BASIC LAW AND CONSTITUTIONAL REVIEW: THE FIRST DECADE

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The author argues that by and large, fundamental rights have been upheld in the last decade. The promise of a high degree of autonomy has largely been kept as the Central Government has exercised great restraint in not interfering with the domestic affairs of Hong Kong, save in the area of democratic development. Nonetheless, many cases with political overtones are increasingly brought before the Courts. If this trend continues and if the judiciary is unable to meet the expectations of the people, the rule of law in Hong Kong will be undermined.

Introduction

On 1 July 1997, Hong Kong became a Special Administrative Region of the People's Republic of China under an innovative model of "one country, two systems". Pursuant to the Sino-British Joint Declaration, Hong Kong will enjoy a high degree of autonomy, possess legislative, executive and judicial power, and its court will have the power of final adjudication. Hong Kong will retain its own social and economic system; socialist policies shall not apply to Hong Kong. The legal system shall remain basically unchanged, and laws previously in force in Hong Kong are to be preserved. Fundamental rights and freedoms are to be protected. These promises were written into the Basic Law, the constitution of the Hong Kong Special Administrative Region (HKSAR). The Basic Law has celebrated its tenth anniversary. This article intends to assess how far these promises in the Joint Declaration have been implemented, and argues that while fundamental rights and freedoms have by and large been well protected, there are indications that democracy deficit in Hong Kong has resulted in many attempts to resolve the political disputes in court and that this trend, if it continues, may eventually threaten the rule of law.

The model of "one country, two systems" envisages the co-existence of two distinct legal systems alongside one another. On one side of the border, there is a well established common law system that is based on Western

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liberalism and the doctrine of separation of powers. The judiciary is the guardian of human rights and the rule of law, and enjoys an exclusive power to interpret legislation and declare the common law. On the other side of the border, legal order has been re-established only since 1978. The country is still in the process of seeking a proper model of legal system that befits the characteristics of a developing economic power under a constitution that is shaped by Socialism/Maoism and Chinese history and culture. The Chinese legal system is based on both the socialist system and the civil law system, but it is subject to increasing influence from the common law system in recent years. A major characteristic of the Chinese legal system, as inherited from the socialist tradition, is its rejection of the doctrine of separation of powers. All powers are vested in the supreme soviet, namely the National People's Congress (NPC). As an elected body representing the people, the NPC exercises legislative, executive and judicial powers. The power of final interpretation of law is vested in the legislative rather than the judicial organ. While there is gradual acceptance of the desirability of having a judiciary exercising independent adjudicatory power (as opposed to having an independent judiciary), the judiciary on the Mainland remains a relatively weak institution and the PRC Constitution is by and large not justiciable in courts.[1] Thus, there is a huge ideological gap between the two systems. This gap manifests itself and results in conflicts when the two systems interact with one another. The Basic Law itself provides the best example of the interface of the two systems. In *Ma Wai Kwan David v HKSAR*, Chief Judge Chan described perceptively the nature of the Basic Law as follows:[2]

> "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

1 The highly discussed decision of the Supreme People's Court in Qi Yue-ling may provide an exception. In this case, relying on a letter of admission issued to the plaintiff, the defendant successfully enrolled and completed her university under the false name of the plaintiff. The plaintiff took out a civil action alleging, *inter alia*, a violation of her constitutional right to education. Her claim was upheld, and this was the first time that the Supreme People's Court found a cause of action under the PRC Constitution. This case was widely speculated to become the beginning of constitutional review in China, but this speculation has not been realised. The Supreme People's Court has not decided any further case since then on the basis of the PRC Constitution. *See Qi Yue-ling v Chen Xiaoqi et al*, reported in (2006) 39(4) *Chinese Education and Society* 58–74.

2 [1997] HKLRD 761 at 772.

> the background and features of the Basic Law, it is obvious that there will be difficulties in the interpretation of its various provisions."

Alongside the huge ideological gap and the vastly different stages of development between the HKSAR and the Mainland legal systems lies the great imbalance of political powers between the Special Administrative Region and its sovereign. When there is no clear demarcation of when two systems end and one country begins, and when mutual trust has not been fully established, it is not surprising that attempts were made by both sides to explore and perhaps also to exploit the boundary separating the two systems. This inevitably leads to controversies and conflicts, and is best exemplified by the conflicts arising from the dual nature of the Basic Law as a piece of national legislation of the PRC and as a constitution of the HKSAR. In a way, the first decade of constitutional experience in Hong Kong can be said to be a story of a delicate exploration in an uncharted sea.

The Power of Constitutional Review

Article 11 of the Basic Law provides that "no law enacted by the Legislature of the Hong Kong Special Administrative Region shall contravene this Law." Article 18 further provides that laws previously in force in Hong Kong shall be maintained to the extent that they do not contravene the Basic Law.[3] The combined effect of these two articles is that any law which contravenes the Basic Law shall be unconstitutional and hence null and void. They provide the legal basis for the *Marbury v Madison*[4] type of judicial review. This power of constitutional review exists before the change of sovereignty, as, unlike Britain which has an unwritten constitution, Hong Kong has always been governed by a written constitution – the Letters Patent and Royal Instructions prior to 1997. The Letters Patent did not play a significant role before 1991, partly because it contained nothing more than a bare framework of governance without a Bill of Rights, and has been invoked only on a few occasions throughout the colonial era.[5] It assumed a more significant role in 1991 when it became part of the Bill of Rights regime.[6]

3 Article 8 defines "laws previously in force in Hong Kong" as "the common law, rules of equity, ordinances, subordinate legislation and customary law."

4 5 US (Cranch) 137 (1803).

5 *See*, for example, *Ho Po Sang v Director of Public Works* [1959] HKLR 632; *Deacon Chiu v Attorney General* [1992] 2 HKLR 84.

6 The Bill of Rights Ordinance came into effect on 8 June 1991. It provides that all pre-existing laws shall be repealed to the extent of inconsistency if they could not be construed consistently with the Bill of Rights, the substantive part of it is identical to the substantive rights provisions in the International Covenant on Civil and Political Rights ("ICCPR"). The Letters Patent was amended at the same time to provide that no subsequent laws should be inconsistent with the ICCPR as applied to Hong Kong.

The power of constitutional review has almost been taken for granted, either before or after 1997. It is generally accepted that the power to construe a constitution should naturally be assumed by the judiciary, and that it is a natural consequence that any legislation that is inconsistent with the constitution as declared by the judiciary shall have no legal effect. In this regard, it is interesting to note that the legitimacy of an unelected judiciary to strike down legislation properly enacted by the Legislature has never been questioned. This may be explained partly by the fact that the Legislature is not constituted fully by members elected by universal and equal suffrage, and partly by the respect and confidence posed in the judiciary. I will return to this point at the end of the article.

Reception of International and Comparative Jurisprudence

In construing the Basic Law, the Hong Kong courts have been very receptive to the use of international and comparative materials.[7] The International Covenant on Civil and Political Rights (ICCPR) has been incorporated into domestic law through the Bill of Rights Ordinance and entrenched by Article 39 of the Basic Law.[8] This has provided a convenient nexus for domestic reception of international and comparative jurisprudence.

Apart from case law from other domestic jurisdictions, the courts have freely referred to decisions from the European Court of Human Rights,[9] Human Rights Committee,[10] Inter-American Court of Human Rights,[11] and International Court of Justice.[12] They are also receptive to soft law such as General Comments and Concluding Observations of various United Nations Human Rights treaty bodies,[13] Siracusa Principles,[14] as well as United Nations Department of State's Country Reports on Human Rights Practices.[15] The courts have received Brandeis brief type of evidence on comparative legislation in a flag desecration case,[16] and evidence of comparative medical research on the establishment of sexual puberty in a claim for equality and privacy of

7 For the position before 1997, *see* J. Chan, "Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence" (1998) 47 *ICLQ* 306.
8 *See*, for example, *Swire Properties Ltd v Secretary for Justice* (2003) 6 HKCFAR 236 at 258.
9 *See*, for example, *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793.
10 *See*, for example, *Chan Shu Ying v Chief Executive of the HKSAR* [2001] 1 HKLRD 641.
11 *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907.
12 *Soceity for the Protection of Harbour v Town Planning Board* [2003] 2 HKLRD 787 at 812; *Leung Kwok Hung v HKSAR* [2005] 3 HKLRD 164 at 225.
13 *Leung Kwok Hung v HKSAR* [2005] 3 HKLRD 164; *Sakthvl Prabakar v Secretary for Security*. [2005] 1 HKLRD 285; *Ng King Luen v Rita Fan* [1997] 1 HKLRD 757.
14 *HKSAR v Ng Kung Siu* (n 11 above); *Leung Kwok Hung v HKSAR* [2005] 3 HKLRD 164.
15 *Leung Kwok Hung v HKSAR* [2005] 3 HKLRD 164.
16 *HKSAR v Ng Kung Siu* (n 11 above).

homosexual conduct.[17] An interesting development is that the Government has been held to its statements made in its periodic reports to international human rights treaty bodies.[18] In *Leung Kwok Hung v HKSAR*, the Court relied partly on the acceptance of the Government of a positive obligation in its report to the Human Rights Committee in holding that the Government had a positive obligation to assist and provide for the right of peaceful public assembly and demonstration.[19]

In contrast, the courts display a more ambivalent attitude towards unincorporated treaties. Under the classic transformation theory, an international treaty has no legal effect in the domestic legal system until it has been expressly or impliedly incorporated into the system. Notwithstanding this formal legal position, an unincorporated treaty may still influence domestic legal development in different ways in the absence of an overriding statute, case law or public interest. In *R v Director of Immigration, ex parte Yin Xiang-jiang*,[20] it was held that Government's obligation to reduce statelessness under the Convention Relating to the Status of Stateless Persons was a relevant consideration in exercising the discretion whether to permit the applicants to remain in Hong Kong. In *Cheung Ng Cheong v Eastweek Publisher Ltd*,[21] it was held that the courts should, where they were free to do so, develop the common law in accordance with treaty obligations applicable to Hong Kong. In relation to freedom of expression, the principles that are developed under international human rights treaties could properly be regarded as an articulation of some of the principles underlying the common law, and shed light on how common law should develop. Accordingly, the courts should subject large awards of damages by a jury in a defamation case to more searching scrutiny than has been customary in the past under the *Wednesbury*-type standard, and set aside a substantial and unprecedented award of damages for libel.

In *Chan To Foon v Director of Immigration*,[22] the applicant invoked the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in support of his claim for legitimate expectation to remain in Hong Kong to live with his minor children. It was held that while ratification of a treaty may give rise to legitimate expectation, such legitimate expectation would be defeated by the expressed reservation in the ICCPR in relation

17 *Leung T.C. William v Secretary for Justice*, HCAL 160/2004; [2006] HKEC 578.

18 *Secretary for Security v Prabakar* [2005] 1 HKLRD 285 (on procedural fairness and non-refoulement).

19 [2005] 3 HKLRD 164 at 180–181.

20 (1994) 4 HKPLR 265.

21 (1995) 5 HKPLR 428. *See* also *Cheng Albert v Tse Wai Chun Paul* [2000] 3 HKLRD 418 at 422 where the Court of Final Appeal held that the defence of fair comment in defamation would not be defeated by malice, Li CJ stated that, in light of the guarantee of the freedom of speech in the Basic Law, "it is right that the courts when considering and developing the common law should not adopt a narrow approach to the defence of fair comment."

