

**Right of Final Adjudication
and Interpretation:
Establishing Constitutional
Interpretation Procedures**

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**RIGHT OF FINAL ADJUDICATION IN HONG KONG:
ESTABLISHING PROCEDURES OF CONSTITUTIONAL INTERPRETATION**

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I. INTRODUCTION

The “right of abode” cases¹ raised questions regarding the proper relationship between the Standing Committee of the National People’s Congress (“Standing Committee”) and the highest court of

1 On January 29, 1999, the Court of Final Appeal (CFA), in two separate cases, invalidated restrictions on who may obtain right of abode status in Hong Kong as contravening the Basic Law. In *Chan Kam Nga (An Infant) & OR v. Director of Immigration*, 1999-1 HKC 347, the CFA held that Chinese nationals obtained right of abode status through parents though the parents acquired Hong Kong permanent residency status after the immigrant’s birth. In *Ng Ka Ling (An Infant) & Anor v. Director of Immigration*, 1999-1 HKC 291, the CFA invalidated a scheme requiring Chinese nationals from mainland China who are claiming right of abode status in Hong Kong to obtain a one-way exit permit from the People’s Republic of China (PRC).

N.B.: All pinpoint cites in the cases are to Lexis pages numbers either by * paging, where provided by Lexis-Nexis, or by the page number of the download where there is no * paging available.

Hong Kong, the Court of Final Appeal (CFA), in interpreting the Basic Law,² Hong Kong's "mini-constitution."³ After the CFA refused to seek a Standing Committee interpretation of two Basic Law provisions, the Chief Executive of the Hong Kong Special Administrative Region (HKSAR) independently sought Standing Committee interpretation of those two provisions. On June 26, 1999, the Standing Committee issued a resolution ("Standing Committee Resolution"), which interpreted the two provisions and effectively overturned the CFA's decisions. Though the Standing Committee's substantive interpretation has significant impact on immigration, the Standing Committee Resolution is more significant for setting three precedents.⁴ First, the Standing Committee Resolution affirms the HKSAR Chief Executive's authority to seek the Standing Committee's interpretation of particular Basic Law provisions ("Right to Assistance").⁵ Second, it affirms the Standing Committee's right to interpret particular provisions of the Basic Law *even after* the CFA has handed down a final decision ("Right of Final Interpretation"). Third, it directs the Hong Kong courts to interpret Basic Law provisions with the purpose of maintaining Hong Kong's prosperity.

The Basic Law is replete with vague terminology the definition of which differs in the civil law tradition of the People's Republic of China (PRC) and the common law tradition of Hong Kong. When viewed in light of the Chinese civil law definitions, the precedents set by the Standing Committee Resolution are consistent with the Basic Law. Effectively, however, the precedents limit the Basic Law's grant of the right of final adjudication ("Right of Final Adjudication") to the CFA. Section II sets forth the relevant terms of art in the Basic Law and how they differ in meaning between the Chinese civil law and the Hong

2 The NPC promulgated the Basic Law in April 1990 to enact the provisions of the Joint Declaration, an agreement between the PRC and Great Britain providing the terms for Hong Kong's return to the PRC. See *HKSAR v. Ma Wai Kwan David & ORS*, 1997-2 HKC 315 at Lexis *18-*20, *46 (1997) (Hong Kong Court of Appeal).

3 See Guiguo Wang & Priscilla M. F. Leung, *One Country, Two Systems: Theory into Practice*, 7 PAC. RIM L. & POL'Y J. 279, 296 (1998). Legal experts debate as to whether the Basic Law should be considered a constitution. Wang and Leung wrote that "the Basic Law should not be considered Hong Kong's Constitution, though it serves certain functions of a constitution for the territory." *Id.* See generally John M. Rogers, *Anticipating Hong Kong's Constitution from a U.S. Perspective*, 30 VAND. J. TRANSNAT'L L. 449 (1997), for the view that the Basic Law is a constitution.

4 See generally *Explanations on Hong Kong Basic Law: Explanations on Interpretation (Draft) of Clause Four, Article 22, and Item three, Clause two, Article 24, of the People's Republic of China Hong Kong Special Administrative Region (SAR) Basic Law by the National People's Congress (NPC) Standing Committee*, WORLD NEWS CONNECTION, June 1999, available in 1999 Westlaw 21206660 [hereinafter *NPC Explanations on Hong Kong Basic Law*].

5 See *infra* note 11 and accompanying text.

Kong common law system. In particular, the Standing Committee employs “interpretation” in its narrow sense to “ascertain[] the sense and meaning of the subject matter”⁶ and this is distinct from “judicial review.”⁷ Thus, only by understanding the narrow meaning of “interpretation” does the implication of the Standing Committee Resolution become comprehensible. Section III examines the procedural history of the right of abode cases leading to the Standing Committee Resolution. Section IV explains the Standing Committee’s rationale for establishing the precedents, the legality of such precedents, and the precedents’ impact on the CFA’s Right of Final Adjudication. This paper concludes that the HKSAR’s Right to Assistance and the Standing Committee’s Right of Final Interpretation are constitutionally valid under the Basic Law of Hong Kong though both rights effectively limit the CFA’s Right of Final Adjudication.

