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**ONE COUNTRY, TWO LEGAL SYSTEMS? THE RULE OF LAW, DEMOCRACY, AND THE PROTECTION OF FUNDAMENTAL RIGHTS IN POST-HANDOVER HONG KONG**

*Report of the International Human Rights Committee of the Association of the Bar of the City of New York and the Joseph R. Crowley Program in International Human Rights*

**INTRODUCTION**

In January 1999, the Hong Kong Court of Final Appeal (“CFA”) for the first time exercised its power of judicial review under the Basic Law of the Hong Kong Special Administrative Region (“HKSAR”). The Basic Law, which has been in place since the July 1997 transfer of sovereignty from the United Kingdom to the People’s Republic of China (“PRC”), effectively serves as Hong Kong’s Constitution and implements the idea that Hong Kong and the PRC will function as “One Country, Two Systems.” The CFA’s decisions -- which expansively interpreted the Basic Law’s right of abode, or permanent residency within Hong Kong, to apply to a broad class of persons currently residing in mainland China -- generated immediate and substantial controversy. No less controversial was the response of the HKSAR administration, which ultimately requested the authorities in Beijing to reinterpret (or interpret)<sup>1</sup> the provisions on which the CFA had relied so as to restrict the right of abode. By June 1999, the Standing Committee (“NPCSC”) of the National People’s Congress (“NPC”) effectively granted the Hong Kong administration’s request.<sup>2</sup>

It was amid these widely reported events that the Association of the Bar of the City of New York (the “Association”), in conjunction with the Joseph R. Crowley Program in International Human Rights at Fordham Law School (“Crowley Program”)<sup>3</sup>, undertook its second mission to Hong Kong. A central purpose of the mission was to follow up on the work of the Association’s first Hong Kong mission, which took place in October 1995. That mission was sent to Hong Kong to monitor and report on issues that were anticipated to affect the rule of law in Hong Kong as a result of the transfer of governmental authority from the United Kingdom to the PRC. The Report of that Mission was published in the Record, under the title *Preserving the Rule of Law in Hong Kong after July 1, 1997: A Report of a Mission of Inquiry*, by the Committee on

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<sup>1</sup> See *infra* note 113.

<sup>2</sup> For a recently published book that brings together the principal documents related to the right of abode controversy, see HONG KONG’S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION (Johannes Chan, H.L. Fu, and Yash Ghai eds., 2000).

<sup>3</sup> Founded in 1997, the Crowley Program promotes teaching, scholarship, and advocacy in international human rights law. Principal elements of the Program include an annual fact-finding mission to an area of the world with significant human rights concerns, a student outreach project involving students in coursework, research and human rights internships, both domestically and abroad, and a speaker series stimulating dialogue and promoting scholarship. The Crowley Program’s inaugural human rights mission traveled to Turkey in 1998 in association with the Lawyers Committee for Human Rights. Results of this mission appeared as a report entitled *Obstacles to Reform: Exceptional Courts, Police Impunity and Persecution of Human Rights Defenders in Turkey*, published jointly by the Crowley Program and the Lawyers Committee, and as Joseph R. Crowley Program/Lawyers Committee for Human Rights, *Justice on Trial: State Security Courts, Police Impunity, and the Intimidation of Human Rights Defenders in Turkey*, 22 *FORDHAM INT’L.L.J.* 2129 (1999). More information about the Crowley Program, is available at <[www.fordham.edu/law/centers/crowley/home.htm](http://www.fordham.edu/law/centers/crowley/home.htm)>.

International Human Rights.<sup>4</sup> The Report was reprinted in the *University of Pennsylvania Journal of International Economic Law*,<sup>5</sup> and was broadly disseminated.

The Association's earlier mission stressed the importance of continuing to monitor events in Hong Kong: "It is also imperative that this monitoring continue well beyond July 1, 1997. Many have expressed to us the view that the risks to Hong Kong's preservation of the rule of law and of its economy will not be as great in the early years of the transition as they will be in later years, when world attention on Hong Kong will have abated and the temptations for exploitation may have increased . . . It is imperative that questions relating to the preservation of the rule of law in Hong Kong not be overlooked or compromised because attention is focused elsewhere. We believe the Association may play a role in assuring that this does not occur."<sup>6</sup>

Since its first mission, the Association has remained active in following developments in Hong Kong and in maintaining and strengthening ties with Hong Kong legal institutions. In 1997 Michael Cardozo, then President of the Association, visited Hong Kong and was warmly received by leading judges, barristers, solicitors, and government officials. In addition, in May 1999, the Association's Committee on Asian Affairs sponsored a highly visible panel discussion that brought together Hong Kong lawyers and officials who have been at the forefront of recent controversies, as well as academic experts on Hong Kong, Chinese, and American constitutional law.<sup>7</sup>

Given its ongoing commitment to monitor the status of the rule of law in Hong Kong, the Association readily agreed to join forces with the Crowley Program on another mission to examine legal developments in Hong Kong two years after the turnover. The joint delegation traveled to Hong Kong on May 28, 1999, and spent approximately two weeks in the HKSAR. The Association was represented by Senior United States District Judge Leonard B. Sand of the Southern District of New York (who also had headed the 1995 mission) and Mae Hsieh and Tracy E. Higgins, members of the Committee on International Human Rights. The Crowley Program was also represented by Professor Higgins, as well as by Professor Martin Flaherty, who together are the Co-Directors of the Crowley Program, and by Robert J. Quinn, Crowley Fellow for 1998/99 and Adjunct Professor at Fordham Law School. The mission included eight Fordham Law students who had been selected as Crowley Scholars in International Human Rights: Elizabeth Crotty, Nate Heasley, Roger Hurley, Kara Irwin, Andrew Kaufman, Nadine Moustafa, Alain Personna, and John Rothermich. In Hong Kong, ten students from the University of Hong Kong assisted the delegation.<sup>8</sup>

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<sup>4</sup> *Preserving the Rule of Law in Hong Kong After July 1, 1997: A Report of a Mission of Inquiry: The Association of the Bar of the City of New York: The Committee on International Human Rights*, 51 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 357-90 (1996).

<sup>5</sup> *Preserving the Rule of Law in Hong Kong After July 1, 1997: A Report of a Mission of Inquiry: The Association of the Bar of the City of New York: The Committee on International Human Rights*, 18 U. PA. J. INT'L ECON. L. 367 (1997).

<sup>6</sup> *Preserving the Rule of Law*, supra note 4, at 388.

<sup>7</sup> The panel was moderated by Daniel Fung, the former Solicitor of Hong Kong, and included Robert Allcock, then Acting Solicitor General of the HKSAR; Denis Chang, Lead Counsel for the plaintiffs in the "Right of Abode" cases and former Chair of the Hong Kong Bar Association; Phillip Dykes, Vice Chair of the Hong Kong Bar Association and Co-Lead Counsel for plaintiffs in the "Right of Abode" cases; Stephen Wong, Deputy Solicitor General of Hong Kong; Professor R. Randle Edwards of Columbia University School of Law and Director of the Center for Chinese Legal Studies; and Professor Paul Gewirtz of Yale Law School and Director of the Global Constitutionalism Project.

As was the case in 1995, the mission devoted its time in Hong Kong to meeting with members of the Hong Kong government, judges, legislators, leaders of the Hong Kong bar (both barristers and solicitors) law professors, journalists, human rights advocates, consular officials and business leaders.<sup>9</sup> Our request to meet with Tung Che-wa, Chief Executive of Hong Kong was not granted, but Mrs. Anson Chan, Chief Secretary for Administration, met with us and she and members of her staff were generous in the amount of time they provided. Meeting again with individuals visited in 1995 presented a special opportunity to compare the events of the ensuing four years with what had then been predicted before the handover and provided a unique perspective for considering the problems that lie ahead.

### A. Overview

In 1995, the Association noted the extent to which persons in Hong Kong are concerned about “the quality and accuracy of criticisms and expressions of concern by persons outside Hong Kong.”<sup>10</sup> That sensitivity to foreign perceptions continues unabated and without regard to whether the perceptions are generally critical or supportive of the Administration or the influence of Mainland China. The mission interviews made clear that Hong Kong officials, businessmen, legislatures and civic leaders continue to care, and care deeply, how the HKSAR is viewed abroad, not only on matters affecting foreign investment and Hong Kong’s role as a world financial center, but also on broader political and social issues. World opinion is thought to have a great impact on how China and Hong Kong will interact with each other and third parties. Not surprisingly, therefore, and just as in 1995, our mission was warmly welcomed and treated with great respect.

The defining events in any current consideration of how well Hong Kong has fared in preserving the rule of law are the right of abode cases. A significant portion of this report is therefore devoted to a discussion of these cases, not all aspects of which have been resolved as of this writing (March 24, 2000). In the Association’s 1995 report we noted that the powers given to the NPCSC to interpret the Basic Law could

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<sup>8</sup> Charlotte Tse, Felix Ng, Jonathan Chang, Josiah Chan, Lee Lap Hang, Marina Tong, Sarah Cheng Po San, Scarlett Cheung, Susan Li Shui Jing, and Annie Szeto. The delegation is indebted to them and to Professor Andrew Byrnes for arranging their participation. In addition, the delegation is indebted to numerous officials, judges, lawyers, scholars, activists, and other informed individuals who met and consulted with the delegation during its visit and the drafting of this Report. We would specifically like to thank the Hong Kong Bar Association, especially Philip Dykes, SC, Denis Chang, SC, Margaret Ng, Ronnie Tong, SC, and Audrey Eu, SC; Christine Loh, of the Citizen’s Party; the Hong Kong Human Rights Monitor, especially Dr. Stephen Ng, and Law Yuk Kai; the Asian Migrant Resource Center, especially Apo Leung and Chan Ka Wai; and the Law Society of Hong Kong, especially Patrick Moss. None of these individuals or organizations bears any responsibility for the views expressed in this Report. The administration of the Hong Kong Special Administrative Region merits special mention for its cooperation in facilitating the delegation’s access to officials and in providing information during our mission. In particular, we are grateful to Mrs. Anson Chan, Chief Secretary for Administration, Mrs. Elsie Leung, the Hong Kong Secretary of Justice, Robert Allcock, Assistant Secretary of Justice, and Michael Suen, Secretary of Constitutional Affairs Bureau. The delegation also would like to thank Dean John Feerick, the alumni of Fordham Law School for their support of the Crowley Program, and Luke McGrath, the 1999-2000 Crowley Fellow, for his efforts in the publication of this report.

<sup>9</sup> A list of those with whom the present mission met is set forth in the Appendix to this Report. A list of the persons with whom the 1995 Mission met appears as an Appendix to the 1995 Report. *Preserving the Rule of Law*, *supra* note 4, at 390.

<sup>10</sup> *Preserving the Rule of Law*, *supra* note 4, at 366.

“seriously undercut the HKSAR’s autonomy and the independence of its courts.”<sup>11</sup> The concern then expressed was that mainland China might exercise this power to exercise untoward dominion over Hong Kong and its courts. At the time of the 1995 mission, however, we did not anticipate that Hong Kong’s administrative authority might *itself* initiate a reference to Beijing to overrule a decision of Hong Kong’s highest court. As we relate here, this is exactly what has occurred.<sup>12</sup>

Though we concentrate here on the right to abode, the 1999 mission also gave the delegation an opportunity to revisit other issues. In 1995, our report noted that although virtually all legal proceedings were conducted in English, “[m]uch of this will change as of July 1, 1997. The Hong Kong legal system will become a bilingual system.”<sup>13</sup> For reasons we discuss below, the progress of bilingualization has proceeded more slowly than anticipated in 1995.<sup>14</sup> Conversely, other concerns that were previously expressed have failed to materialize. The fear that there would be a difficult transition proved to be exaggerated, although many would argue that most contentious items have been left open. With respect to the judiciary, fears that judges appointed after the turnover would be less qualified and independent have proven illusory. Knowledgeable observers from across the political spectrum unanimously assured our delegation that recent appointments continue Hong Kong’s exemplary tradition of judicial independence and ability.

This mission produced two different but related reports. The Report appearing in the *Record* deals primarily with issues involving the rule of law, the heart of the 1995 Report. The protection of human rights, however, obviously encompasses more than what happens in courts of law. This longer Report, produced as a stand-alone publication, will be made available principally to relevant individuals in Hong Kong and New York, examines issues beyond the scope of the 1995 Report. In addition to addressing the rule of law, this Report examines democratization and the implementation of certain fundamental rights, including guarantees against discrimination, labor rights, and access to legal services.

The delegation’s hope is that these Reports will make a positive contribution to the ongoing debate within Hong Kong on how best to carry out the difficult challenge of “One Country, Two Systems” in a manner that preserves the rule of law and protects human rights in Hong Kong.<sup>15</sup>

## I. PRESERVING THE RULE OF LAW

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<sup>11</sup> *Preserving the Rule of Law*, *supra* note 4, at 371.

<sup>12</sup> *See infra* notes 116-130 and accompanying text.

<sup>12</sup> *Preserving the Rule of Law*, *supra* note 4, at 371.

<sup>14</sup> *See infra* notes 256-266 and accompanying text.

<sup>15</sup> In addition to the two versions of the joint Association/Crowley report, the Crowley Program published its own report. Joseph R. Crowley Program/Association of the Bar of the City of New York, *One Country Two Systems? – The Rule of Law, Democracy, and the Protection of Fundamental Rights on Post-Handover Hong Kong*, 23 FORDHAM INT’L. L.J. 401 (1999). While this report is also based on findings made during the same mission, the Crowley Program is solely responsible for its contents and the views expressed therein. *Id.* at 1.

Under the “One Country, Two Systems” pledge, Hong Kong was to retain its autonomous common law framework, including an independent judiciary to exercise the power of final adjudication. Coming as it did so soon after the transition to mainland rule, the right of abode controversy cast an inauspicious light on China’s commitment to this legal independence.

The challenge to Hong Kong's legal system presented by the right of abode controversy stems, in large part, from the readiness of the HKSAR government, having lost in Hong Kong’s highest court, to seek relief from the PRC, thereby undermining the finality of the CFA decision and subjecting the territory to mainland legal principles that are foreign, and in certain respects at odds with, the common law tradition of Hong Kong’s legal culture. This challenge posed by the right of abode controversy arrived in a manner that was not anticipated at the time of the Association of the Bar’s mission prior to the handover. Contrary to the fears expressed at the time, the Hong Kong judiciary has remained highly qualified and independent. The mainland government, moreover, has demonstrated a desire to let Hong Kong administer its own legal and political affairs. HKSAR government officials insist that turning to Beijing was the best way to meet the pressing crisis arising in the context of an untried constitutional system. Nevertheless, the potential cost to the rule of law has been high. By effectively circumventing the CFA's interpretation of the Basic Law, the HKSAR administration’s actions have threatened judicial independence. These actions have also introduced Chinese legal concepts into Hong Kong that could further threaten Hong Kong's common law system, including its ability to safeguard fundamental rights.

This report first considers the importance of the rule of law as a foundation for international human rights and China's obligations under international law to protect the rule of law in Hong Kong. After reviewing the right of abode decisions, it examines both the legality and the prudence of the Hong Kong government's request for a reinterpretation,<sup>16</sup> including the alternatives that the HKSAR government might have pursued. The report concludes by analyzing the NPCSC’s reinterpretation<sup>17</sup> and its implications for cases that are likely to raise similar issues in the near future.

### *A. The Rule of Law*

#### *1. General International Standards*

The Universal Declaration of Human Rights<sup>18</sup> (or “Declaration”) enshrines an international commitment to “the rule of law” as fundamental to the protection of international human rights. No fewer than six of the Declaration's first twelve articles specify principles fundamental to a nation's law and legal system.<sup>19</sup> Both the Declaration and subsequent international instruments elaborate on these principles by

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<sup>16</sup> See *infra* note 113.

<sup>17</sup> *Id.*

<sup>18</sup> Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. GAOR 3d. Sess. Pt. 1, PmbL., at 1, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

<sup>19</sup> *Id.* at arts. 6, 7, 8, 10, 11, 12.

guaranteeing an array of specific rights<sup>20</sup> as well as mandating various procedures and institutions.<sup>21</sup> Many of these instruments are directly binding on Hong Kong, including the International Covenant on Civil and Political Rights (“ICCPR”).<sup>22</sup>

Although nations are free to implement the rule of law in any number of ways,<sup>23</sup> certain general principles must be honored. In particular, the U.N. Basic Principles on the Independence of the Judiciary<sup>24</sup> set forth guidelines to safeguard the integrity and autonomy of courts throughout the world. The Basic Principles state “[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is therefore the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”<sup>25</sup> They further provide that the judiciary shall decide matters, “without any restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect from any quarter or for any reason.”<sup>26</sup> In addition, the Basic Principles declare that “[t]he judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.”<sup>27</sup> Finally, the Basic Principles prohibit “any inappropriate or unwarranted interference with the judicial process,” and forbid that any

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<sup>20</sup> See, e.g., International Covenant on Civil and Political Rights, *opened for signature* on Dec. 16, 1966, 999 U.N.T.S. 171, art. 9 *with reservation* in 999 U.N.T.S. 287 (entered into force Mar. 23, 1976 with reservations upon ratification by United Kingdom and Northern Ireland) [hereinafter ICCPR] (defining right to liberty).

<sup>21</sup> See, e.g., *id.* at art. 13 (stating that everyone shall be entitled to fair and public hearing by competent, independent, and impartial tribunal established by law).

<sup>22</sup> See generally *id.*; see also International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), *reprinted in* 999 U.N.T.S. 3 [hereinafter ICESCR]; International Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, art.1, at 197, U.N. Doc. A/39/51 (1984) *reprinted in* 23 I.L.M. 1027; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A, U.N. GAOR, 20th Sess., Supp. No. 14 at 66 (1965), 660 U.N.T.S. 195; Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49 at 174, U.N. Doc. A/44/736 (1989); Convention on the Elimination of All Forms of Discrimination Against Women, U.N. GAOR, 48th Sess., Supp. No. 38, at 1,2, U.N. Doc. A/47/38 (1993), *reprinted in* 35 I.L.M. 487 (1996), 1249 U.N.T.S. 13. These documents originally became applicable to Hong Kong through ratification and/or extension by the United Kingdom and continue to apply despite the change of sovereign. Moreover, the Basic Law provides that the ICCPR, the ICESCR, and all labor conventions “as applied to Hong Kong . . . shall remain in force and shall be implemented” through local legislation. Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Mar. 4, 1990), at art. 39, para. 20 [hereinafter Basic Law].

<sup>23</sup> See Reed Brody, *Introduction: The Independence of Lawyers and Judges, A Compilation of International Standards*, CENTRE FOR THE INDEPENDENCE OF LAWYERS AND JUDGES BULLETIN, Apr.-Oct. 1990, at 3.

<sup>24</sup> *Basic Principles on the Independence of the Judiciary*, G.A. Res. 40/32, Nov. 29, 1985 & 40/146, Dec. 13, 1985 [hereinafter *Basic Principles*]. The Basic Principles, while not comprising a treaty, have received the approval of the U.N. General Assembly and reflect a considerable global consensus that provides evidence of customary international law.

<sup>25</sup> *Id.* at No. 1.

<sup>26</sup> *Id.* at No. 2.

<sup>27</sup> *Id.* at No. 3.



“judicial decision by the courts be subject to revision.”<sup>28</sup> In these ways, the Basic Principles make clear that legal controversies must be settled by authorities that are not beholden to policymakers who might have a vested interest in the outcome. In the eyes of the world community, judicial independence is a cornerstone principle for the rule of law enshrined in the major human rights instruments.

## 2. *The Sino-British Joint Declaration*

Beyond its obligation to respect the rule of law as an aspect of international human rights law, the PRC has undertaken specific obligations to preserve Hong Kong’s legal structure. These obligations are set forth in the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong<sup>29</sup> (the “Joint Declaration”). The Joint Declaration makes clear that for Hong Kong, “rule of law” means the common law, including judicial independence and finality of judicial decisions.

Despite its name, the Joint Declaration is a treaty. Initially, China resisted the idea of a binding international agreement, but it ultimately agreed to memorializing the handover in treaty form in part because it came to recognize that such a commitment would provide the world community greater assurance of its intent to respect Hong Kong’s special status.<sup>30</sup> Accordingly, the Joint Declaration mandated that the United Kingdom restore Hong Kong to Chinese sovereignty on July 1, 1997, and in turn obligated China to establish the territory as a “Special Administrative Region.” As such, the territory would “enjoy a high degree of autonomy, except in foreign and defense affairs, which are the responsibilities of the Central People’s Government.”<sup>31</sup> China thus bound itself under international law to implement the formula of “One Country, Two Systems” originally envisioned by Deng Xiaoping.

The Joint Declaration makes clear that the high degree of autonomy that Hong Kong currently enjoys extends to its legal system. The main document declares that the HKSAR “will be vested with executive, legislative, and *independent* judicial power, including the power of *final* adjudication,” and further states that “the laws currently in force in Hong Kong will remain basically unchanged.”<sup>32</sup>

A series of binding Annexes to the Joint Declaration flesh out these commitments. Annex II states that “laws previously enforced,” specifically “the common law” as well as “rules of equity, ordinances, subordinate legislation, and customary law,” will remain in effect.<sup>33</sup> Addressing the judiciary, Annex III

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<sup>28</sup> The provision adds: “This principle is without prejudice to judicial review or to mitigation or communication by competent authorities of sentences imposed by the judiciary.” *Id.* at No. 4.

<sup>29</sup> 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, (*signed* Dec. 19, 1984), 23 I.L.M. 1371 [hereinafter Joint Declaration]. The Joint Declaration entered into force on May 27, 1985.

<sup>30</sup> YASH GHAI, HONG KONG’S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 53 (2<sup>nd</sup> ed. 1999). *See also id.* at 70-72 (discussing status of Joint Declaration).

<sup>31</sup> Joint Declaration, *supra* note 29, at art. 3, para. 2.

<sup>32</sup> *Id.* at art. 3, para. 3 (emphasis added).

<sup>33</sup> *Id.* at annex I, para. II.

preserves “the judicial system as previously practiced in Hong Kong except for those changes consequent upon vesting the courts of the Hong Kong Special Administrative Region of the power of final adjudication.”<sup>34</sup> This provision actually reflects a strengthening of the role of the Hong Kong judiciary, since the Joint Declaration elsewhere vests “the power of final judgment” for the HKSAR in a new “court of final appeal” for cases that previously would have been adjudicated by the Privy Council in the United Kingdom.<sup>35</sup> Annex III further provides that “the courts shall exercise judicial power independently and free from any interference . . . and may refer [to] precedents in other common law jurisdictions.”<sup>36</sup> In addition, the CFA “may as required invite judges from other common law jurisdictions” to adjudicate cases.<sup>37</sup>

By acceding to the Joint Declaration, China expressly committed itself to respecting the independence of the Hong Kong judiciary, including the finality of its decisions. Any compromise of this commitment places China in violation of these international legal obligations.

### *B. Implementing International Commitments: Hong Kong and the Basic Law*

The PRC implemented its obligations under the Joint Declaration through the Basic Law. The Basic Law was enacted by the NPC on April 4, 1990 under Article 31 of the PRC Constitution, and took effect on July 1, 1999.<sup>38</sup> The legal status of the Basic Law remains to be fully defined and integrated. In part, the Basic Law derives its legitimacy from, and is intended to comply with, the Joint Declaration. It is also a national statute of the People’s Republic. Yet, it also serves as Hong Kong’s “constitution,” replacing the Letters Patent issued by the British Crown that established the framework for the colonial government.<sup>39</sup>

The Basic Law provides that Hong Kong will maintain its own legal system, along with its distinct political and economic systems, for fifty years. To this end, it authorizes Hong Kong “to exercise a high degree of autonomy and enjoy executive, legislative, and independent judicial power, including that of final adjudication.”<sup>40</sup> The Basic Law safeguards the existing common law framework, declaring that “the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to amendment by the [Hong Kong] legislature.”<sup>41</sup> The Basic Law further elaborates its guarantee of the judicial independence that characterizes common law systems. After repeating the Basic Law’s grant of independent

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<sup>34</sup> *Id.* at annex I, para. III.

<sup>35</sup> *Id.* at annex I, para. III.

<sup>36</sup> *Id.* at annex I, para. III.

<sup>37</sup> *Id.* at annex I, para. III.

<sup>38</sup> XIANFA [Constitution of the People's Republic of China] art. 31, (1982)(granting NPC broad authority to institute systems within such regions “in light of specific conditions”).

<sup>39</sup> See GHAI, *supra* note 30, at 14-17; PETER WESLEY-SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG 42, 72-76 (1994).

<sup>40</sup> Basic Law, *supra* note 22, at art. 2.

<sup>41</sup> *Id.* at art. 8.

judicial power to Hong Kong, “including that of final adjudication,” Article 19 grants the HKSAR courts “jurisdiction over all cases in the Region, except that the restrictions imposed by the legal system and principles previously in force in Hong Kong shall be maintained.”<sup>42</sup>

Notwithstanding its commitment to preserving the common law system, the Basic Law itself contains provisions which, depending upon their interpretation, could undercut judicial independence and the finality of decisions. Specifically, provisions governing the interpretation and amendment of the Basic Law risk subordinating the courts to oversight by NPCSC.<sup>43</sup>

For example, Article 158, which addresses interpretation, begins by declaring that “[t]he power of interpretation of [the Basic Law] shall be vested in the [NPCSC].”<sup>44</sup> The balance of Article 158 discusses the interpretation of the Basic Law in the context of actual cases. It directs the NPCSC to authorize the HKSAR courts “to interpret, on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.”<sup>45</sup> Article 158 then specifies the NPCSC’s role by requiring that certain matters be referred to Beijing. The article states that the Hong Kong courts may interpret provisions outside the limits of their autonomy when adjudicating cases. If, however, a court needs to interpret Basic Law provisions that concern “affairs which are the responsibility of the Central People’s Government” or “the relationship between the Central Authorities and the Region” and the interpretation will “affect the judgment of the case and will not be appealable, then the court must seek an interpretation of the relevant provision”

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<sup>42</sup> *Id.* at art. 19, para. 1 & 2. The Basic Law, however, arguably deviates from the Joint Declaration on various matters, including judicial authority. The same article that guarantees an independent judiciary, for example, denies the Hong Kong courts “jurisdiction over acts of state such as defen[s]e and foreign affairs.” *Id.* at art. 19, para. 3. Not only is this restriction unmentioned in the Joint Declaration, but it may also be overbroad, if interpreted under mainland, and not common law principles. GHAI, *supra* note 30, at 318-20. This deviation from the Joint Declaration is but one of many that resulted from the Basic Law drafting process. Many of these changes may have resulted from a hardening of Chinese attitudes in the wake of the crackdown at Tiananmen Square and Hong Kong’s strong public support for the suppressed pro-democracy movement. GHAI, *supra* note 30, at 63-64.

<sup>43</sup> See GHAI, *supra* note 30, at 68, 149; PETER WESLEY-SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG 69 (1994).

<sup>44</sup> Basic Law, *supra* note 22, at art. 158.

<sup>45</sup> Basic Law, *supra* note 22, at art. 158, para. 2. The meaning of this statement generated considerable debate. Some analysts argued that the statement merely notes the existence of a general power that the NPCSC enjoys before directing the NPCSC to divide this authority between itself and the Hong Kong courts. Others contended that this provision grants the NPCSC a general power to “clarify” the Basic Law whenever it sees fit. Margaret Ng, *Time for the Next Test To Begin*, S. CHINA MORNING POST, July 16, 1999, at 1; interview with Denis Chang, Lead Counsel for Appellants in *Ng Ka Ling*, in Hong Kong (June 8, 1999). In part this argument depended on the Chinese version of the provision, which bears a meaning closer to “possesses,” as opposed to “vests.” *Id.* Since the completion of the 1999 mission, the CFA has rendered this debate moot by endorsing the broad view that the NPCSC may interpret the Basic Law at its own discretion. See *Lau Kong Yung (an infant suing by his father and next friend Lau Yi To) and 16 others v. Director of Immigration*, Nos. 10 and 11 of 1999, HKSAR Court of Final Appeal, 15-16, 19 (Dec. 3, 1999). All citations are to the official version of the case posted at <[www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv\\_10\\_11\\_99.htm](http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_10_11_99.htm)>. For further analysis see notes 225-240 and accompanying text. The case has been subsequently reported at [1999] 4 HKC 731 (CFA).

from the NPCSC. Should the NPCSC interpret the provisions concerned, the Hong Kong courts must follow that interpretation. Judgments previously rendered, however, “shall not be affected.”<sup>46</sup>

From the beginning, the NPCSC’s role in interpreting the Basic Law under Article 158 prompted significant concern. Ironically, government officials assured the Association’s 1995 mission that the NPCSC’s power of interpretation through referral,<sup>47</sup> as well as its general power of interpretation, were included in the Basic Law principally as a symbolic gesture to Beijing and were not likely ever to be used.<sup>48</sup> Fewer than five years later, Article 158 was at the heart of the challenge to Hong Kong’s judicial independence.

### *C. The Right of Abode Decisions*

The right of abode controversy began with a challenge to the constitutionality of certain restrictive immigration legislation passed by Hong Kong’s Legislative Council (“LegCo”).<sup>49</sup> In two cases, *Ng Ka Ling (an infant) & Ors v. Director of Immigration*,<sup>50</sup> and *Chan Kam Nga (an infant) & Ors v. Director of Immigration*,<sup>51</sup> the appellants challenged two ordinances that controlled the right of mainland children of Hong Kong permanent residents to emigrate to the HKSAR as unconstitutionally restrictive of rights guaranteed by Article 24 of the Basic Law.<sup>52</sup>

#### *1. Background*

Immediately after China’s resumed sovereignty over Hong Kong, the Provisional LegCo enacted two immigration ordinances that defined eligibility for the right of abode and outlined an administrative scheme for allowing mainland Chinese citizens with the right of abode to emigrate to Hong Kong. The

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<sup>46</sup> *Id.* at art. 158, para. 3. Paragraph 4 adds that the NPCSC “shall consult its Committee for the Basic Law” -- a group of 12 individuals, six from the mainland and six from Hong Kong, most of whom are not legal experts -- “before giving its interpretation of this Law.” *Id.* at para. 4.

<sup>47</sup> *See infra* note 113 for discussion of interpretation versus reinterpretation/controversy.

<sup>48</sup> Honorable Leonard B. Sand, recollection from the 1995 Hong Kong Delegation of the Association of the Bar of the City of New York (1995). Reference was made to the infrequency with which the Standing Committee’s interpretative role had been invoked with regard to mainland issues. *Id.*

<sup>49</sup> *See Ma* [1997] 2 HKC at 337-44 (discussing formation and legality of Provisional Legislative Council (or “LegCo”).

<sup>50</sup> *See Ng Ka Ling (an infant) & Ors v. Director of Immigration* [1997] 1 HKC 291.

<sup>51</sup> *See Chan Kam Nga & Anor v. Director of Immigration* [1999] 1 HKC 347.

<sup>52</sup> Article 24 outlines six categories of individuals entitled to the right of abode in the HKSAR or to have the status of permanent resident. These categories include: (1) Chinese citizens born in Hong Kong, (2) Chinese citizens who have resided in Hong Kong continuously for seven years, (3) Chinese Nationals “born outside Hong Kong of those residents” in the first two categories, (4) Non-Chinese who have legally resided in Hong Kong continuously for seven years, (5) children under 21 years old born of a person in category (4), and (6) people who had the right of abode in Hong Kong only before the handover. *See Basic Law, supra* note 22, at art. 24.

Immigration (Amendment) (No. 2) Ordinance ("No. 2 Ordinance"), enacted on July 1, 1997, set out the categories of individuals entitled to the right of abode, adding two limitations not mentioned in Article 24 of the Basic Law.<sup>53</sup> First, the No. 2 Ordinance provided that a child of a parent with the right of abode in Hong Kong would be entitled to the right of abode only if her parent already had the right when the child was born.<sup>54</sup> Second, the No. 2 Ordinance added a requirement that those claiming the right of abode on the basis of their fathers' right of abode must have been born within a marriage.<sup>55</sup>

The Immigration (Amendment)(No. 3) Ordinance ("No. 3 Ordinance"), enacted by the Provisional LegCo on July 10, 1997, established an administrative "Certificate of Entitlement Scheme" under which mainland Chinese with the right of abode would be allowed to emigrate to Hong Kong.<sup>56</sup> The immigration scheme required mainland residents claiming a right of abode through their parents to obtain a one-way exit permit from the mainland authorities before being allowed to emigrate, as well as a "Certificate of Entitlement" from the HKSAR Director of Immigration.<sup>57</sup> The Mainland Bureau of the Exit-Entry Administration limited the number of such permits that would be issued each day to 150.<sup>58</sup>

In *Ng Ka Ling*, the HKSAR courts considered three consolidated challenges to these ordinances on behalf of four individuals claiming the right of abode as the natural children of Hong Kong permanent residents.<sup>59</sup> Although all four had emigrated illegally in contravention of the No. 3 Ordinance, one had been born outside of marriage, and was therefore denied the right of abode exclusively under the No. 2 Ordinance.<sup>60</sup> Their combined cases were heard as a test case on behalf of more than a thousand named immigrants claiming the right of abode. The petitioners challenged both immigration ordinances as unconstitutionally restricting the right of abode as guaranteed by Article 24 of the Basic Law.<sup>61</sup>

In *Chan Kam Nga*, eighty-one children born of parents who obtained the right of abode only after their birth challenged the No. 2 Ordinance's requirement that a parent possess the right at the time of the child's birth. As in *Ng Ka Ling*, the children argued that the requirement unconstitutionally denied them the right of abode granted by Article 24.<sup>62</sup> Thus, while *Ng Ka Ling* presented a challenge to the No. 3 Ordinance's permit scheme and the No. 2 Ordinance's legitimacy requirement, *Chan Kam Nga* focused on a

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<sup>53</sup> Hong Kong Immigration (Amendment)(No. 2) Ordinance (1997); *Ng Ka Ling* [1999] 1 HKC at 294.

<sup>54</sup> Hong Kong Immigration (Amendment)(No. 2) Ordinance, schedule 1, para. 2 (1997).

