

## “Excessive Deference” or Strategic Retreat? Basic Law Article 158 and Constitutional Development in Hong Kong

By Thomas E. Kellogg<sup>1</sup>

As the tenth anniversary of the Hong Kong handover has come and gone, a number of scholars, lawyers, and politicians have taken stock of constitutional development in the SAR over the past decade. For many, the story has a positive arc: the negative experience of the early years, especially the controversy over the right of abode case of 1999, was followed by the evolution of the Hong Kong courts’ role as the protector of basic rights.<sup>2</sup>

This narrative has much to recommend it: both the Court of Final Appeal (CFA) and lower-level Hong Kong courts have indeed been steadfast in their approach to basic rights adjudication in recent years. A few cases are especially worthy of note: the May 2005 *Yeung May Wan* decision,<sup>3</sup> for example, in which the court ruled in favor of a group of Falun Gong protestors who had been arrested for blocking the entrance to the central government’s liaison office, showed the CFA’s willingness vigorously to uphold rights protections even for members of a Hong Kong community that is high on Beijing’s enemies list. In its judgment, the Court said the government’s arrest of the protestors under a public obstruction charge infringed on their freedom to demonstrate under Article 27 of the Basic Law.<sup>4</sup>

In another key Basic Law Article 27 free association ruling, also issued in May 2005, the CFA narrowed the Commissioner of Police’s discretion to reject applications to hold a public protest under the government’s statutory scheme for regulating public processions.<sup>5</sup> The CFA’s decision in the case, *Leung Kwok Hung and Others v. HKSAR*, was also noteworthy for its reliance on the International Covenant on Civil and Political Rights (ICCPR) and relevant international human rights law jurisprudence.<sup>6</sup>

Also indicative of the Hong Kong courts’ rights-protective jurisprudence in recent years is the district court decision in *HKSAR v. Li Man Tak and Others*. In that case, the district court put the government on notice that it had to pass legislation to establish more strict oversight of police authority to engage in electronic surveillance or risk the judicial rejection of all evidence obtained through the use of such surveillance techniques. After the government exhausted its appeals, it introduced legislation to cover its electronic surveillance power. In August 2006, the Legislative Council passed the Surveillance Ordinance, bringing police use of covert surveillance techniques within the ambit of judicial authorization for the first time in Hong Kong history.<sup>7</sup>

Most recently, in July 2007, the CFA struck down a legal provision criminalizing same-sex sodomy between consenting adults on the grounds that it infringed on the constitutional right to equality.<sup>8</sup> The Court’s decision in the *Yau Yuk Lung Zigo* case was seen as an important victory for the protection of the rights of sexual minorities in Hong Kong.

Yet even with a growing body of Hong Kong case law in line with international human rights norms, Beijing's interpretative authority under Article 158 of the Basic Law continues to cast a shadow over the rule of law in Hong Kong. This article focuses on the first of three interpretations issued by Beijing during the past decade. In June 1999, the Standing Committee of the National People's Congress issued an interpretation of two Basic Law provisions, establishing their authority to issue interpretations even in the absence of a request from the Court of Final Appeal that it do so. Both that intervention and subsequent interpretations established Beijing's broad-based view of its own authority under Article 158, despite textual ambiguities inherent in that Article that might be construed to limit the central government's interpretative authority.

Though the lack of meaningful legal constraints on the central government's interpretative authority would seem to be a victory for Beijing, that victory is not without cost. To the extent that many observers, both inside and outside China, had hoped that the Standing Committee's constitutional role in Hong Kong might spur the development of an effective constitutional mechanism on the mainland, the ability of the Standing Committee to issue interpretations with a free hand – instead of carefully working through legal arguments and institutional constraints – makes that possibility, never particularly robust, perhaps even more remote.

*Beijing's interpretive authority: playing the A158 card*

Given that the purpose of Article 158 is to harmonize the constitutional authority of the Standing Committee and the Court of Final Appeal, it was perhaps inevitable that the text would be no model of clarity. Article 158 reads as follows:

The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.

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

The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the

provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.

On its face, the text of Article 158 raises several questions, none of which can be easily resolved by the Basic Law text itself. When, and by what process, does the Standing Committee issue interpretations? Are other branches of the Hong Kong government permitted to ask the Standing Committee to issue an interpretation? Most crucially, has the Standing Committee fully delegated its authority to interpret Basic Law provisions that do *not* concern “affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region”? Or does the full text of the Basic Law remain within its ambit? All of these questions continue to be worked out over time, with practice making more clear what the Basic Law had left perhaps deliberately ambiguous.