II. THE BASIC LAW: A CLASH OF LEGAL SYSTEMS

The events surrounding the Standing Committee Resolution were inevitable given the nature of the Basic Law as a document that serves two legal traditions. The PRC, a socialist, civil law country, promulgated the Basic Law to govern Hong Kong, a common law system.⁸ This intermingling of legal systems in the Basic Law has resulted in conflicting understandings of legal terms such as “judicial independence,” “interpretation,” and “adjudication.”⁹

In the Chinese civil law system, “interpretation” of law is the purview of the legislature and is separate and distinct from “adjudication,” which is the judiciary’s mere application of laws.¹⁰ Under the

6 See BLACK’S LAW DICTIONARY 566 (Abridged 6th ed. 1991). Black’s Law defines “judicial review” as the

[p]ower of courts to review decisions of another department or level of government. Form of appeal from an administrative body to the courts for review of either the findings of fact, or of law, or of both. May also refer to appellate court review of decisions of trial court or of an intermediate appellate court.

Id. at 593.

7 See *infra* notes 8-15 and accompanying text (explaining distinction between “interpretation” and “adjudication”).

8 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, 351 (1997). Though Britain and the PRC negotiated the terms governing Hong Kong’s return to the PRC, an effort that resulted in the Joint Declaration, the PRC has always maintained that the Basic Law is a domestically promulgated law. See Wang & Leung, *supra* note 3, at 296.

9 See Jordan, *supra* note 8, at 339-41, 353-54, 378-79.

10 Judicial organs in China “are limited to administering law as received and are not empowered to interpret the law or question its appropriateness.” *Id.* at 344.

common law, the judiciary adjudicates and interprets.¹¹ The Basic Law upholds the PRC's distinction. Article 19 of the Basic Law vests the HKSAR courts with "independent judicial power, including that of final adjudication," while Article 158 vests the Standing Committee with "the power of interpretation."¹² That "judgments previously rendered shall not be affected"¹³ further reflects the distinction between "interpretation" and "adjudication." In adjudicating cases, Hong Kong courts merely apply the interpretation rendered by the Standing Committee, yet the Standing Committee theoretically cannot determine the outcome of a case in merely interpreting the law.¹⁴ In the common law tradition, as interpretation and adjudication in practice are inseparable, both are within the purview of the courts because interpretation necessarily affects application of the laws.¹⁵

The Basic Law's adoption of the civil law distinction between "interpretation" and "adjudication," however, is consistent with British colonial legal traditions in Hong Kong. Article 19 provides that "the restrictions on [HKSAR courts'] jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained."¹⁶ Though Hong Kong is a common law system, the Hong Kong courts under British colonial rule were precluded from ruling on the validity of legislation passed by the sovereign, the British Parliament.¹⁷ The intermediate appellate court of Hong Kong, the Court of Appeal, affirmed this

11 *See id.* at 354.

12 THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA [APRIL 4, 1990] arts. 19 and 158, *replicated in* MING K. CHAN & DAVID J. CLARK, *THE HONG KONG BASIC LAW: BLUEPRINT FOR "STABILITY AND PROSPERITY" UNDER CHINESE SOVEREIGNTY* (1991) [hereinafter BASIC LAW]. *See infra* note 24 and accompanying text of Article 158.

13 BASIC LAW art. 158.

14 *See id.* *See infra* note 24 and accompanying text for text of Article 158. *See also* Peter Wesley-Smith, *Hong Kong's First Post-1997 Constitutional Crisis*, 1999 L. ASIA J. 24, 54.

15 *See* Jordan, *supra* note 8, at 375, 378-79.

16 BASIC LAW art. 19.

17 Though England is a common law system, it does not have a constitution. Thus, prior to England's accession to the European Community,

there was no such thing as an "unconstitutional Act of Parliament Indeed, the constitutional system of England recognizes the doctrine of 'sovereignty of Parliament,' whereby the English Parliament embodies the functions of both the executive and the legislature in one single body in exercise of the sovereignty of the state, and therefore the Acts passed by the English Parliament are virtually unchallengeable before the courts of England[.]

tradition in *HKSAR v. Ma Wai Kwan David & ORS*, where the court refused to consider the legality of the Standing Committee's authority to create the Provisional Legislative Council.¹⁸ Under PRC rule, the NPC and its Standing Committee replaced the British Parliament as sovereign.¹⁹ Relying on Article 19, the court in *Ma Wai Kwan* concluded that the HKSAR courts are precluded from determining the validity of acts by the NPC and its Standing Committee.²⁰

In sum, an overall reading of the Basic Law indicates that the drafters of the Basic Law intended to use the civil law terminology of the PRC. In the PRC context, "interpretation" is determining the meaning of the law and is solely within the legislature's authority. "Adjudication," on the other hand, is applying the law without "interpreting" it and is solely within the court's purview. As such, understanding any interpretation of the Basic Law requires knowing how interpretation functions in a PRC context.