<sup>55</sup> *Id.* schedule 1, para. 1(2).

<sup>56</sup> Hong Kong Immigration (Amendment)(No. 3) Ordinance (1997).

<sup>57</sup> *Id.* schedule 1, para 2(c); *Ng Ka Ling* [1999] 1 HKC at 314-16.

<sup>58</sup> *Ng Ka Ling* [1999] 1 HKC at 317.

<sup>59</sup> *Id.* at 319.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 294-95.

<sup>62</sup> *See Chan Kam Nga & Anor v. Director of Immigration* [1999] 1 HKC 347, at 352.

challenge to the No. 2 Ordinance's limitation of the right of abode to children of Hong Kong residents whose right of abode had already vested at the time of the child's birth.

## 2. *The Court of Final Appeal's Decisions*

The right of abode cases presented the CFA with its first occasion to exercise its power of judicial review under the Basic Law.<sup>63</sup> Regrettably perhaps, the CFA confronted a situation far different from that facing the U.S. Supreme Court in *Marbury v. Madison*.<sup>64</sup> Whereas the immediate result in *Marbury* directly affected only a handful of minor Federal appointees, any ruling on the right of abode would have far-reaching social, political, and economic consequences in Hong Kong. Indeed, the HKSAR administration would later maintain that a broad interpretation of the right would open the doors to up to 1.67 million mainland immigrants over the next decade. Although this figure was keenly disputed, nearly all interested observers agreed that the practical implications of the cases were substantial.<sup>65</sup>

The CFA, nonetheless, seized the opportunity that *Ng Ka Ling* provided by asserting the power to review not only acts of the HKSAR, but also acts of China's NPC.<sup>66</sup> The CFA supported these assertions through reference to China's basic policy, as enunciated in the Joint Declaration, that the HKSAR courts should have the jurisdiction to enforce and interpret the Basic Law, "which necessarily entails jurisdiction . . . over acts of the National People's Congress and its Standing Committee to ensure consistency with the Basic Law."<sup>67</sup> This strong language planted the seed of the first political crisis to grow out of the decision.<sup>68</sup>

### a. Article 158: The Reference Issue

At the time the CFA issued its first right of abode decision in *Ng Ka Ling*, the question of referral under Article 158 appeared to be the most controversial question presented by the case.<sup>69</sup> Specifically, the CFA first had to rule on who should determine whether an issue fell within the scope of the referral provision, and second, whether articles 22 and 24 should be referred to the NPC in this case. The court resolved these

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<sup>63</sup> The Hong Kong Court of Appeal had previously considered the power of judicial review in *HKSAR v. Ma Wai Kwan & Ors* [1997] 2 HKC 315. *Ma* dealt with the legality of the establishment of the mainland-appointed Provisional LegCo as Hong Kong's first post-handover legislative body. *See id.* at 333.

<sup>64</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>65</sup> *See infra* notes 116-118 and accompanying text.

<sup>66</sup> *See Ng Ka Ling* [1999] 1 HKC at 322-23. This assertion represented a radical departure from the Hong Kong Court of Appeal decision in the *Ma* case. There, the Court of Appeals suggested in dicta that the HKSAR courts had no review jurisdiction over the "sovereign" NPC by analogy to the unreviewability of acts of the British Parliament prior to the handover. *See HKSAR v. Ma Wai Kwan David & ORS* [1997] 2 HKC 315, 333-34.

<sup>67</sup> *Ng Ka Ling* [1999] 1 HKC at 322-23.

<sup>68</sup> *See infra* notes 98-112 and accompanying text.

<sup>69</sup> *See supra* notes 44-46 and accompanying text (discussing Basic Law, Article 158).

issues in a manner that both accorded with the language of Article 158 and defended the independence of Hong Kong's judiciary.

The CFA approached this issue employing a “purposive” analysis, emphasizing the second paragraph of Article 158, which provides that the NPCSC “shall authorize” the courts of the Region “to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of autonomy of the Region.”<sup>70</sup> The Court read the phrase “on their own” to “emphasize the high degree of autonomy of the Region and the independence of its courts.”<sup>71</sup> The opinion did, however, acknowledge the limitations on its interpretive authority. It noted that the third paragraph of Article 158 mandates referral to the NPCSC of interpretations “concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region . . . if such interpretation will affect the judgments on the cases.”<sup>72</sup>

Article 158 does not state who determines which provisions must be referred to the NPC and which provisions may be interpreted solely by the courts of the HKSAR. Faced with this question, the CFA reasoned that it held this power exclusively:

In our view it is for the Court of Final Appeal and for it alone to decide [which interpretations must be referred] . . . . It is significant that what has to be referred to the Standing Committee is not the question of interpretation involved generally, but the interpretation of the specific excluded provisions.<sup>73</sup>

Having declared its authority to decide the scope of any referral, the CFA concluded that the interpretation of Article 24, guaranteeing the right of abode, was a matter for its own determination rather than interpretation by the NPCSC.<sup>74</sup>

The interaction between Articles 22 and 24 raised an even more difficult question. Though counsel for the Director of Immigration conceded that Article 24 was a provision “within the limits of autonomy of the Region,”<sup>75</sup> and thus did not mandate referral, he argued that a proper interpretation of Article 24 required interpretation of Article 22, which did mandate referral.<sup>76</sup> Article 22 provides that immigrants to Hong Kong “from other parts of China” must apply for approval and that an immigration limit will be determined by the Central People’s Government (“CPG”).<sup>77</sup> The Director argued that because Article 22 specifically deals with

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<sup>70</sup> *Ng Ka Ling* [1999] 1 HKC at 327 (quoting Basic Law Article 158).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* (quoting Basic Law Article 158, paragraph 3).

<sup>73</sup> *See id.* at 328-29.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 331.

<sup>76</sup> *Id.* at 329.

<sup>77</sup> Article 22 of the Basic Law states:

the relationship between the Central Authorities and the HKSAR, and because interpretation of Article 22 is required for proper interpretation of Article 24, the CFA should have referred the entire case.<sup>78</sup>

Rejecting this argument, the CFA held that if the “predominant provision” at issue in the case is within the jurisdiction of the HKSAR, then it is unnecessary to refer any subsidiary provisions to the NPCSC, even if those provisions arguably fell within the mandatory referral categories of Article 158.<sup>79</sup> The Court again justified its conclusion on “purposive” grounds, reasoning that this “predominant provision” test properly effectuates Article 158’s division of interpretive authority between the HKSAR courts and the CPG.<sup>80</sup>

The significance of the CFA’s method of analysis cannot be overemphasized. By relying on a “purposive” constitutional interpretation that carefully considered the context of the provisions and the PRC’s “underlying policies” toward Hong Kong, the CFA appropriately emphasized both HKSAR’s political autonomy and the primacy of individual rights. But more than that, the purposive approach, in the Court’s own view, represented a commitment to traditional common law principles of adjudication as previously practiced in Hong Kong. Hence, the CFA took pains to declare that “the courts must avoid a literal, technical, narrow or rigid approach.”<sup>81</sup> The CFA’s reliance on what it viewed as standard common law methods, however, would later come into conflict with the “true legislative intent” approach employed by the NPCSC in its reinterpretation.<sup>82</sup>

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

Basic Law, *supra* note 22, at art. 22, para. 4. It could be argued that a literal reading of Article 22 directly conflicts with the right of abode guarantee in Article 24.

<sup>78</sup> *Ng Ka Ling* [1999] 1 HKC at 329.

<sup>79</sup> *Id.* at 330.

<sup>80</sup> *Id.* at 331. The CFA’s stance on referral did not pass without significant criticism. Within Hong Kong, for example, Professor Peter Wesley-Smith of the University of Hong Kong argued that there was a strong case to be made that the Court may have been incorrect in relying on the predominant provision test as the basis not to make a referral. Peter Wesley-Smith, “The Options” (May 13, 1999)(Draft paper prepared for presentation at a seminar organized by the Central Policy Unit, on file with the Crowley Program. The author points out that the views expressed do not necessarily represent his final opinions.) In a similar fashion, Jerome Cohen, a prominent Chinese law expert at New York University Law School, publicly took the CFA to task for failing to ask the NPCSC to consider whether mainland migrants needed permission from Chinese authorities to leave the mainland. According to Professor Cohen, this failure set in motion the resulting right of abode crisis. *See Court Flunked Test, Says US Professor*, S. CHINA MORNING POST, Dec. 6, 1999.

<sup>81</sup> *Ng Ka Ling* [1999] 1 HKC at 326.

<sup>82</sup> *See* GHAI, *supra* note 30, at 225-26; MICHAEL C. DAVIS, WRITTEN TESTIMONY FOR THE LEGISLATIVE COUNCIL ON THE QUESTION OF MECHANISMS FOR SEEKING NPCSC STANDING COMMITTEE INTERPRETATION (June 12, 1999).



b. Articles 22 and 24 of the Basic Law

The CFA next considered the right of abode restrictions themselves. *Ng Ka Ling* and *Chan Kam Nga* challenged three specific limitations: (1) the requirement of a mainland certificate; (2) the limitation of the right to children born within marriage; and (3) the requirement that the right of abode have vested in at least one parent at the time of the child's birth. The CFA invalidated all three.

On the first issue, the Director of Immigration argued that Article 22 of the Basic Law<sup>83</sup> limits the right of abode for mainland Chinese residents by requiring approval by mainland authorities. The certificate of entitlement scheme was therefore constitutional under the Basic Law in that it simply implemented a scheme for approval of requests to emigrate.<sup>84</sup> The Court in *Ng Ka Ling* unequivocally rejected this argument, holding that the right of abode was a “core right,” without which all of the other rights guaranteed in Chapter III of the Basic Law would be useless.<sup>85</sup> Accordingly, the CFA narrowly interpreted Article 22 as applying only to those who lacked the right of abode under Article 24.<sup>86</sup>

The CFA did, however, hold that the Director of Immigration could require verification of an individual's claim to permanent resident status.<sup>87</sup> The Court therefore ruled that the No. 3 Ordinance's requirement of a certificate of entitlement from the HKSAR government was permissible, so long as the Director of Immigration operated the scheme in a “fair and reasonable manner” without “unlawful delay.”<sup>88</sup> This request would become central to a follow-up case that the CFA would decide near the end of 1999.<sup>89</sup>

The Court in *Ng Ka Ling* next addressed the illegitimacy issue.<sup>90</sup> The CFA held that the No. 2 Ordinance's restriction of the right of abode to children born within marriage violated the Basic Law for two primary reasons. First, the Court reasoned that the No. 2 Ordinance's discrimination between legitimate and illegitimate children was antithetical to the “principle of equality” enshrined in both the Basic Law and the ICCPR.<sup>91</sup> Second, the CFA found that the “plain meaning” of Article 24 suggested no restriction: “[a] child born out of wedlock is no more or less a person born of [a permanent] resident than a child born in wedlock.”<sup>92</sup>

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<sup>83</sup> Basic Law, *supra* note 22, at art. 22.

<sup>84</sup> *Ng Ka Ling* [1999] 1 HKC at 331.

<sup>85</sup> *Id.* at 332.

<sup>86</sup> *Id.* at 332-33.

<sup>87</sup> *Id.* at 334.

<sup>88</sup> *Id.* at 334-35

<sup>89</sup> *See infra* notes 225-240 and accompanying text.

<sup>90</sup> *Id.* at 339.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 340.

Issued the same day as the decision in *Ng Ka Ling, Chan Kam Nga* addressed what would emerge as the most important restriction on the right of abode -- the No. 2 Ordinance's limitation of the right to children born after their parents already had acquired permanent residency status.<sup>93</sup> Following the pattern of *Ng Ka Ling*, the CFA again found this restriction on the right of abode unconstitutional.<sup>94</sup> Echoing its analysis of the legitimacy requirement, the Court held that the "natural meaning" of Article 24(3) included all children born of permanent residents regardless of when the parents acquired such status.<sup>95</sup> The CFA also justified its holding under its "purposive" interpretation of Article 24, reasoning that an unrestricted right of abode "enabl[es] that child to be with that parent [in Hong Kong], thereby securing the unity of the family."<sup>96</sup>

### 3. *The Clarification Controversy*

The CFA's unequivocal assertion of the power of judicial review and its narrow interpretation of the mandatory referral provisions of Article 158 assuaged some commentators' fears that the autonomy granted by the Basic Law was little more than an empty promise.<sup>97</sup> Others, however, not the least the CPG, perceived aspects of the decision as threatening to China's sovereignty, and as usurping the NPCSC's ultimate interpretive authority over the Basic Law. Still others feared that the HKSAR administration's concern over increased immigration might lead it to disregard the ruling.<sup>98</sup> This last fear was soon realized when Chief Executive Tung Chee Hwa expressly supported the deportation of overstayers claiming the right of abode pending the negotiation of a new immigration procedure with the mainland.<sup>99</sup>

The most critical responses to the decision initially came from Beijing. Dr. Raymond Wu Wai-yung, a professor and leading advisor to the CPG, argued that the CFA's decision was simply wrong. In his view, the issue should have been referred to the NPCSC for interpretation, and the Basic Law should have been interpreted in accordance with the mainland legal system, not common law principles.<sup>100</sup> In the first official comment of the mainland government on the abode ruling, Zhao Qizheng, a senior official of the State

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<sup>93</sup> See *Chan Kam Nga v. Director of Immigration* [1999] 1 HKC at 352.

<sup>94</sup> *Id.* at 348, 354-55.

<sup>95</sup> *Id.* at 354.

<sup>96</sup> *Id.* The CFA also noted that the ICCPR defines the family as "the natural and fundamental group unit of society and is entitled to protection by society and the State." *Id.* at 355 (quoting ICCPR art. 23(1)).

<sup>97</sup> See, e.g., Editorial, *Landmark Ruling*, S. CHINA MORNING POST, Jan. 30, 1999 (referring to right of abode decision as "restor[ing] the public's flagging confidence, following months of anxiety that Hong Kong's most cherished institutions were being slowly eroded"); Yash Ghai, *Abode Verdict a Resounding Victory for the Rule of Law*, S. CHINA MORNING POST, Feb. 3, 1999.

<sup>98</sup> See e.g., Margaret Ng, *Right of Abode Justice Speaks with a Clear Voice*, S. CHINA MORNING POST, Feb. 5, 1999. LegCo member Margaret Ng warned that "[a]ny suggestion of maintaining policies calculated to frustrate the judgment of the court will be a serious challenge to the rule of law in the HKSAR and will shock the world." *Id.*

<sup>99</sup> *Arrests Pave Way for Test Case on Right of Abode*, S. CHINA MORNING POST, Feb. 8, 1999.

<sup>100</sup> No Kwai-Yan, *Beijing Adviser Rejects Calls for His Resignation*, S. CHINA MORNING POST, Feb. 5, 1999, at 5.

Council, likewise claimed that the decision was contrary to the Basic Law and should be changed.<sup>101</sup> Importantly, this criticism of the right of abode ruling had less to do with the substance of the CFA's decision than with the dictum in *Ng Ka Ling* that the Basic Law gave the CFA authority to review acts of the NPC. In statements widely perceived to reflect Beijing's official position, four prominent mainland legal scholars emphatically denied that the Hong Kong courts had any authority to invalidate mainland legislation that applied to Hong Kong.<sup>102</sup>

The HKSAR Administration was quick to respond to the brewing controversy. On February 12, 1999, Chief Executive Tung dispatched the HKSAR's Secretary for Justice, Elsie Leung, to Beijing to discuss the right of abode decision with mainland government authorities.<sup>103</sup> On February 24, Leung filed an "application for clarification" of the right of abode judgment with the CFA. In addition, she also directly telephoned the Chief Justice of the CFA, Andrew Li Kwok-nang, to request an early hearing date for the clarification process.<sup>104</sup> The Hong Kong Deputies to the NPC also entered the fray by proposing submissions for the NPC's next plenum meeting asking the NPCSC to interpret Articles 22, 24, and 158 of the Basic Law to "rectify" perceived "errors" in the right of abode judgments.<sup>105</sup>

Responding to these developments on February 26, 1999 (less than one month after the original judgement), the CFA issued a terse opinion "clarifying" its decision in the right of abode cases. The Court acknowledged that it was following "an exceptional course" by reconsidering its prior judgment.<sup>106</sup> It briefly noted that its judicial power is "derived from and is subject to" the Basic Law, and for the first time referred to the first paragraph of Article 158 which vests the power of interpretation of the Basic Law in the NPCSC.<sup>107</sup> The most important portion of the clarification addressed the CFA's authority relative to the NPCSC:

[T]he Court's judgment . . . did not question the authority of the Standing Committee to make an interpretation under art[icle] 158 which would have to be followed by the courts of the Region. The Court accepts that it cannot question that authority. Nor did the Court's judgment question . . . the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law.<sup>108</sup>

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<sup>101</sup> *Ruling Against Basic Law, Senior Official Says*, S. CHINA MORNING POST, Feb. 8, 1999. Zhao Qizheng later publicly clarified this statement, saying that these were only his personal views and not necessarily those of the Central Authorities. See also, *Tung Sends Justice Chief to Beijing To Smooth Out Row*, S. CHINA MORNING POST, Feb. 10, 1999.

<sup>102</sup> Mark O'Neill, *Beijing Says Abode Ruling Was Wrong and Should Be Changed*, S. CHINA MORNING POST, Feb. 9, 1999, at 1; Chris Yeung, *Pressure on Abode Court for Rethink*, S. CHINA MORNING POST, Apr. 30, 1999, at 1.

<sup>103</sup> *Justice Chief Leaves for Hong Kong Talks on Friday*, S. CHINA MORNING POST, Feb. 11, 1999.

<sup>104</sup> Angela Li, *'Over-Anxious': Elsie Leung*, S. CHINA MORNING POST, Mar. 6, 1999.

<sup>105</sup> *Ng Ka Ling (an infant) v. Director of Immigration* [1999] 1 HKC 425-26 (factual background in case reporter explaining the CFA's clarification).

<sup>106</sup> *Id.* at 427.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

Nowhere in the clarification did the court expressly vacate or modify any of the conclusions of its original opinion. The clarification instead mainly tracked Article 158's initial grant of interpretive authority to the NPCSC.<sup>109</sup>

The clarification apparently had the desired political effect on Beijing. At its annual plenum session eleven days after the CFA issued its “clarification,”<sup>110</sup> the NPC chose neither to address the right of abode ruling nor refer the matter to the NPCSC. Beijing had apparently received adequate assurance of the CPG's sovereignty and authority under the Basic Law and seemed content to let Hong Kong deal with the potentially large influx of mainland immigrants on its own.<sup>111</sup> The possibility that the NPC would authorize the NPCSC to override the Court's decision by reinterpreting the Basic Law was defused and a constitutional crisis was narrowly averted. Chinese President Jiang Zemin signaled the apparent end of the controversy, when he poetically declared, “the ripples in the pond have become calm.”<sup>112</sup>

#### *D. Challenge from Within: The Request for NPCSC Reinterpretation*<sup>113</sup>

Though it averted a direct clash between the Hong Kong courts and the mainland authorities, Hong Kong could not avoid a constitutional crisis, triggered from within. In retrospect, this development is not altogether surprising. Hong Kong's legal community, and the HKSAR administration in particular, faced the enormous challenge of implementing a novel and complex constitutional order in the context of what the local government perceived as a potentially massive social and demographic crisis.

Even conceding the difficulty of the task at hand, however, the administration's response to the right of abode decisions proved to be controversial and problematic. Claiming that the CFA decision would produce dire social consequences, the HKSAR administration decided to proceed directly with a request to the NPCSC for reinterpretation of the Basic Law provisions on which the CFA had relied. Both the wisdom and the legality of the administration's request are open to serious question. By refusing to implement the CFA judgment, pursuing a request for reinterpretation, and ignoring the more palatable and legally sound alternatives that were available, the HKSAR administration actions served to

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<sup>109</sup> The one area where the CFA may have made a concession beyond the Basic Law's language was its statement that the courts of the HKSAR would have to follow an NPCSC interpretation in adjudicating cases, which is nowhere provided for expressly. Interview with Denis Chang, Lead Counsel for the Petitioners in *Ng Ka Ling*, in Hong Kong (June 8, 1999).

<sup>110</sup> Mark O'Neill, *Abode Ruling 'Not on NPC Agenda'*, S. CHINA MORNING POST, Mar. 5, 1999, at 8.

<sup>111</sup> No Kwai-yan, *Beijing No Longer 'Gatekeeper' On Abode, Warns Lu Ping*, S. CHINA MORNING POST, Mar. 5, 1999.

<sup>112</sup> Interview with Denis Chang, Lead Counsel for the Petitioners in *Ng Ka Ling*, in Hong Kong (June 8, 1999).

<sup>113</sup> There is a controversy over the use of the term reinterpretation as opposed to interpretation. Those who are more sympathetic to the use of this power by the NPCSC, usually use interpretation because that term is used in Article 158 or because it reflects mainland legal concepts. Those who harbor greater concern over the NPCSC's role, generally use reinterpretation, at least when the NPCSC is passing on provisions that Hong Kong courts have already ruled on. We will employ reinterpretation, with regard to the right of abode controversy because we believe this term more accurately reflects what the NPCSC did and was asked to do in that situation.

undermine the Court and cast doubt on its commitment to defend Hong Kong's common law legal traditions.

*1. The HKSAR's Failure To Implement the CFA Judgment*

Before the "clarification" was even issued, Hong Kong's administration already indicated that it would not readily implement the CFA decision. Soon after the CFA's original ruling, the HKSAR government arrested a number of mainlanders who had overstayed their two-way travel permits and were claiming the right of abode under the Court's judgment.<sup>114</sup> The government did agree, however, to expedite the immigration process for 13,000 mainlanders who already had been issued one-way permits but were delayed by the 150 person-per-day immigration quota.<sup>115</sup>

It was at this point that the HKSAR government, together with mainland authorities, also conducted a survey of mainlanders in an effort to determine the likely number of immigrants that would be generated by the CFA's decision. The preliminary results, which were issued on April 28, 1999, were ominous and controversial. According to the government's figures, enforcement of the CFA decision would result in 1.67 million additional mainlanders acquiring the right of abode over the next seven years.<sup>116</sup> The study indicated that 200,000 of the potential immigrants were illegitimate children and that the remaining 1.4 million were children of Hong Kong residents whose right of abode had not yet vested at the time of the child's birth.<sup>117</sup> The analysis assumed that all mainlanders who were eligible for permanent residence would claim this right. Based on that assumption, the administration predicted that 690,000 would be eligible to enter immediately and the remaining 980,000 would come in within the next seven years.<sup>118</sup>

Repeated and alarming government statements stressed that "social resources could hardly meet the immediate needs of this large group of immigrants for education, housing, medical and health, social welfare, etc., thereby triggering severe social problems."<sup>119</sup> Not surprisingly, the government's survey results and

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<sup>114</sup> See *Arrests Pave Way*, *supra* note 99.

<sup>115</sup> Billy Wong Wai-yuk & Audrey Parwani, *Joint Surveys To Tally 'Huge' Influx Total*, S. CHINA MORNING POST, Feb. 2, 1999.

<sup>116</sup> See HONG KONG HUMAN RIGHTS MONITOR, PRESENTATION TO THE LEGISLATIVE COUNCIL ON THE RIGHT OF ABODE (May 10, 1999); THE STATE COUNCIL: THE PEOPLE'S REPUBLIC OF CHINA, REPORT ON ASSISTANCE FROM THE PEOPLE'S GOVERNMENT IN SOLVING PROBLEMS ENCOUNTERED IN THE IMPLEMENTATION OF THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA 3 (May 20, 1999).

<sup>117</sup> See Chris Yeung, *Pressure on Abode Court for Rethink*, S. CHINA MORNING POST, Apr. 30, 1999, at 1; HONG KONG HUMAN RIGHTS MONITOR, *supra* note 116.

<sup>118</sup> See interview with Dr. Stephen Ng, Director, Hong Kong Human Rights Monitor, in Hong Kong (May 31, 1999) (noting that survey methodology has been widely criticized and that there is little evidence that all right of abode holders would actually want to permanently emigrate to Hong Kong); remarks of Gladys Li, SC, Barrister, at Crowley Mission Wrap-Up Session No.1, in Hong Kong (June 10, 1999). Critics claimed that these figures were grossly inflated and that the actual numbers were as low as half the administration estimate. *Id.*

<sup>119</sup> CHIEF EXECUTIVE'S SUBMISSION TO LEGISLATIVE COUNCIL HOUSE COMMITTEE, RIGHT OF ABODE: THE SOLUTION (May 18, 1999) [hereinafter RIGHT OF ABODE: THE SOLUTION] (stating that government's opinion polls show that "public is very concerned about these unbearable consequences").

dramatic predictions of economic catastrophe generated widespread public concern and a demand that some solution be found.<sup>120</sup> The administration soon made clear its belief that only a reversal or nullification of the CFA's judgment could avert imminent crisis. The administration floated three possible options: 1) asking the CFA to reconsider its interpretation in the upcoming "overstayer" test cases; 2) amending the Basic Law; or 3) asking the NPCSC to give its own interpretation of Articles 22 and 24 of the Basic Law.<sup>121</sup> After brief deliberation, the administration determined that the third choice, requesting an interpretation from the NPCSC, was the only feasible alternative.

This decision immediately met with significant opposition from the Hong Kong legal community, which expressed concern over Hong Kong's autonomy and urged alternative approaches.<sup>122</sup> Undeterred, the administration secured a resolution supporting its plan from LegCo, but not before "nineteen members, led by Democratic Party chairman Martin Lee and dressed in black" walked out prior to the vote.<sup>123</sup> In the meantime, many of the Hong Kong Deputies to the NPC, who are themselves not directly elected, made public their view favoring reinterpretation over amendment.<sup>124</sup>

On May 20, 1999, the Chief Executive submitted a formal report to the State Council in Beijing. Among other things, the report observed that the CFA's interpretation differed from the administration's understanding of the wording, purpose, and legislative intent of these provisions; that the control of mainland resident immigration into Hong Kong has a bearing on the relationship between the Central Authorities and the HKSAR; that the HKSAR is no longer capable of resolving the problem on its own; and that the CFA was compelled to approach Beijing in the face of exceptional circumstances.<sup>125</sup> The Chief Executive concluded his report by suggesting that the State Council should ask the NPCSC to interpret, under the relevant provisions of the Constitution and the Basic Law, Article 22(4) and 24(2)(3) of the Basic Law according to the true legislative intent.<sup>126</sup>

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<sup>120</sup> *Id.* Many in Hong Kong opined that government statements were essentially "scare tactics" to draw criticism away from the proposed NPCSC interpretation solution. See Jason Felton, President, American Chamber of Commerce in Hong Kong, Remarks at the Crowley Mission Breakfast with the American Chamber of Commerce in Hong Kong (June 4, 1999); Interview with Dr. Stephen Ng, Director, Hong Kong Human Rights Monitor, in Hong Kong (May 31, 1999).

<sup>121</sup> See RIGHT OF ABODE: THE SOLUTION, *supra* note 119.

<sup>122</sup> See Hong Kong Bar Association, Press Release, *Open Letter to the Chief Executive on the Right of Abode Case* (May 5, 1999); HONG KONG HUMAN RIGHTS MONITOR, *supra* note 116.

<sup>123</sup> See Chris Yeung, *LegCo Walkout on Abode Vote*, S. CHINA MORNING POST, May 20, 1999, at 1; Interview with Rita Fan, President, HKSAR Legislative Council, in Hong Kong (June 7, 1999).

<sup>124</sup> See Chris Yeung, *Balance Between Legality and Reality*, S. CHINA MORNING POST, May 1, 1999, at 13 (noting that key local NPC deputies have insisted that constitution should not be altered simply because of "wrong ruling" by CFA); Interview with Margaret Ng, Legislative Councilor, in Hong Kong (June 7, 1999).

<sup>125</sup> C.H. TUNG, CHIEF EXECUTIVE, HONG KONG SPECIAL ADMINISTRATIVE REGION, REPORT ON SEEKING ASSISTANCE FROM THE CENTRAL PEOPLE'S GOVERNMENT IN SOLVING THE PROBLEMS ENCOUNTERED IN THE IMPLEMENTATION OF THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA 4 (May 20, 1999).

<sup>126</sup> *Id.*

2. *Legality of the Reinterpretation Request*

The request for reinterpretation generated a controversy that dominated Hong Kong political life for weeks. As a threshold matter, prominent members of the Hong Kong bar and academy argued that the Chief Executive's action was flatly inconsistent with the Basic Law. In contrast, the administration, with some support from the legal community, contended that the Basic Law all but mandated the request.

Led by the Hong Kong Bar Association, administration critics first contended that the request itself was *ultra vires*. As the critics pointed out, the Basic Law nowhere authorizes the Chief Executive to seek an interpretation. On the contrary, the Basic Law expressly grants to the CFA alone the power to refer interpretive matters to the NPCSC, and then only in the context of adjudicating cases.<sup>127</sup> The structure of the Basic Law, moreover, contemplates that NPCSC interpretations will be issued before, and not after, the CFA rules on a provision of the Basic Law. This sequence accords respect both to the interpretive authority of the NPCSC and the finality of CFA adjudication. Article 159 reinforces this conclusion by providing a mechanism to change CFA interpretations through amendment to the Basic Law. This procedure, found in many common law systems, reconciles the need for judicial finality with the need to modify fundamental legal provisions in extraordinary circumstances through democratic means.<sup>128</sup>

As the administration's opponents further noted, a government request for reinterpretation is in tension with the Basic Law's central commitments to Hong Kong's high degree of autonomy, common law system, judicial independence, and adjudicative finality.<sup>129</sup> Asking a higher mainland authority to "correct" the judgment reached by Hong Kong's highest court has substantially the same effect as appellate review by the mainland over the CFA. Although the HKSAR administration insisted that, under Article 158, the reinterpretation would not alter the judgment as it affects the named appellants, its argument ignored the importance of the decision's precedential authority in a common law system.<sup>130</sup> While it might "preserve" the judgment as a technical matter, reinterpretation undermines the values of predictability, reliance, and fairness promoted by the doctrine of *stare decisis*. These values are particularly important to the proper role of a court, such as the CFA, with jurisdiction over constitutional cases.<sup>131</sup>

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<sup>127</sup> Basic Law, *supra* note 22, art. 158, para. 2.

<sup>128</sup> See Michael C. Davis, *supra* note 82; HONG KONG HUMAN RIGHTS MONITOR, *supra* note 116; interview with Margaret Ng, Legislative Councilor, in Hong Kong (June 7, 1999).

<sup>129</sup> See *supra* notes 37-45 and accompanying text.

<sup>130</sup> See Margaret Ng, *Time for the Next Test To Begin*, S. CHINA MORNING POST, July 16, 1999; Hong Kong Bar Association, Press Release, *Open Letter to the Chief Executive on the Right of Abode Case* (May 5, 1999). The absence of a class action device worsens this problem by making it difficult, if not impossible, for individuals with similar claims to preserve their rights by joining a suit in which the CFA would issue an initial judgment.

<sup>131</sup> Critics added that this particular request further undermined Hong Kong's autonomy in seeking a reinterpretation of both Articles 22 and 24, given that the government had conceded before the Court that Article 24 was not a referable matter dealing with the relationship between the HKSAR and the mainland. See, e.g., interview with Denis Chang, lead counsel for practitioners in *Ng Ka Ling*, in Hong Kong (June 8, 1999); see also *Ng Ka Ling (an infant) v. Director of Immigration* [1999] 1 H.K.C. 291, 329-31 (discussing whether Article 158 of Basic Law mandates referring to Article 22 or 24 for interpretation).

The Hong Kong administration justified the request by asserting the NPCSC's general power of interpretation, together with the Chief Executive's general powers and duties, arise under the Basic Law. On this view, it claimed Article 158's broad grant of interpretive power "may be exercised by [the NPCSC] in the absence of any reference to it by the CFA . . . [and] . . . may also be exercised in respect of any provision of the Basic Law."<sup>132</sup> Analytically, this argument depends in large measure on drawing a sharp distinction between interpretation and adjudication, a distinction more easily made in mainland legal circles but largely alien to the common law tradition in Hong Kong. Relying on this formal dichotomy, the administration concluded that legislative interpretation by the NPCSC would neither usurp the rightful powers of the Hong Kong judiciary nor interfere with the freedom of Hong Kong judges to decide future cases in accordance with the NPCSC's interpretation.<sup>133</sup>

Assuming the NPCSC's interpretive authority, the administration located its own power to approach that body in Basic Law Articles 43 and 48. Article 43 makes the Chief Executive the head of the HKSAR and provides that he or she shall be "accountable" to the CPG as well as to Hong Kong.<sup>134</sup> Article 48 enumerates the Chief Executive's powers, including the responsibility for the implementation of the Basic Law.<sup>135</sup> According to the administration, these general powers necessarily encompass the authority to request a reinterpretation. The Law Society of Hong Kong<sup>136</sup> and at least one prominent academic<sup>137</sup> were among those who supported this view.

### 3. *The Amendment Alternative*

The prudence of the reinterpretation request generated even greater controversy than the question of its formal legality. Even assuming that the right of abode decision would have an enormous social impact that would have to be contained,<sup>138</sup> alternatives existed that were not only undoubtedly legal, but also accorded greater respect to Hong Kong's rule of law, autonomy, and evolving democracy. These alternatives were raised at the time, and the HKSAR administration itself acknowledged that other possible solutions existed and merited consideration. Of these alternatives, amending the Basic Law under Article 159 was the

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<sup>132</sup> Elsie Leung, Secretary for Justice of the HKSAR, Statement to the House Committee of LegCo (May 18, 1999).

<sup>133</sup> *See id.*; *see also* RIGHT OF ABODE: THE SOLUTION, *supra* note 119 (arguing that NPCSC interpretation of Articles 22 and 24 does not undermine judicial independence).

<sup>134</sup> Basic Law, *supra* note 22, art. 43. "The Chief Executive of the Hong Kong Special Administrative region shall be accountable to the Central People's Government and the Hong Kong Special Administrative Region in accordance to provisions of this Law." *Id.*

<sup>135</sup> *Id.* art. 48(2).

<sup>136</sup> Law Society Press Release, *Right of Abode: The Solution*, May 17, 1999.