22 [2001] 3 HKLRD 109 at 131–134. *See* also *Chan Mei Yee v Director of Immigration* [2000] HKEC 788; *Mok Chi Hung v Director of Immigration* [2001] 2 HKLRD 125.

to the stay of illegal immigrants in Hong Kong. There was no similar reservation in the ICESCR, but Hartmann J held that ICESCR was promotional and aspirational in nature and could not create legally enforceable obligations. This attracted strong rebuke from the Committee on Economic, Social and Cultural Rights. In its Concluding Observation on the Initial Report of the Hong Kong Special Administrative Region, the Committee, in unusually strong language, "regrets" the view that the ICESCR is "promotional" or "aspirational" in nature. It reiterates that such views are "based on a mistaken understanding of the legal obligations arising from the Covenant", reminds the Government that "the provisions of the Covenant constitute a legal obligation on the part of the State parties" and "urges the Government not to argue in court proceedings that the Covenant is only 'promotional' or 'aspirational' in nature".[23]

The nature of the ICESCR was marginally raised in a more recent decision of the Court of Final Appeal in *Ho Choi Wan v Housing Authority*.[24] The issue turned on the interpretation of a particular provision in the Housing Ordinance. Bokhary PJ, in his separate judgment, noted that it was possible to pray in aid the duty under the ICESCR to provide affordable housing, which is a human right of central importance for the enjoyment of all economic, social and cultural rights, in construing the Housing Ordinance.[25] Both the ICCPR and the ICESCR are referred to in the same breath in Article 39 of the Basic Law. While the ICCPR has been incorporated into domestic law via the Bill of Rights Ordinance, it can be powerfully argued that Article 11 of the ICESCR has equally been given effect in domestic law through the provisions of the Housing Ordinance. Whatever differences there may be between the nature of civil and political rights on the one hand and economic, social and cultural rights on the other, this particular aspect of the right to provide affordable housing has been incorporated into domestic law and should therefore be enforceable as such. At the very least, the construction of the relevant provisions in the Housing Ordinance should lean towards a result that would maximise the benefit of the fundamental right. This is in line with *Yin Xiang-jiang* and a long line of authorities that an unincorporated treaty could nonetheless guide the interpretation of a domestic implementation treaty and the development of the common law, as well as the observation of the Economic, Social and Cultural Rights Committee that the ICESCR creates justiciable obligations. Unfortunately, this point was merely *obiter*,

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

[24] (2005) 8 HKCFAR 628.

[25] At 653, Bokhary PJ stated, "If it were necessary to do so in order to establish that the Authority is duty-bound to provide affordable housing, it might well be possible to pray the ICESCR powerfully in aid of construing the Housing Ordinance to impose that duty. As it happens, however, I have arrived at that construction even without taking the ICESCR into account."

partly because Bokhary PJ found against it unnecessary to rely on the ICESCR.[26]

On the whole, the courts have been very receptive to the use of international and comparative materials in relation to civil and political rights. They have been more cautious and conservative in relation to economic, social and cultural rights. While there are some differences between these two sets of rights, the differences are more apparent than real in most cases, especially when the relevant right has been incorporated in one form or another into domestic law.

Interpretation of the Basic Law

Given the dual nature of the Basic Law as being a piece of domestic law in the Mainland and a constitution in the HKSAR, a question arises as to what the proper principles of interpretation of the Basic Law should be. Should the Basic Law be construed in accordance with the Mainland legal principles, or should the courts adhere to the common law approach in construing the provisions of the Basic Law? This issue haunted the Hong Kong courts in the first few years of the HKSAR.

In *Ng Ka Ling v Director of Immigration*,[27] the Court of Final Appeal was clearly in favour of applying a common law approach. That case concerns the constitutionality of certain amendments in the Immigration Ordinance, the effect of which is that children born of Hong Kong Permanent Residents in the Mainland could only claim a right of abode in the HKSAR if they are able to produce a certificate of entitlement, which could only be applied outside Hong Kong and which would only be issued upon the production of an exit permit granted by the security bureau of the Mainland. In an enlightened judgment, the Court of Final Appeal held that a broad and purposive approach to interpretation should be adopted. The purpose of the Basic Law is to be ascertained from its nature and other provisions of the Basic Law, or other relevant extrinsic materials such as the Joint Declaration. The courts should avoid a literal, technical, narrow or rigid approach. Instead, it must consider the context.

The Court also declared that it has jurisdiction to strike down any legislation that is inconsistent with the Basic Law. This power of constitutional review is derived from the duty of the courts to enforce the Basic Law.

[26] *See* also the criticism by Carole Petersen, "Embracing 'Updated' Universal Standards? The Role of Human Rights Treaties and Interpretative Materials in Hong Kong's Constitutional Jurisprudence", a paper presented at the Conference on Interpretation and Beyond, The University of Hong Kong, 25 Nov 2005.

[27] [1999] 1 HKLRD 315.

Accordingly, it has jurisdiction to examine whether legislation enacted by the Legislature or acts of the executive authorities of the HKSAR are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. It is said that the exercise of this jurisdiction is "a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of inconsistency."[28]

The Court went further, to hold that since this jurisdiction of constitutional review is derived from Article 31 of the PRC Constitution, and since the Basic Law is a national law, it follows that the courts should have jurisdiction "to examine whether any legislative acts of the NPC or its standing committee are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent" with the Basic Law. This is highly controversial, as even the Supreme People's Court does not enjoy a jurisdiction to declare a legislative act of the NPC or an act of the Central Government invalid. It immediately provoked strong criticism from the Mainland, and eventually led to an unusual clarification by the Court to the effect that (1) the power of the Hong Kong courts to interpret the Basic Law is derived from the NPC's Standing Committee under Article 158 of the Basic Law; (2) this power is subject to any interpretation made by the NPC's Standing Committee, which shall be binding on Hong Kong courts; and (3) there is no attempt to question the authority of the NPC or its Standing Committee "to do any act which is in accordance with the provisions of the Basic Law and the procedure therein."[29] The last point is circular and does not really clarify anything. It simply means that the court will not declare any act unlawful if it complies with the Basic Law. It does, however, accept the overriding authority of the NPCSC in interpreting the Basic Law, if any interpretation is made. Within five months of the judgment, the NPCSC rendered the first interpretation on the Basic Law, which has the effect of reversing the judgment in *Ng Ka Ling* ("the Interpretation").[30]

In its Interpretation, the NPCSC criticised the Court of Final Appeal for not seeking an interpretation from the NPCSC pursuant to Article 158(3) of the Basic Law before rendering its final judgment. It further stated that the interpretation of the Court of Final Appeal on the relevant provisions of the Basic Law was inconsistent with the legislative intent, which has been reflected in a report prepared by the Preparatory Committee on 10 August 1996. Finally, it confirmed that its interpretation is binding on the HKSAR courts, but that it did not affect the right of any party who had acquired a

[28] At 337, *per* Li CJ.
[29] [1999] 1 HKLRD 577.
[30] For a more detail discussion, *see* J. Chan, H.L. Fu and Y. Ghai (eds), *Hong Kong's Constitutional Debates: Conflicts over Interpretation* (Hong Kong: Hong Kong University Press Press, 2000).

right of abode in the HKSAR under the judgment of the Court of Final Appeal.[31]

Article 158 of the Basic Law is a highly complex provision. It comprises four different sub-paragraphs. The first paragraph states clearly that the power of interpretation of the Basic Law is vested in the NPCSC. This power can be invoked by the NPCSC at any time with or without any invitation from the Court of Final Appeal,[32] and the interpretation is binding on the Hong Kong courts.[33] The second and the third paragraph provide that the courts of the HKSAR are authorised by the NPCSC to exercise a concurrent power of interpretation of the Basic Law in the process of adjudicating cases. This power can be exercised over all the provisions of the Basic Law, except that a mandatory referral should be made to the NPCSC for interpretation by the Court of Final Appeal before it renders its final judgment if (1) it has to interpret a provision concerning affairs that are the responsibility of the Central People's Government, or concerning the relationship between the Central People's Government and the HKSAR, and (2) such interpretation will affect the judgment on the cases.[34] These have been referred to by the Court of Final Appeal in *Ng Ka Ling* as the conditions of "classification" and "necessity." In determining whether a provision is an excluded provision that falls within the category of provisions where referral may be required, the Court has introduced a "main provision" test, namely, to identify which provision was in essence in dispute, and held that the key provision in dispute in *Ng Ka Ling* was Article 24 on the definition of the right of abode, which was a matter within the autonomy of the HKSAR. While the case also raised an issue under Article 22 on exit approval, which concerned the relationship between the Central Government and the HKSAR, Article 22 was only peripheral and as a result, it was unnecessary to refer the case to the NPCSC for interpretation. This conclusion was considered erroneous by the NPCSC. However, it was unclear whether the formulation of the classification and necessity tests themselves was erroneous, or whether the application of these tests was erroneous. The Court of Final Appeal, in a subsequent case, did accept that it

[31] This last point has led to another round of litigation on who were the parties not affected by this Interpretation, apart from the immediate parties in the litigation, as *Ng Ka Ling* was intended to be a test case: *see.Ng Siu Tung v Director of Immigration* [2002] 1 HKLRD 561, which has become a leading authority on the doctrine of substantive legitimate expectation.

[32] Since 1 July 1997, the NPCSC has on three occasions exercised its power of interpretation of the Basic Law under Art 158(1). On none of these occasions was a request for interpretation made by the Court of Final Appeal.

[33] *Lau Kong Yung v Director of Immigration* [1999] 3 HKLRD 778 at 798–799.

[34] Strictly speaking, this requirement to make a referral applies to any court whose judgments are not subject to further appeal. This is in practice confined to the Court of Final Appeal, especially in light of the decision of the Court in *A Solicitor v Law Society of Hong Kong* (2003) 6 HKCFAR 570, in which the Court held that a finality clause confining the appeal to the Court of Appeal as final was of no effect and could not prevent the parties from making a further appeal to the Court of Final Appeal.

had to revisit the necessity test and the classification test.[35] It has not done so and for ten years since the establishment of the HKSAR, the Court has not made any referral pursuant to Article 158.

The referral system itself also gives rise to problems of due process. This referral system is said to be modelled on the European Economic Community system, under which the court of final appeal of a member state is obliged to refer a question of interpretation of the EC Treaty to the European Court of Justice (ECJ) before rendering a final judgment. A typical situation is that the referral to the ECJ is taken as a preliminary point, and once the ECJ has delivered its judgment, that judgment will be incorporated into the judgment of the domestic court. However, there is a major difference between the referral system under Article 158 and that under the European system. Under the European system, the referral is part of the judicial process. The ECJ is a properly constituted court, and the parties to the dispute are entitled to appear before the ECJ to have their views heard before the judgment is rendered. In contrast, the NPCSC is a political body which will decide the question of interpretation behind closed doors. Its only obligation is to consult the Basic Law Committee pursuant to Article 158(4) of the Basic Law, and will unlikely grant the parties to the hearing before the Court of Final Appeal a right to be heard. As far as the parties are concerned, they will be deprived of an opportunity to be heard by the NPCSC on an issue which will be crucial to the outcome of the hearing. It may be argued that there is no violation of the right to a fair hearing as the interpretation is a legislative and not a judicial process. However, in such cases, it will be doubtful whether it is just and fair to introduce changes to the law, be it called clarification or interpretation, in the middle of litigation, which will affect the parties to the litigation.