III. PROCEDURAL HISTORY OF THE RIGHT OF ABODE CASES

Soon after Hong Kong returned to PRC rule, immigrants instituted actions challenging the legality of a series of ordinances enacted by the Provisional Legislative Council, Hong Kong's temporary

See Wang & Leung, *supra* note 3, at 308.

18 *See Ma Wai Kwan David*, 1997 HLC at Lexis 7.

[R]egional courts have no jurisdiction to query the validity of any legislation or acts passed by the sovereign. There is simply no legal basis to do so. It would be difficult to imagine that the Hong Kong courts could, while still under British rule, challenge the validity of an Act of Parliament passed in UK or an act of the Queen in Council which had effect on Hong Kong.... The PRC is the Sovereign of the HKSAR. Under its Constitution, the NPC is the highest organ of state power. Together with its Standing Committee, they exercise the legislative power of the PRC.

Ma Wai Kwan David, 1997 HKC Lexis at 43-44. *See also* J. Kate Burkhart, *HKSAR v. Ma Wai Kwan David & ORS: A Step in the Right Direction*, 6 TUL. J. INT'L & COMP. L. 609, 628 (1998).

There is, however, a difference between determining the validity of legislation passed by the NPC and interpreting the scope of the legislation. *See supra* note 7 and accompanying text. In the right of abode cases, the CFA did not invalidate the Basic Law, but rather the immigration ordinances passed by the HKSAR. Nevertheless, the principle of legislative primacy supports the proposition that the Standing Committee is better suited to interpreting the Basic Law.

19 *Ma Wai Kwan David*, 1997 HKC 347 at Lexis 44.

20 *Id.* at Lexis 45.

legislature.²¹ The immigrants argued that the ordinances imposed restrictions on obtaining right of abode in Hong Kong that contravened Article 24 of the Basic Law, which enumerates the categories of persons qualified to obtain permanent residency status.²² The issue of whether the ordinances contravened the Basic Law involved interpreting the scope of Article 24. Article 24 provides in pertinent part:

The permanent residents on the Hong Kong Special Administrative Region shall be:

1. Chinese citizens born in Hong Kong before or after the establishment of the [HKSAR];
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 [HKSAR];
3. Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2).[.]²³

The CFA thus faced the question of whether Article 158 of the Basic Law authorized it to interpret Basic Law provisions. Article 158 of the Basic Law provides:

[(1)] The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.

[(2)] The Courts of the *Hong Kong Special Administrative Region* may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the [PRC], or concerning the relationship between the [PRC] and the [HKSAR], and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.²⁴

21 On July 1 and July 10, 1997, the Provisional Legislative Council enacted Immigration Ordinances Nos. 2 and 3, enumerating restrictions and requirements for those seeking to acquire right of abode status in Hong Kong. The No. 2 Ordinance, challenged in *Chan Kam Nga*, required children claiming right of abode through their parents to have been born before their parents acquired right of abode. See *Chan Kam Nga*, 1999-1 HKC 347 at Lexis 5. In *Ng Ka Ling*, immigrants challenged the No. 3 Ordinance, which required Chinese nationals from Mainland China to obtain one-way exit permits from the PRC. See *Ng Ka Ling*, 1999-1 HKC 291 at Lexis 2-3.

22 See *id.* at Lexis 21-25.

23 BASIC LAW art. 24.

24 *Id.* art. 158 (emphasis and paragraph numbers added).

The CFA interpreted Article 158 as requiring submission of the relevant provisions to the Standing Committee only: (1) if the relevant Basic Law provisions concern “affairs which are the responsibility of the [PRC,] or ... [concern] the relationship between the [PRC] and the [HKSAR],” (“Exempted Provisions”); and (2) if interpretation of the relevant provisions will affect the final judgment.²⁵

The CFA ruled that Article 158 authorized it to interpret Article 24 because Article 24 only concerned HKSAR affairs. On behalf of the HKSAR government, however, the Director of Immigration argued that Article 24 had to be submitted to the Standing Committee for interpretation because Article 22, an Exempted Provision, qualified Article 24.²⁶ Article 22 of the Basic Law provides in relevant part:

For entry into the [HKSAR], *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 [PRC] after consulting the government of the Region.²⁷

According to the Director, Article 24 cannot be interpreted separately from Article 22 because those “people from other parts of China” qualifying for permanent residents under Article 24(3) fall within the scope of the PRC’s authority under Article 22.²⁸ The Director suggested that pursuant to Article 158 of the Basic Law, the interpretation of these provisions be submitted to the Standing Committee before the CFA reached a final decision.²⁹

The CFA rejected the Director’s suggestion that Article 22 qualified Article 24.³⁰ Because Article

25 See *Ng Ka Ling*, 1999-1 HKC 291 at Lexis 34.

26 See *id.* at Lexis 35.

27 BASIC LAW art. 22 (emphasis added).

28 See *Ng Ka Ling*, 1999-1 HKC 291 at Lexis 35.

29 See *id.* The CFA noted that the Director “makes clear that [he] is not seeking a reference to the Standing Committee under art. 158, but that he must draw to our attention these submissions to enable the Court to consider whether a reference should be made.” *Id.* This indicates that the Director never challenged the CFA’s authority to decide whether Standing Committee interpretation should be sought.

