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# David v. Goliath?: The Hong Kong Courts and China's National People's Congress Standing Committee

By  
Todd Schneider

Five years after China's assumption of sovereignty over Hong Kong, the uneasy mixing of Hong Kong's common law tradition with China's civil law system resembles nothing more than the old saying about oil and water. The best illustration may be the controversy surrounding what has been dubbed Hong Kong's first constitutional crisis,<sup>1</sup> the *Ng Ka Ling* case.<sup>2</sup> In *Ng Ka Ling*, Hong Kong's highest court, the Court of Final Appeal ("CFA"), issued a ruling concerning the right to abode in Hong Kong. The CFA took a generous view of who enjoyed this right, but, more importantly, it asserted a broad statutory interpretative power over both the Hong Kong Legislative Council and China's national legislature, the National People's Congress ("NPC"). Unhappy with the CFA's decision, the Hong Kong Chief Executive petitioned the National People's Congress Standing Committee ("NPCSC") in Beijing for its interpretation of the right to abode case. The NPCSC then reversed *Ng Ka Ling* and promulgated a narrowly drawn definition of this right.

This paper will explain how Hong Kong's constitutional framework, and particularly Article 158 of its Basic Law,<sup>3</sup> leads to conflicts, such as *Ng Ka Ling*, between the CFA and NPCSC, with the latter holding the stronger cards. Yet this paper questions many scholars' view that the NPCSC will always be triumphant in showdowns with the CFA. The *Ng Ka Ling* controversy and particularly its aftermath intimate that the Hong Kong courts' common law tradition may help them to evade the NPCSC's control as long as the NPCSC continues to assert its authority in its peculiarly Chinese civil law fashion. In other words, the Hong Kong judiciary will rely on a slingshot loaded with the common law to take aim at its Goliath, the NPCSC.

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1. See, e.g., Lin Feng, *The Constitutional Crisis in Hong Kong—Is It Over?*, 9 PAC. RIM L. & POL'Y J. 281 (2000).

2. *Ng Ka Ling v. Dir. of Immigration*, [1999] 1 H.K.C. 291 (C.F.A.), reprinted at 38 I.L.M. 551 (1999).

3. See Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Apr. 4, 1988, 29 I.L.M. 1519 (1990).

Ironically, to withstand this attack and to maintain effective authority over the Hong Kong courts, the NPCSC will need to change its rhetoric and approach to match that of its subordinate, the CFA. The central government does have other options for reining in judicial activism in Hong Kong, including appointment and removal of judges, amendment of the Basic Law, and in the worst case scenario, a show of force. Yet each of these responses would threaten the rule of law in Hong Kong, and thereby sharply diminish Hong Kong's attractiveness to foreign investors. By learning how to behave like a common law appellate court, though, the NPCSC would be well positioned to achieve the twin aims of protecting Hong Kong's prosperity and curbing the Hong Kong judiciary. Such a shift could also lead to an important collateral consequence, increased legitimization of the NPCSC.

## I. CHINESE CONSTITUTIONAL LAW

According to its Constitution, China is "a socialist state under the people's democratic dictatorship led by the working class and based on an alliance of workers and peasants."<sup>4</sup> The Constitution does not delimit any separation of powers, because socialist theory views this mechanism as a tool of the bourgeoisie.<sup>5</sup> China is also a unitary state,<sup>6</sup> which means that neither federalism nor a checklist of enumerated powers imposes any limitations on the central government.<sup>7</sup>

Under the Constitution, the NPC is the "highest organ of state power."<sup>8</sup> It enjoys legislative and executive powers,<sup>9</sup> including the capacity to choose the heads of the executive and judicial institutions.<sup>10</sup> It also elects the members of the NPCSC,<sup>11</sup> which is the permanent body of the NPC.<sup>12</sup> Because the NPC is so large (almost 3000 deputies)<sup>13</sup> and only meets for two weeks annually, its main role is to ratify bills proposed by other state organs.<sup>14</sup> The NPCSC, whose members total around 170,<sup>15</sup> actually passes most of China's laws.<sup>16</sup> Besides

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4. CHINA CONST. art. 1 (1982).

5. See YASH GHAI, *HONG KONG'S NEW CONSTITUTIONAL ORDER* 99 (2nd ed. 1997). The influence of this book's views on the Basic Law and the resulting relationship between China and Hong Kong should not be underestimated. Several court decisions have cited this work with approval. See *Lau Kong Yung v. Dir. of Immigration*, (CFA) [1999] 3 H.K.L.R.D. 778, 800 (Li, C.J.); *H.K.S.A.R. v. Ma Wai Kwan*, (C.A.) [1997] H.K.L.R.D. 761, 773.

6. See CHINA CONST. pmbi.

7. See GHAI, *supra* note 5, at 100.

8. CHINA CONST. art. 57.

9. See *id.* at art. 62.

10. See *id.* at art. 62, 79.

11. See *id.* at art. 65.

12. See *id.* at art. 57.

13. China's National People's Congress, at <http://asia.cnn.com/SPECIALS/2001/npccongress/> (last visited Apr. 7, 2002).

14. See GHAI, *supra* note 5, at 102.

15. See *id.* at 103.

16. See *id.* at 104. Technically, the NPC enacts "basic laws" and the NPCSC enacts only "laws." But the distinction is meaningless in practice, with the NPCSC legislating in every area. See *id.* at 101.

this role, the NPCSC's most significant function for the purposes of this article is its power to interpret the Constitution and statutes.<sup>17</sup>

The State Council, composed of a small number of executive officers, including the Premier, serves as both the highest organ of state administration and the primary source of legislative bills and statutes.<sup>18</sup> While China also has a judiciary, including a Supreme Court, Chinese courts cannot review legislation to ensure conformity with the Constitution.<sup>19</sup> Even when a subject is within the sphere of the courts, Communist Party officials often brazenly interfere with the judicial process.<sup>20</sup> Not only does the Party "guide" the outcome in individual cases, but it also "discharge[s] or transfer[s] judges who have decided cases contrary to Party dictates."<sup>21</sup> While the Chinese Supreme People's Court has occasionally overstepped the constitutional limitations on its powers, it has done so only in the interests of furthering Party policy.<sup>22</sup>

As the above suggests, "[t]he constitution seems to bear no relation to the actual government of China."<sup>23</sup> The Chinese Communist Party, and not the constitutional organs, is the true repository of power in China.<sup>24</sup> The Party controls the government through a parallel structure of Party bodies that direct their corresponding state institutions, e.g., the Party National Congress supervises the People's National Congress.<sup>25</sup> It also has the final say on who joins the NPC or NPCSC, because the Party must give its approval to any candidate for these two bodies.<sup>26</sup>

## II.

### HONG KONG CONSTITUTIONAL LAW

In 1984, China and Britain issued a Joint Declaration in which Britain agreed to hand over Hong Kong to China in 1997. China agreed to rule Hong Kong under the rubric of "one country, two systems," i.e., Communist China would allow Hong Kong to maintain its capitalist system for fifty years after the

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17. See CHINA CONST. art. 67.

18. See *id.* at arts. 85, 89; GHAI, *supra* note 5, at 106 (noting that the State Council proposes and drafts seventy percent of bills submitted to the NPC or NPCSC).

19. See ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 46 (1992).

20. See YuanYuan Shen, *Conceptions and Receptions of Legality: Understanding the Complexity of Law Reform in Modern China*, in THE LIMITS OF THE RULE OF LAW IN CHINA 20, 22 (Karen G. Turner et al. eds., 2000).

21. Margaret Y.K. Woo, *Law and Discretion in Contemporary Chinese Courts*, in THE LIMITS OF THE RULE OF LAW IN CHINA 163, 171 (Karen G. Turner et al. eds., 2000).

22. See NANPING LIU, OPINIONS OF THE SUPREME PEOPLE'S COURT: JUDICIAL INTERPRETATION IN CHINA 61-63 (1997).

23. William C. Jones, *The Constitution of the People's Republic of China*, in BASIC CONCEPTS OF CHINESE LAW 339, 342 (Tahirih V. Lee ed., 1997).

24. See *id.* at 342-43.

25. See GHAI, *supra* note 5, at 108.

26. See Murray Scot Tanner, *Organizations and Politics in China's Post-Mao Law-Lawmaking System*, in BASIC CONCEPTS OF CHINESE LAW 388, 395 (Tahirih V. Lee ed., 1997); GHAI, *supra* note 5, at 109-10.

transfer.<sup>27</sup> China also promised to issue a Basic Law to govern Hong Kong that was consistent with the Joint Declaration,<sup>28</sup> and the NPC adopted this Basic Law in 1990.<sup>29</sup>

Various observers have described the Basic Law as a constitution, a mini-constitution, and an ordinary national statute.<sup>30</sup> Under the Basic Law, Hong Kong maintains its pre-handover separation of powers among the three traditional branches of government. The Chief Executive is elected, but only by an 800-person Election Committee rather than through universal suffrage.<sup>31</sup> Elections for the Legislative Council are such that a small fraction of Hong Kong's population, around 230,000 people, vote for two-thirds of the seats and the general population votes for the rest.<sup>32</sup> As for the judiciary, the Chief Executive appoints judges after receiving recommendations from an "independent commission" of legal practitioners.<sup>33</sup> If the judge will serve on the CFA, the Chief Executive must also receive the Legislative Council's approval and then report the appointment to the NPCSC.<sup>34</sup>

The Basic Law also stipulates that Hong Kong "shall be vested with independent judicial power."<sup>35</sup> The courts are to adjudicate cases in accordance with the Basic Law, local laws, and the common law,<sup>36</sup> and the power of "final adjudication" rests with the CFA.<sup>37</sup> In fact, the Basic Law explicitly states that "the laws previously in force in Hong Kong, that is, the common law . . . shall be maintained."<sup>38</sup>

Hong Kong courts may not hear cases concerning "acts of state such as defense and foreign affairs."<sup>39</sup> Furthermore, under Article 158, "[t]he power of interpretation of [the Basic Law] shall be vested in the [NPCSC]."<sup>40</sup> However,

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27. See 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, Sept. 26, 1984, P.R.C. - U.K., 23 I.L.M. 1366, 1371-72 [hereinafter Joint Declaration].