Another fundamental issue is the principles governing the interpretation of the Basic Law. Given that the power of final interpretation is vested in the NPCSC, which is a body with little knowledge of the common law, is it appropriate for the courts to apply exclusively common law principles of interpretation in construing the Basic Law? Should the courts take into consideration the possible response of the NPCSC in interpreting the Basic Law? These questions, which go to the heart of the issue of the independence of the judiciary, were answered in the subsequent case of *Chong Fong Yuen v Director of Immigration*.[36]

In this case, the Court of Final Appeal attempted to define the relations between the Hong Kong courts and the NPCSC in interpreting the Basic

[35] *Lau Kong Yung v Director of Immigration* (n 33 above). For a critique of the classification test and the necessity test, *see* Albert Chen, "The Court of Final Appeal's Ruling in the 'Illgeal Migrant' Children Case: A Critical Commentary on the Application of Article 158 of the Basic Law", in Chan *et al*, n 30 above, p 113.

[36] [2001] 2 HKLRD 533.

Law. It pointed out that, contrary to the common law system under which the power of interpretation of legislation is vested exclusively in the judiciary, the power of interpretation of laws is vested in different organs in the Mainland legal system. The interpretation by the NPCSC is, under Chinese law, legislative in nature. Therefore, the position of the NPCSC *vis-à-vis* the Hong Kong courts is similar to that between the Legislature and the judiciary. This characterisation of the NPCSC's interpretation as a legislative process provides a theoretical justification for the court to reconcile the primacy of the common law in the HKSAR and the respect for the sovereign power. The courts operate within the common law system, and will look to the common law principles of interpretation in construing the Basic Law.[37] In exercising this power of interpretation, the courts will not take into account how the NPCSC would interpret the Basic Law under Chinese law, nor will the courts consider how the NPCSC would respond to their interpretation. This is just like the situation where a common law court will not consider how the Legislature will respond to the court's interpretation of a particular statutory provision, for under a common law system, the interpretation of laws is a matter exclusively for the courts. On the other hand, once a judicial interpretation has been issued, the Legislature, or in this particular situation, the NPCSC, can always intervene through an exercise of its legislative power to reverse the judgment of the courts if it considers that the judicial interpretation is socially, economically or political unpalatable.

In this way, the Court of Final Appeal is able to protect the integrity of the common law system by re-asserting the primacy of the common law principles in interpreting the Basic Law, and dispels any doubt of the independence of the Court. In construing the Basic Law, the Hong Kong courts should only have regard to common law principles, the essence of which is to discover the intent of the Legislature through an objective process. Li CJ stated:[38]

> "The courts' role under the common law in interpreting the Basic Law is to construe the language used in the text of the instrument in order to ascertain the *legislative intent as expressed in the language*. Their task is not to ascertain the intent of the lawmaker on its own. Their duty is to ascertain *what was meant by the language used* and to give effect to *the legislative intent as expressed in the language*. It is the text of the enactment which is the law and it is regarded as important both that the law should be certain and that it should be ascertainable by the citizen." (italics in original)

Under this principle, post-enactment and extrinsic material such as the report of the Preparatory Committee is in general irrelevant and cannot affect

[37] *Prem Singh v Director of Immigration* [2003] 1 HKLRD 550 at 575.
[38] *Ibid.*, at 546.

the clear meaning of the legislative text or give the language of the text a meaning which the language cannot bear. In this regard, the NPCSC did refer to a report prepared by the Preparatory Committee in its Interpretation and regarded the view of the Preparatory Committee as reflecting the true intent of the relevant provision of the Basic Law. The difficulty of this reasoning is that the Preparatory Committee was set up to prepare for the establishment of the first Government of the HKSAR. It had no mandate to interpret the Basic Law. It did not participate in the drafting process, which was completed before its establishment, and its view on the meaning of the Basic Law was given six years after the Basic Law had been promulgated by the NPC. Under common law, such a report is not even admissible as evidence, let alone evidence of intent of the framer of the constitution. In *Chong Fong Yuen v Director of Immigration*, the Court of Final Appeal firmly rejected the relevance of such material in the interpretation of the Basic Law,[39] and hence rejected this part of the Interpretation. Yap queried whether it was permissible for the Court to do so.[40] He argued that if the Interpretation is legislation, it is not for the Court to determine which part of the legislation is valid and which part it can decide not to follow. A reply is that while the Interpretation is legislative in nature, it is not the same as legislation. The Interpretation takes the form of a statement. It sets out in some details the factual background leading to the interpretation. It then sets out the "interpretation" of the relevant article with a brief explanation. The form of the Interpretation is more like a judgment than a statutory provision. The narrative part of the Interpretation could not have been "law" as such, and the format of the Interpretation does not lend itself to an approach of treating the entire statement as if it were a piece of statutory provision. Nor has the surgical approach to statutory interpretation typical of the common law ever been adopted in the Mainland. Faced with such a statement, the court will have to determine which part of the statement constitutes only factual background, which part of the statement represents the substantive interpretation of the relevant article of the Basic Law, and which part of the statement is merely background or matter on procedural points. The Report of the Preparatory Committee is only a procedural matter. It could not have been the intention of the NPCSC to alter the rule of evidence in the common law system. To borrow a phrase from the common law system, its view on the relevance of the Report of the Preparatory Committee is nothing more than an "obiter" remark on how the intention of the Basic Law could have been ascertained. It should be noted that while Article 158 of the Basic Law

[39] [2001] 2 HKLRD 533 at 545I, 547B.

[40] P. J. Yap, "10 Years of the Basic Law: The Rise, Retreat and Resurgence of Judicial Power in Hong Kong", (2007) 36:2 *Common Law World Review* 166.

provides that the interpretation of the NPCSC is binding on the Hong Kong courts, it is only "the interpretation of the provisions concerned", nothing more and nothing less, that is binding on the Hong Kong courts, and it is arguable that anything which is not strictly related to the interpretation of the provisions concerned falls outside the ambit of Article 158 and hence is not binding. This part of the judgment of *Chong Fong Yuen* has never been queried by the Mainland authorities.

The existence of two language texts of the Basic Law has also given rise to an interesting question of interpretation. For instance, Article 105 of the Basic Law provides for a right to compensation for any lawful deprivation of property. The English text uses the term "deprivation", whereas the Chinese term is "zhengyong", which is arguably a narrower term confining to expropriation of property by the Government for public use.[41] If there is a conflict between the English text and the Chinese text of the Basic Law, the Chinese text shall prevail. This may suggest that the English version should be more narrowly construed so as to be consistent with the Chinese text. However, the same English and Chinese terms have been used in the Joint Declaration, and insofar as the Joint Declaration is concerned, both language texts are equally authentic. As a domestic legal instrument giving effect to an international treaty, the court should give due weight to the Joint Declaration in construing the Basic Law. The court will then have to reconcile the two language texts with reference to the object and purpose of the instrument concerned. In this particular context, there is no reason to believe that the Joint Declaration intends to protect against expropriation of property by the Government only and not other forms of deprivation of property, given the prime importance of the right to private property in a capitalist system and the long history of protection of property right in the common law system, both of which the Joint Declaration is eager to preserve.

The Constitutional Role of the Court of Final Appeal

The Court of Final Appeal has readily and consciously assumed a role of the guardian of fundamental rights. This may partly due to the experience accumulated under the Bill of Rights, under which the courts have already

[41] *See* A. Chen, "The Basic Law and the Protection of Property Rights" (1993) 23 *HKLJ* 31. In *Harvest Good Investment Co Ltd v Secretary for Justice*, HCAL 32/2006 (16 July 2007), Hartmann J held that the more narrow meaning of expropriation in the Chinese text should be adopted. In coming to this decision the learned judge preferred to reconcile the two different language texts in the Joint Declaration and in the Basic Law by adopting a more narrow meaning on the basis that the rights to property in the common law are heavily qualified by considerations of public interest (at para 150–152). With respect, the learned judge has confused the issue of what constitutes deprivation with the question of what justifies deprivation.

developed a relatively liberal regime,[42] and partly due to the self-consciousness of its role as the final arbiter of the law in the territory. The Chief Justice is keen to assert the authority and respectability of the Court. Thus, he has invited a panel of distinguished overseas judges to serve as non-permanent judges on the Court of Final Appeal.[43] A policy decision was taken that there will be an overseas non-permanent judge in every hearing of substantive appeal. The overseas judges have made a significant contribution to the jurisprudence of Hong Kong.[44] In the first place, they bring their wisdom and experience to the Hong Kong judiciary and enhance the quality of the judgments. Secondly, they serve as a personal bridge linking Hong Kong common law to the rest of the common law world. Thirdly, they provide an outsider's view on cases that may have a highly sensitive political dimension, such as the enforceability of a judgment of the Taiwan court in Hong Kong.[45]

The judgment of the Court of Final Appeal in *Ng Ka Ling* was generally heralded as a champion for constitutional protection of fundamental rights. As its first case on the Basic Law, the Court of Final Appeal sets the tone by the adoption of a generous and purposive approach of interpretation to give to Hong Kong residents the full measure of fundamental rights and freedoms so constitutionally guaranteed.[46] The promise of a liberal era suffered a set-back when *Ng Ka Ling* was reversed by the Interpretation of the NPCSC. At one stage the Court seems to be uncertain how far it could go and what its relationship with the NPCSC should be. In *Lau Kong Yung v Director of Immigration*,[47] which was decided six months after the Interpretation, the Court adopted an almost defeatist attitude by accepting that the Interpretation is binding on Hong Kong and its tests on classification and necessity had to be reformulated. There is no trace in this judgment of the same spirit in *Ng Ka Ling* of venturing into a brave new world. Instead, the Court adopted a more cautious, and to some critics, a more timid tone.

In *HKSAR v Ng Kung Siu*,[48] the issue was whether an offence of desecration of national flag was consistent with the guarantee of the right to freedom of expression under the Basic Law. In a public demonstration in commemoration of the student movement in Beijing that took place on 4 June 1989, the defendants in that case pierced a hole in both the national flag and the

[42] For a discussion on the pre-1997 Bill of Rights Regime, *see* A. Byrnes, "And Some Have a Bill of Rights Thrust Upon Them: the Experience of Hong Kong's Bill of Rights", in P. Alston (ed), *Promoting Human Rights Through Bill of Rights: Comparative Perspectives* (Oxford University Press, 1997), pp 318–391.

[43] The current overseas non-permanent judges include Sir Anthony Mason, Lord Hoffmann, Sir Gerard Brennan, Sir Thomas Eichelbaum, Lord Millett, Lord Woolf, Lord Scott, Sir Ivor Richardson, Michael McHugh and Thomas Gault.

[44] *See Re James Goudie QC* [2005] HKEC 648.

[45] *See*, for example, the judgment of Lord Cooke in *Chen Li Hung v Ting Lei Miao* [2000] 1 HKLRD 252 at 264.

[46] [1999] 1 HKLRD 315 at 339–340.

[47] [1999] 3 HKLRD 778.

[48] [1999] 3 HKLRD 907.

regional flag and wrote on them the Chinese character of "shame". It was accepted that the demonstration was peaceful and the act of desecration had not resulted in any breach of the peace. The defendants were convicted by a magistrate who gave a highly patriotic judgment, citing no authority but a song composed by the students at Tiananmen Square during the student movement as evidence of the symbolic importance of the national flag. The decision was reversed by the Court of Appeal, which relied heavily on the constitutional guarantee of freedom of expression. On further appeal to the Court of Final Appeal, the conviction was restored. The Court accepted the evidence of comparative legislation through a form of Brandeis Brief and noted that many countries did have statutory protection for their national flags. While the law criminalizing an act of desecration of national and regional flag constituted a restriction on the freedom of expression, the restriction was confined to a particular mode of expression rather than content, and could be justified as necessary for the protection of public order/*ordre public*. Bokhary PJ, who delivered a separate judgment, was obviously more hesitant and wavered between two ends in his judgment. On the one hand, he affirmed the importance of free speech, which covered both substance (what is expressed) and mode (how it is expressed). On the other hand, he found the argument compelling that the restriction of desecrating national flag was only a restriction on a particular mode of expression and not a general restriction of free speech. He obviously struggled a bit, and eventually held that the offence was a permissible restriction, albeit on the outer boundary of permissible restriction. His hesitation is best captured by the last paragraph of his judgment:[49]

> "In the course of her powerful address, counsel for the second respondent posed a rhetorical question. If these restrictions are permissible, where does it stop? It is a perfectly legitimate question. And the answer, as I see it, is that it stops where these restrictions are located. For they lie just within the outer limits of constitutionality. Beneath the national and regional flags and emblems, all persons in Hong Kong are – and can be confident that they will remain – equally free under our law to express their views on all matters whether political or non-political: saying what they like, how they like."

