

**CONSTITUTIONALISM UNDER CHINA**  
STRATEGIC INTERPRETATION OF THE  
HONG KONG BASIC LAW IN  
COMPARATIVE PERSPECTIVE

A THESIS SUBMITTED FOR THE DEGREE OF  
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## ABSTRACT

The scholarly consensus on the political foundations of independent constitutional review – that it invariably stems from electoral and inter-branch competition – has been weakened by recent empirical discoveries which demonstrated that constitutional courts in a number of authoritarian states are actually more activist than previously assumed. This dissertation examines this phenomenon using the case of Hong Kong, an authoritarian polity first under the sovereignty of Britain and then of China. It is widely believed that the competence of the Hong Kong Court of Final Appeal – a cosmopolitan common law final appellate court – to strike down legislative and executive acts, and its ability to induce the regime’s compliance with its rulings, is intrinsic to the Basic Law, just as it is in liberal democracies. Nevertheless, two interrelated anomalous phenomena – the Court’s repeated issuance of activist rulings with near-complete impunity, and the continuing forbearance of China’s foremost constitutional authority, the National People’s Congress Standing Committee (NPCSC), faced with the Court’s aggressive assertions – necessitates careful explanation.

This dissertation proposes an explanatory Constitutional Investment Theory, which highlights the similarities between “investment” in constitutional review and investment in financial assets, to explain the *activation, consolidation, and ascendancy* of independent constitutional review in authoritarian settings. It shows how strong incentives to signal its ideological commitment to the “One Country, Two Systems” scheme, both internationally and domestically, first drove the NPCSC to acquiesce in the Court’s self-aggrandisement; how internal divisions within and external opposition to the Hong Kong regime have rendered retaliation a costly option; and how the Court’s strategic resolution of the Basic Law’s ambiguities has encouraged continuous political investment in its jurisdiction and autonomy. Altogether, these have contributed to the formation of a *dynamic equilibrium of constitution control*, under which the Court and the NPCSC dynamically developed their own jurisprudence within their respective bailiwicks.

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## ROMANISATION OF CHINESE TERMS

In this dissertation, Hong Kong names and terms are romanised according to their conventional Cantonese pronunciation, and Mainland Chinese names and terms are romanised according to the *Putonghua* pinyin system.

### ABBREVIATIONS

AC	Law Reports: Appeal Cases
BLCC	Basic Law Consultative Committee
BORO	The Hong Kong Bill of Rights Ordinance 1991
CCP	Chinese Communist Party
CGJ	Council of Grand Justices of the Judicial <i>Yuan</i> , Republic of China
GDP	Gross Domestic Product
HKC	Hong Kong Cases
HKCFAR	Hong Kong Court of Final Appeal Reports
HKCLR	Hong Kong Criminal Law Reports
HKLR	Hong Kong Law Reports
HKLRD	Hong Kong Law Reports Digest
HKSAR	Hong Kong Special Administrative Region
ICAC	Independent Commission Against Corruption
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
JP	Justice of the Peace
LRD	Legal Recoveries and Collections
MLJ	Malayan Law Journal
NPC	National People's Congress of the People's Republic of China
NPCSC	Standing Committee of the National People's Congress
PAP	People's Action Party, Singapore
RCC	Russian Constitutional Court
ROC	Republic of China (Taiwan)
SC	Senior Counsel
SCC	Supreme Constitutional Court of the Arab Republic of Egypt
SGCA	Singapore Court of Appeal
US	United States of America

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# INTRODUCTION

## CHAPTER 1 INTRODUCTION

### 1. RESEARCH PROBLEM

Constitutions purport to provide polities with perdurable institutional frameworks for collective action, policy-making, and the provision of public goods (see North, 1981; Ostrom, 1989; Drazen, 2000). But constitutional rules serve many additional functions as well: some guard against drastic political change and render the government's commitments credible, while others implement certain ideologies and allocate state authority among different bodies (see Brennan & Hamlin, 2006). Because of their importance, constitutional variations may lead political players to converge on different policy outcomes (Congleton & Swedenborg, 2006). Given the impossibility of foreseeing every contingency and devising appropriate rules accordingly, constitutions are almost always incompletely drafted, inevitably ambiguous, contradictory, or not sufficiently explicit (Dixit, 1996; Goldsworthy, 2006; R. Posner, 2007).

Constitutional bodies vested with the authority of constitutional review interpret, supplement, update, and at times invent constitutional rules. In this significant capacity, they gauge the validity of policy choices emanating from legislatures and cabinets, and reject those that they deem unconstitutional (Law, 2006).

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Constitutional review powers are often, but not always, vested in courts. Constitutional courts <sup>1</sup> have become increasingly influential over political decision-making and policy formulation around the world (Tate & Vallinder, 1995; Stone Sweet, 2000; Guarnieri, et al., 2002; Woods & Hilbink, 2009). Until the early 2000s, however, there was considerable scholarly consensus that intense democratic competition, whether inter-branch and/or inter-party, presupposes the exercise of constitutional review exercised by independent courts (*e.g.* Landes & Posner, 1975; Ramseyer, 1994; Magalhães, 1999; Shapiro & Stone Sweet, 2002; Stephenson, 2003; Chavez, 2004; Miller & Barnes, 2004; Cichowski, 2006). Undeniably, images of constitutional courts being purged by their authoritarian masters abound across the globe: consider Mahathir’s sacking of senior Malaysian Supreme Court Justices in 1988; Boris Yeltsin’s full suspension of the Russian Constitutional Court in 1993; Robert Mugabe’s “great purge” of the Zimbabwean Supreme Court in 2001, and Pervez Musharraf’s arrest of the Pakistani Chief Justice six years later (Bingham, 2011: 145). Indeed, it is intuitive that “democracies enjoy judicial independence, but authoritarian states do not; that courts in democratic states preserve citizen’s rights, but courts in authoritarian states do not” (Moustafa, 2007: 2, 19).

Nevertheless, recent empirical findings have revealed that constitutional courts in at least some former and present non-competitive, authoritarian, states are more autonomous than previously assumed, occasionally defying their regimes, sometimes

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<sup>1</sup> I use the term “constitutional court” to refer to both “Kelsenian” centralised constitutional courts (*e.g.*, the German Federal Constitutional Court) and final appellate courts presiding

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with impunity; importantly, ultimate persecutions of courts were usually preceded by periods of substantial and unpunished judicial activism.<sup>2</sup> These discoveries have called into question the assumption that democracy is necessary for independent and/or activist constitutional review (Helmke & Rusenbluth, 2009), and have corroborated Hirschl's (2010:248) conclusion that "the reliance on courts and judicial means to address core political controversies that often define and divide whole polities – knows no democratic/authoritarian borders."<sup>3</sup>

Throughout this dissertation, an "authoritarian state" is understood as a polity that lacks institutionalised procedures for open, competitive, and deliberate political participation, which neither chooses nor replaces its chief executive through such procedures; in turn, the chief executive's discretionary powers are not subject to substantial checks from the legislature.<sup>4</sup> In this sense, authoritarian states are taken as regimes that are generally free from the pressures and constraints of electoral or inter-branch competition.<sup>5</sup> The nature of constitutional law in such states merits more scholarly attention. After all, non-democratic polities, whether by oligarchs, chieftains,

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over a system of decentralised judicial review (*e.g.*, the United States Supreme Court).

<sup>2</sup> Examples include, but are not limited to, Pakistan (Newberg, 2002); Argentina (Helmke, 2005); Ukraine (Brown & Wise, 2004); Hong Kong (Chen, 2006); Egypt (Moustafa, 2007); Soviet Union and Russia (Trochev, 2008); Chile (Hilbink, 2009); Malaysia (Chuan, 2009); Turkey (Shambayti & Kirdis, 2009); Zimbabwe (Compagnon, 2011).

<sup>3</sup> In fact, constitutional courts in liberal democratic countries are not necessarily activist or influential as well. See Law (2011).

<sup>4</sup> Notice that authoritarianism is a broad category which ranges from fully closed autocracies to hybrid regimes or anocracies. See, Marshall & Cole (2011:9).

<sup>5</sup> Scholars have identified myriad ways in which authoritarian regimes exclude political competition; these include and are not limited to, the manipulation of electoral rules, the restriction of civil liberties, the harassment of political opponents, and the misallocation of state financial and publicity resources. See Goode (2010); Levitsky & Way (2002); Schedler

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monarchs, aristocrats, military juntas, or single-party states, have been the norm for most of human history (Brooker, 2009:1). And as Ginsburg and Moustafa (2008:2) aptly put it, “With more than half of all states categorized as authoritarian or semi-authoritarian and more headed in that direction, it is crucial for us to get a grip on the reality of judicial politics in nondemocratic environments.” Against this background, what are the conditions under which even authoritarian states would voluntarily concede to citizens the constitutional right to challenge their policy decisions, and tolerate courts imposing costly constraints on their policy choices?

In this dissertation I pose this question in the context of the interdependent interpretation of the Hong Kong Basic Law<sup>6</sup> by the Hong Kong Court of Final Appeal – a cosmopolitan common law supreme court whose members include not only local jurists but also a number of sitting or retired justices of the United Kingdom Supreme Court, the Australian High Court, and the New Zealand Supreme Court – and the Standing Committee of the National People’s Congress – an elitist 170-member “legislature within legislature” and *de facto* paramount constitutional authority of the People’s Republic of China (O’Brien, 1988:363). In selecting Hong Kong as a central case for the analysis of constitutional interpretation under authoritarian states, this dissertation makes three contributions to the socio-legal studies and comparative constitutional politics literatures. Firstly, it offers an

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(2006); Ottaway (2003); Abdukadirov (2010); Levitsky & Way (2010).

<sup>6</sup> Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Adopted on 4 April 1990 by the Seventh National People’s Congress of the People’s Republic of China).

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explanation of why authoritarian states would ever voluntarily concede to citizens the right to challenge their policy decisions, and tolerate courts imposing potentially costly constitutional constraints on their policy choices. Secondly, apart from being arguably the most continuously successful<sup>7</sup> instance of constitutional review in the authoritarian “universe,” the saga of Hong Kong also lets us glimpse, albeit imperfectly, the tolerance level of the Chinese Party-state – the world’s most populous country and last major Communist power – towards such contentious issues as the rule of law and judicial independence. Thirdly, this dissertation makes a contribution to the study of comparative constitutionalism. Although Hong Kong has never been an independent state, in many ways it has been governed like one (Hook, 1983:494), with the constitutional frameworks of the suzerain (*i.e.*, the United Kingdom and the People’s Republic of China) being practically non-applicable and non-enforceable within its territorial confines. This differentiates the Hong Kong Basic Law from the constitutions of federated subunits (*e.g.*, states of the United States) or confederated states (*e.g.*, member states of the European Union) (Olivett, 2009:791). The territory provides us furthermore with an exceptional laboratory in which to test constitutional theories empirically. It allows us to hold complex demographic, economic, historical, and cultural variables largely constant in examining the constitutional dynamics of a British colony (1842-1997) and a Chinese dependency (1997-present) at the very same time.

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<sup>7</sup> I understand the word “success” in terms of sustained activism and perdurability regarding constitutional review.

# INTRODUCTION

This introductory chapter is organised as follows. In Section 2, I situate the interpretation of the Hong Kong Basic Law within the broader framework of Chinese constitutional and legal developments. I then lay out my research questions, and declare my proposed hypotheses. Section 3 explains the research methods applied to answering these questions and to look for empirical support for these hypotheses. Section 4 outlines the organisation of the dissertation as a whole.

## 2. CONSTITUTIONAL INTERPRETATION, CHINESE STYLE

In 1978 post-Mao China embarked on an ambitious project to transform itself from a command economy into a relatively market-oriented one, paradoxically dubbed a “Socialist Market Economy with Chinese Characteristics.” Between 1979 and 2009 China’s real Gross Domestic Product grew at an average rate of over 9% *per annum*. By 2010 China had become the world’s third largest economy at market exchange rates and second largest at purchasing power parity (Yueh, 2010:21). In 2011 it even overtook Japan as the world’s second-largest economy, a title Japan had held for more than four decades. Nevertheless, these developments were accompanied by a proliferation of corruption, financial crime, popular unrest, rural poverty, and the pandemic spread of infectious diseases; all of which have considerably undermined the legitimacy and stability of the Communist Party-state (Lin, 2003; Shue, 2010).

The contemporary Chinese Party-state is no stranger to using law

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instrumentally to further its own interests and agenda for political control and economic development. Legal reforms entered a new phase in 1997, when then-paramount leader Jiang Zemin decreed “Governing the State in accordance with Law” to be a fundamental policy of the Communist Party. In 1999 the Constitution was amended to codify the “Socialist Rule of Law” doctrine, which, as Saich (2011) notes, embodies the central Party-state’s insistence on conserving its leading and decisive role in pronouncing what is or is not permitted by law. By 2008 the National People’s Congress (“NPC” hereafter) had enacted 229 statutes to this end (see Ip, 2011). Indeed, the NPC is no longer a mere rubberstamp of the Party, but has become an increasingly assertive political actor (Tanner, 1999; Zhao, 2006).

Compared to the rapid growth of economic and criminal law, constitutional law has made relatively less progress in China. The present Constitution of the People’s Republic of China, ratified in 1982, reflects Deng Xiaoping’s belief that law should serve the Party’s economic modernisation program. Much of the Constitution remains little more than an “authoritative ideological statement and communicative act” (Elkins *et al.*, 2009: 172). Standard Chinese constitutional doctrine does not recognise the separation of powers, but upholds the Soviet doctrine of the people’s congressional supremacy instead (Zhao, 2009). The NPC, consisting of almost three thousand Deputies elected for five-year terms, and meeting about two weeks annually, formally heads the constitutional structure (see Figure 1). This Communist Party-dominated legislature, being the paramount embodiment of the people’s sovereign will, is to enjoy unchallengeable authority over all other branches of

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government, and may not be checked (Xin, 2004).

To enhance the NPC's legislative capacity, China's Dengist reformers looked first to the Standing Committee ("NPCSC" hereafter), a 175-person presidium, which exercises much of the Congress's powers in between plenary sessions. After some debate in the late 1970s and early 1980s, the leadership compromised and set out to transform the NPCSC. Article 67 of the Constitution of 1982 granted the NPCSC the power to enact and amend laws, excepting certain fundamental laws governing criminal offenses, civil affairs, and the structure of the state. The Party's leadership rejected the proposal of a constitutional supervision committee, and decided to grant the NPCSC, rather than any court-like organ, paramount authority to interpret and enforce the constitution. It justified this choice on the grounds that NPCSC review is quick and decisive and that the NPC plenary could correct any mistakes by the NPCSC (O'Brien, 1988:367). Thus, Article 67 mandates that the NPCSC shall superintend the interpretation and enforcement of the Constitution.

Despite its constitutional status as the "permanent body of the highest organ of state power," the NPCSC had previously been known as nothing more than a "rubber-stamp" legislature. But reforms since the 1980s have transformed it into a growingly formidable and professional parliamentary body by Chinese standards. Consider for instance the issue of administrative rule-making by the State Council. Since the 1990s NPC Deputies have expressed dissatisfaction with the discretionary breadth of State Council rule-making publicly. For its part, the State Council has protested certain features of the draft Legislative Law of 2000, which sought to curtail

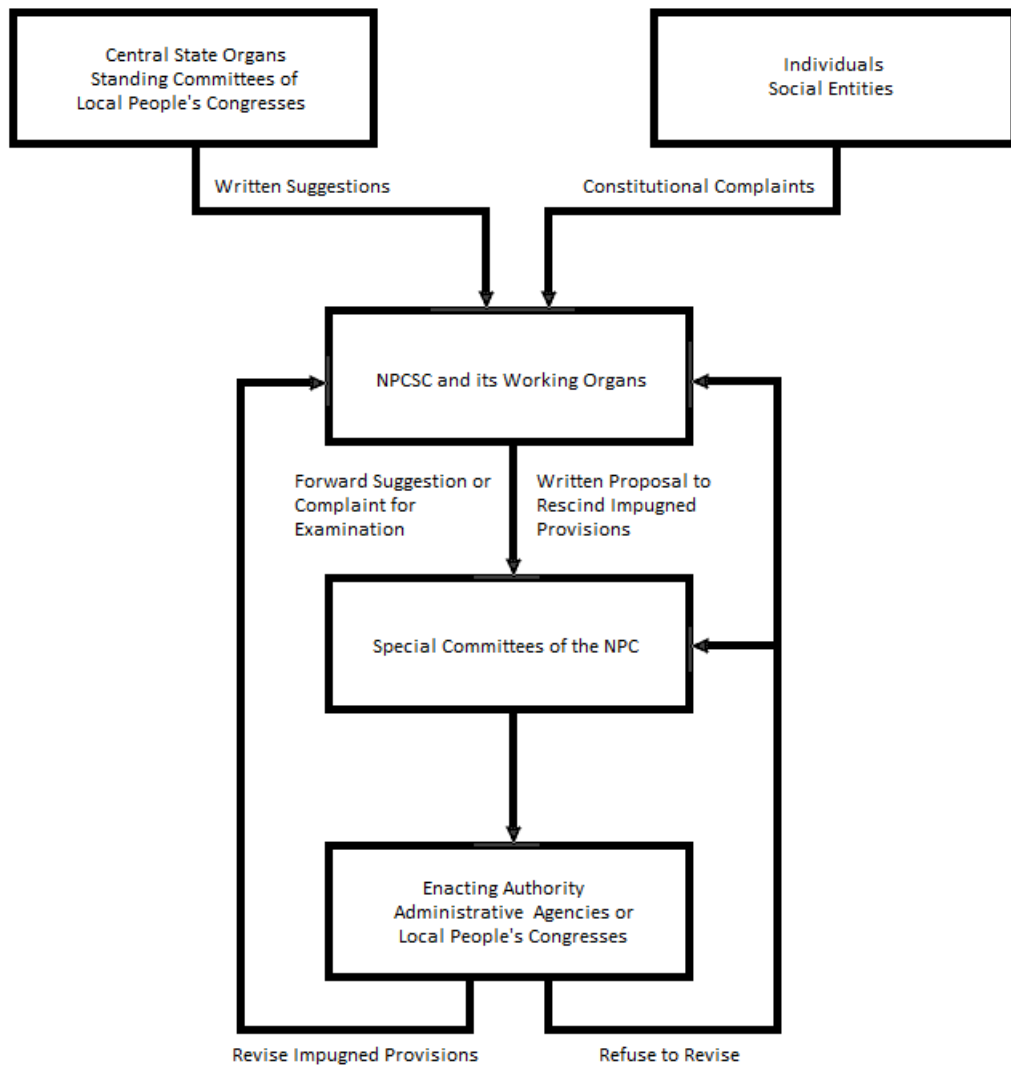
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its rule-making competence (Paler, 2005). The Law sets out an elaborate procedure under which the NPCSC and its various specialised sub-committees may exercise the abstract constitutional review of central- and local-level administrative directives: whenever a sub-committee considers that a certain directive is inconsistent with the Constitution, it may issue its opinion directly to the enacting body of the impugned provisions with or without a hearing. If the committee decides that the impugned provisions are indeed unconstitutional or illegal, it may submit to the NPCSC leadership an opinion in favour of their invalidation, and it is for the leadership, and ultimately, the plenary, to determine the final outcome.

In 2004, a low-profile office, consisting of approximately ten staff members, has been set up within the NPCSC Legislative Affairs Commission to review the constitutionality of national laws and directives pursuant to an internal document known as the Work Procedures for the Review and Recordation of Laws (Lin, 2011: 153-4). Despite its self-aggrandisement, the contemporary NPCSC remains indisputably dominated by the Chinese Communist Party with its highly influential Chairman (*i.e.*, the speaker of the legislature) being almost invariably an *ex-officio* member of the nine-person Politburo Standing Committee – the *de facto* supreme governing organ of China. Unsurprisingly, the NPCSC has not in any known case invalidated legislative and executive acts through its constitutional review procedures (see Bergstein et al., 2006).

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**FIGURE 1: CONSTITUTIONAL INTERPRETATION SCHEME UNDER THE CHINESE LEGISLATIVE LAW OF 2000**



Source: Yu (2009:99)

The 1982 Constitution is not justiciable by the ordinary courts. The Constitution upholds the principle of “independent adjudication,”<sup>8</sup> yet obligates courts – even the Supreme People’s Court, the highest court of the land – to accept the constitutional

<sup>8</sup> Article 126, Constitution of the People’s Republic of China.

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superintendence of their respective congresses.<sup>9</sup> In at least two oft-cited rulings from 1955 and 1986, the Supreme People's Court forbade lower courts to interpret the Constitution.<sup>10</sup> Article 88 of the Legislative Law vested in lower-level congresses and governments proportionally corresponding powers to review unconstitutional or illegal legislation and administrative rules, yet the courts are formally powerless to act. The role of the courts is to try cases according to settled law; they are not entitled to interpret the Constitution or review the constitutionality of legal norms and administrative acts (Chen, 2010:879). Recently, Tong Zhiwei (2010), Vice Chairman of the Constitutional Law Branch of the Chinese Law Society, argued that the Socialist legal system would descend into chaos if courts were allowed to interpret and directly apply the Constitution, a power reserved to the NPC. The practical effects of insulating the Constitution from litigation are to discourage citizens to bring politically sensitive claims before the courts; to circumscribe the scope of judicial review of agency decision-making; and to preserve the Party's supremacy over the status of legal norms.

By contrast, the Hong Kong Basic Law unprecedentedly and explicitly divides powers of constitutional interpretation between the NPCSC and the Hong Kong judiciary, albeit only within the territory.<sup>11</sup> The Basic Law, arising from an United

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<sup>9</sup> Article 128, Constitution of the People's Republic of China.

<sup>10</sup> *Supreme People's Court Reply on the Inappropriateness of the People's Courts in Using the Constitution as the Legal Basis of Criminal Adjudication* (promulgated by the Sup. People's Ct., July 30, 1955); *Supreme People's Court Reply on the Creation and Quotation of Standardized Legal Documents by the People's Courts* (promulgated by the Sup. People's Ct., Oct. 28, 1986).

<sup>11</sup> See Article 158 of the Hong Kong Basic Law.

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Nations-registered international treaty forged in 1984 between the United Kingdom and the People's Republic of China, was drafted over a period of five years by framers drawn from both Hong Kong and Mainland China, and adopted by the NPC in 1990 simultaneously as a national-level statute and as the constitution of the Hong Kong Special Administrative Region ("Hong Kong SAR" hereafter) (Chan & Lim, 2011:476). The Basic Law is a fairly comprehensive and detailed constitutional instrument of 160 articles (surpassing the Chinese Constitution's 138 articles) which cover everything from general principles (Chapter 1), Mainland China-Hong Kong relations (Chapter 2), fundamental rights and duties (Chapter 3), political structure (Chapter 4), and the economy (Chapter 5), to basic social policies (Chapter 6), external relations (Chapter 7), interpretation and amendment (Chapter 8), and supplementary provisions (Chapter 9). It was intended to enshrine China's "One Country, Two Systems" national reunification strategy.<sup>12</sup> While it insulates from China the multi-party political system, common law system, market economy, public finances, monetary system, customs territory, police force, postal system, official languages, and external relations competences of the Hong Kong SAR, it nonetheless unites the latter to the former constitutionally by constituting the NPCSC as the supreme constitutional interpretive authority.

The Basic Law has set up what Benny Tai and Xiaonan Yang (2007) labelled a "double-track constitutional review system" in which two very different bodies

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<sup>12</sup> The "One Country, Two Systems" is a doctrine originally devised by then-paramount leader Deng Xiaoping as a model of possible reunification with Taiwan. The doctrine denotes the

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exercise overlapping constitutional jurisdiction (see Figure 2). Pursuant to this unique scheme, the NPCSC – the supreme state organ of China – has been vested with competence to interpret the Basic Law with finality, as well as the power to nullify Hong Kong laws. Thus, the NPCSC was finally given the opportunity in actual practice to issue detailed interpretations of a *de facto* constitutional document.

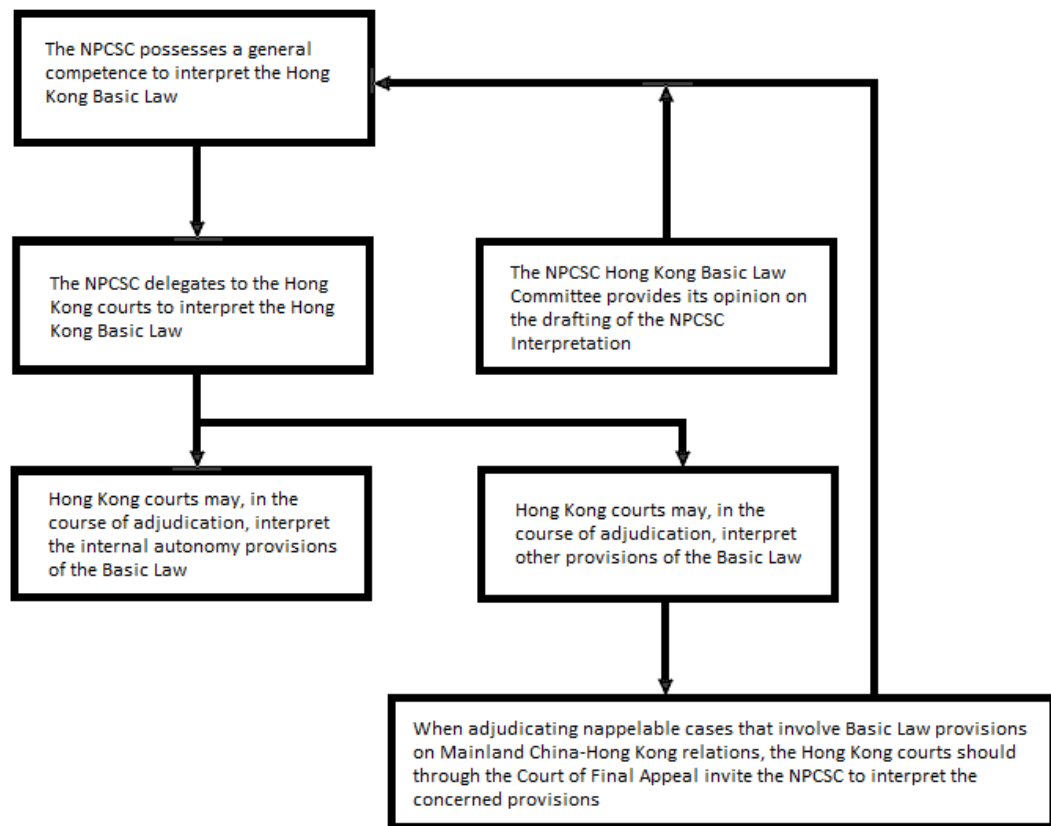
On the other hand, the Hong Kong Court of Final Appeal has, pursuant to the same scheme, asserted for itself a wide-ranging, retrospective power to invalidate laws and executive policies it deems unconstitutional, and rather less successfully, has claimed competence to strike down acts of the NPC or the NPCSC contrary to its interpretation of the Basic Law. In the course of their dynamic interactions, while the NPCSC uses civil law approaches to interpret the Chinese (and the more authoritative) text, the Court employs common law methods to interpret the English version of the same document (Ghai, 2007:401).

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co-existence of Socialist and Capitalist systems within one sovereign state.

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**FIGURE 2: CONSTITUTIONAL INTERPRETATION SCHEME UNDER THE HONG KONG BASIC LAW**



Source: Wong (2004:125)

As of December 2011, as many as 40 per cent (four out of ten) of all NPCSC Interpretations delivered since the promulgation of the Chinese Constitution of 1982 concern the Hong Kong Basic Law (see Yang, 2008:266). The NPCSC has issued Basic Law Interpretations after the Court has issued a judgment (*e.g.*, June 1999), before any litigation has started (*e.g.*, April 2004), and during litigation (*e.g.*, April 2005 and August 2011). The NPCSC has also handed down several informal but legally binding Basic Law re-interpretations (officially known as “Decisions”), one of which

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invalidated in whole or in part twenty-four Hong Kong laws (see Wang, 2008; Yang, 2008). These rulings have altogether stirred considerable political discontent in the territory.

Conversely, the Court of Final Appeal has not given up its struggle for primacy of constitutional interpretation. Indeed, despite operating under the authoritarian SAR regime,<sup>13</sup> the Court is consistently described by academic observers as “activist” (Lin & Gu, 2003:188), “independent,” “influential” (Wesley-Smith, 2001; Tai, 2007; Ma, 2007; Gordon & Mok, 2009), and the “guardian” of constitutionalism and human rights (Chan, 2007; Chen, 2007; Yap, 2007). In the name of the Basic Law the Court has struck down laws and policies in politically charged domains such as immigration,<sup>14</sup> indigenous governance,<sup>15</sup> Non-Permanent Resident rights,<sup>16</sup> public security,<sup>17</sup> the *Falun Gong* movement (a religious sect banned in China nationwide),<sup>18</sup> covert surveillance,<sup>19</sup> homosexual rights,<sup>20</sup> political participation,<sup>21</sup> and election petition.<sup>22</sup>

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<sup>13</sup> Throughout this dissertation, for convenience, I use the term “SAR regime” (see Ma, 2007), to denote the pro-China governing coalition which continuously controlled the Government and the Legislative Council majority of the Hong Kong SAR (Special Administrative Region), to the exclusion of the Hong Kong judiciary, whose autonomy from this coalition is genuine and highly visible.

<sup>14</sup> For example, *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 H.K.C.F.A.R. 4 (Hong Kong Court of Final Appeal).

<sup>15</sup> For example, *Secretary for Justice & Ors v Chan Wah & Ors* (2000) 3 H.K.C.F.A.R. 459 (Hong Kong Court of Final Appeal).

<sup>16</sup> For example, *Secretary for Security v Sakthevel Prabakar* (2004) 7 H.K.C.F.A.R. 187 (Hong Kong Court of Final Appeal).

<sup>17</sup> For example, *Leung Kwok Hung & Ors v H.K.S.A.R.* (2005) 8 H.K.C.F.A.R. 229 (Hong Kong Court of Final Appeal).

<sup>18</sup> For example, *Yeung May Wan & Ors v H.K.S.A.R.* (2005) 8 H.K.C.F.A.R. 137 (Hong Kong Court of Final Appeal).

<sup>19</sup> *Koo Sze Yiu & Anor v Chief Executive of the H.K.S.A.R.* (2006) 9 H.K.C.F.A.R. 441 (Hong Kong Court of Final Appeal).

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In its rulings the Court of Final Appeal frequently relies on international human rights jurisprudence, including the case law of the European Court of Human Rights in Strasbourg and the United Nations Human Rights Committee (Chen, 2009a). In spite of the NPCSC's nullification of the supremacy clauses in the British-enacted Bill of Rights, the Court has boldly through its case law "re-entrenched" in the Basic Law the rights enumerated in the Bill.<sup>23</sup> These developments prompted Singapore legal scholar Michael Hor (2007:79) to observe that the Court's constitutional rulings are "judgments which, if certain names and details were removed, could have come from Canada, Australia or England," the authoritarian political environment in which they were delivered notwithstanding.

What is more, the Court has issued these decisions with near-total impunity. Consider that Hong Kong's authoritarian regime – the SAR regime acting in concert with the NPCSC – has in its "arsenal" the full range of checks and balances deployable against the Court: reinterpretation or amendment by the NPCSC of the Basic Law to reverse the Court's decisions; impeachment by the Legislative Council of defiant judges; curtailment of the Court's jurisdiction; the prerequisite of extraordinary judicial majorities for decisions on unconstitutionality; abolition of constitutional review; the gutting of the Court's budget; and "packing" the Court with

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<sup>20</sup> *Secretary for Justice v Yau Yuk Lung & Anor* (2007) 10 H.K.C.F.A.R. 335 (Hong Kong Court of Final Appeal).

<sup>21</sup> *Lai Tak Shing v Secretary for Home Affairs* (2007) 10 H.K.C.F.A.R. 655 (Hong Kong Court of Final Appeal).

<sup>22</sup> *Mok Charles Peter v Tam Wai Ho & Anor* (FACV 8/2010) (Hong Kong Court of Final Appeal).

<sup>23</sup> For example, see *Swire Properties Ltd v. Secretary for Justice* (2003) 6 H.K.C.F.A.R. 236 (Hong

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additional, politically reliable judges (Schneider, 2002:597; see Epstein *et al.*, 2001:177). Yet in spite of the Court's highly visible self-aggrandisement, neither Hong Kong's SAR regime nor the NPCSC have ever disputed its authority to invalidate primary legislation (Chen, 2006; Davis, 2007). Significantly, since the transfer of sovereignty, the SAR regime has deferred to these invalidations in all but one case, and continues to maintain an affirmative stance towards constitutional review as "a cornerstone of the rule of law."<sup>24</sup>

Notice that courts under authoritarian regimes more often than not enjoy only a limited scope of autonomy, with greater independence over commercial matters than the protection of civil and political rights (Peerenboom, 2010:3). Constitutional courts like the Court of Final Appeal, which showed iterated activist tendencies, are thus rare in authoritarian states (see Silverstein, 2008). In fact, despite the Basic Law's elaborate rights guarantees and provisions for autonomy, the political structure established by it is "authoritarian" (Lam, 2007:11), "uncompetitive" (So & Chan, 2002:363), if not indeed "autocratic" (Ma, 2007:90). Basic voting rights are "extremely circumscribed": neither the executive nor half of the legislature is democratically elected (Boniface & Alon, 2010), and political power is monopolised by China-friendly politicians in Hong Kong. The Chief Executive, succeeding the autocratic colonial Governor, enjoys formal constitutional supremacy over the Legislative Council and is

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Kong Court of Final Appeal) (para. 53).

<sup>24</sup> See "Secretary for Justice Wong Yan Lung's Speech at Conference on Effective Judicial Review: A Cornerstone of Good Governance," available at: <http://www.info.gov.hk/gia/general/200812/11/P200812110116.htm> (accessed on Sep. 3, 2011).

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exclusively in charge of setting the policy and budgetary agenda (Cheung, 2007; Li, 2007:32).

Seen in this light, the Hong Kong Court of Final Appeal is the only state organ that has ever succeeded in continually resisting the central Party-state in the constitutional history of the People's Republic of China. However, this is puzzling. Although it seems that China's own growth and development can take advantage of the continuation of Hong Kong's autonomous legal institutions, the power-holders in Beijing will indisputably do what they consider best for themselves; a "rule-of-law island" within Chinese territorial boundaries may not necessarily be perceived as best for them (Barzel, 2002: 275).

## 3. RESEARCH QUESTIONS

For this dissertation I have constructed a three-stage explanatory framework to sort out the causal mechanisms by which the judicial power of constitutional review may first become *activated*, then *consolidated*, and ultimately *ascend to activism* under authoritarianism.<sup>25</sup> Three research questions are accordingly framed.

- Why did China expressly empower the courts of Hong Kong to interpret the Basic Law and acquiesce in the Court of Final Appeal's activation of its

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constitutional review authority?

- Why has constitutional review consolidated in Hong Kong as seen in the SAR regime's and the NPCSC's consistent acquiescence in the Court of Final Appeal's assertive claims of constitutional powers?
- Why has constitutional review ascend to activism in Hong Kong as evidenced by the impunity of the Court of Final Appeal in repeatedly making expansive interpretations of the Basic Law and invalidating primary legislation and executive decisions?

I propound three answers to each of these questions.

- China's interests in expressing symbolic commitment to a version of liberal constitutionalism in Hong Kong in the form of the "One Country, Two Systems" model, have led the SAR regime and the NPCSC to acquiescence in the Court's activation of its constitutional review powers.
- The consolidation of constitutional review resulted from investment in the Court of Final Appeal's political assets (*e.g.*, constitutional jurisdiction, decisional autonomy, funds, compliance of rulings, *etc.*) by the SAR regime and the NPCSC; it follows that the more trustworthy the Court appears, the more likely the latter will invest in the former over time. In other words, the Court has managed successfully the conflicting roles of asserting its constitutional powers and

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<sup>25</sup> In Chapter 2, I will discuss each of these concepts in greater detail.

# INTRODUCTION

interpreting the Basic Law expansively while systematically taking into account of the political preferences of the SAR regime and Chinese authorities.

- The activist ascendancy of constitutional review expanded in tandem with the costliness of retaliating the Court of Final Appeal, including *inter alia* the time and organisational resources that the SAR regime and/or the NPCSC would need to marshal just to reach and then to implement a decision to retaliate or underinvest (*e.g.*, superseding the Court's ruling by amending the Basic Law).

## 4. RESEARCH DESIGN

Meaningful characterisation of constitutional problems may well demand highly specialised knowledge, such as familiarity with local languages, cultures and histories (Riker & Weimer, 1995:99). In light of this insightful advice, I have integrated into an abstract theoretical argument a highly contextualised exposition of empirical evidence in order to extricate the complex causal nexus (Elster, 2007:27) underlying the evolution of constitutional interpretation within the Basic Law's scheme.

Given that statistical data on Hong Kong and Chinese constitutional law is extremely limited, I mainly used observations as evidence (see Cooter, 2002:8). Because I am more interested in using intensive case studies to show that the theorised causal processes are at work (see Levitsky & Way, 2010:35), I have left the statistical demonstration of the correspondence of theory and observation, as in large-*N* surveys, to those who are better equipped with the requisite data and

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technique. I took constitutional decisions, embodied in the texts of Court of Final Appeal judgments and NPCSC interpretive decisions, as the centre-piece of my case studies, simply because they are the most explicit and direct means through which the preferences of players have been translated into political action (see Robertson, 2010:21). Working within the theoretical framework set out in Chapter 2, I closely examined in the subsequent chapters whenever appropriate the content of constitutional decisions and the governmental responses that followed them.

The data I used include primary and secondary sources, and these differentiate my approach from traditional doctrinal analyses of law. My original fieldwork consisted of bilingual (*i.e.*, Chinese and English) archival analysis of important constitutional and legislative enactments (*e.g.*, the Basic Law and relevant legislation), news reports, official documents (*e.g.*, minutes of the constitutional drafting committee and the legislature), as well as one-to-one research interviews with Hong Kong members of the NPCSC's various committees as well as Justices of the Hong Kong Court of Final Appeal, Members of the Legislative Council, and officials of the government's Justice and Constitutional Affairs departments (see Appendix I). These sources gave insight into the origin and evolution of different actors' constitutional preferences, perceptions, knowledge, strategies, constraints, and patterns in the outcomes generated by their choices (see Farber & O'Connell, 2010:7). In the course of doing research, I moved back and forth between theory and data. In line with the standard processes of scientific inference, I used observable historical data to make inferences about unobservable mechanisms in play, as predicted by my model (see

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Kydd, 2005:23). Concurrently, I used theoretical predictions to infer about those causal mechanisms and preferences that are particularly difficult to observe.

Besides, I have endeavoured, even while concentrating on a single polity, to derive generalisable observations of wide applicability beyond Hong Kong and China. To this end, I constantly checked the specific theoretical findings of this dissertation, whether they fit the dynamics of other authoritarian regimes, and incorporated empirical evidence drawn from other country studies whenever fitting. The reader should understand, however, that I do not intend to present a grand unified theory of constitutional review in this dissertation. Because the medium-range theoretical argument I make is designed to be sensitive to the characteristics of authoritarian regimes, it is not automatically applicable to the whole universe of governmental types, such as liberal democracies or totalitarian states.

## 4. ORGANISATION OF CHAPTERS

This dissertation is organised into eight chapters (including this introduction). Chapter 2, “Venturing Constitutional Review under Authoritarianism,” addresses the question of variation across authoritarian states: why are some more prone than others to support constitutional courts? It begins by reviewing the empirical literatures on constitutional law. On the basis of this evaluation, a theoretical framework known as the Constitutional Investment Theory is developed, featuring

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the causal mechanisms which explain the sustainability of constitutional judicial review in non-democratic regimes. Detailed case studies of constitutional review in other predominantly ethnic Chinese, non-liberal democratic, polities similar to Hong Kong – *i.e.* the Singapore Supreme Court (1965-present) and the Council of Grand Justices of the Republic of China (Taiwan) (1946-2000) – are brought up to support the theory.

Chapter 3, “The Strategic Structure of the Hong Kong Constitution” analyses the drafting and adoption of the Basic Law at two levels, that of *collective choice* – the political bargain struck between China, the United Kingdom, and the Hong Kong (business) elite – and of *delegation* – the set of principal-agent instructions guiding the enforcement of that bargain. Apart from being a vehicle of national reunification, the Basic Law was designed, first, to express China’s commitment to the continuance in Hong Kong of capitalist institutions and pro-business policies in favour of its partner the local business elite, and, secondly, to minimise the agency costs to the Chinese government of superintending post-1997 Hong Kong. I argue that the delegation of significant constitutional interpretive powers to the courts was intended by China to further those two goals: to demonstrate its respect for the liberal-democratic constitutional scheme agreed with the British government, and to reduce the monitoring and policing costs of enforcing the Basic Law. The drafters of the Basic Law likely perceived the courts of British Hong Kong, to which the courts of post-1997 Hong Kong were successors, to be trustworthy agents; after all, these conservative, deferential courts seldom exercised constitutional review jurisdiction.

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Nevertheless, in order to maintain the NPCSC's supremacy, the Basic Law's framers imposed a number of restrictions to bar the Court of Final Appeal from exercising full-fledged constitutional review and interpretive powers. Imperfect information disenabled the drafters to foresee the Court's eventual activism, some ten years after the Basic Law's enactment.

Chapter 4, "China, Britain, and the Quest for Constitutional Review in Hong Kong," takes the *Decision of the NPCSC on the arrangement of existing Hong Kong law in relation to Article 160 of the Hong Kong Basic Law* as its vantage point. The *Decision* was the first time the NPCSC proactively reviewed all Hong Kong laws for consistency with the Basic Law. In the end it invalidated or amended twenty-four statutes, including the supremacy clauses of the Hong Kong Bill of Rights of 1991, an expressive-symbolic document enacted by the Government of Hong Kong under pressure from the local populace and the United Kingdom Parliament following the 1989 Tiananmen crackdown in Beijing. Notably, the Bill vested in the local courts a constitutional review power unmatched by most other comparable documents across the Commonwealth of Nations, enabling them to *repeal*, from the statute books, unconstitutional laws, conclusively. Interestingly, the NPCSC did not nullify the Bill of Rights. In this chapter I explain why the NPCSC's decision to conserve the Bill of Rights and constitutional judicial review did stem from a perception of the Hong Kong judiciary's trustworthiness, given the context of the clashes between the Chris Patten Government and Beijing. The Court's approach to constitutional interpretation had been characterised by a marked tendency to dampen the impact of the Bill, and to

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discourage appeals to international human rights jurisprudence, while embedding in its rulings potentially activist doctrines (*e.g.*, proportionality) which proved useful once activated in the post-British era. I substantiate my argument with a statistical overview of the Court's constitutional case law between 1991 and 1997. I reveal that this Court affirmed the *status quo* and/or China's preferences, without a single instance of defection, yet while entrenching at the same time its own competence to interpret the constitution.

Chapter 5, "The Competition for Constitutional Primacy," investigates the early competition between the Court of Final Appeal and the NPCSC over the *de facto* power of final constitutional interpretation. A description of the Court's establishment, structure, and composition is followed by an analysis concluding that the Court inherited the ex-Supreme Court's trustworthy reputation, together with its political assets – a well-recognised constitutional jurisdiction, decisional autonomy, professional personnel, if not also public respect. The Court nevertheless defied the NPCSC and the SAR regime in a series of immigration cases, challenging the NPCSC's primacy; overturning important government policies; and declaring expansive canons of constitutional interpretation. These decisions ultimately provoked reversal by the NPCSC in a Basic Law Interpretation. This chapter scrutinises the NPCSC's *modus operandi* and interpretive strategies, tracing their effects on the Court's consequent strategy of strategic deference in sensitive policy domains (*e.g.*, affirming the NPCSC's wide-ranging Basic Law interpretive powers, upholding the criminality of desecrating the Chinese flag, but also ensconcing potentially activist doctrines for

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future resort). China did acquiescence in the Court's exercise of constitutional review powers *as if* the former trusted, and hence invested, in the latter's constitutional capacities.

Chapter 6, "The Dynamic Equilibrium of Constitutional Control," first furnishes the reader an overview up to 2011 of the Court of Final Appeal's case law on and the NPCSC's Interpretations of the Basic Law; then shows how throughout the 2000s the Court, whose decisional approach exploited policy domains in which the NPCSC and/or the SAR regime's ideal policy preferences were ill-defined, weak, or internally contested, has managed to deliver activist rulings with impunity. Invoking contextual analyses of relevant constitutional decisions, it examines the consolidation of a *dynamic equilibrium of constitution control* within the Basic Law framework, under which the Court and the NPCSC peacefully co-existed and dynamically developed their own constitutional jurisprudence within their respective bailiwicks. The equilibrium has always been a delicate one, however, and is liable to be upset if one or more of the above variables undergoes change.

Chapter 7, "Judicial Activism and Regime Acquiescence" applies the Constitutional Investment Theory to explain the SAR regime's and the NPCSC's acquiescence in judicial activism in the Hong Kong case, showing how China's strong incentives to signal its commitment to the "One Country, Two Systems" scheme, both internationally and domestically, first drove the NPC to delegate cautiously to the Hong Kong courts constitutional interpretative authority under the Basic Law, and then China to accept the Court's assertions of constitutional power; how internal

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divisions within and external opposition to the SAR regime have rendered retaliation a costly option; and how the Court's resolution of constitutional ambiguities has sustained continuous political investment in its constitutional jurisdiction, decisional autonomy, and professional personnel.

Chapter 8, "Conclusion" concludes by summarising the main findings and arguments of the preceding chapters, and then discusses the implications and wider applicability of the discoveries of this dissertation.

## CHAPTER 2

# VENTURING CONSTITUTIONAL REVIEW UNDER AUTHORITARIANISM

### 1. INTRODUCTION

This Chapter propounds a theory that explains why, by identifying the conditions under which, even a stable authoritarian state free of the pressures of electoral and inter-branch competition sometimes voluntarily concedes to other actors (whether ordinary citizens, interest groups, or opposition parties) the right to reverse or modify its policy preferences, and tolerates constitutional courts imposing constraints on its policy choices. It is organised as follows. Section 2 begins with a review of the existing empirical theories of constitutional judicial review relevant to the present inquiry. Section 3 proceeds to expound an alternative *Constitutional Investment Theory* which identifies the causes underpinning the three successive stages of *activation*, *consolidation*, and *ascendency* of constitutional review under authoritarian states.

The Constitutional Investment Theory takes the preferences, incentives, and actions of constitutional review bodies as given, and concentrates on those of the regime instead. It hypothesises that expressive-symbolic considerations persuade even authoritarian states to surmount the risks and uncertainty of acquiescing in the activation of constitutional review; that trust and reciprocity between the courts and the regime decisively determine the consolidation and scope of authority ceded to

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courts by such a regime; and that the regime's tolerance of judicial ascendancy generally rises in tandem with the transaction costs of policing offending courts. Section 4 provides detailed case studies of Singapore and pre-2000 Taiwan which furnish empirical evidence for the theory. The chapter closes with a section venturing certain conclusions.

## 2. CONSTITUTIONAL REVIEW UNDER AUTHORITARIANISM

### 2.1. THE EXISTING LITERATURE

There is considerable divergence within the empirical literature about the origin, development, and advantages of constitutional review. Constitutional review in authoritarian regimes in particular has been little theorised (Ginsburg & Moustafa, 2008). Most existing theories assume a competitive, liberal, democratic political order. For example, *electoral competition theories* predict that constitutional review is sustained when competing, risk-averse and forward-looking parties locked in iterated prisoners' dilemmas discover a common preference for exercising mutual restraint (e.g., Landes & Posner, 1975; Ramseyer, 1994; Stephenson, 2003; McAdams, 2005; Finkel, 2008). Accordingly, electoral uncertainty and politicians' fear of losing support at the margin are hypothesised to be the motives for empowering constitutional courts (e.g. Ferejohn *et al.*, 2007). Indeed, electoral competition and checks and balances facilitate the emergence of multiple veto players,<sup>1</sup> which in turn empowers

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<sup>1</sup> "Veto players" refers to actors, either institutional (e.g., legislatures) or partisan (e.g., parties)

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constitutional courts all the more. *Inter-branch competition theories* posit that while each veto player on its own might constrain the autonomy of courts for political gains, two or more veto players tend to constrain each other, providing an incentive for courts to make “activist” decisions (e.g. McCubbins & Schwartz, 1984; Voigt, 1999; Andrews & Montinola, 2004; Couso, 2005; McCubbins & Rodriguez, 2006; McCubbins *et al.*, 2006). Because democracies are typically characterised by institutionalised political competition, courts exercising constitutional review will *ceteris paribus* be likelier found in democracies than in non-democracies (e.g. Tsebelis, 1995; McCubbins *et al.*, 2007).

Both sets of competition theories lead one intuitively to conclude that, even though constitutional review may not necessarily emerge in liberal democracies, it would almost certainly be impossible for it to succeed where the regime expects to hold onto lawmaking and administrative power indefinitely. Judicial power does emerge in non-competitive states, however, and would probably be better explained by highlighting the role of *transaction costs* in the regimes’ calculus of how to react to the exercise of constitutional review.<sup>2</sup> Transaction costs may refer to search, information, bargaining, decision-making, or monitoring costs, all of which factor into political agreements forged between influential actors under circumstances in

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within a coalition government), which possess formal authority to unilaterally reject any change to the policy status quo, see Tsebelis (1995).

<sup>2</sup> In the new institutional economics literature, the concept of transaction costs is extremely inclusive; leading scholars have defined them as the “comparative costs of planning, adapting, and monitoring task completion under alternative governance structures” (Williamson, 1989:142) or “the costs of measuring the valuable attributes of what is being exchanged and the costs of protecting rights and policing and enforcing agreements” (North, 1990:127).

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which compromise plays no less a role than coercion (see Lane, 2011:179). These costs may alter the perceptions of political actors analysing the costs and benefits of alternative policy vehicles (Twight, 1994; Dan & Bohte, 2004). All too often existing theory assumes implicitly or explicitly that authoritarian regimes will be able to conserve all instrumental powers so as to prevent any change to the constitutional or policy *status quo*, as if they could veto at will all unfavourable judicial rulings without ever facing insurmountable information, decision, and enforcement costs. However, there is no reason to assume that high transaction costs exist only in competitive democracies. Simply put, the problem of transaction costs stated here is that *even authoritarian regimes cannot possibly possess information about everything that is happening, and they too sometimes encounter prohibitive internal disagreements and external resistance in the course of decision-making and enforcement*. As subsequent sections demonstrate, this may have significant implications for the emergence of constitutional review in non-democratic regimes.

*Instrumentalist theories* by contrast claim that constitutional review is preferred to institutional alternatives because it efficiently provides highly valuable instrumental benefits to the political branches, such as the ability to strike durable legislative bargains in the form of statutes and constitutional rights with interest groups which are proof against repeal by opponent successors (*e.g.*, Landes & Posner, 1975). Still other models describe independent constitutional courts as convenient scapegoats to blame for controversial policies (*e.g.* Salzberger, 1993; Hirschl, 2004; Whittington, 2007); as a feedback mechanism to gather information about the

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consequences of legislation and its implementation (*e.g.* Rogers, 2001); an arbiter of central-local disputes under federal arrangements (*e.g.*, Shapiro, 1981), or as an umpire arbitrating the functioning of capital markets, monetary stability, non-discriminatory contract enforcement, and transparent investment tax incentives (*e.g.* Root & May, 2008). In equilibrium, even multiple, competing, veto-exercising players would refrain from sanctioning an activist court because of the advantages derived from constitutional review.

Any combination of these instrumental advantages may be plausible explanations of constitutional review. However, these theories neglect to address why constitutional review is particularly preferred (or not) as an institutional solution by various ruling regimes. Authoritarian states could and have resorted to institutional options other than constitutional judicial review to perform the same instrumental functions just reviewed, such as oligarchic political management (*e.g.* Iran's Guardian Council), or legislative review (*e.g.* North Korea's Presidium of the Supreme People's Assembly). Additionally, existing instrumental theories thematically focus rather exclusively on the grand functions that constitutional review may embody, while neglecting the causal mechanisms through which *this* arrangement (rather than one without constitutional review) actually emerged. It must be recognised that constitutional review may confer *certain* important instrumental benefits on political rulers *sometimes*, but nothing guarantees that these will accrue *every time*. Any satisfactory explanation must look beyond purely instrumental factors. It is not that instrumental interests are unimportant; the problem is rather that that type of

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demand for instrumental solutions which brings forth independent constitutional review in particular may wax or wane, and thus its operation must fall within the province of empirical investigation rather than theoretical speculation.

### 2.2. OVERVIEW OF THE THEORY

Consider the relationship of a constitutional court to an authoritarian regime in light of the standard principal-agent model, whereby greater informational asymmetry encourages agents to embark on courses of action inconsistent with the original terms of delegation set by their principals (E. Posner, 2000; Cooter, 2002). Conversely, the divergence of principals' and agents' preferences sooner or later moves principals to reclaim their authority from agents, either by dismissing them or by controlling their behaviour through monitoring. Note that a final appellate constitutional court is a special type of agent: it has been formally delegated authority to monitor political acts, some of which will be its principals' (the regime's), even though it depends on the latter fiscally and for the enforcement of its decisions (Stephenson, 2003). The power of a constitutional court is robust to the extent that the regime is convinced that its own interest is to invest in it (McCubbins & Rodriguez, 2006). The court may "declare" a legislative act invalid, but the efficacy of such a decree will depend on the regime's acquiescence in it (Volcansek, 2001:351). The political foundations of constitutional review cannot be taken for granted (Whittington, 2007).

Based on this simple observation, I develop a theory comprising three

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analytically distinct stages: *activation*, *consolidation* and *ascendancy*. I have named it the Constitutional Investment Theory because venturing constitutional review is in many ways similar to investing in financial assets. The following concepts are keys to my theory. *Activation of constitutional review*: setting up a constitutional court and consolidating it as an authoritative organisation within the political system are two different things, involving two distinct stages which could be analytically classified as the stages of constitutional choice and post-constitutional choice (see Vanberg, 2005:67). Independent constitutional review may exist on paper,<sup>3</sup> but in order to exist into practice, it must first be activated by venturesome litigants availing themselves of a court in possession of substantial independence, fiscal sufficiency, professional personnel, and constitutional jurisdiction. All of these political assets of the court must initially flow from the regime, whether tacitly or not. *Consolidation of constitutional review* denotes a subsequent stage in which the regime itself respects and eventually takes for granted the court's competence to examine the constitutionality of laws and policies from time to time. *Ascendancy of constitutional review* is understood as the stage in which the regime proves willing to tolerate judicial activism – in the form of judicially enacted policy in domains previously monopolised by political officials (see Ginsburg & Elkins, 2009:1438).

Problems typifying financial investment, such as its irreversibility and the uncertainty of future returns (see Parisi & Foy, 2009:31), confront the regime in its repeated interaction with the court. First, the costs of the regime's investment in

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<sup>3</sup> Notably, the Constitutional Court of the Second Korean Republic (1960-1962) existed only on

## VENTURING CONSTITUTIONAL REVIEW

constitutional review are “sunk”; they cannot be recovered if the court behaves opportunistically or incompetently at a later time (see Ferejohn, 1995:207; Trochev, 2008). Second, the choice for independent constitutional review is often made under uncertainty about the future benefits of constitutional review to the regime. Even friendly review exercised by judges loyal to the regime imposes undesirable costs; to name just a few, the regime’s policy preferences are subjected to relatively transparent legal assessment; the regime must confront mobilised interest groups in open court; and the regime must forgo opportunities to pursue other valuable courses of action. In short, the range of legally permissible acts available to the lawgiver is reduced (Zorn, 2006:57). Working backwards, a fully rational authoritarian state with complete information operating free of transaction costs would withhold constitutional review powers from courts. But because in the “real world” transaction costs do exist and authoritarian states do invest in courts with constitutional review powers, alternative explanations must be found.

### 2.2.1. ACTIVATION OF CONSTITUTIONAL REVIEW

As of 2003, as many as 164 out of the world’s 193 countries, both democratic and non-democratic, allowed some form of constitutional review, either centralised or decentralised (Ramos Romeu, 2006). Notice that the factors that underpin *the formal adoption of constitutional review at the stage of constitutional design* (e.g., Ginsburg 2003;

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paper; its constitutional jurisdiction had never been activated.

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Hirschl, 2004; Ginsburg, 2008a) need not concern us here because the province of the Constitutional Investment Theory centres on the post-constitutional design phases of constitutional review activation, consolidation, and ascendancy. Indeed, a core presupposition of this dissertation is that institutions, including constitutional review, when put into action, may deliver outcomes that contrast sharply with the intentions of their designers. Nonetheless, it would be useful to suggest the above figures imply that a considerable number of ruling authoritarians have either forgone the opportunity to abrogate the constitutional review established by previous liberal democratic governments, or else they have themselves actually sponsored the entrenchment of constitutional review. Indeed, as Joakim Ekman (2009:9) observes, authoritarian states, especially those that possess formally liberal constitutions, often integrate judicial independence *de jure* with incomplete executive control; in which case supreme or constitutional courts function *both* as arbiters of constitutionality and advocates of political rulers.

The institution of constitutional review may be thought of as comprising a set of duties, a set of claims, and a mechanism for enforcing those claims (see Riker & Sened, 1991; R. Posner, 2007:684). When a claim is said to exist and be enforceable of right (*e.g.* the freedom of assembly), this means that the duty-holder (*i.e.* the state) owes a duty to the claim-holder (*i.e.* the citizen), who has a claim on the duty-holder to perform the duty owed. To enforce her claim, the claim-holder may resort to the mechanism (*i.e.* constitutional court), which assesses whether the claim has been upheld, and if not, instructs the duty-holder to perform its duty. This conception makes the best sense of

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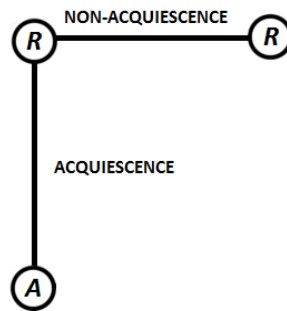
why authoritarian states acquiesce in the activation of constitutional review – the acts of litigants in invoking constitutional review and the act of the constitutional court in asserting constitutional jurisdiction – to model the situation as a one-off Dictator Game (see Figure 3), with the Regime as “Dictator,” and the Activators (*i.e.* litigants and judges) as “Recipient.” At Time 1 the Regime decides whether to give the Activators claims of right, empowering them to impose duties on the regime to give effect to such claims in future (see Riker & Sened, 1996). Assume that at Time 2 the Activators do not have the option to refuse. The standard, payoff-centred, “sub-game perfect Nash equilibrium”<sup>4</sup> prediction, prevalent in the existing empirical literature, is that an instrumentally self-interested Regime would not allow the Activators to invoke constitutional review (see Dannin, 2004). There is thus no activated constitutional review.

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<sup>4</sup> The concept of “subgame perfection” means players are adopting optimal strategies in every

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FIGURE 3: DICTATOR GAME OF CONSTITUTIONAL REVIEW ACTIVATION



Notation: R=Regime A=Activators

The present theory of constitutional review activation, however, emphasises dimensions of constitutional review that do not depend solely on instrumental considerations. The regime's act of acquiescing in the judicial assertion of constitutional powers potentially establishes conventions that determine the relationship between the regime and the courts in future. Under imperfect information at the time of choosing whether to acquiesce, regimes are unlikely to foresee precisely the instrumental benefits and costs of autonomous constitutional review in the context of their own countries in the long run. At the very least, politicians are likely to fail to anticipate all issues that may come before the court (Helmke, 2002:301). The prediction of acquiescence is premised on the consideration that such a choice may be motivated by symbolic as well as instrumental interests (Brennan & Hamlin, 2002). Institutions framed in constitutional documents, including judicial review, may be mechanisms intended to generate concrete social outcomes, but they may also embody "expressive values" in the sense of evoking abstract ideals

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decision-making point and any such point forward (de Figueiredo & Weingast, 2005: 114).

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like equality, justice, fairness, participation, and so on; which political players may value independently of any concrete instrumental results (Brennan & Hamlin, 2002:310).

Accordingly, authoritarians may acquiesce in the activation of judicial review, as specified in the constitution, merely because it symbolises a cluster of beliefs, values, ideologies, identities and the like, intended for domestic and international audiences regardless of any impact review may (or may not) have on the outcome of legislative processes. Given incomplete information about the future, the symbolic expression of such ideals, if found valuable in its own right, may suffice to motivate the toleration of constitutional review at its practical inception (see Hamlin & Jennings, 2011). Although acquiescence in citizens' invoking and judges' exercising constitutional review would, from a strictly payoff-centred standpoint, necessarily damage an authoritarian regime's dominance of constitutional interpretation (however insignificantly), the expressive-symbolic advantages stemming from independent constitutional review may be valuable enough to motivate it (see Brennan & Lomasky, 1993).

It is no novelty for political choices to be made to "establish an enthusiasm for and loyalty to the constitutional order and have more to do with rhetorical appeal than with practical efficacy, more to do with symbols than with reality, more to do with their ability to raise a cheer than with their ability to serve interests" (Brennan & Hamlin, 2006:342). A number of studies suggest that constitutional review is widely viewed as being integral to liberal constitutional reform (see Vanberg, 2005; Hilbink,

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2009; Shambayati & Kirdis, 2009; Robertson, 2010); a symbol of government reliability; a precondition of a nation's entitlement to global respect (Ginsburg & Kagan, 2005:5); and a credible signal to foreign and international actors of the regime's commitment to ideological values such as the rule of law and property rights protection (see Garoupa & Maldonado, 2011). Examples include the establishment of the Egyptian Supreme Constitutional Court ("SCC" hereafter) in 1979 by Anwar Sadat's regime in order to signal a new ideological commitment to neo-liberalism and the "rule of law" (as opposed to former President Gamal Nasser's socialist policies) (Moustafa, 2007), as well as the Soviet Union's activation of the Constitutional Supervision Committee's (predecessor of the first Russian Constitutional Court, "RCC" hereafter) jurisdiction as part of Mikhail Gorbachev's Perestroika programme to "renew socialism" and engender a "socialist rule-of-law state" at the expense of orthodox Leninism (Trochev, 2008; Henderson, 2009: 149).

It may be hypothesised that authoritarian states which accept a formally liberal democratic constitution are likelier to acquiesce in the activation of constitutional review than other such regimes which derive no symbolic benefits therefrom (*e.g.* Leninist states). Viewed from this angle, it is unsurprising that successive constitutional courts emerged in military-ruled South Korea but not in the Communist-ruled North, in Hosni Mubarak's Egypt but not in Muammar Gaddafi's Libya, and in Nationalist China but not in Maoist China.

Consider the unsuccessful attempt of the Chinese Supreme People's Court to assert a *de jure* competence of constitutional review. In 2001 the Court issued a

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controversial instruction to the Shandong Provincial High Court in the case of *Qi Yuling v Chen Xiaoqi et al.*,<sup>5</sup> which concerned identity theft in a case where one private citizen stole another citizen's identity and thus deprived the latter of a tertiary education. The significance of the *Qi* decision lies not in the rescript itself, but rather in certain extrajudicial statements made by Justice Huang Songyou, Presiding Judge of the Court's Civil Tribunal I. In an article published in the *People's Court Daily*, Huang openly declared that the *Qi* rescript was intended to set an example for all Chinese judges by expressly adopting the Constitution in legal reasoning. Huang's statement, backed by then-Chief Justice Xiao, sought to rid the judiciary of the ideological barrier to directly applying the Constitution. The U.S. Supreme Court decision *Marbury v. Madison*<sup>6</sup> was cited to support the position that constitutional review is a long-standing international trend that China ought to follow. However, *Qi* has never been mentioned by any subsequent ruling. According to Peking University law professor Qianfan Zhang (2010:962), it was rumoured within Chinese legal circles that the Court had circulated an internal decree prohibiting lower courts from following *Qi*. In December 2008 the Court announced the repeal of *Qi*, but without even a brief explanatory note. In the same year, Huang Songyou, then Vice President of the Court, was impeached and removed on charges of corruption. Hence the total demise of *de jure* constitutional review in China. Indeed, we might suppose that, had the Supreme People's Court not so aggressively framed *Qi* as a "*Marbury* moment," it

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<sup>5</sup> *Qi Yuling v Chen Xiaoqi et al.* Sup. People's Ct. (24 July 2001) (Chinese Supreme People's Court).

<sup>6</sup> *Marbury v. Madison* 5 U.S. 137 (1803) (United States Supreme Court).

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might have got away with activating at least *de facto* constitutional review without provoking retaliation from its principals. Put in the terms of the Constitutional Investment Theory, the Chinese Party-state never has accepted the judicial authority to explicitly interpret the constitution, not even in a minor private torts case, largely because constitutional review was considered symbolically detrimental to China's traditional Leninist doctrines. Given the entrenched constitutional dogma of Communist Party political supremacy and the National People's Congress's constitutional supremacy, few if any expressive-symbolic benefits, and perhaps actual damage, would have accrued to a Leninist Party-state acquiescing in the activation of such an institution as constitutional judicial review.

An advantage of the expressive-symbolic theory of constitutional review activation under an authoritarian state is that, while providing a theoretical framework for sorting out the relevant explanatory variables, it leaves the content of expressive symbolic behaviour, diverse across space and time, to the province of empirical investigation. After all, no unambiguous or exhaustive definition fixes the set of beliefs that may be expressed: duty, morality, deception, self-deception, among many others could all be factored into the decisional calculus (Hamlin & Jennings, 2011).

Moreover, symbolic and instrumental purposes are not mutually exclusive: the actual trade-off between them in specific cases also belongs to the province of empirical research (see Brennan & Hamlin, 2001). Even if symbolic purposes are more generally explanatory, variations in the activation of constitutional review under

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authoritarian states may well reflect the influence of differing instrumental concerns across political contexts. Once activated, constitutional review faces the consolidation problem; the expressive-symbolic value of constitutional review may remain, but alone it is insufficient to consolidate the institution inasmuch as the marginal utility of symbolism to the regime must eventually diminish as more of it is “consumed.”

### 2.2.2. CONSOLIDATION OF CONSTITUTIONAL REVIEW

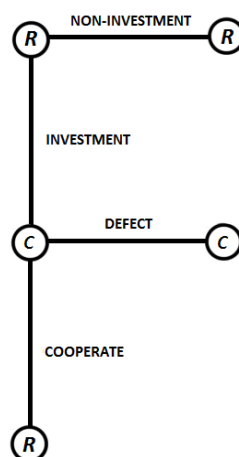
The following model of constitutional review consolidation (see Figure 4) was inspired by the Investment Game in experimental economics (see Smith, 2008). It was found to illuminate the evolutionary trajectories of activated constitutional review under authoritarian states. It consists of two players, the Regime (the investor) and the Court (the investee). Assume that a constitutional dispute has arisen before the game starts. The Regime must decide whether to invest in the Court – endowing it with constitutional jurisdiction, decisional independence, fiscal autonomy, professional personnel, and means of exacting compliance with its decisions – so as to conduct an independent constitutional review of statutes and executive decisions. A significant risk exists that the Court may not reciprocate the Regime’s trust, but exploits political investment and decides opportunistically or incompetently. The Regime must therefore estimate from the information available whether the Court will reciprocate or not. If the Regime decides to “trust” the Court – defined as anticipating that the Court will reciprocate – it will most likely invest in it. Of course,

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if the Regime does not trust the Court, it will opt to substitute for investment such expedients as “telephone justice” – delivering its own verdict through the Court’s façade – or preventing significant cases from reaching the Court at all.

If the Regime chooses to invest, the Court has to choose between cooperation and defection. Suppose the Regime’s ideal policy positions are represented as points lying within a segment  $[R_1, R_2]$ , called the “zone of tolerance,” representing more or less similar policy options, considered by the Regime to be at least as good as each other (Epstein & Knight, 1998:141). Irrespective of its own ideal point in the field, the Court can reciprocate the Regime’s trust (“cooperate”) only by delivering a decision  $c$  within the Regime’s zone of tolerance  $[R_1, R_2]$ . To act otherwise constitutes defection. Hence, the size of the zone of tolerance determines the scope of the Court’s politically tolerable activity. Note that this size may vary across policy domains, as witness the following conceptual extremes.

FIGURE 4: INVESTMENT GAME OF CONSTITUTIONAL REVIEW CONSOLIDATION



Notation: R=Regime C=Constitutional Court

## VENTURING CONSTITUTIONAL REVIEW

Let “Prohibited Policy Domains” denote the subset of policies that directly impinge on the Regime’s own political survival (e.g. state security) in which the distance between  $R_1$  and  $R_2$  (the zone of tolerance) must be very narrow or zero; implying that the Regime’s preferences are unambiguous and non-negotiable (see Figures 5 and 6).

FIGURE 5: COURT COOPERATION IN PROHIBITED POLICY DOMAIN

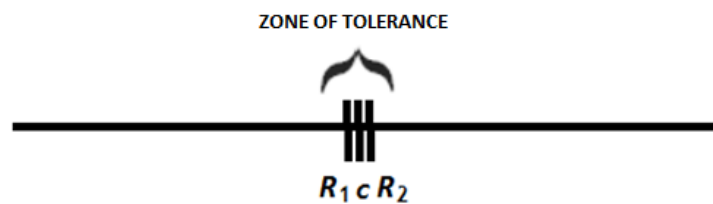
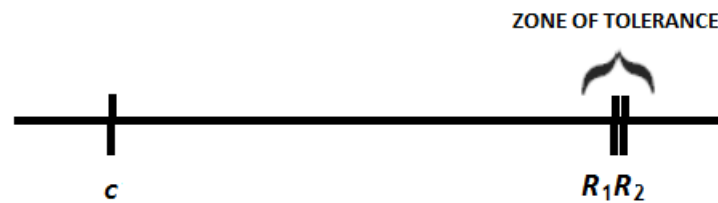


FIGURE 6: COURT DEFECTION IN PROHIBITED POLICY DOMAIN



Judicial defection is strictly prohibited in such a domain. To be perceived as cooperative, the Court must either affirm the Regime’s preferences or resign from the Prohibited Policy Domain altogether. Conversely, let “Permitted Policy Domains” denote the subset of policies that implicate neither the Regime’s survival nor its most cherished goals, where the zones of tolerance will be noticeably broader; meaning that the regime can tolerate a range of Court decisions, including invalidations of the Regime’s own acts. The one-off game ends with the Court’s decision (see Figures 7 and 8).

# VENTURING CONSTITUTIONAL REVIEW

FIGURE 7: COURT COOPERATION IN PERMITTED POLICY DOMAIN

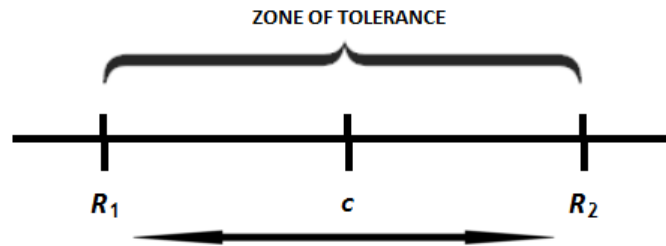
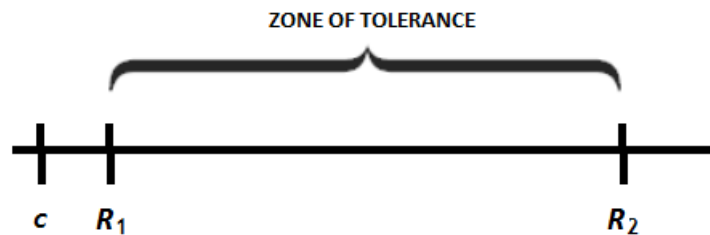


FIGURE 8: COURT DEFECTION IN PERMITTED POLICY DOMAIN



The standard game theory prediction (*i.e.* sub-game perfect Nash equilibrium) of this game, again prevalent in the empirical literature, is solved by backward induction. If the Court's policy ideal point diverges widely from the Regime's zone of tolerance (whether in Prohibited or Permitted Policy Domains), then the Court would in principle *prefer* defection over cooperation. The Regime, likely aware of this, prefers non-investment to investment as well. It thus concludes with no constitutional review. However, weighing-in expressive-symbolic interests and preferences may serve to rescue constitutional review. The Regime may prefer the benefits of showcasing constitutional review to the luxury of getting its way across *all* policy domains, and this may suffice to induce its cooperation with an autonomous (or semi-autonomous) Court, even at the risk of judicial defiance in some cases. This is the more probable as, by their very nature, constitutional review games are never one-off but always

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iterated. A credible threat by the Regime to withdraw its investments in future, as by curtailing the Court's jurisdiction and/or fiscal autonomy, may well suffice to coerce the Court's cooperation (Jacobi, 2006).

In an infinitely iterated game under imperfect information, the *trustworthiness* of the Court, defined as the Court's "reputation" or record of past cooperation, weighs into the Regime's decisional calculus whether to reinvest in the Court or not in forthcoming play. If the Regime calculates based on the Court's past behaviour, that *non-cooperation* will ensue with a certain degree of likelihood, then the Regime, in deciding how much to trust the Court, must relate that likelihood to the threat to each of its own policy preferences. The theory presented yields the following prediction: the higher the Court's trustworthiness, the lower the likelihood of governmental disinvestment in the Court (*i.e.*, restriction to constitutional jurisdiction, circumscription of decisional autonomy, withdrawal of funds, removal of justices, non-compliance with rulings) as iterated play continues.

Suppose now that the Court defected at the start of the game in a case where the Regime has a strong and well-defined preference. The Regime, concluding from this betrayal of trust of first impression that investing in the Court is too high-risk a strategy, will disinvest in it ever after. It follows that any nascent Court with ambitions to exercise perdurable independent constitutional review must prioritise the building up a record of trustworthiness before the Regime. Many trust-building measures are available to the Court, most of which entail the delivery of concrete benefits to the Regime: the Court may affirm important policies of the Regime;

## VENTURING CONSTITUTIONAL REVIEW

improve the procedural robustness of the Regime's decisions, but without interfering with substantive policy outcomes; devise doctrines of self-restraint that foreseeably lock-in judicial cooperation long after the current generation of judges and political officials have retired; or deliver instrumental benefits such as serving as a third-party referee to factional struggles within the Regime, or rendering credible the Regime's domestic and international commitments to property and other constitutional rights.

