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## Right of Abode Cases: The Judicial Independence of the Hong Kong Special Administrative Region v. The Sovereignty Interests of China

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# NOTES

## RIGHT OF ABODE CASES: THE JUDICIAL INDEPENDENCE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

### v.

## THE SOVEREIGNTY INTERESTS OF CHINA

“Autonomy and independence do not grow out of being told what to do and when to do it. It is only by having [its] needs considered, by becoming a participant in the decision-making process, that a child develops the capacity for autonomy.”<sup>1</sup>

### I. INTRODUCTION

The sovereignty of Hong Kong reverted to the People's Republic of China (“PRC” or “China”) on July 1, 1997, after more than 150 years of British colonial rule.<sup>2</sup> Since then, Hong

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1. ELAINE HEFFNER, *MOTHERING: EMOTIONAL EXPERIENCE OF MOTHERHOOD AFTER FREUD AND FEMINISM* 103 (1978).

2. As the fateful result of the Opium War of 1839-1842, British jurisdiction in Hong Kong was acquired through three treaties with China between 1842 and 1898: the Treaty of Nanking, the Convention of Peking 1860 and the Convention of Peking 1898. YASH GHAI, *HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW* 3-6 (2d ed. 1999). These treaties provided for a ninety-nine year lease of Hong Kong, Kowloon and the New Territories, an adjacent peninsula located only a few hundred yards away at the southern tip of the Chinese mainland, with China received nothing in return for the lease. *Id.* The Chinese government has been resentful of these treaties and considered them as “unequal treaties” that were “coercive,” “predatory” and “forced upon” China during the banning of opium trade. *Id.* at 9-12.

Kong has transformed from a British colony to a Chinese special administrative region ("HKSAR").<sup>3</sup> Inevitably, the transfer of sovereignty has created many problems in the recently established HKSAR, where the common law system which has been deeply rooted under British control contrasts with the Chinese socialist legal approach.<sup>4</sup> Oddly, Hong Kong and China are now one country united by distinct and separate legal systems.

Part II of this Note will discuss the recent history of Hong Kong and its relationship with China before the resumption of Chinese control in 1997. Part III will give an overview of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("Basic Law")<sup>5</sup> and examine the

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In 1839, the Chinese Imperial Commissioner, Lin Tse-Hsu, tried to use international law as understood by the West to stop the opium trade. *Id.* at 4 n.2. Lin wrote a letter to Queen Victoria of Great Britain, stating: "Suppose there were people from another country who carried opium for sale to England and seduced your people into buying and smoking it; certainly your honourable ruler would deeply hate it and be bitterly aroused." *Id.* The letter included relevant parts of Vattel's *Le Droit des Gens*, which stated that "it was the right of every state to stop foreign nationals from importing noxious products into its territory," and the state could declare those products to be "contraband and confiscate" them. *Id.* However, Queen Victoria never replied to the letter, and later regarded those three treaties as giving the British full sovereignty over Hong Kong, Kowloon and the New Territories. GHAI, *supra* note 2, at 4, 7. See also 1 JEROME ALAN COHEN & HUNGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 5-7 (1974).

3. In 1982, negotiations on Hong Kong's future began between China and the United Kingdom. WILLIAM H. OVERHOLT, *THE RISE OF CHINA: HOW ECONOMIC REFORM IS CREATING A NEW SUPERPOWER* 206-07 (1993). Two years later, the two countries signed a binding international agreement to establish the framework for the transfer of sovereignty of Hong Kong to China on July 1, 1997, and create a temporary Special Administrative Region guaranteed unchanged for fifty years, but over which China would maintain full control of Hong Kong's defense and foreign affairs. See *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong*, Dec. 19, 1984, U.K.-P.R.C., 23 I.L.M. 1366 (entered into force May 27, 1985) [hereinafter *Sino-British Joint Declaration*].

4. ALBERT HUNG-YEE CHEN, *AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 23 (1992).

5. *Zhonghua Renmin Gongheguo Xianggang Tebie Xinzhengqu Jibenfa* (Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China), reprinted in 29 I.L.M. 1511 (1990), available at

application of the interpretation provision<sup>6</sup> contained within, and its effect on the ability of the HKSAR courts to maintain their judicial independence as guaranteed by the Chinese and British governments.<sup>7</sup> Part IV will explain the procedural history of the right of abode cases and how they challenge the HKSAR courts' power of final adjudication and cause conflicts between HKSAR and the PRC. Part V will analyze the different judicial approaches of the two legal systems, and Part VI will provide some alternatives that the HKSAR may implement to avoid conflict with China's sovereignty interests.

## II. HONG KONG'S RECENT HISTORY AND ITS RELATIONSHIP WITH CHINA BEFORE 1997

The pursuit of sovereignty over Hong Kong has meant different things to the Chinese government at various times, however, one significant meaning remained – “the demands of commerce.”<sup>8</sup> Following the Communist takeover in 1949, Hong Kong's economy developed rapidly with the influx of Chinese refugee entrepreneurs and industrialists, who helped turn the British colony into one of the major leading international business centers in Asia.<sup>9</sup> Since then, Hong Kong experienced extraordinary economic growth and shifted from poverty to prosperity.<sup>10</sup> By the 1980's, Hong Kong was the most prosperous section of Asia after Japan,<sup>11</sup> while the financial sectors in most of the East and Southeast Asian areas were still underdevel-

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[http://www.info.gov.hk/basic\\_law/fulltext/index.htm](http://www.info.gov.hk/basic_law/fulltext/index.htm) (last visited Mar. 19, 2002) [hereinafter Basic Law].

6. *Id.* art. 158.

7. Sino-British Joint Declaration, *supra* note 3, pmb., ¶ 3(3).

8. *See* GHAI, *supra* note 2, at 36.

9. KEVIN P. LANE, SOVEREIGNTY AND THE STATUS QUO: THE HISTORICAL ROOTS OF CHINA'S HONG KONG POLICY 5 (1990). Geographically, Hong Kong is located in the center of East Asia, with Korea and Japan to the North, Taiwan to the East, Singapore and Indonesia to the South and Vietnam and Thailand to the West. *See* George L. Hicks, *Hong Kong on the Eve of Communist Rule, in THE FUTURE OF HONG KONG: TOWARD 1997 AND BEYOND* 23, 48 (Hungdah Chiu et al. eds., 1987).

10. *See, e.g.*, Asian Development Bank, *Hong Kong, China*, at <http://www.adb.org/Documents/Books/ADO/2001/hkg.asp> (last visited Mar. 20, 2002). *See generally* LANE, *supra* note 9, at 1; Hicks, *supra* note 9, at 44.

11. Hicks, *supra* note 9, at 44.

oped.<sup>12</sup> In order to promote commerce, foreign trade and investments, the British government implemented the policy of *laissez-faire*<sup>13</sup> in Hong Kong and authorized the colony to become a separate member of major international and economic organizations, such as the World Trade Organization ("WTO"), the World Customs Organization ("WCO"), the International Monetary Fund and the Asia-Pacific Economic Cooperation ("APEC"), and to enter treaty relations with foreign states.<sup>14</sup> As a result, Hong Kong has become increasingly integrated into the world economy<sup>15</sup> and plays a crucial role as home to the most highly capitalized and specialized financial and trading firms, which serve as intermediaries within and between Asia and the global economy.<sup>16</sup>

In the late 1970's, China began its long march toward economic development and undertook fundamental shifts in its economic policy.<sup>17</sup> Since then, China has experienced substantial growth in its national output and an improvement in the quality of life across the general population.<sup>18</sup> In addition to the growth in both exports and imports between Hong Kong and China, the possibility of overseas investment in China led to increasing integration of the two economies.<sup>19</sup> Rising labor and land costs prompted many industrialists to relocate their factories to the newly established Special Economic Zones<sup>20</sup> on

12. *Id.* at 47.