28. *Id.* at 1372.

29. See Basic Law, *supra* note 3.

30. GHAI, *supra* note 5, at 137.

31. See Basic Law, *supra* note 3, at art. 45, Annex I.

32. See Legis. Council Ordinance, CAP 542 (Sept. 28, 1997); Michael C. Davis, *Constitutionalism Under Chinese Rule: Hong Kong After the Handover*, 27 DENV. J. INT'L L. & POL'Y 275, 283 (1999) (explaining the election law's implementation).

33. See Basic Law, *supra* note 3, at art. 88.

34. See *id.* at art. 90. The CFA has the authority to invite judges from other common law jurisdictions to sit on the CFA. See *id.* at art. 82.

35. *Id.* at art. 19.

36. See *id.* at art. 84.

37. See *id.* at art. 82. The CFA was a Basic Law innovation. Prior to the handover, Hong Kong's highest court had been the Judicial Committee of the Privy Council, which was part of the House of Lords. See John M. Rogers, *Anticipating Hong Kong's Constitution from a U.S. Legal Perspective*, 30 VAND. J. TRANSNAT'L L. 449, 462 (1997).

38. Basic Law, *supra* note 3, at art. 8.

39. *Id.* at art. 19. While under British rule, Hong Kong courts were similarly precluded by the acts of state doctrine from ruling on certain executive acts. See Donna Lee, *Discrepancy Between Theory and Reality: Hong Kong's Court of Final Appeal and the Acts of State Doctrine*, 35 COLUM. J. TRANSNAT'L L. 175 (1997). Lee claims that the Basic Law's act of state limitation has the potential to greatly restrain the Hong Kong judiciary's reach. *Id.*

40. Basic Law, *supra* note 3, at art. 158.

in this same article the NPCSC grants Hong Kong courts the power to interpret Basic Law provisions that “are within the limits of the autonomy of [Hong Kong].”<sup>41</sup> Article 158 then adds an extremely complicated caveat.

[I]f the courts of [Hong Kong] . . . need to interpret the provisions of [the Basic] Law concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and [Hong Kong], and if such interpretation will affect the judgments on the cases, the courts . . . shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the [NPCSC]. . . . When the [NPCSC] makes an interpretation of the provisions concerned, the courts . . . shall follow the interpretation. . . . However, judgments previously rendered shall not be affected.<sup>42</sup>

As will be discussed *infra*, this convoluted referral process was at the heart of the *Ng Ka Ling* controversy.<sup>43</sup>

### III. CONFLICTS IN CHINESE—HONG KONG CONSTITUTIONAL DISCOURSE

This brief overview hints at the most basic legal split between Hong Kong and China: their contrasting theories of what the law is. Hong Kong, developed under the British legal tradition, has prized the rule of law.<sup>44</sup> Under this approach, all laws should be open and clear, and an independent judiciary should have the power of judicial review.<sup>45</sup> Furthermore, the state itself is subject to the rule of law, so that “not only must all power of the public bodies forming the state stem from the law, or be established by law, but . . . this power is limited by law.”<sup>46</sup> In such a system, the constitution’s *raison d’être* is to limit the scope of the government’s authority so that each citizen’s autonomy is protected.<sup>47</sup>

But in China, rather than complying with the “law,” Chinese officials ensure that the law conforms to their policy choices.<sup>48</sup> “Policy in China is law. It

41. *Id.*

42. *Id.* Curiously, this provision allows Hong Kong’s lower courts to interpret all of the Basic Law but restricts the highest court, the CFA, because it alone issues nonappealable judgments. *See Ng Ka Ling*, *supra* note 2, at 565.

43. Although a full discussion is beyond the scope of this article, it is interesting to note that Macao, which was transferred from Portugal to China on December 20, 1999, has a Basic Law with many provisions similar to Hong Kong’s, including judicial independence and the right of final adjudication granted to Macao, the NPCSC authorized as the ultimate interpreter of the Basic Law, and the requirement that the Macao CFA make referrals to the NPCSC in certain situations. Basic Law of the Macao Special Administrative Region of the People’s Republic of China, arts. 2, 12 (promulgated Mar. 31, 1999); *see also* Judith R. Krebs, *Comment: One Country, Three Systems?: Judicial Review in Macau After Ng Ka Ling*, 10 PAC. RIM L. & POL’Y 111 (2000).

44. *Lee*, *supra* note 39, at 183.

45. *See* Joseph Raz, *The Rule of Law and Its Virtue*, 93 L.Q. REV. 195, 198-202 (1977).

46. *See* ALLAN R. BREWER-CARÍAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* 7 (D.F. Bur ed., Cambridge Univ. Press 1989).

47. *See* GHAI, *supra* note 5, at 83.

48. *See* Jones, *supra* note 23, at 345. One very relevant example of this tendency occurred during the drafting of the Basic Law when some legal experts expressed concern that it conflicted with the constitution—e.g., the Basic Law prohibits socialism for fifty years (art. 5) while the constitution mandates socialism (art. 1)—and suggested that the constitution be amended to ensure the

does not merely influence law.”<sup>49</sup> Chinese theories of the law derive from Marxist philosophy, which views law as a tool of the ruling class for perpetuating its hold on power. “The only real law is dialectical materialism[,]” so the Chinese leadership is justified in whatever it does as long as these acts promote “the ultimate goal of communism.”<sup>50</sup> As for the constitution, socialist theory attacks bourgeois (read “Western”) constitutions for their class oppression and domination. Constitutions only need to provide the legal foundation for the dictatorship of the proletariat, and thus the Chinese Constitution does not bother establishing an independent judiciary.<sup>51</sup>

As if this meta-difference was not enough, China and Hong Kong also diverge in the practice of the law. Because of Britain’s 150-year rule over Hong Kong, the former colony uses the common law, while China relies on civil law.<sup>52</sup> Thus, in China, the legislature interprets the law with the courts merely enforcing the law,<sup>53</sup> while in Hong Kong, the courts are legal interpreters.<sup>54</sup> The Basic Law seems to combine these two approaches, with the NPCSC and the Hong Kong courts both given the power to interpret Hong Kong law.<sup>55</sup> Yet when the NPCSC “interprets” the law, it may “either clarify the meaning of the law or extend it, thus negating the distinction . . . between interpretation and law making.”<sup>56</sup> The Hong Kong judiciary, on the other hand, relies on the common law. Such a huge difference in style is, as one scholar has understated, “unlikely to promote harmony of interpretation.”<sup>57</sup>

Beyond the law, Hong Kong and China have vastly dissimilar conceptual frameworks in other arenas, most notably economic theory and sovereignty. While the economic clash between these two is beyond the scope of this article, each unit’s view of autonomy vis-à-vis sovereignty is of paramount importance. China’s obsession with sovereignty stems from its recent history. During the 19th and 20th centuries, Western powers, and later Japan, carved up China into imperial outposts, challenging the authority of the central government. During the early 20th century, Chinese warlords operating from regional power bases exacerbated internal divisions and further weakened centralized rule.<sup>58</sup> Today,

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Basic Law’s validity. Instead, the NPC just issued a proclamation that the Basic Law was constitutional. See GHAI, *supra* note 5, at 177.

49. Jones, *supra* note 23, at 345 (emphasis in original).

50. *Id.* at 346.

51. See GHAI, *supra* note 5, at 84-85.

52. Lee, *supra* note 39, at 177.

53. See Guiguo Wang and Priscilla M.F. Leung, *One Country, Two Systems: Theory into Practice*, 7 PAC. RIM L. & POL’Y 279, 301 (1998).

54. PETER WESLEY-SMITH, AN INTRODUCTION TO THE HONG KONG LEGAL SYSTEM 13 (3rd ed. 1988). Many observers posit that civil law courts, like their common law brethren, interpret the law to some extent. Indeed, the Chinese Supreme Court is explicitly authorized to make judicial interpretations that bind lower courts. See Resolution of the Standing Committee of the National People’s Congress on Providing an Improved Interpretation of the Law, June 10, 1981. However, China is one of the few countries where the legislature itself explicitly interprets the laws. See Feng, *supra* note 1, at 302.