This explains the divergent fates of the Egyptian and Russian constitutional courts. While the Egyptian SCC had for more than one decade since its establishment consistently cooperated with Mubarak's regime over all important matters ranging from national security through economic policy to electoral dominance and thus steadily marched into a period of unpunished activism in the 1990s (Moustafa, 2007), the RCC quickly slipped into open conflict with the federal executive in the early years of its existence and was predictably abolished by Boris Yeltsin following the 1993 Russian Constitutional Crisis (Trochev, 2008). Recall the Chinese Supreme People's Court's failure to assert constitutional review competence in the *Qi* case. Largely because the Court had not trampled the regime's fundamental policy interests in this mere torts case, and was quick to rectify its political mistake within the latter's zone of tolerance, its political trustworthiness had been swiftly reconstituted, enabling it to deliver in 2007 a landmark decision,<sup>7</sup> which affirmed its inherent powers to issue, unlike the concrete judgments of the United States Supreme

## VENTURING CONSTITUTIONAL REVIEW

Court, *abstract yet legally binding* decrees and rescripts, somehow inaccurately, known as “Judicial Interpretations.” In issuing these and other, similar decisions, the Court openly defied the National People’s Congress’s position that only its own Legislative Interpretations have the effect of law; and that only through the adjudication of concrete cases may the Court interpret statutes (Ip, 2011). Ironically, Judicial Interpretations are unconstrained by the dictates of the Chinese Constitution, which is neither justiciable nor enforceable. In other words, the Court created for itself, with impunity, “the widest possible power of legal interpretation among all other courts in the world,” making it “[China’s] third lawmaking organisation after the National People’s Congress and the State Council” (Wang, 2010:23). Judicial Interpretations typically rework statutory principles by detailing vague provisions, excluding certain statutorily permissible claims, and providing new grounds for judicial decision-making not found in the primary legislation (Howson, 2010). Regimes are thus likelier to cede autonomy and authority to the Court in proportion as the latter prove themselves trustworthy by conferring benefits, whether expressive or instrumental (see Moustafa, 2007:49). Over time the Court’s trustworthiness will likely become consolidated as a seldom questioned part of the constitutional landscape (see Elster, 2007).

### 2.2.3. ASCENDANCY OF CONSTITUTIONAL REVIEW

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<sup>7</sup> *The Supreme People’s Court Regulations on the Work of Judicial Interpretations, Judicial Distribution* [2007] No. 12 (promulgated by the Sup. People’s Ct., Mar. 9, 2007) (Chinese Supreme People’s

## VENTURING CONSTITUTIONAL REVIEW

Constitutional review becomes politically consequential not only insofar as it is consolidated, but also insofar as regimes are willing to tolerate judicial activism. A constitutional court may in the aggregate return highly valuable benefits to the regime, which in turn provides the latter with a strong incentive to withhold attacks following the delivery of individual activist decisions. However, the temptation of pursuing short-term interests may push the regime towards sanctioning an activist constitutional court. In a world of zero transaction costs, a regime could of course straightforwardly reverse every court decision which strayed outside its zone of tolerance. Nevertheless, in a world of positive transaction costs regimes are the likelier to tolerate courts' upsetting the constitutional or policy *status quo*, the higher the informational, decision-making, and decision-enforcement costs mount of monitoring or rejecting such upheavals.

Consider the case of constitutional review when an authoritarian state faces high information costs. Even authoritarian states will not have defined their preferences with pinpoint accuracy for every constitutional issue that may arise. Like all human organisations, they have limited attention spans and information-processing capacities; calculating ideally precise policy preferences throughout every policy domain is most likely prohibitively costly. The regime is far likelier to tolerate judicial activism in Permitted Policy Domains, where it is indifferent across a manifold of possible outcomes. The regime may have incomplete

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Court).

## VENTURING CONSTITUTIONAL REVIEW

information about such domains, having allocated little of its scarce information-acquisitional resources to them; or it may know enough but simply care nothing. Conversely, activism in Prohibited Policy Domains in which the regime has unambiguous and non-negotiable preferences – especially touching its own survival – would most likely provoke (possibly violent) retaliation.

Too, authoritarian states are not homogeneously monolithic, but vary across a notional continuum of “internal cohesiveness”; *i.e.* sundry factions insufficient to constitute veto players in their own right may hold conflicting views about the costs and benefits of alternative policies; and it may be more or less costly to “get it together” (depending on the issue). Transaction costs may thus be regarded as inversely related to the decisiveness of the group (Lane, 2011:196). A regime that bears fewer difficulties at internal bargaining over retaliating against the courts or responding to external resistance to its retaliations will naturally be far likelier to punish adverse judicial decisions. Even authoritarian states must sometimes run into issues on which reaching any compromise at all between its various factions if not also with regime opponents proves prohibitively costly.

In order to turn the Egyptian SCC into an inactive and illiberal institution (Lombardi, 2009: 240), Mubarak during the 2000s adopted the strategies of transaction cost-reduction, such as eliminating the legal professional organisations and human rights groups that supported the Court, and appointing one loyalist after another as Chief Justice. External resistance is not unique to authoritarian states, as Georg Vanberg (2005) argues in the context of contemporary Germany; the existence of a

## VENTURING CONSTITUTIONAL REVIEW

transparent political environment and significant public support for an activist constitutional court tend to increase the transaction costs to the government of mounting a backlash against the court. Finally, because of imperfect information and other limitations, the regime may be indifferent or semi-indifferent to the policy issue under review; hence it will tolerate a broader range of judicial preferences so long as the Court's rulings do not overstep certain "fences," represented in the linear policy preference field as the zone of tolerance  $[R_1, R_2]$  beyond which the Court would be encroaching upon the regime's well-defined preferences and interests. Consider the case of the contemporary Korean Constitutional Court, which has been regarded as *the* most powerful Kelsenian constitutional court in East Asia (Ginsburg, 2003). This Court began life in 1988 under the presidency of military strongman Roh Tae-woo. While it had, during its infancy, prudently upheld all major (draconian) national security statutes to the satisfaction of the right-wing regime (see Park, 2008; 97), it had also promoted the regime's economic credibility by nullifying legislation that conferred excessive privileges to the public sector. Expectedly, the Court had been positively reciprocated by the regime, which tacitly invested in it greater institutional autonomy and jurisdictional competence (*vis-à-vis* the ordinary judiciary), and introduced statutory amendments in line with the Court's various advices on legal improvements.

Indeed, a cooperative constitutional court will not necessarily be one that is politically inactive, however. Firstly, the court may invalidate legislation or executive policies in ways that do not disfavour the incumbent regime: the acts may be

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out-dated or failed; or the court may merely be imposing technical procedural preferences; or the ruling may amount to constructive criticism nudging the regime toward a more defensible course of action (Tsebelis, 2002:228). Secondly, every act of political compliance with court decisions constitutes feedback information, encouraging more filing by constitutional litigants who anticipate their own success (Ginsburg, 2003); constitutional complaints are the life blood and enabling prerequisites of constitutional review, which may thus take on a life of its own. Thirdly, under informational asymmetry, cooperative courts may subtly influence the regime's behaviour by carefully devising and publicising clarifications of constitutional rules, which may shape the expectations of the regime without its fully witting "informed" consent – a series of such rulings gradually altering the regime's conduct in subsequent interactions (see Maravall & Przeworski, 2003; Ginsburg & McAdams, 2004; McAdams, 2005). Fourthly, cooperative courts may deliver decisions consistent in themselves with the regime's present zone of tolerance, yet harbouring "timed bombs" of activist doctrines for future activation. Fifthly and finally, courts that have built up a large fund of political assets – respect from the populace and trust by the regime, are likelier to enjoy impunity when issuing politically consequential decisions. Regimes may discover afterwards that the marginal costs of sanctioning constitutional courts with good judicial reputation and strong backing from the public are higher than the marginal benefits of their own absolute discretion in the matters in issue (see Garoupa *et al.*, 2011).

# VENTURING CONSTITUTIONAL REVIEW

## 2.3. IMPLICATIONS OF THE THEORY

The Constitutional Investment Theory fits in with the general observation that legislative and executive governmental preferences and capacities set firm boundaries to plausible judicial action (see Jacobi, 2006). It coheres, moreover, with the literature on self-enforcing constitutions, the main insight of which is that constitutional settlements survive only to the extent that politicians have incentives to comply with the rules contained in them (see Weingast, 2006; Przeworski, 2006; Chavez *et al.*, 2011). At a deeper theoretical level, it chimes with Elinor Ostrom's (1998) behavioural theory of collective action – that trust, reciprocal cooperation and trustworthiness mutually reinforce and determine the levels of cooperation and the net benefits to be gained even in social dilemmas.

## 3. APPLICATION OF THE THEORY

### 3.1. OVERVIEW

To instantiate the theory being propounded, case studies of constitutional review in Singapore and Taiwan (up to 2000) have been selected. Both polities have relatively strong Confucian cultural traditions, and are predominantly ethnic Chinese societies. Like Hong Kong, Singapore and Taiwan have been “newly industrialised economies” or “Asian Tigers,” characterised by relative political stability, the complex

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cohabitation of strong authoritarian states and flourishing capitalist economies, rapid economic growth, and high levels of education. However, the path of constitutional review in each of these countries diverges significantly from each other: constitutional review by the Singapore Supreme Court is consolidated but deferential while on pre-democratic Taiwan's Council of Grand Justices, it was ultimately consolidated and activist.

### 3.2. SINGAPORE

#### 3.2.1. Overview

The Singapore Supreme Court, currently consisting of the Court of Appeal and High Court divisions, is professional, incorrupt, and well-paid; its Chief Justice amongst the highest paid judicial officials in the world, earning more than US\$1 million every year in total compensation; and it is considered powerful when handling commercial cases and routine administrative matters, and regularly rules against the Government, which virtually always complies (Ginsburg, 2008b). With a Constitution that explicitly guarantees the paramountcy of fundamental individual rights and due process, the Supreme Court formally enjoys even greater powers than its British counterpart, which may not strike down the Acts of Parliament, due to the doctrine of parliamentary sovereignty (Lin, 2009: 295).

Over the past three decades the Supreme Court has continually heard cases

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involving constitutional challenges. And yet, despite the Court's strong institutional autonomy and high performance in commercial adjudication, it has remained extremely deferential to the Government and consistently interpreted constitutional rules "narrowly" and "mechanistically" (Tey, 2010: 301). Constitutional litigation takes up a minor share of the Supreme Court's docket, in which commercial cases predominate (Thio, 2002). To date, no legislation has ever been struck down by the Court; no political office-holder has ever lost a defamation suit against an opposition figure; and no foreign publisher has ever successfully defended a defamation accusation brought by the Government (Tey, 2010). This section addresses the following questions: *Why did the Singapore Government acquiesce in the judiciary's assertion of constitutional review powers? What explains the Singapore Supreme Court's contemporary dichotomous treatment of constitutional and private law?*

### 3.2.2. AUTHORITARIANISM IN SINGAPORE

Founded by the British in 1848, modern Singapore acquired independence from Malaysia in 1965 following a period of terrorism and social unrest (Zimring et al., 2010: 3). Moving "from the third world to first," as Lee Kuan Yew put it (2000), Singapore emerged as one of the world's leading financial centres in the 1980s. Notably, the city-state's economic success has been attributed to the regime's single-minded pursuit of economic growth (Lin, 2009: 288). The PAP dominates Singapore's Government, which has been described as "authoritarian" (e.g., Case,

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2009: 99). The Cabinet, in turn, is always unopposed in Parliament and backed by a constellation of sophisticated statutory boards that shoulder the responsibilities of a regulatory state (Sheehy, 2004). Between 1968 and 1981 the PAP held every single parliamentary seat; after 1981, at most six elected opposition politicians at any one time sat in a legislature of over eighty members. Thus, the PAP may amend the policy status quo at will unobstructed. For instance, the Government redrew constituency boundaries to prevent undesirable electoral outcomes after a PAP opponent was returned in the 1981 Election (Jones, 1997).

The PAP might alter the constitutional status quo as easily. Between 1965 and 1979 the Constitution of the Republic of Singapore could have been amended by a simple majority in Parliament. Since 1979 a two-thirds majority is required to amend provisions of the Singapore Constitution other than those concerning sovereignty and the election of the President. This change did not undermine the PAP's veto power, however. Given that the PAP has always enjoyed super-majoritarian status in the legislature, the Government easily abolished trial by jury in 1969 and suspended appeals to the Judicial Committee of the Privy Council in London in 1994 (Jones, 1997). The Government also possesses a wide array of legislative instruments preventing the emergence of new veto players; including the Penal Code, which deals with unlawful assembly; the Miscellaneous Offences (Public Order and Nuisance) Act, which empowers the Government to regulate public processions; the Public Entertainment and Meetings Act, which requires public entertainment, including talks and discussions in a public place, to be licensed; and the Public Order (Preservation) Act

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and the Preservation of Peace Act, which authorise the Government to disperse assemblies in gazetted areas (Tan, 2011). In sum, these attributes place Singapore squarely within the category of authoritarian governments.

### 3.2.3. ACTIVATION

Constitutional judicial review in Singapore originated in two phases, the first being the adoption of a Bill of Rights in the Constitution, and the second being the Government's acquiescence in the judicial assertion of authority to review legislation for conformity with that Constitution. Singapore's Constitution institutes a parliamentary democracy based on the Westminster model (Thio, 2002). Exceptionally, Article IV contains a comprehensive Bill of Rights. Given that independence in 1965 was unexpected, no constituent assembly had been convened to formally debate a constitutional bill of rights. On 22 December 1965, the Singapore Parliament adopted a "makeshift Constitution" that comprises the State Constitution 1963, the Republic of Singapore Independence Act 1965, and the Fundamental Liberties Clauses from the Malaysian Federal Constitution (Yap, 2010). It was not until 1980 that all provisions of Singapore's Constitution could be found in one single document. Much of the contemporary Constitution expresses Singapore's new identity as a sovereign, secular, and multi-racial parliamentary democracy.

The early Singapore Supreme Court interpreted the Constitution very conservatively (Tan, 2011). Legislative deals, no matter how arbitrary, were

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considered beyond the purview of judicial intervention. *Lee Mau Seng v Minister for Home Affairs, Singapore & Another*<sup>8</sup> involved the right to legal counsel reached the Supreme Court. Chief Justice Wee Chong Jin decided that the accused could only exercise this constitutional right at the discretion of the agency with custody of him. Responding to the challenge to Section 8(1) of the Internal Security Act, which authorises the Minister for Home Affairs to detain a person without trial so long the President is satisfied the detention is necessary for national security, the Court held that the judicial branch has no authority to question ministerial discretion.

*Ong Ah Chuan v Public Prosecutor*<sup>9</sup> largely marked the formation of constitutional review in Singapore. In this case, the Government acquiesced to the Judicial Committee of the Privy Council's ("the Board") broad assertions of constitutional interpretive powers. Specifically, the Board defined "law" for the purpose of the Singapore Constitution as "a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution." This formulation implied that constitutional review is meant to check and balance, not blindly affirm the Government's policy preferences (Thio, 2008). In asserting the right of constitutional review and due process, the Board ruled consistently with the Government's policy preference; *i.e.* that the mandatory death penalty did not breach the "fundamental rules of natural justice" (Yap, 2010). The Government reciprocated

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<sup>8</sup> *Lee Mau Seng v Minister for Home Affairs, Singapore & Anor* [1971] 2 M.L.J. 137 (Singapore High Court).

<sup>9</sup> *Ong Ah Chuan v Public Prosecutor* [1981] 1 M.L.J. 64 (Privy Council, on appeal from

## VENTURING CONSTITUTIONAL REVIEW

by refraining from interfering with the Board's aggrandisement on behalf of the Singapore Supreme Court (Silverstein, 2008: 80). Notice that the latter's exercise of constitutional review actually reaffirmed the former's ideal policy preferences, and thus demonstrated the judicial willingness to cooperate. The Government's decision reflected both instrumental and expressive preferences. The Judicial Committee of the Privy Council is one of the most prestigious constitutional and legal institutions in the world. Upholding the Board's ruling would enhance the legitimacy of the Government's preferred status quo. Furthermore, the Government's obedience to the ruling, including the portions that set up constitutional review, provided the PAP with ample expressive-symbolic benefits: it rendered Singapore's liberal constitutional bill of rights and the Government's commitment to the modern ideals of constitutionalism and the rule of law credible.

Judicial activism continued in the highest echelons of Singapore's judiciary. *Chng Suan Tze v Minister for Home Affairs*<sup>10</sup> marked the Supreme Court's first-ever assertion of constitutional authority *vis-à-vis* the Government. In December 1988 four persons were arrested and detained without trial for what the Government alleged was a Communist conspiracy to overthrow the republic. The Government's ideal policy position in this case was unequivocal: to safeguard national security by jailing the arrestees. The latter petitioned the Court for their release on the grounds that the Government had not followed the appropriate procedures set out in the Internal Security Act. Unexpectedly, the Court agreed, and delivered an outcome that strayed

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Singapore).

## VENTURING CONSTITUTIONAL REVIEW

away from the Government's non-negotiable preferences over the Prohibited Policy Domain of national security (see Silverstein, 2008). The judgment held that "the rule of law demands that the courts should be able to examine the exercise of discretionary power" and that "the notion of a subjective or unfettered discretion is contrary to the rule of law." In line with the Privy Council's holding in *Ong*, the Court overruled *Lee Mau Seng*, asserting that "although a court will not question the executive's decision as to what national security requires, the court can examine whether the executive's decision was in fact based on national security considerations." It emphasised that all arbitrary and irrational acts of Government are unconstitutional (see Silverstein, 2008). According to the new ruling, the President's satisfaction in pursuance of the Internal Security Act was no longer unreviewable as in *Lee Mau Seng*. The Court ordered the arrestees released.

Just seven years after the *Ong* case, which had operationalised constitutional review, the Supreme Court chose a policy domain as politically sensitive as national security to announce its first invalidation of a Government act on constitutional grounds. Answering the Court's non-cooperation, the Government implemented its ruling in letter but not in spirit. Re-arresting the prisoners, the Government strictly followed the statutory requirements and secured the outcome it desired. Within two months of the judgment in *Chng*, the PAP-controlled Parliament exercised its veto by conclusively terminating constitutional review jurisdiction in internal security cases as well as much of the Privy Council's functions as Singapore's court of final appeal

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<sup>10</sup> *Chng Suan Tze v Minister for Home Affairs* [1989] 1 M.L.J. 69 (Singapore Court of Appeal).

## VENTURING CONSTITUTIONAL REVIEW

(Silverstein, 2008). In the parliamentary debates the Minister of Home Affairs expressed concern that the controversial judgment had been heavily influenced by “irrelevant” foreign precedents (Lin, 2009:295). In the end *Chng Suan Tze* was overturned and *Lee Mau Seng* reinstated. The Government had unambiguously signaled its displeasure with the *Chng Suan Tze* misadventure (Tey, 2010). However, in the light of the Court’s previous cooperativeness, the authoritarian government did not go any further, such as removing the impugned Justices from their positions.

### 3.2.4. CONSOLIDATION AND NON-ASCENDANCY

In originating constitutional judicial review jurisdiction, the Privy Council had carefully chosen a typical criminal case and rendered a holding that favoured the Government. In view of the Board’s cooperativeness, the Government had reciprocated with tolerance. In *Chng Suan Tze*, however, the Supreme Court had defected in a sensitive national security case in which the Government’s ideal policy position was non-negotiable. Consistent with the predictions of the theory propounded here, the Court’s non-cooperativeness precluded the complete re-establishment of trustworthiness in subsequent iterations of the “game.” Having lost trust in the Court’s constitutional review practice, the Government decided both to ignore its ruling and drastically to reduce its jurisdiction.

After *Chng* the Supreme Court could rebuild its trustworthiness and avoid further traumatically disempowering sanctions only by invariably cooperating with

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the Government. Less than a year after *Chng*, the constitutional amendment was challenged in a *habeus corpus* case – *Teo Soh Lung v Minister of Home Affairs & Others*<sup>11</sup> – and this furnished the Court an opportunity to rescue its trustworthiness. This time the Court dismissed the appeal on narrow jurisdictional grounds and affirmed the validity of the amendment. In *Dow Jones Publishing Company (Asia) Inc. v Attorney General*<sup>12</sup> the Asian Wall Street Journal published articles that had questioned the intentions of the Singapore Government in establishing a second stock exchange. After the newspaper refused to publish an official rebuttal, the Government ordered the reduction of its circulation from 5000 to 400 copies a day, justifying itself on the grounds that the *Journal* had been “engaging in the domestic politics of Singapore.” In fact, the Government of Singapore has long mistrusted foreign journalists as opportunists conspiring to sour the local population on its rule (Tan, 2011). The Court affirmed the Government’s policy preference, arguing that “the political, social, and economic policies of the Government of the day are part and parcel of the domestic politics of Singapore.” One year later, in *JB Jeyaretnam v Public Prosecutor*,<sup>13</sup> the Supreme Court upheld the conviction of opposition legislator J. B. Jeyaretnam for holding a public meeting without the license required by the Public Entertainment Act. Jeyaretnam contended that the requirement violated Article 14(2) of the Constitution, which prohibits arbitrary obstruction of the freedom of expression. The Court rejected his argument, holding that the requirement could not be regarded as

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<sup>11</sup> *Teo Soh Lung v Minister of Home Affairs & Others* [1989] 2 M.L.J. 116 (Singapore High Court).

<sup>12</sup> *Dow Jones Publishing Company (Asia) Inc v Attorney General* [1989] 2 M.L.J. 385 (Singapore Court of Appeal).

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arbitrary, as the licensing officer was not given absolute, untrammelled discretion in granting licenses.

In *Chan Hiang Leng Colin and Others v Public Prosecutor*,<sup>14</sup> the issue was the appropriateness of the Minister of Home Affairs' deregistration of the Jehovah's Witnesses on national security considerations. The Government's position was that their opposition to compulsory military service must be outlawed as threatening public order. Although Chief Justice Yong Pung How began his judgment with an assertive statement – "The court [has] a duty to declare invalid any exercise of power, legislative and executive, which exceeds the limits of the power conferred by the Constitution" – he immediately retreated with the slippery-sloping concession that "the sovereignty, integrity and unity of Singapore are undoubtedly the paramount mandate of the Constitution, and anything, including religious beliefs and practices, which tend to run counter to these objectives, must be restrained." Declining the recognition of foreign religious freedom case law, the Chief Justice declared, "The Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia." The Supreme Court has accepted that state security considerations without more trump all other arguments of right once the "sovereignty, integrity and unity" of the state is invoked (Thio, 2009: 74).

In *Jabar v Public Prosecutor*,<sup>15</sup> the Court ruled on the claim that a five-and-a-half

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<sup>13</sup> *JB Jeyaretnam v Public Prosecutor* [1990] 1 M.L.J. 129 (Singapore High Court).

<sup>14</sup> *Chan Hiang Leng Colin & Ors v Public Prosecutor* [1994] 3 S.L.R. 662 (Singapore High Court).

<sup>15</sup> *Jabar v Public Prosecutor* [1995] 1 S.L.R. 617 (Singapore Court of Appeal).

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year delay in executing a death sentence constituted unconstitutional cruelty in punishment. Chief Justice Yong decided, “Any law which provides for the deprivation of a person’s life or personal liberty is valid and binding so long as it is validly passed by Parliament. The Court is not concerned with whether it is also fair, just, and reasonable as well.” With that the Supreme Court’s subservience to executive discretion was etched in stone. The Supreme Court faced the Jehovah’s Witnesses again in *Chan Hiang Leng Colin v Minister for Information and the Arts*.<sup>16</sup> This time it held that “it is not illegal to profess the beliefs of Jehovah’s Witnesses per se, nor is it an offence to be a Jehovah’s Witness,” but added nonetheless the twist that “in pursuing these activities, Jehovah’s Witnesses may not be a member of the Singapore Convention of Jehovah’s Witnesses or any other unregistered society and they may not have access to the prohibited publications.” The Court cited an Australian case during the Second World War to justify the curtailment of religious liberty, even though Singapore was then at peace (Tey, 2010). In *Public Prosecutor v Taw Cheng Kong*,<sup>17</sup> the Court of Appeal division flip-flopped the invalidation by the High Court division of Section 37(1) of the Prevention of Corruption Act, which “over-inclusively” provides that Singapore citizens who commit an offence anywhere outside Singapore may be sanctioned as if the offence had been committed inside. The Court of Appeal held that lower courts must first examine the reason for elevating a right “on a constitutional pedestal” before determining the scope of that right,

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<sup>16</sup> *Chan Hiang Leng Colin & Ors v Minister for Information and the Arts* [1996] 1 S.L.R. 609 (Singapore Court of Appeal).

<sup>17</sup> *Public Prosecutor v Taw Cheng Kong* [1998] 2 S.L.R. 410 (Singapore Court of Appeal).

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reading the entire Constitution “contextually” to avoid distorting or enhancing a “particular right to the perversion of the others.” While the Supreme Court in *Nguyen Tuong Van v Public Prosecutor*<sup>18</sup> warned against “a blind acceptance of the legislative fiat,” it nonetheless took the conservative view that “the mandatory death sentence prescribed under the Misuse of Drugs Act is sufficiently discriminating to obviate any inhumanity in its operation” and therefore constitutional (Yap, 2010). Note that death by hanging is mandatory in Singapore for murder, kidnapping, certain drug-related offences, and for the unlawful possession and use of firearms.

*Chee Siok Chin v Minister for Home Affairs*<sup>19</sup> concerned three protestors who demonstrated peacefully outside the Central Provident Fund building, wearing T-shirts and holding a placard calling for the Housing and Development Board, the Government of Singapore Investment Corporation, the Central Provident Fund, and the National Kidney Foundation to be more transparent and accountable. The police arrived and warned them that they had already breached the Miscellaneous Offences (Public Order and Nuisance) Act. Shortly afterwards, the protestors surrendered their T-shirts and placards upon demand by the police. The protestors sought judicial declarations that the Minister for Home Affairs and the Commissioner of Police had acted unconstitutionally in seizing their belongings and ordering their dispersal during the exercise of their constitutional rights of freedom of speech, of expression, and of peaceful assembly (Tan, 2011). The Court conceded that the demonstration had been non-violent, yet held that it was nonetheless “a conscious and calculated effort to

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<sup>18</sup> *Nguyen Tuong Van v Public Prosecutor* [2004] 2 S.L.R. 328 (Singapore Court of Appeal).

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disparage and cast aspersions on these institutions ...,” and that “the integrity of the public institutions and more specifically of the persons entrusted with these institutions, forms an integral part of the foundation that grounds Singapore.”

In the widely reported case of *Yong Vui Kong v Public Prosecutor*,<sup>20</sup> the Court of Appeal unanimously affirmed the Government’s preference for maintaining capital punishment. The defendant in this case had been sentenced to death by hanging after being convicted of a violation of the Misuse of Drugs Act 1973 by trafficking 47.27 grams of diamorphine into the country. Section 33, read in conjunction with Schedule 2 of the MDA, imposes the mandatory death sentence on persons convicted of trafficking more than 15 grams of diamorphine. The defendant appealed against this sentence on the grounds that it was an unconstitutional violation of the right to life and of the right to equal protection under Articles 9(1) and 12(1) of the Constitution (Ganesh, 2010). The Court affirmed the constitutionality of the mandatory death penalty for drug-trafficking offences, holding that it neither violates their constitutional right to life, as deprivation of life is done in accordance with law, nor their right to equal protection (see Yap, 2010).

### 3.2.5. ANALYSIS

In the years following the Supreme Court’s constitutional emergence in *Chng*, a highly conservative Chief Justice, whose revealed preferences were congruent with the

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<sup>19</sup> *Chee Siok Chin v Minister for Home Affairs* [2003] 2 SLR 445 (Singapore High Court).

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Government's, was appointed to cement the judicial internalisation of the official communitarian ideology (see Tey, 2010). In 1989, the Constitution was amended to limit appeals to the Privy Council only in civil cases in which both parties consented to appealing to the Board, and criminal cases in which the capital punishment is involved and that Court of Criminal Appeal judges were unable to agree among themselves (Tan, 2011). Finally, in 1993, the Privy Council as Singapore's court of final appeal was abolished.

The Government conserved, if it did not actually strengthen, its multiple channels for shaping the preferences of the Court for constitutional review. Contrary to established practice in other common law jurisdictions, many Supreme Court appointments are short-termed and subject to renewal at the Government's discretion. Judicial Commissioners, who complement regular Supreme Court justices, enjoy no security of tenure and are appointed for such periods as the executive deems fit. Untenured lower court judges are sometimes obliged to serve as prosecutors. In the rare instances when the Supreme Court tries to adopt a more liberal approach, Parliament moves rapidly to restore the equilibrium in favour of the Government (Tan, 2011).

Nevertheless, the mere fact that constitutional review has lasted at all in Singapore suggests that the Government's trust and investment in the Supreme Court was restored after the Court showed some cooperativeness. In fact, the Court is not short of political assets in exercising constitutional review: its constitutional

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<sup>20</sup> *Yong Vui Kong v Public Prosecutor* [2010] S.G.C.A. 20 (Singapore Court of Appeal).

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jurisdiction is well-recognised, its personnel are highly professional, and it enjoys considerable autonomy. The Government has tolerated the Court's broad assertions of constitutional authority in such cases as *Colin Chan* (1994) and *Nguyen* (2005). Simultaneously, the Court has also become more adept at sending signals of cooperativeness, such as limiting or rejecting constitutional doctrines from more liberal democratic jurisdictions, and interpreting rights-protective constitutional provisions conservatively (see Hor, 2007). The Court explicitly presumes the Government to work in society's best interests, and has taken allegations of abuse of power or bad faith very seriously (Lin, 2009). The Court has rebuilt its trustworthiness with a record of strong cooperation in the past two decades, but now its preferences have become so consistent with the Government's that there is little reason for it to exercise activist constitutional review.

Much of these phenomena stemmed from the large numbers of Prohibited Policy Domains confronting the Singapore Supreme Court for crafting expansive constitutional doctrines. This state of affairs originates in the regime's high internal coherence. The Singapore Government is widely recognised for homogeneity in voice and interventionism in style (Lin, 2009). The PAP Government is deeply committed to maintaining executive control over all facets of socioeconomic life, bringing everything else in line with its overarching national development goals. Prime Minister Lee Hsien Long's truism aptly captures the Singapore Government's remarkable attention-span: "Anything [in Singapore] not expressly permitted is forbidden" (cited in Lam, 2000). Since 1965 the PAP has promoted a pragmatic

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ideology that gives primacy to economic progress, social and political stability, and material nation building (Tey, 2010: 294). On 15 January 1993 the Government promulgated a declaration known as the “Shared Values.” The Shared Values have, surprisingly, proved more useful than the codified, rights-oriented Constitution in predicting outcomes in constitutional cases (Sheehy, 2004).<sup>21</sup> For the PAP the Government’s utmost responsibility is to ensure the individual’s “fundamental freedoms,” conceived not as civil and political but as social, cultural and economic rights. Accordingly, in most adjudicated constitutional controversies, the Government’s preferences are unequivocal.

The large numbers of Prohibited Policy Domains, in turn, originated from the high internal cohesiveness of and low transaction costs incurred by Singapore’s authoritarian government. The PAP experiences little elite factionalism and the Government’s legitimacy has always been solidly rooted in a commitment to preserve order and national security (Slater, 2010: 241). Able to act as one under effective leadership and confronted only by weak oppositional groups, the Singapore authoritarian government exercises its veto – including amending the Constitution – at will at very low decision-making cost. Even where the Government is willing to show some little tolerance in Permitted Policy Domains, the zone of tolerance that notionally represents its tolerability is very narrow. Any move of the Supreme Court outside these confines would be apt to turn into a Pyrrhic victory, and would most

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<sup>21</sup> Displayed prominently on plaques on the premises of state agencies, the Values are: (1) Nation before community and society above self; (2) Family as the basic unit of society; (3) Community support and respect for the individual; (4) Consensus not conflict; (5) Racial and

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likely precipitate the decision being overturned (Yap, 2010).

### **3.3. TAIWAN (UP TO 2000)**

#### **3.3.1. OVERVIEW**

Relatively insignificant in its first forty years of existence, the Council of Grand Justices of the Judicial Yuan (“CGJ” hereafter) has rapidly built up its constitutional profile since the late 1980s, and by the 2000s, has emerged as an important force in Taiwan’s constitutional governance. Constitutional review in Taiwan was activated and became consolidated under authoritarian rule, yet it has been acknowledged as politically salient and influential (Yeh & Chang, 2011). How did this transformation come about?

#### **3.3.2. AUTHORITARIANISM IN TAIWAN**

Taiwan was part of Manchurian Empire until it was ceded to the Empire of Japan in 1895 following the First Sino-Japanese War. Colonial rule ended in 1945 with Japan’s defeat in the Second World War. In the same year, the Republic of China (“ROC” hereafter) on the Mainland extended its sovereignty to Taiwan. When full-scale civil war broke out in China in 1947, the ROC National Assembly enacted the Temporary

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religious harmony.

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Provisions for the Period of National Mobilisation to Suppress the Communist Rebellion in 1948. Presidential powers were radically expanded and military courts were empowered to try civilians and political dissidents.

Within a year's time the ROC central government, under the leadership of Generalissimo Chiang Kai-shek and his Chinese Nationalist Party, lost the civil war and the entire Mainland to the Communist rebels led by Mao Zedong. Together with over one million Chinese refugees and half a million men of the armed forces, the Nationalists fled to Taiwan, which constituted the core remaining territory of the ROC after 1949. Recognised and marketed by the United States in the next three decades as the legitimate government of the whole of China, the ROC persisted as an authoritarian regime until at least 1996, the year in which the first direct presidential election was held, if not 2000, when the Nationalists were finally ousted from government (Williams, 2005).

Since the 1970s the Nationalist regime has been increasingly confronted with newly invented civic associations and a burgeoning private sector. In 1986 certain major political activists coalesced into the pro-independence Democratic Progressive Party. Almost at the same time, the political system of Taiwan underwent a transformation. President Chiang Ching-kuo, son of Chiang Kai-shek, appeared to recognise the insufficiency of the island's enormous economic success to sustain the ROC politically in the long term. Largely because in the Cold War endgame anti-Communism no longer drew as much American support for the Nationalists against the Communist Mainland, Taiwan's top decision-makers increasingly saw

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democratisation as the best way to conserve their status as the “good China” (Levitsky & Way, 2010). In 1987 Chiang imposed political liberalisation despite the opposition of his Party’s conservative faction. His successor, the native Taiwanese Lee Teng-hui, furthered his cause by legalising opposition parties and repealing most restrictions on freedom of the press.

However, as Levitsky and Way observe (2010: 315), national elections did not do away with Taiwan’s authoritarian regime, inasmuch as the Nationalists continued to control all major television channels, most radio stations, and Taiwan’s two leading newspapers; to licenses for financial support from businesses; to maintain their own commercial empire worth at least US\$ 2.4 billion; to mobilise civil servants on the regime’s behalf during elections; and to grant competitive advantages to local allies in the transportation, construction, and banking industries (Cheng & Haggard, 2001). While the elections themselves were largely clean, the regime’s manipulation of state resources gave it immense advantages over its political opponents. It was no surprise when in 1996 the Nationalists won more than three-fourths of the National Assembly seats, two-thirds of the Legislative Yuan seats, as well as the presidential election – all of them direct elections. Yet, notwithstanding its smashing victory, the Nationalist Party continued to advance reforms, withdrawing from the military and the public universities, and after 1997 allowing private television stations to emerge. With the help of media liberalisation, the Democratic Progressive Party managed narrowly to win the plurality vote in the 2000 presidential election, thus completing Taiwan’s transition to liberal democracy.

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### 3.3.3. ACTIVATION

In December 1946 the ROC Nationalist regime – a victor in the Second World War, a founder of the United Nations, and a formidable military power unmatched by the Maoist rebels – unilaterally ratified a new constitution for the whole of China. Intended to bolster the regime’s achievements in modernisation and Westernisation (Chen, 2007; Yeh & Chang, 2011) and to move China from the stage of “political tutelage” by the Nationalist Party to full liberal constitutional democracy with a government based on the separation of powers, elected by free multiparty elections, and respectful of civil liberties and human rights, the 1946 Constitution declares the ROC to be “a democratic republic of the people, to be governed by the people and for the people.”

Not surprisingly, this liberal Constitution formally established constitutional review, in the form of an independent, central constitutional court, known as the Council of Grand Justices of the Judicial Yuan. Article 78 provides, “The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and ordinances.” Article 117 provides, “In case of doubt as to whether any provincial rule or regulation contravenes national laws, the matter shall be settled by interpretation by the Judicial Yuan.” And most importantly, Article 171 establishes that “(1) Laws that contravene the Constitution shall be null and void, (2) In case of doubt as to whether a given law contravenes the Constitution, the matter shall be

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settled by interpretation by the Judicial Yuan.”

It is noteworthy that the CGJ preceded most other Kelsenian constitutional courts in the world, even the German *Bundesverfassungsgericht*. Before 2003 the Council consisted of seventeen Grand Justices, serving nine-year renewable terms, who were appointed by the President with the approval of the Control Yuan (1948-1992) and later the National Assembly (1992-2000). Most Justices were either career judges or law professors who held doctoral degrees from prestigious European and North American law schools. It has also become a common practice since the 1990s for the CGJ to cite academic sources from the United States, Germany, and Japan in their rulings (Chen, 2007). Initially, only state organs could petition the CGJ for abstract constitutional review. The CGJ Act of 1958 endowed private citizens with standing to petition likewise, so long as all other legal remedies have been exhausted. In practice, however, a large portion of individual petitions has been dismissed (Chen, 2007). Later, the CGJ Adjudication Procedures Act of 1993 further endowed *locus standi* to corporate legal persons as well as to one-third at least of the members of the Legislative Yuan acting in concert.

### 3.3.4. CONSOLIDATION AND ASCENDANCY

While the CGJ from time to time did exercise constitutional review, it did not declare an act of government unconstitutional until 1980 (Chen, 2007). Most of its early decisions dealt with technical, jurisdictional issues rather than civil or political rights,

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substantiating its widespread image as an accomplice of the regime (Chen, 2010: 876). One of the CGJ's most politically significant rulings was delivered in 1954, when the Council notoriously permitted the members of the Legislative Yuan, the Control Yuan, and the National Assembly elected before 1949 to stay in office for the next forty years (*Interpretation No. 31*). The CGJ did disagree with the regime once, in 1960 (*Interpretation No. 86*). In this case the Grand Justices meekly questioned the constitutionality of the executive's administrative control of the lower courts. The regime simply left the decision unimplemented until democratisation caught up with it several decades later. At the dawn of political liberalisation, the CGJ became a little more activist, but defected from the regime only on matters that did not implicate its continuation. In 1990 the CGJ declared unconstitutional provisions in the Offences Punishable by the Police Act, which had authorised the police to arrest, detain, and impose punishments for minor crimes without judicial involvement (*Interpretation No. 251*). However, recognising the ruling's shock impact on the regime's operations, the Council pragmatically granted a one-and-a-half-year grace period for making arrangements consistent with its decision.

In a landmark case the CGJ gave constitutional sanction to a decision reached by the multiparty National Affairs Conference, convened by President Lee Teng-hui, which forced the retirement of the Old Guard in each of the legislative bodies (*Interpretation No. 261*). The National Assembly complied with the CGJ's decision, which in turn was backed by the President's faction. By dismantling past authoritarian institutions, the CGJ helped the ruling reformist faction of the

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Nationalist Party to facilitate Taiwan's political and constitutional transition to liberal democracy (Chen, 2007). Another series of interpretations, also beginning in the mid-1980s, involved the rigorous application of the doctrine of legislative reservation borrowed from German law. Previously, much of Taiwan's enforceable "rulebook" consisted of ambiguous administrative regulations decreed by executive agencies rather than the legislature, a common authoritarian practice. The CGJ established in the 1990s that administrative rules were only valid if clearly consistent with constitutional rights and the organic law of the agency concerned. In 1995, the CGJ struck down as inconsistent with the legislative reservation doctrine the Enforcement Rules of the University Act, which had required students in all universities to take and pass a set of prescribed courses (*Interpretation No. 380*).

The CGJ's scope of jurisdiction expanded as democratisation processes sped up in the 1990s, empowering it to resolve critical cases involving the government's authoritarian inheritance (Ginsburg, 2003). In 1995 the CGJ struck down as contrary to the constitutional right to freedom of assembly the Trade Union Law's prohibition on trade union formation by technical workers in the education industry (*Interpretation No. 375*). Thereafter, the CGJ declared unconstitutional several provisions of the Elimination of Gangsters Act, which had empowered the police with discretion to label one a "gangster," and arrest and sentence her to "rehabilitation" without a judicial warrant (*Interpretation No. 384*). Taking account of the political effects of such a radical reduction of police powers, the CGJ granted the government a one-and-a-half-year grace period for reforming the law. In the same year the CGJ

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altered the relationship between the legislature and the executive by holding that the constitution mandates the Premier to resign whenever the Legislative Yuan is re-elected (*Interpretation No. 387*). The regime duly complied: Premier Lien Chan resigned before the inauguration of the third Legislative Yuan in 1996, and Premier Vincent Siew resigned after the election of the fourth Legislative Yuan in 1999. This procedural requirement, however, posed no real challenge to the incumbent, as the Legislative Yuan was firmly in the hands of the Nationalists. Later, the CGJ invalidated several provisions of the Criminal Procedure Act allowing prosecutors to detain suspects for two or more months without court approval (*Interpretation No. 392*); thus ending a practice used for more than fifty years under Nationalist rule (Chen, 2007). The Grand Justices then dealt with the question whether the Vice President could simultaneously hold the office of Premier. The CGJ decided that, although it was the framers' intention to separate powers, Vice President Lien Chan's concurrent Premiership caused no real difficulty to the functioning of the constitutional order (*Interpretation 419*). As mentioned above, Lien ultimately relinquished his Premiership under popular pressure, the CGJ's ruling notwithstanding.

In 1998 the CGJ ruled unconstitutional several provisions in the University Act, which had required all universities to establish military training programmes, on the grounds this violated the right to academic freedom (*Interpretation No. 450*). The CGJ then reviewed the Assembly and Parades Act, upholding the requirement of prior permission for holding demonstrations, but invalidating the "advancement of

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communist or secessionist views during demonstrations” as a ground for denying permits (*Interpretation No. 445*). The CGJ declared freedom of political expression to be an inalienable channel for the exercise of popular sovereignty. Rejecting the regime’s argument that controlling mass demonstrations is a paramount concern, the CGJ further struck down as unjustifiably vague and disproportionate the power of law enforcement bodies to deny permits on the grounds of “national security” and “the public interest.” Instead, the Grand Justices introduced the more stringent test of “clear and immediate danger” for prohibiting mass demonstrations.

On 4 September 1999 the Third National Assembly ratified a fifth amendment to the Constitution, which provides that the Fourth National Assembly shall be appointed from the various political parties according to the ratio of votes each party received in the corresponding Legislative Yuan election. This amendment, which turned the National Assembly into an unelected body, was challenged by a group of Legislative Yuan lawmakers as inconsistent with Article 25 of the Constitution, which requires the Assembly to exercise its powers “on behalf of all citizens of the nation.” The Grand Justices affirmed the challenge and further decreed that the amendment contradicted the constitutional principles of liberty and democracy. The challenged amendment would also have extended the term of the Third National Assembly by two years and forty-two days and the Fourth Legislative Yuan by five months. The CGJ declared that such self-empowering term extensions violated the right of the electorate to decide for themselves the appropriate term of office for their elected representatives, and was thus inconsistent with the constitutional principles of

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democracy and the rule of law. The National Assembly, as the organ at the apex of the State, questioned the CGJ's competence to decide the constitutionality of constitutional amendments themselves. The Assembly maintained that validly enacted constitutional amendments are an integral part of the constitution, and that all constitutional provisions are equal. There could thus be no valid legal challenge to the amendment.

The CGJ rejoined by reasserting its power to interpret the Constitution on all issues, including any failure of the supreme lawmaker to comply with applicable rules. In the view of the Grand Justices, the Assembly had disturbed the "rational channels" whereby the people expressed their sovereign will. Ultimately the CGJ succeeded in invalidating the amendment, and reminded the National Assembly that all acts undermining the constitutional foundations would be checked (*Interpretation No. 499*). This was the last significant and enforced ruling of the CGJ before the end of the authoritarian Nationalist regime. In 2000 the Democratic Progressive Party's Chen Shuibian became the first democratically elected, non-Nationalist President of the ROC, inaugurating a new era in the constitutional history of Taiwan.

### 3.3.5. ANALYSIS

In its first forty years of existence, the CGJ neither took on politically controversial cases nor ruled against important government decisions. At most, it merely questioned the regime in one insignificant case that concerned appropriate

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administrative arrangements for the judiciary. It was inconsequential at the time whether the lower courts are ultimately controlled by the CGJ or the Ministry of Justice; the hegemony of the Nationalist Party over the legal system would have remained. Having incrementally established such a record of cooperation, the CGJ was increasingly trusted by the regime to contribute to the political liberalisation programme of the 1990s. With this new task, the CGJ's ambit of activity and degree of institutional independence was enlarged unprecedentedly.

Since the late 1980s, the CGJ increasingly saw a need to assert its autonomy from the regime in order to strengthen its credibility and influence (Garoupa et al., 2011). But it had refrained from using its powers opportunistically in ways that might have undermined its relationship with the regime. For example, the CGJ straightforwardly implemented President Lee's unambiguous preferences in the decision that abolished the authoritarian legislature of the past. In scrutinising the powers of law enforcement bodies, the CGJ exhibited both independent judgment and an acute awareness of the regime's likely reaction. The grace periods the CGJ gave to the regime have proved crucial to winning the government's acquiescence and cooperation. Concomitantly, as elite fragmentation<sup>22</sup> and social pluralism accelerated, and transaction costs rose in tandem, previously Prohibited Policy Domains increasingly morphed into Permitted ones where the regime's zones of tolerance were becoming considerably enlarged. In the context of civil rights cases, Nationalist rulers faced a trade-off between

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<sup>22</sup> In the early 1990s, the major factional conflict within the Nationalist Party was between President Lee Teng-hui's "Mainstream" faction and the mainland Chinese Old Guard's "Non-mainstream" faction. The clashes culminated in the latter's split from the Nationalist

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demonstrating to domestic and international audiences that their democratic commitments were *credible* in the long run ( $R_1$ ), and the benefit to the regime in the short run of controlling opponents by curbing their civil rights through repressive statutes ( $R_2$ ). Because the regime, due to fragmentation, could aggregately tolerate a wide range of outcomes between these two poles, the CGJ was free to choose between striking down a repressive statute and upholding it, without risking being perceived by the regime as a defector.

As the year 2000 approached, the CGJ, staffed by distinguished jurists, had accumulated vast political influence. It had gained respect from the general public and political officials alike (Yeh & Chang, 2011). Ultimately, carrying a trustworthy reputation empowered the CGJ to hand down a ruling as politically salient as the invalidation of a constitutional amendment without being sanctioned in consequence. Note that the Nationalist regime had firmly controlled both the Presidency and the Legislative Yuan throughout the 1990s, and have never lost control of the legislature up till the present day. Even the election of Chen Shuibian in 2000, which sealed the regime's fate, stemmed from the Nationalists' internecine factional split, and was largely unforeseeable in the immediately preceding years (Garoupa et al. 2011, 34). Indeed, in that Presidential election, the two rival "pan-Blue" candidates, Lien Chan and James Soong, combined won a landslide popular vote of nearly 60%, while Chen Shuibian, who won the race by a plurality, garnered less than 40% of the popular vote. Although a degree of political competition existed in the 1990s, electoral failure was

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Party to form the New Party in 1993. See Cheng and Haggard (2001).

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never imminent for the Nationalists. Nevertheless, despite its solid majority, the regime allowed the CGJ's constitutional review to expand, and complied even with its most controversial rulings. These outcomes are all adequately accounted for in the Constitutional Investment Theory of the reciprocal relationship between a constitutional court's willingness to cooperate with its regime and the level of trust the regime, in turn, places in the constitutional court, proportional to the latter's cooperative reputation.

### 4. CONCLUSION

While courts in authoritarian states generally tend to be weaker than their democratic counterparts, recent empirical research suggests that they have nonetheless come to play increasingly important roles in policy formulation and implementation. Existing competitive and instrumentalist theories of constitutional review could be greatly improved, when being stretched to accommodate authoritarianism, if more attention were devoted to the exact causal mechanisms linking the origins and outcomes of constitutional review. Constitutional review, though not necessarily vitiated by authoritarianism, may develop along different lines than it would have in a democratic context. The functions that constitutional courts perform for different regimes vary considerably across space and time.

Venturing constitutional review is similar to investing, in the sense that both entail risk. This chapter has demonstrated that ceding power to a constitutional court

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requires the regime to believe, or act as if they believed that the constitutional court will use that power “correctly,” leading to certain politically profitable outcomes (see Baron, 1998:408). In the process it has exposed not only the risks inherent in an authoritarian regime’s ceding competence and resources to a constitutional court which may behave defiantly or opportunistically, but also the importance, in handling this dilemma, of the court’s trustworthiness before the regime. In the long run, the more cooperative the court, the likelier it is to persuade its regime to acquiesce in, if not support its self-aggrandisement. Trust and reciprocity are the causal mechanisms hypothesised to join up all the variables that determine the destiny of courts under authoritarian regimes. If it would exercise perdurable constitutional review powers, a constitutional court must showcase its sensitivity to the regime’s core values and policy preferences and devote considerable resources to proving its trustworthiness. The theory and evidence presented here together yield the following propositions.

- All else being equal, *before* the solidification of the court’s trustworthiness, activist constitutional review must be built on iterated court-government cooperation *without any* instance of defection by the court in decisions that impinge on Prohibited Policy Domains.
- In Permitted Policy Domains authoritarian governments may be indifferent for a variety of reasons, including limited attention span and internal fragmentation, or just the relative unimportance of the issues to be adjudicated to their political and/or electoral monopoly. The theory suggests that internally more incoherent

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authoritarian governments face higher transaction costs in exerting vetoes. Such conditions may be conducive to greater judicial activism.

- One may expect that the more internally cohesive and politically interventionist the regime, the smaller the scope it will leave for judicial autonomy (*e.g.* Singapore). Conversely, the more circumstances constrain the regime from intervening (even discounting external opposition), the more the courts will enjoy impunity when aggrandising their own powers (*e.g.* Taiwan). The scope of judicial ascendancy will thus depend in large part on the extent of the authoritarian regime's will and effective power to police cooperation and defection in the exercise of constitutional review.

The findings of this chapter, which span Singapore and Taiwan, and a number of other cases, confirm the observation that the eventual durability of constitutional review in a particular polity is determined more by politics and historical contingency than by culture and universal values (Ginsburg, 2003; Chen, 2010). In Singapore and Taiwan governments acquiesced in the activation of constitutional review as part of the symbolism expressing those polities' aspirations to modernity and equality with the West. Although constitutional review has been largely consolidated in both polities, in the past two decades in Singapore, where the transaction costs of monitoring judicial decisions has been low, constitutional review has been turned into a routinely used instrument for lending legal authority and credibility to the government's most controversial decisions. The Taiwanese CGJ became activist

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because the Nationalists' internal fragmentation and the emergence of a vibrant civil society made it harder for the regime to retaliate.

The Singapore case featured a Court that abused the Government's trust in a Prohibited Policy Domain at an early stage, and has yet to fully recover in consequence, as the Government continues to withhold investment. Early defection heightens the regime's skepticism about letting independent constitutional review become activated. On the other hand, nascent constitutional courts will possibly be driven to cooperate with authoritarian governments for some time after their establishment by: awareness of their own mistrustedness and lack of political influence; selective judicial appointments which align judicial policy preferences with the government's; and unwillingness to see their decisions overridden (Langer, 2003:59). After all, courts embedded in political systems where their decisions are subject to veto at will are likely to anticipate this reaction and craft decisions that will be less likely overturned (Maltzman *et al.*, 1999:48).

# CHAPTER 3

## THE STRATEGIC STRUCTURE OF THE HONG KONG CONSTITUTION

### 1. INTRODUCTION

As thoroughly discussed in Chapter 2, this dissertation is predicated on the proposition that the possibility of formally establishing constitutional judicial review by authoritarian regimes is already well enough attested in the literature to be taken as given. I have therefore turned my attention to the activation, consolidation, and ascendancy of independent constitutional review once officially adopted in the stage of constitutional choice or design. My main line of argumentation is that activation stems from the regime's expressive-symbolic interests; that consolidation depends on trust and reciprocity between courts and the regime; and that ascendancy in activism is partly determined by the magnitude of the transaction costs the regime will incur to retaliate against an activist court. In this chapter I show that the authoritarian government's expressive-symbolic interests, its (prospective) trust in the constitutional court, and its aversion to high political transaction costs do not merely factor into the ultimate fate of constitutional review, but may sometimes reach back even to the constitutional design stage.

Although constitutional provisions rarely provide for explicit sanctions to their infringement, constitutions usually create incentives amenable to the strategic

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analysis of interdependent decision-making (Cooter, 2002, 9). Methodologically, I regard the making of constitutions not as a sacred rite occurring under ideal *ex ante* conditions free of conflict, but rather as the conclusion of policy bargains hammered out between negotiating factions in the light of changing circumstances and unforeseen contingencies (see Dixit, 1996). At the heart of constitutional-making thus lie two central issues: the *collective choice problem*, which confronts competing constitutional framers attempting to attain durable bargains that will outlive themselves; and the *delegation problem*, which confronts framers attempting to decide to whom they should grant the authority to implement those agreements on theirs and their posterity's behalf (see Brennan & Buchanan, 1985; Stearns *et al.*, 2009:499).

I shall examine how these two problems bore on the constitutional design of the Hong Kong Basic Law, which is unique in several ways. A neo-liberal constitution that explicitly enshrines the principles of free market and quasi-electoral democracy drafted by many framers of China's contemporary Leninist Constitution, the Basic Law departed radically from the standard model of post-World War II decolonisation by facilitating the absorption into the world's most populous Leninist state of a "thriving, free, open, cosmopolitan, and capitalist" city-state inhabited by some six million British subjects (M. Chan, 1991:6; see also Heong, 2002).

This chapter is organised as follows. Section 2 reviews Hong Kong's constitutional development from 1842 up to the conclusion of the Sino-British Joint Declaration in 1984. It shows how China's preference for the unification of national sovereignty and the United Kingdom's for constitutional democratic values determined the content of the Joint Declaration's provisions. Section 3 shows how the Hong Kong Basic Law may be conceptualised as a political bargain forged

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interdependently between the Chinese Party-state and the territory's business elite, ceding to China a monopoly over important policy domains such as sovereignty and political reform, in exchange for the security of the latter's capitalist public finance policies. As we shall see in Chapter 6, sovereignty, political reform, and public finance, have all become Prohibited Policy Domains in relation to constitutional judicial review by the Court of Final Appeal. Section 4 explores another dimension of the Basic Law: principal-agent instructions that supervise the implementation of the policy bargain contained within the constitution. It demonstrates how the Basic Law's framers, both the Chinese government as senior partner and the Hong Kong business elite as junior partner, designed these provisions to reduce the transaction costs – especially agency and information costs – of ensuring that their agents (the post-1997 Hong Kong Government, Legislative Council, and Judiciary) would act in conformity with their preferences reflected in the constitution.

I demonstrate that, the question of intentionality aside, the drafters did in fact craft agency-cost reduction arrangements; amongst which may be counted: executive dominance; corporatist political representation; and enforcement mechanisms such as the supremacy of the NPCSC within the territory's constitutional structure, and the allocation of constitutional interpretive authority to the future Hong Kong courts. In particular, I shall adduce empirical evidence to support my conclusion that *the delegation of constitutional interpretative authority to the courts largely stemmed from China's symbolic interest in affirming its commitment to the territory's Westernised constitutional and legal values through the "One Country, Two Systems" model; but the Basic Law's framers had never intended the Court of Final Appeal to exercise full-fledged constitutional review authority in striking down primary legislation to the detriment of China and its political allies*

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*in Hong Kong.*

Section 5 offers a concise discussion about how the findings of this chapter fit with the Constitutional Investment Theory. From the constitutional design of the Basic Law, I infer the zones of tolerance of the future China- and business-friendly SAR regime in Hong Kong within the political and economic domains. Although the China and business-backed drafters of the Basic Law have spoken little on social and cultural issues and maintained the constitutional importance of liberal rights and freedoms, they have unambiguously indicated their preferences for the unquestionable sovereignty of China over Hong Kong as embodied by the supremacy of the Communist Party-dominated NPCSC (the Prohibited Policy Domain of national sovereignty), as well as a small and business-friendly government in Hong Kong (the Permitted Policy Domain of pro-business, conservative, public finance policies). Any decision of a future Court of Final Appeal under the Basic Law that breaches these two definitive principles would predictably be perceived as non-cooperative by the post-1997 SAR regime, and may lead to consequences specified in my theory expounded in Chapter 2.

## **2. BETWEEN EMPIRES**

### **2.1. AUTHORITARIANISM IN BRITISH HONG KONG**

The British Empire founded what was to become modern Hong Kong in the wake of their victory in the First Anglo-Chinese War (1839-1842) over the Manchurian Dynasty then ruling China, and its accession to the Treaty of Nanking in 1842,

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sixty-six years after the independence of the United States. On being told that Hong Kong had been incorporated into the Empire, Lord Palmerston, twice Prime Minister of Great Britain, dismally called the island that “barren rock with scarcely a house upon it” (cited in Williams, 2005:122). Unlike most other British colonies, Hong Kong was governed as a trading outpost rather than a territorial settlement (Selwyn-Clarke, 1947). The “expatriates” who governed it never numbered more than one per cent of the entire population (Goodstadt, 2005:8). Hong Kong’s strategic importance further strengthened during the late 1940s and the early 1950s, when the Communist Party conquered Mainland China and the United Nations imposed an embargo on trade with the Communists because of their role in the Korean War. After that Hong Kong became a magnet for Chinese refugees from Communism; who comprised highly skilled workers and, above all, wealthy industrialists from Shanghai who brought with them the industrial technology, knowledge, and capital which laid the foundations of Hong Kong’s subsequent economic power (Wesley-Smith, 1994; Williams, 2005; Young & Cullen, 2010). By 1970 the Crown Colony had grown up an immigrant society with a population of four million and become Communist China’s main economic gateway (Boniface & Alon, 2010:792).

Throughout its history the territory was governed by a colonial regime which resisted any change either to its authoritarian constitution or economic policies inherited from the nineteenth century (see Chan & Postiglione, 1996; Goodstadt, 2005). Nobel laureate Milton Friedman (1980:34) somehow simplistically praised Hong Kong as the “best example” of all contemporary societies that “rely primarily on voluntary exchange through the market to organise their economic activity and in which government is [economically] limited.” The territory’s economic strategy,

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essentially a “relic from the 19<sup>th</sup> century,” encompassed low taxes, negligible state borrowing, regular budget surpluses, minimal interference with market forces, no state planning, no development subsidies, and no investment incentives (Goodstadt, 2011:95). The colonial regime’s explicit refusal to take part in any significant social engineering had effectively shielded it from controversial public debates common in democratic countries (Tsang, 2004:276). There was a long-standing belief that the state should refrain from direct contacts with the people (see Scott, 2010:8). This gradually altered with the public sector’s steady expansion since the 1970s into such policy as public housing, health, education, and social welfare, under the guidance of the doctrine of “Positive Non-interventionism” (Cheung, 2004: 2).

Hong Kong’s Colonial Constitution, constituted by several documents (the Letters Patent being the most important) and constitutional conventions, bore more resemblance to the medieval English political system than its modern Westminster successor. The autocratic Governor, as representative of the Crown, vested with the authority to legislate for “the peace, order, and good government,” exercised far more extensive powers in Hong Kong than the Queen and the Prime Minister in the United Kingdom. The Governor sat in both the Legislative Council and the Executive Council (loosely modelled after Parliament and the Privy Council respectively) as their president. Fusing legislative and executive powers as in Westminster, government frontbenchers constituted the Legislative Council majority until 1976, and together with pro-government backbenchers, they dominated the legislative agenda until 1997. Notice that senior career civil servants, rather than professional partisan politicians, dominated all cabinet positions; and expatriate bureaucrats held the office of the Chief Secretary, head of government, until the 1993. This “pure administrative state”

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or “bureaucratic polity” substituted for democracy a benevolent authoritarianism based on performance legitimacy and administrative legality (King, 1975; Wong, 2007a:76). Unsurprisingly, the Legislative Council was no more than a “marginal legislature” which enjoyed little support from the general public and served mainly as a legitimising device for the executive (Cheek-Milby, 2003; Wan, 2010).

More importantly, the colonial regime, through a sophisticated system of policy consultation and consensus, collaborated extensively with the elite of the local, ethnic Chinese business community (Tang, 1999:279; Goodstadt, 2005). Beginning in the late Nineteenth century, the Government allowed Justices of the Peace and the General Chamber of Commerce to nominate to the Legislative Council representatives of big business and the professions. This system persisted until the mid-1980s, when the Government decided to formalise its system of elite appointments by introducing into the Legislative Council “Functional Constituencies,” a form of corporatist political representation.

China was clearly aware of the immense political influence wielded by the business elite. Even during British rule the Chinese Communist Party had engaged in considerable “united front” work in Hong Kong, reaching out to and building relationships with members of business and professional groups in order to win their cooperation and support for China’s plans to reunify with Hong Kong (Loh & Lai, 2007:23). When Deng Xiaoping said in 1984 that a Chinese “patriot” could believe in “capitalism, feudalism, or even slavery,” he was really signalling his willingness to form alliances with Hong Kong capitalists, whom the Communist Party formerly condemned, in order to pragmatically fulfil the grand objective of national unity. Accordingly, since the early 1980s, regular “pilgrimages” to Beijing have been made

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by Hong Kong business leaders from the Legislative Council, the Urban Council, the Trade Development Council, the Factory Owners Association, and the Chinese Manufacturers' Association (Chu, 2010:35). As the Sino-British talks progressed in the 1980s, local capitalists had seized the opportunity to initiate major investment projects in Hong Kong in light of the gradual exodus of British capital; this was considered to be a sign of loyalty and confidence from the perspective of Beijing, which ultimately accumulated into the decision of the Chinese Communist Party to give the business elite a leading role in post-British governance (Ma, 2012:71).

Although successive colonial Governors constructed an efficient civil service and a sophisticated economic infrastructure, they were unique amongst their Imperial counterparts in that they made little progress toward electoral democracy. Consider the fact that, beginning immediately after the Second World War, it became the policy of the Commonwealth to enable the colonies to achieve full, democratic independence (Lau, 1997). Governor Mark Young (1946-1947) did consider options for replacing the appointed members of the Legislative Council with elected politicians, but this brief flirtation with democracy was abandoned when the Communists toppled the Nationalist regime of Chiang Kai-shek in 1949.

Guarding its political monopoly, the Government of Hong Kong resisted any democratisation thereafter, citing as justification that if either Nationalist-backed or Communist-backed politicians got elected, it might destabilise the Colony (Lau, 1997). In 1952 Governor Alexander Grantham persuaded Whitehall to abandon plans for transition to self-rule. Grantham's position (cited in Loh, 2006:44; Tang, 1994:320), which later became the orthodox view within the Government, was that "provided that the government maintains law and order, and does not tax the people too much

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and they can obtain justice in the courts, they are satisfied and well content to devote their time to making more money in one way or another,” and that “the fundamental political problem of the British colony of Hong Kong is its relationship with China and not the advancement to self-government and independence, as in the case of most British colonies.”

Note that civil liberties were under-supplied by the colonial regime (Ma, 2007). The Government had always been ambivalent at best towards rights: not only had it noted that the suppression of certain civil liberties benefitted trade and commerce, but also, heavily influenced by Diceyan conceptions of parliamentary sovereignty, it tended to presume human rights codes to be inferior to the English common law (Wesley-Smith 1992, 17). Although by the 1980s Hong Kong’s population was thirty-six times the size of all remaining British dependencies put together, it continued to be the “human rights exception” within the Commonwealth. In 1953 the United Kingdom had excluded the territory from the applicability of the European Convention on Human Rights, and in 1967 it prohibited Hong Kong British subjects to bring their rights claims to the European Court of Human Rights in Strasbourg (Jayawickrama, 1992:64). On 20 July 1976 the British government, although ratifying the International Covenant on Civil and Political Rights (“ICCPR” hereafter) on behalf of the territory, reserved against the right to democratic government. According to Frank Stock (2001:147), Solicitor General (1987-1991) and Supreme Court Judge (1992-1997), the Government was of the view that the conventional rights were already “sufficiently” and “effectively” protected by the common law and by various and sundry statutory provisions. Even in the late 1980s open partisan activity was still suppressed, public assemblies were controlled, advocates of constitutional reform

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were closely monitored, and donations to an announced political party were illegal (see Degolyer & Lee Scott, 1996).

### 2.2. TOWARDS THE TRANSFER OF SOVEREIGNTY

In the 1950s, given the credible threat of armed Chinese (Communist) invasion, a tacit consensus between the United Kingdom and the People's Republic of China to conserve the authoritarian *status quo* in the Crown Colony seemed to have emerged (M. Chan, 1996). Thereafter the British government continued conspicuously to cooperate with China on many occasions. For example, in 1972 it acquiesced in the Chinese insistence before the United Nations that the Hong Kong question was completely within China's sovereign jurisdiction. In the same year the British withdrew from Taiwan their diplomatic delegation to the Republic of China, so as to accommodate Communist China's "one-China" policy. In the early 1980s China was just re-emerging from the ashes of the Cultural Revolution, whereas Hong Kong had already evolved into a leading international financial centre. Although the two economies had been increasingly interacting with each other since Deng Xiaoping's ascension in 1978, their political systems remained mutually irreconcilable. This, however, did not dampen China's ambitions to exert its sovereignty over Hong Kong. Indeed, against the recent history of Western colonialism, Japanese aggression, and civil war, the People's Republic of China was obsessed with sovereignty being "supreme, unlimited, illimitable" as a source of unity and strength (Schneider, 2002:580-1). In the eyes of China's Communist rulers, their State possessed plenary and non-derogable political authority and legal jurisdiction over all territories and

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peoples whom they regard as “Chinese,” *i.e.* Taiwan, Hong Kong, Macao, and so on (Delisle & Lane, 1997:62). Because of the significance of Hong Kong as a symbol of national humiliation in history of modern China, any concession on the territory’s sovereignty would put Deng among the ranks of traitors (Chan, 2011a:17). The words of Wu Jianfan (1988:66), Basic Law drafter and later Member of the NPCSC Hong Kong Basic Law Drafting Committee, aptly demonstrate this attitude, “The [Chinese] nation enjoys *complete sovereignty* over [Hong Kong], just as it does over all provinces, autonomous regions, and municipalities directly under the control of the Central Government [emphasis added].”

The agenda of national unification under the rubric “One Country, Two Systems” was originally formulated by the Chinese Communist Party in 1978 in the context of its projected unification with the Republic of China on Taiwan. In September 1981 NPCSC Chairman Ye Jianying proposed that Nationalist-ruled Taiwan be established as a “Special Administrative Region” of Communist China. A year later China publicly announced its intention of resuming sovereign and administrative powers over Hong Kong on July 1, 1997, when the United Kingdom’s ninety-nine-year lease on the New Territories was scheduled to expire. In November 1982 Liao Chengzhi, China’s spokesman on Hong Kong and Macao Affairs, told a group of industrialists from Hong Kong that Beijing was willing to recover its sovereignty without changing the territory’s capitalist system and way of life (Chu, 2010:62). Beijing realised that foreign and local investors and businessmen alike were extremely worried that Hong Kong, traditionally committed to *laissez-faire*, would lose all its economic prosperity under a Leninist Party-state (see Wang & Leung, 1998:288). To shore up domestic and international confidence, Deng Xiaoping decided

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that the doctrine of “One Country, Two Systems,” under which socialism on the Mainland and capitalism in Hong Kong would peacefully coexist under one sovereign umbrella, should underpin the post-1997 constitutional order. Deng’s plan offered Hong Kong “a high degree of autonomy” and included a promise that its capitalist system should remain unchanged for fifty years. It was a pragmatic choice given China’s distinct self-interest to absorb into its jurisdiction a fully-developed Westernised capitalist economy, something that it has never possessed.

Although the Nineteenth Century Sino-British treaties had given the United Kingdom possession of Hong Kong Island and Kowloon Peninsula (excluding the New Territories) in perpetuity, the Margaret Thatcher Government nevertheless, in stark contrast to its approach to the Falkland Islands conflict, caved in to China’s insistence on full recovery, and conceded that the three parts of the territory had become so integrated that they must revert to China in their entirety in March 1983. Between July 1983 and September 1984, the British and Chinese governments had organised twenty-two rounds of talks. In the first four talks, the United Kingdom proposed to transfer the sovereignty of Hong Kong to China while retaining administrative powers over the territory. In September 1983, Deng Xiaoping explicitly rejected this option, asserting that to do so would lead to a unilateral declaration on the part of the Chinese over the resolution of the Hong Kong question. Thereafter, London acquiesced in Beijing’s demands and the negotiators shifted their attention to China’s post-1997 policy towards Hong Kong.

Notably, China stipulated that any negotiation over Hong Kong’s future were strictly a matter between the two sovereign states, and neither the Government nor the Hong Kong people had any role to play in it. It was grim irony that China claimed

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to represent the views and interests of the Hong Kongers, most of whom had fled to the territory out of fear and loathing of the Communist Party. However, the British government had also turned down the request of the local members of the Hong Kong Executive and Legislative Councils to participate in the negotiations with Beijing (Chung, 2001:51). In 1984 Britain and China agreed, without consultation with or referendum to the citizens of Hong Kong, that their territory would be transferred from the former's to the latter's sovereignty on 1 July 1997 (Tang & Ching, 1996). This agreement, officially known as the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, was signed by Chinese Premier Zhao Ziyang and Margaret Thatcher, and registered with the United Nations as a binding inter-state treaty.

The Joint Declaration gave each side what it wanted. Both governments agreed upon the goals of maintaining "prosperity" and "stability" in Hong Kong. As insisted by Britain and accepted by China, the Joint Declaration promised Hong Kong a liberal-democratic form of constitutional order and a degree of autonomy in some ways tantamount to that of a sovereign state (see Davis, 1999). The Declaration's commitment to an economically libertarian constitutional foundation is explicable by a mixture of expressive-symbolic and instrumental interests in the constitutional design calculus of both sides. Under pressure from Parliament lest more than three million British subjects are "betrayed" and handed over to an authoritarian Leninist state, British diplomats realised that it would be imperative for the United Kingdom to leave behind some liberal constitutional safeguards and democratic hope for the future (Chan, 2011:30). According to Sir Sze-yuen Chung (2001), then Senior Member

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of the Executive Council, the British side insisted, contrary to China's position, that the Chief Executive and the Legislative Council of the Hong Kong Special Administrative Region ("Hong Kong SAR" hereafter) must be returned by elections rather than mere appointment. Ultimately, the Chinese government accepted a number of Western-style principles of constitutionalism as this did not threaten China's pursuit of national sovereignty and might help stem the rush to emigrate and the haemorrhaging of capital and investment. The Chinese government conceded elements of libertarianism in post-1997 Hong Kong's constitutional order so as to convince its citizens to stay-on on the grounds that the system of government to which they were accustomed would continue much as they had always known it (Miners, 2000:97):

Reflecting the United Kingdom's preferences, the Joint Declaration provided that the Chief Executive (successor to the British Governor) was to be chosen by "elections or consultations" held locally, and that the Legislative Council was to be chosen by "elections."<sup>1</sup> Annex I of the Declaration, an elaboration of China's stance regarding Hong Kong, promised, "The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force." The Declaration also promised that Hong Kong would exercise a high degree of autonomy, except in foreign affairs and national defence, which were to be the responsibilities of the Chinese sovereign;<sup>2</sup> that locals would be vested with executive, legislative, and independent judicial powers (there was no mention of constitutional judicial review); that foreign nationals, including British citizens, would have the right to hold public

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<sup>1</sup> Article 4, Sino-British Joint Declaration.

<sup>2</sup> Article 2, Sino-British Joint Declaration.

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office within the new government;<sup>3</sup> that the existing social and economic systems would not be interfered with;<sup>4</sup> and that the rights and freedoms of the person – of speech and of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief, of private property, of ownership of enterprises, of the legitimate right of inheritance and foreign investment – would be protected.<sup>5</sup> Note that in explicating these rights, the United Kingdom had departed significantly from both its own domestic tradition and from the practice of the Government of Hong Kong to reject any modern codification of rights. Whitehall may well have been moved by a symbolic interest in holding China's Leninist state to a semblance (at least) of commitment to Hong Kong's autonomy.

Reflecting China's strategy of reinforcing local economic confidence and co-opting conservative business and professional elements into the future pro-China SAR regime, the Joint Declaration also allowed for the territory to retain its status as a free port, a separate customs territory, an international financial centre, as well as continue to enjoy the free flow of capital, a freely convertible dollar, and financial independence from Mainland China.<sup>6</sup> Furthermore, post-1997 Hong Kong would have the right to maintain and develop external relations, conclude international agreements with sovereign states and international organizations, and issue its own travel documents.<sup>7</sup> China considered a prosperous Hong Kong essential to its own development plans, providing hard currency earnings, access to trade and technology,

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<sup>3</sup> Article 3, Article 4, Sino-British Joint Declaration.

<sup>4</sup> Article 5, Sino-British Joint Declaration.

<sup>5</sup> Article 5, Sino-British Joint Declaration.

<sup>6</sup> Article 6, Article 7, Article 8, Sino-British Joint Declaration.

<sup>7</sup> Articles 9, Article 10, Sino-British Joint Declaration.

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and a boost to the development of the Southern coastal areas (Rabushka, 1989:643).

### 3. THE HONG KONG BASIC LAW AS A STRATEGIC POLITICAL BARGAIN

#### 3.1. OVERVIEW

A constitution may be analogised to a bargain between political factions with differing preferences and competing interests, which provides all parties with a common framework for the conduct of collective political action (Wagner, 1987:106). To stand the test of time, constitutions must establish effective control mechanisms that conserve the joint gains that the constitutional bargain promised. Accordingly, this section analyses the Hong Kong Basic Law as a strategic political agreement forged between the Chinese government and Hong Kong's most influential business elites (see Kuan, 1991).

