已經完成；香港特別行政區成立以後，對原有法律的修改及宣布停止生效的機構是香港特別行政區立法機關。

根據《香港基本法》第十一條規定，香港特別行政區立法機關制定的任何法律，均不得同本法相抵觸。

法院審判應當以《香港基本法》為司法的最高依據，法官不能把衡平法的法律思想或者把西方的“法官立法”凌駕于《香港基本法》之上。

（三）普通法系與大陸法系的關系

在法律淵源上，香港是英國式的普通法系，中國是大陸法系。兩大法系的法律思想、法律構成以及處理法律問題的原則和方法都是有根本性區別的。

應當首先考察一下《香港基本法》的法律淵源。是純粹的普通法系還是純粹的大陸法系，或者是兩者兼容？我的結論是，香港基本法是一部以大陸法系思想為主導，同時吸收了普通法系思想的法律。主要因為：其一，這部法律制定權和修改權都屬于全國人民代表大會，屬于國家立法，不是香港立法。其二，根據該法第一百五十八條規定，法律解釋權屬于全國人民代表大會常務委員會，同時授權香港法院在審判案件時有一定的司法解釋權，這完全是大陸法系的法律解釋模式。其三，這部法律是一部成文法，香港制定的其他任何法律都不得與之相抵觸，其效力形式也與普通法的傳統有所不同。其四，這部法律的體例、表述方式等都采取了中國的立法習慣。當然，這部法律在起草過程中也吸收了許多普通法系的思想，在條文中也隨處可見普通法系的痕跡，因此也不能簡單認為這是一部純粹大陸法系的法律。

分析《香港基本法》的法律淵源，有利于站在正確的立場和角度，用正確的思想邏輯去理解《香港基本法》的各項規定以及規定精神。這一點對于香港法院的法官尤其重要。以單一的普通法系的邏輯或者單一的大陸法系邏輯來理解《香港基本法》，都會產生法律理解上的沖突。香港執行中央管理事務和中央與香港關系條款時，要超越單純的普通法系思想，更多地以大陸法系思想來考慮問題；內地在處理香港自治范圍事務條款時，應當尊重并運用普通法系的思想。從實際來看，香港對中國法律和法律思想了解不如內地對香港法律和法律思想的了解，有些香港人士認識《香港基本法》問題往往非常偏面。

（四）國內法與國際法的關系

首先，《香港基本法》是一部國內法。根據《中英關于香港問題的聯合聲明》，制定《香港基本法》既是一項條約義務，也是一項條約權利。作為條約義務，這部法律要嚴格體現《中英聯合聲明》的規定，不能偏離條約原則；作為條約權利，這是一部

國內法，它的制定和實施有獨立自主性，不受外來隨意干涉。

西方國家把社會制度、意識形態和價值觀念的斗爭轉移到香港來，拿香港“做文章”或者在香港“做文章”，會對香港造成嚴重損害。

（五）不變與變的關系

“香港法律制度不變”是一個原則性概念，并非規定香港法律一成不變。香港在發展過程中，各項法律制度和管理制度應當不斷發展和完善，香港立法機關可以通過立法加以改變。但是，這種改變不能與《香港基本法》的規定相抵觸。

在堅持《香港基本法》穩定性的同時，不能排斥根據需要及時作出修改。當然修改《香港基本法》嚴格依照法定程序進行，并不得同“一國兩制”基本方針相抵觸。

四、香港基本法的法律解釋

法律解釋既是立法權的延伸，又是法律實施的一項重要活動，對于正確實施法律關系重大。

（一）《香港基本法》的法律解釋問題一直是個受到高度關注的問題

在香港基本法起草過程中，香港各界就對法律解釋權的歸屬問題爭議較大。這些爭論涉及到不同社會制度和法律傳統，以及中央與香港特別行政區的關系等方面。當時曾有三種觀點：

一是認為，法律解釋權應當全部授予香港法院。按照普通法系的理論和做法，法官在判案時有權解釋案件所涉及到的法律條款；既然香港的法律傳統得到保留并享有終審權，那麼，香港法院在審理涉及基本法條文的案件時就有權進行解釋，終審法院應當有最高解釋權。

二是認為，法律解釋權可以共有，即由全國人大常委會與香港特別行政區共同行使。按照中央與香港特別行政區的職權划分，有關國防、外交以及中央與香港關系事務的條款，由全國人大常委會解釋；有關香港自治范圍內事務的條款，由香港法院解釋。

三是認為，香港法院審理的終審案件涉及《香港基本法》條款，應當提請全國人民代表大會常務委員會作出解釋後判決。該觀點參照了歐洲共同體的法律解釋的做法，認為香港法院在審理具體案件時，

對香港自治范圍的和有關國防、外交及其他中央管理事務的基本法條款都可以進行解釋，但如果終審案件涉及到對基本法的解釋，在作出終審判決前，必須提請全國人民代表大會常務委員會作出指引性的解釋。

經過反復修訂，最後形成了《香港基本法》第一百五十八條規定，在總體上確立了香港基本法的法律解釋權屬于全國人大常委會，同時也授予香港法院在審判案件時必要的解釋權，但香港法院的解釋在范圍或者程序上受到一定限制。

1999 年 6 月 26 日，第九屆全國人民代表大會常務委員會第十次會議對《香港基本法》第二十二條第四款和第二十四條第二款第（三）項作出解釋。香港基本法》的法律解釋問題成為了香港基本法實施中的一個焦點問題。

（二）香港基本法的解釋權和解釋程序

關于《香港基本法》的解釋問題，該法第一百五十八條作了明確規定。規定既體現維護國家主權和憲法原則，也體現從香港的實際出發，是“一國兩制”方針是法律解釋問題上的具體運用。

1、《香港基本法》的解釋權屬于全國人大常委會

《香港基本法》第一百五十八條第一款規定：“本法的解釋權屬于全國人民代表大會常務委員會。”從這一規定可以得出：全國人大常委會對《香港基本法》的所有條款，包括對香港自治范圍內的條款，都有解釋權。

規定《香港基本法》的解釋權屬于全國人大常委會是經過全面考慮的：

一是國家主權的要求。《香港基本法》規定的內容不僅是香港自治范圍內的事務，它還是一部規定國家對香港行使主權以及如何行使主權的法律。作為立法權延伸的法律解釋，與立法權、修改權一樣，既是國家主權的要求，也是行使國家主權的保証。國家保留法律解釋權是必要的。

二是中國憲法原則要求。按照中國憲法規定和法律解釋傳統，中國法律的解釋權屬于全國人民代表大會常務委員會，地方性機關不享有此項權力。《香港基本法》是一部全國性法律，由香港法院解釋不合理。

三是不會干涉香港法院審判具體案件。香港法院有審判權和終審權，全國人大常委會解釋基本法只是對法律條文的原意作出解釋，不針對具體案件，而且解釋也不影響法院對相關案件已經作出的判決，充分尊重了香港法院的審判權。

2、授權香港法院解釋自治范圍條款

《香港基本法》第一百五十八條第二款規定："全國人民代表大會常務委員會授權香港特別行政區法院在審理案件時對本法關于香港特別行政區自治范圍內的條款自行解釋。"

這一規定完全尊重了普通法的司法傳統。按照中國的法律解釋制度，行使司法解釋權的法院只能是最高人民法院，地方各級人民法院并不具有司法解釋權力。

從該規定可知，香港各級法院對在審理案件時所涉及《香港基本法》關于香港自治范圍內的條款時，可以自行進行解釋，無需提請全國人大常委會作出解釋；同時，這種解釋權力已根據《香港基本法》的立法授權自動取得，不需要再經全國人大常委會另行授權。

3、香港法院對其他條款解釋的限制

《香港基本法》第一百五十八條第三款規定："香港特別行政區法院在審理案件時對本法的其他條款也可解釋。但如香港特別行政區法院在審理案件時需要對本法關于中央人民政府管理的事務或中央和香港特別行政區關系的條款進行解釋，而該條款的解釋又影響到案件的判決，在對該案件作出不可上訴的終局判決前，應由香港特別行政區終審法院請全國人民代表大會常務委員會對有關條款作出解釋。如全國人民代表大會常務委員會作出解釋，香港特別行政區法院在引用該條款時，應以全國人民代表大會常務委員會的解釋為准。但此以前作出的判決不受影響。"

由于香港終審法院的判決具有終局法律效力，《香港基本法》規定的對特別行政區自治范圍以外的條款在終局判決前報請全國人大常委會解釋的做法，意在避免可能因香港與中央解釋不一致而產生不良的法律後果和法律影響。

關于全國人大常委會對《香港基本法》作出解釋的效力。本條款明確規定"如全國人民代表大會常務委員會作出解釋，香港特別行政區法院在引用該條款時，應以全國人民代表大會常務委員會的解釋為准。"這里所指的"全國人民代表大會常務委員會作出解釋"，不是

單指全國人大常委會因香港終審法院提請而作出的解釋，也包括全國人大常委會主動作出的解釋。全國人大常委會對《香港基本法》作出的解釋的效力，既是解釋權的固有含義，也是解釋權的內在必然要求。

4、徵詢香港特別行政區基本法委員會的意見

《香港基本法》第一百五十八條第四款規定："全國人民代表大會常務委員會在對本法進行解釋前，徵詢其所屬的香港特別行政區基本法委員會的意見。"這是全國人大常委會解釋《香港基本法》的一個必經程序。該委員會有中國內地及香港人士各6人組成，其中港方委員要經香港特別行政區行政長官、立法會主席和終審法院首席法官聯合提名，報全國人大常委會任命。因此，規定全國人大常委會行使《香港基本法》解釋權時須徵詢該委員會意見，旨在使全國人大常委會的解釋盡可能反映香港民意，保証《香港基本法》的正確實施。

（三）全國人大常委會解釋不會損害香港法治

1999年6月26日，全國人大常委會第一次行使解釋權。第九屆全國人民代表大會常務委員會第十次會議對《香港基本法》第二十二條第四款和第二十四條第二款第（三）項作出解釋。

這次解釋引起較大疑慮和爭議，香港和國外一些人士批評全國人大常委會解釋法律"損害香港法治"。

事實上，認為"全國人大常委會解釋香港基本法損害香港法治"的觀點，主要只是一個抽象性的概念，是普通法系邏輯的簡單結論，并非建立在對《香港基本法》進行全面深入的法律研究的基礎之上。

1、解釋《香港基本法》是全國人在常委會的職權，根據《香港基本法》第一百五十八條第一款規定，全國人大常委會有權對《香港基本法》任何條款作出解釋。因此，這次解釋是在行使職權，并非越權干涉香港法院審判案件。

2、解釋是在香港終審法院的法律解釋在程序和實體上都不適當的情況下作出的。1999年1月29日香港終審法院判決涉及對《香港基本法》第二十二條第四款和第二十四條第二款第（三）項的解釋。在程序上，對有關中央管理的事務及中央與香港關系的條款，香港終審法院沒有依照《香港基本法》第一百五十八條第三款的規定請全國人民代表大會常務委員會作出解釋；在實體上，終審法院的解釋又不符合立法原意。

我認為，關于終審法院的解釋是否符合立法原意，屬于對法律的不同理解問題。根據中國立法解釋的做法，全國人大常委會解釋法律不一定按照字面意思，甚至可以做出擴大或者縮小解釋，以符合當時的立法愿意。因此，如果雙方有不同理解是正常的。關于香港終審法院判決的程序問題，《香港基本法》第二十二條第四款明確地規定在第二章“中央和香港特別行政區的關系”內，很顯然是屬于中央與香港關系條款；第二十四條第二款第（三）項的立法原意問題，全國人大常委會香港特別行政區籌備委員會在報告中曾作過說明，該報告并經全國人民代表大會通過，依照中國法律習慣，已經具有法律解釋性質，香港終審法院的解釋涉及對上述文件的否定，實際上也影響到中央和香港的關系，因此，香港終審法院在判決前，應當請全國人大常委會作出解釋。香港終審法院沒有請全國人大常委會解釋，明顯違背了《香港基本法》第一百五十八條第三款規定。

在評論是否損害香港法治的時候，我們究竟應當奉行什麼樣的准則，是遵守《香港基本法》的行為損害了香港法治，還是違背《香港基本法》的行為損害香港法治呢。要是終審法院嚴格依照《香港基本法》規定的程序作出判決，就不會有全國人大常委會的法律解釋。

3、這次解釋的程序合法。對解釋程序的爭論，主要是行政長官有沒有權力提請國務院向全國人大常委會提出法律解釋的議案。這個問題，《香港基本法》沒有明確規定。但該法明確規定的行政長官負責實施《香港基本法》，并對中央人民政府負責和香港特別行政區負責。因此，行政長官在執行《香港基本法》過程中，遇到本身不能解決的問題，向國務院請求幫助是其職務的當然權力。

4、這次解釋是情勢所迫，中央是謹慎用權的。盡管香港終審法院的判決不恰當，但中央為了避免不必要的爭議，一直要求香港尋求自行解決的途徑。但是，香港無法自行解決法律問題，又無力接受判決可能帶來的 160 多萬人口。有些人士提出修改《香港基本法》，中央政府的確不能接受。在這種情況下，解釋法律是唯一解決辦法。

為什麼不同意修改《香港基本法》？主要理由有四點：一是，《香港基本法》要有穩定性，不能隨便修改；二是，修改《香港基本法》的程序比較嚴格，全國人民代表大會每年只開一次，時間上來不及；三是，法律問題是因香港終審法院沒有嚴格依法辦事造成的，反

過來卻要修改法律，會混淆是非；四是，用解釋的方法解決在法律上是站得住腳的，完全符合《香港基本法》的規定。

從全國人大常委會解釋法律這件事，我覺得以下几個問題應當引起重視：

1、要深入研究《香港基本法》，比如對法律解釋等各種程序性的問題以及香港法院的違憲審查權問題等，都應當有所明確。

2、要加強香港和內地的法律交流，增加共識。

3、中央要慎用解釋權。在行使權力時要考慮適當的形式，比如，解釋最好不要涉及具體案件，否則會引起不必要的誤解和疑慮。

4、香港一定要學好、用好《香港基本法》，不能偏離《香港基本法》。

五、要對香港繁榮穩定有信心

我認為，香港的繁榮穩定有以下四大保証：

1、在香港繼續實行原有資本主義制度，一方面有利于中國順利收回香港主權；另一方面，一個繁榮穩定的、與國際社會聯系緊密的香港，也完全符合全體中國人民包括香港人民的根本利益，中國不會也沒有必要來改變香港已經証明是好的管理制度。這是香港繼續繁榮穩定的內在保証。

2、《中英關于香港問題的聯合聲明》是香港原有制度不變的外在保証。

3、《香港基本法》是香港的法律保証。

4、中國政治領導人的榮譽感是香港的政治保証。

有了以上四大保証，香港一定會成為“一國兩制”的旗幟和典范和通向世界的文明窗口。香港的明天一定會更加美好。

憲法研討會: 從比較角度看基本法的實施
Constitutional Law Conference on Implementation
of the Basic Law : A Comparative Perspective

Resolution of Commonwealth - State Disputes in Australia: Lessons for Hong Kong ?

Professor George Winterton

Social harmony is essential for the development and prosperity of any society; indeed for its very survival. This is as true of relations between governments and governmental organs within a society as it is of relations between private individuals and groups. Yet disputes occur, and not necessarily to society's detriment. Constitutional mechanisms designed to divide power between governments and governmental branches – federalism, devolution, the separation of powers – inevitably lead to occasional conflicts between the repositories of divided governmental power. While some social disruption, or at least unease, results, these confrontations are an important means for promoting governmental accountability and individual liberty. A court which never risked confrontation with government by invalidating legislation or administrative action would prove a poor guarantor of individual rights and administrative justice. Brandeis J's famous characterization of the separation of powers as designed "not to avoid friction, but by means of the inevitable friction incident to the distribution of ... governmental powers ... to save the people from autocracy"[1] applies to all constitutional doctrines which divide governmental power.

Yet government would collapse if competition and conflict degenerated into outright war. As another leading American Supreme Court Justice, Robert Jackson, noted,

> "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches *separateness but interdependence, autonomy but reciprocity.*"[2]

The quality and effectiveness of a constitutional system depends less on the avoidance of intergovernmental disputes than on the manner in which they are resolved.

---

[1] *Myers v United States* (1926) 272 U S 52, 293.

Mechanisms should be put in place before disputes arise to enable the method of resolving them to proceed independently of the merits of the dispute.

There is considerable divergence between Hong Kong's "one country, two systems" formula for devolving governmental power, which is surely *sui generis*, and Australia's century–old federal system which combines federalism, responsible government and the legal separation of judicial power with fully representative bicameral government. Yet the two systems also have much in common. Power is divided between central and regional governments; both are common law societies governed in accordance with the rule of law enforced by independent courts; both afford civil rights and liberties a high degree of protection; and both practise – in the words of Hong Kong's Basic Law – a "capitalist system and way of life".[3] With its long history of resolving national-regional governmental disputes, Australia may offer lessons – both positive and negative – for Hong Kong–China relations. Of that, however, Hong Kong constitutional experts will be the best judges.

Since the focus of this Conference is on Hong Kong's constitutional system, not Australia's, it will be appropriate to outline Australian Commonwealth–State dispute resolution with a relatively broad brush. Such disputes generally fall into three categories depending on the nature of the issue in contention: disputes arising out of intergovernmental political and financial relations; litigation on justiciable issues of private law; and disputes regarding the federal balance of legislative, executive or judicial power, usually the first. Each of these will be examined in turn.

---

[2] *Youngstown Sheet & Tube Co v Sawyer* (1952) 343 U S 579, 635. Emphasis added.
[3] HKSAR *Basic Law* art 5.

Intergovernmental relations

A characteristic feature of Australian federalism is the States' financial dependence on the Commonwealth, which dates from 1910 when the constitutional provision guaranteeing the States three-quarters of all customs and excise revenue[4] was terminated.[5] Vertical fiscal imbalance is greater in Australia than in any major federation except India[6], with the States and Territories raising less than 30 per cent of their expenditure.[7] The balance is provided through financial grants from the Commonwealth in the form both of untied and conditional or specific purpose payments, the latter frequently the subject of detailed agreements between the Commonwealth and the States and Territories.

This feature of Australian federalism has long been recognised. As long ago as 1935, Sir Harrison Moore remarked that "contrary to what might be supposed, agreements of governments loom large in a federal system".[8] He considered "some measure of co-operation" between governments in a federation a "matter of sound policy, or even of necessity if policy is to be effective".[9] These view were echoed almost fifty years later by the High Court of Australia in recognizing the constitutional validity of Commonwealth–State co-operation to implement measures beyond the individual capacity of either.[10] Mason J held that the federal division of legislative power

---

[4] Commonwealth Constitution s 87.
[5] The *Surplus Revenue Act* 1910 (Cth) s 3.
[6] See Parliament of Victoria, Federal–State Relations Committee, *Australian Federalism: The Role of the States* (October 1998), 105; Treasury Department of Western Australia, Intergovernmental Relations Division, *Revenue Sharing or Tax Base Sharing? Directions for Financial Reform of Australia's Federation* (June 1998), 11-13.
[7] See *ibid,* 8 (graph).
[8] W H Moore, "The Federations and Suits Between Governments" (1935) 17 *Journal of Comparative Legislation & International Law* (3d ser) 163, 181.
[9] *Ibid,* 182.
[10] *R v Duncan, ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535, 552-553, 560-563, 566, 583, 589, 592.

"*necessarily* contemplates that there will be joint co-operative legislative action to deal with matters that lie beyond the competence of any single legislature".[11] Deane J went even further, proclaiming Commonwealth–State legislative co-operation "a positive objective of the Constitution",[12] a proposition which may, with respect, be a trifle overstated.[13]

A remarkable feature of Commonwealth-State co-operation is how infrequently provision is made for the resolution of disputes which inevitably arise when money is at stake. This is true even when the joint endeavour is embodied in a formal agreement recognized by statute. An example is an agreement recently concluded by the Commonwealth, the six States and the two self-governing Territories to regulate federal – State financial relations upon the implementation of a Goods and Services Tax, the proceeds of which are payable to the States and Territories. The *Intergovernmental Agreement on the Reform of Commonwealth–State Financial Relations,* annexed to a Commonwealth statute[14], regulates critical aspects of Commonwealth, State and Territory taxation and Commonwealth financial grants, all of which could easily lead to dispute, yet it contains no dispute resolution provision.