His learned judge could have easily delivered a dissenting judgment, especially in light of the marginal majority of 5 to 4 in the relevant US jurisprudence.[50]

[49] *Ibid.*, at 148.

[50] *Texas v Johnson* 491 US 397 (1988); also *United States v Eichman* 496 US 310 (1989). Bokhary PJ has since then adopted a more liberal and progressive approach by delivering, on a number of occasions, a separate or dissenting opinion in a number of leading cases thereafter: *see*, for example, *Leung Kwok Hung v HKSAR* [2005] 3 HKLRD 164; *Prem Singh v Director of Immigration* [2003] 1 HKLRD 550.

This cautious attitude may be understandable at a time when the relationship between the Court and the NPCSC was rather uneasy, if not tense and when mutual trust was at its lowest. The Court needed time to re-build the trust and to search for a new balance between aligning itself as a court of final adjudication and respecting the sovereignty of the Central Government in exercising the power of final interpretation of the Basic Law.

This period of uncertainty lasted for over a year until the decision of *Chong Fong Yuen*, when the Court was able to reconcile its role as a constitutional court within the four corners of Hong Kong and the NPCSC as a sovereign power. The power of final adjudication can sit well with the power of final interpretation once the power of final interpretation is regarded as legislative rather than judicial intervention. Short of any interpretation by the NPCSC, the Court of Final Appeal is in all respects a court with a final say on what the law is. In this way, *Chong Fong Yuen* represents jurisprudential liberation of the constitutional role of the Court of Final Appeal, and since then, the Court seems to have regained its confidence as a guardian of fundamental rights.

Since then two major themes evolve from the judgments of the Court of Final Appeal. The first theme is its eagerness to position itself as a liberal constitutional court protecting fundamental rights. In a line of decisions, the Court gradually established firm jurisprudence on the approach to fundamental rights that is in line with contemporary liberal thinking on human rights. The second theme is to maintain continuity with the previous system. The establishment of the SAR is not the creation of a new regime as such, but a continuation of the previous regime, and the court should be slow to disturb such continuity.

A Liberal Human Rights Regime

The approach of the Court to fundamental rights is best captured by its judgment in *Leung Kwok Hung v HKSAR* where Li CJ stated:[51]

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

[51] [2005] 3 HKLRD 164 at 178, para 16, footnotes omitted.

courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed on them."

Accordingly, any restriction on fundamental rights must satisfy two constitutional requirements, namely that the restriction must be prescribed by law (legality test), and that the restriction must be necessary for the protection of some legitimate interests (necessity test). In *Shum Kwok Sher v HKSAR*, Sir Anthony Mason NPJ, after taking into account a range of comparative materials, held that, consistently with international human rights jurisprudence, the expression "prescribed by law" in Article 39(2) of the Basic Law mandates the principle of legal certainty.[52] To satisfy this principle, the law must be adequately accessible to the citizen and must be formulated with sufficient precision to enable the citizen to regulate his conduct. A law that confers a discretionary power must give an adequate indication of the scope of the discretion, though the degree of precision required will depend on the subject matter. Thus, in *Leung Kwok Hung v Chief Executive of the HKSAR*, it was held that an executive order authorizing covert surveillance did not constitute "law" for this purpose.[53] In another case of *Leung Kwok Hung v HKSAR*, it was held that a provision in the Public Order Ordinance conferring a discretionary power on the Commissioner of Police to object to a public procession on the ground of maintaining "public order (*ordre public*)"was too vague to be able to satisfy the test of legal certainty.[54] In contrast, in *Shum Kwok Sher*, the Court of Final Appeal held that the common law offence of abuse of public office, which has not been invoked for centuries, is a well-established offence in the common law and can be formulated with reasonable precision notwithstanding its archaic origin. Legal certainty should not bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.

While the Court has followed closely the legality test as developed by the European Court of Human Rights, it takes the view that the word "necessary" should be given its ordinary meaning and no assistance is to be gained by substituting for "necessary" a phrase such as "pressing social need".[55] The

[52] (2002) 5 HKCFAR 381; [2002] 2 HKLRD 793, at para 60, following *Sunday Times v United Kingdom* (1979–80) 2 EHRR 245 at 271, para 49. *See* also *Noise Control Authority v Step In Ltd* [2005] 1 HKLRD 702; *Lau Wai Wo v HKSAR* (2003) 6 HKCFAR 624; *HKSAR v Li Man Tak* [2005] HKEC 1308; *Association of Expatriate Civil Servants v Chief Executive* [1998] HKLRD 615; *Bahadur v Director of Immigration* [2002] 2 HKLRD 775. The same principle applies to formulations such as "provided by law", "in conformity with the law", or "according to law".

[53] [2006] HKEC 816 (CA). The case went on appeal to the Court of Final Appeal on a narrow ground of the power of the court to order a stay of unconstitutionality: *Koo Sze Yiu v Chief Executive of the HKSAR* [2006] 3 HKLRD 455 (*sub nom*).

[54] [2005] 3 HKLRD 164.

[55] *Leung Kwok Hung v HKSAR* [2005] 3 HKLRD 164 at 182. *See* also *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442 at 460F–G; *Ming Pao Newspapers Ltd v Attorney General of Hong Kong* [1966] AC 907 at 919G–H.

test of necessity, however, involves the application of a proportionality test in a democratic society which recognizes and respects human rights. A democratic society is aspirational. Its hallmarks are plurality, tolerance and broadmindedness. Having reviewed a large number of cases, the Court concluded that "although the terms in which the proportionality test is formulated for application may vary from one jurisdiction to another, having regard to matters such as the text of constitutional instrument in question and the legal history and tradition informing constitutional interpretation in the jurisdiction concerned, the nature of the proportionality principle is essentially the same across the jurisdiction."[56] The proportionality test requires (1) that the restriction must be rationally connected with one or more legitimate purposes; and (2) that the means used to impair the right must be no more than is necessary to accomplish the legitimate purpose in question. It held that if the legitimate purposes have been set out in the constitutional provision, the list is then exhaustive. Having formulated the test this way, the Court rejected an additional requirement that the legitimate purpose must be of sufficient importance to justify limiting a fundamental right. The Court left open whether this extra requirement may be relevant where the legitimate purpose has not been set out.[57] However, if the legitimate purpose is of little importance, it could hardly justify the restriction of fundamental right. In other words, the importance of the legitimate purpose is already embodied in the proportionality test.

The affirmation of the application of proportionality test is a major step forward. It enables the courts to conduct a balancing exercise between protecting fundamental rights and its impact on other important social objectives, albeit with a starting point in favour of fundamental rights. It also requires the courts to scrutinize closer the justifications for restricting a fundamental right. Once this position has been reached, it is difficult to draw any distinction between human rights cases and other types of cases. It is likely that in the foreseeable future, the concept of proportionality will find its way into general administrative law cases and replace the concept of *Wednesbury* unreasonableness, which narrow scope has been subject to increasing attacks in recent years.[58]

Margin of Appreciation

At the same time, the Court also introduced the concept of margin of appreciation. This concept originates from European jurisprudence wherein national institutions are deemed to be in a better position than international courts to

[56] At 185, para 34.
[57] *Ibid.*, at 184–185, para 38.
[58] *See* J. Chan, "A Sliding Scale of Unreasonableness in Judicial Review" [2006] *Acta Juridica* 223–256.

evaluate local needs and conditions. Hence, the principle has logically no place in domestic law. However, it has been modified in Hong Kong such that deference is accorded to the Legislature in recognition of its information advantage and its policy role. Thus, in *Lau Cheong v HKSAR*, the Court was prepared to defer to the Legislature on the question whether mandatory life sentence for murder irrespective of moral culpability was desirable or necessary.[59] Sir Anthony Mason justified in a public lecture such deference to Legislature with reference to the doctrine of legislative supremacy.[60] In a similar vein, Lester and Pannick explained:[61]

> "Just as there are circumstances in which an international court will recognize that national institutions are better placed to assess the needs of society, and to make difficult choices between competing considerations, so national courts will accept that there are circumstances in which the Legislature and the executive are better placed to perform those functions."

While it must be right that in some circumstances the court should give deference to the Legislature because the Legislature is in a better position to make the assessment on the needs of society, this principle, if unchecked, would easily turn into a braking force to liberalism. In theory, every piece of legislation must be a result of careful thoughts and balance by the Legislature, and the role of the court may be highly circumscribed if it is too ready to give deference to the Legislature. In this regard, the experience under the Hong Kong Bill of Rights is of particular relevance. The first decision of the Court of Appeal on the Bill of Rights in *R v Sin Yau Ming* set an enlightened and liberal trend for the interpretation and the application of the Bill of Rights.[62] This trend suffered a serious set-back when two years later, the Privy Council warned in *Attorney General of Hong Kong v Lee Kwong Kut* that:[63]

> "While the Hong Kong judiciary should be zealous in upholding an individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done the Bill

[59] [2002] 2 HKLRD 612 at 641. *See* also *HKSAR v Pun Ganga Chandra* [2001] 2 HKLRD 151; *HKSAR v Lam Kwong Wai* [2005] HKEC 26; *HKSAR v Ng Kung Siu* [20002] 1 HKLRD 56; *Bahadur v Director of Immigration* [2002] 2 HKLRD 775; *R v Director of Public Prosecution, ex p Kebilene* [2000] 2 AC 326 at 380–381; Singh, Hunt and Demetriou, "Is there a role for the 'margin of appreciation' in national law after the Human Rights Act?" [1999] EHRLR 15.

[60] Sir Anthony Mason, "The Role of the Common Law in Hong Kong", in J. Young and R Lee (eds), *The Common Law Lecture Series 2005* (Faculty of Law, The University of Hong Kong, 2006), p 1, at pp 15–16.

[61] A. Lester and D. Pannick, *Human Rights Law and Practice* (London: Butterworths, 1999), p 74.

[62] [1992] 1 HKLR 185; (1991) 1 HKPLR 88.

[63] [1993] AC 951 at 975; affirmed in *R v Johnstone*, at 1750, *per* Lord Nicholls.

> will become a source of injustice rather than justice and it will be debased in the eyes of the public. In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the Legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime. It must be remembered that questions of policy remain primarily the responsibility of the Legislature."

The difficulty of the reasoning of the Privy Council is that it replaces a relatively well established approach of rationality and proportionality by a more subjective, and usually more conservative, intuitive approach. The dividing line between law and policy could be rather artificial, and there is no objective principle to determine when and how much deference should be given to the Legislature or the Executive Government. It ends up with a rather subjective approach.

