



## The Basic Law A Decade On: Implementation Challenges and Future Outlook

### INTRODUCTION

In the past decade, the interpretation and implementation of the new constitutional order has led to some controversies and a series of judicial reviews. This is totally understandable since the Basic Law is not only an overriding constitutional document, but also covers almost all aspects of Hong Kong, including its political and economic systems and people's livelihood.

In the first constitutional challenge against the Basic Law after Reunification, *HKSAR v Ma Wai Kwan, David* [1997] HKLRD 761 at 772I-773B, the Honourable Mr Justice Chan, the then Chief Judge of the High Court, said:

"The Basic Law is not only a brainchild of an international treaty, the Joint Declaration. It is also a national law of the PRC and the constitution of the HKSAR. It translates the basic policies enshrined in the Joint Declaration into more practical terms. The essence of these policies is that the current social, economic and legal systems in Hong Kong will remain unchanged for 50 years. The purpose of the Basic Law is to ensure that these basic policies are implemented and that there can be continued stability

and prosperity for the HKSAR. Continuity after the change of sovereignty is therefore of vital importance.

...

The Basic Law is a unique document. It reflects a treaty made between two nations. It deals with the relationship between the sovereign and an autonomous region which practises a different system. It stipulates the organizations 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."

These legal challenges are not unique to Hong Kong. The government of every jurisdiction that is open and pluralistic will face legal challenges. The Basic Law has provided the HKSAR with a skeleton on which muscles and tendons should be developed using concrete experience, local legislation and the jurisprudence of local courts to form a well-developed body.





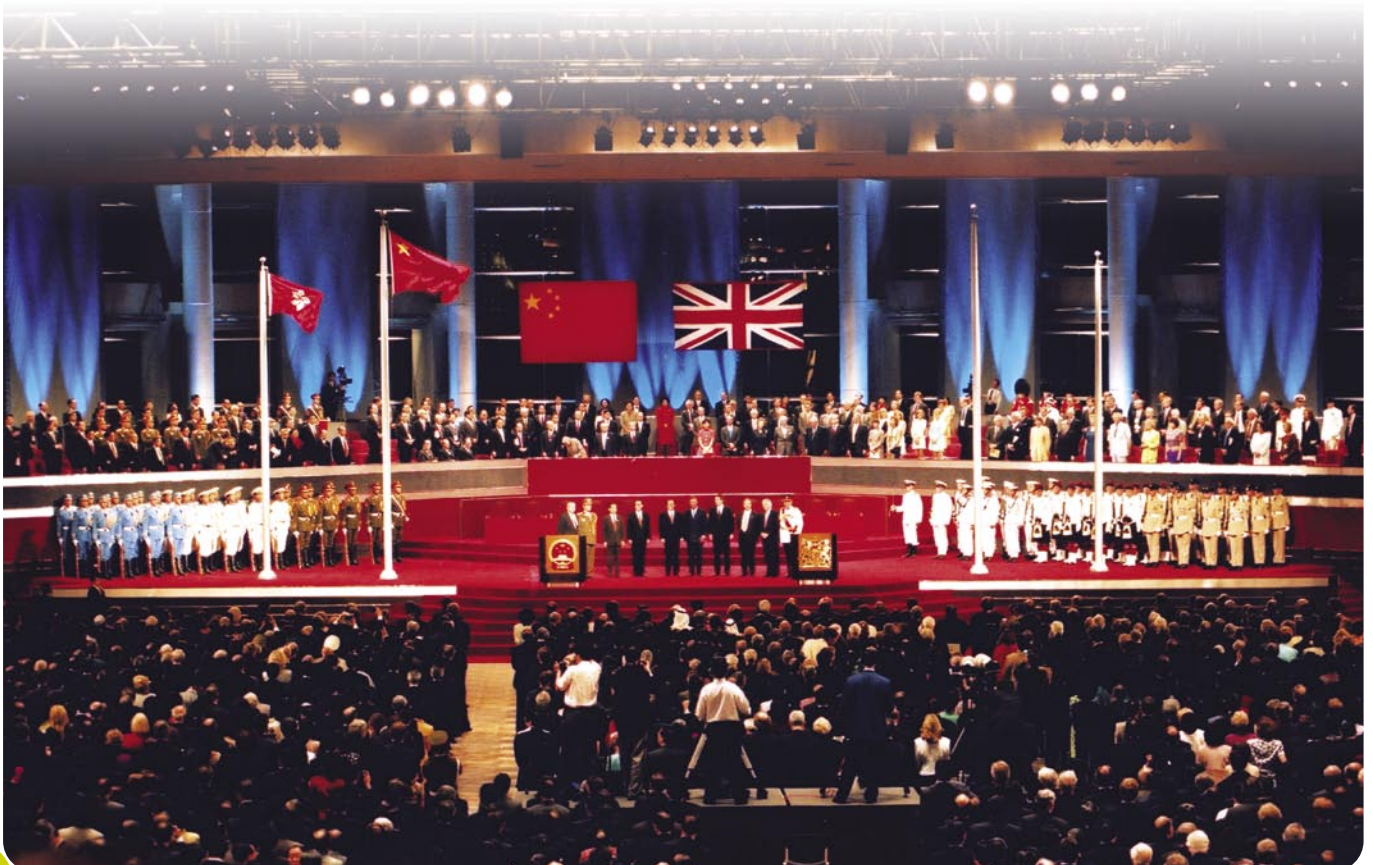
## PURPOSE

### Historical Background

The purpose of establishing the HKSAR through the enactment of the Basic Law is best understood against Hong Kong's unique status in world history. Hong Kong is a part of China and yet operates an entirely different economic and legal system from the Mainland. While under British rule for one and a half centuries, Hong Kong was kept apart from the Mainland but developed its own successful economic and legal systems, and since the 1970s Hong Kong has assumed a significant place in the international financial market.