The first opportunity for Beijing to tip its hand as to its own view of its constitutional authority under Article 158 came relatively soon after the handover, with the 1999 right of abode controversy. The facts of the case, *Ng Ka Ling and Others v. Director of Immigration*,<sup>9</sup> were somewhat convoluted: the case involved four plaintiffs, all of whom were asserting the right of abode under Article 24(2) of the Basic Law, despite not having adhered to the formalities of mainland and Hong Kong immigration law.<sup>10</sup> In effect, the claimants argued that the relevant regulations restricted their right of abode under the Basic Law, and were therefore unconstitutional.

The case turned on the Court's interpretation of not only Article 24(2) of the Basic Law, but also 22(4), which gives Beijing authority over entry into Hong Kong by persons from the Mainland.<sup>11</sup>

For the first time, the Court of Final Appeal was dealing with the division of interpretative authority under Article 158. The Court decided to be bold. In a unanimous decision issued in January 1999, the CFA found for the plaintiffs, and in so doing laid out its view of its own power of constitutional interpretation.

After a recitation of the facts of the case, the Court turned first to its power of judicial review over Hong Kong law. On this point, the court was forceful and direct, stating that the courts of the SAR “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 inconsistent to hold them to be invalid.”<sup>12</sup> The Court held this to be not merely a matter of judicial discretion, but rather an “obligation” that the courts must fulfill.<sup>13</sup>

The Court also dealt with the question of when a reference must be made to the Standing Committee under Article 158. In answering this question, the Court created a two-part test for when to refer, one that, unlike certain other sections of the opinion, has withstood outside criticism and proved durable. The Court, apparently looking to limit the number of questions that would be referred to Beijing to the maximum extent possible, declared that, in order to be referred, a question had to both concern a provision of the Basic Law that dealt with the responsibilities of the central government – what it referred to as the “classification condition” – and also that the interpretation would “affect the judgment of the case.” The Court termed this second condition the “necessity condition.”<sup>14</sup>

This two-part test set a high bar for referral, and also arguably extended the Hong Kong courts’ authority beyond the simplest reading of Article 158: according to some scholars, the text of Article 158 suggests that any move by the courts to interpret Basic Law provisions relating to Beijing’s authority should be preceded by an automatic referral to Beijing. The Court of Final Appeal, in setting up an additional hurdle to referral, effectively limited the number of opportunities that Beijing would have to weigh in on the meaning of the Basic Law, at least with the CFA’s imprimatur.

Certainly the Court’s boldest move was its assertion of authority to pass judgment on the constitutionality of mainland law. Spurred in part by a desire to clarify what it saw as an error in an earlier judgment by a lower court,<sup>15</sup> the CFA made clear its view that its jurisdiction included national, not just local, law:

What has been controversial is the jurisdiction of the courts of the Region to examine whether any legislative acts of the National People’s Congress or its Standing Committee (which we shall refer to simply as “acts”) are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. In our view, the courts of the Region do have this jurisdiction and indeed the duty to declare invalidity if inconsistency is found. It is right that we should take this opportunity of stating so unequivocally.<sup>16</sup>

Though its declaration would cause controversy, nonetheless, the Court’s position is not without merit: as the facts of the *Ng Ka Ling* case demonstrate, it is inevitable that certain mainland laws and regulations will touch upon Basic Law provisions; in order to give full effect to the Basic Law, the courts of Hong Kong would almost certainly have to review mainland law when and as necessary.

Yet such an approach would have to overcome one of the key precepts of mainland constitutional law: legislative supremacy, which is referred to in the Chinese context by the term “democratic centralism.” Under the mainland constitution, the government eschews a system of checks and balances in favor of, on paper at least, the supreme authority of the legislature. Under Article 3 of the Chinese constitution, the People’s Congress is given the authority to supervise both the courts and the executive.<sup>17</sup> The CFA’s assumption of authority to review mainland legislation, while consistent with

the common law governmental structure laid out in the Basic Law, is nonetheless fundamentally incompatible with the central government's constitutional framework.

Finally, the CFA also made a few key points about its method of constitutional interpretation. The Court declared that it would take a "purposive"<sup>18</sup> approach, one that read the provisions of the Basic Law in light of the principles enunciated therein. In particular, the Court cited the importance of Article 39 of the Basic Law, which incorporated the ICCPR into Hong Kong law. The Court also promised to give a "generous interpretation" of the Basic Law's rights provisions, so as to give Hong Kong citizens the "full measure of fundamental rights and freedoms... guaranteed (by the constitution)."<sup>19</sup>

In essence, the Court was attempting to both define its role as the protector of the basic rights of Hong Kong citizens, and to clarify its own authority, both as compared with the other branches of the SAR government, and also relative to the Standing Committee of the NPC.