13. *See id.* at 44; LANE, *supra* note 9, at 1.

14. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, *Trade Policy and Trade Controls: Hong Kong's Autonomy in Economic and Trade Matters After the Handover on 1 July 1997*, at <http://www.info.gov.hk/tid/departments/trade/hkauto.htm> (last modified Mar. 6, 2001).

15. LANE, *supra* note 9, at 3.

16. *Id.*

17. Y.C. Jao, *Hong Kong's Economic Prosperity After the Sino-British Agreement: A Preliminary Assessment*, in *THE FUTURE OF HONG KONG: TOWARD 1997 AND BEYOND* 57, 67 (Hungdah Chiu et al. eds., 1987).

18. *Id.*

19. *Id.* at 70; Hicks, *supra* note 9, at 51.

20. There are six Special Economic Zones: Shenzhen, Zhuhai, Shantou, Xiamen, Hainan Province and Pudong New District. GHAI, *supra* note 2, at 117 n.16. These special zones are established to experiment with new economic forms, providing a substantial role for foreign investment in the private economy, but within the framework of a socialist modernization. *Id.* at 117. Within these Special Economic Zones, special laws may be enacted,

the southern coast of China, just to the north of Hong Kong.<sup>21</sup> Thus, Hong Kong's role as the main gateway to China, not only for exports and imports but also investments, expanded drastically.<sup>22</sup> Nonetheless, major developments in relations between Hong Kong and China did not advance significantly until the Sino-British negotiations on the transfer of sovereignty started in 1984.<sup>23</sup>

### III. THE BASIC LAW

For six million Hong Kong people, the "social and economic systems" and "life-style" are guaranteed to remain "unchanged for 50 years."<sup>24</sup> The "one country, two systems"<sup>25</sup> principle, established by 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 ("Sino-British Joint Declaration")<sup>26</sup> in 1984, sought to ensure that HKSAR would "enjoy a high degree of autonomy."<sup>27</sup> Moreover, HKSAR's legal system is assured of

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establishing a different regime of laws, particularly commercial laws. *Id.* at 118. Their role is to facilitate direct investments or joint ventures by foreign citizens, overseas Chinese nationals and compatriots in Hong Kong and Macau. These investments and joint ventures are primarily for export purposes, domestic sales that require special permission and to attract custom duties. *Id.*

21. Jao, *supra* note 17, at 67.

22. *Id.* at 70. By the mid 1980's, Hong Kong has regularly provided about one-third of China's hard-currency earnings, while China became Hong Kong's second largest export market. *Id.* at 76-79. As early as 1969, China was Hong Kong's largest country of origin, and by 1980, its largest country of destination. *Id.*

23. *Id.* at 63-68.

24. Sino-British Joint Declaration, *supra* note 3, pmbl., ¶¶ 3(5), 3(12).

25. This term was originally envisioned by Deng Xiaoping, the late Premier of the People's Republic of China. See generally Deng Xiaoping, One Country, Two Systems (June 22-23, 1984), in ON THE QUESTION OF HONG KONG 6-11 (The Bureau of the Compilation and Translation of Works of Marx, Engels, Lenin and Stalin Under the Central Committee of the Communist Party of China trans., 1993).

26. Sino-British Joint Declaration, *supra* note 3, annex I, ¶ 23(c).

27. *Id.* pmbl., ¶ 3(2). However, HKSAR's "high degree of autonomy" does not include "foreign and defense affairs which are the responsibilities of the Central People's Government." *Id.* See also Basic Law, *supra* note 5, arts. 12-14.

"independent judicial power" which includes "finality of judicial decisions."<sup>28</sup>

Soon after the Sino-British Joint Declaration was signed in 1984, a special committee, composed of members from both Hong Kong and mainland China, was formed to draft the Basic Law of the HKSAR.<sup>29</sup> The six million local residents in HKSAR consider the Basic Law the "mini-constitution."<sup>30</sup> The official text of the Basic Law, however, only refers to it as a "constitutional document"<sup>31</sup> of the SAR and consists of the following sections:

(1) the body of the Basic Law which comprises a total of nine chapters with 160 articles;

(2) Annex I, which sets out the method for the selection of the Chief Executive of the HKSAR;

(3) Annex II, which sets out the method for the formation of the Legislative Council of the HKSAR and its voting procedures; and

(4) Annex III, which sets out the national laws to be applied in the HKSAR.<sup>32</sup>

Article 158, Interpretation and Amendment of the Basic Law, defines the power of interpretation as "vested in the Standing Committee of the National People's Congress" ("NPC"),<sup>33</sup> and it

28. Sino-British Joint Declaration, *supra* note 3, pmbi., ¶ 3(3). The Sino-British Joint Declaration also provided that the "laws currently in force in Hong Kong will remain basically unchanged." *Id.* See also Basic Law, *supra* note 5, art. 8.

29. See generally Basic Law, *supra* note 5. The Basic Law was enacted by the National People's Congress under article 31 of the PRC Constitution, and came into effect on July 1, 1997. See XIANFA art. 31, (1982). The Basic Law text exists in two official languages, Chinese and English, and there is no easy textual way to reconcile the differences between the two languages.

30. Tom Clarke, *Ng Ka Ling v. Director of Immigration; Tsui Kuen Nang v. Director Immigration; Director of Immigration v. Cheung Lai Wah: One Basic Law, Two Interpretations*, 23 MELB. U. L. REV. 773, 773 (1999).

31. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, *The Document*, at [http://www.info.gov.hk/basic\\_law/fulltext/index.htm](http://www.info.gov.hk/basic_law/fulltext/index.htm) (last visited Mar. 19, 2002).

32. *Id.*

33. Basic Law, *supra* note 5, art. 158. The NPC, China's form of a parliament, is the highest legislation-making body of the country. GHAI, *supra* note 2, at 99. The NPC approves or rejects suggestions issued by the State Council (or the Central People's Government *see infra* note 36), including the elec-

also states that the Standing Committee of the National People's Congress ("SCNPC")<sup>34</sup> shall "authorize the courts of the HKSAR to interpret on their own, in adjudicating cases, the provisions of the Basic Law which are *within the limits of the autonomy* of the HKSAR."<sup>35</sup> However, Article 158 further defines that the HKSAR's Court of Final Appeal ("CFA") shall "seek an interpretation of the relevant provisions from the SCNPC" if the Court needs to interpret the provisions of the Basic Law "concerning affairs that are the responsibility of the Central People's Government ("CPG")."<sup>36</sup> HKSAR courts must follow the interpretation of the SCNPC.<sup>37</sup> However, judgments previously rendered by the HKSAR courts "shall not be affected."<sup>38</sup> Ironically, Article 158 does not specify who shall determine what provisions must be referred to the NPC and whether such provisions may be interpreted solely by the courts of HKSAR.<sup>39</sup>

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tion of state president and vice president and other high-ranking politicians. GHAI, *supra* note 2, at 99-103. The NPC also has the power to amend, enforce and supervise the PRC Constitution. *Id.* This legislation body is responsible for deciding on the ratification or abrogation of treaties and important agreements with foreign states. *Id.* It is comprised of 3,000 deputies, representing the country's thirty provinces and various regions and municipalities. *Id.*

34. The SCNPC is comprised of the chairman, vice chairmen and approximately 170 members. GHAI, *supra* note 2, at 103-05. The SCNPC is responsible for implementing State Council decisions, which have been adopted by the NPC, supervising the work of the State Council, the Central Military Commission, the Supreme People's Court and the Supreme People's Procuratorate, and fulfilling the role and responsibilities of the NPC when it is not in session. *Id.*