When Britain and China were negotiating over

the future of Hong Kong, the most important guiding principle was to ensure Hong Kong's stability and prosperity after reunification. The Sino-British Joint Declaration, signed in 1984, provided that China should resume the exercise of sovereignty over Hong Kong on the basis that Hong Kong would retain its capitalist system and its common law legal system, and would exercise a "high degree of autonomy". Except for foreign and defence affairs and other matters outside the limits of the autonomy of the Region as specified by the Basic Law (for example, the appointment of the CE and the principal officials of the HKSARG), the HKSAR was to be vested with executive, legislative and independent judicial powers, including that of final adjudication.



## New Constitutional Order

As stated in the Preamble of the Basic Law, the purpose of establishing the HKSAR lies not just in upholding national sovereignty and territorial integrity, but also in maintaining the prosperity and stability of Hong Kong.

Maintaining the prosperity and stability of Hong Kong is important for the livelihood and in the interest of the community. It is not purely an economic consideration but also involves elements which are essential to a society built on justice and the rule of law. All these must be taken into account in the implementation of the Basic Law.

Upon China's resumption of the exercise of sovereignty over Hong Kong on 1 July 1997, a new constitutional order was put in place. This is found in the Basic Law. The Basic Law faithfully reflects the guarantees contained in the Joint Declaration. Hence the guarantee of "One Country, Two Systems" is further extended from an international treaty to the national law of the Mainland and the mini-constitution of the HKSAR. The followings are some of the special features of Hong Kong's arrangements.

Firstly, the PRC practises a unitary system. Under such a system, there is only one state and powers enjoyed by local governments are conferred by that state. The HKSAR was established by the NPC under Article 31 of the PRC Constitution. It was the NPC that enacted the Basic Law and thereby conferred upon the HKSAR its executive, legislative and judicial powers.

Secondly, although the Basic Law relates specifically to the HKSAR, it is a national, not a regional law - in two senses. Firstly, it was made by the NPC and, secondly, other parts of China must comply with it.

The third special feature is the unprecedented concept of "One Country, Two Systems". Separate regions within other countries normally share the same, or similar, economic or legal systems. But Hong Kong's economic and legal systems are fundamentally different from those in the Mainland. The Basic Law preserves Hong Kong's different systems and confers on the HKSAR an extraordinarily high degree of autonomy. As noted earlier, under the Basic Law, the CPG is expressly responsible for the foreign affairs and defence of the HKSAR and for certain other matters, such as the appointment of the CE and the principal officials of the HKSARG. But most other matters are within Hong Kong's autonomy.

Hong Kong probably has a higher degree of autonomy than any other territory that is not sovereign. It certainly has much greater autonomy than the states within a federal jurisdiction, such as the United States of America. The HKSAR is a separate customs territory. It has its own currency and its own taxation system. With the authorization of the CPG, it can even enter into bilateral treaties with other countries in areas such as air services, extradition and mutual legal assistance. Some 200 multilateral treaties apply to Hong Kong even though many of them do not apply in the rest of China.



### STRENGTHENING

So much for the constitutional framework and design. The important question is, of course: is it working? It is true to say that the promise of continuity in the laws and legal system has been honoured, not just in form, but in full substance.

Under the "One Country, Two Systems" principle, the laws and legal system previously in force in Hong Kong (including the common law) are maintained under the new constitutional order, except for any that contravenes the Basic Law.

The rule of law is the key to Hong Kong's past and continuing success. Preserving the substance and effect of the laws and legal system previously in force in Hong Kong is so important that it is like protecting the foundation of Hong Kong. The rule of law, which encompasses such concepts as justice being free from political and human interference, integrity and equality before the law, must be nurtured, promoted and practised.

#### Common Law

Before 1997, the common law system was introduced in Hong Kong. It is a mature system that has gained widespread respect. The common law as practised in Hong Kong is not identical to that in other common law jurisdictions. Indeed, one of the strengths of the common law is its ability to adapt to meet the needs of each particular jurisdiction. Although the details vary from one common law jurisdiction to another, they share certain key features.

What are those key features? The first is that many basic principles evolved, and continue to evolve, through judge-made law. Those principles

**The rule of law, which encompasses such concepts as justice being free from political and human interference, integrity and equality before the law, must be nurtured, promoted and practised.**

originally emerged from decisions of judges in England and Wales, but now they are developed by courts throughout the common law world.

Another feature of common law jurisdictions is that, as a general rule, judge-made principles can be displaced by legislation. Modern communities could not function without legislation, and it is generally not regarded as improper or disrespectful of the judiciary, to legislate in a way that contradicts common law principles. Taxation and licensing systems are two obvious departures from common law principles that are essential in a modern society. All common law jurisdictions now have a large body of statute law that is, in many respects, at least as important as the common law. Nevertheless, the common law continues to be the foundation on which those laws are built.

Looking beyond the detailed principles established by the judges, one can say that the common law is underpinned by certain core values that are deeply cherished. Any attempt to displace these core values will be met with very strong resistance, particularly by members of the legal profession. In some jurisdictions those values are entrenched in a constitution, and are protected from being swept away, or undermined, by ordinary legislation.

Amongst the underlying values and ideals of the common law is the fundamental concept of the rule of law. There are several vital principles under this concept, all of which took root in Hong Kong:

- (a) First is that laws operate separately from the political system; they are published and are accessible; and they provide a degree of certainty and predictability as to how disputes are to be resolved.
- (b) Second is that everyone, no matter how high, is subject to the law, and that a person can only be punished for conduct that is in breach of the law.
- (c) Third is that of equality before the law: no one gets better or worse treatment under the law because of his or her status, wealth, race and so on.
- (d) Fourth is that the settlement of disputes is in the hands of judges who are independent of the executive and who are not subject to pressure from any source in carrying out their duties.

BL 8 provides that the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene the Basic Law. Hong Kong thus remains a common law jurisdiction. The English language continues to be one of the official languages. It is still the predominant language of the law, although the use of Chinese language in courts has been increasingly common,

especially in the lower courts.