But for Beijing, this assertion of authority went too far. Its reaction was both swift and negative. Less than a month after the decision was announced, Xu Chongde, a well-known Beijing-based conservative academic with deep ties to the government, denounced the decision as undermining the authority of the Standing Committee. In Xu's view, the CFA had "overly expanded its powers."<sup>20</sup> Peking University professor and longtime government-affiliated academic Xiao Weiyun also criticized the ruling as overstepping the court's authority in a manner that was detrimental to "one country, two systems."<sup>21</sup> Xu and Xiao's comments were echoed a few days later by then-Information Minister Zhao Qisheng. "The court's decision is a mistake and against the Basic Law," Zhao told a group of reporters. "This is a very serious matter."<sup>22</sup>

The SAR government was also displeased, and in a highly unusual move, asked the court for a clarification of its verdict. On February 26, 1999, the CFA complied. Perhaps signaling its discomfort with the government's request, the Court noted that the government had "invite(d) the Court to take an exceptional course."<sup>23</sup> In general, the CFA noted, further commentary by the Court was best left to subsequent verdicts rather than post-verdict public statements by the judiciary.

Even with its seeming reservations, the CFA reaffirmed Beijing's authority under Article 158 of the Basic Law to issue interpretations, and, further, that "the Court accepts that it cannot question... the authority of the (central government) to do any act which is in accordance with the provisions of the Basic Law and the procedure therein."

Even with this rather artful statement by the Court – placating critics in Beijing while leaving substantive matters as vague as possible – the Hong Kong government was not mollified. Although it lacked a clear procedural basis for doing so, in May 1999, it asked the central government for an interpretation, one that more closely adhered to its own reading of Articles 22(4) and 24(2).

On June 26, 1999, Beijing obliged, offering a relatively short Interpretation of Articles 22(4) and 24(2)(3) of the Basic Law.<sup>24</sup> Under the Standing Committee's reading, both Article 22(4) and Article 24(2)(3) were both found to be provisions that are relevant to the "responsibility of the Central People's Government" and the "relationship between the Central Authorities and the (SAR)." It then offered the more narrow reading of those Articles. It did, however, reaffirm that those litigants who had brought their case to court would nonetheless keep the fruits of their victory. Although similarly-situated persons would in future be out of luck, Ng Ka Ling herself and her co-litigants would be allowed to remain in Hong Kong.

The Standing Committee's acceptance of the government's invitation to intervene had additional consequences beyond the right of abode issue: in issuing an interpretation in the absence of any request from the CFA, the Standing Committee established the precedent that its interpretative authority is a free-standing one. In other words, Beijing need not wait for a query from the CFA in order to issue an interpretation. The only procedural limit on the Standing Committee's interpretative authority is that it must consult with the Basic Law Committee, a step that, admittedly, it has taken in each of the three interpretations it has issued.<sup>25</sup>

*The CFA changes course: "excessive deference" or strategic retreat?*

In the wake of the 1999 interpretation controversy, it is perhaps understandable that the Court of Final Appeal wished to fully cede the more controversial ground that it had staked out in the *Ng Ka Ling* case. In two key subsequent cases, *Lau Kong Yung and Others v. Director of Immigration*<sup>26</sup> and *Director of Immigration v. Chong Fung Yuen*,<sup>27</sup> the CFA explicitly granted that Beijing's Article 158 authority was in essence unlimited, noting in *Lau Kong Yung* that "(t)he power of interpretation of the Basic Law conferred by art. 158(1) is in general and unqualified terms" and that "(t)hat power and its exercise is not restricted or qualified in any way by art. 158(2) and 158(3)."<sup>28</sup> In *Chong Fung Yuen*, the CFA reiterated the point, noting that "the power of the Standing Committee extends to every provision in the Basic Law and is not limited to the excluded provisions referred to in art. 158(3)."<sup>29</sup>