55. See Basic Law, *supra* note 3, at art. 158.

56. GHAI, *supra* note 5, at 203.

57. See *id.* at 138.

58. See *id.* at 113.

the Chinese view sovereignty as a source of unity and strength,<sup>59</sup> and have described it as “supreme, unlimited, illimitable.”<sup>60</sup> Given this backdrop, it is unsurprising that Beijing has disregarded and even crushed expressions of autonomy that contradicted the Communist Party, even when the central government itself had previously granted the region a measure of autonomy.<sup>61</sup> Meanwhile, Hong Kong is equally obsessed with its autonomy, especially for its market economy. Recall the Basic Law’s guarantee that Hong Kong will be capitalist for at least 50 years.<sup>62</sup> During the years between the signing of the Joint Declaration and the transfer of power, though, Hong Kong citizens began to fear for their liberty and rights as well, especially in light of the Tiananmen Square massacre.<sup>63</sup>

The very basis of the Hong Kong-China relationship, the “One Country, Two Systems” formula, reflects a schizophrenia over sovereignty and autonomy. The first half is an assertion of Chinese sovereignty, while the latter expresses Hong Kong’s autonomy. The Basic Law reflects this irreconcilable split too. One provision, Article 2, states that Hong Kong enjoys “a high degree of autonomy,” but adds that the NPC grants Hong Kong this authority.<sup>64</sup> Thus, Chinese sovereignty and Hong Kong autonomy are at loggerheads within the same constitutional clause.<sup>65</sup>

#### IV.

##### THE NG KA LING CASE AND THE INTERPRETATION

Because there are so many potential flash points, it should come as no shock that within the first month of China’s resumption of sovereignty, litigants sought to clarify China’s authority over Hong Kong. In *H.K.S.A.R. [Hong Kong Special Administrative Region] v. Ma Wai Kwan*, a criminal case alleging conspiracy, the defendants argued that the ordinance they were charged with violating was invalid, because the Provisional Legislative Council (“PLC”) that had enacted the ordinance was illegal.<sup>66</sup> This claim was based on the fact that China, unhappy with the last Hong Kong legislative election under British rule in 1995, had replaced that legislature with an appointed Provisional Legislative Council that took office on July 1, 1997, the date of the handover.<sup>67</sup> China claimed that the British Legislative Council violated the Basic Law and thus

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59. See *id.* at 41.

60. Heng Loong Cheung, Comment, *Hong Kong SAR: Autonomy Within Integration?*, 4 UCLA J. INT’L L. & FOREIGN AFF. 181, 184 (1999).

61. See GHAI, *supra* note 5, at 116.

62. Basic Law, *supra* note 3, art. 5.

63. See Davis, *supra* note 32, at 303 n.151.

64. Basic Law, *supra* note 3, art. 2.

65. See GHAI, *supra* note 5, at 145.

66. [1997] H.K.L.R.D. 761, 763 (C.A.).

67. See Davis, *supra* note 32, at 282. The Provisional Legislative Council served for a year, until Hong Kong’s first elected Legislative Council took office. As for China’s unhappiness with the 1995 legislature, it stemmed from both Britain’s broadening of the franchise and the election of certain democratic legislators. See *id.* at 280-82.

empowered it to appoint the PLC.<sup>68</sup> Yet the PLC “appeared to clearly violate the NPC transition legislation’s specific electoral requirements” as well as the Basic Law and Joint Declaration’s requirements that the Hong Kong legislature be an elected body.<sup>69</sup> The Court of Appeal (Hong Kong’s intermediate appellate court) managed to decide *Ma Wai Kwan* on other grounds. But in dicta, it added that the Court could not reach the issue of the PLC’s illegality, because “regional courts have no jurisdiction to query the validity of any legislation or acts passed by the sovereign [i.e., the NPC].”<sup>70</sup>

The defendants did not appeal this decision.<sup>71</sup> As a result, it was not until a year and a half later that the CFA reached this same issue, and related topics, in the celebrated case *Ng Ka Ling*.<sup>72</sup> Several illegal immigrants had filed suit in *Ng Ka Ling*, claiming a violation of their constitutional right to abode as laid out in Article 24 of the Basic Law.<sup>73</sup> They alleged that two ordinances, passed by the PLC just ten days after the handover impermissibly infringed on this right by imposing additional requirements on immigrants applying for permanent residency.<sup>74</sup> The Court of First Instance (the trial court) and the Court of Appeal both held that the broader restriction on the plaintiffs’ rights was constitutional, but that the other, narrower one was not.<sup>75</sup> However, when the CFA accepted the appeal, these issues became subsumed under the preliminary question of whether the CFA had jurisdiction of the *Ng Ka Ling* appeal or whether Article 158 required it to seek an interpretation from the NPCSC.

Before examining the CFA’s treatment of Article 158, it should be pointed out that, unlike some other “foundational” cases,<sup>76</sup> *Ng Ka Ling* involved a claim that would affect the status of hundreds of thousands, if not millions, of people.<sup>77</sup> The case also implicated “the central concept in the Basic Law[,] the

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68. See Rogers, *supra* note 37, at 488.

69. Davis, *supra* note 32, at 282; see also Joint Declaration, *supra* note 27, at Annex I, 1373; Basic Law, *supra* note 3, at art. 68; 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 Administrative Region, Apr. 4, 1990.

70. *Ma Wai Kwan*, *supra* note 5, at 780-81 (Chan, C.J.). However, the Court did claim the power to “examine the existence . . . of the acts of the sovereign or its delegate.” *Id.* at 781. It thus explored the history of the Provisional Legislative Council’s establishment and concluded that the NPC, through its Preparatory Committee on Hong Kong, had indeed established the Council. See *id.* at 784-86.

71. See Charlotte Parsons, *Challenge To Body Dropped*, S. CHINA MORNING POST, Aug. 29, 1997, at 6. No explanation was given for this decision. See *id.*

72. See *Ng Ka Ling*, *supra* note 2.

73. See Basic Law, *supra* note 3, at art. 24.

74. See Immigration (Amendment) (No. 2) Ordinance, No. 122 of 1997 (adopted July 1, 1997); Immigration (Amendment) (No. 3) Ordinance, No. 124 of 1997 (adopted July 10, 1997). The No. 2 Ordinance said that only children born in wedlock were eligible for the right to abode; the No. 3 Ordinance required that people applying for permanent residency have a valid travel document and a certificate of entitlement. The authorities then restricted entry even further by requiring Chinese applicants to apply for certificates of entitlement in their home district, see Government HKSAR Gazette Extraordinary 67-70 (1997), which in effect meant that China could impose a quota on immigration to Hong Kong.

75. See *Ng Ka Ling*, *supra* note 2, at 560-61.

76. See, e.g., *Marbury v. Madison*, 5 U.S. 137 (1803) (concerning the appointment of a D.C. magistrate).

77. See *infra* note 99 and accompanying text.

right to abode,”<sup>78</sup> whose importance stemmed from the fact that citizenship and residency were seen as crucial for maintaining Hong Kong’s separateness within the context of “One Country Two Systems.”<sup>79</sup> Thus, in *Ng Ka Ling*, the CFA had to answer two critically important questions of self-definition: 1) who was a Hong Kong resident, and 2) what institution decided who was a Hong Kong resident?

The CFA ended up taking an expansive view of the right of abode, and consequently struck down all of the restrictions as unconstitutional.<sup>80</sup> However, before it could do so, the Court had to clear the nasty hurdle of Article 158. Rather than leaping over it directly, the CFA decided to resolve two other issues beforehand. First, it addressed the constitutional jurisdiction of the Hong Kong courts. Unsurprisingly, it concluded that it could judicially review acts of the Hong Kong legislative and executive branches.<sup>81</sup> Indeed “this jurisdiction is a matter of obligation[.]”<sup>82</sup> Next, the CFA asserted something rather more remarkable: all Hong Kong courts had the authority to review acts of the NPC and the NPCSC to ensure that they complied with the Basic Law.<sup>83</sup> Thus, the CFA ruled contrary to the Court of Appeal’s dicta in *Ma Wai Kwan*.<sup>84</sup> The CFA next pondered how it should interpret the Basic Law. It elected to take a “purposive approach,” which meant that “in ascertaining the true meaning of the [Basic Law], the courts must consider the purpose of the [Basic Law] . . . as well as the language of its text in the light of the context.”<sup>85</sup> Courts should give “a generous interpretation” to the Basic Law’s fundamental rights and freedoms, including the right to abode as stipulated in Article 24.<sup>86</sup>

The disposition of these two court-initiated issues laid the theoretical framework for striking down the immigration restrictions. But they also assisted the CFA in overcoming the impediment of Article 158. Finally reaching the referral issue, the Court announced a two-part test for determining when it must seek an NPCSC interpretation:

The Classification Condition: Is the Basic Law provision in question an Article 158 excluded provision?

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78. GHAI, *supra* note 5, at 161.

79. *Id.* at 138. As further evidence of its prominence, note that the right to abode is the first, and most extensive, of the rights laid out in the Basic Law’s Chapter on fundamental rights and duties. See Basic Law, *supra* note 3, at art. 24. The *Ng Ka Ling* Justices also frequently refer to the importance of this right. See, e.g., *Ng Ka Ling*, *supra* note 2, at 568 (“The right to abode is . . . a core right . . . [because] without it and the right to enter which is an essential element, the rights and freedoms guaranteed [by the Basic Law] can hardly be enjoyed. . .”).

80. See *Ng Ka Ling*, *supra* note 2, at 567-76.

81. See *id.* at 562.

82. See *id.*

83. *Id.*

84. It also ignored the fact, strenuously argued by the government, that Hong Kong courts could not have reviewed acts of the British Parliament before the handover. See *id.* at 563. The CFA distinguished that history by arguing that while the Basic Law imported “legal . . . principles previously in force in Hong Kong,” see Basic Law, *supra* note 3, at art. 19, it did not “bring to the new order restrictions only relevant to legislation of . . . Parliament imposed under the old order.” *Ng Ka Ling*, *supra* note 2, at 562.