Not only does the common law as it was on 1 July 1997 continue to apply in Hong Kong, but BL 84 allows the courts of Hong Kong, when adjudicating cases, to refer to precedents of other common law jurisdictions, so that the common law in Hong Kong can continue to develop over time and have regard to developments elsewhere. A good example is the common law offence of misconduct in public office, where the Court of Final Appeal, in the case of *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793, had regard to decisions of the English courts and Australian courts when determining the ingredients of the offence. This enriched the common law after Reunification.

### **International Rights and Obligations**

Before Reunification, Hong Kong benefited from over 200 multilateral treaties, which had been applied to Hong Kong by the United Kingdom. These included agreements in the fields of civil aviation, merchant shipping, private international law, protection of labour standards, and customs cooperation. They also related to many international organisations in which Hong Kong participated, such as the World Trade Organisation, the Asian Development Bank, the World Health Organisation, the Customs Cooperation Council, the International Maritime Organisation, and the World Intellectual Property Organisation. Following an agreement reached in the Sino-British Joint Liaison Group, the Chinese Government arranged for those treaties to continue to apply to the HKSAR after Reunification, even though many do not apply to Mainland China.

The British bilateral agreements that previously



applied to Hong Kong could not continue to apply to the HKSAR after Reunification. However, under authorization from the CPG, the HKSARG has successfully negotiated new agreements in areas such as surrender of fugitive offenders, mutual legal assistance, and air services, with most of our major bilateral partners.

Prior to Reunification, the six major United Nations human rights treaties with reporting obligations were extended to Hong Kong by the British Government. They are:

- (a) the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), applied to Hong Kong in 1969;
- (b) the International Covenant on Civil and Political Rights ("ICCPR"), applied to Hong Kong in 1976;
- (c) the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), applied to Hong Kong in 1976;
- (d) the Convention against Torture ("CAT"), applied to Hong Kong in 1992;
- (e) the Convention on the Rights of the Child ("UNCRC"), applied to Hong Kong in 1994;
- (f) the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), applied to Hong Kong in 1996.

After Reunification, the above six major human rights treaties continue to apply to the HKSAR,

and the HKSARG continues to report regularly to the treaty monitoring bodies. The preparation of those reports is done entirely by the HKSARG. HKSAR teams attend the hearings of our reports as part of the relevant Chinese delegation, except in the case of the ICCPR which we attend in our own right by special arrangement between the CPG and the United Nations. Hearings of the reports, and the monitoring bodies' concluding observations, are the subject of wide media coverage in Hong Kong.

### **Judicial Independence**

Over the last decade, the greatest assurance offered to Hong Kong people and overseas investors is the recognition of and respect for judicial independence under the new constitutional order. BL 85 provides that our courts shall exercise judicial power independently, free from any interference.

The independence of the judiciary, in Hong Kong as elsewhere, is essentially made up of two aspects: constitutional independence and independence of outlook. Judicial independence is underpinned by the method of judicial appointment and the guarantee of security of tenure. Judges also enjoy a large measure of protection against civil liability in respect of their judicial functions and their performance as judges cannot be questioned by the legislature.

Judicial independence is regarded as a fundamental aspect of the rule of law. It ensures that, if individuals are involved in proceedings with a public authority, the judge deciding the case will be completely impartial. This gives the community confidence that their disputes will be

handled fairly, whether they are of a criminal or civil nature.

So far as the judiciary is concerned, BL 81 provides that the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the CFA of the HKSAR. The other main provisions concerning the judiciary in the Basic Law relate to the appointment of judges and their security of tenure.

BL 88 provides that:

"Judges of the courts of the [HKSAR] shall be appointed by the [CE] on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors."

The security of tenure of judges is provided for by BL 89, which states as follows:

"A judge of court of the [HKSAR] may only be removed for inability to discharge his or her duties, or for misbehaviour, by the [CE] on the recommendation of a tribunal appointed by the Chief Justice of the [CFA] and consisting of not fewer than three local judges.

The Chief Justice of the [CFA] of the [HKSAR] may be investigated only for inability to discharge his or her duties, or for misbehaviour, by a tribunal appointed by

the [CE] and consisting of not fewer than five local judges and may be removed by the [CE] on the recommendation of the tribunal and in accordance with the procedures prescribed in this Law."

Every single judge who had been in office on June 30, 1997, was re-appointed the following day. It is fair to say that new judicial appointments since then have been entirely uncontroversial. It is particularly noteworthy that judges from overseas common law jurisdictions are appointed as non-permanent members of the CFA, and they are of the highest international standard. They now include four serving members of the House of Lords of the United Kingdom, two former Chief Justices of Australia and a former Chief Justice of New Zealand. One of these non-permanent judges sits as a full member of the CFA in each of its sittings.

BL 84 provides that the courts, when adjudicating cases, may refer to precedents of other common law jurisdictions. Although this makes preparation of cases more difficult, the common law of Hong Kong is enriched and can continue to develop in a pluralistic manner.

It is particularly worth mentioning that in cases concerning basic human rights guaranteed by the Basic Law, the court sometimes ruled in favour of the Government, sometimes against. This proves the independence of the HKSAR's judiciary and highlights the effectiveness of the Basic Law in protecting basic human rights.





### Approach of Interpretation of Basic Law

An important issue that Hong Kong courts have addressed over the last decade is the proper approach to be adopted when interpreting the Basic Law. The CFA has determined that a purposive approach is to be adopted. Interpretation of the Basic Law is complicated by the fact that it is a national law implemented in a common law system preserved under the Basic Law. The unique nature of the Basic Law is exemplified by BL 158 which sets out, in accordance with Article 67(4) of the Constitution of the PRC, that the power of interpretation of the Basic Law lies in the NPCSC, which has authorized the courts of the HKSAR to interpret on their own the provisions of the Basic Law that are within the limits of the autonomy of the Region in adjudicating cases.

In this regard, it has been suggested, in the *David Ma* case, that the common law principles of interpretation, as developed in recent years, are sufficiently wide and flexible to allow a purposive interpretation of the plain language of the Basic Law (*HKSAR v Ma Wai Kwan, David*, at

803D per Mortimer V-P). This purposive approach to constitutional interpretation was first laid down by the CFA in the case of *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315.