Some have criticized the CFA for these statements. Eminent Chinese law scholar and New York University law professor Jerome Cohen, in a 2000 speech at Hong Kong University, called the CFA's decision in *Ng Ka Ling* "unwisely provocative," and then suggested that the Court had gone too far in the other direction and had "unnecessarily prostrated itself" in its verdict in *Lau Kong Yung*.<sup>30</sup> Senior Hong Kong law scholar Yash Ghai also expressed regret over the "total capitulation by the Court to the Central Authorities" and the "excessive deference that the CFA has paid to the NPCSC."<sup>31</sup> In a more recent commentary, Chinese University of Hong Kong law professor Ling Bing similarly faulted the court for overstating Beijing's interpretative authority in the *Lau* and *Chong* cases,<sup>32</sup> calling the CFA's verdicts in those cases were "misconceived."<sup>33</sup> Overall, Prof. Ling argues that "the CFA's assessment of the NPCSC's interpretative power is misguided and damaging to the high degree of autonomy and the 'One Country Two Systems' policy which underpin the constitutional system in Hong Kong."<sup>34</sup>

Yet by ceding that ground, the court was able to avoid controversy and, in so doing, both preserve the two-part referral test and, in the *Chong Fung Yuen* case, issue a ruling that aggressively protected the rights of the litigants involved.<sup>35</sup> In some ways, the results in these cases are unsatisfying, as the critics suggest: clear and reasonable limits on Beijing's Article 158 power would help maintain public confidence in the legal system and in the rule of law in Hong Kong. In the absence of that likely unreachable goal, the CFA's decision to focus on the preservation of the referral test and the enforcement of basic rights protections makes sense. In fact, one could argue that its avoidance of renewed controversy over Article 158 has strengthened its ability to act as a protector of human rights, in part by ensuring its attentions and strength were not diverted by regular run-ins with Beijing over exactly where the line between the CFA and the NPCSC lies.<sup>36</sup> Rather than being seen as the weak link in Hong Kong's constitutional jurisprudence, these cases might better be seen as making the best of a bad situation.

Although the Court of Final Appeal did not explicitly abandon its claim of authority to review mainland law, neither has it reaffirmed that authority, nor, since the *Ng Ka Ling* case, made any use of it.<sup>37</sup> At present, the Court seems now to prefer avoiding the subject altogether. The Standing Committee has taken a similar approach: while it has not formally rejected the CFA's claim, it has by no means embraced it. The strongly-worded attack on the Court's reasoning on this point by government-affiliated scholars in the immediate aftermath of the announcement of the *Ng Ka Ling* decision is perhaps clear enough indication of official views on the matter.<sup>38</sup>

Close to a decade later, it is easy to see the Court of Final Appeal's opinion in the *Ng Ka Ling* case as an example of judicial overreach: perhaps it was unlikely that Beijing would have ever accepted explicit limits on its interpretative authority, and it was perhaps predictable that Beijing could not allow the suggestion that national legislation would be subject to judicial review by Hong Kong courts to stand without some sort of rebuttal.

Such political miscalculations aside, looking at the *Lau Kong Yong* and *Chong Fung Yuen* cases in light of more recent jurisprudence, one could argue that the CFA was right to abandon ground that it could not, in the end, successfully defend: if the Standing Committee had found it necessary and proper to issue an interpretation of Basic Law provisions unrelated to its own or its shared authority, it would likely not have been stopped from doing so by the pronouncements of the CFA in *Ng Ka Ling* or any subsequent case.

Yet the central government's victory on Article 158 was not without cost for Beijing. In essence, Beijing has missed an unprecedented opportunity: by failing to either develop constraints on its own power or create a more transparent process for issuing interpretations, it has missed an opportunity for confidence-building steps that would signal to the people of Hong Kong that it too was willing to constrain itself and work with the existing institutions within the legal order.

There are benefits to such constraints: if the Standing Committee were institutionally pushed to issue more authoritative interpretations, the quality of its interpretations might rise. At present, the Standing Committee does not have to persuade, and does not make an effort to do so: its interpretations are not fully tested at the ballot box, and its pronouncements, once issued, cannot be questioned or reviewed. As a result, the Standing Committee has few external incentives to further develop its legal reasoning techniques.

More well-reasoned and persuasive statements from the Standing Committee would go a long way toward improving the degree of public acceptance of Standing Committee interventions. As one leading scholar of Hong Kong law has noted, the central government's Article 158 role does not enjoy a high degree of legitimacy among the people of Hong Kong:

The lack of legitimacy – in the eyes of many people in Hong Kong, particularly its legal community and a significant segment of its political elite – of the NPCSC in performing the task of constitutional interpretation has proved to be the major cause of constitutional controversies in post-1997 Hong Kong.<sup>39</sup>

It is not too late, of course, for Beijing to announce changes to its Article 158 interpretation process, or to rethink its view of the limits on its authority under the Basic Law. The Standing Committee would almost certainly gain a greater degree of public legitimacy among the people of Hong Kong if it were willing to relinquish the notion of complete and unfettered autonomy over Basic Law interpretation.