35. Basic Law, *supra* note 5, art. 158 (emphasis added).

36. *Id.* The CPG, also known as the State Council, is the executive body of the Chinese government - the Chinese government's cabinet. GHAI, *supra* note 2, at 105-06. The CPG consists of the Premier, Vice-Premiers, Councilors, Ministers, the Auditor-General and the Secretary-General. *Id.* The CPG formulate rules, makes policy decisions and coordinates the work of the various state organs. *Id.* It is responsible for the day-to-day administration of the country. *Id.* Furthermore, it formulates the tasks and responsibilities of the ministries and the commissions, supervises the local government administration bodies, and directs and administers the affairs of everything from "education, culture, public health and family planning to civil affairs, judicial matters and public security." *Id.*

37. Basic Law, *supra* note 5, art. 158.

38. *Id.*

39. GHAI, *supra* note 2, at 68.



Initially, the SCNPC's role and power in interpreting the Basic Law under Article 158 prompted significant concern.<sup>40</sup> Nonetheless, government officials in HKSAR and China assured the public that the SCNPC's power of interpretation was included in the Basic Law principally as a symbolic gesture to Beijing and was not likely ever to be used.<sup>41</sup> However, the right of abode cases, which occurred subsequent to the Handover,<sup>42</sup> were filed by mainland China-born children of HKSAR permanent resident parents.<sup>43</sup> These cases questioned the power of independent judicial review and final adjudication of the CFA, the highest court of the land.<sup>44</sup> These cases challenge the ambiguity of Article 158's language and raise the interpretation controversy between the courts of HKSAR and the NPC.<sup>45</sup>

#### IV. RIGHT OF ABODE CASES

##### A. Background

The HKSAR Court of Final Appeal's consolidated decisions in *Ng Ka Ling*<sup>46</sup> and *Chan Kam Nga*<sup>47</sup> arose from separate judicial

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40. *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, 384 (1997).

41. *Tenth Annual Philip D. Reed Memorial Issue Special Report: One Country, Two Legal Systems?*, 23 FORDHAM INT'L L.J. 1, 12 n.37 (1999) [hereinafter *Reed Special Report*].

42. The term, Handover, is referred to the event of the reversion of sovereignty on July 1, 1997.

43. See *infra* notes 46-48 and accompanying text.

44. PETER WESLEY-SMITH, AN INTRODUCTION TO THE HONG KONG LEGAL SYSTEM 70-71 (3d ed. 1998).

45. See discussion *infra* Part IV.A-B.

46. *Ng Ka Ling (an infant) & Anor v. Director of Immigration; Tsui Kuen Nang v. Director of Immigration; Director of Immigration v. Cheung Lai Wah*, (1999) 2 HKCFAR 4, [1999] 1 HKLRD 315, [1999] 1 HKC 291 (Jan. 29, 1999), available at [http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv\\_14\\_16\\_98.htm](http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_14_16_98.htm) (last visited Mar. 20, 2002) [hereinafter *Ng Ka Ling*].

47. *Chan Kam Nga & Anor v. Director of Immigration*, (1999) 2 HKCFAR 82, [1999] 1 HKLRD 304, [1999] 1 HKC 347 (Jan. 29, 1999), available at [http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv\\_13\\_98.htm](http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_13_98.htm) (last visited Mar. 20, 2002) [hereinafter *Chan Kam Nga*].

review proceedings<sup>48</sup> brought as test cases to assert the right of abode in HKSAR by the mainland China born, natural children of HKSAR permanent residents.<sup>49</sup> Each of these children reported to the HKSAR Immigration Department, claiming their right of abode, under Article 24 of the Basic Law, in the days following the reversion of sovereignty on July 1, 1997.<sup>50</sup> These mainland China-born children either entered HKSAR illegally after the Handover or overstayed a temporary entry permit issued prior to the Handover.<sup>51</sup>

Under Article 24(2) of the Basic Law,<sup>52</sup> "Fundamental Rights and Duties of the Residents," six categories of permanent residents are allowed in HKSAR:

(1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;

(2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;

(3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);

(4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;

(5) Persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after the establishment of the Hong Kong Special Administrative Region; and

(6) Persons other than those residents listed in categories (1) to (5), who, before the establishment of the Hong Kong

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48. See *HKSAR v. Ma Wai Kwan David & Ors.*, [1997] HKLRD 761, [1997] 2 HKC 315; *Cheung Lai Wah v. Director of Immigration*, [1997] HKLRD 1081, [1997] 3 HKC 64; and *Chan Kam Nga & Anor v. Director of Immigration*, [1998] 1 HKLRD 142, [1998] 1 HKC 16. These cases were combined and heard as test cases on behalf of more than a thousand named immigrants claiming the right of abode.

49. *Ng Ka Ling*, 1 HKLRD at 316.

50. *Id.*

51. *Id.*

52. Basic Law, *supra* note 5, art. 24(2).

Special Administrative Region, had the right of abode in Hong Kong only.<sup>53</sup>

Furthermore, Article 24(3) provides that the above-mentioned residents "*shall have the right of abode* in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode."<sup>54</sup>

The right of abode cases as initiated by a challenge to the constitutionality of certain HKSAR restrictive immigration legislation, the Immigration (Amendment) (No. 2) Ordinance ("No. 2 Ordinance")<sup>55</sup> and the Immigration (Amendment) (No. 3) Ordinance ("No. 3 Ordinance"),<sup>56</sup> passed and enacted by HKSAR's Legislative Council ("LegCo")<sup>57</sup> on July 1, 1997 and July 10, 1997 respectively.<sup>58</sup> The appellants in these cases challenged the two ordinances, which controlled the right of mainland children of HKSAR permanent residents to immigrate to the HKSAR, as unconstitutional and as violating their rights guaranteed by Article 24 of the Basic Law.<sup>59</sup> The No. 2 Ordinance provides that a child of a parent with the right of abode in HKSAR is entitled to the right of abode *only if* the child's parent already had the right when the child was born.<sup>60</sup> The ordinance also requires that those claiming the right of abode on the basis of their fathers' right of abode must have been born

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53. *Id.*

54. *Id.* art. 24(3) (emphasis added).

55. Hong Kong Immigration (Amendment) (No. 2) Ordinance (July 1, 1997), at <http://www.legco.gov.hk/yr97-98/english/bills/bills10/bills10.htm> [hereinafter No. 2 Ordinance].

56. Hong Kong Immigration (Amendment) (No. 3) Ordinance (July 10, 1997), at <http://www.legco.gov.hk/yr97-98/english/bills/bills10/bills10.htm> [hereinafter No. 3 Ordinance].

57. The main functions of the LegCo of the HKSAR are to enact laws, examine and approve budgets, taxation and public expenditure, and monitor the work of the HKSAR government. GHAI, *supra* note 2, at 281-88. In addition, the LegCo is also given the power to endorse the appointment and removal of the judges of the CFA and the Chief Judge of the High Court, as well as the power to impeach the Chief Executive. *Id.* Also, the Basic Law details the formation, term of office, powers and functions of the LegCo. See Basic Law, *supra* note 5, arts. 66-79.

58. See No. 2 Ordinance, *supra* note 55; No. 3 Ordinance, *supra* note 56.

59. *Ng Ka Ling*, 1 HKLRD at 317-18. See also Basic Law, *supra* note 5, art. 24.

