

THE HONG KONG COURT OF FINAL APPEAL

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I THE COURT

The Hong Kong Court of Final Appeal ('CFA') is, as its very name suggests, the final court of appeal in the Hong Kong Special Administrative Region ('HKSAR'). The Region is an unalienable part of the People's Republic of China ('PRC').¹ The Court was established pursuant to the *Basic Law*, a constitution for Hong Kong, enacted as a statute of the National People's Congress ('NPC'), the 'highest organ of state power' in the PRC.² The Standing Committee of the NPC ('Standing Committee') is its permanent body. The *Joint Declaration*, the agreement between the United Kingdom and the PRC, which sets out the terms of China's resumption of the exercise of sovereignty over Hong Kong, provided for the handover in 1997 and the enactment of the *Basic Law*.³

The *Basic Law* maintains the judicial system which existed when Hong Kong was a British colony except for consequences arising from the establishment of the CFA. The handover terminated the final appeal from Hong Kong courts to the Privy Council. The jurisdiction formerly exercised by the Privy Council is, in a broad sense, now exercised by the CFA. The Court hears and determines appeals from the Court of Appeal (an intermediate appellate court) and the Court of First Instance which exercises both a civil and a criminal jurisdiction. The jurisdiction of the Court of First Instance is broadly similar to that of the Supreme Courts of the Australian States. Appeals lie as of right and by leave. Leave is granted (or refused) by the Court of Appeal or by the Appellate

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¹ *Basic Law of the Hong Kong Special Administrative Region* 29 ILM 1511, art 1 ('*Basic Law*'). Adopted by the National People's Congress on 4 April 1990.

² *Constitution of the People's Republic of China* art 57.

³ *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*, 19 December 1984, 23 ILM 1366 (entered into force 1 July 1997) ('*Joint Declaration*').

Committee of the CFA, which consists of three judges of the CFA. Leave is granted if, in the opinion of the Court granting leave, ‘the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court for decision’.⁴ Article 19 of the *Basic Law* expressly provides that the courts of the HKSAR have no jurisdiction over acts of state, such as defence and foreign affairs.

The *Basic Law* vests the power of final adjudication in the CFA (subject to art 158),⁵ which may invite judges from other common law jurisdictions to sit on the Court.⁶ The Court consists of four permanent judges (all of whom are permanent residents of Hong Kong), including Chief Justice Andrew Li. The Court sits as a bench of five judges, the fifth judge being drawn from a list of non-permanent Hong Kong judges or, more often, from the panel of foreign judges.⁷ The panel of foreign judges consists of myself and Sir Daryl Dawson (Australia), Lord Hoffmann, Lord Nicholls of Birkenhead and Lord Millett, (all currently serving Law Lords), Lord Cooke of Thorndon, Sir Edward Somers and Sir Thomas Eichelbaum (New Zealand).

The participation by foreign judges in the work of the CFA has recently been the subject of debate in the media. It has been suggested that foreign judges may not be familiar with conditions in Hong Kong. This suggestion has been countered by the Secretary for Justice, who sees the participation of foreign judges as a benefit for Hong Kong.⁸

The *Basic Law* sets up a legislature (the Legislative Council), a very powerful executive (which is not subject to the control of the Legislative Council) and a judiciary. The election of members of the Legislative Council is not fully based on the principle of all members being elected by universal and equal suffrage. The United Nations Human Rights Committee has made this point,⁹ suggesting that there has been a non-compliance with arts 2, 25 and 26 of the *International Covenant on Civil and Political Rights* (‘ICCPR’).¹⁰

The *Basic Law* contains guarantees of fundamental rights. Further, art 39 states:

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

⁴ *Hong Kong Court of Final Appeal Ordinance 1997* (Hong Kong) s 22(1)(b).

⁵ For a discussion of art 158, see below nn 13–15 and accompanying text.

⁶ *Basic Law* art 82.

⁷ *Hong Kong Court of Final Appeal Ordinance 1997* (Hong Kong) s 16. The section sets out the composition of the CFA. It provides for one foreign judge only to sit on a case.

⁸ See Cliff Buddle, ‘Judges Who “Drop in”’, *South China Morning Post* (Hong Kong, People’s Republic of China), 9 March 2001, 17.

⁹ See United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee (Hong Kong): China*, CCPR/C/79/Add.117 (1999).

¹⁰ Opened for signature 19 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976).