At the same time, the application of the proportionality test will inevitably involve value choices and value judgment over the relative importance of competing factors. In this sense, the personal value of a judge on issues such as the doctrine of separation of powers, the proper boundary between the court *vis-à-vis* the Legislature, and the extent of commitment to human rights in light of countervailing social objectives will affect the balancing process. The current Court of Final Appeal is clearly swung towards better protection of fundamental civil and political rights. The contrast between the Court of Final Appeal and the Court of Appeal is quite noticeable, and many appeals from the Court of Appeal are allowed, not so much that the Court of Appeal has erroneously applied the law, but rather that the Court of Final Appeal has made a different value choice in the application of the necessity test. In *Yeung May Wan v HKSAR*,[64] certain members of Falun Gong, who conducted a peaceful demonstration outside the China Liaison Office, were charged with and convicted of offences of obstruction of a public place, wilfully obstructing police in their execution of duties and assaulting police officers. While the obstruction charges were quashed by the Court of Appeal, it upheld the charges of obstructing police in their execution of duties and assault, which were based on the refusal of the demonstrators to leave the police vehicle after they had been arrested and brought to the police station. The Court of Appeal held that there was no nexus between the original unlawful arrest and the subsequent conduct at the police station. This was rejected by the Court of Final Appeal, which held that the starting point was that every resident was entitled to freedom of the person. As the original arrest was unlawful, the act of maintaining custody which was unlawful formed no part

[64] (2005) 8 HKCFAR 137. *See* further below.

of the duty of any police officer. Therefore, if the police officer was obstructed or assaulted while doing so, he was not obstructed or assaulted while acting in the due execution of his duty. On the contrary, persons unlawfully in custody were entitled to use reasonable force to free themselves. While the difference between the two levels of courts appears technical on its face, the underlying difference is one that goes to the commitment to fundamental rights. A weak commitment would lead to rights being easily displaced by other factors such as public order and security.

Perhaps the most striking example is the contrasting approach adopted by the Court of First Instance and the Court of Appeal in *So Wing Keung v Sing Tao Ltd* on the importance of freedom of expression and the role of the media.[65] In that case, the identity of a witness who has been put under a witness protection programme was disclosed in the press. The ICAC applied *ex parte* for a search warrant and conducted a high profile search of seven newspapers. It was accepted that the disclosure was made inadvertently by the journalists without any intention to pervert the course of justice. It was equally clear that the purpose of the search was to go after journalistic materials with a view to discovering the identity of the persons who provided the journalists with the identity of the witness.[66] One of the newspapers challenged the warrant on the ground that, in light of the importance and sensitivity of journalist's source of information, the proper approach should be an application for a less intrusive production order. At first instance, Hartmann J upheld the challenge. He set down seven guiding principles, including the primacy of freedom of expression, the interpretation of the relevant statutory provisions through the glass of the Basic Law and the importance of the constitutional values it enshrines, and the preference for a less intrusive means of interfering with fundamental rights. In particular, the learned judge was astonished that the ICAC has not been able to provide any objective basis for a fear of destruction of materials that justified an application for an *ex parte* search warrant. When asked, the ICAC replied that "it's not a question of knowing that [the journalists] will [destroy the material], it's a question of not being able to take the risk that they won't . . ." (sic).[67] Hartmann J rejected such a justification as mere surmise, and held that journalists deserved respect as professionals. In contrast, apart from a passing remark on freedom of expression, the Court of Appeal emphasised law enforcement. It rejected the seven principles set out by Hartmann J, and did not accept that the media was responsible or trustworthy. It kept referring to the fact that the journalists were suspects as well. The difficulty of this reasoning is that while

[65] [2005] 2 HKLRD 11 (CA); [2004] HKEC 963 (CFI).

[66] The defendant's barrister and solicitor were the prime suspects. Both of them were subsequently charged and convicted: *see HKSAR v Kanjanapas Chong-kwong Derek*, DCCC 298/2005 (14 June 2006).

[67] [2004] HKEC 963, at para 69.

it is true that the journalists committed an offence by wrongfully disclosing the identity of a witness under a witness protection programme, it was unnecessary to go after the journalists' sources to establish such a charge. The purpose of the search is not to gather evidence against the journalists, whom it was accepted had been manipulated, but rather to identify the person who supplied the information to the journalists. The differences between the two judgments could only be explained in terms of value judgment on the relative importance of freedom of expression and the role of the media over protection of integrity of investigation.

Even within the Court of Final Appeal, the difference in terms of value choice is increasingly apparent. In *HKSAR v Ng Kung Siu*, Bokhary PJ delivered a rather hesitant judgment. He was troubled by a conclusion that desecration of national flag in the absence of any violence or breach of the peace would be an undue restriction on freedom of expression. If this could be constitutional, where would it stop? He answered by saying it would stop where it was. The case set the outer boundary of how far the restriction could go. He was prepared to accept the choice of the Legislature in setting the boundary, and agreed reluctantly with the majority. Since then Bokhary PJ has delivered a few separate judgments which he would like to go further than the majority of the Court. By the time the judgment of *Leung Kwok Hung* was delivered, Bokhary PJ delivered a dissenting judgment by adopting a general starting point that all prior restraints would be dubious and should be subject to a rigorous scrutiny. He advocated that certainty, necessity and proportionality operated in unison, and argued that there was nothing to suggest that ordinary policing was insufficient that should justify a prior restraint to prevent the holding of a public meeting or demonstration. He would push the balancing point further and require more vigorous justifications in support of a restriction of fundamental rights than other members of the Court, and this is obviously a difference in value choice rather than in the formulation of legal principles. Such differences will be more apparent and will play an increasingly important role in future judgments in light of the rather open-ended proportionality test.

Public Order (*Ordre Public*)

In applying the proportionality test, it is necessary to identify the legitimate objective. In most cases the legitimate purposes have already been set out in the constitutional instruments. A particularly difficult concept is the objective of protecting "public order (*ordre public*)" It is an imprecise and elusive concept. On the one hand, it no doubt includes public order in the law and order sense, that is, the maintenance of public order and prevention of public

disorder. Yet the French term of "*ordre public*" goes beyond the prevention of crime and public disorder, and is akin to the English concept of public policy. The Siracusa Principle defines it as "the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*)."[68] This definition does not take the matter too far. Alexander Kiss focuses on the protection of the collectivity. He concludes:[69]

> "In sum: [public order (*ordre public*) may be understood as a basis for restricting some specified rights and freedoms in the interest of the adequate functioning of the public institutions necessary to the collectivity when other conditions, discussed below, are met. Examples of what a society may deem appropriate for the *ordre public* have been indicated: prescription for peace and good order; safety; public health; aesthetic and moral considerations; and economic order (consumer protection, etc). It must be remembered, however, that in both civil law and common law systems, the use of this concept implies that courts are available and function correctly to monitor and resolve its tensions with a clear knowledge of the basic needs of the social organization and a sense of its civilized values."

Professor Manfred Nowak is equally vague in his attempt to define this concept:[70]

> ". . . . In addition to the prevention of disorder and crime, it is possible to include under the term *ordre public* all of those "universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based."

The Hong Kong courts have on a number of occasions considered the meaning of this elusive term. In *HKSAR v Ng Kung Siu*,[71] the flag desecration case, the concept of public order (*ordre public*) was taken to include what was necessary for the protection of the general welfare or for the interests of the collectivity as a whole. Further, the concept must remain a function of time, place and circumstances. This is a rather odd formulation, as it suggests that while the offence of desecration of national flag may be justified at the early days of the establishment of the HKSAR, it may not be justifiable long after

[68] *See* para 22.
[69] Kiss, "Permissible Limitations on Rights", in L. Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, 1981), p 290 at 302.
[70] Nowak, *Covenant on Civil and Political Rights; A Commentary* (Engel, 1993), p 356, para 45 and 381, para 24.
[71] [1999] 3 HKLRD 907.

the HKSAR has been established. In *Wong Yeung Ng v Secretary for Justice*, the defendant was charged with scandalising the court by a series of abusive articles in the newspaper, which abuse was pushed to the climax by the defendants conducting an unprecedented paparazzi on a Court of Appeal judge for three days round the clock in revenge of an unfavourable *obiter* remark made in his judgment against the newspaper. The Court of Appeal justified the offence of scandalising the court on the ground of public order (*ordre public*). It was held that the term "*ordre public*" included:[72]

> "the existence and the functioning of the state organization, which not only allowed it to maintain peace and order in the country but ensured the common welfare by satisfying collective needs and protecting human rights. The courts represented a vitally important institution in the state organization. They were the embodiment of the rule of law, which played a pivotal role in the satisfaction of the 'collective needs' and the protection of 'human rights'. Therefore, the 'protection . . . of public order (*ordre public*)' included the protection of the rule of law, at least to the extent that the rule of law was eroded if public confidence in the due administration of justice was undermined."

While the court seems to be satisfied with a rather vague definition of public order (*ordre public*) as a constitutional law/international law concept, it takes a more critical view when this term becomes a domestic law concept. The Public Order Ordinance provides for an advanced notification system for the organisation of any public demonstration that exceeds a certain number of participants. Upon notification of the intention to hold a public procession, the Commissioner of Police has a discretion to object to the public procession "if he reasonably considers that the objection is necessary in the interests of . . . public order (*ordre public*)." In *Leung Kwok Hung v HKSAR*,[73] the Court of Final Appeal held that while the meaning of this phrase can be reasonably ascertainable at the constitutional level, it was too vague and imprecise as an operational criterion at the domestic level. It failed to provide an adequate indication of the scope of the discretion, and hence failed the test of legal certainty.

Continuity with the Previous System

Another major theme of "one country, two systems" is that the previous social, economic and legal system will remain basically unchanged. This is

[72] [1999] 2 HKLRD 293 (CA); [1998] 2 HKLRD 123 (CFI).
[73] [2005] 3 HKLRD 164.

important at the time of the Joint Declaration as it provides the much needed assurance to the people of protection of vested rights and interests at a time of great uncertainty about the future. On the other hand, it is necessary that Hong Kong's system has to move on with time, and a rigid adherence to a historical point in time will not be in the interest of the HKSAR. The tension between stability and certainty on the one hand and the need to make progress and adaptation to new challenges on the other has emerged in a number of cases.

In *Association of Expatriate Civil Servants of Hong Kong v Chief Executive of the HKSAR*,[74] the applicants challenged the decision of the Chief Executive to promulgate two instruments, namely the Public Service (Administrative) Order 1997 and the Public Service (Disciplinary) Regulation, on the ground that they provided for the appointment and removal of holders of public office contrary to the provisions of the Basic Law. They argued that the procedures for the appointment and dismissal of public servants had to be established either by legislation or with legislative approval, whereas the Order and the Regulation were executive orders only and were hence inconsistent with Articles 48(7) and 103 of the Basic Law. Article 48(7) empowered the Chief Executive to appoint or remove holders of public office in accordance with "legal" procedure. Article 103 provided that "Hong Kong's previous system of recruitment [and] . . . discipline . . . for the public service . . . shall be maintained." Keith J held that since the previous procedures for the recruitment and dismissal of holders of public officers were established by the Crown under the Letters Patent and the Colonial Regulations in the exercise of its prerogative, and by the Governor in the exercise of powers expressly conferred upon him by the Colonial Regulations, the maintenance of the previous system did not require the current system to have the approval of the Legislature. Therefore there was no violation of Article 103 of the Basic Law. Keith J also drew a distinction between "in accordance with legal procedures" in Article 48(7) and "prescribed by law" that appears elsewhere in the Basic Law. The phrase in Article 48(7) simply meant "in accordance with such procedures as are lawfully established to maintain Hong Kong's previous system of recruitment and discipline for the public service" and has to be construed together with Article 103. Since the procedures laid down by the Chief Executive in the Order and the Regulation maintained Hong Kong's previous system of recruitment and discipline in the public service and were therefore lawfully established, it followed that those procedures fell within the phrase "legal procedures" in Article 48(7).