The Basic Law, drafted according to the Joint Declaration, is a *sui generis* organic statute that does not easily fit into existing categories of constitutional law (Bauman, 1997). It is roughly analogous to the Canadian Constitution Act 1982 and the Commonwealth of Australia Constitution Act 1900, in the sense that both constitutional instruments of Canada and Australia originated as Acts of the British Parliament. Promulgated by the Chinese National People's Congress on 4 April 1990, the Basic Law constitutionalises the Joint Declaration and the "basic" Sino-British policies of "One Country, Two Systems"; "Hong Kong People Governing Hong Kong"; and "High Degree of Autonomy" (Wang, 2008). Reflecting principles of the Joint Declaration, it provides a wide range of guarantees for Hong Kong's future autonomy

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and for continuity with the pre-existing colonial system of government. The two most significant provisions concerning the territory's autonomy from the Chinese government are Article 2, which provides that Hong Kong shall exercise "a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication"; and Article 22, which prohibits any department of the Chinese central government, as well as those of any province, autonomous region, or municipality within China, to intervene in Hong Kong's internal affairs. These provisions have been fortified by still others guaranteeing the territory's financial and tax autonomy;<sup>8</sup> its status as a free port<sup>9</sup> and separate customs territory; and its competence independently to participate in international organisations and international trade,<sup>10</sup> to issue its own passports and formulate its immigration policies,<sup>11</sup> and to make treaties with sovereign states, and regional and international organisations, in matters of economics, trade, finance, money, shipping, communications, tourism, culture and sports.<sup>12</sup> With all these constitutional competences, post-1997 Hong Kong may be regarded as enjoying probably the most far-reaching external autonomy that has ever been conceded to any autonomous region in the world, and which enables it to act as a "semi-sovereign" confederated state (Olivetti, 2009:791).

Collective choices at the constitutional level wield immense influence over subsequent political outcomes. Hence constitutional framers are under proportionally immense pressures to design institutions that will benefit themselves in the future

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<sup>8</sup> Article 106, Hong Kong Basic Law.

<sup>9</sup> Article 114, Hong Kong Basic Law.

<sup>10</sup> Article 116, Hong Kong Basic Law.

<sup>11</sup> Article 154, Hong Kong Basic Law.

<sup>12</sup> Article 151, Hong Kong Basic Law.

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(Ginsburg, 2003:23-4). Many of the Basic Law's substantive provisions, although grounded on the Joint Declaration, turned out to reflect the conservativeness of the Hong Kong and Chinese elites. Unavoidably, the drafting process was dominated by the elites of both sides, all of whom held stakes in the post-1997 governance of the territory. I demonstrate below how different provisions of the Basic Law serve different expressive-symbolic and instrumental functions corresponding to the preferences of the different negotiating parties. In particular I highlight the collective choice and principal-agent solutions embedded in the Basic Law's architecture.

### 3.2. COLLECTIVE CHOICE

#### 3.2.1. THE POLITICAL ABSORPTION OF ECONOMICS

On 18 June 1985 the NPCSC approved the appointments to a Basic Law Drafting Committee consisting of 59 members, of which a majority (36) were Mainland Chinese and a minority (23) Hong Kong residents. Several of the Hong Kong Basic Law's framers had helped draft the 1982 Chinese Constitution; they included Zhang Youyu, Deputy Director of the NPC Law Committee, and the academicians Hu Sheng, Xiao Weiyun, and Xu Chongde. Other members, like Deputy Foreign Minister Lu Ping and Shao Tianren, adviser to the NPC's Foreign Affairs Committee, had partaken in the highest-level international negotiations that resulted in the Joint Declaration (Lau, 1988:90-1). By contrast, about 70 percent of the Drafting Committee's Hong Kong members could be classified as prominent businessmen and industrialists (Loh, 2006:33). According to Ambrose King (1986), a former Vice

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Chancellor of the Chinese University of Hong Kong, these appointments reflected what he termed “the political absorption of economics,” which is what enabled China to promise the cream of the Hong Kong business elite that they would dominate the polity after 1997. Indeed, the Committee included some of the richest men in the world, tycoons like Li Ka-shing (Cheung Kong Holdings), David Li (Bank of East Asia), and Sir Pao Yue-kong (Worldwide Shipping Group and Kowloon Wharf), and other prominent bankers and industrialists whose average age was sixty-two at the time of the Committee’s inception (Chiu, 2010). By the end of 1985 it was obvious that China favoured the local business elite, who provided the solidest support Beijing had. These business leaders generally considered Hong Kong’s reversion to China inevitable, and their only realistic option to protect their vested political and economic interests by coalescing into a “Pro-China Bloc.”

At the same time, Beijing was intent on making its voice heard in the territory. The Chinese policy of political-economic collaboration has continued up till the present day (Chu, 2010:76). A former high representative of China in Hong Kong (holding the title of “Director of the New China News Agency) and a member of the Basic Law Drafting Committee, Xu Jiatus (1994), revealed in his memoirs that Deng Xiaoping had intended his principle “Hong Kong People Governing Hong Kong” to mean the political dominance of the Hong Kong bourgeoisie, not the leadership of any other classes. Similarly, NPCSC Hong Kong Basic Law Committee Member Lau Nai-keung (2009:58) recently admitted that in explicating the principles of “One Country, Two Systems” Deng had “mistakenly” understood “capitalism” as merely “the dictatorship of the capitalist class,” and further misinterpreted “the dictatorship of the capitalist class” to over-simplistically mean the rule of a few “grand financial

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oligarchs.”

The NPCSC Hong Kong Basic Law Drafting Committee was supplemented by a 180-person Basic Law Consultative Committee (“BLCC” hereafter), whose members came entirely from Hong Kong and were chosen to represent the views of the general public (J. Chan, 2011a:29). The BLCC members were to be drawn from ten social categories: the commercial sector, the financial sector, the legal profession, other professionals, the media, labor and grassroots associations, the organised religions, and expatriates.

Ji Pengfei, Director of the State Council’s Hong Kong and Macau Affairs Office, was appointed to chair the Drafting Committee. In April 1986, during the second plenary session of the Committee, it was resolved that five different “Subgroups” would be set up to draft different parts of the Basic Law. The Subgroups included: (1) Mainland China-Hong Kong relations, (2) fundamental rights and the duties of citizens, (3) political structure, (4) economic system, (5) education, science, technology, culture, sports, and religion. Each Subgroup would be chaired by two Conveners, one from Hong Kong and the other from China. Chairman Ji and the Conveners would jointly form a Presidium which would superintend the Committee’s overall progress (J. Chan, 2011:28). Over a period of nearly five years, the Drafting Committee organised 9 plenary sessions, 25 meetings of the Chairman and Vice-Chairmen, 3 meetings of the General Working Group, 73 meetings of the Special Groups, and 5 meetings of the Committee for Selecting Designs for the Regional Flag and Regional Emblem of Hong Kong.<sup>13</sup>

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<sup>13</sup> See, *Explanations on the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft) and its Related Documents* (NPCSC Hong Kong Basic Law Drafting Committee, 28 March 1990).

## STRATEGIC CONSTITUTION

Note that the Drafting Committee, although handpicked by China, was initially diverse ideologically. Martin Lee and Szeto Wah, the leaders of Hong Kong's democratisation movement, originally served on the Committee, until their memberships were suspended on 31 October 1989 for their strong views against the crackdown in Tiananmen Square on 4 June 1989. By the end of the drafting process, the number of Hong Kong-based drafters had fallen to 18.<sup>14</sup> After Tiananmen the Drafting Committee, reflecting the Communist regime's fear of losing power, beefed up Basic Law provisions on national security, subversion, and political control (J. Chan, 2011).

Somehow, counter-intuitively, the drafting of the Basic Law did not turn out entirely a top-down process. Although the Hong Kong members of the Drafting Committee were pledged to give way to the "national interest" and the "interests of the entire Chinese people" in writing up the territory's future constitution (Fu & Cullen, 2002:193), quite a number of public consultations, such as town hall meetings, had been held. Over a hundred revisions were made to the first consultative draft released in April 1988, followed by the publication of the second consultative draft in February 1989. During the five-year drafting process, Hong Kong's future constitution was exposed, on virtually a daily basis, to heated debates and enthusiastic discussions over the fundamental doctrines and human rights principles that best suited the territory (J. Chan, 2011:29).

### 3.2.2. THE NEO-LIBERAL CONSTITUTION

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<sup>14</sup> Some of the Hong Kong members of the Drafting Committee who had been known for their pro-China preferences, like the renowned novelist Louis Cha, also resigned at this time.

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Given the pre-eminence of the business elite in the drafting of the constitution, it is unsurprising that the Draft Basic Law had become in the 1980s quite “unique among contemporary national constitutions in [that it] enshrines general principles and concrete policies to preserve individual economic freedom” (Rabushka, 1989:644). The ultimate version of the constitution highlights the primacy of neo-liberal economics, given that the provisions that are most definitive and detailed are those dealing with the structure of the economy (Ghai 1993:806). As Mushkat and Mushkat (2009) observe, the Basic Law’s overriding purpose was constitutionally to insulate the “ultra-capitalist” Hong Kong political economy from China’s then-centrally planned one. Elaborate provisions guaranteeing Hong Kong’s public finance policies’ faithful adherence to the economically libertarian path were thus built into the Basic Law “on an unprecedented scale by historical and contemporary standards.” Consider the following provisions of the constitution.

China’s official adherence to Marxism-Leninism cast a pall of uncertainty over the future of Hong Kong’s capitalist system; expectedly, Basic Law drafters responded by spelling out in considerable detail those provisions which sustain the political dominance of the business elite. Much of the Basic Law is dedicated to elaborating the protection of property rights and to enshrining free-market and small-government principles. The two most important such provisions are Article 5, which guarantees Hong Kong’s “capitalist system” against the “Socialist system and policies” practiced in Mainland China; and Article 6, which protects “the right of private ownership of property in accordance with law.” Throughout the constitution these principles were reiterated in greater detail; for example, Article 105 protects “the right of individuals and legal persons to the acquisition, use, disposal, and inheritance of property and

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their right to compensation for lawful deprivation of their property,” and that “Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay; moreover, that “*The ownership of enterprises and the investments from outside [the Hong Kong SAR] shall be protected by law [emphasis added].*”

Another series of provisions specified the business-friendly, neo-liberal, public finance policies of the future government. Members of the Drafting and Consultative Committees had cited the normative component of Nobel Laureate James M. Buchanan’s Constitutional Economics research programme to justify the use of constitutional rules to constrain the state’s budgetary and taxation powers allegedly in favour of individual liberty (Brennen & Buchanan 1980). The Basic Law requires the Government not only to keep public expenditure within the confines of actual revenue, but also quite explicitly to maintain “a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product.”<sup>15</sup> It also requires a low tax policy to be pursued;<sup>16</sup> requires the government to “provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial centre”;<sup>17</sup> insists that Hong Kong currency must be backed by a 100 per cent reserve fund with a possible view to suppress the temptation to freely print money (Xiao, 2001:412);<sup>18</sup> prohibits foreign exchange controls; mandates that the Hong Kong dollar is “freely convertible”; and enjoins the government to “safeguard the free flow of capital within, into and out of [the Hong

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<sup>15</sup> Article 107, Hong Kong Basic Law.

<sup>16</sup> Article 108, Hong Kong Basic Law.

<sup>17</sup> Article 109, Hong Kong Basic Law.

<sup>18</sup> Article 111, Hong Kong Basic Law.

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Kong SAR].”<sup>19</sup> Article 118 even promises “an economic and legal environment for encouraging investments, technological progress and the development of new industries.” The constitutionalisation of low-tax and other business-friendly policies implied that any increase in public spending must either stem from the fruits of economic growth or be offset by decreasing expenditure elsewhere in the government budget. These provisions were meant to confine the government within bounds economically, and to assign exclusively to the private sector (dominated by the business elites themselves) the creation and distribution of income (Rabushka, 1989:647). Consistent with these drafters’ pro-business preferences, the Basic Law included few provisions regarding social welfare or labour policy: Article 145 empowers the government to “formulate policies on the development and improvement of [the largely under-developed colonial social welfare system] in the light of the economic conditions and social needs” without defining what such “needs” are. Article 147 simply authorises the government to “on its own [initiative] formulate laws and policies relating to labour.”

### 3.2.3. THE SYMBOLISM OF CONSTITUTIONAL RIGHTS

In line with the Joint Declaration, the Basic Law also features an elaborate bill of rights, in Chapter III. The Drafting Committee’s Subgroup on Fundamental Rights and Duties was jointly chaired by Simon Lee, a retired Justice of Appeal of the Hong Kong Supreme Court, and Wang Shuwen, a law professor at the Chinese Academy of Social Sciences. The other members, however, included not a single constitutional or human

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<sup>19</sup> Article 112, Hong Kong Basic Law.

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rights lawyer, but rather Tam Yiu-chung, a pro-China Hong Kong legislator, Lau Wong-fat, an indigenous politician, Peter Kwong, Bishop of the Anglican Church in Hong Kong, Kwok Kwong, president of the Hong Kong Buddhist Association, Chen Xen, Secretary of the Central United Front Office of the Communist Party, and Lin Hengyuan, Chairman of the NPCSC Legal Group and a framer of the 1982 Chinese Constitution. This Subgroup ended up merely transplanting into the Hong Kong Basic Law, supposed to be a liberal constitution, the rights framework found in the 1982 Constitution of the People's Republic of China (Jayawickrama, 1988:394). The Basic Law, being essentially identical with its Mainland Chinese counterpart in respect of fundamental rights, offered "nothing new" (Rabushka, 1989:646).

However, as in the Chinese Constitution, this rights framework ranges wide, encompassing legal equality;<sup>20</sup> electoral rights;<sup>21</sup> freedoms of speech, of press, of publication, of association, of assembly, of procession, of demonstration, of forming and joining trade unions, of participating in strikes;<sup>22</sup> freedom of the person;<sup>23</sup> inviolable homes;<sup>24</sup> freedom and privacy of communication;<sup>25</sup> freedom of movement;<sup>26</sup> freedom of conscience, of religious belief, and of participating in public religious activities;<sup>27</sup> freedom of occupational choice;<sup>28</sup> freedom to engage in academic, literary, artistic, and cultural activities;<sup>29</sup> right to confidential legal advice;<sup>30</sup> a right to

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<sup>20</sup> Article 25, Hong Kong Basic Law.

<sup>21</sup> Article 26, Hong Kong Basic Law.

<sup>22</sup> Article 27, Hong Kong Basic Law.

<sup>23</sup> Article 28, Hong Kong Basic Law.

<sup>24</sup> Article 29, Hong Kong Basic Law.

<sup>25</sup> Article 30, Hong Kong Basic Law.

<sup>26</sup> Article 31, Hong Kong Basic Law.

<sup>27</sup> Article 32, Hong Kong Basic Law.

<sup>28</sup> Article 33, Hong Kong Basic Law.

<sup>29</sup> Article 34, Hong Kong Basic Law.

<sup>30</sup> Article 35, Hong Kong Basic Law.

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sue the executive branch;<sup>31</sup> social welfare;<sup>32</sup> and freedom of marriage.<sup>33</sup> Additionally, Article 39 of the Basic Law provides that the ICCPR, the International Covenant on Economic, Social and Cultural Rights (“ICESCR” hereafter), and international labour conventions, insofar as applied to Hong Kong, shall remain in force and may be implemented through primary legislation. This voluminous codification of rights channelled China’s expressive-symbolic commitment to a liberal-constitutional Hong Kong polity, yet its symbolism needs to be cross-examined. Note that, at the time of drafting, China had not acceded to the ICCPR; constitutional rights in the Chinese Constitution are not justiciable by the courts but were meant to serve only as general, largely non-binding guidance for the enactment of primary legislation; and finally, no provision in the Basic Law permitted the striking down of executive or legislative acts contrary to the rights enumerated. It is likely, then, that the inclusion of a bill of rights in the Basic Law stemmed from some causal nexus of the constraints inherent in the Joint Declaration, and the requisites of a symbolic strategy to promote enthusiasm for and loyalty to the nascent constitutional order; and not from a primary concern with practical political efficacy or any interests of the citizenry (see Brennan & Hamlin, 2006:342).

### 3.3. SEMI-ENTRENCHMENT

The Basic Law is a semi-entrenched constitutional document: it is not entrenched in China, but is deeply entrenched in Hong Kong. In Mainland China it is regarded as a

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<sup>31</sup> Article 35, Hong Kong Basic Law.

<sup>32</sup> Article 36, Hong Kong Basic Law.

<sup>33</sup> Article 37, Hong Kong Basic Law.

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statute enacted under Article 31 of the Chinese Constitution, which states, “The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress *in the light of the specific conditions* [emphasis added].” To establish legal certainty that the libertarian-capitalist Basic Law does not contradict the Chinese Constitution’s mandate that the socialist system shall prevail in China nation-wide, the NPCSC issued a Decision in 1990 expressly acknowledging the Basic Law’s constitutionality.<sup>34</sup>

The Basic Law itself provides that the State Council or the NPCSC may propose amendments at any time, presumably to endow China with greater political flexibility in dealing with contingencies in Hong Kong. The Basic Law is much more deeply entrenched locally: according to Article 159, amendments originating in Hong Kong must undergo three separate ratification processes – the consent of two-thirds of the territory’s Deputies to the NPC, then two-thirds of the Members of the Legislative Council, and then the Chief Executive’s consent. Two conditioning mechanisms impose constraints on amending the Basic Law from Hong Kong: first, the NPC convenes only two weeks every year, clamping a cap on the practical frequency of amendment, and second, all amendments must not contradict the “established basic policies of the China regarding Hong Kong,” as reflected in the Joint Declaration.<sup>35</sup>

### 4. THE DELEGATION PROBLEM

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<sup>34</sup> *Decision of the National People’s Congress on the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (promulgated by the National People’s Congress, 4 April 1990).

<sup>35</sup> Article 159, Hong Kong Basic Law.

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## 4.1. DELEGATION IN CONSTITUTIONAL DESIGN

Constitutions do not execute themselves; they usually embody principal-agent instructions to guide their implementation by agents (see Ginsburg, 2003:23). In the case of the Basic Law, the principals – the Chinese Party-state and the Hong Kong business elite – must rely on agents – officials and lawmakers of the post-1997 government – to implement their preferences (Mueller, 1996; Buchanan, 1997). Given Hong Kong's far-reaching autonomy, the principals are likely to be disadvantaged by the asymmetry of information, and hence unable to sanction agents who pursue courses of action incompatible with their own preferences. Acts of the Government, the Legislative Council and/or the Judiciary may contradict provisions of the Basic Law crucial to China's interests.

Hong Kong's autonomy is sufficiently high that leaving its government to people likely to be difficult to control could become prohibitively costly to Beijing. A classical principal-agent problem thus subsists between the Chinese Party-state and the Hong Kong SAR. Specifically, the members of the Drafting Committee must have dealt with measuring the political transaction costs of enforcing the Basic Law's provisions (see Wood & Bohte, 2004:183; see also North, 1990:363-4). Indeed, constitutional design is often concerned with reducing agency costs through oversight and sanction mechanisms (see E. Posner & Ginsburg, 2010). Constitutional framers are often interested to govern after their new constitution is ratified; it follows that they will have had an incentive to design institutions maximising their capacity to rule under the new order (Ginsburg, 2003:24).

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Pursuant to the Basic Law the State Council may issue administrative directives to the Hong Kong Chief Executive, and the NPC may expand the list of national-level statutes applicable in the territory; revise or repeal the Basic Law; or invalidate Legislative Council enactments which it considers contrary to the Basic Law (Liebman, 1998); although these options have never been used as of the time of writing. It must never be forgotten that China's domestic legal structures, including the Basic Law, reflect its unity- and sovereignty-centred worldviews. The belief is widespread in the country that excessive devolution could undermine China's political stability and ultimately the legitimacy of the central Party-state.

### **4.2. EXECUTIVE DOMINANCE AND CORPORATIST POLITICAL REPRESENTATION**

Constitutional choice is not written on a "clean slate," nor does it happen in an "institutional vacuum"; rather, the choice between prospective rules is constrained by existing rules, and both will constrain future choices between further rules (Brennan & Hamlin, 2001:125). Mindful of the perils of integrating an anti-Communist polity into the Party-state's sovereign boundaries, the drafters in making their constitutional choices found the Colonial Constitution effective for producing "safe" outcomes and reliable parliamentary majorities (Pepper, 2000:58). Indeed, one core spirit of the constitutional design of the Basic Law was to retain main characteristics of the colonial system (Ma, 2007).

The political system established under the Basic Law allocates a disproportionate amount of power to the executive, and substitutes corporatist for democratic political representation, in order to secure the political domination of the

## STRATEGIC CONSTITUTION

Chinese Party-state and the Hong Kong business elite (see Figure 9). Indeed, in April 1987, when Deng Xiaoping met with the Drafting Committee, he warned that Hong Kong's system of government should not be "completely Westernised" (Flowerdew, 1998:60). However, it is practically undeniable that the Basic Law, establishing a constitutional order along liberal-democratic lines, drew heavily from both Westminster constitutionalism and American-style separation of powers. It creates an executive and a legislative branch which are separately elected, such that the formation of the Executive Council (the cabinet) and the Chief Executive's term of office do not depend on parliamentary confidence votes. The continuation of the colonial system of "executive dominance," although nowhere explicated in the Basic Law, may be summarised as an arrangement which has "the executive authorities and the legislature coordinating [with] as well as checking each other, as well as the principle of judicial independence" (Chen, 2005:10).

Nevertheless, inheriting important characteristics of the Westminster system, the Basic Law explicitly permits the appointment of Members of the Legislative Council to the Executive Council (therefore allowing the overlapping of parliament and cabinet),<sup>36</sup> and requires the Government to be "accountable to the Legislative Council."<sup>37</sup> The Government is obliged to present, regularly, to the house "policy addresses" in a manner similar to the Queen's Speeches in the United Kingdom, attend question time in the Legislative Council, and obtain the approval of legislators for taxation and public expenditure-related decisions. The Basic Law also vests in the Legislative Council a set of parliamentary privileges derived from the customary practices of the Westminster Parliament, such as, among others, the powers to

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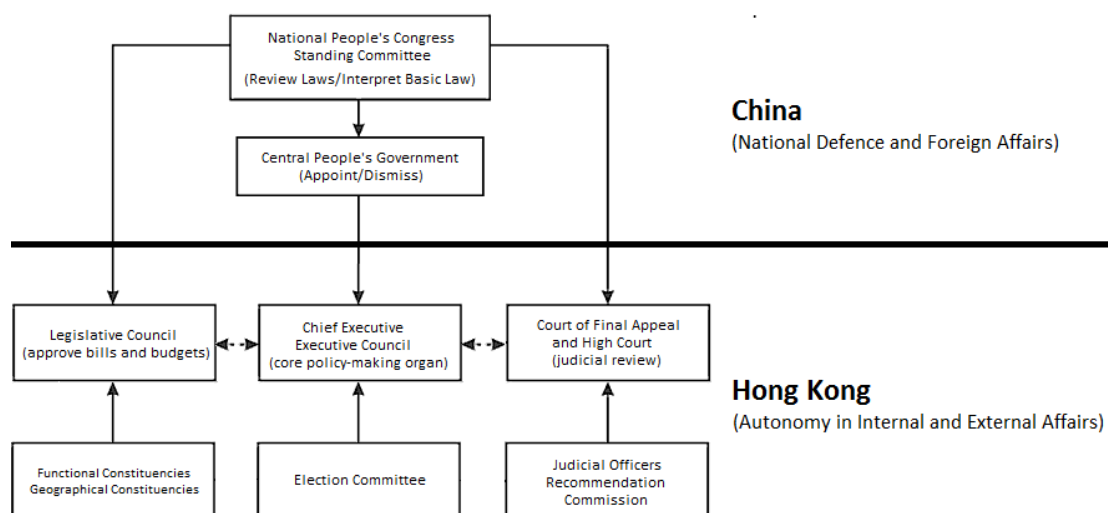
<sup>36</sup> Article 55, Hong Kong Basic Law.

<sup>37</sup> Article 64, Hong Kong Basic Law.

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summon people before the house, order the production of documents, and regulate its own proceedings.<sup>38</sup> Furthermore, it provides for a non-partisan professional civil service to implement policy choices emanating from the political branches.<sup>39</sup>

**FIGURE 9: POLITICAL STRUCTURE UNDER THE HONG KONG BASIC LAW**



The Chief Executive, as representative and head of government of Hong Kong,<sup>40</sup> is accountable to both China and Hong Kong.<sup>41</sup> Together with his principal officials, most prominent being the Chief Secretary of Hong Kong (head of government during the British era), he is appointed by China to five-year terms. In practice, the Basic Law's Chinese members of the Drafting Committee, at least, did not regard the Chief Executive as merely the representative of the SAR, but more akin to China's prefect in charge of Hong Kong affairs, armed with the most of the autocratic powers wielded by the Colonial Governor (Scott, 2010:29). Pursuant to Article 48, s/he approves bills and budgets passed by the Legislative Council, and promulgates laws; decides on

<sup>38</sup> Chapter IV, Section 3, Hong Kong Basic Law.

<sup>39</sup> Chapter IV, Section 6, Hong Kong Basic Law.

<sup>40</sup> Article 43, Hong Kong Basic Law.

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government policies, and issues executive orders; nominates principal officials; appoints and removes judges; conducts external affairs; appoints or removes other public officers; approves legislative motions; regarding revenues or expenditure to the Legislative Council; authorises government officials to testify before the Legislative Council; pardons persons convicted of criminal offenses or commutes their penalties; and handles petitions and complaints. Significantly, the Chief Executive wields a veto power: s/he may refuse to sign a bill passed by the Legislative Council and return it for reconsideration. If for a second time the Legislative Council passes it with a two-thirds majority, and the Chief Executive is still discontent with it, s/he need not acquiesce in a two-thirds majority like the American President, but may, as the British Prime Minister, dissolve the legislature instead. The legislature has no such reciprocal powers over the Chief Executive. It may impeach the Chief Executive by a two-thirds majority, provided that an investigation committee led by the Chief Justice finds that a serious breach of law or duty has been committed. Conviction upon impeachment does not effect removal from office immediately, however, as that decision rests ultimately with China's government.

During British rule individual legislators might have proposed motions or bills without the Governor's prior approval so long as they did not concern government revenue. By contrast, Article 74 of the Basic Law provides that all bills introduced by individual legislators and relating to "Government policies" must first obtain the consent of the Chief Executive, whereas such bills "relating to public expenditure or political structure or the operation of the Government" are forbidden. According to one comparative empirical study, the Chief Executive is more powerful than most of

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<sup>41</sup> Article 45, Hong Kong Basic Law.

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the world's presidents (Ma, 2002:353).

Article 45 of the Basic Law provides that the Chief Executive “shall be selected by election or through consultations held locally and be appointed by the Central People’s Government,” and “the method of selecting the Chief Executive shall be specified in the light of the actual situation in [the Hong Kong SAR] and in accordance with the principle of gradual and orderly process,” and, most importantly, “[t]he ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.”

An 800-member Election Committee, provided by Annexe 1 of the Basic Law, elects the Chief Executive. It is made up of members who are themselves elected by the Functional Constituencies, by special constituencies, by religious bodies, or who participate *ex officio* as members of the Hong Kong Legislative Council or the Hong Kong delegation to the National People’s Congress (Loh & Lai, 2007:18). In addition to a “substantive” power to appoint the Chief Executive after each election, the Election Committee’s “constitutive power” ensures that China’s preferences will be reflected in all elections in Hong Kong’s economically based representation, the corporate persons of which typically lean pro-China owing to their commercial interests in China (Young & Cullen, 2010:2).

Being chosen by an electoral college loyal to Chinese interests, it is virtually certain that the Chief Executive’s policy preferences will substantially cohere with Beijing’s. Hong Kong’s high degree of autonomy from China means that the actual outcomes of domestic policy processes must often and unpredictably stray from any certain connection with the policies preferred by China, necessitating delegation to a

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trustworthy Chief Executive. And the Chief Executive's informational advantage and local expertise are bound to be attractive to his Mainland Chinese principals. Indeed, as Tai (2011a:185) observes, if China would influence Hong Kong politics, it would be more convenient to vest powers in one trusted agent, rather than disperse them among many agents. After all, the parcelling out of legislative, executive, and judicial powers amongst independent branches, with or without overlap, increases the transaction costs of government (R. Posner, 1987:39). Further, this option relieves China from dealing with potentially hostile popular forces, thus lowering its political transaction costs (see Ghai 1993:812).

Another principals' mechanism intended to solve problems of agency opportunism was to institutionalise the pro-China SAR regime dominated by the business elite through a scheme of corporatist political representation, embodied in an electoral college and a set of Functional Constituencies occupying at least half the legislative seats (Mushkat & Mushkat, 2009:308). Functional Constituencies were introduced by the colonial government to respond to international criticisms of the undemocratic nature of the Joint Declaration, not with thoroughbred democracy but with a hybrid that filled twenty-four out of the fifty-six seats of an entirely-appointed Legislative Council with "corporate representatives" selected from amongst a limited number of the registered members of certain incorporated professions and other corporate persons; thus doctors, lawyers, accountants, social workers, teachers, but also banks, real estate and insurance companies, transport operators, and corporate members of chambers of commerce and industry bodies, as well as a handful of trade unions to represent employees.

Corporatist representation proved to be conducive to safeguarding the interests

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of business and the professions in the legislative process, who could be counted on to act as faithful agents of their business elite principals (Wan, 2010:200). From the perspective of the Hong Kong business elite, experimentation with Western democracy would be extremely risky. Provided that both the Chinese government and the local elite were generally opposed to a directly-elected legislature, they shared a “commonality of interests” that turned out to be central to the new authoritarian state (Scott, 2000:31). During the Basic Law’s drafting the business establishment allied with its former adversaries – pro-Communist Party labour unions – to lobby against universal suffrage, which would have threatened their future political predominance (Hsu, 1996). They regard the adoption of democratic institutions to countervail any Chinese interference in Hong Kong’s self-rule as naïve, given that nothing could credibly prevent (or legally outlaw) China’s re-establishing direct rule over the territory. They believe Hong Kong can avoid intervention or indeed full-scale re-integration only by demonstrating its economic value to China (Chu, 2010:82).

Functional Constituencies featured prominently in the design of the Legislative Council: legislators directly elected from popular Geographical Constituencies occupied no more than about one-third of the sixty-seat legislature and could not win passage of any bill without the cooperation of the legislators indirectly elected by Functional Constituencies, who are mostly pro-China (Pepper, 2000:70). Moreover, accession to the half-half division between direct and indirect representation was postponed until the Third Legislative Council (2004-2008). In conceptualising the Hong Kong polity in purely economic terms as a division of labour between corporate persons, rather than as a society of individuals with varying ideological preferences,

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the drafters could conserve the ideological *status quo* while claiming to have allowed for a diverse representation in politics of people from all walks of life (see Loh & Lai, 2007:20).

### 4.3. JUDICIAL INDEPENDENCE

Besides, the Drafting Committee seemed to have anticipated the economic and political benefits of an independent judiciary, part of the constitutional scheme left by the British Government (J. Chan, 1999:1020). An independent judiciary not only expeditiously reduces business transaction costs by enforcing public and private contracts, but also attracts foreign investment and facilitate economic development by lending credibility to constitutional commitments to pro-business laws and policies (Moustafa, 2007). It is widely recognised that a relatively transparent and predictable legal system established by the United Kingdom has helped to transform Hong Kong into one of the most profitable markets in Asia (Barton, 2002:368).

The Basic Law maintains all law previously in force in Hong Kong, including the common law, the rules of equity, and customary Chinese law, in addition to statutes and secondary legislation.<sup>42</sup> The Basic Law also guarantees the jurisdiction of the Hong Kong judiciary over all Hong Kong cases (albeit subject to prior, general limitations on jurisdiction);<sup>43</sup> conserves the established organisation of the judiciary;<sup>44</sup> provides that courts are to “exercise judicial power independently, free from any interference”;<sup>45</sup> and that “the judicial system previously practiced in Hong Kong shall

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<sup>42</sup> Article 8, Hong Kong Basic Law.

<sup>43</sup> Article 19, Hong Kong Basic Law.

<sup>44</sup> Article 81, Hong Kong Basic Law.

<sup>45</sup> Article 85, Hong Kong Basic Law.

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be maintained except for those changes consequent upon the establishment of the Court of Final Appeal....”<sup>46</sup> Significantly, Article 92 authorises recruitment of Permanent Judges of the Court of Final Appeal from other common law jurisdictions, evidently in hopes of bolstering confidence in the post-1997 judiciary. In theory, it is possible to have a five-member Court of Final Appeal consisting of only one ethnic Chinese (the Chief Justice), three British (or other Commonwealth countries) expatriate permanent judges, and a foreign non-permanent judge. The Basic Law additionally permits the Hong Kong courts to use the comparative method and cite the precedents of other common law jurisdictions as legal authority in Hong Kong.<sup>47</sup>

### 4.4. ENFORCEMENT MECHANISMS

Several Basic Law provisions concern the effective implementation of China’s fundamental policies respecting Hong Kong. Consider the following. Article 11 provides, “No law enacted by the legislature ... shall contravene [the Basic Law]”; Article 23 obligates the territory to “enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organisations or bodies from conducting political activities in [the Hong Kong SAR], and to prohibit political organizations or bodies of [the Hong Kong SAR] from establishing ties with foreign political organizations or bodies”; and Article 159 requires, “No amendment to [the Basic Law] shall contravene the established basic policies of the People's Republic of China regarding Hong Kong.” The explicitness of these provisions is no guarantee of

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<sup>46</sup> Article 81, Hong Kong Basic Law.

<sup>47</sup> Article 92, Hong Kong Basic Law.

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their being heeded; their practical efficacy thus depends on effective enforcement and oversight. In designing a constitutional framework for bounded autonomy, the government must ensure above all that a trespass of the limits of autonomy will be effectively checked and rectified (Chen, 1988:122). Intentionally or unintentionally, the drafters of the Basic Law set up oversight mechanisms that might be classified, analytically, as the “police patrol,” the “fire alarm,” and the “fire extinguisher.”

### 4.4.1. POLICE PATROL OVERSIGHT

“Police patrol” describes the direct inspection of defiant agency behaviour by the principal itself (see Shepsle, 2010). “Police patrols” enable the principal to initiate detection of agency malfeasance and impose sanctions immediately. Police patrol mechanisms were created in profusion by the Drafting Committee. Article 160 of the Basic Law provides that extant laws of Hong Kong found inconsistent with itself in the post-1997 period shall be amended or repealed, following the “procedures” provided in the Basic Law. Article 17 provides that the NPCSC may, after consulting with its own Basic Law Committee, invalidate any act of the Legislative Council touching Mainland China-Hong Kong relations that it has found inconsistent with the Basic Law. In line with Article 67 of the Chinese Constitution, Article 158(1) states, “The power of interpretation of this Law shall be vested in the Standing Committee of the National People’s Congress.” Finally, to ensure that Hong Kong’s statute books comply with China’s political preferences, Article 160 of the Basic Law empowers the NPCSC to invalidate any law of Hong Kong found before the transfer of sovereignty to contradict the Basic Law. Taken together, these imply that the NPCSC is entitled to

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issue binding Interpretations relating to any or all provisions of Hong Kong law, and competent to exercise this power to correct agent misbehaviour at any time and in unqualified terms, whenever it deems fit (Wang, 2009:149). This secures for China the last word in Hong Kong politics.

### 4.4.2. FIRE ALARM OVERSIGHT

The drafters also established what might be called the “fire alarm” oversight mechanism, by opening up channels whereby individual litigants may bring to the NPCSC’s attention unlawful acts of the Hong Kong authorities (see McCubbins & Schwartz, 1984). “Fire alarms” conserve the principal’s monitoring costs, as the primary role of identifying agency malfeasance is delegated to other stakeholders. Following the Chinese legal model, the Basic Law distinguishes “final interpretation” from “final adjudication,” a distinction unknown to Hong Kong’s common law system (M. Chan, 1991:28). Article 34 further guarantees the right of Hong Kong residents to challenge in court the acts of executive organs and personnel.

Most importantly, Article 158(3) states, “The courts of [the Hong Kong SAR] may also interpret other provisions of [the Basic Law] in adjudicating cases. However, if the courts ... in adjudicating cases, need to interpret the provisions ... concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Government and [the Hong Kong SAR], and if such interpretation will affect the judgments on the cases, the courts of [the Hong Kong SAR] shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National

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People's Congress through the Court of Final Appeal ... *When the Standing Committee makes an interpretation of the provisions concerned, the courts ... in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected [emphasis added].*"

This mechanism for making judicial references of Basic Law provisions to the NPCSC was modelled on the preliminary rulings procedure from national supreme courts to the European Court of Justice (Lo, 2007: 164). As the "fire-alarm" oversight mechanism within the Basic Law, it works as follows: litigants play the leading role by identifying (presumably through being adversely affected by) governmental misdeeds and complain to the courts. If a complained-of misdeed is so serious as to have reached the appellate level, and to impinge on the political interests of China, the "fire alarm" rings, with the Court of Final Appeal making a compulsory referral to the NPCSC, petitioning the latter to intervene directly to right the wrong (Ling, 2007:629). Importantly, the NPCSC's Interpretations may negate the very precedents of the Court and *its* interpretations of the Basic Law (Wang, 2007:611).

### 4.4.3. FIRE EXTINGUISHER OVERSIGHT

Finally, the drafters invented yet a third monitoring mechanism: the (self-help) "fire extinguisher," which empowers both individuals and private organisations to resolve their complaints at home, without need of China's intervention, by suing the SAR regime in Hong Kong courts for breaches of the Basic Law (see Shepsle, 2010:432). Compared to the "police patrol" or the "fire alarm," the "fire extinguisher" is generally less costly and time-consuming for political principals. Consider Article

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158(1), which states that the NPCSC “shall authorize the courts of [the Hong Kong SAR] to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of [the Hong Kong SAR].” The Chinese drafters, in a joint meeting of the Mainland China-Hong Kong Relations and Political Structure Subgroups convened on 3 August 1987, expressed a general view that Hong Kong courts would be prone to “get it wrong” in their interpretations of the Basic Law, causing embarrassment to the Chinese government, or even souring relations with a friendly nation; this necessitated a restriction of the scope of justiciable acts and empowerment of the NPCSC to overturn “wrong” interpretations.<sup>48</sup>

Nevertheless, most members of the Drafting Committee were able to reach a general consensus that a judicial competence to interpret the Basic Law was necessary for the sake of continuity with the common law system already in place in Hong Kong; entailing, practically, that “once a law is passed by the legislature, only the courts have the power to interpret it ... [thus] ... in the future, the courts ... should have the power to interpret the Basic Law while adjudicating cases” (Lee, 1988:310). A compromise was finally reached in the Eighth Plenary Session of the Drafting Committee, when the Mainland China-Hong Kong Relations Subgroup announced that it is permissible “to increase the power of the courts of [the Hong Kong SAR] in interpreting the Basic Law,” and that because of this, “the [NPCSC] will not interpret those provisions of the Basic Law which are within the limits of the autonomy of [the Hong Kong SAR] and which are involved in the adjudication of cases by the courts of [the Hong Kong SAR].”<sup>49</sup> NPCSC Hong Kong Basic Law Committee Member and

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<sup>48</sup> Personal interview with Mr. Martin Lee, S.C. (former Member of the NPCSC Hong Kong Basic Law Drafting Committee) (7 December 2011).

<sup>49</sup> *Report by the Subgroup on the Relationship Between the Central Authorities and the Hong Kong Special Administrative Region on the Amendment of Articles, in Basic Law Drafting Committee*

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Dean of Tsinghua Law School Wang Zhenmin (2009:149) interpreted this settlement as implying that China would refrain from interfering with judicial interpretations of the Basic Law that fall within the scope of the territory's autonomy.

The empowerment of post-1997 courts to interpret the Basic Law is explicable after all, quite apart from its cohering with the constitutional democratic and "One Country, Two Systems" principles of the Basic Law. Returning to the three hypotheses of principal-agent relationships identified by Stephenson (2011:1441), above, the Hong Kong colonial courts at the time of the Basic Law's drafting surely met the "ally principle" by showing policy preferences similar to China's. These judges, who would remain in employment according to Article 93 under no less favourable conditions after the handover than before, have been described as "conservative, inward looking, and parochial, showing excessive deference to executive policies and legislative sovereignty, and demonstrating only half-hearted commitment to fundamental human rights" (J. Chan, 1998; see also Davis, 1997); and as constituting a judicial culture that preferred order to rights (Tai, 1999:64). Consider the Supreme Court's 1987 decision in *The Home Restaurant Ltd. v Attorney General*,<sup>50</sup> which held that the ICCPR, because it is an international treaty, does not have the force of law in Hong Kong. Rarely invited to pronounce on the validity of primary legislation, the courts had predominantly avoided politically contentious issues whenever possible (Miners, 1986:63). In fact, Kevin Zervos (2010), then an official of the Attorney General's Chambers and since 2011 the Director of Public Prosecutions of the Hong Kong SAR, admitted retrospectively that the constitutional decisions of the colonial courts had

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*Secretariat, Collection of Documents of the Eighth Plenary Session of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* [in Chinese], at 8-9 (1989).

<sup>50</sup> *The Home Restaurant Ltd. v Attorney General* [1987] HKLR 237 (Hong Kong High Court).

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made “very little impact” on the legal system.<sup>51</sup>

Now consider the delegation of constitutional interpretive powers to the courts in the light of three leading hypotheses in the principal-agent literature about the conditions under which principals are willing to delegate greater discretion to agents (Stephenson, 2011:1441): the “ally principle,” when the agent’s policy preferences are reasonably expected to be similar to the principal’s; the “uncertainty principle,” when no connection between policies and outcomes is certain; and the “expertise principle,” when the agent’s informational advantage is reasonably expected to increase. The “uncertainty” hypothesis explaining delegation of Basic Law interpretation to the courts mirrors delegation to the Chief Executive against a background of unprecedented sub-national autonomy. The “expertise principle” is equally easily discerned. From China’s perspective at the time of the drafting of the Basic Law, delegating broad constitutional interpretive powers to the courts would have seemed safe and harmless enough. It was traditionally said that the rule of law, not democracy, was the foundation of Hong Kong’s economic success (see Arner & Hsu, 2008). Undoubtedly, the colonial courts were institutionally sufficiently insulated from the political branches to function fairly and expeditiously in applying English-derived common law principles to commercial cases.

It has been vigorously contested by some Mainland Chinese Basic Law drafters and Chinese-trained academics whether the courts’ power to interpret the constitution under Article 158 amounts to full-fledged “constitutional review” leading to the conclusive and unconditional invalidation of statutes (see Fan, 2006:186). After all, no provision of the Basic Law expressly provides for competence

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<sup>51</sup> Personal interview with Mr. Kevin Zervos, S.C. (Director of Public Prosecutions, Government of the Hong Kong SAR) (2 November 2011).

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in the courts to invalidate acts of the Legislative Council. Indeed, the legitimacy of constitutional review was long in doubt, at least on the Chinese side, due to this lack of textual reference. Thus, they reason, the courts may not void statutes, because judicial interpretations, being inferior to legislation in the hierarchy of legal norms, cannot override legislation (Zhou, 1993). Writing in 1994, Peter Wesley-Smith (1994:48), an expert on Hong Kong constitutional law and the former Dean of the Faculty of Law at the University of Hong Kong, admitted that he did not know whether the Hong Kong courts would retain the power to review acts of the legislature after 1997.

In fact, prominent Basic Law drafters from both China and Hong Kong have warned against courts striking down primary legislation on constitutional grounds. Shao Tianren, Co-Convenor of the Mainland China-Hong Kong Relations Subgroup, argued that the supremacy of Parliament (*mutatis mutandis* the National People's Congress), rather than the courts, has always been the *grundnorm* of Hong Kong, before and after 1997; Wu Jianfan, a member of the same Subgroup, argued likewise that Article 19 of the Basic Law, which provides that "restrictions on [the courts'] jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained" forbade the courts any power to strike down statutes, as parliamentary sovereignty had constituted a basic norm in the colonial legal system (cited in Chan, 1999:1018). Liu Yiu-chu (1988: 56), Hong Kong-based Basic Law drafter and NPC Deputy argued that, "It would be *strange* to implement the 'one country, two systems' policy by giving [the Hong Kong SAR] courts the power of final adjudication over disputes which concern the 'constitutionality' of [Hong Kong SAR] legislation ... It would amount to establishing the supremacy of the [Hong Kong SAR] judiciary not

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only over the [Hong Kong SAR] executive and legislature, but also over the [Chinese] Central Government in all matters covered by the Basic Law.” Wu Jianfan (1988: 76) similarly commented that, to give the Court of Final Appeal “the power to declare a portion of the [legislation] or the entire [legislation] invalid” and review “whether laws are in accordance with the Basic Law and legal procedures” may possibly contravene the Chinese Constitution, which empowers the NPCSC “to review local regulations enacted by the organs of state power in the provinces, autonomous regions, and municipalities directly under the Central Government and can repeal those local laws and regulations that contravene the Constitution,” and may even result in “a dramatic change in the common law judicial system [of Hong Kong],” and hence “it is doubtful whether this method of review is feasible.” Drafter Xiao Weiyun (2003:873) recalled that, “during the drafting process of the Basic Law, there was no mentioning of endowing the courts of [the Hong Kong SAR] with American-style judicial review powers.”

These perspectives are consistent with Chinese constitutional doctrine and legislative drafting practices. Local Chinese courts have no competence to declare provincial or municipal ordinances invalid; these courts may only ignore local ordinances when these are found to contradict national legislation, giving direct effect to the superior (*e.g.* NPC) enactment in the hierarchy of laws (Cottrell & Ghai, 2001:211). The practical difference between ignoring an impugned ordinance and invalidating it is, that the former only affects the particular case at bar, without impugning the *general* validity of the ordinance; which may still be relied on by other branches of government and even applied in other court cases (see Chen, 2011:148). Some scholars have argued that “judicial ignoring” is not necessarily impotent; it may

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catch the attention of the local political branches and the NPCSC, leading them to reconsider the impugned legislation (Song, 1998; Wong, 2004).

The upshot is that the Chinese members of the Drafting Committee expected judicial interpretation of the Basic Law to reveal information about grave legal inconsistencies, so that the NPCSC might undertake corresponding constitutional revisions. The Macao Court of Final Appeal, the supreme court of the former Portuguese colony, established in 1999, followed these publicists, and twice<sup>52</sup> held that the courts must refrain from applying enactments of the Legislative Assembly which contravenes the Macao Basic Law, but may not invalidate them, as courts have no competence to render generally binding judgments (Lo, 2011).

Despite giving the Hong Kong courts a conditional power to interpret the Basic Law, the drafters also set in place a number of safeguards that prevent the courts, as fire-extinguishers, from going too far from their mandate. Consider Article 80, which states, “The courts ... shall be the judiciary of [the Hong Kong SAR], exercising the adjudicative power of [the Hong Kong SAR].” To restrict the role of courts to “adjudication” instead of the broader notion of “judicial” implies that their ends are limited to resolving disputes but not invalidating statutes inconsistent with the Basic Law (Lo, 2011:468). Consider the fact that in Chinese political discourse the rubric “judicial system” normally sweeps-in the procuracy with the judiciary; their coupling mirrors the long-standing ideological bias of the Chinese Communist Party that courts are fundamentally punitive and policy-implementing organs, rather than ones that invent policy in their own right (Ip, 2011).<sup>53</sup> Now consider Article 19 of the Basic

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<sup>52</sup> *Case No 28/2006* (July 18, 2007); *Case No 8/2007* (30 April 2008) (Macao Court of Final Appeal).

<sup>53</sup> Indeed, the legal vocabulary of the People’s Republic of China contains only the narrow term “adjudicative organ” to describe the courts; Section 3 of the People’s Courts Organic Law of 2006 determines the objectives of the adjudicative function to be to “safeguard the dictatorship

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Law, which excludes “acts of state” such as foreign affairs and national defence from the jurisdiction of the Hong Kong courts. The courts are also required to obtain a “certificate” from the Chief Executive answering questions of fact concerning acts of state that arise in the course of adjudication. This legally binding certificate is to be based on a more senior certifying document issued by the Chinese government. The post-1997 SAR regime could in theory contend in the courts that every statute or executive decision of it challenged is in fact an act of state and thus non-justiciable.<sup>54</sup>

## 5. DISCUSSION

In this chapter I have explored the strategic structure of the Hong Kong Basic Law from both historical and institutional design perspectives. In analogising the Basic Law to a political bargain, I wish to disclaim the error of identifying such an agreement with a “social contract” agreed between all of the citizens of Hong Kong (see R. Posner, 1987:9). I have rather endeavoured to show evidence that many important provisions of the Basic Law were designed, within the Joint Declaration’s constraints, to serve the political and economic interests of elite political factions, namely the Chinese Communist Party and Hong Kong’s influential business sector.

The circumscribed form of liberal-democratic government envisioned in the Basic Law reflected foremost the British government’s necessity of vindicating its expressive-symbolic interests when handing over millions of British subjects to a Leninist Party-state; whereas, the neo-liberal economic policies constitutionalised by the Basic Law reflected a political exchange between China and the Hong Kong

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of the proletariat” and “educate citizens to be loyal to the Socialist motherland.”

<sup>54</sup> Personal interview with Mr. Martin Lee, S.C. (former Member of the NPCSC Hong Kong

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business elite. The supremacy of the NPCSC over the territory's political structure, and the concentration of power in the Chinese-appointed Chief Executive were rooted in China's preferences for sovereign unity and political control over Hong Kong affairs. The spirit of the polity enshrined in the Basic Law was that of *limited* rather than democratic government. The Basic Law principles reviewed above essentially restrict the SAR regime to devising policies that discourage negative externalities and promote positive ones (see R. Posner, 2007:681). On the dark side, the limited suffrage arrangements in the Basic Law have not empowered the citizenry to check government officials who trespass the confines of their constitution.

The Chinese Party-state and Hong Kong business elites had strong incentives to structure the Basic Law so as to reduce expected agency and other transaction costs. To this end the Chinese-appointed drafters installed multiple oversight mechanisms into the Basic Law to enable correction of any agent-drift by the post-1997 government in its implementation of the constitution's substance. I have shown that the inclusion of constitutional rights and judicial independence in the Basic Law was in part motivated by a political-economic strategy of shoring up confidence and sustaining foreign investment in Hong Kong. For the rest, I have contended that the delegation of constitutional interpretive powers to the territory's courts was calculated not just to raise a cheer in Hong Kong for China's commitment to constitutionalism, but to operate at the same time as a "fire extinguisher" principal-agent oversight mechanism.

None of my reasoning should be read as excluding or dismissing instrumental considerations. Constitutions can and usually do serve both expressive-symbolic and

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Basic Law Drafting Committee) (7 December 2011).

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instrumental ends (Hamlin, 2011). While China has conceded extraordinary autonomy to Hong Kong in conducting its internal affairs and external relations, the Mainland Chinese members of the Drafting Committee were mindful that without effective levers of higher control, these agents might stray unbearably far away from the common political interests of China and the Hong Kong business elite in upholding Chinese sovereignty, slowing down democratic political reform, and maintaining business-friendly public finance policies.

## CHAPTER 4

# CHINA, BRITAIN, AND THE QUEST FOR CONSTITUTIONAL REVIEW IN HONG KONG

### 1. INTRODUCTION

On 23 February 1997, the NPCSC of the People's Republic of China rendered its verdict on the fate, after the transfer of sovereignty scheduled for 1 July 1997, of Hong Kong laws already existent.<sup>1</sup> It justified the *Decision Regarding the Treatment of the Existing Hong Kong Laws According to Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* ("Existing Laws Decision" hereafter) on the basis of Article 160 of the Hong Kong Basic Law, which states that upon the transfer of sovereignty "the laws previously in force in Hong Kong shall be adopted ... except for those which the [NPCSC] declares to be in contravention of this Law."

The NPCSC ended up nullifying in whole or in part twenty four laws, including liberal statutes enacted by the Chris Patten Government that had safeguarded the rights of association, assembly and demonstration; expanded the size of the electorate for legislative elections; and, most importantly for the purposes of this study, four sections of the Hong Kong Bill of Rights Ordinance 1991 (Ghai, 2007). However, the NPCSC neither quashed the Bill nor abrogated the competence

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<sup>1</sup> *Decision of the Standing Committee of the National People's Congress Regarding the Treatment of the Existing Hong Kong Laws According to Article 160 of the Basic Law of the People's Republic of China* (Adopted at the 24<sup>th</sup> Meeting of the Standing Committee of the Eighth National People's Congress on 23 February, 1997).

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of the Hong Kong judiciary to strike down primary legislation as unconstitutional. In short, China's supreme constitutional authority acquiesced in the continuance into the post-1997 era of the territory's colonial institution of constitutional review.

It has been argued earlier that the venturing of constitutional review by an authoritarian state is tantamount to its investing in an autonomous court in face of risk and uncertainty. The construction undergoes the stages of activation, consolidation and ascendancy. It was argued that expressive-symbolism dominates such a government's calculus to acquiesce in the activation of review by litigants and judges; that the consolidation and perdurability of review depend on how much the regime trust the constitutional court, which in turn rests on the authorities' perception of the likelihood of judicial cooperation; and that ascendancy in judicial activism is the likelier to achieve ascendancy the higher the transaction costs to the regime of policing defiant judicial behaviour.

In this chapter I apply this three-stage schema to answer the following questions: *Why did the Government of British Hong Kong acquiesce in the activation by the courts of full-fledged judicial review only in 1991, a mere six years before the expiry of its 155-year rule? Why did the NPCSC abandon its earlier avowals to abolish judicial review in Hong Kong altogether?* This chapter is organised as follows. In Section 2 I advance the argument that the Government of Hong Kong, under immense political pressure from the United Kingdom Parliament and the local citizenry, adopted a Bill of Rights to reflect its strategic interests in an expressive-symbolic condemnation of China's Tiananmen Square crackdown in 1989. In Section 3 I begin with a statistical overview of the Bill of Rights decisions of the Appellate Jurisdiction of the Supreme Court of Hong Kong ("the Court" hereafter) and the Judicial Committee of the Privy Council

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(“the Board” hereafter) in London. Then I undertake a detailed, chronological study of all of the important decisions in which the Court and the Board judged the conformity of legislation and executive decisions to the Bill of Rights. Finally I demonstrate that the Justices of the Supreme Court, both judicially and extra-judicially, had consistently and strongly signalled their cooperativeness with China, their respect for its preference against judicial activism and their caution before its hostility towards change to the policy or constitutional *status quo*, while at the same time inscribing in their judgments potentially activist methods of constitutional interpretation. Section 4 follows up the predictions of my theory, illustrating how the NPCSC reciprocated the cooperativeness of the courts by investing constitutional competence in their post-1997 successors, as if the former trusted the latter, and acquiescing in the validity of the courts’ Bill of Rights case law. Section 5 concludes.

## 2. ACTIVATION

### 2.1. PRE-BILL OF RIGHTS CONSTITUTIONAL REVIEW

Constitutional review of a sort existed during most of British rule. The Charter of Hong Kong (later known as the Hong Kong Letters Patent), first issued in 1843, provided a basis on which the courts could rely to gauge the validity of legislative and executive policy choices. In 1913 Supreme Court Justice Henry Gompertz asserted in the case of *Ibrahim*<sup>2</sup> that the Legislative Council was “a strictly

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<sup>2</sup> *Ibrahim* [1913] 8 H.K.L.R. 3 (Hong Kong Supreme Court).

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non-sovereign body, deriving its powers wholly from the Royal Letters Patent. Any enactment it may purport to pass which is not within the scope of the Letters Patent is made without jurisdiction, and the Courts would have no hesitation in pronouncing it bad.” Nevertheless, as admitted by Kemal Bokhary, a former Justice of Appeal of the Supreme Court, constitutional review before the enactment of the Bill of Rights “did not practically exist.”<sup>3</sup> While the courts were competent at commercial adjudication, they like their Singapore counterparts played only a marginal role in constitutional governance (see S. Zhu, 2007). This was explicable within the terms of my theoretical framework as expounded in Chapter 3. British Hong Kong was never a liberal democracy in either constitutional form or governmental practice; its political elites always unashamedly and explicitly rejected any prospect of democratic reform. Indeed, the Government could have acquired few symbolic benefits from activating liberal democratic institutions like elections or constitutional review, given that the sources of political legitimacy lay elsewhere, *i.e.* administrative efficiency and economic performance (see Chapter 3).

Two further problems obstructed the exercise of constitutional review during the colonial era. Firstly, the constitution was more like an instrument for public management than the organic law of a forum for the aggregation of political preferences; in itself it was a poor basis for constitutional review (see Wesley-Smith, 1994). Few of the classical principles of constitutionalism were ever enshrined in the territory’s “rudimentary” constitutional instruments (Chen, 2007:673). The pragmatic standards ambiguously drafted in the wording “the peace, order, and good government of the Colony” were the only constitutional constraints on the merits of

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<sup>3</sup> Personal interview with Justice Kemal Bokhary (Former Justice of Appeal of the Hong Kong Supreme Court) (8 November 2011).

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primary legislation. The broad language and the lack of any mention of rights in the Letters Patent or the Royal Instructions left the judiciary very few grounds upon which to review public policies imposed from the top down by the Government.<sup>4</sup> Secondly, while the United Kingdom, Hong Kong's sovereign, could be considered a liberal democracy, its doctrine of parliamentary sovereignty does not permit its own courts to challenge the constitutionality of legislation, at least not until the emergence of European Union law at the earliest, if not the enactment of the Human Rights Act in 1998. This state of affairs in Britain itself meant that little precedent was available to guide the Hong Kong courts in constitutional interpretation or the judicial review of primary legislation (Wesley-Smith, 1994).

Most Hong Kong judges, being either British nationals or lawyers trained in the English legal tradition, experienced considerable uneasiness in exercising powers that their more prestigious counterparts in the United Kingdom had never wielded (Byrnes, 2000). However, the unwillingness of Hong Kong judges to exercise constitutional review was not necessarily a demerit, politically. As argued above in Chapter 3, the trustworthiness of the Hong Kong judiciary, accumulated over more than a century of deference to the colonial regime, contributed to persuading the framers of the Basic Law to adopt the principle of judicial interpretation of the constitution.

### 2.2. THE EXPRESSIVE DIMENSIONS OF THE BILL OF RIGHTS

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<sup>4</sup> For example, pursuant to Article 7 of the Letters Patent, the Governor was vested with immense powers to legislate as he deemed fit for "the peace, order, and good government of the Colony."

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Before turning to the details of the Hong Kong Bill of Rights, it may be useful to review first the institutional design of comparable documents within the Commonwealth (see Erdos, 2010). The Canadian Charter of Rights and Freedoms 1982, for example, permits the courts to strike down legislative acts; however, it also empowers Parliament to override judicial invalidations by declaring that the challenged provisions shall remain in force “notwithstanding” the Charter. The New Zealand Bill of Rights Act 1990 requires the judiciary to interpret statutes so as to render them consistent with the Bill, yet preserves the validity of statutes even when such interpretation proves impossible. The United Kingdom’s Human Rights Act 1998 mandates the higher courts to interpret statutes consistently with the European Convention on Human Rights, and to issue declarations of incompatibility if they find the challenged primary legislation to contradict the Convention. Such declarations, however, are not binding on Parliament, and nor does any provision guarantee that Parliament must heed them (see Kavanagh, 2009). Thus, notwithstanding that varying constitutional review powers were granted to the courts by these rights enactments, the Canadian, New Zealand, and United Kingdom Bills uniformly leave Parliament in ulterior control of the constitutionality of their own statutes.

By contrast, the Hong Kong Bill of Rights Ordinance 1991 empowers the courts at all levels to declare existing primary legislation to be *repealed* if found inconsistent with the International Covenant on Civil and Political Rights (“ICCPR” hereafter). The courts were also empowered to nullify legislative enactments inconsistent with the ICCPR as entrenched by the amended Letters Patent. In effect, it supplanted parliamentary sovereignty with a very strong form of judicial supremacy.

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Thus, this Bill of Rights broke radically with the constitutional tradition of Hong Kong from 1842 up to 1991. The colonial regime had been an authoritarian one which held in reserve the full panoply of repressive legal instruments needed to protect its political monopoly. For example, the Criminal Procedure Ordinance and the Police Force Ordinance licenced the police to search private premises without a warrant; the Emergency Regulations Ordinance provided for imprisonment without trial on grounds of public security; the Societies Ordinance required all “societies” to register with the Commissioner of Police; the Crimes Ordinance criminalised the elusive offense of “loitering,” authorising the police to arrest people whom they perceive as wandering about with “no clear purpose”; the Education Ordinance prohibited the discussion of politics in schools; the Public Order Ordinance criminalised as “unlawful assembly” the meeting of three or more people in any public place, unless the participants had received prior permission from the Commissioner of Police (see Ma, 2007).

Notably, the demand for political rights and civil liberties was consistently low throughout British rule amongst a politically apathetic local populace (see DeGolyer & Lee Scott, 1996; Ma, 2007). Hence the colonial regime, governing without opposition, had little incentive to confer on such a populace rights which might well have severely burdened it with transaction costs. Defying calls for one from academia, Attorney General Jeremy Mathews frankly affirmed in 1988 that he had no plans to introduce a Bill of Rights. Even as late as April 1989, when Beijing students had already assembled in Tiananmen Square to protest the Chinese government, Hong Kong Secretary for Constitutional Affairs Michael Suen maintained the Government’s usual hostility to constitutional reform, asserting that no human rights

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legislation would be considered until China had finalised the Basic Law in 1990 (Jayawickrama, 1992).

Hirschl (2004) has theorised the empowerment of constitutional courts by strategic coalitions of hegemonic yet increasingly threatened political and economic elites as a policy instrument used to insulate the *status quo* against political uncertainty. Adducing evidence from Canada, New Zealand, Israel and South Africa, Hirschl argued that bills of rights could further the interests of anxious rulers in two main ways: by preserving existing political and social arrangements, and by assisting politicians to shift blame for controversial decisions onto the courts (Hirschl, 2006). Accordingly, Hirschl concluded (2000; 2004; 2005a; 2005b) that the Government of Hong Kong's adoption of the Bill of Rights and constitutional judicial review in June 1991, after the signing of the Joint Declaration, in 1984, stemmed directly from its imminent evaporation of political power. Thus, the colonial regime was strengthening the courts to uphold its imperialist ideological hegemony on its behalf beyond the time when its tenure would end; hoping thereby to perpetuate many of its neo-liberal preferences in face of looming political uncertainty.

However, the origins of constitutional review do not sit comfortably with this theory. The Government of Hong Kong faced no serious threat in 1991. The British governing elite were committed peacefully to withdraw from Hong Kong in 1997, according to the Joint Declaration; the business elite was to take up prominent positions in the new Legislative Council, as promised by China; and the administrative elite was to retain its prestigious position within the executive branch, pursuant to the Basic Law. Property rights were largely secured and the economy was clearly flourishing. By 1997, Hong Kong was the second "most competitive

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economy” in the world (after Singapore) according to the World Economic Forum and an “advanced economy” as noted by the International Monetary Fund (Tang, 1999, 281) with Gross Domestic Product (GDP) *per capita* higher than that of the United Kingdom, something unprecedented in the history of the British Empire (Lau, 1997; Williams, 2005). The formation of rights-based constitutional review in 1991 was thus an unlikely measure for securing existing policy bargains against future political competition; or for reducing the electorate’s agency costs in controlling the government; or for making credible economic commitments to attract foreign investment; or for enhancing legislative discipline of a defiant bureaucracy.

The 1989 Tiananmen Square crackdown in Beijing unleashed an unprecedented demand for rights protection amongst both the people of Hong Kong and international stakeholders; this was a far more proximate cause of the adoption of the Bill of Rights (Ghai, 1997; Jones, 2001; Sing, 2003; Williams, 2005; Scott, 2010:7; Tam, 2010). Political attitudes amongst the Hong Kong citizenry changed fundamentally: one million citizens took to the streets in an unprecedented demonstration of their support for the protestors in Beijing. This “massive outpour of sympathy” redoubled demand for local constitutional reform: the Hong Kong Alliance in Support of the Patriotic Democratic Movement in China, a body organised by the Democratic camp in response to the Tiananmen events, took in some HK \$30 million (approximately US \$3.8 million) within one month’s time from fund-raising campaigns and public donations (M. Chan, 1996). The events of Tiananmen forced even the big business lobby, affiliated with the pro-China business elite, to lower its profile (M. Chan, 1991:20).

Also shocked by the Tiananmen Square horrors, the United Kingdom

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Government was forced to reassess its authoritarian Hong Kong policy and, most importantly, its cooperative relationship with China since the Sino-British negotiations (Sing, 2003). In the summer of 1989 Whitehall unilaterally suspended scheduled meetings of the Sino-British Joint Liaison Group, and abandoned its previous stance that the Hong Kong people should trust the drafters of the Basic Law (Chan, 1991:20). The United Kingdom may be said to have “formally defected” from its cooperative relationship with China after 1989 (So, 2003). Under considerable international pressure to entrench a neutral body of human rights law like the ICCPR in Hong Kong (Wong, 2007:294), within a month of the crackdown the House of Commons had before it a report by the Foreign Affairs Committee which argued that “A Bill of Rights should be introduced as soon as possible so that it becomes entrenched in the Hong Kong system, and a substantial body of case law on it can be built up. Hong Kong should not arrive at 1997 with its rights and freedoms newly minted and untested” (cited in Lui, 2007:71). In the ensuing months the United Kingdom sought to shore up the territory’s governability, forestall mass emigration and capital flight leading up to 1997 by emplacing confidence-building institutions. These included granting the right of abode in Britain to 50,000 qualified Hong Kong families, building a new airport to symbolise economic prosperity, and framing a representative government (M. Chan, 1996:21).

The Tiananmen Square events were so traumatic that it provided a “trigger” for the colonial regime’s adoption of a justiciable Bill of Rights against a background of explosive demand for rights protection among the local population and international audiences (see Erdos, 2010). In some sense, the Bill of Rights was intended by Whitehall to be a “morale booster” in the territory (Clark, 1991:49). What

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followed was consistent with the general observation that constitutional judicial review has become “probably an inescapable institution under any newly created or seriously modernised constitution” (Robertson, 2010:383). This time, Secretary Suen announced that it was no longer necessary to pin rights protection on the final version of the China-framed Basic Law; and that the Government had already begun reviewing the rights implications of Hong Kong’s existing laws in order to prepare for the introduction of the Bill (Jayawickrama, 1992). The Constitutional Affairs Branch of the Government stressed the importance of the Bill’s being justiciable: “The effect of a justiciable Bill of Rights is to enable a person to challenge directly in the courts legislation or administrative practices which offend against the provisions of a Bill of Rights” (cited in Wong, 2007).

### 2.3. CONSTITUTIONAL DESIGN OF THE HONG KONG BILL OF RIGHTS OF 1991

Overall, the Bill was imposed and drafted from the top down from the United Kingdom government through the Governor to the local civil service.<sup>5</sup> According to Philip Dykes, Assistant Solicitor General at the time, under British pressure, the Secretary for Constitutional Affairs immediately assumed responsibility for policy, and the Attorney General’s Chambers was assigned to draft the Bill, with the assistance of Justice Barry Strayer of the Canadian Federal Court, who spent three months in Hong Kong. There was little popular consultation about the Bill’s substance; for instance, the inclusion of socio-economic and cultural rights was virtually not debated (Byrnes, 2004). Instead of creating *ex nihilo* a comprehensive

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<sup>5</sup> Personal Interview with Mr. Philip Dykes, S.C. (Former Assistant Solicitor General of British Hong Kong) (15 November 2011).

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indigenous rights charter, the colonial authorities merely enshrined *verbatim* the ICCPR, which had been mentioned in the Joint Declaration of 1984. In part, this reflected the Government's inexperience of human rights law: consider that the Legal Department had to build up its library of human rights documents and reference books "almost from scratch," and that "the learning curve was steep" (Byrnes, 2000:325).

The preamble to the Hong Kong Bill of Rights Ordinance of 1991 stated that one of its purposes was "to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong; and for ancillary and connected matters." As of 8 June 1991 the Bill has accorded the ICCPR constitutional status in the territory. Section 3 provides, "All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction"; and, "All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed." Section 4 mandated the courts to construe future legislation so as to be "consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong." Interestingly, Sections 3 and 4 actually did little more than codify common law principles of statutory interpretation which repeal earlier legislation to the extent they contradict later (Panditarante, 2011:434). Section 6 further vested in any Hong Kong "court" or "tribunal" powers to issue orders to grant remedies for violations or threatened violations of the Bill.

Given that the Hong Kong Legislative Council, like the British Parliament, has no competence to bind its successors, the Ordinance itself did not affect the constitutionality of future legislation (Wesley-Smith, 1994). To enable the Bill to

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constrain future legislative behaviour, the Government requested Parliament to amend the Letters Patent by inserting a clause providing, "No law of Hong Kong shall be made ... that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with [the ICCPR] as applied to Hong Kong." The intended result of the amendment was to invalidate, on the grounds of inconsistency with the Letters Patent, any new law made in Hong Kong from 8 June 1991 onwards that infringed the rights and freedoms enumerated in the ICCPR. Statutes already in existence at the time of the Bill's entering into force were to be interpreted in accordance with the Bill wherever possible; legislation entirely inconsistent with the Bill was to be repealed. This amendment clearly echoed with Article 39 of the Hong Kong Basic Law, ratified only one year earlier, which provides for the implementation of the ICCPR in the Hong Kong SAR.

The Hong Kong Bill of Rights, contained in Part II of the Ordinance, creates no new rights; its wide range of political rights and civil liberties were drawn directly from the ICCPR, including: the entitlement to rights without distinction;<sup>6</sup> the right to life;<sup>7</sup> freedom from torture and inhuman treatment;<sup>8</sup> freedom from slavery;<sup>9</sup> the security of the person;<sup>10</sup> the rights of persons unlawfully deprived of their liberty;<sup>11</sup> freedom from imprisonment for breach of contract;<sup>12</sup> liberty of movement;<sup>13</sup> limitations on expulsion from the territory;<sup>14</sup> the right to a fair and public hearing;<sup>15</sup>

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<sup>6</sup> Article 1, Hong Kong Bill of Rights; Articles 2 and 3, ICCPR.

<sup>7</sup> Article 2, Hong Kong Bill of Rights; Article 6, ICCPR.

<sup>8</sup> Article 3, Hong Kong Bill of Rights; Article 7, ICCPR.

<sup>9</sup> Article 4, Hong Kong Bill of Rights; Article 8, ICCPR.

<sup>10</sup> Article 5, Hong Kong Bill of Rights; Article 9, ICCPR.

<sup>11</sup> Article 6, Hong Kong Bill of Rights; Article 10, ICCPR.

<sup>12</sup> Article 7, Hong Kong Bill of Rights; Article 11, ICCPR.

<sup>13</sup> Article 8, Hong Kong Bill of Rights; Article 12, ICCPR.

<sup>14</sup> Article 9, Hong Kong Bill of Rights; Article 13, ICCPR.

<sup>15</sup> Article 10, Hong Kong Bill of Rights; Article 14.1, ICCPR.

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the rights of persons charged with or convicted of criminal offences;<sup>16</sup> freedom from retrospective penal liability;<sup>17</sup> the right to recognition as a person before law;<sup>18</sup> the protection of privacy, family, home, correspondence, honour and reputation;<sup>19</sup> freedom of thought, conscience and religion;<sup>20</sup> freedom of expression;<sup>21</sup> the right of peaceful assembly;<sup>22</sup> freedom of association;<sup>23</sup> the right to marriage;<sup>24</sup> the rights of children;<sup>25</sup> the right to participate in public affairs;<sup>26</sup> equal protection under the law;<sup>27</sup> and the rights of minorities.<sup>28</sup>

Concerned to maintain coherence with the imminent Hong Kong Basic Law, the Ordinance exempts armed forces personnel,<sup>29</sup> prisoners,<sup>30</sup> juvenile detainees,<sup>31</sup> people not having the right to enter and stay in Hong Kong,<sup>32</sup> and persons not having the right of abode,<sup>33</sup> from benefitting from the Bill's protection. Furthermore, the Bill neither provided for a right to self-determination as specified in Article 1 of the ICCPR, nor banned war propaganda and hate speech as required by Article 20. Section 13 of the Bill of Rights Ordinance also provides that the Executive Council and the Legislative Council need not be electable, contrary to the ICCPR.

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<sup>16</sup> Article 11, Hong Kong Bill of Rights; Article 14.2, ICCPR.

<sup>17</sup> Article 12, Hong Kong Bill of Rights; Article 15, ICCPR.

<sup>18</sup> Article 13, Hong Kong Bill of Rights; Article 16, ICCPR.

<sup>19</sup> Article 14, Hong Kong Bill of Rights; Article 17, ICCPR.

<sup>20</sup> Article 15, Hong Kong Bill of Rights; Article 18, ICCPR.

<sup>21</sup> Article 16, Hong Kong Bill of Rights; Article 19, ICCPR.

<sup>22</sup> Article 17, Hong Kong Bill of Rights; Article 21, ICCPR.

<sup>23</sup> Article 18, Hong Kong Bill of Rights; Article 22, ICCPR.

<sup>24</sup> Article 19, Hong Kong Bill of Rights; Article 23, ICCPR.

<sup>25</sup> Article 20, Hong Kong Bill of Rights; Article 24, ICCPR.

<sup>26</sup> Article 21, Hong Kong Bill of Rights; Article 25, ICCPR.

<sup>27</sup> Article 22, Hong Kong Bill of Rights; Article 26, ICCPR.

<sup>28</sup> Article 23, Hong Kong Bill of Rights; Article 27, ICCPR.

<sup>29</sup> Section 9, Hong Kong Bill of Rights Ordinance.

<sup>30</sup> Section 9, Hong Kong Bill of Rights Ordinance.

<sup>31</sup> Section 10, Hong Kong Bill of Rights Ordinance.

<sup>32</sup> Section 11, Hong Kong Bill of Rights Ordinance.

<sup>33</sup> Section 12, Hong Kong Bill of Rights Ordinance.

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Nevertheless, the Bill did entrench relatively stringent standards for derogations, which explicitly bind all public authorities, and initiated a wave of review of existing statutes.