*The Costs of Victory: Hong Kong as a vehicle for constitutional development on the mainland*

It was a noble hope: for years before the 1997 handover, pundits both inside and outside Hong Kong mused that concerns over encroachments by Beijing on Hong Kong may have it backward. Instead, the counter-argument stated, it might be Hong Kong that shaped China in its own capitalist, rule of law-abiding and socially and politically stable image. Capturing the oft-repeated sentiment in a story published on the eve of the July 1, 2007, handover, *Time* magazine closed a long story on economic reforms on the mainland with the observation that “(i)t may turn out that Hong Kong will change China far more than China can hope to change Hong Kong.”<sup>40</sup>

Such prognostications were the most common on the economic front: in its pre-handover overview, the now-defunct business weekly *Asiaweek* struck a cautiously optimistic tone as it reported the belief that “Hong Kong will change China as much as the other way around.” *Fortune* magazine followed suit, noting that the two jurisdictions grow closer by the day:

Hong Kong is one of the major engines of change in China, and every day the relationship between the two grows more intimate and important. The

Chinese watch racy Hong Kong TV, which opens windows to the world; youngsters wear Hong Kong fashions and affect Hong Kong slang.<sup>41</sup>

With such synergies growing by the day, the *Fortune* scribe noted, one might well ask “whether Hong Kong will change China more than China will change Hong Kong.”

Not everyone saw the Hong Kong economic influence as positive, however: longtime China watcher Robin Munro predicted that the worst of Hong Kong’s money culture would find its way into the mainland in short order: “Hong Kong will change China,” Munro told *New York Times* reporter Nicholas Kristof. “I’m sure we’ll see more venality and appetite for money-making. But I doubt that this means more democracy and liberalism.”<sup>42</sup>

Such predictions were not limited to the economic realm: both political and legal reform on the mainland were potential beneficiaries of the Handover, according to several observers. Writing in 1988, China scholar Andrew Scobell focused on the Basic Law itself as a vehicle for the transfer of legal ideas:

Certainly, the current process of drafting a new constitution or basic law for the territory... the mainland will find certain aspects of the present Hong Kong Legal structure appealing and will possibly incorporate specific items into its own system.<sup>43</sup>

Hopeful predictions continued to resonate well after the handover: writing in 2001, Yale Law School constitutional law scholar Paul Gewirtz, while noting the potential threat to Hong Kong’s autonomy created by the Standing Committee’s constitutional interpretative authority, nonetheless noted the potential benefits of the Standing Committee’s significant role in Hong Kong’s constitutional decision-making.<sup>44</sup> If the Standing Committee decided to develop the Basic Law Committee as its primary repository for in-house expertise on Hong Kong constitutional matters, then the development of this committee might serve as a model for similar progress on the within China:

Indeed, the Basic Law Committee has the potential to set a broader example for the future of constitutionalism on the Mainland. No one expects judicial review of the constitutionality of government actions to be established any time soon on the Mainland. Serious recent proposals, however, have been made to set up a permanent Committee under the NPCSC that would have the specialized power to make constitutional interpretations and assess the constitutionality of laws. However limited such a legislative committee might seem to constitutionalists in most other countries and in Hong Kong, establishing such a committee might strengthen the all-important idea that the PRC Constitution is “law”, not just a political document. Over time, such a committee might develop more and more expertise, procedural regularity and independence, and thereby take on some of the institutional features that allow courts in other

countries to play a significant role in interpreting the constitution and strengthening its force in society. Over the long term, such a committee might even evolve into a form of constitutional court.<sup>45</sup>

Senior scholar of Chinese law Jerome Cohen has made a similar point about the potential cross-pollination effect that the Basic Law Committee, if allowed to develop mechanisms for increased transparency and authoritative interpretation, might play:

If the BLC is permitted to develop... it may boost the gradually increasing momentum to establish a constitutional committee of the NPC as a more legitimate instrument for interpreting the PRC Constitution itself.<sup>46</sup>