The Chief Justice stated that a purposive approach to the interpretation of the Basic Law was appropriate. While the language of the Basic Law text was important, a literal, technical, narrow or rigid approach must be avoided. The relevant provision should be construed in its context, which could be found in the Basic Law itself or relevant extrinsic materials including the Joint Declaration.

The purposive approach to interpretation of the Basic Law has been further developed by the CFA in *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533. According to the CFA, the court's role, in the absence of a binding interpretation by the NPCSC, is to apply the common law in interpreting the Basic Law, by construing the language in the light of its context and purpose in order to ascertain the legislative intent as expressed in the language. Once the courts conclude that the meaning is clear, the courts are bound to give effect to the clear meaning of the language.

The advantage of an approach to interpretation that gives effect to the clear meaning of the Basic Law is that everyone can rely on that meaning when planning their affairs. They know that the courts will interpret the Basic Law according to its language.

Another advantage of using the common law approach is that, since both the legal profession and Judiciary in Hong Kong are trained in that approach, lawyers can advise their clients on the



way in which the courts will interpret the Basic Law. This creates a degree of certainty and confidence.

One of the great strengths of the common law is its flexibility. As the jurisprudence develops in respect of the interpretation of the Basic Law, the fact that the Basic Law is a unique document, promulgated in a civil law jurisdiction, will be taken fully into account. The common law principles will not inhibit the faithful implementation of the Basic Law.

### **Constitutional Review of Local Legislation**

Another important issue that the HKSAR's courts have been faced with is the situation in which there is a conflict between local legislation and the Basic Law. The LegCo of the HKSAR does not have an unlimited power to legislate. BL 11(2) provides that no law enacted by the legislature of the HKSAR shall contravene the Basic Law. That being so, if the courts come to the conclusion that a local law does contravene the Basic Law, it will give effect to the Basic Law rather than the local law. This reflects the primacy of the Basic Law.

This process ensures that the Basic Law is not just a piece of paper setting out ideals to be attained, but that it contains fully enforceable guarantees of rights and obligations, and of other aspects of the basic policies regarding Hong Kong of the CPG. The enforceability of those provisions has created tremendous confidence in the Basic Law and in the HKSAR.

### **Supremacy of the Basic Law**

The supremacy of the Basic Law in the legal system of the HKSAR is reinforced by BL 8, 18

and 160. BL 8 (read with BL 18) provides for the continuing application in the HKSAR of "laws previously in force" (ie the common law, rules of equity, ordinances, subordinate legislation and customary law), except for any laws that contravene the Basic Law and subject to any amendment by the legislature of the HKSAR. BL 160 provides that laws declared by the NPCSC to be in contravention of the Basic Law shall not be adopted upon the establishment of the HKSAR, and that any laws later discovered to be in contravention of the Basic Law shall be amended or cease to have force in accordance with the relevant procedure.

In addition, BL 17(2) requires the HKSAR to report laws enacted by the local legislature to the NPCSC for the record. The NPCSC is empowered by BL 17(3) to return any such law which is "not in conformity with the provisions of [the Basic Law] regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the [HKSAR]". Any such law returned by the NPCSC shall immediately be invalidated. Accordingly, any law which is inconsistent with the Basic Law does not form part of the laws of the HKSAR.

BL 19(1) vests the HKSAR with independent judicial power, including that of final adjudication, and BL 19(2) then confers judicial power on the courts of the HKSAR by providing that "[t]he courts of the [HKSAR] shall have jurisdiction over all cases in the [HKSAR], except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained." The courts of the HKSAR shall have no jurisdiction over acts of state such as defence and foreign affairs



(BL 19(3)). The judicial powers of the courts of the HKSAR are further expressly provided for in BL 80, 82 to 85. Under BL 158, the NPCSC authorizes the courts of the HKSAR to interpret, in adjudicating cases, the provisions of the Basic Law under specified circumstances.

### ***Judicial Reviews in Hong Kong Before Reunification***

The above provisions of the Basic Law lay the foundation of judicial review in the HKSAR post 1997. But, of course, judicial review existed in Hong Kong under the previous legal system. Before Reunification, the Letters Patent and the Royal Instructions were the key constitutional documents of Hong Kong. The Letters Patent authorized laws to be made "for the peace, order and good government" of Hong Kong. Those words were held to confer the widest law-making powers appropriate to a Sovereign. Therefore the scope for challenging primary legislation as being outside those powers was originally very limited. However, in June 1991, the Letters Patent were amended to provide that no local law could be made which restricted the rights

and freedoms enjoyed in Hong Kong in a manner which was inconsistent with the ICCPR as applied to Hong Kong.

The High Court decisions in *R v Lum Wai-ming* (1992) 2 HKPLR 182 and *R v Chan Wai-ming (No 2)* (1992) 2 HKPLR 231 are examples of the courts exercising that power. In both cases, the defendants were charged with offences under the Dangerous Drugs Ordinance (Cap 134). The prosecution sought to rely on mandatory presumptions in the Ordinance to prove the offences. Under human rights jurisprudence, a presumption that places an onus on a defendant must pass the three-fold test of rationality, minimal impairment and proportionality. It was held in *R v Lum Wai-ming* that the presumption (concerning the keys of a motor vehicle) failed the test, and so was inconsistent with the presumption of innocence guaranteed under Article 14(2) of the ICCPR. The provision was therefore ultra vires the legislative powers conferred by the Letters Patent. However, in *R v Chan Wai-ming (No 2)* the presumption (concerning the keys of a drawer) was upheld.



### ***Judicial Reviews in Hong Kong After Reunification***

Since Reunification, constitutional review has continued to be conducted by local courts. Judges see themselves as entrusted with the constitutional duty to ensure that the legislature and the executive of the HKSAR abide by the Basic Law. The CFA in *Ng Ka Ling* explained this role as follows:

"In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid."