This no doubt reflects the Commonwealth's financial dominance, which is exemplified in two provisions in the Act. In the Agreement all parties undertook to "use their best endeavours" to secure the enactment of legislation which "will require compliance with the Agreement".[15] But the relevant provision in the Commonwealth Act falls short of a commitment to comply with the Agreement; instead, it merely provides

---

[11] *Ibid,* 563. Emphasis added.
[12] *Ibid,* 589.
[13] His Honour referred to s 51 (xxxiii), (xxxiv), (xxxvii) and (xxxviii) and Ch V of the Constitution.
[14] *A New Tax System (Commonwealth–State Financial Arrangements) Act* 1999 (Cth).

that "[i]t is the intention of the Commonwealth to comply with, and give effect to, the agreement".[16] The Act further provides that a determination made thereunder by the Commonwealth Treasurer, Health Minister, Commissioner of Taxation or Statistician is, for the purposes of the Act, "*conclusively* presumed to be correct".[17] Such a provision is not unusual; a similar provision in the Commonwealth–State *Financial Agreement* of 1927 made the Commonwealth Auditor–General's certificate conclusive regarding Commonwealth expenses which the States were obliged to reimburse.[18]

Some Commonwealth-State agreements make explicit provision regarding disputes, but neither the provisions nor experience under them have proved satisfactory to the States. A provision which could not be considered one for dispute *resolution* appears in the *Innovative Health Services for Homeless Youth Agreement* for 1999-2000: if either party believes that the other has failed to fulfil its obligations under the Agreement it can seek to negotiate a settlement but, if differences are not resolved, either party may terminate the Agreement.[19] More satisfactory is the *Australian Health Care Agreement* for 1998-2003 which contains a true dispute resolution clause whereby matters in dispute are to be determined by an independent arbitrator.[20] However, the Commonwealth recently refused to comply with the report of an arbitrator under the Agreement which would have required considerable additional expenditure on hospitals, claiming that it

---

[15] Clause 4.
[16] Above n 14, s 10(2).
[17] *Ibid*, s 22. Emphasis added.
[18] See the *Financial Agreement* Part IV clause 1, Schedule to the *Financial Agreement Act* 1928 (Cth).
[19] Clause 10.1. There are eight essentially identical bilateral agreements between the Commonwealth and each State and Territory. A similar provision – although slanted in favour of the Commonwealth – appears in the *Supported Accommodation Assistance Program Agreement* IV for 2000-05, clauses 7.2-7.6.
[20] Clause 10. Moore referred to arbitration clauses in 1935: above n 8, 181.

was based on an erroneous pricing index.[21] The States are seeking to have the dispute resolved by the Council of Australian Governments (COAG), comprising all nine Australian Heads of Government, and at least one State (New South Wales) is considering litigation.[22]

Litigation of disputes arising under Commonwealth-State/Territory agreements is a theoretical possibility, but the High Court has tended to question whether the law of contract is appropriate for intergovernmental agreements dealing with financial and governmental matters, especially if significant issues are left for further negotiation or the exercise of Commonwealth ministerial discretion. Thus Dixon J described a Commonwealth-New South Wales agreement (approved by both Parliaments) providing for the settlement of returned soldiers as:

> "rather an arrangement between two governments settling the broad outlines of an administrative and financial scheme than a definitive contract enforceable at law."[23]

In the leading case on this subject, South Australia sought declarations to enforce a Commonwealth-South Australia Agreement of 1949 relating to railway standardization. The High Court unanimously refused relief, holding that the Agreement was not only partly inchoate in that significant matters were left for further agreement, but also (in the case of three justices) on the ground that its very nature and subject-matter suggested that it was not intended to create legally enforceable rights and obligations.[24] The Agreement

---

[21] M Metherell and L Doherty, "State May Sue Over Lost $210m", *Sydney Morning Herald*, 18 March 2000, 5.
[22] *Ibid.*
[23] *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 409.
[24] *South Australia v Commonwealth* (1962) 108 CLR 130. For a good discussion of the case, see E Campbell, "Suits Between the Governments of a Federation" (1971) 6 *Sydney Law Review* 309, 319-322, 331.

was characterised as a merely "political arrangement"[25] which was "outside the realm of contracts altogether".[26] McTiernan J remarked that the Agreement:

> "does not produce legal rights or obligations. It ...[embodies] plans for construction of publicly-owned railways. The carrying out of these intended works is a matter of governmental policy. The promises on either side are of a political nature...Their performance necessarily requires executive and further parliamentary action. It is a matter for the discretion of the respective governments to take such action if and when they see fit to do so. It is not contemplated...that its performance could ever be the subject of a judicial order."[27]

However, where the terms of a Commonwealth-State/Territory agreement are concluded, reasonably certain and capable of judicial enforcement at least by declaration, there appears to be no inherent reason to preclude justiciability. As a leading Australian commentator has observed,

> "While it may readily be accepted that the remedies which a court can grant are limited, there is no reason why bargains between governments the terms of which are sufficiently precise should not be justiciable in the courts. There may be advantages in their justiciability, in terms of the conduct of public affairs. It cannot automatically be assumed that governments do not intend to undertake legally enforceable duties when they reach agreements between themselves. If adaptation of the existing contract law to suit the needs of public contracts is required, so be it: in this as in other respects, the development may be overdue".[28]

Indeed, the rule of law suggests that there should be a presumption in favour of judicial enforceability.[29] Compliance with commitments should be no less obligatory for governments and other public bodies than for individuals and private corporations and associations.

---

[25] *South Australia v Commonwealth* (1962) 108 CLR 130, 149 per Taylor J. See, likewise, at 149 per McTiernan J, 154 per Windeyer J.
[26] *Ibid,* 153 per Windeyer J.
[27] *Ibid,* 148-149. See also *ibid,* 141 per Dixon C J (Kitto J concurring), quoting Moore, above n 8, 186-187.
[28] C Saunders, "Towards a Theory for Section 96-Part 2" (1988) 16 *Melbourne University Law Review* 699, 719. See, likewise, *ibid,* 724.
[29] For issues relating to enforcement, see *ibid,* 715-718, 720-723.

Nevertheless, negotiation by public servants and Ministers remains the principal method for resolving Australian intergovernmental disputes regarding financial and governmental issues. The nine Heads of Government meet occasionally under various auspices. For many years the Commonwealth Prime Minister and State Premiers met at least annually as the "Premiers' Conference" which *(inter alia)* determined the size of Commonwealth financial grants to the States. This function has now been taken over by a Ministerial Council, comprising the nine Australian Treasurers, established by the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations.*[30] The other long-standing Heads of Government body, which usually met in conjunction with the Premiers' Conference, is the Loan Council, established pursuant to the *Financial Agreement* of 1927 to approve borrowing by all Australian governments. Like the Premiers' Conference, it has been replaced by a meeting of Treasurers, and its responsibilities have been significantly reduced.

Recently established Heads of Government bodies are COAG, established in 1992, currently an ad hoc body convened by the Prime Minister to discuss a specific issue (drugs in 1999), and the Treaties Council, established in 1996, for consultation and discussion regarding treaties and other international agreements. It has so far met only once (in November 1997) and has largely been superseded by the Commonwealth-State Standing Committee on Treaties (SCOT), also established in 1996, comprising public servants from all nine governments, which meets twice each year.

Currently of greater significance than Heads of Government meetings are the numerous Ministerial Councils (presently more than thirty) comprising Ministers from all nine Australian governments across the entire spectrum of ministerial portfolios.

---

[30] See the Agreement, Part 4.

Subjects include Aboriginal and Torres Strait Islander affairs, the administration of justice, Attorneys-General, agriculture, consumer affairs, drugs, education, the environment, gambling, housing, immigration and multicultural affairs, local government, minerals and energy, small business, tourism, transport and workplace relations, as well as the Commonwealth-State Financial Relations Ministerial Council noted earlier. Additionally, there are about ten Ministerial Councils relating to particular geographical areas, comprising Ministers from the Commonwealth and the State or States affected, such as the Murray-Darling Basin Ministerial Council, the Wet Tropics Ministerial Council and the Tasmanian World Heritage Area Ministerial Council.

Ministerial Councils have rightly been criticised as tending to impair ministerial accountability to their respective Parliaments and, when draft uniform legislation is adopted, effectively compromising the independent judgement of the Parliaments, [31] but they appear to serve a useful function not only in resolving disputes, but also in avoiding them.

Suits in contract and tort

Resolution of Commonwealth-State disputes involving issues of private law – such as claims in contract or tort – ought to be more clear cut than those considered above, but unfortunately the law on the subject is unclear.

The High Court is constitutionally invested with original jurisdiction "[i]n all matters...[i]n which the Commonwealth, or a person suing or being sued on behalf of the

[31] See, e.g., Western Australia Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles: Tenth Report* (31 August 1995), paras 2.2, 2.3, 2.8-2.12; Western Australia

Commonwealth, is a party."[32] The Commonwealth Parliament is constitutionally empowered to "make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power", [33] a power exercised in the *Judiciary Act* 1903. Section 57 of that Act authorises a State "making any claim against the Commonwealth, whether in contract or in tort" to bring a suit against the Commonwealth in the High Court, which is empowered to remit the suit for trial by the Federal Court or a State or Territory court.[34]

However, no provision is expressly made for the converse situation – Commonwealth suits against a State. The High Court has held that such suits fall within federal jurisdiction, being authorized either by the Constitution itself [35] or the *Judiciary Act,*[36] but the reasoning underlying the decision has been strongly questioned.[37] However, support may be derived from a recent decision of the High Court holding that the Commonwealth's liability to suit arises from a combination of the Constitution and the common law: the former removes Crown or executive immunity from suit while liability arises under the common law.[38] This reasoning would probably apply also to Commonwealth suits against a State. This approach, which was not accepted by the

---

Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Uniform Legislation: Twenty-First Report* (9 April 1998), paras 1.8-1.13.

[32] Commonwealth Constitution s 75(iii).

[33] *Ibid,* s 78.

[34] *Judiciary Act* 1903 (Cth) s 44 (2) and (2A).

[35] Commonwealth Constitution s 75 (iii): *Commonwealth v New South Wales* (1923) 32 CLR 200, 206-207 per Knox CJ, 215-216 per Isaacs, Rich and Starke JJ.

[36] *Judiciary Act* s 58: *ibid,* 221-222 per Higgins J.

[37] See *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 217 per McHugh J; M Pryles and P Hanks, *Federal Conflict of Laws* (1974), para 6.2.2.

[38] *Commonwealth v Mewett* (1997) 191 CLR 471, 531 per Gaudron J, 550-551 per Gummow and Kirby JJ (Brennan CJ concurring); *Lipohar v R* (1999) 168 ALR 8, para [52] per Gaudron, Gummow and Hayne JJ.

minority in the case,[39] would also overcome any difficulty arising from the fact that the *Judiciary Act* refers only to suits in contract or tort.[40] The former would probably extend to quasi-contract, but other common law (including equity) causes of action, such as breach of trust or breach of fiduciary obligation, would appear to fall outside the express provisions of the *Judiciary Act.*

The *Judiciary Act* provides that

> "In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject."[41]

After some doubt as to whether this provision extends to substantive as well as procedural rights, the High Court has concluded that it does,[42] so that "as nearly as possible"[43] suits to which the Commonwealth or a State is a party are determined in accordance with the relevant Commonwealth, State or Territory statute law and the common law which would apply were the suit one between citizens.[44] There is one *Australian* common law, not a separate common law of each State and Territory;[45] nor does Australia embrace the concept of a separate "federal common law".[46] Thus, as a leading High Court justice has observed, the law applicable to a suit to which the Commonwealth or a State is a party is

> "the whole body of the law, statutory or not, by which the rights of the parties would be governed if the Commonwealth or State were a subject instead of being the Crown."[47]

---

[39] *Commonwealth v Mewett* (1997) 191 CLR 471, 496, 500-501 per Dawson J, 513 per Toohey J, 532 per McHugh J.

[40] See the *Judiciary Act* 1903 (Cth) ss 56-58.

[41] *Ibid,* s 64.

[42] *Maguire v Simpson* (1977) 139 CLR 362, 373, 382-383, 388, 401-402, 405, 407 (Stephen J left the question open: 392); *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254.

[43] This phrase has been interpreted to mean " as completely as possible": *Asiatic Steam Navigation Co Ltd v Commonwealth* (1956) 96 CLR 397, 427 per Kitto J, adopted in *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 264. See also N Seddon, *Government Contracts: Federal, State and Local* (2d ed, 1999), para 4.16.

[44] See the *Judiciary Act* 1903 (Cth) ss 64, 79 and 80.

[45] See *Lipohar v R* (1999) 168 ALR 8, paras [43]-[54] per Gaudron, Gummow and Hayne JJ, [180] per Kirby J (but Callinan J disagreed on this point: paras [230]-[261]); *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2000) 169 ALR 324, para [11] per French J (Fed Ct).

[46] *Lipohar v R* (1999) 168 ALR 8, para [52] per Gaudron, Gummow and Hayne JJ; Seddon, above n 43, pp 138-139.

[47] *Asiatic Steam Navigation Co Ltd v Commonwealth* (1956) 96 CLR 397, 427 per Kitto J, adopted in *Maguire v Simpson* (1977) 139 CLR 362, 382-383 per Gibbs J. See, likewise, *ibid,* 373 per Barwick CJ.

This commendable principle implements the ideal of "equality before the law" inherent in Dicey's concept of the rule of law, which

> "excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals."[48]

The federal balance of power

Probably of greatest interest is Australia'a record in resolving disputes between the Commonwealth and the States and others, including private individuals and groups, over the federal balance of power, especially legislative power. This balance is prescribed in the express and implied provisions of the Commonwealth Constitution which was enacted by the United Kingdom Parliament in the *Commonwealth of Australia Constitution Act* 1900. At least since that Parliament abdicated the power to legislate for Australia in the *Australia Act* 1986 (UK) s 1, the authority of the Constitution has been considered to derive from the Australian people.[49]

The fora for Commonwealth-State ministerial consultation and negotiation noted above play an important role in resolving, and indeed avoiding, intergovernmental disputes regarding the federal balance of power, as on other issues. However, those that cannot be prevented or resolved are litigated, usually in the High Court which has original jurisdiction in matters "arising under the Constitution or involving its interpretation".[50] Suits involving such matters which are commenced in a lower court can be removed into the High Court by an order of that Court "at any stage of the proceedings

---

[48] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed, 1959), 202-203.

[49] See G Winterton, "Popular Sovereignty and Constitutional Continuity" (1998) 26 *Federal Law Review* 1.

before final judgment"; such an order "shall be made as of course" on application by the Attorney-General of the Commonwealth, a State or Territory.[51] Suits involving constitutional matters may not proceed in any court until the Attorneys-General of the Commonwealth, the States and the Northern Territory have been given notice thereof and a reasonable period to consider intervention,[52] to which they are entitled, with full rights of appeal.[53] Such intervention is common.

Far from embracing the suggestion of Professor Jesse Choper that disputes regarding the federal balance of power be non-justiciable,[54] the High Court has always regarded the justiciability of such disputes as axiomatic.[55] As a strong Bench noted in the important *Boilermakers* case which emphasized the necessity for an independent federal judiciary,

> "The conception of independent governments existing in the one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of the governments were placed in the federal judicature."[56]

On appeal, the Privy Council similarly noted that

> "in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive."[57]

---

[50] See the Commonwealth Constitution s 76 (i) and the *Judiciary Act* 1903 (Cth) s 30 (a). See also Commonwealth Constitution s 75.
[51] *Judiciary Act* 1903 (Cth) s 40 (1).
[52] *Ibid*, s 78B.
[53] *Ibid*, s 78A.
[54] See JH Choper, *Judicial Review and the National Political Process* (1980), 175, 187, 193-195.
[55] See, e.g., *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 per Fullagar J: " in our system the principle of *Marbury* v. *Madison* is accepted as axiomatic"; O Dixon, *Jesting Pilate* (1965), 174: "To the framers of the Commonwealth Constitution the thesis of *Marbury* v. *Madison* was obvious". See also Sir Owen Dixon's speech on being sworn in as Chief Justice of the High Court: (1952) 85 CLR xi, xiii.
[56] *R v Kirby, ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 267-268 per Dixon CJ, McTiernan, Fullagar and Kitto JJ. See, likewise, *ibid*, 276.
[57] *Attorney-General for Australia v R* [1957] AC 288, 315.

The Commonwealth Constitution, like that of the United States, does not expressly authorize judicial review of legislation, but that power can be inferred from several provisions.[58]

The federal balance of power has shifted greatly in favour of the Commonwealth over the century of federation. As a High Court justice noted succinctly thirty years ago, " the position of the Commonwealth...has waxed and that of the States has waned."[59] Justice Stephen Breyer of the United States Supreme Court noted recently, in agreement with his colleague Kennedy J, that the framers of the United States Constitution would recognize modern day American separation of powers and civil rights, but not federalism:

> "[T]hey would not recognize modern day federalism. Rather, ...they would find that federalism 'has undergone remarkable evolution'."[60]

The same is true of Australia.

Many factors have contibuted to the centipetal tendency of Australian federalism. Some, such as the effect of two World Wars, the growth of international economic and political integration, the impact of the welfare state and environmentalism, are common to most national governments.[61] Other factors, however, are more specifically Australian.

---

[58] See Commonwealth Constitution ss 74 and 76 (i) and covering clause 5. For reference to the literature on this issue, see G Winterton, "The Significance of the *Communist Party* Case" (1992) 18 *Melbourne University Law Review* 630, 650.
[59] *Victoria v Commonwealth* (the *Payroll Tax* case) (1971) 122 CLR 353, 396 per Windeyer J.
[60] S Breyer, "Does Federalism Make a Difference?" [1999] *Public Law* 651, 660, quoting Kennedy J.
[61] See above, n 59; J Crawford, " The Legislative Power of the Commonwealth," in G Craven (ed), *The Convention Debates 1891-1898: Commentary, Indices and Guide* (1986), 113, 122.

The States have become increasingly dependent on Commonwealth financial assistance, especially since they effectively lost their power to levy income tax in 1942,[62] and as a result of the increasing breadth of the concept of duties of excise denied to them by s 90 of the Constitution.[63]

The manner in which the Constitution divides power between the Commonwealth and the States, at least as interpreted by the High Court since 1920,[64] has also enhanced federal power. Like its United States model, the Commonwealth Constitution confers power only on the Commonwealth, not the States, which retain the residue.[65] When Commonwealth powers are interpreted liberally, as is generally recognized as appropriate for a Constitution which is difficult to amend but must nevertheless evolve with changing circumstances,[66] they naturally cover an increasingly wide range of activities. The Commonwealth Constitution contains no provision like s 92 of the Canadian *Constitution Act*, which confers legislative powers on the Provinces, or arts 2 and 12 of the Hong Kong *Basic Law*, which provides that Hong Kong shall enjoy "a high degree of autonomy", which would enable the States also to benefit from the evolution of constitutional words and concepts.[67] Reliance upon the concept of the Commonwealth as a "federal" polity and the argument that no power should be interpreted in a manner which could destroy the "federal balance"[68] is a poor substitute since "federalism" does

---

[62] See *South Australia v Commonwealth* (the *First Uniform Tax* case) (1942) 65 CLR 373.
[63] See, most recently, *Ha v New South Wales* (1997) 189 CLR 465.
[64] See *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (the *Engineers* case) (1920) 28 CLR 129.
[65] Commonwealth Constitution s 107. *Cf.* United States Constitution, Tenth Amendment.
[66] See *Commonwealth v Tasmania* (the *Tasmanian Dam* case) (1983) 158 CLR 1, 127-128 per Mason J, noting earlier authorities.
[67] It has been suggested that the constitutional framers laboured under a misapprehension on this point: see Crawford, above n 61, 124-125.
[68] See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 199-200 per Gibbs CJ (Aickin J concurring), 251-252 per Wilson J; *Tasmanian Dam* (1983) 158 CLR 1, 99-100 per Gibbs CJ, 197-198 per Wilson J, 302 per Dawson J.

not entail any inherent balance of power and "federal balance" is an intrinsically evolutionary concept.[69]

The States not surprisingly resent the centralist direction of constitutional jurisprudence,[70] especially the High Court's interpretation of the Commonwealth's power "to make laws...with respect to [e]xternal affairs,"[71] which has been held to authorize legislation implementing ratified international treaties whatever their subject-matter, subject only to express and implied constitutional prohibitions.[72] Commentators are divided on this, as on most, issues but several have strongly criticized the High Court. One critic claimed that the Court "has failed utterly to discharge its contemplated [role]"[73]-"to protect federalism"[74]- and alleged that the Court "has pursued a conscious policy of centralism",[75] which is highly questionable and certainly unprovable. He observed, rather colourfully, that the Court's

> "constitutional jurisprudence of federalism consists largely of a list of catastrophes for the States, in much the same way as a list of battle honours on a British regimental standard marks the chief disasters of the French army."[76]

However, with respect, this is a considerable over-statement. The High Court continues to police the federal constitutional boundaries and has ruled against the Commonwealth on federal grounds on several occasions in recent years.[77]

---

[69] See *Koowarta* (1982) 153 CLR 168, 227-228 per Mason J, 255 per Brennan J; *Tasmanian Dam* (1983) 158 CLR 1, 126-127 per Mason J, 220-222 per Brennan J.
[70] See, e.g., R Court, Premier of Western Australia, *Rebuilding the Federation: An Audit and History of State Powers and Responsibilities Usurped by the Commonwealth in the Years Since Federation* (February 1994), 8-9.
[71] Commonwealth Constitution s 51(xxix).
[72] *Tasmanian Dam* (1983) 158 CLR 1.
[73] G Craven, " The High Court of Australia: A Study in the Abuse of Power" (1999) 22 *University of New South Wales Law Journal* 216, 222.
[74] *Ibid*, 221.
[75] *Ibid*, 223.
[76] *Ibid*, 222.
[77] See *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; *New South Wales v Commonwealth* (the *Incorporation* case) (1990) 169 CLR 482; *Re Dingjan, ex parte Wagner* (1995) 183

Moreover, the States' legal position conveys an incomplete picture of their effective power within the Australian federation. It has rightly been noted that "the restraints on federal power were from the first more political than legal."[78] This continues to be the case. The Commonwealth's use of its broad "external affairs" power has recently been characterized as employing "but a fraction of the latent power" available to it:[79]

> "Such accumulation of latent Commonwealth power as a result of the globalisation process is constrained in practice by political factors. The most significant constraints on Commonwealth intrusion into areas traditionally regarded as being subject to state legislative competence are political rather than legal."[80]

These political constraints are essentially electoral considerations. The States are masters at employing public opinion as a weapon against the Commonwealth. The governing party or coalition cannot easily afford to alienate State electors for fear of jeopardising not only their own political survival, but also that of their State political colleagues.

This is illustrated by the current controversy over mandatory sentencing laws in Western Australia and the Northern Territory, where they appear to enjoy public support. Despite strong domestic and international pressure to intervene legislatively, even from within the senior governing party, the Prime Minister refuses to do so. The Commonwealth's power to intervene in Western Australia (which, incidentally, faces a general election later this year) is somewhat questionable; the relevant legislation would

---

CLR 323; *Re Australian Education Union, ex parte Victoria* (1995) 184 CLR 188; *Victoria v Commonwealth* (the *Industrial Relations Act* case) (1996) 187 CLR 416.

[78] Crawford, above n 61, 123.

[79] B Galligan and B Rimmer, "The Political Dimension of International Law in Australia," in BR Opeskin and DR Rothwell (eds), *International Law and Australian Federalism* (1997), 306, 314.

need to rely on the external affairs power to implement provisions of international human rights treaties. But there is no doubt as to the Commonwealth's power to legislate for the Northern Territory, notwithstanding self-government,[81] as it did three years ago when, on a conscience vote, the Commonwealth Parliament overturned that Territory's unique euthanasia law.[82] Since deference to Northern Territory self-government did not constrain the Prime Minister from supporting Commonwealth intervention on that occasion, and he professes to oppose mandatory sentencing, it appears that political considerations are staying the government's hand on mandatory sentencing.

Conclusion

It would be foolhardy for an outsider to comment on the intricacies of Hong Kong's *Basic Law*. But the lessons of Australian federalism may be relevant. While electoral considerations will not constrain Chinese intervention in Hong Kong affairs, the necessity for retaining international and local confidence in Hong Kong's autonomy, economy and adherence to the rule of law- the very rationale for the "one country, two systems" policy- may. Hence, Hong Kong's greatest security, from both external and internal threats, surely lies in maintaining the rule of law enforced by an independent judiciary.[83] For, as Justice Felix Frankfurter of the United States Supreme Court advised an Israeli Attorney-General, no doubt with British experience in mind, independent judges may ultimately be more important than a written constitution.[84]

---

[80] *Ibid.* See, likewise, Parliament of Victoria, Federal-State Relations Committee, *International Treaty Making and the Role of the States* (October 1997), paras 1.21-1.27: P Durack, *The External Affairs Power* (Institute of Public Affairs, Federalism Project Issues Paper No 1, October 1994), 17-21.
[81] Pursuant to Commonwealth Constitution s 122.
[82] See the *Euthanasia Laws Act* 1997 (Cth).
[83] See HKSAR *Basic Law* arts 2 and 19.
[84] See GJ Jacobsohn, *Apple of Gold· Constitutionalism in Israel and the United States* (1993), 95.