### 2.4. ANALYSIS

In enacting its own Bill of Rights, the Government of Hong Kong had expressed an evaluative judgment of the Chinese Party-state's behaviour in Tiananmen. After all, such a Bill could not have been expected to have exerted any practical constraint on Beijing's human rights attitudes and practices, as the colonial regime had no authority to bind its post-1997 successor. China as incoming sovereign would have all power to repeal any such Bill and abolish constitutional review so soon as the Letters Patent expired. The Bill is therefore best understood as a symbolic expression of the political values to which the Hong Kong people committed themselves at the time and for the indefinite future. While symbolism prevailed in the formation of constitutional review, the Government of Hong Kong nonetheless also infused the Bill with certain instrumental elements designed to strengthen its current credibility and, if possible, prolong its influence after the transfer of sovereignty.

Note that the Hong Kong Bill of Rights is an incomplete document: the enumerated rights are largely overarching principles which leave great room for interpretation in actual enforcement. As always, lawgivers cannot possibly foresee every contingency, but are obliged by practical necessity to render their laws general and incomplete. This incompleteness, however, is not necessarily undesirable in a bill of rights; it enabled the Legislative Council to devolve onto the courts some of the

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policy tasks that otherwise must have been implemented by itself (see Parisi & Fon, 2009). The Bill's rights are circumstantial and open-ended *standards* to assist the adjudicator in making fact-specific determinations in particular situations; contrast them with more specific and well-defined *rules* that reduce the adjudicator's discretion. It follows that standards are less costly for lawmakers to enact than rules, exacting less specificity and so less time and organisational resources in their production. In drafting a Bill of Rights expeditiously by adopting the flexible and open-ended standards of the ICCPR, the colonial regime "externalised" implementation and decision-making costs, outsourcing them to the courts and other adjudicatory bodies (see Parisi & Fon, 2009:11). They may well have been striving to be seen as having fulfilled the rights guarantees they promised their constituents, while preferring to sidestep the sort of rights decision-making in concrete cases which could have attracted political controversy (see Stephenson, 2010:290).

Note, too, that the Bill neither changed Hong Kong's authoritarian politics, nor imposed any obligation to provide for anything beyond "negative" civil and political rights (*viz.* "positive," socio-economic rights). More importantly, the Bill reflected an attempt by the Hong Kong and United Kingdom governments to reinterpret the bargain struck in the Joint Declaration and in what would later become the Basic Law. Although the Bill of Rights cohered with Article 39 of the Basic Law in providing for implementation of the ICCPR in the context of a non-representative government, at the same time it exploited the Basic Law's promise to conserve after the transfer of sovereignty Hong Kong's common law jurisprudence to entrench constitutional review in the Supreme Court's case-law ahead of 1997. Note that constitutional review in Hong Kong had not been anticipated by the framers of the Basic Law in the

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mid- and late-1980s, an era in which the Court had been uniformly deferential to the colonial regime.

## 3. CONSOLIDATION AND NON-ASCENDANCY

### 3.1. CHINA'S PREFERENCES WITH REGARD TO CONSTITUTIONAL REVIEW

Needless to say, China's leaders were outraged by a unilateral constitutional review bargain struck only in the "eleventh hour" of British rule, and really aimed at discrediting China's treatment of political dissidence. On the day of the enactment of the Bill of Rights Ordinance, the Chinese Ministry of Foreign Affairs issued a statement asserting China's right to examine its compatibility with the Hong Kong Basic Law (see Ghai, 1997:460; Davis, 1997). China was particularly critical of the Bill's encroachment on and *de facto* superiority over other statutes. Taking into account that the Bill had led to the repeal of a number of repressive provisions in criminal law and public security law that had endowed the executive authorities with broad powers, China saw the Bill as a foreign plot to impose costly constraints on the future SAR regime (Wesley-Smith, 1994; Cheung & Chen, 2004).

China had never intended to have the ICCPR directly enforced by the Hong Kong courts,<sup>34</sup> and had regarded the Bill of Rights as just a vehicle for the British government's political posturing.<sup>35</sup> Full-fledged constitutional judicial review of legislation in Hong Kong had not been anticipated by the framers of the Basic Law in

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<sup>34</sup> Personal interview with Mr. Philip Dykes, S.C. (Former Assistant Solicitor General of British Hong Kong) (15 November 2011).

<sup>35</sup> Personal interview with Mr. Shiu Sin-por (Former Deputy Secretary-General, NPCSC Hong Kong SAR Preparatory Committee) (4 November 2011).

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the mid- and late-1980s, who operated in an era which the Court was doubtlessly deferential.<sup>36</sup> Nevertheless, China also appeared to have appreciated the fact that the Bill neither created new rights nor required democratisation of the political system, and so cohered with the Basic Law, Article 39, providing that the ICCPR “as applied to Hong Kong shall remain in force and shall be implemented...” An ICCPR-based Bill of Rights, on this view, would be marginally tolerable so long as it came neither entrenched nor a competitor of the Basic Law for constitutional supremacy. Indeed, after some initial hostile rhetoric, China adopted a “tolerant” attitude towards the proposition of a judicially enforceable statutory bill of rights.<sup>37</sup>

Evidence suggests that China was concerned with the permissible extent of judicial behaviour in pursuance of the Bill of Rights. Ji Pengfei, former Chairman of the Basic Law Drafting Committee, denounced what he characterised as an attempt to empower the courts to overmaster Hong Kong’s law-enforcement agencies, which he believed would undermine the stability of the existing system during transition (Wong, 2007). In spite of China’s repeated criticisms, the Government of Hong Kong did not hasten its constitutional adventure. In 1992, Chris Patten, formerly Chairman of the Conservative Party and the architect of his Party’s victory in the 1992 general election, became Hong Kong’s final Governor, charged by Prime Minister John Major with overseeing the windup of the Empire’s last bastion (Lau, 1997:48). Unlike the Governors before him, Patten was a politician rather than a career civil servant of the Colonial Office. Upon his arrival, he signalled a sea-change in the Government’s constitutional policy, announcing his ambition to entrench civil and political rights

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<sup>36</sup> Personal interview with Ms. Maria Tam (Former Member of the NPCSC Hong Kong Basic Law Drafting Committee) (17 December 2011).

<sup>37</sup> Personal interview with Mr. Shiu Sin-por (Former Deputy Secretary-General, NPCSC Hong Kong SAR Preparatory Committee) (4 November 2011).

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for perdurable continuance even after the 1997 handover (Williams, 2005). Patten's first policy address to the Legislative Council outlined his political reform plans to "give the local people as much democratisation as possible without breaching the terms of the Basic Law" (Tsang, 1997). The centrepiece of this agenda was an electoral reform package designed around the blind spots of the Basic Law (Pepper, 1997). It sought to transform a closed and authoritarian administrative state into one controlled by three tiers of fully elected assemblies, with the Legislative Council at its apex.

Mindful of the Basic Law's restriction that no more than a third of the legislature's seats may be popularly elected, the "Patten package" created instead of geographical seats nine new "Functional Constituencies" which, however, were configured so as to represent all employed people in Hong Kong. The implication was that all non-dependents were to dispose of two votes, one geographic and one functional. Patten also abolished corporate voting. Consequently, the electorate was enlarged to 2,700,000 from a mere 104,609 (Sing, 2007). The Patten package amounted to the introduction "through the backdoor" of a fully elected legislature (Lau, 1997:48). In the ensuing 1995 general election around one million voters turned out; two thirds of them voted for the Pan-Democratic Camp at the expense of pro-China politicians (M. Chan, 1996).

China had responded immediately to the Government of Hong Kong's revolutionary moves, concluding that it would be impractical to put off preparatory work on the Hong Kong SAR until 1996, the year specified in the Basic Law (Goodstadt, 2000:731). On 2 July 1993 the NPCSC set up the Preliminary Working Committee to serve as a *de facto* dual power to the Patten Government charged with

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preparing recommendations for China's leaders about how to minimise uncertainty over the transfer of sovereignty and win the debate with the British over the pace of political reform in Hong Kong. In its 1995 comments on the Bill of Rights, the Preliminary Working Committee asserted that "the British Government decided to ignore repeated iterations by the Government of the People's Republic of China of its basic principles, and chose to enact the Bill which has an adverse effect on the implementation of the Basic Law."<sup>38</sup> A NPCSC Hong Kong SAR Preparatory Committee was appointed to succeed the Preliminary Working Committee in 1996 to perform even more important functions. This Committee encompassed 56 Chinese representatives and 94 Hong Kong members; more than half of the Hong Kong members originated from the business elite establishment: 36% were from the business sector; 35% were professionals; only 17% were from the religious, social work, grassroots, or rural sectors, and 12% were career politicians (Liang 1996, 122). It was charged with several transitional tasks, including the establishment of a 400-member Selection Committee, which in turn was delegated the authority to choose the first Chief Executive and a Provisional Legislative Council for post-1997 Hong Kong.

Notably, China in the 1990s attained the status of paramount veto player over constitutional developments in Hong Kong. It sufficed for the threat posed by China to the Supreme Court's jurisprudence to be credible or perceived as real. Any change to the *status quo* made by the Patten Government, the Legislative Council or the Supreme Court could be unilaterally abrogated by China upon the transfer of

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<sup>38</sup> The Legal Sub-Group put forward these views on the Hong Kong Bill of Rights Ordinance in the 17<sup>th</sup> Meeting of the Legal Sub-group of the Preliminary Working Committee (15-16 October 1995).

## THE QUEST FOR CONSTITUTIONAL REVIEW

sovereignty, as by an NPCSC Interpretation of inconsistency with the Basic Law (see Davis, 1999). During the 1990s, even large infrastructure projects, such as the airport and port facilities, carried out by the Government of Hong Kong, needed China's approval.

The mere prospect that China might in the foreseeable future quash Court rulings had immediate impact on the shape of judicial review in Hong Kong. The credibility of China's implicit threat of abrogation and the imminent expiry of the colonial regime's mandate meant that risk-averse judges could have little choice but to temper the influence of judicial review on the policy *status quo* in Hong Kong. The Court's situation was complicated by the uniform opposition of the entire Chinese establishment and all of their local allies to constitutional review, which implied the transaction costs of coalescing to retaliate against "bad" judicial behaviour would be low; rendering their subtle (and not so subtle) threats all the more credible.

### 3.2. STRATEGIC DEFERENCE UNDER THE BILL OF RIGHTS

Despite China's vigorous censure of constitutional review pursuant to the Bill of Rights, the NPCSC was eventually to tolerate both the Hong Kong courts' competence to strike down unconstitutional legislation, and its case law arising from post-1991 Bill of Rights litigation. Pursuant to the NPCSC's Existing Laws Decision, only those provisions of the Bill of Rights Ordinance were invalidated which asserted its primacy over other primary legislation. What explains this seemingly counter-intuitive choice by the NPCSC? Consider that from China's viewpoint, the risk was that a Hong Kong Supreme Court armed with constitutional review powers

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might abuse China's toleration and, turning activist, behave opportunistically or incompetently. For China (and the local business elite) to suffer the institutionalisation of judicial review of legislation, *trust* in the courts was the primary prerequisite.

Recall that the central hypothesis of this dissertation is that *the more trustworthy the constitutional court appears to the government, the less likely the latter will underinvest in the former as iterated play continues*. Working backwards from the NPCSC's decision against abrogating constitutional review, I infer that the Chinese Party-state and the incoming SAR regime must have estimated from the Appellate Jurisdiction of the Supreme Court's track record between 1991 and 1997 that it would behave deferentially after 1997. If both did "trust" the Court – (defined as anticipating that it would seldom or never stray away from their zones of tolerance and fail to take account of their most sensitive concerns) – to uphold Chinese sovereignty over Hong Kong, the unrepresentative polity, and pro-business public policies, then this would have been most likely to conduce to their acquiescence in constitutional judicial review.

Nascent constitutional courts with ambitions to exercise perdurable and independent review must prioritise building up a cooperative relationship with whatever regime is in power. Many trust-building measures are available to courts, most of which consist of delivering material benefits to the regime; as by consistently affirming the regime's major policies, enhancing the procedural robustness of government decisions without interfering with substantive policy outcomes, or devising self-restraining doctrines that lock-in judicial cooperation long after the current generation of judges and political officials have retired. The regime will cede

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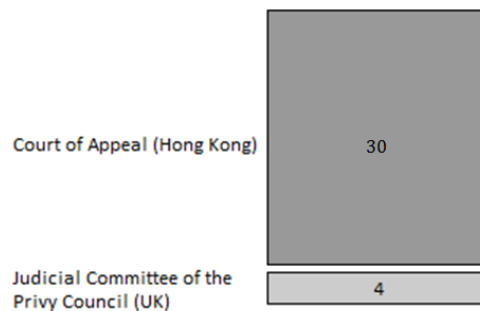
autonomy and authority to a constitutional court in proportion as the latter has pre-emptively reciprocated, as it were (see Moustafa, 2007:49). In time the constitutional court's trustworthiness may inure as an unquestioned part of the political landscape (see Elster, 2007).

### **3.3. STATISTICAL OVERVIEW OF FINAL JUDGMENTS ARISING FROM THE BILL OF RIGHTS**

Set forth below is a statistical synopsis of the Bill of Rights case law of the Appellate Jurisdiction of the Supreme Court of Hong Kong (the "Court" hereafter) and the Judicial Committee of the Privy Council in London (the "Board" hereafter) between the enactment of the Bill of Rights in 1991 and the transfer of sovereignty in 1997 (for more details, see Appendix B). In that time the Court and the Board jointly delivered 34 final judgments concerning the Hong Kong Bill of Rights. The vast majority of decisions (88.2%,  $n=30$ ) were issued by the Court (see Figure 10).

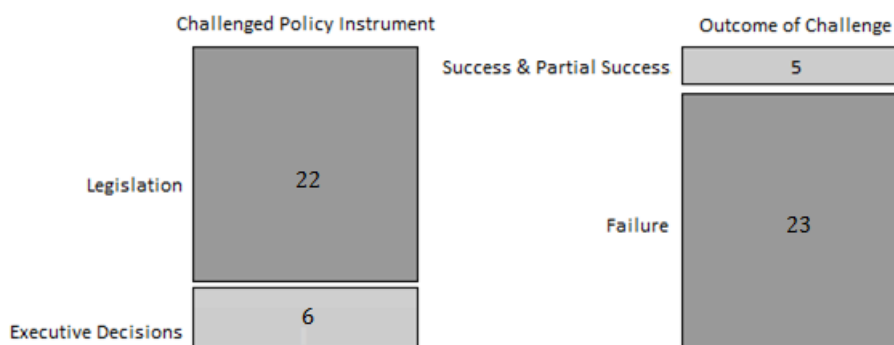
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**FIGURE 10: BREAKDOWN OF FINAL JUDGMENTS RELATING TO THE HONG KONG BILL OF RIGHTS**



Of the 30 decisions issued by the Court the majority (93.3%,  $n=28$ ) challenged either legislative or executive acts (“Constitutional Review Cases” hereafter). A majority of Constitutional Review Cases challenged primary legislation (78.6%,  $n=22$ ). The overall success rate is conspicuously low at 17.9% ( $n=5$ ) (See Figure 11).

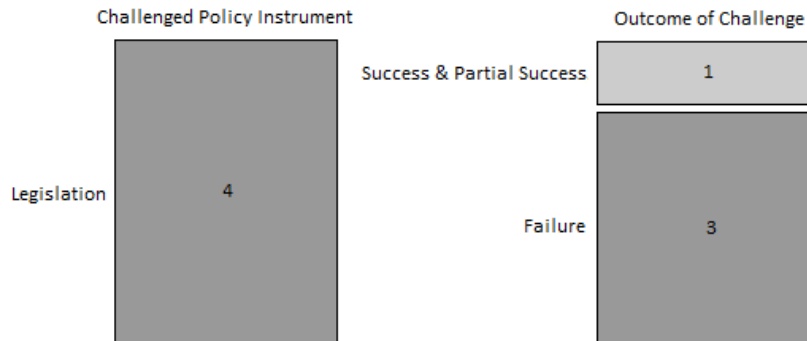
**FIGURE 11: BREAKDOWN OF FINAL CONSTITUTIONAL REVIEW JUDGMENTS OF THE APPELLATE JURISDICTION OF THE SUPREME COURT**



Of the four decisions issued by the Board, all were Constitutional Review Cases that challenged primary legislation (100%,  $n=4$ ). The success rate is only slightly higher than before the Court, and probably skewed toward exaggeration by the very small sample size (25%,  $n=1$ ) (See Figure 12).

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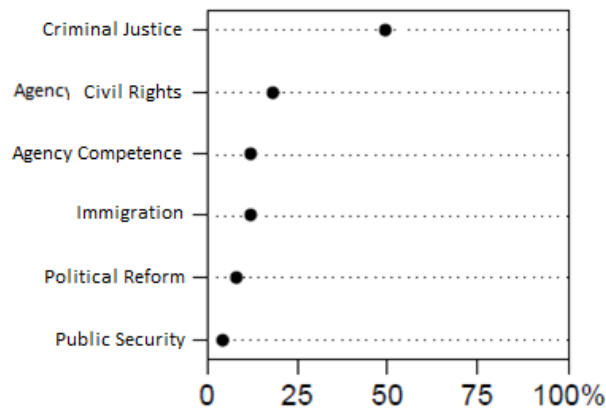
**FIGURE 12: BREAKDOWN OF FINAL CONSTITUTIONAL REVIEW JUDGMENTS OF THE PRIVY COUNCIL**



Consider now the policy domains on which the 34 judgments of both the Court and the Board impinge (see Figure 13). Decisions touching criminal justice policy, the influence of which was more often than not confined to the rights of accused individuals, without sweeping-in political and social issues, comprised nearly half of all cases (52.9%,  $n=18$ ). The next most impinged-on domain was civil rights (20.6%,  $n=7$ ); followed by agency competence (8.8%,  $n=3$ ), immigration (8.8%,  $n=3$ ); political reform (5.9%,  $n=2$ ); and last and least frequently, public security (2.9%,  $n=1$ ). According to these data, it is fair to suggest that the decisions of both courts of appeal had only a minimal impact on the power of the Hong Kong state.

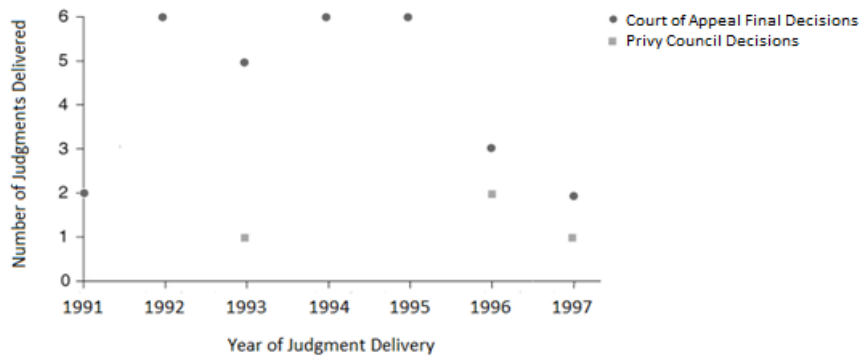
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**FIGURE 13: POLICY DOMAINS OF FINAL BILL OF RIGHTS JUDGMENTS**



The Bill of Rights dockets of the Court and the Board were quite small: at most, the two courts handed down only six such judgments annually (1992, 1993, 1994 and 1995). The number of decisions dropped as the transfer of sovereignty approached (see Figure 14).

**FIGURE 14: FINAL BILL OF RIGHTS JUDGMENTS BY YEAR**



## 3.4. CASE STUDIES

### 3.4.1. OVERVIEW

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In what follows in this Section, important Bill of Rights decisions of the Court and the Board between June 1991 and June 1997 will be studied in chronological order. To avoid selection bias, I have covered every case in which either the Court or the Board invalidated primary legislation or executive decisions. In passing, I shall reveal how the Court has incrementally built up potentially activist canons and doctrines of constitutional interpretation amid conserving the constitutionality of existing policies.

### 3.4.2. “ENTIRELY NEW JURISPRUDENTIAL APPROACH”

*R v Sin Yau Ming*<sup>39</sup> was the first case in which the Court exercised constitutional review pursuant to the new Bill of Rights.<sup>40</sup> The issue concerned several reverse-onus provisions in the Dangerous Drugs Ordinance which violated Article 11(1) of the Bill of Rights, which provides that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” The reverse-onus provisions placed the burden of proof on the defendant to rebut, “on a balance of probabilities,” a presumption of possession for the purpose of trafficking arising from certain primary facts, such as possession of a certain minimum quantity of drugs, or possession of a key leading to premises where a certain minimum quantity of drugs was discovered.

The Court invalidated the provisions. As Justice Michael Kempster, speaking for the Court, determined that a mandatory presumption of fact may be consistent

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<sup>39</sup> *R v Sin Yau Ming* [1992] 1 H.K.C.L.R. 127 (Hong Kong Court of Appeal).

<sup>40</sup> Before 1997 appeals could be made from the Court to the Judicial Committee of the Privy Council in London. However, because of the high cost of such appeals, this channel was infrequently utilised.

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with the Bill of Rights as long as the Crown could show that the facts to be presumed “rationally and realistically” derive from that proved, and also that the presumption is no more than proportionate to what is demanded by the degree of the criminal act against which the community necessitates protection.<sup>41</sup> The Court further declared, “The interests of the individual must be balanced against the interests of society generally but, in the light of the contents of the [ICCPR] and its aim and objectives, with a bias towards the interests of the individual.”<sup>42</sup>

The Court also laid out an ambitious agenda for constitutional interpretation. Vice President Justice William Silke held, “We [judges] are no longer guided by the ordinary canons of construction of statutes nor concerned with the *dicta* of the common law inherent in our training. We must look, in our interpretation of the Hong Kong Bill, at the aims of the [ICCPR] and give full recognition and effect to the statement which commences that Covenant. From this stems the *entirely new jurisprudential approach* to which I have already referred [emphasis added].”<sup>43</sup>

### 3.4.3. TAMING THE BILL OF RIGHTS

On the day of the *Sin Yau Ming* judgment, however, another chamber of the Court in deciding *Tam Hing Yee v Wu Tai Wai*<sup>44</sup> took a more “cooperative” approach, reversing the lower court’s reliance on the European Court of Human Rights’ case law, and rejecting the persuasive authority of international human rights treaties and foreign bills of rights in a case determining the constitutionality of the statutory competence

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<sup>41</sup> *Sin Yau Ming*, at 137.

<sup>42</sup> *Sin Yau Ming*, at 97.

<sup>43</sup> *Sin Yau Ming*, at 54.

<sup>44</sup> *Tam Hing Yee v Wu Tai Wai* [1992] 1 H.K.L.R. 185 (Hong Kong Court of Appeal).

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of the judiciary to prohibit a judgment debtor leaving Hong Kong. A judgment creditor had applied for an extension of an order issued pursuant to Section 52E(1)(a) of the District Court Ordinance, which prohibits a debtor leaving Hong Kong. Before the case reached the Court, Judge Bernard Downey of the competent District Court had declared the impugned provision inconsistent with Article 8 of the Bill of Rights (the right to liberty of movement). The Court overturned this decision; importantly, it circumscribed the reach of the Bill of Rights by holding that the Ordinance did not apply between private individuals, in the teeth of provisions of the ICCPR obligating State parties to vindicate Convention rights against violations of them by private actors.

### 3.4.4. EMBEDDING THE PROPORTIONALITY DOCTRINE

In a subsequent case, *R v Man Wai Keung*,<sup>45</sup> delivered on 7 July 1992, the claimant challenged Section 83XX(3)(a) in the Criminal Procedure Ordinance, which authorised the courts to award costs in the event of a retrial, as inconsistent with Article 22 of the Bill of Rights Ordinance, which guarantees equal justice under law. Justice Kemal Bokhary ruled, “There is no requirement of literal equality in the sense of unrelenting identical treatment always. For such rigidity would subvert rather than promote true even-handedness. So that, in certain circumstances, a departure from literal equality would be a legitimate course and, indeed, the only legitimate course.”<sup>46</sup> Based on this *dictum*, he formulated a three-part test destined to inure into the territory’s constitutional jurisprudence. “To justify such a departure it must be

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<sup>45</sup> *R v Man Wai Keung (No. 2)* [1992] 2 HKCLR 207 (Hong Kong Court of Appeal).

<sup>46</sup> *Man Wai Keung*, at 52.

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shown: one, that sensible and fair-minded people would recognise a genuine need for some difference of treatment; two, that the difference embodied in the particular departure selected to meet that need is itself rational; and, three, that such departure is proportionate to such need.”<sup>47</sup> The Court’s degree of activism in this case must not be overstated, given that the challenged provision was a minor one involving the judicial power itself, rather than executive or legislative powers; and provoking no retaliation from either the Hong Kong authorities or China. This case was followed by a wave of judgments that affirmed the public policy *status quo*.

*R v Wong Hiu Chor*<sup>48</sup> involved a criminal appeal against the constitutionality of the evidential burdens imposed on the defendants under Sections 18A(2) and 35A(2) of the Import and Export Ordinance (which prohibits the smuggling of goods), pursuant to Article 11(1) of the Bill (presumption of innocence). Justice Barry Mortimer invoked a proportionality test to gauge the Sections’ constitutionality, applying it, however, in a simplistic manner. “To demonstrate the proportionality of the provision ... [it] is [enough] to establish that the presumption is no more than reasonable, having regard to the need of Hong Kong Society to deter and punish smuggling and those who assist in it”;<sup>49</sup> and “In applying the Bill of Rights ... the conclusion of the legislature in providing the presumption must be considered.”<sup>50</sup> The other two judges in the case, Justices R.G. Penlington and K.T. Fuad, also affirmed the legitimacy of the proportionality test in assessing constitutional validity questions. Yet Fuad conceded, deferentially, that the Legislative Council has a “reasonable,” “sensible,” and “fair” concern that the city-state’s international

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<sup>47</sup> *Man Wai Keung*, at 52.

<sup>48</sup> *R v Wong Hiu Chor & Ors* [1993] 1 H.K.C.L.R. 107 (Hong Kong Court of Appeal).

<sup>49</sup> *Wong Hiu Chor*, at 40.

<sup>50</sup> *Wong Hiu Chor*, at 40.

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reputation and integrity must be safeguarded against the grave detriments to the economy unleashed by smuggling.<sup>51</sup> The Court has thus affirmed the colonial regime's rightful predominance over matters of macroeconomic policy.

### 3.4.5. JUDICIAL DEFERENCE TO LEGISLATIVE POLICY CHOICES

*R v Securities and Futures Commission ex parte Lee Kwok Hung*<sup>52</sup> which reached the Court in 1993, concerned the competence of the Securities and Futures Commission, a statutory agency, to police members of the financial community with their full cooperation under Section 33(4) of the Securities and Futures Commission Ordinance. The appellant, a production executive of a publicly listed company under investigation, contended that Section 33(4) was inconsistent with the Bill of Rights, Articles 5 (security of the person) and 14 (protection of privacy and reputation).

In the Court's judgment, Justice Henry Litton reiterated that the "Bill of Rights is a constitutional document," meaning that "its provisions must be given a 'generous and purposive' construction."<sup>53</sup> Nevertheless, he held that the central purpose of the Commission was to enhance Hong Kong's status as an international financial centre, and investigative powers were necessary for the Commission to carry out its functions. Ultimately, "The adoption of the [ICCPR] as part of the domestic law of Hong Kong was never intended to strike these down wholesale ..."<sup>54</sup> And, "*In balancing the interests of the individual on the one hand against*

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<sup>51</sup> *Wong Hiu Chor*, at 16.

<sup>52</sup> *R v Securities and Futures Commission ex parte Lee Kwok Hung* [1993] 2 H.K.L.R. 51 (Hong Kong Court of Appeal).

<sup>53</sup> *Lee Kwok Hung*, at 7.

<sup>54</sup> *Lee Kwok Hung*, at 4.

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*the interests of society on the other, and in so doing remembering the broad purpose of the Bill of Rights, which is the protection of the individual, I have come decisively [to the conclusion] ... that the interests of society must prevail ... [emphasis added].*<sup>55</sup>

He was joined by Vice President Justice Derek Cons, who went so far as to argue that there is no established right to privacy; that “*the sovereign power of [the legislature] ... may be exercised arbitrarily, i.e. at the whim or caprice of the holder*”; and that *the Members of the Legislative Council would not have designed a statute in a way that allowed the courts to strike it down on privacy grounds [emphasis added].*<sup>56</sup> The Court’s judgment amounted to a statement of relinquishing the *de facto* mandate of judicial supremacy imposed on it by the Bill of Rights.

*Attorney General v Lee Kwong-kut*,<sup>57</sup> issued in May 1993, was the first Hong Kong Bill of Rights judgment decided by the Judicial Committee of the Privy Council. Notably, it affirmed the Court’s mixed approach to constitutional review, which minimises the political impact of judicial decisions while harbouring new, potentially activist doctrines. The Court had held that Section 30 of the Summary Offences Ordinance (providing that a person proven to be in possession of a thing reasonably suspected of being stolen or unlawfully obtained, who failed to provide a satisfactory explanation to a magistrate, was guilty of an offence) violated the presumption of innocence guaranteed by the Bill of Rights, and, as such, was effectively repealed by the Bill. Coming on the heels of conflict between itself and the Singapore government,<sup>58</sup> the Board’s decision symbolised the deferential turn in its

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<sup>55</sup> *Lee Kwok Hung*, at 17.

<sup>56</sup> *Lee Kwok Hung*, at 21.

<sup>57</sup> *Attorney General v Lee Kwong-kut* [1993] A.C. 951 (United Kingdom Privy Council, on appeal from Hong Kong).

<sup>58</sup> See Chapter 2.

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Commonwealth review jurisprudence.

Speaking for the Board, Lord Woolf candidly admitted that general rights in such a Bill “are always subject to implied limitations,”<sup>59</sup> and warned against judicial activism. “While the Hong Kong judiciary should be zealous in upholding an individual’s rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion.”<sup>60</sup> Another *dictum* of the Board asserted that rigid and inflexible standards should not be imposed on the Legislative Council’s plans to resolve the pressing problems caused by serious crime, because “*questions of policy remain primarily the responsibility of the legislature* [emphasis added].”<sup>61</sup> The Board had in effect exhibited readiness to cooperate with the political branches on behalf of the Hong Kong Court.

### 3.4.6. CAUTIOUS ACTIVISM

Similarly, in *Chan Chak Fan v R*,<sup>62</sup> Justice Bokhary, notwithstanding commencing his opinion with the activist sentiment that “*The Letters Patent entrench the Bill of Rights by prohibiting any legislative inroad into the International Covenant on Civil and Political Rights as applied to Hong Kong ... Any legislative inroad into the Bill is therefore unconstitutional, and will be struck down by the courts as guardians of the constitution*

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<sup>59</sup> *Lee Kwong-kut*, at 11.

<sup>60</sup> *Lee Kwong-kut*, at 19.

<sup>61</sup> *Lee Kwong-kut*, at 13.

<sup>62</sup> *Chan Chak Fan v R* [1994] 3 H.K.C. 145 (Hong Kong Court of Appeal).

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[emphasis added],”<sup>63</sup> nevertheless rejected the petitioner’s challenge to the constitutionality of immigration legislation, very much in the style of the Singapore case of *Chan Hiang Leng Colin and Others v Public Prosecutor*, delivered in the same year (see Chapter 2). Undoubtedly, *Chan Chak Fan* was a shining example of how the Justices combined deference with the entrenchment of potentially activist constitutional doctrines.

On 26 April 1994 the Court delivered its judgment in *Lum Wai Ming v R*,<sup>64</sup> tacitly affirming the High Court’s ruling that struck down the factual-presumption provisions in Section 47(1)(c) of the Dangerous Drugs Ordinance, redrafted following the *Sin Yau Ming* decision (above), for being disproportionate, irrational, and *ultra vires* according to the amendments to the Letters Patent mandating that the ICCPR overrides all legislation until 1997. Chief Justice Sir Ti-Liang Yang (the first local to hold that position) addressed another issue in the case. He held that the trial judge had erred in applying the revised Section 47, which came into force on 26 June 1992, to the case of the appellant, whose unlawful trafficking offences allegedly committed against Section 7 of the Ordinance took place earlier, on 20 December 1990. The appellant contended that the revisions could not have retroactive effect under the common law. The Chief Justice agreed, quashed the conviction, and annulled the sentence and confiscation order. Notwithstanding the Court’s affirmation of the important principle of legislative non-retroactivity, it yielded to the Government’s preference for a retrial under Section 7 (regardless of the irrelevance of Section 47(1)(2)), to the appellant’s detriment. In other words, the Court had pragmatically circumscribed the actual impact of its decision on the Government’s criminal

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<sup>63</sup> *Chan Chak Fan*, at 12.

<sup>64</sup> *Lum Wai Ming v R* [1992] 2 H.K.C.L.R. 221 (Hong Kong Court of Appeal).

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prosecutorial policy.

The Court issued its decision in *R v Kwok Hing-man*<sup>65</sup> in June 1994. The appellant had been convicted and placed on probation in 1991 for possessing unlawfully obtained cigarettes contrary to Section 30 of the Summary Offences Ordinance. However, Section 30 had thereafter been struck down by the Privy Council in *Lee Kwong-kut*. In this seemingly insignificant decision, the Court settled an important constitutional point, that an unconstitutional law is retroactively so, its provisions invalid back to the date of enactment. Justice Gerald Nazareth set aside the conviction, holding that the appellant had been convicted for an offence that may be deemed non-existent. He justified this decision on the pragmatic grounds of its narrow impact on the processes of criminal justice: "Few of those convicted of s. 30 offences will still be serving their sentences,"<sup>66</sup> hence the decision would cause little inconvenience to the Government.

### 3.4.7. UPHOLDING CHINESE SOVEREIGN INTERESTS

Next, we consider *R v To Kwan-hang*.<sup>67</sup> This case involved the arrest of several pro-democracy protestors who had tried to break through a police cordon surrounding the offices of China's representatives in Hong Kong (then known as the New China News Agency). The arrestees argued that their right to peaceful assembly under Article 17 of the Bill of Rights had been infringed by Section 18 of the Public Order Ordinance, which provides, "When 3 or more persons, assembled together,

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<sup>65</sup> *R v Kwok Hing-man* [1994] 2 H.K.C.L.R. 17 (Hong Kong Court of Appeal).

<sup>66</sup> *Kwok Hing-man*, at 7.

<sup>67</sup> *R v To Kwan-hang* [1994] 4 H.K.P.L.R. 356 (Hong Kong Court of Appeal).

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conduct themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such conduct provoke other persons to commit a breach of the peace, they are an unlawful assembly.”

Reaffirming the newly founded, liberal principles of constitutional interpretation, Vice President Justice Neil Macdougall affirmed the status of the Bill of Rights as a constitutional instrument which entrenched fundamental rights and freedoms, and hence must be accorded with a generous and purposive interpretation. Nevertheless, he showed little sympathy with the protestors, describing them such that “Putting the most favourable interpretation on their actions, it seems that they have taken it upon themselves to decide that these sections [of the Public Order Ordinance] had been repealed by the Hong Kong Bill of Rights Ordinance.” This time, Justice Bokhary maintained that the Public Order Ordinance’s constitutionality could be saved under the Privy Council’s “realism” doctrine as espoused in the *Lee Kwong Kut* case. In this politically charged case which directly involved the Chinese Party-state’s interests, the Court showed due respect to the incoming sovereign’s Prohibited Policy Domain respecting state security issues. It ruled that protestors who defy the police automatically fit the statutory definition of an “unlawful assembly,” which was drafted so as to accord with the Bill of Rights; to the protections of which the appellants are therefore not entitled.

*Lee Miu Ling v Attorney General*<sup>68</sup> was arguably the first politically salient case in which a law’s constitutionality was challenged in proceedings which arguably could have threatened the Chinese authorities and the Hong Kong business elite

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<sup>68</sup> *Lee Miu Ling v Attorney General* [1996] 1 H.K.C. 124 (Hong Kong Court of Appeal).

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because it fell just inside a very narrow zone of tolerance. The provisions in question were those of the Legislative Council (Electoral Provisions) Ordinance related to Functional Constituencies, and the litigants sought to declare them repealed by Article VII (5) of the Letters Patent and Section 3(2) of the Hong Kong Bill of Rights Ordinance. It is also relevant that the Functional Constituency system had been found incompatible with the ICCPR by the United Nations Human Rights Committee. This form of corporatist representation disadvantages those not formally employed; moreover, the legislative share of some more populous Functional Constituencies may be lower than that of less populous ones.

The Court held that the Functional Constituencies, having been established by Letters Patent, Article VII(3) – thus by constitutional law – were not subject to judicial review. Justice Bokhary argued that *“If we [judges] decide that [a statutory provision] is constitutional, we uphold it. But if we decide that it is unconstitutional, then, simply by saying so, we strike it down [emphasis added].”*<sup>69</sup> The specific basis of the complaint was that some citizens would be able to vote in both a Geographical Constituency and a Functional Constituency at the same time, while others would only be able to vote in a Geographical Constituency; that, moreover, a voter in a larger Functional Constituency would have a vote of less weight than that of a voter in a smaller Functional Constituency.

Justice Bokhary rhetorically asked himself, *“Would sensible and fair-minded people condemn that arrangement as irrational or disproportionate?”* His answer was that *“they would not so condemn it.”*<sup>70</sup> Justice Godfrey opined, *“The restriction of the voting rights ... is a necessary concomitant of the exercise by the legislature of*

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<sup>69</sup> *Lee Miu Ling*, at 3.

<sup>70</sup> *Lee Miu Ling*, at 34.

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its right to make a law"; thus it is impossible to deem the restriction to be an unreasonable one.<sup>71</sup> The practical effect of this ruling was to burden litigants with a high threshold for proving political discrimination; twisting the language of the Bill of Rights, the Court taxed future showings of discrimination by necessitating demanding proofs of "irrationality" (e.g., Chan, 1998:327).

### 3.4.8. PRESERVING ANTI-CORRUPTION INVESTIGATIVE POWERS

*Ming Pao Newspapers Limited v Attorney General*<sup>72</sup> again showcased the Court's reluctance to challenge the *status quo*. *Mingpao* is a leading daily newspaper, which in the mid-1990s was investigating an alleged cartel conspiring to depress prices at government land auctions. *Mingpao* reporters who attended one auction interviewed Independent Commission against Corruption ("ICAC" hereafter) officers. The following day the newspaper reported that "according to ICAC sources" an investigation of possible bid-fixing was underway. The publisher and senior editorial staff of *Mingpao* were charged with breaching Section 30 of the Prevention of Bribery Ordinance for disclosing details of a suspected offence under that Ordinance (Cullen, 2001). At trial the magistrate had invalidated Section 30's blanket restriction as imposing a disproportionate burden on free speech contrary to Article 16 of the Bill (freedom of expression). On appeal by the Government the Court vindicated Section 30. Justice Henry Litton, writing for a unanimous court, held that, regardless of this case's particulars, Section 30(1) must be enforced to the letter as necessary for

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<sup>71</sup> *Lee Miu Ling*, at 52.

<sup>72</sup> *Ming Pao Newspapers Limited v Attorney General* [1996] A.C. 907 (United Kingdom Privy Council, on appeal from Hong Kong).

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“effective law enforcement in the field of prevention of bribery and [for] the respect for the rights and reputations of other persons.”<sup>73</sup>

The defendants appealed to the Privy Council, which ruled in favour of *Mingpao* on factual grounds but not on the unconstitutionality of the challenged statutory provision. The Privy Council held that Section 30 did not impose a blanket restriction on freedom of expression, as it made provision for circumstances in which it was permissible to disclose a suspect’s identity, and no restrictions prohibited such disclosure once the suspect had been arrested. It was necessary to prohibit disclosure of a suspect’s identity to third parties, as the suspect might find out thereby that he was under investigation and take evasive action. The applicable restrictions were found not disproportionate to the aim of protecting the integrity of investigations into corruption; it followed that Section 30 had not been repealed by the Bill of Rights Ordinance. To convict under Section 30, the Board held, the Government would have to show that the defendant knew the identity of a person under investigation, and that he had disclosed to that person, or to third parties, the identity of the investigatee or other details of the investigation. Because the ICAC was at that stage merely carrying out a general investigation with no particular suspect, the newspaper could not have committed an offense under the challenged provision.

Lord Jauncey, writing for the Board, affirmed the Court’s decision in the respect of holding that Section 30 is “eminently sensible and by no means disproportionate to the important objectives sought to be achieved ... The court with its knowledge of local conditions in Hong Kong has endorsed the decision ... in these circumstances their Lordships could see no reason to interfere.”<sup>74</sup> The Board did not cite any

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<sup>73</sup> *Ming Pao*, at 9.

<sup>74</sup> *Ming Pao*, at 79.

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further supporting evidence of Section 30's constitutionality (Cullen, 2001:166). The core message was seen by some to be that constitutional review of legislation is unnecessary in most circumstances, given that every piece of legislation might be said to have been seriously considered by the legislature (Chan, 1998:32).

### 3.4.9. CONSOLIDATING CONSTITUTIONAL REVIEW

*The Association of Expatriate Civil Servants of Hong Kong v The Secretary for the Civil Service and the Attorney General*<sup>75</sup> involved a challenge brought by civil servants of British (and other ethnic non-Chinese) origin against the Government's policy to localise the civil service. Justice Bokhary created a test by which to assess the differential treatment of local and non-local civil servants: "one, sensible and fair-minded people would recognise a genuine need for some such distinction; two, that the particular distinction made to meet that need is itself rational; and three, that such distinction is proportionate to such need."<sup>76</sup> In this unanimous judgment, Justice Bokhary, Justice Mortimer, and Justice Ching upheld as constitutional six of the thirteen challenged administrative decisions. In the final analysis, the Court made relatively minor changes to the rest pursuant to the Bill of Rights.

Subsequently, *Fok Lai Ying v Governor in Council*,<sup>77</sup> featured the issue of a person's entitlement to a hearing *ex ante* whose land was to be "resumed" by the government for a public purpose. Section 3 of the Crown Lands Resumption Ordinance stated that "whenever the Governor in Council decides that the

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<sup>75</sup> *The Association of Expatriate Civil Servants of Hong Kong v The Secretary for the Civil Service and the Attorney General* [1996] H.K.C.A. 612 (Hong Kong Court of Appeal).

<sup>76</sup> *Expatriate Civil Servants*, at 80.

<sup>77</sup> *Fok Lai Ying v Governor in Council* [1997] H.K.L.R.D. 810 (Hong Kong Court of Appeal).

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resumption of any land is required for a public purpose, the Governor may order the resumption thereof under this Ordinance.” In this case which concerned an important power of the executive, the trial judge held that the Governor in Council was obligated to provide not just this but any applicant with an opportunity to make submissions before the resumption was ordered, and as no such opportunity had been provided, the order for resumption was null.

Nevertheless, this decision was overturned by the Court, which consisted of Vice President Justice Henry Litton, Justice Gerald Godfrey, and Justice Charles Ching. The Court severely criticised the trial judgment as a judge-made scheme amounting to legislative amendment. Justice Litton added that whenever a legislative enactment confers a power to an administrative body there is a presumption that it will be wielded in a manner that is “fair in all the circumstances.”<sup>78</sup> However he concluded that the presence of unfairness cannot alone invalidate a statutory programme.<sup>79</sup> The Court held that the Governor was not bound to consult anyone other than the Executive Council, which is appointed by himself. Justice Litton reasoned, “*The justice of the common law, coming to the aid of an individual, cannot supply the omissions of the legislature in this way [emphasis added],*” or else “chaos” rather than “fairness” would result.<sup>80</sup> This time, however, even the Privy Council declined to back up the Court’s deference to the Government of Hong Kong but affirmed the ruling of the trial court. Speaking for the Board, Lord Cooke condemned the impugned provisions as “singularly sweeping and on their face draconian,” striking them down for the arbitrariness and unlawfulness they had

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<sup>78</sup> *Fok Lai Ying*, at 23.

<sup>79</sup> *Fok Lai Ying*, at 31.

<sup>80</sup> *Fok Lai Ying*, at 31.

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created in enabling the public authorities to take away someone's home for alleged public purposes.<sup>81</sup>

Finally, *Lau Wong Fat v Attorney General*<sup>82</sup> challenged the constitutionality of the New Territories Land (Exemption) Ordinance. Lau Wong Fat, appellant and Chairman of the Rural Council (the *Heung Yee Kuk*), was (and is, as of May 2012) the *de facto* leader of Hong Kong's indigenous inhabitants (mostly descendants of those who were already living in the New Territories before British rule). A former member of the Basic Law Drafting Committee, concurrently, he sat in the British-backed Legislative Council and the Chinese-backed Provisional Legislative Council representing that constituency. Lau invoked judicial review to prevent the Government legislating the right of women to inherit rural land in the New Territories as much as land in any other part of Hong Kong, in case of intestacy, contrary to traditional Chinese custom which had prevailed in the New Territories. Lau contended that the offending Ordinance violated Article 23 of the Bill of Rights, which protects the "rights of minorities," such as the right to "enjoy their own culture, to profess and practice their own religion, or to use their own language."

Before proceeding to the merits of the challenge, Justice Godfrey affirmed in principle judicial nullification of primary legislation and executive decisions. "If the Ordinance is shown, in properly constituted proceedings, to restrict the rights and freedoms enjoyed in Hong Kong in a manner inconsistent with the BORO, then, I apprehend, the court would be entitled to declare the Ordinance to be of no effect ..."<sup>83</sup> The courts in such a case would "treat the Governor's decision to assent

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<sup>81</sup> *Fok Lai Ying v Governor in Council* [1997] 3 L.R.C. 101 (United Kingdom Privy Council, on appeal from Hong Kong).

<sup>82</sup> *Lau Wong Fat v Attorney General* [1997] H.K.L.R.D. 533 (Hong Kong Court of Appeal).

<sup>83</sup> *Lau Wong Fat*, at 2.

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to the Ordinance as judicially reviewable and would grant the appropriate relief.”<sup>84</sup> To fully appreciate the long-range implications of these affirmations of principle, it is essential to read this statement against the traditional legislative supremacy in the Hong Kong polity and the Governor’s *de facto* supremacy in the territory’s workaday politics: the Court in effect was asserting its own supremacy over these two bodies.

In this judgment the Court was signalling its willingness to affirm the political branches’ preferences as well as China’s preference for minimalist constitutional judicial review, while yet simultaneously pursuing its own long-run interest in entrenching review. It held that the Ordinance was merely according to women the same rights in relation to the inheritance of land as in elsewhere in Hong Kong in an era in which the discrimination against women has been considered inappropriate by all civilised nations.<sup>85</sup> Justice Godfrey proceeded to condemn Lau, despite his political eminence: “What the Court was asked in effect to do was to take one side in the political dispute, aligning itself on the plaintiff’s side of the argument ... something which no Court would ever do.”<sup>86</sup>

### 3.4.10. SUMMARY

Note that judgments of the Court coincided with China’s threats that the British Hong Kong judges might not necessarily continue beyond June 1997, and with their persistent warnings to repeal the Bill of Rights Ordinance (Ghai, 1997). Indeed, from 1991 to 1997, the Court constituted the strategic centre of judicial self-restraint, given

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<sup>84</sup> *Lau Wong Fat*, at 2.

<sup>85</sup> *Lau Wong Fat*, at 4.

<sup>86</sup> *Lau Wong Fat*, at 15.

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that it enjoyed an overall view of the judicial system to take the interests of the whole into consideration. While certain lower court judges had exhibited considerable activism, the Court had usually quarantined these adventures to avoid a political reaction from China that would compromise the political position of the courts after the transfer of sovereignty.

### 3.4.11. EXTRA-JUDICIAL TRUST-BUILDING

Justices, whether unconsciously or not, signalled their willingness to restrain judicial activism not only in their judgments, but also in public statements. Generally, they worried aloud lest the Bill should become a “criminal’s charter” (Byrnes, 2004:40). When Sir Derek Cons (1991, cited in Ghai, 1997), then Vice-President of the Court, opened an international conference on the Bill of Rights in the same week as it was enacted, he complained that the courts had been dragged into “uncharted and possibly stormy seas” by their newly founded competence of constitutional review. Justice Henry Litton had, before his appointment, criticised the Bill for “the importation of concepts and vocabulary alien to the legal system.” Similarly, Justice Benjamin Liu asserted that constitutional review has had “great adverse impact on criminal and civil litigation,” and has “exerted fundamental impact on judicial reasoning, judicial process and law enforcement agencies in such a way that it indirectly weakens the effectiveness of law enforcement agencies in the implementation of public order.” The Bill was introduced “within the shortest possible time” with no other purpose than to relieve “the fear of the British people and their lack of confidence in the future of Hong Kong under Chinese sovereignty”

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(cited in Ghai, 1997:464).

On 17 November 1995 Chief Justice Sir Ti-liang Yang responded to the request of Anson Chan, Chief Secretary of the Government of Hong Kong, to clarify a controversy stemming from leaked private conversations between himself and Zhang Junsheng, Vice-Director of China's New China News Agency in Hong Kong, over the undesirability of the Bill of Rights (Hsu, 1996:82). This had turned out to be the highest-level criticism of constitutional review yet from inside the judiciary. Sir Yang roundly denounced the judicial competence to nullify primary legislation on the grounds that it undermined "the demarcation between the Judiciary and the Legislature," and created "chaos [that] need not be specified."<sup>87</sup> As he went on to argue, "While the Bill of Rights cannot entrench anything against future repeal by ordinary legislation, it might be thought to give the Bill of Rights some quality higher than that of ordinary legislation ... It should be the Executive's rather than the Judiciary's responsibility to bring to its Legislature's attention any bill which appears to be inconsistent with the Bill of Rights." One year after these comments, the Chief Justice declared his candidacy for the office of Chief Executive, promising to deliver an honest and just administration for the Hong Kong SAR.

In the first three chapters I advanced the thesis that the more trustworthy the constitutional court is perceived by the regime to be gauged by its sustained cooperative behaviour in the past, the less likely the latter will politically underinvest in the court, as iterated interaction between the two as to constitutional review continues. This means that even an authoritarian government, if it concludes that trusting the courts is a low-risk strategy, will generally be willing to reciprocate or

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<sup>87</sup> The Chief Justice's Statement on the Hong Kong Bill of Rights Ordinance (Cap 383), 17 November 1995.

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invest in the court in future. The regime will likely concede autonomy and authority to the courts insofar as the latter labour within the policy-spectrum zones of tolerance of the former.

Now consider these theses in light of the present case. Recall that the Chinese government had two distinct concerns in relation to the Bill of Rights. The first, which concerns the Bill's relationship to the Basic Law, lay beyond the jurisdiction of the courts. In this regard the British Hong Kong has repeatedly breached China's trust by initiating reforms that lie outside China's zone of tolerance (implying that China could not remain tolerant to them). The second lay within reach of the Hong Kong courts. Accordingly, the Court has always ruled within the confines of that set so as to narrow the scope of constitutional review, and to uphold the competences of law-enforcement bodies.

In January 1997 the Legal Subgroup of the NPCSC Hong Kong SAR Preparatory Committee reviewed 624 Hong Kong statutes and recommended that sixteen be repealed (among them Articles 2(3), 3, and 4 of the Hong Kong Bill of Rights Ordinance) and nine modified. In making its recommendation to the NPCSC, the Committee was constrained by time and the limited resources and hence could not possibly review every single statutory provision then in existence, but to single out those that were "plainly inconsistent" with the Basic Law for invalidation.<sup>88</sup> Notice that the Bill of Rights as a whole was preserved in favour of the Chinese government's commitment to the ICCPR as expressed by Article 39 of the Basic Law.<sup>89</sup>

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<sup>88</sup> Personal interview with Mr. Shiu Sin-por (Former Deputy Secretary-General, NPCSC Hong Kong SAR Preparatory Committee) (4 November 2011).

<sup>89</sup> Personal interview with Ms. Maria Tam (Former Member of the NPCSC Hong Kong Basic Law Drafting Committee) (17 December 2011).

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In its Existing Laws Decision the NPCSC nullified fourteen statutes<sup>90</sup> and amended provisions in ten other primary and delegated legislative enactments.<sup>91</sup> The Existing Laws Decision consisted of four parts: the first established some principles regarding the adaptation of laws previously in force in Hong Kong; the second part (annex 1) included fourteen ordinances to be repealed in their entirety; the third part (annex 2) encompassed ten ordinances to be repealed in certain sections; and the fourth part (annex 3) provided some rules for the interpretation and application of valid laws. Unsurprisingly, the laws and sections of laws which had constituted Chris Patten's democratic reforms were all repealed.<sup>92</sup> Consistent with the predictions of my theory, the NPCSC rewarded the courts by acquiescing in their constitutional review jurisdiction and implicitly permitting Bill of Rights-generated case law to carry over into the post-1997 era.

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<sup>90</sup> Trustees (Government of Hong Kong Securities) Ordinance; Application of English Law Ordinance; Foreign Marriage Ordinance; Chinese Extradition Ordinance; Colony Armorial Bearings (Protection) Ordinance; Secretary of State for Defence (Succession to Property) Ordinance; Royal Hong Kong Regiment Ordinance; Compulsory Service Ordinance; Army and Royal Air Force Legal Services Ordinance; British Nationality (Miscellaneous Provisions) Ordinance; British Nationality Act 1981 (Consequential Amendments) Ordinance; Electoral Provisions Ordinance; Legislative Council (Electoral Provisions) Ordinance; Boundary and Election Commission Ordinance.

<sup>91</sup> Immigration Ordinance; any statutory provision giving effect to the British Nationality Act; Urban Council Ordinance; Regional Council Ordinance; District Boards Ordinance; Urban Council, Regional Council and District Board Election Expenses Order (sub. Leg. A) and the Resolution of the Legislative Council (sub. Leg. C) made under the Corrupt and Illegal Practices Ordinance; Sections 2(3), 3, and 4 of the Bill of Rights Ordinance; Personal Data (Privacy) Ordinance; Personal Data (Privacy) Ordinance; Societies Ordinance; Public Order Ordinance.

<sup>92</sup> These include Electoral Provisions Ordinance, Legislative Council (Electoral Provisions) Ordinance, Boundary and Election Commission Ordinance, provisions concerning the interpretation and the purpose of the Ordinance in Section 2(3), provisions concerning the "affection to previous law" in Section 3 and provisions concerning the "interpretation of laws in the future" in Section 4, of Hong Kong Bill of Rights Ordinance, provisions concerning the Ordinance's overriding position in Section 3(2) of Personal Data (Privacy) Ordinance major amendments, having been made since 17 July 1992, to the Societies Ordinance, major amendments, having been made since July 27 1995, to the Public Order Ordinance.

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Consider the following outcomes of the Existing Laws Decision. First, the fact that none of the judicial invalidations of legislation on Bill of Rights grounds were reversed corroborates the Constitutional Investment Theory's inference that China found the Hong Kong courts trustworthy enough for it to invest in its constitutional jurisdiction. Second, while Article 160 of the Basic Law empowered the NPCSC to review "the laws previously in force in Hong Kong," which by virtue of Article 8 includes "the common law" and "rules of equity," the Existing Laws Decision subjected neither to scrutiny; rather, it left it up to the courts to determine whether existing common law principles, so influential in the territory's constitutional law, would be valid under the new constitution. Third, by contrast, the NPCSC invalidated most of Chris Patten's political reforms of the 1990s, including those provisions of the Bill of Rights that had elevated it above other statutes enacted by the Legislative Council.

The 1989 demonstrations in Hong Kong had shifted the paradigm of China's Hong Kong policy from protecting Hong Kong from China to protecting China from Hong Kong (Davis, 1999:278). Atop China's legal review agenda was the reinstatement of the pre-1995 Public Order Ordinance and pre-1992 Societies Ordinance, which had been amended to relax the constraints imposed on public demonstrations and the registration of societies. In 1992 the Societies Ordinance, which the Government of Hong Kong had used to control politically unacceptable organisations, had been changed to provide better protection for civil society from arbitrary government action and to bring the Ordinance in line with the Basic Law's provisions against ties between the Hong Kong SAR and overseas political organisations. Three years later, the Public Order Ordinance had been amended to

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replace the Commissioner of Police's power to license demonstrations and protests with a system of notification requiring the Commissioner, in deciding whether to ban a demonstration, to comply with Article 21 of the ICCPR. In February 1997 the NPCSC had made it clear that both amendments would not survive the transfer of sovereignty (Scott, 2010:259).

### 5. DISCUSSION AND CONCLUSION

Constitutional review in British Hong Kong was perdurable and consolidated, but deferential. The jurisprudence of the Appellate Jurisdiction of the Supreme Court of Hong Kong was shaped by the influence of the English tradition of judicial deference to Parliament, but also by the credible threat of retaliation issuing from an incoming sovereign, the Chinese government, who enjoyed both high internal cohesiveness and well-defined preferences for the boundaries of constitutional rights and judicial review in the territory. Even after enactment of the Bill of Rights, the Court had invariably affirmed the *status quo* and/or the Chinese authorities' ideal policy preferences almost without a single instance of defection. In exercising highly deferential and cooperative constitutional review, the Court had succeeded in convincing China that it was a trustworthy agent. Following my theoretical explanation, the NPCSC, being able to anticipate that constitutional review Hong Kong-style would impose no excessive constraints on post-1997 political actors, found little reason to abolish the institution; especially as this might have been perceived to undermine its commitment to Hong Kong's self-rule, precipitating mass emigration and capital flight, and setting back Taiwan's reunification with China (see

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Law, 2006).

In Chapter 2 I argued that the emergence of constitutional review in authoritarian states more often than not involves a complex interplay of *both* instrumental and expressive-symbolic factors. Constitutional framers are interested not only in using constitutional rules as means to achieve certain instrumental goals (*e.g.*, reducing the expected costs of governing), but also in endorsing the intrinsic values of those rules as symbolic expressions of ideological commitment, whether to constitutional democracy or Marxism-Leninism. Consider the importance of China's expressive-symbolic interests in the present case. Suppose British Hong Kong had never subscribed to the values of economic libertarianism and the rule of law. Suppose, further, that Britain as the outgoing sovereign had been a Leninist state. All else being equal, it is highly unlikely that an agreement forged between the United Kingdom and China would have contained the libertarian and constitutionalist elements of property rights, judicial independence, or elections by universal suffrage as they exist in the Basic Law today. Rather, in this hypothetical situation, China could have installed a system in which the courts of Hong Kong enjoyed no constitutional jurisdiction, with property rights in the Basic Law being subsumed under collective ones without much resistance from any side.

Indeed, it would seem that the judges needed not to have been so deferential: judicial invalidations of legislation were tolerated, if not indeed encouraged, by the Government of Hong Kong under Governor Chris Patten. The ideal policy preferences of the Government seemed to have been to sweep away repressive legislation and to create multiple veto players that might survive the 1997 transition. Yet the Hong Kong Court and the Privy Council mostly affirmed the *status quo* and

## THE QUEST FOR CONSTITUTIONAL REVIEW

reined-in any tendency to activism. Hong Kong judges, whom the Basic Law provided would stay on the benches of post-1997 courts, were presumably addressing signals of their trustworthiness and cooperativeness to the Chinese government, who strongly opposed constitutional review, and had from the beginning threatened to repeal the Bill. China had adopted a “tolerant” attitude towards constitutional review given that the Court had not disrupted stability in Hong Kong.<sup>93</sup>

On the other hand, as mentioned in Chapter 2, judicial cooperativeness does not imply the total absence of judicial activism. The Court and the Privy Council had, through cautious, incremental steps, built up potentially activist constitutional doctrines that will be available, as judicial precedents, for future use. In the case of British Hong Kong, these gradually entrenched “time-bombs” included, among others, the doctrine of proportionality in assessing the merits of statutes, explicit reference to foreign and international human rights case law, and most importantly, the judicial competence to declare impugned legislation null and void, rather than merely ignoring it or leaving up to the legislature the final determination of the constitutionality of statutes. After all, at the point of technical legal doctrines hardly interest politicians or indeed anyone else besides (academic) lawyers. Notably, the Court repeatedly elaborated the details of the proportionality doctrine in constitutional review, in stark contrast to the United Kingdom Appellate Committee of the House of Lords, which did not really articulate a clearer view on this issue until after the Human Rights Act was enacted in 1998.<sup>94</sup> As we shall see, legal

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<sup>93</sup> Interview with Mr. Shiu Sin Por (Former Deputy Secretary-General, NPCSC Hong Kong SAR Preparatory Committee) (4 November 2011).

<sup>94</sup> See *R (Daly) v Home Secretary* [2001] 2 A.C. 532 (United Kingdom Judicial House of Lords).

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doctrines could serve as an instrument of political control by higher courts over lower courts, as well as other branches of government (Jacobi & Tiller, 2007). While far from being “determinative,” the jurisprudence of the Court has clearly been “influential” in the post-1997 era.<sup>95</sup> The proportionality test has afforded the courts with great flexibility in constitutional review.<sup>96</sup>

By subtly embedding the seeds of activist doctrines in otherwise deferential rulings, the Court managed to win the positive reciprocity of China and the incoming SAR regime. On 1 July 1997 a new court – the Hong Kong Court of Final Appeal – was sworn-in to replace the Judicial Committee of the Privy Council as Hong Kong’s final appellate court. All three of the new Court’s Permanent Judges were drawn from the Court: Justice Kemal Bokhary, Justice Henry Litton, and Justice Charles Ching. Recall that each of them had delivered highly deferential judgments, at least, during the 1991-1997 period, if not also criticised the Bill of Rights. We shall explore in Chapters 5 and 6 how this Court, which started from modest beginnings, counter-intuitively morphed into arguably the most successful and activist constitutional court in the universe of authoritarianism.

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<sup>95</sup> Personal Interview with Justice Michael Hartmann (Non-Permanent Judge of the Hong Kong Court of Final Appeal) (21 November 2011).

<sup>96</sup> Personal interview with Justice Kemal Bokhary (Former Justice of Appeal of the Hong Kong Supreme Court) (8 November 2011).

## CHAPTER 5

# THE COMPETITION FOR CONSTITUTIONAL PRIMACY

### 1. INTRODUCTION

In the first two years after the transfer of sovereignty in 1997, the SAR regime faced two apparently irresolvable complications. The first was the mounting influx of immigrants from Mainland China. Desperate to minimise the social and economic costs expected to be borne because of these newcomers, the Provisional Legislative Council immediately enacted legislation restricting the number of entrants allowed into the territory from the other side of the border with China. The second complication was the Hong Kong Court of Final Appeal: in case after case it struck down anti-immigration statutes as violating the right of abode embodied in the Basic Law; whilst asserting its own interpretive primacy in constitutional matters over Interpretations of the NPCSC and acts of the local legislature. To the SAR regime and their supporters, the Court's *de facto* "veto" in the landmark case *Ng Ka Ling and another v The Director of Immigration*<sup>1</sup> was an unambiguous breach both of the Basic Law's promise of Hong Kong executive dominance and of the Chinese constitutional doctrine of congressional supremacy.

Unsurprisingly, the SAR regime struck back at the Court, demanding that it "clarify" its assertions of constitutional primacy, and petitioning the NPCSC to reinterpret the Basic Law so as to overturn the *Ng Ka Ling* ruling and restore the

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<sup>1</sup> *Ng Ka Ling and another v The Director of Immigration* [1999] 2 H.K.C.F.A.R. 4 (Hong Kong Court of Final Appeal).

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invalidated immigration legislation. Ultimately, the NPCSC and the SAR regime found a way out of this impasse, crafting a pragmatic solution that has ever since shaped the territory's political constitution. While the NPCSC did overturn the Court's ruling in *Ng Ka Ling*, it and the SAR regime also acquiesced in the activation of the Court's authority to nullify legislation and executive decisions, refraining from revoking the Court's self-appointed competence to review even the constitutionality of NPCSC acts. But the bargain was struck only after the Court had begun to deliver more cooperative rulings in line with the preferences of the territory's authoritarian government. In effect, a tacit consensus emerged: the SAR regime would grant the Justices their power, so long as their interpretation of the Basic Law did not stray far from the fundamental interests of the authorities in Prohibited Policy Domains.

Till the present day, this implicit pact has stuck; however, its foundations remain puzzling. Recall that in chapter 3 it was observed that, while the NPCSC had delegated authority to interpret the Basic Law to the courts of the Hong Kong SAR, it had still conserved in its own hands the ultimate prerogative of interpretation and declined explicitly to acknowledge the Court's competence to invalidate statutes for unconstitutionality; and that in Chapter 4 it was demonstrated that constitutional review and the Bill of Rights likely survived the transfer of sovereignty only because the former Supreme Court showed off its deference to the Chinese government.

In what follows of this chapter I explore the implications of my Constitutional Investment Theory by applying it to diachronic case studies of the constitutional jurisprudence of the Court of Final Appeal from *Ng Ka Ling* in 1999 to the last major immigration case, *Ng Siu Tung and others v Director of Immigration*,<sup>2</sup> in 2002. As in

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<sup>2</sup> *Ng Siu Tung & Ors. v. Director of Immigration* (2002) 5 H.K.C.F.A.R. 1 (Hong Kong Court of Final Appeal).

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Chapter 4, I will cover every case in which the Court struck down primary legislative or executive policy choices. Section 2 introduces how the Court was established, how it was organised, and what powers it was given. Section 3 addresses the question of why the SAR regime acquiesced in constitutional review when activated. Section 4 explains why the political authorities tolerated not only the consolidation of the Court's constitutional review competence but even the re-emergence of activism on it. Section 5 concludes.

## 2. PRELIMINARY INVESTMENT IN THE COURT OF FINAL APPEAL

Before we delve into the particulars of the Court of Final Appeal's strategic interactions with Hong Kong's authoritarian government, it is useful to briefly survey the Court's history and composition: How was it established and what are its powers? In February 1988, the United Kingdom proposed to the People's Republic of China the establishment of the Court of Final Appeal *before* the transfer of sovereignty on 1 July 1997, with a view to the Court's having a chance to "gain experience and win public confidence" (Feinerman, 1997:80). This agreement stipulated that no more than one foreign judge versed in common law would be permitted to sit on the Court, and that, although the Court would be permitted to invite such a judge to sit and vote on its bench, this would not be mandatory. The 1991 accord, reached without any public consultation in the territory, was strongly opposed by the Hong Kong Bar Association (acting for barristers) and the Law Society (acting for solicitors). Notwithstanding the David Wilson Government's intense lobbying of the Legislative Council, the latter still sore from the trauma of Tiananmen, passed a resolution demanding the Government to modify the accord

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reached by the outgoing and incoming suzerains. This, however, the Government was unable to accomplish (Louie, 2003:216).

In 1995 the Chris Patten Government reinvigorated the 1991 accord. The Government asserted that it would be “difficult to overestimate the contribution of a respected, efficient and impartial common law system to the overall success of Hong Kong as an international commercial, financial and service centre,” and that failure to establish this would jeopardise “the delicate balance which maintains business and investors’ confidence in Hong Kong in the run-up to 1997 and beyond.”<sup>3</sup> Eventually, the Government reached an agreement with China in June 1995 on the shape of the Court of Final Appeal. Although both the Joint Declaration and the Basic Law permitted the Court to invite “*judges* from other common law jurisdictions [emphasis added]” to sit on its bench, the 1995 agreement explicitly maintained that the Court would be composed of a Chief Justice, three Permanent Judges, and only *one* Non-Permanent Judge, who might be from Hong Kong or from another common law jurisdiction. The Hong Kong Court of Final Appeal Ordinance, enacted by the Legislative Council in 1995 based on an agreement signed by the Senior Representatives of the Sino-British Joint Liaison Group, represented a series of compromises between the Chinese and British governments over issues that had not been settled after the ratification of the Joint Declaration. The vast majority of all directly-elected Members of the Legislative Council voted against the bill, viewing it as embodying too many British concessions; nonetheless, it received endorsement by the plenary legislature by a margin of about two to one (Feinerman, 1997:80). Even so, the Court was not to be established until the transfer of sovereignty on 1 July 1997.

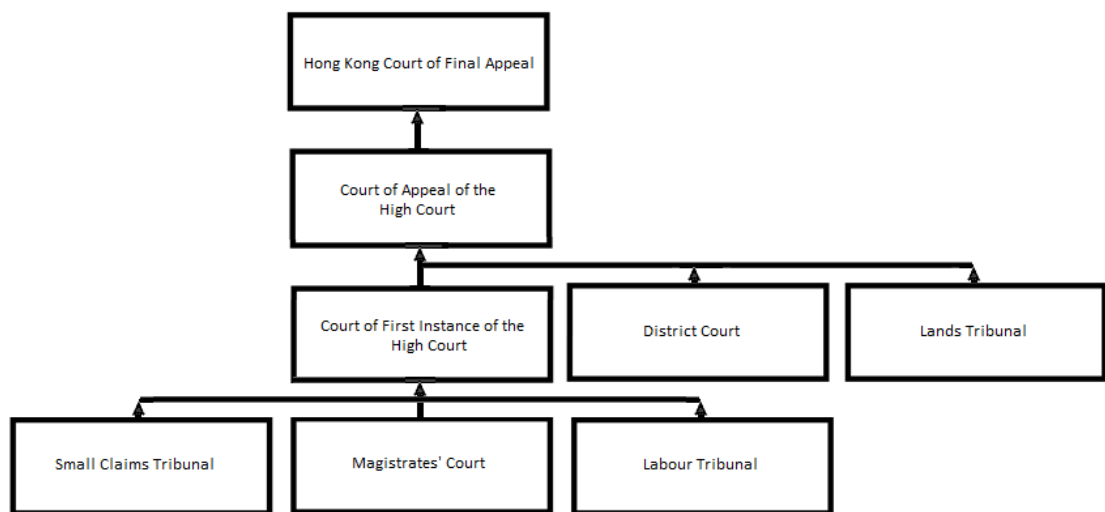
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<sup>3</sup> Attorney General’s Chambers, *Introductory Paper on the Draft Hong Kong Court of Final Appeal* (Hong Kong: Government of Hong Kong, 1994).

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Chinese concerns went beyond the presence of foreign judges on the bench to the very jurisdictional competence of the Court. In exchange for the United Kingdom accepting the incorporation of the Basic Law's exclusion of "acts of state" from the Court's jurisdiction into the Court's organic statute, China waived her demand in May 1995 that the Ordinance should feature a "post-verdict remedial mechanism" expressly designed to veto politically undesirable decisions of the Court (Lo, 2000:226). Note that the United Nations had issued a warning that the ambiguity of the term "acts of state" afforded China unlimited discretion to curtail the Court's powers, given that the ultimate meaning of this term rested in the hands of the NPCSC (Leung, 1997:853).

**FIGURE 15: THE JUDICIAL HIERARCHY OF THE HONG KONG SAR**



The Court of Final Appeal, unlike the Taiwanese Council of Grand Justices, the German *Bundesverfassungsgericht*, or the French *Conseil Constitutionnel*, was not designed to be a specialised constitutional tribunal; rather, it was founded on the principles typifying generalist common law supreme courts like the United States Supreme Court, the Indian Supreme Court, the Canadian Supreme Court, and the

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Australian High Court, which exercise final appellate civil and criminal jurisdiction, and positioned at the apex of the ordinary judicial system (see Figure 15). The Basic Law implied the Court's total independence from the Chinese Supreme People's Court. Section 3 of the Hong Kong Court of Final Appeal Ordinance establishes the Court as a "superior court of record." Section 4(2) explicitly prohibits the Court from exercising jurisdiction over "acts of state *such as* defence and foreign affairs [emphasis added]." Note that use of the vague term "such as" effectively exposed the Court's jurisdiction to attack by the NPCSC, with its power to define "acts of state" (Feinerman, 1997:83). Section 7A(1) of the Ordinance obligates the Chief Executive, in the appointment or removal of Permanent and Non-Permanent Judges of the Court of Final Appeal, to obtain the Legislative Council's consent. Section 12 requires that Permanent Judges of the Court must be either former members of the Hong Kong High Court or certified lawyers who have practiced law in Hong Kong for at least 10 years. Section 14 provides that the Chief Justice and the Permanent Judges shall vacate their office upon reaching retiring age, while no mandatory retirement age applies to Non-Permanent Judges.

Noticeably, the Ordinance does not expressly provide for the Court's jurisdiction over constitutional matters; instead, it limits appeals to the Court from the Court of Appeal of the High Court to civil judgments where HK\$1 million (approximately US\$ 128,205) or more is in dispute, and in any other civil matter to appeals at the discretion of either the Court of Appeal of the High Court or the Court of Final Appeal if, in either court's opinion, a question of "great general or public importance" is presented. Regarding criminal matters, appeals from any decision of the High Court may lie, at the discretion of the Court of Final Appeal. The Chief Justice and the other Justices of the Court of Final Appeal were nominated by the

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first Judicial Officers Recommendation Commission chaired by the Chief Executive designate, and endorsed by the Provisional Legislative Council (J. Chan, 2011c:294). Thereafter, the Commission was to comprise nine members appointed by the Chief Executive according to strict criteria set forth by the Judicial Officers Recommendation Ordinance. Five of the members were to be drawn from the judiciary and the legal profession (the Chief Justice, two other judges, a barrister, and a solicitor), supplemented by three members not involved in the practice of law. The Secretary for Justice was to be the only member serving in the Government. Permanent Judges of the Court of Final Appeal are appointed until retirement age.

Judicial salaries were also largely secured: the Chief Justice's salary is at the same pay grade as the Chief Secretary, and Justices of the Court are paid a salary at a grade comparable to the Financial Secretary's and the Secretary for Justice's (Wesley-Smith, 2001:112). The Non-Permanent Judges of the Court are to be chosen on a case-by-case basis by the Chief Justice from two lists consisting of a maximum of 30 judges, those listed being appointed for three years at a time. One list contains retired Hong Kong judges from the former Supreme Court; the second contains sitting and retired judges from outside the territory with experience on final appellate courts elsewhere in the common law world (see Table 1). Non-Permanent Judges, like their Permanent counterparts, are sworn in by the Chief Executive before the Hong Kong flag, and are constantly reminded by the Court that they must reason and rule solely as Justices of Hong Kong.<sup>4</sup>

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<sup>4</sup> Personal Interview with Mr. Andrew Li (first Chief Justice of the Hong Kong Court of Final Appeal) (29 November 2011).