Issues which have been covered in such proceedings are wide-ranging, and have significant implications for the development of the HKSAR. They include, for example, the following:

- (a) the constitutionality of the Provisional Legislative Council;
- (b) the extent to which Chinese citizens born on the Mainland to Hong Kong residents have the right of abode;
- (c) whether the national and regional flags are to be protected against desecration;
- (d) the constitutionality of legislation affecting the salary of civil servants;
- (e) freedom of expression and freedom of residents to travel and to enter the HKSAR.

Such public law litigation does not suggest that the legal system is hitting problems since other open and pluralistic jurisdictions have experienced similar increases in public law legal challenges. Instead, it demonstrates the breadth of the human rights protection conferred by the Basic Law and its potency to override inconsistent domestic legislation and to streamline government administrative action.

As pointed out earlier, the decisions in these cases, some in favour of the government and some against, proves the independence of Hong Kong's judiciary and highlights the effectiveness of the Basic Law in protecting basic human rights. Two examples from within the last two years reinforced that conclusion.

#### ***Public Order Ordinance***

Firstly, in July 2005, the CFA made a landmark ruling in the case of *Leung Kwok Hung & Others v HKSAR* [2005] 3 HKLRD 164, on the constitutionality of provisions in the Public Order Ordinance (Cap 245) that require the organizers of certain public assemblies to give advance notice to the police.

Those proposing to organize public meetings of more than 50 persons, or public processions of more than 30 persons, are required to notify the Commissioner of Police. The Commissioner may only restrict or prohibit a gathering where he reasonably considers that this is necessary in the interests of, among others, public order (*ordre public*).

Emphasizing the importance of freedom of speech and freedom of peaceful assembly, the CFA said, at 175H that:



"... These freedoms enable such dialogue and debate to take place and ensure their vigour. A democratic society is one where the market place of ideas must thrive. These freedoms enable citizens to voice criticisms, air grievances and seek redress. ... Minority views may be disagreeable, unpopular, distasteful or even offensive to others. But tolerance is a hallmark of a pluralistic society. Through the exercise of these freedoms minority views can be properly ventilated."

The Court then analysed the constitutional requirements that must be satisfied before a restriction on these rights is permissible. They are:

- (a) the restriction must be prescribed by law; and
- (b) the restriction must be necessary in a democratic society in the interests of one of the grounds specified in the ICCPR and must be proportionate to the purpose of protecting those interests.

The Court confirmed that the notification system satisfied the Basic Law protection on freedom of expression and assembly. However, as to the concept of "*ordre public*" as a ground of imposing restrictions, the Court held that this French expression, which has a broader meaning than public order, did not give an adequate indication of the scope of the discretion. That part of the Ordinance was struck out, leaving the remainder of the Ordinance in place.

### ***Interception of Communications and Surveillance***

Secondly, in February 2006, the CFI, in *Leung Kwok Hung and Koo Sze Yiu v CE of the HKSAR*, HCAL 107/2005, ruled on the constitutionality of section 33 of the Telecommunications Ordinance (Cap 106), which enabled the CE to authorize interception of telecommunications whenever he considers that the public interest so requires, and of the Executive Order issued by the CE to law enforcement agencies in respect of covert surveillance. The Court ruled that the Executive Order, while legally made, comprised administrative directions only and did not constitute a set of "legal procedures" for the purposes of BL 30; as for section 33 of the Telecommunications Ordinance, it was ruled unconstitutional insofar as it authorized or allowed access to or disclosure of the contents of any message or any class of messages.

However, given the serious consequences that would occur in respect of law and order if law enforcement agencies were deprived of these powers of investigation, the court ordered that the two instruments should be given temporary validity for six months, to enable the Government to enact fresh legislation with sufficient safeguards for the right to privacy.

On appeal, the CFA in July 2006 set aside the temporary validity order and replaced it with an order suspending the declarations of unconstitutionality for six months (*Koo Sze Yiu and Another v CE of the HKSAR* [2006] 3 HKLRD 455). The Court reasoned that the rule of law involves meeting the needs of law and order as well as providing a legal system that is able to

function effectively. In order to meet those needs and preserve that ability, exceptional circumstances may call for exceptional judicial measures, including temporary validity and suspension.

The Interception of Communications and Surveillance Ordinance was enacted in August 2006 before the six-month period expired. This Ordinance provides a new legal basis for the conduct of interception of communications and the use of surveillance devices by law enforcement agencies. It also provides for procedural safeguards to protect the right to privacy. All interception and the more intrusive type of surveillance must be authorized by one of the panel judges. The law enforcement agencies are also required to conduct internal reviews while independent oversight is provided by the newly created Commissioner on Interception of Communications and Surveillance. The Ordinance has struck a fair balance between the maintenance of law and order and the protection of privacy.

### ***Benefits of Judicial Review***

These two cases are good illustrations of the effectiveness of the Basic Law in protecting fundamental human rights like freedom of assembly and right to privacy. They also demonstrate the strength and independence of our judiciary that jealously guards these rights.

The above cases also demonstrate that judicial review has helped to ensure that the HKSAR legislation which purports to authorize the executive or government to act in a particular way or adopt a particular decision would not contravene the Basic Law. The supremacy of the Basic Law by

virtue of BL 11 (as well as BL 8, 18 and 160) is fully respected and implemented in the HKSAR.

Nevertheless, it is appropriate to quote the words of the Honourable Chief Justice Li at the ceremonial opening of this legal year on the role of the courts in handling judicial review cases:

"Judicial review proceedings cannot provide a panacea for these problems. The constitutional role of the courts is only to determine the limits of legality by reference to the relevant constitutional and statutory provisions and the applicable common law principles. The courts are only concerned with what is legally valid, and what is not, in accordance with legal norms and principles.

Within the limits of legality, the practical solutions to the complex and difficult political, economic and social problems faced by society must be discussed and found through the proper operation of the political system. Citizens have to look to the political process to deliver appropriate workable solutions to these problems."





## KEEPING AN OPEN MIND

Of course, not everything has gone as smoothly as one should have liked during the past ten years. The interpretation of the new constitutional order and its implementation has inevitably given rise to some controversies.