Mainland scholars have made similar appeals for their government to take seriously their experience in Hong Kong, and to apply that experience to the mainland. Prominent Tsinghua University constitutional law scholar and government advisor on Hong Kong law Wang Zhenmin has pointed out that the process of issuing interpretations that both ensure the stability of the legal system and respect the authority of the Hong Kong courts has been, for the central government, a “new subject of study.”<sup>47</sup> More specifically, Wang has called upon the central government to “more quickly finish the task of constructing the judicial review system (on the mainland)” both to better manage relations between the central government and Hong Kong, and to meet the needs of legal development within China.<sup>48</sup>

Careful not to overstate their case, Western scholars generally listed a set of reforms that would be helpful to Basic Law Committee development, including allowing submissions or even oral arguments from interested parties; the open publication of the Committee’s final detailed recommendations the NPCSC, with the reasoning behind those recommendations fully spelled out; and the disclosure of any dissenting views. Without such improvements, one would assume that both the constructive development of Beijing’s constitutional role in Hong Kong, and progress on the Basic Law Committee as a model for constitutional development on the mainland, would grind to a halt.

That, in essence, is what has happened: Beijing has not taken advantage of the opportunity presented by its Article 158 authority; instead, it seems to have recognized that, given the clear political costs associated with overuse of its interpretative power, interventions should be made as infrequently as possible. And it has not, as of this writing, applied any of the lessons of its Hong Kong experience to constitutional development on the mainland. As far as is known, the NPC Standing Committee has yet to issue a single constitutional interpretation regarding PRC law, despite its clear authority to do so under the Chinese constitution.<sup>49</sup>

Yet it may be the case that with the Standing Committee’s interpretative power, less is in fact more. One could be forgiven for harboring suspicions that Beijing’s approach to Basic Law interpretation has thus far been somewhat outcome determinative: the SAR government asked Beijing for an interpretation on right of abode, and, soon thereafter, Beijing produced an interpretation that bolstered the SAR government’s

position. The Standing Committee's second interpretation, issued in April 2004, had the effect of eliminating the possibility of direct election of the Hong Kong Chief Executive for the 2007 and also maintained the pre-existing, less than fully democratic, electoral system for the 2008 Legco elections.<sup>50</sup> Both aspects of the interpretation were seen as beneficial to pro-Beijing political parties in Hong Kong. Its third, and to date, final interpretation regarding the Chief Executive's term – surprise, surprise – gave the candidate supported by Beijing, Donald Tsang, free reign to run for two full terms despite having already served for two years as a replacement to the much-maligned first Chief, Tung Chee Hwa.<sup>51</sup> A practice of issuing more detailed and verbose interpretations, in the absence of a real and sustained commitment to going where the text of the law and rigorous legal reasoning lead, might do more harm than good.

As Hong Kong enters its second decade as a Special Administrative Region of the People's Republic of China, its citizens have much to be thankful for: its courts have developed into robust enforcers of basic rights protections, and the SAR government, though some of its decisions might be called into question, has at least avoided much of the strong partisan rhetoric that was used all too often in the first few years after 1997.

For its part, the central government in Beijing has, in recent years, decided to leave well enough alone, adopting a mostly hands-off attitude regarding the Hong Kong legal system. It deserves credit for having done so. Whether Beijing will continue to maintain this sensible and commendable position will only be tested if and when the courts and the government find themselves on opposite sides of an issue of major constitutional or legal importance. Only when the political pressure is on and the stakes are high will the question of how fully Beijing has come to accept the benefits of restraint finally be answered.

.....

Thomas E. Kellogg is Senior Research Scholar at the Yale Law School's China Law Center and Lecturer at the Yale Law School. He also has worked for non-governmental organizations in the United States, Asia and the Middle East, and lectured at several law schools in the U.S. and China.

---

<sup>1</sup> Senior Fellow, China Law Center and Lecturer-in-Law, Yale Law School.

<sup>2</sup> For an excellent overview of constitutional development in post-1997 Hong Kong which articulates this view, see Danny Gittings, "Changing Expectations: How the Rule of Law Fared in the First Decade of the Hong Kong SAR," *Hong Kong Journal*, July 2007. Prof. Albert H. Y. Chen of Hong Kong University takes a similar view in his "Constitutional Adjudication in Post-1997 Hong Kong," 15 *Pac. Rim L. & Pol'y J.* 627 (2006).

<sup>3</sup> *Yeung May Wan & Others v. HKSAR*, [2005] 2 HKLRD 212.

<sup>4</sup> [2005] 2 HKLRD 212, 225-229. The Court also relied heavily on relevant common law caselaw in reaching its judgment that the police acted improperly in arresting the Falun Gong practitioners, who were engaged in peaceful protest at the time of arrest.