<sup>137</sup> Peter Wesley-Smith, *supra* note 80.

<sup>138</sup> Though widespread, this assumption was by no means universal. During the delegation's stay, the Catholic Cardinal of Hong Kong made front page news by declaring that, even if the projection of 1.6 million new arrivals was correct, the HKSAR could and should accommodate all right of abode claimants. *See* Jo Pegg, *Cardinal Slams Tung Abode Moves*, S. CHINA MORNING POST, June 6, 1999, at 1.



most widely urged. In contrast to legislative interpretation, amendment is the formal mechanism employed by most common law systems for changing constitutional rules.<sup>139</sup>

As set forth in Article 159, the power to amend the Basic Law “shall be vested in the . . . National People’s Congress.”<sup>140</sup> The NPCSC, the State Council, or the Hong Kong government may propose bills for amendments. If the amendment proposed comes from Hong Kong, the bill must clear three hurdles before being submitted by the Hong Kong deputies who represent the HKSAR in the NPC. The bill must be approved by: 1) two-thirds of the deputies themselves; 2) two-thirds of all the members of LegCo; and 3) the HKSAR’s Chief Executive.<sup>141</sup>

Within Hong Kong, nearly all sides agreed that overturning a judicial interpretation of the Basic Law through amendment would have generated substantially less concern about maintaining judicial independence than seeking reinterpretation. Advocates of the amendment route noted, first, that an amendment would fully accord with the “power of final adjudication” guaranteed by both the Joint Declaration<sup>142</sup> and the Basic Law.<sup>143</sup> Instead of asking the NPCSC to “correct” an erroneous interpretation by the HKSAR’s highest court, an amendment would simply alter the relevant constitutional provision. In this way, an amendment would have addressed the feared crisis created by the CFA’s action without undermining the finality of the CFA’s judgment or its independence, and it would have preserved the unity of final adjudication and the practice of interpretation that characterizes the common law tradition. Second, an amendment would have better accorded with the HKSAR’s “high degree of autonomy,” especially as reflected in Article 158. Article 158 expressly assigns to the Hong Kong courts the responsibility of interpreting Basic Law provisions “within the limits of the autonomy of the Region.” A clear consensus in the Hong Kong legal community viewed Article 24’s right of abode guarantee as falling within the HKSAR’s “limits of autonomy,” a point that even the government conceded at trial.<sup>144</sup> Assuming that any amendment to Article 24 would have originated in Hong Kong, the amendment process would have better maintained the HKSAR’s autonomy by allowing it to consider, as an initial matter, any narrowing of the scope of Article 24. In contrast, an NPCSC correction of a considered judgment of the CFA, even at the request of the HKSAR government, compromised the HKSAR’s autonomy and consolidated power in the Central People’s Government.

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<sup>139</sup> The main exception, of course, is the British Constitution, which remains unwritten. See ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF LAW OF THE CONSTITUTION 330 (1889).

<sup>140</sup> Basic Law, *supra* note 22, art. 159, para. 1.

<sup>141</sup> *Id.* art. 159, ¶ 2. Before the NPC considers an amendment bill, “the Committee of the Basic Law shall study it and submit its views.” *Id.* ¶ 3. In addition, no amendment shall contravene the established policies of the PRC regarding Hong Kong. *Id.* ¶ 4.

<sup>142</sup> Joint Declaration, *supra* note 29, at art. 3. See *supra* notes 29-37 and accompanying text (discussing Joint Declaration’s guarantee of judicial independence and finality).

<sup>143</sup> Basic Law, *supra* note 22, arts. 2, 19. See *supra* notes 40-42 and accompanying text (discussing Basic Law’s guarantee of judicial independence and finality).

<sup>144</sup> See *supra* note 75 and accompanying text.

In addition, the amendment process would have entailed at least a formal role for Hong Kong's representative institutions, and greater public debate and democratic participation than did reinterpretation.<sup>145</sup> Article 159's requirement that amendment bills be forwarded to the NPC only after gaining approval by the Chief Executive, two-thirds of the LegCo, and two-thirds of the Hong Kong deputies to the NPC,<sup>146</sup> would have ensured at least some degree of public deliberation and guaranteed that Hong Kong's fundamental law, including its protection of rights, could only be altered with overwhelming public support within the HKSAR.

In this case, the governments in both Hong Kong and Beijing seemed determined to foreclose democratic participation in the reinterpretation process. First, the HKSAR administration did not make the text of its request public until over three weeks after it had been submitted to the State Council.<sup>147</sup> Then, when two LegCo members attempted to fly to Beijing to make the case against reinterpretation, they were barred from boarding the plane at the Hong Kong airport at the direction of mainland authorities.<sup>148</sup> These episodes tended to confirm criticisms that the hasty and secretive reinterpretation process effectively precluded a considered discussion about whether the CFA decision created a potential demographic crisis in the first place, much less the best legal means to resolve it.

Stung by opposition to the request, the HKSAR administration went to great lengths to refute accusations that the decision was made out of sheer expediency.<sup>149</sup> In the Chief Executive's submission to the LegCo House Committee, the government argued both that the amendment process would take too long and that it lacked support politically.<sup>150</sup> As a practical matter, the administration asserted that an amendment could not be enacted in time to avert the impending immigration crisis even if sufficient political support existed.<sup>151</sup> Officials pointed out that since Article 159 vests the power of amendment solely in the NPC, and since the NPC had recently concluded its sole plenary meeting for 1999 in March, the HKSAR would face a potentially massive influx of immigrants claiming the right of abode for almost a full year before the law

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<sup>145</sup> The government could have created opportunities for greater democratic participation in the decision to request reinterpretation, but failed to do so.

<sup>146</sup> Basic Law, *supra* note 22, art. 159, para. 2.

<sup>147</sup> The request was submitted on May 20 and not released until June 11. See Margaret Ng, *Wrapped Up in Secrecy*, S. CHINA MORNING POST, June 4, 1999, at 1.

<sup>148</sup> See Angela Li, *Legislators Barred from Beijing Flights*, S. CHINA MORNING POST, June 11, 1999, at 1.

<sup>149</sup> See, e.g., Elsie Leung, Secretary for Justice of the HKSAR, *Statement at the House Committee Meeting of the Legislative Council* (May 18, 1999) ("In deciding between an interpretation and an amendment, the Administration has been guided by firm principle, not expediency.").

<sup>150</sup> RIGHT OF ABODE: THE SOLUTION, *supra* note 119.

<sup>151</sup> *Id.* (arguing that before amendment could be passed, many mainland residents will have exercised or obtained the right of abode under the CFA ruling).

could be changed.<sup>152</sup> The administration also expressed concern that the CFA judgment would encourage mainlanders asserting the right of abode to emigrate illegally and then claim the right once in Hong Kong.<sup>153</sup>

This argument, however, overlooked several aspects of the government's own inaction. On the one hand, the HKSAR made no effort to implement the decision immediately. Indeed, the government remained in negotiations with the mainland about enforcement of the CFA judgment for almost six months after it had been issued.<sup>154</sup> On the other hand, the HKSAR government apparently failed to consider the possibility of interim legislation as a means to control the flow of mainlander immigration while abiding by the CFA's judgment pending an amendment.<sup>155</sup> Some observers argued that such legislation could mitigate any immigration influx pending amendment, thereby eliminating the need to request an NPCSC reinterpretation.<sup>156</sup> Although the authorities were made aware of this alternative, both in public statements by the Hong Kong Bar Association and in testimony before LegCo,<sup>157</sup> the administration never seriously considered the possibility of interim legislation and neither the legality nor feasibility of this option was ever widely addressed.<sup>158</sup>

The CFA's judgment implicitly endorses legislative measures that would implement the right of abode gradually in the face of exigent circumstances.<sup>159</sup> First, the CFA upheld the "certificate of entitlement scheme" under the No. 3 Ordinance, allowing the HKSAR authorities some degree of control over the

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*; see also, interview with Jason Felton, American Chamber of Commerce in Hong Kong (June 4, 1999)(suggesting that government was afraid that illegal immigrant smugglers would spread the word that once immigrants arrive in Hong Kong, they cannot be sent back).

<sup>154</sup> Interview with Robert Allcock, HKSAR DOJ, in Hong Kong (June 4, 1999).

<sup>155</sup> This option might be viewed as a legislative analogy to the U.S. Supreme Court's remedial decision in *Brown II*, *Brown v. Board of Education*, 349 U.S. 294 (1955). There, the Court ruled that equitable principles permitted enforcement of the fundamental constitutional right to equal protection of laws "with all deliberate speed," rather than immediately, in light of the massive social dislocations that might otherwise result. Of course, even the Court itself later recognized the danger of "too much deliberation and not enough speed." See *Griffin v. County School Board*, 377 U.S. 218, 229 (1964). The difference in the Hong Kong context would be that any delay would not last longer than a year since the purpose would be to allow for the NPC to take up a proposed amendment at its next meeting.

<sup>156</sup> HONG KONG BAR ASSOCIATION, SOLUTIONS TO THE PROBLEM OF MASS IMMIGRATION (May 16, 1999); Michael C. Davis, *Home To Roost*, S. CHINA MORNING POST, May 16, 1999, at 10.

<sup>157</sup> See, e.g., HONG KONG BAR ASSOCIATION, *supra* note 156; Michael C. Davis, *supra* note 82.

<sup>158</sup> Interview with Robert Allcock, HKSAR DOJ, in Hong Kong (June 4, 1999); interview with Albert Chen, Dean of the University of Hong Kong Law Faculty, in Hong Kong (June 7, 1999).

<sup>159</sup> See, e.g., interview with Denis Chang, Lead Counsel for the petitioners in the right of abode cases, in Hong Kong (June 8, 1999)(noting that CFA's judgment is subject to "reasonableness" requirement which "gives a window" for administrative mitigation of impending influx); interview with Albert Chen, Dean of University of Hong Kong Law Faculty, in Hong Kong (June 7, 1999)(observing that CFA's judgment left certificate of entitlement scheme intact, lessening urgency of immigration crisis).

process of verifying immigrant's claims to the right of abode.<sup>160</sup> Second, the CFA expressly noted that such a verification scheme was subject to a "reasonableness" requirement.<sup>161</sup> Having been granted "reasonable" control over the verification of permanent resident status, the HKSAR could have adopted lawful legislative and administrative measures to implement the decision in an orderly fashion.<sup>162</sup>

Administration authorities initially rejected the use of such interim measures to facilitate amendment. This initial resistance was based on the view that any less than total and immediate implementation of the CFA judgment would be illegal.<sup>163</sup> Some language in the decision can be read to support this view. The CFA warned, for example, that any immigrant who experiences "unlawful delay" in the acceptance or rejection of her permanent resident application could "invoke public law remedies in our courts."<sup>164</sup> Nevertheless, senior officials at the Department of Justice ("DOJ") advised our delegation that the alleged immediacy of the immigration crisis prevented them from exploring this option fully. The DOJ, however, did express genuine interest in the possibility in the event of a similar crisis in the future.<sup>165</sup>

For their part, most opponents of reinterpretation did not advocate interim measures to facilitate amendment either.<sup>166</sup> Indeed, numerous interviews revealed somewhat less interest in the idea than was shown by administration officials.<sup>167</sup> Administration opponents declined to pursue the idea in the right of abode context for several reasons. First, the HKSAR administration, not individual LegCo members, controls the introduction of such legislation. Second, most defenders of the CFA decision believed the administration was committed to reinterpretation almost from the beginning, making attempts at compromise futile.<sup>168</sup> Finally, the lawyers who argued the right of abode cases were constrained by the possibility that agreeing to delay in the implementation of the CFA's decision might violate their ethical obligation to their clients.

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<sup>160</sup> *Ng Ka Ling* [1999] 1 HKC at 334 (stating that "[i]t is reasonable for the legislature to introduce a scheme which provides for verification of a person's *claim* to be a permanent resident." (emphasis in original)).

<sup>161</sup> *Id.* at 335 ("[A]s a matter of statutory construction, the courts would import the requirement of reasonableness into a number of provisions for operating such verification scheme.").

<sup>162</sup> Interview with Denis Chang, Lead Counsel for the petitioners in the right of abode cases, in Hong Kong (June 8, 1999).

<sup>163</sup> Interview with Robert Allcock, HKSAR DOJ, in Hong Kong (June 4, 1999)(arguing that under CFA's actual abode order, no partial implementation of judgment would have been legal).

<sup>164</sup> *Ng Ka Ling* [1999] 1 HKC at 335. Additionally, the CFA decision granted a statutory right of appeal to the HKSAR Immigration Tribunal for any rejected abode applicants applying for a certificate of entitlement. *Id.*

<sup>165</sup> Interview with Elsie Leung, HKSAR Secretary of Justice, and Robert Allcock, HKSAR DOJ, in Hong Kong (June 10, 1999).

<sup>166</sup> One exception was Professor Michael C. Davis of the City University of Hong Kong, who proposed this type of approach in testimony before LegCo. *See supra* notes 156-157.

<sup>167</sup> Interview with Denis Chang, Lead Counsel for Petitioners in *Ng Ka Ling*, in Hong Kong (June 8, 1999); interview with Elsie Leung, HKSAR Secretary of Justice, and Robert Allcock, HKSAR DOJ, in Hong Kong (June 10, 1999).

<sup>168</sup> *See, e.g.*, interview with Denis Chang, Lead Counsel for Petitioners in *Ng Ka Ling*, in Hong Kong (June 8, 1999).

Despite concerns on both sides, the possibility of seeking amendment to the Basic Law, combined with reasonable interim legislation narrowly tailored to address any genuine short-term crisis, could have been explored. Certainly the legal obstacles do not appear so great as to preclude further exploration of this type of approach. The administration's main argument to the contrary -- that the CFA judgment required complete and immediate implementation -- carries little weight, given the government's failure to even begin enforcement by the time the NPCSC issued its reinterpretation almost five months later.<sup>169</sup>

While the legal obstacles to interim legislation do not appear to have been overwhelming, the potential benefits were substantial. Assuming that the CFA's judgment could have been implemented in a reasonable, orderly and gradual manner, the purported socio-economic crisis could have been averted in the short term.<sup>170</sup> The delay would have allowed a public debate about the scope of the problem, permitted the formulation of a politically feasible amendment if one were deemed necessary, and would have controlled the situation pending the next plenum meeting of the NPC in March of 2000.<sup>171</sup> If the Basic Law had been amended, the controversy would have been satisfactorily resolved. The authority of the CFA would have remained unchallenged, the rule of law would have remained unquestioned, and Hong Kong's autonomy would have been preserved.

Even assuming that the problem of timing could have been addressed through interim legislation, HKSAR authorities contended that the amendment commanded insufficient support in both LegCo and among the Hong Kong deputies to the NPC to meet Article 159's two-thirds requirement in each.<sup>172</sup> Others argued that the Hong Kong deputies to the NPC doomed any potential amendment when they signed a unanimous statement stating that they would not support amendment.<sup>173</sup> Moreover, LegCo passed a resolution supporting the request for reinterpretation, albeit without the participation of the directly elected members.<sup>174</sup>

These obstacles to amendment, though formidable, might not have prevented an amendment supported by the administration. Moreover, these obstacles are an appropriate part of the entrenchment of the Basic Law under Article 159.<sup>175</sup> As one prominent lawyer observed, amendments to constitutions are

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<sup>169</sup> Interview with Robert Allcock, HKSAR DOJ, in Hong Kong (June 4, 1999). Indeed, the administration had in the meantime continued to arrest illegal immigrants claiming the right of abode without a certificate of entitlement. *See Arrests Pave Way*, *supra* note 99.

<sup>170</sup> HONG KONG BAR ASSOCIATION, *supra* note 156.

<sup>171</sup> *Id.* (stating that though administrative measures could "alleviate the threat of an immediate or sudden influx of mainlanders" that "[i]n the long term, the only acceptable solution would be to introduce amendments to the Basic Law.").

<sup>172</sup> *But see* interview with Rita Fan, LegCo President, in Hong Kong (June 7, 1999). The members had walked out to protest the government's maneuvers undermining the authority of the CFA and the integrity of the common law. *See Yeung*, *supra* note 122, at 1.

<sup>173</sup> Interview with Margaret Ng, LegCo Member, in Hong Kong (June 7, 1999). In Ms. Ng's analysis, these deputies supported the reinterpretation alternative because an amendment to the Basic Law would be equivalent to the admission that the NPC and the drafters of the Basic Law had made a mistake, not the CFA. *Id.*

<sup>174</sup> Interview with Margaret Ng, LegCo Member, in Hong Kong (June 7, 1999).

<sup>175</sup> Interview with Denis Chang, Lead Counsel for Petitioners in *Ng Ka Ling*, in Hong Kong (June 8, 1999).

supposed to be difficult to obtain, especially when they would restrict rights. If a society lacks the consensus to support such a change despite significant social consequences, then the right should be preserved.<sup>176</sup>

#### 4. *Legislative Interpretation in a “Hybrid” System*

More than any one step that it took in this drama, the administration’s basic argument -- that an NPCSC reinterpretation better reflects the hybrid legal system that the Basic Law created -- may pose the most serious threat to the common law tradition as Hong Kong has known it.<sup>177</sup> The administration argued that, because the CFA had simply misinterpreted the legislative intent behind Article 24, the article need not be amended; rather, it contended the drafters’ “true legislative intent” could be furnished, as it frequently is in the mainland legal system, by the national Chinese body that adopted the law in the first place.<sup>178</sup> Though the administration recognized that “[i]t is natural for those familiar with a common law system to object to a non-judicial body revising an interpretation . . . given by a final appellate court,” it nonetheless considered legislative interpretation proper because “Hong Kong is part of the [PRC], which has a civil law system.”<sup>179</sup>

Such an erosion of the “One Country, Two Systems” ideal threatens to supplant Hong Kong’s common law framework with the materially different approach to law practiced in the mainland. Indeed, a number of Hong Kong officials appear either to welcome this prospect or view it to some extent as inevitable. Both in meetings and in public statements, Mrs. Elsie Leung, the Hong Kong Secretary of Justice, indicated that resistance to mainland legal ideas reflected “arrogance” on the part of those steeped in the common law.<sup>180</sup> The fact remains, however, that this concept of a hybrid system conflicts with the mainland’s pledge to maintain “two systems” -- the very commitment that was necessitated by the mainland legal system’s failure to secure a comparable degree of confidence from the legal and investment communities in and outside China.<sup>181</sup>

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<sup>176</sup> Gladys Li, Hong Kong Barrister, Remarks at Crowley Wrap-Up Session, No. 1, in Hong Kong (June 10, 1999)

<sup>177</sup> RIGHT OF ABODE: THE SOLUTION, *supra* note 119, at para. 1; Elsie Leung, Secretary for Justice of the HKSAR, Statement at the House Committee Meeting of the Legislative Council (May 18, 1999); Interview with Gu Min Kang, Professor, City University of Hong Kong, in Hong Kong (June 9, 1999).

<sup>178</sup> RIGHT OF ABODE: THE SOLUTION, *supra* note 119, at para. 24; Elsie Leung, Secretary for Justice of the HKSAR, Statement at the House Committee Meeting of the Legislative Council (May 18, 1999); interview with Gu Min Kang, Professor, City University of Hong Kong, in Hong Kong (June 9, 1999).

<sup>179</sup> Elsie Leung, Secretary for Justice of the HKSAR, Statement at the House Committee Meeting of the Legislative Council (May 18, 1999).

<sup>180</sup> See Chris Yeung & No Kwai-yan, *Anson Pushes Two Systems*, S. CHINA MORNING POST, June 30, 1999; interview with Elsie Leung, Secretary for Justice of the HKSAR, in Hong Kong (May 18, 1999).

<sup>181</sup> See ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 121 (1998); GHAI, *supra* note 30, at 213-14, 323-34.

It has often been said that the Chinese system reflects the Chinese Communist Party's ("CCP") "rule by law," rather than the rule of law.<sup>182</sup> During the Cultural Revolution, the regime sought to dispense with the law outright, purging the nation of judges, lawyers, and law schools. Under Deng Xiaoping, the mainland recommitted itself to building a legal system, making substantial strides that have paralleled its economic progress.<sup>183</sup> These vast changes in the mainland legal tradition achieved a type of milestone in 1999, when the NPC adopted a constitutional amendment committing the mainland to the "rule of law."<sup>184</sup> Notwithstanding these considerable achievements, the mainland system remains fundamentally different from the common law framework that Deng's pledge of "One Country, Two Systems" was designed to protect.<sup>185</sup>

The differences between the systems begin with the Chinese constitutional framework. In contrast to liberal constitutions, China's socialist constitution serves not to constrain state power, but to enhance it in service of the policies and goals of the CCP.<sup>186</sup> The most recent constitution, adopted in 1982, accordingly rejects the separation of powers and instead concentrates authority in the NPC, which meets annually,<sup>187</sup> the

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<sup>182</sup> As generally used outside China, "rule of law," indicates government constrained by legal norms, while "rule by law," suggests the use or manipulation of the law to facilitate government policies, including those that infringe on fundamental rights. *See, e.g.,* Jacob A. Fisch, *China Entry Will Help More Than Just Trade*, L.A. TIMES, Nov. 26, 1999, at B9 ("that the government has now ratified a law banning 'cults' appears to support the argument that China is governed by a system of rule by law rather than rule of law"), Testimony of Xiao Qiang, Executive Director of Human Rights in China before the House Committee on International Relations, Subcommittee on Human Rights (June 26, 1998), Federal News Service, *available in* LEXIS, News Library, Curnws File ("[r]ule by law is not rule of law"). It should be noted, however, that within China, "rule by law" can have a meaning very close to "rule of law" as used outside the country. Specifically, "rule by law" within China is sometimes employed to suggest government action that is subject to certain checks, and is has been contrasted to the phrase, "rule by men," which is used to indicate less constrained government decision-making. *See, e.g.,* Li Nuer, *Village Autonomy Opens China's Future Democratization*, XINHUA NEWS AGENCY, Nov. 29, 1998, Item No. 1129006 (the development of village self-governance is "one of the transition from 'rule by man' to 'rule by law'").

<sup>183</sup> CHEN, *supra* note 181, at 33-34.

<sup>184</sup> XIANFA art. 5, (1982). Article 5 was adopted at the Second session of the Ninth National People's Congress, on March 15, 1999. *Id.*

<sup>185</sup> Though our delegation found this sentiment to be the dominant view among the Hong Kong legal community, we also encountered dissenting views independent of the administration both within and outside of the HKSAR. During our meeting with the Law Society of Hong Kong, for example, several solicitors expressed the view that intervention by the NPCSC should not be opposed out of an automatic fear of Chinese legal processes. *See* Interview with officers and members of the Law Society of Hong Kong, in Hong Kong, (June 8, 1999). In the U.S., Michael Dowdle, a Chinese law expert at Columbia University, has argued that China's larger constitutional system . . . has developed to the point where it deserves to be taken seriously." He further insists that "the Hong Kong community's failure to even try to integrate Hong Kong's domestic constitutional design and principles into those of China's larger constitutional structure . . . threatens the security of Hong Kong autonomy." Michael Dowdle, *Assessing the Relationship Between the Right of Abode Cases and China's Constitutional Development* (unpublished manuscript on file with Crowley Program). For a perspective on recent mainland legal reforms that is more critical, *see* Lawyers Committee for Human Rights, *Lawyers in China: Obstacles to Independence and the Defense of Rights* (1998).

<sup>186</sup> *See* CHEN, *supra*, note 181, at 40; GHAI, *supra* note 30, at 84-86.

<sup>187</sup> XIANFA art. 2, (1982).

much smaller NPCSC, which meets bimonthly,<sup>188</sup> the State Council, which acts as the administration,<sup>189</sup> and the Central Military Commission, which directs the armed forces.<sup>190</sup> Although the Chinese constitution does confer an impressive array of individual rights, these provisions are not directly enforceable, since judicial review of constitutional claims is unknown in China.<sup>191</sup> Taken together, these institutional and formal conditions point to significant differences between the mainland and common law traditions.<sup>192</sup>

Further, the Chinese approach draws a functional distinction between legal interpretation, in the sense of determining the meaning of a given provision, and adjudication, understood as the practice of hearing and resolving cases. In the mainland system, the power of interpretation may be “legislative” and “administrative” as well as judicial. This conception formally contrasts with the common law tradition, in which courts generally exercise interpretive and adjudicatory authority together. Mainland interpretive methods also differ from common law approaches by, among other things, rejecting *stare decisis*. As one of Hong Kong’s leading constitutional experts put it, “the approaches of the two systems to the question of interpretation are strikingly different.”<sup>193</sup>

The tensions between the mainland and common law approaches are reflected, to a degree, in the two core legal documents marking the transition of Hong Kong from British to Chinese rule. In the earlier of these documents, the Joint Declaration, the power of “final adjudication” was understood, in practice, as necessarily entailing the authority to engage in interpretation. The Basic Law, however, divides the two functions, albeit in a limited way: it reposes in the NPCSC the ultimate power of interpretation, yet extends to the CFA the power of final adjudication.<sup>194</sup> To the extent that the two powers might clash, the Basic Law contemplates a unitary proceeding, in which the CFA itself would seek the NPCSC’s guidance, before issuing its mandate, on matters effecting the mainland or Hong Kong’s relations with the mainland.

Beyond the distinction between adjudication and interpretation, the common law and mainland traditions differ markedly in their approach to interpretation itself. The key document in mainland legal interpretation, the NPC Standing Committee’s 1981 Resolution on Strengthening the Work of Interpretation of Laws (“1981 Resolution”), outlines a “concept of ‘interpretation’ . . . quite different from that accepted in the common law or even civil law jurisdictions . . . [and] clearly inconsistent with the principle of separation

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<sup>188</sup> *Id.* at art. 67.

<sup>189</sup> *Id.* at art. 85.

<sup>190</sup> *Id.* at art. 92.

<sup>191</sup> CHEN, *supra* note 181, at 46; GHAI, *supra* note 30, at 306.

<sup>192</sup> GHAI, *supra* note 30, at 308. These differences are dramatic, notwithstanding the absence of constitutional judicial review in the British common law system. As the right of abode and flag cases demonstrate, *see infra* notes 241-254 and accompanying text, common law-trained judges have a ready familiarity with the concept of judicial review. This familiarity is derived from transnational bodies such as the European Court of Human Rights, jurisdictions such as the United States or Ireland, and Hong Kong’s own experience under the Letters Patent, the constitutional instruments for colonial Hong Kong under which Hong Kong courts could declare local ordinances invalid. *Id.*

<sup>193</sup> *Id.* at 212. For a detailed analysis supporting this assessment, *see id.* at 198-202, 211-18.

<sup>194</sup> GHAI, *supra* note 30, at 198.



of powers, judicial interpretation, and the rule of law as understood in many countries in the contemporary world.”<sup>195</sup> Most importantly, the 1981 Resolution gives the NPCSC power to provide a “legislative interpretation” of any legal provisions that need to be clarified or supplemented.<sup>196</sup> One prominent legal scholar has pointed out that in practice, this idea of “legislative interpretation” is “tantamount to legislative amendment in most legal systems.”<sup>197</sup> There also seem to be no particular limitations on the NPCSC’s power of legislative interpretation, other than the NPCSC’s own guidelines.<sup>198</sup>

Whereas common law interpretation generally claims fidelity to the law as a set of constraints, the NPCSC approach stresses deference to government policy and ultimately to the rule of the CCP.<sup>199</sup> As one leading scholar notes, “[t]he NPC and the judicial and administrative bodies under it are instruments of the Communist Party, and as their primary function is the implementation of its policy, there has been little reason to develop the science of autonomous legal interpretation.”<sup>200</sup> The NPCSC Interpretation confirms this observation. Indeed, the only instance in which the document departs from the HKSAR’s Chief Executive’s request is its conclusion that the matter should have been referred to Beijing in the first place, thereby placing Hong Kong affairs more closely under the supervision of mainland policymakers.

#### *E. The NPCSC’s Interpretation<sup>201</sup> and the Implications for the Rule of Law in Hong Kong*

Notwithstanding the legal and prudential objections raised by the Hong Kong legal community, the Chief Executive proceeded to request the reinterpretation, in the form of a report to the State Council in Beijing. Several features of the actual request confirm concerns put forward by members of the Hong Kong bar. In procedural terms, the request was far from transparent. As noted, the contents of the request were not made public until June 11, 1999, even though the report to the State Council was submitted on May 20.<sup>202</sup> No formal mechanism was established, moreover, for opponents of reinterpretation to submit their views.

On the merits, the request sought reinterpretation of Articles 22(4), 24(2) and (3) by relying primarily on mainland legal principles. In particular, the Chief Executive sought to have the provisions restored to their “true legislative intent,” citing among other things a 1996 “opinion” issued by Preparatory Committee for the

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<sup>195</sup> CHEN, *supra* note 181, at 95.

<sup>196</sup> *Id.*

<sup>197</sup> *See also*, GHAI, *supra* note 30, at 225 (“The NPCSC has, in all instances, modified law rather than interpreted it.”).

<sup>198</sup> *See* NPCSC, Resolution Strengthening the Work of Interpretation of Laws (1981). The Resolution’s “four basic rules” are set forth in CHEN, *supra* note 181, at 95-96.

<sup>199</sup> GHAI, *supra* note 30, at 213.

<sup>200</sup> *Id.*

<sup>201</sup> *See* 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, June 26, 1999 [hereinafter NPCSC Interpretation]. We defer to the official designation when referring to the document itself. *But see supra* note 113; Ng, *supra* note 129, at 3-4.

<sup>202</sup> *See supra*, note 147.

HKSAR, a body of mainland and Hong Kong members established by the NPC to form the first post-handover administration and legislature.<sup>203</sup> Conversely, the request did *not* ask the NPCSC to consider whether the CFA should have initially referred the two articles in question to Beijing under Article 158.<sup>204</sup> As many commentators had expected,<sup>205</sup> the NPCSC granted the Chief Executive's request, issuing its own interpretation of Articles 22 and 24 on June 26, 1999.

### *1. Toward a Hybrid System?*

In contrast to a common law opinion, the substance of the NPCSC Interpretation was conclusory, lacking reasoned analysis. In substance, moreover, the NPCSC Interpretation realized the fears of administration opponents in several ways. First, it rejected the CFA's determination that the abode cases did not require referral of Articles 22 and 24 to the NPCSC under Article 158.<sup>206</sup> Instead, the NPCSC concluded that Articles 22 and 24 "concern the relationship between the Central Authorities and the [HKSAR]" and so should have been referred initially under Article 158.<sup>207</sup> At no point, however, did the NPCSC Interpretation address the CFA's "predominant provision" test, or any other aspect of the Court's analysis concerning the division of interpretive authority under Article 158.<sup>208</sup>

Second, the NPCSC Interpretation briefly noted the grant of interpretive authority to the NPCSC under Article 67(4) of the PRC Constitution and Article 158(1) of the Basic Law, giving it the power to restore the true legislative intent. It then overturned the CFA's interpretation of Articles 22 and 24, stating, "the interpretation of the Court of Final Appeal is not consistent with the legislative intent."<sup>209</sup> Finally, the NPCSC Interpretation construed Article 22(4) as requiring approval by the mainland authorities for residents of the mainland to enter the HKSAR,<sup>210</sup> and proclaimed that there are no exceptions to this approval requirement. It insisted that to enter Hong Kong without such approval is "unlawful."<sup>211</sup> The NPCSC Interpretation made no attempt to explain why such a requirement should apply to those who enjoy the right of abode nor why the CFA's interpretation of the Article was incorrect.

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<sup>203</sup> GHAI, *supra* note 30, at 75.

<sup>204</sup> HKSAR Chief Executive, Report on Seeking Assistance from the Central People's Government in Solving Problems Encountered in the Implementation of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (May 20, 1999) (translation of HKSAR government's submission to PRC State Council.)

<sup>205</sup> Interview with Denis Chang, Lead Counsel for the Petitioners in the Right of Abode Cases, in Hong Kong (June 8, 1999).

<sup>206</sup> NPCSC Interpretation, *supra* note 201, at 1.

<sup>207</sup> *Id.* at 2.

<sup>208</sup> See *supra* notes 79-80 and accompanying text.

<sup>209</sup> NPCSC Interpretation, *supra* note 201, at 2.

<sup>210</sup> Basic Law, *supra* note 22, at art. 22(4). Article 22(4) states that "for entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval." *Id.*

<sup>211</sup> NPCSC Interpretation, *supra* note 201, at 2.

The NPCSC Interpretation considered Article 24 in the same manner, quoting the language of the article that grants the right of abode to the children of permanent residents.<sup>212</sup> It then simply stated that these provisions “mean . . . such parents must have fulfilled the condition prescribed by category (1) or (2) of Article 24(2) of the Basic Law . . . at the time of [the child’s] birth.”<sup>213</sup>

The NPCSC Interpretation concluded by directing the courts of the HKSAR to “adhere to this Interpretation” in adjudicating all future questions under Articles 22 and 24.<sup>214</sup> In apparent deference to Article 158’s requirement that “judgments previously rendered shall not be affected” by any NPCSC reinterpretation, however, the NPCSC Interpretation stated that it “does not affect the right of abode . . . under the judgment of the [CFA] on the relevant cases dated 29 January 1999 by the parties concerned in the relevant legal proceedings.”<sup>215</sup>

The NPCSC Interpretation underscored the differences between mainland legal interpretation on the one hand, and the approach of the common law, which was to be maintained in Hong Kong under Article 8 of the Basic Law, on the other. As a mainland institution, the NPCSC inevitably approached the Basic Law from the PRC interpretive tradition. The Interpretation that resulted accordingly represented a significant step toward a hybrid system and away from the idea of “One Country, Two Systems.”

To the extent that its reasoning is articulated, the NPCSC Interpretation relied for its conclusion exclusively on “true legislative intent” of Article 24, an argument previously made by the HKSAR government in its request.<sup>216</sup> Application of this approach, however, did little to validate this basis of decision. According to the NPCSC, the “true legislative intent,” at least with respect to Article 24, may be found in the NPC’s resolution approving its Preparatory Committee’s report on the HKSAR, both issued in 1996. Reliance on these materials for legislative intent is worthless, both because they were issued six years *after* the NPC adopted the Basic Law and because the Preparatory Committee did not draft the Basic Law.<sup>217</sup>

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *See Id.* at 1. *See also* RIGHT OF ABODE: THE SOLUTION, *supra* note 119, at para. 15 (arguing that “legislative interpretation is not equivalent to amendment, because such interpretation must be faithful to true legislative intent”).