60. No. 2 Ordinance, *supra* note 55, sched. 1, para. 2 (emphasis added).

within a marriage.<sup>61</sup> The No. 3 Ordinance establishes an administrative immigration scheme, which requires mainland residents claiming a right of abode through their parents to apply for a "Certificate of Entitlement."<sup>62</sup> In addition, each applicant must obtain a one-way exit permit to the HKSAR through the mainland authorities, the Exit-Entry Administration of the Public Security Bureau ("PSB"), before being allowed to emigrate.<sup>63</sup>

For many years, there has always been a significant demand among Chinese nationals to settle in Hong Kong.<sup>64</sup> Thus, Hong Kong immigration law requires Chinese emigrants to apply for an exit permit from the PSB, and a daily quota is agreed upon previously by China and HKSAR administrations to limit the issuance to 150 permits each day.<sup>65</sup> The daily quota system is implemented "in order to protect and maintain the economic prosperity and social stability of Hong Kong," and to avoid a mass and rapid influx of mainland emigrants.<sup>66</sup> Hence, the administrations need to take the necessary measures to control the movement of nationals between Hong Kong and China.<sup>67</sup> Although Hong Kong immigration law requires that all Chinese mainlanders who obtained an exit permit by the PSB to

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61. *Id.* sched. 1, para. 1(2) (emphasis added).

62. No. 3 Ordinance, *supra* note 56, sched. 1, para. 2(c).

63. *Id.* According to the Basic Law, HKSAR is authorized to maintain and apply its own separate "immigration controls on entry into, stay in and departure from [HKSAR] by persons from foreign states and regions." Basic Law, *supra* note 5, art. 154.

64. GHAI, *supra* note 2, at 172 n.38. The standards of living and quality of life in Hong Kong are significantly more superior than in China, some say on average thirty times better off. See *Hong Kong Diminished: Between Them, the Government of Tung Chee-Hwa in Hong Kong and His Bosses in Beijing Have Undermined the Territory's Rule of Law*, *ECONOMIST*, July 3, 1999, at 16, available at 1999 WL 7363714.

65. See GHAI, *supra* note 2, at 172; *China Experts Attack Hong Kong Court Decision on Children*, *AGENCE FRANCE-PRESSE*, Feb. 6, 1999, available at 1999 WL 2541544; No Kwai-Yan, *Beijing Adviser Rejects Calls for His Resignation*, *S. CHINA MORNING POST*, Feb. 5, 1999, at 4, available at 1999 WL 2520230.

66. GHAI, *supra* note 2, at 172.

67. *Id.* In reference to the entry into Hong Kong of Chinese nationals from other parts of China, the Sino-British Joint Declaration provided that it "shall continue to be regulated in accordance with the present [quota] practice." Sino-British Joint Declaration, *supra* note 3, annex I, pt. XIV.

apply to a HKSAR immigration office, in practice, those who had been given a permit were admitted automatically.<sup>68</sup>

In the right of abode cases, all appellants had emigrated illegally in contravention of the No. 3 Ordinance.<sup>69</sup> Some were born outside of marriage, and therefore were denied the right of abode provided for exclusively under the No. 2 Ordinance.<sup>70</sup> In sum, abode appellants have the right to challenge three specific limitations of the Ordinances: (1) the requirement of a mainland exit certificate; (2) the limitation of the right to children born within marriage; and (3) the requirement that the right of abode will have vested in at least one parent at the time of the child's birth.<sup>71</sup> Consequently, the issues in *Ng Ka Ling* and *Chan Kam Nga* concentrated on whether the CFA was required to refer the case to the SCNPC for interpretation of the relevant provisions of the Basic Law under Article 158, and whether the CFA would be capable of invalidating acts of the NPC inconsistent with the Basic Law for enacting the No. 2 and No. 3 Ordinances.<sup>72</sup>

### *B. 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>73</sup> The CFA recognized that the ruling on the right of abode cases would have far-reaching social, political and economic consequences in HKSAR.<sup>74</sup> In fact, the HKSAR administration would later maintain that a broad interpretation of the right would open the doors to up to 1.67 million mainland im-

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68. GHAI, *supra* note 2, at 173.

69. *Ng Ka Ling*, 1 HKLRD at 334-35.

70. *Id.* at 335.

71. *Id.* at 336; *Chan Kam Nga*, 1 HKLRD at 304-05.

72. *Ng Ka Ling*, 1 HKLRD at 317-18. See also Joseph W. Dellapenna, *Does the Rule of Law Matter in the Hong Kong Special Administrative Region?*, in CHINA AND HONG KONG IN LEGAL TRANSITION: COMMERCIAL AND HUMANITARIAN ISSUES 91, 109-10 (Joseph W. Dellapenna & Patrick M. Norton eds., 2000).

73. Cliff Buddle, *Key Right-of-Abode Battle to Begin*, S. CHINA MORNING POST, Oct. 25, 1999, at 1, available at 1999 WL 28995761.

74. Chris Yeung, *Pressure on Abode Court for Rethink*, S. CHINA MORNING POST, Apr. 30, 1999, at 1, available at 1999 WL 16766585.

migrants over the next decade.<sup>75</sup> However, the CFA resolved the issues of right of abode in a manner that both accorded with the language of the Basic Law and defended the independence of HKSAR's judiciary.<sup>76</sup> Since Article 158 does not clearly state who determines which provisions of the Basic Law must be referred to the SCNPC and which provisions may be interpreted solely by the CFA, on January 29, 1999, the CFA decided in *Ng Ka Ling* 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>77</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 SCNPC.<sup>78</sup> Thus, the CFA invalidated two of the three limitations imposed by the No. 2 and No. 3 Ordinances.<sup>79</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.<sup>80</sup> First, the CFA ruled that the No. 2 Ordinance discriminated between legitimate and illegitimate children and was antithetical to the "principle of equality"<sup>81</sup> enshrined in both the Basic Law and the International Covenant on Civil and Political Rights ("ICCPR").<sup>82</sup> The

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75. Chris Yeung & Angela Li, *Lawyers Make Urgent Plea on Abode Decision*, S. CHINA MORNING POST, May 18, 1999, at 1, available at 1999 WL 16768517; Frank Ching, *Hong Kong: Judgment Call: China's Denunciation of a Hong Kong Court Ruling Not Only Threatens the Territory's Judicial Independence But Raises Questions About 'One Country, Two Systems'*, FAR E. ECON. REV., Feb. 18, 1999, at 20, available at 1999 WL-FEER 8674470.

76. Yash Ghai, *Litigating the Basic Law: Jurisdiction, Interpretation and Procedure*, in HONG KONG'S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION 3, 17-19 (Johannes M.M. Chan et al. eds., 2000).

77. *Ng Ka Ling*, 1 HKLRD at 342-43.

78. *Id.* at 345.

79. *Id.* See also *supra* text accompanying note 71.

80. *Ng Ka Ling*, 1 HKLRD at 352-54.

81. *Id.* at 352.

82. See Basic Law, *supra* note 5, arts. 25, 39; The International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. The ICCPR

CFA also found that the "plain meaning" of Article 24 suggested that "[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>83</sup> Second, the CFA found the No. 2 Ordinance's restriction of the right to children born after their parents already had acquired permanent residency status unconstitutional.<sup>84</sup> The Court held that the "natural meaning" of Article 24 included all children born of permanent residents, regardless of when the parents acquired such status.<sup>85</sup> The Court further stated that an unrestricted right of abode "enabl[es] the child to be with the parent [in HKSAR], thereby, securing the unity of the family."<sup>86</sup> However, the CFA ruled that the Director of Immigration of HKSAR could require verification of an individual's claim to permanent resident status.<sup>87</sup> Thus, the Court held that the No. 3 Ordinance's requirement of a Certificate of Entitlement from the HKSAR was permissible, so long as the Immigration Department operated the scheme in "a fair and reasonable manner" without "unlawful delay."<sup>88</sup>

### C. *The Aftermath*

The CFA's reasoning in *Ng Ka Ling* emphasized consistency with the Basic Law, HKSAR's political autonomy and the importance of individual rights rather than the sovereign authority of the NPC.<sup>89</sup> The CFA declared that "the courts must avoid a literal, technical, narrow or rigid approach,"<sup>90</sup> and relied on what it viewed as standard "common law" methods.<sup>91</sup> How-

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originally became applicable to Hong Kong through ratification and/or extension by the United Kingdom and continues to apply despite the change of sovereignty. See GHAI, *supra* note 2, at 406-09. The Basic Law provides that the ICCPR and other international conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR. See Basic Law, *supra* note 5, art. 39(1).