This distinction between "legal procedure" and "prescribed by law" is dubious. The essence of legality is to require legal sanction of the procedure.

[74] [1998] 1 HKLRD 615.

Such technical distinction is hardly consistent with the broad and purposive interpretation that is called for in the construction of a constitutional document.

The decision of Keith J was distinguished by Hartmann J in *Leung Kwok Hung v HKSAR*, whose decision was upheld by the Court of Appeal.[75] In this case, the applicant argued that the provision authorising interception of telecommunication under the Interception of Telecommunication Ordinance was so vague that it could not pass the legality test in Article 30. This was virtually conceded, but the Government relied on an Executive Order to set out the procedure for application of approval for interception of telecommunication, and argued that the legality was provided for by Article 30 of the Basic Law itself, which permits interception of communication so long as it is done "in accordance with legal procedures". Relying on the decision of Keith J, the Government argued that Executive Order fell within the scope of "legal procedures". Hartmann J rejected this argument, and confined Keith J's decision to the situation when Article 48(7) was read in conjunction with Article 103. In this context, the phrase has to be construed in the light of the right to privacy under Article 30. Hartmann J stated:

> "148. In interpreting the phrase as it appears in art. 48(7), however, as I have said, Keith J recognised that it was not necessarily to be interpreted in the same manner elsewhere in the Basic Law. In my judgment, the context in which the phrase is to be interpreted in art.30 is very different – art.30 for a start goes to fundamental rights guaranteed to all Hong Kong residents – and by reason of that very different context demands a different interpretation.
>
> 149. In my view, it is a formalistic outcome to say that the fundamental right contained in art.30, which the article requires shall be protected by law, may nevertheless be restricted by a body of purely administrative procedures which are not law and which bind only public servants who, in the event of abuse, are subject only to internal disciplinary proceedings. That, in my view, would derogate substantially from the practical and effective value of the right guaranteed by the article. That, I am satisfied – giving the article a generous interpretation in order to protect the full measure of the value of the right it guarantees – cannot have been the intention of those who drafted the Basic Law.

[75] HCAL 107/2005 (CFI), CACV 73 and 87/2006 (CA). On further appeal to the Court of Final Appeal, the appellants no longer pursued the issue of legality of the executive order but concentrated on the validity of the suspension order: [2006] 3 HKLRD 455 (sub nom *Koo Sze Yiu v Chief Executive of the HKSAR*).

> 150. I am satisfied, therefore, that the use of the phrase 'in accordance with legal procedures' in art.30 means procedures which are laid down by law in the sense that they form part of substantive law, invariably, in order to comply with the requirements of legal certainty, within legislation, primary and/or secondary."

Hartmann J's reasoning is to be preferred.

The tension between converging to the previous system and development of the previous system arose again in *Secretary for Justice v Lau Kwok Fai Bernard*.[76] As a result of the Asian economic downturn, the Government proposed reducing public officers' pay by introducing the Public Officers Pay Adjustment Ordinance.[77] The applicants were public officers appointed before 1 July 1997. They argued that the relevant legislative provision varied their employment contracts so as to expressly authorise pay reduction unilaterally by the Government. Such unilateral downward adjustment of pay was not permissible before 1997 and the new term introduced by legislation made their conditions of service less favourable than before, hence contrary to Article 100 of the Basic Law, which provides that "public servants serving . . . before the establishment of the HKSAR, may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before." They further argued that the Government had failed to conduct a Pay Trend Survey in assessing the adjustment of public officers' pay, and that the Pay Trend Survey had become an established part of the system for such assessments. The Court of Appeal decided in their favour. On further appeal to the Court of Final Appeal, it was held that the principal object of Article 100 was to ensure continuity of employment so that a public officer would be no worse off than before 1 July 1997. This was indeed an element of continuity reflected in the entire Basic Law. However, Article 100 did not seek to prohibit or inhibit changes to "pay, allowances, benefits and conditions of service", except to the extent that such changes were less favourable than before 1 July 1997. Sir Anthony Mason NPJ, in delivering the judgment for the Court, noted that the Government possessed a plenary legislative power which extended to altering public officers' contract of service and to a reduction in their pay, and this plenary legislative powers enjoyed by the Legislative Council after 1 July 1997 remained the same. Article 100 only operated as a bar below which the reduction could not go, which is not the case here. As pay reduction was effected by legislation and not by a variation of contract, and since the conditions of service before 1 July 1997 were also exposed to a variation by way of reduction of pay through legislative action that was independent of contractual authority, the

[76] (2005) 8 HKCFAR 304.
[77] Cap 580.

legislative provision reducing pay did not make the conditions of service "less favourable".

Further, Sir Anthony Mason held that Article 103 was designed to preserve the continuity of the previous system, but this did not entail preservation of all of its elements. Some degree of change was to be expected in any system governing the public service. Whether to conduct a Pay Trend Survey has always been a matter of discretion and not an obligation, and the Pay Trend Survey was not so inherent an element in the pay adjustment scheme that its omission would of itself, irrespective of circumstances, constitute a breach of Article 103. A provision designed to offer transitional protection to employees, such as Article 103, was not intended to stultify the process of government.

As between continuation/preservation and development of the previous system, the Court of Final Appeal has come down in favour of enabling further development of the system, which is what a healthy government should be doing. It is prepared to adopt a purposive construction of Articles 100 and 103, although the ironic result is that a purposive construction which is normally intended to benefit the holder of rights is now invoked to justify a restriction of rights.

Politicising the Courts

It has already been argued that the existence of constitutional review will compel judges to be more explicit about their value choice in their judgments. This is not to say that judges are biased and would decide cases according to their own preference. Rather, values about law and society, the proper role of the judiciary, the degree of tolerance to the disturbance of a harmonised and stable society and so on will influence a judge in carrying out the balancing exercise that is crucial to any constitutional challenge. A consequence of having a constitution, and particularly a constitutional bill of rights, is that the open texture of constitutional provisions will afford much greater room for personal value choices to influence the outcome of the balancing process. If the process is not carefully managed, it may lead to a danger of politicisation of the judiciary. In the last ten years a wide variety of cases that have far reaching political consequences have been brought before the court, thus subjecting the independence and impartiality of the judiciary to the most strenuous test.

The trend of bringing political cases to the court indeed began soon after the enactment of the Bill of Rights in 1991. In *Lee Miu Ling v Attorney General*,[78] the applicant challenged the functional constituency system for

[78] (1995) 5 HKPLR 585.

being a violation of the right to vote by universal and equal suffrage that is guaranteed by Article 21 of the Bill of Rights. Functional constituency is a unique feature in Hong Kong, under which a member of the functional constituency is entitled to vote for the return of a member to the Legislative Council. It creates an elitist group the members of which enjoy a vote in addition to the vote in their geographical constituency. The size of the electorate of the functional constituencies varies significantly; the smallest one can have only 39 members.[79] This system has long been criticised for being discriminatory. The Human Rights Committee has concluded in its Concluding Observations on the Fourth Periodic Report of the United Kingdom on Hong Kong that functional constituency elections were incompatible with Article 25 of the ICCPR:[80]

> "The Committee considers that the electoral system in Hong Kong does not meet the requirements of article 25, as well as articles 2, 3 and 26 of the Covenant. It underscores in particular that only 20 of 60 seats in the Legislative Council are subject to direct popular election and that the concept of functional constituencies, which gives undue weight to the views of the business community, discriminates among voters on the basis of property and functions. This clearly constitutes a violation of article 2, paragraph 1, 25(b) and 26."

The Applicant argued that firstly, the conferral of an extra vote on members of functional constituencies on the ground of their property or functions violated the right to vote by universal and equal suffrage. Secondly, the great disparity in size of each functional constituency resulting in great disparity in the voting powers of different members of different functional constituencies further violated the right to vote by equal suffrage. Both arguments were rejected by the Court of Appeal. On the first point, functional constituency elections were provided for by the Letters Patent, the then constitution of Hong Kong and was therefore immune from the Bill of Rights challenge. On the second point, the Court held that once functional constituency was found to be constitutional, a variation in size of different functional constituencies was an inevitable result, and the test was whether sensible and fair-minded people would condemn the degree of variation as irrational and disproportionate. The Court answered the question in the negative. Moreover, the applicant, not being a member of a functional constituency, had no status to challenge the disparity in voting power.

It is not easy to follow the reasoning of the Court in formulating its test. The proper test should be whether a sensible and fair-minded person would

[79] Regional Council Functional Constituency, whereas the largest has 487,000 voters.
[80] Reproduced in (1996) 5 HKPLR 641 at 644, para 19.

consider the degree of variation rational and proportionate. By asking a negative question, the Court effectively reversed the burden of proof by asking the applicant who was asserting her right to disprove the justification for restricting her right, rather than asking the Government to justify the restriction of her right. The formulation of the test resembles the *Wednesbury* unreasonableness test, which has a very high threshold to overcome.

Senior Non-Expatriate Officers' Association v Secretary for the Civil Service is a notable case in that the applicants were directorate officers in the Hong Kong Civil Service.[81] As the "cream" in the Civil Service, it is unprecedented for this group of civil servants to take out legal action against the Government. They challenged the Government's circular that prohibited all directorate officers to serve on the Selection Committee, a body set up by the PRC Government to select the first Chief Executive of the HKSAR. The Court held that the restriction on their right to take part in the conduct of public affairs under Article 21 of the Bill of Rights was both reasonable and rational, as it was legitimate for the Government to maintain political neutrality of high ranking civil servants. While this conclusion is supportable, Sears J might have gone too far to hold, albeit *obiter*, that by becoming a civil servant, a person necessarily forfeited certain rights in order to ensure that there was good government. This proposition may be too vague and too sweeping, as it is unclear what rights would have to be given up by joining the civil servants. It is also questionable whether a career choice would entail the loss of a fundamental right.

However, the interesting part of this case is that it shows that communication channels with the Government have broken down, even among senior civil servants, and even senior civil servants have to resort to judicial action to resolve disputes with the Government. Indeed, since then, there are a few more high profile actions brought by the civil servants against the Government, notably on the terms of service of the civil service.

Following the breakdown of the Sino-British negotiation on political reform in 1995, the Chinese Government announced that it would set up a Provisional Legislative Council pending the election of the first Legislative Council of the HKSAR. The Provisional Legislative Council was established and began to operate in Shenzhen in the first half of 1997. Its members were addressed as "honourable". Its process was similar to that adopted by the Legislative Council in Hong Kong, and it scrutinised and passed bills for the post-1997 HKSAR. This was regarded as an usurpation of the legislative function of Hong Kong Legislative Council. An attempt was made to have the court declared the Provisional Legislative Council unconstitutional. The Court refused to grant leave on the ground that this was an attempt to

[81] (1997) 7 HKPLR 91.

bring the court into a political dispute, and the applicant had failed to show any interest in bringing the action. Keith J stated: [82]

> "3. What this applicant is seeking to do is in some way to involve the court in the political conflict that is taking place between the British Hong Kong side and the Chinese side. Courts are not concerned with political matters. They are solely concerned with issues of law.
>
> 11. Essentially, the judiciary here is being utilized so that it would become involved in this political conflict and it would have to promote in one way or another the political interests of Mr Martin Lee's client, the democratic party, or those who operate the Provisional Legislature. That is wrong because that would involve and threaten the independence of the judiciary. Whatever personal views one has about these matters, judges must stand back from this type of political conflict. A judge's duty is only to be concerned with those who break the law, either in criminal matters or break the law in civil matters.
>
> 13. I do not consider that what the Provisional Legislature has done should in any way be supervised by this court. Judicial review essentially is a power of the High Court to supervise officials, Government officers, a variety of persons who act contrary to the law. In my judgment it would be wholly wrong for a judge here to seek to supervise this Provisional LegCo operating as it does in China. It is not necessary to decide, but I do not think that it would be doing anything unlawful if it were to meet in Hong Kong, but presumably it has deliberately decided to meet outside Hong Kong to prevent any potential conflict with the law."