<sup>217</sup> A related problem is that reliance on the NPC resolution would, in effect, permit amendment of the Basic Law by means of post-hoc measures claiming to clarify the true legislative intent. To be sure, in U.S. constitutional jurisprudence, the Supreme Court has relied on occasion upon the actions of early Congresses, especially the First Congress, as probative of the Constitution’s “original understanding.” *See, e.g.,* Lynch v. Donnelly, 465 U.S. 668, 673-75 (1984)(relying on actions of the First Congress for the contemporaneous understanding of the Establishment Clause). This practice, however, differs from the NPCSC’s Interpretation in several key respects. First, the First Congress convened in 1789, even before the ratification process in the original thirteen states had concluded (though after the Constitution had received the requisite nine ratifications). Second, 20 of the 79 members of the First Congress had served as delegates at the Federal Convention that drafted the Constitution, and some of these and other members had participated in the state ratifying conventions. Jacobus Ten Broek, *The Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction* (pt. 4) 27 CALIF. L. REV. 157 (1939); *see also* Bowsher v. Synar 478 U.S. 714, 724 n.3 (listing members of the First Congress who had been delegates at the Federal Convention). Finally, the Supreme Court typically relies on the actions of early Congress to confirm conclusions based upon sources that are

This dubious application of original intent is not surprising since there are no rules or guidelines limiting an NPCSC legislative interpretation to the “true legislative intent” of a provision.<sup>218</sup> By relying on legislative documents that actually post-date the Basic Law by several years, the NPCSC Interpretation made clear that it was effectively overriding, not interpreting, the provisions in question, and effectively imposing mainland legal principles onto Hong Kong’s common law system.<sup>219</sup>

## 2. *The Question of Guidelines Governing Future Reinterpretation Requests*

In the wake of the right of abode litigation, several observers suggested that some sort of constitutional or legislative mechanism should be promulgated in order to control and limit the influence of mainland interpretation and its potential to subvert the “One Country, Two Systems” ideal.<sup>220</sup> Such a mechanism might consist of legislative guidelines or a constitutional amendment limiting HKSAR government requests for NPCSC interpretation to circumstances of social emergency. Presumably, such a mechanism would implement some kind of procedure requiring legislative input and public debate on the question, and perhaps requiring super-majority vote of LegCo. Such a convention, its proponents argue,

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contemporaneous with the Constitution’s drafting and ratification. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 975-85 (relying on the First Congress in conjunction with other sources of original understanding). By contrast, the 1996 NPC approval of the Preparatory Committee opinion that same year came six years after the Basic Law had been drafted and adopted. In addition, no claim has ever been advanced that the composition of the NPC or Preparatory Committee overlaps with the Basic Law’s drafters to an extent comparable to the First Congress and Federal Convention. Finally, the NPCSC Interpretation did not rely on post-drafting materials merely to confirm a legislative intent based upon earlier or contemporaneous sources, but instead relied exclusively on the later sources. *See* PETER WESLEY-SMITH, *supra* note 39; GHAI, *supra* note 30, at 57-61, 75.

<sup>218</sup> *See supra* notes 180-186 and accompanying text (discussing lack of rules or limitations on mainland conceptions of legal interpretation). In its request, the HKSAR administration also supported a “true legislative intent” argument with reference to the NPC’s adoption of the Preparatory Committee’s 1996 opinion. It further cited a 1993 agreement of the Joint Liaison Group reflecting the views of the mainland and UK governments. Reliance on these documents for the “true legislative intent,” however, is unconvincing because, among other reasons, the Basic Law was promulgated in 1990 and neither the NPC as a whole, the Preparatory Committee, nor the Joint Liaison Group played a direct role in the drafting process. Michael C. Davis, *Legislative Intent and the CFA Right of Abode Judgment*, Forum on Current Issues Under the Basic Law, sponsored by JUSTICE, The Hong Kong Section of the International Commission of Jurists (May 29, 1999); Hong Kong Bar Association, Press Release, *The Bar’s Response to the Government Paper to LegCo*, May 20, 1999 (noting that CFA rejected Joint Liaison Group Agreement as indicative of meaning of articles relevant to *Ng Ka Ling*, and that government never argued that Preparatory Committee resolution had any legal effect in actual case).

<sup>219</sup> Interview with Denis Chang, Lead Counsel for the Petitioners in *Na Ka Ling*, in Hong Kong, (June 8, 1999). On the issue of the actual intent underlying Articles 22 and 24, our delegation was repeatedly told that the right of abode was originally extended to offspring of Hong Kong residents to mitigate pre-handover fears of elite “brain drain.” The idea apparently was that Hong Kong residents who had settled in other jurisdictions, such as Canada, and who were waiting to see how Hong Kong would fare under Chinese sovereignty, would have additional incentive to return if their children automatically had a right of abode. Only later did the problem of mainland offspring become apparent. *Id.*

<sup>220</sup> Interview with Yash Ghai and Johannes Chan, Professors of Law, University of Hong Kong, in Hong Kong (June 8, 1999); Interview with Albert Chen, Dean of the University of Hong Kong Law Faculty and Professor of Law, in Hong Kong (June 7, 1999).

would “judicialize” NPCSC interpretation, and prohibit its overuse or abuse simply to overrule court decisions perceived as unfavorable by the government.<sup>221</sup>

Conversely, others argue that the adoption of guidelines or rules governing NPCSC interpretation requests, however well intentioned, would encourage interpretations to be sought more frequently.<sup>222</sup> As Denis Chang told the delegation, such guidelines or conventions would actually legitimize a “post-remedial mechanism” by which to circumvent the rulings of the Hong Kong courts.<sup>223</sup> In this perspective, the normalization of such requests would also serve to validate mainland legal norms as an appropriate method of constitutional and statutory interpretation, further weakening Hong Kong’s common law system.

Whether additional guidelines or safeguards would better secure the rule of law in Hong Kong depends on the frequency with which the HKSAR government resorts to requests for NPCSC interpretation in the future. If future requests are infrequent, then arguably it would be better to avoid promulgation of explicit guidelines, and thereby leave the government’s strategy in a state of questionable legality under the Basic Law. In the words of Denis Chang, “at this stage of political development in China, the less said the better.”<sup>224</sup> On the other hand, if HKSAR government requests for NPCSC intervention become the norm, then explicit guidelines, requiring the government at least to satisfy clear legal conditions and open up the requests to some kind of public debate, may be preferable.

### 3. *Subsequent Controversies*

Following the right of abode controversy, the fate of the “One Country, Two Systems” ideal will almost certainly turn on the frequency and resolution of future constitutional controversies. As this Report went to press, the CFA already had handed down two cases, both of which presented potential for substantial conflict. In both, the CFA ruled in favor of the HKSAR government, thereby avoiding the possibility of another reinterpretation request. To this extent, these cases tend to confirm the government’s prediction that the need for NPCSC reinterpretation would arise infrequently. Precisely because the judgments affirmed the government, however, they do not test the resolve of the HKSAR to seek reinterpretation only rarely, and they do not test the willingness of the NPCSC to intervene in cases that go against the government.

#### a. The Legitimacy of NPCSC Interpretation

Within months of the NPCSC’s Interpretation, the CFA heard arguments on a new challenge that could well have generated a constitutional crisis even more profound than the initial right of abode

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<sup>221</sup> Interview with Yash Ghai and Johannes Chan, Professors of Law, University of Hong Kong, in Hong Kong (June 8, 1999).

<sup>222</sup> Interview with Denis Chang, Lead Counsel for the Petitioners in *Ng Ka Ling*, in Hong Kong (June 8, 1999).

<sup>223</sup> *Id.* Mr. Chang suggested that Beijing originally wanted such a “post-remedial mechanism” written into the Basic Law, but that then-governor Christopher Patten refused to accept such a provision. *Id.*

<sup>224</sup> *Id.*

controversy. The case, *Lau Kong Yung v. Director of Immigration*,<sup>225</sup> arose directly out of that controversy and attacked the legality of the NPCSC Interpretation itself. The Court rejected this challenge unanimously, broadly affirming the NPCSC's power of interpretation. The judgment therefore avoided a confrontation that would have directly pitted Hong Kong's highest court against the CPG.

*Lau Kong Yung* involved seventeen mainlanders who had illegally overstayed the terms of their admission to Hong Kong, most by remaining after their mainland two-way exit permits had expired. The HKSAR Director of Immigration issued removal orders against the mainlanders under the local Immigration Ordinance. Following the original right of abode decisions, the seventeen challenged their removal on the grounds that they had qualified for the right of abode as interpreted by the CFA. Those rulings, however, had also struck down the statutory mechanism for obtaining an HKSAR certificate of entitlement recognizing a person's right of abode, thereby eliminating their only means to legalize their status in Hong Kong.<sup>226</sup>

In the face of this dilemma, the petitioners argued that the proper resolution was to invalidate the removal orders against them, pending the development of a new method for vetting individual right of abode claims. As in the earlier right of abode cases, the principles at issue applied not just to the parties in the case but to possibly thousands of mainlanders in a similar situation. In June, before the NPCSC issued its Interpretation, the Court of Appeal struck down the removal orders as to the seventeen individuals before that court.<sup>227</sup> The Director then appealed to the CFA. By the time the case was argued in the highest court, the NPCSC had issued its Interpretation, which apparently invalidated the underlying basis for the claimants' right of abode.

The timing ensured that *Lau Kong Yung* would involve issues at least as important as those considered in the original right of abode decisions themselves. Armed with the NPCSC Interpretation, the administration argued that the pronouncement was legitimate and binding; that it restored the requirement of obtaining a mainland one-way permit as a condition to obtain an HKSAR certificate of entitlement; and that nothing in the statutory scheme or other source of law required the HKSAR immigration authorities to consider the individuals' right of abode claims.<sup>228</sup> In response, the seventeen claimants directly questioned the NPCSC's authority to act. Most significantly, they argued that the NPCSC lacked the power to interpret the Basic Law unless requested to do so by the CFA under Article 158(3), and therefore that the NPCSC Interpretation was invalid.<sup>229</sup> In addition, they contended that any applicable power the NPCSC could wield did not apply to matters purely internal to Hong Kong, such as the ability to establish the right of abode independent of mainland permits; that the HKSAR's request for a reinterpretation had been illegal; and that in light of the circumstances, the Director had been under a duty to establish right of abode claims in the absence of the then-invalid one-way permit requirement.<sup>230</sup>

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<sup>225</sup> *Lau Kong Yung*, HKSAR Court of Final Appeal (Dec. 3, 1999). All citations are to the official version of the case posted at <[www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv\\_10\\_11\\_99.htm](http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_10_11_99.htm)>.

<sup>226</sup> *Id.* at 2-13.

<sup>227</sup> [1999] HKLRD 516 (Chief Judge, Nazareth and Mortimer VPP).

<sup>228</sup> *Lau Kong Yung*, at 2-16.

<sup>229</sup> *Id.* at 15-16.

<sup>230</sup> *Id.* at 30 (Litton, J., concurring).

In December, the CFA upheld the removal orders. It was a resounding, though not unexpected, victory for the government. Addressing the point individually, each of the five Justices agreed that the NPCSC possesses plenary authority to interpret the Basic Law. Chief Justice Li's opinion of the Court located NPCSC authority in Article 67(4) of the PRC Constitution<sup>231</sup> together with Article 158(1) of the Basic Law.<sup>232</sup> The Court further ruled that the NPCSC's Interpretation must be deemed effective as of July 1, 1997, the date the Basic Law came into effect, since it "declared what the law had always been."<sup>233</sup> The Court's opinion conspicuously did *not* analyze the legality of the HKSAR administration's request for a reinterpretation, nor did it address its own decision not to refer Articles 22 and 24 to the NPCSC initially.<sup>234</sup>

Given the Court's constitutional rulings, it followed that the removal orders against the seventeen claimants were valid. The CFA also rejected other arguments that the removal orders were unlawful.<sup>235</sup> On this point, Justice Bokhary issued *Lau Kong Yung's* lone dissent, arguing that the claimants would have

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<sup>231</sup> The relevant article states, "The Standing Committee of the National People's Congress exercises the following functions and powers: . . . (4) to interpret laws . . ." Xianfa, art. 67(4).

<sup>232</sup> On this point, Chief Justice Li specifically rejected Denis Chang's argument that the final version of Article 158 reflected a narrowing of the NPCSC's power, which had been more broadly stated in an earlier draft. The Court further rejected the structural argument that Articles 158(2) & (3) are best read as provisions constraining the NPCSC's authority consistent with the Basic Law's goal of guaranteeing a "high degree of autonomy." *Lau Kong Yung*, at 15-16.

<sup>233</sup> *Id.* at 18. Here the Court analogized to "the common law declaratory theory of judicial decisions," citing *Kleinwort Benson Ltd. v. Lincoln City Council* [1998], 3 WLR 1095, 1117-19 and 1148.

<sup>234</sup> The opinion summarized the Court's "view on Interpretation" as follows:

- (1) The Standing Committee has the power to make the Interpretation under Article 158(1).
- (2) It is a valid and binding Interpretation of Article 22(4) and Article 24(2)(3) which the courts in the HKSAR are bound to follow.
- (3) The effect of the Interpretation is:
  - (a) Under Article 22(4), persons from all provinces, autonomous regions or municipalities directly under the Central Government including those persons within Article 24(2)(3), who wish to enter the HKSAR for whatever reason, must apply to the relevant authorities of their residential districts for approval in accordance with the relevant national laws and administrative regulations and must hold valid documents issued by the relevant authorities before they can enter the HKSAR.
  - (b) To qualify as a permanent resident under Article 24(2)(3), it is necessary that both the parents or either parent of the person concerned must be a permanent resident within Article 24(2)(1) or Article 24(2)(2) at the time of birth of the person concerned.
- (4) The Interpretation has effect from July 1, 1997.

*Id.* at 18-19. On the issues that were left open, *see Hong Kong Bar Association*, "The CFA Decision in the Lau Kong Yung case," (Dec. 3, 1999) <[www.hkba.org/press-release/19991203.htm](http://www.hkba.org/press-release/19991203.htm)>.

<sup>235</sup> With the exception of Justice Mason's concurrence, which elaborated on aspects of the Court's constitutional analysis, the other opinions concentrated on claims that the Director had a duty at least to consider the mainlanders' "humanitarian" claims against removal under the ordinance or general administrative law principles.

asserted humanitarian grounds for remaining had they known of the NPCSC Interpretation at the time. The dissent reasoned that general notions of fairness implicit in the common law should compel the Director to consider humanitarian considerations before returning the claimants to the mainland.<sup>236</sup>

The reactions to the CFA decision in *Lau Kong Yung* largely echoed reactions to the reinterpretation itself. Few observers expected the CFA to initiate an even more profound constitutional crisis by challenging the NPCSC's authority, whether out of prudence or a regard to merits of the case. The HKSAR administration, not surprisingly, heralded the decision as a vindication of the NPCSC's authority and its own decision to seek reinterpretation. At the same time, officials continued to stress that requests for reinterpretation would be made only in exceptional circumstances; as Secretary of Justice Elsie Leung declared, "time and again we have said the Government is not going to press for interpretations lightly, nor is the Standing Committee going to exercise the power lightly."<sup>237</sup>

Conversely, critics of the reinterpretation expressed disappointment that the Court had upheld the NPCSC's authority in such sweeping terms.<sup>238</sup> Margaret Ng stated that, "I'm very disappointed about the ruling as it means that the NPC Standing Committee can interpret any part of the Basic Law at any time, and the interpretation has a binding effect on the courts in Hong Kong."<sup>239</sup> A number of critics nonetheless continued to direct their harshest criticisms at the administration for seeking the reinterpretation in the first place, asserting that the CFA had little room to maneuver once the NPCSC had been brought in.<sup>240</sup>

#### b. Desecration of the PRC and HKSAR Flags

Just two weeks after *Lau Kong Yung*, the CFA avoided another possible constitutional crisis in *HKSAR v. Ng Kung Siu*,<sup>241</sup> a case involving a constitutional challenge to Hong Kong ordinances banning the desecration of the PRC and HKSAR flags.

In May 1998, two individuals who had engaged in a non-violent protest of the killings in Tiananmen Square were convicted of defacing the PRC and HKSAR flags under Hong Kong's National and Regional

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<sup>236</sup> For this proposition, Justice Bokhary relied among other sources on 1 JOHN AUSTIN LECTURES ON JURISPRUDENCE OR PHILOSOPHY OF POSITIVE LAW 485 (5<sup>th</sup> ed. Robert Campbell ed. 1885). *Id.* at 33, 34 (Bokhary, J., dissenting).

<sup>237</sup> *Intervention Will Be Rare: NPC Advisor*, S. CHINA MORNING POST, Dec. 6, 1999, at 1-2.

<sup>238</sup> Among those making this point were Professor Jerome Cohen, who nonetheless also criticized the CFA for failing to initially refer the original right of abode cases. *Court Flunked Test, Says U.S. Professor*, *supra* note 80, at 1. Earlier, in Beijing, Professor Cohen had argued that under a better reading of the Basic Law, NPCSC interpretations of the Basic Law concerning local affairs "could justifiably be deemed nonbinding by the HKSAR courts." See Jerome Cohen, *Reflections on the Chinese Constitution and its Relation to the Basic Law of the Hong Kong Administrative Region*, (Sept. 15, 1999), at 3.

<sup>239</sup> *Court Flunked Test, Says U.S. Professor*, *supra* note 80, at 2.

<sup>240</sup> See *HKSAR Now Powerless, Say Critics* S. CHINA MORNING POST Dec. 4, 1999, at 1-2.

<sup>241</sup> *HKSAR v. Ng Kung Siu and Lee Kin Yun*, No. 4 of 1999, HKSAR Court of Final Appeal (Dec. 15, 1999). All citations are to the official version of the case posted at <[www.info.gov.hk/jud/guid2cs/html/cfa/judmt/facc\\_4\\_99.htm](http://www.info.gov.hk/jud/guid2cs/html/cfa/judmt/facc_4_99.htm)>.



Flag Ordinances. The Provisional LegCo had enacted the National Flag Ordinance pursuant to Article 18(2) and Annex III of the Basic Law, which obligated the HKSAR legislature to apply the PRC Flag Law to Hong Kong. The Provisional LegCo further enacted the Regional Flag Ordinance to safeguard the HKSAR flag. Each ordinance makes desecration of the flag a criminal offense subject to fine and imprisonment. The defendants challenged these provisions as unconstitutional under the Basic Law. The Court of Appeal upheld the challenge, holding that the laws violated freedom of speech under Basic Law Article 39,<sup>242</sup> which incorporates protections of the ICCPR,<sup>243</sup> including ICCPR Article 19's protection of free speech.<sup>244</sup> This language is identical to Article 16 in Part II of the Bill of Rights Ordinance (“BORO”).

The resulting appeal set the stage for a new constitutional dispute that promised to involve Beijing more directly than any of the previous controversies. In contrast to the right of abode cases, *Ng Kung Siu* implicated the status of a mainland statute made applicable to the HKSAR through an annex to the Basic Law.<sup>245</sup> Many observers, moreover, believed that Beijing would be far more concerned about the treatment

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<sup>242</sup> Basic Law, art. 39. Article 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.

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.

*Id.*

<sup>243</sup> See Hong Kong Bill of Rights Ordinance, Cap. 383 (1991) [hereinafter BORO]. The BORO incorporates many of the provisions of the ICCPR into the domestic laws of Hong Kong. See *Ng Kung Siu*, at 12.

<sup>244</sup> ICCPR, art. 19(2) and (3). Article 19 provides:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputation of others.

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

*Id.*

<sup>245</sup> Technically, the national law did not automatically apply directly to Hong Kong, but instead had to be implemented through local legislation. As the CFA noted, under Annex III of the Basic Law (which specifies national laws to be applied to the HKSAR), the HKSAR was obliged “by virtue of Article 18(2) of the Basic Law, to apply the PRC Law on the National Flag locally by way of promulgation or legislation. Accordingly, the legislature (then the Provisional Legislative Council) applied it to the HKSAR by legislation by the enactment of the National Flag Ordinance. Legislation as opposed to promulgation was appropriate since the national law had to be adapted for application in the HKSAR.” *Ng Kung Siu*, at 5.

of the national flag than with the migration of mainlanders claiming a right to live in the HKSAR.<sup>246</sup> Such concern, speculation ran, might lead either to NPCSC intervention of its own accord or to another reinterpretation request by the HKSAR administration.<sup>247</sup>

The chance for either possibility evaporated when the CFA ruled in favor of the government. In another unanimous judgment, the CFA rejected both the free speech claim under Article 39 as it incorporates the ICCPR, as well as a related claim under Basic Law Article 27.<sup>248</sup> Chief Justice Li's opinion first concluded that the two ordinances did not amount to "a wide restriction on freedom of expression."<sup>249</sup> Turning directly to the ICCPR, the Court next considered whether the restrictions were "necessary" means to further the permissible governmental ends of "national security . . . public order (*ordre public*), or . . . public health or morals." In the view of the Court, public order as used in the ICCPR was broad enough to encompass the government's interest in protecting the flags as national and regional symbols. Relying on Hong Kong precedents, the CFA further concluded that the "limited restriction on the right to the freedom of expression . . . satisfied the test of necessity."<sup>250</sup> In a lone concurrence, Justice Bokhary noted that the protection of speech under Article 27 of the Basic Law was even broader than under the ICCPR, since Article 27 is devoid of any express limitation of the right. The Justice nonetheless observed that numerous jurisdictions had either upheld or maintained flag desecration laws, including Italy, Germany, Japan, Norway, and Portugal, and further commented that the contrary U.S. precedents themselves had been decided by 5-4 majorities.<sup>251</sup> Despite voting to uphold the ordinances, Justice Bokhary made clear that in his view, the laws "lie just within the outer limits of constitutionality," and that restrictions of expression under the Basic Law should end "where these restrictions are located."<sup>252</sup>

Compared with the right of abode decisions, reaction to *Ng Kung Siu* was generally muted. Supporters of the ordinances applauded the decision while opponents, expressing disappointment, nonetheless acknowledged that the underlying flag desecration issue had produced different results in different jurisdictions.<sup>253</sup> The Hong Kong Bar Association appeared to sum up the general response in

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<sup>246</sup> See May Tam & Lillian Kwok, *Issue of Whether International Conventions Override Local Laws*, HONG KONG STANDARD (April 20, 1999).

<sup>247</sup> See *Jurisdiction Controversy Looms*, HONG KONG STANDARD (Apr. 20, 1999).

<sup>248</sup> Basic Law, art. 27 provides:

Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.

*Id.*

<sup>249</sup> *Ng Kung Siu*, at 12.

<sup>250</sup> *Id.* at 12-16.

<sup>251</sup> *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 491 U.S. 310 (1990).

<sup>252</sup> *Id.* at 24, 18-25 (Bokhary, PJ, concurring).

<sup>253</sup> S. CHINA MORNING POST, Dec. 15, 1999.

declaring that the “CFA’s conclusion is a judicial value judgment made in the context of balancing the rights in question with the legislature’s undoubted right to place some restrictions on these rights,” that the “decision does not signify that there is any wholesale curtailment of the basic human rights enshrined in the Basic Law,” and that, “the Rule of Law dictates that all decisions of the Courts must be respected and accepted.”<sup>254</sup>

#### 4. Bilingualization

For both Hong Kong and China, the potential benefits of the “One Country, Two Systems” experiment go beyond the preservation of the common law tradition within the mainland’s legal framework. The resumption of PRC sovereignty promises to make Hong Kong’s legal system accessible to millions of people by making it available in both English, the traditional colonial language, *and* Chinese.<sup>255</sup> Bilingualization of the HKSAR legal system would be a signal achievement for the mainland and Hong Kong alike. Direct access to the common law tradition would enhance China’s ongoing efforts at legal reform and modernization, allowing for a critical assessment from a different legal system’s perspective. Conversely, the increased use of Chinese within the Hong Kong legal system would promote a greater understanding of mainland legal principles. For the first time, bilingualization promises to make the workings of the law accessible and comprehensible to the vast majority of the Hong Kong population. Indeed, for the Hong Kong citizen, this might well be the most important legal consequence of the “One Country, Two Systems” ideal. Nevertheless, some members of the legal profession have expressed concern that the decreased use of English will lead to a dilution of common law standards. While this concern should not be dismissed, we believe that the potential advantages of bilingualization far outweigh any liabilities, and we encourage the efforts currently underway to make Hong Kong’s legal system more genuinely available to all.

In addition, bilingualization should bring Hong Kong in closer compliance with international standards concerning the rule of law, which typically direct governments to provide adequate access to legal services regardless of language.<sup>256</sup> Approximately ninety-five percent of Hong Kong’s population speaks

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<sup>254</sup> Hong Kong Bar Association, “Press Release On Flag Desecration Case,” (Dec. 15, 1999), <<http://www.hkba.org/press-release/19991215.htm>>. Another potential constitutional issue now confronting the Hong Kong courts deals with the definition of “ratable value” of property for the purposes of assessing government rent -- the rough equivalent of property taxes in Hong Kong. *See Agrila Ltd. v. Commissioner of Rating and Valuation* [1999] 2 HKC 168; interview with Johannes Chan & Yash Ghai, Professors of Law, University of Hong Kong, in Hong Kong (June 8, 1999). The appellant property developers in *Agrila Limited v. Commissioner of Rating and Valuation* argued to the Lands Tribunal that the HKSAR government’s definition of ratable value under several local ordinances was inconsistent with the government rent definition in Article 121 of the Basic Law. *See Basic Law supra* note 22, at art. 121; *Agrila Ltd* [1999] 2 HKC at 168. The Lands Tribunal agreed, finding the government’s rent regulations to be an unacceptable modification of the valuation scheme set out by Article 121. *See Agrila Ltd.* [1999] 2 HKC at 168. A government appeal is now pending. This ruling, if it stands, will cost the HKSAR government substantial revenue in lost rents. The *Agrila* case may well become another instance in which the HKSAR administration finds the temptation to request an interpretation outweighs the potential cost to the rule of law.

<sup>255</sup> The Joint Declaration in effect mandates adequate linguistic access to the justice system by assuming that Chinese shall be the HKSAR’s official language while additionally permitting the use of English. Joint Declaration, *supra* note 29, at annex I, art. I. Implementing this obligation, Article 9 declares that “[i]n *addition* to the Chinese language, English *may also* be used as an official language by executive authorities, legislature, and judiciary” of the HKSAR. Basic Law, *supra* note 22, at art. 9 (emphasis added).

<sup>256</sup> Article 2 of the U.N. Basic Principles on the Role of Lawyers, for example, declares that:

Cantonese, the principal dialect of the region. “Putonghua,” known in the West as Mandarin, is China’s official dialect and is the main spoken language of Beijing and much of the rest of the country. While China has hundreds of other dialects, the country has one written language. Hong Kong Cantonese is a partial exception, however, since it employs classical Chinese characters, while the mainland employs characters that were simplified after the PRC was established.<sup>257</sup> For most of the colonial period, however, Hong Kong’s executive, legislative, and judicial functions were conducted neither in Cantonese nor in Puntonghua, but almost entirely in English.<sup>258</sup> The resumption of China’s sovereignty has accelerated efforts to create a truly bilingual system of governance.<sup>259</sup>

Already, significant steps toward this goal have been achieved. All of the laws of the HKSAR have been translated and published in equally authoritative English and Chinese versions.<sup>260</sup> In addition, the HKSAR judiciary is establishing a basic Chinese-language version of the common law by translating significant earlier English-language court decisions from Hong Kong and other jurisdictions.<sup>261</sup> The judiciary

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Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, *language*, religion, political or other opinion, national or social origin, property, birth, economic or other status.

G.A. Res. 45/121, U.N. GAOR, 45th Sess. (1990); G.A. Res. 45/166 U.N. GAOR, 45th Sess. (1990)(emphasis added). As with the Basic Principles on the Independence of the Judiciary, *see Basic Principles, supra* note 24, the Basic Principles on the Role of Lawyers, do not constitute a treaty, but have received the approval of the General Assembly and reflect a considered global consensus that provides evidence of customary international law.

<sup>257</sup> *See* GHAI, *supra* note 30, at 347.

<sup>258</sup> *See id.* at 346-49 (noting also that in some lower level courts, such as juvenile court or coroner’s inquiries, courts could choose to hold proceedings in either language).

<sup>259</sup> In 1974, the colonial government passed the Official Languages Ordinance that for the first time designated both English and Chinese the official languages for all government communications with the public. *See* Official Languages Ordinance (Cap. 5) 1974, Feb. 15, 1974, ¶ 3(1). In addition, this Ordinance provided that both languages “possess equal status and . . . enjoy equality of use.” *Id.* ¶ 3(2). In 1987, the government amended the ordinance to require that all legislation be enacted and published in both English and Chinese and to provide for the translation of all prior ordinances into Chinese. *See* Official Languages (Amendment) Ordinance, 1987, ¶ 4 (creating Bilingual Advisory Committee to confirm authenticity of both versions); Interpretive and General Clauses (Amendment) Ordinance (Cap. 1) 1987, ¶ 10(b)(providing that English language text and Chinese language text of ordinance are equally authentic, presumed to have same meaning, and where comparison of two versions discloses difference of meaning which rules of statutory interpretation do not resolve meaning which best reconciles texts shall be adopted); *see also* Law Drafting Division of the Department of Justice, *A Paper Discussing Cases Where the Two Language Texts of an Enactment are Alleged to be Different*, May 1998 (creating further explicit guidelines for reconciliation between two versions).

<sup>260</sup> *Id.* § 1.5. Both Chinese and English language texts of all laws are also readily available on a website attached to the DOJ’s website. *See BLIS on the Internet*, (visited May 6, 1999) <<http://www.justice.gov.hk/blis.nsf>> (on file with the *Fordham International Law Journal*).

<sup>261</sup> Interview with Patrick Chan, Chief Justice of the High Court, in Hong Kong (June 10, 1999). The Committee for a Bilingual Legal System is currently choosing the most important common law cases from both Hong Kong and other common law jurisdictions to translate into Chinese. *Id.*

also has been developing a legal glossary to establish and record accepted Chinese equivalents to established English common law terms.<sup>262</sup> As for court access, sixty-five percent of lower-level court proceedings are now conducted in Chinese.<sup>263</sup> Although most upper-level legal proceedings still are conducted in English,<sup>264</sup> recent legislation allows members of the court, counsel, parties, and witnesses to any proceeding to use either or both languages.<sup>265</sup>

Given this background, the delegation finds it surprising that, two and a half years after the turnover, there has yet to be a case argued in Hong Kong's highest court in anything but English. In 1995, the perception among bar leaders was that the introduction of Chinese would proceed at a more rapid pace. Indeed, several prominent members of the bar, including native-born but English-educated barristers, advised us that they were brushing up on their Chinese because they would not otherwise feel comfortable arguing in that language.

Judges on the higher courts informed the delegation that English remains the language of choice because some of the members of the Court speak only that language. This is especially true in the cases of visiting judges sitting on the CFA. Yet it is difficult to believe that Hong Kong can much longer maintain a legal system in a language other than that of its sovereign and the vast majority of its population. It is of course difficult to evaluate how much of the desire to continue litigating exclusively in English is motivated by the sense that English and the common law are inexorably entwined, and how much derives from the simple preference for that which is familiar and comfortable. Further, those who hope the interchange of legal thinking between Hong Kong and the mainland may have a salutary impact on China's legal system will find their hopes diminished if the common law is a legal system that is entirely dependent on a foreign tongue. The scene outside the CFA during oral argument in *Lau Kong Yung*, the follow-up right to abode case heard in October, was particularly poignant in this context: as one newspaper reported, "[u]p to 200 anxious right of abode seekers gathered outside [the Court] as arguments were heard on whether they should be allowed to stay in Hong Kong . . . . Most listened intently to arguments, broadcast via television, even though they could not understand the English used."<sup>266</sup>

Modern simultaneous translation devices exist and are utilized by many courts to enable proceedings to go forward among participants who speak different languages. While we recognize that using more than a single language creates difficulties, we believe that the accelerating use of Chinese in Hong Kong courts is necessary if the courts are to be fully accessible to the populace.

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<sup>262</sup> HONG KONG COURT INTERPRETERS GRADE, JUDICIARY, A GLOSSARY OF LEGAL EXPRESSIONS; *see also* interview with Patrick Chan, Chief Justice of the High Court, in Hong Kong (June 10, 1999).

<sup>263</sup> Interview with Patrick Chan, Chief Justice of the High Court, in Hong Kong (June 10, 1999).

<sup>264</sup> *Id.* Sixty-five percent of all cases in the magistrates courts are now heard in Chinese, but only thirty-five percent of all cases in the district courts and fifteen percent of cases in the High Court are heard in Chinese. *Id.*

<sup>265</sup> Official Languages (Amendment) Ordinance, Cap. 5, ¶ 5 (in force June 11, 1999). Finally, to combat the lack of proficiency in Cantonese among many members of the judiciary, the judiciary has begun sending several judges to Beijing each year for intensive Chinese language training. *See* Interview with Patrick Chan, Chief Justice of the High Court (June 10, 1999).

<sup>266</sup> Ambrose Leung Tsing-Yan and Ella Lee, *Hearing Is "Last Hope" For Migrants*, S. CHINA MORNING POST, October 26, 1999, at 1.

One serious concern, however, is that rather than develop a truly bilingual system of co-equal languages, Hong Kong will increasingly adopt the Chinese language and abandon English.<sup>267</sup> The delegation met with members of the legal profession and judiciary who expressed this concern, citing as evidence a perceived decline in English-language fluency among members of the bar and law students.<sup>268</sup> The importance of this concern stems from the reality that English is the language of the vast body of precedent and history that constitutes the common law tradition. This tradition includes not only the case law of pre-1997 Hong Kong, but also of other common law jurisdictions like Australia, Canada, England and Wales, and the United States.<sup>269</sup> A deterioration of English-language usage in Hong Kong risks weakening reliance on this established body of jurisprudence. Moreover, the common law is constantly evolving. A deterioration of English-language usage risks isolating Hong Kong's system not only from its own past, but also from contemporary developments in the common law.