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

The *Basic Law* also contains provisions which protect judicial independence and maintain the basic procedures regulating due process (including trial by jury) previously applied in Hong Kong. The right to a fair trial without delay and the presumption of innocence are expressly guaranteed.¹¹ Judicial appointments are made by the Chief Executive on the recommendation of an independent commission composed of judges, legal practitioners and eminent persons from other sectors.¹² A judge may only be removed for the inability to discharge his or her duties, or for misbehaviour. Removal is carried out by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice and consisting of no fewer than three local judges.¹³

The Preamble to the *Basic Law* recites the PRC decision that upon China's resumption of the exercise of sovereignty over Hong Kong, the HKSAR would be established and that under the principle of 'one country, two systems', the socialist system and policies would not be practised in Hong Kong. Article 8 of the *Basic Law* provides:

The law previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administration Region.

The article preserves the common law, but in what state or condition is a matter that is yet to be explored in detail.

The judicial system in Hong Kong is substantially similar to the judicial system in common law jurisdictions like Australia, New Zealand and Canada. Sitting as a judge in the CFA is no different from sitting as a judge in the High Court of Australia, with the exception that the faces and the accents are different. Court procedures and the style of oral argument would be familiar to an Australian lawyer, although more use is made of written argument than is the case in the High Court of Australia.

Hong Kong counsel, including Senior Counsel, are mainly Chinese, though there are a number of English lawyers practising in Hong Kong. There is also a sprinkling of Australian and New Zealand counsel, of whom the leader would be Gerard McCoy SC, a New Zealander, who has appeared in some of the leading cases. Overseas counsel, who are invariably English, may secure ad hoc admission to appear in a particular case. As a result, I have heard argument presented by leading English counsel in a number of appeals, including taxation, intellectual property and constitutional cases. In some instances their presentation of argument has been very impressive. However, the best counsel in Hong Kong also maintain a very high standard.

¹¹ *Basic Law* art 87.

¹² *Basic Law* art 88.

¹³ *Basic Law* art 89.

II ARTICLE 158 AND QUESTIONS OF INTERPRETATION

Article 158 of the *Basic Law* marks the fundamental departure between the CFA and the judicial system of the HKSAR on the one hand, and their counterparts in other common law jurisdictions on the other. The article begins by vesting the power of interpretation of the *Basic Law* in the Standing Committee. The article then states that the Standing Committee shall authorise the courts of the HKSAR ‘to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region’. Then follows the third paragraph of the article which is in these terms:

The courts of the [HKSAR] may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the NPC through the [CFA] of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

Article 158 contains three novel elements when viewed from a common law perspective. First, the power of interpretation is vested not in the courts (Mainland or Hong Kong) but in the Standing Committee. Second, the article states that the Standing Committee ‘shall authorise’ the courts of the Region ‘to interpret on their own, in adjudicating cases, the provisions of this law which are within the limits of the autonomy of the Region’. The third paragraph authorises the courts also to ‘interpret other provisions of the Basic Law’. The latter authority is subject to an important limitation. If there is a need to interpret provisions of the *Basic Law* concerning affairs which are the responsibility of the Central Authorities or concerning the relationship between the Central Authorities and the HKSAR, the HKSAR courts, before delivering an unappealable judgment, shall seek an interpretation of the relevant provisions from the Standing Committee. Third, such an interpretation, when given, is binding on the courts.

Under art 158, the Standing Committee is obliged to consult the Committee on the *Basic Law* of the HKSAR before adopting an interpretation under art 158(3). This Committee comprises six Mainland members and six Hong Kong members. The Committee prepares a report for the Standing Committee. The proceedings of the Committee on the *Basic Law* are not public.

III CASE LAW

In *Ng Ka Ling v Director of Immigration*¹⁴ it was contended that provisions of the *Immigration (Amendment) (No 3) Ordinance 1997* (Hong Kong) ('the *Ordinance No 3*') were in conflict with art 24, which guarantees the right of abode in Hong Kong to those born outside Hong Kong to a parent who was a permanent resident of Hong Kong. It was argued that art 24 should be read down by reference to art 22, which requires that people entering Hong Kong from the Mainland have exit approval from the Mainland authorities. *Ordinance No 3* provided in effect that all persons (including those seeking to exercise a right of abode under the *Basic Law*) entering from the Mainland must have Mainland exit approval. Article 22 is within chapter II of the *Basic Law*, dealing with the relationship between the Central Authorities and the HKSAR, whereas art 24 appeared on its face to be a provision within the Region's autonomy.