83. *Ng Ka Ling*, 1 HKLRD at 353.

84. *Id.* at 352-54; *Chan Kam Nga*, 1 HKLRD at 306, 313-14.

85. *Chan Kam Nga*, 1 HKLRD at 310.

86. *Id.* (construing ICCPR, *supra* note 82, art. 23(1)).

87. *Ng Ka Ling*, 1 HKLRD at 348.

88. *Id.*

89. See Clarke, *supra* note 30, at 780. See also Reed Special Report, *supra* note 41, at 18.

90. *Ng Ka Ling*, 1 HKLRD at 340.

91. *Id.*

ever, the CFA's ruling in *Ng Ka Ling* immediately received many critical responses.<sup>92</sup> Some perceived aspects of the decision as threatening to China's sovereignty and as usurping the SCNPC's ultimate interpretive authority over the Basic Law.<sup>93</sup> Others feared that the HKSAR administration's concern over increased immigration might lead it to disregard the CFA ruling.<sup>94</sup> Dr. Raymond Wu Wai-Yung, a local Basic Law Committee member and leading advisor to the CPG on how to interpret the Basic Law, argued that the "CFA's decision was simply wrong."<sup>95</sup> Dr. Wu maintained that the CFA should have referred the right of abode issues to the SCNPC for its interpretation, and the Basic Law should have been interpreted in accordance with the mainland legal system, not the common law principles that the CFA adopted.<sup>96</sup> Although Dr. Wu reiterated that the CFA was independent from the local executive and legislature, he insisted that HKSAR is part of China and its judicial independence could not override China's sovereign rights.<sup>97</sup> Furthermore, four influential mainland legal ex-

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92. Professor Jerome A. Cohen, a prominent Chinese law expert at New York University Law School, pointed out CFA's failure to ask the SCNPC whether mainland migrants needed permission from Chinese authorities to leave the mainland, and further criticized the CFA, stating: "The court, I think, set in motion the whole political [right of abode] crisis." See Cliff Biddle, *Court Flunked Test, Says U.S. Professor*, S. CHINA MORNING POST, Dec. 6, 1999, at 4, available at 1999 WL 30351120. Law Professor Xiao Weiyun of Beijing University argued that the *Ng Ka Ling* decision was in direct opposition to the interest of Hong Kong residents and has hindered efforts to maintain stability and prosperity. See Rone Tempest, *Hong Kong-Beijing Dispute Deepens China: Mainland Official Assails Ruling by Territory's Top Court*, L.A. TIMES, Feb. 9, 1999, at A4, available at 1999 WL 2128294. See generally XIAO WEIYUN ET AL., WHY THE COURT OF FINAL APPEAL WAS WRONG: COMMENTS OF THE MAINLAND SCHOLARS ON THE JUDGMENT OF THE COURT OF FINAL APPEAL, reprinted in HONG KONG'S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION 53 (Johannes M.M. Chan trans., Johannes M.M. Chan et al. eds., 2000).

93. *Landmark Ruling*, S. CHINA MORNING POST, Jan. 30, 1999, at 14, available at 1999 WL 2519692.

94. *Test for Tung*, S. CHINA MORNING POST, Feb. 9, 1999, at 14, available at 1999 WL 2520660.

95. *Reed Special Report*, supra note 41, at 21. See No, supra note 65, at 4; Angela Li, *Step Down Call to Beijing Adviser*, S. CHINA MORNING POST, Feb. 4, 1999, at 4, available at 1999 WL 2520100.

96. See *Reed Special Report*, supra note 41, at 21; No, supra note 65, at 5.

97. See No, supra note 65, at 5.



perts,<sup>98</sup> who had helped draft the Basic Law, challenged the *Ng Ka Ling* decision, claiming the CFA had abrogated to itself powers that must remain invested with the NPC.<sup>99</sup>

On February 12, 1999, the Chief Executive of the HKSAR, Tung Chee-Hwa, dispatched HKSAR's Secretary for Justice, Elsie Leung, to Beijing to discuss the right of abode ruling with the Chinese government authorities.<sup>100</sup> Moreover, on February 24, 1999, the HKSAR administration filed an "application for clarification" of the right of abode judgment with the CFA.<sup>101</sup> In response to the *clarification* request, the CFA issued a brief opinion ("*Ng Ka Ling* (No. 2)") clarifying its decision in *Ng Ka Ling*.<sup>102</sup> In its brief opinion, the CFA held that its judicial power is "derived from and is subject to" the Basic Law, and acknowledged that the Court was following "an exceptional course" by reconsidering or "clarifying" its prior judgment.<sup>103</sup> However, the CFA did not expressly vacate or modify any of the conclusions from its original decision.<sup>104</sup> Instead, the *Ng Ka Ling* (No. 2) opinion acknowledged the initial grant of interpretive authority to the SCNPC as stated in Article 158 of the Basic Law.<sup>105</sup>

Meanwhile, the HKSAR administration repeatedly stressed the severe social problems and unbearable consequences that would be triggered by the *Ng Ka Ling* decision, including the fact that social resources could hardly meet the immediate needs of this large group of immigrants for "education, housing,

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98. Professors Xiao Weiyun and Shao Tianren of Beijing University, Professor Wu Jianfan of the Legal Research Centre of the Social Science Academy of the PRC and Professor Xu Chongde of the People's University in Beijing. See XIAO, *supra* note 92, at 53-59.

99. See Rowan Callick, *China Lays Down Some Basic Law in Hong Kong*, AUSTL. FIN. REV., Feb. 10, 1999, at 1, available at 1999 WL 5066225.

100. See Chris Yeung & Cheung Yi, *Law Chief in Beijing Abode Trip*, S. CHINA MORNING POST, Feb. 11, 1999, available at 1999 WL 2520786.

101. Johannes M.M. Chan, *What the Court of Final Appeal Has Not Clarified in Its Clarification: Jurisdiction and Amicus Intervention*, in HONG KONG'S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION 171, 172 (Johannes M.M. Chan et al. eds., 2000).

102. *Ng Ka Ling & Others v. Director of Immigration* (No. 2), (1999) 2 HKCFAR 141, [1999] 1 HKLRD 577, [1999] 1 HKC 425 (Feb. 26, 1999), available at [http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv\\_14\\_16\\_98a.htm](http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_14_16_98a.htm) (last visited Mar. 19, 2002) [hereinafter *Ng Ka Ling* (No. 2)].

103. *Ng Ka Ling* (No. 2), 1 HKLRD at 577.

104. *Id.*

105. *Id.* See also Basic Law, *supra* note 5, art. 158.

medical and health services, social welfare and other needs.”<sup>106</sup> Since the Handover, Hong Kong’s government had already put 43,000 mainland children into an education system whose primary schools have long run on half-day shifts because of overcrowding.<sup>107</sup> Hence, a special government task force was set up to oversee the influx of mainland children created by the *Ng Ka Ling* ruling.<sup>108</sup> The task force also sought to establish a means of regulating the potential massive influx, by arranging a DNA testing system to detect and eliminate frauds.<sup>109</sup> However, many mainlanders contested the requirement of DNA typing of parents and child, a procedure that could cost between \$300 and \$1,000, and which would impose a prohibitive sum for the mainland families,<sup>110</sup> whose average annual income was roughly \$840.<sup>111</sup>

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106. 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*, in HONG KONG’S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION 474, 476 (Johannes M.M. Chan et al. eds., 2000), available at [http://www.info.gov.hk/basic\\_law/english/f04.htm](http://www.info.gov.hk/basic_law/english/f04.htm) (last visited Mar. 19, 2002) [hereinafter *Chief Executive’s Report*]. See also Chee-Hwa Tung, Opening Remarks at the Press Conference on Right of Abode Issue (May 18, 1999), at <http://www.info.gov.hk/ce/speech/cesp.htm> (last visited Mar. 19, 2002) [hereinafter *Chief Executive’s Remarks*].