### NPCSC Interpretations

The most significant legal issue since Reunification has been the interpretation of the Basic Law by the NPCSC. Under BL 158, the ultimate power to interpret the Basic Law is vested in the NPCSC. The HKSAR courts are authorized to interpret the Basic Law in adjudicating cases, although in certain situations they must seek an interpretation by the NPCSC before deciding a case.

Since Reunification, the NPCSC has on three occasions interpreted provisions in the Basic Law.

### Right of Abode

BL 24 confers a right of abode in the HKSAR on a number of categories of people. The effect of that article was to confer a right of abode in the HKSAR on tens of thousands of children born and raised in the Mainland who had not previously had such a right. If all these children arrived at once, the impact on the social support services would have been extremely difficult to bear.

The HKSARG therefore introduced amendments to the Immigration Ordinance, which took effect from 1 July 1997, to implement a Certificate of Entitlement Scheme in respect of Mainland children. The legislation provided that, to enjoy their right of abode, they must hold a valid travel document, which in practice means a valid One

Way Permit issued by Mainland Authorities, to which there was affixed a valid Certificate of Entitlement issued by the Department of Immigration. In order to obtain such a certificate, they must prove to the satisfaction of the Director of Immigration that at least one of their parents had the right of abode in the HKSAR.

That Certificate of Entitlement Scheme was challenged before the courts as being inconsistent with the Basic Law. On 29 January 1999, the CFA delivered its judgments in *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 and *Chan Kam Nga v Director of Immigration* [1999] 1 HKLRD 304 relating to Chinese nationals born outside Hong Kong who claimed for the right of abode.

The CFA held that the following aspects of the Certificate of Entitlement Scheme were inconsistent with the Basic Law:

- (a) the requirement for the certificate to be affixed to a One Way Permit;
- (b) the requirement to apply to the Exit-Entry Administration of the Public Security Bureau in the Mainland when applying for a Certificate of Entitlement;
- (c) its retrospective effect from 1 to 9 July 1997;
- (d) its exclusion of persons born out of wedlock to a mother who does not have a right of abode in the HKSAR; and
- (e) its exclusion of persons whose parent did not have a right of abode at the time of birth.

It was estimated that the effect of the CFA's interpretation was that, within ten years, about 1.67 million people born in the Mainland would have the right to live in Hong Kong. That could have meant a 25% increase in Hong Kong's population. Faced with this massive immigration problem, and being unable to solve the problem in Hong Kong, the CE sought assistance from the CPG which in turn sought an interpretation by the NPCSC of the relevant parts of BL 22 and 24. The NPCSC confirmed on 26 June 1999 that the provisions in the Basic Law were to be interpreted narrowly. The immigration problem was therefore solved.

However, that Interpretation only had prospective effect and did not affect those litigants whose rights had already been determined by the CFA ruling. In the final paragraph of the Interpretation, the NPCSC stated that it did not affect the right of abode in the Region which had been acquired under the judgment of the CFA on the relevant cases dated 29 January 1999 by the parties concerned in the relevant legal proceedings. But other than that, the question of whether any person fulfilled the conditions prescribed by the relevant part of BL 24 shall be determined by reference to the Interpretation.

### ***Constitutional Development***

The second Interpretation of the Basic Law by the NPCSC occurred in April 2004. It was not the result of any request from the HKSAR. It related to the provisions in the Basic Law on the methods for selecting the CE and for electing members of the Legislative Council after 2007. A number of aspects of the procedures for amending the relevant provisions were unclear.

The NPCSC on 6 April 2004 issued its Interpretation of Annexes I and II of the Basic Law. Its Interpretation may be summarized as follows:

- (a) First, the phrases "subsequent to the year 2007" and "after 2007" stipulated in the two Annexes include the year 2007;
- (b) Second, the provisions in the two Annexes that "if there is a need" to amend the method for selecting the CEs for the terms subsequent to the year 2007 or the method for forming the LegCo and its procedures for voting on bills and motions after 2007 mean that they may be amended or remain unamended;
- (c) Third, the CE shall make a report to the NPCSC as regards whether there is a need to make an amendment; and the NPCSC shall, in accordance with the provisions of BL 45 and 68, make a determination in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The bills on the amendments to the two methods, and LegCo's procedures for voting on bills and motions, and proposed amendments to such bills shall be introduced into the LegCo by the HKSARG;
- (d) Fourth, if no amendment is made to the two Annexes, the provisions relating to the method for selecting the CE in Annex I, and the provisions relating to



the method for forming the third term of the LegCo and the provisions relating to its procedures for voting on bills and motions in Annex II will still be applicable.

In mid-April 2004, the CE submitted his report to the NPCSC. That report endorsed the two reports of the Constitutional Development Task Force and agreed with its views and conclusion. It also stated that the CE considered that the methods for selecting the CE in 2007 and for forming the LegCo in 2008 should be amended, so as to enable the HKSAR's constitutional development to move forward. Finally, it requested the NPCSC to determine, in accordance with the provisions of BL 45 and 68, and in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress, whether the methods for selecting the CE in 2007 and for forming the LegCo in 2008 may be amended.

The Decision of the NPCSC was issued on 26 April 2004. The material parts of that Decision may be summarized as follows:

- (a) First, the election of the third CE to be held in 2007 shall not be by means of universal suffrage. The election of the LegCo in the fourth term in 2008 shall not be by means of an election of all the members by universal suffrage. The ratio between members returned by functional constituencies and members returned by geographical constituencies through direct elections, who shall respectively occupy half of the seats, is to remain unchanged.

The procedures for voting on bills and motions in the LegCo are to remain unchanged.

- (b) Second, subject to the above part of that Decision not being contravened, appropriate amendments that conform to the principle of gradual and orderly progress may be made to the specific method for selecting the third CE in 2007 and the specific method for forming the LegCo in the fourth term in 2008 according to BL 45 and 68 and Annex I and Annex II to the Basic Law.