Because art 22 is an excluded provision (in that it is withdrawn by art 158 from interpretation by the CFA), the question was whether it should be referred to the Standing Committee for interpretation. The Court declined to take this course on the ground that the predominant provision to be interpreted was art 24 and it was not excluded by art 158. The Court went on to hold that *Ordinance No 3* was invalid,¹⁵ a result which generated apprehensions in Hong Kong about the level of immigration from the Mainland to Hong Kong. These apprehensions were reinforced by the Court's decision in *Chan Kam Nga v Director of Immigration*¹⁶ that the restriction in the *Immigration (Amendment) (No 2) Ordinance (1997)* (Hong Kong) confining entry to permanent residents in category 3 of art 24 to those born of a parent who had the right of abode in Hong Kong at the time of birth was invalid.

Another question which arose in *Ng Ka Ling* was whether the NPC statute which established the Provisional Legislative Council (which had in turn enacted the *Immigration (Amendment) (No 2) Ordinance 1997* (Hong Kong)) was ultra vires the *Basic Law*. The Court held against ultra vires but, in so doing, upheld its capacity to declare invalid a NPC law which was inconsistent with the *Basic Law*. This aspect of the Court's judgment generated controversy and led to an application by the HKSAR Government for a clarification of the judgment.¹⁷

Concerned by the prospect that there might be a large number of immigrants from the Mainland exercising a right of abode, the HKSAR Government sought an interpretation from the Standing Committee overruling the Court's judgment except in its application to the cases in which judgment had been delivered. The

¹⁴ (1999) 2 HKCFAR 4 ('*Ng Ka Ling*').

¹⁵ The Court held that the Ordinance was unconstitutional to the extent that it requires the permanent resident to hold a one way permit before he or she can enjoy the right of abode.

¹⁶ (1999) 2 HKCFAR 82.

¹⁷ *Director of Immigration v Cheung Lai Wah* (1999) 2 HKCFAR 141.

Standing Committee issued an *Interpretation*,¹⁸ the effect of which was considered by the CFA in *Lau Kong Yong v Director of Immigration*.¹⁹

The *Interpretation* stated that the relevant words in art 22(4) mean:

People from all provinces, autonomous regions, or municipalities directly under the Central Government, including those persons of Chinese nationality born outside Hong Kong of Hong Kong permanent residents who wish to enter the [HKSAR] for whatever reason, must apply to the relevant authorities ... for approval in accordance with relevant national laws and administrative regulations and must hold valid documents issued by the relevant authorities before they can enter the [HKSAR].

The *Interpretation* continued by stating that category 3 in art 24(2) granted the right of abode to persons born of Chinese citizens in category 1 (being those born in Hong Kong) and category 2 (those who have ordinarily resided in Hong Kong for a continuous period of not less than 7 years) provided that the parent or grandparent fulfilled the relevant requirement at the time of birth of the person claiming to be in category 3. The *Interpretation* asserted that the legislative intent as stated together with the legislative intent relating to all other categories in art 24(2) had been reflected in the *Opinion on the Implementation of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*.²⁰ The *Interpretation* then instructed the courts of the HKSAR to adhere to the *Interpretation*.

Established pursuant to 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 Special Administration Region*,²¹ the Preparatory Committee came into being in 1996. On 10 August 1996, the Preparatory Committee issued a document entitled *Opinions of the Preparatory Committee for the Hong Kong Special Administration Region of the National People's Congress on the Implementation of Article 24(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*. This document was subsequently referred to in a Working Report submitted by the

¹⁸ *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 at the Tenth Session of the Ninth National People's Congress on 26 June 1999 <http://www.info.gov.hk/basic_law/fulltext/content0221.htm> at 18 May 2001 (copy on file with author) ('*Interpretation*').

¹⁹ (1997) 3 HKLRD 778 ('*Lau Kong Yong*').

²⁰ Adopted at the Fourth Plenary Meeting of the Preparatory Committee for the Hong Kong Special Administrative Region of the National People's Congress on 10 August 1996.

²¹ Adopted by the Third Session of the Seventh National People's Congress on 4 April 1990 (the *Basic Law* was adopted upon the same day). For the text of the decision, as well as of the *Basic Law* and other relevant documents, see Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd ed, 1999) 568–9.