憲法研討會: 從比較角度看基本法的實施
Constitutional Law Conference on Implementation of the Basic Law : A Comparative Perspective

The Interpretation of the Basic Law - Common Law and Mainland Chinese Perspectives

Professor Albert H Y Chen

THE INTERPRETATION OF THE BASIC LAW
- COMMON LAW AND MAINLAND CHINESE PERSPECTIVES

Albert H Y Chen

I. INTRODUCTION

In Lau Kong-yung and 16 others v The Director of Immigration, the case in which the Hong Kong Court of Final Appeal (CFA) considered the effect of interpretation of the Basic Law issued by the National People's Congress Standing Committee (NPCSC) in June 1999, Sir Anthony Mason, Non-Permanent Judge of the Court, said:

> The Standing Committee's power to interpret laws is necessarily exercised from time to time otherwise than in the adjudication of cases. So the expression "in adjudicating cases" [in article 158 of the Basic Law] makes it clear that the power of interpretation enjoyed by the courts of the Region is limited in that way and differs from the general and free-standing power of interpretation enjoyed by the Standing Committee under Article 67(4) of the PRC Constitution and Article 158(1) of the Basic Law. This conclusion may seem strange to a common lawyer but, in my view, it follows inevitably from a consideration of the text and structure of Article 158, viewed in the light of the context of the Basic Law as *the constitution for the HKSAR embodied in a national law enacted by the PRC.* (emphasis supplied)

The paradox of "one country, two systems" is that a special administrative regions --- Hong Kong and Macau. And the paradox of the Basic Law lies in its dual nature. It is at once a national law and the constitutional instrument of the Hong Kong Special Administrative Region (HKSAR). It was enacted by the National People's Congress in accordance with the Chinese constitutional principles and legislative procedures, and yet it serves as the foundation of the common law in the post-1997 legal system of Hong Kong and is enforced by the courts of Hong Kong's common law based legal system.

How, then, should the Basic Law be interpreted? What are the appropriate approaches to or methods for its interpretation? Do common law approaches suffice? To what extent should cognizance be taken of mainland Chinese constitutional and legal norms? These are the challenging questions posed by the Basic Law. It is not the purpose of this article to answer these questions directly. The purpose is more modest, and is to pave the way for working out the answers by studying the experience of constitutional interpretation in other common law jurisdictions, particularly the USA, and the institutional framework for legislative interpretation in mainland China.

II. CONSTITUTIONAL INTERPRETATION IN COMMON LAW JURISDICTIONS

Although England is the home of the common law, it is in the USA that the jurisprudence of constitutional interpretation originated and reached the highest level of development within the common law family of legal systems. Unlike Britain, the USA was founded upon a written constitution. The American experience demonstrates that constitutional interpretation is inseparable from judicial review of the constitutionality of governmental actions, particularly legislative enactments. Such judicial review was first established by the American Supreme Court in Marbury v Madison (1803). The justification for judicial review provided in that case is as forceful now as it was two centuries ago: The Constitution is a superior law, a higher law, relative to ordinary laws enacted by the legislature. Like ordinary laws, the Constitution is also law (as provided for in Article VI of the Constitution), and the judiciary has to apply the law in deciding cases. Where it finds that there is a conflict between an applicable provision in an ordinary law and the Constitution, the latter must prevail. In the words of Chief Justice Marshall:

> The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is consequently, to be considered, by this court, as one of the fundamental principles of our society. ... It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[1]

The American practice of constitutional judicial review has generated three questions that are inextricably linked to one another:

(a) Is it legitimate for courts to strike down laws that have been enacted by democratically elected legislatures (including the Congress and state legislatures)?

(b) How should courts interpret the Constitution?

(c) How activist should courts be, or to what extent should they practise self-restraint, in reviewing legislative acts?

1. The legitimacy of judicial review

The tension between judicial review and democracy is encapsulated in a term commonly used in American constitutional discussion, "the counter-majoritarian difficulty". The theoretical problem is described by Alexander Bickel as follows:

> [W]hen the Supreme Court declares unconstitutional a legislative act ... it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it. ... [I]t is the reason the charge can be made that judicial review is undemocratic. ... judicial review is a deviant institution in the American democracy.[2]

The question of the legitimacy of constitutional judicial review of legislation is ultimately a question of political theory rather than a question of law. The answer depends on the development of a coherent political theory that deals with the nature and status of the constitution, the fundamental concepts of democracy and constitutionalism and the relationship between them, and the functions served by judicial review.

One widely held view, which is basically the view expressed by Chief Justice Marshall in Marbury itself, traces the legitimacy of judicial review back to the intention and strategy of the framers of the constitution. A contemporary exponent of this approach is Michael Perry. In his latest book, The Constitution in the Courts (1994), Perry argues that the framers of the American constitution and the democratic political community that adopted the constitution deliberately chose to use the strategy of establishing certain rights and liberties by means of constitutional law rather than statutory law. This was because they were skeptical about the capacity of the ordinary, majaritarian politics of the community to respect rights, especially during political stressful times. The constitutional strategy they adopted presupposes a distrust, a lack of faith, in the future ordinary politics of the community. And judicial review is the institutional mechanism for protecting the rights enshrined in the constitution against erosion by such ordinary politics. Perry then asks: why should we, the living members of this community, support the constitutional strategy adopted by the framers and ratifiers of the constitution? His answer is that the American experience of judicial review has proved to work well as a means of protecting constitutional rights.[3]

Another defence of judicial review along similar lines has been offered by Bruce Ackerman in his famous work, we the People (1991). He argues that the "counter-majoritarian difficulty" arises only because theorists adopt a "monistic" understanding of democracy according to which democracy means government by elected politicians. He advances instead a "dualist" constitutionalism:

> A dualist Constitution seeks to distinguish between two different decisions that may be made in a democracy. The first is a decision by the American people; the second, by their government.[4]

The first decision refers to the making of the constitution or constitutional amendment, when the people are specially mobilized to participate in the deliberations. The conditions of constitutional politics give enhanced legitimacy to constitutional law as the supreme law. The constitution represents the will of We the People, whereas legislation --- the second kind of decisions mentioned above --- represents no more than the acts of We the Politicians. Such ordinary legislation cannot overturn the considered judgment previously reached by We the People. Those who question the judgment must "move onto the higher lawmaking track" and seek a constitutional amendment. In the meantime, the courts are the appropriate institution to perform the "preservationist function" with respect to the constitution. In Ackerman's view, this is an essential element of a "well-ordered democratic regime".

On the other hand, Laurence Tribe, another leading scholar of American constitutional law, questions whether the legitimacy of judicial review needs to be based on the will or consent of the people, whether at the time of adoption of the constitution or at the present moment. He argues that the function that judicial review serves in the American system of constitutional democracy is an extremely positive and valuable one, and this alone justifies the practice of judicial review.

In Tribe's view, the virtue of judicial review is that is enables constitutional challenges to governmental (including legislative) actions to be made in the course of which those in positions of authority are called to account for such actions in the language of constitutional principles, rights and ideals. This is a specially valuable kind of conversation, argumentation, analysis, critique and debate:

> What counts most is how the judiciary, *in making such challenges possible*, compels our political discourse to address issues of power in the language of constitutional principle, a language that connects our past to our aspirations as a people.[5] ... By debating our deepest differences in the shared language of constitutional rights and responsibilities and in the terms of an enacted constitutional *text*, we create the possibility of persuasion and even moral education in our national life ... Although the non-judicial branches, too, are sworn to uphold the Constitution, the

> independent judiciary has a unique capacity and commitment to engage in constitutional discourse --- to explain and justify its conclusions about governmental authority in a dialogue with those who read the same Constitution even if they reach a different view. This is a commitment that only a dialogue-engaging institution, insulated from day-to-day political accountability but correspondingly burdened with oversight by professional peers and vigilant lay criticism, can be expected to maintain.[6]

For Tribe, this constitutional dialogue is one that will never end --- "looking not toward any one, permanent reconciliation of conflicting impulses but toward a judicially modulated unending struggle."[7] "Fundamentally, the Constitution is ... a text to be interpreted and reinterpreted in an unending search for understanding."[8]

The American system of constitutional judicial review can perhaps best be understood as a product of the synthesis of democracy and constitutionalism.[9] Both democracy and constitutionalism uphold the dignity, autonomy and equal moral worth of each human being. The emphasis of democracy is on the sovereignty of the people, their democratic participation in political processes, including the law-making process, and the authority of the law that is democratically made. Constitutionalism stresses the need for state power to be limited and to be subject to checks and balances so as to minimize the abuse of state power, even when state power is in the hands of democratically elected leaders. This is because the individual is entitled to certain basic rights that deserve protection against majority rule:

> Each individual has, constitutionalism claims, a zone of physical and psychological space that should be largely immune from governmental regulation, even regulation that an overwhelming majority of society considers wise and just.[10]

From this perspective, when courts review legislation on the basis of the constitutional bill of rights, they are performing a legitimate function of protecting minority rights against majority rule.[11]

It should however be borne in mind that constitutional judicial review as it developed the USA is not only concerned with the protection of individuals' rights and the enforcement of the constitutional bill of rights. It is equally concerned with the enforcement of the constitutional division of power between different branches of government, and between the federal government and state governments. Indeed, this latter function, rather than the former, was in practice was the predominant in the first century of American constitutional history. Thus Martin Shapiro suggests that the legitimacy of judicial review was established in the USA by the Supreme Court making a major contribution to policing the boundary between different levels of government in the federal constitutional structure. A fund of legitimacy was stored up first, which could

then be relied on by the Court when it turned to the business of striking down laws on the ground of individuals' rights.[12]

The global expansion of constitutional review of legislation --- or what Mauro Cappelletti calls "constitutional justice" --- after the Second World War means that the legitimacy of such review is gaining international acceptance. This movement is partly a response to the experience of totalitarianism and the growth of modern state power. In the late twentieth century, post-communist societies and other countries emerging from dictatorship of one form or another have also been eager to embrace constitutional review. Cappelletti, a leading scholar of comparative constitutional law, said in a 1985 lecture:

> [S]ince World War II, Western societies have been experiencing what I do not hesitate to characterize as a constitutional and civil rights revolution. ... The constitutional revolution --- and I do mean what this word says --- occurred in Europe only with the suffered acquisition of the awareness that a constitution, and a constitutional bill of rights, need judicial machinery to be made effective. The United States certainly provided an influential precedent. But the most compelling lesson came from domestic experience, the experience of tyranny and oppression by a political power unchecked by machinery both *assessable* to the victims of governmental abuse, and *capable* of restraining such abuse. ... Indeed, it seems as though no country in Europe, emerging from some form of undemocratic regime or serious domestic strife, could find a better answer to the exigency of reacting against, and possibly preventing the return of, past evils, than to introduce constitutional justice into its new system of government.[13]

Cappelleti was speaking in the mid-1980s. Since then dramatic progress in the global reach of democracy has been made, and Kommers and Finn have provided a more up-to-date description:

> The late twentieth century is an age of judicial review. What was generally regarded as a unique feature of the American Constitution prior to the Second World War is now a major feature of numerous constitutions around the world. The proliferation of constitutional courts in Western Europe, Latin America, Asia, and, lately, in the former communist countries of Eastern Europe, is one of the most fascinating constitutional developments of our time.[14]

It should be noted in this regard that most of these new systems of constitutional review have been modelled on the Continental European systems, particularly Germany's Federal Constitutional Court, a specially constituted court specialising in constitutional jurisprudence, rather than on the American and British Commonwealth systems of constitutional review by ordinary courts.

2. Approaches to constitutional interpretation

There are many theories of, approaches to and methods for interpreting a constitutional instrument such as the US constitution. This article takes as the point of departure of our investigation Philip Bobbitt's theory of constitutional interpretation, because I think it is one of the best attempts to understand different theories, approaches and methods in this regard as a coherent whole.

Bobbitt develops his theory in two major works, Constitutional Fate (1982) and Constitutional Interpretation (1991). The focus of his study is "constitutional modalities", meaning forms or types of arguments that are conventionally used in arguing and deciding cases in American constitutional law. These constitutional modalities are crucial to the enterprise of constitutional interpretation. They are the tools of the enterprise, as well as "the ways in which legal propositions are characterised as true from a constitutional point of view":[15]

> The modalities of constitutional argument are the ways in which law statements in constitutional matters are assessed; standing alone they assert nothing about the world. But they need only stand alone to provide the means for making constitutional argument.[16]

In Bobbitt's view, these constitutional modalities constitute the grammar of constitutional law,[17] and familiarity with them is a prerequisite for effective thinking in constitutional law.[18] Indeed, the very legitimacy of judicial decisions in constitutional law depends on, and is maintained by, the operation of these modalities of constitutional argument.[19] And the defence of each modality can be shown to correspond to one of the standard defences of the system of judicial review.[20]

As regards the relationship between these constitutional modalities, Bobbitt recognises that they are basically incommensurate with one another,[21] and thus may point to diverging outcomes when applied to the same case.[22] Yet Bobbitt believes that no single modality can be elevated to a privileged status,[23] and that it is both unnecessary and harmful to search for a "meta-logic" that can dictate the "right" outcome in a particular case.[24] Indeed, there is scope for choice, for conscience, for moral decisions and for justice precisely because there is indeterminacy in the operation of the modalities. In practice, more than one modality will be employed in deciding a case.[25] As Bobbitt points out:

> If you were to take a set of colored pencils, assign a separate color to each of the kinds of arguments, and mark through passages in an opinion of the Supreme Court deciding a constitutional matter, you would probably have a multi-colored picture when you finished. Judges are the artists of our field ... and we expect the creative judge to employ all the tools that are appropriate, often in combination, to achieve a satisfying result. ... What makes the *style* of a particular person ... is the

preference for one particular mode over others.[26]

What, then, are the modalities of constitutional argument identified by Bobbitt? There are six of them:

(a) the textual;

(b) the historical (also known as originalism);

(c) the doctrinal;

(d) the prudential;

(e) the structural;

(f) the ethical.

Each of these forms of argument represents an approach to, or a method of, constitutional interpretation. In the following, each modality will be discussed, with reference to how it is understood by Bobbitt and to related analysis by other scholars.

A. The textual approach to interpretation (textualism or literalism)

According to Bobbitt, textualism privileges "the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary 'man on the street'".[27] This corresponds to the literal rule in ordinary statutory construction, which emphasizes the plain and ordinary meaning of the words in the legislative text.[28] The strength of this approach is that it enables citizens to rely on their understanding of the words of the law, whereas it would be undemocratic for legal specialists to exercise a monopoly over the meaning of legal texts.[29] This approach, known in Australia as "literalism",[30] was applied by the High Court of Australia in the famous Engineers case (1920),[31] where the court rejected any "implication which is formed on a vague, individual conception of the spirit of the compact [i.e. the Constitution], which is not the result of interpreting any specific language to be quoted, nor referable to any recognised principle of the common law of the Constitution". It also said:

> It is the chief and special duty of this court faithfully to expound and give effect to [the Constitution] according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed ... In doing this, to use the language of Lord Macnaghten [in a 1913 case], "a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. ..."[32]

B. The historical approach to interpretation (originalism)

The historical modality of constitutional argument advocates the meaning of the constitutional text at the time of its adoption, and the intention of its framers and ratifiers. "Historical arguments draw legitimacy from the social contract negotiated from an original position".[33] The constitution is understood as a social contract entered into by the founding generation and binding on subsequent generations subject to the possibility of constitutional amendment. The terms of the contract, and their meaning, were fixed at the crucial historical moments of the adoption and amendment of the constitution, and the need for enforcement of such terms is the sole justification for judicial review of subsequently enacted legislation. This historical approach to constitutional interpretation, more commonly known as originalism in the US, is usually associated with the debate between "conservatives" and "liberals" in the domain of constitutional law. The conservatives rely on originalism to argue that it is wrong to read into the Constitution certain privacy rights such as the right to abortion,[34] or to understand its prohibition of "cruel and unusual punishments" as including the death penalty.[35]

There are several versions of originalism. One focuses on the meaning of the constitutional text that the framers intended it to bear. Another upholds the meaning of the text as commonly understood by members of the community at the time of its enactment.[36] Within originalism, there are also different views regarding whether the interpretive enterprise should focus on the text or on the intention and purposes of the founders.[37] According to one school of thought (which can be described as the textualist version of originalism), all that matters is the words of the constitutional text as understood by the founding generation.[38] Another school (which can be called "intentionalism"[39] to contrast it with "textualism") privileges the intention of the founders, what they had in mind and what objectives they sought to achieve, and advocates the liberal use of records of debates at the constitutional convention and other sources of historical evidence for the purpose of ascertaining such intention and purposes.

The leading exponents of originalism include Scalia J of the US Supreme Court and Judge Robert Bork (whose nomination to the Supreme Court was rejected by the Senate partly because of his adherence to originalism). Scalia J criticizes the "living constitution" school of thought:

> [T]he Great Divide with regard to constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning. The ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and "find" that changing law. Seems familiar, doesn't it? Yes, it is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the

statutes of democratic legislatures.[40]

Judge Bork advocates the following originalist approach to judicial review of legislation:

> [A]ll that a judge committed to *original understanding* requires is that the *text, structure and history* of the Constitution provide him not with a conclusion but with a major premise. The major premise is a principle or ... value that *the ratifiers wanted* to protect against hostile legislation or executive action. The judge must then see whether that principle or value is threatened by the statute or action challenged in the case before him.[41]

C. *The doctrinal approach to interpretation (doctrinalism)*

Bobbitt defines the doctrinal modality as one that applies rules generated by precedent.[42] Doctrinalism reflects the common law approach to the development of legal norms through the gradual accumulation of case law. It is based on "the notion that the judicial function with respect to the Constitution is essentially a common law function, arising from the court's common law process respecting litigants."[43] As formulated by several other scholars:

> A *doctrinal approach* searches out past interpretations as they relate to specific problems ... and tries to organize them into a coherent whole and fit the solution of current problems into that whole. ... *Doctrinalists* typically claim their approach is based on the notion of a developing rather than a static "Constitution." ... Doctrines do not exist from the beginning of time; they have been created, assembled, and reassembled.[44]

Thus instead of focusing one's attention of the constitutional text and its meaning, the doctrinalism attempts to apply the relevant doctrines and verbal formulas or tests (such as whether there exists a "compelling state interest" that can justify the restriction of certain rights) developed by the courts in resolving current issues.[45]

Bobbitt's idea of the doctrinal modality of constitutional thinking also embraces two other elements.[46] First, doctrinalism emphasizes the importance of adherence to rules and principles, and is against considerations of expediency or policy in judicial decision-making. In this regard, it is reminiscent of Herbert Wechsler's call for "neutral principles" of constitutional law --- judicial decision-making in constitutional law must be "principled" and based on reasons which in their neutrality and generality transcend the immediate outcome of the case and are equally applicable to future cases. Secondly:

> [T]he doctrinal approach holds that fairness will result ... if methods of judging which all concede to be fair are followed scrupulously. These methods include adherence to traditional standards of dispassion and disinterest, the elaboration of

convincing reasons for deciding one way or the other, the mutual opportunity for persuasion.[47]

The concept of doctrinalism is closely related to, and indeed overlaps with, David Strauss' idea of "common law constitutional interpretation".[48] Strauss suggests that constitutional law has binding authority not because it is the command of its founders, but because constitutional law as it has evolved represents the accumulated wisdom of many generations and has been well tested over time. The development of American constitutional law has followed the common law model, and "represents a flowering of the common law tradition":[49]

> Common law constitutional interpretation has two components. ... The first component is traditionalist. The central idea is that the Constitution should be followed because its provisions reflect judgments that have been accepted by many generations in a variety of circumstances. The second component is conventionalist. It emphasizes the role of constitutional provisions in reducing unproductive controversy by specifying ready-made solutions to problems that otherwise would be too costly to resolve.

D. The prudential approach to interpretation (prudentialism)

While doctrinalism eschews policy considerations, prudentialism upholds the legitimacy of such considerations in judicial decision-making in constitutional law. Bobbitt defines the prudential modality of constitutional argument as one that seeks "to balance the costs and benefits of a particular rule".[50] It is therefore a utilitarian, pragmatic and consequentialist mode of thinking. As Bobbitt puts it: "Prudential arguments is actuated by facts, as these play into political and economic policies".[51] He gives the following example:

> Consider whether the state can require mandatory testing for the AIDS virus antibodies. To say that it is wise, unwise, or simply unclear on the present facts whether or not it is wise to permit such testing is to propose an evaluation from a *prudential* point of view.[52]

Prudentialism is often associated with the jurisprudential thought of Mr Justice Louis Brandeis, Mr Justice Felix Frankfuter and Professor Alexander Bickel.[53] It is sometimes cited to explain the doctrines of justifiability developed by the American Supreme Court. These doctrines, which include the ban on advisory opinions, doctrines on ripeness, standing and mootness, and the political question doctrine, enable the court to decline to exercise jurisdiction in appropriate cases even where it is invited to enforce the constitution. In Bobbitt's words, they are "mediating devices by which the Court can introduce political realities into its decisional process."[54] The *Ashwander* rules,[55] according to which the court will avoid deciding a constitutional question unless it is absolutely

necessary to do so, serve a similar purpose. Mr Justice Brandeis, who participated in the Ashwander decision, once said: "The most important thing we do is not doing."[56]

In his famous book, *The Least Dangerous Branch* (1962), Professor Bickel provides the classic statement of the prudential approach to constitutional interpretation:

> The accomplished fact, affairs and interests that have formed around it, and perhaps popular acceptance of it --- these are elements ... that may properly enter into a decision to abstain from rendering constitutional judgment or to allow room and time for accommodation to such a judgment; and they may also enter into the shaping of the judgment, the applicable principle itself.[57]

The leading contemporary advocate of prudentialism, or what he describes as "the pragmatic approach to constitutional adjudication",[58] is Judge Richard Posner:

> The pragmatic judge ... wants to come up with the best decision having in mind present and future needs, and so does not regard the maintenance of consistency with past decisions as an end in itself but only as a means for bringing about the best results in the present case. ... because the pragmatic judge sees these "authorities" merely as sources of information and as limited constraints on his freedom of decision, he does not depend upon them to supply the rule of decision for the truly novel case. For that he looks also or instead to sources that bear directly on the wisdom of the rule that he is being asked to adopt or modify.[59]

E. The structural approach to interpretation (structuralism)

The structural modality of constitutional argument is defined by Bobbitt to mean one that infers rules from the relationships that the constitution mandates among the structures it sets up.[60] Structuralism is particularly useful in dealing with questions of federalism, separation of powers and inter-governmental issues, but less effective in tackling issues of civil liberties and human rights.[61] Bobbitt sees structuralism as a kind of "macroscopic prudentialism", "drawing not on the peculiar facts of the case but rather arising from general assertions about power and social choice".[62]

Further exploration into structuralism would reveal that there are at least three types or levels of the structural modality of constitutional argument. The first is textual structuralism. This seeks to interpret each provision in the constitution in the light of all the provisions of the constitution. The particular provision is understood as a component part of a larger whole in which inner unity and coherence is sought. The second level of structuralism has been called "systematic structuralism".[63] Here the unit of analysis is not simply the whole text of the constitution, but the entire political order, the totality of the constitutional scheme, including not only the text but also relevant traditions, practices and previous interpretations. The particular provision is interpreted in the light of this

greater whole in which unity and coherence is sought. "Transcendent structuralism",[64] the third strand of structuralism, is even more ambitious:

> Suppose interpreters decide that the constitution also includes one or more political theories as well as practices, interpretations, and traditions. Interpreters would then find it necessary to employ *philosophy* to understand those political theories and their implications for constitutional meaning. But they might need yet another approach to help them bring the text, practices, traditions, and interpretations into a coherent whole with the normative demands of the relevant political theories. We call this approach *transcendent structuralism.*[65]

This third species of structuralism in fact merges with the ethical modality of constitutional argument as understood by Bobbitt, to which we now turn.