At that time, there were different views as to whether the Central Authorities should have interfered with the affairs of the HKSAR. One view was that the Central Authorities should not have a hand in the HKSAR's affairs except in defence and foreign affairs. A contrary view was that, the political system is an integral part of the system of the HKSAR, the establishment of which is clearly the power and responsibility of the NPC. By constitutional design, the Central Authorities should therefore have both the power and responsibility in overseeing Hong Kong's constitutional development. Under the "One Country, Two Systems" arrangement, it has never been intended that Hong Kong can on its own make changes to the electoral systems.

It is fair to point out that the role played by the NPCSC in the two election methods has been provided clearly in the Basic Law. Subsequent to the year 2007, if there is a need to amend the provisions of the election methods, the Basic Law provides for the approval or the reporting of



the amendments to NPCSC for the record.

### ***CE's Term of Office***

The third Interpretation by the NPCSC occurred in April 2005 and related to the length of office of a CE who is selected after the previous CE did not complete his original five-year term. This issue arose after the State Council accepted the resignation of the second-term CE in March 2005. Two views had emerged as to the term of office of his successor — namely a full five-year

term and the remainder of the original five-year term. The Basic Law does not expressly deal with the situation in question.

In order to avoid any uncertainty concerning the selection of the CE in 2005, the acting CE requested an interpretation of the Basic Law by the NPCSC. The NPCSC interpreted that, having regard to the relevant provisions of the Basic Law, the term of office of a new CE, in such circumstances, should be the remainder of the original five-year term.





### **Concern over Interpretations**

The NPCSC's power to interpret the Basic Law reflects Article 67(4) of the PRC Constitution which empowers the NPCSC to interpret all national laws.

When the NPCSC made the first Interpretation on the Basic Law provisions relating to the right of abode issue, some lawyers in Hong Kong argued that the NPCSC could only interpret the Basic Law if the HKSAR courts requested such an interpretation, and could only interpret those provisions which fell outside the HKSAR's high degree of autonomy. The issue was raised in the case of *Lau Kong Yung v Director of Immigration* [1999] 3 HKLRD 778 which went all the way to the CFA.

The Court rejected the above arguments and held that the NPCSC's power of interpretation was in general and unqualified terms. Moreover, it held that any such interpretation was binding on the courts of the HKSAR. The judgment of Sir Anthony Mason NPJ demonstrates the extent to which the court understood the dynamics of the new constitutional order. He said as follows:

"... This conjunction of a common law system under a national law within the larger framework of Chinese constitutional law is a fundamental aspect of the principle of 'one country, two systems' which is recited in the Preamble to the Basic Law.

As is the case with constitutional divisions of power, a link between the courts of the Region and the institutions of the PRC is required. In a nation-wide common law system, the link would normally be between

the regional courts and the national constitutional court or the national supreme court. Here, however, there are not only two different systems, but also two different legal systems. In the context of 'one country, two systems', BL 158 provides a very different link. That is because the Article, in conformity with Article 67(4) of the PRC Constitution, vests the general power of interpretation of the Basic Law, not in the People's Supreme Court or the national courts, but in the NPCSC."

Later on, after concluding that the NPCSC's power was unqualified, Sir Anthony Mason added that:

"This conclusion may seem strange to a common lawyer but, in my view, it follows inevitably from a consideration of the text and structure of BL 158, viewed in the light of the context of the Basic Law and its character as the constitution for the HKSAR embodied in a national law enacted by the PRC."



The judgment in this case was a landmark in the implementation of the Basic Law, since it placed beyond all doubt the legality and constitutionality of the NPCSC interpretations.

In a subsequent CFA decision in *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533 at 545A-G, the binding effect of the NPCSC's interpretation on the HKSAR courts and its nature under the principle of "One Country, Two Systems" have been further explained as follows:

"... Where the NPCSC has made an interpretation of the Basic Law pursuant to its power under Article 67(4) of the Chinese Constitution and BL 158, the courts in Hong Kong are under a duty to follow it. The Court so held in *Lau Kong Yung* where the Court stated that the NPCSC's power of interpretation of the Basic Law under BL 158(1) originating from the Chinese Constitution 'is in general and unqualified terms'. In particular, that power of the NPCSC extends to every provision in the Basic Law and is not limited to the excluded provisions referred to in BL 158(3).

Equally, where the NPCSC makes an interpretation of an excluded provision pursuant to a judicial reference from the Court under BL 158(3), the courts in Hong Kong in applying the provision concerned shall follow the NPCSC's interpretation, although judgments previously rendered shall not be affected. This is expressly provided for in BL 158(3).

The NPCSC's power to interpret the Basic Law is derived from the Chinese Constitution

and the Basic Law. In interpreting the Basic Law, the NPCSC functions under a system which is different from the system in Hong Kong. As has been pointed out, under the Mainland system, legislative interpretation by the NPCSC can clarify or supplement laws. Where the NPCSC makes an interpretation of a provision of the Basic Law, whether under BL 158(1) which relates to any provision, or under BL 158(3) which relates to the excluded provisions, the courts in Hong Kong are bound to follow it. Thus, the authority of the NPCSC to interpret the Basic Law is fully acknowledged and respected in the Region. This is the effect of the Basic Law implementing the 'One Country, Two Systems' principle as was held by the Court in *Lau Kong Yung*. Both systems being within one country, the NPCSC's interpretation made in conformity with BL 158 under a different system is binding in and part of the system in the Region."

All three Interpretations had been controversial. However, in view of the provisions of the Basic Law as elucidated by the CFA, it is clear that all three Interpretations have been lawful and constitutional. Nevertheless, it must be accepted that the NPCSC's power of interpretation has caused concern about the integrity and certainty of our legal system. As such, interpretation from the NPCSC will not be sought lightly.

The following observations may also be made on the NPCSC's power of interpretation. Firstly, the Central Authorities of the Mainland is very determined to do what is best for Hong Kong. They are very well informed and many have a



clear understanding as to why an interpretation by the NPCSC would trigger worries and criticisms among common law lawyers in Hong Kong.

Secondly, the Mainland is actively promoting the rule of law, not just in form but in substance, as reflected in the various government reports submitted to the NPC. Further, China is frank in admitting her weaknesses and is very determined to demonstrate to the world of this pursuit.