85. *Id.* at 564.

86. *Id.*

The Necessity Condition: If so, must the CFA interpret this provision to decide the case?<sup>87</sup>

The Court then proclaimed, "In our view, it is for the [CFA] and for it alone to decide, in adjudicating a case, whether both conditions are satisfied."<sup>88</sup> Although the Justices were silent as to why this should be the case, two justifications may be hypothesized. First, the wheels of justice would slow down unnecessarily in some cases, i.e., those that were referred to the NPCSC but that the NPCSC decided did not merit its interpretation. However, the more important reason was that an expedited referral process would be a cession of power and an eroding of the Hong Kong courts' autonomy. Given the influence of Beijing on the other two branches,<sup>89</sup> the Hong Kong judiciary had a heightened role in the struggle for regional autonomy. The *Ng Ka Ling* Court was keenly aware of this duty, and it pointed several times to language in the Basic Law that "emphasize[d] the high degree of autonomy of [Hong Kong] and the independence of its courts."<sup>90</sup>

To ensure its autonomy, the Court then clarified the first part of its referral test, the classification condition. The parties in *Ng Ka Ling* disagreed as to whether an Article 158 excluded provision was at issue in the case. Article 24 of the Basic Law, which the plaintiffs relied upon for their right to abode claim, was considered to be within the limits of Hong Kong's autonomy. However, Article 22 said that "people from other parts of China must apply for approval" before they could enter Hong Kong.<sup>91</sup> Both parties agreed that this provision, which had the potential to circumscribe Article 24's right to abode, involved the central government and thus implicated Article 158's referral process. The Director of Immigration argued that in a case where an excluded provision (Article 22) was relevant to a non-excluded provision (Article 24), the CFA was obligated to seek an NPCSC interpretation.<sup>92</sup> But the CFA chose the plaintiff's test instead: a referral must be made only when an excluded provision is the *predominant* provision to be interpreted in a case.<sup>93</sup> The Justices then decided that Article 22 was a relevant, but not predominant, provision for deciding *Ng Ka Ling*, so no referral was required.<sup>94</sup>

As with its initial consideration of Article 158, the CFA viewed the classification condition through the lens of Hong Kong autonomy. To the Court, the judiciary's interpretation of non-excluded provisions was "an essential part of [Hong Kong's] high degree of autonomy."<sup>95</sup> Any scheme that moved these pro-

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87. *Id.* at 565-66.

88. *Id.* at 566.

89. *See supra* notes 31-32 and accompanying text.

90. *Ng Ka Ling*, *supra* note 2, at 564.

91. *See Basic Law*, *supra* note 3, at art. 22.

92. *See Ng Ka Ling*, *supra* note 2, at 567.

93. *See id.* at 567.

94. *See id.* at 567-68. As for the relationship between Articles 22 and 24, the CFA held that Article 22 only applied to people from China who did not enjoy the right to abode, and that its entry requirements could not apply to someone who already enjoyed permanent residency under Article 24. *See id.* at 568-69.

95. *Id.* at 567.

visions within the NPCSC's purview would be "a substantial derogation from" Hong Kong's autonomy.<sup>96</sup> The Court also justified its classification test by making a "purposive interpretation" of Article 158. It claimed that the predominant provision requirement better fulfilled Article 158's goal of vesting interpretation in the NPCSC and authorizing Hong Kong courts to interpret non-excluded provisions.<sup>97</sup> What the Court did not openly state was that once again it had adopted a test that would severely restrict the number of cases to be referred to the NPCSC. It is also noteworthy how the CFA had previously laid the groundwork so that the "purposive approach," a common law theory, could be applied to Article 158. Thus, at the Basic Law's focal point for imposing the Chinese civil law split between adjudication and interpretation, the CFA in *Ng Ka Ling* relied on the common law to try to eliminate the gap.

After the Court handed down *Ng Ka Ling*, the immediate uproar in Hong Kong focused on the immigration issue. The Hong Kong government announced that the decision, along with another CFA case decided the same day,<sup>98</sup> would open Hong Kong to a flood of 1.6 million immigrants.<sup>99</sup> Although some argued that these numbers were inflated,<sup>100</sup> the government's pronouncements influenced public opinion against the CFA.<sup>101</sup> Simultaneously, a mainland official as well as Chinese legal experts lambasted the CFA's ruling in *Ng Ka Ling*.<sup>102</sup> Many saw the central government standing behind these scholars' attack.<sup>103</sup>

The Director of Immigration fueled the controversy further by requesting that the CFA "clarify" its decision in *Ng Ka Ling*.<sup>104</sup> The CFA reluctantly agreed to do so and justified its reopening of *Ng Ka Ling* by referring to the extraordinary nature of the case.<sup>105</sup> In a brief, two-page opinion, the Court announced that it had never questioned the NPCSC's authority to make an Article 158 interpretation,<sup>106</sup> "[n]or did the Court's judgment question . . . the authority of the [NPC or NPCSC] to do any act which is in accordance with the provisions of the Basic Law."<sup>107</sup> But by ignoring the issue of whether the CFA had the authority to review acts of the NPC or the NPCSC, the clarification clarified

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96. *Id.*

97. *Id.*

98. See *Chan Kam Nga v. Director of Immigration*, [1999] 1 H.K.L.R.D. 304 (C.F.A.).

99. Maria Loventime U. Estanislao, Note, *Right of Final Adjudication in Hong Kong: Establishing Procedures of Constitutional Interpretation*, 1 ASIAN-PAC. L. & POL'Y J. 10, 16 (2000).

100. See *One Law, Two Systems? What the NPC's Reinterpretation Means*, ASIA WK., July 9, 1999, available at 1999 WL 7759372.

101. In one survey of Hong Kong residents, nearly eighty-four percent opposed the results in the immigration cases. See Frank Ching, *Scare Tactics*, FAR E. ECON. REV., May 13, 1999, at 8.

102. Mark O'Neill, *Beijing Says Abode Ruling Was Wrong and Should Be Changed*, S. CHINA MORNING POST, Feb. 1, 1999, at 1.

103. Johannes Chan, *Judicial Independence: Controversies on the Constitutional Jurisdiction of the Court of Final Appeal of the Hong Kong Special Administrative Region*, 33 INT'L L. 1015 (1999).

104. See *Ng Ka Ling v. Director of Immigration (No. 2)*, [1999] 1 H.K.L.R.D. 577 (C.F.A.) [hereinafter *Ng Ka Ling (2)*].

105. See *id.* at 578.

106. See *id.*

107. See *id.*

very little. It did provoke the Chief Executive to take an even more controversial step—to seek an interpretation from the NPCSC on the two right to abode cases.<sup>108</sup> Many in Hong Kong questioned whether the Chief Executive had the authority to make such a referral, and many more feared the chilling effect that would result from the Hong Kong government's seeking an NPCSC interpretation whenever it was unhappy with a CFA decision.<sup>109</sup> They also criticized the local government for not taking the more time-consuming but more legitimate approach of overturning the CFA's decision through amendment of the Basic Law.<sup>110</sup>

Nevertheless, the Chief Executive asked for and received an NPCSC interpretation,<sup>111</sup> which stated that the CFA had erred in not making a referral, because the Basic Law provisions at issue in the right to abode cases were excluded ones. Even worse, the CFA's interpretation was wrong because it was "not consistent with the legislative intent."<sup>112</sup> The NPCSC interpreted Articles 22 and 24 as containing a narrowly drawn right to abode, which overruled *Ng Ka Ling*. It also notified Hong Kong courts that they should adhere to the Interpretation in future cases concerning these provisions.<sup>113</sup> Additionally, in an Explanatory Note, the NPCSC stated that the CFA's decision threatened the "stability and prosperity of Hong Kong" because it would allow in too many immigrants. Consequently, Articles 22 and 24 had to be interpreted to prevent such an outcome.<sup>114</sup>

## V.

### LOADING THE SLINGSHOT

Unsurprisingly, many Hong Kong observers have concluded that the *Ng Ka Ling* episode weakened the Hong Kong courts and eroded the region's autonomy.<sup>115</sup> They have also predicted that the controversy would chill the Hong Kong courts' activism. As proof, they cite the subsequent case *H.K.S.A.R. v. Ng Kung Siu*.<sup>116</sup> In that case, the CFA unanimously upheld the convictions of pro-democracy protesters who had violated two flag desecration ordinances. Indeed,

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108. See *One Law, Two Systems*, *supra* note 100.

109. See Estanislao, *supra* note 99, at 19.

110. See Feng, *supra* note 1, at 299-300.

111. See 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 June 26, 1999).

112. *Id.*

113. *Id.*

114. See Qiao Xiaoyang, Explanatory Note on "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 (Draft)," June 22, 1999.

115. See, e.g., *Rewriting the Basic Law*, ASIAN WALL ST. J., Jan. 23, 2001, at 6. But see Tahiri V. Lee, "Après Moi Le Déluge?" *Judicial Review in Hong Kong Since Britain Relinquished Sovereignty*, 11 IND. INT'L & COMP. L. REV. 310 (2001) (arguing that post-Interpretation Hong Kong courts still retain a significant degree of authority through their power to declare statutes unconstitutional).