<sup>5</sup> *Leung Kwok Hung & Others v. HKSAR*, [2005] 3 HKLRD 164.

<sup>6</sup> *Leung Kwok Hung & Others v. HKSAR*, [2005] 3 HKLRD 164. See, e.g., paragraphs 71-78. The CFA's conclusion on the constitutionality of the government's scheme can be found in paragraph 78.

---

<sup>7</sup> For an extended account of the litigation that led to the passage of the Surveillance Ordinance, see Thomas E. Kellogg, "A Flawed Effort? Legislating on Surveillance in Hong Kong," *Hong Kong Journal*, May 1, 2007. Available online at: [http://www.hkjournal.org/archive/2007\\_summer/kellogg.htm](http://www.hkjournal.org/archive/2007_summer/kellogg.htm).

<sup>8</sup> *Secretary for Justice v. Yau Yuk Lung Zigo*, July 17, 2007. The right to equality is protected by Article 25 of the Basic Law. The legal provision in question, Section 118F of the Crimes (Amendment) Ordinance, criminalized only such acts that took place "otherwise than in private." But the court held that the law's exclusive focus on same-sex sodomy constituted differential treatment not justified by the government. The court found this lack of justification for the differential treatment to be a fatal flaw, and therefore held that the provision violated the Basic Law. See *Yau Yuk Lung Zigo*, paragraphs 29-30.

<sup>9</sup> [1999] 1 HKLRD 315. The decision in the *Ng Ka Ling* case was released in tandem with its sister decision, *Chan Kam Nga v. Director of Immigration*, [1999] 1 HKLRD 304; since the bulk of the constitutional discussion is contained in the *Ng Ka Ling* decision, I refer only to that decision here.

<sup>10</sup> Article 24 reads as follows:

Residents of the Hong Kong Special Administrative Region ("Hong Kong residents") shall include permanent residents and non-permanent residents.

The permanent residents of the Hong Kong Special Administrative Region shall be:

- (1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;
- (2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;
- (3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);
- (4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;
- (5) Persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after the establishment of the Hong Kong Special Administrative Region; and
- (6) Persons other than those residents listed in categories (1) to (5), who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.

The above-mentioned residents shall have the right of abode in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode.

The non-permanent residents of the Hong Kong Special Administrative Region shall be persons who are qualified to obtain Hong Kong identity cards in accordance with the laws of the Region but have no right of abode.

<sup>11</sup> Article 22(4) reads as follows:

For entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region.

<sup>12</sup> [1999] 1 HKLRD 315, 337.

<sup>13</sup> *Ibid.*

<sup>14</sup> [1999] 1 HKLRD 315, 342.

<sup>15</sup> *HKSAR v. Ma Wai Kwan, David & Others*, [1997] HKLRD 761. In relevant part, the Appeals Court stated that:

In the context of the present case, I would accept that the HKSAR courts cannot challenge the validity of the NPC Decisions or Resolutions or the reasons behind them which set up the Preparatory Committee. Such decisions and resolutions are the acts of the sovereign and their validity is not open to challenge by the regional courts.

[1997] HKLRD 761, 781.

<sup>16</sup> [1999] 1 HKLRD 315, 337.