# CONSTITUTIONAL PRIMACY

**TABLE 1: COURT OF FINAL APPEAL JUSTICES APPOINTED BETWEEN 1997 AND 2000**

Name	Position in the Court	Relevant Legal Position before Appointment	Year
Andrew Li	Chief Justice	Queen's Counsel of the private bar	1997
Kemal Bokhary	Permanent Judge	Justice of Appeal, Hong Kong Supreme Court	1997
Henry Litton	Permanent Judge	Justice of Appeal, Hong Kong Supreme Court	1997
Charles Ching	Permanent Judge	Justice of Appeal, Hong Kong Supreme Court	1997
Patrick Chan	Permanent Judge	Chief Judge of the Hong Kong High Court	2000
Sir Denys Roberts	Non-Permanent Judge	Chief Justice of Hong Kong	1997
Sir Alan Huggins	Non-Permanent Judge	Vice President, Hong Kong Supreme Court	1997
Art McMullin	Non-Permanent Judge	Vice President, Hong Kong Supreme Court	1997
Sir Derek Cons	Non-Permanent Judge	Vice President, Hong Kong Supreme Court	1997
William Silke	Non-Permanent Judge	Vice President, Hong Kong Supreme Court	1997
Kutlu Fuad	Non-Permanent Judge	President, Brunei Court of Appeal	1997
Gerard Clough	Non-Permanent Judge	Justice of Appeal, Hong Kong Supreme Court	1997
Neil Macdougall	Non-Permanent Judge	Justice of Appeal, Hong Kong Supreme Court	1997
Sir Noel Power	Non-Permanent Judge	Chief Justice of Hong Kong	1997
Gerald Nazareth	Non-Permanent Judge	Justice of Appeal, Hong Kong Supreme Court	1997
Sir Anthony Mason	Non-Permanent Judge	Chief Justice of the High Court of Australia	1997
Lord Cooke of Thorndon	Non-Permanent Judge	Law Lord, UK Judicial House of Lords;	1997
Sir Edward Somers	Non-Permanent Judge	Justice, Supreme Court of New Zealand	1997
Sir Daryl Dawson	Non-Permanent Judge	Justice, High Court of Australia	1997
Lord Nicholls of Birkenhead	Non-Permanent Judge	Law Lord, UK Judicial House of Lords	1998
Lord Hoffmann	Non-Permanent Judge	Law Lord, UK Judicial House of Lords	1998
Sir Gerard Brennan	Non-Permanent Judge	Chief Justice of the High Court of Australia	2000
Sir Thomas Eichelbaum	Non-Permanent Judge	Chief Justice of New Zealand	2000
Lord Millett	Non-Permanent Judge	Law Lord, UK Judicial House of Lords	2000

## 3. CONSTITUTIONAL SHOWDOWN

### 3.1. OVERVIEW

The first ever constitutional “showdown” of post-British Hong Kong sprang from the Court’s controversial *Ng Ka Ling* judgment, which in turn sprang from challenges to the constitutionality of the China-appointed Provisional Legislative Council and the immigration legislation it enacted. This Section applies the first stage of the Constitutional Investment Theory’s three-stage scheme (activation-consolidation-ascendancy) to explain the reaction of the SAR regime and the NPCSC to the Court’s self-aggrandisement. Before proceeding to the facts of the

## CONSTITUTIONAL PRIMACY

showdown and applying the Theory to the empirical evidence, this section begins with a review of the formation of the first post-1997 Government and Legislative Council, and of the constitutional disputes in the High Court that finally evolved into the *Ng Ka Ling* litigation.

### 3.2. THE BUILDING BLOCKS OF THE SAR REGIME

Shortly after the adoption of the Bill of Rights in 1991 came the partial democratisation of Hong Kong. The first direct General Election was held in September 1991; however, it only sent up 18 legislators from the Geographical Constituencies, the rest of the seats having been prepossessed by corporatist representatives of 21 Functional Constituencies, by 17 non-official appointees, and by three government frontbenchers. This arrangement was consistent with China's preferences, whose leaders in February 1990 had agreed to allow only 18 directly elected seats in the 1991 Legislative Council and 20 such seats in the 1995 Legislative Council. Additionally, China's government had agreed to a "through-train" policy, whereby the 1995 Legislative Council would remain the legislature of Hong Kong through the transfer of sovereignty until 1999 (Feinerman, 1997:86-7).

Be all that as it may, the 1991 General Election clearly reflected the attitudes of the electorate in the Tiananmen aftermath: 16 of the 18 legislators directly elected belonged to the Pan-Democratic Bloc, while every candidate from the Pro-China Bloc was defeated (Chan, 1996:172). Governor Chris Patten rode the tide of public opinion to introduce stronger democratic reforms in 1995, expanding the electorate to include 2.7 million newly eligible voters, which amounted to bringing "through the backdoor" a fully elected Legislative Council (Lau, 1997:48). In the 1995 General

## CONSTITUTIONAL PRIMACY

Election around one million voters turned out, two-thirds of whom voted for the Pan-Democratic Bloc. The back-door democratisation of the legislature undermined the executive's traditionally unchallenged dominance in law-making, which the Basic Law had sought (now in vain) to reproduce (Newman, 2000:37). However, with the political executive still being unelected, Hong Kong undoubtedly remained "far from being truly democratic, accountable, and effective" (Chan, 1997). China denounced the 1992-1997 reforms as a deliberate plot to subvert its authority by planting Western democratic institutions on Chinese soil (Pepper, 1999:320).

On 31 August 1994 the NPCSC adopted a resolution that the Legislative Council of British Hong Kong elected in 1995 shall be dissolved on 30 June 1997, because its relatively democratic composition allegedly violated the Sino-British Joint Declaration and the Hong Kong Basic Law. On 24 March 1996 the Preparatory Committee decided to set up a Provisional Legislative Council, which began operations as of January 1997, six months before the transfer of sovereignty. The unelected legislature was largely China's contingency plan for dealing with the "derailing" of the through-train as a result of the Government's constitutional reforms of the mid-1990s, which introduced representative democracy to Hong Kong at a pace unacceptable to the Chinese government (Chen, 2007:164). But it appeared to violate, in both letter and spirit, the Basic Law and the transitional legislation enacted by the NPC which had provided that the legislature should be chosen through elections specified in the Joint Declaration. Note that Article 68 of the Basic Law provides that the Legislative Council shall be constituted by "elections." Annex II of the Basic Law also states that the first Legislative Council shall be formed in accordance with the *Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong*

## CONSTITUTIONAL PRIMACY

*Special Administrative Region of 1990* (Chan, 1997).

In other words, in setting up an unelected legislature for Hong Kong, China had reneged on its former commitment that the last Legislative Council of British Hong Kong would ride a “constitutional through-train” to the first Legislative Council of the Hong Kong SAR (Byrnes, 2000). The provisional legislature was chosen by a 400-member Selection Committee, who in turn had been chosen by the 150-member Preparatory Committee chaired by the Chinese Foreign Minister. It was criticised both by the international community and by Governor Patten, who denounced it as having “no legitimacy, no credibility, and no authority”; indeed, its membership included 10 individuals who had been defeated in the 1995 General Election (Thornburgh, 1997). Even NPC Deputy Liu Yiu-chu, a former Basic Law drafter, reportedly pointed out, “Setting up a provisional legislature before 1997 was never ratified by the NPC and cannot be done without the most blatant disregard for legal theory and reason ... it contravenes the Sino-British Joint Declaration, an international treaty which stipulates Britain is in charge of Hong Kong until midnight on 30 June 1997” (cited in Feinerman, 1997:94).

Since the transfer of sovereignty, a governing coalition drawn from the Pro-China Bloc has controlled both executive and legislative branches till the present day. Of the sixty provisional lawmakers fifty-four had worked in Chinese-appointed bodies; six of them had previously won direct elections while 10 had in fact lost in 1995 (Pepper, 2000:68).<sup>5</sup> For the General Election of 1998 the old model, as envisaged by the Basic Law, was adopted. To assist the Pro-China minority to gain more seats in the direct elections and prevent the Pan-Democrats from winning a sweeping victory,

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<sup>5</sup> There were a few exceptions, such as Frederick Fung, who could be considered as a marginal member of the Pan-Democratic Bloc.

## CONSTITUTIONAL PRIMACY

the previous first-past-the-post electoral system was replaced by proportional representation of medium-sized, multi-member, constituencies. This forced the Pan-Democrats to compete against each other, and Pro-China parliamentarians capitalised on the opportunity to capture at least one seat in each constituency by winning about 25% of the popular vote (Cheng, 2001:17). The SAR regime enjoyed the support of a wider Pro-China community consisting of business and professional elites dispersed across statutory agencies and advisory bodies as well as the enlarged Hong Kong delegations to the National People's Congress and the Chinese People's Political Consultative Committee, both of which resulted from China's strategy to co-opt Hong Kong leaders who did not serve in traditional China-friendly bodies (Ma, 2012:74).

The first head of the SAR regime was Chief Executive Tung Chee-hwa, who by virtue of his Office (as discussed in Chapter 3) was vested with wide-ranging political powers under the Basic Law exceeding those of most of the world's presidents. Tung was without doubt the ideal person to head the governing coalition. Being the son of a tycoon who had built an impressive shipping business, Tung had received his early education in a pro-Communist school and graduated from the University of Liverpool in the United Kingdom. The son of a Shanghainese immigrant, Tung was culturally familiar to many Chinese leaders at the time, including President Jiang Zemin (1993-2003) and his highly influential Shanghai faction within the Chinese Communist Party. And as a transnational businessman, Tung had forged longstanding friendships with elite families in the United States and Britain through his commercial dealings. Tung came to public attention in 1992 when he entered politics as a non-portfolio member of Chris Patten's Executive Council. In appointing as Hong Kong's first Chief Executive a leader who shared their

## CONSTITUTIONAL PRIMACY

background and conservative beliefs, China was reassuring the Hong Kong business elite that their political predominance would be secured (Loh & Lai, 2007:27-29). Nonetheless, Tung's cabinet consisted of the three top civil servants – the Chief Secretary Anson Chan (who had held the same position under Governor Patten), the Financial Secretary Sir Donald Tsang (who had also held the same position under Governor Patten), and the Secretary for Justice Elsie Leung – as well as three members of the Provisional Legislative Council, and eight public personalities (three of whom had previously served under Chris Patten) (Miners, 2000:100-101).

### 3.3. THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS

As discussed in the previous two chapters, the NPCSC forms part of post-1997 Hong Kong's constitutional architecture. In line with the Chinese Constitution of 1982, the Basic Law vests the authority of final interpretation of itself in the NPCSC. In fact, it was not until the promulgation of the Constitution that the NPCSC was empowered to enact and amend laws, except those falling within the jurisdiction of the Congress itself, and when the NPC is not in session, to supplement and amend those laws that the NPC has enacted (Article 67). Thus the NPCSC may annul national administrative regulations and local law if they contravene the Constitution or national legislation (Chen, 2000:412).

On the basis of Leninist theory the NPC is the keystone of a monolithic state structure embodying the spirit of the Paris Commune of 1871 which “combin[ing] legislation and administration” exposed the futility of the separation of powers and checks and balances (O'Brien, 1988:344). However, in the early post-Mao years it became clear that the 3000-member NPC, even if reformed, could contribute little to

## CONSTITUTIONAL PRIMACY

clearing up the legislative work that had accumulated since the 1950s. By early 1982 it had become clear that if the NPC was to contribute to political efficiency, it must create specialised organs and recruit professional personnel. Indeed, by the late 1970s it was increasingly recognised that expanding the powers of the NPCSC, a previously politically insignificant secretariat, was the ideal solution that would neither undermine the NPC's constitutional supremacy nor challenge the dominance of the Communist Party. As China's *de facto* legislature, the much smaller 175-person NPCSC would be far prompter to deliberate and pass the many primary acts of legislation that could not wait for the NPC's infrequent and interminable scale of debate (see Figure 16).

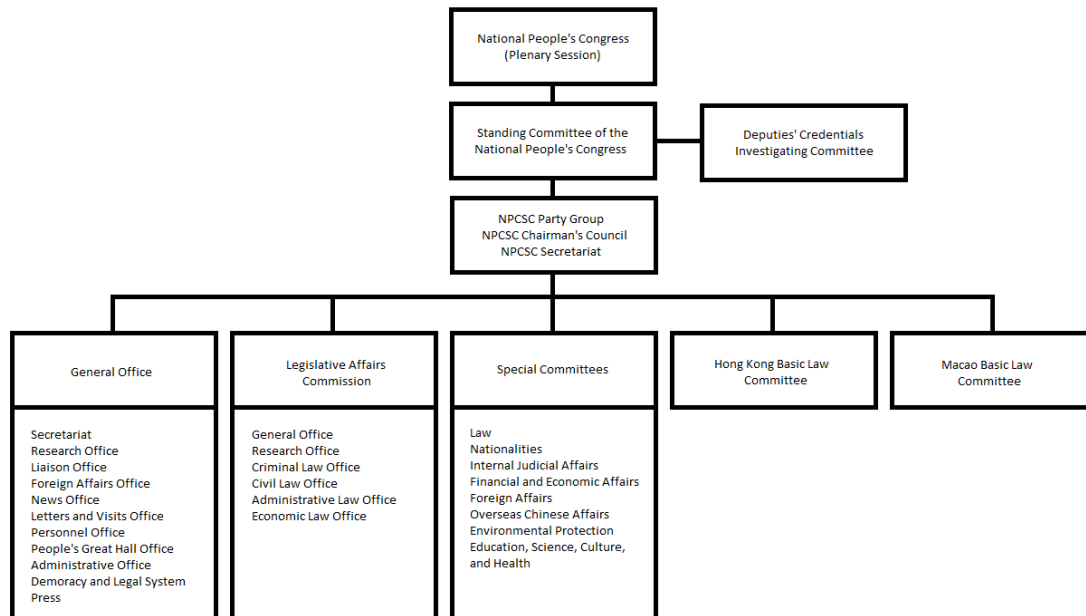
During the early to mid-1980s, the NPCSC was widely regarded as a "dumping ground" for retired CCP and state leaders; surprisingly, however, it turned out that the many eminent Party elders serving on the NPCSC were a key source of its self-aggrandisement, given that in China authority tends to vest in individuals rather than institutions. Among those serving on the 6<sup>th</sup> and 7<sup>th</sup> NPCSCs, 7 were incumbent or previous Politburo members; over half of the 155 members of the 6<sup>th</sup> NPCSC had previously held rank at least equal to a central government minister's or vice minister's (Tanner, 1999: 97-99). Uncomfortable with retirement, many had been seeking a new political role to play and the foreseeable result was a notable increase in NPCSC assertiveness *vis-à-vis* other state organs. Aware of its own institutional weaknesses, the NPC since late 1987 has begun to expand NPCSC oversight.

Since Tiananmen the increasingly assertive Party elders on the NPCSC and the elaboration of its bureaucratic and sub-committee system have combined to leverage the NPCSC's political influence (Tanner, 1999:118). The Party too is being increasingly pressed to consult and accommodate a substantial array of interests into the

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legislative process (Tanner, 1999:235).

**FIGURE 16: THE ORGANISATIONAL STRUCTURE OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS**



Source: Tanner (1999:98).

During the 1980s the NPCSC checked some of the more ambitious plans of the Party's reformist faction: in repeatedly remanding drafts of the Bankruptcy Law, the State-Owned Enterprise Law, and the Villagers' Committee Law, the NPCSC has shown itself willing and able to scrutinise and prevent passage of unrevised initiatives relaxing administrative control, decentralising power, and restricting the power of CCP committees (see Dowdle, 1997). A draft amendment to the Criminal Law of 1997,<sup>6</sup> which would have granted public security officials immunity from prosecution for acts performed while on duty, had to be abandoned due to strong disagreement of deputies. When the Legislative Law of 2000 was being debated, the

<sup>6</sup> Proposed Criminal Law Amendment Bill of the 8<sup>th</sup> National People's Congress of the People's Republic of China (National People's Congress, 1997).

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NPCSC, defying the State Council's preferences, insisted on Article 71 which prohibits central government departments to make free-standing "laws," confining them to "regulations" that demonstrably give effect to an administrative directive of the State Council.

Thanks to the "empire building" of NPCSC Party elders, the Chinese Congress has an elaborate legislative bureaucracy (Tanner, 1999). One of the more important is the Legislative Affairs Commission, comprised of some 200 professional legislative draftsmen tasked with drafting, reviewing, and amending bills; offer advice to lawmakers; and consulting over legislative proposals. Article 158 of the Hong Kong Basic Law set up a new working committee under the NPCSC known as the Hong Kong Basic Law Committee. It consists of twelve members, six each from the Chinese Mainland and Hong Kong, reappointed every five years by the NPCSC (see Table 2). The Hong Kong members are nominated jointly by the Chief Executive, the President of the Legislative Council, and the Chief Justice. The NPCSC is required to consult the Committee before nullifying any act of the Legislative Council;<sup>7</sup> enacting or repealing a national statute applicable to Hong Kong under Annex III;<sup>8</sup> or interpreting<sup>9</sup> or amending<sup>10</sup> the Basic Law; thus rendering the Committee "quasi-judicial" (Ghai, 2007:373).

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<sup>7</sup> Article 17, Hong Kong Basic Law.

<sup>8</sup> Article 18, Hong Kong Basic Law.

<sup>9</sup> Article 158, Hong Kong Basic Law.

<sup>10</sup> Article 159, Hong Kong Basic Law.

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**TABLE 2: MEMBERS OF THE  
FIRST NPCSC HONG KONG BASIC LAW COMMITTEE (1997-2003)**

Name	Member	Position
Xiang Chunyi	Secretary General	Deputy Secretary General, NPC Legislative Affairs Commission
Wong Po-yan	Deputy Secretary General	Hong Kong member of the Basic Law Drafting Committee
Wang Yingfan	Member	Vice Foreign Minister of China
Qiao Xiaoyang	Member	Deputy Secretary General, NPC Legislative Affairs Commission
Chen Ziyang	Member	Deputy Director of the Hong Kong and Macao Affairs Office
Liu Zheng	Member	Deputy Secretary General, NPCSC
Wu Jianfan	Member	Chinese Mainland member of the Basic Law Drafting Committee
Raymond Wu	Member	Hong Kong member of the Basic Law Drafting Committee
Ng Hong-mun	Member	Hong Kong Deputy to the NPC
Albert Chen	Member	Dean, Faculty of Law, The University of Hong Kong
Anthony Neoh	Member	Senior Counsel of the Hong Kong Bar
Maria Tam	Member	Hong Kong member of the Basic Law Drafting Committee

The framers of the Basic Law had originally considered whether the Basic Law Committee might be vested with the powers of an arbitration panel.<sup>11</sup> This would have assimilated it to the Judicial Committee of the Privy Council, whose opinion the Queen (*mutatis mutandis* the NPCSC) by constitutional custom was obliged to adopt. In the end, the Committee itself eschewed this *modus operandi*, opting instead to be an ordinary working committee under the NPCSC. The Committee met twice or thrice every year, in Beijing or other Chinese cities.<sup>12</sup> Its proceedings are not open to the general public,<sup>13</sup> and in its early years both Hong Kong and Mainland Chinese members raised concerns over its “problems of transparency and efficiency.” There is no clear division of labour within the Committee, and members participate as individuals rather than representatives of any Hong Kong or Mainland constituencies. The Committee willingly took popular opinions into account as an

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<sup>11</sup> Ko Chi Fai, “Anthony Neoh Reveals the Internal Lack of Transparency: Basic Law Committee Disagreements in relation to Interpretation,” *Wenweipo* (16 September 1999).

<sup>12</sup> Personal interview with Prof. Wong Yuk-shan (Member of the NPCSC Hong Kong Basic Law Committee) (9 December 2011).

<sup>13</sup> Personal interview with Prof. Albert Chen (Member of the NPCSC Hong Kong Basic Law Committee) (8 November 2011).

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“important consideration,” and the Mainland members have always been specialists familiar with Hong Kong.<sup>14</sup> The Committee works closely with the Legislative Affairs Commission to produce and perfect draft Interpretations for approval by the NPCSC.<sup>15</sup> When the NPCSC interprets the Basic Law, it divides itself into six working groups, each including a NPC Deputy from Hong Kong to explain the Hong Kong perspective. The NPCSC Hong Kong Basic Law Committee Members and other Hong Kong NPC deputies are listed as observers with the right to speak.<sup>16</sup> Besides engaging NPCSC Interpretations, the Committee also organises conferences and seminars on relevant matters.

### 3.4. THE ACTIVATION OF CONSTITUTIONAL REVIEW

The first major constitutional case that reached the Hong Kong Court of Final Appeal was the highly controversial *Ng Ka Ling v Director of Immigration*. At issue were sensitive topics such as: the constitutionality of laws enacted by the Provisional Legislative Council; the competence of the courts to invalidate acts of the executive and legislative branches, and of the Chinese NPCSC, found to be inconsistent with the Basic Law; the right of abode, and immigration policy; and the conditions under which the Court ought to refer a case involving the Basic Law to the NPCSC for interpretation.

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<sup>14</sup> Personal interview with Prof. Wong Yuk-shan (Member of the NPCSC Hong Kong Basic Law Committee) (9 December 2011).

<sup>15</sup> Personal interview with Ms. Maria Tam (Member of the NPCSC Hong Kong Basic Law Committee) (17 December 2011).

<sup>16</sup> Personal interview with Ms. Maria Tam (Member of the NPCSC Hong Kong Basic Law Committee) (17 December 2011).

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## 3.4.1. THE CHALLENGE

In the Basic Law the constitutional rubric “Permanent Resident” is largely equivalent to the notion of “Citizen” in most other jurisdictions. A Hong Kong Permanent Resident, Chinese or non-Chinese, is entitled to live and work in the territory indefinitely, enjoying the rights and freedoms guaranteed by Chapter 3 of the constitution, including voting and standing for election to most political offices, including Member of the Legislative Council. The Basic Law expressly grants the children of Permanent Residents the right to reside in Hong Kong; *viz.* Article 24(2) provides that a person of Chinese nationality born outside Hong Kong to a Permanent Resident is automatically a Permanent Resident, permitting children born to Hong Kong parents outside Hong Kong to repatriate to the territory should they wish. However, the Basic Law’s framers, when they drafted this provision, did not foresee the proliferation of Mainland-born children whose father, mother or both would possess Hong Kong Permanent Resident status.

Recognising this problem, the Provisional Legislative Council on 1 July 1997 enacted the Immigration (Amendment) No. 2 Ordinance, which excluded illegitimate children born outside Hong Kong from Permanent Resident status, and on 10 July 1997 the Immigration (Amendment) No. 3 Ordinance, that retroactively (back to 1 July 1997) restricted the right of abode to those Mainland Chinese children only whose parents were married and had Permanent Resident status at the time of their birth (Fokstuen, 2003:266-7).

The No. 3 Ordinance decreed that even persons having a right of abode under the Basic Law, both before or after enactment, actually reside in Hong Kong subject to a strict quota enforced through a “Certificate of Entitlement” system. To top it off,

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the Immigration Department published a notice, dated 11 July 1997, requiring applications for Certificates of Entitlement to be made through the Exit-Entry Administration of the Public Security Bureau in the Mainland Chinese district where the applicant resides. The one-way permit, the origins of which may be traced back to the 1950s, was to be issued only to those permitted by the Chinese government to settle in Hong Kong (subject to a daily quota). Violators were to be returned to the Mainland, whence they might reapply in conformity with the proper procedure (Cheung & Chen, 2004:63).

The constitutional challenge in *Ng Ka Ling* emerged from the uncertain immigration status of four illegal immigrants who claimed a right of abode in Hong Kong. Of the four applicants, three of them reached the territory on 1 July 1997. All three individuals had been born out of wedlock to a Chinese father who had resided in Hong Kong continuously for the legal period of at least seven years. The fourth applicant, who was also born out of wedlock to a Hong Kong Permanent Resident, came to British Hong Kong in December 1994 and overstayed. Each applicant had reported to the Immigration Department only after the transfer of sovereignty, asserting their status as Permanent Residents under Article 24 of the Basic Law; which *nota bene* provides that a person of Chinese nationality born outside Hong Kong to Chinese parents who had been born in or had continuously resided for seven or more years in Hong Kong before or after the transfer of sovereignty is by operation of Law a Permanent Resident.

The *Ng Ka Ling* applicants alleged that both Ordinances impermissibly infringed on the Basic Law by imposing a heavier burden on immigrants seeking permanent residency. The courts below (*i.e.* both divisions of the High Court: the Court of First Instance and the Court of Appeal) had held that Article 24 of the Basic

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Law must be read together with Article 22, which provides that residents of Mainland China must apply for permission to enter Hong Kong, and thus the impugned Ordinances were constitutional. While the majority in the Court of Appeal of the High Court conceded that the new Certificate system introduced by the Ordinances ought not to affect any person who had arrived in Hong Kong before the transfer of sovereignty, the legislation was in the main held to be consistent with the “broad principles” of the Basic Law (Cheung & Chen, 2004:64).

Before proceeding to determine the validity of the challenged legislation, the Court of Final Appeal decided it must resolve two outstanding issues: (1) whether the judiciary has the competence to nullify statutes inconsistent with the Basic Law; and (2) whether legislation enacted by the Provisional Legislative Council was unconstitutional because the Provisional Legislative Council itself was unconstitutional. The Court was obliged to revisit the correctness of the 1997 High Court (Court of Appeal) decision in *HKSAR v David Ma*,<sup>17</sup> which yielded preliminary answers to both questions. *David Ma* was a criminal case in which the accused were charged in 1995 with conspiracy to pervert the course of public justice, a common law offence. On 3 July 1997, the tenth day of the trial, the defendants argued that the common law had not survived the change of sovereignty on 1 July 1997, and their indictments should thus discontinue. The High Court disagreed, as the Basic Law had clearly provided for the continuation after the change of sovereignty of law previously in force, and that the criminal justice system of British Hong Kong had been preserved by the Hong Kong Reunification Ordinance, a primary legislation of the Provisional Legislative Council. The accused proceeded to argue that the provisional legislature was nowhere sanctioned in the Basic Law, being nothing but

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<sup>17</sup> *HKSAR v David Ma* [1997] H.K.L.R.D. 76 (Hong Kong Court of Appeal).

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China's unilateral and illegitimate political riposte to the equally unilateral, illegitimate reforms of Governor Patten; and violated moreover those provisions that were properly to govern the first Legislative Council, set out in Article 68 of the Basic Law and in the NPC's 1990 *Decision*; thus rendering unconstitutional and invalid all of its statutes.

In this very first constitutional case after the transfer of sovereignty, the Government acquiesced in, if not actively supported, the activation of constitutional review competence in the courts of Hong Kong. Chief Judge Patrick Chan of the High Court had agreed with the submission of Solicitor General Daniel R. Fung that "a generous and purposive approach" ought to be adopted in interpreting the Basic Law, but nonetheless held that "it is obvious that there will be difficulties in the interpretation of its various provisions," considering that the Basic Law is "unique" in embodying "a treaty made between two nations" deals with "the relationship between the Sovereign and an autonomous region which practises a different system"; articulates "the organisations and functions of the different branches of government"; sets out "the rights and obligations of the citizens"; and was "drafted in the Chinese language, with an official English version, [except that] the Chinese version takes precedence in case of discrepancies."<sup>18</sup>

Vice President Justice Nazareth also agreed with the Solicitor General's argument that the Government's submission "did not for one moment question the competence of Hong Kong courts before 1st July 1997 to determine questions of conformity of Hong Kong statutory law with the Letters Patent ... similarly, that the ... courts, after 30th June 1997, are clearly empowered to determine questions of

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<sup>18</sup> *David Ma*, at 14.

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constitutionality of ... legislation *vis-à-vis* the Basic Law,"<sup>19</sup> and held that post-1997 courts "would have the same [constitutional] jurisdiction, *i.e.* to question conformity of legislation [with the Basic Law]."<sup>20</sup>

However, the Court declined to consider the constitutionality of the Provisional Legislative Council. In the words of Chief Judge Chan, the territory's courts had no jurisdiction to question the acts of their Chinese sovereign, because "There is simply no legal basis to do so. It would be difficult to imagine that the Hong Kong courts could, while still under British rule, challenge the validity of an Act of Parliament passed in United Kingdom or an act of the Queen in Council which had effect on Hong Kong."<sup>21</sup> In short, the High Court was of the opinion that just as the former courts of British Hong Kong had no competence to judge acts of the United Kingdom Parliament before the transfer of sovereignty, so likewise the Hong Kong SAR courts were not empowered to nullify acts of the NPC. Where parliament is sovereign, there is no room for judicial review of the kind that strikes down sovereign acts. The Court ruled that the Chinese Constitution of 1982 gave the highest organs of state power – the NPC and the NPCSC – plenary legislative jurisdiction over Hong Kong. According to Chief Judge Chan, although it was "unfortunate" that the Legislative Council elected in 1995 was deprived of its existence following the transfer of sovereignty, it is "not the business of the Court to enter into the political arena and to determine what the real reasons were." The High Court conclusively presumed that an act of the NPC or the NPCSC subsequent to the Basic Law Act necessarily prevails over it (J. Chan, 1997:386).

As Chief Judge Chan reasoned, the Provisional Legislative Council was created

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<sup>19</sup> *David Ma*, at 131.

<sup>20</sup> *David Ma*, at 132.

<sup>21</sup> *David Ma*, at 57.

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to ensure the continuity of laws, which “is the key to stability”; “Any disruption will be disastrous ... one moment of legal vacuum may lead to chaos ... That must be the intention of the Basic Law.”<sup>22</sup> Even though the Provisional Legislative Council was not strictly a “legislative body” provided by Article 68 of the Basic Law, its formation nonetheless stemmed from “a sovereign act” of the NPCSC which the courts of Hong Kong “cannot challenge.”<sup>23</sup> Essentially, the High Court in *David Ma* took the position that the courts of Hong Kong are bound to apply Decisions and Resolutions of the NPC or the NPCSC, regardless whether they had been formally incorporated into the Basic Law. In other words, the Court may be described as having made a purely political choice (Wesley-Smith, 2003:172).

### 3.4.2. THE RULING

In *Ng Ka Ling* a unanimous Court of Final Appeal, consisting of Chief Justice Andrew Li, Justice Kemal Bokhary, Justice Charles Ching, Justice Henry Litton, and Sir Anthony Mason (former Chief Justice of Australia), while affirming the High Court’s acknowledgement of the Hong Kong judiciary’s constitutional review competence, reversed Chief Judge Chan’s decision on the constitutional relationship between the courts of Hong Kong and the NPCSC. In the following statement, which unequivocally amounted to an assertion of judicial supremacy, Chief Justice Li ruled that “*the exercise of this [constitutional] jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency [emphasis added]*,”<sup>24</sup> and

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<sup>22</sup> *David Ma*, at 17

<sup>23</sup> *David Ma*, at 784-787.

<sup>24</sup> *Ng Ka Ling*, at 61.

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that the Basic Law “*distributes and delimits powers, as well as providing for fundamental rights and freedoms. As with other constitutions, laws which are inconsistent with the Basic Law are of no effect and are invalid* [emphasis added].” The Court also found fault with “The analogy [in the High Court’s *David Ma* judgment] drawn with the old [colonial] order [which] was misconceived,”<sup>25</sup> because “the [judiciary’s] position in the new [post-1997] order is fundamentally different.”<sup>26</sup> This is because “The [constitutional] jurisdiction to enforce and interpret the Basic Law necessarily entails the jurisdiction stated above over acts of the National People’s Congress and its Standing Committee to ensure their consistency with the Basic Law”; whence it is for the courts to “*determine whether an act of the National People’s Congress or its Standing Committee is inconsistent with the Basic Law* [emphasis added].”<sup>27</sup>

Such aggressive assertions of constitutional interpretive primacy notwithstanding, the Court proceeded “cooperatively” to defend the NPCSC’s Decision setting up the Provisional Legislative Council. Largely because *Ng Ka Ling* was the case of first impression in post-1997 Hong Kong concerning the scope of judicial competence, the Court felt impelled finally to resolve the unsettled controversy over the constitutionality of the Provisional Legislative Council following *David Ma* (Bauman, 1997:21). Knowing the sweeping consequences of nullifying every law ever enacted by the provisional legislature, the Court chose deference, holding that, although there had been a presumption in favour of a constitutional “through-train” for the 1995 Legislative Council, such an arrangement was to have materialised “only if certain conditions were met”;<sup>28</sup> implying that the

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<sup>25</sup> *Ng Ka Ling*, at 68.

<sup>26</sup> *Ng Ka Ling*, at 69.

<sup>27</sup> *Ng Ka Ling*, at 64.

<sup>28</sup> *Ng Ka Ling*, at 70.

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Patten Package did not conform with these conditions of the NPCSC. The purpose of the Provisional Legislative Council was to “fill the legislative vacuum” and perform only “limited functions and for a limited time as an interim measure” until the first Legislative Council was formed; hence the Provisional Legislative Council was constitutional under the Basic Law.<sup>29</sup>

The Court nevertheless invalidated portions of the No. 3 Ordinance, not on grounds of the Provisional Legislative Council’s incompetence to legislate, but for the statute’s retroactivity and its requirement that the one-way permit issued at the discretion of Mainland Chinese authorities was a condition for entry to Hong Kong, contrary to Article 24 of the Basic Law. The Court also held invalid the No. 2 Ordinance’s requirement that the parent must have been a Hong Kong Permanent Resident at the time of the child’s birth for the child to claim a right of abode in Hong Kong under Article 24(2)(3) of the Basic Law. Chief Justice Li explained that “Article 24(3) confers the right of abode in unqualified terms on permanent residents ... The Mainland laws requiring exit approval for Mainland residents coming to Hong Kong of course are and remain fully enforceable on the Mainland. But they cannot provide a constitutional basis for limiting rights conferred by the Basic Law.”<sup>30</sup> The Chief Justice added without the right of abode and the right to enter, the rights and freedoms guaranteed by the Basic Law can hardly be enjoyed, including the right to vote and to stand for election.<sup>31</sup>

The significance of the Court’s judgments in *Ng Ka Ling* and in the related immigration case of *Chan Kam Nga*, rendered on 29 January 1999 far transcended the interests of the claimants in these two cases, effectively usurping the political

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<sup>29</sup> *Ng Ka Ling*, at 170.

<sup>30</sup> *Ng Ka Ling*, at 111.

<sup>31</sup> *Ng Ka Ling*, at 110.

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branches' prerogatives in deciding the immigration status of hundreds of thousands, if not millions, of people (Schneider, 2002:582). The Court had also delineated its constitutional relationship to its principal, the NPCSC. In its unanimous judgment the Court had interpreted Article 158 of the Basic Law, establishing the system of constitutional interpretation itself, as encompassing two types of legal provisions: (1) those arising from Hong Kong's autonomous jurisdiction, and (2) "excluded provisions" which: (a) concern affairs for which China's government are responsible, or (b) concern the constitutional relationship between the government and the Hong Kong SAR. The Court constructed a stringent "predominant provision test" to determine its duty to refer to the NPCSC for Interpretation provisions concerning the constitutional relationship between Beijing and Hong Kong. The test was designed with a view to safeguarding the high degree of judicial autonomy enjoyed by the Hong Kong polity, and entitled the Hong Kong courts to interpret most of the provisions of the Basic Law independently of the NPCSC; only obligating the Court to refer an "excluded provision" to the NPCSC for interpretation when it is a "predominant provision" for (as opposed to being merely relevant to) the case at bar (Tai, 2002:194). The Court would only refer to the NPCSC issues relating to responsibilities of the Chinese government or to the constitutional relationship between the Chinese government and Hong Kong, and only if the issue substantially affected the judgment in the case at bar (Fu & Cullen, 2002:216). In *Ng Ka Ling* the Court found that the impugned immigration statutes "predominantly" concerned Article 24, leading it to conclude that the matter lay within Hong Kong's autonomous jurisdiction. Additionally, the "predominant provision test" empowered inferior courts to interpret (in the first instance) all provisions of the Basic Law, excluded and non-excluded, without limitation.

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Chief Justice Li outlined an ambitious methodological “guidance to [the] interpretation of the Basic Law” (*per* High Court Justice of Appeal Frank Stock extra-judicially [2001:157]). In *Ng Ka Ling* the Chief Justice elaborated, “The Basic Law is an entrenched constitutional instrument ... As is usual for constitutional instruments, it uses ample and general language. It is a living instrument intended to meet changing needs and circumstances.”<sup>32</sup> Moreover, “It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied ... Gaps and ambiguities [in the Basic Law] are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the Basic Law and relevant extrinsic materials.”<sup>33</sup>

When interpreting “provisions that define the class of Hong Kong residents,” the courts ought to “consider the language in the light of any ascertainable purpose and the context,” amid which “Of particular relevance would be the provisions of the [ICCPR] as applied to Hong Kong which remain in force by virtue of Article 39 and any relevant principles which can be distilled from the ICCPR.”<sup>34</sup> Recall that, as shown in Chapter 4, in 1997 the NPCSC had invalidated the provisions of the Hong Kong Bill of Rights that had made the ICCPR supreme over all Hong Kong law. With the above guidelines, the Court had practically re-constitutionalised the ICCPR in derogation of the NPCSC’s invalidation. “As to the language of its text,” the Chief Justice added, “the courts must avoid a literal, technical, narrow or rigid approach,” and must consider if “The context of a particular provision is to be found in the Basic

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<sup>32</sup> *Ng Ka Ling*, at 73.

<sup>33</sup> *Ng Ka Ling*, at 74.

<sup>34</sup> *Ng Ka Ling*, at 78.

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Law itself as well as relevant extrinsic materials including the Joint Declaration.”<sup>35</sup> He concluded, “Constitutional interpretation, like other forms of interpretation, is essentially question-specific ... when questions of interpretation arise, the courts will address the challenges posed by the questions raised and develop principles as necessary to meet them.”<sup>36</sup>

### 3.4.3. THE CLARIFICATION

Considerable evidence suggests that when the Justices were deciding *Ng Ka Ling*, they really believed that they were ruling within Permitted Policy Domains. Consider the following: when *Ng Ka Ling* reached the Court in January 1999, the Government had expressly indicated no intention to refer the case to the NPCSC for Interpretation; and as revealed by Chief Justice Li in his judgment, the Government had in fact retreated from its position in *David Ma* and accepted that the courts of Hong Kong “have the jurisdiction ... to examine acts of the National People’s Congress and its Standing Committee for inconsistency with the Basic Law.”<sup>37</sup>

Indeed, immediately following the Court’s decision in *Ng Ka Ling*, Chief Secretary Anson Chan praised it as demonstrating that “the rule of law is alive and well in Hong Kong, that our courts operate independently, and that human rights continue to be protected in Hong Kong ... anyone is free to challenge the administration’s decision and they can be assured of receiving a fair hearing from our courts ... We respect the Court’s decision and we will act accordingly.”<sup>38</sup> Director

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<sup>35</sup> *Ng Ka Ling*, at 76.

<sup>36</sup> *Ng Ka Ling*, at 79.

<sup>37</sup> *Ng Ka Ling*, at 70

<sup>38</sup> Anson Chan “Statement of the Acting Chief Executive” (30 January 1999).

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of Immigration Lee Siu-kwong explained, “Both the Immigration Department and Mainland officials agree to follow the Court of Final Appeal ruling,” and Secretary for Security Regina Ip mentioned that the Government would discuss with Chinese government the “possible ways and means to facilitate the early entry into Hong Kong of those eligible persons” (Lo, 2008:97). Members of the SAR regime expressed similar views: the Liberal Party called the judgment a “landmark,” “correct” and “courageous.”<sup>39</sup> The State Council in Beijing also openly supported the Court’s ruling, with its deputy representative to Hong Kong Wang Fengchao saying that Hong Kong should consider on its own ways to solve the problem brought about by migrants from the Mainland, and that the government had no intention of intervening (Lo, 2008:101).

It was the Court’s broad assertion of supreme constitutional review jurisdiction that provoked China, rather than its interpretation of Articles 22 and 24(2) of the Basic Law.<sup>40</sup> Note that the prevailing view within Chinese academic circles had been that the Basic Law sets up a system of *executive* dominance within which the legislative and judicial branches ought to “cooperate” with their ministerial masters for political stability’s and efficiency’s sake (Shao, 2009; Chen & Wang, 2009; Zou, 2009; Qian, 2009). Importantly, the Mainland Chinese framers of the Basic Law, including several individuals who had taken part in the Preparatory Committee, openly argued that the *Ng Ka Ling* judgment, as well as prejudicing Hong Kong’s long-term interests, flouted the Basic Law, the “One Country, Two Systems” doctrine, and the sovereignty of the NPC (Xiao *et al.*, 2000). Four eminent Chinese scholars, legal advisors to China’s government and drafters of the Basic Law (widely mocked

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<sup>39</sup> The Liberal Party, “Statement: Focus on Collective Drive” (5 February 1999).

<sup>40</sup> Personal interview with Mr. Martin Lee, S.C. (former Member of the Legislative Council) (7 December 2011).

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in Hong Kong as the "Four Great Guardians of the Doctrine," with reference to four fictional characters in a popular martial arts novel by the novelist Louis Cha), launched a sustained attack on the Court of Final Appeal (see Ghai, 2007:134), going so far as to denounce the Court for having transformed Hong Kong into an "independent political entity" (Cheung & Chen, 2004:65).

Xiao Weiyun (2003:853) in particular censured the Court's claim of jurisdiction to review NPCSC acts for consistency with Basic Law as "totally exceeding the ambit of judicial independence, placing its jurisdictional competence above the highest state organ of China, and thus contradicts the Chinese Constitution and the Basic Law." Power to review and invalidate laws enacted by the Legislative Council, according to Xiao, had been vested in the NPCSC, not the Court of Final Appeal, on whom the Basic Law nowhere expressly confers such a power (Xiao *et al.*, 2000:56). Wu Jianfan averred that the Basic Law permits the Hong Kong courts merely to apply, not challenge NPC statutes, a stance he has maintained ever since the drafting of the Basic Law (see Chapter 3) (Xiao *et al.*, 2000:55).

Likewise, a number of members of the SAR regime had mounted a campaign against the Court. NPC Deputy Victor Sit openly demanded Chief Justice Andrew Li to resign because he had failed to consult the NPCSC and to "probe the principles and spirit of the Basic Law" (see Lo, 2008:85). Ironically, Louis Cha himself, former Basic Law drafter and the novelist who originated the derisory epithet "Four Great Guardians of the Doctrine," chided Chief Justice Li for behaving like "a grandchild who beats up the grandfather," whence the Court ought to "apologize" to the NPCSC (Cottrell & Ghai, 2001:222). Shiu Sin-por, former Deputy Secretary General of the Preparatory Committee, warned that "judicial activism" as practiced by the Court in *Ng Ka Ling* would produce immense problems (see Lo, 2008:86).

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Raymond Wu, Member of the NPCSC Hong Kong Basic Law Committee, excoriated the Hong Kongers for “superstitiously” worshipping judges as “authorities who wear red robes and wigs,” which made them “the slaves of law”; those who opposed the supremacy of NPCSC Interpretations were akin to “patients” of an insane asylum who needed psychotherapy; Tsang Hin-chi, a Hong Kong Member of the NPCSC, maintained that the Court should take steps to solve the problems it created (see Lo, 2008:90-5).

Under considerable pressure from Mainland China, the Government took the unprecedented step of asking the Court to “clarify” *Ng Ka Ling*. This petition was made wholly because of China’s displeasure with the Court’s assertion that it might invalidate NPCSC acts (Chen, 2006:636). On 26 February 1999 the Court accepted the petition and issued its ruling in *Ng Ka Ling v Director of Immigration (No. 2)*,<sup>41</sup> which admitted that (1) the Hong Kong courts’ power to interpret the Basic Law is derived from the NPCSC under Article 158 of the Basic Law; (2) any Interpretation made by the NPCSC under Article 158 would be binding on the Hong Kong courts; (3) the Court’s judgment in *Ng Ka Ling* did not purport to impugn the authority of the NPC and NPCSC “to do any act which is in accordance with the provisions of the Basic Law and the procedure therein.”<sup>42</sup> The Court described the delivery of this Clarification as “exceptional” and disallowed the Bar Association to appear as *amicus curiae* (Cottrell & Ghai, 2001:222).

The practical implications of the Clarification were that the competence of the Hong Kong courts to interpret the Basic Law and review the acts of government authorities is not absolute, and that once the NPCSC has spoken, the courts must

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<sup>41</sup> *Ng Ka Ling v Director of Immigration (No. 2)* (1999) 2 H.K.C.F.A. 141.

<sup>42</sup> *Ng Ka Ling (No 2)*, at 6.

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obey (Chen, 2006:639). Beijing seemed to be satisfied with this resolution, and the first wave of attacks on the Court ceased in reciprocity for its re-articulation of judicial self-restraint (So & Chan, 2002:376). Chinese officials composed their disagreements, stating that the Clarification had adequately resolved the controversy (Barton, 2002:382-3). An official of the NPCSC Legislative Affairs Commission stated, “We believe that the Court of Final Appeal’s clarification in its 26 February judgment is necessary.”<sup>43</sup> When asked if Beijing would take any further action against the Court, Vice Premier Qian Qishen merely replied, “Let us leave [the Court’s clarification] as it is” (Li, 2011:154). NPCSC Member Tsang Hin-Chi and the NPCSC Hong Kong Basic Law Committee’s Tsui Sze-man also agreed that after the Clarification, there was no necessity for the NPCSC to reinterpret or amend the Basic Law’s provisions on constitutional review (Barton, 2002:382-3).

Hong Kong’s legal community generally considered the Clarification not as a retreat from the Court’s original position, but as a statement explicating what had been implicit in the original judgment (Chen, 2006:641). Note that the Court did not actually withdraw from its original position that it may strike down acts of the NPCSC *not* in accord with the Basic Law. The “clarification” was viewed merely as placating Mainland China, and it was seen to have served its purpose (Ghai, 2007:13).

### 3.4.4. ENTER THE STANDING COMMITTEE

The SAR regime, however, was not so satisfied, even after the Court of Final Appeal’s Clarification. Although immigration is not a Prohibited Policy Domain in the sense

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<sup>43</sup> “Speech of Wen Wei Po, the Spokesman for the Legislative Affairs Commission of the Standing Committee of the National People’s Congress Concerning the Judgment of the Court of Final Appeal of the Hong Kong Special Administrative Region” (26 February 1999).

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that it does not directly impinge on the continued political survival of the incumbent regime, *Ng Ka Ling* had strayed too far from the regime's zone of tolerance. The Government feared that the decision would trigger an inundation of children from the Mainland in the next ten years, estimated at 1.675 million,<sup>44</sup> who, seeking to settle in Hong Kong, would precipitate severe social and economic crises. It was estimated that an additional public expenditure of HK\$700 million (approximately US\$89.7 million) would be needed to accommodate them. According to Goodstadt (2005: 90), the Government's estimates aroused suspicion that it was determined to overturn *Ng Ka Ling* at all costs. The Government foresaw that these ten months might open a "vacuum period" in which illegal immigrants could try to sneak into Hong Kong (Lo, 2008:98). To avoid the costly option of amending the Basic Law, presumably because it would be ten months before the NPC met again in March 2000, the Chief Executive took a shortcut, inviting the NPCSC to reverse the Court's decision with a binding Interpretation. Significantly, public opinion on the Government's decision was divided: a poll conducted by the Hong Kong Policy Institute showed that 60% of respondents supported the option of inviting the NPCSC to interpret the Basic Law to deal with the influx, while 40% supported revising the Basic Law; however, another survey of 506 people conducted by the University of Hong Kong's Social Science Research Centre found that 70.5% of respondents were undecided about the option of revising the Basic Law while another 29.5% said they were "clear," and 73% said they were "unclear" about the choice of NPCSC interpretation of the Basic Law while only 27% said they were "clear" about it (cited in Lo, 2008:106).

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<sup>44</sup> The Legislative Council, "Assessment of Service Implication in Relation to the Judgment of the Court of Final Appeal on the Right of Abode Issue Tabled at the Legislative Council" (6 May 1999).

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Pursuant to a motion approved in the Legislative Council, the Government submitted a report to the State Council in Beijing in May 1999, soliciting its referral to the NPCSC for a Basic Law Interpretation. The Government's report stated that the Court's judgment was "different from the Government's understanding of the wording, purpose and legislative intent of these provisions."<sup>45</sup> Chief Executive Tung opined, "Through the interpretation, we hope to relieve the population pressure and establish the original legislative intent."<sup>46</sup> There is no evidence that the SAR regime was acting under pressure from Beijing (Tsang, 2001:7; Chen, 2009b:759). The referral to the NPCSC became extremely controversial, as nothing explicit in the Basic Law suggests that the Government can refer to NPCSC the interpretation of Hong Kong's constitution. The move has been castigated as a self-inflicted blow to Hong Kong's autonomy and judicial authority, and to the rule of law (see Chen, 2002:78).

The NPCSC obligingly delivered a decision in *The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 22(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* ("Immigration Interpretation" hereafter),<sup>47</sup> which effectively reinstated the statutory provisions invalidated by the Court (Lee, 2001). The drafting process of this Interpretation was notably less transparent than was normal for NPC legislation; it took a mere two weeks to render the document, in contrast to the several months NPCSC Legislative Interpretations usually take (Dowdle, 2007:72) The Interpretation

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<sup>45</sup> The Hong Kong SAR Government, "Report in relation to the Request for the Central People's Government to Assist in the Resolution of the Implementation of Provisions of the Hong Kong Basic Law" (20 May 1999).

<sup>46</sup> Tung Chee-hwa, "Opening Remarks at the Press Conference on Right of Abode Issues" (18 May 1999).

<sup>47</sup> *The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 22(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).

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decreed that only children had a right of abode one or both of whose parents had been Permanent Residents of Hong Kong at the time of birth; that all applicants for immigration from China must be granted a Certificate of Entitlement as a condition of immigration to Hong Kong; and that the Court of Final Appeal had failed to distinguish properly between the internal affairs of Hong Kong and relations between Hong Kong and China (Wong, 2004). The Court had erred in not making a referral to the NPCSC, as the Basic Law provisions at issue belonged to the category of “excluded provisions.” The Immigration Interpretation has terminated the precedential force of *Ng Ka Ling*, according to Wang Zhenmin (2007:611), Tsinghua Law School professor and since 2006 Member of the NPCSC Hong Kong Basic Law Committee. Qiao Xiaoyang, Deputy Secretary General of the NPC Legislative Affairs Commission, opined that the Court of Final Appeal should have consulted the NPCSC before rendering its decision in order to guarantee the “correct” interpretation of the Basic Law; that *Ng Ka Ling* had undermined the “stability and prosperity of Hong Kong” by permitting too many immigrants; and that the petition of the NPCSC by the Chief Executive was consistent with the powers granted him by Articles 43 and 48(2) of the Basic Law (Lo, 2008:102).

After the Interpretation was rendered, Chief Executive Tung announced that he was “very, very pleased” that the NPCSC had “made a giant step towards solving a very difficult problem” (Lo, 2008:83). The Government now estimated that the NPCSC Interpretation had reduced 1.675 million potential immigrants to a mere 170,000; the population influx problem was deemed to have been solved (Wong, 2004:17). Even amid this “retaliation,” however, the Government and the NPCSC made concessions supporting the Court’s authority; for instance, the Interpretation exempts from its own effect any right of abode in Hong Kong acquired and vested

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under the judgment in *Ng Ka Ling*. Moreover, on the day the Immigration Interpretation was issued, the Government announced a “Concession Policy” whereby right of abode claimants who resided in the territory between 1 July 1997 and 29 January 1999, and who had during that time made a claim for right of abode with the Director of Immigration, would not be affected by the Interpretation. About 3,700 persons benefitted from this Concession Policy; however, there were another 5,000 disappointed claimants who believed they should have been entitled to the decision in *Ng Ka Ling* or the Government’s Concession Policy (J. Chan, 2011b) – an issue that would be dealt with by the Court in *Ng Siu Tung* (see below).

### 3.5. APPLYING THE THEORY

The NPCSC has exercised considerable self-restraint in pursuing its rivalry with the Hong Kong Court of Final Appeal for primacy respecting the Basic Law’s meaning. Its Immigration Interpretation did not invalidate the competence of the Hong Kong courts to nullify acts of the Legislative Council, or the Court of Final Appeal’s claim that it may review the decisions of the NPC and NPCSC; or quash the Court’s “predominant provision test” relating to Article 158 of the Basic Law (Lee, 2001:323). In fact, immediately after the NPCSC Interpretation, even High Court Chief Judge Patrick Chan, whose judgment was affirmed by the Interpretation, believed that the *dicta* in *Ng Ka Ling* interpreting broadly the Hong Kong judiciary’s power to review the constitutionality of statutes was still good law (see Lee, 2001:338).

What persuaded the NPCSC to acquiesce in the activation of the courts’ constitutional jurisdiction despite the politically undesirable results obtained in *Ng Ka Ling*? Recall that political choices are often motivated by both instrumental and

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expressive-symbolic interests. Consider first the NPCSC's instrumental incentives. Despite *Ng Ka Ling's* reputation as a manifesto of the Court's defiance and activism, the ruling also showcased the Court's eagerness to earn political trust – not least in that the Court had struck down no act of the NPCSC, but instead upheld the constitutionality of the Provisional Legislative Council whilst proscribing the Patten Package as flouting the original Sino-British settlement of the first post-1997 Legislative Council's composition. The *Ng Ka Ling* decision yielded important cooperative benefits to China, investing the Provisional Legislative Council with legitimacy and reassuring the government that what the NPCSC had done *in practice* would receive the Court's full endorsement.

These considerations, however, might well not have sufficed to insure the Court's review jurisdiction; the NPCSC's expressive-symbolic interests must have weighed in too. As discussed in Chapter 2, political decisions are often made to promote domestic and international enthusiasm in a nascent constitutional order (Brennan & Hamlin, 2006:342). The same interests also figured in the NPCSC's calculus of the costs and benefits of letting constitutional review to be activated in Hong Kong.

Firstly, the *David Ma* case, in which the High Court asserted the constitutional jurisdiction of the Hong Kong judiciary, yet also expressed a willingness to defer to the sovereignty of the NPC, did serve China's overriding preference for congressional supremacy, as codified in the Basic Law; hence review of Legislative Council statutes was politically acceptable to China. Secondly, Chinese rulers, acting through officials on the NPCSC in charge of Hong Kong affairs, had a strong interest in signalling to the international community their commitment to the "One Country,

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Two Systems” solution and to the vibrancy of the Basic Law.<sup>48</sup> As the NPCSC Hong Kong Basic Law Committee’s Wang Zhenmin (2007:617) explained, “China does understand the extreme importance of Hong Kong preserving its common law. The excellent rule of law tradition is an invaluable asset and advantage to Hong Kong which deserves careful preservation.” China has an especial interest in convincing Taiwan of its tolerance of Westernised, autonomous legal institutions within its territories (Miners, 2000:99; Lam, 2007). Indeed, if the Taiwanese were to perceive China as interfering in Hong Kong’s legal affairs to the detriment of its rights and freedoms, they would hesitate all the more over the prospect of the transfer of sovereignty with China (Schneider, 2002:597). An independent judiciary exercising review powers like that of Hong Kong, forming an integral part of this commitment, showcases China’s tolerance of Western values previously entrenched in the former British colony. Any move made by China undermining the credibility of this commitment, would, in addition to jeopardising Hong Kong’s value as an international financial and commercial centre, alarm Taiwan. The island’s independent constitutional review authority, the Council of Grand Justices, is a key player in its political life (see Chapter 2). The commitment of China’s government to preserving Hong Kong’s constitutional autonomy and integrity stems from the pragmatics of its politico-economic grand strategy (Law, 2006).

Indeed, despite its supremacy on the Mainland, the NPCSC decided to adopt a highly restrained approach to the territory’s affairs, at least for the time being. In 1998 the NPCSC sent envoys to Hong Kong to instruct local NPC Deputies: to eschew interfering with or complaining against the Government, as Mainland Chinese NPC

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<sup>48</sup> The United Kingdom, the United States, and the European Union regularly monitor political developments in post-1997 Hong Kong.

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Deputies do in their home provinces; to waive immunity from arrest in Hong Kong territory while the NPC is in session (notwithstanding the Chinese Constitution's guarantee to the contrary); and to focus exclusively on matters related to Mainland China (Fu & Choy, 2007:207).<sup>49</sup> This approach was mandated in the teeth of some Deputies' publicly-expressed disappointment with the "heavy-handed and disrespectful manner" with which the NPCSC handled the matter; having been summoned to a meeting with senior NPCSC officials who issued their orders peremptorily (Fu & Choy, 2007:208).

It is noteworthy, too, how, after *Ng Ka Ling*, the SAR regime soft-pedalled a constitutional jurisdiction nowhere explicated in the Basic Law, which empowered the courts to nullify laws and policies. Recall that authoritarian governments, like their democratic counterparts, necessarily incur transaction costs in reaching decisions. To roll back constitutional judicial review would have imposed on the Government a great deal of difficulties in order to overcome internal disagreements and neutralise external resistance by the public.<sup>50</sup> The cohesiveness of the SAR regime on the issue of constitutional review was conspicuously low. As set forth in Subsection 3.4.3 above, senior members of the Pro-China establishment had harshly criticised the Court and judicial review; however, as evidenced just below, important constituencies within the regime, especially the government legal service, senior civil servants, and certain party politicians, perceived an expressive-symbolic interest in supporting constitutional review in Hong Kong. The Department of Justice in particular played a leading role in explaining its procedures and its benefits to

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<sup>49</sup> See, *Standing Committee of the National People's Congress Measure Concerning the Execution of Deputies' Duties by the Deputies of Hong Kong to the National People's Congress* (1998).

<sup>50</sup> Personal Interview with Prof. Albert Chen (Member of the NPCSC Hong Kong Basic Law Committee) (8 November 2011).

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officials and academics from Mainland China.<sup>51</sup> This division of opinion persisted despite the regime's near-unanimity in resolving to stem the tide of immigration from the Mainland.

Thus, in November 1999, ten months after *Ng Ka Ling*, Secretary for Justice Elsie Leung described constitutional litigation as "a healthy sign that the new constitutional order is being developed through the clash of ideas presented to our independent judiciary," and concluded that "when courts are required to decide upon the constitutionality of legislation, they are drawn into issues that have a much higher policy content than is usually the case. This is inevitable when legislation dealing in detail with highly controversial issues is judged against a constitution that is drafted in broad terms, and that may not expressly deal with those issues."<sup>52</sup> On another occasion, Secretary Leung praised constitutional litigation in the courts as "demonstrating the liveliness of the Basic Law and the independence of the judicial system,"<sup>53</sup> and added that constitutional litigation had helped "to elucidate the relevant provisions of the Basic Law."<sup>54</sup> Similarly, on 4 April 2000 Senior Assistant Solicitor General Peter Wong wrote in a leading, pro-China local newspaper, "Through [constitutional] litigation, the courts have incrementally built up its [*sic*] interpretations of the Basic Law, rendering the Law's meaning and applicability even

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<sup>51</sup> Personal interview with Mr. P.Y. Lo (Chairman of the Constitutional Affairs and Human Rights Panel, Hong Kong Bar Association) (7 November 2011); personal interview with Prof. Albert Chen (Member of the NPCSC Hong Kong Basic Law Committee) (8 November 2011); personal interview with Mr. Andrew Li (first Chief Justice of the Hong Kong Court of Final Appeal) (29 November 2011).

<sup>52</sup> Elsie Leung, "The New Constitutional Order under the Basic Law - Speech by Secretary for Justice at the Annual Reunion Dinner of St. John's College, The University of Hong Kong" (1 November 1999), cited in Lo (2010: 221).

<sup>53</sup> "Basic Law Litigation Demonstrates the Independence of the Judiciary: Elsie Leung suggests that Litigation is an Inevitable Stage of the Establishment of a New Constitutional Order," *Wenweipo* (9 April 2000).

<sup>54</sup> Elsie Leung, "Sticking to Basics: Litigation is Inevitable over Parts of the Basic Law," *South China Morning Post* (9 April 2000).

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clearer.”<sup>55</sup>

The Department of Justice even stepped up to defend judicial prerogatives against rival claims and criticisms. When in December 1999 NPCSC Hong Kong Basic Law Committee Member Albert Chen suggested the Committee might be converted to a constitutional court-like body hearing the legal opinions of both parties to a case before recommending a Basic Law Interpretation to the NPCSC, Secretary Leung, presumably defending the Court of Final Appeal’s status as Hong Kong’s top constitutional court, argued that the Committee is “not a court” and was intended to be nothing more than a consultative body.<sup>56</sup> And when NPC Deputy Ma Lik ridiculed the foreign common law judges on the Court of Final Appeal as “parachute judges,” the Department of Justice came to their defence in no uncertain terms: “Judges appointed to the Court from such jurisdictions are of the highest international standing. Their appointments have played an important part in establishing the excellent reputation of the Court. They also reflect the confidence placed in Hong Kong’s judicial system by other major common law jurisdictions. These have been important factors in preserving confidence in the independence of the judiciary in Hong Kong ...” (Chan, 2002:94). Moreover, legal officers of the government, all trained in the Anglo-American common law tradition, “tend to have their own thinking about constitutional law,” the drastically different views held by certain Mainland lawyers notwithstanding.<sup>57</sup>

Jasper Tsang, Member (later President) of the Legislative Council and

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<sup>55</sup> Peter Wong, “The Basic Law of the Hong Kong SAR: Development and Prospect,” *Wenweipo* (4 May 2000).

<sup>56</sup> “Albert Chen Advocates the Basic Law Committee to Imitate a Court,” *Ming Pao* (6 December 1999).

<sup>57</sup> Personal interview with Anonymous Official B (Department of Justice) (23 November 2011).

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Chairman of the Democratic Alliance for the Betterment of Hong Kong – the largest pro-China political party in Hong Kong, – admitted that if the judgment of the Court could be “altered” or “overruled” by the Chinese government, then the principle of “final adjudication” would be meaningless, especially given that “the power of final adjudication enjoyed by the Hong Kong courts is part of the basic policy of ‘One Country, Two Systems’.”<sup>58</sup> He exhorted Beijing and the Mainland jurists to understand the common law principles which the Hong Kong courts utilised to interpret the Basic Law and other laws, and admonished, “It is not necessary for them to insist that the Court intended to challenge the National People’s Congress and is always ready to oppose it.”

The SAR regime also confronted strong civil society resistance to any threat to punish the Court of Final Appeal. Even though Hong Kong harboured widespread views supportive of the regime’s anti-immigration statutes (Wong, 2004:19), a large body of public opinion equally condemned any tendency to overturn a binding ruling of the highest court just because it is politically embarrassing or administratively inconvenient (Goodstadt, 2005:89). Influential circles within Hong Kong’s prominent legal profession also censured the Government for inviting the NPCSC to reverse the Court (Wong, 2004:18). Lawmaker Margaret Ng of the Pan-Democratic Bloc submitted to the Executive Council a petition signed by 500 lawyers expressing their view that the Government’s reaction to *Ng Ka Ling* had severely threatened judicial independence and the rule of law. A group of senior law professors joined other academics to launch another signature campaign against the Government for disregarding the rule of law (Lo, 2008:104). The Bar Association

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<sup>58</sup> Jasper Tsang Yok-sing, “Both the Power of Final Adjudication and the Power of Legislative Interpretation Should Be Respected,” *Ming Pao* (11 February 1999).

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denounced the Clarification and the Interpretation of the Basic Law for their severe impacts on the “One Country, Two Systems” scheme. Legislator, Chairman of the Democratic Party, and former Basic Law drafter, Martin Lee warned that the reversal of *Ng Ka Ling* had already deprived Hong Kong of its “high autonomy” as promised by the Basic Law. And Bar Association Chair Audrey Eu publicly defended the Court, stressing that even the highest state organ, the NPCSC, must abide by the Basic Law, and that any actions of the NPCSC contrary to the Basic Law are inappropriate (Li, 2004:154).

### 4. CONSOLIDATING CONSTITUTIONAL REVIEW

#### 4.1. OVERVIEW

According to the Constitutional Investment Theory, the Court’s success in consolidating constitutional review after the traumas of *Ng Ka Ling* and quietly resuming activism implies the ruling elite’s trust and re-investment in the Court. It further implies that the Court has been able to shore up its reputation by establishing a record of cooperation with and reciprocity to the SAR regime and the NPCSC. The Court’s trustworthiness in turn has incentivized the SAR regime and the NPCSC to invest autonomy, funds, personnel, and constitutional jurisdiction in the Court.

Indeed, any young constitutional court like the Hong Kong Court of Final Appeal with ambitions to exercise perdurable constitutional review must prioritise its relations with the SAR regime and the NPCSC. As evidenced below, the Court adopted a range of trust-building measures, affirming many important policy preferences of Mainland China touching Prohibited Policy Domains such as national

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sovereignty; devised doctrines of self-restraint deferent to the NPCSC's constitutional supremacy; procedurally corrected and revised acts of government without meddling with their policy substance; and exploited cases cautiously chosen for not implicating the SAR regime's or the NPCSC's fundamental interests so as to lay the doctrinal foundation for future activism.

### 4.2. AFFIRMING THE NPCSC'S FORMAL PRIMACY

For example, *Lau Kong Yung and others v The Director of Immigration*<sup>59</sup> concerned removal orders against those Mainland Chinese who applied for immigration to Hong Kong between the *Ng Ka Ling* judgment and the NPCSC Interpretation. The appellants argued that they could not have obtained the requisite Certificates of Entitlement, because no procedure for application for them existed at the time; hence, the removal orders were invalid. The Court, by a four to one split, held for the Government, rejecting the argument that the Director of Immigration is obligated to consider humanitarian factors in assessing immigration applications. Thus the Court "cooperated" in implementing the Immigration Interpretation, that Hong Kong Permanent Residents by Mainland Chinese descent must obtain exit approval from the Chinese authorities and hold a one-way permit before entering Hong Kong; that, in order to qualify as a Hong Kong Permanent Resident, at least one of the applicant's parents must have been a Permanent Resident at the time of the applicant's birth.

Signally withdrawing from its overt activism in *Ng Ka Ling*, the Court in *Lau*

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<sup>59</sup> *Lau Kong Yung & Ors v Director of Immigration* (1999) 2 H.K.C.F.A.R. 300 (Hong Kong Court of Final Appeal).

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*Kong Yung* not only affirmed the constitutional force of the NPCSC Interpretation, but even deferentially held – Article 17 of the Basic Law notwithstanding<sup>60</sup> – that the NPCSC has competence to interpret all of the Basic Law provisions, even those dealing with Hong Kong’s internal affairs. Sir Anthony Mason reasoned that the NPCSC’s power to interpret the Basic Law is one that is “general and free-standing” by virtue of Article 67(4) of the Chinese Constitution and Article 158(1) of the Basic Law.<sup>61</sup> Sir Anthony concluded that this “general power of interpretation of the Basic Law ... is plainly a power to give an authoritative interpretation of the Basic Law binding on all institutions in [the Hong Kong SAR].”<sup>62</sup>

Chief Justice Andrew Li added, “It is clear that the [NPCSC] has the power to make the Interpretation. This power originates from Article 67(4) of the Chinese Constitution and is contained in Article 158(1) of the Basic Law itself. The power of interpretation of the Basic Law conferred by Article 158(1) is in *general and unqualified terms*” [emphasis added] and “that power and its exercise is not restricted or qualified in any way by Article 158(2) and 158(3).”<sup>63</sup> The Court conceded that any conditions governing when and how the NPCSC should interpret Basic Law provisions concerning Hong Kong’s autonomy must derive entirely from those conventions of constitutional interpretation (if any) developed by the NPCSC. The full implications of Article 158 were apparent: notwithstanding that the Court of Final Appeal has all final *adjudicative* powers, while the NPCSC cannot try any case litigated in the courts of Hong Kong, it may at any time interpret the Basic Law *sua sponte*, and Hong Kong courts shall be bound by all such Interpretations (Chen,

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<sup>60</sup> This Article vests in the Standing Committee the power to review Hong Kong laws when central government responsibility or Mainland China-Hong Kong relations are involved.

<sup>61</sup> *Lau Kong Yung*, at 160-164.

<sup>62</sup> *Lau Kong Yung*, at 166.

<sup>63</sup> *Lau Kong Yung*, at 57.

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2002).

### 4.3. DEFENDING CHINA'S SYMBOLS OF SOVEREIGNTY

In *HKSAR v Ng Kung Siu and another*,<sup>64</sup> issued 12 days after *Lau Kong Yung*, the Court rejected, in a Prohibited Policy Domain – that of national sovereignty – the claim that a statute criminalising flag desecration unnecessarily restricted freedom of expression contrary to Article 19 of the ICCPR – again deferring to China's narrow zone of tolerance. The defendants, pro-democracy street demonstrators, were convicted by a Magistrate's Court for desecrating the Chinese and Hong Kong flags; however, the Magistrate neither fined nor imprisoned them, but bound them over to keep the peace for 12 months on a recognisance of HK\$2,000 (approximately US\$256.4) for each of the two charges. The defendants had succeeded in their appeal before the High Court, which had relied heavily on the Bill of Rights guarantee of freedom of expression (Chan, 2007:421). The Government had then appealed to the Court of Final Appeal, which rendered its judgment in December 1999, eleven months after *Ng Ka Ling*. The challenged provisions – Sections 7 of the National Flag and National Emblem Ordinance and the Regional Flag and Regional Emblem Ordinance – were held constitutional.

Note that China's government, through the National Flag Law promulgated by the NPCSC on 28 June 1990, had already expressed a clear preference that the Chinese flag, a symbol of national sovereignty, must be given the utmost respect. Article 19 of this Law prohibits "publicly and wilfully burning, mutilating, scrawling

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<sup>64</sup> *HKSAR v Ng Kung Siu & Anor* (1999) 2 H.K.C.F.A.R. 442 (Hong Kong Court of Final Appeal).

## CONSTITUTIONAL PRIMACY

on, defiling or trampling upon” the flag. It was listed in Annex III as one of the national laws incorporated into the Hong Kong legal *corpus* upon the transfer of sovereignty by Article 18(2) of the Basic Law. The Provisional Legislative Council enacted the National Flag and National Emblem Ordinance whose Section 7 simply replicates the language of Article 19 of its Chinese counterpart. Hong Kong flag desecration is banned by a similar provision in the Regional Flag and Regional Emblem Ordinance (Wacks, 2000:1).

The defendants in *Ng Kung Siu* argued that these provisions imposed an unnecessary restriction on the freedom of expression contrary to Article 19 of the ICCPR, hence Article 39 of the Hong Kong Basic Law. They denied that the restriction was necessary to respect the rights of others or to protect *ordre public*. The Court conducted a review of diverse materials, including the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR; an Advisory Opinion by the Inter-American Court on the word “laws” in Article 30 of the American Convention on Human Rights; decisions of the United States Supreme Court (such as *Texas v Johnson*<sup>65</sup>); a decision of Italy’s Supreme Court of Cassation; a decision of Germany’s *Bundesverfassungsgericht*; and a provision of the Portuguese Penal Code. Chief Justice Andrew Li, holding for the Government, declared, “*the principle of ‘one country, two systems’ is a matter of fundamental importance, as is the reinforcement of national unity and territorial integrity. Protection of the national flag and the regional flag from desecration ... will play an important part in the attainment of these goals [emphasis added].*”<sup>66</sup>

The Court further pointed out that the Chinese and Hong Kong flags are

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<sup>65</sup> *Texas v Johnson* 491 U.S. 397 (1989).

<sup>66</sup> *Ng Kung Siu*, at 61.

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important and unique symbols, hence banning their desecration is subsumed under the concept of “public order” (*ordre public*) within the meaning of Article 19 of the ICCPR. In striking down the statutes, the High Court was adopting an inappropriately narrow understanding of *ordre public*. Flag desecration is “a form of non-verbal speech or expression,”<sup>67</sup> and the impugned statutes do constitute a restriction which, however, is *de minimis*, given that the same message may still be freely expressed by other modes or media than the one prohibited by the statute. The Court of Final Appeal thus concluded that the “necessity” and “proportionality” tests had been satisfied (Chen, 2009a:245-6). Beijing was no doubt suitably mollified.

More importantly, however, the Court of Final Appeal, even while deferring to China’s interest in immunising the symbol of its sovereignty over Hong Kong, was also upholding its own competence to domesticate NPCSC legislation within the frame of the Basic Law, the Hong Kong Bill of Rights, and the ICCPR, simply by reviewing the flag laws’ constitutionality in the first place (Chen, 2002:81). Note as well that by its judgment the Court neither fined nor imprisoned the defendants, but merely bound them over to keep the peace for 12 months. The Chief Justice further softened the ruling’s impact by expatiating on the freedom of expression as “a fundamental freedom in a democratic society,” which “includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticize government institutions and the conduct of public officials.”<sup>68</sup>

The pre-eminence of the Hong Kong Bill of Rights (whose supremacy clause was invalidated by the NPCSC in 1997) was in this case creatively reaffirmed by interpreting Article 39 of the Basic Law as giving the ICCPR the same overriding

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<sup>67</sup> *Ng Kung Siu*, at 40.

<sup>68</sup> *Ng Kung Siu*, at 41.

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status as other provisions of the Basic Law itself relative to primary legislation and executive decisions. This reasoning was apparently accepted by the Government, which demurred to assert the supremacy over the ICCPR (provided in the Basic Law) of primary legislation enacted to implement an act of the NPC. Instead, the Department of Justice based the Government's case on the claim that the flag desecration ban does not violate the ICCPR in the first place; relying heavily on the comparative jurisprudence of liberal democracies that maintain flag desecration bans (Petersen, 2007:35).

### 4.4. DEFINING THE FREEDOM OF SPEECH

Subsequently, in *Albert Cheng v Paul Tse*,<sup>69</sup> a case that involved neither policy choices of the SAR regime nor specific Basic Law provisions, the Court of Final Appeal held that malice *per se* does not preclude the common law defence of fair comment in defamation. Two hosts of a popular phone-in radio talk show were sued for defamation by a solicitor (who also was a social activist) for conducting themselves unethically and unprofessionally. In early post-1997 Hong Kong, phone-in radio talk show programmes were important channels for the public to air their grievances against the territory's unelected government, to which officials and politicians could and would sometimes respond directly. Many senior officials and department heads also tuned in to these programmes as a way of keeping abreast of the latest public sentiments (Lau, 1997). The programme hosted by the defendants was Hong Kong's most popular radio programme at the time; importantly, both defendants, who commanded considerable respect from their sizable audience, were outspoken critics

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<sup>69</sup> *Albert Cheng v Paul Tse* [2000] H.K.C.F.A. 35 (Hong Kong Court of Final Appeal).