F. The ethical approach to interpretation

In Bobbitt's words, the ethical modality of constitutional argument attempts to derive "rules from those moral commitments of the American ethos that are reflected in the Constitution".[66] This type of constitutional thinking can also be described as philosophical, aspirational or moral.[67] It enables philosophical reflections, social morality and the vision and aspirations embodied in the constitution to be taken into account in constitutional interpretation.

For Bobbitt, the force of ethical argument "relies on a characterization of American institutions and the role within them of the American people", or "the character, or *ethos*, of the American polity".[68] In his view, this kind of argument can be used to strengthen individuals' rights, because the American constitutional ethos is one that limits the power of government and secures rights in the private sphere, which "can be defined as those choices beyond the power of government to compel".[69]

Both conventional morality and moral philosophy have been argued to be relevant to constitutional interpretation. For example, Harry Wellington writes:

> Judicial reasoning in concrete cases must proceed from society's set of moral principles and ideals. ... And that is why we must be concerned with conventional morality, for it is there that society's set of moral principles and ideals are located. ... the Supreme Court is ... well positioned to translate conventional morality into legal principle.[70]

On the other hand, Ronald Dworkin advocates a "moral reading" of the constitution based on moral and political philosophy rather than conventional morality. In *Freedom's Law*, he writes:

> Most contemporary constitutions declare individual rights against the government

> in very broad and abstract language ... The moral reading proposes that we all --- judges, lawyers, citizens --- interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice. ... people who form an opinion must decide how an abstract moral principle is best understood. ... The moral reading therefore brings political morality into the heart of constitutional law.[71]

The "political morality" that Dworkin relies on can be understood as a kind of critical morality (as contrasted with conventional morality) --- moral thinking based on philosophical reflections on what is a "coherent strategy of interpreting the Constitution",[72] which stands at a distance from and can be critical towards the prevailing mores and values of the majority of people in society at a particular time, whether at present or at the time of the adoption of the constitution. Dworkin believes that this approach to constitutional interpretation is not inconsistent with the original intention of the framers of the constitution, because they only intended to lay down principles based on certain concepts, allowing succeeding generations to apply them without being bound by the founding generation's own conceptions. This theory is based on the distinction between "concept" and "conception", and that between "interpretive intent" and "substantive intent".

In Dworkin's view, language regarding matters such as "equality" or "cruelty" in the American constitution denotes concepts rather than specific conceptions. Different people can employ the same concepts while having different conceptions of what precisely are the kinds of behaviour or concrete situations which are covered by the concept. Thus when framers of the American constitution used words such as "equality" or "cruelty" in the constitution, they did not preclude the possibility of subsequent generations developing and then applying their own conceptions regarding these concepts as cases arise. Thus Dworkin writes:

> [W]e must take what I have been calling "vague" constitutional clauses as representing appeals to the concepts they employ, like legality, equality and cruelty. The Supreme Court may soon decide, for example, whether capital punishment is "cruel" within the meaning of the constitutional clause that prohibits "cruel and unusual punishment". It would be a mistake for the Court to be much influenced by the fact that when the clause was adopted capital punishment was standard and unquestioned. That would be decisive if the framers of the clause had meant to lay down a particular *conception* of cruelty, because it would show that the conception did not extend so far. But it is not decisive of the different question that Court now faces, which is this: Can the Court, responding to the framers' appeal to the *concept* of cruelty, now defend a conception that does not make death cruel?[73]

Further theoretical clarification of the matter is provided by Paul Brest, who drew the

distinction between the "substantive intent" and the "interpretive intent" of the adopters of the constitution. The substantive intent refers to how the adopters would themselves interpret and apply the relevant constitutional provision to a case if the case comes before them. The interpretive intent refers to how the adopters intended future judges to interpret and apply the provision to the future case, and "what are the canons by which the adopters intended their provisions to be interpreted".[74] Brest points out that it is possible that the adopters' interpretive intent was such that they did not intend that their substantive intent (i.e. their own views of how the provision would apply to a particular case) should govern the future application of the provision (such as the provision on "cruel and unusual punishment), and they intended instead to delegate to future judges significant discretion:

> [T]he adopters may have intended that their own views not always govern. ... The adopters may have understood that, even as t instances to which they believe the clause ought or ought not to apply, further thought by themselves or others committed to its underlying principle might lead them to change their minds. Not believing in their own omniscience or infallibility, they delegated the decision to those charged with interpreting the provision.[75]

G. The purposive approach

The six modalities of constitutional argument theorised by Bobbitt have all been considered above. They do not include, however, what is often called the purposive approach to constitutional interpretation, which has been referred to by Hong Kong courts in the context of the interpretation of the Basic Law.[76] Where then does the purposive approach stand in relation to the other modalities of constitutional interpretation?

The essence of the purposive approach can best be understood when it is contrasted with the literal approach to interpretation. Both are the most basic approaches to the construction of ordinary statutes. Whereas the latter focuses on the plain meaning of the words in the legislative text, the purposive approach attempts to go beyond the literal meaning and to discern the purposes or objectives that the law was intended to achieve, and hence to interpret the provision in such a way as to enable the objective to be realised. But both the literal approach and the purposive approach are designed to ascertain and implement the intention of the legislature. While the literal approach tries to discern the intention from the words used, the purposive approach adopts a broader view of what are the relevant materials to be considered in ascertaining that intention.

How, then, is the purpose of the relevant constitutional text to be identified if a purposive approach to constitutional interpretation is to be adopted? What kind of arguments about such purpose can be made? Here we need to return to the modalities of

constitutional argument discussed above. The textual modality suggests that the purpose of the relevant provision can be understood by reading it, reading the related provisions and reading the constitution as a whole. This approach has been termed "purposive textualism":

> *Purposive textualism* seeks the basic goal(s) that either an isolated clause or the text as a whole attempts to achieve, then interprets the clause or document in light of this objective.[77]

Similarly, historical, doctrinal, prudential, structural and ethical arguments can be used to discuss the purpose behind a constitutional provision. It can therefore be seen that the purposive approach to constitutional interpretation can best be understood not as an independent modality of constitutional argument, but as an integral part of each of the six constitutional modalities discussed above, particularly where the argument being made departs from the plain meaning of the text or there is no such plain meaning which can be used to resolve the issue in question.

H. The nature of constitutional interpretation

The constitutional modalities discussed above are no more than forms of argument that shape and propel forward the continuing conversation about the constitutionality of governmental actions, or what Tribe calls "an ongoing discourse --- a discourse with the other levels and branches of government, with the people at large, with courts that have gone before and courts yet to be appointed."[78] They do not and cannot provide conclusive answers to constitutional questions. As Walter Murphy and his co-authors point out:

> No approach or combination of approaches can turn constitutional interpretation into an exact science or eliminate controversy about what "the Constitution," whether as text or text plus, means. ... constitutional interpretation involves more than intellectual analysis. It is a political act and, like many political acts in a constitutional democracy, involves both creativity and compromise.[79]

It is widely recognised that judicial decision-making in the domain of constitutional law --- and this is probably more true in the this domain than in other legal domain --- involves moral freedom and hence moral choice on the part of judges, who have to balance conflicting interests,[80] take policy considerations into account, make value judgment[81] and engage in judicial law-making.[82] Thus, after studying various modalities of constitutional argument, Bobbitt finds that "there is no conclusive mode, no trans-modal standard",[83] that can prescribe how the judge should decide a case. Instead, they leave her a space for moral reflection and choice,[84]h which, according to Bobbitt, can only be made in accordance with one's conscience and moral sensibility:[85]

> That is the method of American constitutional interpretation, arising no doubt from the agnosticism of the Constitution itself, which studiedly refrains from endorsing particular values other than the structures by which our values are brought into being and preserved. ... And thus when a constitutional decision is made, its moral basis is confirmed if the forms of arguments can persuasively rationalize the decision, and the decision is not made on grounds incompatible with the conscience of the decision maker. That is constitutional decision according to law.[86]

If so much in constitutional adjudication depends on the subjective value choice of individual judges, where is the objectivity and neutrality of the law? In an article entitled "Objectivity and Interpretation", Owen Fiss attempts to answer this question and to respond to what he describes as the "new nihilism, one that doubts the legitimacy of adjudication":[87]

> The nihilist would argue that for any text --- particularly such a comprehensive text as the Constitution --- there are any number of possible meanings, that interpretation consists of choosing one of those meanings, and that in this selection process the judge will inevitably express his own values. All law is masked power.[88]

Fiss argues that the discretion of judges in interpretation and adjudication is in fact constrained, and to this extent there exists "bounded objectivity"[89] in the law. The sources of constraint are the existence of "disciplinary rules" by which the correctness of the judge's interpretation can be evaluated, and the existence of an "interpretive community" --- of lawyers, judges, legal scholars and others --- which recognises these rules as authoritative. The disciplinary rules consist of both substantive and procedural norms.[90] They include rules "that specify the relevance and weight to be assigned to the material (e.g., words, history, intention, consequence)" as well as "those that define basic concepts and that established the procedural circumstances under which the interpretation must occur."[91] Fiss attaches particular importance to the procedural norms among the disciplinary rules:

> The judiciary is a coordinate agency of government, always competing, at least intellectually, with other agencies for the right to establish the governing norms of the polity. The judiciary's claim is largely founded on its special competence to interpret a text such as the Constitution, and to render specific and concrete the public morality embodied in that text; that competence stems not from the personal qualities of those who are judges --- judges are not assumed to have the wisdom of philosopher-kings --- but rather from the procedures that limit the exercise of their power.[92]

Fiss writes about some of the most fundamental of these procedural norms:

> The judge must stand independent of the interests of the parties or even those of the body politic (the requirement of judicial independence); the judge must listen to grievances he might otherwise prefer not to hear (the concept of a nondiscretionary jurisdiction) and must listen to all who will be directly affected by his decision (the rules respecting parties); the judge must respond and assume personal responsibility for that decision (the tradition of the signed opinion); and the judge must justify his decision in terms that are universalizable (the neutral principles requirement).[93]

Fiss' defence of the "bounded objectivity" of interpretation and adjudication applies equally to the domains of constitutional law and ordinary law. In the former domain, however, some scholars have put forward the thesis that comparative study reveals that there exists a common core of universally applicable principles of constitutional adjudication among many legal systems. The shared intellectual dynamics in different countries of the operation of such principles suggest that constitutional adjudication rests on some kind of objective ground. For example, Kommers and Finn writes:

> [P]rinciples of rationality and proportionality seem to constitute the core of judicial review wherever it is practiced, despite wide variations in the vigor with which the powers of judicial review are exercised. ... The case law of constitutional courts such as the Supreme Court of Canada, the United States, India, and Ireland as well as the European Court of Human Rights and the Constitutional Courts of Germany, Italy, and Spain may apply the principles in dramatically different ways and with different results. But the fact that all of these courts invoke some variation on these principles suggests that something universal is at work here and that *some degree of objectivity and determinacy informs the process of constitutional adjudication.*[94]

The Canadian law professor David Beatty has written a book to demonstrate that the twin principles of proportionality and rationality are indeed what "constitutional law is mostly about".[95] "Studying the judgments of [Canadian and] other courts entrusted with the powers of judicial review shows how the principles of rationality and proportionality are universal in space as well as in time":[96]

> Showing judges employing the same process of reasoning no matter where they sit is a powerful piece of evidence in support of the integrity and the intelligibility of the law. The body of comparative jurisprudence written by these courts gives law and these legal principles a measure of objectivity and neutrality that transcends national borders and different cultures and environments.[97]

The most interesting and ambitious part of Beatty's thesis is that principles of proportionality and rationality are not only relevant to judicial review of governmental

actions on the basis of constitutional guarantees of human rights, but also to the work of the courts in determining the boundaries of the powers of federal and provincial governments in federal constitutional systems.

In Beatty's view, the principle of proportionality is concerned with the determination of the constitutionality legitimacy of the objective behind an impugned act, whereas the principle of rationality is applicable to the permissibility of the means used to achieve the objective. "Together, these two basic principles require those who have been entrusted with the powers of the state to act with a measure of moderation and proportion."[98]

The principle of proportionality as understood by Beatty requires the court to consider whether the objective behind the impugned act is of sufficient importance to justify the imposition of limitations on the relevant right of the individual or group (in a human rights case) or on the relevant power of the other order of government (in a federal division of power case). The court has to balance the relevant interests and to engage in a cost-and-benefit analysis. In performing the balancing exercise, the court has to look "for the closest analogies -- by comparing the challenged law with other laws, both at home and aboard, that involve similar interests and ideas".[99] The principle of proportionality is therefore a principle about balance and consistency.

If the objective of the challenged law passes the test of proportionality, the next stage of analysis is to consider whether the means used to achieve the objective is "really necessary" or whether the same objective can be achieved by the employment of some other means which would "[display] more respect for the freedom of individuals or the sovereignty of other governments"[100] (in a federal system where both the federal and provincial governments can be regarded as exercising sovereignty). The principle of rationality is therefore a principle about necessity. The court has to consider whether the means being used to achieve the legitimate objective is a rational and reasonable one, having regard to the possibility of other less drastic or more moderate means that may be used for the same purpose.

Beatty's analysis reinforces the view mentioned above that in constitutional interpretation and adjudication, the task of the court is by no means the mechanical application of clear and precise legal rules to the circumstances of the case. On the contrary, the court has to perform a difficult exercise of weighing competing interests, choosing among conflicting values, and making its own assessment of what is rational, reasonable, necessary and constitutionally acceptable.

3. Judicial restraint and judicial activism

One of the key differences between the interpretation of statutes and constitutional interpretation is that whereas the former involves no more than the application of a

statute to a case, the latter may lead to a declaration that a statute or a part thereof is null and void, and hence a deliberate judicial decision not to apply a relevant statute to a case covered by it. Whereas the purpose of ordinary statutory interpretation is to discover and implement the intention of the legislature, constitutional interpretation may lead to the rejection and frustration of the intention of the legislature. The implications of this difference between ordinary statutory construction and constitutional interpretation were explored by James B Thayer in his classic article on "The Origin and Scope of the American Doctrine of Constitutional Law" published in 1893.[101] This article was regarded by Justice Frankfurter as "the most important single essay" ever published in the field.[102]

In this article, Thayer emphatically rejects the view that in cases involving constitutional interpretation in the context of judicial review of legislation,

> The court's duty ... is the mere and simple office of construing two writings and comparing one with another, as two contracts or two statutes are construed and compared when they are said to conflict; of declaring the true meaning of each, and, if they are opposed to each other, of carrying into effect the constitution as being of superior obligation ...[103]

His thesis is as follows:

> in dealing with the legislative action of a co-ordinate department [Congress], a court [the Supreme Court] cannot always, and for the purpose of all sorts of questions, say that there is but one right and permissible way of construing the constitution. When a court is interpreting a writing merely to ascertain or apply its true meaning, then, indeed, there is but one meaning allowable; namely, what the court adjudges to be its true meaning. But when the ultimate question is not that, but whether certain acts of another department ... are legal or permissible, then this is not true. In the class of cases which we have been considering, *the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.*[104]

The approach to constitutional interpretation and adjudication which Thayer advocates is known as "judicial restraint". Judicial restraint means that the judiciary should defer to the judgment of the legislature on most matters and should exercise the power of striking down legislation only sparingly. Judicial restraint stands in contrast to judicial activism, which means judges will not hesitate too much before substituting their own judgment for that of the legislature (for example, as regards how to balance competing interests, values and rights), and the power of judicial review of legislation will be exercised liberally and actively.

In Thayer's view, the court should only strike down an Act of Congress where its violation of the Constitution is "clear", "obvious", "plain", "unequivocal", or "so manifest

as to leave no room for reasonable doubt". The question is not whether the court itself would choose to legislate in this way if it were the legislator, but whether the legislature's choice is beyond the scope of its power. The problem is structurally similar to the situation where the court hears an appeal from the jury verdict, when the court will not substitute its opinion for the jury's but would only ask whether "reasonable men could not fairly find as the jury have done":[105]

> The legislature in determining what shall be done, what it is reasonable to do, does not divide its duty with the judges, nor must it conform to their conception of what is prudent or reasonable legislation. The judicial function is merely that of fixing the outside border of reasonable legislative action ...[106]

The doctrine that Thayer proposed has been called the doctrine of the clear mistake:

> [The court] can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, --- so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative Acts; that is the text which they apply, --- not merely their own judgment a to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it. This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.[107]

Thayer's theory of constitutional interpretation and judicial review supports a presumption of the constitutionality of legislation which can be rebutted by cogent argument. This presumption still operates in American, Canadian and Australian constitutional law in some categories of cases, albeit not in cases involving civil liberties and human rights.[108] What are the types of situations in which judicial activism is appropriate has been an central issue in American constitutional debate. One of the most influential theories in this regard originated from the famous "footnote 4" in Mr Justice Stone's judgment in the Supreme Court decision in the Carolene Products case (1938).[109] The case was decided at a time when American constitutional jurisprudence was in a state of flux. The Supreme Court had just retreated from its (unpopular) activism in striking down the laws of Roosevelt's New Deal policy on the ground of substantive due process and protection of contractual and property rights, and returned to the older doctrine of the presumption of the constitutionality of legislation. Footnote 4 of Justice Stone's opinion was intended "to plant the seeds of a new jurisprudence"[110] that would enable the court to play an activist

role in future in the domain of civil liberties. And this possibility did materialise for the American Supreme Court in the second half of the twentieth century.

What Justice Stone suggested in "footnote 4" is that the presumption of the constitutionality of legislation may be weaker or inapplicable to three types of cases:

(a) those "within a specific prohibition of the Constitution, such as those of the first ten amendments [i.e. the Bill of Rights adopted in 1791], which are deemed equally specific when held to be embraced within the Fourteenth";[111]

(b) cases concerning "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation";

(c) cases involving "statutes directed at particular religious, or national, or racial minorities", or "prejudice against discrete and insular minorities ... which tends seriously to curtail the operation of those political processes ordinarily thought to be relied upon to protect minorities".

Parts (b) and (c) of "footnote 4" formed the basis of John Hart Ely's "political process theory" of the American Constitution which he developed in his famous book, Democracy and Distrust (1980).[112] According to this theory, the American Constitution is largely about democratic procedures and open processes for the conduct of politics and the enactment of policies, and it provides for few substantive values itself. Where laws have been democratically made, the judiciary should not intervene by way of judicial review, which "can appropriately concern itself only with questions of open participation ... [including] protection of minorities against discriminatory legislation --- and not with the substantive merits of the political choice under attack."[113] Judicial review is justified when

> (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.[114]

Process-based constitutional theories like Ely's have however been criticised by Laurence Tribe, who points to "the stubbornly substantive character of so many of the Constitution's most crucial commitments":[115]

> Even the Constitution's most procedural prescriptions cannot be adequately understood, much less applied, in the absence of a developed theory of fundamental rights that are secured to persons against the state --- a theory whose

> derivation demands precisely the kinds of controversial substantive choices that the process proponents are so anxious to leave to the electorate and its representatives.[116]

Hence the debate continues, for example, among "conservatives" who advocate originalism and judicial restraint, "moderates" who support judicial review where "it is a necessary corrective for an objectively determinable failure in the political process",[117] and "liberals" who push for judicial activism to realise the aspirations and ideals which they see in the Constitution.

III. CONSTITUTIONAL AND LEGISLATIVE INTERPRETATION IN MAINLAND CHINA

In the debate in 1999 surrounding the HKSAR government's decision to refer the Basic Law provisions regarding the right of abode to the NPCSC for interpretation, government officials said that the practice of legislative interpretation (i.e. interpretation of laws by the legislature) in China is a feature of its Civil Law based legal system. They argued that although this practice is alien to the Common Law tradition in Hong Kong, the Hong Kong legal community had to recognise that under the principle of "one country, two systems", Hong Kong must accept the practice as a necessary consequence of the marriage of the Common Law and Civil Law systems. The existence of Parliamentary interpretations of law in the constitutional systems in Belgium and Greece was cited in support of this argument.

The better view is that the use of "legislative interpretation" in the legal system of the PRC is a feature of the socialist (or communist) rather than the Civil Law heritage of this system. It is true that shortly after the Revolution of 1789, due to the distrust of the judiciary in pre-revolutionary times and an attempt to practise a pure system of separation of powers, France in 1790 enacted a law requiring the judiciary to refer questions of interpretation of laws to the legislature.[118] However, this system was abandoned when the French Civil Code was adopted in 1804. Legislative interpretation is not part of the legal systems of leading Continental European members of the Civil Law family today, such as Germany, France, Italy, Spain and Austria. Instead they have constitutional courts that specialise in the task of constitutional interpretation and review of the constitutionality of legislation.[119] Indeed, Germany's Constitutional Court has been so successful and enjoys such a high prestige that it has served as the main model for imitation in the worldwide movement of expansion of judicial control of constitutionality mentioned above in this article.

1. Socialist constitutionalism

It was in the former socialist countries in Russia and Eastern Europe that systems of legislative interpretation and legislatures' review of the constitutionality of legislation

really abounded. These countries never accepted even in theory the bourgeois constitutional doctrines of the separation of powers and checks and balances. Their constitutions affirmed the sovereignty of the people, and the people were supposed to exercise political power through their representatives in the national assemblies (Supreme Soviet or National People's Congress). There was a "unitary orientation toward the exercise of state power".[120] In theory the national assembly of people's deputies exercised supreme political power; the laws they made were a supreme expression of the will of the people and were not subject to judicial restraint.[121] Courts, like other organs of the state, were themselves accountable to the national assembly. In practice, there was a concentration of power in the leaders of the Communist Party, which provided leadership for the national assembly as well as other state organs (including courts) both in theory and in practice. There were no enforceable constitutional limitations on the powers of either the party central committee (or its politbureau) or the national assembly. The constitution was a "political-philosophical declaration rather than a set of legally binding norms" that regulated the actual operation of political forces and determined who would become political leaders of the nation. Hence Ludwikowski doubts whether constitutionalism can be said to exist in these socialist states.