116. See [1999] 3 H.K.L.R.D. 907 (C.F.A.).

the same Chief Justice who had penned those mighty words in *Ng Ka Ling* about the judiciary's obligation to protect basic rights took quite a different tack in *Ng Kung Siu*. There he found that the need for public order outweighed an individual's free speech right. Most striking were the Chief Justice's concluding remarks:

Hong Kong is at the early stage of the new order following resumption of the exercise of sovereignty by . . . China. The implementation of 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.<sup>117</sup>

Gone are the references to an independent judiciary. Gone are the invocations to autonomy. In their place is a newly found concern with "national unity and territorial integrity," which are concepts drawn straight from the Basic Law's Preamble.<sup>118</sup>

Yet, as disheartening as *Ng Kung Siu* must have been for proponents of judicial activism in Hong Kong, it still represents only one piece of the Hong Kong court's jurisprudence. A closer examination of *Ng Ka Ling* and the Interpretation, as well as several subsequent right to abode cases, casts a different light on the Hong Kong judiciary.

The Interpretation and its hidden weaknesses should be our starting point. For example, it was silent regarding the CFA's adoption of a "purposive" approach to the Basic Law.<sup>119</sup> More significantly, the Interpretation left undisturbed the CFA's conclusions in *Ng Ka Ling* on constitutional jurisdiction. This silence is somewhat surprising in light of the vehement attacks by Chinese legal scholars and government officials and their call for "rectification" of this issue.<sup>120</sup> Nevertheless, the CFA still has the potential to declare NPC or NPCSC acts in violation of the Basic Law. Certainly, any use of this authority would present a fundamental anomaly in that a Chinese *regional* court would be asserting a power over the NPC and NPCSC that Chinese national courts do not possess, not even the Chinese Supreme People's Court. Moreover, if the CFA really tried to do so, the NPCSC would almost certainly issue an interpretation under its Article 158 general interpretive power that denied the CFA any authority over national organs.

Yet even issuing such an interpretation would not guarantee that it spoke with the effect intended by its drafters. As evidence of this phenomenon, one need look no further than *Lau Kong Yung v. Director of Immigration*, in which a group of illegal immigrant plaintiffs questioned both the legality and the applicability of the Interpretation.<sup>121</sup> In *Lau Kong Yung*, decided six months after the Interpretation, the CFA held that the Interpretation was binding on Hong Kong

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117. *Id.* at 926 (Li, C.J.).

118. See Basic Law, *supra* note 3, pmb1.

119. But see Feng, *supra* note 1, at 312 (arguing that the NPCSC implicitly offered a contrasting interpretive approach, that of original legislative intent).

120. See Davis, *supra* note 32, at 292-93.

121. [1999] 3 H.K.L.R.D. 778 (C.F.A.).

courts and that it had taken effect on July 1, 1997, i.e., the date the immigration ordinances came into effect.<sup>122</sup> But then the Court took an unexpected turn: it announced that Section 1(2) of the No. 3 Ordinance was still unconstitutional. (Under this section, the No. 3 Ordinance was deemed to have taken effect on July 1, 1997, even though the ordinance was not enacted until July 10, 1997.<sup>123</sup>) Chief Justice Li noted that *Ng Ka Ling* had found Section 1(2) to be unconstitutional for two separate reasons. First, the section impermissibly infringed on Article 24's right to abode. Second, Section 1(2) violated Article 15(1) of the International Covenant on Civil and Political Rights ["ICCPR"], as applied to Hong Kong through Article 39 of the Basic Law because it punished somebody for an offense that was not criminal at the time the person acted.<sup>124</sup> The subsequent Interpretation had eliminated the first basis of unconstitutionality, but it had been silent as to the second. Accordingly, the CFA announced, "This ground is not affected by the Interpretation. . . . [and thus] the retrospective provision in s.1(2) . . . remains invalid."<sup>125</sup>

In one sense, the holding in *Lau Kong Yung* was a minor step in defense of the right to abode. Despite having enacted the No. 3 Ordinance on July 10, 1997, the Provisional Legislative Council had included a provision that made the Ordinance operational from July 1, 1997.<sup>126</sup> The CFA's date switch thus protected a very small number of immigrants (those arriving between July 1 and 10) from the Ordinance's more extensive requirements.<sup>127</sup> But for the Hong Kong courts, it signaled far more. From now on, unless an Interpretation spoke directly to each part of a referred CFA decision, the CFA would assume that the points not addressed were still good law. For the courts, this was merely an application of the common law's ancient mandate rule, namely that a higher authority's silence on an issue signifies acceptance of the lower court's ruling.<sup>128</sup> However, given the Chinese civil law tradition, it is highly unlikely that the NPCSC understood this rule of the game before it issued its Interpretation. Even one of the opinions in *Lau Kong Yung*, while not referring to the mandate rule, discussed what the NPCSC had been trying to do. "In making [the Interpretation], the [NPCSC] did not purport to act, and has never purported to act, as a court. . . . It was doing exactly what it said it was doing, namely interpreting

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122. See *Lau Kong Yung*, *supra* note 5, at 802-03 (Li, C.J.).

123. *Id.* at 803.

124. See *id.* at 803 (Li, C.J.). Article 39 of the Basic Law states, "The provisions of the International Covenant on Civil and Political Rights . . . shall remain in force and shall be implemented through the laws of [Hong Kong]." Article 15(1) of the ICCPR states in part, "No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offence, under national or international law."

125. *Lau Kong Yung*, *supra* note 5, at 803 (Li, C.J.).

126. See *Ng Ka Ling*, *supra* note 2, at 571.

127. However, the inapplicability of the No. 3 Ordinance to this small group did not necessarily mean that no immigration restrictions applied to them. Article 22 of the Basic Law still required that these immigrants receive their local government's approval before they could properly enter Hong Kong. *Ng Siu Tung v. Dir. of Immigration*, [2000] H.K.E.C. 1325 (C.A.) (Keith, J.).

128. See, e.g., 18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4478 (2001).

the law.”<sup>129</sup> Given its own frank acknowledgment of the NPCSC’s capabilities, the CFA appears somewhat disingenuous in grafting the common law mandate rule onto its relationship with the civil-law trained NPCSC.<sup>130</sup> It seems obvious that in *Lau Kong Yung* the CFA was not as concerned with the particularities of the law of the case doctrine as it was with fashioning a mechanism for resisting the NPCSC’s authority.

*Lau Kong Yung* also revealed another of the Interpretation’s inadequacies: its complete failure to touch upon the CFA’s test for when an Article 158 referral is required. Chief Justice Li noted that after the Interpretation, “the Court may need to re-visit the classification and necessity conditions and the predominant test in an appropriate case.”<sup>131</sup> However, he and the Court were content to leave it at that, rather than formulating a new test. Once again, the CFA relied upon NPCSC silence to maintain the Hong Kong judiciary’s autonomy.

However, *Lau Kong Yung* did contain an important acknowledgment by the CFA regarding the NPCSC’s power over the Basic Law and the Hong Kong courts. After discussing Article 158 at great length, Justice Mason concluded that the NPCSC had the general power of interpreting the Basic Law, i.e., it could do so on its own initiative.<sup>132</sup> In other words, the NPCSC would not be forced to wait for referrals from Hong Kong institutions before it could make its opinion known.

Despite this admission of the NPCSC’s plenary power, the more important message from *Lau Kong Yung* was the CFA’s willingness to avoid the Interpretation’s strictures. Subsequently, in July 2001, the CFA once again demonstrated its post-Interpretation streak of independence in the twin cases of *Chong Fung-Yuen v. Director of Immigration*<sup>133</sup> and *Tam Nga Yin et al. v. Director of Immigration*.<sup>134</sup> In both cases, which were handed down on the same day, the CFA explored the right to abode as applied to Hong Kong children. In *Chong Fung-Yuen*, the plaintiff, who was born in Hong Kong while his parents were traveling there, claimed the right to abode under Article 24(2)(1): “The permanent residents of . . . Hong Kong . . . shall be . . . Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region.”<sup>135</sup> The Legislative Council had passed an ordinance, though, limiting the scope of this right to children born in Hong Kong to permanent residents.<sup>136</sup>

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129. *Lau Kong Yung*, *supra* note 5, at 817 (Ching, J.).

130. Furthermore, applying this rule within *Lau Kong Yung* results in inconsistency. Earlier, the Court had held, “As a result of the Interpretation, the original scheme [i.e., the No. 3 Ordinance and the Director of Immigration’s Notice] is and has since 1 July 1997 been constitutional.” *Lau Kong Yung*, *supra* note 5, at 802 (Li, C.J.). Yet, the CFA also holds Section 1(2) unconstitutional and claims that the No. 3 Ordinance took effect on July 10, 1997.

131. *Lau Kong Yung*, *supra* note 5, at 800 (Li, C.J.).

132. *See id.* at 821 (Mason, J.).

133. *See* FACV 26/2000 (C.F.A. July 20, 2001), at [http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv\\_26\\_00.htm](http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_26_00.htm).

134. *See* FACVs 20 & 21/2000 (C.F.A. July 20, 2001), at [http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv\\_20\\_21\\_00.htm](http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_20_21_00.htm).

135. Basic Law, *supra* note 3, at art. 24(2)(1).

136. *See* Immigration Ordinance, cap. 115, sched. 1, para. 2(a).