Notwithstanding this clear warning, cases were still brought to the court when the disputes could not be resolved at the political level. The first case with a strong political context that reached the Court of Final Appeal after the handover was *HKSAR v Ng Kung Siu*, the issue being whether the offence of desecration of the national flag was consistent with the guarantee of the right to freedom of expression.[83] The Court upheld the offence, though Bokhary PJ delivered a somewhat hesitant separate judgment supporting the majority.

In *Chan Shu Ying v Chief Executive of the HKSAR*,[84] the applicant unsuccessfully challenged the Government's decision to abolish Urban Council and Regional Council. The two councils had a relatively long history, having been in existence respectively since before the Second World War and since

[82] *Ng King Luen v Rita Fan* [1997] 1 HKLRD 757.
[83] (1999) 2 HKCFAR 442; [2002] 1 HKLRD 56. *See* also pp 428, 429–430 above.
[84] [2001] 1 HKLRD 641.

1985. Shortly before the handover, the NPCSC decided that these two councils, which were constituted by election, would cease to exist. Their powers and responsibilities would be assumed by provisional bodies until it was determined by the laws of the HKSAR what would then come into existence. After a long process of consultation, the Government decided to abolish the two bodies and replace them with 18 District Councils. While the members of the District Councils were largely elected, these Councils, unlike their predecessors, did not possess any legislative, executive or administrative powers. They were constituted only as advisory bodies. The new Ordinance creating the District Councils was the subject matter of this judicial challenge.

Hartmann J held that the right to take part in the conduct of public affairs under Article 25 of the ICCPR included not only participation in situations which have legislative, executive or administrative powers but also participation in institutions which, while not possessed of those powers, do have the power by way of open debate, consultation and advice to have a real influence on public affairs. It is for each jurisdiction, through its constitution and its law, to decide the modalities best suited to meeting the changing conditions of its own society which at the same time complying with Article 25. In Hong Kong, it has been decided to place executive and administrative powers in the hands of the Government, whereas legislative power is vested in the Legislative Council. It was further decided to create a number of District Councils which are able to debate local needs and to influence the Government in its formulation and implementation of policies to meet those needs. Thus, through the establishment of both the Legislative Council and the District Council, the requirements of Article 25 were held to have been met.

In contrast, in *Secretary for Justice v Chan Wah*,[85] the applicant successfully challenged the electoral arrangements for the election of village representatives, which was open only to indigenous villagers of the New Territories, that is, descendants by patrilineal descent of ancestors who in 1898 were residents of villages in the New Territories. It was held that "public affairs" under Article 21 of the Bill of Rights would cover all aspects of public administration at all levels, including at the village level. It is an unreasonable restriction on the right to take part in public affairs to exclude non-indigenous villagers, who, like the applicant, have spent their whole life in the village, as candidates in the village election, and an unlawful discrimination on the ground of sex under the Sex Discrimination Ordinance to have different treatment between male and female non-indigenous villagers who have married an indigenous villager regarding their right to vote in the village election. Although Article 40 of the Basic Law protects the lawful traditional rights and interests of indigenous inhabitants of the New Territories, the court

[85] (2000) 9 HKPLR 610.

held that the deprivation of the political rights of the non-indigenous inhabitants was unnecessary for the protection of the lawful traditional rights and interests of the indigenous inhabitants.

The disputes over civil servants' pay cuts have already been discussed.[86] Civil servants form the backbone of the Government. Career stability has always been the prime concern of civil servants. There are also well established mechanisms on resolution of disputes within the civil servants. When the civil servants are prepared to take the Government to court, it is always a dangerous sign on governance. Indeed, shortly after the decision of the Court of Final Appeal, the then Chief Executive was forced by mounting public discontent to step down from his office.[87]

Another example of a resort to legal action to force a change in government policy is the Harbour Reclamation case.[88] For many years the Government has treated Victoria Harbour as a convenient source of land. A huge amount of reclamation has been done over the years. Around 1994, the Town Planning Board unveiled a massive plan for further reclamation. This led to the enactment of a private member bill shortly before the handover, the effect of which was to create a presumption against reclamation. Around 2002, the Town Planning Board submitted to the Chief Executive in Council a draft plan for constructing a bypass to ease traffic congestion in the central area. The plan required a substantial amount of reclamation. The applicant had lodged objections to the plan but failed to persuade the Board to reduce the amount of reclamation. As a result, judicial process was launched. The Board argued that it had taken into account the statutory presumption against reclamation and considered that the presumption had been displaced by wider public interest. The proper weight to be attached to the competing factors was a matter for the Board, and the court should not intervene unless the decision of the Board was *Wednesbury* unreasonable. In contrast, given the statutory intention and the irreversible nature of reclamation, the Applicant argued that the presumption could only be displaced when there was cogent and persuasive evidence that there was an overriding public need, which was a present need, that there were no other reasonable alternatives which could satisfy the public need, and that the reclamation was kept to a minimum. This overriding and compelling present need test was subsequently endorsed by the Court of Final Appeal. An interesting aspect of this case was that alongside the litigation, the Applicant had launched a highly successful

[86] *Secretary for Justice v Lau Kwok Fai* (2005) 8 HKCFAR 304. *See* pp 433–434 above.

[87] For details, *see* Carole Petersen, "Hong Kong's Spring of Discontent: The Rise and Fall of the National Security Bill in 2003", in H.L. Fu, C. Petersen and S. Young (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (Hong Kong: Hong Kong University Press, 2005), Ch 1.

[88] *The Society for the Protection of Harbour v Town Planning Board* [2003] 3 HKLRD 960 (CFI); [2004] 1 HKLRD 396 (CFA). For a more detailed discussion of these cases, *see* J. Chan, "A Sliding Scale of Reasonableness in Judicial Review" [2006] *Acta Jurisdica* 223–256.

public campaign to protect the Harbour, which has effectively aroused public concern and sympathy for the cause of protecting the Harbour from further unnecessary and unjustifiable reclamation. Although the litigation was only partially successful, it had successfully changed the public mood and fostered a more cautious attitude on the part of the Government in proposing reclamation.

Two other highly controversial pieces of litigation concern the Hong Kong Housing Authority, a statutory body responsible for the provision of affordable rental public housing for about 30 per cent of the total population of Hong Kong. *Ho Choi Wan v Hong Kong Housing Authority* turned on the proper interpretation of section 16(1A) of the Housing Ordinance, which provides that any "determination of variation of rent" shall not exceed 10 per cent of the median rent to income ratio (MRIR).[89] As a result of economic recession, this ratio had exceeded 10 per cent since mid-2000. The response of the Housing Authority was to freeze the rent and defer any rent review, despite a long and consistent practice of over 20 years to conduct biannual rent review. There was strong public demand for a reduction in rent. The Housing Authority argued that it had a legal obligation to bring down the rent to a level that was within the statutory limit only when it decided to vary the rent. It had no such obligation when the rent remained unchanged. The tenants were not impressed by such argument, which was said to run contrary to the legislative intention of protecting the tenants from unaffordable rent. The effect of the Housing Authority's argument would be that in times of economic success, the MRIR would go up and leave room for rent increase, whereas in times of economic recession when reduction of rent would be most pressing, the Housing Authority could freeze and hence maintain a high rent. They further argued that in light of the consistent past practice, they had a legitimate expectation that the Housing Authority would conduct a rent review biannually and not to defer rent review for over four years, thereby maintaining a high level of rent. It was obvious that the relevant legislation was not happily drafted. The statutory formula was unnecessarily rigid. It was drafted at a time of inflationary economy with a view to preventing the Housing Authority from making excessive rental increase. The regime could not work in deflationary economy. As economic depression continued, the MRIR had risen to such a point that even if the Housing Authority was prepared to reduce rent, it could not do so if the MRIR would still exceed the statutory limit after the reduction – its choice was either not to review rent at all and maintain a high rent, or to reduce rent to such a magnitude that it would be able to bring down the MRIR within the statutory limit, which may not be possible in some cases even if the rent were reduced to nil because the rent of

[89] (2005) 8 HKCFAR 628.

different housing estates was reviewed at different times as a batch. At the heart of the matter, it was a question of housing policy involving allocation of scarce public resources. It was an important, and indeed rather emotional, issue affecting over 2.4 million people living in public housing. The problem was compounded by a poorly drafted and ill-thought out legislative scheme, and the court was forced to make good sense out of such a scheme.

The Court of Final Appeal rejected the argument of legitimate expectation on the basis that any such expectation would have been defeated by the introduction of a three-year review cycle by the legislation. It further held that, as a matter of statutory construction, there was no duty to comply with the statutory ceiling if there was no variation of rent. This is a justifiable conclusion in light of the rather convoluted and poor drafting. However, this construction would still tie the hands of the Housing Authority in that it could only avoid the statutory ceiling by freezing the rent for as long as the MRIR remains at a level above 10 per cent. To get out of this difficulty, the Court held that "variation" could only mean "upward adjustment", and therefore the phrase "any determination of variation of rent" did not extend to a decision to reduce rent. Thus, the Housing Authority was free to reduce rent, even if the reduction did not result in bringing the MRIR down to the statutory ceiling. This is a rather strained interpretation. Lord Millett justified it on the basis that the effect of giving the fullest meaning of the word "variation" would frustrate the object of the Legislature to give a degree of statutory protection to tenants, and if the Legislature had inadvertently used a word which has a wider meaning than necessary to achieve its purpose, the court may restrict the scope of the word so as not to frustrate the intent of the Legislature. In contrast, counsel for the tenants argued that "any determination of variation of rent" could be construed to include "any determination of no variation of rent", and hence the Housing Authority could not frustrate the legislative intent by forever freezing the rent. This was rejected by the Court on the ground that "variation" could only mean some change in the rent. Yet the Court was quite content to construe the word "variation" to mean only upward increase and not downward decrease. As counsel for the tenants submitted in his reply, the task of the Court was to choose between two extremes, both of which were equally absurd!

The second housing decision concerns a privatisation attempt by the Housing Authority to divest the retail and car park facilities within its housing estates to Link REIT, a unit trust to be listed on the Hong Kong Stock Exchange. Link REIT would acquire these assets and facilities through a global offering, and on completion of the global offering, these assets would be managed by its subsidiaries which would adopt a market-oriented approach.[90] The

[90] *Lo Siu Lan v Hong Kong Housing Authority* [2004] HKEC 1521 (CFI); [2004] HKEC 1541 (CA); (2005) 8 HKCFAR 363.

applicant, a public housing tenant, challenged the decision on the ground that the Housing Authority had no authority to sell (and would hence be no longer in control of) its assets under section 4(1) of the Housing Ordinance, which requires the Housing Authority "to secure the provision of housing and such amenities ancillary thereto". The challenge was rejected on the simple ground that, as a matter of construction, the obligation of the Housing Authority under section 4(1) was merely to secure the provision of those facilities. Section 4(1) did not require the Housing Authority to be the direct provider. It would discharge its obligations so long as these facilities were available, albeit provided by Link REIT, a third party over whom the Authority had no control.