In the socialist legal system, the power to interpret laws was regarded as part of the legislative function and usually vested with the presidium or standing committee of the national assembly. For example, under article 49(b) of the 1936 Constitution and article 121(5) of the 1977 Constitution of the USSR, the Presidium of the Supreme Soviet enjoyed the power to "interpret the laws of the USSR".[122] Under article 64(4) of the 1965 Romanian Constitution,[123] the State Committee (the standing committee of the national assembly) may issue binding interpretations on laws. Supreme Courts in socialist systems were also authorised to issue interpretations of law. For example, the Organic Law of the USSR Supreme Court (1979) empowered the Court to issue binding explanations "concerning questions of the application of legislation which arise during the consideration of judicial cases".[124] Similarly, the Law on Court Organization of the Russian Republic (the largest union republic of the USSR) empowered its Supreme Court "to give explanatory directives to courts for the application of ... legislation."[125]

Since the late 1950's, judicial control of the legality of administrative action (as distinguished from the constitutionality of legislative enactments) began to develop in countries such as Yugoslavia, Hungary, Romania and Bulgaria. In the 1960's, some of the Eastern European states also began to consider introducing institutions to monitor the constitutionality of legislation. In 1963, Yugoslavia established a federal constitutional court. In 1965, Romania set up a constitutional committee under its national assembly to report on the constitutionality of bills.[126] In 1984, a similar body was instituted in Hungary. In the Soviet Union, the Presidium of the Supreme Soviet (equivalent to the NPCSC of the PRC) was responsible for control of the constitutionality of laws. Then, in

1986, Poland achieved a breakthrough in establishing a constitutional tribunal --- "a precedent that was followed by virtually all new European democracies until more recent years".[127]

After the fall of communism in Eastern Europe and Russia, new constitutional arrangements have been established in the former socialist states. Foreign models have been eagerly transplanted in attempts at "constitutional engineering". It has been pointed out that constitutional review of legislative and other government acts has become "the greatest novelty of the post-socialist world".[128] In the constitutional debates, one of the most controversial issues involved the selection of an appropriate model for the control of constitutionality of state actions.[129]

2. The PRC system of constitutional and legislative interpretation

In their formative years, the political, constitutional and legal systems were much influenced by the relevant theory, practice and models in the Soviet Union. The first constitution of the PRC --- the 1954 Constitution --- established the National People's Congress (NPC) as the supreme organ of state power, and this was the Chinese equivalent of the Supreme Soviet. In the following discussion, we shall focus on the provisions and practice in mainland China regarding the interpretation of the Constitution and laws.

Under the 1954 Constitution, the NPC was the sole state organ that was authorised to enact laws (*falu*, as distinguished from *falling*, or decrees, which the NPCSC could make).[130] It was also responsible for constitutional amendment and for "supervising the implementation of the Constitution."[131] The NPCSC was given the power to interpret laws and to enact decrees.[132]

The 1978 Constitution, which was the third constitution of the PRC, reaffirmed the relevant powers of the NPC and its Standing Committee as stated in the 1954 Constitution.[133] In addition, it also provided that the NPCSC had the power to interpret the Constitution itself.[134]

In 1981, the NPCSC adopted a Resolution on Strengthening the Work of Interpretation of Laws.[135] It provides for four types of interpretation:

(a) The NPCSC may interpret or enact decrees (*faling*) on provisions in laws that need to be further clarified or supplemented. This is known as legislative interpretation.

(b) The Supreme People's Court and the Supreme People's Procuratorate may respectively or jointly interpret points of law arising from the concrete application of the law in the course of their adjudicative and procuratorial work. This is known as judicial interpretation, as both the courts and procuratorates in the PRC are regarded as judicial (*sifa*) organs.

(c) The State Council and its departments may interpret points of law arising from the concrete application of the law in areas other than adjudicative and procuratorial work. This is known as executive (or administrative) interpretation.

(d) The standing committee of a local people's congress may interpret or enact provisions regarding provisions in local regulations which need to be further clarified or supplemented, and a local people's government may interpret points of law arising from the concrete application of local regulations.

It is noteworthy that until the fourth (and current) constitution of the PRC was adopted in 1982, the NPCSC had no formal power to make or amend laws (as distinguished from decrees). The 1982 introduced for the first time a system in which the NPC and its Standing Committee share legislative power. The NPC is empowered to enact "basic laws" relating to criminal and civil matters, state organs and other matters;[136] the NPCSC is empowered to enact and amend laws other than those which fall within the jurisdiction of the NPC itself,[137] and, when the NPC is not in session, to supplement and amend laws that have been enacted by the NPC (subject however to the "basic principles" in such laws).[138]

As in the previous constitution, the 1982 Constitution confers on the NPCSC the exclusive power to interpret both the Constitution and the laws.[139] At the same time, it extends the power to supervise the implementation of the constitution to the NPCSC (previously this power belonged only to the NPC itself).[140] Thus the NPCSC may annul administrative regulations (made by the State Council) or local regulations (made by local people's congresses) on the ground that they contravene the Constitution or the laws.[141]

In the legal history of the PRC, there were only three occasions on which the NPCSC expressly exercised its power of interpreting laws, whereas its power of constitutional interpretation has never been expressly exercised. The three instances of legislative interpretation were the NPCSC's interpretations on the implementation of the PRC Nationality Law in the HKSAR and in the Macau SAR in 1996 and 1998 respectively, and its interpretation of articles 22(4) and 24(2)(iii) of the Basic Law of the HKSAR in June 1999. In the cases of the first two interpretations, they were more in the nature of supplementary legislation introducing new provisions into the law (rather than "interpretation" in the sense of clarifying the meaning of particular words or phrases in a legislative text and resolving any ambiguity therein). The third interpretation, however, was intended to achieve and did achieve the purpose of indicating (in relation to each of the two provisions being interpreted by the NPCSC) which of two possible meanings that the relevant text can bear represents the correct interpretation of the text.

One leading writer, who is himself an official of the NPCSC, has suggested that these are not the only instances of legislative interpretation in the PRC. In an article

published in 1993 in *Chinese Legal Science* (*Zhongguo faxue*), the leading law journal in mainland China, he identifies 6 other instances of interpretation by the NPCSC, 5 of which occurred in the 1955-56 and the last in 1983.[142] On the first five occasions, the NPCSC made "decisions" (the documents issued were entitled decisions rather than interpretations) that amplified existing provisions in the Constitution or the laws. It should be noted that in the 1950s, the NPCSC did not have any power to make or amend laws, but it had the power to interpret laws. This probably explains why legal norms enacted by the NPCSC to fill the gaps in and thus to supplement existing laws may be regarded as "interpretations" made by the NPCSC. This broad view of the scope of interpretation was also reflected in the 1981 Resolution on interpretation mentioned above, which regards the making of "supplementary provisions" as falling within the legitimate sphere of "interpretation". It should be noted that even as of 1981, the NPCSC had not yet acquired the formal power to make and amend laws.

Let us turn to the 1983 decision of the NPCSC which has been regarded as the last instance of legislative interpretation before the NPCSC issued the three documents expressly called "interpretations" in the 1990s as mentioned above. This was the Decision regarding the Exercise by the State Security Organs of the Public Security Organs' Powers of Investigation, Detention, Preparatory Examination and Arrest. The text of the Decision itself consists of only one sentence, and includes as its annex several relevant provisions of the Constitution and the Law of Criminal Procedure. These provisions vest certain powers in the public security organs, and were enacted before the establishment of the state security organs. What the 1983 Decision did was to provide that the newly established state security organs may also exercise these powers. It can therefore be seen that the Decision is, like its predecessors in the 1950s and its first two successors in the 1990s (i.e. the two interpretations on the Nationality Law) also in the nature of supplementary or amendment legislation.

In the years before the enactment of the new Law on Legislation by the NPC in spring 2000, there was a debate in China about whether legislative interpretation should be abolished and the power of interpreting laws be vested in the courts as part of their adjudicatory function.[143] One view, for example, was that since the NPCSC already enjoys the power of making and amending laws under the 1982 Constitution, its power of interpreting laws is superfluous. If there is a need to clarify the meaning of existing legal provisions or to supplement and elaborate on them, the NPCSC can always resort to legislative amendment. According to this view, there is a distinction between the NPCSC's power to interpret the Constitution and its power to interpret laws. NPCSC's power of constitutional interpretation is worth retaining, because unlike the case of law (which the NPCSC can amend), the NPCSC does not have the power to amend the Constitution itself. The power of constitutional amendment vests exclusively in the NPC; the plenary session of the NPC is only convened once a year, and there may a need to

interpret the constitution when the NPC is not in session. The case for the retention of the NPCSC's power to interpret laws is weaker, because both the power to amend the law and to interpret the law are vested in the NPCSC, and the substance of the two powers overlaps to a significant extent.

However, this argument has not been accepted by the authorities, as can be seen in the content of the new Law on Legislation. The Law affirms the NPCSC's power to interpret laws,[144] although the nature of such legislative interpretation has been re-defined (i.e. formulated in a different way from that in the 1981 Resolution on interpretation). Article 42(2) of the Law provides for interpretation of laws by the NPCSC in two kinds of circumstances:

(a) where it is necessary to further clarity the concrete meaning of provisions in the law;

(b) where new circumstances have arisen after the enactment of a law and it becomes necessary to clarify the basis for the application of the law.

It seems therefore that the range of circumstances to which legislative interpretation is applicable is narrower than as provided fro in the 1981 Resolution, which refers not only to the further clarification of the law but also to the making of supplementary provisions.

The Law on Legislation also introduces for the first time in the legal history of the PRC procedural rules for interpretation of laws by the NPCSC. The state organs which can request an interpretation from the NPCSC are specified.[145] It is provided that the work organ of the standing committee will draft the bill for the interpretation, which will go to the Council of Chairpersons (which decides whether to put it on the agenda of the NPCSC) and then the plenary session of the NPCSC. The Law Committee of the NPC will further consider and, if necessary, amend the bill on the basis of views expressed at the plenary session, and the bill will then be ready for adoption by the NPCSC. When adopted, such interpretations of laws have the same force as laws themselves.

It may be noted that although the making of interpretations of laws by the NPCSC is a legislative act that is subject to the kind of procedural norms applicable to the legislative process, the provisions in the Law on Legislation on the procedures for interpretation are less elaborate than those applicable to the enactment of laws themselves. For example, the latter expressly provide that bills for laws should normally be considered at three separate meetings of the NPCSC before they are voted on (including more detailed examination of the bill by members of the NPCSC divided into separate groups), and provide for the examination of the bills by relevant specialist committees of the NPC. Bills for laws may not only be submitted by relevant state organs but also by ten members of the NPCSC acting jointly. On the other hand, the drafting of bills for interpretation is reserved to the work organ of the NPCSC (normally the

Legislative Affairs Commission of the NPCSC).

It has been pointed out above that the NPCSC has never formally and expressly exercised its power of interpreting laws except on three occasions in the 1990's in relation to Hong Kong and Macau. It remains to be seen whether the formal machinery for legislative interpretation introduced by the new Law on Legislation will result in the power being more actively used in future. The same can be said of the formal machinery introduced by this Law regarding the review of lower level legal norms against norms at higher levels of the hierarchy of legal norms in the Chinese legal order.[146]

As regards such review, the most interesting provision in the new Law is article 90. Under paragraph 1 of this article, relevant state organs may request the NPCSC to review administrative and local regulations on the ground that they contravene the Constitution or the laws. Paragraph 2 goes on to provide that any social organisation, enterprise or citizen may also make a written representation to the NPCSC suggesting that it should review the constitutionality or legality of an administrative or local regulation. Under article 91, representatives of the state organ that enacted the impugned regulation may be requested to attend a hearing.

Although some scholars have produced books and articles on the proper approaches to and principles of statutory construction in mainland China, no authoritative set of rules has yet evolved in this regard. This is understandable given the paucity of acts of legislative interpretation in the PRC legal system, and the fact that most of the judicial interpretations issued by the Supreme People's Court are in effect subsidiary legislation designed to supplement and elaborate on existing laws.[147] A few rudimentary rules of interpretation can now be found in the new Law on Legislation. For example, it is provided that laws will not normally have retrospective effect; where there is inconsistency between two legal norms enacted by the same organ, the one later in time will prevail; where there is inconsistency between a general norm and a specific norm enacted by the same organ, the specific norm will prevail. However, where a new general norm conflicts with an older but more specific norm and it is doubtful how they should be applied, the question shall be determined by the NPCSC. Hence, at least in theory, the NPCSC remains the ultimate interpreter of laws in the PRC.

IV. CONSTITUTIONAL INTERPRETATION AND THE BASIC LAW IN HONG KONG

Under the doctrine of Parliamentary sovereignty, the Parliament in the United Kingdom enjoys supremacy, and the courts do not have the power to strike down Acts of Parliament as constitutional. (However, after the UK's entry to the European Communities in 1972, European Communities law enjoys supremacy over any provision in Acts of Parliament that is inconsistent with it, and as a matter of construction of the

Act and the European Communities Act 1972 enacted by Parliament itself, the UK courts will give priority to European Communities law.) Unlike the UK Parliament, the legislative competence of colonial legislatures is limited, and colonial courts and the Privy Council sitting as the final appellate court from colonies have the power to declare legislative enactments of colonial legislatures as ultra vires and invalid. Whether the colonial enactment is ultra vires is, of course, a question of interpretation of the colonial constitution that confers law-making authority on the colonial legislature and defines the scope and limits of its power.

1. Hong Kong's colonial constitution

Hong Kong's pre-1997 constitution was contained in the Letters Patent issued by the Crown. Before the 1991 amendment of the Letters Patent, although the Hong Kong courts in constitutional and legal theory enjoyed the power to review the constitutionality of local legislation, in practice they never had the opportunity to exercise the power.[148] This was because the Letters Patent was only a crude and rudimentary written constitution for the colony. It did not contain any guarantee of civil liberties and human rights. Neither did it set up any system of division of power as between the colonial government and the metropolitan government. The colonial legislature had extensive law-making powers, but it was (until constitutional reforms began in 1985 --- the year following the conclusion of the Sino-British Joint Declaration on the future status of Hong Kong) an appointed legislature of official and unofficial members, and bills passed by it would not become law until and unless they received the assent of the Governor appointed by the Crown. In any event, the British Government in London retained unlimited power to disallow and hence invalidate ordinances enacted by the Hong Kong legislature.

In the light of this background, what happened in 1991 can be regarded as the first constitutional revolution in Hong Kong --- the second being, of course, the reversion to Chinese rule and the Basic Law becoming into force in 1997 (which I have elsewhere interpreted as a shift in the Grundnorm). In 1991, in an attempt to restore confidence in Hong Kong's future that had been deeply shaken by the Tiananmen incident of 4 June 1989, the Hong Kong Government introduced and the local legislature passed the Hong Kong Bill of Rights Ordinance, which incorporated into the domestic law of Hong Kong the provisions of the International Covenant on Civil and Political Rights (ICCPR) which had already been applied by the UK to Hong Kong on the level of international law. The Ordinance expressly repealed all pre-existing legislation that was inconsistent with it. At the same time, the Letters Patent were amended to give the ICCPR supremacy over future ordinances of the colonial legislature. As the Court of Appeal explained in 1994:[149]

> The Letters Patent entrench the Bill of Rights by prohibiting any legislative inroad into the International Covenant on Civil and Political Rights as applied to Hong Kong. The Bill is the embodiment of the covenant as applied here. Any legislative

inroad into the Bill is therefore unconstitutional, and will be struck down by the courts as the guardians of the constitution.

The Bill of Rights and the corresponding amendment to the Letters Patent inaugurated the era in Hong Kong's legal history of judicial review of legislation on the basis of human rights guarantees. The case law developed by Hong Kong's courts in this new era has been documented by other scholars, and it will not be necessary to analyse it here. It suffices to emphasize five salient facts in this regard:

(a) The Hong Kong courts had already acquired considerable experience in judicial review of the constitutionality of legislation when the Basic Law came into force in July 1997.

(b) Basic principles in such judicial review, such as the principles of rationality and proportionality as enunciated by the Canadian Supreme Court in the famous Oakes case, had already been introduced into Hong Kong case law by the time the Basic Law commenced to operate.

(c) The Hong Kong courts had also, before 1997, adopted the approach to constitutional interpretation advocated by the Privy in cases such as Minister of Home Affairs v Fisher[150] and Attorney General of the Gambia v Jobe,[151] which was to give provisions on rights "a generous and purposive construction"[152] and to avoid "the austerity of tabulated legalism".[153]

(d) The courts were more activist in judicial review in the early history of Bill of Rights litigation, but leaned towards judicial restraint subsequently. To quote my colleague Andrew Byrnes: "After an initial period of expansive rhetoric, reasonably generous interpretations of the Bill of Rights, and a preparedness on the pat of the courts to subject legislative and executive decisions to substantive scrutiny, the trend has been towards a more conservative and parochial approach to interpretation of the Bill of Rights, with an increasing reluctance on the part of the courts to subject the legislature and executive to meaningful scrutiny against the standards of the Bill."[154]

(e) The legitimacy of judicial review in this era was never queried. It can easily be seen that the kind of "counter-majoritarian difficulty" that constitutional theorists encounter in the USA and other liberal democratic states was not relevant to colonial Hong Kong. In the early 1990s, Hong Kong was just beginning its journey of democratization, with the first ever direct election on the basis of universal suffrage to a portion of seats in the legislature being introduced in 1991 (the 1985 and 1988 elections were both on the basis of "functional constituencies" only). Most of the laws that were on the statute looks had been enacted by a legislature that consisted solely of appointed members. In these circumstances, the use by the judiciary (though predominantly expatriate) of international and

comparative human rights jurisprudence to review the constitutional validity of Hong Kong laws could only be a welcomed phenomenon for the local community.

2. The Basic Law of the HKSAR

The Basic Law is a more interesting and much richer constitutional instrument than the Letters Patent (including the Letters Patent as amended in 1991). This is because the Basic Law not only provides for human rights guarantee. Like the constitutions of federal states, the Basic Law sets up a system of division of power between the Central People's Government and the HKSAR Government for the purpose of enabling Hong Kong to exercise a "high degree of autonomy" and to practise the principle of "Hong Kong people ruling Hong Kong". In framing the domestic political system of the SAR, the Basic Law has designed intricate mechanisms of power sharing and checks and balances as between the executive and legislative branches of the SAR Government, intending to strike a balance between executive domination of the political system (the Chief Executive being ultimately appointed by and accountable to Beijing) and the executive's accountability to the elected legislature (a principle emphasized in the Joint Declaration), and between democratization and political stability. And in order to inspire confidence in "one country, two systems" and trust that communism will not be introduced into Hong Kong, the Basic Law provides fairly detailed guidance on the economic and social policies and practices that should be followed in the HKSAR. All these features combine to make the Basic Law a rich and interesting document, and to expand vastly the range of subject matters over which the power of judicial review may potentially be exercised by the courts of the HKSAR.[155] As we see above, constitutional interpretation and constitutional judicial review are inextricably linked. The expanding scope of judicial review in the HKSAR would naturally entail increasing demands on the practice of the art of constitutional interpretation.

We have in a previous section of this article examined the various modalities of constitutional argument. There is no reason why the full array of such armaments cannot be employed in battles of constitutional litigation in the HKSAR. Under the Basic Law, Hong Kong continues to practise the common law system, and these constitutional modalities have been developed in the common law tradition, particularly the American tradition which has the longest experience with constitutional litigation. Indeed, one would not be going too far even if one suggests that these modalities of constitutional argument are universal and transcend the gap between the common law and civil law families of legal systems.

Would, however, the use of originalism as an approach to constitutional interpretation be particularly problematic in the case of the HKSAR, given the fact the Basic Law was largely drafted and adopted by mainland Chinese persons despite the

participation of some Hong Kong members of the drafting committee and the National People's Congress? If the original intent were to be given effect to, does this mean that the Basic Law would have to be interpreted in accordance with mainland Chinese thinking, assumptions, values and interest? If this is the case, will the common law tradition, values and principles in Hong Kong be gradually eroded?

The force of originalism as one of the legitimate and most important modes of constitutional interpretation need not and cannot be denied. The real question is how originalism is to be applied. As discussed above, originalism does not necessarily mean giving effect to the subject intent of the framers and adopters of the constitution. How the constitutional text was understood by members of the community at the time of enactment of the constitution can be an even more important consideration. In the case of the Basic Law, the relevant members of the community would include the people of Hong Kong. Hence how they understood the wording and promise of the Basic Law in the late 1980s and 1990 (the Basic Law was adopted in 1990 by the NPC after several years of drafting and consultation work) does matter. And since much of the content of the Basic Law simply reproduced the text of Sino-British Joint Declaration, how the people of Hong Kong understood the wording and promise of the Joint Declaration in 1984 also matters.

The conceptual distinction mentioned above between "substantive intent" and "interpretive intent" is also instructive in the interpretation of the Basic Law. It is well possible that the mainland Chinese framers and adopters of the Basic Law did not intend that their own ideas regarding the substantive solutions to concrete problems of interpretation of the Basic Law should be binding in future on the courts of the HKSAR. Their interpretive intent might be such that they intended to enable to people of Hong Kong, including their lawyers and judges, to resolve these problems themselves in accordance with canons of interpretation generally accepted in Hong Kong and with the customs and values of the people of Hong Kong. Hence it can be seen that interpreting the Basic Law in the light of liberal and democratic values and common law modes of thinking is not necessarily inconsistent with originalism.

We have also seen earlier in this article that constitutional interpretation and judicial review must be informed by an underlying political theory concerning the nature and purpose of the constitution. In the case of the Basic Law, the relevant theory is undoubtedly the theory of "one country, two systems", which confers on the people of Hong Kong a high degree of autonomy which they exercise subject to the sovereignty of the PRC. The theory would also affirm the maintenance of the existing economic and social systems of Hong Kong, the protection of human rights, and the gradual democratization of the HKSAR as envisaged in the Basic Law itself. There exists however an internal tension in the theory which will not be easy to resolve, and the resolution of which necessarily involves a political choice. Where is the boundary between

Hong Kong autonomy and Chinese sovereignty to be drawn? We can think of a spectrum with the two poles representing the most extreme version of Hong Kong's autonomy (close to independence) and that of Chinese sovereignty (with Hong Kong's autonomy very closely circumscribed by mainland Chinese interests and policies). President Jiang Zemin has once used the phrase "the river water will not disturb the well water" to characterize the mutual respect and accommodation which the balance between sovereignty and autonomy will require. Post-1997 events in Hong Kong such as the continued commemoration of the 4 June incident, the activities of Falungong practitioners in Hong Kong and speech relating to Taiwanese independence in the Hong Kong media can be interpreted as tests of this balance in the early life of the HKSAR.