- 
- <sup>17</sup> Article 3 of the PRC Constitution reads in relevant part: “All administrative, judicial and procuratorial organs of the state are created by the people's congresses to which they are responsible and under whose supervision they operate.”
- <sup>18</sup> [1999] 1 HKLRD 315, 339.
- <sup>19</sup> [1999] 1 HKLRD 315, 340.
- <sup>20</sup> Mark O’Neill, “Beijing says abode ruling was wrong and should be changed,” *South China Morning Post*, February 9, 1999.
- <sup>21</sup> “Legal Experts on Hong Kong Court Ruling,” *People’s Daily* (English edition), Feb 8, 1999.
- <sup>22</sup> Elisabeth Rosenthal, “Immigration Ruling by Hong Kong Court is Generating New Tensions With Beijing,” *New York Times*, February 11, 1999.
- <sup>23</sup> [1999] 1 HKLRD 577, 578.
- <sup>24</sup> The Interpretation by the Standing Committee of the National People’s Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Adopted by the Standing Committee of the Ninth National People’s Congress at its Tenth Session on 26 June 1999.
- <sup>25</sup> For an argument that the Standing Committee is in fact making progress on developing procedural mechanisms, see Zhenmin Wang, “From the Judicial Committee of the British Privy Council to the Standing Committee of the Chinese National People’s Congress – An Evaluation of the Legal Interpretative System after the Handover,” 37 *Hong Kong L. J.* 605, 612-13 (2007).
- <sup>26</sup> [1999] 3 HKLRD 778.
- <sup>27</sup> [2001] 2 HKLRD 533.
- <sup>28</sup> [1999] 3 HKLRD 778, 798-99.
- <sup>29</sup> [2001] 2 HKLRD 533, 548.
- <sup>30</sup> Jerome A. Cohen, “Hong Kong’s Basic Law: An American Perspective,” International Symposium to Commemorate the 10<sup>th</sup> Anniversary of the HKSAR Basic Law, April 1, 2000.
- <sup>31</sup> Albert H. Y. Chen, “Constitutional Adjudication in Post-1997 Hong Kong,” 15 *Pac. Rim L. & Pol’y J.* 627, 644-45 (2007).
- <sup>32</sup> Ling Bing, “Subject Matter Limitation on the NPCSC’s Power to Interpret the Basic Law,” 37 *Hong Kong Law L. J.* 619 (2007).
- <sup>33</sup> *Ibid.* at 624.
- <sup>34</sup> *Ibid.* at 621.
- <sup>35</sup> In *Chong Fung Yuen*, the Court held that, as per Article 24(2)(1) of the Basic Law, any individual born in Hong Kong was in fact entitled to the right of abode, regardless of the status of his or her birth mother in Hong Kong at the time of birth. Although the Court found in favor of the Director of Immigration in the *Lau Kong Yung* case, nonetheless it did suggest that the director should “consider these ... applicants with wuch sympathy as they deserve, bearing in mind their special circumstances,” before making a final decision on the execution of the removal orders against them. [1999] 3 HKLRD 778, 809.
- <sup>36</sup> Johannes Chan SC makes a similar point in a recent article. According to Prof. Chan:  
...*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. ... In a line of decisions, the Court gradually established firm jurisprudence in line with contemporary liberal thinking on human rights.
- Johannes Chan SC, “Basic Law and Constitutional Review: The First Decade,” 37 *Hong Kong L. J.* 407, 422 (2007).
- <sup>37</sup> Albert H. Y. Chen, “Constitutional Adjudication in Post-1997 Hong Kong,” 15 *Pac. Rim L. & Pol’y J.* 627, 638 (2007).
- <sup>38</sup> Albert Chen, “Constitutional Crisis in Hong Kong: Congressional Supremacy and Judicial Review,” 30 *Int’l Law.* 1025, 1025-26 (1999).
- <sup>39</sup> Albert H. Y. Chen, “Constitutional Adjudication in Post-1997 Hong Kong,” 15 *Pac. Rim L. & Pol’y J.* 627, 631-632 (2006).
- <sup>40</sup> Johanna McGeary, “One Country, Many Systems: Inside China,” *Time*, June 30, 1997.
- <sup>41</sup> Marshall Loeb, “China: A Time for Caution,” *Fortune*, February 20, 1995.
- <sup>42</sup> Nicholas Kristof, “Analysis: Year of the Trojan Horse -- Who Changes Whom?,” *New York Times*, July 1, 1997.
- <sup>43</sup> Scobell, Andrew. “Hong Kong's influence on China.” *Asian Survey* 28, 6: 599-612 (1988).

- 
- <sup>44</sup> Disclosure: Prof. Gewirtz is the author's colleague at the China Law Center at Yale Law School.
- <sup>45</sup> Paul Gewirtz, "Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics," 31 Hong Kong L. J. 200, 214-215 (2001).
- <sup>46</sup> Jerome A. Cohen, "Hong Kong's Basic Law: An American Perspective," International Symposium to Commemorate the 10<sup>th</sup> Anniversary of the HKSAR Basic Law, April 1, 2000.
- <sup>47</sup> Wang Zhenmin, *China's Judicial Review System* (Zhongguo Weixian Shencha Zhidu), China University of Politics and Law Press, 2004, p. 371.
- <sup>48</sup> Ibid.
- <sup>49</sup> Constitution of the People's Republic of China, Article 67(4).
- <sup>50</sup> Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Adopted by the Standing Committee of the Tenth National People's Congress at its Eighth Session on 6 April 2004.
- <sup>51</sup> Interpretation of Paragraph 2, Article 53 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress, Adopted at the 15<sup>th</sup> Session of the Standing Committee of the Tenth National People's Congress on 27 April 2005.