Preparatory Committee to the NPC and was approved by the NPC in 1997. The Interpretation excited much discussion.²²

In *Lau Kong Yung* the CFA rejected an argument that the Standing Committee could only give an interpretation under art 158 on a judicial reference by the Court in connection with an excluded provision in the *Basic Law*. Li CJ pointed out that the power of interpretation originates in s 67(4) of the *Chinese Constitution*, and that it is conferred by art 158(1) in general and unqualified terms.²³ As I noted in that case, the *Basic Law* brings about a conjunction of a common law system under a national law within the larger framework of Chinese constitutional law and that is a fundamental aspect of the concept of 'one country, two systems'.²⁴

The *Interpretation* also indicated, in its preamble, that the Court should have referred the interpretation of art 22 in *Ng Ka Ling* to the Standing Committee. That view has been relied upon in another immigration case, *Chong Fung Yuen v Director of Immigration*, in which judgment has been reserved by the CFA. In that case, the HKSAR submitted that the Court should refer the interpretation of the art 24(2)(1) provision in the *Basic Law* to the Standing Committee. Article 24(2)(1) includes in the permanent residents of the HKSAR '(1) Chinese citizens born in Hong Kong before or after the establishment of the [HKSAR]'. The outcome in *Chong Fung Yuen v Director of Immigration* will be awaited with interest. In *Lau Kong Yung*, the Court referred to the possibility that it might revisit its approach to the reference issue in light of the view expressed in the preamble to the Standing Committee's *Interpretation*.

IV THE FUTURE

The reference mechanism, which stands at the interface of two legal systems, will undoubtedly generate a range of questions in the future. There is also the possibility that the Standing Committee will exercise its freestanding power of interpretation in relation to any provision of the *Basic Law*, even by way of overruling a judicial interpretation, though that may well be a highly exceptional step.

One point that should be made about the *Basic Law* cases in the CFA is that, although the HKSAR is a party, the PRC is not joined as a party. It was not a party in *Ng Ka Ling* where the validity of the NPC statute setting up the Legislative Council was under challenge. The explanation for this is no doubt to be found in Chinese constitutional law where a challenge to the validity of a law made by the highest organ of the state, at least in a provincial court, may well be unknown. Whatever the explanation may be, the intersection between the two legal systems is fraught with questions which have not been fully explored.

²² For a collection of primary sources and the range of views expressed, see Johannes Chan, H L Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (2000).

²³ *Lau Kong Yung* (1997) 3 HKLRD 778, 798.

²⁴ *Ibid* 820.

One difficulty is that we in the common law world regard interpretation and validity of statutes as matters for the courts. This is a fundamental element in the separation of powers and in the exercise of judicial power. In the PRC, however, interpretation of legislation, like legislation itself, is a function of the legislature or, more accurately, of the highest organ of the state through its permanent body, the Standing Committee. Other bodies, such as the Supreme People's Court (the highest court in the PRC) and the Procuratorate, also issue interpretations but these bodies do not have the authority of Standing Committee interpretations.

From the perspective of international human rights jurisprudence, the CFA's most significant decision has been the flag desecration case, *HKSAR v Ng Kung Siu*.²⁵ In that case, the Court upheld the validity of Hong Kong legislation making desecration of the national flag and the Hong Kong flag offences. In reaching that conclusion, the Court held that the legislation fell within the *ordre public* exception to the right of freedom of expression, which is guaranteed by art 19 of the *ICCPR* (art 39 of the *Basic Law* picks up the *ICCPR*).

Outside the *Basic Law*, the CFA deals with a wide range of cases. One case concerned enforcement by a Mainland company of an arbitration award against a Hong Kong company, the Mainland company having succeeded in a Mainland arbitration against the Hong Kong company. That gave rise to a number of questions because the procedures adopted by the China International Economic and Trade Arbitration Commission,²⁶ the Chinese arbitration authority, are rather different from those which we follow.²⁷

Hong Kong is a flourishing arbitration centre. The Hong Kong International Arbitration Centre has been very successful. In 1999 it handled 257 cases. An international arbitration in which I am engaged, one which involves a dispute between European, North American and Malaysian interests, is being processed under the auspices of the Centre.

The UK Secretary of State for Foreign and Commonwealth Affairs presents to the UK Parliament every six months a report on the implementation of the *Joint Declaration*. These reports²⁸ draw attention to matters which have generated controversy, such as the right of abode cases and the seeking of an interpretation by the HKSAR Government from the Standing Committee. They have continued to assert confidence in the integrity and independence of the judicial system and the maintenance of the rule of law in Hong Kong.

²⁵ [2000] 1 HKC 117.

²⁶ The Commission was established in April 1956 within the China Council for the Promotion of International Trade (originally as the Foreign Trade Arbitration Commission).

²⁷ For an illustration of these problems in a case in which enforcement was permitted, see *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111.

²⁸ See, eg, United Kingdom, Secretary of State for Foreign and Commonwealth Affairs, *Six-monthly Report on Hong Kong July-December 2000*, presented to the United Kingdom Parliament February 2001, Cm 5067, available at <<http://www.fco.gov.uk/news/keythemepage.asp?PageId=56>> at 17 May 2001 (copy on file with author).