Despite these concerns, the delegation strongly applauds the efforts that the HKSAR has made towards greater bilingualization. In contrast to efforts that seek to make Hong Kong's legal system a "hybrid" of common law and mainland principles, making the common law system available in both Chinese and English clearly comports with general international standards, the Joint Declaration and the Basic Law. We take seriously local concerns about the diminution of the common law should Chinese supplant English. Nonetheless, the delegation believes that greater access to the system for the majority Chinese-speaking population would not only enhance its fairness, but also would actually broaden the support it currently commands through increased understanding.

#### *F. Conclusions*

If the PRC's pledge to maintain "One Country, Two Systems" has meaning, it must include a commitment to preserve the rule of law in Hong Kong and in particular, judicial independence, the finality of decisions, and the respect for precedent, as those judicial qualities have been known in practice in Hong Kong for decades. This common law tradition has been a central component of what makes Hong Kong among the most stable, open, and productive societies both in Asia and the world. The right of abode controversy reflects a grave threat to this system, whether intended or not, and merits the attention and concern of lawyers around the world. This threat came with unexpected swiftness, within a mere two years of the resumption of Chinese sovereignty. It also came from an unexpected quarter, prompted not by the mainland, but by the Hong Kong administration itself.

Even in isolation, the right of abode controversy is significant because it challenges Hong Kong's common law traditions on several fronts simultaneously. First, the HKSAR administration undermined respect for law by failing to implement the CFA's judgment. Second, its request for a reinterpretation was, at best, inconsistent with an alternative interpretation of the Basic Law that would have limited the role of the NPCSC and therefore better-secured judicial independence. Third, by failing to pursue the amendment

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<sup>267</sup> Interview with Audrey Eu, Chair of the Hong Kong Bar Association, in Hong Kong (June 10, 1999).

<sup>268</sup> *Id.* Interview with Professor Albert Chen, University of Hong Kong, in Hong Kong (June 7, 1999).

<sup>269</sup> The Joint Declaration and the Basic Law recognize a role for the international common law tradition in adjudication by Hong Kong courts. *See* Joint Declaration, *supra* note 29, at § III (1984)(stating that HKSAR courts may refer to precedents in other common law jurisdictions); *see also* Basic Law, *supra* note 22, at art. 84 (authorizing courts to refer to precedents in other common law jurisdictions).

process or to consider interim measures that might have allowed that process to go forward, the administration abandoned a course that might have addressed the alleged immigration crisis while avoiding significant costs to the rule of law. Perhaps most important, the request for reinterpretation has introduced the concept of Hong Kong as a “hybrid” legal system, a prospect that certain HKSAR officials apparently view as an opportunity for closer ties with Beijing rather than as fundamentally inconsistent with the common law system that Beijing pledged to uphold.

Although Beijing itself appears not to have instigated the right of abode crisis, its actions in the matter here largely confirmed the concerns of those who questioned its commitment to Hong Kong’s legal independence. Not only did the NPCSC grant the HKSAR executive everything it requested, but it also went further by castigating the CFA for not having referred all relevant provisions to it in the first place. In so doing, the NPCSC engaged in an instrumental analysis that takes a significant step toward realizing a “hybrid” system.

Paradoxically, the HKSAR administration’s insistence that it took these steps only to meet an unusual and compelling crisis acknowledges that Hong Kong’s legal system paid a price for reinterpretation. In contrast to the original right of abode cases, recent CFA rulings have avoided challenging Beijing’s authority, thus denying the HKSAR leadership an opportunity to demonstrate whether reinterpretation will be an extraordinary measure. Should the right of abode controversy turn out to have been an isolated event, as the administration maintains, the damage done need be neither fundamental nor lasting. If, however, further requests lead to further reinterpretations, then Hong Kong’s common law traditions will necessarily erode. It is our hope that this will not come to pass, and that instead the efforts and goodwill of the Hong Kong legal community, and of the Hong Kong and PRC governments, will make good the “One Country, Two Systems” pledge.

## II. INTERPRETATION V. AMENDMENT: LESSONS FOR THE STATE OF DEMOCRACY IN HONG KONG

As discussed in Part I, the HKSAR administration bypassed the response most democratic and consistent with the rule of law when it dismissed the possibility of amendment of the Basic Law as a means of addressing the right of abode crisis. Indeed, some have suggested that the administration’s reluctance to seek an amendment was motivated in part by concern that the amendment process might be used to accelerate the pace of democratization.<sup>270</sup> Whatever the merits of this claim, the administration, in its quest for a quick response to the feared crisis, ignored possible legislative options and discounted the value of popular deliberation regarding the status and meaning of the Basic Law.<sup>271</sup> Its ability and willingness to do so reflects the political and structural weaknesses of Hong Kong’s emerging democratic institutions.

In this part, we examine the status of democracy in Hong Kong through the lens of the right of abode controversy. The first section discusses the HKSAR administration’s attitude toward democratization within the context of the debate over amendment to the Basic Law. It also reviews the interaction between the Chief Executive and members of LegCo regarding the decision to seek interpretation, highlighting missed

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<sup>270</sup> See, e.g., Interview with Margaret Ng, Legislative Councilor, Hong Kong, (June 7, 1999) (suggesting that administration may fear that if Basic Law can be amended to solve right of abode crisis, then it could be amended to accelerate pace of democratic reforms).

<sup>271</sup> See *supra* notes 146-56 and accompanying text.

opportunities for democratic participation in the referral process. Finally, moving away from the right of abode controversy, this Part reviews the electoral system and the limits on legislative power in greater detail. It assesses Hong Kong's progress towards full democracy, measuring that progress against the Joint Declaration, the Basic Law, and Hong Kong's obligations under international law.

*A. Democracy, Amendment, and the Right of Abode*

As a response to the right of abode controversy, any argument favoring amendment over interpretation must acknowledge at the outset that the mechanism for amending the Basic Law is not highly democratic. In fact, the amendment procedure severely limits the role of the HKSAR's citizenry. Article 159 of the Basic Law vests the power to amend in the NPC.<sup>272</sup> Bills to amend the Basic Law may be proposed by the NPCSC, the State Council, or by the Hong Kong government.<sup>273</sup> If the bill to amend the Basic Law originates from the Hong Kong government, then Article 159 directs the Hong Kong deputies to submit the bill to the NPC only after it has cleared three hurdles: (1) the consent of two-thirds of the deputies themselves; (2) the consent of two-thirds of all the members of LegCo; and (3) the approval of the HKSAR's Chief Executive.<sup>274</sup> After clearing these hurdles, the proposal must then be adopted by the NPC in order to amend the Basic Law.<sup>275</sup>

One practical implication of this procedure is that the citizens of Hong Kong are not ensured direct participation in the amendment process; there is no formal mechanism for popular approval of a proposed amendment.<sup>276</sup> Moreover, their indirect participation through their popularly elected representatives in LegCo is guaranteed only when the bill to amend originates from the HKSAR.<sup>277</sup> Should the NPC choose to amend the Basic Law on its own initiative, the Hong Kong deputies to the NPC would be the only direct voice of Hong Kong.<sup>278</sup> Although the Basic Law gives the residents of the HKSAR the right to elect deputies to the NPC,<sup>279</sup> the Election Council nominated by the NPCSC chooses those deputies.<sup>280</sup>

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<sup>272</sup> See Basic Law, *supra* note 22, ch. VIII, art. 159. For a discussion of the amendment process and its limitations, see GHAI, *supra* note 30, at 177-82. For an evaluation of the amendment process in response to the right of abode controversy, see HONG KONG HUMAN RIGHTS MONITOR, SUBMISSION OF THE HKHRM TO THE LEGISLATIVE COUNCIL PANEL ON CONSTITUTIONAL AFFAIRS ON THE PROCEDURE FOR THE AMENDMENT OF THE BASIC LAW (March 15, 1999) [hereinafter SUBMISSION OF THE HKHRM].

<sup>273</sup> The Basic Law provides that "[t]he power to propose bills for amendments to this Law shall be vested in the Standing Committee of the National People's Congress, the State Council, and the Hong Kong Special Administrative Region." Basic Law, *supra* note 22, ch. VIII, art. 159.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> For a discussion of the desirability of adopting such a mechanism, see SUBMISSION OF THE HKHRM, *supra* note 272.

<sup>277</sup> See Basic Law, *supra* note 22, ch. VIII, art. 159.

<sup>278</sup> The power of the NPC to amend the Basic Law is qualified to some degree by a requirement that the NPC must solicit and consider the views of the Committee for the Basic Law ("CBL" or "Committee"), a group comprised of six mainland members and six HKSAR members qualified to give expert advice on the interpretation and functions



Despite these substantial limitations on the amendment process, from the standpoint of democratic processes, the procedure is superior to reinterpretation in several respects.<sup>281</sup> First, because a bill to amend Articles 22 and 24 of the Basic Law would have originated from the HKSAR,<sup>282</sup> it would have required the approval of two-thirds of the members of LegCo.<sup>283</sup> The administration cited the impossibility of achieving a supermajority of members of LegCo or the Hong Kong delegates to the NPC as a justification for seeking interpretation.<sup>284</sup> Yet, this supermajority requirement is designed precisely to ensure considerable debate and consensus among the directly elected representatives of the citizens of Hong Kong, the representatives of the business and professional communities, and the administration advocates of the bill before any change to the Basic Law is made.<sup>285</sup>

Second, the amendment process requires a longer time frame than reinterpretation, and would have permitted a longer period of public education on the issue as well as the consolidation of public support for or opposition to amending the Basic Law.<sup>286</sup> Although this delay was cited by the administration as another reason to reject the amendment route,<sup>287</sup> any problems created by the delay might have been addressed

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of the Basic Law. The members of the CBL are not elected. *See* GHAI, *supra* note 30, at 196 (describing composition of Committee).

<sup>279</sup> *See* Basic Law, *supra* note 22, ch. II, art. 21.

<sup>280</sup> *See* GHAI, *supra* note 30, at 255 (suggesting that this process may not comport with requirements of Basic Law).

<sup>281</sup> From a common law standpoint, the amendment course is superior in the sense that it is clearly legal under the Basic Law in contrast to the reinterpretation route. Moreover, it comports with the preservation of the Rule of Law and with respect for the finality of Court of Final Appeals interpretations of the Basic Law under a common law system of statutory interpretation. *See supra* notes 141-45 and accompanying text.

<sup>282</sup> *See* Interview with Margaret Ng, Legislative Councilor, Hong Kong (June 7, 1999) (noting that, although possibility of interpretation was discussed in Beijing in immediate aftermath of CFA decision, amendment was never raised). Legislative Councilor Margaret Ng suggested that the reluctance of the part of the NPC to propose (or accept proposals for) amendments to the Basic Law stemmed in part from unwillingness to admit that change to the law might be necessary. *Id.*

<sup>283</sup> *See* Basic Law, *supra* note 22, ch. VIII, art. 159.

<sup>284</sup> *See* Interview with Mrs. Anson Chan, Chief Secretary for Administration, Hong Kong (June 9, 1999).

<sup>285</sup> Under the current composition of LegCo, the margin necessary for amendment could be sustained by a combination of all of the functional constituency seats (30) plus the Election Committee seats (10); however, it is likely, as a practical matter, to require the support of many of the popularly-elected members. *See* Basic Law, *supra* note 22, ch. VIII, art. 159; *see also* GHAI, *supra* note 30, at 177-82 (discussing entrenchment of Basic Law). *Cf.* Owen M. Fiss, *Hong Kong Democracy*, 36 COLUM. J. TRANSNAT'L L. 493 (1998) (noting tenuous status of entrenchment of Basic Law as national law of China).

<sup>286</sup> The CFA decision was handed down on January 29, 1999. The administration first announced its intention to seek interpretation at the end of April and submitted its request on May 20th. In contrast, the earliest date on which an amendment could have been considered was March 2000.

<sup>287</sup> *See* Interview with Mrs. Anson Chan, Chief Secretary for Administration, Hong Kong (June 9, 1999).

through interim legislation.<sup>288</sup> As noted in Part I, this possibility was apparently ignored by the administration.<sup>289</sup>

The amendment process also would have guaranteed a more careful consideration of the implications of altering the Basic Law to limit a fundamental right under Section III. Although a consensus in favor of amendment might have emerged, the process should have allowed for careful deliberation before the scope of basic rights was restricted in favor of economic or social considerations. Finally, and perhaps most importantly, the amendment process would have allowed for the participation of the Hong Kong people in the constitutional lawmaking process for the first time.<sup>290</sup> In short, the procedure for amending the Basic Law, though imperfect, would have afforded time for popular participation in the process, public debate, and serious reflection by the citizens whose rights were affected.

The procedure followed by the administration in seeking a reinterpretation of Articles 22 and 24 included no comparable provisions for public participation. In contrast to the relatively clear procedures for its formal amendment, the Basic Law makes no mention of the authority of the administration to seek an interpretation from the NPCSC.<sup>291</sup> Proceeding without a constitutional framework, the administration was left to create its own procedures for referral to the NPCSC. In so doing, it repeatedly bypassed opportunities to engage the public in the process through the public's elected representatives.

To the extent that it sought to engage the public in this controversy, the administration appeared more interested in manipulating public opinion than fostering informed public debate.<sup>292</sup> At the end of April, the administration released the preliminary results of a survey designed to measure the magnitude of the immigration and almost simultaneously announced its decision to seek interpretation. Clearly, the administration's actions left very little time for independent assessment of the survey results. Moreover, the administration's emphasis on the dire consequences of the feared immigration for social resources triggered an understandably panicked response, primarily among the poorer economic segments of Hong Kong society.<sup>293</sup>

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<sup>288</sup> See *supra* note 153 and accompanying text (discussing interim legislation).

<sup>289</sup> See *id.*

<sup>290</sup> The Basic Law was a product of the negotiations between China and Great Britain, its parameters set out in the Joint Declaration. See Joint Declaration, *supra* note 29. The role of the people of Hong Kong was rather limited, and the document was never voted on or approved by them. See GHAI, *supra* note 30, at 41-43 (noting limited role of Hong Kong people in negotiations and concluding that "leaders and people of Hong Kong were used opportunistically and cynically by both sovereigns"); Fiss, *supra* note 285 at 497 (noting that although "[a] number of prominent Hong Kong figures participated in the drafting of the Basic Law, . . . they hardly dominated that process; in any event they were chosen by Beijing, not by the people of Hong Kong").

<sup>291</sup> For a discussion of the administration's justification of this authority, see *supra* notes 119-26 and accompanying text.

<sup>292</sup> See, e.g., JOINT STATEMENT OF HONG KONG HUMAN RIGHTS MONITOR, HONG KONG HUMAN RIGHTS COMMISSION, JUSTICE, AND SOCIETY FOR COMMUNITY ORGANIZATIONS, (May 3, 1999) (calling upon administration "[t]o stop indulging in propaganda, and, instead to promote rational discussion on viable solutions").

<sup>293</sup> See Interview with Dr. Stephen Ng, Hong Kong Human Rights Monitor, in Hong Kong (May 31, 1999). This perception was reconfirmed through the two weeks during which the delegation met with social service providers and advocacy groups.

Beyond manipulating public opinion, the administration failed to consult with LegCo regarding the decision to seek an interpretation.<sup>294</sup> The administration did seek and obtain a resolution from LegCo supporting the plan to seek interpretation; however, the vote was taken only after the decision in favor of interpretation had been made by the administration.<sup>295</sup> Amendment was not presented as an alternative. In protest, almost one-third of LegCo members walked out of the vote.<sup>296</sup>

As for public debate over the interpretation request, the administration did not release the text of the request for interpretation until over three weeks *after* it had been submitted to the State Council.<sup>297</sup> Mrs. Anson Chan, Chief Secretary for Administration, explained this decision to the delegation as unfortunate but necessary: "We would have liked to have published the text of our request but felt that the State Council should make that decision."<sup>298</sup>

The only formal legal channel for opponents to express their disagreement with a request for interpretation by the administration appears to be through communication with the Committee for the Basic Law ("CBL" or "Committee").<sup>299</sup> The Basic Law, however, neither provides a mechanism for consulting with the CBL, nor does it oblige the CBL to take those views into account.<sup>300</sup> Furthermore, the Basic Law specifies no procedure through which opponents might express their views directly to the State Council or the NPC.<sup>301</sup>

Having been largely foreclosed from the process within the HKSAR and with no clear option for participating in the interpretation process, members of LegCo sought to present their views to Beijing directly. When two LegCo members attempted to fly to Beijing to make the case against interpretation, however, they were barred from boarding the plane at the Hong Kong airport at the direction of mainland

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<sup>294</sup> See, e.g., Democratic Party Press Release, Democrats Urge Chief Executive to Consult Democratically-Elected Re: Right of Abode (May 3, 1999) (reproducing text of letter requesting meeting with Chief Executive Tung).

<sup>295</sup> See *Basic Law Under Question*, S. CHINA MORNING POST, July 8, 1999.

<sup>296</sup> See *id.*

<sup>297</sup> The request was submitted on May 20 and not released until June 11. See *supra* note 147.

<sup>298</sup> See Interview with Mrs. Anson Chan, Chief Secretary for Administration, Hong Kong (June 9, 1999).

<sup>299</sup> According to Anson Chan, this would have been the appropriate venue for opponents to make their case. *Id.* Naturally, because the Basic Law does not explicitly authorize such a request by the administration, it is not surprising that it does not provide a procedure for objecting to the request.

<sup>300</sup> See GHAI, *supra* note 30, at 196-97 (discussing role of CBL and procedures surrounding it).

<sup>301</sup> Despite the lack of a formal channel, opponents of reinterpretation did attempt such communication. See Democratic Party Press Release, Democratically-Elected Members of LegCo Demand Meeting with State Council to Oppose Reinterpretation of the Basic Law (June 3, 1999). As one LegCo member pointed out, however, at least 12 LegCo members are not permitted to travel to Beijing. See Interview with Emily Lau, Legislative Councilor, Hong Kong (June 1, 1999).

authorities.<sup>302</sup> When a representative of the same group attempted to present the group's views to a visiting Beijing official, he was again deterred.<sup>303</sup>

In short, after rejecting the more democratic alternative of amendment, the administration bypassed every opportunity to encourage democratic participation in the interpretation process. The administration's decision to seek interpretation rather than amendment does not by itself pose a serious threat to democracy in Hong Kong, nor does it appear to violate any international obligations regarding democratic participation *per se*. Rather, the government's response to the crisis represents a missed opportunity to strengthen democratic values in Hong Kong by encouraging public participation in the debate over the status and meaning of the Basic Law. Moreover, the deliberate foreclosure of representatives of pro-democracy groups from participating in the referral process does not bode well for the development of democratic institutions in Hong Kong.

### *B. International Obligations and Domestic Structures*

Although international law guarantees the people of Hong Kong the right to shape and to participate in their government, this right was realized only belatedly and partially under British sovereignty,<sup>304</sup> and was almost entirely disregarded in the negotiations over the terms of reversion to Chinese sovereignty.<sup>305</sup> Nevertheless, several important international human rights instruments are relevant to Hong Kong and provide the standard against which the democratic institutions of the HKSAR must be measured.

The Universal Declaration of Human Rights enshrines a strong commitment to democratic principles.<sup>306</sup> Article 21(1) states that "[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives."<sup>307</sup> It continues, "[t]he will of the people shall be the basis

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<sup>302</sup> See Li, *supra* note 148, at 1. Ironically, a group of student protestors successfully presented a petition of 15,000 names opposing reinterpretation to the NPCSC representatives in Beijing. See also Emily Lam, *Legislators Barred from Mainland Soil*, S. CHINA MORNING POST, July 8, 1999.

<sup>303</sup> See No Kwai-Yan, *Beijing Chief Shielded from Petition*, S. CHINA MORNING POST, June 30, 1999, at 2.

<sup>304</sup> The ICCPR was ratified by Britain and applied to Hong Kong in 1976 with an express reservation regarding the obligation to create and elect a legislature. See ICCPR, *supra* note 20. The same reservation was included in the BORO, which was intended to implement the ICCPR in Hong Kong's domestic law. See BORO, *supra* note 243, Part III, § 13. See Andrew Byrnes, *And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights*, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES, ch. 9, 318-91 (Philip Alston ed., Oxford: Clarendon Press, 1999).

<sup>305</sup> See GHAI, *supra* note 30, at 43.

<sup>306</sup> See Universal Declaration, *supra* note 18. Although not legally binding when adopted, much of the Universal Declaration of Human Rights ("Declaration") is regarded as part of customary international law. Whether this status extends to the guarantee of Article 21 is less clear. See Hurst Hannum, *The Status and Future of the Customary International Law of Human Rights*, 25 GA. J. INT'L & COMP. L. 287 (1996). Nevertheless, the Declaration does represent an international consensus regarding human rights aspirations and therefore provides a relevant standard of measurement. See Nihal Jayawickrama, *Hong Kong and the International Protection of Human Rights*, in HUMAN RIGHTS IN HONG KONG 152-62 (Raymond Wacks, ed. 1995).

<sup>307</sup> Universal Declaration, *supra* note 18, art. 21(1).

of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."<sup>308</sup> Thus, the Declaration not only mandates that citizens be permitted a voice in their own government but also requires, within broad parameters, the direct accountability of the government to the people in its exercise of power.<sup>309</sup>

The ICCPR,<sup>310</sup> which was ratified by Britain and applied to Hong Kong in 1976, states that every citizen has the right "to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and be elected at genuine elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."<sup>311</sup> Article 26 adds "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law."<sup>312</sup>

It is undisputed that the ICCPR continues to apply to Hong Kong in some form. In the Joint Declaration, China undertook to continue in force the human rights treaties to which the United Kingdom was a signatory on behalf of Hong Kong.<sup>313</sup> Moreover, because human rights treaties are increasingly regarded as surviving a change in sovereignty, the ICCPR and other treaties may be viewed as applicable to Hong Kong under international law even without this express commitment by China.<sup>314</sup>

The rights protected by these treaties are also incorporated in the domestic law of Hong Kong. The Basic Law provides that "the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and international labor conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region."<sup>315</sup> The BORO also incorporates virtually all of the rights secured by the ICCPR.<sup>316</sup> The scope of application and enforceability of these treaties with respect to individual rights will be discussed in greater

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<sup>308</sup> *Id.*

<sup>309</sup> See Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992); Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. J. 77 (1988).

<sup>310</sup> ICCPR, *supra* note 20.

<sup>311</sup> *Id.* art. 25. The ICCPR also guarantees the right to self-determination. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) (defining self-determination as "the right of a people to determine its collective political destiny in a democratic fashion").

<sup>312</sup> ICCPR, *supra* note 20, art. 26.

<sup>313</sup> The Joint Declaration states that "[t]he provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force." Joint Declaration, *supra* note 18, annex I, § XIII. For a discussion of democracy and human rights in Hong Kong as an international obligation of China, see Michael C. Davis, *International Commitments To Keep: Hong Kong Beyond 1997*, 22 S. ILL. L.J. 293 (1998).

<sup>314</sup> See GHAI, *supra* note 30, at 418-19.

<sup>315</sup> Basic Law, *supra* note 22, ch. IV, art. 39.

<sup>316</sup> See BORO, *supra* note 243, Part II, arts. 1-23.

length in Part III.<sup>317</sup> For purposes of China's obligation to establish a representative government in Hong Kong, however, the critical issue is not the overall applicability of the ICCPR but the status of the reservations entered by the United Kingdom with respect to Article 25. Article 25, quoted above, guarantees the right of citizens to participate in government through elections.<sup>318</sup> When ratifying the ICCPR, the United Kingdom entered the following reservation: "The Government of the United Kingdom reserves the right not to apply sub-paragraph (b) of Article 25 in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong."<sup>319</sup>

The issue of whether this reservation was incorporated into the Basic Law to qualify the applicability of the ICCPR is a question still open to debate. Some have argued that, by referring to the ICCPR with the qualifying phrase "as applied to Hong Kong," and by providing that the provisions "shall *remain* in force,"<sup>320</sup> the Basic Law incorporated the human rights treaties only to the extent that they were implemented under British rule.<sup>321</sup>

In our view, however, the stronger argument weighs against recognizing the continuing effect of such qualifications. First, the validity of the reservation under the ICCPR was at least questionable as applied to the United Kingdom prior to the creation of the first legislative council in 1985. In 1994, the Human Rights Committee (or "HRC") issued a General Comment that reservations that derogate from rights may be invalid.<sup>322</sup> Specifically, the HRC stated:

[r]eservations that offend peremptory norms would not be compatible with the object and purpose of the ICCPR. Although treaties that are exchanges of obligations between States allow them to reserve *inter se* application of rules of international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.<sup>323</sup>

Although the Human Rights Committee did not mention Article 25 specifically, it did cite the right to self-determination in Article 1 and made particular reference to aspects of the covenant designed to guarantee rights.<sup>324</sup>

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<sup>317</sup> See *infra* text accompanying notes 402-430.

<sup>318</sup> See ICCPR, *supra* note 20, art. 25.

<sup>319</sup> *Id.*

<sup>320</sup> Basic Law, *supra* note 22, ch. IV, art. 39 (emphasis added).

<sup>321</sup> The legal sub-group of the Preliminary Working Committee for the Joint Declaration seemed to hold this view. See George Edwards & Johannes Chan, *Hong Kong's Bill of Rights: Two Years Before 1997* (reproducing views of this subgroup).

<sup>322</sup> See Human Rights Committee, *General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant*, U.N. Doc. CCPR/C/21/Rev. 1/Add. 6, Nov. 2, 1994.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

Second, one need not view the reservation regarding Article 25 as invalid *when entered* to conclude that it is no longer relevant to Hong Kong. The intent of the reservation was to relieve the immediate obligation to create an elected legislative body in Hong Kong. Once the United Kingdom established such a body in 1985, the reservation ceased to shield from scrutiny the undemocratic or unequally democratic character of the legislature. This was the view of the Human Rights Committee in its *4th Periodic Report on Hong Kong*.<sup>325</sup> The HRC took the view that "once an elected Legislative Council is established, its election must conform to Article 25 of the Covenant."<sup>326</sup> It follows from this view that the "preservation" of this reservation may not shield China from the obligation to ensure full and equal representation in the legislative council.

In addition, the ICCPR's guarantee of equal protection before the law is relevant to the latter point regarding unequal representation.<sup>327</sup> Both the ICCPR and the Declaration evince a strong commitment to the formal equality of citizens with respect to fundamental rights.<sup>328</sup> The ICCPR thus obliges states not only to recognize its citizens' right to political participation, but also to ensure that its citizens enjoy this right equally.<sup>329</sup> This commitment to an equal right of participation is also expressed in Article 21 of the BORO, notwithstanding the reservation regarding the creation of an elected legislature.<sup>330</sup> In short, whatever the applicability of Britain's reservation concerning the right to representation in Article 25, the reservation should not be read to apply to the equality guarantee in Article 25 or the guarantee of equal protection in Article 26. Rather, the legislative body created to represent the people of Hong Kong should do so in a way that respects their equality as citizens "without distinction of any kind."<sup>331</sup>

### *C. Areas of Concern*

#### *1. The Composition of LegCo*

The Basic Law established a system of only partially direct elections for selecting the legislature, a model based on the electoral system of the pre-reversion legislature first established in 1985.<sup>332</sup> The current

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<sup>325</sup> See U.N. GAOR, Hum. Rts. Comm., 145th mtg. at ¶19, U.N. Doc. CCPR/C/79/Add. 57 (1995).

<sup>326</sup> *Id.*

<sup>327</sup> See ICCPR, *supra* note 20, art. 26.

<sup>328</sup> See Universal Declaration, *supra* note 18, art. 1 ("All human beings are born free and equal"); *id.* art. 2 (guaranteeing all rights to everyone without distinction); *id.* art. 10 (stating that all are equal before law); *id.* art. 21 (granting equal access to public service and universal and equal suffrage); ICCPR, *supra* note 22, art. 2 (guaranteeing rights to all without distinction); *id.* art. 14 (granting equality before courts); *id.* art. 25 (granting equal right to participate in public affairs, to vote, and to public service); *id.* art. 26 (granting equal protection of law).

<sup>329</sup> See ICCPR, *supra* note 22, art. 25. Article 25 makes a specific point of guaranteeing rights to political participation without distinction, explicitly referring to the principles in Article 2. *Id.*

<sup>330</sup> BORO, *supra* note 243, Part III, § 13.

<sup>331</sup> ICCPR, *supra* note 22, art. 2.

<sup>332</sup> For a concise discussion of the establishment of an elected legislature in Hong Kong under British rule, see GHAI, *supra* note 30, at 260-61.

system utilizes a combination of functional constituencies, defined largely by industry or professional groups,<sup>333</sup> geographic constituencies apportioned equally among five districts,<sup>334</sup> and members selected by the Election Committee.<sup>335</sup> This section analyzes the electoral system and composition of LegCo in some detail, particularly the inequalities in the system of functional constituencies and their impact on the distribution of political power among economic groups in Hong Kong.

In the functional constituency system, industry or professional grouping rather than geographical apportionment defines voting districts. Introduced by Britain in 1985, the system was intended as a step toward greater democratic participation by Hong Kong citizens in their government and replaced a process of nomination and appointment of representatives from the business and professional sectors.<sup>336</sup> At the time, the government justified the creation of functional constituencies instead of electoral districts by reference to a need for stability and prosperity.<sup>337</sup> It was feared that "direct elections would run the risk of a swift introduction of adversarial politics, and would introduce an element of instability at a critical time."<sup>338</sup> Nevertheless, after the signing of the Joint Declaration, Governor Chris Patten's administration expanded the scope of the various functional constituencies in Hong Kong to include virtually all employed workers.<sup>339</sup> Though the Patten reforms still discriminated against homemakers, the unemployed, and the elderly, the resulting system was considerably more representative of the Hong Kong people.<sup>340</sup>

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<sup>333</sup> The 28 functional constituencies for the 1998 elections were: Provisional Urban Council; Provisional Regional Council; Heung Yee Kuk (rural village association); Agriculture and Fisheries; Insurance; Transport; Education; Legal; Accountancy; Medical; Health Services; Engineering; Architecture, Surveying and Planning; Labour; Social Welfare; Real Estate; Tourism; Hong Kong General Chamber of Commerce; Chinese General Chamber of Commerce; Federation of Hong Kong Industries; Chinese Manufacturers Association; Finance; Financial Services; Sports, Performing Arts, Culture, and Publication; Import and Export; Textiles and Garments; Wholesale and Retail; and Information Technology. While the Labour constituency returned three members, the remainder are single member districts. See Legislative Council Ordinance, CAP 542 (Sept. 28, 1997) [hereinafter LegCo Ordinance], Part III, § 20-21; Schedule (listing functional constituencies and electors); see also HONG KONG HUMAN RIGHTS MONITOR, REPORT ON 1998 LEGISLATIVE COUNCIL ELECTIONS (Dec. 1998) [hereinafter MONITOR REPORT].

<sup>334</sup> The five geographic districts are Hong Kong Island, Kowloon West, Kowloon East, New Territories West, and New Territories East. Twenty seats are allocated among these five districts according to population. See LegCo Ordinance, *supra* note 333, Part III, § 18-19.

<sup>335</sup> Ten members are returned by the Election Committee, which consists of 800 members representing four sectors composed of 200 members each. See LegCo Ordinance, *supra* note 333, Part IV, § 22; Schedule 2, Part 1 (describing process for selecting Election Committee).

<sup>336</sup> See REPRESENTATIVE GOVERNMENT IN HONG KONG, THE FUTURE DEVELOPMENT OF REPRESENTATIVE GOVERNMENT IN HONG KONG (Hong Kong, The Government Printer 1984) (summarizing British government's position on electoral changes and creation of democratic institutions in Hong Kong).

<sup>337</sup> See *id.*

<sup>338</sup> See *id.* at 9.

<sup>339</sup> For a view of the Patten reforms and the response of the Chinese government, see David Carter, *Regional Report: Hong Kong: Is Democracy in Its Future?*, 3 J. INT'L L. & PRACTICE 551 (1994).

<sup>340</sup> The scope of the Patten reforms was limited by a desire to conform to the framework set out by the Basic Law so that the LegCo might remain in place through the reversion to Chinese sovereignty. Ultimately, China rejected the



In 1997, the Patten changes (embodied in the Electoral Provisions Ordinance) were invalidated by the NPCSC as inconsistent with the Basic Law.<sup>341</sup> The Legislative Council Ordinance, passed by the Provisional LegCo after the reversion to Chinese sovereignty, established a new framework for the selection of LegCo.<sup>342</sup> Notwithstanding commitments to universal suffrage in the Basic Law,<sup>343</sup> the new ordinance significantly reduced the representative character of Hong Kong's democratic institutions.

First, the ordinance substantially narrowed the functional constituency electorate. In the 1998 elections, fewer than 200,000 voters constituted the full electorate for the thirty functional constituency seats.<sup>344</sup> Moreover, the small fraction of the electorate that voted in the functional constituencies was heavily weighted in favor of the conservative pro-business and pro-Beijing communities, which resulted in the reinforcement of their economic power through the political process.<sup>345</sup>

This wholesale exclusion of a majority of the electorate from the functional constituencies, though most significant, is not the only problematic aspect of the electoral system. Even among the electorate comprising the functional constituencies, voting is not equal and procedures are not uniform. First, the size of the functional constituencies varies dramatically. For example, in the 1998 election, the largest functional constituency, the education constituency, had 61,290 registered electors.<sup>346</sup> The smallest, the urban and regional councils, had fifty each.<sup>347</sup> Yet, these three constituencies each determined one LegCo seat. Second, some functional constituencies feature individual voting, others corporate voting, and still others a combination of the two. In the legal functional constituency, for example, the electorate is made up of

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reforms as inconsistent with the Basic Law and the "through train" was derailed. See Michael C. Davis, *Constitutionalism Under Chinese Rule: Hong Kong After the Handover*, 27 DENV. J. INT'L L. & POL'Y 275, 283 (1999). Although the Patten reforms moved the functional constituency system toward universal suffrage, the apportionment of votes among the functional constituencies was highly unequal. More than one million voters in the "broad" functional constituencies returned only nine seats while 82,000 electors returned the remaining functional constituency seats. See NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS, HONG KONG REPORT NO. 2, THE PROMISE OF DEMOCRATIZATION IN HONG KONG: THE NEW ELECTION FRAMEWORK (Oct. 23, 1997).