Article 24(2)(1)'s plain language clearly supported the plaintiff's position that the ordinance was an impermissible infringement. However, the Director of Immigration argued that before the CFA could issue a ruling on this case, it was required to seek an interpretation from the NPCSC. The CFA rejected the Director of Immigration's position and furthermore held that the plain language of Article 24(2)(1) granted the right to abode to anyone born in Hong Kong, regardless of whether their parents were legal or illegal residents or even passersby.<sup>137</sup>

Regarding the Article 158 issue, the Director of Immigration had claimed that because the provision would have a "substantive (meaning not substantial but real) effect" on the central government's affairs and/or its relationship to Hong Kong, it qualified for a referral. The CFA rejected this proposed test in favor of a different one:

Article 158(3) in focusing on the provision in question requires the Court to consider the character of the provision. The question is whether the provision has the character of one which concerns affairs which are the responsibility of the Central People's Government or the relationship between the Central Authorities and [Hong Kong].<sup>138</sup>

The CFA then announced that based on Article 24(2)(1)'s character, it was not an excluded provision. However, the Court supplied no explanation for this conclusion, nor did it offer any general guidance for determining the "character" of Basic Law provisions. Indeed, after *Chong Fung-Yuen* (and *Tam Nga Yin*, see below), it seems the only way one can know if a Basic Law provision is an excluded one is to ask the CFA. The vagueness of the character test is especially ironic, given the CFA's earlier discussion of the common law in *Chong Fung-Yuen*. After noting with pride Hong Kong's adherence to the common law, the Court discussed how a common law judge should approach legislative interpretation. "[I]t is regarded as important both that the law should be certain and that it should be ascertainable by the citizen."<sup>139</sup> Surely this basic requirement applies to judge-made law as well, yet the CFA's character test falls woefully short.

Despite its vagueness, the character test leaves the CFA in control of when to refer questions to the NPCSC. As the Court itself admits, if it had adopted the Director of Immigration's "substantive effect" test, "[it] would mean that most if not all the articles in the Basic Law could be potentially excluded provisions."<sup>140</sup> A requirement that every constitutional question be referred to the NPCSC would have severely curtailed the Hong Kong courts' autonomy. On the other hand, a procedure such as the character test could potentially emasculate the threat of Article 158 to Hong Kong sovereignty.

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137. See *Chong Fung-Yuen v. Dir. of Immigration*, CACV 61/2000 (C.A.), at <http://law.hku.hk/clsourcebook/conlawcase/chongfungyuenCA.htm>.

138. *Id.*

139. *Id.*

140. *Id.*

The CFA also took additional steps in *Chong Fung-Yuen* to limit the central government's authority over Hong Kong courts. In the Interpretation, the NPCSC had declared that:

The legislative intent as stated by this Interpretation, together with the legislative intent of all other categories of Article 24(2) of the Basic Law . . . have been reflected in the "Opinions on the Implementation of Article 24(2) of the Basic Law . . ." adopted at the Fourth Plenary Meeting of the Preparatory Committee for [the HKSAR] of the [NPC] on 10 August 1996.<sup>141</sup>

Article 24(2)(1), the source of the controversy in *Chong Fung-Yuen*, clearly fit within the above category of Basic Law provisions whose legislative intent should be gleaned from Preparatory Committee Opinions. Furthermore, one of these Opinions stated that Article 24(2)(1)'s grant of permanent residency to anyone born in Hong Kong actually applied only to children born in Hong Kong to a lawful Hong Kong resident.<sup>142</sup> However, the CFA managed to avoid these contrary precedents by holding that the Interpretation was not a binding interpretation of Article 24(2)(1). Therefore, any NPCSC statement about legislative intent was not binding on a case involving interpretation of Article 24(2)(1). Instead, it was merely extrinsic evidence of what the provision might mean. But given that Article 24(2)(1)'s meaning was completely clear, according to the CFA, there was no need to resort to extrinsic interpretive devices.

Indeed, the CFA went further than it needed to and held that all the Preparatory Committee Opinions were suspect for the purpose of interpreting the Basic Law. The Court discussed the general science of legislative interpretation, and announced that extrinsic materials, such as the Joint Declaration published prior to the Basic Law's enactment in 1990, could be aids to interpretation. The CFA strongly questioned the use of extrinsic materials created after the enactment, even if they were published before the Basic Law took effect in 1997, a category that would include Preparatory Committee Opinions. Even though *Chong Fung-Yuen* technically left open the question as to when post-enactment materials could be used in Basic Law interpretation, the CFA heavily implied that the answer would be "Never." What is perhaps most astounding about this part of the opinion is that the Court itself admitted that the entire pre-enactment/post-enactment materials debate was irrelevant for the present case. The language in Article 24(2)(1) was so clear that there was no need to resort to extrinsic devices to ascertain the provision's meaning. Thus, the CFA's negation of the NPCSC's assertion of legislative intent was complete dicta.

The CFA then engaged in more dicta to limit the Interpretation's scope even further. As part of his argument that Article 24(2)(1) was an excluded provision, the Director of Immigration had claimed that the Interpretation established Article 24(2)(3) as an excluded provision, and thus all the provisions within Article 24(2) must be excluded. The Director of Immigration relied on the following passage from the Interpretation's Preamble to support his position:

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141. Interpretation, *supra* note 111.

142. See Preparatory Committee Opinion, Aug. 10, 1996.

[The NPCSC] . . . has decided to make, under the provisions of Article 67(4) of the Constitution of the People's Republic of China and Article 158(1) of the Basic Law . . . an interpretation of the provisions of Articles 22(4) and 24(2)(3) of the Basic Law . . . as follows . . .<sup>143</sup>

Despite this language, the CFA held that because the Interpretation dealt with two intertwined Basic Law provisions, it was not clear that Article 24(2)(3) was an excluded provision. Apparently, for a provision to be obviously excluded, the NPCSC would have needed to examine it on its own. Once again, the Court had whittled away at the precedential value of the Interpretation, despite clearly contrary language in the statement itself.

The importance of *Chong Fung-Yuen's* dicta on Article 24(2)(3) became clear only in light of its twin case, *Tam Nga Yin*.<sup>144</sup> In that case, the CFA held that the Basic Law did not grant permanent residency to children adopted by Hong Kong residents. However, in reaching this conclusion, the Court took great pains to explain that it was relying on the Interpretation as little as possible to reach this result. In *Tam Nga Yin*, the Basic Law provision at issue was Article 24(2)(3): "The permanent residents of . . . Hong Kong . . . shall be . . . persons of Chinese nationality born outside Hong Kong of those residents listed in [Article 24(2)(1)&(2)]."<sup>145</sup> The CFA held that the Interpretation was not binding on this Article as it related to adopted children, because that issue was not before the NPCSC. However, the Interpretation did contain a binding statement on Article 24(2)(3)'s time of birth requirement (i.e., the Article granted the right to abode only when a parent was a permanent resident at the time of the child's birth), which the CFA was obliged to follow. Despite that admission, the CFA refused to hold that Article 24(2)(3) was an excluded provision. Instead, the CFA applied its newly formed "character" test and determined that this Article's character was such that no referral was required. The Court once again offered no explanation or basis as to why Article 24(2)(3)'s character made it a non-excluded provision. Nevertheless, the central government probably was not as concerned with the CFA's attempts to distance itself from the Interpretation in *Tam Nga Yin*, since the outcome was favorable to the Director of Immigration.

In addition to the CFA, the Court of Appeal has also been willing to hand down decisions that questioned the Interpretation's, and by extension the NPCSC's authority, a sharp contrast from the lower court's earlier refusal to entertain jurisdiction over the NPC in *Ma Wai Kwan*.<sup>146</sup> For example, in *Ng Siu Tung v. Director of Immigration*,<sup>147</sup> another right to abode case, the Court of Appeal pondered how to apply to *Ng Ka Ling* Article 158's mandate that an NPCSC interpretation would not affect "judgments previously rendered." More

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143. Interpretation, *supra* note 111.

144. See *Tam Nga Yin*, *supra* note 134.

145. Basic Law, *supra* note 3, at art. 24(2)(3).

146. See *supra* note 70 and accompanying text.

147. See CACVs 415, 416 & 417/2000 (C.A.), at <http://law.hku.hk/cls/sourcebook/conlawcase/NgsiutungCA.htm>. The CFA subsequently overturned this decision. See *Ng Siu Tung v. Dir. of Immigration*, 13 HKCU 1 (2002).

than 5,000 plaintiffs claimed that because *Ng Ka Ling* was a test case contesting their rights, they were now immune from the Interpretation's effects.<sup>148</sup> However, the Justices held that only the actual parties in *Ng Ka Ling*, and those whom the Director of Immigration now treated as actual parties, were protected from the Interpretation. In reaching their decisions, the Justices noted that in the Interpretation, the NPCSC had specifically referred to its effect on the parties to the right to abode cases.<sup>149</sup> Justice Leong found this statement to be an application of Article 158.<sup>150</sup> Yet Justice Keith, while agreeing with his fellow Justices on the outcome, did not see any reason to consult the Interpretation on this issue:

I have decided to attach little weight to the NPCSC's statement as to the reach of the Interpretation. That is because the reach of any interpretation . . . was not a matter which had been referred to the NPCSC. In other words, although the NPCSC had been asked to interpret Art. 22(4) and Art. 24(3), it had not been asked to interpret the phrase "judgments previously rendered" in Art. 158(3). Accordingly, although its statement as to the reach of the Interpretation was a considered and important expression as to who was to be affected by the Interpretation, the statement [did] not necessarily . . . [interpret] the phrase "judgments previously rendered," and [did] not . . . necessarily identify who . . . [was un]affected by the Interpretation.<sup>151</sup>

It must have shocked the NPCSC, the permanent body of the "highest organ of state power," when a Court of Appeal judge so willfully ignored its Interpretation. But, through a strict (some might say hypertéchnical) application of the mandate rule, Justice Keith managed to narrow further the NPCSC's authority and correspondingly expand the Hong Kong judiciary's autonomy. Admittedly, this act of rebellion was played out within a decision that ultimately produced an outcome pleasing to the central government.