107. See *Hong Kong: Enter the Children*, ECONOMIST, Feb. 6, 1999, at 42, available at 1999 WL 7361636.

108. See *id.* See also CENSUS AND STATISTICS DEPARTMENT OF HKSAR, ESTIMATES OF THE NUMBER OF MAINLANDERS WITH RIGHT OF ABODE (1999), reprinted in HONG KONG’S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION 265-87 (Johannes M.M. Chan et al. eds., 2000) [hereinafter CENSUS REPORT]. See, e.g., Billy Wong Wai-Yuk & Jimmy Cheung, *Taskforce on Migrants Calculations Begin Amid Fears of Huge Influx After Abode Ruling*, S. CHINA MORNING POST, Feb. 3, 1999, at 1, available at 1999 WL 2519942.

109. See Diane Stormont, *International: Hong Kong Freedoms Challenged By Beijing*, DAILY TEL. (LONDON), Feb. 10, 1999, at 13, available at 1999 WL 12599576.

110. See Anne Stewart, *DNA Tests a Costly Solution*, S. CHINA MORNING POST, Feb. 3, 1999, at 4, available at 1999 WL 2519986; Billy Wong Wai-Yuk, *Hopeful Migrants Face Steep DNA Bills*, S. CHINA MORNING POST, Feb. 4, 1999, at 4, available at 1999 WL 2520095.

111. WORLD BANK, COUNTRY DATA: CHINA AT A GLANCE 1 (2001), at [http://www.worldbank.org/data/countrydata/aag/chn\\_aag.pdf](http://www.worldbank.org/data/countrydata/aag/chn_aag.pdf) (last visited Mar. 22, 2002).

According to HKSAR's estimations, in addition to some 13,000 children who have the Certificate of Entitlement and are now guaranteed their right of abode, another 75,000 could arrive in the next four years, and up to 400,000 are waiting to arrive in the next decade.<sup>112</sup> Moreover, HKSAR estimated the influx of children would cost \$91 billion<sup>113</sup> in additional capital spending to provide "housing, education, vocational training and retraining, medical and health care, welfare services, employment services, and transport."<sup>114</sup> Consequently, the *Ng Ka Ling* ruling outraged many ordinary Hong Kong citizens, who feared the massive influx and the strain it would put on social services in a time of deep recession.<sup>115</sup> However, the HKSAR government's calculations did not include the benefits that would flow from the expenditures, particularly employment opportunities and the benefits of an increased number of young migrants in a rapidly aging population.<sup>116</sup>

Although the HKSAR government had the option to amend the Basic Law by legislative voting, HKSAR's Chief Executive Tung Chee-Hwa eventually turned to China to settle the right of abode dispute.<sup>117</sup> The HKSAR government dismissed the amendment option, claiming that it could not take place for another ten months, when the NPC would next meet, a delay too long to contemplate.<sup>118</sup> Furthermore, the HKSAR government stated that "there [was] no guarantee even then, that the NPC would make any amendments."<sup>119</sup> Therefore, on May 20, 1999, Chief Executive Tung submitted a formal report to the

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112. *Hong Kong: Enter the Children*, *supra* note 107, at 42.

113. The estimated expenditure of HKD \$710 billion (Hong Kong dollars) is approximately USD \$91 billion. Mark Landler, *Beijing Overturns a Hong Kong Court Ruling on the Residency Status of Immigrants*, N.Y. TIMES, June 27, 1999, at A9, available at 1999 WL 30525282. See also CENSUS REPORT, *supra* note 108, at 275.

114. CENSUS REPORT, *supra* note 108, at 275.

115. *Hong Kong: Whose Laws?*, ECONOMIST, Mar. 6, 1999, at 38, available at 1999 WL 7361997. At that time, Hong Kong was mired in 7% economic recession. See Rowan Callick, *Beijing Pressing To Have Last Word*, AUSTRALIAN FIN. REV., Feb. 10, 1999, at 11, available at 1999 WL 5066247.

116. *Hong Kong Diminished*, *supra* note 64, at 16.

117. Craig S. Smith & Christina Mungan, *Hong Kong Vows to Challenge China Intervention*, WALL ST. J., June 28, 1999, at A19, available at 1999 WL-WSJ 5458196.

118. See Chief Executive's Remarks, *supra* note 106.

119. *Id.*

State Council in Beijing, requesting that the State Council ask the SCNPC to interpret the relevant provisions of the Basic Law according to the "true legislative intent."<sup>120</sup> As a result, the HKSAR government, particularly its Chief Executive, received heavy criticism from local legal communities for taking the case up to Beijing, jeopardizing the rule of law and compromising the independence of the judiciary.<sup>121</sup> Nonetheless, substantial numbers of people in Hong Kong expressed support for the government's decision to ask for SCNPC's interpretation, and hoped that the SCNPC would revoke the right of abode from the new migrants or reduce the excessive numbers of eligible mainland children under the *Ng Ka Ling* ruling.<sup>122</sup>

#### *D. The Standing Committee Interpretation of the Basic Law*

On June 26, 1999, the Standing Committee of the Ninth National People's Congress at its Tenth Session issued an "interpretation" of Articles 22(4) and 24(2)(3) of the Basic Law.<sup>123</sup> The SCNPC stated in its interpretation that the CFA failed to seek an interpretation of the SCNPC in compliance with the requirement of Article 158(3) of the Basic Law.<sup>124</sup> The SCNPC justified its interpretation by declaring that those relevant provisions, Articles 22 and 24, "concern affairs which are the responsibility of the Central People's Government and concern the relationship between the Central Authorities"<sup>125</sup> and the HKSAR. Hence, the SCNPC's interpretation overturned the CFA's stance on Article 24, and stated "the interpretation of

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120. See *Chief Executive's Report*, *supra* note 106, at 477.

121. F.T. McCarthy, *Hong Kong: Whose Law?*, *ECONOMIST*, Dec. 11, 1999, available at 1999 WL 29811990. See also *Hong Kong Diminished*, *supra* note 64, at 16; Bretigne Shaffer, *Hong Kong Undermines Its Own Freedom*, *WALL ST. J.*, July 2, 1999, at A12, available at 1999 WL-WSJ 5458970.

122. See Smith & Mungan, *supra* note 117; Landler, *supra* note 113, at 9.

123. The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted on June 26, 1999, by the Standing Committee of the Ninth National People's Congress of the People's Republic of China at its Tenth Session, 38 I.L.M. 1469 (1999), available at [http://www.info.gov.hk/basic\\_law/fulltext/index.htm](http://www.info.gov.hk/basic_law/fulltext/index.htm) (last visited Mar. 19, 2002) [hereinafter Interpretation].

124. *Id.* at 1469.

125. *Id.*

the Court of Final Appeal is not consistent with the legislative intent."<sup>126</sup>

The SCNPC's interpretation made no attempt to explain why the CFA's interpretation was incorrect or why such a requirement should apply to those who seek the right of abode.<sup>127</sup> It simply stated that the relevant 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>128</sup> The SCNPC found that the Basic Law gives residency rights only to children whose parents were Hong Kong residents when they were born, but agreed that the right extends to children born out of wedlock.<sup>129</sup> Although the SCNPC overturned the CFA's decision, the right of abode in HKSAR, which has been acquired under the judgment of the CFA on the *Ng Ka Ling* ruling "shall not be affected."<sup>130</sup> Here, the SCNPC did not apply its interpretation retrospectively.<sup>131</sup>

While the SCNPC's interpretation defused the immigration crisis, as repeatedly emphasized by the HKSAR administration, a "subtle but real constitutional conflict remains."<sup>132</sup> In the CFA's clarification opinion, the Court held that "it cannot 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 and the procedure therein."<sup>133</sup> However, problems may arise if the CFA believes that the NPC's acts are inconsistent with the Basic Law.<sup>134</sup> Inevitably, HKSAR's judicial independence will suffer and the CFA's independent constitutional review power will be detrimentally frustrated, since the NPC can easily interfere and re-interpret the

126. *Id.*

127. *Id.* at 1469-70.