<sup>341</sup> See Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (adopted by Standing Committee of Eight National People's Congress at its 24th Sitting on February 23, 1997), Annex 1 (listing Electoral Provisions Ordinance among legislation previously in force that contravene Basic Law).

<sup>342</sup> LegCo Ordinance, *supra* note 333.

<sup>343</sup> See Basic Law, *supra* note 333, ch. IV, art. 68.

<sup>344</sup> According to one estimate, the number of eligible functional constituency voters was reduced from 2.7 million to 180,000. See Davis, *supra* note 340.

<sup>345</sup> See Davis, *supra* note 340, at 284-85 (noting that "the design of this model seemed clearly aimed at keeping the democratic camp in the minority").

<sup>346</sup> See MONITOR REPORT, *supra* note 333, ¶ 9.01.

<sup>347</sup> See *id.*

individual members of the Hong Kong Bar Association and the Law Society.<sup>348</sup> The finance functional constituency, in contrast, has an electorate of banks and related businesses.<sup>349</sup> Others, such as the real estate functional constituency, have both individual and corporate voters.<sup>350</sup> This complex composition of the functional constituency electorate undermines transparency and creates an opportunity for corruption. Indeed, according to one report, the practice of multiple voting of corporations via their arms or subsidiaries in the 1998 election resulted in an even greater concentration of power in the hands of a small number of individuals.<sup>351</sup>

The combined effect of these inequalities in the electoral system can be quite dramatic. According to one estimate, in the 1998 LegCo election, the five smallest functional constituencies, most of which feature corporate voting, had an aggregate of only 837 voters.<sup>352</sup> These 837 voters determined five LegCo seats, the same number of LegCo seats as one-quarter of the entire registered electorate in the geographical constituencies, or 698,843 individuals.<sup>353</sup> The political impact was equally dramatic in that the various pro-democracy candidates received sixty percent of the popular vote but only one-third of the seats in LegCo.<sup>354</sup>

The ten seats chosen through the Election Committee only exacerbate the inequality created by the functional constituency system. The Basic Law provides for substantial overlap between the functional constituencies and the Election Committee.<sup>355</sup> The Selection Committee, which determined the ten Election Committee seats in the 1998 election, was even more heavily weighted in favor of the pro-Beijing and pro-business sectors.<sup>356</sup> The 400 members of the Selection Committee were selected by the functional constituency voters plus designated local and national political figures.<sup>357</sup>

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<sup>348</sup> See LegCo Ordinance, *supra* note 333, Schedule 1, Part 2, § 8.

<sup>349</sup> See *id.* Schedule 1, Part 2, § 22.

<sup>350</sup> See *id.* Schedule 1, Part 2, § 16.

<sup>351</sup> See MONITOR REPORT, *supra* note 333, ¶ 9.03. The extent of this multiple voting is difficult to determine with certainty because it must be done through a cross-referencing of elector roles and corporate ownership records. Nevertheless, the Hong Kong Human Rights Monitor has highlighted some of the more egregious instances in which a single individual controls anywhere from 6 to 20 votes in the functional constituency elections. See MONITOR REPORT, *supra* note 333, ¶ 9.04-9.08; Gren Manuel, *Tycoons Buy Extra Ballots*, S. CHINA MORNING POST, Feb. 22, 1998, at 2.

<sup>352</sup> See MONITOR REPORT, *supra* note 333, ¶ 9.02.

<sup>353</sup> See *id.*

<sup>354</sup> See *Record Turnout Poised To Give Democrats Sweeping Victory*, S. CHINA MORNING POST, May 25, 1998, at 1.

<sup>355</sup> See Basic Law, *supra* note 22, annex I, § 2 (defining composition of Election Committee).

<sup>356</sup> In addition to the functional constituency seats, members of the Provisional LegCo and the Hong Kong delegates to the NPC of the Chinese central government also had votes in the Selection Committee election. See Davis, *supra* note 340, at 284.

<sup>357</sup> See *id.*

Finally, Legislative Council Ordinance made significant changes to the electoral process for the geographic districts. Previously, these districts had been single member districts where the candidate with the most votes prevailed.<sup>358</sup> The new ordinance created multi-member districts coupled with a complex system for proportional representation. Under some circumstances, such a system yields a more representative body by ensuring minority groups a voice in the legislature. In the context of Hong Kong, however, where more than half of the legislature is chosen by an indirect process already calculated to represent various constituencies in society, the proportional representation argument is weak. Instead, the change away from single-member districts seemed calculated to reduce the number of seats held by pro-democracy candidates.<sup>359</sup>

## *2. The Selection of the Executive and the Balance of Power Between LegCo and the Executive*

In addition to these limitations in the electoral process, the democratic character of the HKSAR government is further limited by restrictions on the functions and powers of LegCo relative to the Executive. The Chief Executive is not directly elected but nominated by the Election Committee and appointed by the CPG, a process that is preserved by the Basic Law at least until 2007.<sup>360</sup> Because international law does not expressly dictate that the Chief Executive be popularly elected, this system of indirect selection does not in itself constitute a violation of international norms. However, the combination of a powerful appointed or indirectly elected Chief Executive and a weak legislature, in which only a minority of seats is popularly elected, undercuts the right of citizens to participate meaningfully in their government.<sup>361</sup> This Part explores several examples of restrictions on LegCo's power relative to the Executive, including limitations on the introduction of legislation by LegCo members and the bicameral voting requirement for members' bills.

## *3. Restrictions on LegCo Member Bills*

The power of LegCo members to introduce legislation is limited in significant ways. The Basic Law prohibits LegCo members from introducing bills relating to the political structure or government operations, or bills requiring public spending.<sup>362</sup> Furthermore, in order to introduce bills "relating to government policy," LegCo members must obtain the consent of the Chief Executive.<sup>363</sup>

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<sup>358</sup> See Margaret Ng, *Democrats the Losers in Tung's Game Plan*, S. MORNING POST, Sept. 19, 1997 at 29; Chris Yeung, *Greater Uncertainty for Key Candidates*, S. CHINA MORNING POST, Mar. 2, 1998 at 6.

<sup>359</sup> See Davis, *supra* note 340, at 285. The multi-member districts also had the effect of pitting pro-democracy candidates against each other. See Linda Choy, *Historic Poll a Fight Among Friends; Revamped Multi-Seat Battlegrounds Pit Allies Against Each Other in Scramble for Votes*, S. CHINA MORNING POST, Feb. 23, 1998, at 6.

<sup>360</sup> See Basic Law, *supra* note 22, annex III. After 2007, changes in the electoral process for the Chief Executive and LegCo would not entail an amendment to the Basic Law; however, they would require a two-thirds majority of the LegCo and the consent of the Chief Executive. *Id.*

<sup>361</sup> See *supra* notes 341-43 and accompanying text.

<sup>362</sup> See Basic Law, *supra* note 22, ch. IV, art. 74 (providing that "[b]ills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council.").

<sup>363</sup> See *id.*

The potential scope and effect of these restrictions is enormously broad. Indeed, the restriction on bills calling for government spending could alone virtually eliminate private member bills having anything but the most trivial impact.<sup>364</sup> In an attempt to limit the scope of this restriction, LegCo members have argued that the prohibition of private member bills that require public spending in Article 74 of the Basic Law refers only to bills that directly require public expenditure.<sup>365</sup> The HKSAR administration insists, however, that the prohibition also covers private member bills that affect public spending even indirectly or incidentally.<sup>366</sup> The current LegCo Rules of Procedure apply a "charging effect" test that would prohibit the introduction of a bill only if it has the effect of increasing government expenditures.<sup>367</sup>

Perhaps even more significantly, the Basic Law does not elaborate the meaning of political structure, government operations, or government policy.<sup>368</sup> Taken together, these categories conceivably cover virtually any and every issue that LegCo might reasonably address. Even under a relatively limited interpretation of this language, these restrictions mean that most legislation must originate with the Chief Executive, or, at a minimum, with the permission of the Chief Executive. The administration's position is

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<sup>364</sup> See *Standing by LegCo*, S. CHINA MORNING POST, Jan. 21, 1999, at 14. Despite this substantial limitation on private member bills, LegCo does exercise a measure of budgetary power under the Basic Law. Article 73 provides that the government cannot collect or spend public funds without the approval of the legislative branch. However, because Hong Kong's legislative branch cannot introduce bills on public spending, the executive branch has primary responsibility for planning revenue collection and spending, for fear of pork barrel spending by LegCo. LegCo's power over public expenditure, then, largely derives from its power to reject the administration's spending proposals. If LegCo does reject the administration budget, then according to the Basic Law the Chief Executive may ask it to approve provisional appropriations. If the Chief Executive and LegCo cannot agree on a budget, then the Chief Executive may dissolve LegCo. New LegCo elections and new budget talks between the administration and the next LegCo would then be necessary. The administration has some incentive to compromise, however, because if the new LegCo also refuses to pass the original administration budget bill, then the Chief Executive must resign. See GHAI, *supra* note 30, at 293-94.

<sup>365</sup> See Angela Li, *Officials Stifling Private Bills, Says Unionist*, S. CHINA MORNING POST, Mar. 2, 1999, at 4.

<sup>366</sup> See Jimmy Cheung, *Special Power Invoked To Halt Bills, Government Includes LegCo and Judiciary*, S. CHINA MORNING POST, Jan. 20, 1999, at 1 (explaining government's expansive interpretation of limits on private member bills).

<sup>367</sup> See Interview with Mrs. Rita Fan, President of the Legislative Council, Hong Kong (June 7, 1999).

<sup>368</sup> Nor does the Basic Law specify who determines whether a private member bill falls within one of these prohibited categories. Under RULES OF PROCEDURE OF THE LEGISLATIVE COUNCIL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION 34 (amended Apr. 28, 1999) [hereinafter LEGCO RULES OF PROCEDURE], the President of LegCo has the power of decision on this issue. One influential constitutional scholar has supported this view by noting that exercising such authority is commensurate with the LegCo President's duty under the Basic Law, art. 72, § 2, to decide on the legislative agenda. See GHAI, *supra* note 30, at 282 n.34. The HKSAR administration, in contrast, has stated that the Chief Executive should determine the scope of the restrictions. The administration has argued that giving the LegCo President the power of decision would defeat the Basic Law Article 74 purpose of restricting LegCo powers. See *Tung Should Rule on Bills*, S. CHINA MORNING POST, Apr. 29, 1999, at 6 (quoting Chief Secretary for Administration Anson Chan).

that "government policy" includes policies reflected in legislation, making the definition seemingly circular and all encompassing.<sup>369</sup>

Legislative Councilor Lee Cheuk Yan's attempt to introduce legislation that would restore certain labor rights eliminated by the Provisional LegCo illustrates the impact of these limitations. His bill would have expanded the right to file a claim with the Labour Tribunal under certain circumstances and would have expanded available remedies for violations of labor rights.<sup>370</sup> LegCo President Rita Fan determined that the proposed bills would have entailed additional public expenditure, and therefore ruled that both bills violated Basic Law Article 74.<sup>371</sup> Apparently adopting the administration's position regarding the definition of government policy, she also determined that the bills affected government policy in that they called for the repeal of existing legislation.<sup>372</sup>

The limitations on LegCo members' powers to initiate legislation may also apply to amendments to bills introduced by the government, thereby further restricting the power of legislators to affect government policy. The Tung administration has argued that amendments related to government policy also require consent from the Chief Executive when proposed by LegCo.<sup>373</sup> The administration insists that since the Basic Law requires that private member bills related to government policies be approved by the Chief Executive before being introduced,<sup>374</sup> so too must private member amendments to government bills.<sup>375</sup> The LegCo Rules of Procedure provide otherwise, subjecting amendments to the "charging effect" test for public expenditure but not to the requirement of obtaining the consent of the Chief Executive for amendments affecting government policy.<sup>376</sup> Whether this rule violates Article 74 of the Basic Law has yet to be determined.<sup>377</sup>

#### 4. *The Bicameral Restriction on Private Member Bills*

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<sup>369</sup> See Cheung, *supra* note 366, at 1 (quoting representative of administration on view that Government includes executive, legislature, and judiciary).

<sup>370</sup> See *infra* notes 452-455 and accompanying text.

<sup>371</sup> See Jimmy Cheung, *Rita Fan "Conspiring to Kill Private Bills,"* S. CHINA MORNING POST, July 20, 1999, at 6.

<sup>372</sup> See *id.* Councilor Lee Cheuk-yan is considering seeking judicial review of this decision, however, the risk of prohibitive legal costs (because Hong Kong follows the "British Rule" where the losing party may be required to pay costs for both sides, regardless of the merit of the losing party's claim) may cut or even forestall the appeal process. See *Unionist Weighs Cost of Lawsuit,* S. CHINA MORNING POST, July 29, 1999, at 2.

<sup>373</sup> See Danny Gittings, *Close Encounters of a Political Kind,* S. CHINA MORNING POST, July 18, 1999.

<sup>374</sup> Basic Law, *supra* note 22, ch. IV, art. 74.

<sup>375</sup> See Paper for the Committee on Rules of Procedure of LegCo, Part A, § 5 (1999) (describing Tung administration's position).

<sup>376</sup> See LEGCO RULES OF PROCEDURE, *supra* note 368, Part K, rule 57.

<sup>377</sup> See Gittings, *supra* note 373, (noting that, although time has passed for administration to invoke judicial review of rules as adopted, if LegCo passes amendment that government believes violates Article 74, then it may bring legal challenge).

Beyond these severe limits on the introduction of legislation by members, the Basic Law imposes different standards for bills introduced by the administration and bills introduced by LegCo members. Administration bills require only a simple majority of all LegCo members to pass.<sup>378</sup> In contrast, bills introduced by LegCo members must receive a majority of both the votes of the functional constituency representatives and a majority of the votes of the representatives of geographic districts and the Election Committee combined.<sup>379</sup>

This bicameral voting requirement has two notable effects. First, the bicameral requirement for LegCo-sponsored bills means that a simple majority of either group may block the legislation. Thus, the functional constituency representatives who are selected by a process that overlaps considerably with the selection process for the Chief Executive may block the passage of a bill introduced by a legislator chosen from a geographic district. Second, a bill introduced by the administration may succeed with the support only of the functional constituency and Election Committee representatives, both of which are more likely to share the position of the administration.<sup>380</sup> In practical terms, these limitations have meant that, even under the less restrictive LegCo Rules of Procedure, no private member bill amending a government bill had passed as of June 1, 1999.<sup>381</sup> Under the system of bicameral voting, only one private member bill had passed LegCo as of June 1, 1999.<sup>382</sup> In short, the bicameral voting requirement, combined with the restrictions on the ability of LegCo members to introduce legislation, severely limit the ability of LegCo members to pursue legislation that diverges in any way from the administration's agenda.

#### *D. International Obligations and the Pace of Democratization*

Neither the Universal Declaration of Human Rights nor the ICCPR prescribes in any detailed way the form a government must take. On the contrary, the structure of government is an issue largely within the scope of national sovereignty.<sup>383</sup> Nevertheless, by guaranteeing the right of citizens to equal and meaningful participation in government, international law does impose certain broad limitations on that structure. In view of these standards, the delegation believes that the existing electoral system in Hong Kong falls short of the standard for equal participation and raises serious concerns with respect to the rights of citizens to participate in a meaningful way in their government.

First, the delegation agrees with the Human Rights Committee of the United Nations that the functional constituency system violates the requirement of equal representation guaranteed by Article 25 and 26 of the ICCPR.<sup>384</sup> In its pre-handover *4th Periodic Report on Hong Kong*, the HRC noted, "only 20 of 60

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<sup>378</sup> See Basic Law, *supra* note 22, annex II.

<sup>379</sup> See *id.*

<sup>380</sup> See GHAI, *supra* note 30, at 262-64, 279 (discussing structure of legislature and relationship to Chief Executive)

<sup>381</sup> See Interview with Mrs. Rita Fan, President of LegCo, Hong Kong (June 7, 1999).

<sup>382</sup> See Interview with Ms. Cyd Ho, Legislative Councilor, Hong Kong (June 1, 1999).

<sup>383</sup> See *supra* note 306.

<sup>384</sup> See ICCPR, *supra* note 20, arts. 25 & 26 (guaranteeing equal and meaningful participation and equal protection of laws).

seats in the Legislative Council are subject to direct popular election."<sup>385</sup> It concluded, "the concept of functional constituencies, which give undue weight to the views of the business community, discriminates among voters on the basis of property and functions. This clearly constitutes a violation of articles 2, ¶¶ 1, 25(b), and 26."<sup>386</sup>

Notwithstanding its requirement of equal participation, the ICCPR does not prescribe a particular system of districting or apportionment. In theory, an electoral system in which citizens are classified and represented by occupation rather than (or in addition to) geographic districts would not violate international standards so long as representation is universal and equally apportioned.<sup>387</sup> The functional constituency system in place in Hong Kong, however, falls far short of this standard. As described above, the functional constituencies are unequally apportioned and the majority of Hong Kong people are excluded altogether from representation.<sup>388</sup> Moreover, the representation in LegCo is not merely unequal, but unequal in a way that reinforces an already powerful and indirectly elected Chief Executive.<sup>389</sup>

One need not argue that the ICCPR precludes any departure from equal representation to conclude that the extremely unequal system in Hong Kong violates the ICCPR. Article 25 may permit reasonable departures from equal apportionment; however, the reasons for departing may not contravene the purposes of the treaty.<sup>390</sup> In contrast, the objective of providing a disproportionate voice to the business community in order to ensure economic stability and reduce the likelihood of political change undermines the goal of meaningful popular participation protected by the treaty.

The coincidence of views that is likely among the administration, the functional constituency representatives, and the Election Committee representatives also exacerbates the effect of the limitations on the powers of LegCo members to introduce legislation and the bicameral voting requirement for member bills. Viewed through the lens of party politics in Hong Kong, the restrictions can be seen as a deliberate constraint on the pro-democracy agenda advanced by many of the members representing the geographic districts.<sup>391</sup>

These restrictions on the powers of the legislature to influence government policy threaten to relegate it to a consultative role, or worse, render its actions a mere rubber stamp of administration policy. This

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<sup>385</sup> U.N. GAOR, Hum. Rts. Comm., 145th mtg. at ¶19, U.N. Doc. CCPR/C/79/Add. 57 (1995).

<sup>386</sup> *Id.*

<sup>387</sup> The requirement of equal representation in the ICCPR is not tied to geographic apportionment. Article 25 speaks of "universal and equal suffrage," a requirement that may be met through a number of different districting plans. *See ICCPR, supra* note 20, art 25.

<sup>388</sup> *See supra* notes 343-58 and accompanying text.

<sup>389</sup> *See supra* notes 352-61 and accompanying text.

<sup>390</sup> *Cf.* Human Rights Committee, General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant, U.N. Doc. CCPR/C/21/Rev. 1/Add. 6, Nov. 2, 1994 (involving central purpose of treaty as limitation on reservations).

<sup>391</sup> *See supra* note 359.

possibility contradicts the Basic Law's own goal of gradual progress towards a fully representative democracy.<sup>392</sup> Moreover, by handcuffing the most democratic body, and particularly the directly elected component of that body, the restrictions undermine the right of Hong Kong citizens to participate in their own government.<sup>393</sup>

The Basic Law implicitly acknowledges some of these problems. Consistent with the goal of a movement toward universal suffrage, the Basic Law provides for a gradual decrease in the number of Election Committee seats in LegCo.<sup>394</sup> In the LegCo elections in 2000, the number of Election Committee seats will be reduced from ten to six, and the directly elected seats will be increased correspondingly by four.<sup>395</sup> In 2003, the remaining Election Committee seats will be replaced by directly elected seats, for the first time bringing the number of directly-elected seats up to the level of the seats returned by the functional constituencies.<sup>396</sup>

Unfortunately, the Basic Law provides no corresponding timetable for the elimination of the functional constituencies. Indeed, according to Annex II, the current system will remain in place until at least 2007, after which any amendment will require approval by two-thirds vote of LegCo and approval by the Chief Executive.<sup>397</sup> At that time, the Basic Law provides for a review of the selection method for the Chief Executive and LegCo.<sup>398</sup> Changes such as universal and equal voting for the Chief Executive and all LegCo seats may be instituted only with the approval of both a two-thirds supermajority of LegCo members and the Chief Executive.<sup>399</sup> Clearly, the functional constituencies and the indirectly selected Executive are well positioned to survive even beyond 2007.

### *E. Conclusion and Recommendations*

According to Article 68 of the Basic Law, "[t]he ultimate aim is the election of all members of the Legislative Council by universal suffrage."<sup>400</sup> This commitment is echoed in Article 21 of the BORO that calls for "universal and equal suffrage."<sup>401</sup> In light of these aspirations and the requirements of international law, the delegation recommends that the system of unequal representation under the functional constituency

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<sup>392</sup> Basic Law, *supra* note 22, ch. IV, art. 68.

<sup>393</sup> *See supra* note 347 and accompanying text.

<sup>394</sup> *See* Basic Law, *supra* note 22, annex II, Part I § 1.

<sup>395</sup> *See id.*

<sup>396</sup> *See id.*

<sup>397</sup> *See id.* annex II, § 3.

<sup>398</sup> *See id.*

<sup>399</sup> *See id.*

<sup>400</sup> *See id.* ch. IV, art. 68.

<sup>401</sup> BORO, *supra* note 243 art. 21.



framework be eliminated either prior to 2007 by amendment to the Basic Law, or immediately following according to the procedures specified by the Basic Law. The delegation further urges the administration and members of the LegCo to support other measures that would transform the institutions of government in the HKSAR into ones more representative of the democratically expressed will of the people of Hong Kong.

### III. LESSONS FOR THE FUTURE OF LAW AND FUNDAMENTAL RIGHTS IN HONG KONG

The right of abode controversy and reinterpretation process suggests a significant change in the relationship between the mainland system and the HKSAR, the impact of which extends well beyond the cases itself. Looking toward the future of basic rights in Hong Kong, two important lessons emerge. First, the change in the mainland/HKSAR relationship came at the expense of the HKSAR's autonomy, particularly the independence of its legal institutions. The change may have undermined the ability of those institutions to safeguard fundamental rights. Second, the change in the mainland/HKSAR relationship came at the expense of a fundamental right explicitly included in the language of the Basic Law, raising concern that other rights contained in the Basic Law could be at risk. In light of these concerns, this Part analyzes two areas, labor rights and anti-discrimination protection, in which basic rights protected under international law have been neglected by the HKSAR administration.

#### A. Association and the Workplace: Labor Rights Concerns

Hong Kong's pledge to respect the rights of workers is found in the Joint Declaration and the Basic Law, as well as the ICCPR, ICESCR, and various international labor conventions. Joint Declaration Article 3(5) recognizes the "rights of assembly and association, the right to strike, and the right to choose one's occupation."<sup>402</sup> Annex I also recognizes "the right to form and join trade unions."<sup>403</sup> The Basic Law echoes these provisions, recognizing in Article 27 the freedom to form and join trade unions and to strike,<sup>404</sup> and recognizing in Article 33 the freedom of choice of occupation.<sup>405</sup> The Basic Law also incorporates these pledges through Article 39's incorporation of the ICCPR<sup>406</sup> and the ICESCR.<sup>407</sup> The ICESCR protects, *inter*

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<sup>402</sup> See Joint Declaration, *supra* note 29, at art. 3(5).

<sup>403</sup> See *id.* at Annex I, "Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Hong Kong," Art. XIII, line 151.

<sup>404</sup> See Basic Law, *supra* note 22, at art. 27.

<sup>405</sup> See *id.* at art. 33. Other relevant provisions of the Basic Law include Article 147 (stating that HKSAR shall on its own formulate laws and policies relating to labor), Article 148 (stating that relationship between non-governmental organizations in Hong Kong, including labor organizations, and their counterparts on mainland shall be based on principles of non-subordination, non-interference, and mutual respect).

<sup>406</sup> ICCPR, *supra* note 20. The ICCPR is important to a discussion of labor rights in that it protects the right of freedom of peaceful assembly (Article 21) and association (Article 22). *Id.*

<sup>407</sup> ICESCR, *supra* note 22; Basic Law, *supra* note 22, at art. 39. Both the ICCPR and the ICESCR were ratified by the British on July 20, 1976 and applied to Hong Kong, with reservations. Britain ratified the ICESCR for Hong Kong on July 20, 1976, but with a significant reservation concerning trade unions in Hong Kong. The reservation "disapplied the right of trade unions to establish national federations or confederations or their right to join

*alia*, the right to work,<sup>408</sup> the conditions of workers,<sup>409</sup> the right to form trade unions,<sup>410</sup> and the international labor conventions in force in Hong Kong.<sup>411</sup> Three of these Conventions warrant discussion. Convention No. 87 on the Freedom of Association and Protection of the Right to Organize provides that both employers and employees shall have the right to establish and join organizations of their own choosing without interference.<sup>412</sup> It further ensures that participation in an organization or federation will be free of interference by government authorities, and obligates member states to take measures implementing its provisions.<sup>413</sup> Convention No. 98 on the Right to Organize and Collective Bargaining aims to prohibit acts of anti-union discrimination, to protect both employers and employees from interference, and to promote voluntary negotiation between management and labor.<sup>414</sup> Convention No. 154 on Collective Bargaining defines collective bargaining and obligates signatories of Convention No. 98 to establish legislation to implement collective bargaining if it is not widely practiced.<sup>415</sup>

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international federations." See GHAI, *supra* note 30, at 412 (stating that reservation reflects Britain's concern that political forces from Taiwan or mainland might attempt to use Hong Kong trade unions to cause unrest in colony).

<sup>408</sup> ICESCR, *supra* note 22, at art. 6.

<sup>409</sup> *Id.* at art. 7.

<sup>410</sup> *Id.* at art. 8.

<sup>411</sup> Forty-six international labor conventions are applicable to Hong Kong. See HKSAR INFORMATION SERVICE DEPARTMENT, HONG KONG-A NEW ERA-REVIEW OF 1997, EMPLOYMENT 117 (1997). Pursuant to the Constitution of the International Labor Organization ("ILO"), the conventions were originally applicable to the HKSAR as a "non-metropolitan territory" of the PRC. See INTERNATIONAL LABOUR ORGANIZATION CONSTITUTION art. 35(4). China has since notified the ILO that the HKSAR is not to be regarded as a non-metropolitan territory of China but as an "inseparable part" of China. GHAI, *supra* note 30, at 417-18. The ILO Conventions continue to be recognized by the HKSAR. It is unclear what the Chinese meant by their declaration of inseparability, but no other member state has objected and presumably the previous practice of Hong Kong being subject to reporting and dispute resolution of the ILO continues. *Id.*

<sup>412</sup> ILOLEX 04/07/50, Convention Number 87, Freedom of Association and Protection of the Right Organize Convention, 1948 (ratified in 1963).

<sup>413</sup> *Id.* Britain ratified Convention Number 87 with reservations designed to limit the ability of Hong Kong's unions to expand, merge, and affiliate themselves with other entities both in the territory and abroad, and the June 1997 ordinances were intended to remove these limitations. The reservations included provisions: (1) requiring all officers of a trade union or federation to be engaged or employed in the industry or occupation with which the union is connected; (2) limiting use of union funds to objects specified in national laws or as approved by a public authority; (3) authorizing public supervision of the accounts of trade unions and the application of union rules; (4) requiring government consent for a union merger involving any union affiliated with an entity outside the territory; (5) requiring government consent for a union affiliation with an international organization; and (6) authorizing the government to prevent cross-industry federation of unions. See GHAI, *supra* note 30, at 413.

<sup>414</sup> ILOLEX 18/07/51, Convention Number 98, Right to Organize and Collective Bargaining Convention, 1949 (ratified 1975); INTERNATIONAL LABOUR ORGANIZATION, INTERNATIONAL LABOUR STANDARDS 48 (4th Ed., 1998). Although Britain attached no reservations to Convention Number 98, it failed to pass implementing legislation, raising doubts about the convention's efficacy in the territory. Again, the June 1997 ordinances were intended to remove those doubts.

<sup>415</sup> ILOLEX 11/08/1983 Convention Number 154, Collective Bargaining Convention (1981) (not ratified by United Kingdom and Northern Ireland).

Hong Kong's system for implementing these pledges relies on three bodies: the Labour Department,<sup>416</sup> the Labour Tribunal,<sup>417</sup> and the Labour Advisory Board ("LAB").<sup>418</sup> The Labour Department is a part of the HKSAR administration and implements policy and legislation for the HKSAR.<sup>419</sup> The Labour Department ostensibly promotes harmonious labor relations and responsible trade unionism, focusing on conciliation of employer-employee disputes. The LAB is an independent twelve-member board composed of six employees and six employer representatives and chaired by the Commissioner for Labour.<sup>420</sup> The LAB is charged with providing "guidance" on labor policies and legislation. It operates through special committees dedicated to particular areas of policy and legislation.<sup>421</sup> The Labour Department may consult the LAB on policy questions or proposed legislative changes. The Labour Tribunal is an adjudicative body designed to provide an informal venue for employers and employees to settle monetary disputes.<sup>422</sup> The Labour Department may refer cases to the Labour Tribunal after efforts at informal conciliation have failed.<sup>423</sup>

The HKSAR administration argues that the system of safeguards implemented through the Labour Department, LAB, and Labour Tribunal provide adequate legal protection for workers' rights and satisfy Hong Kong's treaty obligations. Nevertheless, several substantive gaps exist that may pose a threat to

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<sup>416</sup> HKSAR INFORMATION SERVICE DEPARTMENT, *supra* note 411, at 114-21 (outlining responsibilities of Labour Department and agencies within department). The Labour Department has five divisions principally responsible for the different aspects of protection and promotion of worker's rights: Labour Relations Division (provides conciliation service and advises on matters relating to conditions of employment and the Employment Ordinance), the Workplace Consultation Promotion Unit (strengthens the promotion of voluntary negotiation, consultation and effective communication between employers and employees), the Labour Relations Promotion Unit (organizes activities to promote harmonious labor-management relations), the Registry of Trade Unions (registers trade unions and organize educational courses for unionists), and the Minor Employment Claims Adjudication Board ("MECAB") (adjudicating small labor claims). *Id.*

<sup>417</sup> LABOUR TRIBUNAL, GUIDE TO COURT SERVICES, JUDICIARY (May 1999).

<sup>418</sup> *See* HKSAR INFORMATION SERVICE DEPARTMENT, *supra* note 411, at 114-21.

<sup>419</sup> *Id.*

<sup>420</sup> *Id.* at 117.

<sup>421</sup> *Id.* Special Committees include: employees' compensation, employment services, occupational safety and health, labor relations, and the implementation of international standards.

<sup>422</sup> Insofar as the Labour Tribunal is the principle adjudicative body for workplace disputes, the fairness and efficacy of the procedures before the Labour Tribunal are paramount. During the mission representatives of both employers and employees criticized the Labour Tribunal as favoring the other's interest. Nevertheless, employers prefer the Labour Tribunal as an alternative for dispute resolution to a mandatory collective bargaining statute. *See* Interview with Dr. Eden Woon, Director of Hong Kong General Chamber of Commerce, in Hong Kong (June 4, 1999). Union critics claimed that the tribunal presiding officers have too much unrestrained authority and at times improperly force settlements. They also charge that there has been an increase in workload and legislation but not personnel forcing many cases to be settled out of court. *See* Interview with Elizabeth Tang, Hong Kong Confederation of Trade Unions, in Hong Kong (June 1, 1999).

<sup>423</sup> The Labour Relations Division refers over 90% of cases to the Labour Tribunal after an unsuccessful attempt at conciliation. *See* HKSAR INFORMATION SERVICE DEPARTMENT, *supra* note 411, at 118.

workers' rights and lead to controversy. These include inadequate protections for union organizers, unnecessary limits on the right to strike, and inadequate measures to promote meaningful collective bargaining. Significantly, these gaps had been closed in the June 1997 ordinances repealed by the provisional LegCo immediately after the reversion. The repeal of those ordinances suggests hostility toward the rights of workers and a lack of commitment to meeting Hong Kong's obligations under international treaties and labor conventions.

The three labor ordinance amendments passed by the LegCo in June 1997 were intended to implement Article 8 of the ICESCR and International Labour Organization ("ILO") Convention Nos. 87, 98, and 154.<sup>424</sup> The Trade Union (Amendment No. 2) Ordinance removed all restrictions on the use of union funds and on the federation of cross-industry unions, removed the ban on the elections of persons from outside the enterprise or sector to the executive committee of unions and to the individual union federation, and lowered the age limit for union officials from twenty-one to eighteen.<sup>425</sup> The Employment (Amendment No. 4) Ordinance strengthened protections for the right of association and collective bargaining by providing a right of reinstatement to employees showing wrongful discharge for union activities.<sup>426</sup> The Employee's Right to Representation, Consultation, and Collective Bargaining Ordinance ("Collective Bargaining Ordinance") implemented the right of collective bargaining by laying out specific guidelines for representation and consultation.<sup>427</sup> Although each of these ordinances provided new local statutory mechanisms for workers, they did not, by themselves, expand the rights of workers. Rather, the legislation was intended to fulfill obligations under the ICCPR, ICESCR,<sup>428</sup> and the applicable ILO Conventions.<sup>429</sup>

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<sup>424</sup> See HONG KONG HUMAN RIGHTS COMMISSION REPORT TO ICESCR 20-23 (April 1998) [hereinafter HRC Report]. It was seen that prior to the handover that training and labor-market situations were insufficiently flexible and not really plugged in to the needs of employers and would be workers.

<sup>425</sup> See Trade Unions (Amendment No. 2) Ordinance 1997 (Appendix 44) (providing for regulation and control of trade union activities).

<sup>426</sup> See Employment (Amendment No. 4) Ordinance 1997 (Appendix 43) (providing for protection against discrimination on ground of employee's participation in trade union activities).