30 See *id.* at Lexis 38-40. The CFA found that while Article 22 may arguably be relevant to the interpretation of Article 24, submitting both to the Standing Committee for interpretation would give the Standing Committee power to interpret Article 24, a non-exempted provision. The CFA thus adopted a “predominant provision” test.

As a matter of substance, what predominantly is the provision of the Basic Law that has to be interpreted in this adjudication of the case? If the answer was an excluded provision, the Court of Final Appeal was bound to refer.

24 alone did not concern PRC affairs or the relationship between the PRC and the HKSAR, the CFA did not need to submit the relevant provisions to the Standing Committee for interpretation.³¹ More importantly, the CFA asserted that Article 158 conferred exclusive authority to the CFA to decide when provisions had to be submitted to the NPC for interpretation.³²

Under the CFA's interpretation of Article 24, the CFA invalidated the HKSAR ordinances challenged by the immigrants. The HKSAR denounced the CFA decisions as opening Hong Kong to a flood of 1.6 million immigrants and burdening Hong Kong's social and educational systems.³³ Though some argued that the HKSAR inflated the estimated number of immigrants,³⁴ the HKSAR was nevertheless successful in convincing Hong Kong residents that the CFA's rulings threatened the prosperity of Hong Kong.³⁵ The HKSAR inflated the numbers hoping to obtain enough public support for its next action, submitting the CFA's interpretation of the Basic Law's Articles to the Standing Committee, and to soften criticism that the submission was an attack on Hong Kong's high degree of autonomy.³⁶

If the answer was a provision which was not an excluded provision, then no reference has to be made, though an excluded provision was arguably relevant to the construction of the non-excluded provision even to the extent of qualifying it.

Id. at Lexis 9. Determining that Article 24 is the predominant provision, the CFA interpreted Article 24 without resort to Article 22. *See id.* at Lexis 35. *See also* Wesley-Smith, *supra* note 14, at 37-38.

31 *See supra* note 30. Because Article 24 on its face was not an exempted provision, submitting both provisions to the Standing Committee for interpretation would violate Hong Kong's high degree of autonomy. *See* Wesley-Smith, *supra* note 14, at 37.

32 *See Ng Ka Ling*, 1999-1 HKC 291 at Lexis 9. *See also* Wesley-Smith, *supra* note 14, at 37.

33 *See NPC Explanations on Hong Kong Basic Law*, *supra* note 4, at WL 1-2.

34 *See One Law, Two Systems? What the NPC's reinterpretation means*, ASIA WEEK, 1999 WL 7759372, July 9, 1999 [hereinafter *One Law, Two Systems?*]. This figure includes 980,000 people who qualify as second-generation mainland residents, that is, they are children who qualify under Article 24(3) when their parents, who originally obtained right of abode through Article 24(3), become permanent residents. *See NPC Explanations on Hong Kong Basic Law*, *supra* note 4, at WL 1-2.

35 According to a survey conducted by the Hong Kong Policy Institute, 83.8% of respondents opposed the CFA right of abode decisions. *See* Frank Ching, *Scare Tactics*, FAR EASTERN ECONOMIC REVIEW, May 13, 1999, ¶ 5 (visited Aug. 8, 1999) <http://203.105.48.72/9905_13/p18hongkong.html> (downloaded from <<http://www.feer.com>>). *See also* *Its claiming ROA exert pressure on immigration control*, HK Special Administrative Region Govt. Press Release (visited Aug. 21, 1999) <<http://www.info.gov.hk/gia/general/199907/16/0716262.htm>>.

36 *See Hong Kong Under Chinese Rule: Hearings Before the Subcommittee on East Asian and Pacific Affairs of the Senate Foreign Relations Committee*, CONGRESSIONAL TESTIMONY BY FEDERAL DOCUMENT CLEARING HOUSE, 1999 WL 20009861, July 1 1999, at WL 4 [hereinafter *Testimony of Jerome Cohen*]. The HKSAR government considered three options: bringing a new suit and hoping that the Court would overrule itself, seeking an amendment to the Basic Law, or seeking the Standing

On May 20, 1999, under authority granted by Articles 43 and 48 of the Basic Law, HKSAR Chief Executive Tung Chee-Hwa submitted to the State Council³⁷ a “Report Requesting the Central People’s Government’s Assistance in Resolving Problems Encountered in Implementing Relevant Provisions of the PRC Hong Kong SAR Basic Law.”³⁸ Tung argued that Articles 43 and 48 of the Basic Law authorized him to seek a Standing Committee interpretation of the relevant provisions, which would be a final interpretation.³⁹ Article 43 is a general provision stating that the Chief Executive is head of the HKSAR and is accountable to the PRC.⁴⁰ Further, Article 48, which enumerates the powers and functions of the Chief Executive, provides that the Chief Executive is “responsible for the implementation of this Law and other laws which, in accordance with this Law, apply in the Hong Kong Special Administrative Region.”⁴¹