What about the tests which the courts of the HKSAR have endured? They are represented by the series of cases involving the constitutionality of the Provisional Legislative Council, the immigration control scheme on the migration of children of Hong Kong permanent residents from the mainland to Hong Kong, and national flag desecration law. It remains for this final part of the article to reflect on this drama in the light of the comparative materials in the earlier parts of the article.

3. The drama of constitutional litigation

It has been pointed out above that Hong Kong courts had been exercising the power of judicial review of legislation on human rights grounds before the 1997 transition, and that the Basic Law apparently expands the scope of matters that can become subjects of judicial review. However, nowhere in the Basic Law can any express provision be found empowering the Hong Kong courts to strike down any legislation. Given the fact that judicial review of legislation is unknown in the mainland Chinese system, and in the light of the fact that the NPCSC, in exercise of its power under article 160 of the Basic Law to declare which of Hong Kong's pre-existing laws contravene the Basic Law and cannot therefore survive the 1997 transition, had in its February 1997 Decision on the Treatment of the Laws Previously in Force in Hong Kong struck out sections 2(3), 3 and 4 of the Hong Kong Bill of Rights Ordinance, it is by no means clear that, if the "substantive intent" of the Chinese draftsmen of the Basic Law were to count, the Basic Law intended to confer on the HKSAR courts the power to review legislation.

I have elsewhere argued, on the basis of the text of the Basic Law and the kind of reasoning used in Marbury v Madison, that the judicial review power of the post-1997 Hong Kong courts can be legally justified.[156] Whether it is justified as a matter of political theory is of course a different question. As the Hong Kong polity democratizes, the "counter-majoritarian difficulty" will arise in Hong Kong as it has done in the USA and Canada, particularly if the higher levels of the Hong Kong judiciary continue to be dominated by expatriate judges socially distanced from the Hong Kong Chinese community. Even as it stands, the Hong Kong legislature represents a broad spectrum of

local opinion and includes politicians with strong grassroot support, and it can be argued that the courts should show appropriate deference to and respect for the judgment of the legislature, particularly on matters of social policy. On the other hand, given the fear of many members of the public in Hong Kong that Chinese sovereignty over Hong Kong may lead to a deterioration in human rights, democracy and the Rule of Law, a strong judiciary with the power to check upon not only the executive but also the legislature may be conducive to confidence building and hence receive public support.

A. Ma Wai-kwan

In the light of these considerations, the Court of Appeal's decision in HKSAR v Ma Wai-kwan on 29 July 1997 may be regarded as the Marbury v Madison of the constitutional history of the HKSAR. The case involved a challenge to the legality or constitutionality of the establishment of the Provisional Legislative Council (PLC), and the court considered the jurisdictional issue of whether it could review the validity of an act of the sovereign authority such as the NPC or the NPCSC, as well as the substantive issue of whether the establishment of the PLC was consistent with the provisions and purposes of the Basic Law. The court accepted the Solicitor General's submission that since Hong Kong courts had before 1997 enjoyed the power to review the constitutionality of local legislation (on the basis of the Letters Patent), and article 19 of the Basic Law enables them to retain their former jurisdiction, the courts of the HKSAR have the "power to determine the constitutionality of SAR made laws vis-à-vis the Basic Law".[157]

Although this part of the judgment is obiter, it deals with the most crucial issue in the new constitutional order of Hong Kong, and the proposition it upheld has never been challenged by any party in subsequent cases. In this way, Ma Wai-kwan paved the way for the unanimous decisions of the Court of First Instance, the Court of Appeal and the Court of Final Appeal to strike down that part of the Immigration (Amendment) Ordinance 1997 which denied the right of abode in the HKSAR to illegitimate children whose fathers were Hong Kong permanent residents as being inconsistent with the Basic Law as interpreted in the light of the ICCPR and the Hong Kong Bill of Rights. It should be noted that this particular limb of the controversial decision of the Court of Final Appeal (CFA) on 29 January 1999 had not in any way been affected by the NPCSC's interpretation in June 1999.

The Court of Appeal in Ma Wai-kwan decided on a second proposition, and the rejection of that proposition by the CFA in Na Ka-ling 18 months later was to provoke the great constitutional crisis of February 1999 leading to the CFA's infamous "clarification" of its January judgment (this first crisis was soon followed by the second constitutional crisis of May 1999 prompted by the decision of the HKSAR Government to refer Basic Law provisions on the right of abode to the NPCSC for interpretation). The proposition, originally submitted to the court by the Solicitor General, is that as a

local or regional court, the Hong Kong court has no jurisdiction to challenge or overturn any act of a sovereign authority such as the NPC or the NPCSC.

I believe it is unfortunate that the Court of Appeal accepted this proposition (hereinafter called Proposition 2) in its judgment --- not because I think the substance of the proposition is wrong, but because

(a) it is not necessary to decide this major constitutional point in this case;

(b) the reasons cited by the court to support this proposition are of dubious validity;

(c) the proposition proved to be so controversial that the CFA in Ng Ka-ling felt it necessary to reject it explicitly, and the direct and rather extreme way in which the CFA did this proved to be disastrous.

There are at least two reasons why it was not necessary for the Court of Appeal to decide the point in Ma Wai-kwan. First, as would be clear from reading the judgment of each of the three judges in the court, the court clearly held that given the fact that the "through train" scenario for the transition of the legislature in 1997 had failed to materialise, the establishment of the PLC was not only not inconsistent with the Basic Law but in fact facilitated or contributed positively to the implementation of the Basic Law. If this is the case, then the question of the jurisdiction of the Hong Kong court to review acts of the central authority does not arise --- the question would only arise if the Hong Kong court thinks that such an act is contrary to the Basic Law. Here, the situation is structurally similar to that encountered by the CFA in HKSAR v Ng Kung-siu (the flag desecration case). As the CFA decided that the flag desecration law was not inconsistent with the freedom of expression, it was not necessary for it to consider whether the Hong Kong court has the jurisdiction to review and invalidate a Hong Kong law that has reproduced the provisions of and is designed to implement a national law which the NPCSC has decided to apply to the HKSAR.

Secondly, it should be stressed that no act of the NPC or the NPCSC was being questioned in this case. The PLC was established by neither of these two organs; it was established by the Preparatory Committee for the SAR in pursuance of the 1990 Decision (passed on the same day as the passage of the Basic Law) of the NPC on the Method for the Formation of the First Government and the First Legislative Council of the HKSAR. The real question was whether the Preparatory Committee in establishing the PLC had exceeded the scope of its permissible powers under this NPC Decision of 1990. I have tried to demonstrate in another article that this should be regarded as an issue which is not justifiable before a Hong Kong court.

I have also argued in that article that the doctrine of justificiability provides the true explanation of why a Hong Kong court before 1997 could not question the validity of the

UK government's appointment of a particular person as Governor of Hong Kong, which is an example used by the Court of Appeal to support its reasoning behind Proposition 2. The reasoning is that since before 1997, the Hong Kong court could not question the validity of an act of the sovereign (such as an Act of Parliament or the appointment of the Governor), and since article 19 maintains but does not enlarge the pre-existing jurisdiction of the Hong Kong courts, the courts of the HKSAR cannot question the validity of an act of the NPC or its Standing Committee.

I have suggested in that article that the true reason why pre-1997 Hong Kong courts could not review these acts is not that cited by the Court of Appeal. Acts of Parliament could not be reviewed because of the doctrine of Parliamentary supremacy (so even the UK courts cannot review the Acts). Certain acts of the Crown such as appointment of the Governor could not be reviewed because they belong to those prerogative acts that are not justifiable before the courts (and not even the UK courts can review such acts). But after the landmark decision of the House of Lords in the Council of Civil Service Unions case (1985), it has been established that not all prerogative acts are non-justifiable.

However, the fact that the reasoning used by the Court of Appeal to reach Proposition 2 is dubious does not necessarily mean that Proposition 2 is wrong as a matter of substance. In another article commenting on that part of the CFA's decision in Na Ka-ling which deals with the power of the Hong Kong courts to review whether acts of the NPC or NPCSC are consistent with the Basic Law, I have tried to argue that Proposition 2 is indeed basically correct, subject to some qualifications which I introduce in that article. The reason why Proposition 2 is basically correct has to do with supremacy of the NPC under Chinese constitutional law, which is analogous to the supremacy of Parliament under British constitutional law. This also explains why the mainland Chinese side reacted so sharply when the CFA in Na Ka-ling flatly rejected Proposition 2 and emphatically affirmed its opposite.

B. Ng Ka-ling

In Ng Ka-ling, the CFA also dealt with the interpretation and application of articles 158, 24 and 22 of the Basic Law. I have elsewhere commented on this aspect of the decision in detail and criticized the court's interpretation of articles 158 and 22. Here I would like to reflect on certain other aspects of the decision, particularly in the light of the overseas jurisprudence discussed earlier in this paper. Three questions are worth pondering:

(a) Was it necessary for the CFA to invalidate the link between the certificate of entitlement and one-way exit permit established by the immigration legislation for migrants who came to Hong Kong to exercise their right of abode?

(b) Is the right of abode such a "core right" that restrictions thereof deserve the most rigorous scrutiny normally applicable to the most basic human rights?

As far as question (a) is concerned, I would suggest that the answer is in the negative. This is because the CFA's decision on the "retroactivity point" was sufficient to dispose of the case. All the parties to the litigation in the Ng Ka-ling case had arrived in Hong Kong before the relevant immigration control scheme was enacted on 9 July 1997. The CFA's ruling that the scheme could not operate retrospectively to limit the right of abode of persons entitled to that right who had already entered Hong Kong before the scheme was enacted into law would be sufficient ground for the court to allow the appeal and dispose of the case.

One wonders whether the CFA's decision in Ng Ka-ling (or even the Court of Appeal's decision in Ma Wai-kwan) would have been the same had its attention been drawn to the Ashwander rules developed by the American Supreme Court, which provide as follows:[158]

(1) The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it, nor will the Court formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

(2) The Court will not decide a constitutional question properly presented by the record if some other ground upon which the case may be disposed of is also present.

(3) If a statute is challenged on constitutional grounds, the Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.

As Kommers and Finn point out:[159]

> These rules are really self-imposed canons of restraint. Out of respect for the principle of separated powers, they exhort the Supreme Court to presume the constitutionality of legislative acts, to reach constitutional issues last not first, and never to anticipate a constitutional question in advance of the necessity of deciding it. The rules reflect the seriousness of any judicial decision that interprets the Constitution since there is no way to get around a constitutional decision unless --- short of noncompliance --- the Constitution is amended or the Supreme Court changes its mind.

In the case of Hong Kong, we should perhaps add to the last sentence, "or unless the NPCSC intervenes and makes an interpretation"!

We now turn to question (b) above. The CFA held that the right of abode is a

"core right" because "without it and the right to enter which is an essential element, the rights and freedoms guaranteed can hardly be enjoyed, including in particular the right to vote and to stand for election".[160] And the court should adopt a "generous approach" in interpreting the Basic Law so as to protect this core right and to "scrutinize with the greatest care any submission that Article 22(4) encroaches on that core right."[161]

With respect, it may be doubted whether the right of abode --- which in the context of the case is largely the right to migrate from the mainland for settlement in Hong Kong --- should be elevated to a level as high as well-established basic human rights such as the right not to be tortured, the right of freedom from arbitrary arrest and detention, the right to a fair trial, or the right to freedom of speech and association (and here the court expressly referred to the right to vote and stand for election). The right of persons born and settled in mainland China to migrate to Hong Kong cannot be regarded as a core human right unless one makes the assumption that the human rights mentioned above do not exist in mainland China and hence they have to come to Hong Kong if they are to enjoy these human rights.

It is widely recognised in various parts of the world that population migration and population growth are major matters of public or social policy. On such matters, there is a reasonable case for judicial restraint and deference to the judgment of the legislature. In Ng Ka-ling, the judgment was apparently the unanimous view of both the executive and legislative authorities on both the Hong Kong side and mainland side, and that was the judgment that the CFA attempted to challenge and but ultimately failed to succeed.

C. Chan Kam-nga

It was not the CFA's decision in Ng Ka-ling, but its decision in Chan Kam-nga on the same day, that proved to be its undoing and ultimately prompted the reference to the NPCSC. The question in Chan Kam-nga was how to interpret the ambiguous text of article 24(2)(iii) of the Basic Law: Does it confer the right of abode on all Chinese citizens who are children of current Hong Kong permanent residents ("the liberal interpretation"), or does it limit the right to those born of parents who at the time of the children's birth had already satisfied the requirements article 24(2)(i) or (ii) (which means they were effectively Hong Kong permanent residents at the time of the children's birth) ("the narrow interpretation")? The interpretation can go either way; the judge in the Court of First Instance had chosen the liberal interpretation, and the three judges in the Court of Appeal had chosen the narrow interpretation.

In Ng Ka-ling, the CFA had said that while "a generous interpretation" should be given to the rights of residents provided for in chapter 3 of the Basic Law, "when interpreting the provisions that define the class of Hong Kong residents, including in particular the class of permanent residents (as opposed to the constitutional guarantees of

their rights and freedoms), the courts should simply consider the language in the light of any ascertainable purpose and the context."[162]

In Chan Kam-nga, the CFA chose the liberal interpretation of article 24(2)(iii), because this is its "natural meaning", and because "[t]hat natural meaning gives effect to an obvious purpose of Article 24" --- the purpose of family re-union, and the protection of the family is provided for in the ICCPR. With respect, it should be pointed out that the meaning of article 24(2)(iii) must be recognised as ambiguous, for otherwise the Court of Appeal would not have adopted a construction opposite to that which the CFA inclined towards. As regards family re-union, there is no reason why family re-union cannot be achieved by the migration of the parents from Hong Kong to the mainland to join their children rather than by the reverse movement. Indeed, having given birth to their children in the mainland and then migrating to Hong Kong for settlement, the parents themselves had chosen to be separated from their own children, and they can hardly complain that their human rights are being violated.

But the most crucial point about Chan Kam-nga is that the CFA's attention was never brought to the principle of presumption of the constitutionality of legislation, which as mentioned above recognised as a legitimate principle in judicial review of legislation worthy of adoption in a wide range of cases (albeit not those involving violation of basic human rights and fundamental freedoms).

After examining the American jurisprudence of judicial review, three prominent South African scholars of constitutional law concluded that there are certain lessons to be drawn for the future interpretation of the new South African constitution. The first guideline they formulated is as follows:

> *If in doubt, defer to legislative determinations.* The first prong of a system of judicial review must engage the problem of uncertainty in the text. If there is any uncertainty in the meaning of a constitutional provision, as there inevitably will be, however diligent the framers are and however detailed the language is, the courts must defer to the legislature.[163]

One wonders whether the decision in Chan Kam-nga would have been different, and the subsequent travail avoided, if the jurisprudence of the presumption of the constitutionality of legislation had been seriously addressed by the learned judges in this crucial case.

D. Conclusion

But history is made up of contingent events. Things might have been very different if just one more point had been considered in one case, and there are an infinite number of routes which history could have taken but has not taken. And we are the product of history and constrained by it. But we are not prisoners of history, nor its

victims. By reflecting upon our past, we can learn from it. We learn from both our achievements and our failures, but more from our failures. There is also much to learn from others who have gone before us in the same field, as this article attempts to demonstrate. Hong Kong is a latecomer to the world of constitutional interpretation and judicial review, and she has only started the journey of her constitutional history as an autonomous part of China. The child is learning to walk; she stumbles, she falls, she rises again; she staggers, and she then moves forward with greater confidence and more hope. So hope abides; and learning never ends.

(This is a first draft only; endnotes have not been completed.)

Resolution of Disputes between the Central and Regional Governments: Models in Autonomous Regions

Yash Ghai

Introduction

The scope of the paper

The title given to me for my paper assumes that there are models of dispute settlement in autonomous areas. My own limited research suggests that there are no 'models', if by that is meant some regularity and pattern, or a desirable system. The rules and institutions for dispute settlement are contingent upon a number of historical, political and legal factors which vary considerably from one autonomous area to another. Thus autonomous areas within a particular part of the world or sharing the same political or legal traditions may have similarity in their dispute settling mechanisms (for example the three Nordic autonomies of Åland, Greenland and Faeroes exhibit certain common characteristics). I have not undertaken a search for a 'model'; instead I focus on a comparison of the system in Hong Kong with two other autonomies. I make the comparison with reference to the choices that are available in designing dispute resolution systems, such as mediation, arbitration or litigation, as well as the broader political context which affect the frequency of disputes (e.g., the method used for distributing or dividing powers), and the likely preference among the methods (e.g., whether the overall system is democratic or authoritarian).

Defining autonomous regions

In this paper, I define an autonomous region as a region which has a substantial measure of autonomy within a state which is essentially unitary. There may be more than one such region in the state. The distinction I draw here is between autonomy and federalism—in the latter, self-government is, as it were, generalised and extends to all regions of the state. This distinction may be important for the study of norms, institutions and procedures for dispute settlement, for in autonomy a region confronts a whole state, clothed in the full strength of its sovereignty, while in a federation regions form a sort of trade union with common interests, and thus enhanced in their negotiating position, confront the centre in a state of divided sovereignty. The distinction does not mean that the institutions and procedures that are employed in a federation cannot be used with advantage for regional autonomy. The 'sovereign' centre may, however, be reluctant to adopt some of these institutions and procedures, in order to emphasis the subordinate position of the region (and I will argue that this is the Chinese position regarding Hong Kong) , but this is not the case everywhere (and certainly not in Finland in relation to Åland, which is one of my sources of comparison). The distinction may also begin to lose some of its salience in federal systems where a particular region may acquire greater power than other regions (as in Quebec) or a self-standing autonomous arrangement may be tied in to an existing federal system (for which Canada again provides us an example in the aboriginal territory of Nunavat).

Åland Islands

But in order to achieve a sharper focus I have taken as my points of comparison two examples of regional autonomy. The first, as indicated above, is Åland, which consists of a series of islands in the Baltic. It has a small population, of just under 30,000 people, but it is a much studied autonomy, being one of the earliest of its kind, and generally considered to be a success. For a long period it was part of the Swedish empire, and was administered for a substantial part of that period as an adjunct to Finland. When Sweden lost Finland to Russia in the early part of the 19th century, Åland went with it, being ruled as a component of the Grand Duchy of Finland. But on the grant of independence to Finland by the Soviet Union in 1917, the people of Åland staked out a claim to be re-joined to Sweden, which it looked upon as the motherland. The people of Åland are Swedish speaking and were afraid of losing their identity in a Finland with a different language and flushed with Finnish nationalism after so centuries of external rule. They had the support of Sweden in their claim, but in the end, in the sensible Nordic style, the dispute was referred to the newly established League of Nations which duly delivered a Solomonic judgment, under which sovereignty over Åland would be stay with Finland, but with sufficient autonomy for the Åland people to maintain their Swedish language and culture (and control over natural resources), which would also be declared a neutral, demilitarised zone (to assuage Swedish anxieties of the future military uses of these islands). So in 1921 Finland legislated to implement autonomy for Åland, the centrepiece of which were the guarantees worked out under the auspices of the League of Nations.

Puerto Rico

The second example is Puerto Rico, located in the Caribbean. The US acquired Puerto Rico in 1898, as spoils of victory in a war with Spain. For the major part of the first 70 years the US ruled it as a colony (euphemistically designated as an 'unincorporated territory' in the language of the US Constitution). In 1900 some local representative institutions were set up, but control remained firmly vested in a Governor sent from the US and responsible to Washington. A very large part of the population (which today amounts close to 4 million) are descendants of Spanish settlers, who have maintained the Spain language and culture, and a significant measure of civil law. In the dying days of the Spanish empire Puerto Ricans had extracted a charter of autonomy from its distant rulers. The sense of identity that the autonomy had facilitated sharpened under the even more alien rule of the US. In 1947 the US agreed to arrangements for the election of a Governor from and by the residents of Puerto Rico. But their struggles for self-government did not bear fruit until 1952, in the global era of decolonisation, when the US agreed to substantial autonomy and a constitution for Puerto Rico drawn by a constituent assembly elected by its residents. The exact scope of the autonomy, and Puerto Rico's relations with the US, remained defined in the then much truncated colonial legislation, the Organic Law, now renamed the Federal Relations Act, itself embedded in the doctrines of the US Constitution under which sovereignty still lay with the US. Attempts to amend or repeal the Federal Relations Act have failed in the face of the opposition in the US Congress, although in practice Puerto Rico enjoys substantial autonomy, greater in some respects than states in the US federation.

Comparing Hong Kong with Åland and Puerto Rico

There are a number of reasons why comparisons between autonomies granted to Åland, Puerto Rico and Hong Kong might be instructive. There are a number of similarities and differences, which help us to explore the distinctiveness of each as well as the commonalities. In all cases, the region is only a minute part of the state, with a very small proportion of the population. In all cases, 'sovereignty' remains with the centre (the case of Åland comes closest to shared sovereignty). Linguistic distinctions are fundamental in Åland and Puerto Rico, and not unimportant in Hong Kong. In Puerto Rico and Hong Kong there are issues of bilingualism of the legal system, but also the interaction of legal systems with different traditions. In all cases there has been some external involvement—in Åland in the ways described above, in Hong Kong first with the UN dropping the then British colony from its list of colonies, and then with Britain's role through the Sino-British Joint Declaration and the Joint Liaison Group, and Puerto Rico also dropping out of the purview of the UN on achieving 'self-government' in 1952. All three have concepts similar to Hong Kong's right of abode or permanent resident, as a way to emphasis autonomy. In Åland and Hong Kong the same instrument serves to establish local institutions and the relationship with the centre, while Puerto Rico makes do with two separate instruments. On a broader front, the economic systems in Åland and Puerto Rico follow the same principles as on their mainlands, unlike Hong Kong. In the former two, both the region and the mainland are democratic, with strong traditions of legality, while in the case of Hong Kong, neither part is democratic. The relationships in the first two are consensual (although that is not how they originated in Åland, where the League of Nations ignored the wishes of the islanders) while in the third they were imposed. Consequently referenda have played an important role in reaching decisions in the former, unlike in Hong Kong.

Not all of these factors and distinctions are immediately relevant to dispute settlement. But I believe that dispute settlement mechanisms should be located in a broad context if we are to understand their dynamics. For example in a non-democratic system, strong legal guarantees of regional autonomy may be less effective than weak legal guarantees where the region and the centre are both democratically constituted. I therefore make some comparison which go beyond the strictly legal and constitutional.

Importance of dispute resolution mechanisms

The obvious importance is that an autonomy system which does not have an effective mechanism to resolve disputes will shore up difficulties, and is likely to collapse in due course (the separation of Bangladesh from Pakistan can be explained on the inadequacy of dispute resolution mechanisms). Autonomy systems are normally complex and complicated. They divide public powers between different levels of government. They allocate financial and other resources to regions. They may establish parallel systems of courts. Normally these lead to competition between governments for power, resources and jurisdiction. Moreover, since the laws and policies of both sets of governments impact on the people, their welfare depends on a clear understanding of jurisdiction and responsibility. Disputes are bound to arise.