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of the Hong Kong and Chinese authorities. At issue was whether the *purpose* (or motive) behind even an honestly believed opinion may be used to deprive commentators of the common law defence of fair comment.

Ruling in favour of the radio hosts, the Court, which included Lord Nicholls of Birkenhead (sitting Law Lord of the House of Lords) and Sir Denys Roberts (former Chief Justice of Hong Kong, 1979-1988), unanimously acknowledged the obligation to develop the common law consistently with the constitutional guarantee of free speech, as promised in its *Ng Kung Siu* decision. In his lead judgment Lord Nicholls held that the defence of fair comment “envisages that everyone is at liberty to conduct social and political campaigns by expressing his own views, subject ... to the objective safeguards which mark the limits of the defence”; and that it is not for the courts to determine which purposes or motives are morally, socially, or politically desirable, because such kind of censorship would undermine the legally recognised freedom to make comments in relation to the public interest.<sup>70</sup> Chief Justice Li supplemented this reasoning with the argument that, “In a society which greatly values the freedom of speech and safeguards it by a constitutional guarantee, it is right that the courts ... should adopt a generous approach so that the right of fair comment on matters of public interest is maintained in its full vigour.”<sup>71</sup> In affirming the right to comment on public policy and affairs freely (while avoiding direct confrontation with specific acts of China’s government), the Court sought to demonstrate its independence even after *Ng Ka Ling* (see Tai, 2002:209).

### 4.5. INTERPRETING THE RIGHT TO PARTICIPATION IN INDIGENOUS POLITICS

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<sup>70</sup> *Albert Cheng*, at 42-45.

<sup>71</sup> *Albert Cheng*, at 3.

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*Secretary for Justice and Others v Chan Wah and Others*<sup>72</sup> involved the constitutionality of rules governing elections in indigenous settlements of the New Territories region of Hong Kong. This case was brought by non-indigenous villagers challenging the constitutionality of the regime for electing Village Representatives in two New Territories villages in 1999 – Po Toi O Village and Shek Wu Tong Village – on the grounds that they violated the Basic Law, the Bill of Rights, and the Sex Discrimination Ordinance. The two applicants, non-indigenous inhabitants of indigenous villages, were excluded from the rights to vote and stand for public office, respectively. Both the first instance and appellate divisions of the High Court had already decided in their favour. The applicants claimed that any rule excluding them from participation in the Village Representative election was inconsistent with Article 39 of the Basic Law and Article 21(a) of the Bill of Rights.

At issue was the question of how rights of political participation square with Article 40 of the Basic Law, which expressly confers rights peculiar to indigenous people to protect their traditional culture. Indigenous governance is a controversial topic in Hong Kong. Some residents of New Territories villages are designated “indigenous inhabitants” or “indigenous villagers,” defined as descendants through the male line of residents of villages in the geographical area the British colonists called the New Territories. In 1898 the Crown Colony of Hong Kong – then comprising only Hong Kong Island and Kowloon Peninsula – had been expanded to include these “New Territories” north of Kowloon and south of the Shenzhen River, yet only after overcoming the hard resistance of the indigenous people to the British

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<sup>72</sup> *Secretary for Justice & Ors v Chan Wah & Ors* (2000) 3 H.K.C.F.A.R. 459 (Hong Kong Court of Final Appeal).

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army. In exchange for their tacit consent to British rule, the Government of Hong Kong offered a set of concessions to their traditional way of life; *e.g.*, only male descendants could succeed to their parents' estates; selection of Village leaders was limited to indigenous members only (Leung, 2007:214). These concessions have been re-affirmed by China in the Basic Law.

In December 2000 a unanimous Court consisting of Chief Justice Li, Justice Ribeiro, Justice Bokhary, Justice William Silke (author of the landmark *Sin Yau Ming* judgment, which had established judicial supremacy under the Bill of Rights, see Chapter 4), and Lord Millett (incumbent Law Lord of the Judicial House of Lords) ruled that the impugned electoral rules had imposed unreasonable limitations on the applicants' right to participate in public affairs. The Court interpreted Article 40 of the Basic Law to have conferred on indigenous inhabitants rights of self-government, but not to the exclusion of other inhabitants of the same locales. The Court reasoned that the ethnic composition of the 600 Villages in the New Territories had undergone a transformation, with indigenous inhabitants emigrating to urban areas and non-indigenous people moving into these Villages. The Court noted that in one applicant's Village, the non-indigenous inhabitants outnumbered the indigenous ones. Because Village Representatives ought to serve the interests of the Village as a whole, it is unreasonable to continue denying voting rights to the non-indigenous. Such exclusionism, moreover, is inconsistent with Article 21 of the Hong Kong Bill of Rights (the right to participate in public life); and, in particular, the exclusion from the vote of non-indigenous men married to indigenous women, but not of non-indigenous women married to indigenous men, is inconsistent with Section 35 of the Sex Discrimination Ordinance (Gordon & Mok, 2009:123).

However, although ruling for the appellants, the Court confined the otherwise

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sweeping effect of its judgment to the two Villages complained of, excluding myriad others. Evidently it wished to avoid political controversy by preserving the vested interests of the indigenous establishment. The indigenous inhabitants, long-time loyalists of the Chinese government, excoriated the ruling anyway and launched a campaign demanding that the NPCSC issues an Interpretation of Article 40 in their favour (Tai, 2002:210). This time, the Government not only refused to defer the case to the NPCSC, but positively reciprocated the Court's political caution by enacting a statute that imposed over all the New Territories a dual election system whereby each Village would elect two Village Representatives, one serving only the indigenous inhabitants and the other all Villagers (Chen, 2006:674). In its message to the legislature the Government elucidated, "The Government believes that there is a need to reform the election of village representatives, in order to ensure that such elections are carried out openly, fairly, and justly and in conformity with the Bill of Rights and the Sex Discrimination Ordinance."<sup>73</sup>

### 4.6. CIRCUMSCRIBING THE IMMIGRATION INTERPRETATION

In *Director of Immigration v Chong Fung Yuen*,<sup>74</sup> at issue was whether under Article 24(2)(1) of the Basic Law, a right of abode vests in children born in Hong Kong to Chinese parents not Hong Kong residents but Mainlanders visiting Hong Kong temporarily or illegally resident in Hong Kong. A literal reading would be that such a right does vest; however, both the challenged statutory provisions and the NPCSC Hong Kong SAR Preparatory Committee (in 1996) suggested otherwise. The NPCSC

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<sup>73</sup> Abstract of Reference Material for the Legislative Council (HAB/CR 1/20/154 Pt.6).

<sup>74</sup> *Director of Immigration v Chong Fung Yuen* (2001) 4 H.K.C.F.A.R. 211 (Hong Kong Court of Final Appeal).

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in its Immigration Interpretation had concluded that the original intent of Article 24(2) have already been reflected in the Preparatory Committee's 1996 Opinions. The Court had to decide how it should approach constitutional interpretation: by following the original intent of the Preparatory Committee, as approved and adopted by the NPCSC, but extrinsic to the text of the Basic Law, or to take an eventually more activist path.

According to Chinese legal doctrine, in which the NPC is supreme, Opinions adopted by the NPCSC have the force of constitutional law and may not be treated as mere extrinsic materials. A Court that accepted the Chinese approach would have to follow the Preparatory Committee's Opinions on Article 24 of the Basic Law. Indeed, orthodox Chinese lawyers insisted that, the Hong Kong Basic Law having been "written in the spirit of Continental Civil Law," it would be unconstitutional for Hong Kong courts to interpret it in the spirit and after the principles of the common law (Fan, 2006:183). This position, however, was rejected even by the Government *ex parte*.<sup>75</sup> Starting from the common law vantage endorsed by the Government itself, the Court approached the Preparatory Committee's Opinions critically as post-enactment extrinsic materials necessitating strict attention as to their applicability. Thus, in *Chong Fung Yuen* the Court actually defied the NPCSC, but not before taking the mistrust-deflecting step of paying due homage to the NPCSC's theoretical constitutional supremacy and asseverating its deference to it: "Where the [NPCSC] makes an Interpretation of a provision of the Basic Law ... 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."<sup>76</sup>

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<sup>75</sup> *Chong Fung Yuen*, at 27.

<sup>76</sup> *Chong Fung Yuen*, at 31.

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Nevertheless, Chief Justice Li explained that at common law, extrinsic materials produced by the NPCSC, whether pre- or post-enactment, cannot generally affect the judicial interpretation of the Basic Law as long as the courts are capable to clearly construe constitutional provisions in the light of their context and purpose.<sup>77</sup> He insisted that the courts must not give constitutional provisions meanings which their language cannot bear, notwithstanding the existence of potentially relevant extrinsic materials.<sup>78</sup> Permissible extrinsic materials aiding the interpretation of the Basic Law, according to the Court, include “pre-enactment materials, that is, materials brought into existence prior to or contemporaneous with the enactment of the Basic Law, although it only came into effect on 1 July 1997.”<sup>79</sup> Based on this premise, the Court concluded that the NPCSC’s Interpretation of 1999, being opinion best categorised as a kind of *obiter* instead of the *ratio* or original intent of Article 24(2) of the Basic Law, was not binding in *Chong Fung Yuen*. Exploiting the judicial prerogative of “distinguishing,” the Court held that the NPCSC Interpretation applied exclusively to Articles 22(4) and 24(2)(3) of the Basic Law, but not to 24(2)(1), the provision at issue; thus, the Court ruled for the appellants. Notably, in this case the Court also claimed for itself the further prerogative to judge the “character” (rather than the practical effect) of a Basic Law provision, to determine whether it is subject to the NPCSC’s Interpretation as concerning Mainland China-Hong Kong relations.

Note that, two years earlier, the NPC had enacted the Legislative Law of 2000, Section 8(3) of which granted itself (and the NPCSC) exclusive legislative jurisdiction over Hong Kong and Macao – a provision presumably inserted in response to the immigration cases and obviously implying pre-emption of the Court (see Li,

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<sup>77</sup> *Chong Fung Yuen*, at 40.

<sup>78</sup> *Chong Fung Yuen*, at 41.

<sup>79</sup> *Chong Fung Yuen*, at 39.

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2000:133). Even so, neither the NPCSC nor the Government sought to overturn the ruling in *Chong Fung Yuen*, despite its activism; one supposes out of aversion to another round of high transaction costs like the ones arising from the NPCSC Interpretation of 1999. Certainly, China has little direct interest in whether Mainland Chinese born in Hong Kong to visitors or illegal entrants have the right of abode in Hong Kong. Lu Ping, then-Head of the State Council's Hong Kong and Macao Affairs Office, candidly let on that it "it is not China's problem that a few millions of people migrate to Hong Kong ... [rather] ... it is Hong Kong that cannot bear this burden."<sup>80</sup> This may also explain why the NPC did not proceed to overrule the Court of Final Appeal's interpretation (Chen, 2001:186). The Government publicly signalled its commitment to accepting the Court's decision implicitly, even if it lost its suit. On the morning after *Chong Fung Yuen* was handed down, the NPCSC Legislative Affairs Commission spokesperson did express concern over the Court's activism, pointing out that the ruling was "not consistent" with the NPCSC's understanding of the Basic Law (Chen, 2001:179). This statement, according to Albert Chen of the NPCSC Hong Kong Basic Law Committee, may be understood as expressing China's displeasure with the Court's subtle contempt of the NPCSC Interpretation of 1999, which after all explicitly declared that the Preparatory Committee's opinion did embody the original intent of the Basic Law (Chen, 2006:649).

Despite successful outcomes in *Chan Wah* and *Chong Fung Yuen*, the Court of Final Appeal continued to take care to build trust amid the project of consolidating its constitutional jurisdiction. In *Tam Nga Yin v Chan Wai Wa*<sup>81</sup> the Court confronted

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<sup>80</sup> "Lu Ping Criticizes Ng Ka Ling Ruling, The Mainland Departments Cannot Control the Situation," *Hong Kong Economic Times* (6 March 1999).

<sup>81</sup> *Tam Nga Yin & Ors. v Director of Immigration* (2001) 4 H.K.C.F.A.R. 251 (Hong Kong Court of Final Appeal).

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the issue of whether the Basic Law confers the right of abode in Hong Kong to Chinese citizens born outside Hong Kong but subsequently adopted by Hong Kong Permanent Residents. Article 19(1) of the Bill of Rights provides, “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State,” and this was brought to the Court’s attention. Nevertheless, the Court rejected the appellant’s contention that Article 24 of the Basic Law should be expansively interpreted to cover adopted children so as to promote family union consistently with this and other provisions in the Basic Law and the Bill of Rights (J. Chan, 2011d).

### 4.7. FULL RECOVERY

Finally, in *Ng Siu Tung & Others v Director of Immigration*, the last major Chinese immigration case, the Court of Final Appeal reasserted its activism. About 5,000 applicants alleged that the Chief Executive had on at least six different occasions publicly stated that the Government would respect the rulings of the Court – that is, before the NPCSC’s Immigration Interpretation was issued. The Legal Aid Department had advised those seeking to establish their right of abode to bring no individual suits for the time being, as similar cases were already being heard by the Court. In a letter to certain appellants dated 24 April 1998 the Secretary for Security, too, had stated, “After the whole litigation process is completed, the Immigration Department will follow the final judgment of the Courts in dealing with the applications for the Certificate of Entitlement” (Jhaveri *et al.*, 2010:484). Relying detrimentally on these statements, the appellants claimed a “legitimate expectation” that their applications should be disposed just as the parties in *Ng Ka Ling* and

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associated decisions had been (Cheung & Chen, 2004:67).

On 10 January 2002 the Court by a 4 to 1 vote recognised the rights of about one-fifth (1,000) of the claimants. The Court unexpectedly upheld the doctrine of substantive legitimate expectation, ruling that all applicants who had received either *pro forma* replies from the Legal Aid Department advising them against bringing or joining suit, or the 24 April 1998 letter of the Secretary for Security, had a legitimate expectation of being treated like the parties to the test cases, whose rights had not been compromised by the (non-retroactive) NPCSC Interpretation. On the other hand, the Court ruled against claimants who relied merely on oral statements made by Government officials. The joint opinion of Chief Justice Andrew Li, Justice Robert Ribeiro, Justice Patrick Chan (the former Chief Judge of the High Court in *David Ma*), and Sir Anthony Mason stated, “The essential function of ... ‘the doctrine of legitimate expectation’ is to give judicial relief against abuse of executive power.”<sup>82</sup> In *obiter dicta* the Justices hinted that the courts were to act on the principle of “fairness” when accommodating either procedural or substantive legitimate expectations, because “fairness requires that a legitimate expectation be duly taken into account during the process of reaching a decision ... it [might] sometimes dictate the result of that process,” nonetheless, when the courts give effect to legitimate expectations, whether substantive or procedural, they must “avoid trespassing upon the policy preserve of the executive ...”<sup>83</sup>

The Government was clearly caught off guard by this unprecedented ruling, yet despite warnings of the heavy burden on the territory’s housing and health care capacity, officials announced their intention to abide by the Court’s decisions (Martin,

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<sup>82</sup> *Ng Siu Tung*, at 330.

<sup>83</sup> *Ng Siu Tung*, at 347.

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2004:479). Their respect for the Court is not difficult to explain. The impact of the Court's defiance was not very far-reaching in the immediate aftermath of the decision. By the end of December 2002 only about 380 persons out of the original 5,000 applicants in *Ng Siu Tung* had been preferred (J. Chan, 2011b:161).

The Court of Final Appeal has deliberately taken a "balanced approach" to its constitutional jurisprudence, eschewing extreme positions on the ideological continuum.<sup>84</sup> Sir Anthony (2007:306) has also extra-judicially admitted that the Court has been very cautious about the impact of its decisions as well as the public's confidence in those decisions. In consolidating its review power, the Court has requited the SAR regime and the NPCSC with crucial benefits, even while steadily laying an activist jurisprudential foundation. It aptly illustrates my contention that judicial cooperativeness and judicial activism may co-exist despite intrinsic tensions. Indeed, even the NPCSC has had to admit that the Court is more efficient as Hong Kong's *de facto* primary (if not final) constitutional review authority, surely on all issues peripheral to China's core interests. The NPCSC is encumbered by decided limitations to its institutional capacity: it is not a judicial body; it has a weak record of enforcing China's own Constitution; and it is unfamiliar with Hong Kong's political and legal reality (Yu, 2007:194). In this regard, the Court had served the NPCSC well by implementing the Basic Law on its behalf.

## 5. CONCLUSION

The early constitutional history of the Hong Kong SAR was characterised by

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<sup>84</sup> Personal Interview with Mr. Andrew Li (first Chief Justice of the Hong Kong Court of Final Appeal) (29 November 2011).

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competition between the Court of Final Appeal and the NPCSC for *de jure*, and later *de facto*, constitutional primacy. By the end of 2002, however, barely five years after the transfer of sovereignty, the Court had not only survived the constitutional crisis of 1999, but also liquidated any effective opposition to its constitutional jurisdiction while conserving a high degree of decisional autonomy.

This Chapter has applied the Constitutional Investment Theory to the facts and circumstances so as to make sense of these dynamics and yield interesting results. The Hong Kong Court of Final Appeal was born of an international compromise between two globally influential sovereign states who are both veto-wielding Permanent Members of the United Nations Security Council. The thesis that regimes will cede powers to a constitutional court only if they believe, or act as if they believed the court will behave trustworthily is borne out by the controversies that preceded the Court's establishment. China did acquiesce in a competence in the Court to interpret the Basic Law, and in the seating of a foreign common law judge, yet it put "acts of state" beyond the Court's jurisdiction, while conserving the NPCSC's authority to interpret the Basic Law with finality. The empirical evidence also supports the hypothesis that expressive and symbolic interests enabled the activation of constitutional review. The realities of the international system oblige China constantly to reassure the global community, and Taiwan in particular, of its commitment to the "One Country, Two Systems" model and thus to the institution of the independent judiciary and constitutional review.

Consolidation of constitutional review is a gradual process of political investment by the SAR regime. Recall that trust was hypothesised to be the mechanism joining up the variables that determine the fate of constitutional courts under authoritarian regimes. The Court has managed remarkably the conflicting

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roles of developing robust common law constitutional jurisprudence while treading sensitively in the shadow of the Leninist Party-state towering over the territory's constitutional arena (Yap, 2007a).

The Court was able to secure its constitutional powers after *Ng Ka Ling* with the aid of the enormous fund of inherited political assets – professionalised staff, funds, public respect, the tradition of independence – lavished on the former Supreme Court by the British and Chinese Governments; in addition to its own trust-building measures deployed in *Ng Kung Siu* (prohibiting flag desecration) and *Lau Kong Yung* (affirming the NPCSC's free-standing power to interpret the Basic Law). Although the Court did defect from the NPCSC in several cases (*i.e.* *Ng Ka Ling*, *Chong Fung Yuen*, and *Ng Siu Tung*), it is also the case that immigration does not impinge on the Chinese government's fundamental interests, which centre around national sovereignty instead; and if immigration matters did impinge on the fundamental interests of the SAR regime, they would have found the cost of retaliation too high, given constitutional judicial review's importance to Hong Kong's polity. In fact, the Court never ignored the interests and concerns of China (Tai, 2002:195): even in *Ng Ka Ling* the Court affirmed the constitutionality of the Provisional Legislative Council; in *Ng Kung Siu* it paid homage to the symbols of Chinese sovereignty; and in *Lau Kong Yung* the Justices ceded to the NPCSC more authority over the Basic Law than strictly necessary (Ling, 20007).

My theory also proposes that internally fragmented authoritarian governments face high decision and information costs in mobilising to refute particular instances of judicial activism, which in turn may well encourage greater activism. I have been able to adduce considerable evidence supporting this proposition. Certain influential members internal to the SAR regime did censure the Court for asserting its claims to

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constitutional jurisdiction; however, others equally influential inside the Government and the political parties defended the Court's independence, even when they did not agree with every judgment. I have further shown that, when the SAR regime turned against the Court to sanction it after *Ng Ka Ling*, they ran up against formidable external resistance as well, mainly from Hong Kong's prestigious legal establishment and academia, but also from large segments of the general public.

## CHAPTER 6

# THE DYNAMIC EQUILIBRIUM OF CONSTITUTIONAL CONTROL

### 1. INTRODUCTION

This Chapter focuses on what I call a *dynamic equilibrium of constitution control* – a state of affairs wherein the Hong Kong Court of Final Appeal co-exists peacefully with the NPCSC, each master in its own interpretative sphere of policy domains, yet also dynamically developing its own constitutional jurisprudence. This Chapter, inquiring into how this equilibrium consolidated, is organised as follows. Section 2 begins with an overview of the dynamic equilibrium as reflected by the constitutional interpretive activity of the Court and the NPCSC, respectively, as well as the appointments made to these two bodies between 1997 and 2011. Section 3 turns to cases studies of “Prohibited Policy Domains” and “Permitted Policy Domains,” taking up the cases in chronological order. Section 4 examines the political significance of the 2011 landmark case of *Democratic Republic of the Congo v FG Hemisphere*,<sup>1</sup> the first case which the Court of Final Appeal referred to the NPCSC for final decision under Article 158 of the Basic Law. Finally, Section 5 concludes with the findings of this Chapter.

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<sup>1</sup> *Democratic Republic of the Congo and Others v FG Hemisphere Associates LLC* [2011] H.K.C.F.A. 42 (Hong Kong Court of Final Appeal).

# DYNAMIC EQUILIBRIUM

## 2. THE DYNAMIC EQUILIBRIUM

### 2.1. OVERVIEW

The Court of Final Appeal has grown ever more assertive in defining the features of the Hong Kong's constitutional autonomy *vis-à-vis* the Mainland People's Republic of China. Through the 2000s, the Court struck down or reversed an unprecedented number of statutes and executive decisions, from unconditionally releasing *Falun Gong* protestors in the teeth of Mainland China's nationwide ban against the sect,<sup>2</sup> to scaling back the discretion in public security matters of the Commissioner of Police.<sup>3</sup> It recognised homosexual rights,<sup>4</sup> and affirmed the rights of Hong Kong's one million Non-Permanent Residents to travel and return from overseas.<sup>5</sup> It eliminated jurisdictional limits that had been imposed by the Legislative Council on its competence to hear parliamentary election petitions,<sup>6</sup> and ordered the SAR regime to revise covert surveillance statutes to comply with fundamental rights guarantees.<sup>7</sup> And it has devised new strategies of constitutional review; for example, reviving defunct British Imperial laws as additional grounds for gauging the validity of

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<sup>2</sup> *Yeung May Wan & Ors v H.K.S.A.R.* (2005) 8 H.K.C.F.A.R. 137 (Hong Kong Court of Final Appeal).

<sup>3</sup> *Leung Kwok Hung & Ors v H.K.S.A.R.* (2005) 8 H.K.C.F.A.R. 229 (Hong Kong Court of Final Appeal).

<sup>4</sup> *Secretary for Justice v Zigo Yau* (2007) 10 H.K.C.F.A.R. 335 (Hong Kong Court of Final Appeal).

<sup>5</sup> *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 H.K.C.F.A.R. 480 (Hong Kong Court of Final Appeal).

<sup>6</sup> *Mok Charles Peter v Tam Wai Ho & Anor* (FACV 8/2010) (Hong Kong Court of Final Appeal).

<sup>7</sup> *Koo Sze Yiu & Anor v Chief Executive of the H.K.S.A.R.* (2006) 9 H.K.C.F.A.R. 441 (Hong Kong Court of Final Appeal).

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impugned acts;<sup>8</sup> striking down non-infringing statutory provisions the better to achieve constitutional ends;<sup>9</sup> and applying remedial interpretation to “read down” otherwise unconstitutional primary legislation;<sup>10</sup> all in the absence of express Basic Law mandates.

Not unexpectedly, the Court of Final Appeal has become the target of sustained criticism. Commentators have condemned it for undermining the doctrine of executive dominance (Fan, 2006); denounced judicial review of legislation as *ultra vires* the Basic Law;<sup>11</sup> censured the Justices for unduly encroaching upon the ambit of public administration (Chen & Wang, 2009); claimed that it has developed an oppositional mentality toward the executive branch (Lin & Gu, 2003; Gao, 2011); chided it for being too ready to substitute its will for that of the legislature (Shiu, 2009); and stigmatised it a collaborator with anti-establishment activists (Zou, 2009; Zhang, 2009).

The Court’s activism has also drawn critical remarks from China. In early 2008 Chinese Vice President (and as of August 2012 President Hu Jintao’s heir apparent) Xi Jinping admonished, “there should be solidarity and sincere cooperation within the governing team of Hong Kong and there should be mutual understanding and support amongst the Executive, the Legislature and the Judiciary,”<sup>12</sup> and in 2009 Wu Bangguo, Chairman of the NPCSC, went so far as to demand that Hong Kong courts

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<sup>8</sup> *Solicitor v Law Society of Hong Kong* (2003) 6 H.K.C.F.A.R. 570 (Hong Kong Court of Final Appeal).

<sup>9</sup> *Koon Wing Yee & Anor v Insider Dealing Tribunal & Anor* (2008) 11 H.K.C.F.A.R. 170 (Hong Kong Court of Final Appeal).

<sup>10</sup> *HKSAR v Hung Chan Wa* (2006) 9 H.K.C.F.A.R. 614 (Hong Kong Court of Final Appeal).

<sup>11</sup> Francis Chong, “Special Administrative Region Courts “Invalidate Laws” Beyond their Jurisdiction,” *Sing Tao Daily* (1 January 2012).

<sup>12</sup> Ambrose Leung, “Xi tells Tsang to Govern Sensibly”, *South China Morning Post* (8 July 2008).

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“uphold the authority of the Chief Executive” and “provide whole-hearted support to the work of the Chief Executive.”<sup>13</sup>

Notably, the ascendancy of the activist Court has coincided with a new phase of political development in Hong Kong-Mainland China relations, in which the NPCSC has taken up its own more activist approach to interpreting the Basic Law. The NPCSC has added new thresholds for initiating electoral reform;<sup>14</sup> preserved the Election Committee method of choosing the Chief Executive and the corporatist political representation in the Legislative Council;<sup>15</sup> redefined the term of office of the Chief Executive;<sup>16</sup> ruled out elections by universal suffrage until at least 2017;<sup>17</sup> and obligated the Hong Kong courts to follow China’s policy of granting absolute

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<sup>13</sup> “Speech of Wu Bangguo, Chairman of the National People’s Congress Standing Committee delivered in a Seminar marking the 10<sup>th</sup> Anniversary of the Basic Law of the Macao Special Administrative Region” (4 December 2009).

<sup>14</sup> *The Interpretation of 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>15</sup> *Decision of the Standing Committee of the National People’s Congress on issues relating to the Methods For Selecting the Chief Executive of the Hong Kong Special Administrative Region in the Year 2007 and For Forming the Legislative Council of The Hong Kong Special Administrative Region in the Year 2008* (Adopted by the Standing Committee of the Tenth National People’s Congress at its Ninth Session on 26 April 2004); *Decision of the Standing Committee of the National People’s Congress on Approving the “Amendment to Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China Concerning the Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region”* (Adopted by the Standing Committee of the Eleventh National People’s Congress at its Sixteenth Session on 28 August 2010).

<sup>16</sup> *Interpretation of Article 53(2) 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 15th Session of the Standing Committee of the Tenth National People’s Congress on 27 April 2005).

<sup>17</sup> *Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage* (Adopted by the Standing Committee of the Tenth National People’s Congress at its Thirty-first Session on 29 December 2007).

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immunity to sovereign states.<sup>18</sup>

Perhaps surprisingly, the NPCSC has neither exploited its interventions as occasions to curtail or abrogate the Court of Final Appeal's constitutional review powers nor reversed any of its invalidations of legislation; "no hint of criticism of the continued impartial administration of justice" has been voiced, even after the *Ng Ka Ling* setback in 1999 (Williams, 2005:235). Recall that the SAR regime formally controls the level of "investment" in the Court's constitutional jurisdiction, decisional autonomy, personnel composition, and budget, and the NPCSC is constitutionally privileged to quash at will any interpretation of the Basic Law by the Court (Davis, 2007:90). In theory, the Court might be rendered "as powerless as the citizen who has started the judicial review proceeding" (Tai, 2007a:72).

Before studying how the Court of Final Appeal and the NPCSC entered into cohabitation within the dynamic equilibrium, the following subsections provide the reader with a statistical overview of the constitutional jurisprudence of the Court and of the NPCSC between 1997 and 2011, as well as information about the Justices appointed to the Court and Members appointed to the NPCSC Hong Kong Basic Law Committee between 2001 and 2011.

### 2.2. OVERVIEW OF POST-1997 CONSTITUTIONAL JURISPRUDENCE

From 1 July 1997 to 31 December 2011 the Court of Final Appeal has in at least 146 separate judgments interpreted or restated its interpretation of the Hong Kong Basic

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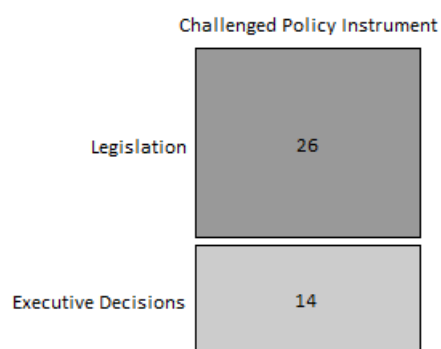
<sup>18</sup> *Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress* (Adopted by the Standing Committee of the Eleventh National People's Congress at its 22nd Session on 26 August 2011).

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Law. Of these, the Court has reviewed the constitutionality of legislative and executive acts in 40 joint or individual decisions, and in 6 other judgments not involving the validity of governmental acts set out novel constitutional doctrines or interpretive canons for the inferior courts (see Appendix B).<sup>19</sup> By contrast, in the same time frame the NPCSC has issued four formal Interpretations and an additional three Decisions/Approvals relating to the Basic Law.

Of the Court's 40 review decisions, primary legislation was being challenged in the majority (65%,  $n=26$ ) (see Figure 17). Of these challenges the percentage successful stands at 46.2% ( $n=12$ ), whereas that of challenges against executive/agency decisions stands even higher at 64.9% ( $n=9$ ). The overall success rate of challenges in the Court of Final Appeal, both of primary legislation and of executive/agency decisions, stands at 57.5% ( $n=23$ ) in this time frame.

**FIGURE 17: BREAKDOWN OF CONSTITUTIONAL REVIEW JUDGMENTS OF THE HONG KONG COURT OF FINAL APPEAL**



Consider the policy domains touched by the Court of Final Appeal's 46 constitutional judgments (Figure 18, see Appendix B for coding method and case

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<sup>19</sup> Based on the author's search of the website of the Hong Kong Legal Information Institute ([www.hklii.org](http://www.hklii.org)) which provides for the complete list of Hong Kong Court of Final Appeal judgments.

## DYNAMIC EQUILIBRIUM

details); *viz.* immigration (21.7%, *n*=10), criminal justice (19.6%, *n*=9), agency competence (17.4%, *n*=8), civil rights (13%, *n*=6), public finance (10.9%, *n*=5), public security (6.5%, *n*=3), electoral administration (4.3%, *n*=2), judicial process (4.3%, *n*=2), foreign affairs (2.2%, *n*=1), and educational policy (2.2%, *n*=1). Apart from these, the Court has also on many occasions dealt with constitutional issues (mainly in the form of *obiter*)<sup>20</sup> regarding the retention of established law;<sup>21</sup> *viz.* the state ownership of land,<sup>22</sup> property rights,<sup>23</sup> confidential legal advice,<sup>24</sup> access to the courts,<sup>25</sup> reasons for decisions,<sup>26</sup> benefit of laws retroactively reducing penalties,<sup>27</sup> freedom of thought and conscience,<sup>28</sup> participation in public life,<sup>29</sup> the right to work,<sup>30</sup> trial by jury,<sup>31</sup> fair trial,<sup>32</sup> presumption of innocence,<sup>33</sup> presumption of the requirement of

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<sup>20</sup> These decisions will not be addressed by this dissertation because they neither involve the assessment of the constitutionality of policies nor the declaration of new constitutional principles.

<sup>21</sup> For example, *Unruh v Seeberger* (2007) 10 H.K.C.F.A.R. 31 (Hong Kong Court of Final Appeal)

<sup>22</sup> For example, *China Field Ltd v Building Appeal Tribunal (No. 2)* [2009] H.K.L.R.D. 662 (Hong Kong Court of Final Appeal).

<sup>23</sup> For example, *HKSAR v Wong Hon Sun* [2010] 1 H.K.C. 18 (Hong Kong Court of Final Appeal).

<sup>24</sup> For example, *Akai Holdings Ltd. v Ernest & Young* [2009] 2 HKC 245 (Hong Kong Court of Final Appeal).

<sup>25</sup> For example, *Ng v Max Share Ltd.* (2005) 8 H.K.C.F.A.R. 1 (Hong Kong Court of Final Appeal).

<sup>26</sup> For example, *Swire Properties Ltd. v Secretary for Justice* (2003) 6 H.K.C.F.A.R. 236 (Hong Kong Court of Final Appeal).

<sup>27</sup> For example, *Seabrook v HKSAR* (1999) 2 H.K.C.F.A.R. 184 (Hong Kong Court of Final Appeal).

<sup>28</sup> For example, *Ma Bik Yung v Ko Chuen* (2006) 9 H.K.C.F.A.R. 888 (Hong Kong Court of Final Appeal).

<sup>29</sup> For example, *Lai Tak Shing v Secretary for Home Affairs* (2007) 10 H.K.C.F.A.R. 655 (Hong Kong Court of Final Appeal).

<sup>30</sup> For example, *Yeung Chung Ming v Commissioner of Police* (2008) 11 H.K.C.F.A.R. 513 (Hong Kong Court of Final Appeal).

<sup>31</sup> For example, *Kissel v HKSAR* [2010] H.K.L.R.D. 435 (Hong Kong Court of Final Appeal).

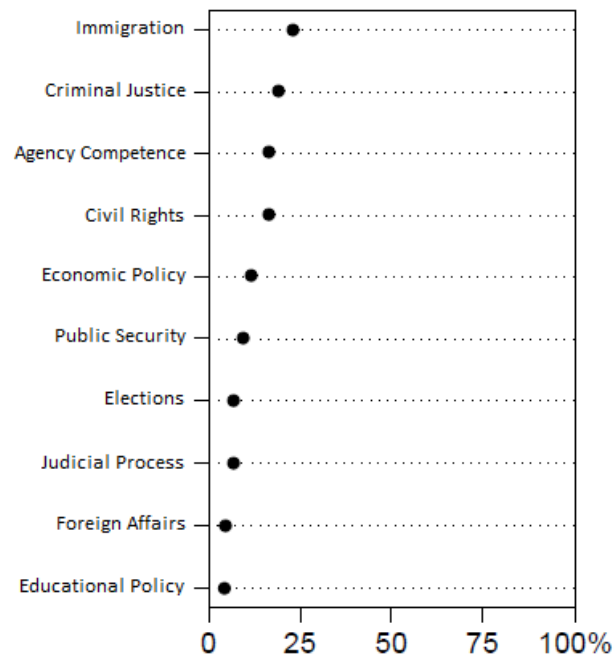
<sup>32</sup> For example, *Tse Mui Chun v HKSAR* (2003) 6 H.K.C.F.A.R. 601 (Hong Kong Court of Final Appeal).

<sup>33</sup> For example, *Choi Shih Bin v HKSAR* (2005) 8 H.K.C.F.A.R. 70 (Hong Kong Court of Final Appeal).

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*mens rea*,<sup>34</sup> compensation for taking of property,<sup>35</sup> continuation of treaties,<sup>36</sup> constitutional horizontality,<sup>37</sup> and so on.

**FIGURE 18: POLICY DOMAINS OF CONSTITUTIONAL JUDGMENTS OF THE HONG KONG COURT OF FINAL APPEAL (1997-2011)**



Now consider a breakdown of the policy domains touched on by the NPCSC's Interpretations (see Figure 19): immigration (25%,  $n=1$ ), political reform (50%,  $n=2$ ), and foreign affairs (25%,  $n=1$ ).

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<sup>34</sup> For example, *Donald Koo v Kao, Lee & Yip* [2009] 5 H.K.C. 36 (Hong Kong Court of Final Appeal).

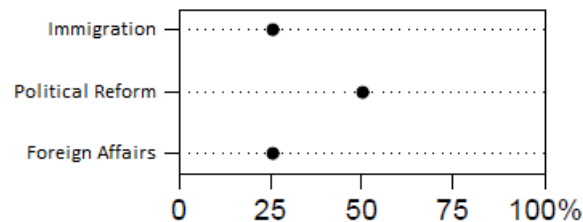
<sup>35</sup> For example, *Director of Lands v Yin Shuen Enterprises Ltd.* (2003) 6 H.K.C.F.A.R. 1 (Hong Kong Court of Final Appeal).

<sup>36</sup> For example, *Re Yung Kwan Lee* (1999) 2 H.K.C.F.A.R. 245 (Hong Kong Court of Final Appeal).

<sup>37</sup> For example, *Leung Lai Fong v Ho Sin Ying* (2009) 12 H.K.C.F.A.R. 581 (Hong Kong Court of Final Appeal).

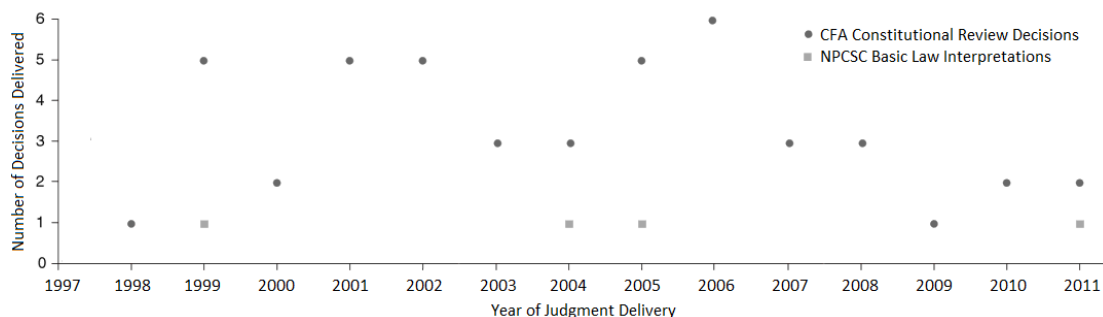
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**FIGURE 19: POLICY DOMAINS OF BASIC LAW INTERPRETATIONS OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS (1997-2011)**



The Court of Final Appeal delivered an average of 3.2 judgments interpreting the constitution per year from July 1997 to December 2011, whereas the NPCSC only issued an average of 0.28 Interpretations per year during the same period (see Figure 20).

**FIGURE 20: YEAR AND NUMBER OF HONG KONG CONSTITUTIONAL DECISIONS (1997-2011)**



As will be seen below, the small volume of such decisions does not necessarily imply that the Court or the NPCSC have had little impact. Consider that the Court's judgments are automatically binding on the lower courts (which also exercise constitutional judicial review powers) *via* the common law doctrine of *stare decisis*, and that the NPCSC's Interpretations are binding all three branches of the Hong Kong SAR state, *per* Article 158 of the Basic Law.

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### 2.3. COMPOSITION OF THE COURT OF FINAL APPEAL AND THE NPCSC HONG KONG BASIC LAW COMMITTEE

The personnel of the Court of Final Appeal experienced no significant change between 1997 and 2000 in selection and endorsement trends. Similar to the arrangements on the United Kingdom Supreme Court, Permanent and Local Non-Permanent Judges of the Court of Final Appeal were drawn from the higher courts, based on considerations like seniority and professional reputation. Overseas Non-Permanent Judges were chosen from sitting and retired Justices of Commonwealth Supreme Courts (see Table 3). While no Permanent Judge was appointed to the Court between 2001 and 2011, Chief Justice Geoffrey Ma succeeded Chief Justice Andrew Li after his retirement in 2010.

Ma had previously been the Chief Judge of the High Court and, before joining the judiciary, a Senior Counsel of the Hong Kong Bar. Notably, he was counsel for the Government in *Ng Ka Ling* (see Chapter 5), where he argued that the Court ought not to refer the case to the NPCSC. Above all, the appointment of highly qualified, if not internationally renowned, judges to the Court has staffed it with superior legal expertise, and endowed it with informational advantages over the political branches in terms of institutional alternatives tending to the resolution of constitutional problems.

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**TABLE 3: JUSTICES OF THE COURT OF FINAL APPEAL APPOINTED BETWEEN 2001 AND 2011**

Name	Position in the Court	Relevant Legal Position before Appointment	
Geoffrey Ma	Chief Justice	Chief Judge of the High Court	2010
Lord Scott of Foscote	Non-Permanent Judge	Law Lord, UK Judicial House of Lords	2003
Michael McHugh	Non-Permanent Judge	Justice, High Court of Australia	2005
Sir Thomas Gault	Non-Permanent Judge	Justice, New Zealand Supreme Court	2005
Murray Gleeson	Non-Permanent Judge	Chief Justice, High Court of Australia	2009
Lord Walker of Gestingthorpe	Non-Permanent Judge	Justice, UK Supreme Court	2009
Lord Neuberger of Abbotsbury	Non-Permanent Judge	Law Lord, UK Judicial House of Lords	2009
Robert Tang	Non-Permanent Judge	Vice President, Hong Kong High Court	2010
Michael Hartmann	Non-Permanent Judge	Justice of Appeal, Hong Kong High Court	2010
Frank Stock	Non-Permanent Judge	Vice President, Hong Kong High Court	2010
Lord Clark of Stone-cum-Ebony	Non-Permanent Judge	Justice, UK Supreme Court	2011
Lord Collins of Mausebury	Non-Permanent Judge	Justice, UK Supreme Court	2011

At the same time, the NPCSC Hong Kong Basic Law Committee is increasingly being staffed by members familiar with Hong Kong law and politics (see Table 4). As of 2011, four out of six Hong Kong members of the 12-member Committee are common law lawyers educated in the United Kingdom or the United States.<sup>38</sup> Additionally, academic authorities on the Basic Law such as Rao Geping (Mainland China), Wang Zhenmin (Mainland China), and on constitutional judicial review such as Johnny Mok (Hong Kong) and Albert Chen (Hong Kong), have either been appointed or retained.

Notably, Elsie Leung, former Secretary for Justice and President of the International Federation of Women Lawyers, who has consistently expressed sympathy with independent, if not activist, constitutional review, was selected to be

<sup>38</sup> Personal interview with Prof. Wong Yuk-shan (Member of the NPCSC Hong Kong Basic Law Committee) (9 December 2011).

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Deputy Secretary General of the Committee. As we shall see, the appointment of persons familiar with common law approaches to constitutional decision-making has not only reduced the NPCSC's informational advantage with regard to Hong Kong constitutional developments, but also softened the friction between the NPCSC and the Court amid their interdependent interpretation of the Basic Law.

**TABLE 4: MEMBERS OF THE SECOND AND THIRD  
NPCSC HONG KONG BASIC LAW COMMITTEE (2003-2013)**

Name	Member	Position
Qiao Xiaoyang	Secretary General (2003-)	Deputy Secretary General, NPCSC
Elsie Leung	Deputy Secretary General (2006-)	Hong Kong Secretary for Justice
Li Fei	Member (2003-)	Deputy Secretary General, NPC Legislative Affairs Commission
Wang Guangya	Member (2003-2006)	Former Vice Minister of Foreign Affairs
Wang Fengchao	Member (2006-)	Deputy Director, Central-Hong Kong Liaison Office
Liu Zhen	Member (2003-2006)	Deputy Secretary General, NPCSC
Rao Geping	Member (2006-)	Professor of International Law, Peking University
Chen Zuor	Member (2003-2006)	Deputy Director, State Council Hong Kong and Macau Affairs Office, State Council Hong Kong and Macau Affairs Office
Xia Yong	Member (2003-2006)	Professor of Jurisprudence, Chinese Academy of Social Sciences
Wang Zhenmin	Member (2006-)	Dean and Professor of Law, Tsinghua University
Lau Nai-keung	Member (2007-)	Member, Chinese People's Political Consultative Conference
Wong Yuk-shan	Member (2008-)	Deputy, National People's Congress
Johnny Mok	Member (2008-)	Senior Counsel, Hong Kong Bar

### 3. INTERDEPENDENT INTERPRETATION OF THE BASIC LAW

#### 3.1. OVERVIEW

As seen in Figures 19 and 20, and Appendix B, I have categorised constitutional decisions issued by the Court of Final Appeal and the NPCSC from 1 July 1997 to 31

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December 2011 into 11 Policy Domains. Recall that in Chapter 2 I have proposed the distinction between Prohibited and Permitted Policy Domains. A “Prohibited Policy Domain” is an area of policy that directly impinges on the regime’s (perceived) political survival, in which government decisions are usually unambiguous and non-negotiable. Courts which deviate from these decisions are likely to face retaliation. Conversely, a “Permitted Policy Domain” is a policy area that does not implicate on the regime’s survival. In other words, the regime’s zone of tolerance in relation to constitutional review rulings will be larger.

On the basis of my empirical findings, I coded Political Reform, Foreign Affairs, Public finance, and Public Security as Prohibited Policy Domains, and Civil Rights, Agency Competence, Criminal Justice, Immigration, Elections, Judicial Process, and Educational Policy as Permitted Policy Domains. I discuss the NPCSC’s and the Court of Final Appeal’s interpretations of the Basic Law over Prohibited Policy Domains in Subsection 3.2. and Permitted Policy Domains in Subsection 3.3. Drawing from primary and secondary data, I demonstrate below how the Hong Kong judiciary facilitated the consolidation of constitutional judicial review by systemically deferring to the SAR regime in most Prohibited Policy Domains. As we shall see in Subsection 3.2.4., there is one notable exception: Public Security. The Court’s activism in this domain is, however, explicable by its sensitiveness to the size of the SAR regime’s zone of tolerance. The Court has nonetheless interpreted the Basic Law expansively in Permitted Policy Domains.

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### 3.2. PROHIBITED POLICY DOMAINS: “STABILITY” AND “PROSPERITY”

It was shown in Chapter 3 that the Chinese Party-state and the Hong Kong business elite have since the 1980s stated unambiguous, non-negotiable positions in two Prohibited Policy Domains: national sovereignty (often dubbed “stability”) and business-friendly public finance policy (often dubbed “prosperity”). As Deng Xiaoping put it, “It is necessary for the Hong Kong people who govern Hong Kong to be patriots ... [they] must ... truthfully protect the Motherland’s resumption of sovereignty over Hong Kong and refrain from undermining Hong Kong’s prosperity and stability”;<sup>39</sup> adding, “The rulers of Hong Kong after 1997 are to run a capitalist system, but they would not do anything that undermines the Motherland’s interests.”<sup>40</sup> Deng elaborated, “Hong Kong’s prosperity and stability are closely interrelated with China’s developmental strategy.”<sup>41</sup>

Flowing almost naturally from “stability” and “prosperity” is a certain hostility towards electoral democracy based on universal suffrage, which has been perceived by both elites as devastating to national sovereignty and neo-liberal economic institutions. Chinese authorities are prone to believe that democratisation implies the implantation of Western-style democracy in Hong Kong and the endangerment of Chinese sovereignty and national security with the expansion of American and British influence into the territory (Lo, 2008:134). This reflects Deng’s concern that “Hong Kong needs a stable political system ... this political system must not

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<sup>39</sup> “Speech of Deng Xiaoping to Hong Kong Visitors of Beijing from the Industrial and Business Sector” (22 and 23 June 1984).

<sup>40</sup> “Safeguard Hong Kong’s Prosperity and Stability] (Speech of Deng Xiaoping to the Hong Kong and Macao Group of National Day Spectators” (3 October 1984).

<sup>41</sup> “We need to Adopt International Experiences: Deng Xiaoping to the participants of the Conference on China and the World in the 1990s” (3 June 1988).

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implement the systems of the United Kingdom and the United States ... [because] to completely adopt [these systems] would create chaos, and this is extremely harmful ....” In March 2000 Qiao Xiaoyang, Deputy Director of the NPC Legal Committee (now Secretary General of the NPCSC Hong Kong Basic Law Committee), publicly averred that if “One Country” should come into conflict with the “Two Systems,” it is “One Country” that must prevail – essentially meaning that the territory’s autonomy must always subserve China’s pursuit of its national interest (Wong, 2004:5).

Simultaneously, the corporatist SAR regime is prone to view democratisation as a pretext for the seizure of governmental power by the less well-off, who would elect politicians with redistributionist and welfarist tendencies. Democratisation, and the loss of control over the course of public finance policies, in brief, implies for them a transfer of power to left-wing politicians who would increase the tax burden on businesses and encourage rent-seeking by labour. In sum, both the Chinese Party-state and the SAR regime have repeatedly stressed that their monopoly over the pace of political reform and direction of public finance must be put beyond question or challenge. From the Mainland perspective, rapid democratisation in Hong Kong might amplify threats to national security and hence to the survival of the Communist Party-state. For the business elite, a “left turn” in economic policies would risk their continuance as the territory’s *de facto* masters as well as its long-term prosperity. In brief, any judicial review that impinges on political decisions taken in these two Prohibited Policy Domains creates a do-or-die situation for the elites on both sides of the boundary. Either the Court affirms their decisions and goes unpunished, or it strikes them down and faces the near-certainty of retaliation.

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### 3.3. POLITICAL REFORM

#### 3.3.1. CHINA-HONG KONG CONFLICTS: THE GENESIS OF NPCSC ACTIVISM

The Hong Kong Basic Law was designed at least in part to postpone universal suffrage elections (Goodstadt, 2005:226). Recall that the constitutional framework of the Basic Law requires that the Government dominate, that the Legislative Council be constrained, and that local governments be abolished in favour of centralisation (Lam *et al.*, 2007:289). During his first term (1997-2002), Chief Executive Tung Chee-hwa and his Executive Council ignored all requests, including those from the Legislative Council, for public consultation on political reforms conducive to representative democracy; instead, the Government went so far the other way as to abolish in 1999 the elected and quasi-autonomous Urban and Regional Councils, and to reclaim the authority to appoint one out of four Members of the much less powerful District Councils. With China's support Tung stood for a second term unchallenged in the 2002 Chief Executive Election.

Chief Executive Tung clashed with the civil service establishment headed by Chief Secretary Anson Chan, who believed that the doctrine of "executive dominance" really meant the continuation of the colonial-era tradition of government by bureaucrats, with the Chief Executive, like former Governors, passively approving top civil servants' policy recommendations at the Executive Council. After experiencing ever-growing tensions with the bureaucracy (Goodstadt, 2005:42), the Chief Executive simply restructured the executive branch by replacing all civil servant-ministers with Secretaries appointed at his own discretion. Instead of

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expanding elections, Tung's package ratified the appointment of leaders of the Pro-China Democratic Alliance for the Betterment of Hong Kong ("DAB" hereafter) and the pro-business Liberal Party – all Members of the Legislative Council – to the Executive Council, with a view to consolidating the SAR regime (Tai, 2007b:542). With the support of the Functional Constituencies, the pro-China majority, which tends to receive less than 40% of the popular vote, have performed quite well in every General Election since the transfer of sovereignty. In the First Legislative Council (1998-2000) 41 out of 60 Members belonged to the governing coalition; in the Second Legislative Council (2000-2004) it was 39 Members; in the Third Legislative Council (2004-2008) the number belonging to the coalition was still 35 (Li, 2007:30); and in the Fourth Legislative Council (2008-2012) the number had inched back up to 37 – always a majority.

In September 2002 China suddenly demanded that Hong Kong enact a national security law pursuant to Article 23 of the Basic Law. Article 23 was inserted into the Basic Law immediately after the Tiananmen debacle, and states that Hong Kong should enact legislation to criminalise acts of treason, secession, sedition, subversion against the Chinese state, or theft of "state secrets", and destroy ties between local and foreign political organisations (see Chapter 3). A timetable was agreed between the two sides that a National Security (Legislative Provisions) Bill would be introduced in February 2003 (Lo, 2008:152). So long as the SAR regime dominated the Legislative Council, Chief Executive Tung felt confident that the Bill would pass and that any amendments proposed by the oppositional Pan-Democratic Bloc would be defeated.

However, mainstream public opinion regarded Article 23 as one of the greatest

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threats to civil liberties, given that offences like “subversion” and “secession” have been virtually unknown in Hong Kong’s statute books (Petersen, 2005). Critically, the “subversion” clause caused much anxiety because in Mainland China, mere expression of opinions questioning the legitimacy of the Communist Party without any positive acts could be opportunistically construed as “subversive” by law-enforcement bodies. Not so surprisingly, the campaign to promote the Bill hit resistance not only externally but even inside the Government. Two of the Government’s most senior officials, Chief Secretary Sir Donald Tsang and Secretary for Justice Elsie Leung, abstained from participating in propaganda for the Bill. As a result, Secretary for Security Regina Ip had to shoulder responsibility for promoting the Bill on her own; yet her hard-line stance for state security at the expense of democratic freedoms gave even more impetus to the tide running against Article 23 (Lo, 2008). On 1 July 2003, only eight days before the Legislative Council was to resume the second reading of the Bill, more than 500,000 people took to the streets, the largest demonstration ever assembled against the territory’s Government (Petersen, 2005:2).

On 5 July the Government, refusing to resign, agreed to make several “concessions” that would in theory circumscribe the Bill’s reach, whilst insisting nonetheless that it must be enacted on schedule on 9 July. On 6 July the Liberal Party withdrew from Tung’s regime and its leader, James Tien, resigned from the Executive Council. Anticipating the Bill’s defeat in the Legislative Council, where 31 out of 60 members, including Liberal Party lawmakers, were pledged to vote against it, the Executive Council, after convening a special meeting on 7 July, announced the Bill’s withdrawal (Lo, 2008:156-7). Presumably in face of mounting pressures from the

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public, Secretary of Security Regina Ip and Financial Secretary Anthony Leung (who had got involved in an earlier scandal) resigned on 16 July. Now persuaded by the Pro-China parties in the Legislative Council, who had come to view the National Security Bill saga as a burden on their electoral prospects, Chief Executive Tung announced in September, 2003 that the Bill had been indefinitely postponed. This failed, however, to prevent the Pan-Democratic Bloc from winning the District Council elections two months later in a landslide, and capturing 60.52% of the popular vote (thus 25 out of 30 Geographical Constituency seats) in the 2004 Legislative Council elections. On 1 July 2004, one year after the first mass demonstration, almost half a million people again took to the streets to air their discontent with the Tung Government and to demand universal suffrage elections in 2007/2008, the earliest dates permissible under the Basic Law. Indeed, the deepest division in Hong Kong society proved to be not along ethnic or religious fault-lines but on the question of democratic reform (Diamond, 2008:318).

### 3.3.2. INTERPRETING POLITICAL REFORM

The failures of the Tung Government and the electoral victory of Pan-Democratic legislators perceived to be sympathetic to American and British interests alarmed the Chinese Party-state, who thereafter adopted a much more proactive approach to Hong Kong.<sup>42</sup> The events of 2003 triggered the institution of the Central Hong Kong and Macao Work Coordination Group within the Chinese Communist Party, headed by then-Vice President and Politburo Standing Committee Member Zeng Qinghong

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<sup>42</sup> Personal Interview with Prof. Albert Chen (Member of the NPCSC Hong Kong Basic Law Committee) (8 November 2011).

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(succeeded by Vice President Xi Jinping). This was charged with power to coordinate greater Chinese involvement in the territory's politics. Possibly disquieted by the popular democratic movement, the NPCSC, absent any request by the State Council or the SAR regime (let alone constitutional litigation in the Hong Kong courts), proclaimed *sua sponte* on 6 April 2004 *The Interpretation 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* ("Electoral Reform Interpretation" hereafter).

Before reviewing the details of the Electoral Reform Interpretation, note that the Basic Law does not expressly provide any methods for ascertaining when or how to modify the electoral regime for the Chief Executive and the Legislative Council so as to achieve the goal of universal suffrage. Articles 45 and 68 merely state the regime shall be determined "in the light of the actual situation" and "in accordance with the principle of gradual and orderly progress," with the "ultimate aim" being "universal suffrage." The Electoral Reform Interpretation filled in this gap by specifying that, should a need arise to amend the electoral provisions of the Basic Law, the Hong Kong Chief Executive is duty-bound to report to the NPCSC evidencing the urgency of the state of affairs, whereupon the NPCSC shall decide if any such urgency exists within the meaning of Articles 45 and 68 of the Basic Law, which afford the NPCSC immense leeway in setting the pace of the territory's democratisation; based on the ambiguous principles of "the actual situation" and "gradual and orderly progress" (Young & Cullen, 2010:42). Compare this to the Basic Law's Annexes I and II, which merely provide that, if "there is need to amend" the electoral law for the Chief Executive and the Legislative Council, the amendments must be ratified by "a two-thirds majority of all the members of the Legislative Council" with "the consent

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of the Chief Executive.” In effect, the Electoral Reform Interpretation amended the Basic Law with further hurdles to be monitored by the NPCSC for any prospect of change to the most important electoral arrangements in the territory.

In accordance with the NPCSC Interpretation, Chief Executive Tung submitted a report to the NPCSC on 15 April. Eleven days later the NPCSC delivered its *Decision on issues relating to the Methods For Selecting the Chief Executive of the Hong Kong Special Administrative Region in the Year 2007 and For Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008*, ruling out universal suffrage for the elections of the Chief Executive and the Legislative Council in 2007 and 2008, respectively, yet also conceding that the electoral regime of 2007 and 2008 may be reformed within certain confines conserving the Election Committee that elects the Chief Executive and the existing 50:50 proportion of Functional Constituencies to Geographical Constituencies in the legislature. The NPCSC justified its edict with the following statement: “*Any change relating to the methods for selecting the Chief Executive ... and for forming the Legislative Council ... shall conform to principles such as being compatible with the social, economic, political development of Hong Kong, being conducive to the balanced participation of all sectors and groups of the society ... to the effective operation of the executive-led system ... [and] ... to the maintenance of the long-term prosperity and stability of Hong Kong*” [emphasis added].

The NPCSC also determined that since the transfer of sovereignty, “Hong Kong residents have enjoyed democratic rights that they have never had before,” and that “at present, different sectors of ... society still have considerable differences ... and have not come to a broad consensus” on electoral reform, and thus the territory

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ought not to proceed radically to democratise its system at this stage. In many ways it is necessary for China to conserve the Functional Constituency system lest they lose control over Hong Kong's politics, given that most lawmakers from the SAR regime have been elected at any one time through corporatist representation. Functional Constituency legislators have been responsible for vetoing motions of no confidence against Secretary for Justice Elsie Leung in 1999, the Chief Executive's Senior Special Assistant Andrew Lo in 2000, and Financial Secretary Anthony Leung in 2003, as well as for defeating the pro-labour Protection of Wages on Insolvency [Amendment] Bill in 1999, the middle-class tax-reducing Revenue [No. 2] Bill in 2003, and a range of other motions that call for an end of monopoly in the electricity and gas supply markets (1998 and 1999); regulation of working hours (2000); more effective protection of the statutory rights and benefits of employees (2001); and minimum wages (2002) (Kwok, 2006:413-415). Undoubtedly, Functional Constituency lawmakers have fulfilled their duty as defenders of the fundamental interests of China and the Hong Kong business elite.

### **3.3.3. INTERPRETING THE CHIEF EXECUTIVE'S TERM OF OFFICE**

At the time when the Electoral Reform Interpretation was promulgated, the Tung Government had become immensely unpopular, with its promises of economic growth unfulfilled against a backdrop of drastic deflation in the stock and real estate markets, a high rate of unemployment, and the wholesale bankruptcy of small businesses amid the Asian financial crisis (So, 2002:415-6). Presumably under pressure from the Chinese government, Tung resigned on 10 March 2005; however,

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his departure ignited another constitutional controversy over the length of the succeeding Chief Executive's term of office. Consider the relevant provisions of the Basic Law. Article 46 provides, "The term of office of the Chief Executive ... shall be five years. He or she may serve for not more than two consecutive terms"; and Article 54 provides, "In the event that the office of Chief Executive becomes vacant, a new Chief Executive shall be selected within six months ...."

On 5 May 2004, in line with the opinion of mainstream legal professionals, Secretary for Constitutional Affairs Stephen Lam affirmed in the Legislative Council that "the term of office of the Chief Executive, as prescribed in the Basic Law, is five years." This reading had become politically problematic because Tung had been succeeded *pro tempore* by Chief Secretary Sir Donald Tsang, as Acting Chief Executive. Although popular, Sir Donald had never been part of the pro-China establishment. A cadet of the British administrative service and a graduate of Harvard's Kennedy School of Government, he had served under successive Colonial Governors and had been appointed Hong Kong's first non-expatriate Financial Secretary by Governor Chris Patten in the 1990s. A Roman Catholic by religion, Tsang had been made a Knight Commander of the Order of the British Empire by Queen Elizabeth II in 1997. Although Tsang was indisputably an ideal candidate for Chief Executive based on his deep administrative experience and popularity in the polls, his British connections were a source of intense suspicion in Beijing about his loyalty to Mainland China.

It is widely believed that China wanted to keep Sir Donald on a two-year "short leash" during which he would have to prove his loyalty before he being rewarded with a full five-year term (Ghai, 2007:399). Accordingly, Secretary for Justice Elsie

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Leung switched the Government's official position, now claiming that Tung's successor should merely run out the remaining years of Tung's term, i.e. two years (Chan, 2006:304).<sup>43</sup> In fact, the NPCSC Legislative Affairs Commission had issued a detailed statement asserting that the new Chief Executive's term of office should be the remainder of his predecessor's term, and that it is unnecessary for the NPCSC to interpret the Basic Law again.

The Pan-Democratic Bloc and the Bar Association among other groups profoundly disagreed. On 4 April a Pan-Democratic legislator petitioned the High Court for judicial review, seeking a declaratory judgment that "the true effect of Article 46 of the Basic Law is that the term of office of the Chief Executive shall be five years, whether or not the vacancy in the office of the Chief Executive arises otherwise than by reason of expiry of term of office."<sup>44</sup> However, if Tsang would become the next Chief Executive, his only realistic course of action was to prove himself trustworthy in the eyes of China's government (Tai, 2007b:546). Although public opinion opposed yet another NPCSC Interpretation, on 6 April 2005 Tsang submitted a report to the State Council that *inter alia* requested that the NPCSC interpret Article 53(2) of the Basic Law in the case of the successor to an uncompleted term. The report notified the State Council that public opinion was divided, and that judicial review proceedings had begun. Sir Donald anticipated that the Court of Final Appeal would be bound, even if the question reached them, to refer it to the NPCSC, and that given its full schedule of meetings, the NPCSC would be hard pressed, by the time the Court sent the case up, to issue an Interpretation before the election date

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<sup>43</sup> See, "Statement by the Secretary for Justice on the Term of the New Chief Executive," March 12, 2005, available at <http://www.doj.gov.hk/eng/archive/pdf/sj20050312e.pdf> (last visited on 14 January 2012).

<sup>44</sup> *Chan Wai Yip Albert v SJ* (HCAL 36/2005) (Hong Kong Court of First Instance).

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of 10 July provided in the Basic Law (Feng & Lo, 2007:144). The report further explained to proceed by way of amending the Basic Law would not be feasible, as the next meeting of the NPC would not be held until March 2006. The Acting Chief Executive warned that any constitutional crisis arising after July 2005 from the unfilled vacancy might end in detriment to the territory's "stability" and "prosperity." An NPCSC Interpretation pre-empting judicial review would be the most prudent option under the circumstances.

On 27 April 2005 the NPCSC promulgated the *Interpretation of Article 53(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* ("Chief Executive Interpretation" hereafter). The NPCSC, as expected, ruled that whenever the office of Chief Executive becomes vacant, the term of office of her successor should be the remainder of hers; but conceded that this succession method may be amended after 2007. In his Explanatory Note to the Chief Executive Interpretation, Li Fei, Deputy Director of the NPCSC Legislative Affairs Commission, asserted, "The correct implementation of Basic Law 53(2)" is crucial to the "smooth selection of a new Chief Executive of Hong Kong and his subsequent appointment by the Central People's Government ... ." With the issuance of the Chief Executive Interpretation, it had become clear that Tsang had received the tacit endorsement of China's government (Chan, 2006:305). On 2 June 2005 Tsang officially declared his candidacy and was elected, unchallenged, two weeks later. Soon after the Chief Executive Interpretation Albert Chen of the NPCSC Hong Kong Basic Law Committee, admitted that, had judicial review not been pre-empted, the Court of Final Appeal would almost certainly have reached the opposite conclusion, given that common law rules of statutory construction forbid courts to interpret in ways

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the language cannot bear, and that nothing in the text of the Basic Law could bear the “remaining term” interpretation (2005: 261).

### 3.3.4. INTERPRETING UNIVERSAL SUFFRAGE

On 29 December 2007 the NPCSC issued a further *Decision on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage* (“Universal Suffrage Decision” hereafter). The origins of the Universal Suffrage Decision go back to the Electoral Reform Interpretation of 2004. The Government had recommended that the Chief Executive Election Committee be expanded from 800 to 1,600 members and include all District Council members (most of them directly elected); that the nomination threshold of the Chief Executive be increased from 100 to 200, given the Committee’s new composition; and that (confidence) voting proceed even when only one candidate has been nominated (Young & Cullen, 2010:42-3). The proposal, however, was vetoed in the Legislative Council by Pan-Democratic Bloc legislators who controlled slightly more than one-third of the seats, preventing the SAR regime from achieving a supermajority.

The Universal Suffrage Decision addressed the situation after this proposal of the Tsang Government’s had been defeated. Universal suffrage was ruled out for the 2012 Chief Executive and Legislative Council Elections, but not the same Elections in 2017 and 2020 respectively. At an “appropriate” time, the NPCSC declared, “amendments conforming to the principle of *gradual and orderly progress* [emphasis

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added]” for the 2012 Elections. The NPCSC concluded that “with the joint efforts of the Government ... and the people of Hong Kong, the democratic system of [Hong Kong] will definitely make progress continuously.” The core meaning of the Universal Suffrage Decision was that universal suffrage was to be postponed for another ten years, and that the burden of political reform was to be shifted from China’s government to Hong Kong’s politicians (Chen, 2008:12-13). In 2010, following an internal split within the Pan-Democratic Bloc which effectively disintegrated their veto bloc in the legislature, the NPCSC enacted, with the historic support of the Democratic Party, the *Decision on Approving the “Amendment to Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China Concerning the Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region* (“Annex I Decision” hereafter).

The Annex I Decision gave constitutional force to the reform package proposed by the Government one year earlier to initiate moderate democratic reforms by expanding the size of the Election Committee from 800 to 1,200 members (leaving intact the Committee’s corporatist representation elements), and the number of Legislative Council Members from 60 to 70 (without altering the 50:50 proportion of Functional and Geographical Constituencies). This Decision does contain a small breakthrough, by permitting the five new Functional Constituencies (7% of all seats) to be selected by some 3.3 million voters who are not concurrently electors of any other existing Functional Constituency.

### 3.3.5. JUDICIAL RESTRAINT AS TRUST-BUILDING

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The NPCSC, transmitting the preferences of the Communist Party and its Central Hong Kong and Macao Work Coordination Group, has shown itself quite activist in forestalling any deviation from the Party-state's sovereign interests in the territory's political development. By contrast, the Court of Final Appeal has eschewed addressing matters of political reform altogether. From 1997 to 2011 no judgment of the Court even touched on fundamental political reforms; neither the arrangements of the Chief Executive Election nor the particularities of the Functional Constituency system of representation in the legislature. The few electorally-related rulings of the Court have cautiously avoided the kind of sweeping impact that might have trespassed against China's non-negotiable preferences in this Prohibited Policy Domain. In fact, in elaborating its constitutional jurisprudence, the Court has paid witting heed to Hong Kong's peculiar circumstances, of which China's exercise of national sovereignty is a critical aspect; and has ultimately settled on a "balanced" approach to dealing with "One Country, Two Systems" matters.<sup>45</sup>

Constitutional litigation against corporatist political representation was in fact raised in the High Court in *Chan Yu Nam v Secretary for Justice*,<sup>46</sup> yet both first-instance and appellate divisions of this Court took pains to reject the challenge, arguing that corporate voting has historically been a democratic innovation aimed at enlarging the franchise, and that the Basic Law nowhere expressly limits the right to vote to individual citizens (Lim, 2011:859). At this point the case had not reached the Court of Final Appeal; nevertheless, any finding by the Court of the Functional Constituencies' unconstitutionality (within a Prohibited Policy Domain) would

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<sup>45</sup> Personal Interview with Mr. Andrew Li (first Chief Justice of the Hong Kong Court of Final Appeal) (29 November 2011).

<sup>46</sup> *Chan Yu Nam v Secretary for Justice* [2010] H.K.C.A. 364 (Hong Kong Court of Appeal).

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instantly have been perceived as a signal defection risking a backlash that might have gone well beyond provoking an NPCSC Interpretation. And earlier, the Court of First Instance of the High Court had in *Chen Shu Ying v Chief Executive of Hong Kong*<sup>47</sup> upheld the Government's controversial decision to abolish the elected local governments through the Provision of Municipal Services (Reorganisation) Ordinance. None of these cases have been appealed to the Court of Final Appeal.

### 3.4. PUBLIC FINANCE

#### 3.4.1. PUBLIC FINANCE AS A PROHIBITED POLICY DOMAIN

As analysed in Chapter 3, the business elite embedded in the Basic Law its monopoly over public finance policy-making in post-1997 Hong Kong. Under the auspices of the elite, the Basic Law mandated the Government to balance its budget, cap taxation levels, and adhere to pro-business policies, with scant reference to social welfare provision or labour rights. The Basic Law also delegates to the SAR regime, highly influenced by the business elite – including several large property developers – ownership over all land, and the power to control its use through zoning and selling leaseholds to the land from which it derives revenue (Burns, 2004:32). While Chief Executive Tung's years in power witnessed an expanded role of the government in public finance-making (compared to the colonial era) against the background of the territory's recessions following the 1997 Asian financial crisis, (Tsang, 2004:277), the Donald Tsang Government soon fine-tuned its public finance policy to embrace the

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<sup>47</sup> *Chen Shu Ying v Chief Executive of Hong Kong* [2001] 1 H.K.L.R.D. 405 (Hong Kong Court of First Instance).

## DYNAMIC EQUILIBRIUM

so-called “Big Market, Small Government” doctrine, which holds in practice that economic development ought to be the territory’s top priority (Ngan & Li, 2007:535; see Williams, 2005:224). Tsang’s doctrine appeared to reflect the neo-liberal pro-business tendencies of the preeminent business elite rather than a genuine adherence to the ideals of the free market philosophy (Wong & Luk, 2007). Undoubtedly, Hong Kong’s “eclectic corporatist” form of government brought with it a form of “multilateral ad hoc bargaining” characterized by the lack of a consistent economic philosophy and state-directed development programmes (Ma, 2012:80).

As anticipated by the drafters of the Basic Law, the SAR regime’s members, partners and supporters continued to be drawn above all from the business community.<sup>48</sup> Business leaders have direct access to the Chief Executive and the Financial Secretary (Latter, 2007:131). Notably, Henry Tang, the son of tycoon and Chairman of the Hong Kong Textile Trade Union Leo Tang, served as Financial Secretary and later Chief Secretary throughout much of the 2000s. The political representation of big enterprises remained guaranteed by the institution of corporatist political representation in the Legislative Council, and by the occupation-based seats in the Chief Executive’s Election Committee (Goodstadt, 2005:226). The business elite’s political dominance has been evidenced by ongoing accusations of government-business collusion (Lui & Chiu, 2012:120), and translates into a veto against any change to the “Big Market, Small Government” policy – such as stronger labour rights, the expansion of social welfare, higher taxes, and ultimately the assumption of political power by the left from the Pan-Democratic

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<sup>48</sup> Occupational Deafness (Compensation) (Amendment) Ordinance 1997; Employment (Amendment) (No. 5) Ordinance 1997; Employees’ Rights to Representation, Consultation and Collective Bargaining Ordinance 1997; Trade Unions (Amendment) (No. 2) Ordinance 1997.

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Bloc (Tai, 2007b:548). The Government feels a strong interest in maintaining its monopoly of the direction of public finance; in terms of the Constitutional Investment Theory herein propounded, public finance must be a Prohibited Policy Domain of the SAR regime. Any decision of the Court of Final Appeal that strayed from these non-negotiable preferences would be seen as a defection, and might well provoke actual retaliation.

### 3.4.2. STATE MONOPOLY OF LAND USE

The first major constitutional case involving economic policy to reach the Court of Final Appeal was *Director of Lands v Yin Shuen Enterprises & Nam Chun Investment Company*.<sup>49</sup> The case concerned how to assess the amount of compensation payable on the “resumption” of land (*i.e.* its confiscation for a public purpose) pursuant to the Lands Resumption Ordinance.<sup>50</sup> In 1999 the Government resumed agricultural lands held by two private companies in order to build public housing facilities. These lands had significant development potential but were held under Government leases that permitted no building. The appellants challenged the Government’s compensation for the failure of the resumption to reflect a price above the value of the land, subject to the purchasers’ willingness to pay such a price. The Director of Lands rebutted that the comparables ought to be ignored because Section 12(c) of the Ordinance provides, “No compensation shall be given in respect of any expectancy or probability of the grant or renewal or continuance, by the Government ... of any license, permission, lease or permit ...”. The appellants impugned the

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<sup>49</sup> (2003) 6 H.K.C.F.A.R. 1 (Hong Kong Court of Final Appeal).

<sup>50</sup> Cap. 124.

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constitutionality of Section 12(c), arguing that it contravened Article 105 of the Basic Law, which guarantees the right to compensation for lawful deprivation of property; thus that any compensation must correspond to the property's real value at the time, and be paid without delay.

Overturning the High Court, the Court of Final Appeal deferred to the Government. Lord Millett (incumbent United Kingdom Law Lord at the time) held that notwithstanding Article 105 the Government possessed the right to exploit the development potential of the land since it remains the property of the Government.<sup>51</sup> Justice Kemal Bokhary added that persons whose property is compulsorily acquired possess a constitutional right to compensation according to the property's 'real value' under Article 105 of the Basic Law. Although Section 12(c) of the Lands Resumption Ordinance is subject to constitutional review under the Basic Law, Bokhary asserted that "Section 12(c) merely excludes a speculative element which sometimes inflates land prices and that such exclusion is consistent with compensation according to the real value of the property resumed", as provided by the Basic Law.<sup>52</sup>

### 3.4.2. PUBLIC HOUSING

The second major economic constitutional case – involving social welfare in public housing, was *Ho Choi Wan v Hong Kong Housing Authority*.<sup>53</sup> In *Ho Choi Wan* two public housing tenants sued the Housing Authority for failure to review the average rent-to-income ratio of tenants since 1998. Pursuant to Section 16 (1A) of the Housing

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<sup>51</sup> At 57.