The Court of Appeal also tried to undermine the Interpretation when it heard *Chong Fung-Yuen*,<sup>152</sup> prior to the CFA's ruling in the same case. Like the CFA, the Court of Appeal rejected the Director of Immigration's argument that it should be guided by the Interpretation's statement that Preparatory Committee Opinions contained the legislative intent behind Article 24(2). It reasoned that because the Interpretation had not dealt with Article 24(2)(1), the NPCSC had not provided any guidance on this issue. Therefore, the Court was free to rule

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148. See *id.* (Keith, J.).

149. The Standing Committee of the National People's Congress states:

This Interpretation does not affect the right to abode in [Hong Kong] which had been acquired under the judgment of the Court of Final Appeal on the relevant cases dated 29 January 1999 [i.e., *Ng Ka Ling* and *Chan Kam Nga*] by the parties concerned in the relevant legal proceedings.

Interpretation, *supra* note 111.

150. See *Ng Siu Tung*, *supra* note 147 (Leong, J.).

151. See *id.* (Keith, J.). In another part of his opinion, Justice Keith coyly writes:

The public controversy which erupted over the Government's decision to seek an interpretation by the NPCSC of these provisions and over the Interpretation itself is well known, but I do not, of course, comment on that debate. The court's function is merely to apply the law as we conceive it to be.

*Id.*

152. See *Chong Fung-Yuen*, *supra* note 137.

however it chose, which happened to be contrary to the Director's position.<sup>153</sup> Justice Leong even argued, "Until Article 24(2)(1) is submitted to the [NPCSC] for interpretation, it cannot be said that the Opinion of the Preparatory Committee on Article 24(2)(1) is the legislative intention of this Article."<sup>154</sup> He wrote this despite the Interpretation's unequivocal statement that the Opinions contained the legislative intent for all subsections of Article 24(2).<sup>155</sup>

What was even more interesting in *Chong Fung-Yuen* at the Court of Appeal level was how the Director argued that the Interpretation "constitutes persuasive obiter dicta in relation to the interpretation of Article 24(2)(1)."<sup>156</sup> Rather than relying on the NPCSC's position at the summit of the Chinese civil law tradition, the Director instead tried to shoehorn the Interpretation into the common law in hopes of bolstering his case. However, the Justices firmly rejected this argument. Justice Rogers argued that the general rule that dicta should be ignored was especially applicable to statements by the NPCSC, because its procedures did not allow for interested parties to engage in adversarial proceedings before it. He then added:

Most importantly however, obiter dicta in relation to statutory interpretation can only be of assistance to courts insofar as they indicate a process of reasoning. In none of the documents, [including the Opinions and the Interpretation,] to which our attention has been drawn . . . is there any process of reasoning expressed or any indication given as to why there should be any limitation of what otherwise would be clear constitutional rights.<sup>157</sup>

Thus, Justice Rogers refused to heed dicta from the NPC and NPCSC because they had not behaved like common law courts in composing it. However, the Justice seems to have ignored the fact that, at the time these institutions issued their interpretations, they were not engaged in jurisprudence.

## VI. FUTURE SHOWDOWNS

The CFA's opinion in *Chong Fung-Yuen* and the other cases discussed in the previous section suggest that Hong Kong Justices will continue along the already established path of manipulating the common law to guard regional autonomy. As a result, if the NPCSC wants to corral Hong Kong judges more effectively, it would be well advised to issue a different kind of interpretation. The interpretation will need to be far more detailed, to address all the important points made in the Hong Kong courts' decisions, and to provide *some* reasoning

153. *See id.* (Mayo, J.).

154. *Id.* (Leong, J.).

155. The Standing Committee of the National People's Congress states:

The legislative intent as stated by this Interpretation, together with the legislative intent of all other categories of Article 24(2) . . . have been reflected in the "Opinions on the Implementation of Article 24(2) . . ." adopted at the Fourth Plenary Meeting of the Preparatory Committee for the Hong Kong Special Administrative Region of the [NPC] on 10 August 1996.

Interpretation, *supra* note 111.

156. *Chong Fung-Yuen*, *supra* note 137 (Rogers, J.).

157. *Id.* (Rogers, J.).

to back up the conclusions. In short, the NPCSC will need to start behaving like a common law appellate court if it hopes to rein in the Hong Kong judiciary.

Admittedly, Beijing does have other options for curbing judicial activism. It could amend the Basic Law by rewriting Article 158 such that all cases requiring interpretation of Basic Law provisions would need to be referred to the NPCSC before a nonappealable final judgment could be made. Under the Basic Law, the NPC has the power to amend the Basic Law, with the NPCSC, the State Council and Hong Kong each allowed to propose amendments.<sup>158</sup> Yet the Basic Law also imposes limits on amendments. Article 159 states, "No amendment to this Law shall contravene the established basic policies of . . . China regarding Hong Kong."<sup>159</sup> Meanwhile, the Basic Law's Preamble makes clear that these policies "have been elaborated . . . in the Sino-British Joint Declaration."<sup>160</sup> Turning then to the Declaration, we see that China agreed to vest Hong Kong with judicial power such that the courts could exercise this power "independently and free from any interference."<sup>161</sup> Thus, any amendment that curbed the judiciary's power would seem to violate Article 159's prohibition. But how exactly would one know if an amendment did violate an established basic policy? "The only mechanism for this determination under the Basic Law is the power of interpretation of the NPCSC, which can scarcely be expected to overrule its parent body, [i.e., the NPC.]"<sup>162</sup> Furthermore, the NPC could first amend the Basic Law to eliminate Article 159's substantive limitations on amendments, and then enact any amendment it wished,<sup>163</sup> including, presumably, one that explicitly curbs the judiciary's independence.

Another possibility would be for China to target the Hong Kong judges themselves. Article 89 of the Basic Law states that a judge may be removed "for inability to discharge his or her duties, or for misbehavior."<sup>164</sup> Significantly, a panel of local judges appointed by the Chief Executive performs this evaluation.<sup>165</sup> The absence of the NPCSC from this process seems to protect judges from being removed for "misbehavior" that, in reality, is just opposition to the Party line. However, recall the Chief Executive's power to appoint the judiciary.<sup>166</sup> Indeed, because the two institutions involved in appointing judges<sup>167</sup> are controlled or heavily influenced by Beijing, one would expect that when current Hong Kong judges step down, their replacements will be less inde-

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158. See Basic Law, *supra* note 3, at art. 159. If Hong Kong proposes an amendment, it must meet stringent requirements, i.e., two-thirds of the region's NPC deputies, two-thirds of the Legislative Council and the Chief Executive must all agree on the proposal. However, the NPCSC and the State Council do not have any such requirements. See *id.*

159. *Id.*

160. *Id.*, pmb1.

161. Joint Declaration, *supra* note 27, at 1374.

162. GHAI, *supra* note 5, at 179.

163. Feng, *supra* note 1, at 293-94.

164. See Basic Law, *supra* note 3, at art. 89.

165. See *id.* If the Chief Justice of the CFA is under suspicion, the panel must consist of at least five local judges. For all other judges, the panel must have at least three local judges. See *id.*

166. See *supra* note 33 and accompanying text.

167. The Chief Executive appoints all judges, but the Legislative Council only approves those who serve on the CFA. See *supra* notes 33-34 and accompanying text.

pendent. In fact, it is possible that in the near future the Chief Executive could appoint judges that will be less willing to contradict the party. However, an explicit limit on changing the judiciary is the "independent commission" that must recommend the judge to be appointed.<sup>168</sup> While pro-democracy legislators have been critical of the secretive nature of the commission's work,<sup>169</sup> they have nevertheless praised the commission's choices.<sup>170</sup> Observers have also commented that the selection process so far has been free of politics and resulted in highly qualified judges.<sup>171</sup> Furthermore, all the judges who wrote the decisions cited in this paper were appointed by the current Chief Executive and the (Provisional) Legislative Council,<sup>172</sup> so new Hong Kong judges could also prove to be more independent than the central government would like. Furthermore, is Beijing willing to wait the many years required for a sufficient turnover on the CFA? Can it even afford to dawdle? Once the Hong Kong population has grown accustomed to an independent judiciary that protects their autonomy, it will be that much more difficult to install judges who may roll back these gains.