What is undesirable is not, as is some times imagined, the frequency of disputes, but the failure to recognise or deal with them. Disputes which are satisfactorily resolved, or at least managed, since resolution is often too ambitious a goal, help to strength the overall system. Fair procedures, which at least provide for some parity between governments, are necessary if dispute resolution is to strengthen unity or at least a sense of common purpose. The rules for dispute resolution in Åland are generally considered to be fair and this has helped to reconcile Åland to Finnish sovereignty, while the perceived unfairness whereby the Standing Committee will give interpretations of the Basic Law at the behest of the Chief Executive of the HKSAR has reinforced the alienation of many in Hong Kong from the system of (weak) autonomy.

Some forms of dispute resolution help to clarify the constitutional framework for the exercise of autonomy and the relations between governments, and thus reduce disputes in the future. In other cases, the mechanism of dispute resolution, especially when affected by the courts, can assist in the development of the framework and thus introduce some flexibility which may be precluded by the difficulty of using the formal amendment procedure (the courts may also introduce inflexibility, for the same reason—this is some times a complaint which Puerto Ricans make against the jurisprudence of the US Supreme Court as regards their relationship to Washington). In relation to Hong Kong, it can be argued that the interpretation by the Standing Committee of the NPC of the right of abode and the subsequent elaboration of it by the Court of Final *Appeal (Lau Kong Yung v Director of Immigration* [1999]3 HKLRD 778) has reduced flexibility, which the earlier Court of Final Appeal decision (*Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315) had sought to achieve.

The formal mechanisms for dispute resolution also provide us a good insight into the nature of autonomy, whether, for example, it represents a hierarchy between governments or a more co-ordinate relationship; and whether the relationship between them is essentially bureaucratic or political. I would argue that the relations between Åland and Helsinki are more political than between Hong Kong and Beijing, which are largely bureaucratic, while Puerto Rico falls in between (with Puerto Rico trying to make them political while Washington relegates them to the bureaucratic). It is often assumed that it is in the interest of the region to push the dispute to the political sphere, but this cannot be determined a priori—if the system is not given to democratic values, there may be better accommodation of regional concerns at the bureaucratic level.

Avoiding disputes over legislative powers

Even if dispute resolution can have some healing qualities, no one sets out to proliferate disputes and conflicts. Both Åland and Hong Kong have mechanisms, principally of prior consultation, to avoid disputes. Examples here are taken from Åland. One way to minimise conflicts over legislation is a provision whereby the national authorities must obtain Åland's views on any legislative proposals 'of special importance to Åland' (s. 28). Before the national government or President issue regulations that 'only concern Åland or that otherwise are especially significant to Åland', the government of Åland is to be consulted (s.33). Frustration in Åland at its inability to pass legislation for want of

competence can be assuaged by another provision which enables it to present proposals on national matters to the national legislature via the national government (s. 22).

The potential of conflicts/disputes

But some times parties may chose to adopt systems which are more likely to generate disputes than not—for other good reasons. For example, in both federal and autonomy systems, there is now much more emphasis on what is called 'co-operative' relationships than before. This is reflected both in the ways that powers are divided between different levels of government and in institutions that articulate them. In older systems, powers are vested in one government exclusively, so that each power belongs to one or another government. In the newer systems, powers are shared in relation to many subjects; there may be a large list of concurrent powers. Some times a topic may be disaggregated (e.g., agriculture divided into training, marketing, research, subsidies, etc) and different parts vested in different governments. In both these cases there are likely to be more disputes as to jurisdiction and the validity of legislation than if powers were exclusively vested. There is also likely to be need for greater consultation and co-operation, which may both smooth the path to policy and implementation but also increase the scope for differences.

In principle, Åland and Hong Kong fall into the older category. In Åland there is an exclusive list for the region and an exclusive list for the centre. There is no provision for residual matters, but a somewhat complicated formula that may deal with them. After the enumeration of Åland's powers, the Act says: 'other matters deemed to be within the legislative competence of Åland in accordance with the principles underlying this Act' (s. 19(27). A similar provision appears at the end of the national list in favour of national competence (s. 27(42)). An example of a regional power not explicitly provided for is the holding of a referendum; Åland passed a law for a referendum on whether Åland should become a member of the EU in the event that Finland did so. The Åland Delegation (for which see below) had doubts about the competence of the Assembly, but the Supreme Court upheld it as it was only a consultative or advisory referendum.

However, this relatively neat division is now subject to potential disruption due to respective responsibilities of Åland and Finland vis a vis the European Union. Finland's accession to the EU does not disturb the division of powers between Åland and Finland, and so the implementation of EU legislation is the responsibility of Åland in so far as it concerns its powers—but as far as the EU is concerned, the implementation is the responsibility of Finland, not Åland. Finland's membership of the EU certainly has increased interaction between Helsinki and Åland. It has been suggested that the Finnish President might veto Åland legislation which contravenes EU law, but the author (a senior official of the Ministry of Justice) who made this statement says that the President 'would hardly do so in situations which are open to various interpretations. Furthermore, the veto of the President of the Republic is of no use if a directive is not implemented at all by Åland. This leads to the conclusion that the only way to solve these problems is to keep up good 'speaking terms' between the State and Åland' (Palmgren 1997: 95).

Hong Kong does not suffer from the overlap of responsibilities with the centre. The distinguishing feature of its autonomy ('one country two systems') is the separation

of its market oriented economic and social systems from those on the mainland, not integration. Even the currency is different, and the fiscal and tax systems are kept separate. So there are few jurisdictional problems that arise from the Basic Law. Nor, in general, is there need for co-ordination of policies. These factors reduce the scope of disputes. But there are at least four factors which can complicate matters.

The first is that there is no list of Hong Kong powers—originally a list was envisaged and the first draft of the Basic Law included it. But the enterprise was abandoned after it was realised that it would be a huge list, since most powers were to rest with Hong Kong. It would have made more sense to list instead the powers of Central Authorities, since that would be a small list. But the mainland authorities were unhappy with the notion that in this way residual powers would lie with Hong Kong, for to them this seemed more appropriate for a federal system. So we are left to infer Hong Kong's powers somewhat indirectly, and this leaves scope for varying interpretations (as happened in the right of abode cases).

The second problem is that while 'foreign' affairs are the responsibility of the Central Authorities, Hong Kong has been delegated significant 'external' affairs, including maintaining relations and concluding treaties with foreign states, regions and 'relevant' international organisations in the 'appropriate fields' (art. 151). The distinction between 'foreign' and 'external' is not clear, at least in the English version of the text, nor is the meaning of 'appropriate fields'.

The third difficulty is that even when it is clear that a subject is vested in Hong Kong, the precise scope of that subject is not clear. This is most obvious in the case of provisions about the economy. For example, Hong Kong has the power to impose taxes, but it must follow the 'low tax policy previously pursued in Hong Kong as reference' (art. 108); while Hong Kong is free to regulate its currency, the Hong Kong dollar must remain controvertible (art. 112); and Hong Kong's powers to provide social welfare are constrained by requiring it to base them on the 'previous social welfare system' (art. 145).

Finally, and most importantly, because the very status of the Basic Law has been thrown in doubt by the most recent CFA decision on the right of abode, it is no longer clear how self-contained the Basic Law is as the means of dividing power between Hong Kong and the Central Authorities. The Hong Kong government itself has taken the view that the PRC is the 'sovereign' of Hong Kong, and can do what it likes in Hong Kong. (this view was advanced by the government, and accepted by the Hong Kong Court of Appeal, in the first constitutional case after the transfer of sovereignty, *HKSAR v Ma Wai Kwan David* [1997] HKLRD 761). If the plenary powers of the NPC in the PRC constitution prevail over the Basic Law, then of course there is, properly speaking, no division of powers between Hong Kong and the Central Authorities. The only dispute then will be whether Hong Kong can validly make law on some subject; no one may question the applicability of PRC law if it is intended to apply in Hong Kong.

Puerto Rico suffers from a similar conundrum. While Puerto Rico was granted the power to elect the Governor in 1947 and to draft and adopt its own constitution in 1952, its legislative powers are still based on the Federal Relations Act (of the US Congress). The Puerto Rican Constitution vests 'the legislative power' in the Legislative Assembly, without more, but to understand the scope of this legislative power, we have to turn to the Federal Relations Act. It provides that 'the statutory laws of the United States [i.e., federal legislation] not locally inapplicable....shall have the same force and effect in Puerto Rico as in the United States' (s. 9). (The section expressly exempts Puerto Rico from the application of federal revenue laws). This might seem to establish the principle that Puerto Rico enjoys the same status for this purpose as any state of the US federation, so that in matters not reserved to the federal government, Puerto Rico's legislature may make any laws. This was the impression that the US gave to the UN when it secured the removal of Puerto Rico from the list of colonies under UN supervision. And this is the preferred interpretation of Puerto Rico, which regards the arrangements leading to the adoption of the Puerto Rican Constitution as constituting a compact between itself and the US on self-government. In practice, Puerto Rico is left free to legislate on matters which belong to the jurisdiction of states in the US, but the US courts have held that the US Congress may legislate on any matter for Puerto Rico, and that any federal law may override the Puerto Rican constitution (*US v Quinones* 758 F2nd 40 (1985). What is 'locally inapplicable' is also finally determined by the US courts. The autonomy of Puerto Rico would therefore seem to depend on the self-restraint of the US Congress. I understand that there has not been a major problem here in recent years, but Puerto Ricans consider the reform of the Federal Relations Act essential to secure guarantees of autonomy—and necessary to fulfil undertakings of the US to the UN. Indeed, it may be that secure guarantees would require the amendment of the US Constitution, which is certainly not on the cards.

Role of Regional Governments in Safeguarding Autonomy

I should mention at this stage that my paper deals only with disputes between the national and regional governments. None of the systems I am considering here restricts access to courts or other tribunals to governments only—as the Papua New Guinea (PNG) did under the 1976 Organic Law on Provincial Government. The reason that in PNG a large part of the dispute resolution machinery, including judicial review of national or provincial laws, was restricted to governments was to prevent the proliferation of disputes and burdening courts. It was also to prevent 'excessive legalism' which it was feared might otherwise result. The PNG system depended heavily on inter-governmental negotiations for the development and operation of autonomy, and there was anxiety that threats of private litigation might hamper agreements between governments. Private parties were free to go to courts for violations of constitutional provisions other than the division of powers between the different levels of government.

Another assumption of the restriction on private challenges to legislation in PNG was that the governments would be alert to infringements of their autonomy and would take appropriate measures to safeguard autonomy. Puerto Rican and Åland legislatures and governments have been very jealous of their autonomy and take vigorous steps to develop and safeguard it. Åland has been particularly successful, and since its autonomy

was first established in 1921, it has persuaded Helsinki to increase both the substance of autonomy and the legal guarantees for it. In Åland , a key role in preserving autonomy is assigned to the democratically elected Legislative Assembly (in entrenchment of autonomy, in the appointment of the Governor, who represents the National Government—the President appoints after consultation with Speaker of Assembly, if no consensus, then from 5 names given by the Assembly, s. 52, the Speaker is consulted before the Governor is dismissed, s. 54; the Assembly elects two members of the Åland Delegation (for which see below), two being appointed by the National Council of State, and the Chair by the President after agreement with the Speaker of the Åland Assembly, s. 55, in practice the governor acts as the Chair; the right to comment on certain types of legislative proposals before the national legislature, e.g., conscription s. 12, the right to request the introduction of legislative proposals before the national legislature on topics outside its own competence, s. 22; the Assembly decides on electoral laws, within the general principle of universal and equal suffrage, and the relationship between the legislature and the government in Åland.) Because the Åland government is responsible to the Assembly, it has had to vigorously defend autonomy.

In Hong Kong the situation has so far been quite different. The Hong Kong government has rarely, at least in public, made a pitch for regional autonomy (nor were the Basic Law provisions on the executive designed to make it the champion of autonomy). In the *Ma* case referred to earlier, it was the government of Hong Kong which advanced the argument that the PRC was the sovereign of Hong Kong and consequently its acts could not be challenged. It was the Hong Kong government which criticised the CFA decision in *Ng Ka Ling* when the CFA tried to establish a broad juridical base for Hong Kong's autonomy and to declare its jurisdiction to supervise the legal boundaries between Hong Kong and the Central Authorities as established in the Basic Law. It was the Hong Kong government which initiated the move for the reinterpretation of articles 22 and 24 of the Basic Law, knowing full well that it would undermine the moral and legal authority of the CFA, which alone had the capacity to stand up for Hong Kong's autonomy. Efforts to maintain the autonomy of Hong Kong have come almost entirely from private groups, among whom I include certain sections of the Legislative Council; after a valiant attempt, the judiciary has thrown in the towel. Thus from Hong Kong's perspective, the topic of dispute resolution between the governments of Hong Kong and the PRC is relatively unimportant. In fact it can be said that the executive, and to some extent, the legislature in Hong Kong was designed to prevent disputes with the centre, so great is their dependence on the Central Authorities.

Mechanisms and Institutions for Dispute Resolution

It is only in Åland that there is a formal procedure for dispute settlement. For Puerto Rico it is assumed , given the US legal culture, that the primary instrument for dispute resolution would be the courts. In Hong Kong, as we shall see, the National People's Congress is the final arbiter of disputes. Of course it should be recognised that formal procedures do not exhaust the range of possibilities of ways of finding accommodation—preventative measures like requirements for consultation, which exist formally in Hong Kong's Basic Law, need to be studied as well. There are also informal ways of discussing and resolving differences—the Puerto Rico Commissioner to the US, who sits in but

cannot vote in the US House of Representatives, performs important liaison and lobbying functions which should pave the way for political settlements. But to set the stage for comparative analysis, as well as to explore the varieties of dispute resolution mechanisms, it is useful to first give an account of the provisions in Åland.

Åland Delegation

The principal institution is the Åland Delegation. It consists of 5 members: two each are appointed by the national government and the Åland Assembly. The chair is the Governor or another person appointed by the President of Finland, after agreement with the Speaker of the Åland Assembly (s. 55). The Delegation, which meets either in Åland or Helsinki, operates in the Swedish language. Its functions, to facilitate the smooth operation of the autonomy, are varied—supervision of the legality of Åland legislation, decisions on allocations of revenue to Åland, giving advice to Åland and national governments, and dispute resolution. Members of the Delegation act in their individual capacities, and for the most part they operate by consensus. It happens not infrequently that a member appointed by the national cabinet supports the legality of a law while a member appointed by the Assembly opposes it. The Delegation gives reasons for its decisions for the guidance of authorities; and the decisions are published in the Gazette and annually, in a special publication.

Supervision of legality of legislation

Copies of the Åland legislation are given to the Delegation and the national Ministry of Justice. In the first place the legislation is examined by the Delegation, which forwards its opinion on legality to the President via the Ministry of Justice, which may attach its own opinion. The President has the power to annul the legislation, but he may only do so if he obtains an opinion of the Supreme Court. The President is not bound by the opinion of the Supreme Court, but by convention he would not annul a law unless the Supreme Court advised him/her that it exceeded the competence of the Assembly. There is a similar convention that the President would not refer the legislation to the Supreme Court unless the legislation was declared by the Delegation to be outside Assembly's competence, although if the Ministry of Justice disagreed with the opinion of the Delegation, it might recommend to the President that the opinion of the Supreme Court be sought. I understand that on average, about 4 or 5 laws are held to be unconstitutional annually, out of about 35 laws.

There is no formal provision for the review of national legislation if it has encroached upon the legislative competence of the Assembly. The Delegation and the Supreme Court may have to comment on the scope of national legislative power on a review of Åland legislation, but there used to be no direct review of national legislation (achieving results similar to that in the Swiss federation). Instead, national legislative proposals were referred to the parliamentary Select Committee for Constitutional Law, for scrutiny of compliance with the Åland Autonomy Act. Consideration was given last year, when the Finnish constitution was reviewed, to provide for a constitutional court to review national legislation, but it was rejected in favour of the older system. However, the courts are now required to give primacy to national constitutional laws in application of legislation—they may not declare a law unconstitutional but they may not enforce a

provision which is unconstitutional (s. 106 of the Constitution). Whether the Åland Autonomy Act qualifies as constitutional law is unclear.

It should also be mentioned that the role of the President in reviewing Åland legislation, as in other decisions regarding the autonomy of Åland, is based on his/her discretion. Ordinarily the President is required to act on the advice of the Cabinet, but a special exception is made in respect of presidential functions in relation to Åland (s. 58). This puts the President in the role of an umpire between the competing claims of the central and Åland governments: s/he is not merely an agent of the central government. In this regard s/he is well qualified to resolve disputes between the two governments.

Supervision of the legality of Hong Kong legislation

In Hong Kong the primary responsibility for the supervision of legality of Hong Kong legislation on the division of powers lies with the Standing Committee of the NPC. All laws passed by the Legislative Council are transmitted to the Standing Committee. If it considers that a law is not consistent with the Basic Law provisions concerning the responsibilities of the Central Authorities or their relationship with the HKSAR, it *may* invalidate the law (art. 17). The use of 'may' in the English and Chinese texts suggests that the Standing Committee has the discretion to let the law stand despite the inconsistency. This seems similar to the discretion of the President in Finland who does not have to accept the opinion of the Supreme Court that an Åland law exceeds Åland's competence (a conclusion also supported by the other language of s. 19). But the view of the Ministry of Justice is that the President has no discretion but to annul a law which exceeds Åland's competence (Palmgren 90).

Unlike the Åland Delegation, the Standing Committee also controls the application of national laws in Hong Kong. National laws can apply in Hong Kong only if they are listed in Annex III of the Basic Law. Apart from an initial list of national laws applicable in Hong Kong contained in the Annex, the Standing Committee decides on the extension of national laws to Hong Kong. These laws have to be on matters outside the autonomy of Hong Kong (art. 18). However, if there is unrest in Hong Kong which endangers national unity or security and which Hong Kong authorities cannot deal with, the Central Government may extend national emergency laws to Hong Kong.

In reviewing Hong Kong legislation and in extending national laws to Hong Kong (except the emergency laws in the circumstances mentioned in the previous paragraph), the Standing Committee has to consult, in addition to the Hong Kong government, with the Committee for the Basic Law ('CBL'). The idea for the CBL seems to have come from a committee in the Greenland Home Rule Act (conferring autonomy on Greenland, which is part of Denmark), which in turn drew upon the Åland Delegation. But there are important differences between the CBL and the Delegation. The Delegation is an independent and freestanding body, while the CBL is a committee of the Standing Committee. Although in each case the members are supposed to act in their individual capacity, given the control in China of the Communist Party, the mainland members may have some difficulty in establishing their independence. Secondly, the membership of the Delegation is more democratic, in that the regional members are chosen by the Assembly,

while the Hong Kong members of the CBL are appointed jointly by Chief Executive, the Chief Justice and the Speaker of the Legco. The role of the CBL is advisory or consultative, that of the Delegation is more varied. The Delegation gives reasoned decisions which are published; so far the opinions of the CBL have been secret. The language of the Delegation is Swedish, the language of Åland (Swedish being also the language of correspondence between Åland and the national government); the language of CBL is Mandarin, not English or Cantonese. Altogether, the Delegation plays a much more important, independent, and open role in the operation of the autonomy of Åland and in regional-central relations than the CBL does in relation to Hong Kong. These differences provide us with a glimpse into the nature of two autonomies.

Supervision of the legality of Puerto Rico's legislation
In 1900 when civilian government was first established in Puerto Rico, and an elected local legislature appointed, it was provided that 'all laws enacted by the Legislative Assembly shall be reported to the Congress of the United States, which hereby reserves the power and authority, if deemed advisable, to annul the same' (sec.31). Later the veto power was transferred to the Governor (then a US appointee), but the veto could be overturned by a two-thirds vote. Nevertheless, the US President retained unlimited veto. This veto was used by President Truman in 1946 to annul legislation which restored Spanish as the language of instruction in schools. The veto typified the subordination of Puerto Rico and caused great resentment. The veto was abolished in 1952 when Puerto Rico obtained its own constitution with self-government ('Commonwealth'). As indicated earlier, the US Congress can overrule Puerto Rican legislation by its own legislation. But today the principal method for the supervision of Puerto Rican legislation is through the courts.

The Role of the Judiciary in Dispute Resolution

In federal or autonomy systems where the common law applies, courts play a primary role in dispute settlement. The function of courts is to maintain the constitutional and other laws, and to resolve conflicts between laws. Central to this function and the safeguarding of autonomy is a degree of entrenchment of autonomy provisions , so that ordinary laws in derogation of them can be invalidated. Courts generally resolve disputes between governments through litigation, but constitutions in common law states tend now to provide for the advisory jurisdiction of courts. The advisory jurisdiction can be used to resolve disputes, or at least to get an authoritative interpretation of the law in dispute. A good example is the reference to the Supreme Court of Canada by the Canadian Government on the right of Quebec, whether under national or international law, to secede unilaterally from Canada. The ruling by the Court did not end the political controversy, but at least it clarified the legal framework within it must be resolved.

Although a great strength of the common law is supposed to be its judicial system, a number of common law states, while accepting the ultimate authority of the judiciary in the resolution of disputes, have preferred to rely on mediation and arbitration before permitting resort to the courts, on the grounds that early resort to courts may harden attitudes and sharpen conflicts (as prominently in the 1976 PNG Organic Law and

subsequently in the 1996 South African Constitution). One can interpret the Åland provisions where matters go to the Delegation before reference to the Supreme Court in this light.

In none of the examples studied in this paper is it easy to apply the common law rules for the judicial resolution of inter-governmental disputes. Finland did not provide for judicial review of legislation. However, appreciating the importance of the umpiring role of an independent judiciary, the autonomy legislation provided for references to the Supreme Court as a way around the traditional rule prohibiting judicial review of legislation. It is generally accepted that the Supreme Court has played an important role in maintaining the balance of the autonomy system, and although it is a national court, as indeed all judicial bodies in and for Åland are, there is wide acceptance of its impartiality and competence.

The last statement points to the dilemma about the role of the judiciary in the Hong Kong system. Despite the more restricted role of the judiciary in Finland, it was possible to prescribe an important role for the courts, although all courts are national. Åland and Helsinki share a common legal tradition and culture in which judges are neutral and independent and accepted as such by all parties. Similarly in relation to Puerto Rico, despite originally a different Spanish tradition, the US legal culture has influenced Puerto Rico, and despite some reservations in Puerto Rico about the record of the US Supreme Court (see below), there is a general acceptance of the legitimacy of the judicial role.