<sup>427</sup> See Trade Unions (Amendment No. 2) Ordinance 1997 (Appendix 44) (providing for Collective Bargaining that: "Unions which organize more than 15% of the workforce of enterprises with more than 50 employees, when authorized by over half of the workforce, have the right to represent the workforce in negotiations with management").

<sup>428</sup> See ICESCR, *supra* note 22, at art. 5(2) (stating that no restriction upon or derogation from any fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations, or customs shall be admitted on pretext that ICESCR does not recognize such rights or that it recognizes them to lesser extent.); *see also*, ILO Convention Number 87, *supra* note 412, at art. 1 (noting that each member of ILO for which this Convention is in force undertakes to give effect all its provisions); ILO Convention #98, *supra* note 414, at art 4 (stating that measures appropriate to national conditions shall be taken, where necessary, to encourage and promote full development and utilization of machinery for voluntary negotiation between employers and employees' organizations, with view to regulation of terms and conditions of employment by means of collective agreement); ILO Convention #154, *supra* note 415, at art. 5 (stating that measures adapted to national conditions shall be taken to promote collective bargaining).

<sup>429</sup> See ICESCR, *supra* note 22, at art. 8 (protecting trade unions and employees' right to strike).

Two weeks after the reversion, the new Provisional LegCo suspended all three ordinances,<sup>430</sup> citing an alleged need "to review" the provisions.<sup>431</sup> Three months later, the Provisional LegCo passed the Employment and Labour Relations (Miscellaneous Amendments) Bill of 1997 ("ELRB") repealing the principal provisions of the June 1997 ordinances.<sup>432</sup> The ELRB re-imposed portions of the old Trade Union Ordinance that restricted the use of union funds for political purposes and prohibited persons outside a union's enterprise or sector to sit on its executive committee,<sup>433</sup> eliminated the right of reinstatement provided in the Employment Ordinance, and repealed the Collective Bargaining Ordinance in its entirety.<sup>434</sup>

The Hong Kong Confederation of Trade Unions ("HKCTU")<sup>435</sup> immediately challenged the ELRB before the ILO's Committee on Freedom of Association.<sup>436</sup> The HKCTU argued generally that the ELRB constituted a violation of Hong Kong's commitments under Conventions Nos. 87, 98, and 154 because the June 1997 Ordinances repealed by the ELRB were implementing legislation required to give the Conventions full effect.<sup>437</sup> The HKCTU further alleged specific violations of these Conventions.<sup>438</sup>

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<sup>430</sup> Legislative Provisions (Suspension of Operation) Ordinance 1997, Ordinance No. 126 of 1997, THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION GAZETTE, July 18, 1997, Legal Supplement No 1, A329.

<sup>431</sup> HRC Report, *supra* note 424.

<sup>432</sup> Employment and Labor Relations (Miscellaneous Amendments) Bill October 29, 1997.

<sup>433</sup> Andrew Byrnes, Johannes Chan, and PY Lo, BASIC LAW AND HUMAN RIGHTS BULLETIN, Mar. 1999, at 74. The Employment and Labour Relations Bill of 1997 ("ELRB") also required that officers of first level unions be engaged in trade, industry, or occupation of their employing union and that trade union funds not be used for political purposes.

<sup>434</sup> *See id.* "To repeal the Employment Ordinance, thus limiting civil remedies for anti-union discrimination to cases involving dismissal and permitting reinstatement only if both employer and employee agreed . . . To repeal the Collective Bargaining Ordinance thus removing the procedure for collective bargaining that had been laid down in that Ordinance." *Id.*

<sup>435</sup> The Hong Kong Confederation of Trade Unions ("HKCTU") is an independent trade union established in 1990. It currently represents approximately 140,000 members in 42 affiliates. *See* Hong Kong Conference Trade Union (visited on Nov. 24, 1999) <<http://www.hk-labour.org.hk>> (on file with the *Fordham International Law Journal*). The HKCTU's primary functions including assisting workers to organize unions and negotiate with employers for better employment terms, providing trade union education, providing legal counsel for workers in labor disputes, seeking better worker legislation, and establishing solidarity exchanges and cooperation with the international democratic trade union movement. *Id.*

<sup>436</sup> ILOLEX Case No. 1942, *Report in Which the Committee Requests To Be Kept Informed of Developments Complaint Against the Government of China: Hong Kong Special Administrative Region Presented by the Hong Kong Confederation Of Trade Unions*, 1997, Complainants' Allegations, ¶¶ 238-49 [hereinafter ILOLEX Case No. 1942].

<sup>437</sup> *See id.*; *see also*, ICESCR, *supra* note 22, at art. 8 (protecting trade unions and employees' right to strike). The HKCTU further argued that because the June 1997 Ordinances implemented the Conventions and pre-dated the reversion, their provisions were "in force in Hong Kong" within the meaning of Article 39 and their repeal other than by amendment violates the Basic Law.

<sup>438</sup> The complaint alleged, for example, that by re-imposing limits on union political spending and on election of cross-sector individuals to individual union executive committees, the ELRB constitutes an improper intrusion into

With respect to collective bargaining, HKCTU's complaint alleged that the ELRB violated Convention 154 and Articles 2 and 4 of Convention No. 98 by repealing the Collective Bargaining Ordinance in its entirety. The complaint maintained that the Collective Bargaining Ordinance was important because it established objective criteria for the recognition of worker representatives and unions. Without those criteria, employers may effectively and without penalty deny recognition of workers' groups and refuse negotiations with them. This constitutes interference in violation of Convention No. 98 Article 2,<sup>439</sup> and Article 4,<sup>440</sup> and frustrates the purpose of Convention No. 154.

In its response to the complaint, the HKSAR argued that the June 1997 ordinances were never "in force" within the meaning of Basic Law Article 39 because they had been rushed through in the final sitting of the expiring LegCo.<sup>441</sup> The HKSAR also argued that the ELRB was permissible because the provisions repealed were not necessary implementations of ILO Convention obligations,<sup>442</sup> and that the existence of the LAB and the Labour Department's Workplace Consultation Promotion Unit (established in April 1998) fully satisfied Hong Kong's obligations to "encourage and promote `voluntary' negotiations."<sup>443</sup>

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union activity and a retraction of protections in violation of Convention # 87, Article 3. The complaint also alleged that the HKSAR violated Convention # 98, Article 1 by repealing the portion of the Employment Ordinance that provided the right of reinstatement to workers showing wrongful discharge for union activity. Article 1 states that "workers shall enjoy adequate protection against acts of anti-union discrimination in respect to employment." The complaint argued that the surviving remedies -- limited monetary compensation and reinstatement on mutual consent -- are insufficient because they still allow an employer intent on obstructing union activity to remove organizers from the workplace. See ILOLEX Case No. 1942, *supra* note 436, Complainants' Allegations, ¶¶ 238-49.

<sup>439</sup> See ICESCR, *supra* note 22, at art. 2 (stating "workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.")

<sup>440</sup> *Id.* at art. 4 (requiring government to take measures "to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organization and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.").

<sup>441</sup> Of course, the 1995 LegCo would not have been expiring had Beijing not rejected a "through-train" procedure for legislators as was provided for the judiciary. ILOLEX Case No. 1942, *supra* note 436, The Government's Reply, ¶¶ 250-60.

<sup>442</sup> Regarding the specific allegations of the Complaint, the HKSAR argued that the restrictions on use of union funds, affiliations, and election of officers in the ELRB do not violate Convention No. 87, Article 3 because they merely reinstate permissible reservations in effect since 1963. Regarding reinstatement and collective bargaining, the HKSAR argued that Conventions Nos. 98 and 154 require neither mandatory reinstatement nor mandatory collective bargaining. The HKSAR argued that reinstatement on consent and "voluntary" negotiation at the level of the individual enterprise (as opposed to the sector or industry level) were permissible, and indeed preferred. Moreover, the HKSAR argued that the ELRB did not violate the Conventions because the LAB on behalf of workers and employers had ratified the repealing legislation. *Id.*

<sup>443</sup> See ILOLEX Case No. 1942, *supra* note 436, The Government's Reply, ¶ 252. The government argued that:

. . . the LAB has proved to be the cornerstone of Hong Kong's harmonious labour relations . . . ha[ving] an impressive and proven track record and . . . contributed greatly to improving labour rights and benefits in Hong Kong over the past five decades. The proposals to repeal two and amend one of the three labour-related Ordinances in question were drawn up on the basis of the

On November 18, 1998, the Committee on Freedom of Association of the ILO ("ILO Committee") reported its conclusion and recommendations in the matter.<sup>444</sup> The ILO Committee recommended repealing parts of the ELRB and reinstating specific parts of the June 1997 Ordinances. Specifically, the ILO Committee recommended that the HKSAR take steps to repeal sections 5, 8, and 9 of the ELRB to remove restrictions on election of union officers and the use of union funds.<sup>445</sup> The ILO Committee further recommended that the HKSAR review the ELRB with a view to ensuring that provision is made in legislation for protection against all acts of anti-union discrimination and the possibility of the right to reinstatement.<sup>446</sup> Finally, the ILO Committee requested the HKSAR to give serious consideration to the adoption in the near future of legislative provisions laying down objective procedures for determining the representative status of trade unions for collective bargaining purposes that respect freedom of association principles.<sup>447</sup>

The HKSAR has disputed any need to implement the legislative changes called for in the ILO Committee's conclusion and recommendations.<sup>448</sup> Nevertheless, the ILO Committee's decision is significant in two respects. First, it is an authoritative determination that the repeal of the June 1997 ordinances was contrary to Hong Kong's international legal commitments and Article 39 of the Basic Law.<sup>449</sup> Second, and perhaps more significantly, the decision obligates the HKSAR to submit regular follow-up reports on their efforts to implement the ILO Committee's recommendations.<sup>450</sup> This situation will bring the HKSAR's progress to the further attention of the Committee of Experts on the Application of Conventions and Recommendations, and afford interested parties an opportunity to comment.<sup>451</sup>

Locally, Lee Cheuk Yan, Legislative Councilor and General Secretary of the HKCTU, has tried to force the administration to act on the ILO's recommendations by attempting to introduce legislation that would restore certain provisions eliminated by the ELRB. His proposed Employment Bill<sup>452</sup> seeks to

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recommendations of the LAB. As such, it represented a reasonable balance between the interests of employers and employees.

*Id.*

<sup>444</sup> ILOLEX Case No. 1942, *supra* note 436.

<sup>445</sup> *See id.*, Committee Recommendations, (a) & (b), ¶ 271.

<sup>446</sup> *See id.*, Committee Recommendations, (c), ¶ 271.

<sup>447</sup> *See id.*, Committee Recommendations, (d).

<sup>448</sup> HK Labor Express, HK Violations of International Labor Conventions 87 & 98 (visited Nov. 24, 1999) <<http://www.hk-labour.org.hk/english/eexpress13-1.htm>> (on file with the *Fordham International Law Journal*); *see* ILOLEX Case No. 1942, *supra* note 436, Committee Recommendations, (a) and (b) (stating view of government that mandatory collective bargaining would harm industrial harmony and deter foreign investment).

<sup>449</sup> *See* Basic Law, *supra* note 20, ch. IV, art. 39.

<sup>450</sup> *See* ILOLEX Case No. 1942, *supra* note 436; *see also* Joint Declaration, *supra* note 29, art. 3(5).

<sup>451</sup> *See* ILOLEX Case No. 1942, *supra* note 436.

<sup>452</sup> Employment (Amendment No.2) Bill 1998.

strengthen the right to file a claim at the Labour Tribunal for acts of anti-union discrimination as well as strengthening available remedies to include "employment, promotion, reinstatement without prior mutual consent, compensation not subject to a ceiling and possible punitive damages."<sup>453</sup> His proposed Labour Relations Bill reiterates the rights accorded in the repealed Collective Bargaining Ordinance, including provisions requiring that employees be paid for time taken to pursue legitimate union activities and providing remedies for an employer's breach of the employee's right to consultation and collective bargaining.<sup>454</sup> Both bills have been stalled and the chance of their passing in the near future is small. The delegation supports the conclusions and recommendations of the ILO Committee and urges the HKSAR to implement the ILO Committee's recommendations calling for the repeal of certain provisions of the ELRB and the reinstatement of the principal provisions of the June 1997 ordinances.

### *B. Equality and Anti-Discrimination*

Anti-discrimination protection is another area in which Hong Kong's international obligations have been less than fully honored. Hong Kong enacted its first anti-discrimination ordinances in 1995, addressing discrimination in the areas of gender and disability.<sup>455</sup> Although these ordinances survived the provisional LegCo's attack on labor rights, the HKSAR administration's limited implementation of the spirit of the 1995 ordinances and its resistance to the enactment of legislation prohibiting racial discrimination cast doubt on its commitment to eliminating discrimination.

#### *1. Applicable Law*

Article 2 of the Universal Declaration of Human Rights provides that everyone is entitled to all of the rights and freedoms set forth therein "without discrimination of any kind, such as race, colour, sex, . . . [or] national or social origin."<sup>456</sup> Article 2(1) of the ICCPR and Article 2(2) of the ICESCR employ essentially the same language.<sup>457</sup> Article 3 in both the ICCPR and the ICESCR requires states to "undertake to ensure the equal right of men and women" to the enjoyment of the rights set forth therein.<sup>458</sup> ICCPR Article 26 further requires parties to incorporate these principles of equality and anti-discrimination into their domestic legal framework. Article 26 states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee

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<sup>453</sup> Labour Relations (Rights to Representation, Consultation, and Collective Bargaining) Bill (2d Draft) (Nov. 22, 1998).

<sup>454</sup> *Id.*

<sup>455</sup> Sex Discrimination Ordinance, 1995, ch. 48 [hereinafter SDO]; Disability Discrimination Ordinance, 1995, ch. 487 [hereinafter DDO]. The next year, the Hong Kong government passed the Family Status Discrimination Ordinance. See Family Status Discrimination Ordinance, 1997 [hereinafter FSDO].

<sup>456</sup> Universal Declaration, *supra* note 18.

<sup>457</sup> See ICCPR, *supra* note 20, at art. 2(1); see ICESCR, *supra* note 22, at art. 2(2).

<sup>458</sup> ICCPR, *supra* note 20, at art. 3; ICESCR, *supra* note 22, at art. 3.



to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, . . . [o]r national or social origin.<sup>459</sup>

Both covenants require parties to promote respect for the rights enumerated therein,<sup>460</sup> to provide adequate remedies for violations of those rights,<sup>461</sup> and to report to the appropriate international committee their progress in implementing the Conventions.<sup>462</sup> Article 2(2) of the ICCPR requires states "to adopt such legislative or other measures as may be necessary to give effect" to the rights recognized therein.<sup>463</sup> Article 2(3)(b) further requires parties "to develop the possibilities of judicial remedy."<sup>464</sup>

Hong Kong is also bound by two international human rights treaties specifically created to promote equality of gender and race: the Convention on the Elimination of All Forms of Discrimination Against Women<sup>465</sup> ("CEDAW") and the Convention on the Elimination of Racial Discrimination<sup>466</sup> ("CERD").

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<sup>459</sup> ICCPR, *supra* note 20, art. 26.

<sup>460</sup> *Id.* at art. 2; ICESCR, *supra* note 22, at art. 2.

<sup>461</sup> *See* ICCPR, *supra* note 20, art. 2(3)(a) (finding States Parties undertake to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy").

<sup>462</sup> ICESCR, *supra* note 22, at art. 16; ICCPR, *supra* note 20, at art. 40.

<sup>463</sup> ICCPR, *supra* note 20, at art. 2(2).

<sup>464</sup> Article 2(3)(b) makes it clear that each State Party to the present Covenant undertakes to "ensure that any person claiming such a remedy shall have his right thereto determined by competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy." *Id.* at art. 2(3)(b).

<sup>465</sup> Convention for the Elimination of all Forms of Discrimination Against Women ("CEDAW"), Mar. 1, 1980, 1249 U.N.T.S. 13, pmbl. [hereinafter CEDAW] (available at United Nations High Commissioner for Human Rights, International Human Rights Instruments <[http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_boo/iv\\_boo/iv\\_8.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_8.html)>). The United Kingdom, having ratified CEDAW on April 7, 1986, extended it to Hong Kong on October 14, 1996. *See* Centre for Comparative and Public Law ("CCPL") of the University of Hong Kong, CEDAW in Hong Kong (last modified Mar. 16, 1999) <<http://www.hku.hk/ccpl/cedaw.htm>> (on file with the *Fordham International Law Journal*). The United Kingdom has entered reservations to Articles 1, 2, 9, 11, 13, 15, and 16 of CEDAW. *See United Nations Division for the Advancement of Women* (visited July 30, 1999) <[gopher://gopher.un.org/00/ga/cedaw/CEDAWSP2.EN](http://gopher://gopher.un.org/00/ga/cedaw/CEDAWSP2.EN)> (on file with the *Fordham International Law Journal*). China ratified CEDAW on November 4, 1980 and extended application to Hong Kong after the handover. On June 10, 1997, the Chinese Government notified the U.N. Secretary-General that CEDAW "will apply to the Hong Kong Special Administrative Region with effect from July 1 1997 with certain reservations." *See* CCPL, *supra* note 20. China has entered one reservation to Article 29(1) of CEDAW. *United Nations Division for the Advancement of Women, supra.*

<sup>466</sup> *See* International Convention on the Elimination of All Forms of Racial Discrimination, open for signature Mar. 7, 1966, 660 U.N.T.S. 13, 5 I.L.M. 352 (entered into force Jan. 4, 1969) [hereinafter CERD]. The United Kingdom, having ratified CERD on October 11, 1966, had extended it to Hong Kong, with certain reservations, on March 7, 1969 and entered into force there on April 6, 1969. China ratified CERD on January 28, 1982, and extended its application to Hong Kong after the handover. China adopted the reservations of the United Kingdom (reservations 4, 15, 20) and added a reservation (reservation 22) of its own. *Id.* On June 10 1997, the Chinese Government notified the United Nations Secretary-General that CERD "will apply to the Hong Kong Special Administrative Region with effect from July 1 1997 with certain reservations."

Signatories to CEDAW agree, "to adopt the measures required for the elimination of [gender] discrimination in all its forms and manifestations."<sup>467</sup> The instrument enumerates the measures governments should take to eliminate discrimination "in the political, social, economic and cultural fields."<sup>468</sup> As with the ICCPR and the ICESCR, CEDAW requires parties to promote respect for the rights enumerated therein,<sup>469</sup> to provide adequate remedies for violations of those rights, and to report their progress in implementing the Convention.<sup>470</sup> China submitted its first report on the HKSAR to the CEDAW Committee on November 25, 1998.<sup>471</sup> Hearings discussing the report were held in New York in January 1999.<sup>472</sup>

Similarly, parties to CERD agree to "prohibit and bring to an end, by all appropriate means including legislation as required by circumstances, racial discrimination by any persons, group or organization."<sup>473</sup> Like CEDAW, CERD requires parties to promote respect for the rights enumerated therein,<sup>474</sup> to provide adequate remedies for violations of those rights,<sup>475</sup> and to report their progress in implementing CERD.<sup>476</sup> China filed its most recent report under CERD on January 15, 1996. Hearings discussing the report were held at the Forty-ninth Session on August 9, 1996.

Although Article 39 of the Basic Law incorporates the ICCPR and ICESCR and indicates that they "shall be implemented through the laws of the Hong Kong Special Administrative Region,"<sup>477</sup> the Basic Law does not include an express endorsement of anti-discrimination principles.<sup>478</sup> Basic Law Article 25 provides that "[a]ll Hong Kong residents shall be equal before the law,"<sup>479</sup> but creates no remedy for residents who suffer official discrimination and fails altogether to address private acts of discrimination. BORO does

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<sup>467</sup> CEDAW, *supra* note 465, at pmbl.

<sup>468</sup> *Id.* at art. 3.

<sup>469</sup> *Id.* at art. 2.

<sup>470</sup> *Id.* at art. 18.

<sup>471</sup> The United Nations High Commissioner for Human Rights Treaty Bodies Database (visited July 30, 1999) <<http://www.unhchr.ch/tbs/doc.nsf>> (on file with the *Fordham International Law Journal*).

<sup>472</sup> *See generally*, Moana Erickson and Andrew Byrnes, *Hong Kong and the Convention on the Elimination of All Forms of Discrimination against Women*, 29 HONG KONG LAW JOURNAL 350-68 (1999).

<sup>473</sup> *See CERD, supra* note 466, at art. 2.

<sup>474</sup> *Id.*

<sup>475</sup> *Id.* at art. 6.

<sup>476</sup> *Id.* at art. 9.

<sup>477</sup> *See Basic Law, supra* note 22, at art. 39.

<sup>478</sup> *See id.* at ch. III, arts. 24-42. This sets forth the "Fundamental Rights and Duties of the Residents" of the HKSAR and contains 18 articles, none of which endorse anti-discrimination principles directly beyond article 25's general provision for equality before the law.

<sup>479</sup> *Id.* at art. 25.

include several provisions addressing equality and discrimination. Addressing gender, Article 1(2) states, "[m]en and women shall have an equal right to the enjoyment of all civil and political rights set forth in this Bill of Rights."<sup>480</sup> Article 19 provides for equal rights in the dissolution of a marriage.<sup>481</sup> BORO is weaker on racial discrimination than it is on gender discrimination, however, with Article 22 providing limited protection against discrimination on any grounds such as race, color or other status. Further, the protections of BORO do not extend to private sector acts.<sup>482</sup>

The Sex Discrimination Ordinance ("SDO"), enacted on July 14, 1995, was Hong Kong's first legislation forbidding discrimination in the private sector.<sup>483</sup> The SDO defines conduct constituting unlawful discrimination based on gender, marital status, or pregnancy.<sup>484</sup> It includes specific prohibitions on discriminatory hiring and employment practices,<sup>485</sup> sexual harassment in the workplace,<sup>486</sup> discrimination in education,<sup>487</sup> and "discrimination in provision of goods, facilities or services."<sup>488</sup>

The SDO is enforced by an independent Equal Opportunities Commission<sup>489</sup> ("EOC") charged with investigating "complaints related to any act alleged to be unlawful by virtue of the . . . [anti-discrimination] ordinances,"<sup>490</sup> and to effect settlement conciliation.<sup>491</sup> Under the SDO, the EOC may also initiate its own

<sup>480</sup> See BORO, *supra* note 243, art. 1(2) (1991).

<sup>481</sup> *Id.*, art. 19(4), art. 22.

<sup>482</sup> *Id.* at §§ 7(1) & (2).

<sup>483</sup> See SDO, *supra* note 455, at ch. 480. The LegCo that was elected in 1995 passed the SDO. Along with the SDO, the 1995 LegCo passed the DDO. See DDO, *supra* note 455, at ch. 487. The LegCo passed the FSDO the next year. See FSDO, *supra* note 455. For a discussion of the effect of these ordinances, see Carole J. Petersen, *The Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT'L 335 (1996); Carole J. Petersen, *Hong Kong's First Anti-Discrimination Laws and Their Potential Impact on the Employment Market*, 27 HONG KONG L.J. 324 (1997).

<sup>484</sup> SDO, *supra* note 455, at ch. 480, §§ 5-8.

<sup>485</sup> *Id.* at art. 11.

<sup>486</sup> *Id.* § 24.

<sup>487</sup> *Id.* § 25.

<sup>488</sup> SDO, *supra* note 455, § 28. The majority of the complaints brought under the SDO to date allege violations in the employment context rather than with sexual harassment or other types of discrimination in education or the provision of goods and services. See Equal Opportunities Commission ("EOC"), *Statistics on Inquiries and Complaints* <<http://www.eoc.org.hk/statistic/estate2.html>> (on file with the *Fordham International Law Journal*) (indicating that from Jan. 1, 1999 to Mar. 31, 1999, 72 of 87 complaints under SDO dealt with employment).

<sup>489</sup> See SDO, *supra* note 455, § 63(7) (stating, "The Commission shall not be regarded as a servant or agent of the Government or as enjoying any status, immunity or privilege of the Government.").

<sup>490</sup> The EOC is comprised of a Chairperson and 16 members. See EQUAL OPPORTUNITIES COMMISSION, 1997-8 ANNUAL REPORT 67 (1998). Between April 1, 1997 and March 31, 1998, the EOC concluded investigations on 139 of the 227 cases it handled. *Id.* at 11. Seventy-one of those cases proceeded to conciliation with 55 of those cases being conciliated successfully. *Id.* During that time period, the EOC operated on a budget of HK\$35,782,400. *Id.* at 54. It processed 90 claims under the SDO, 136 under the DDO and one under the FSDO. *Id.* at 11.

formal investigations,<sup>492</sup> but remedies in EOC proceedings are limited to party conciliation and the issuance of enforcement notices.<sup>493</sup> Victims of sex discrimination may also file a civil complaint in the District Courts.<sup>494</sup> Complainants in the District Court may seek equitable and monetary relief, which the EOC is not authorized to order,<sup>495</sup> with monetary awards of up to HK\$150,000.<sup>496</sup> There is currently no local ordinance prohibiting acts of racial discrimination by private parties.

### *C. Areas of Concern: Gender*

Although the enactment of the SDO was a significant first step in promoting gender equality, a much more substantial commitment to enforcement is needed to ensure that the step is not merely symbolic. The most significant obstacle to effective enforcement of the SDO may be the HKSAR administration's unwillingness to acknowledge the scope of the problem. The administration cites low numbers of complaints to the EOC as evidence that discrimination is not a significant issue.<sup>497</sup> Officials also point to statistics showing that most complaints are resolved through "conciliation," suggesting that Hong Kong is not a litigious society and that formal, binding, and punitive remedies are unnecessary.<sup>498</sup> This view contrasts sharply with the opinions of many academics,<sup>499</sup> geographically-elected legislators,<sup>500</sup> activists,<sup>501</sup> and service

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<sup>491</sup> See Equal Opportunities Commission Website, *Position Paper on Legislative Means*, (visited Nov. 23, 1999) <<http://www.eoc.org.hk/>> (on file with the *Fordham International Law Journal*). The FSDO and DDO give the EOC responsibility for administering the ordinances. See FSDO, *supra* note 455, §§ 44-52.

<sup>492</sup> SDO, *supra* note 455, § 70.

<sup>493</sup> *Id.* §§ 77, 84.

<sup>494</sup> *Id.* § 76.

<sup>495</sup> *Id.* §§ 76(1)(c) & (3) ("Proceedings [for unlawful acts under the SDO] shall be brought in the District Court but all such remedies shall be obtainable in such proceedings as, apart from this subsection and § 75(1), would be obtainable in the High Court.").

<sup>496</sup> *Id.* Initial figures indicate that few complainants have filed claims in the District Court with the assistance of the EOC. *Id.* §§ 76(1)(c), 85. As of April 1999, the EOC assisted complainants in only two cases taken to completion. One case was brought under the DDO and one, a sexual harassment case in a university, under the SDO. See *EOC Welcomes Judgements in Discrimination Cases*, EOC NEWS (EOC), Apr. 1999, at 8.

<sup>497</sup> See Interview with David Lan, Secretary Home Affairs Bureau, in Hong Kong (June 9, 1999) (stating Hong Kong is society in which merit, not gender, determines way people are treated and that gender discrimination was not significant problem in HKSAR). Official government reports also deny the existence of any significant problem. In its 1998 report under CEDAW, for example, China reported that the SDO and EOC largely satisfied Hong Kong's obligations. See PEOPLE'S REPUBLIC OF CHINA, INITIAL REPORT ON THE HONG KONG SPECIAL ADMINISTRATIVE REGION UNDER ARTICLE 18 OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, (Nov. 25, 1998).

<sup>498</sup> Interview with David Lan, Secretary Home Affairs Bureau, in Hong Kong (June 9, 1999).

<sup>499</sup> See Interview with Dora Choi, Chinese University, in Hong Kong (June 8, 1999) (stating that EOC does not perform even its relatively limited function nearly as well as it should, because it does not advocate enough).

providers<sup>502</sup> who met with the delegation and shared research, case examples, and personal experiences suggesting that gender-based discrimination is a widespread problem.<sup>503</sup>

Determining the level of gender discrimination in Hong Kong is a complex task beyond the scope of this Report. Nevertheless, it must be emphasized that, whatever the overall level of gender discrimination, Hong Kong is obliged to provide adequate remedies for *any* violation of an individual's right to be free from discrimination on the basis of gender. Before this commitment is fully realized, a number of significant gaps must be filled. Some of these gaps may be addressed within the current framework through changes in EOC policy. Filling other gaps will likely require legislative action, including provisions addressing the problems confronted by minority women.<sup>504</sup>

One area in which EOC policy should be strengthened concerns the use of EOC-initiated investigations. The EOC has the authority under Section 70 of the SDO to initiate its own investigations into possible misconduct.<sup>505</sup> According to critics, the EOC has not been active enough in the use of this power.<sup>506</sup> EOC statistics support this view: records indicate that of 227 cases handled between April 1, 1997 and March 31, 1998, only one involved an EOC-initiated investigation.<sup>507</sup> At a minimum, this figure suggests a lack of enthusiasm on the part of the administration of the HKSAR to identify potential cases of gender-based discrimination.<sup>508</sup> Worse, by conveying this lack of enthusiasm, the administration adds to family and

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<sup>500</sup> See Interview with Cyd Ho, Member of Legislative Council and The Frontier, in Hong Kong (June 1, 1999) (stating that Hong Kong government cannot address issues not covered by SDO, including violence against women and care for elderly women who have not worked without institution of women's bureau).

<sup>501</sup> See Interview with Lam Ying Hing, Hong Kong Women Worker Association, in Hong Kong (June 3, 1999) (stating that government has not dealt with problems faced by unemployed women who formerly worked in Hong Kong factories that have closed).

<sup>502</sup> See Interview with Tsang Kar-yin, Association for the Advancement of Feminism, in Hong Kong (June 10, 1999) (criticizing EOC for failing to reach large numbers of women, most of whom do not have clear understanding of what discrimination is, who do not have access to educational programs provided by EOC).

<sup>503</sup> Factors in Hong Kong that contribute to sex discrimination include a lack of awareness of discrimination that stems from cultural norms ascribing women to the role of a nurturer. The economic crisis has resulted in high unemployment rates among women and pressures within households contributing to domestic violence. Interview with Maryanne King, Director Hong Kong Women Christian Council, in Hong Kong (June 2, 1999).

<sup>504</sup> This group in particular includes foreign domestic workers, who often suffer not only from the weaknesses of the SDO, but also the lack of protections from private acts of racial/national origin discrimination.

<sup>505</sup> Interview with Tsang Kar-yin, Association for the Advancement of Feminism, in Hong Kong (June 10, 1999).

<sup>506</sup> See, e.g., Interview with Dora Choi, Chinese University, in Hong Kong (June 8, 1999) (discussing reactive rather than active role EOC has taken wherein it does not initiate actions or investigations without being prompted by complaint).

<sup>507</sup> See Interview with Tsang Kar-yin, Association for the Advancement of Feminism, in Hong Kong (June 10, 1999). The investigation, now concluded, involved the higher test scores required by girls for admittance to high schools. *Id.*

<sup>508</sup> *Id.*

cultural pressures that discourage women from initiating complaints.<sup>509</sup> Conversely, the EOC's active use of its independent investigative powers would send a message to victims and violators that gender discrimination will not be tolerated, that victims will find support and assistance in the HKSAR administration, and that violators will suffer the legal consequences of their actions. Such a message would have ameliorative as well as deterrent effects.

Another area open to improvement concerns education and publicity of existing complaint procedures and remedies.<sup>510</sup> In its *1997-98 Annual Report*, the EOC acknowledged that it did not reach out to the community in its first year of operation. Its mission statement for its second year therefore promised aggressive public awareness programs.<sup>511</sup> Critics argue that the EOC failed to meet this objective, noting that current EOC education programs are directed toward employers only, and not employees or the general public.<sup>512</sup>

Although the delegation agrees that education of employers or other potential violators is vitally important, educating workers about the scope of their rights and the procedures for enforcement is also necessary. Without such efforts, the government's policy seems tailored to keep the number of complaints low. This scheme is particularly problematic where the government relies on low complaint totals to argue against the existence of a problem and then fails to use its independent powers of investigation.<sup>513</sup>

The EOC's conciliation process, used in more than fifty percent of investigated cases, should also be improved in order to protect workers' rights more effectively. The process is initiated with a formal complaint, which the EOC then investigates.<sup>514</sup> After the investigation, the EOC's only recourse is to mediate a conciliation hearing between the parties.<sup>515</sup> Although mediation can be effective under many circumstances, it is not an effective tool to resolve certain types of disputes arising from alleged violations of the SDO and may put undue pressures on complainants.<sup>516</sup> Some activists suggest, for example, that a woman who files a complaint against an employer for sexual harassment may not feel comfortable

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<sup>509</sup> *Id.*

<sup>510</sup> *See id.* (stating that EOC has held most training sessions in high end hotels and similar venues far from where most middle-class or poor women reside or work).

<sup>511</sup> EQUAL OPPORTUNITY COMMISSION, *supra* note 490, at 4.

<sup>512</sup> Interview with Tsang Kar-yin, Association for the Advancement of Feminism, in Hong Kong (June 10, 1999); Interview with Dora Choi, Chinese University, in Hong Kong (June 8, 1999).

<sup>513</sup> Interview with Tsang Kar-yin, Association for the Advancement of Feminism, in Hong Kong (June 10, 1999); Interview with Dora Choi, Chinese University, in Hong Kong (June 8, 1999).

<sup>514</sup> EQUAL OPPORTUNITY COMMISSION, *supra* note 490, at 11.

<sup>515</sup> *Id.*

<sup>516</sup> Interview with Tsang Kar-yin, Association for the Advancement of Feminism, in Hong Kong (June 10, 1999).

confronting the employer face-to-face in the hearing.<sup>517</sup> Others point to potential conflicts posed by the EOC serving in the dual role of investigator and mediator.<sup>518</sup>

While recognizing the benefits of communication and non-confrontational dispute-resolution, the delegation urges the EOC to adapt the conciliation procedures ensuring that victims do not suffer any undue pressures and are fully apprised of their rights and available remedies, including judicial remedies.