128. *Id.* at 1470.

129. Interpretation, *supra* note 123, at 1470.

130. *Id.*

131. *Id.*

132. Frank Shihong Hong, *International Decision: Ng Ka Ling v. Director of Immigration*, 2 HKCFAR 4, Court of Final Appeal of the Hong Kong Special Administrative Region, January 29, 1999, 94 AM. J. INT'L L. 167, 171 (2000).

133. *Ng Ka Ling* (No. 2), 1 HKLRD, at 577.

134. Regardless of how CFA handles the issue, the integrity of all involved will be damaged. The CFA's power will be undermined, China will be accused of interfering in Hong Kong's affairs and the HKSAR government will be criticized for not defending judicial independence.

Basic Law without giving any explanation, and simply state that it is the responsibility of the Central People's Government.<sup>135</sup>

#### V. DIFFERENCES BETWEEN THE PRC AND THE HKSAR LEGAL SYSTEMS

The SCNPC's interpretation underscored the differences between mainland legal interpretation and the approach of the common law, which was to be maintained in HKSAR under Article 8 of the Basic Law.<sup>136</sup> As a mainland institution, the SCNPC invariably approached the Basic Law from the PRC interpretive tradition.<sup>137</sup> Hence, China's legal experts were astonished by the CFA's ruling in *Ng Ka Ling*.<sup>138</sup> From China's point of view, the right of abode crisis was a great annoyance because of the fact that HKSAR seemed to have allowed itself to be over-run by massive mainland influx.<sup>139</sup> A Chinese legal expert, Professor Xu Chongde,<sup>140</sup> publicly criticized the CFA's judgment and asked, "how could the Court of Final Appeal, as Hong Kong's highest court, have made a decision that was so bad for the territory?"<sup>141</sup> The Professor further denounced the CFA ruling and stated that the resulting negative impact has been in "direct opposition to the interests of Hong Kong residents and has hindered efforts to maintain stability and prosperity" in Hong Kong.<sup>142</sup>

This question underpins the essence of the dispute between the two sides, and is the fundamental difference between the common law system in HKSAR and China's socialist legal system. At its most fundamental, it is the rule of law versus the

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135. Yash Ghai, *The NPC Interpretation and Its Consequences*, in HONG KONG'S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION 199, 207-09 (Johannes M.M. Chan et al. eds., 2000).

136. Basic Law, *supra* note 5, art. 8.

137. Hongshi Wen, *Interpretation of Law by the Standing Committee of the National People's Congress*, in HONG KONG'S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION 183, 188-95 (Johannes M.M. Chan et al. eds., 2000). See also XIANFA art. 67, sec. 4 (1982).

138. Wen, *supra* note 137, at 206-07.

139. *Id.*

140. See *supra* note 98 and accompanying text.

141. China: NPC Clarifies Basic Law, CHINA DAILY, July 7, 1999, at 4, available at 1999 WL 17780753.

142. *Id.*

rule by law.<sup>143</sup> The Chinese phrase that expresses the notion of "the rule of law" (*fa zhi*) could also be translated as "rule by law."<sup>144</sup> Similarly, the PRC Constitution, *Xianfa*,<sup>145</sup> is not law in the English common law sense.<sup>146</sup> Under the rule of law inherited by Hong Kong, decisions in courts are made strictly according to the law.<sup>147</sup> The common law court generally defers the social consequences of its decision to the administration, focusing mainly on the interpretation of the law.<sup>148</sup> On the other hand, the Chinese legal system takes into consideration such issues as the consequences of every decision and action.<sup>149</sup>

Under the Chinese legal system, the NPC is the highest state organ and enjoys both the power to enact and interpret legislation.<sup>150</sup> The NPC's legislative acts and decisions are "not subject to challenge or veto by any other [state] organ."<sup>151</sup> Therefore, if the SCNPC adopts a decision that is inconsistent with the national law, no court in China has jurisdiction to declare the decision invalid.<sup>152</sup> Indeed, the only redress is to invite the NPC or the SCNPC to reconsider its decision.<sup>153</sup>

In China, the role of the court is confined to adjudicating cases.<sup>154</sup> The concept of constitutional review by judicial organ simply does not exist in the mainland system.<sup>155</sup> Its legal system is based on the socialist theory that all powers arise from the people and should ultimately rest in the people, whose will is reflected by the NPC, the "supreme soviet."<sup>156</sup> The courts on the mainland would never make a judgment that affects the stability of society, even if it means sacrificing the integrity and

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143. Dellapenna, *supra* note 72, at 126-28.

144. *Id.* at 126.

145. See generally XIANFA; *supra* note 29 and accompanying text.

146. See Ann D. Jordan, *Lost in the Translation, Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region*, 30 CORNELL INT'L L.J. 335, 337-38 (1997).

147. See *id.* at 348-50.

148. See *id.*

149. See *id.*

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

151. XIAO, *supra* note 92, at 54.

152. See CHEN, *supra* note 4, at 105. See also XIANFA arts. 3, 92, 110, 128 & 133 (1982).

153. See CHEN, *supra* note 4, at 105.

154. See *id.* at 106-07.

155. See *id.*

156. *Id.*

consistency of its law.<sup>157</sup> Instead of recognizing the doctrine of separation of powers,<sup>158</sup> the PRC system is based on separation of functions and responsibilities,<sup>159</sup> under the unified guidance of the organs of state power.<sup>160</sup>

On the other hand, Hong Kong is under a very different system, the common law. Article 8 of the Basic Law provides 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" and preserved in the HKSAR.<sup>161</sup> The common law believes in the separation of powers, and the power of interpretation of law rests solely in the judiciary.<sup>162</sup> Neither the legislature nor the executive has the power to make authoritative interpretations of the law.<sup>163</sup> In fact, the sole power of the judiciary to pronounce authoritative interpretation of legislation goes to the very root of the common law system.<sup>164</sup>

Nonetheless, Law Professor Shao Tianren<sup>165</sup> of Beijing University asserted that Hong Kong courts did not enjoy the power of constitutional review before the Handover because of the doctrine of supremacy of Parliament under English law.<sup>166</sup> Therefore, even under the guarantee of Article 8 of the Basic Law, HKSAR courts could not have this power after the Handover.<sup>167</sup> However, under the common law system, no organ is

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157. Ching, *supra* note 75, at 20.

158. The doctrine of separation of powers is established by the landmark United States Supreme Court decision, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

159. The separation of functions and responsibilities is among the "administrative, adjudicative and procuratorial organs." CHEN, *supra* note 4, at 108.

160. *Id.*

161. Basic Law, *supra* note 5, art. 8 (emphasis added).

162. See generally *Marbury*, 5 U.S. at 137.

163. *Id.*

164. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 328 (6th ed., 2000).