Such a general role for the judiciary was not possible in Hong Kong, despite its own tradition of the common law, and an active role of the judiciary in settling political disputes, at least since 1990 when the Bill of Rights became law. The reason lay not in Hong Kong, but in the PRC. Unlike the older civil law tradition, not only was there no scope for judicial review, there was none for the separation of powers, for the truth is that the PRC system was less civil as it was Leninist. In neither of the other two case studies was there such a clash of political philosophies and legal traditions between the region and the centre as in China-Hong Kong. Neither the PRC nor the Hong Kong approaches could be ignored. The Åland type of solution where the civil law system was adapted to incorporate an large element of the judiciary into dispute resolution was theoretically possible, but unfortunately there was the lack of trust in the competence or impartiality of the PRC judiciary, so it could not serve the role that the Finnish Supreme Court was able to play in relation to Åland's autonomy (and indeed it plays no role in the Basic Law system). But more fundamentally, the Åland solution was not possible because the PRC authorities wished to maintain a secure control over Hong Kong, which would be problematic if the final authority over dispute settlement and interpretation passed to an independent judiciary. But the Hong Kong system could not be ignored either, for there was a wide spread feeling that capitalism (which some regard as the raison d'etre of 'one country two systems') could not function without a strong system of legality. The solution that emerged was to provide for the rule of law so far as the economy was concerned, but to subordinate the political system to a different regime. Some of this is reflected in the shape of article 158, on which I will say little since there are several papers on it; and some in other parts of the Basic Law.

Some doubted, not without reason, whether this form of hybridisation which marries two different traditions and fragments the rule of law could guarantee legality even where the PRC thought it important—the market economy. The ultimate authority of the Standing Committee for the interpretation of the Basic Law had the potential to undermine the moral and legal authority of the Hong Kong judiciary. It was hoped that conventions might develop to restrict the jurisdiction of the Standing Committee under article 158, leaving it to the Court of Final Appeal to develop the jurisprudence of the Basic Law. Unfortunately the request of Hong Kong's Chief Executive for the intervention of the Standing Committee (and the statement of a senior government official that the government had the right to go to the Standing Committee for interpretations of the Basic Law 'before, during or after' litigation in the Hong Kong courts) put paid to those hopes. The broad jurisdiction that the Standing Committee may assume and the endorsement of that breadth by the CFA means that there is no appropriate framework for the resolution of inter-governmental disputes. Instead article 158 promises to become the framework for resolving intra-Hong Kong disputes, as it did in the only interpretation so far when the Hong Kong government pitted itself the Hong Kong judiciary. There is now little prospect that the mighty and monolithic political system of the Mainland would be counter-balanced by the judiciary, the only really independent official body in the HKSAR.

To return briefly to Puerto Rico, the US Congress claims, constitutionally, complete powers but the formula specifying which US federal laws apply is vague and has been used by the Puerto Rico Supreme Court to restrict the application of federal laws, and used by the US Supreme Court to extend application. But because the US Supreme Court is the final judicial body, it meant that more US laws were applied than may have been intended. Appeals go from the Puerto Rican courts to the federal courts, and attempts to carve out an area of exclusive jurisdiction for the regional courts have so far been unsuccessful. I understand that the federal courts avoid jurisdiction over matters within the autonomy of Puerto Rico (itself a problematic concept) unless the Puerto Rican courts have committed a palpable error. The fastening of the US Constitution and the jurisprudence of the federal courts on Puerto Rico has meant that its courts, although rooted in the Spanish, civil law tradition, have assimilated their approach and doctrines in the public law area to the US system (perhaps not unlike the South African courts which preserve the Roman-Dutch law traditions in private law, but have assimilated the common law approach and rules in public law).

Role of external bodies in dispute settling

It is surprising how often external states or international/regional organisations have played a role in establishing autonomy; and therefore it is of interest to examine their role in the maintenance of autonomy. Although in all our three cases, external factors played a role in the establishment of autonomy, it is only in Åland that there was in fact an international guarantee, although limited to four points: (a) preservation of Swedish

language in schools; (b) maintenance of landed property in hands of Ålanders; (c) restriction of rights, within reasonable limits, of franchise of new comers; and (d) ensuring the appointment of a Governor who will possess the confidence of the local population.

Sweden and Finland agreed that the League of Nations Council had the authority to watch over the application of the guarantees (spelled out in detail by the two states on the basis of the above decision of the League of Nations). Finland had to forward to the Council, with its observations, any claims of the Legislative Assembly of Åland in connection with the application of the guarantees. The Council had to consult the Permanent Court of International Justice on juridical questions that might arise.

No disputes were referred to the League of Nations, even though in the early years there was considerable resistance in Finland to the autonomy. The Finnish Government and the Åland authorities were able to settle disputes without the intervention of the League of Nations Council. But as a well informed commentator says, 'Apparently the existence of the guarantees binding Finland internationally and the Council's supervisory powers had a moderating effect on the Finnish Government' (Hannikainen 1997:60).

The UN did not succeed to the League of Nations in this respect, as with other minority protection treaties; but the arrangement was not deemed to come to an end, unlike other cases of minority treaties-a UN report concluded that circumstances had not changed to terminate the arrangements, and that 'Finland's obligations towards Sweden still exits'. It is interesting that in 1921, when the League of Nations made its decision, both Sweden and Finland disclaimed that there was a bilateral treaty—Finland perhaps for obvious reasons, and Sweden because it did not want to be seen to have sold the Åland Swedish speakers down the river; it being more convenient that the League of Nations should shoulder the blame. In 1947, both states claimed that there was in fact a binding bilateral treaty—Sweden because it wanted some international protection for the Ålanders, especially with fears of Soviet expansion, and Finland because it needed the protection of international law from Soviet ambitions, and was willing to assume responsibilities under international law to highlight the role of international law (for details, see Hannikainen 60-65). In practice Sweden has hardly ever interfered, and even when it first asserted that Finland had obligations to Sweden, it remarked upon the exemplary manner in which Finland had discharged its obligations under the League of Nations decision. The increasing and complex Nordic co-operation means that, in any case, any dispute would be taken care of through other channels of consultations and co-operation.

In Hong Kong it could be argued that the UK has a responsibility for 50 years to ensure autonomy- and thus be able to influence dispute settlement, but it is unlikely to do so.
In its last 6 Monthly Report to the UK Parliament on Hong Kong, the UK government says that despite the end of the JLG, as a co-signatory of the Joint Declaration, it 'retains a moral and political commitment to the people of Hong Kong' (para 35). It amounts to saying that the UK has no legal obligations to ensure respect for the terms of the JD. In practice the UK is unlikely to intervene in case China violates guarantees given in the JD.

Internationalisation in HK occurs also through HK's treaty obligations, e.g., WTO., extradition arrangements, etc., based on acceptance by foreign states of HK's special status with international consequences, and the international human rights obligations, especially, with the monitoring mechanisms—all of these tend towards the protection of its autonomy.

In Puerto Rico, the request to the UN to drop it from the list of colonies was supported by the majority of Puerto Rican politicians. As the US did not live up to its declarations to the UN, and the negotiations to reform the Federal Relations Act broke down, many of them regreted their haste in getting Puerto Rico off the list, and thus losing even the little leverage that it had provided them. The more militant of Puerto Rican nationalists have tried to internationalise its situation (and through Castro's courtesy, there is even an 'embassy', or a government in exile, in Havana). But it is extremely unlikely that the US would pay much heed to international opinions and pressures in its dealings with Puerto Rico.

Concluding Remarks

I have not had time to analyse the types of disputes that usually arise in autonomy systems, such as jurisdictional or more political, for example. Nor have I had time to explore the range of mechanisms that can be used to resolve disputes, such as mediation, arbitration, referendum, etc. There is a great deal more to say on the structure of institutions, which influence the kinds of disputes that recur or the approach to their solution—and on this point there is clearly much to comment on in the institutional relationships intra-Hong Kong and between Hong Kong and the Central Authorities.

However, I would like, in view of the discussions in Hong Kong on political reforms, to end with some comments on the effect of democracy on dispute settlement. Democratisation changes the nature of the dispute settlement. In the legal arrangements for Puerto Rico and Åland, the sovereignty of US and Finland is not diminished, but it is hard to imagine either government going against the wishes of a majority of the region. So democracy turns weak legal provisions into strong guarantees. But without regional democracy, strong legal guarantees can be ineffective.

This effect arises not only from the fact that regional democracy helps to give an identity to the region, but also that well accepted values require that democratically arrived views should be respected.

Thirdly, in a system where there is a commitment to democracy, the national government knows that it cannot push the region too much, for it might force it into an escalation of its demands into a higher form of autonomy or even independence (as has happened in Puerto Rico and has been a factor in Åland). But more fundamentally, it means that the region is treated with respect and dignity on which autonomy is premised, not as a vassal possession.

憲法研討會: 從比較角度看基本法的實施
Constitutional Law Conference on Implementation
of the Basic Law : A Comparative Perspective

Application of Article 158 of the Basic Law

Mr. Robert Allcock

Application of Article 158 of the Basic Law

- a speech by the Acting Solicitor General, Mr Robert Allcock, at the Constitutional Law Conference on Implementation of the Basic Law: a Comparative Perspective, at the Furama Hotel, Hong Kong, on 29 April, 2000

In any country where constitutional powers may be exercised both by national and regional authorities, demarcation issues are bound to arise. For example, a litigant may challenge a statutory provision as being outside the authority of the particular legislature that enacted it. Those of you from countries with a long history of central and regional powers will be familiar with your own demarcation issues, and with your own mechanisms for resolving them. I welcome the opportunity provided by this Conference to learn from your experience.

2. At the same time, we must be aware of the differences that exist between the constitutional arrangements in Hong Kong and those in other jurisdictions. Let me briefly mention some of the special features of Hong Kong's arrangements.

Special features

3. First, the People's Republic of China is a unitary system. Under such a system, there is only one state, and powers enjoyed by local governments are conferred by that state. The Hong Kong SAR was established by the National People's Congress ('NPC') under Article 31 of the PRC constitution. It was the NPC that enacted the Basic Law, and thereby conferred upon the SAR its executive, legislative and judicial powers.

4. This contrasts with the position in federal jurisdictions where several individual states co-exist within another state. Within some (but not all) federations, specifically enumerated powers are assigned to the central government by the individual states – as in Australia and the USA. This is the reverse of the position in a unitary system.

5. Secondly, although the Basic Law concerns the Hong Kong SAR, it is a national, not a regional law - in two senses. First, it was made by the NPC and, secondly, other parts of China must comply with it.

6. The third special feature is the concept of 'one country, two systems'. Separate regions within other countries normally share the same, or similar, economic and legal systems. But Hong Kong's economic and legal systems are fundamentally different from those in the Mainland. The Basic Law preserves Hong Kong's different systems, and confers on the SAR an extraordinarily high degree of autonomy. Under the Basic Law, the Central People's Government is expressly responsible for the foreign affairs and defence of the Hong Kong SAR and for certain other matters, such as the appointment of the Chief Executive and the principal officials of the SAR Government. But most other matters are within Hong Kong's autonomy. The common law system continues to prevail, and national laws can only be applied to Hong Kong if they relate to defence, foreign affairs or other matters outside the limits of Hong Kong's autonomy. Only eleven national laws currently apply to the SAR.

7. These three special features of Hong Kong's constitutional arrangements should be kept in mind when demarcation issues are being considered. Let me turn now to the mechanisms for resolving such issues. One of the key provisions is Article 158 of the Basic Law. This relates to the interpretation of the Basic Law.

Article 158

8. I will start by quoting from the judgment of Sir Anthony Mason in last year's Court of Final Appeal case of Lau Kong Yung [1999] 3 HKLRD 778 at 820.

> "As is the case with constitutional divisions of power, a link between the courts of the Region and the institutions of the People's Republic of China is required. In a nation-wide common law system, the link would normally be between the

> regional courts and the national constitutional court or the national supreme court. Here, however, there are not only two different systems, but also two different legal systems. In the context of "one country, two systems", art.158 of the Basic Law provides a very different link. That is because the article, in conformity with art.67(4) of the PRC Constitution, vests the general power of interpretation of the Basic Law, not in the People's Supreme Court or the national courts, but in the NPC Standing Committee."

9. I would add that this power of interpretation is different from judicial interpretation made in the course of litigation, and is described as legislative interpretation.

10. The Standing Committee's power of legislative interpretation is reflected in Article 158 of the Basic Law. Paragraph 1 of that article states that the power of interpretation of the Basic Law shall be vested in the Standing Committee. Paragraphs 2 and 3 of the article go on to deal with the powers of the SAR courts. In summary, they provide that the courts may, in adjudicating cases, interpret provisions in the Basic Law. However, if three criteria are satisfied, the courts must, according to Article 158(3), seek an interpretation of the relevant provision from the Standing Committee, and must follow that interpretation. The three criteria are –

(1) the provision concerns affairs which are the responsibility of the Central People's Government or the relationship between the Central Authorities and the Region (which I will call 'an excluded provision');

(2) the court needs to interpret the provision and such interpretation will affect the judgment in the case; and

(3) the court's final judgment is not appealable.

11. Given Hong Kong's high degree of autonomy, there are relatively few provisions in the Basic Law that satisfy the first of those

criteria. As a result, the SAR courts are able to interpret most provisions on their own. Even if an excluded provision needs to be interpreted in order to resolve a demarcation issue, that issue could still be the subject of legal proceedings in the SAR courts. This is because decisions of the Court of First Instance and Court of Appeal are appealable. Those courts are therefore authorized by Article 158 to interpret the provision on their own. However, if the case reached the Court of Final Appeal ('CFA'), its decision would not be appealable. If the interpretation of the Basic Law provision would affect the judgment in the case, the CFA would therefore be required to seek a Standing Committee interpretation.

12. It is also possible that a demarcation issue could be resolved by an interpretation of the Basic Law made by the Standing Committee under Article 158(1) i.e. otherwise than when requested by the CFA to give an interpretation. The CFA has decided that the Standing Committee's power under that article applies to all provisions in the Basic Law. However, it is unlikely that the Standing Committee would exercise this power save in wholly exceptional circumstances, particularly in respect of provisions that are not excluded provisions.

13. Article 158 has given rise to much debate, both durign its drafting and since being implemented. Many commentators feel that it has the potential for undermining Hong Kong's autonomy. However, I would like to emphasize certain features of our new constitutional order that may help to allay that concern in respect of demarcation issues.

High degree of autonomy

14. The most important feature is Hong Kong's high degree of autonomy. The authority of the executive, legislative and judicial bodies in Hong Kong is much broader than that of regional organs in most other countries. This means that many of the demarcation issues that arise elsewhere are unlikely to arise in respect of Hong Kong. This can be demonstrated by looking at the powers conferred on the legislature, the executive authorities and the judiciary of the Hong Kong SAR.

(1) Legislature

15. I will start with the legislature. Professor Yash Ghai has commented that the 'legislative capacity of the HKSAR is vast'. The Basic Law does not enumerate the areas over which the SAR may legislate. Instead, laws may be enacted on any subject matter that is within Hong Kong's high degree of autonomy under the Basic Law.

16. This contrasts with the position in many federal jurisdictions, where the legislative powers of central government are broader, and the powers of the regions are more restricted. For example, the Australian Constitution gives the Commonwealth a long list of legislative powers over areas such as currency, immigration, divorce, and trade and commerce with other nations. Although the Australian States enjoy concurrent power in respect of most of these areas, they cannot legislate inconsistently with a Commonwealth law dealing with that topic. Such legislative powers in federal jurisdictions are a frequent source of demarcation issues.

17. Since Reunification, over 180 Ordinances have been enacted on a vast array of subject matters. So far no one has challenged any of these Ordinances on the basis that their subject matter falls outside Hong Kong's legislative powers. It is possible that such a challenge will arise in the future. For example, legislation might be enacted that appeared to conflict with a national law that applies in Hong Kong. If the SAR legislature's power to enact such legislation were challenged, the extent of that power could be determined through an interpretation of the Basic Law in the manner I have outlined.

18. On a related matter, Article 17 of the Basic Law provides that all laws enacted by the SAR legislature shall be reported to the Standing Committee for the record. If the Standing Committee considers that a law is not in conformity with the excluded provisions of the Basic Law it has the power to invalidate it. It can do this if, after consulting its Committee for the Basic Law, it returns the law on this ground.

However, in almost three years since Reunification, it has not done so.

(2) Executive authorities

19. Turning to executive power, Hong Kong's high degree of autonomy means there are relatively few restrictions on its executive power. The SAR Government does not, of course, have authority over defence or foreign affairs, but it may conduct 'external affairs' as authorized by the Central People's Government under the Basic Law.

20. The provisions in the Basic Law dealing with external affairs distinguish between those agreements that the SAR may enter into on its own and those for which the authorization of the Central People's Government is required. This is an example of a situation in which there could, in theory, be a difference of opinion as to whether the SAR could act without authorization. However, as with legislative powers, the scope for such problems is relatively limited.

21. This situation again contrasts with that in many federal jurisdictions where demarcation issues concerning executive power can arise in many areas. For example, in Australia, there is no reference in the Constitution to the sharing of executive power, and I understand that executive power will usually follow the legislative power. An example of a demarcation issue that arose as a result is the case of Davis v Commonwealth (1988)166 CLR 79. This involved the question of the Commonwealth's executive power to commemorate the Australian Bicentenary. It is difficult to imagine any similar issue arising in Hong Kong or the Mainland over commemorations of Chinese anniversaries.

(3) Judicial power

22. I turn now to the judiciary. Judicial power in the SAR is far less problematic in Hong Kong than in other regional jurisdictions. For example, in some federations, some issues arising in a province or region are determined by the regional courts and others are determined by federal courts. This may give rise to demarcation issues. Take, for example, the landmark case of Marbury v Madison I Cranch 137,

2 L.Ed 60(1803), in which the US Supreme Court established its power to judicially review legislation. The decision in that case was based not on the substantive issue before the court, but on the question of the court's jurisdiction. It had been argued that the court had jurisdiction to hear the substantive issue by virtue of a statutory provision. However, the Supreme Court struck down that provision as being inconsistent with the Constitution. As a result, the court was unable to determine the substantive issue before it.

23. In contrast, Hong Kong's courts have jurisdiction over all cases in the Region, except for restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong. In particular, SAR courts have no jurisdiction over acts of state such as defence and foreign affairs. These restrictions are, however, comparatively minor when compared with those of regional courts in some federations.

Issues that have arisen

24. Since Reunification, a number of issues have arisen in respect of constitutional powers under the Basic Law. Before I deal with those issues, I will briefly mention the flags case, which was yesterday the subject of a detailed analysis by my colleague, Andrew Bruce SC. The Law of the PRC on the National Flag is one of the eleven national laws that apply in Hong Kong. That law was applied locally by way of an SAR Ordinance. It was argued that the Ordinance was inconsistent with Article 19 of the ICCPR (freedom of expression), and therefore contravened Article 39 of the Basic Law. Article 39 provides for the implementation of the ICCPR in Hong Kong. However, the CFA ruled that there was no such inconsistency. As a result, it was unnecessary for the court to rule on the extent of the SAR's power to enact legislation applying a national law to Hong Kong.

25. I turn now to the demarcation issues that arose in the context of the right of abode cases decided by the CFA last January.

(1) Acts of the NPC

26. The first issue was whether Hong Kong courts can review for consistency with the Basic Law acts of the NPC and its Standing Committee relating to Hong Kong. In its decision last January, the CFA stated that it could review such acts and, if they were found to be inconsistent with the Basic Law, could declare them to be invalid. It subsequently clarified its decision by stating that it did not question the authority of the NPC to do any act that is in accordance with the provisions of the Basic Law and the procedure therein.

(2) CFA's power of interpretation

27. The second issue was whether or not the CFA could interpret two Articles of the Basic Law on its own, or had to seek an interpretation from the Standing Committee. This question turned on the proper application of Article 158(3) of the Basic Law. As I explained earlier, if three criteria are satisfied, the CFA must seek a Standing Committee interpretation. The two articles in question were Articles 24(2)(3) and 22(4).

28. Article 24(2)(3) sets out one of the categories of persons who are entitled to the right of abode in Hong Kong. The CFA held that Article 24(2)(3) was not an excluded provision and so could be interpreted by the court on its own.

29. Article 22(4) provides that, for entry into the Hong Kong SAR, people from other parts of China must apply for approval. The CFA assumed that the article concerned the relationship between the Central Authorities and the Region (i.e. it was an excluded provision). However, it declined to seek an interpretation of the article from the Standing Committee on the basis that it was not the 'predominant provision' that needed to be interpreted in the case.

30. Subsequently, the Standing Committee, acting under Article 158(1), decided that both articles should have been referred to it for interpretation. Subsequently the Chief Justice commented (in Lau

Kong Yung's case) that the court may need to revisit the predominant provision test in an appropriate case.

(3) Requesting an interpretation

31. The third issue was whether it was lawful and constitutional for the Chief Executive to request an interpretation by the Standing Committee of the two articles I have referred to, after the CFA had itself interpreted them. The Chief Executive requested such an interpretation on the basis that –

(1) the effect of the CFA's interpretation would have been to place unbearable pressure on the Hong Kong SAR;

(2) the issue was one of principle involving how the Basic Law should be interpreted;

(3) the control of entry of Mainland residents into Hong Kong had a bearing on the relationship between the Central Authorities and the Hong Kong SAR; and

(4) the Hong Kong SAR was not able to resolve the problem on its own.

32. The request of an interpretation was an exceptional act, and we all hope that the need for such an act will never arise in future. The SAR Government is however firmly of the view that the request was both lawful and constitutional. The Government relies in particular, on the Chief Executive's constitutional duties both to implement the Basic Law (Article 48(2)) and to be accountable to the Central People's Government (Article 43(2)).

(4) Standing Committee's power of interpretation

33. The fourth issue was whether the Standing Committee can interpret Basic Law provisions otherwise than when the CFA refers the provisions to it under Article 158(3). Three views have been expressed on this –

(1) it cannot interpret any such provisions in the absence of a CFA reference;

(2) it can only interpret excluded provisions in the absence of such a reference; and

(3) it can interpret any provision in the absence of a reference.

34. As I mentioned a moment ago, when the Standing Committee interpreted the two articles of the Basic Law, it stated that the CFA should have referred them both to the Standing Committee for interpretation. In other words, they were excluded provisions. The Standing Committee's interpretation did not touch on its power to interpret provisions that are not excluded provisions in the absence of a CFA reference.

35. However, in Lau Kong Yung's case, the CFA held that the Standing Committee has a free-standing power to interpret any provision in the Basic Law and, if it does so, Hong Kong courts are bound by that interpretation.

Conclusion

36. Those, then, are the demarcation issues that have arisen in Hong Kong since Reunification. They have been the subject of heated debate – and that debate continues. This is a healthy sign. Constitutional issues are inherently controversial, and Hong Kong cannot expect to escape from such controversies – particularly in the early years of the new constitutional order.

37. However, what I have tried to demonstrate today is that Hong Kong's high degree of executive, legislative and judicial power makes it unlikely that we will face many of the demarcation issues that exist in federal jurisdictions. Moreover, if such issues do arise, mechanisms exist under the Basic Law for their resolution.

38. The Basic Law reflects a unique vision for enabling two fundamentally different systems to exist within one country. The experience to date demonstrates that this vision can and is being faithfully implemented in practice.