#### *D. Areas of Concern: Race*

As with gender, the most significant obstacle to eliminating racial discrimination is official and public indifference to the problem.<sup>519</sup> Most members of the administration, government officers,<sup>520</sup> legislators representing functional constituencies, and businesspersons<sup>521</sup> do not regard racial discrimination as a significant problem. Those interviewed by the delegation repeatedly cited the results of a 1996 government survey in which 83% of those polled did not consider racial discrimination a significant problem and favored public education measures over legislation to address the issue.<sup>522</sup>

In contrast, many academics, popularly elected legislators,<sup>523</sup> legal practitioners,<sup>524</sup> activists, service providers<sup>525</sup> and individuals shared research, case examples, and personal experiences suggesting that race-

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<sup>517</sup> *Id.*

<sup>518</sup> *Id.* Complainants are generally not permitted to bring counsel with them to conciliations. If both parties agree to have counsel present, however, then they may bring attorneys with them. Nonetheless, complainants rarely bring counsel to conciliations. Interview with Fanny Cheung, Equal Opportunities Commission, in Hong Kong (June 9, 1999).

<sup>519</sup> Hong Kong is a multi-racial community. Although 96% of the population is of Chinese ancestry, over 16 ethnicities are represented in the territory. See HOME AFFAIRS BRANCH, GOVERNMENT SECRETARIAT, EQUAL OPPORTUNITIES: A STUDY OF DISCRIMINATION ON THE GROUND OF RACE, at 4 (Feb. 1997). The largest among them include Filipino, Indian, Pakistani, Bangladesh, Sri Lankans, and Nepalese. *Id.* In total, there are roughly 400,000 racial or ethnic minority residents of Hong Kong, of whom a majority are permanent residents of the HKSAR under the Basic Law or otherwise entitled to long-term residency. *Id.*

<sup>520</sup> Interview with Mr. David Lan, Secretary Home Affairs Bureau, in Hong Kong (June 9, 1999).

<sup>521</sup> Interview with Dr. Eden Woon, Director of Hong Kong General Chamber of Commerce, in Hong Kong (June 4, 1999).

<sup>522</sup> HOME AFFAIRS BUREAU, THE 1996 SURVEY ON RACIAL DISCRIMINATION (1996). In an interview, Mr. David Lan, Secretary for the Home Affairs Bureau, supported this view by stating "there is no obvious problem of any significance that warrants specific legislation if people are forced to act towards others in a special way when in the past their behavior didn't need correction, such unnecessary legislation will only create resentment." Interview with David Lan, Secretary Home Affairs Bureau, in Hong Kong (June 9, 1999).

<sup>523</sup> Interview with Christine Loh, Frontier Party member, LegCo, in Hong Kong (June 10, 1999).

<sup>524</sup> Interview with Vandana Rajwani, Director of Indian Resources Group, in Hong Kong (June 7, 1999).

<sup>525</sup> Interview with Belinda Winterbourne, Hong Kong Human Rights Monitor (June 7, 1999).

based discrimination is a problem. Among the most vocal of this group, the Human Rights Monitor denounced the government's readiness to use the opinions of the racial majority as an excuse for ignoring discrimination suffered by racial minorities.<sup>526</sup> In response to the government survey, the Human Rights Monitor conducted its own informal survey polling only members of ethnic minorities.<sup>527</sup> Their results contrast sharply with the government's survey. Whereas the HKSAR's general population survey found that only a minority found racial discrimination to be a problem, sixty-seven percent of the minority respondents to the Human Rights Monitor's survey reported that they had either experienced or witnessed racial discrimination. Eighty percent agreed that legislation would be helpful, and seventy-six percent would support such legislation.<sup>528</sup>

The results of the Human Rights Monitor's survey are reinforced by a number of well-publicized incidents of racial discrimination. For example, an eighteen-year-old university graduate answered a newspaper advertisement for a Native-English speaker to teach spoken English to kindergartners.<sup>529</sup> The advertisement called for no other qualifications. The young woman inquired by telephone about the position and after a brief exchange the prospective employer asked her race. When she replied she was Indian, she was told that the school would only hire Caucasian English-speakers, from England or the United States.<sup>530</sup> Because there is currently no law prohibiting private employers from basing hiring decisions on race, the young woman had no remedy.<sup>531</sup>

In the area of public accommodations, tavern owners in the Wan Chai district of Hong Kong island were found to be charging higher admission charges to dark-skinned or Asian clientele than to fair-skinned Caucasians.<sup>532</sup> In response to a public outcry, Secretary for Home Affairs David Lan Hong-tsung said he was surprised by the incident, but there was no need to introduce legislation against racial discrimination.<sup>533</sup> In a

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<sup>526</sup> See HONG KONG HUMAN RIGHTS MONITOR, *THE NEED FOR LEGISLATION ON RACIAL DISCRIMINATION, A SUBMISSION TO THE LEGCO PANEL ON HOME AFFAIRS*, (Sept. 1998). In its 1996 Concluding Observations on Hong Kong, the United Nations Committee on Economic Social and Cultural Rights also criticized the HKSAR's use of the racial majority opinion, criticizing the government's "step-by-step" approach according to which legislation for the protection of vulnerable minorities is adopted primarily on the basis of public opinion surveys, that is based on majority views. U.N. COMMITTEE ON ECONOMIC, SOCIAL AND POLITICAL RIGHTS, *1996 REPORT ON HONG KONG* (1996).

<sup>527</sup> See HONG KONG HUMAN RIGHTS MONITOR, *supra* note 526, at 3.

<sup>528</sup> *Id.* Among those who considered themselves to have personally experienced or witnessed racial discrimination, the discrimination occurred mostly in employment (45%), admission to facilities (33%), sales or delivery of goods or services (20%), government services (16%), home purchase or rental (15%), medical care (12%), access to education (6%), business investment (5%), and other settings like social occasions (12%). *Id.*

<sup>529</sup> Lucia Palpal-latoc, *Laws Against Racial Discrimination Not Necessary, School Job Applicant Fails on Skin Color*, HONG KONG STANDARD, Apr. 25, 1998.

<sup>530</sup> *Id.*

<sup>531</sup> Lucia Palpal-latoc, *Schools' Policy on Teachers Discriminates Against Asians*, Apr. 25, 1998, HONG KONG STANDARD, at 1.

<sup>532</sup> Lucia Palpal-latoc, *Disco Accused of Unfair Entry Policy*, Apr. 25, 1998, HONG KONG STANDARD, at 1.

<sup>533</sup> *Id.*



similar incident, certain hotels were exposed for charging Asian tourists higher rates than Americans or Europeans.<sup>534</sup> As in the employment situation, the victims of the discrimination had no legal recourse.

The HKSAR administration itself has been accused of discriminatory customs and immigration policies targeting Nepalese and Thai travelers. In October 1998, the HKSAR administration removed Nepal from the list of countries whose citizens could enter Hong Kong without a visa.<sup>535</sup> The HKSAR administration claimed it was trying to curb an increase in the use of forged travel documents and abuse of visa-free visitation rights.<sup>536</sup> Nepalese sources, however, charged that HKSAR officials were trying to curb the growth of the Nepalese population in Hong Kong by deterring new arrivals.<sup>537</sup> They further charged HKSAR officials with using improper immigration searches on Nepalese visitors, again in an effort to deter new arrivals.<sup>538</sup>

The most visible evidence both of the multi-ethnic character of Hong Kong society and the often-marginal status of minority groups is the large population of foreign domestic workers in Hong Kong. These workers are usually vulnerable to exploitation because of language and communication barriers, lack of familiarity with local circumstances, and ignorance of available assistance or remedies.<sup>539</sup> In addition to the lack of protections from private acts of racial/national origin discrimination, they suffer from the added vulnerability created by the HKSAR's immigration policy known as the "two week rule." Because of this

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<sup>534</sup> HONG KONG HUMAN RIGHTS MONITOR, RACE DISCRIMINATION IN HONG KONG (Feb. 1998).

<sup>535</sup> Visa-free access for visitors from Bangladesh, India, and Pakistan was also curtailed, cutting the visa-free entry period from three months to two weeks. See Glenn Schloss, *Consuls-general Express Their Fears, Allegations of Racism in Visa Ruling Rejected*, S. CHINA MORNING POST, Jan. 27, 1999, at 2. Nepalese had long served the British in Hong Kong as Gurkha soldiers. As agreed with China and Britain, Gurkha families born before December 1982 were given permanent residents with the British Nationalities in Overseas. The policy provided Nepalese permanent residents to interact freely with their families, relatives, and close friends from Nepal. See Far East Overseas Nepalese Association, Press Statement, Apr. 4, 1999 (on file with the *Fordham International Law Journal*).

<sup>536</sup> Interview with Mr. David Tong, Assistant Director of Immigration Department, in Hong Kong (June 4, 1999). See also Glenn Schloss, *supra* note 535 (quoting Immigration Department Director Ambrose Lee Siu-kwong stating "the decision was made primarily on immigration grounds; it has nothing to do with race or nationality").

<sup>537</sup> The Nepalese in Hong Kong are believed to have grown from just a few hundred in the early 1990s to 17,400 at the end of 1998, making them the tenth largest foreign [ethnic] group. See Glenn Schloss, *Mushrooming Nepalese Community 'Prompted Removal of Visa-Free Access'*, S. CHINA MORNING POST, Mar. 21, 1999, at 4.

<sup>538</sup> Government figures show that of the 8785 visitors searched over the period of February 1998 to January 1999, 1565 (11.3%) were Nepalese, whereas Nepalese accounted for only 0.5% of all visitors. See Christine Loh, *Eliminate Discrimination at Customs Airport Command*, Press Release, Mar. 23, 1999 (on file with the *Fordham International Law Journal*). Secretary for Security Regina Ip Lau Suk-yea defended the searches as efforts to detain drug couriers and that some prior couriers were Nepali. See Glenn Schloss, *Customs Officers Accused of Racism in Body Searches*, S. CHINA MORNING POST, Mar. 11, 1999, at 2. Government figures, however, cast doubt on this explanation. In 1996, 11 Nepalese were found with drugs in their possession, and only four in 1997. In 1998, none of the three persons found possession drugs were Nepalese. See Loh, *supra*.

<sup>539</sup> See Loh, *supra* note 538.

vulnerability, they often endure low wages, poor living, and working conditions,<sup>540</sup> and even physical and sexual abuse.

The HKSAR's policy for foreign domestic workers applies to those who are not residents of China, Macau, or Taiwan and are employed in Hong Kong under a standard two-year employment contract to perform duties such as domestic cooking, household chores, baby-sitting, and child minding.<sup>541</sup> The "two week rule" applies to those whose contracts are terminated prematurely.<sup>542</sup> The rule requires them to leave Hong Kong within two weeks.<sup>543</sup>

Introduced in early 1987, the rule was intended to curb various abuses such as "job-hopping," whereby workers deliberately terminated their contracts in order to change employers and stay on indefinitely in Hong Kong. In practice, however, the rule provides unscrupulous employers with a unilateral threat of deportation over any worker who objects to low wages, poor conditions, or abuse. Even workers willing to institute proceedings in the Labour Tribunal are vulnerable to this threat because, although they may secure extensions of the two-week period during labor proceedings, the rule does not permit them to work legally in Hong Kong during the two weeks or any extension thereof.<sup>544</sup> This rule creates the untenable situation where a worker suffering poor conditions or abuse is forced to endure the conditions or risk homelessness (because most domestic helpers live in the home of the employer), financial collapse, and either deportation or weeks or months of uncertainty as proceedings to validate the complaint take place.

The "two week rule" has been the subject of international attention and criticism in the past. The United Nations Committee on Economic, Social and Cultural Rights recognized it as a matter of concern in its Concluding Observations in December 1994. This U.N. Committee recommended that the HKSAR

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<sup>540</sup> Although the standard employment contract of foreign domestic helpers specifies certain conditions of work and living to be provided by the employer, such as level of salary, provision of suitable and furnished accommodation, food free of charge, and free medical treatment, these terms are frequently breached by employers. This situation is especially problematic where workers lack English proficiency, insofar as translations of the standard domestic worker employment contracts and accompanying explanatory notes are difficult to obtain. See HONG KONG HUMAN RIGHTS MONITOR, BRIEFING PAPER FOR THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION ON THE THIRTEENTH PERIODIC REPORT BY THE UNITED KINGDOM IN RESPECT OF HONG KONG UNDER THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (visited Apr. 10, 1999) <[http://www.lawhk.hku.hk/demo/unhrdocs/cerd\\_EXS.htm](http://www.lawhk.hku.hk/demo/unhrdocs/cerd_EXS.htm)> (on file with the *Fordham International Law Journal*).

<sup>541</sup> See HONG KONG HUMAN RIGHTS MONITOR, SUBMISSION TO THE UNITED NATIONS ON HKSAR UNDER THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1998).

<sup>542</sup> A change of employment upon premature termination of contract is permitted on an exceptional basis, for example, circumstances where the employer has emigrated or has become insolvent or the foreign domestic helper has been abused or exploited by the employer. See HONG KONG HUMAN RIGHTS MONITOR, BRIEFING PAPER, *supra* note 540.

<sup>543</sup> See HOME AFFAIRS BUREAU, *supra* note 522, at 15. The Hong Kong Judicial Committee, while recognizing past abuse of the former policy of permitting foreign workers an unrestricted six-month stay after termination of employment, see HONG KONG HUMAN RIGHTS MONITOR-UNITED KINGDOM, FOURTEENTH PERIODIC REPORT IN RESPECT OF HONG KONG UNDER THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1996).

<sup>544</sup> See HONG KONG HUMAN RIGHTS MONITOR, *supra* note 526 (noting that workers are given "visitor" status during legal proceedings challenging their contract termination, and that "visitors" are not permitted to work legally).

administration should review the employment conditions of foreign domestic helpers to provide the full enjoyment of rights under the ICESCR.<sup>545</sup> It further recommended the abolition of the "two week rule" because it caused serious impairment of the foreign domestic helper's economic, social, and cultural rights.<sup>546</sup>

This account of racial and ethnic discrimination in Hong Kong is admittedly anecdotal and cannot definitively establish the rate or pattern of such discrimination in Hong Kong. Nevertheless, as with gender discrimination, whatever the actual level of racial discrimination, Hong Kong has an obligation under international law to provide an adequate remedy for any and all acts of race discrimination. The current law falls far short of that standard in that there is no remedy at all for private acts of discrimination on the basis of race or ethnicity.

In response to calls for the passage of a race discrimination ordinance along the lines of the SDO, the HKSAR administration has adopted what it calls a step-by-step approach:

Anti-discrimination legislation is a new area of law in Hong Kong, which has far-reaching implications for the community as a whole. The Hong Kong Government accordingly maintains its view that a step-by-step approach allowing both the government and the community thoroughly to assess the impact of such legislation in the light of experience offers the most suitable way forward.<sup>547</sup>

The intent behind the policy is to give Hong Kong time to develop experience with the SDO, family status, and disability ordinances before moving to confront other areas such as race or age discrimination.

In the meantime, though the HKSAR administration claims to pursue a policy of public education and voluntary compliance, there is little evidence of any serious efforts in this area. For example, when asked by Legislative Councilor Christine Loh to provide details on funding for anti-discrimination programs in the years 1999 to 2000 and procedures for grant making to community service providers, the administration's written response stated only that the administration "would be formulating a suitable programme of activities for implementation in 1999/2000 and they would be looking into funding arrangements . . ."<sup>548</sup>

With respect to voluntary compliance, the administration did release a Code of Practice Against Discrimination in Employment Areas on the Ground of Race ("Anti-discrimination Code") in November 1997.<sup>549</sup> This voluntary code is designed to encourage employers and staff to "examine their conduct,

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<sup>545</sup> See U.N. COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, REPORT ON HONG KONG UNDER THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (Dec. 1994); see also, HONG KONG HUMAN RIGHTS MONITOR, *supra* note 526.

<sup>546</sup> See HONG KONG HUMAN RIGHTS MONITOR, *supra* note 526.

<sup>547</sup> *Government 'Turning Blind Eye' to Racial Discrimination*, HONG KONG STANDARD, Jan. 20, 1999, at 1.

<sup>548</sup> HONG KONG HUMAN RIGHTS MONITOR, CAMPAIGN FOR LEGISLATION AGAINST RACIAL DISCRIMINATION, (visited May 9, 1999) <<http://www.friday.org.hk/hkhrm/english/reports/enw/enw0199d.htm>> (on file with the *Fordham International Law Journal*) (paraphrasing written reply of Peter Lo, Acting Secretary for Home Affairs Bureau).

<sup>549</sup> HONG KONG HOME AFFAIRS BUREAU, CODE OF PRACTICE AGAINST DISCRIMINATION IN EMPLOYMENT ON THE GROUND OF RACE (on file with the *Fordham International Law Journal*).

understand what practices are discriminatory, and to stop them."<sup>550</sup> The Anti-discrimination Code covers terms and conditions of employment, selection, recruitment, interviewing, promotion, grievances, and dismissal procedures.<sup>551</sup> The Anti-discrimination Code, however, contains no grievance procedures for victims, no reporting requirements, and no remedies, binding or otherwise, and there is little evidence that the Anti-discrimination Code has had any effect. Indeed, critics of the Anti-discrimination Code point out that not only is it voluntary, but it also contains a statement essentially releasing employers from even a moral obligation to comply.<sup>552</sup> This provision states that the "Government recognizes that it may not always be feasible for everyone to follow all the good practices recommended in this Code."

The step-by-step approach is problematic on several levels. First, it sanctions an arbitrary hierarchy of rights; an effective "queue" for victims of discriminatory conduct that allows redress for gender-based claims, for example, but not race-based claims. Second, it condones a majoritarian attack on core principles of individual human dignity: because the majority of Hong Kong's people allegedly are not ready to recognize the equality of racial minorities, the administration sacrifices the rights of the minority. This represents a failure on the part of the administration to understand principles of equality and anti-discrimination as fundamental protections of inherent rights, rather than privileges to be accorded in due time.<sup>553</sup> Such policy squarely conflicts with Hong Kong's commitments under international law.

While recognizing the value of progressive measures, including public education, the U.N. Committee on Economic Social and Cultural Rights has expressed its concern over the absence of legislation banning racial discrimination. In its 1994 Concluding Observations, the Committee expressed "its concern that in spite of recent Government initiatives to introduce legislation concerning non-discrimination in relation to sex and disability, there is an absence of comprehensive legislation providing protection against discrimination on the grounds referred to in article 2 of the Covenant."<sup>554</sup> Article 2 includes prohibitions on discrimination based on race, color, or national origin. In failing to implement protections in those areas, Hong Kong fails to satisfy its obligations under the ICESCR.<sup>555</sup> Similarly, Hong Kong's obligations under

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<sup>550</sup> *Id.*

<sup>551</sup> *Id.*

<sup>552</sup> Interview with Vandana Rajwani, Director of Indian Resources Group, in Hong Kong (June 7, 1999).

<sup>553</sup> Moreover, the legislative process permits a prolonged enactment that would give businesses and the community time to prepare for any legislation by drafting and disseminating company policies or procedures and training employees. This method was used with the SDO. The SDO was presented for first reading at the LegCo nine months before its enactment, and in its final version included a three year phase-in period. Finally, the step-by-step approach rests on a faulty and illogical foundation. HKSAR officials argue that delaying anti-race discrimination legislation indefinitely is acceptable because the problem is not significant and because Hong Kong needs time to adjust to existing legislation -- legislation that itself ironically addresses the insignificant problems of gender, family status, and disability discrimination. But if the problem is not significant, then few claims would be expected and legislation should not prove disruptive in any fashion requiring prolonged adjustment. A more candid statement of the objection that creating policies and training employees to implement any legislative scheme would take resources away from income-generating activities; resources that employers do not want to spend, particularly when they do not perceive a widespread problem.

<sup>554</sup> See HONG KONG HUMAN RIGHTS MONITOR-UNITED KINGDOM, *supra* note 543.

<sup>555</sup> As Article 2 of the ICCPR contains essentially the same language, Hong Kong's failure to implement race discrimination legislation fails to satisfy the ICCPR as well. Moreover, Article 26 of the ICCPR requires Hong

CERD include an obligation not only to "prohibit" but also affirmatively "to bring to an end, by all appropriate means *including legislation* as required by circumstances, racial discrimination by any persons, group or organization."<sup>556</sup> Although CERD does allow consideration of local circumstances, nothing in Hong Kong's current legal or political order provides grounds for delay.

### *E. Conclusions and Recommendations*

The delegation recognizes the important steps Hong Kong has taken in passing the SDO and establishing the EOC. The delegation concludes, however, that additional measures are necessary to achieve and maintain gender equality.<sup>557</sup> Most readily achievable are policy changes designed to educate women about their rights and available remedies and to encourage the EOC to use its existing powers, especially that of independent investigation. More involved legislative initiatives should be considered to address the problems of violence against women and of foreign domestic workers. Finally, public discussion should be encouraged on the proposal of a number of Hong Kong-based human rights organizations and political parties urging the creation of a Women's Bureau within the HKSAR administration, charged with analyzing the effect of all government policies on women as well as drafting policy proposals to promote gender equality.<sup>558</sup>

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Kong to provide an effective remedy for violations of the rights therein. Lacking legislation creating a remedy for private discrimination, Hong Kong arguably violates Article 26 as well. See ICCPR, *supra* note 20.

<sup>556</sup> See CERD, *supra* note 466, art. 2(1)(d) (emphasis added).

<sup>557</sup> See *Initial Report on the Hong Kong Special Administrative Region under Article 18 of the Convention on the Elimination of all Forms of Discrimination Against Women*, at art. 2, para. 18 (Nov. 25, 1998).

<sup>558</sup> See CEDAW, *supra* note 465; see also The Democratic Party of Hong Kong, *The Initial Report on Hong Kong SAR Under CEDAW by the Democratic Party, Hong Kong*, Conclusion, Jan. 1999 (visited Apr. 25, 1999) <<http://www.hku.hk/ccpl/cedawweb/DP.html>> (on file with the *Fordham International Law Journal*); see HONG KONG HUMAN RIGHTS MONITOR, *supra* note 526, at part II(A)(2); The Frontier, *HKSAR Under Article 18 of CEDAW*, Conclusion (visited Apr. 25, 1999) <<http://www.hku.hk/ccpl/cedawweb/Frontier.html>> (on file with the *Fordham International Law Journal*). Advocates argue that the proposed Women's Bureau would allow the government to address more effectively areas of gender discrimination not covered by the narrow mandates of SDO or EOC, including private sector conduct. For example, advocates suggest that a Women's Bureau would help promote policies and legislation intended to curb violence against women. The CEDAW Committee expressed concern about services provided by the HKSAR for victims of domestic abuse as well as the HKSAR's apparent failure to examine the problem of sexual violence. It was similarly concerned about the HKSAR's failure to mention sexual violence against women in its report to the CEDAW Committee. See CEDAW, *supra*. Advocates in Hong Kong suggest that a Women's Bureau might deal with these issues by promoting anti-stalking laws, laws expanding the definition of rape and criminalizing marital rape, and laws mandating counseling for abusers and the reporting of domestic violence. Harmony House, *Submission to the CEDAW Committee on the Initial Report on Hong Kong Under CEDAW by Non Government Organizations*, Article 5(C)(1) (visited Apr. 25, 1999) <<http://www.hku.hk/ccpl/cedawweb/CEDAW4.html>> (on file with the *Fordham International Law Journal*). Others suggest a Women's Bureau might initiate policies to train police, medical professionals, and social workers to deal with victims of domestic or sexual violence, and help to establish shelters to protect victims of sexual violence and a 24-hour rape crisis hotline. Harmony House, *supra*; Association Concerning Sexual Violence Against Women, *Submission to the CEDAW Committee on the Initial Report on Hong Kong Under CEDAW by Non Government Organizations*, Article 5(6) (visited Apr. 25, 1999) <<http://www.hku.hk/ccpl/cedawweb/CEDAW4.html>> (on file with the *Fordham International Law Journal*); Hong Kong Women Workers Association, *Submission to the CEDAW Committee on the Initial Report on Hong Kong Under CEDAW by Non Government Organizations*, Article 3(5)

The delegation is concerned by the absence of legal protections for racial minorities and urges the government of Hong Kong to adopt legislation in the near future. Such legislation could be modeled on the SDO, or on the proposed bill of Legislative Councilor Christine Loh. As noted above, implementation could be phased in, as with the SDO. And as noted above with regard to the SDO and EOC, educational initiatives developed to promote racial equality and understanding between all races should accompany legislation.

### *CONCLUSION*

In this time of transition for Hong Kong, the resolve of the HKSAR administration to uphold the rule of law and its commitment to fulfilling its obligations under international law will continue to be tested. In the December 15, 1999 decision of the CFA in the case of *HKSAR v. Ng Kung Siu and Lee Kin Yun*, No. 4 of 1999, HKSAR Court of Final Appeal (Dec. 15, 1999), Chief Justice Li stated:

Hong Kong is at the early stage of the new order following resumption of the exercise of sovereignty by the People's Republic of 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.

The successful implementation of this principle will safeguard the HKSAR's status as the premiere example of economic and political stability in Asia. It is toward this end that the Association of the Bar of the City of New York and the Crowley Program offer this Special Report, hopeful that in this one country, these two systems of law can be sustained to advance the rights and dignity of all men and women in the Hong Kong Special Administrative Region and the People's Republic of China as a whole.

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(visited Apr. 25, 1999) <<http://www.hku.hk/ccpl/cedaweb/CEDAW4.html>> (on file with the *Fordham International Law Journal*).

*APPENDIX I.*  
*ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK/*  
*JOSEPH R. CROWLEY PROGRAM*  
*MISSION ITINERARY*

<b>Date</b>	<b>Event*</b>
Wednesday, May 26	Toy Manufacturer's Association/Hong Kong Toy Council Convention, Shenzhen, China
Thursday, May 27	Meeting with Hong Kong University students Membership meeting, Hong Kong Human Rights Monitor
Friday, May 28	Scheduling
Saturday, May 29	Panel on Right of Abode organized by JUSTICE (local branch of International Commission of Jurists)
Sunday, May 30	Attendance and observation at march marking 10 <sup>th</sup> Anniversary of Tiananmen Square Attendance and observation at rally concluding march at Government House
Monday, May 31	Meeting with Hong Kong University students and faculty Meeting with Professor Tim Hamlett and Professor Judith Clarke, Hong Kong Baptist University Meeting with the Hong Kong Human Rights Monitor, Dr. Stephen Kam-Cheung Ng, LAW Yuk-Kai, and Belinda Winterbourne in attendance
Tuesday, June 1	Interview with Emily Lau and Cyd Ho Sau Lan, The Frontier Interview with Franklen CHOI Kin Shing, Hong Kong Catholic Commission for Labour Affairs Interview with Kin-ming Liu, Hong Kong Journalists Association Interview with Martin Lee, The Democratic Party Interview with Elizabeth Tang, Hong Kong Confederation of Trade Unions Interview with Philip Segal, The International Herald Tribune
Wednesday, June 2	Interview with Martin Clarke & Mayella Chung,

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\* Unless otherwise noted all interviews and meetings took place in Hong Kong.

## ONE COUNTRY, TWO LEGAL SYSTEMS?

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<b>Date</b>	<b>Event*</b>
	Radio Television Hong Kong
	Interview with May Wong, Hong Kong Coalition for the Charter on the Safe Production of Toys
	Interview with Mary Ann King, Hong Kong Women Christian Council
	Interview with Lina Paclibar-Deslate, Filipino Migrant Workers' Union
	Meeting with Hong Kong People's Council on Public Housing Policy, Virginia Ip Chiu Ping, Ronald So Ngai Long, and Cherry Che Wai Ling in attendance
	Meeting with Sidney Jones, Human Rights Watch
	Interview with Dennis Yau, Hong Kong Trade Development Council
	Interview with Lekhanath Koirala, Far East Overseas Nepalese Association
Thursday, June 3	Interview with York Liao, Varitronix Limited
	Interview with Bob Lee, Hasbro
	Interview with Tsang Yok Sing, Democratic Alliance for Betterment of Hong Kong
	Interview with Fly Lam Ying Hing, Hong Kong Women's Workers Association
	Interview with Glen Schlosh, South China Morning Post
	Interview with Mary Yuen, Peace & Justice Commission of the Hong Kong Catholic Diocese
	Interviews with S.C. Liu, and Yip So, residents, Diamond Hill squatter area
	Interview with Ms. Bong-on, Friends of Thai
	Interview with Edith Chang, Harmony House
Friday, June 4	Meeting with American Chamber of Commerce in Hong Kong Jason Felton, Frank Martin, Sharon Mann, Sally Harpole, Jon Zinke, W. Anthony Stewart, and Paul Muther in attendance



ONE COUNTRY, TWO LEGAL SYSTEMS?

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<b>Date</b>	<b>Event*</b>
	Interview with Robert Allcock, Department of Justice
	Interview with Dr. Eden Y. Woon, Director, Hong Kong General Chamber of Commerce
	Interview with The Honorable Justice Litton, Court of Final Appeals Interview with Edgar K.W. Yuen, Ming Pao Newspapers Ltd.
	Interview with Michael C. Davis, Chinese University
	Interview with Michael M.Y. Suen, Secretary of Constitutional Affairs Bureau
	Interview with Mohamed Alli Din, United Muslim Association of Hong Kong
	Interview with Lee Wing Tat, Legislative Councillor, Democratic Party and Chair, LegCo Housing Committee
	Meeting with Nelsy Hasibuan, and Reiko Harima, Asian Migrant Center
	Attendance and observation at Tiananmen Square 10 <sup>th</sup> Anniversary Vigil
Saturday, June 5	Interview with TS Won, Hong Kong Toy Council
Sunday, June 6	Meeting with Lina Paclibar-Deslate and Lori Brunio, Filipino Migrant Workers' Union
	Interview with Sunik Karyawat, Indonesian Women Workers
	Interview with Umaporn Meskri, Thai Women Association in Hong Kong
Monday, June 7	Interview with Helene M. Curran, Christian Action Domestic Helpers and Migrant Workers Programme
	Interview with Rita Fan, President LegCo
	Interview with Margaret Ng, LegCo
	Interview with Professor Albert Chen, University of Hong Kong
	Interview with The Honorable Mr. Justice Bokhary, Permanent Judge of the Court of Final Appeal
	Meeting with Hong Kong Bar Association, Ronny Tong, Audrey Eu, Philip Dykes, Margaret Ng, and other members in attendance

<b>Date</b>	<b>Event*</b>
Tuesday, June 8	<p>Meeting with Vision 2047 Foundation Kelly Loper, Nicholas Allen, Peter Barrett, Robert Dorfman, Dr. Patrick Leung, Louis Loong, Kenneth Morrison, David Teng Pong, Paul Woodward, and Ashok Kothari, in attendance</p> <p>Interview with CK Law, LegCo</p> <p>Meeting with Dr. Dora Choi and Grace Mak, Chinese University</p> <p>Interview with Professor H.L. Fu, University of Hong Kong</p> <p>Meeting with Johannes Chan and Yash Ghai, Hong Kong University</p> <p>Interview with Yim Yuet Lim, Zitang Sex Workers Concern Organization</p> <p>Meeting with The Law Society of Hong Kong, Patrick Moss, Anthony Chow, Peter C.L. Lo, Simon Ip Shing Hing, and Mark Bradley in attendance</p> <p>Interview with Cherry Che Wai Ling, Hong Kong People's Council on Public Housing Policy</p> <p>Telephone interview with Tessa Stewart, HK Federation of Women's Centres</p> <p>Interview with Denis Chang, SC, JP</p> <p>Interview with LAW Yuk-Kai, Hong Kong Human Rights Monitor</p>
Wednesday, June 9	<p>Interview with Lee Cheuk Yan, LegCo and Hong Kong Confederation of Trade Unions</p> <p>Interview with Andrew Wong, LegCo Constitutional Affairs Committee</p> <p>Interview with Philip Dykes, SC</p> <p>Meeting with Hong Kong Christian Industrial Committee Eli Chan Ka Wai, Alice KWAN Ming Wai, and Xavier Chan Yi Chi in attendance</p> <p>Interview with Danny Gittings, South China Morning Post</p> <p>Interview with Anson Chan, Chief Secretary for Administration, HKSAR</p> <p>Interview with Philip SL Beh, The University of Hong Kong Faculty of Medicine, Dept. of Pathology</p>

<b>Date</b>	<b>Event*</b>
	Interview with Wong Ka Ying, Association Concerning Sexual Violence Against Women
	Interview with Vandana Rajwani, Indian Resources Group
	Meeting with HO Hei Wah, and SZE Lai Shan, Society for Community Organization
	Meetings with City University Law Faculty, Professors Lin Feng, Zhu Guobin, Priscilla M.F. Leung, Gu Main, Wang Chen Guang, and David N. Smith in attendance
	Interview with Willy Wo Lap Lam
	Interview with David Lan and John Dean, Home Affairs Secretaries, HKSAR
	Meeting with US Consul General Richard Boucher and US Consul Kenneth Chern
	Interview with Fannie Mui-ching Cheung, Equal Opportunities Commission
	Attended and observed Denis Chang, SC, JP, lecture at Hong Kong University
	Interview with Ronald Arculli, JP, Legislative Councillor, Liberal Party
Thursday, June 10	<u>Wrap up session #1: Rule of Law; LegCo Conference Room</u> Mak Hoi Wah, Vice Chair of the Alliance for the Patriotic Democratic Movement in China CJ Chan, High Court Harry F.M. MAK, Justice Department, Legal Aid Division
	<u>Wrap up session #2: Business &amp; Labour</u> Elsie Leung, Secretary for Justice, Department of Justice Edward Ho, LegCo, Liberal Party Virginia Ip Chiu Ping, Ronald So Ngai Long, and Cherry Che Wai Ling, of the Hong Kong People's Council on Public Housing Policy Tsang Kar-yin, Association For the Advancement of Feminism
Friday, June 11	Interview with T.K. Lai, Immigration Department, HKSAR and David TONG Hin-yeung, Customs and Excise Department, HKSAR
	Interview with Jimmy Lai, Apple Daily
	Wrap up discussions with Hong Kong University students

**Date**

**Event\***

Interview with Fernando Cheung, Polytechnic University

Meeting with Professor Peter Wesley-Smith, University of Hong Kong