The central government's final option for curbing judicial activism is its most drastic: a show of force, such as arrests and detentions, or in the worst case scenario, sending in the army. Yet all of the options, such as amending the Basic Law, changing the composition of the judiciary, and especially the use of force, share some weaknesses. The first is that China's treatment of Hong Kong, including the Basic Law itself, is governed by a bilateral international agreement, the Joint Declaration.<sup>173</sup> The Declaration specifically provides that Hong Kong courts will exercise judicial power "independently and free from any interference."<sup>174</sup> However, the treaty provides no effective means of enforcing compliance. This lack of an enforcement mechanism may help explain why Britain complained, but did nothing more, when China replaced an elected

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168. See *supra* note 33 and accompanying text. Early in his tenure, Chief Executive Tung Chee-hwa ignited controversy by dropping two independents from this commission and replacing them with pro-China people. See Angela Li and Linda Choy, *Judges Body Loses Two Independents*, SOUTH CHINA MORNING POST, Apr. 12, 1997, at 1.

169. See Wan Wai-kwan, *Lawmakers Upset at 'Rubber Stamp' Treatment and Lack of Transparency in Selection Process*, S. CHINA MORNING POST, June 14, 2000, at 6.

170. See Linda Leung, *Top Court Positions Rubber-Stamped*, S. CHINA MORNING POST, June 23, 2000, at 6.

171. See Angel Lau and May Sin-mi Hon, *Judiciary Promotes Rising Star Ribeiro As Litton And Ching Announce Resignations In Biggest Change Since Handover*, S. CHINA MORNING POST, May 11, 2000, at 6.

172. See, e.g., Erik Guyot, *Hong Kong Makes Popular Choice for Chief Justice*, WALL ST. J., May 23, 1997, available at 1997 WL-WSJ 2421706. Chief Justice Andrew Li (who subsequently wrote the *Ng Ka Ling* opinion) was described as "a prudent, conservative individual highly committed to the idea of an independent judiciary." *Id.*

173. Some Chinese scholars have argued that the Joint Declaration is not a binding legal obligation on China, because Britain never validly took control of Hong Kong in the nineteenth century. Therefore, Britain "cannot impose binding conditions on its return." Rogers, *supra* note 37, at 475. But China itself agreed during the finalizing of the Joint Declaration that it was a legally binding treaty. See GHAI, *supra* note 5, at 53. Furthermore, Britain has stated that the "Joint Declaration is a treaty, binding as such under public international law." Rogers, *supra* note 37, at 477-78. Nevertheless, China has subsequently confused the matter, suggesting that its activities in Hong Kong are domestic matters not subject to British interference. See Rogers, *supra* note 37, at 476.

174. Joint Declaration, *supra* note 27, at 1374.

Legislative Council with an appointed Provisional Legislative Council, even though this was a facial violation of the Joint Declaration.<sup>175</sup> Similarly, after the CFA handed down *Ng Ka Ling*, the British Consulate in Hong Kong issued a statement supporting the CFA and Hong Kong's judicial autonomy.<sup>176</sup> Yet the Chief Executive still made the referral, the NPCSC still issued the Interpretation, and Britain did nothing. Thus, international law seems to offer minimal protection to the Hong Kong courts.<sup>177</sup>

Nevertheless, international opinion may prove to be a more effective prophylactic. While China has a long history of ignoring international opinion regarding human rights violations, these criticisms do sting enough that Beijing takes pains to avoid them.<sup>178</sup> Therefore, world opinion, which would look unfavorably upon excessive attacks on the Hong Kong judiciary's independence, could offer some protection to the Justices.

Likewise, China, in its dealings with Hong Kong, may wish to please another foreign audience, one much closer to home. Beijing has been unwavering in its quest to reclaim Taiwan,<sup>179</sup> and has engaged in extensive negotiations with the Taiwanese on this issue. The Taiwanese people quite logically view Hong Kong as a test case for reunification with China. If they were to perceive China as interfering with the Hong Kong legal system in order to restrict fundamental rights, the Taiwanese would be much more hesitant about reuniting with China.<sup>180</sup>

In the final analysis, though, the most powerful reason for China to refrain from meddling with the Hong Kong judiciary is that such interference would severely threaten the golden goose of Hong Kong's economy.<sup>181</sup> Hong Kong is an economic powerhouse because vast amounts of foreign investment have poured into it, in part because of the perception that the region is under the rule of law.<sup>182</sup> Excessive Chinese intervention in the Hong Kong legal system would undermine the attractiveness of Hong Kong as a place to do business.<sup>183</sup>

Nevertheless, Professor Michael Davis has argued that China has "a kind of Singaporean vision [of Hong Kong]—authoritarianism plus liberal economic policies and some commitment to the rule of law."<sup>184</sup> The Explanatory Note to the Interpretation supports this thesis. The NPCSC justified its narrow interpre-

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175. See Rogers, *supra* note 37, at 489.

176. See Albert Chen, *Constitutional Crisis in Hong Kong: Congressional Supremacy and Judicial Review*, 33 INT'L L. 1025, 1036 n.24 (1999). The U.S. Consulate and American Chamber of Commerce in Hong Kong also issued similar statements. See *id.*

177. But see Rogers, *supra* note 37, at 489 (arguing that since an egregious violation of the Joint Declaration would "damage China's reputation for honoring treaties," China does have an incentive to comply with the Joint Declaration).

178. See, e.g., *China Once Again Blocks Vote on Motion to Condemn*, EFE News Services, Apr. 18, 2001 (describing how China garnered support to block a resolution in the U.N. Human Rights Commission that would condemn China's human rights record).

179. See Krebs, *supra* note 43, at 115.

180. See Rogers, *supra* note 37, at 472.

181. See *id.*

182. See Davis, *supra* note 32, at 301.

183. See *id.* at 311.

184. *Id.* at 297.

tation of the constitutional right to abode as “protect[ive of] the long-standing prosperity and stability of Hong Kong.”<sup>185</sup> China might therefore slice the rule of law in Hong Kong such that personal freedoms are minimized, but business interests are left in, which would produce a “politically inert and economically dynamic Hong Kong.”<sup>186</sup>

In fact, Davis cites *Ng Ka Ling* as an example of the “ascendancy of the Singaporean vision.”<sup>187</sup> Certainly, *Ng Ka Ling* and its aftermath demonstrated that the local and central government can combine to overturn a Hong Kong court’s definition of a constitutional right.<sup>188</sup> Yet, as this paper has argued, the right to abode cases have not strengthened China’s authority over Hong Kong and its courts as much as is commonly believed. Of the several options China has for dealing with a independent judiciary, the one strategy that accomplishes this goal *and* sustains the rule of law in Hong Kong, thus maintaining Hong Kong’s attractiveness to foreign investors, is the adoption of common law rhetoric and technique in NPCSC interpretations.

Recall too that the NPCSC does not need to wait for a referral from Hong Kong to issue an interpretation. It can exercise its authority *sua sponte*. While excessive use of its general interpretative power could also threaten the rule of law in Hong Kong, even *sua sponte* interpretations would need to conform to common law protocol if the NPCSC wanted to be sure it was reining in the Hong Kong Justices. Otherwise, the judiciary would sidestep these new interpretations as they did the first one.

If the NPCSC were to start using common law rhetoric in its dealings with Hong Kong, this colloquy could lend support to Hong Kong’s autonomy. Beijing’s previous failures with experiments in regional autonomy stemmed in part from the fact that the central and regional governments had “no institutions for dialogue, mechanisms for defining issues between parties, or procedures for negotiations or adjudication.”<sup>189</sup> A quasi-common law court system encompassing the NPCSC and the Hong Kong judiciary would help in creating many of these critical elements. It could also reduce the tension inherent in the fact that whenever problems crop up regarding the legal relationship between Hong Kong and China, “[o]ne of the contestants is also the umpire.”<sup>190</sup>

A switch to common law discourse could also herald a major shift in the NPCSC’s legitimacy. While liberal constitutions are a “major legitimizing device” in society because of their overt reliance on universally recognized values (like human rights), a socialist constitution “must seek its legitimacy from else-

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185. Explanatory Note, *supra* note 114.

186. Davis, *supra* note 32, at 299.

187. *Id.* at 300.

188. *See id.* at 294. As the leading English newspaper in Hong Kong editorialized, “Indeed, can anyone in Hong Kong retain absolute confidence in a constitution which can be subject to reinterpretation whenever its reasonable meanings do not fit with government plans?” *Autonomy Eroded*, S. CHINA MORNING POST, Dec. 12, 2000, available at 2000 WL 29100723.

189. GHAI, *supra* note 5, at 124.

190. *See id.* at 137.

where, namely socialist theory.”<sup>191</sup> By implication, the institutions created by a socialist constitution, such as the NPCSC, share this lack of internally created legitimacy. Engaging in common law discourse could therefore enhance the NPCSC’s standing. However, this path carries dangers of its own for the NPCSC: “a well developed science of interpretation would undermine the political supremacy of the [Communist] Party” because its ability to control interpretations would be threatened.<sup>192</sup> Besides this obstacle, the NPCSC faces the practical problem of having very little practice in any type of legislative interpretation. Including *Ng Ka Ling*, it has exercised this authority only nine times in its history.<sup>193</sup>

In short, it seems that the prediction that “[after the handover] China will seek to frustrate the maintenance of the common law and the rule of law in Hong Kong,”<sup>194</sup> was premature. Instead, Beijing, and the NPCSC specifically, may become frustrated as the Hong Kong courts manipulate common law juridical principles to protect regional autonomy. Using a slingshot loaded with the common law, the Hong Kong judiciary will continue to cast stones at its Goliath, the NPCSC.

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191. See *id.* at 86.

192. *Id.* at 210-11.

193. Feng, *supra* note 1, at 310 n.162.

194. Lee, *supra* note 39, at 184.