Committee’s interpretation. *See id.* The HKSAR rejected the first two options as being slow. *See id.* Some Hong Kong legal scholars, however, view that the opposition of two-thirds of the Hong Kong delegates to the NPC to seeking an amendment forced the HKSAR to seek a Standing Committee interpretation. *See One Law, Two Systems?*, *supra* note 34, at WL 1. These delegates reportedly believed that the CFA made a mistake. *See id.* Under the Basic Law, a two-thirds majority of both the Legislative Council (LegCo) and the Hong Kong delegation is required to pass an amendment. *See id.*

37 Why the Chief Executive submitted the report to the State Council, as opposed directly to the Standing Committee, is unclear. Tung’s submission to the State Council, as opposed to the Standing Committee, and the use of the word “assistance” in the title of the report suggest that he was not appealing a CFA final decision but that he was seeking “assistance.” In contrast, appeal connotes review of the correctness of the CFA’s decision. *See supra* note 7 for definition of judicial review. Use of “assistance” as opposed to “appeal” may be mere semantics for in effect what the Chief Executive sought was the Standing Committee’s review of the CFA decisions.

The Chief Executive’s request for “assistance,” however, may be important in that it suggests that the Chief Executive can involve the PRC in HKSAR affairs not in connection with a CFA decision.

38 *See NPC Explanations on Hong Kong Basic Law*, *supra* note 4, at WL 1.

39 *See Hong Kong Under Chinese Rule: Hearings Before the Subcommittee on East Asia and Pacific Affairs of the Senate Foreign Relations Committee*, Congressional Testimony by Federal Document Clearing House, July 1, 1999, 1999 WL 20009860, at WL 2 (statement by Margaret Ng) [hereinafter Statement by Margaret Ng].

40 Article 43 states:

The Chief Executive of the Hong Kong Special Administrative Region shall be the head of the [HKSAR] and shall represent the Region.

The Chief Executive of the [HKSAR] shall be accountable to the [PRC] and the [HKSAR] in accordance with the provisions of this Law.

BASIC LAW art. 43.

41 Article 48, in relevant part, states:

The Chief Executive of the [HKSAR] shall exercise the following powers and functions:

1. To lead the government of the Region;

Justifying his reliance on these provisions, Tung claimed that he was entitled to assistance, including a final interpretation by the Standing Committee, because the CFA's ruling had made implementation of the Basic Law difficult.⁴² Margaret Ng, a Legislative Council member, criticized Tung for "clearly stretching articles 43 and 48 beyond their meaning."⁴³ Despite Tung's assertion that his plea would only be a one-time event,⁴⁴ critics condemned Tung for establishing a dangerous precedent, which allows him to circumvent judicial decisions as he pleases.⁴⁵

IV. STANDING COMMITTEE'S INTERPRETATION OF THE BASIC LAW

Within days after Tung submitted his report,⁴⁶ the Standing Committee issued a resolution effectively overturning the CFA's right of abode decisions and declaring that the CFA violated the Basic Law by not submitting Exempted Provisions to the NPC for interpretation.⁴⁷ While the Standing Committee Resolution has broad implications for mainland immigrants,⁴⁸ it is most significant for establishing three

2. To be responsible for the implementation of this Law and other laws which, in accordance with this Law, apply in the [HKSAR].

Id. art. 48.

42 *See* Statement by Margaret Ng *supra* note 39, at WL 2.

43 *Id.*

44 *See generally* *China Overpowers HK Crt in Immigration*, DOW JONES INTEL NEWS (June 26, 1999).

45 *See* Statement by Margaret Ng, *supra* note 39, at WL 2.

46 *See NPC Explanations on Hong Kong Basic Law*, *supra* note 4, at WL 2. The State Council, after considering Tung's report, requested the Standing Committee Standing Committee issue a final interpretation. *See id.*

47 *See generally id.*

48 The Standing Committee found that Article 22 qualified Article 24 and, therefore, the PRC maintains the right to control the entry into Hong Kong of all Mainlanders, including those entitled to right of abode under Article 24(3). *See id.* at WL 3. The Standing Committee found that the Basic Law drafters intended Article 22(4) to "affirm the entry and exit control system between the mainland and Hong Kong, which has been implemented over a long period." *Id.*

The Standing Committee interpreted the original intent of Article 24 as "to prevent a large population flow into Hong Kong, so as to facilitate Hong Kong's long-term prosperity and stability." *Id.* Thus, the Standing Committee concluded that Article 24 is inseparable from Article 22, because both were originally intended to control immigration between the PRC and the HKSAR and to ensure Hong Kong's overall prosperity. *See id.*