165. See *supra* note 98 and accompanying text.

166. See XIAO, *supra* note 92, at 56. Professor Shao argued that Hong Kong, as a British colony, was not empowered to challenge an Act of Parliament of the United Kingdom. See *id.* Likewise, HKSAR does not have the right to challenge the legislative act of the NPC and its Standing Committee. See *id.*

167. See *id.*



above the law.<sup>168</sup> Even before the Handover, the doctrine of the supremacy of Parliament had not prevented the Hong Kong courts from declaring certain legislation invalid if the Parliament failed to comply with the manner and form requirements for legislative amendments.<sup>169</sup>

## VI. CONCLUSION

Clearly, the sovereignty interest of the PRC inevitably conflicted with the CFA's ruling in *Ng Ka Ling*.<sup>170</sup> Hong Kong saw the Basic Law as a legal guarantee of autonomy, right and a capitalist economy.<sup>171</sup> The populous envisioned an independent judicial system with the powers to enforce the Basic Law, which was a primary means of underwriting that guarantee.<sup>172</sup> To the contrary, the Chinese government viewed judicial review as a restriction on its powers as sovereign, as well as complicating its overview of the HKSAR.<sup>173</sup> Beijing preferred a legal system whereby the mode of interpretation was more political and flexible.<sup>174</sup> Moreover, the SCNPC interpretation represented a significant step toward a hybrid legal system in HKSAR, away from the idea of "one country, two systems."<sup>175</sup>

There are alternative methods available to resolve similar judicial review controversies in the future. From China's perspective, Xianfa and the NPC are supreme in the mainland,<sup>176</sup> and their supremacy is materialized in HKSAR through the

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168. NOWAK & ROTUNDA, *supra* note 164, at 85.

169. See generally JOSEPH JACONELLI, ENACTING A BILL OF RIGHTS: THE LEGAL PROBLEMS 155-78 (1980). Since the promulgation of the Hong Kong (Legislative Power) Orders in 1986 and 1989, the Hong Kong courts might declare an English Act repealed if it was inconsistent with a local statute in certain defined areas. See GHAI, *supra* note 2, at 213-14.

170. XIAO, *supra* note 92, at 53-56.

171. See GHAI, *supra* note 2, at 139-42.

172. *Id.*

173. See XIAO, *supra* note 92, at 53-59. See also *supra* notes 95-99, 139-42 and accompanying text.

174. *Hong Kong: Uncharted Territory*, BUS. ASIA, Feb. 22, 1999, available at 1999 WL 10768451.

175. *Hong Kong Diminished*, *supra* note 64, at 16; No Kwai-Yan, *Concern for Judicial System After Mainland Experts Say Migrants Verdict Challenges NPC, Crisis Fear Over Attack on Court*, S. CHINA MORNING POST, Feb. 8, 1999, at 1, available at 1999 WL 2520459.

176. See XIAO, *supra* note 92, at 53-56.

framework of the Basic Law.<sup>177</sup> Thus, the Basic Law is the bridge between the two conflicting legal systems and legal cultures. However, the success of this linkage largely depends on the relationship between China and HKSAR and the development of constitutionalism in China. The Basic Law recognizes and preserves the internal differences of the two legal systems,<sup>178</sup> but it lacks an institutional structure to generate positive consensus between both sides, and particularly, to restrain Chinese authorities from possible interference. Hence, suggestions to resolve future controversies include: (1) strengthening the communication channel between the two conflicting legal systems; (2) establishing a formal dispute resolution mechanism in the Basic Law; and (3) amending relevant provisions in the Basic Law to clearly identify under what circumstances the CFA should seek an interpretation from the NPC.

If China pledges to maintain the "one country, two systems" principle, the PRC government must demonstrate a commitment to preserve the rule of law in HKSAR, its judicial independence, finality of judicial decisions, as well as other judicial qualities that have been known in practice in Hong Kong for the past decades. Undoubtedly, the common law system has been a central component of what makes Hong Kong among the most stable, open and productive societies both in Asia and the world.<sup>179</sup> The right of abode controversy reflects a perilous threat to the common law system, and merits the attention and concern of lawyers around the world.<sup>180</sup> In contrast to the original right of abode cases, subsequent CFA rulings have avoided challenging Beijing's authority and held that the SCNPC's interpretation was a "valid and binding interpretation" of Articles 22(4) and 24(2)(3) of the Basic Law, which the

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177. See generally Basic Law, *supra* note 5, art. 158.

178. See generally Basic Law, *supra* note 5.

179. Yuan-li Wu, *In the Shadow of 1997: Interaction Between Hong Kong and Its Economic Partners and Neighbors*, in *THE FUTURE OF HONG KONG: TOWARD 1997 AND BEYOND* 139, 140-41 (Hungdah Chiu et al. eds., 1987).

180. See Lucia Tangi, *Powers Told to Back Off Controversy*, H.K. STANDARD, Feb. 12, 1999, available at 1999 WL 5640657; Jill McGivering, *Britain in Clash over Hong Kong Law*, THE TIMES, Feb. 10, 1999, at 9, available at 1999 WL 7972003.

courts of the HKSAR are under a duty to follow.<sup>181</sup> In its recent ruling, *Ng Siu Tung*,<sup>182</sup> the CFA followed the SCNPC's interpretation and ruled that the right of abode applied only to migrants who arrived before the Handover on July 1, 1997, with parents who were permanent HKSAR residents at the time.<sup>183</sup> Those who arrived after the Handover, but before January 29, 1999 (the decision date of *Ng Ka Ling* and *Chan Kam Nga*), may be allowed to stay under the case by case discretion of the Director of Immigration, if they can show the HKSAR government's promise or representation gives rise to a "legitimate expectation."<sup>184</sup> Whether this judgment marks the end of the right of abode controversy will depend on the HKSAR government's attitude on reconsidering the removal orders to those remaining appellants,<sup>185</sup> and how serious those mainland Chinese abode-seekers, who failed in the recent legal battle, are in planning to appeal to the United Nations.<sup>186</sup> Should the right of abode controversy turn out to have been an isolated event, as

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181. *Lau Kong Yung & Others v. Director of Immigration*, (1999) 2 HKCFAR 300, [1999] 2 HKLRD 58 (Dec. 3, 1999), available at [http://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) (last visited Mar. 19, 2002) (The CFA upheld the HKSAR government's right to deport 17 mainland children, who were born before their parents had obtained the right to live in Hong Kong.).

182. *Ng Siu Tung & Others v. Director of Immigration*, FACV Nos. 1-3 of 2001 (Jan. 10, 2002), available at [http://legalref.judiciary.gov.hk/doc/prd/html/whats\\_new/eng\\_jud/FACV000001\\_2001.htm](http://legalref.judiciary.gov.hk/doc/prd/html/whats_new/eng_jud/FACV000001_2001.htm) (last visited Mar. 20, 2002) [hereinafter *Ng Siu Tung*].

183. *See id.*

184. *Id.* Over 1,000 of those 5,114 appellants have previously received specific statement from the Director of Immigration in standard letters, stating that the HKSAR government would treat persons who fell within the category whose status was being determined by the court as if they were parties to the litigation. *Id.* Hence, in *Ng Siu Tung*, the CFA applied the "doctrine of substantive legitimate expectation" and allowed those appellants' cases to be reconsidered by the Director of Immigration if they can show a "legitimate expectation that they would receive the same treatment as the parties in *Ng Ka Ling* and *Chan Kam Nga*, and that the judgments in those cases would be implemented by the Director of Immigration in their cases." *Id.*

185. Matt Pottinger, *Hong Kong Ruling Rejects Abode Seekers*, WALL ST. J., Jan. 11, 2002, at A8, available at 2002 WL-WSJ 3382699. *See also* *China: Ruling on Hong Kong Residency*, N.Y. TIMES, Jan. 11, 2002, at A6.

186. Alan Low, *Abode-Seekers to Take Hong Kong Case to United Nations*, AGENCE FRANCE-PRESSE, Jan. 11, 2002, available at 2002 WL 2314074.

the HKSAR administration maintains, the damage done need be neither fundamental nor lasting. If, however, further requests lead to additional reinterpretation from the NPC, then Hong Kong's common law traditions will necessarily erode. Thus, it is strongly recommended that the PRC and HKSAR governments consider the available alternative resolutions.

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