<sup>52</sup> At 1.

<sup>53</sup> *Ho Choi Wan v Hong Kong Housing Authority* (2005) 8 H.K.C.F.A.R. 68 (Hong Kong Court of Final Appeal).

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Ordinance, the Housing Authority has an obligation to ensure that the Median Rent-to-Income Ratio (MRIR) of all public housing estates does not exceed 10%. Note that the Housing Authority is an important statutory agency responsible for providing affordable public rental housing to about 30% of Hong Kong's total population. Section 16(1A) had been introduced in June 1997 by the last Legislative Council of British Hong Kong, which not only provided that the median rent-to-income ratio of public housing rents must not exceed 10%, but also that public housing rents might increase only once in every three years. The legislative intent of this amendment, enacted at a time of rapid economic growth, was to prohibit the Government to drastically raise public housing rents to pay for maintenance costs (Ma, 2007:83-4). However, a severe recession had caused this ratio to exceed 10% since mid-2000, arguably contrary to Section 16(1A); indeed, in face of strong public demand for rent reduction the Housing Authority strategy had been to freeze the rent and defer any rent review indefinitely. Indeed, the attitude of the SAR regime towards public housing policy remained "traditionalist" in the sense that officials tend to commit themselves to the philosophy of "simple" social policy, believing that public housing is nothing more than a "maintenance-oriented" social programme that should be terminated one day when the markets return to normal (Lee, 2012:184).

The Court, however, deferred to the Housing Authority, rejecting the claim that the appellants had an enforceable expectation that rent reviews should be conducted regularly in line with past practice. Circumscribing the effect of Section 16(1A), Lord Millett held, "Having regard to the legislature's purpose and the consequences of including downwards variations, in my opinion s.16(1A) ... does not prevent [the

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Housing Authority] from reducing the rent as often and by as little as it may consider appropriate.”<sup>54</sup> Millett concluded, “By removing all constraints on the Housing Authority’s power to reduce rents in times of deflation, a decision on this ground will afford tenants better and fuller protection ...”<sup>55</sup> Justice Bokhary, though dissenting, felt obliged to stress that he was “not saying that economic, social and cultural rights enjoy precisely the same status as civil and political rights under [Hong Kong’s] constitutional arrangements ... civil and political rights are contained in the Hong Kong Bill of Rights, which embodies the ICCPR’s application to Hong Kong, while economic, social and cultural rights are not contained in any such instrument.”<sup>56</sup>

### 3.4.3. PRIVATISATION

In a subsequent judicial review case – *Lo Siu Lan v Hong Kong Housing Authority*<sup>57</sup> – which involved a strictly non-constitutional challenge against the privatisation of retail and car park facilities within public housing estates, the Court again overruled the High Court in favour of the reigning *status quo*. A unanimous Court rejected the appellant’s contention that by selling such assets the Housing Authority had violated Section 4(1) of the Housing Ordinance, which mandates the Authority “to secure the provision of housing and such amenities ancillary thereto.” The Court of Final Appeal not only decided that Section 4(1) did not require the Housing Authority to be the *direct* provider, but also that its statutory obligations may be transferred to a

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<sup>54</sup> *Ho Choi Wan*, at 118.

<sup>55</sup> *Ho Choi Wan*, at 119.

<sup>56</sup> *Ho Choi Wan*, at 67.

<sup>57</sup> *Lo Siu Lan v Hong Kong Housing Authority* (2005) 8 HKCFAR 363 (Hong Kong Court of Final Appeal).

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private concern, such as the Link Real Estate Investment Trust, over which the Authority had no control – thus giving full backing to the Government’s privatisation policies. According to the Government, the Court had solved a pressing problem for the Housing Authority by erasing “all legal impediments” to the transfer – enabling the Authority to re-launch the REIT’s initial public offering.<sup>58</sup> Importantly, the Court had helped resolve the Hospital Authority’s budget deficit problem; had the majority decided in line with Justice Bokhary’s dissenting judgment, the outcome could have sizeable implications on public administration as a whole (Cheung & Wong, 2006:130).

### 3.4.4. AUSTERITY MEASURES

In *Secretary for Justice v Bernard Lau*<sup>59</sup> the Court of Final Appeal consolidated three appeals claiming the unconstitutionality of Section 10 of the Public Officers Pay Adjustment Ordinance and Section 25 of the Public Officers Pay Adjustments (2004/2005) Ordinance. *Bernard Lau* was litigated against the backdrop of the 1997 economic downturn, in which civil servants’ high pay levels had grown to be matter for public concern (Cheung, 2005:157), while austerity measures like early retirement, salary freezes, departmental mergers, and privatisation were causing anxiety among civil servants, who also complained of discrimination between senior and junior staff in terms of differential pay reductions (Leung, 2007:277).

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<sup>58</sup> Housing, Planning and Lands Bureau, “Legislative Council Panel on Housing Progress on Divestment of Housing Authority’s Retail and Carparking Facilities,” CB(1) 62/05-06(03) (October, 2005).

<sup>59</sup> *Secretary for Justice v Bernard Lau* (2005) 8 H.K.C.F.A.R. 304 (Hong Kong Court of Final Appeal).

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The appellants in this case had been hired before the transfer of sovereignty on 1 July 1997. They contended both statutory provisions, which varied their employment contracts to reflect unilateral pay reductions by the Government, were unconstitutional, as inconsistent with Article 100 of the Basic Law, which provides, “Public servants serving in all Hong Kong government departments, including the police department, before [1997], may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service *no less favourable than before*” [emphasis added]. The appellants contended that the cuts had made their conditions of service less favourable than before the transfer of sovereignty.

Additionally, Article 103 of the Basic Law provides, “Hong Kong’s previous system of recruitment, employment, assessment, discipline, training and management for the public service, including ... pay and conditions of service, shall be maintained ....” Note that both constitutional provisions codified what Hong Kong’s civil servants had inherited from the colonial regime: a pay system based on the doctrine of “fair comparison” with the private sector, using periodic pay level reviews and annual pay trend surveys to provide the public sector with a stable pay regime. Conserving the territory’s efficient British-style civil service was one of the main goals codified in the Basic Law to smoothen the transition. The drafters did not anticipate the contingency of a severe recession that would frustrate pay comparability with the private sector (Cheung, 2005:181).

A unanimous Court dismissed the appeal. Sir Anthony Mason, writing the opinion, called the two pieces of legislation “austerity measures following the South East Asian economic crisis which occurred in the later part of 1997.”<sup>60</sup> Sir Anthony

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<sup>60</sup> *Bernard Lau*, at 6.

## DYNAMIC EQUILIBRIUM

defined the scope of Article 100 by reasoning that its effect “was to prohibit a reduction below [public service pay levels prevailing immediately before the transfer of sovereignty] ... It was not to prohibit any reduction at all.”<sup>61</sup> Because the pay reductions mandated by the statutes did not depress actual pay below the level immediately before 1 July 1997, the provisions were constitutional. He further held that the scope of the Government’s plenary power necessarily extended to the public service, and to the relations between the Government and public officers and the conditions of their appointment, including public service pay scales.<sup>62</sup>

The Court proceeded next to hold that Article 103 “does not entail preservation of all the elements of which the system consists.”<sup>63</sup> The Court ruled that Article 103 was designed merely to offer transitional protection to public sector employees, not to “stultify the processes of government and prevent the capacity of government to reform and improve its processes.”<sup>64</sup> The Government later acknowledged that the ruling in *Bernard Lau* had freed it to revive a thorough-going review of public service fringe benefits and consolidate its proposals for change.<sup>65</sup>

### 3.4.5. ANALYSIS

Wittingly or unwittingly, the Court has given a wide berth to Chapter V of the Basic Law, which enacts the fundamentals of Hong Kong’s neo-liberal capitalist economy.

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<sup>61</sup> *Bernard Lau*, at 33.

<sup>62</sup> *Bernard Lau*, at 38.

<sup>63</sup> *Bernard Lau*, at 65.

<sup>64</sup> *Bernard Lau*, at 74.

<sup>65</sup> Legislative Council, “Panel on Public Service Meeting Background Brief on review of fringe benefit type of civil service allowances,” LC Paper No. CB(1)1280/05-06(04) Ref: CB1/PL/PS (20 April 2006).

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In every public finance constitutional case the Court has defended the Government's dominance of land use (one of the territory's most important sources of public revenue); affirmed the Housing Authority's power to set rent levels; and lent support to neo-liberal, conservative, economic policies like privatisation and austerity measures – all non-negotiable preferences of the SAR regime and the business elite.

Following the Court of Final Appeal, the High Court too has on a number of occasions reasoned that the International Covenant on Economic, Social and Cultural Rights enshrined in Article 39 of the Basic Law is in essence merely “promotional” and “aspirational” – at the cost of drawing fierce criticism from the United Nations. The High Court ruled that the judiciary would not invoke the ICESCR to constrain the Government's social and economic policies.<sup>66</sup> A Non-Permanent Judge of the Court of Final Appeal told me that the Hong Kong Judiciary indeed has afforded greater deference to the SAR regime in economic and financial matters, unlike “irreducible” human rights issues.<sup>67</sup>

Fifteen years after the Basic Law came into force, the boundaries of the spheres of constitutional control belonging to the Court of Final Appeal, to the SAR regime and to the NPCSC have largely been clarified and delineated. Well aware of which are the Prohibited Policy Domains, the Court has exercised circumspect self-restraint over those parts of the Basic Law covering Mainland China-Hong Kong relations, political structure, and the economy. The Court has left it up to the NPCSC and to the

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<sup>66</sup> For example, *Chan Mei Yee & Anor v Director of Immigration & Anor* (unreported, 13 July 2000, H.C.A.L. 77 99/1999) (Hong Kong Court of First Instance); *Chan To Foon & Ors v Director of Immigration & Anor* [2001] 3 H.K.L.R.D. 109 (Hong Kong Court of First Instance); *Mok Chi Hung & Anor v Director of Immigration* [2001] 2 H.K.L.R.D. 125 (Hong Kong Court of First Instance).

<sup>67</sup> Personal interview with Justice Michael Hartmann (Non-Permanent Judge of the Hong Kong Court of Final Appeal) (21 November 2011).

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SAR regime to determine the best meaning of these provisions. However, as we shall see below, this has in no way inhibited the Court in making the most of its powers as touching the rest of the policy continuum.

### 3.5. PUBLIC SECURITY

#### 3.5.1. OVERVIEW

Public security, normally the most forbidden Prohibited Policy Domain in authoritarian states, has curiously been an area in which the Court of Final Appeal was able to deliver activist rulings with impunity. Indeed, in the series of high profile cases the Court may seem at first blush to have defied the SAR regime. However, I contend that each judgment is adequately explained by the Court's sensitiveness to the SAR regime's own internal security (as opposed to China's national security), the Government's long-standing policy of tolerance toward most public security issues, as well as by the high transaction costs the SAR regime would have incurred to reverse the Court.

#### 3.5.2. THE *FALUN GONG* IN HONG KONG

The first case was *Yeung May Wan v HKSAR*, which involved the prosecution of sixteen *Falun Gong* demonstrators in 2002 who had been protesting in front of the Liaison Office of the Chinese government against the alleged mistreatment of their fellows on the Mainland. Note that the *Falun Gong* were legally registered in Hong

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Kong, yet since 1999 had been classified an illegal “evil cult” by Mainland China, who persecuted its practitioners (Wong, 2004).

Since 2001, *Falun Gong* practitioners have been organising both high-profile workshops and exhibitions detailing how members have been inhumanly tortured in Mainland China, and protest demonstrations demanding the prosecution and trial of former Chinese paramount leader President Jiang Zemin. The NPC Deputies from Hong Kong have frequently called on the Government to withdraw its legal certification of the *Falun Gong* and outlaw them on grounds of national security (J. Chan, 2002:105). And indeed, Secretary for Security Ip has criticised the sect for spreading “heretical thinking” and “directing people towards superstition.”<sup>68</sup>

On 14 March 2002 a small-scale demonstration took place outside the Liaison Office. The trifling size of the demonstration meant the protestors had no obligation to notify the police in advance under the Public Order Ordinance, which applies only to assemblies involving thirty persons or more. The affair ended with sixteen *Falun Gong* protestors being arrested after a scuffle with the police, who tried to move them on after a string of warnings. The clash caused minor injuries to seven policemen and nine protestors. All sixteen protestors, mostly from Hong Kong but also including one New Zealand and four Swiss nationals, were charged with “public obstruction” (an offence normally reserved for the nuisances caused by street hawkers); nine were further charged with obstructing the police, and three with assault.

Note that this unprecedented arrest of *Falun Gong* was triggered by complaints from the Liaison Office staff. On 15 August 2002 the Magistrates’ Court concluded a

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<sup>68</sup> “Hong Kong Security Official Criticises Falun Gong as Superstitious,” available at [http://news.bbc.co.uk/hi/chinese/news/newsid\\_1196000/11963822.stm](http://news.bbc.co.uk/hi/chinese/news/newsid_1196000/11963822.stm) (last visited on 24 February 2012).

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twenty seven-day trial in which Magistrate Symon Wong convicted all sixteen protestors, fining them between HK\$1300 (approximately US\$166.7) and HK\$3800 (approximately US\$487.2). On appeal, the High Court (Court of Appeal) unanimously overturned the convictions for obstruction of public places but upheld the offences of obstructing and assaulting the police. The protestors then appealed to the Court of Final Appeal.

On 5 May 2005 the Court, unanimously reversing the High Court, held that the arrests were unlawful, and acquitted the protestors of all charges, releasing them unconditionally. Chief Justice Li, Justice Ribeiro, Justice Chan, and Justice Sir Anthony opened their joint opinion arguing that the freedom to demonstrate and the freedom of speech “involve the freedom to express views” that “may be critical of persons in authority,” but “*are at the heart of Hong Kong’s system and it is well established that the courts should give a generous interpretation to the constitutional guarantees for these freedoms in order to give to Hong Kong residents their full measure* [emphasis added].”<sup>69</sup> The Court noted in *dicta* that the constitutional right to demonstrate has huge implications on the scope of police powers of arrest in relation to public order offences.<sup>70</sup> The policemen who arrested the protestors taking part in a peaceful demonstration had no reasonable grounds to suspect the arrestees of committing the charged offences, hence the arrests were unlawful. Significantly, in dismissing the charges of assaulting the police, the Court also noted, “*persons unlawfully in custody are entitled to use reasonable force to free themselves* [emphasis added].”<sup>71</sup>

It is noteworthy that the Government complied with this controversial ruling,

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<sup>69</sup> *Yeung May Wan*, at 1.

<sup>70</sup> *Yeung May Wan*, at 31.

<sup>71</sup> *Yeung May Wan*, at 53.

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which cast in stark relief the continued independence and distinction of Hong Kong's legal system from China's.<sup>72</sup> One may surmise that, notwithstanding the Court's encroachment on a Prohibited Policy Domain, the SAR regime at least is possessed of an ample zone of tolerance within this domain, unlike the Government in Singapore, as witness the *Chng Suan Tze* case.<sup>73</sup> Although the *Falun Gong* outraged the "patriotic" faction of the SAR regime, a crackdown on the movement ratified by the territory's courts, so renowned for their independence, would have incited the excoriations of the international community – an undesirable consequence for the business and civil service factions of the same regime (Wong, 2004). The *Falun Gong* had neither broken Hong Kong law nor caused any social turmoil in the territory: the target of the protestors was solely the top Chinese leadership rather than the political leaders of the SAR regime. For these reasons, the regime's aggregate zone of tolerance  $[R_1, R_2]$  could be broad enough to encompass the Court of Final Appeal's decision; which thus may not have been perceived as non-cooperative. And even if some pro-China factions did perceive it so, the regime as a whole, being internally divided, had to apprehend the massive transaction costs of deciding a common yet effectual way of sanctioning the Court. Surprisingly perhaps, the NPCSC accorded the Court full respect, and seemed to sidestep bringing its power to issue Interpretations overruling the Court to bear on the *Falun Gong* as an issue affecting Mainland China-Hong Kong relations (Leung, 2007:205).

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<sup>72</sup> Alyssa Lau, "Hong Kong reverses Falun Gong convictions," *The New York Times* (6 May 2005), available at, <http://www.nytimes.com/2005/05/05/world/asia/05iht-hong.html> (last visited on 24 February 2012).

<sup>73</sup> See Chapter 2.

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### 3.5.3. POLICE COMMISSIONER'S DISCRETION OVER PUBLIC SECURITY

In *Leung Kwok Hung and others v HKSAR*, the Court again issued a seemingly activist decision, invalidating Section 14(1) of the Public Order Ordinance as unconstitutionally vague and a breach of the ICCPR's "prescribed by law" requirement; in that it empowered the police to restrict or prohibit demonstrations on grounds of *ordre public*. The facts of this case pertained to a march along Queensway, a busy public highway near the Central Business District, led in May 2002 by political activist Leung Kwok Hung (since 2004 a Member of the Legislative Council). Arriving at Police Headquarters, the protestors demanded the release of another political activist earlier convicted of assaulting and obstructing a police officer. The protest itself was peaceful, but Leung and his aides had refused to comply with the notification procedure in Section 13A of the Public Order Ordinance, requiring assembly organisers to give written notice to the police of any procession attended by more than thirty people, with a description of the purpose, time, route, and the estimated number of attendees. Also targeted by this act of civil disobedience was Section 14(1) of the Ordinance, authorising the Commissioner of Police to object to the procession on vaguely worded public security grounds. Leung and two other activists were convicted of holding an unlawful procession contrary to the statute.

The three were convicted by Chief Magistrate Patrick Li in November 2002 and were bound over for three months on a recognizance of HK\$500 (approximately US\$64.10). In other words, the defendants were not jailed but required to be of "good behaviour" or else forfeit the bail money. The High Court dismissed the appeal by a 2 to 1 majority in November 2004. Leung appealed to the Court of Final Appeal. On 8

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July 2005 the Court of Final Appeal, divided four to one, rendered its judgment dismissing the appeal itself, yet striking down the vague, excessively broad concept of *ordre public* that had been furnishing grounds in Section 14 for the Police Commissioner to disallow a peaceful procession.

The majority cautioned that restrictions to the constitutional right of peaceful assembly “must be necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.”<sup>74</sup> The majority held, however, that the right of peaceful assembly involves “a positive duty” on the part of the executive to adopt reasonable measures to facilitate lawful assemblies to occur peacefully.<sup>75</sup> Any restriction of the right of peaceful assembly by the Commissioner of Police must satisfy a proportionality test that takes account of such considerations as “whether a potential restriction is rationally connected with one or more of the statutory legitimate purposes,” and “whether the potential restriction is no more than is necessary to accomplish the legitimate purpose in question.”<sup>76</sup> The Court did uphold the constitutionality of the prior notification requirement, as being “of assistance in enabling [the] Government to fulfil its positive duty” so long as it remains “a limited discretion, constrained by the proportionality test” and subject to judicial review.<sup>77</sup>

The net result was to curtail the discretion of the Commissioner to restrict the right of peaceful assembly on grounds of *ordre public* pursuant to Sections 14(1), 14(5)

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<sup>74</sup> *Leung Kwok Hung*, at 17.

<sup>75</sup> *Leung Kwok Hung*, at 22.

<sup>76</sup> *Leung Kwok Hung*, at 57.

<sup>77</sup> *Leung Kwok Hung*, at 93.

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and 15(2) of the Public Order Ordinance.<sup>78</sup> The majority reasoned that the civil law concept of *ordre public*, reaching far beyond the ordinary meaning of “maintenance of public order and prevention of public disorder,” gave the Police Commissioner “imprecise and elusive” discretion the “boundaries [of which] ... cannot be clearly defined.”<sup>79</sup> Checking the Commissioner’s discretion to disallow peaceful processions for loosely defined political reasons, the Court further instructed the Commissioner to apply the proportionality test whenever he exercises his statutory discretion to impose limits on the right of peaceful assembly, warning that such discretion must not be wielded arbitrarily.<sup>80</sup>

This “activist” decision, too, fell within the Government’s zone of tolerance **[R<sub>1</sub>R<sub>2</sub>]**. Even though the SAR regime has been moving toward “soft authoritarianism” (represented as **R<sub>1</sub>**) by reviving the repressive provisions of the colonial Public Order Ordinance and Societies Ordinance repealed by the last British Hong Kong legislature,<sup>81</sup> and by authorising “national security” as grounds for the police to shut down a demonstration (So & Chan, 2002:380), it has also been taking a relaxed approach to enforcing these laws (represented as **R<sub>2</sub>**): in the period 1997-2004, 594 public meetings and processions (3.5% of the total) took place without the police being notified as required by law, yet only 64 people were prosecuted (Ma, 2007:184). The Commissioner himself seldom strictly enforces the advance notification requirement; and the regress to authoritarian legal instruments notwithstanding, the police almost invariably approve assemblies when notification

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<sup>78</sup> *Leung Kwok Hung*, at 95.

<sup>79</sup> *Leung Kwok Hung*, at 70.

<sup>80</sup> *Leung Kwok Hung*, at 96.

<sup>81</sup> These provisions required that demonstrations which are to include more than thirty participants shall seek prior police approval, and associations shall first register and meet with government approval before they become legal.

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is given (Chen, 2006:671).

The early SAR regime's behaviour thus suggest that it is in the aggregate tolerant to most public demonstrations – possibly out of its inheritance of the British colonial regime's conventions of political self-restraint (notice that most of the early SAR's ministers held similar positions in the Patten Government), as well as internal disagreements with liberal elements within the regime or apprehension of external resistance from civil society. Indeed, in the Statute Law (Miscellaneous Provisions) Bill 2007, the Government asked the Legislative Council to sever the notion of “public order (in the ordinary law and order sense)” from “public order (*ordre public*)” in the Public Order and the Societies Ordinances, explicitly in line with *Yeung May Wan* and *Leung Kwok Hung*. Following these rulings, reliance on the Public Order Ordinance to prosecute protestors has waned, though worries have arisen that the still vaguer Police Force Ordinance is being invoked instead for similar purposes.<sup>82</sup> At all events, the Government has applauded Court for recognising that “the freedoms protected by [the Basic Law] were at the heart of Hong Kong's system,” and that “the law required reasonable give and take between users of public places.”<sup>83</sup>

### 3.5.4. COVERT SURVEILLANCE

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<sup>82</sup> Personal Interview with Mr. Leung Kwok Hung (Member of the Legislative Council) (13 December 2011).

<sup>83</sup> Security Bureau, Hong Kong Police Force, and Department of Justice, “Bills Committee on the Statute Law (Miscellaneous Provisions) Bill 2007 Amendments to the Public Order Ordinance (Cap. 245) and the Societies Ordinance (Cap. 151),” LC Paper No. CB(2)2336/06-07(01) (3 July 2007).

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The next case exemplifying the Court of Final Appeal's activism was *Koo Sze Yiu v Chief Executive*, concerning Section 33 of the Telecommunications Ordinance 1963, which authorised covert surveillance by law enforcement agencies. Consequent upon the courts' exclusion of evidence obtained by covert surveillance in criminal cases, the Chief Executive-in-Council had decreed an Executive Order known as the Law Enforcement (Covert Surveillance) Order<sup>84</sup> in order to impose more stringent authorisation and review procedures for covert surveillance, while yet declining to undertake statutory revisions to the same end (see Jhaveri *et al.*, 2010:466). This Order had been struck down by the High Court as constituting insufficiently precise legal procedures for regulating covert surveillance or protecting constitutional privacy rights. The Government warned that the judgment would deprive law enforcement agencies of a crucial weapon to combat crime and protect public security (Jhaveri *et al.*, 2010:467).

The statutory provisions challenged in *Koo Sze Yiu* ostensibly legitimised covert surveillance. The appellants also challenged the above-mentioned Executive Order under which covert surveillance pursuant to Section 33 was to be conducted in certain circumstances. The Court of Final Appeal affirmed the High Court, finding both Section 33 and the Executive Order inconsistent with Section 30 of the Basic Law, which provides for the protection of the freedom and privacy of communication and prohibits any infringement of this freedom, except by authorities who comply with legal procedures to satisfy the demands of public security or investigation in relation to criminal offences. Justice Bokhary, writing for a unanimous Court, conceded, "covert surveillance is an important tool in the detection and prevention of crime and

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<sup>84</sup> Special Supplement No 5 of the Hong Kong Government Gazette No 31/2005, E57-E75.

## DYNAMIC EQUILIBRIUM

threats to public security ... covert surveillance is not to be prohibited but is to be controlled.”<sup>85</sup>

In proceedings Chief Executive Tsang reiterated the Government’s warning that if both statute and Executive Order were nullified, all covert surveillance would be unlawful, and law enforcement would be debilitated. The Court invalidated both all the same, claiming for itself however a competence to suspend the effect of the invalidation for a grace period of six months to allow time for the laws to be revised. Sir Anthony admitted that this newly asserted competence might raise “fundamental doctrinal questions relating to the separation of powers, the role of the courts, the relationship between the courts and the legislative branch of government.”<sup>86</sup>

Nevertheless, the SAR regime required the Court’s self-restraining compromise, reciprocally investing further in its authority and legitimacy by introducing a legislative revision within the six-month period decreed by the Court. At around 2 am on 6 August 2005, after a 58-hour marathon debate, the Legislative Council enacted the Interception of Communications and Surveillance Ordinance specifying the circumstances under which covert surveillance is permissible, and giving the courts jurisdiction to issue authorisations before covert interceptions and surveillance may take place. This might be explained by the mounting social concerns on the issue and public pressures on the legislature to take action.<sup>87</sup>

### 3.5.5. ANALYSIS

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<sup>85</sup> *Koo Sze Yiu*, at 3.

<sup>86</sup> *Koo Sze Yiu*, at 61.

<sup>87</sup> Personal interview with Mr. Kevin Zervo, S.C. (Director of Public Prosecutions, Hong Kong) (2 November 2011).

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In sum, the Court of Final Appeal has enjoyed considerable leeway in ruling against the Government in public security cases. This was made possible by many factors: the political assets accumulated by the Court's earlier cooperativeness, the SAR regime's aggregate tolerance to those public security issues which actually arose, and the high transaction cost of uniting a divided regime to sanction the Court. There is also the important consideration that contemporary Hong Kong has never experienced a genuine public security threat: no armed secession movement has ever arisen, and virtually all demonstrations, even the 1 July 2003 protest which involved over half a million of people, have been entirely peaceful. The benefits of acquiescing in the Court's dissident-friendly approach, which confers credible evidence of the continuation of judicial independence and the rule of law, manifestly outweighed the costs to the Government of the Court's several public security decisions. Nonetheless, any future contraction of the SAR regime's zone of tolerance over public security issues is likely to reduce the ability of the Court to promulgate activist rulings with impunity.

### 3.5.6. SUMMARY

Reasoning backwards, from the impunity which the Court of Final Appeal has so far enjoyed when exercising constitutional review, one may infer its deference to the NPCSC and the SAR regime in Prohibited Policy Domains such as national sovereignty and public finance. The Court's consistent record of cooperation in these two policy domains has cemented a strong reputation for trustworthiness that weighs heavily in the reciprocating calculus of the SAR regime and the NPCSC when

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they get around to deciding whether to “invest” in further reliance on the Court.

### 3.6. PERMITTED POLICY DOMAINS

#### 3.6.1. CIVIL RIGHTS: THE FREEDOM TO TRAVEL

The Court of Final Appeal has also issued several illustrious rulings relating to civil rights. Consider *Gurung Kesh Bahadur v Director Immigration*, in which a Nepalese Non-Permanent Resident challenged Section 11(10) of the Immigration Ordinance, which provides that permission to reside in Hong Kong expires immediately upon the permittee’s departure, as contrary to Article 31 of the Basic Law which guarantees Residents’ (Permanent and Non-Permanent) “freedom to travel and to enter or leave [Hong Kong].” In 1995 the appellant arrived in Hong Kong to apply to change his status from visitor to dependent of his wife, and was granted a permit to stay until 1999. In 1997 he briefly left Hong Kong for Nepal for around two weeks, but upon return, the Immigration Department refused him permission to land pursuant to Section 11 of the Immigration Ordinance, even though his permitted period of stay had not yet expired (Panditarante, 2011:452). The appellant was not deported, however, but was subsequently charged with criminal offences. After being acquitted, he appealed for constitutional review of the Department’s decision.

The Government contended that all “rights,” including the right to travel, enumerated in the Basic Law that are not contained in the ICCPR as domesticated in the Hong Kong Bill of Rights Ordinance, are subject to the same domestication through local legislative processes. Rejecting this line of reasoning for an unanimous

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Court, Chief Justice Li held, “This could not have been the intention of the Basic Law”; rather the intent of the Basic Law’s framers was to entrench constitutional rights and freedoms which should be interpreted generously.<sup>88</sup> The Court concluded that the right of a Non-Permanent Resident to re-enter Hong Kong after travelling “is an essential element of these rights,” while the Government’s reading of Section 11(10) “would destroy his status as a Non-Permanent Resident which is the foundation of the rights conferred by Article 31,”<sup>89</sup> hence it is “unconstitutional and invalid.”<sup>90</sup>

In fact, Section 11(10), not necessarily unconstitutional in itself, does not apply to Non-Permanent Residents; appellant was therefore entitled to land in Hong Kong without need of applying for another residence permit pursuant to Section 7(1) of the Immigration Ordinance.<sup>91</sup> This decision confirmed the rights of Non-Permanent Residents, and harbours far-reaching policy implications, especially given that appellant belonged to an ethnic minority (Nepalese), and that as many as one million Non-Permanent Residents live in Hong Kong, embracing Mainland Chinese on one-way permits as well as foreign nationals who have come to work in Hong Kong in the fields of business, finance and trade.<sup>92</sup>

The Court again interpreted Article 31 of the Basic Law in *Official Receiver & Trustee in Bankruptcy of Chan Wing Hing v Chan Wing Hing*. Impugned was Section 30A(10)(b)(i) of the Bankruptcy Ordinance, which sweepingly sanctions bankrupts, if they leave Hong Kong without notifying their trustee, by automatically extending the prescribed period of bankruptcy. The statute also trammels judicial discretion to

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<sup>88</sup> *Gurung Kesh Bahadur*, at 29.

<sup>89</sup> *Gurung Kesh Bahadur*, at 37.

<sup>90</sup> *Gurung Kesh Bahadur*, at 38.

<sup>91</sup> *Gurung Kesh Bahadur*, at 40.

<sup>92</sup> *Gurung Kesh Bahadur v Director Immigration*, at 2.

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mitigate or toll this sanction. The constitutional question was whether the provision constitutes an impermissible restriction on the freedom to travel protected by Article 8 of the Basic Law.

Chief Justice Andrew Li restated the principle in *Bahadur* that any restriction on the right to travel “must be prescribed by law” and be “necessary to protect the rights of others.”<sup>93</sup> The Chief Justice then used the proportionality test to gauge the constitutionality of 30A(10)(b)(i),<sup>94</sup> finding the provision excessively “harsh,” because it “operates irrespective of the reason for the bankrupt’s failure to notify which triggers it”;<sup>95</sup> “applies indiscriminately to all situations”;<sup>96</sup> and kerbs any “discretion vested in the court to dis-apply the sanction or to mitigate its consequences, however meritorious or deserving the circumstances.”<sup>97</sup> The Court concluded that the restriction goes beyond what is necessary for the protection of the creditors’ rights, and invalidated it accordingly.

### 3.6.2. CIVIL RIGHTS: HOMOSEXUAL RIGHTS

The Court of Final Appeal has sustained its activism over civil rights throughout the late 2000s. In *Secretary for Justice v Zigo Yau*, for example, it invoked the Basic Law and the Bill of Rights to strike down Section 118F(1) of the Crimes Ordinance, which criminalised sodomy between consenting homosexual men. The respondents were accused of having cultivated a liaison over the Internet and then committed the act in

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<sup>93</sup> *Chan Wing Hing*, at 34.

<sup>94</sup> *Chan Wing Hing*, at 35.

<sup>95</sup> *Chan Wing Hing*, at 47.

<sup>96</sup> *Chan Wing Hing*, at 48.

<sup>97</sup> *Chan Wing Hing*, at 49.

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a private car parked beside a public road.<sup>98</sup> Chief Justice Li began his judgment by affirming equality as a fundamental human right.<sup>99</sup> He strongly criticised discriminatory law as being “unfair and violates the human dignity of those discriminated against,” and “breeds tension and discord in society.”<sup>100</sup>

The Chief Justice held that because Section 118F(1) “gives rise to differential treatment on the ground of sexual orientation, justification for the difference in treatment is required.”<sup>101</sup> “A genuine need for the differential treatment,” according to Li, “cannot be established from the mere act of legislative enactment.”<sup>102</sup> He reminded parliamentarians that although they are entitled to determine whether it is imperative to criminalise a certain conduct to protect the public from sexual misconduct, they are not allowed to do so discriminatorily.<sup>103</sup> He held that Section 118F(1) is discriminatory because it criminalises only homosexual buggery but not heterosexual acts of a similar nature.<sup>104</sup> The courts are obligated, according to the Chief Justice, to implement the constitutional guarantee of equality before the law under such circumstances.<sup>105</sup>

The Government accepted the Court’s decision – revealing preferences which include a broad zone of tolerance within a Permitted Policy Domain. Traditionally uninterested in social engineering, the Government hinted that, except for legalising homosexual marriage, it is willing to entertain a wide range of initiatives on

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<sup>98</sup> *Zigo Yau*, at 4.

<sup>99</sup> *Zigo Yau*, at 1.

<sup>100</sup> *Zigo Yau*, at 2.

<sup>101</sup> *Zigo Yau*, at 25.

<sup>102</sup> *Zigo Yau*, at 27.

<sup>103</sup> *Zigo Yau*, at 28.

<sup>104</sup> *Zigo Yau*, at 28.

<sup>105</sup> *Zigo Yau*, at 29.

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homosexual matters from the Legislative Council and the Court of Final Appeal;<sup>106</sup> it even tabled the Domestic Violence (Amendment) Bill before the legislature on 17 June 2009 extending the scope of the domestic violence ordinance include to same-sex cohabitants, offering them additional civil remedies (Hotten, 2011:821).

### 3.6.3. CIVIL RIGHTS: ANALYSIS

Available evidence indicates that the Court of Final Appeal's impunity in delivering such activist civil rights decisions is likely to have stemmed from the SAR regime's relative tolerance to these matters. In *Bahadur* the Court actually conserved the impugned statutory provision, merely invalidating its application to Non-Permanent Residents, whose rights were clearly protected by the Basic Law. The Court did not burden the Government, as the protection of Non-Permanent Residents' right to return to Hong Kong only applied to the period specified by their stay permits, which essentially is determined by the Immigration Department.

In *Chan Wing Hing* the Government was not even affected by the invalidation of the clause prohibiting bankrupts, who make up a small fraction of society, to travel. The Government's incentive to intervene, given the transaction costs, was as small. Finally, what the Court of Final Appeal struck down in *Zigo Yau* was a colonial law. The SAR regime has never elaborated a stance on homosexuality, unless one counts its recognition in 2006 of an equal age of consent for both homosexual and heterosexual intercourse. The Court's decision, though activist, landed comfortably

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<sup>106</sup> "Minutes of the 4<sup>th</sup> Meeting of the Legislative Council Bills Committee on Domestic Violence (Amendment) Bill 207," Ref : CB2/BC/11/06 LC Paper No. CB(2)633/07-08 (13 November 2007).

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within one of the SAR regime's broad zones of tolerance.

### 3.6.4. AGENCY COMPETENCE: THE SOLICITORS' DISCIPLINARY TRIBUNAL

The Court of Final Appeal has been jealous in conserving its final adjudicative jurisdiction against all statutory restrictions, as evidenced by *A Solicitor v Law Society of Hong Kong*. The solicitor in this case had been penalised by a statutory solicitors' disciplinary tribunal after complaints that alleged breaches of the Solicitors' Practice Promotion Code and the Solicitors' Practice Rules. Section 13(1) of the Legal Practitioners Ordinance, a primary legislation, provides that "an appeal against any order made by a Solicitors Disciplinary Tribunal shall lie to the Court of Appeal [of the High Court] and the *decision of the Court of Appeal on any such appeal shall be final*" [emphasis added]; the solicitor appealed. The constitutional challenge was whether Section 13(1), which had forbade appeals from the Solicitors Disciplinary Tribunal first to the Privy Council and then to the Court of Final Appeal, made part of the law of post-1997 Hong Kong and was consistent with the Basic Law.

The Court created jurisdiction in itself to try the question whether it may hear and determine appeals against judgments of the Court of Appeal notwithstanding the statutory limitation on its own competence. The Secretary for Justice obtained leave to intervene to respond to the "constitutional question" arising from the challenge to Section 13(1) (Lo, 2004:48-9). The Secretary contended that a statutory provision neither repealed nor judicially struck down at the time of the transfer of sovereignty on 1 July 1997 was a law previously in force and formed part of the law of Hong Kong; after the handover, the Colonial Laws Validity Act would no longer

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be relevant given the Basic Law's exclusive supremacy over statutory law.<sup>107</sup>

The Chief Justice rejected this argument, holding for the Court that, despite the present defunctness of the Colonial Laws Validity Act, it had during its currency before the transfer of sovereignty definitely nullified the statutory finality-of-appeal clause, which therefore could not have made part of the law of British Hong Kong at the transfer of sovereignty, nor hence thereafter.<sup>108</sup> Li held that the Court of Final Appeal had been instituted to "replace the Privy Council as the final appellate court in the new order after 1 July 1997."<sup>109</sup> Although the Chief Justice conceded that the Legislative Council may restrict resort to the Court of Final Appeal for final adjudication through statutory means, such limitation cannot be made arbitrarily and without a legitimate purpose.<sup>110</sup> Li added, "In the exercise of their independent judicial power, it is the *duty* of the courts to review any legislation enacted which seeks to impose any limitation on the power of final adjudication vested in the Court by [the Basic Law] and to consider whether the limitation satisfies the proportionality test [emphasis added]."<sup>111</sup> He concluded that the finality provision in the Legal Practitioners Ordinance "is an absolute one"<sup>112</sup> thus it cannot be considered as reasonable, proportionate, and legitimate.<sup>113</sup>

The Court's retrospective invocation of defunct Imperial laws has potentially sweeping repercussions, amplifying the grounds on which statutes enacted before the transfer of sovereignty might be annulled. The legal rationale for this move is

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<sup>107</sup> *A Solicitor*, at 19.

<sup>108</sup> *A Solicitor*, at 20.

<sup>109</sup> *A Solicitor*, at 28.

<sup>110</sup> *A Solicitor*, at 30.

<sup>111</sup> *A Solicitor*, at 32.

<sup>112</sup> *A Solicitor*, at 39.

<sup>113</sup> *A Solicitor*, at 40.

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dubious; the Court never explained how it should have assumed the lapsed jurisdiction of the Privy Council, which had not annulled the statute in question (as neither had the NPCSC upon the transfer of sovereignty), to strike down a *bona fide* law by relying on a foreign statute no longer in force in the territory (Yap, 2007:468).

### 3.6.5. AGENCY COMPETENCE: THE POLICE DISCIPLINARY TRIBUNAL

*Lam Siu Po v Commissioner for Police*<sup>114</sup> involved a police officer's challenge to Regulation 9 of the Police (Discipline) Regulations, made by the Chief Executive-in-Council by power conferred in Section 45 of the Police Force Ordinance, which in establishing a police disciplinary tribunal, prohibited legal representation of the accused. The officer complained that the prohibition contravened Article 10 of the Bill of Rights, guaranteeing the right to a fair public hearing by an independent and impartial tribunal.<sup>115</sup> A unanimous Court held for the officer. Justice Bokhary determined that the constitution prohibits legislation that creates unfairness in disciplinary proceedings given that disciplinary proceedings affect rights and obligations under Article 10 of the Bill of Rights.<sup>116</sup>

Seemingly accentuating the ineffectualness of the NPCSC's 1997 Existing Laws Decision, which purport to nullify the supremacy clauses of the Bill of Rights,<sup>117</sup> Justice Bokhary, writing for the Court, declared the provision "repealed by Section 3 of the Hong Kong Bill of Rights Ordinance for such inconsistency or, if one does not

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<sup>114</sup> *Lam Siu Po v Commissioner for Police* (2009) 12 H.K.C.F.A.R. 237 (Hong Kong Court of Final Appeal).

<sup>115</sup> *Lam Siu Po*, at 3.

<sup>116</sup> *Lam Siu Po*, at 24.

<sup>117</sup> See Chapter 4.

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regard it as having been repealed, is to be treated as void for unconstitutionality by reason of such inconsistency.” He nevertheless conceded a modicum of deference to agency discretion: “Whether a defaulter should be permitted to be legally represented ... is primarily for the disciplinary tribunal to assess ... no court would disturb such an assessment except for plainly compelling reasons.”<sup>118</sup> Justice Ribeiro added that the challenged provisions prevented the tribunal from discharging its duty of fairness in relation to legal representation.<sup>119</sup> The success of *Lam Siu Po* triggered numerous applications to the lower courts for judicial review of police disciplinary tribunal decisions, which raised similar issues (Young & Cheng, 2011:565-6).

### 3.6.6. AGENCY COMPETENCE: THE INSIDER DEALING TRIBUNAL

In *Koon Wing Yee v Insider Dealing Tribunal* the Court of Final Appeal for the first time ever struck down a statutory provision, itself consistent with both the Basic Law and the Bill of Rights, in the name of achieving a higher end. This case originated with the Insider Dealing Tribunal, a statutory agency instructed by the Financial Secretary, which had found the appellants responsible for insider dealing contrary to the Securities (Insider Dealing) Ordinance. The Tribunal issued several orders against appellants, including disqualification as director of a listed company, disgorgement of gains from the insider dealing, and payment of a pecuniary penalty three times the net benefit accrued. The appellants complained to the High Court that the Tribunal’s procedural and evidentiary rules undermined their privilege against

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<sup>118</sup> *Lam Siu Po*, at 25.

<sup>119</sup> *Lam Siu Po*, at 140.

## DYNAMIC EQUILIBRIUM

self-incrimination, and that the civil standard of proof, which required them to prove their case “on the balance of probabilities,” infringed their rights under Articles 10 and 11 of the Bill of Rights.<sup>120</sup> In May 2007 the High Court held in their favour, holding that Insider Dealing Tribunal inquiries were in fact criminal in nature. The appropriate standard of proof, according to the High Court, should have been the more rigorous criminal rather than civil standard.

The Financial Secretary appealed to the Court of Final Appeal. The unanimous Court, consistent with its stance of deferring to the Government on economic regulatory matters, reversed the High Court. It admitted that the inquiry of a Tribunal competent to impose a penalty entailed determination of a criminal charge challengeable under the Bill of Rights, but held that the inquiry in question was not criminal due to the Tribunal's concomitant competence to order disqualification, the purpose of which was protective rather than punitive. In order to restore the Insider Dealing Tribunal's ruling against the appellants and maintain its consistency with Articles 10 and 11 of the Bill of Rights, the Court struck down Section 23(1)(c) of the Securities (Insider Dealing) Ordinance, forestalling any excuse for labelling the Tribunal's inquiry “criminal” (without quashing the pecuniary penalties involved). As the proceedings were now “civil,” this justified the Tribunal to apply the civil standard of proof, free from the constraints of the Bill of Rights.

Sir Anthony, delivering the judgment of the Court, strove to justify this “novel” decision which “would result in the striking down of a legislative provision which

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<sup>120</sup> Article 10 of the Bill of Rights gives everyone a right to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge against him. Article 11 of the Bill of Rights provides, among other things, that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law; and that the person shall not be compelled to testify against himself or to confess guilt.

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does not itself infringe the Bill of Rights” and which was not supported by any precedent.<sup>121</sup> He reasoned that the Bill of Rights Ordinance must be understood as empowering the judiciary “to resolve the tension which exists between the legislative will and the protection given by the Bill of Rights by striking down only that part of the statute that causes the violation or breach, even if it does not itself infringe the Bill of Rights, when to do so best gives effect to the legislative intention [emphasis added].”<sup>122</sup>

Despite this strained justification and the radical aggrandisement of the Court’s powers, the SAR regime has little incentive to sanction the Court. Note that the Court embedded the Government’s policy ideal point in its ruling by holding against the appellants. The Court moreover took account of the supersession of the Insider Dealing Tribunal in 2003 by a new Market Misconduct Tribunal, established under a new Securities and Futures Ordinance, which was empowered to impose only civil sanctions and not criminal fines; the Government evidently being aware that otherwise the Ordinance and Tribunal might contravene the Bill of Rights.<sup>123</sup>

### 3.6.7. CRIMINAL JUSTICE: CERTAINTY OF OFFENCE

The Court has substantially remoulded the territory’s criminal justice system by its expansive interpretations of the Basic Law. In *Shum Kwok Sher v HKSAR*<sup>124</sup> the Court considered the constitutionality of the common law offence of abuse of public office, holding that, notwithstanding its “archaic origin and vague formulation,” the offence was reasonably clear and foreseeable, hence satisfied the legality test (Chan & Lim,

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<sup>121</sup> *Koon Wing Yee*, at 110.

<sup>122</sup> *Koon Wing Yee*, at 113.

<sup>123</sup> *Koon Wing Yee*, at 48.

<sup>124</sup> *Shum Kwok Sher v HKSAR* (2002) 5 H.K.C.F.A.R. 381 (Hong Kong Court of Final Appeal).

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2011:483). Sir Anthony upheld its constitutionality by interpreting Article 39 of the Basic Law, which mandates the constitutional effect of the ICCPR, as including the principle of legal certainty. He reasoned that the offence is not as uncertain as the appellant contended; variability “in the forms of misconduct by a public officer ... does not ... lead to the existence at common law of more than one offence.”<sup>125</sup> But he further held expansively that such phrases in the Basic Law as “prescribed by law” and “according to law” entail the principle of legal certainty; a norm cannot be treated as “law” unless formulated with sufficient precision to allow the citizen to regulate his own conduct: he must be able to foresee the consequences that may follow a given action.<sup>126</sup> In setting new thresholds for parliamentary enactments to qualify as valid “law,” the Court of Final Appeal struck down no acts of the Government or the Legislative Council, and therefore triggered no punishment.

### 3.6.8. CRIMINAL JUSTICE: BURDEN OF PROOF

In *HKSAR v Lam Kwong Wai* the appellants, having been charged with the offence of possession of an imitation firearm, argued that the persuasive burden of proof imposed on defendants by the Firearms and Ammunition Ordinance infringed their right to be presumed innocent, guaranteed in Article 11 of the Bill of Rights (Buchman, 2010:578). More precisely, Section 20(3)(c) of this statute provided that a person in possession of an imitation firearm shall be presumed to have committed an offense unless he can satisfy the court that his possession had no purpose threatening to the public peace. The Court unanimously censured the Government for failing to

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<sup>125</sup> *Shum Kwok Sher* at 88.

<sup>126</sup> *Shum Kwok Sher* at 63.

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show why it was unable to achieve the legitimate aim of prosecuting a serious crime relying on the standard common law evidentiary principle in criminal cases, which places the burden of proof on the prosecution to prove a defendant's guilt beyond a reasonable doubt (Young & Cheng, 2011:559). Yet the Court declined to invalidate the provision even so: Sir Anthony Mason argued that the weight to be accorded to the preferences of the Legislative Council varies according to the nature of the problem being dealt with.<sup>127</sup>

Faced with encroachment on a basic right yet a lack of express constitutional protection, the strategy chosen by the Court this time was to uphold but “remedially interpret” the impugned statute, substituting an evidential burden for the persuasive burden, which effectively places the burden on the defendant. It was not immediate clear why the Court did not strike down the provision outright, though one may suspect that it may have been attempting to explore new avenues of constitutional review. Relying heavily on the United Kingdom's Human Rights Act, which in 1998 vested in the courts the power of remedial interpretation, Sir Anthony reasoned, “In common law systems, courts enjoy wide-ranging inherent and implied powers and there is no reason to think that the courts of [the Hong Kong SAR] stand as an exception to the generality of this statement ... some [judicial] powers to be implied under the Basic Law may be ultimately traced back to the common law.”<sup>128</sup> As the Non-Permanent Judge explained in *dicta*, the canon of remedial interpretation means one “which will, so far as it is possible, make it Basic Law-consistent,” and that only when such interpretation is impossible will the Court proceed to make a declaration

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<sup>127</sup> *Lau Cheong*, at 45.

<sup>128</sup> *Lau Cheong*, at 69.

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of unconstitutionality;<sup>129</sup> in this way the Court limits its own interference in the exercise of legislative competence.<sup>130</sup>

Similarly, in *HKSAR v Hung Chan Wa* the Court again resorted to remedial interpretation in response to a challenge to Sections 47(1) and 47(2) of the Dangerous Drug Ordinance. The Government has fully embraced the remedial interpretations issued by the Court. For instance, it explicitly relied on *Lam Kwong Wai* to explain its rationale of adopting an evidential rather than a persuasive burden of proof in the criminal provisions of the Employment (Amendment) Bill 2009.<sup>131</sup>

### 3.6.9. SUMMARY

The Court's highly predictable deference within even these domains has provided the NPCSC and the SAR regime with sufficient information likely to have persuaded them that trusting the Court is safe. Having amassed such a fund of political assets, the Court of Final Appeal could "exchange" it for further investments in its constitutional jurisdiction, autonomy, professional staff, funding, and compliance from the political branches. Over time the Court's trustworthiness has evolved into an unquestioned part of the territory's background constitutional landscape.

## 4. THE FIRST REFERENCE

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<sup>129</sup> *Lau Cheong*, at 78.

<sup>130</sup> *Hung Chan Wa*, at 77.

<sup>131</sup> Bills Committee on Employment (Amendment) Bill 2009, "Administration's Response to Issues Raised by Members at the Bills Committee Meetings held on 16 July and 12 October 2009", LC Paper No. CB(2)80/09-10(01).

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### 4.1. OVERVIEW

In *Democratic Republic of Congo and others v FG Hemisphere Associates* the Court of Final Appeal finally activated for the first time in fourteen years the reference procedure in Article 158 of the Basic Law by requesting an Interpretation of the Basic Law from the NPCSC. Recall that in *Ng Ka Ling* the Court had raised a stringent threshold known as the “predominant provision test,” enabling itself in virtually all cases to set aside its constitutional duty to refer constitution-interpretative decisions to the NPCSC. In the previous fourteen years the Court had persistently declined to refer cases to China’s supreme organ of state power, fearing a “slippery slope” ending in the NPCSC’s constitutional review authority superseding its own (as foreshadowed in the NPCSC Immigration Interpretation of 1999). The Court appeared to be unwilling to compromise its own final appellate powers and undermine the authority and autonomy of the Hong Kong courts. Even though the Court has managed with impunity to avoid referring matters to the NPCSC, the procedure has always been “a nightmare to the Court of Final Appeal that it cannot get rid of” (Tai, 2011b:381). The Court must equally fear provoking China’s wrath by taking too often its own path and straying too far from her preferences in politically pivotal cases.

### 4.2. THE DISPUTE

*FG Hemisphere* is one case that presented the issue of sovereign immunity to the Hong Kong courts. China has been engaged the Democratic Republic of the Congo (DRC) in manifold development projects of state-owned enterprises. *FG Hemisphere*

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Associates LLC, an American company, sought to recover a previous bad debt from the DRC through entry fees owed to the DRC by Chinese state-owned enterprises in Hong Kong. The DRC counter-claimed that Hong Kong must follow the Mainland's policy that, a state and its property, shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution. FG Hemisphere responded that Hong Kong courts should continue to apply the doctrine of restrictive immunity, which the United Kingdom had bequeathed to Hong Kong before 1997 *via* the common law. China intervened to disagree, and asserted, in line with the DRC its development partner, that granting foreign states absolute immunity in its domestic courts has always been the foreign policy of China.

The Chinese Ministry of Foreign Affairs sent three official letters to the Hong Kong judiciary. The first and second simply explained that absolute immunity remained the consistent and principled position of China despite her accession to the United Nations Convention on Jurisdiction and Immunities of States and their Property in 2004. However, in view of the High Court's decision that under the doctrine of restrictive immunity states do not enjoy absolute immunity from suit especially in purely commercial disputes, the Ministry drafted its third letter in a much more threatening tone, insisting, *"If Hong Kong were to adopt a regime of state immunity which is inconsistent with the position of the [Chinese] State, it will undoubtedly prejudice the sovereignty of China and have a long-term impact and serious prejudice to the overall interests of China [emphasis added]."* According to the Ministry, restrictive state immunity would subject "the overall power and capacity of the Central People's Government in uniformly conducting foreign affairs" to "substantial interference"; hamper "normal intercourse and cooperation in such areas as economy and trade

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between China and the states concerned”; and “*tarnish the international image of China* [emphasis added].”

The High Court’s rejection of DRC’s defence against the restrictive immunity doctrine contradicted express principles of China’s foreign policy; along the notional continuum of policy preferences its judgment lay uncomfortably far away from the ideal policy preferences of the Chinese government. Clearly, too, the absolute immunity principle and other Chinese foreign policy positions, like all matters relating to national sovereignty, lay deep inside a Prohibited Policy Domain. Beijing would not tolerate any judgment by a Hong Kong court that might complicate its plans for political influence in Africa. For the Court of Final Appeal to act defiantly and uphold the restrictive immunity doctrine would amount to a colossal defection that would inflict devastating losses on its political capital and trustworthiness. The NPCSC would have overturned the Court instantly, and perhaps eliminated in whole or in part its constitutional review competence to boot (see J. Chan, 2011c:316).

### 4.3. THE JUDGMENT

The DRC demanded that the Court of Final Appeal refer to the NPCSC for an Interpretation pursuant to Article 158 of the Basic Law, as the case involved foreign affairs, which are external to the jurisdiction of the Court according to Article 19 of the Basic Law. The Court’s judgment began with Justice Bokhary’s dissent, which led with the following iconic statement: “*It has always been known that the day would come when the Court has to give a decision on judicial independence. That day has come. Judicial independence is not to be found in what the courts merely say. It is to be found in what the*

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*courts actually do. In other words, it is to be found in what the courts decide [emphasis added].*<sup>132</sup> Parsing the technicalities of state immunity doctrine with emphasis on a detailed evaluation of the jurisprudence of the United States Supreme Court and the British Judicial House of Lords, Bokhary concluded that it was neither necessary to adopt the absolute immunity position nor to refer the case to the NPCSC for interpretation. He then proceeded to justify his position as a matter of principle: “Even – and perhaps especially – in the face of a threatened constitutional crisis, it is essential to the survival of the rule of law in general and judicial independence in particular that when the Court decides ... its decision is reached by a faithful application of the law.”<sup>133</sup> Reaching the heart of the matter, he concluded, “The question of whether ... state immunity ... extends to commercial transactions is a question of common law which the Court can and must decide ... That the common law system continues in Hong Kong is not in question. *Nor is it in question that foreign affairs are for the Central People’s Government alone and not for even Hong Kong’s executive let alone Hong Kong’s judiciary.* The present case does not – and no case ever does – involve any exercise of jurisdiction over acts of state, defence or foreign affairs [emphasis added].”<sup>134</sup>

This was not the position adopted by the majority, consisting of Sir Anthony Mason, Justice Chan, and Justice Ribeiro. Citing in their own comprehensive analysis of foreign jurisprudence and relevant materials relating to the drafting of the territory’s contemporary constitution, the majority reached a diametrically opposite conclusion, that “the Basic Law ... allocate[s] to the [Chinese] Central People’s

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<sup>132</sup> *FG Hemisphere*, at 1.

<sup>133</sup> *FG Hemisphere*, at 84.

<sup>134</sup> *FG Hemisphere*, at 84.

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Government responsibility for the foreign affairs of [Hong Kong] and exclude[s] the management and conduct of foreign affairs from the sphere of [Hong Kong's] autonomy. Because the Central People's Government's responsibility for foreign affairs is exclusive ... the courts of [Hong Kong] are bound to respect and act in conformity with the decisions of [the Central People's Government] on matters of foreign affairs relating to the People's Republic of China as a sovereign State."<sup>135</sup> They then concluded, "*The debate in other jurisdictions as to whether constitutional responsibility for determining state immunity policy should rest with the executive, the legislature or the judiciary is therefore settled by the Basic Law*" [emphasis added].<sup>136</sup>

The majority warned, in line with the Foreign Affairs Ministry's threats, that "Courts would be ill-advised to attempt to deem an impleaded State to have submitted to their jurisdiction when it has not done so explicitly by its words or conduct ... Such a course is likely to be damaging to the relations between the two States and may very well be ineffectual in any event."<sup>137</sup> The majority ruled that it is not for themselves to express their opinions about the merits of China's policy of absolute (rather than restrictive) immunity, because they are simply not equipped to make such judgments in the absence of relevant information on the full implications of either alternative.<sup>138</sup> Thus did the majority cement the Court of Final Appeal's trustworthiness in this politically sensitive case, taking the unprecedented step of referring Articles 13 and 19 of the Basic Law to the NPCSC for its Interpretation; framing the following questions, to all of which the Court had in its detailed judgment already provided an answer.

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<sup>135</sup> *FG Hemisphere*, at 324.

<sup>136</sup> *FG Hemisphere*, at 331.

<sup>137</sup> *FG Hemisphere*, at 392.

<sup>138</sup> *FG Hemisphere*, at 281.

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### 4.4. COURT-NPCSC INTERPLAY

The Court conspicuously showcased its trustworthiness in a Prohibited Policy Domain just when it counted the most, steering the Chinese Party-state to rest content with Hong Kong's home-rule system of constitutional review. Indeed, it was never urgent for the Court to make a reference to the NPCSC, had it simply justified adoption of the doctrine of absolute immunity from the precedents of select foreign common law jurisdictions (Yap, 2011:399). It would be inaccurate to condemn the Court's manoeuvre as a surrender of its constitutional jurisdiction to the NPCSC. According to Tai (2011), *FG Hemisphere* afforded the Court an ideal opportunity to defuse the Article 158 constitutional "bomb" with the least damage to its own authority and autonomy. Firstly, the territory's most ardent defenders of local autonomy have little to criticise in a reference made in relation to China's own foreign affairs policy, mainly provided in the Basic Law Chapter 2, and not constitutional provisions directly impinging on Hong Kong's own external affairs, set out in the Basic Law Chapter 7 (Tai, 2011:382). Secondly, seeking an interpretation through the Article 158 reference procedure cost the Court of Final Appeal far less than if the NPCSC had issued its own, potentially devastating Interpretation, as could have been very realistically anticipated.

Thirdly, delivering a lengthy, sophisticated, and principled judgment evaluating all relevant legal and policy issues and rendering its own provisional ruling before the NPCSC got around to its Interpretation created an impression that the Court of Final Appeal remained *de facto* the real final adjudicative authority in Hong Kong. Fourthly and most importantly, each of the four questions referred to

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the NPCSC had been narrowly drafted to require only a “yes” or “no” answer. This strategy subtly minimised the NPCSC’s reasoning, effectively limiting the scope and reach of its Interpretation, and, setting a precedent for future Justices of the Court that trammels the NPCSC’s discretion, entrenched through the doctrine of *stare decisis* a restrictive mode of commencing Article 158 references (Tai, 2011:383). Finally, by working out the questions precisely, and unambiguously specifying how it would have answered them, the Court carved out for itself a proactive, guiding, if not pre-emptory role in the strategic interpretation of the Basic Law (see Chen, 2011:371; Lo, 2011a:390).

Being the *de jure* supreme constitutional interpretive organ of all China, the NPCSC was of course not bound by the Court’s style of reference; it was at liberty to design its own response. Nonetheless, it opted to applaud the Court of Final Appeal’s *FG Hemisphere* ruling; for example, NPCSC Deputy Director of the Legislative Affairs Commission Li Fei praised the Court’s decision to make a reference as “necessary and appropriate.”<sup>139</sup> My interviews with Members of the NPCSC Hong Kong Basic Law Committee indicate that the reference had the effect of deepening mutual trust between the NPCSC and the Court.<sup>140</sup> At length, the NPCSC promulgated its *Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (“State Immunity Interpretation” hereafter). In this Interpretation the NPCSC reciprocated the Court’s

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<sup>139</sup> *The Explanations on the Draft Interpretation of Paragraph 1, Article 13 and Article 19 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* (At the 22nd Session of the Standing Committee of the Thirteenth National People’s Congress on 24 August 2011).

<sup>140</sup> Personal interview with Prof. Albert Chen (Member of the NPCSC Hong Kong Basic Law Committee) (8 November 2011); Personal interview with Prof. Wong Yuk-shan (Member of the NPCSC Hong Kong Basic Law Committee) (9 December 2011).

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deference by directly quoting each of the latter's questions and providing acute, affirmative answers without excess or overreach.

NPCSC Hong Kong Basic Law Committee Member Lau Nai-keung provided a detailed account of how the NPCSC produced the State Immunity Interpretation.<sup>141</sup> The Committee had already been following the lower court judgments in *FG Hemisphere* over a year before the Court of Final Appeal requested the Interpretation, and had three times discussed the issues. Members of the Committee at last sent a report to the NPCSC detailing their views on how to design the Interpretation, which set out the individual opinion of each Member including dissenters. The NPCSC then consulted the opinions of various members of the Hong Kong legal profession, with the NPCSC Hong Kong Basic Law Committee present as observers. Lau pointed out that the NPCSC "does not necessarily agree to interpret its legislation [including the Hong Kong Basic Law], and that recently it had indeed rejected, returned, or postponed [interpretation requests]"; consequently, the Basic Law Committee "took [the NPCSC's response] very seriously" and participated, in the person of six NPC Deputies from Hong Kong, in the NPCSC's internal discussions set to hammer out the Interpretation's final form. The Committee supplemented this with research staff sent to each NPCSC discussion sub-group, to provide them with technical assistance.

Lau's feeling was that "contrary to the impressions of many Hong Kong people, the Mainland [government] was not really that interested in interpreting the Basic Law." "On the day [of deciding the Interpretation]," Lau added, "the discussion of elderly welfare [in Mainland China] was also on the agenda ... most [NPCSC] Members were only interested in this topic [rather than the Interpretation] ... we

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<sup>141</sup> Lau, Nai-keung, "Behind the Unanimous Vote for the Interpretation of the Basic Law," *Hong Kong Economic Journal* (26 August 2011).

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could only accomplish our tasks after struggling hard to capture the right to speak towards the end of the meeting.” He concluded with the observation that in producing the State Immunity Interpretation, the NPCSC was “balanced,” “rational,” and “self-restraining.” The Court of Final Appeal then issued its own final judgment applying the NPCSC’s Interpretation to the case in favour of the DRC. Thus came to a close this unprecedented constitutional development.

## 5. CONCLUSION

Throughout the 2000s the Hong Kong Court of Final Appeal has persistently upheld the supremacy of the Basic Law’s provisions protecting the territory’s self-rule, rights and freedoms, and autonomous common law system with the extensive use of purposive interpretive techniques and comparative law from the United States, the United Kingdom, and the Council of Europe (Ghai, 2007). Nonetheless, a decade of iterated interdependent Basic Law interpretation has made clear that, whereas the Court may have the final say in policy domains like civil rights, agency competence, and criminal justice, the NPCSC shall monopolise interpretation in political reform and national sovereignty (see Ling, 2007:644). All else being equal, *before* the solidification of the court’s trustworthiness, activist constitutional review must be built on iterated court-government cooperation *without any* instance of defection by the court in decisions that impinge on Prohibited Policy Domains. In Chapter 5, it has been shown that the Court has built up a trustworthy reputation in the first five years of its existence, such as upholding the constitutionality of the Provisional Legislative

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Council, clarifying that it had no intention to question the NPCSC's authority, and upheld laws favoured by the authorities, such as statutes prohibiting flag burning. The developments that followed cohere squarely with the predictions of the Constitutional Investment Theory: the higher the Court's trustworthiness, the lower the likelihood of the SAR regime's disinvestment in the Court as they repeatedly interact.

In Permitted Policy Domains authoritarian governments may be tolerant for a variety of reasons, including limited attention span and internal fragmentation, or just the relative unimportance of the issues to be adjudicated to their political and/or electoral monopoly. The Constitutional Investment Theory suggests that internally more incoherent authoritarian regimes face higher transaction costs in exerting vetoes. Such conditions may be conducive to greater judicial activism. The Court also respectfully leaves public finance decisions to the SAR regime, which so jealously guards its dominance over this policy domain. The last Section demonstrated that the NPCSC's State Immunity Interpretation marked the consolidation of a unique constitutional control equilibrium in Hong Kong, with the Court of Final Appeal and the NPCSC each developing its own interpretive canons and approaches while respecting each other's "proprietary" policy domains. The Court, acting largely within the confines of Permitted Policy Domains, is very much a cooperative, trustworthy court; but this does not imply political insignificance. While the Court has affirmed critical policies of the SAR regime, improved the constitutional and procedural robustness of government decisions, refrained from excessively intervening the generation of substantive policy outcomes, and devised doctrines of

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self-restraint, it has also left its mark on Hong Kong's constitution, building in new rules that have not been envisaged by the Basic Law's drafters. Nevertheless, to a large extent, depictions of the Court as unconstrained actor freely imposing its policy preferences on the political branches are empirically invalid and theoretically unwarranted.

## CHAPTER 7

# JUDICIAL ACTIVISM AND REGIME ACQUIESCENCE

### 1. INTRODUCTION

The People's Republic of China has so far, indeed, left much of constitutional decision-making in relation to the Hong Kong Basic Law to the Court of Final Appeal,<sup>1</sup> adopting a largely hands-off approach to the territory's internal affairs.<sup>2</sup> In producing Basic Law Interpretations, the NPCSC has substantially restrained itself, whilst the executive authorities of the Chinese Party-state have, according to one "insider" interviewee, shown "tolerance" and "patience" towards the Court's exercise of constitutional review.<sup>3</sup> Judicial independence has been rated as "so far so good" by a former leader of the opposition Pan-Democratic Bloc and constitutional law practitioner in Hong Kong,<sup>4</sup> and the senior judges themselves have so far experienced no political pressure they perceive as undermining their judicial authority.<sup>5</sup> As of 2011, no jurisdiction-stripping legislation has been enacted and no retaliatory slashing of the judicial budget has been reported.

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<sup>1</sup> Personal interview with Justice Kemal Bokhary (Permanent Judge of the Hong Kong Court of Final Appeal) (8 November 2011).

<sup>2</sup> Personal interview with Prof. Albert Chen (Member of the NPCSC Hong Kong Basic Law Committee) (8 November 2011).

<sup>3</sup> Personal interview with Mr. Sin-por Shiu (Former Deputy Secretary General, NPCSC Hong Kong SAR Preparatory Committee; Incumbent Member of the Central Policy Unit, Hong Kong SAR Government) (4 November 2011).

<sup>4</sup> Personal Interview with Mr. Martin Lee, S.C. (Member of the Legislative Council) (7 December 2011).

<sup>5</sup> Personal Interview with Justice Michael Hartmann (Non-Permanent Judge of the Hong Kong Court of Final Appeal) (21 November 2011).

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How did such a state of affairs come to be in an authoritarian state? Recall that, while authoritarian regimes could have conserved all constitutional powers in their own hands, the pursuit of some longer-term interests can motivate them to adopt strategies, such as investing in independent constitutional courts, that would not be optimal were regime-court interaction not repeated over a sustained period of time (Rogers, 2006:291). Furthermore, in the light of the argument presented in Chapter 3, the Court has abdicated its constitutional responsibilities to function in accordance with the NPCSC's wishes as a "fire alarm" oversight mechanism by opening up channels through which litigants may bring alleged breaches of the Basic Law by the Hong Kong authorities to the NPCSC's attention for final decisions, and as a "fire extinguisher" oversight mechanism to implement the NPCSC's will against potential local malfeasance. Rather, the Court has continuously resisted from referring cases to the NPCSC, circumscribed the effects of some of the NPCSC's interpretations, and expansively interpreted the Basic Law in ways not envisioned by China's rulers.

Following the logic of the Constitutional Investment Theory, I explain in this chapter how the remarkable ascendancy of the Court depends on the SAR regime's acquiescence in its constitutional decisions and investment in its review competence. This chapter is organised as follows. In Section 2, to explain voluntary acquiescence, I contend that constitutional judicial review yields adequate cooperative benefits to the territory's authoritarian government that, overall, outweigh the political costs of judicial activism. To illustrate involuntary acquiescence, I argue in Section 3 that suspending investment in the Court in retaliation for particular unfavourable judgments would impose disproportionate decision costs on a SAR regime already riven by internal disagreements and facing strong external resistance. This chapter

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closes with a conclusion in Section 4.

## 2. VOLUNTARY ACQUIESCENCE

### 2.1. OVERVIEW

Intentionally or not, the Hong Kong Court of Final Appeal has consistently moved to restore its trustworthiness whenever it found this waning. As shown in the last two chapters, this Court has exercised self-restraint regularly in cases that impinged on Prohibited Policy Domains such as sovereignty and economic stability. The Court has also shown deference in Permitted Policy Domains, especially criminal justice. Consider *Lau Cheong & Another v HKSAR*,<sup>6</sup> which involved a challenge to the provision for mandatory life imprisonment for murder in Hong Kong law. The appellants claimed that life imprisonment contravened the Bill of Rights, as constituting cruel, inhuman or degrading punishment, and that it infringed the requirement that prisoners be treated in ways facilitating reformation and social rehabilitation. The Court staunchly defended the constitutionality of the challenged statute, holding that appropriate weight must be given to the unequivocal preferences of the Legislative Council on this controversial issue. In line with the Government's submissions, the Court further held that life imprisonment was neither arbitrary nor disproportionate. The Court concluded that the legislature's blanket judgment that murder merited life imprisonment was rational and tenable, and should be respected (Mason, 2007:314). Nevertheless, the Court took this opportunity

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<sup>6</sup> *Lau Cheong & Anor v HKSAR* (2002) 5 H.K.C.F.A.R. 415 (Hong Kong Court of Final Appeal).

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to reiterate the point, arguably contrary to the NPCSC's Existing Laws Decision of 1997, that the constitutional force of the Bill of Rights has survived the transfer of sovereignty; Chief Justice Li and Justice Ribeiro observed, "Basic Law Article 39(1) provides, among other things, that the provisions of the [ICCPR] as applied to Hong Kong shall remain in force ... [and] ... The Hong Kong Bill of Rights Ordinance effects the necessary incorporation into our domestic laws of the ICCPR ...."<sup>7</sup>

In another major criminal constitutional case, *So Wai Lun v HKSAR*,<sup>8</sup> the Court of Final Appeal heard a challenge to a conviction for unlawful sexual intercourse with a girl under the age of 16, contrary to Section 124 of the Crimes Ordinance. The appellant contended that Section 124 is unconstitutional for criminalising the conduct of males but not females, inconsistent with the principles of equality enshrined by the Bill of Rights and the Basic Law. Without much legal analysis the Court unanimously concluded that Section 124 was justified and proportionate in its departure from uniform equality. Justices Bokhary and Chan demurred from further evaluating Section 124 by stating, "Those and other legislative possibilities and permutations are matters fit for future public consultation and debate."<sup>9</sup>

During the rapid ascendancy of its activism in constitutional review in the 2000s (see Chapter 6), the Court also delivered in *Po Fun Chan v Winnie Cheung*<sup>10</sup> a judgment that helped the Government raise barriers to applicants of judicial review. The Legal Aid Department was rejecting more than half of all applications for legal aid in invoking judicial review, and the Court obliged by overruling the

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<sup>7</sup> *Lau Cheong*, at 32.

<sup>8</sup> *So Wai Lun v HKSAR* (2006) 9 H.K.C.F.A.R. 530 (Hong Kong Court of Final Appeal).

<sup>9</sup> *Lau Cheong*, at 38.

<sup>10</sup> *Peter Po Fun Chan v Winnie C.W. Cheung and Another* (2007) 10 H.K.C.F.A.R. 676 (Hong Kong Court of Appeal).

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long-standing “potential arguability” test in favour of a more demanding “reasonable arguability” test.

Additionally, the Court has signalled a willingness to cooperate extra-judicially. In his address on the opening of the legal year 2006, Chief Justice Li opined, “On judicial review, the courts do not assume the role of the maker of the challenged decision.”<sup>11</sup> One year later he remarked, “judicial review proceedings cannot provide a panacea for [political, economic and social] problems ... The courts are only concerned with what is legally valid, and what is not, in accordance with legal norms and principles.”<sup>12</sup> In his last speech as Chief Justice, he averred, “The solution to political, social, and economic problems cannot be found through the legal process and can only be found through the political process,” which must have reassured the SAR regime that the Court understood where the “fences” of the zones of tolerance lie.<sup>13</sup> In 2011 Li’s successor, Chief Justice Geoffrey Ma, similarly stressed, “The courts do not serve the people by solving political, social or economic issues. They are neither qualified nor constitutionally able to do so.”<sup>14</sup>

Besides trust-building rhetoric, the Court’s constitutional interpretations have yielded concrete benefits both to the SAR regime and to the Chinese Party-state, which all the more motivated the political authorities to accept the Court’s constitutional jurisprudence and invest in its review capacities. Recall, as demonstrated in Chapter 2, that while courts exercising “cooperative” constitutional review may confer significant instrumental benefits on their regimes, which in turn attract further investment from the latter, the precise benefits that ultimately emerge

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<sup>11</sup> Chief Justice's Speech at Ceremonial Opening of the Legal Year 2006.

<sup>12</sup> Chief Justice's Speech at Ceremonial Opening of the Legal Year 2007.

<sup>13</sup> Chief Justice's Speech at Ceremonial Opening of the Legal Year 2010.

<sup>14</sup> Chief Justice's Speech at Ceremonial Opening of the Legal Year 2011.

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are likely to vary across country contexts. Based on the results of my original fieldwork and research interviews, I shall describe, in the following sub-sections, how the Hong Kong judiciary's constitutional review, spearheaded by the Court of Final Appeal, has contributed to maintenance of the constitution by solving two fundamental problems: the non-credibility of pre-commitments and incompleteness.