Further, the Standing Committee's interpretation of the original intent of Articles 22 and 24 evidences that the Standing Committee views the overall purpose of the Basic Law as ensuring Hong Kong's prosperity and stability. *See id.* Under the Standing

precedents that directly limit the CFA's Right of Final Adjudication. First, the HKSAR Chief Executive may obtain a Standing Committee interpretation of the Basic Law after the CFA has already entered a holding in the matter by virtue of Articles 43 and 48 when a CFA decision would compromise the stability and prosperity of Hong Kong. Second, the Standing Committee may exercise its Right of Final Interpretation at the request of the HKSAR Chief Executive, even after the CFA issued a final decision. Last, the Hong Kong courts must interpret Basic Law provisions with the goal of maintaining Hong Kong's stability and prosperity.

A. *HKSAR Chief Executive Has a Limited Right to Assistance*

By recognizing the Chief Executive's Right to Assistance, the Standing Committee Resolution implicitly equated the general powers granted to the Chief Executive to implement HKSAR laws as provided by Articles 43 and 48 with authority to seek a Standing Committee final interpretation of a CFA decision that endangered Hong Kong's prosperity. By not directly addressing whether Articles 43 and 48 conferred on the Chief Executive the Right to Assistance, the Standing Committee merely assumed that Articles 43 and 48 conferred such authority.⁴⁹ Therefore, the Standing Committee could determine that the Chief Executive's appeal was valid because the CFA's right of abode decisions threatened the prosperity of Hong Kong by permitting an immigration influx.⁵⁰ The Standing Committee's interpretation comported with its reading of the purpose of the Basic Law as ensuring Hong Kong's prosperity.⁵¹ In that regard, when the overall object of the Basic Law, i.e., the prosperity of Hong Kong, is compromised by the

Committee's interpretation, any limits imposed on immigration would necessarily be in conformity with the original intent of Basic Law. *See id.*

49 The Standing Committee Resolution merely states:

In accordance with power endowed by Article 43 and Item two, Article 48, of the PRC Hong Kong SAR Basic Law, Tung Chee-hwa, chief executive [sic] of the Hong Kong SAR, on 20 May submitted to the State Council the "Report Requesting the Central People Government's Assistance in Resolving Problems Encountered in Implementing Relevant Provisions of the PRC Hong Kong SAR Basic Law."

Id. at WL 1.

50 *See id.* at WL 2.

51 The Standing Committee interpreted the original intent of Articles 22 and 24 as controlling immigration for the purpose of ensuring Hong Kong's prosperity and stability. *See id.* at WL 3.

judiciary, the Chief Executive must submit the issue to the Standing Committee.

1. *Questionable validity of the Chief Executive's Right to Assistance*

To determine the validity of the Standing Committee's interpretation of Articles 43 and 48, one must examine whether such an interpretation is consistent with other Basic Law provisions and with "the legislative history of the Law and the policies that gave it shape."⁵² Apart from the articles upon which Tung relied, no other Basic Law provision manifestly authorizes the Chief Executive to seek a final interpretation from the Standing Committee.⁵³ Chapter VIII of the Basic Law, "Interpretation and Amendment of the Basic Law," contains only two articles: Articles 158 and 159. Article 158 authorizes the Hong Kong courts to interpret relevant provisions of the Basic Law, except Exempted Provisions.⁵⁴ The CFA must submit Exempted Provisions to the Standing Committee for interpretation before rendering a final judgment.⁵⁵ Article 159 vests the NPC with the power to amend the Basic Law.⁵⁶ No powers are reserved within this section for the Chief Executive to seek a Standing Committee interpretation. Those critical, as well those not critical, of the Standing Committee Resolution point to the Basic Law's silence to support their respective positions that the drafters of the Basic Law either intended or did not intend to confer the Right to Assistance upon the Chief Executive.

Tung's critics view the Basic Law's silence as a clear manifestation that the Basic Law drafters did not intend to grant the Chief Executive the Right to Assistance.⁵⁷ To support their position, these critics cite a 1995 agreement between the PRC and Britain on the composition and functions of the CFA ("CFA Agreement").⁵⁸ During the negotiations of the CFA Agreement, the PRC insisted that the Chief Executive

52 See Wang & Leung, *supra* note 3.

53 See *id.* at WL 2.

54 See *supra* note 25 and accompanying text.

55 See BASIC LAW art. 159.

56 See *id.*

57 See Statement by Margaret Ng, *supra* note 39, at WL 2.

58 See Jared Leung, *Concerns Over the Rule of Law and the Court of Final Appeal in Hong Kong*, ILSA J. INT'L & COMP. 843, 860-61 (1997). See also Lee, *infra* note 85, at 189-90.

retain the right to overturn CFA decisions, fearing that “the CFA might render erroneous decisions which could leave [the PRC or the HKSAR] with no recourse.”⁵⁹ When Britain and the PRC finalized the CFA Agreement, however, China dropped its demands and agreed on a compromise.⁶⁰ The resulting CFA Agreement only gave the Chief Executive the express power to direct the CFA to re-open a criminal case when new, relevant evidence arose.⁶¹