This case has attracted considerable criticism from all quarters. The tenants were worried that the rent would rise sharply once the management of the facilities was put into the hand of a corporation that would adopt a market-oriented approach, especially at a time of economic recession. This worry was indeed subsequently proved to be true. The application was brought on the day before the deadline for applications for units in Link REIT, and had successfully pushed back the listing of the company. Those who had applied for the units and expected to make a profitable speculation complained that the litigation was brought with ulterior motives. Others criticised the Housing Authority for planning through a major privatisation project in a cavalier manner. In light of these circumstances, Bokhary PJ emphasised in his judgment that "the question presented to the Court in this appeal is a pure question of legal capacity to be decided as a matter of statutory interpretation."

A final example comprises a few cases on the restrictions on the organisation of public assembly and demonstrations. In *Yeung May Wan v HKSAR*,[91] which has been referred to above, the defendants were members of Falun Gong, an organisation which has been banned in the Mainland. They demonstrated outside the Liaison Office of the Central People's Government and protested about alleged mistreatment of and brutality against group members by the Mainland Government. The demonstration was peaceful, largely static and included displaying a banner. Upon refusal to disperse as demanded by the police, the demonstrators were forcibly removed and subsequently charged with an offence of obstructing a public place without lawful excuse and obstructing a police officer in the due execution of his duties.

In a celebrated judgment, the Court of Final Appeal dismissed both charges. It was held that a person who created an obstruction was not acting without lawful excuse if his conduct involved a reasonable use of the public place. What was reasonable was a question of fact and degree, depending on all the circumstances, including the extent, duration, time, place and purpose of the

[91] (2005) 8 HKCFAR 137.

obstruction. Where an obstruction resulted from a peaceful demonstration, it was essential that the constitutionally protected right to demonstrate was recognised and given substantial weight when assessing its reasonableness. Bearing in mind the constitutional right to demonstrate, the arrest for obstruction was unlawful and would take the police officers outside the due execution of their duties. Hence, the defendants could not be guilty of the offence of obstructing a police officer in the due execution of his duty.

The obstruction offence has been considered by demonstrators a nuisance at its best, and an instrument of suppression and harassment in the hands of the police at its worst. The Court of Final Appeal has clarified the law and limited its operation in light of the constitutional right to freedom of expression and the right to peaceful assembly. While Falun Gong is banned in the Mainland, it remains a lawful organisation in the HKSAR. The Court has not taken into account the status of the organisation, and has accorded its members constitutional protection as they are entitled to enjoy with any other residents in Hong Kong. This case is exemplary of the independence of the judiciary in Hong Kong despite its highly political context.

Regulation of public assembly and demonstrations has a chequered history in Hong Kong.[92] A draconian regime was in place under the Public Order Ordinance before 1980, under which any three or more persons who gather in a public place and discuss any matter of public interest without first obtaining a licence from the police commissioner commits an offence. The law was liberalised as a result of public outcry, but the essence remains to be that any public assembly and demonstration without the approval of the police commissioner remains an unlawful assembly. The form of approval has been changed from the requirement of a prior positive approval from the police to an absence of objection from the police within a statutorily defined period after a mandatory requirement to notify the police of an intention to organise a public assembly. The requirement of approval, in whatever form, and the wide police power to regulate public assembly and demonstrations have long been a source of conflict. It is argued that the discretionary power can be, and has indeed been, abused, and any prior control is unnecessary as the police enjoy a wide array of powers to disperse a public assembly or demonstration if its conduct is no longer peaceful. Many social activists simply defy the requirements of advance notification or application for approval. On many occasions, in the absence of an application or notification, an approval or

[92] For a historical account, *see* Roda Mushkat, "Peaceful Assembly", in R. Wacks (ed), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992), Ch 12. The law was liberalised in 1980 and in 1995, but the amendments in 1995 were not adopted as laws of the HKSAR. In 1997, the present version of the Public Order Ordinance (Cap 245) was enacted, which introduced the "notice of no objection" system for the organisation of public processions. It also empowers the Commissioner of Police to impose conditions or to prohibit/object to the holding of public meetings and processions on grounds of, *inter alia*, public order (*ordre public*).

a letter of no objection is thrust by the police into the hands of the demonstrators minutes before the demonstration takes place. In or about 1997, the Provisional Legislative Council refined the scheme of no objection by empowering the Commissioner of Police to impose conditions on or object to an intended public assembly and demonstration on the grounds of, *inter alia*, public order (*ordre public*). It was considered that this formulation, which was borrowed from Article 18 of the ICCPR, would be insulated from any constitutional challenge.

In *Leung Kwok Hung v HKSAR*, the applicant, who is a veteran street demonstrator, an elected legislator, and an activist who would not be hesitant to test the law to its limits, lodged a constitutional attack against the notification regime.[93] In a celebrated judgment, the Court of Final Appeal struck down, for want of legal certainty, the power to object to the holding of public assembly and demonstrations on the ground of public order (*ordre public*). It further held that the police did indeed have a duty to assist the demonstrators in demonstrating. In this way, the applicant succeeded in reforming the law after failing to achieve this goal for many years in the political arena.

The diversity and complexity of these cases are highly impressive. The court is perceived to be an effective instrument in pursuing legal/political reform when there is no other effective avenue to achieve such purposes or a forum to resolve otherwise unsolved political disputes. To a large extent this is a result of frustration of the political process, particularly the lack of democratic development on the political front. *Leung Kwok Hung v Chief Executive of the HKSAR* is a classic example.[94] Although the Telecommunication Ordinance authorising interception of telecommunication has long been acknowledged to be incompatible with the Bill of Rights, the Government has refused to change the law. A private member bill to amend the Ordinance was successfully passed by the Legislative Council in June 1997. The bill was to come into effect on a date to be appointed by the Government. For eight years after its enactment the Government still failed to appoint an operation date. When the legality of telephone interception was eventually and successfully challenged in a criminal trial, the Government's response was to introduce an Executive Order. It was only after the decision of the Court of Final Appeal and with a deadline of six months imposed by the judiciary that the Government was prepared to rush through a piece of amending legislation. By then, the Government, through its intensive lobbying efforts, secured the passage of the new law by rejecting virtually every single amendment proposed by legislators from the pan-democratic camp in the Legislature.

93 [2005] 3 HKLRD 164.

94 [2006] HKEC 239 (CFI); [2006] HKEC 816 (CA); *sub nom Koo Sze Yiu v Chief Executive of the HKSAR* [2006] 3 HKLRD 455 (CFA).

Thus, the frustration at the political level is one of the direct contributing causes to the influx of political cases before the courts. In light of all these cases, the Chief Justice made the plea at two successive Openings of the Legal Year in 2005 and 2006 that the Court is not a place to resolve political disputes. The Court could only make a decision on law, and that may or may not give the parties what they want to achieve in litigation. While the court will continue to discharge its functions according to law, judicial independence and impartiality will be perceived to be compromised when the judiciary continues to be dragged into a whole range of political debates.

Conclusion

A few tentative conclusions can be drawn. First, by and large, fundamental rights have been upheld in the last decade. The judiciary is conscious of its role of being the guardian of human rights, and has adopted a liberal approach to constitutional interpretation. The principle of constitutional review has been firmly established. In exercising this power, particularly in the context of fundamental rights, the court has adhered reasonably close to the international human rights paradigm. It is receptive to international jurisprudence in building up its own jurisprudence. It tries to strike a balance between protection of fundamental rights and other competing societal interests, with a bias in favour of fundamental rights, particularly civil and political rights. The principles of legal certainty and proportionality are firmly established in the human rights context, and it is believed that, before long, the principle of proportionality will become part of the general law of judicial review of administrative action.

Secondly, "one country, two systems" embodies a delicate division of powers between the Central Government and the HKSAR, and the court has an unenviable task of delineating the boundary of the division. On the one hand, the court has to establish its credibility and reputation as an independent and impartial tribunal. It has a constitutional duty to serve as a guardian of fundamental rights and to protect the integrity of the common law system. On the other hand, the court has to be sensitive to the political reality that the extent of its jurisdiction is dependent on the tolerance and self-restraint of the Central Government, and will have to accept that at some point, two systems end and one country begins. So far the court has been treading this path carefully and sensibly. It has adopted a pragmatic approach to the power of interpretation of the NPCSC. It is able to reconcile between NPCSC as a symbol of sovereignty and the Court of Final Appeal as the guardian of the common law system. The Court of Final Appeal at one stage intended to assume the role of a strong constitutional court by extending the frontiers of its jurisdiction, and suffered a set-back after the first

Interpretation by the NPCSC. It has restored its full vigour and confidence after the *Chong Fung Yuen* case, which confidence and liberalism are best displayed in the *Leung Kwok Hung* case and *Yeung May Wan* case.

Thirdly, there is little interference from the Mainland authorities. The promise of a high degree of autonomy has largely been observed. The Central Government has exercised great restraints in any attempt to interfere with the domestic affairs of Hong Kong, save in the area of democratic development.

Fourthly, the judiciary remains a well respected institution. Given the open texture of the Basic Law, there is inevitably more room for judicial creativity. When proportionality lies at the heart of constitutional adjudication, value choices of the judiciary will play an increasingly significant role in the adjudication process, and this is inevitable whenever a constitution is introduced. So far the judiciary has made a value choice in favour of liberalism and the protection of fundamental human rights. It has a reasonably impressive record in upholding civil and political rights, though it has exhibited greater caution and restrains in dealing with economic, social and cultural rights or matters of public policy. On the whole, the judiciary has maintained its independence and impartiality. It is true that it has been faced with an increasing volume of cases which have political implications, but this does not mean that its decisions are political.

Fifthly, the resort to judicial challenges as a means for pushing legal or political reform is itself a result of the democratic deficit in Hong Kong. In a democratic system, the political process provides for reconciliation and compromise of different interests by a rational means. The role of the judiciary is to ensure that the political agenda is not hijacked by the majority in parliament so as to prejudice the legitimate rights and interests of the minorities. Judicial scrutiny is thus justified because "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[95] In contrast, the functional constituency system in Hong Kong enables a powerful elite group to dominate the legislature, and the elected representatives of the people have only a weak voice. The Government is able to push through any legislation by engaging sufficient support from some elected representatives and the majority of the functional constituency representatives. On some occasions this was done irrespective of the merits or reasoning of the opposition. When the political process is no longer dictated by reasoning, and when opposite views are treated with ignor-ance or even

[95] *United States v Carolene Products*, 304 US 144 (1938), *per* Stone J. But also *see* B. Ackerman, "Beyond *Carolene Products*", 98 Harv L Rev 713 (1985), where Ackerman argued that the converse could also be true when there is a powerful minority that is vocal and well-organised. *See* also K. C. Wheare, *Modern Constitutions* (Oxford, 2nd edn, 1966) where both sides of the problems were discussed. The author is grateful to Professor Lim Chin Leng for drawing attention to this debate.

contempt, those who are frustrated or disillusioned could only resort either to street politics or to the courts. Thus, when many cases of a political nature or with a political overtone are brought before the Courts as attempts to change the system have led to nowhere in the political process, this is in a way a negative verdict and a sign of frustration of the political process. If the political forum remains ineffective, this trend of seeking judicial intervention will inevitably continue. In so doing, the integrity and independence of the judiciary will be subject to the most strenuous test. After all, the judiciary is not the appropriate forum to deal with difficult issues of distribution of resources or to formulate policies with far reaching consequences. So far, the verdict on the performance of the judiciary in adhering to its proper role and in withstanding political pressure is quite positive. However, if this trend continues unchecked, if the political process remains ineffective, and when the judiciary is unable to meet the expectations of the people, the rule of law will be undermined.