### 2.2. CREDIBLE PRE-COMMITMENTS

The Court of Final Appeal's constitutional review has underpinned the credibility of the political pre-commitments embodied in the Basic Law, into which China had codified policies more to the liking of major players (*e.g.*, large businesses, international stakeholders), if not also citizens (see Acemoglu & Robinson, 2007:133). Indeed, Lau Nai-keung (2009) of the NPCSC Hong Kong Basic Law Committee described the Basic Law as "a social contract forged between the Hong Kong people and the [Chinese] government," and above all "an insurance bill for those Hong Kong people who do not trust the [Chinese] Communist Party." Moreover, as Deng Xiaoping himself let on, the Hong Kong Basic Law was deliberately designed to "serve as a model for Macao and Taiwan,"<sup>15</sup> and to become "a Law ... of historical and international significance ... not only for the Third World but for all mankind."<sup>16</sup> Lu Ping (2009), Deputy Secretary General of the Basic Law Drafting Committee, reports that Deng explicitly highlighted the importance of law in guaranteeing the

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<sup>15</sup> "Deng Xiaoping's Speech at a Meeting with the Members of the Committee for Drafting the Basic Law of the Hong Kong Special Administrative Region" (16 April 1987).

<sup>16</sup> "Deng Xiaoping's Remarks to Members of the Committee for Drafting the Basic Law of the Hong Kong Special Administrative Region who were attending its Ninth Plenary Meeting" (17 February 1990).

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interests of foreign, especially British, business in Hong Kong in exchange for the territory's "prosperity" and "stability."

The capacity of regimes to credibly commit to their own promises is an invaluable asset and benefits all domestic and international stakeholders (Voigt, 2008:368). Even an authoritarian government, having pledged itself to constitutional commitments, may be able to renounce short-term interests to achieve much larger long-term goods (Holmes, 2003:25). Such commitments are not automatically credible, however – a constitution will be maintained only if it makes sense to those who live under its dictates (Elkins *et al.*, 2009:7). The credibility problem emerges insofar as the interests of those wielding political authority diverge from those of pre-commitment beneficiaries (Acemoglu & Robinson, 2007:133). The Basic Law suffers from just this credibility problem, embittered by the cynicism that nowadays greets promises made by the Chinese Communist Party, which are widely assumed to be binding on them only so long as they find it advantageous to themselves in any particular instance to be constrained (Wesley-Smith, 1997:125-6). Indeed, no higher control prevents the NPCSC to expand the list of Mainland Chinese laws applicable in Hong Kong, to revise or repeal the Basic Law, or to invalidate any act of the Legislative Council on Basic Law grounds (Liebman, 1998:296).

Although the Court has on many occasions delivered rulings that contradict the NPCSC's understanding of the Basic Law's original intent, it is precisely such defiant rulings that have enhanced the credibility of pre-commitments enshrined by China in the Basic Law. The Court's constitutional jurisprudence, which has cautiously policed certain official transgressions of Basic Law provisions, has indirectly enabled China's government to convince not only the local populace that Hong Kong will continue to

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enjoy great autonomy but also the international community and the people of Taiwan that reunification with the Mainland will have the same effect (see Tai, 2007:545). Moreover, the United Nations Human Rights Committee has generally remarked positively on the regular reports that Hong Kong submits.<sup>17</sup> Notably, the Government is aware of the utility of the Court's human rights decisions; in its correspondence with the Human Rights Committee, it has quoted the Court's declarations conveying a generous approach to interpretation in support of its claim that "Hong Kong has a strong tradition on the rule of law."<sup>18</sup>

Consequently, the Court of Final Appeal's influence has transcended national boundaries, its rulings, both constitutional and non-constitutional, having been cited by appellate courts across the Commonwealth from the United Kingdom, Australia, Canada, and New Zealand to Malaysia, Singapore, the Cayman Islands, Trinidad and Tobago, Fiji and Tonga. Lo (2010) has charted the quantity of citations of the Court's decisions in the United Kingdom, Australia, New Zealand, and Singapore as of 2010 (see Table 6). The high visibility of the Court of Final Appeal's jurisprudence on the international stage has amplified China's room for manoeuvre in honouring its treaty commitments as to Hong Kong. In the vast majority of cases, the fifth Justice of the Court has been chosen from the list of overseas common law judges, and have included the former Chief Justices of England and Wales, Australia, and New Zealand, as well as sitting Law Lords and Supreme Court Justices of the United Kingdom (Gittings, 2009:162). All this would not have been possible without the

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<sup>17</sup> Personal interview with anonymous official B (Department of Justice) (23 November 2011).

<sup>18</sup> *Legislative Council Panel on Home Affairs Initial response to the Concluding Observations of the United Nations Human Rights Committee on the Second Report of the Hong Kong Special Administrative Region (HKSAR) in the light of the International Covenant on Civil and Political Rights (Home Affairs Bureau), LC Paper No. CB(2)2219/05-06(01).*

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express or tacit consent of the SAR regime and the NPCSC.

As such, any backlash against the Court would be immediately noticed internationally, a fact that would severely complicate China's calculus if they were ever to contemplate withdrawing their investment in Hong Kong's judicial review. Aware of all this, the Chinese Supreme People's Court in particular has sent regular study delegations to the Court of Final Appeal, and has cited its achievements as part of its rationale for setting up on the Mainland a case-law supervision system inspired by the *stare decisis* principle (Ip, 2011).

**TABLE 5: CITATION OF THE JUDGMENTS OF THE HONG KONG COURT OF FINAL APPEAL IN SELECTED COMMONWEALTH JURISDICTIONS (1997-2010)<sup>19</sup>**

Jurisdiction	Court (Citation Number)
United Kingdom	Judicial Committee of the Privy Council (3); Supreme Court (1); Judicial House of Lords (3); English Court of Appeal (8); Scottish Court of Session (1); Northern Irish Court of Appeal (1); English High Court (19)
Australia	High Court of Australia (2); Federal Court of Australia (6); New South Wales Supreme Court (2); Victoria Supreme Court (5); Queensland Supreme Court (1); Western Australia Supreme Court (2)
New Zealand	Supreme Court of New Zealand (3); Court of Appeal of New Zealand (1); High Court of New Zealand (3)
Singapore	Court of Appeal of the Supreme Court (8); High Court of the Supreme Court (3)

Consider just the likely effects of the Court's work on the international stage: on 29 June 1997 *Fortune Magazine* had published a special issue under the headline "The

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<sup>19</sup> P.Y. Lo, "The Impact of CFA Jurisprudence beyond Hong Kong," *Hong Kong Lawyer* (23 August 2010), available at: <http://law.lexisnexis.com/webcenters/hk/Hong-Kong-Lawyer-/The-impact-of-CFA-jurisprudence-beyond-Hong-Kong> (last visited on 3 January 2012).

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Death of Hong Kong,” which predicted that as “Hong Kong becomes a captive colony of Beijing ... *governed by corruption and political connections rather than the even-handed rule of law*, it seems destined to become a global backwater ... the naked truth about Hong Kong's future can be summed up in two words: It's over [emphasis added]”<sup>20</sup> Exactly ten years later, the same magazine revoked its own predictions, admitting, “Well, we were wrong ... Hong Kong is hardly dead ... China has left Hong Kong alone to thrive under its ‘one country, two systems’ pledge ... *Beijing's [political] role ... hasn't translated ... into interference in the judicial system or the press, which remain largely independent* ... global business is still looking to cash in on Hong Kong's role as a gateway to China and a financial center .... [emphasis added]”<sup>21</sup> Likewise, an empirical study revealed a statistical significant correlation between the Court of Final Appeal's assertion of independence and greater demand for Hong Kong stocks along with higher stock prices (and *vice versa*) (Barton, 2002). These findings are consistent with general observations that judicial independence operates as a device guaranteeing otherwise unenforceable promises, such as to respect property rights and individual liberties (and in China's case “One Country, Two Systems”); rendering them credible commitments (North & Weingast, 1989).

### 2.3. CONSTITUTIONAL INCOMPLETENESS

The Court of Final Appeal has reduced the uncertainty associated with the ambiguity of constitutional incompleteness – even though the Basic Law is far more detailed

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<sup>20</sup> Louis Kraar and Joe McGowan, “The Death of Hong Kong,” *Fortune Magazine* (26 June 2007).

<sup>21</sup> Sheridan Prasso, “Oops! Hong Kong is hardly dead,” *Fortune Magazine* (28 June 2007).

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and comprehensive than the former Hong Kong Letters Patent. Recall that constitutions cannot spell out in precise detail the rules and procedures applicable to every conceivable situation, owing to the inevitable informational and organisational limitations of constitutional framers (Dixit, 1996). To draft a complete constitution is prohibitively costly, if not indeed undesirable. Incompleteness does not always stem merely from the scarcity of resources or the political price of making hard decisions immediately (Trachtman, 2008:213) – a surmise corroborated by the views of the Basic Law framers themselves, who while drafting it openly admitted the desirability of incompleteness: “If the Basic Law is drafted with excessive detail and concreteness, future legislative activity ... will be heavily constrained, and this will not be conducive to social development.”<sup>22</sup> Lu (2009:63) reveals that Deng Xiaoping also preferred the Basic Law’s provisions to be “rougher” instead of “tight,” thereby “leaving more space to the [post-1997 Hong Kong] government.”

Justice Barry Mortimer, Non-Permanent Judge of the Court of Final Appeal acknowledged that the Basic Law, being a “new constitution,” cannot provide the people of Hong Kong a legal basis for every conceivable contingency, therefore judges must try their best to resolve constitutional problems themselves.<sup>23</sup> The Basic Law’s very incompleteness has empowered the Court to update it in line with its view of contemporary change – for instance in macroeconomic developments (*Bernard Lau*) or in the status of homosexuals (*Zigo Yau*). This has spared the SAR regime or the NPCSC the cost of formally amending the Basic Law. Secretary for

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<sup>22</sup> The Opinions on the Structure of the Basic Law (Draft) of Certain Basic Law Drafting Committee Members (notes), available at <http://ebook.lib.hku.hk/bldho/articles/BL0008.pdf> (last visited on Oct. 12, 2011).

<sup>23</sup> Cheung Siu Wai, “Speech of Justice Barry Mortimer of the Court of Final Appeal in New York City: Hong Kong’s Implementation of the Basic Law takes time” *Takungpo* (10 November 1999).

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Justice Elsie Leung directly admitted that the accumulation of the Court's constitutional decisions "eliminates misunderstandings in the Basic Law."<sup>24</sup> The Court has also sharpened understanding of the Basic Law by filling in its gaps with judicial clarifications and interpretations, freeing political decision-makers to concentrate on formulating ideal policies. Its pragmatic jurisprudence has positively assisted a weak Legislative Council to produce legitimate, comprehensive, detailed legislation.<sup>25</sup>

But incompleteness has also set the stage for the SAR regime and aggrieved groups and citizens to prefer alternative interpretations of the Basic Law. Most notably, the provisions of the Basic Law safeguarding civil liberties and introducing universal suffrage have inspired a concept of constitutional order alternative to authoritarianism in practice, which is supported by opposition political parties and social activists who frequently appeal for judicial review (Scott, 2010:46). Indeed, a "striking growth" of judicial review applications has been observed in post-1997 Hong Kong, given the expansion in the volume of legislation and in administrative discretion, the availability of multiple grounds for individual claims under the Basic Law, and the greater rights-consciousness amongst the citizenry.<sup>26</sup> The territory's persistent "democratic deficit" has pushed the courts into a politicised position far beyond what was originally envisaged. Public disenchantment with authoritarianism has been identified as the key determinant of the growth of constitutional litigation

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<sup>24</sup> "Elsie Leung During Interview with Our Paper Points out that Dynamic Development is the Special Characteristic of the Common Law," *Takungpo* (14 October 1999).

<sup>25</sup> Personal interview with Mr. Edwin Lau (Principal Assistant Secretary, Constitutional and Mainland Affairs Bureau) (3 November 2011); Personal interview with Mr. Kevin Zervos, S.C. (Director of Public Prosecutions, Government of the Hong Kong SAR) (2 November 2011).

<sup>26</sup> Personal interview with Mr. Andrew Li (first Chief Justice of the Hong Kong Court of Final Appeal) (29 November 2011).

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(see Ghai, 2007:403-4; Ma, 2007; Chan, 2009; Gittings, 2009; Daly, 2010; Tam, 2010).

Lawmaker Leung Kwok Hung, an experienced petitioner for constitutional judicial review, believes that, if only Hong Kong were fully an electoral democracy with a strong legislature, political activists would have far less motivation to bring constitutional claims to the courts.<sup>27</sup>

By exercising constitutional review, the Court has facilitated the convergence of the regime and aggrieved litigants on a common standard interpretation of the Basic Law, enabling cooperation between both sides rather than a descent into open, extra-constitutional conflicts that benefit no one (see Elkins *et al.*, 2009:108). Hong Kong's decentralised system of constitutional review has helped reduce the stakes of politics, convincing aggrieved citizens that they have less to lose if they stay under the Basic Law than if they act extra-constitutionally; even while reasonably shielding power-holders at the same time (see Mittal & Weingast, 2010:342).

The ultimate reason for regimes to defer to any constitutional court cannot entirely be that the court may sanction them, given that the sanctions depend on those very authorities to be implemented. Nevertheless, through the cumulative weight of its interpretations of the Basic Law, the Court of Final Appeal by making out one particular judgment as focal may raise self-fulfilling expectations amongst both Government and aggrieved litigants about how each will act toward other pursuant to that interpretation. The Court may then exert symbolic influence by virtue of having made a particular resolution focal. The central factor reinforcing this self-fulfilling momentum is that actors tend to prefer coordination to total constitutional breakdown (see Ginsburg & McAdams, 2004), given that the latter is

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<sup>27</sup> Personal interview with Mr. Leung Kwok Hung (Member of the Legislative Council) (13 November 2011).

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often associated with political chaos and economic instability. Another factor safeguarding this momentum is the high transaction costs of suspending the Basic Law framework, as evidenced by the fact that the Basic Law is itself backed by a binding inter-state treaty registered with the United Nations – the Sino-British Joint Declaration. Indeed, the Basic Law has never been amended once as of 2012, more than two decades after its promulgation.

The cooperative benefit yielded to the regimes supersedes mere coordination: the Court's defence of the constitutionality of many important statutes and public policies has laid fractious political controversies to rest – after its rulings, demand has fizzled out to disregard the laws of the Provisional Legislative Council, legalise flag burning, eliminate life imprisonment, or cancel public service pay cuts. After all, the practical political consequences of constitutional judicial review could be understood in terms of the legitimacy that it gives to laws maintained or never nullified (Mashaw, 1997:51). In sum, the Court's *de facto* legitimation of controversial policy decisions has in practice reduced the dimensions of external resistance confronting the regimes. This coheres with the general insight that independent constitutional review often has the ability to harness private and non-governmental interests to help police state action, which in turn promotes market rationality, eases pressures on the elite to reform the political system, and provides aggrieved citizens with a sense of vindication (see Moustafa, 2007).

A Basic Law drafter and NPCSC Basic Law Committee Member, Maria Tam, has described the past 15 years of interpreting Basic Law as a journey of “mutual adjustment” and “consensus building” between the Court and the NPCSC.<sup>28</sup> The

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<sup>28</sup> Personal interview with Maria Tam (Member of the NPCSC Hong Kong Basic Law Committee) (17 December 2011).

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“attitude” of the Court has begun to undergo a pragmatic shift, and the pragmatics of the Court’s Declarations of Unconstitutionality seemed to be edging nearer the “original intention” of the framers. The case studies in Chapters 5 and 6 show that despite the Court’s “striking down” rhetoric, the regime retained *de facto* power to determine whether, post-litigation, the invalidated provision is to be repealed or amended within the statute books. In other words, the Court of Final Appeal’s constitutional jurisdiction increasingly resembles that of a “fire alarm” oversight mechanism originally envisaged by the Basic Law’s framers (see Chapter 3).

Consider as an example the 2010 case of *Mok Charles Peter v Tam Wai Ho*<sup>29</sup> in which the Court under a new Chief Justice, Geoffrey Ma, dealt with a dispute over the electoral results for the Information Technology Functional Constituency seat in the 2008 Legislative Council General Election. The High Court had earlier dismissed the appellant’s petition, who had lost the election by 35 marginal votes. Appellant appealed his case to the Court of Final Appeal, at the same time challenging Section 67(3) of the Legislative Council Ordinance, which barred appeal from the Court of Appeal of the High Court on an election petition. Indeed, the High Court had refused to grant leave to appeal to the Court of Final Appeal, after holding that Section 67(3) was proportionate and constitutional. The appellant had to seek leave directly from the Court, who, granting it, proceeded unanimously to invalidate Section 67(3) as contravening Article 82 of the Basic Law.

Fourteen years after Hong Kong’s transfer of sovereignty, the Court of Final Appeal continues to demonstrate its commitment to independent constitutional review of legislation. Chief Justice Ma reasoned that in gauging the constitutionality

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<sup>29</sup> *Mok Charles Peter v Tam Wai Ho & Another* (2010) 13 H.K.C.F.A.R. 762 (Hong Kong Court of Final Appeal).

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of legislation, “It was important to acknowledge that while the views of the legislature were to be considered, it was the court that had the ultimate responsibility to determine whether legislation was constitutional. This was a matter of law, only for the courts to determine.”<sup>30</sup> Justice Bokhary issued to the lower courts an even stronger guidance against the doctrine of deference: expressions like “margin of appreciation” or “deference” are to be avoided “when the Court is engaged in constitutional review,” because “*the Court must not and does not defer to anybody on the question of what is or is not constitutional ... Where legislation lies outside [the range of absolute and non-derogable rights and freedoms], the Court will intervene [emphasis added].*”<sup>31</sup> Nevertheless, in this case the Court merely affirmed the finality of its review powers without altering the electoral outcome, and so avoided outraging the SAR regime. Furthermore, after the NPCSC’s Existing Laws Decision of 1997, the Court could not simply *repeal* impugned legislation contrary to the Bill of Rights directly from the statute books. Rather, the invalidated provisions in *Mok Charles Peter* would remain in the statute books in the absence of additional legislative action. Reciprocating the Court’s politically tolerable decision, the Government ultimately chose the path of remedying the unconstitutionality through introducing new legislation. In 2011 the Legislative Council invested in the Court’s electoral jurisdiction by drastically expanding its competence to settle electoral disputes not only for the legislative branch itself, but also for elections to the office of the Chief Executive, the eighteen District Councils, and to myriad New Territories Village Representatives.<sup>32</sup>

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<sup>30</sup> *Mok Charles Peter*, at 56.

<sup>31</sup> *Mok Charles Peter*, at 79.

<sup>32</sup> See Section 22 of the Hong Kong Court of Final Appeal Ordinance amended 2011.

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Tellingly, Mainland Basic Law drafter Xu Chongde (2010:62), known for his stance against the Hong Kong courts' claims to plenary constitutional review competence under the Basic Law, has recently praised the Court of Final Appeal for "defending the image and interests of the entire [Chinese] State ... [and] ... comprehend[ing] the fact that the national interest [of China] and the interests of [Hong Kong] are totally in line with each other." In sum, the Court of Final Appeal has won the recognition and respect of the public sector lawyers of both Hong Kong and Mainland China, who in turn have convinced government decision-makers that constitutional judicial review is a political advantageous institution overall.

### 3. INVOLUNTARY ACQUIESCENCE

#### 3.1. OVERVIEW

Even if the Court of Final Appeal does return important benefits on the "constitutional investment" of the regime, the latter in the pursuit of short-term interests are always tempted to retaliate against the Court for its periodic activism. Furthermore, the SAR regime's consistent loyalty towards China's political interests have rendered the role of the Court as a "fire extinguisher" extinguishing political agency costs on behalf of the NPCSC all the more negligible. Altogether, there are sufficient incentives for the regime to attack the institution of constitutional judicial review of legislation and executive action. As I shall demonstrate in this section, however, the transaction costs to the political officials of Court-curbing are in many

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ways very high. Recall that real-life politics, democratic or authoritarian, more often than not operate in worlds of positive transaction costs in which a regime could hardly directly veto every judicial ruling that departs from its policy preferences. Examples of such positive transaction costs include the regime's difficulty in acquiring sufficient information about the consequences of the Court's decisions, organizing its various factions to act decisively against the Court, and overcoming the external resistance associated with attacking the Court. Constitutional review is likelier to flourish in those regimes where parties, factions, and branches of government bargaining with each other, while simultaneously taking account of the reactions of diverse interest groups and the electorate, imposes higher transaction costs than elsewhere on the process of reaching decisions to sanction activist courts. Although such regimes typically reside in competitive democracies, but this is not completely the case, there is no reason to presume that authoritarian governments are universally immune to the effects of high transaction costs and imperfect information.

### 3.2. INTERNAL FRAGMENTATION

The post-1997 years have proved that while an authoritarian governing coalition is practicable in ensuring that most Government bills and budget proposals will be ratified by the Legislative Council, it suffers from important limitations too. Notably, the cohesiveness and decisiveness of the SAR regime varies across issues, spanning such ideologically adverse bodies as the Federation of Trade Unions, a leftist

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grassroots organisation, and the Liberal Party, the main conservative pro-business party. Though sharing important China-friendly political objectives, these diverse bodies' fiscal and economic preferences radically diverge, and each may oppose the Government on specific policy proposals (Zhang, 2009). What is more, the political co-optation strategy of the SAR regime and the Chinese Party-state has given rise to an "eclectic corporatist structure" which incorporated business and professional elites into the policy-making process, albeit in a diverse and fragmented manner; being dispersed unevenly among the various statutory authorities, advisory bodies, and policy commissions, these elites often bend government policy in their own interest, stage firm resistance to government initiatives, or seek "particularistic" rents, in their own self-interest (Ma, 2012: 74-80).

For example, Chief Executive Tung, according to Anthony Cheung (2004:17), who later became a Non-Portfolio Member of Chief Executive Tsang's Executive Council, had failed to improve relations with lawmakers. More importantly, as a non-cohesive alliance of interests united only by pro-China leanings (Chen, 2011b:232), the decisional difficulties to overcome to reach internal agreement and face external resistance were entrenched. This has fomented the emergence of judicial activism as theorised by the Constitutional Investment Theory; the regime's own incoherence has widened its zones of tolerance on many issues.

Other resistance attempts to undermine judicial independence sprang from within. The Government legal service, particularly, has played an important role in superintending the consolidation of judicial review. Successive Secretaries for Justice have constantly reiterated that constitutional review has a very positive role to play in Hong Kong's governance. Secretary Elsie Leung was well aware of the cooperative

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benefits yielded by the Court to the Government during her term of office: in 2003, she averred, “The accumulation of constitutional case-law has enriched and developed the Basic Law under the common law system, and thoroughly demonstrated [the constitution’s] vitality.”<sup>33</sup>

Cambridge-educated Wong Yan-lung, Leung’s successor in 2005, candidly told a panel of international constitutional experts in 2008, “Although defeats in judicial reviews can be hard to swallow immediately, I am convinced, and I know that conviction is shared by many of my colleagues in the government, that the commitment to the high standards of legality, reasonableness and fairness, and the metamorphosis brought about by judicial discipline at times, will improve public administration, and will make Hong Kong a better society and home for our next generation.”<sup>34</sup> Secretary Wong fully accepted that “*any domestic legislation contravening the Basic Law will be declared invalid and struck down by the court ... where infringement of fundamental rights is involved, the judicial scrutiny will be more intense and the width of deference to the legislature or executive more limited* [emphasis added].”

Most importantly, the governmental legal service – which has acted as connective tissue joining up the regime with the judiciary – has conceived of no form of constitutional control alternative to the existing system of a constitutional court reviewing statutes for constitutionality.<sup>35</sup> Indeed, the Department of Justice has on many occasions refused to ask the Court to refer constitutional issues to the NPCSC for interpretation. Even in *FG Hemisphere*, in which China’s position was so

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<sup>33</sup> “The Speech of the Secretary for Justice at the Seminar on the Thirteen Years of Basic Law Promulgation” (12 April 2004).

<sup>34</sup> “Keynote Speech by the Hon. Wong Yan Lung, SC, JP at the Joint Conference on “Effective Judicial Review: A Cornerstone of Good Governance” (11 December 2008).

<sup>35</sup> Personal interview with Prof. Albert Chen (Member of the NPCSC Hong Kong Basic Law Committee) (8 November 2011).

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uncompromising, the Secretary for Justice refused to demand that the Court make a reference to the NPCSC, so long as it accepted the doctrine of absolute immunity (Yap, 2011:400).

It is now virtually unquestionable within the bureaucracy that when the Court of Final Appeal strikes down a law, the regime has no alternative but to accept that it is null and invalid.<sup>36</sup> And in December 2010 the Secretary for Constitutional and Mainland Affairs Stephen Lam publicly acknowledged that statutes invalidated by the Court would be considered invalid by the Government, whose duty it was to introduce remedial legislation to address the invalidity.<sup>37</sup> Besides, senior civil servants generally take it for axiomatic that the Government is constitutionally required to respect the independence of the judiciary, and to comply with its judgments.<sup>38</sup> The Department of Justice undertakes constitutional and human rights assessments of Government bills and policies in the light of the Court's jurisprudence;<sup>39</sup> its Division of Prosecutions reviews the conformity of its prosecutorial strategies with human rights law;<sup>40</sup> and the Government customarily includes in its briefs to the Legislative Council a statement that the proposed legislations are compatible with constitutional guarantees.<sup>41</sup> Despite its recent

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<sup>36</sup> Personal Interview with Mr. Edwin Lau (Principal Assistant Secretary, Constitutional and Mainland Affairs Bureau) (3 November 2011).

<sup>37</sup> "Electoral Petition Appeal Judgment of Unconstitutionality Delivered," *Ming Pao Daily* (15 December 2010).

<sup>38</sup> Personal interview with Mr. Edwin Lau (Principal Assistant Secretary, Constitutional and Mainland Affairs Bureau) (3 November 2011).

<sup>39</sup> Personal interview with Anonymous Official B (Department of Justice) (23 November 2011).

<sup>40</sup> Personal interview with Mr. Kevin Zervos, S.C. (Director of Public Prosecutions, Government of the Hong Kong SAR) (2 November 2011).

<sup>41</sup> Jimmy Ma, 'Scrutiny of Legislative Drafting by the Legislature: The Role of the Legal Advisers of the Hong Kong Legislative Council', available at: [http://www.opc.gov.au/calc/docs/Loophole\\_papers/Ma\\_Jan2010.pdf](http://www.opc.gov.au/calc/docs/Loophole_papers/Ma_Jan2010.pdf) (accessed on 6 June 2012).

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tightening of policy, the semi-autonomous Legal Aid Department continued to grant financial aid to judicial review applicants who fit its low income profile, to lower the costs of invoking judicial review against important public decisions.<sup>42</sup>

Most importantly, the legal service has proactively undertaken to explain the relevance of Hong Kong constitutional judicial review to the political authorities and academics of Mainland China.<sup>43</sup> The Department of Justice has worked with senior Chinese officials, communicating the message that review by the courts does not in principle undermine government legitimacy; as a result, there has been an increasing understanding on the Mainland that the Hong Kong judiciary has in fact eschewed extremism and striven to hold the middle ground in constitutional disputes.<sup>44</sup>

Besides, in its last years the Chris Patten Government managed to mobilise support for the rule of law and judicial independence from business interests (Goodstadt, 2001:195). Economically it is well known that courts perceived as independent are often able to enforce public contracts and promissory notes in the teeth of sovereign power as well as to blunt the edge of unsympathetic policies (Posner, 2010). The Liberal Party, flagship of business interests, declared in its manifesto that “it is necessary to have effective and powerful checks and balances between the executive, the legislature, and the judiciary ... in order to constrain any possible abuse of power and transition towards totalitarian rule ... inter-branch superintendence is something that Hong Kong must possess.”<sup>45</sup> In fact,

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<sup>42</sup> Personal interview with Anonymous Official A (Constitutional and Mainland Affairs Bureau) (13 January 2011).

<sup>43</sup> Personal Interview with Prof. Albert Chen (Member of the NPCSC Hong Kong Basic Law Committee) (8 November 2011); Mr. PY Lo (17 December 2011).

<sup>44</sup> Personal interview with Mr. Andrew Li (first Chief Justice of the Hong Kong Court of Final Appeal) (29 November 2011).

<sup>45</sup> Website of the Liberal Party, available at <http://www.liberal.org.hk/intro.html> (last visited on 24 February 2012).

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China-friendly Hong Kong tycoons themselves have resorted to constitutional judicial review in pursuit of their own claims, the most significant recent case being *Cheng Kar-shun v Li Fung-ying*.<sup>46</sup> Cheng Kar-shun, a Member of the Standing Committee of the Chinese People's Political Consultative Conference (China's *de facto* upper house), challenged the constitutional competence of particular parliamentary committees to wield investigative powers on behalf of the whole Legislative Council. Even an opposition politician has observed the business faction within the SAR regime to be rather hostile to attempts to punish the courts, despite their self-aggrandisement, seeing it as a threat to Hong Kong's status as an international financial centre governed by the rule of law.<sup>47</sup> According to Tony Latter (2007:13), the former deputy chief of the Monetary Authority (Hong Kong's central bank), the SAR Government is extremely concerned with its image and reputation abroad. As such, any political attack on judicial independence would jeopardise Hong Kong's image as "Asia's World City." Extra-judicially, Sir Anthony Mason (2007:302-3) also noted that, "It is important for the Court of Final Appeal's decisions to be seen to conform to internationally accepted judicial standards ... Hong Kong's reputation as an international financial centre depends upon the integrity and standing of its courts." Hence any plan to uproot constitutional review would be strongly resisted by both internal and external elements.

### 3.3. EXTERNAL RESISTANCE

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<sup>46</sup> *Cheng Kar-shun v Li Fung-ying* [2009] H.K.C.F.I. 875 (Hong Kong Court of First Instance).

<sup>47</sup> Personal Interview with Leung Kwok Hung (Member of the Legislative Council) (13 December 2011).

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Recall that constitutional review functions like a fire alarm, alerting whom it may concern that sub-constitutional players have overstepped the boundaries of the constitution. The resulting focal points lay a foundation for common beliefs and knowledge about the constitutionality of statutes or policies in ways that may coordinate civil society both in reacting to government policy and in coming to the Court's defence (see Law, 2009b:732). The external resistance to political interference with judicial autonomy, so crucial to the integrity of constitutional review, resulted from just that. Post-1997 incidents repeatedly demonstrated that civil society groups had been active in mobilising protests and movements against government actions and policies; for instance, human rights activists and Pan-Democratic politicians allied with each other to defend political freedoms, while professional organisations such as the Journalists Association and the Bar Association have played important roles in securing press freedom and "rule of law" ideals (Ma, 2007:207). The free media and the vibrant legal academy have played vital roles in publicising the Court's rulings in ways conducive to judicial autonomy.<sup>48</sup>

Judicial assessments of government conduct provided the benefit of ample information empowering interest groups and other political actors such as the Roman Catholic Church, academics, human rights NGOs, radio personalities, and politicians in opposition to coordinate resistance to the Government and Legislative Council (Lo, 2007:224). The organised legal profession, in particular, played a major role in forestalling any local attempt to trigger a NPCSC Interpretation (Tam, 2010). And a 2006 poll conducted by the Chinese University of Hong Kong indicated that as many as 40.6% of the 811 respondents would support the Court of Final Appeal

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<sup>48</sup> Personal interview with Justice Kemal Bokhary (Permanent Judge of the Hong Kong Court of Final Appeal) (8 November 2011).

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should it refuse to comply with a NPCSC Interpretation, as opposed to only 21.3% of them who held the opposite position (38.5% said they did not understand the issue) (see Table 6). The “social acceptance” of constitutional judicial review has factored into the Chinese government’s decision to acquiesce in the Court’s constitutional jurisprudence.<sup>49</sup>

**TABLE 6: ATTITUDES TOWARDS THE JUDICIARY IN THE CONTEXT OF “ONE COUNTRY, TWO SYSTEMS” (%)**

The CFA should accept an interpretation made by the NPCSC	Should not accept	Should accept	Don’t understand	(n)
Overall	40.2	21.3	38.5	(811)
Age				
Under 30	58.4	15.2	26.4	(125)
30-54	42.8	23.2	34.0	(470)
55 and over	23.3	21.4	55.3	(206)

( $\chi^2 = 51.09$ ,  $df = 4$ ,  $P < 0.001$ )

Source: Ng & Kuan (2008).

## 4. CONCLUSION

While the Hong Kong Court of Final Appeal suffered a serious political blow as a result of *Ng Ka Ling*, it managed to consolidate the institution of constitutional judicial review and eventually resume an activist stance in the years that followed. In fact, the *Ng Ka Ling* setback was unable to be exploited to subvert the territory’s judicial independence (Williams, 2005:235). The Court has even succeeded in

<sup>49</sup> Personal interview with Mr. Shiu Sin-por (Former Deputy Secretary General, NPCSC Hong Kong SAR Preparatory Committee) (4 November 2011).

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creatively reinterpreting the Immigration Interpretation two years after *Ng Ka Ling*, in *Chong Fung Yuen*, which granted the right of abode to a further pool of applicants contrary to the Government's position in *Ng Siu Tung*. The events surrounding the strategic interpretation of the Hong Kong Basic Law explored in the previous chapters are thus highly consistent with the Constitutional Investment Theory's predictions that trust and reciprocity underpin the iterative consolidation of constitutional review, especially in authoritarian states. The intensity of constitutional review ascendancy will thus depend in large part on the extent of the authoritarian regime's will and effective power to police cooperation and defection in the court's exercise of constitutional review powers.

The acquiescence of the SAR regime and the Chinese Party-state in the self-aggrandisement and activism of the Court of Final Appeal may adequately be explained by the cooperative benefits offered by constitutional review, and by the high transaction costs of sanctioning the Court, in terms of internal fragmentation and external resistance. Apart from these, the Court has apparently also realised that, although it may be the primary interpreter of the constitution, it is neither the final nor the only one (Yap, 2007:564). Above all, the potential future gains to the SAR regime and the NPCSC of the cooperative returns of constitutional review and the transaction costs that would arise from its abolition or impairment give them compelling incentives to live by a trust-and-reciprocity strategy in their iterated interactions with the Court of Final Appeal.

# CHAPTER 8

## CONCLUSION

### 1. OVERVIEW

Empowered judges do not fit well with classical understandings of authoritarianism (Solomon, 2007:127). Authoritarian states, far less encumbered by the constraints of electoral and inter-branch competition than their liberal democratic counterparts, may be theorised to have less incentive to respect constitutional limits on their authority, and thus also weaker motives to refrain from manipulating judicial institutions for their own purposes. However, recent empirical research has revealed that constitutional courts in a number of authoritarian, non-competitive, political environments have already become more autonomous and activist than previously assumed possible. This dissertation has inquired how such a court vesting in itself competence to carry on constitutional judicial review of both legislative and executive acts could have become an authoritative and respected political institution in Hong Kong, an authoritarian polity under the sovereignty first of Britain and then of China.

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### 2. CONSTITUTIONAL REVIEW AS POLITICAL INVESTMENT

It is commonly assumed that the Hong Kong Court of Final Appeal's general competence to invalidate acts of the Legislative Council and the Government in the name of the Basic Law, and its power to exact the compliance of the SAR regime with its rulings, is unquestionably part and parcel of constitutional design. This position is historically inaccurate and empirically problematic; the willingness of political rulers, especially those with an authoritarian pedigree, to accept constraints imposed on them by courts are not an arrangement that can simply be taken for granted. The fact that the Court and its *de facto* colonial predecessor – the Supreme Court of Hong Kong – has for more than twenty years (1991 to the present) got away with nullifying both primary legislation and the acts of a dominant executive calls for painstaking explanation.

Nowadays those who resort to constitutional law in Hong Kong – politicians, the lower courts, social activists, academics, journalists, and so on – must consult not only the provisions of the Basic Law but also the Court of Final Appeal's interpretations of their meaning. This dissertation has sought to understand how the Court accumulated the power to essentially equate its interpretations with the actual provisions of the Basic Law with virtual impunity (see Whittington, 2007). Seemingly, the Court simply asserted its authority to say what the Basic Law means with authoritative finality and the authorities of Hong Kong and Mainland China have generally proved willing to acquiesce in this assertion. The competence to define

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concrete provisions and abstract values of the territory's constitution is an institution that has emerged through conflict and compromise between two sovereign states (the United Kingdom and the People's Republic of China), two constitutional review bodies (the Hong Kong Court of Final Appeal and the NPCSC), and two partisan groupings (the Pro-China Bloc and its Pan-Democratic opponents).

In order to provide an adequately comprehensive and accurate explanation of these often counterintuitive developments, I constructed a Constitutional Investment Theory which posits three successive stages – activation, consolidation and activist ascendancy – by which constitutional review has been constructed under the joint and auspices of the SAR regime and the Chinese Party-state. I theorised the relationship between the NPCSC and the Court of Final Appeal as a principal-agent relationship. As the focus of my research is the role of the regime in the emergence of constitutional judicial review, I took as given the actions, preferences, and incentives of the Court. I highlighted the similarities between the venturing of constitutional review and (financial) investment, highlighting how the future benefits yielded to the ruling elite by constitutional review are uncertain, and how their investment in a potentially opportunistic or incompetent constitutional court creates “sunk” costs.

Authoritarian states, in ceding power to a constitutional court, confront the risk that it may behave in undesirable ways. It is generally in the instrumental interest of authoritarian states to conserve their own monopoly of power and to refuse acquiescence in constitutional review. And indeed, many undemocratic regimes do reject empowering an independent judiciary. However, instrumental explanations break down when such states do cede power to such courts, and vest them with

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substantial autonomy.

Constitutional review may exist as a defunct, or impotent, *de jure* institution even in an authoritarian state. Activated, consolidated, and activist constitutional review must depend on political investment on the part of the governing regime, whether through tacit acquiescence and/or active support. I hypothesised, as underpinning the performance of constitutional courts under authoritarian states, a number of causal mechanisms; *i.e.* expressive-symbolic interests, trust and reciprocity, and transaction costs. Constitutional makers are interested not only in achieving instrumental goals, but also in their intrinsic values as ends in themselves, as symbols and expressions of ideological commitments, whether to Marxism-Leninism, Islamism, democratic liberalism, or something else. Acquiescence in independent constitutional judicial review was conjectured to depend on whether the authoritarian state in question perceived that it could derive symbolic-expressive rents therefrom. Regimes that tend to abide by liberal-leaning *de jure* ideological commitments are likelier to acquiesce than those whose commitments lie elsewhere; *e.g.* Leninist Party-states, theocracies, absolute monarchies.

I concluded that constitutional review can become consolidated only when, in the early stages of its emergence, the court is able to convince the regime of its trustworthiness, mainly through the consistent return of cooperative benefits to the latter. An authoritarian state will invest constitutional jurisdiction, decisional autonomy, professional staff, and adequate funding only in a court perceived to be trustworthy. Note that the preservation of political survival is a principal objective of any authoritarian state, often pursued at all costs (Chung, 2011:297); authoritarian

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regimes, unlike their liberal democratic counterparts, tend to refuse political defeat or the atrophy of political power even in exchange for long-term gains (Przeworski, 2006). A defection by the court at this early stage in a Prohibited Policy Domain (*e.g.* regime security, electoral monopoly) where the regime's perceived political survival is at stake, will likely convince the latter to withhold investment. The Theory also suggests that in the later stages, when constitutional review has been consolidated or nearly so, transaction costs – more precisely, the severity of any internal disagreement and/or external resistance – will also affect the willingness and ability of the regime to sanction unwanted judicial activism.

I have modelled the Hong Kong Basic Law as containing both a strategic political bargain and a set of principal-agent instructions, and sought to demonstrate that many of its most important provisions were designed (within the Sino-British Joint Declaration's constraints) to serve the political and economic interests of the Mainland Chinese and Hong Kong factions that drafted and ratified it. The neo-liberal pro-business policies enshrined in the Basic Law safeguarded the predominant interests of the Hong Kong business elite; likewise, the NPCSC's supremacy in interpreting the Basic Law with finality secured China's unified national sovereignty. Corporatist political representation and the brakes on democratic reform reflected elite preferences on both sides. Altogether, democratic reform, national sovereignty, and public finance constituted the specific Prohibited Policy Domains in which the Chinese Party-state and Hong Kong's business elites have ideal policy zones of tolerance with the least leeway. The Basic Law by its own terms authorised courts to interpret its provisions, but did not clarify whether they

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are entitled to strike down primary legislation on constitutional grounds. Indeed, had the Court been politically timid, it could easily have abdicated the power of constitutional review by holding that such a power is exclusively vested in the NPCSC, and that any legislation not vetoed by it must be presumed consistent with the Basic Law which the courts have a duty to enforce (Chen, 1988:124).

Constitutional judicial review in British Hong Kong practically originated with the enactment of the Bill of Rights of 1991, which reflected the wishes of the United Kingdom Government and the Hong Kong colonial regime to condemn China's handling of the 1989 Tiananmen protests. China reacted aversely, perceiving the Bill as a foreign plot to undermine the Basic Law as well as its sovereignty, and repeatedly threatening to abolish rights-based constitutional review upon the transfer of sovereignty. However, as of the transfer of sovereignty on 1 July 1997, the NPCSC has left constitutional review and the Bill of Rights largely intact.

The fact that China tolerated constitutional review to be rapidly consolidated between 1991 and 1997 is adequately explained by the ability of the colonial Supreme Court to convince the incoming sovereign that it was and would continue to be largely trustworthy and cooperative in its post-1997 reincarnation in the sense assumed by the Constitutional Investment Theory. Despite the Bill of Rights' radical expansion of their jurisdiction, the Court remained highly deferential, demurring to challenge the policy *status quo* except in a limited number of cases where rights had clearly been infringed. Having calculated that constitutional review by such a judiciary would not impose excessive constraints on the post-1997 SAR regime, the NPCSC had little incentive to abolish the institution. Meanwhile, however, the Court

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had been taking incremental steps to entrench for future use activist constitutional doctrines, such as the proportionality test, by exploiting innocuous cases.

Competition between the nascent Court of Final Appeal and the NPCSC for constitutional primacy characterised the first five years of post-1997 constitutional history. This Court, being the cosmopolitan brainchild of two globally influential sovereign states, was by virtue of the Basic Law officially an agent of the NPCSC, delegated by it to interpret the Basic Law, but also constrained by its authority to issue ultimate interpretations of the Basic Law. The Court, however, found it could exploit the considerable informational disadvantages and institutional limits of the NPCSC under the “One Country, Two Systems” scheme, and thereby managed to lay claim to constitutional review powers that potentially threaten the authority of the NPCSC.

The need of the Chinese Party-state to showcase expressive-symbolically its ability and willingness to fulfil its ideological commitments under the “One Country, Two Systems” doctrine, winning respect from the international audience and Taiwan, has likely played a central role in the NPCSC’s acquiescence in the Court’s claim of constitutional jurisdiction. Even though the Court strayed from the preferences of the SAR regime and the NPCSC in *Ng Ka Ling* and suffered successive sanctions thereafter, it survived these setbacks with the political assets inherited from its colonial predecessor, and with a strategic use of trust-building measures in subsequent cases that impinged on China’s non-negotiable interests over political reform and national sovereignty. The internal disunity of the SAR regime also helps explain the survival of effectual constitutional review; weighty factions within the

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regime differed too much and for too long over what to do about the Court.

Being able to rebuild trust through consistent cooperation with the SAR regime and the NPCSC in Prohibited Policy Domains, the Court of Final Appeal won the ruling elite's tacit consent to its activism in numerous Permitted Policy Domains such as immigration, civil rights, agency competence, criminal justice, and electoral management, as well as the special case of public security, normally a Prohibited Policy Domain. The Court ardently upheld the constitutional autonomy of Hong Kong *vis-à-vis* Mainland China, especially respecting the fundamental rights and freedoms of the local people, and the maintenance of the common law.

In wielding these competences, the Court has yielded important cooperative benefits to the SAR regime and to the NPCSC; such as rendering credible the political and economic commitments embodied in the Basic Law, reducing the uncertainty and coordination problems stemming from the Basic Law's incompleteness, or legitimising controversial policies. After all, it is not uncommon that constitutional courts in authoritarian states serve regime interests, notwithstanding the fact that they also facilitate the expression of opposition in certain contexts (Ginsburg, 2012:723). Furthermore, the SAR regime's internal disunity; the external resistance – galvanised by a free press – of the legal profession, academia, and civil society; and the government legal service's persuasion of Mainland Chinese authorities on the advantages of constitutional review, all have contributed to the Court's impunity. Ultimately, iterated trust and reciprocity between the Court, the SAR regime and/or the NPCSC have struck an equilibrium of constitutional control between the interpretive bodies, each co-existing peacefully with other while developing

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dynamically its own canons and jurisprudence in its respective domains of predominance.

Subject to the breadth of the zones of tolerance which represent the range of policy choices acceptable to the SAR regime and the Chinese Party-state, the Court of Final Appeal has elsewhere considerable freedom to tailor to its own taste the details of its constitutional jurisprudence and the institutional parameters of constitutional review. Indeed, nearly all the decisions of the Court, while satisfying the preference of the Justices for greater constitutional autonomy for Hong Kong, are in the zones of tolerance of the SAR regime and/or the NPCSC. Assuming that the ideal policy positions of the SAR regime and the NPCSC remain constant or change predictably, the Court of Final Appeal's impunity depends on how accurately it estimates the boundaries of the various Permitted Policy Domains, and identifies and steers clear of Prohibited Policy Domains. Based on available empirical evidence, it would appear that the Court has so far managed to avoid open conflict.

Nevertheless, this dynamic equilibrium may be disrupted by changes in several variables: (1) a decrease of the breadth of the regime's zones of tolerance within Permitted Policy Domains; (2) an increase in the number of Prohibited Policy Domains; (3) a decrease of transaction costs to sanctions for the Court's activist overreaching; or (4) a voluntary withdrawal by the Court from activism, in whole or in part. To put these in concrete terms, constitutional review as an institution is undoubtedly consolidated and activist nowadays, but whether this situation could continue depends on the regime's attitude towards politically undesirable rulings as well as the amount of internal disagreements and external resistance that it would

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incur should it ever decide to punish the Court. Consider that external resistance could weaken if the citizenry no longer supports the Court (*e.g.*, after the Court has rendered a series of unpopular decisions) and that disagreements internal to the regime could disappear with the top political elites tightening their grip of power (*e.g.*, eliminating opposing factions and taking a more interventionist approach to politics), thereby limiting the policy space available for the Court to deliver activist decisions, at the expense of the entrenched constitutional tradition of self-restraint.

### 3. JUDICIAL MOTIVATION

Although my descriptions of the Hong Kong Court of Final Appeal's activism under the Mainland's aegis, may appear to be consistent with the "strategic model of judicial behaviour," which predicts that courts will rule strategically to avoid being reversed (see Epstein & Knight, 1998), I do not claim to know the actual motivations behind successful and unsuccessful constitutional courts in authoritarian states. For instance, how did the Hong Kong and Taiwanese courts manage to avoid conflict and opt for effective trust-building measures in their interactions with their respective governments, while their Russian and Singapore counterparts defied their regimes in Prohibited Policy Domains cases long before trust and reciprocity had been established? Consider this issue in the Hong Kong case in greater detail. The Court's self-restraint over economic policy cases may have resulted from the Justices' awareness of the devastating political consequences that follow the striking-down of

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Government public finance measures, but equally it may be attributable to the Court's sincere ideological alignment with the Government in this policy domain. Furthermore, given that most if not all Justices of the Court had no previous political affiliation and were selected by an independent judicial commission, it seems likely that their motives for defying the political branches must transcend partisan linkages. My interviews with several Justices of the Court of Final Appeal indicate that, while they believe it important to assert Hong Kong's autonomous constitutional identity, they do not consciously have any overall strategy for deciding constitutional cases across policy domains.

Throughout my dissertation, I have advanced the conjecture that a young constitutional court in an authoritarian state has a compelling incentive to cooperate with the regime, at least in the early days of its existence. The tentative explanation offered by this dissertation for why such a court would ever defy its political principals is the incidence of classic principal-agent problems and moral hazard. Under the "right" conditions of information asymmetry and perceptively high transaction costs borne by the regime, even regime-appointed judges deeply trusted by the rulers may be tempted to reveal their "real" preferences in certain cases, and pursue courses of action inconsistent with the incumbent's policy preferences. Agency cost-reduction mechanisms in selecting and managing judges are usually imperfect even in authoritarian states, enabling judicial defection to pass unsanctioned at a later time under these "right" conditions.

This problem leads to the following research programmes, which have not been directly addressed in this dissertation: to investigate variations in constitutional

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courts' behaviour across different authoritarian states, as well as over different levels of the court system within the same authoritarian state. The strength of the Constitutional Investment Theory is in predicting the choices of the *political officials* during the activation, consolidation, and ascendancy of constitutional review, not the content of individual judgments or the behavior of individual judges – issues best left to those better able to collect data about attitudes and strategic behavior internal to constitutional courts.

Here it must be noted that the acquiescence of the regime in constitutional review and their subsequent investment in the constitutional court is a necessary but not a sufficient condition for judicial empowerment. Even if the regime is weak and fragmented, this is not always sufficient for the constitutional court to assert control (Helmke & Rios-Figueroa, 2011). If constitutional judges are to exercise any independent influence on the political branches, they must adopt policy agenda, whether intentionally or not, that are distinct from that of the regime who delegated their powers to them (Shepsle, 2006:1044; Hilbink, 2008; Shapiro, 2008:335). Judges with such an agenda may or may not arise in any particular regime at any particular time (Shapiro, 2008:332). The willingness of courts to be assertive – like other historically contingent elements – can neither be taken for granted nor completely predicted by theory, at least in the present state of social science technology (see Congleton, 2011:616). Future methodological advances may change this.

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### 4. CONCLUDING REMARKS

This dissertation has sought to uncover the conditions underpinning the activation, consolidation, and ascendancy of activism of constitutional review under authoritarianism. Hopefully, it has repositioned the empirical debate over constitutional review. It is possible for independent constitutional judicial review to be activated, consolidated, and ascend to activism even in the absence of electoral and/or inter-branch competition, or overarching instrumentalist concerns on the part of the sovereign, as long as the appropriate levels of expressive-symbolic interests, regime-court trust, and transaction costs exist. It has applied the Constitutional Investment Theory to the peculiar case of Hong Kong, wherein the Court of Final Appeal has come to develop into one of the most powerful constitutional players in the territory in the absence of competitive democratic institutions for the selection either of the Chief Executive, the Legislative Council, or the NPCSC. Indeed, as of 2012, the Court has undoubtedly become arguably *the* most continuously influential constitutional court in the “universe” of authoritarian regimes. The vitality of constitutionalism in Hong Kong, under which the SAR regime acts within the constraints of a formal constitution interpreted by a potent constitutional court, is of significance not only to the seven million people of this city-state (Tsang, 2001:xi). It also marks the entrenchment of Western-style constitutionalism within the sovereign boundaries of the Chinese Party-state, in which even the NPCSC has to work out its

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constitutional interpretations not in Marxist-Leninist or emotional nationalist terms but within the confines of legal argumentation. Ongoing investment in independent constitutional review does not necessarily harm authoritarian states. Undoubtedly, the investment made by Hong Kong's and China's political decision-makers in the Court of Final Appeal's constitutional review jurisdiction paid off. Although the Court has from time to time brought short-term inconvenience to the SAR regime and the Chinese Party-state, it has, *inter alia*, helped stabilise the political system and legitimise the authoritarian framework of government set up by the Basic Law.

## APPENDIX A

# INTERVIEWS

This dissertation has benefitted greatly from qualitative evidence garnered from original research interviews. These were carried out to develop a reliable and accurate description of the decisional processes that underlay how the SAR regime and the NPCSC reacted to the judicial interpretation of constitutional instruments, and to capture the subjective perceptions and anticipatory reactions of actors whose individual or collective behaviour was to be explained by the proposed theory (see Vanberg, 2005:116). I specifically selected as my interviewees persons who had been directly and substantially involved in one or more instances of the following: (a) constitutional interpretation on the Court of Final Appeal; (b) the interpretation of the Basic Law by the Standing Committee of the National People's Congress; (c) the decisions made by the Government and the Legislative Council of the Hong Kong SAR in relation to (a) and (b).

My interviewees may be sorted into five categories: (1) present and former Justices of the Court of Final Appeal; (2) present and former Hong Kong members of the Chinese National People's Congress and its sub-committees; (3) present and former members of the Legislative Council; (4) present and former officials of the Department of Justice and the Constitutional Affairs Bureau; and (5) professional constitutional lawyers (see Table 8 below). Most interviewees held more than one relevant position. Often they gave answers reflecting their changing perspectives.

Access to these elites is not easily achieved, and when it is permitted, the

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researcher has a solemn duty to maintain a high level of professionalism, and ensure that the subjects will afterwards continue to be willing to speak to other members of the academic community (Clark, 2011:271). These interviews were semi-structured, meaning that while they were guided by several themes and broad questions, they nonetheless provided interviewees ample opportunities to expatiate on their experiences. I established a number of rules for these interviews to encourage the interviewees to converse more comfortably. Firstly, I made it explicit that questions touching specific events they had experienced in connection with their careers would not be asked unless by consent. Secondly, interviewees may remain anonymous by request. Two interviewees opted for anonymity. Thirdly, in the light of the political sensitiveness of the subject-matter, I promised not to audiotape the interview, instead resorting to the taking of detailed interview notes. The interviews were conducted smoothly, and to date no interviewee has raised any special concern. Fourthly, information generated by the interviews has been used throughout this dissertation, whether cited or not. Notice that the explicit citation of the interviewee's identity has only been applied to direct quotes that the interviewee has consented to being identified with. Otherwise, I have adhered to the not-for-attribution policy, meaning that I used the information provided by the interviewees without directly quoting or identifying the source (Toobin, 2008:415).

Some difficulties arose in conducting interviews on a large scale that treated the present subject, especially the strategic interpretation of the Hong Kong Basic Law. Constitutional interpretation (as opposed to electoral politics, social movements, and so on) is an activity that usually involves only a very small group of elites. This is not

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surprising, especially in an authoritarian setting, because the lack of prerequisites such as specialised knowledge, qualifications, political ties, and interest in the technicalities of constitutional law often bar entry to the interpretive enterprise. Consequently, the pool of suitable potential interviewees is bound to be small, and the number who accepted my invitation turned out to be smaller still. I sent interview invitations to thirty individuals and ultimately sixteen accepted. I believe all the same that my pool of interviewees has actually served in full the purposes of this dissertation, especially given that most of them are highly popular figures who have participated extensively in constitution-making and constitutional interpretation, often for decades.

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**TABLE 7: LIST OF INTERVIEWEES**

Interviewees	Relevant Position Held	Interviewed
Kemal Bokhary	Permanent Judge, Hong Kong Court of Final Appeal; Former Justice of Appeal, Supreme Court of Hong Kong	8 November 2011
Albert H.Y. Chen	Member, NPCSC Hong Kong Basic Law Committee Chan Professor of Constitutional Law, University of Hong Kong Former Dean, Faculty of Law, The University of Hong Kong	8 November 2011
Mark Daly	Partner of Barnes & Daly (major solicitors' firm specialising in constitutional litigation)	28 November 2011
Philip Dykes, S.C.	Former Assistant Solicitor General of British Hong Kong; Former Chairman of the Hong Kong Bar Association	15 November 2011
Michael Hartmann	Non-Permanent Judge, Hong Kong Court of Final Appeal; Justice of Appeal, the High Court of Hong Kong	21 November 2011
Edwin Lau	Principal Assistant Secretary of Constitutional and Mainland Affairs, Government of the Hong Kong SAR	3 November 2011
Andrew Li	Former Chief Justice, Hong Kong Court of Final Appeal	29 November 2011
Martin Lee, S.C.	Former Member, NPCSC Hong Kong Basic Law Drafting Committee; Former Member, Hong Kong Legislative Council; Former Chairman, Democratic Party of Hong Kong	7 December 2011
Leung Kwok Hung	Member, Hong Kong Legislative Council Chairman, League of Social Democrats	12 December 2011
P.Y. Lo	Chairman, Constitutional Affairs and Human Rights Panel, Hong Kong Bar Association	7 November 2011
Shiu Sin-por	Member (now Head), Central Policy Unit, Government of the Hong Kong SAR; Formerly Deputy Secretary General, NPCSC Hong Kong SAR Preparatory Committee	4 November 2011
Maria Tam	Member, NPCSC Hong Kong Basic Law Committee; Former Member, Hong Kong Provisional Legislative Council Former Member, NPCSC Hong Kong Basic Law Drafting Committee	17 December 2011
Wong Yuk-shan	Member, NPCSC Hong Kong Basic Law Committee	9 December 2011
Kevin Zervos, S.C.	Director of Public Prosecutions, Government of the Hong Kong SAR	2 November 2011
Anonymous Official A	Constitutional and Mainland Affairs Bureau, Government of the Hong Kong SAR	13 January 2011
Anonymous Official B	Department of Justice, Government of the Hong Kong SAR	23 November 2011

# APPENDIX B

## LIST OF CONSTITUTIONAL DECISIONS

**TABLE 8: HONG KONG BILL OF RIGHTS JUDGMENTS OF THE  
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (1991-1997)**

Case	Challenged Policy Instrument <sup>1</sup>	Policy Domain <sup>2</sup>	Outcome <sup>3</sup>
<i>Attorney General of Hong Kong v Lee Kwong-kut and others</i> [1993] AC 951	Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405)	Criminal Justice	S
<i>R v Chan Chi-hung</i> [1996] AC 442	Crimes Ordinance (Cap. 200)	Criminal Justice	F
<i>Ming Pao Newspapers Limited v Attorney General of Hong Kong</i> [1996] UKPC 12	Prevention of Bribery Ordinance (Cap. 201)	Civil Rights	F
<i>Fok Lai Ying v Governor in Council &amp; others</i> [1997] UKPC 36	Crown Lands Resumption Ordinance (Cap. 124)	Civil Rights	S

S = Success or Partial Success    F = Failure    N/A = Non-applicable

<sup>1</sup> Despite most of the cases involved more than one species of challenged policy instrument (e.g., primary legislation and executive decision), for simplicity I coded as the Challenged Policy Instrument instruments that were hierarchically highest within the case, according to the following order: primary legislation > delegated legislation > executive decisions.

<sup>2</sup> My coding methodology concentrates on the policy domain under which the decision has the greatest impact. I adopted a two-part test in coding the specific policy domain of each decision: (1) which policy domain(s) does/do the Court's decision impinge on? If there is more than one answer, (2) which policy domain is relatively more important than the other(s)? Consider *Secretary for Justice v Zigo Yau* (2007) as an illustration of my methodology. This case involved the Court of Final Appeal declaring a Crimes Ordinance provision (which criminalised homosexual but not heterosexual buggery) as unconstitutional. Applying the test, in answering the first question, I identified two domains: criminal justice and (homosexual) civil rights. In response to the second question, I noted that the judgment predominantly concerned the equality and non-discrimination of homosexual rights rather than typical criminal justice issues such as criminal administration and sentencing. Therefore, I coded *Zigo Yau* as a civil rights case.

<sup>3</sup> Decisions that invalidated in whole or in part a challenged policy instrument have been coded as "S," while other decisions have been coded as "F." In coding "S" decisions, I took a broad view of the notion of "invalidation" to include remedial interpretations that, in spite of superficially safeguarding the constitutionality of the impugned policy instruments, have in practice nullified their challenged effects.

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**TABLE 9: FINAL HONG KONG BILL OF RIGHTS JUDGMENTS OF THE COURT OF APPEAL (1991-1997)**

Case	Challenged Policy Instrument	Policy Domain	Outcome
<i>R v Sin Yau Ming</i> [1992] 1 HKCLR 127	Dangerous Drugs Ordinance (Cap. 134)	Criminal Justice	S
<i>Tam Hing Yee v Wu Tai Wai</i> [1992] 1 HKLR 185	District Court Ordinance (Cap. 336)	Civil Rights	F
<i>R v Lam Wan-kow</i> [1992] 1 HKCLR 272	Dangerous Drugs Ordinance (Cap. 134)	Criminal Justice	F
<i>R v Fu Yan</i> [1992] 2 HKCLR 59	N/A	Criminal Justice	F
<i>R v Man Wai Keung</i> CACC403/1990	Criminal Procedure Ordinance (Cap. 221)	Criminal Justice	S
<i>R v Chandra Thanwardas Mirchandani</i> [1992] 2 HKCLR 174	Criminal Cases Rules (Cap. 221 subordinate legislation)	Criminal Justice	F
<i>R v Chan Wai Ming</i> [1993] 1 HKCLR 51 14.2	Dangerous Drugs Ordinance (Cap. 134)	Criminal Justice	F
<i>R v Wong Hiu Chor and others</i> [1993] 1 HKCLR 107	Import and Export Ordinance (Cap. 60)	Criminal Justice	F
<i>R v Securities and Futures Commission ex parte Lee Kwok Hung</i> [1993] 2 HKLR 51	Securities and Futures Commission Ordinance (Cap. 24)	Agency Competence	F
<i>Chan Chuen-kam and others v R</i> [1993] 2 HKCLR 144	Crimes Ordinance	Criminal Justice	F
<i>Wong King Lung and Others v Director of Immigration</i> [1994] 1 HKLR 312	Immigration Ordinance (Cap. 115)	Immigration	F
<i>R v Wan Siu-kei</i> [1994] 2 HKCLR 127	Crimes Ordinance (Cap. 200)	Criminal Justice	F
<i>Business Rights Ltd. v Building Authority</i> CACV000212/1993 (1994)	Building Ordinance (Cap. 123)	Agency Competence	F
<i>Chan Chak Fan and another v R</i> [1994] 2 HKCLR 17	Immigration Ordinance (Cap. 115)	Immigration	F
<i>R v Lum Wai Ming</i> [1992] 2 HKCLR 221	Dangerous Drugs Ordinance (Cap. 134)	Criminal Justice	S
<i>Hai Ho Tak v Attorney General</i> [1994] 2 HKLR 202	Immigration Ordinance (Cap. 115)	Immigration	F
<i>Otis Elevator Co. (HK) Ltd. v Director of Electrical and Mechanical Services</i> CACV000184/1994	Lifts and Escalators (Safety) Ordinance (Cap. 327)	Agency Competence	F
<i>R v Kwok Hing-man</i> [1994] 2 HKCLR 160	Summary Offences Ordinance (Cap. 228)	Criminal Justice	S
<i>R v To Kwan Hang and another</i> [1995] 1 HKCLR 25	Public Order Ordinance (Cap. 245)	Public Security	F
<i>Attorney General v Tang Yuen Lin</i> (1995) 5 HKPLR 631	N/A	Criminal Justice	F
<i>Kwan Kong Co Ltd v Town Planning Board</i> [1996] 2 HKLR 363	Planning Ordinance (Cap. 131)	Agency Competence	F
<i>R v Cheung Ka Fai &amp; Others</i> [1995] 2 HKCLR 189	Executive decision	Criminal Justice	F
<i>Eastweek Publisher Ltd and another v Cheung Ng Sheong, Steven</i> [1995] 3 HKC 601	N/A	Civil Rights	N/A
<i>Lee Miu Ling and another v Attorney General (No.2)</i> (1995) 5 HKPLR 181;	Legislative Council (Electoral Provisions) Ordinance (Cap. 381)	Political Reform	F
<i>R v Lam Chi Keung</i> [1997] HKLRD 421	Evidence Ordinance (Cap. 8)	Criminal Justice	F
<i>Chim Shing Chung v Commissioner of Correctional Services</i> [1996] 6 HKPLR 313	Executive decision	Criminal Justice	F
<i>The Attorney General v Mak Chuen Hing &amp; 71 others</i> HCMA398/1996	Gambling Ordinance (Cap. 148)	Criminal Justice	F
<i>The Association of Expatriate Civil Servants of Hong Kong v The Secretary for the Civil Service and another</i> CACV260/1995	Executive decision	Political Reform	S
<i>Hong Kong Polytechnic University and others v Next Magazine Publishing Ltd and another</i> [1996] 2 HKLR 260	N/A	Civil Rights	N/A
<i>Lau Wong Fat v Attorney General</i> [1997] HKLRD 533	New Territories Land (Exemption) Ordinance (Cap. 452)	Civil Rights	F

Notation: S = Success or Partial Success    F = Failure    N/A = Non-applicable

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**TABLE 10: HONG KONG BASIC LAW INTERPRETATIONS OF THE  
STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S  
REPUBLIC OF CHINA (1997-2011)**

Decision	Date of Promulgation	Policy Domain
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	Immigration
The Interpretation of 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	Political Reform
Decision of the Standing Committee of the National People's Congress on issues relating to the Methods For Selecting the Chief Executive of the Hong Kong Special Administrative Region in the Year 2007 and For Forming the Legislative Council of The Hong Kong Special Administrative Region in the Year 2008	Adopted by the Standing Committee of the Tenth National People's Congress at its Ninth Session on 26 April 2004	Political Reform
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 15th Session of the Standing Committee of the Tenth National People's Congress on 27 April 2005	Political Reform
Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage	Adopted by the Standing Committee of the Tenth National People's Congress at its Thirty-first Session on 29 December 2007	Political Reform
Approval on the "Amendment to Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China Concerning the Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region" and announcement on the "Amendment to Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China Concerning the Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures" by the Standing Committee of the National People's Congress	Adopted by the Standing Committee of the Eleventh National People's Congress at its Sixteenth Session on 28 August 2010	Political Reform
Interpretation of Paragraph 1, Article 13 and Article 19 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 by the Standing Committee of the Eleventh National People's Congress at its 22nd Session on 26 August 2011	Foreign Affairs

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**TABLE 11: CONSTITUTIONAL JUDGMENTS OF THE HONG KONG COURT OF FINAL APPEAL (1997-2011)**

Case Name/Number/Year	Challenged Policy Instrument	Policy Domain	Outcome
<i>Thang Thieu Quyen v Director of Immigration</i> (1998) 1 H.K.C.F.A.R. 167	Executive Decision	Immigration	S
<i>Ng Ka Ling v The Director of Immigration</i> (1999) 2 H.K.C.F.A.R. 4	Immigration (Amendment) (No 2) Ordinance Immigration (Amendment) (No 3) Ordinance	Immigration	S
<i>Chan Kam Nga v Director of Immigration</i> (1999) 2 H.K.C.F.A.R. 82	Immigration Ordinance (Cap. 115)	Immigration	S
<i>Re Yung Kwan Lee</i> (1999) 2 H.K.C.F.A.R. 245	Transfer of Sentenced Persons Ordinance (Cap. 513)	Criminal Justice	F
<i>Lau Kong Yung and others v The Director of Immigration</i> (1999) 2 H.K.C.F.A.R. 300	Executive Decision	Immigration	S
<i>HKSAR v Ng Kung Siu and another</i> (1999) 2 H.K.C.F.A.R. 442	National Flag and National Emblem Ordinance (No. 116 of 1997) Regional Flag and Regional Emblem Ordinance (No. 117 of 1997)	Civil Rights	F
<i>Albert Cheng v Paul Tse</i> (2000) 3 H.K.C.F.A.R. 339	Common Law Defence of Fair Comment	Civil Rights	N/A
<i>Secretary for Justice v Chan Wah</i> (2000) 3 H.K.C.F.A.R. 459	Indigenous People Electoral Arrangements of 1999	Electoral Affairs	S
<i>Agrila Limited v Commissioner of Rating &amp; Valuation</i> (2001) 4 H.K.C.F.A.R. 83	Government Rent (Assessment and Collection) Ordinance (Cap. 515) and Rent Regulations	Economic Policy	F
<i>Director of Immigration v Chong Fung Yuen</i> (2001) 4 H.K.C.F.A.R. 211	Executive Decision	Immigration	S
<i>Tam Nga Yin and others v The Director of Immigration</i> (2001) 4 H.K.C.F.A.R. 251	Executive Decision	Immigration	F
<i>Fateh Muhammad v Commissioner of Registration</i> (2001) 4 H.K.C.F.A.R. 278	Immigration Ordinance (Cap. 115)	Agency Competence	F
<i>Ng Siu Tung and Others v. The Director of Immigration</i> (2002) 5 H.K.C.F.A.R. 1	Executive Decision	Immigration	S
<i>Li Defan and another v HKSAR</i> (2002) 5 H.K.C.F.A.R. 320	N/A (Right to be Free from Testifying Against Oneself)	Criminal Justice	N/A
<i>Shum Kwok Sher v HKSAR</i> (2002) 5 H.K.C.F.A.R. 381	Common Law Offence of Abuse of Public Office	Criminal Justice	N/A
<i>Lau Cheong and another v HKSAR</i> (2002) 5 H.K.C.F.A.R. 415	Offences Against the Person Ordinance (Cap. 212)	Criminal Justice	F
<i>Ma Bik Yung v Ko Chuen</i> [2001] H.K.C.F.A. 56	N/A (Role of Apologies in Discrimination and Harassment)	Civil Rights	N/A
<i>Gurung Kesh Bahadur v Director of Immigration</i> (2002) 5 H.K.C.F.A.R. 480	Executive Decision	Civil Rights	S
<i>Director of Lands v Yin Shuen Enterprises Limited</i> (2003) 6 H.K.C.F.A.R. 1	Lands Resumption Ordinance (Cap. 124)	Economic Policy	F
<i>Prem Singh v Director of Immigration</i> (2003) 6 H.K.C.F.A.R. 26	Immigration Ordinance (Cap. 115)	Immigration	S
<i>Tse Mui Chun v HKSAR</i> (2003) 6 H.K.C.F.A.R. 601	Copyright Ordinance (Cap. 528)	Economic Policy	F
<i>A Solicitor v Law Society of Hong Kong</i> (2004) 7 H.K.C.F.A.R. 45	Legal Practitioners Ordinance (Cap. 159)	Judicial Process	S
<i>Director of Immigration v Lau Fong</i> (2004) 7 H.K.C.F.A.R. 56	Executive Decision	Immigration	S
<i>Secretary for Security v Prabakar</i> (2004) 7 H.K.C.F.A.R. 187	Executive Decision	Immigration	S
<i>Ng Yat Chi v Max Share Limited</i> (2005) 8 H.K.C.F.A.R. 1	Judicial Order	Judicial Process	F
<i>Noise Control Authority v Step In Limited</i> (2005) 8 H.K.C.F.A.R. 113	Noise Control Ordinance (Cap. 400)	Agency Competence	F

## APPENDICES

Case Name/Number/Year	Challenged Policy Instrument	Policy Domain	Outcome
<i>Yeung May Wan and others v HKSAR</i> (2005) 8 H.K.C.F.A.R. 137	Executive Decision	Public Security	S
<i>Leung Kwok Hung and others v HKSAR</i> (2005) 8 H.K.C.F.A.R. 229	Public Order Ordinance (Cap. 245)	Public Security	S
<i>Secretary for Justice v Lau Kwok Fai Bernard</i> (2005) 8 H.K.C.F.A.R. 304	Public Officers Pay Adjustment Ordinance (Cap. 574); Public Officers Pay Adjustments (2004/2005) Ordinance (Cap. 580)	Economic Policy	F
<i>Ho Choi Wan v Hong Kong Housing Authority</i> (2005) 8 H.K.C.F.A.R. 628	Agency Decision	Economic Policy	F
<i>A Solicitor v Law Society of Hong Kong</i> (2006) 9 H.K.C.F.A.R. 175	Legal Practitioners Ordinance (Cap. 159)	Agency Competence	F
<i>Koo Sze Yiu v Chief Executive</i> (2006) 9 H.K.C.F.A.R. 441	Telecommunications Ordinance (Cap. 106) Executive Order	Public Security	S
<i>So Wai Lun v HKSAR</i> (2006) 9 H.K.C.F.A.R. 530	Crimes Ordinance (Cap. 200)	Criminal Justice	F
<i>Official Receiver and Trustee in Bankruptcy of Chan Wing Hing v Chan Wing Hing</i> (2006) 9 H.K.C.F.A.R. 545	Bankruptcy Ordinance (Cap. 6)	Civil Rights	S
<i>HKSAR v Lam Kwong Wai</i> (2006) 9 H.K.C.F.A.R. 574	Firearms and Ammunition Ordinance (Cap. 238)	Criminal Justice	S
<i>HKSAR v Hung Chan Wa</i> (2006) 9 H.K.C.F.A.R. 614	Dangerous Drugs Ordinance (Cap. 134)	Criminal Justice	S
<i>Tong Yiu Wah v HKSAR</i> (2007) 10 H.K.C.F.A.R. 324	Delegated Legislation	Agency Competence	F
<i>Secretary for Justice v Zigo Yau</i> (2007) 10 H.K.C.F.A.R. 335	Crimes Ordinance (Cap. 200)	Civil Rights	S
<i>Mo Yuk Ping v HKSAR</i> (2007) 10 H.K.C.F.A.R. 386	N/A (Common Law Offence of Conspiracy to Defraud)	Criminal Justice	N/A
<i>HKSAR v Ng Po On and another</i> (2008) 11 H.K.C.F.A.R. 91	Prevention of Bribery Ordinance (Cap. 201)	Criminal Justice	S
<i>Koon Wing Yee v Insider Dealing Tribunal and another</i> (2008) 11 H.K.C.F.A.R. 170	Securities (Insider Dealing) Ordinance (Cap. 395)	Agency Competence	S
<i>Yeung Chung Ming v Commissioner of Police</i> (2008) 11 H.K.C.F.A.R. 513	Police Force Ordinance (Cap. 232)	Agency Competence	S
<i>Lam Siu Po v Commissioner of Police</i> (2009) 12 H.K.C.F.A.R. 237	Delegated Legislation	Agency Competence	S
<i>Medical Council v Helen Chan</i> (2010) 13 H.K.C.F.A.R. 248	Agency Decision	Agency Competence	F
<i>Mok Charles Peter v Tam Wai Ho</i> (2010) 13 H.K.C.F.A.R. 762	Legislative Council Ordinance (Cap. 542)	Electoral Affairs	S
<i>Democratic Republic of the Congo and Others v FG Hemisphere Associates LLC</i> [2011] H.K.C.F.A. 42	N/A (Common Law Doctrine of Restrictive State Immunity)	Foreign Affairs	N/A
<i>The Catholic Diocese of Hong Kong v Secretary for Justice</i> [2011] H.K.C.F.A. 71	Education Ordinance (Cap. 279)	Educational Policy	F

S = Success or Partial Success      F = Failure      N/A = Non-applicable

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