Other legal scholars view the Standing Committee’s interpretation of Articles 43 and 48 as granting the Chief Executive the Right to Assistance when Hong Kong’s prosperity is threatened as merely filling in a gap in the Basic Law.⁶² According to this view, the Basic Law’s silence on procedures for appealing to the Standing Committee when the CFA incorrectly refused to seek a Standing Committee interpretation was an accidental omission.⁶³ “The Basic Law drafters apparently assumed that, since the Standing Committee can issue such interpretations of its own accord at any time, it was unnecessary to provide for a request outside the judicial channel.”⁶⁴ Though such a view is consistent with PRC procedural norms and the principle of “legislative interpretations,”⁶⁵ the Standing Committee’s gap-filling may violate the “one-country, two systems” principle.⁶⁶

59 Leung, *supra* note 57, at 860.

60 *See id.* at 860-61.

61 *See id.*

62 *See* Testimony of Jerome Cohen, *supra* note 36, at WL 5.

63 *See id.*

64 *See id.*

65 China’s legal system is based on legislative primacy and the NPC, and not the judiciary, enjoys the power of final interpretation. *See* CONSTITUTION OF THE PEOPLE’S REPUBLIC OF CHINA art. 67 (Adopted as amended on March 29, 1993) [hereinafter PRC CONST.]. Because the Basic Law is an internal law promulgated by the NPC, much like other PRC laws, the Standing Committee, in theory, could overrule any judicial decision that it finds incorrectly interpreted the law. *See* Testimony of Jerome Cohen, *supra* note 36, at WL 5.

66 *See* BASIC LAW arts. 8, 18. Article 18 prohibits the application of PRC laws in Hong Kong and Article 8 guarantees that Hong Kong retains its common law system. *See id.* The HKSAR Chief Executive’s Right to Assistance may violate these two provisions because the Right to Assistance imposes a Chinese civil law tradition on Hong Kong’s common law system. *See id.* *See also infra* note 96.

2. Scope of Chief Executive's Right to Assistance

Despite the Hong Kong legal community's concern that the Chief Executive will exercise his Right to Assistance with unbridled discretion,⁶⁷ there are limitations on the Chief Executive's broad power. First, the Chief Executive may appeal only Basic Law Exempted Provisions.⁶⁸ Accordingly, the CFA must have first incorrectly refused to refer an Exempted Provision to the NPC. In the Standing Committee Resolution, the Committee found that Articles 22 and 24 are Exempted Provisions and that the CFA incorrectly refused to refer the articles to the Standing Committee for interpretation.⁶⁹ A further limitation, however, is self-imposed. In a statement to reporters, Tung recognized the danger of the precedent that he had set and he vowed that no further appeals would be made.⁷⁰ While Tung's words are not law, his statement evidences his concern that repeated assistance from the NPC could endanger the prosperity of Hong Kong.⁷¹

⁶⁷ See *One Law, Two Systems*, *supra* note 34. Questioning the propriety of the HKSAR's request, Democratic Party Leader Martin Lee stated: "If the CFA's ruling is in favor of the government, then it is final; if against the government, then it is semi-final." *Id.* Lee's statement reflects the view that the NPC's interpretation of Articles 43 and 48 gives the HKSAR Chief unbridled discretion to overturn any decision of the CFA that he does not like. According to the Standing Committee interpretation, the HKSAR Chief may request a Standing Committee re-interpretation whenever he encounters difficulty in implementing the laws. In this instance, the CFA's decision caused difficulty because the large influx of immigrants endangered Hong Kong's prosperity. One assumption underlying this criticism is that given the NPC's broad interpretation of "difficulty in implementing the laws," the Chief could easily seek NPC review by classifying any CFA decision as endangering Hong Kong's prosperity. Another assumption is that the HKSAR Chief would not exercise discretion in employing his Right to Assistance.

The Chief Executive's use of the word "assistance" in seeking the final interpretation, however, suggests that the Chief Executive may involve the PRC in Hong Kong affairs not in connection with any CFA decision. See *supra* note 37.

⁶⁸ See *One Law, Two Systems*, *supra* note 34. There are other criticisms arguing that the NPC can indiscriminately find nearly anything as concerning PRC affairs, particularly since the HKSAR is part of the PRC. It is important to note, however, that the HKSAR agreed that if Article 22 did not qualify Article 24, NPC interpretation would not have been required. See *Ng Ka Ling (An Infant)*, 1999-1 HKC 291 at Lexis 35-36. Naturally, there are provisions that concern only Hong Kong. See *id.* One current litigation may be instructive as to how the PRC will define "state affairs." Several persons are challenging Hong Kong ordinances preventing the burning of PRC and Hong Kong flags. See Testimony of Jerome Cohen, *supra* note 36, at WL 2. While the suit is currently in the Court of Appeal, the Hong Kong legal community has been discussing the question of whether the HKSAR Chief will exercise his Right to Assistance should the Court of Final Appeal decide that the ordinance contravenes the Basic Law. See *id.*

⁶⁹ See *NPC Explanations on Hong Kong Basic Law*, *supra* note 4, at WL 2-3.