Trust between Hong Kong and the Central Authorities with an open mind is crucial in the successful implementation of "One Country, Two Systems". Trust can only come with frank communication and understanding. There is clearly a common goal, ie to enable Hong Kong to prosper under the new constitutional order.

### LOOKING AHEAD

After Reunification, Hong Kong has gone through the most trying time. Avian flu, the financial crisis, the right of abode issue, the bursting of the bubble economy, the SARS epidemic, economic restructuring and globalization have brought numerous challenges to us. It is undeniable that the implementation of the "One Country, Two Systems" principle has been a great success.



The overall success so far has been acknowledged by the governments of other jurisdictions. They agree that the rule of law and an independent judiciary remain pillars of Hong Kong's open society, while various freedoms and rights remain respected and defended in Hong Kong. In her latest Six-monthly Report to Parliament, the British Foreign Secretary concluded that "the 'One Country, Two Systems' principle has worked well in practice and that the rights and freedoms promised to Hong Kong in the Joint Declaration and the Basic Law continue to be upheld."

How to turn "One Country, Two Systems" from an unprecedented experiment in history, giving rise to doubts and challenges, into a constructive platform, generating massive synergy for the advancement of the rule of law for both Hong Kong and China, is the challenge of the day.

With the rising economic power of the Mainland, there is now even greater motivation to ensure the continuity of the common law in Hong Kong. Hong Kong faces acute competition from other Asian cities in respect of international investment. However, although there is no room for complacency, Hong Kong's position is still irreplaceable at this moment. People in Hong Kong command confidence on the international level and conduct business on that level. Thanks to the well-established common law system and the independent judiciary, Hong Kong is still ahead of many Asian cities as an international financial centre. This is one of our keys to avoid being marginalized against the rapidly booming economy in the Mainland.

On the economic front, Hong Kong has been benefiting greatly from the reunification with the

Mainland. The Mainland is the biggest trading partner of HKSAR. Hong Kong's world-class financial market and facilities, supported by world-class legal services, are precisely what is urgently required by the Mainland's rapidly developing manufacturing and services industries. All these are further strengthened by the advent of Closer Economic Partnership Arrangement, ie the CEPA, which made it easier for Hong Kong to access the Mainland market in respect of goods and services.

Last year, two major banking corporations in the Mainland got listed in the Hong Kong Stock Exchange, with breaking records on the amount of capital raised. Firstly, the Bank of China, one of the top four banks in the PRC, raised HK\$86.7 billion or US\$11.14 billion in June 2006. Secondly, the Industrial and Commercial Bank of China was simultaneously listed on both the Hong Kong Stock Exchange and Shanghai Stock Exchange on 27 October 2006. It raised at least US\$14 billion in Hong Kong (H-shares) and another US\$5.1 billion in Shanghai (A-shares).

Due to the rapid economic growth, the need for professional legal services is phenomenal. The benefits derived by the Hong Kong lawyers from "One Country, Two Systems" are likewise significant. Of course, Hong Kong lawyers have to compete with their international counterparts on large projects. However, the proximity with China, geographical and cultural, is a definite advantage. International corporations find comfort in our common law legal system, independent judiciary and able legal profession. The Mainland parties are likewise at ease with Hong Kong lawyers who share the same language and culture,

and who are extremely familiar with the way the Mainland market operates.

The HKSARG are actively promoting the development of Hong Kong as a centre for resolving disputes arising out of international business transactions in the Mainland. Our arbitration facilities are world class. Awards made by the Hong Kong International Arbitration Centre are enforceable in the Mainland and in all contracting states of the New York Convention. That Centre already handles about 300 cases per year, and this is likely to increase further as alternative dispute resolution becomes more popular.

As regards court judgments, a formal agreement has been signed in July last year whereby certain judgments in commercial disputes given by designated Mainland courts would be enforceable in Hong Kong and vice versa. When implemented, Hong Kong judgments at District Court level or higher will be enforceable in the Mainland if certain criteria are satisfied. Under the arrangement, judgments given by certain Mainland courts will be enforceable in Hong Kong if similar criteria are satisfied. The courts in question are those at the Intermediate People's Court level or higher, plus a small number of Basic Level People's Courts that are designated to handle foreign-related commercial cases. Once this is in force, those doing business in the Mainland will have the option of resolving their disputes in Hong Kong by way of litigation, in addition to arbitration, knowing that the resulting award can be enforced in the Mainland, and many other jurisdictions.

The Mainland has embarked on a massive programme of legislation and law reforms. There is a strong determination to strengthen the legal



system, and to win the confidence of the international investors, especially after her entry into the WTO.

With her entry into the WTO, China's globalization has gone past the point of no return. The central and regional authorities of the Mainland know too well that unless the business world can trust the Mainland legal system, China cannot offer a truly safe haven for all foreign businessmen and investors. Thus, huge efforts have been put into legislation and reforms on the law relating to the market economy and judicial process. The Mainland authorities have been moving fast on changes aimed at strengthening the rule of law in China. Hong Kong may play a part in that process. There is thus every reason and great incentive on the part of the Central Authorities to ensure the rule of law in Hong Kong is strong and thriving.

While its economy is going from strength to strength, our country has placed unprecedented emphasis on the rule of law. The importance of the rule of law was declared by the NPC in the

most solemn manner by incorporating into the Constitution the principles of "governing the country according to law" and "making it a country under rule of law" through the adoption of the *Amendment to the Constitution of the People's Republic of China* in 1999. Our country has come a long way in promoting the rule of law in recent years. While legislation and law reform in relation to market economy and judicial proceedings is now in full swing, vigorous efforts are also being made to explore how the law can be used as a means to promote a harmonious society in such aspects as community care, family security and environmental protection.

There are certainly many more formidable challenges ahead. With the concerted efforts by the Mainland and Hong Kong, the "One Country, Two Systems" principle will prove to be not merely an unprecedented experiment, but also an innovative mechanism which can facilitate continuous development of the economy and rule of law of the Mainland and Hong Kong. This will also set a good example to the rest of the world.