⁷⁰ Tung told reporters that he has "taken this course of action because there was no alternative. This is not something we would like to do again if we can help it." *China Overpowers HK Crt in Immigration Case*, *supra* note 44.

⁷¹ See Testimony of Jerome Cohen, *supra* note 36, at WL 5. Continued request for assistance to the Standing Committee would undermine the business community's faith in Hong Kong's rule of law. The international business continuously cites the stability fostered by Hong Kong's rule of law as the reason for Hong Kong's prosperity. See Leung, *supra* note 57, at 850-851.

Additionally, Tung's attempts to garner public opinion through "scare tactics" to build support for his action suggest that he fears the backlash of public opinion⁷² and this fear should limit him in exercising his Right to Assistance.

B. *NPC's Right of Final Interpretation*

Responding to the Chief Executive's request for assistance, the Standing Committee justified interpreting Articles 22 and 24 after the CFA had interpreted the articles under the Standing Committee's broad powers of interpretation, which include the Right of Final Interpretation. The Right of Final Interpretation is the power to interpret an Exempted Provision even after the CFA has also interpreted the same provision. The Standing Committee based its authority to interpret Exempted Provisions on Article 67(4) of the PRC Constitution and Article 158(1) of the Basic Law.⁷³ Article 67 of the PRC Constitution enumerates interpretation of the laws as one of the Standing Committee's functions and powers.⁷⁴ Article 158(1) of the Basic Law states that "[t]he power of interpretation of this Law shall be vested in the [Standing Committee]."⁷⁵ Further, Article 158 does not exclusively grant to Hong Kong courts the authority to interpret provisions relating to purely Hong Kong affairs. Article 158 states that the "courts of the [HKSAR] may *also* interpret other provisions of this Law in adjudicating cases."⁷⁶ The presence of the word "also" signifies that Article 158 does not exclusively grant the power to interpret non-Exempted Provisions to the CFA.⁷⁷ According to the Standing Committee Resolution, these two provisions reserved to the Standing Committee an all-encompassing power of interpretation. The Standing Committee justified

72 Tung's "scare tactics" of inflating the number of immigrants qualifying under Article 24(3) evidence that he wanted public opinion on his side before taking the drastic measure of seeking a final interpretation by the Standing Committee. Tung's tactics may have been somewhat successful in drumming up public opinion in support of the HKSAR's position on immigration. *See supra* note 35.

73 *See NPC Explanations on Hong Kong Basic Law, supra* note 4, at WL 2.

74 PRC CONST. art. 67.

75 *See* BASIC LAW art. 158(1), *supra* note 24.

76 *Id.* (emphasis added).

77 Because the Standing Committee determined that the relevant provisions are Exempted Provisions, the question of whether the Standing Committee can exercise its power of interpretation with regards to non-Exempted Provisions remains. *See* Wesley-Smith, *supra* note 14, at 50.

exercising this power of interpretation *even after* the CFA interpreted the same provisions as “necessary and appropriate ... to ensure correct implementation of the law.”⁷⁸

To justify its final interpretation as “ensur[ing] the correct implementation of the law,”⁷⁹ the Standing Committee determined that the Articles 22 and 24 are Exempted Provisions that the CFA should have referred to the Standing Committee.⁸⁰ In noting that “the administration procedure governing the entry of mainland residents into Hong Kong also concerns the relationship between the [PRC] and the Hong Kong SAR,” the Standing Committee accepted the HKSAR’s argument that Article 22 qualified Article 24.⁸¹

The Standing Committee found that Article 22 permitted the PRC to control immigration into the HKSAR by Mainland Chinese nationals, including those entitled to right of abode status in Hong Kong under Article 24(3).⁸² Coming to this conclusion, the Standing Committee interpreted both articles in light of the Basic Law’s purpose of maintaining the prosperity of Hong Kong.⁸³ Because restricting immigration would prevent Hong Kong’s social and economic resources from being overburdened, interpreting Article 24 as being qualified by Article 22 comported with the Basic Law’s purpose of maintaining Hong Kong’s stability and prosperity.⁸⁴

The Standing Committee, having determined that the CFA incorrectly interpreted Articles 22 and

78 *NPC Explanations on Hong Kong Basic Law*, *supra* note 4, at WL 2.

79 *Id.*

80 *See id.*

81 *Id.* at WL 3. While the NPC ruling has been criticized for broadly defining the meaning of China’s state affairs, the CFA in its January 29th ruling admitted that Article 22 concerned affairs that are the responsibility of the people’s government or the relationship between the PRC and the HKSAR. *See Ng Ka Ling*, 1999-1 HKC 291 at Lexis 42. Thus, evident from the NPC’s explanation, the divergence between the Standing Committee’s interpretation and that of the CFA centers on the question of whether Article 22 qualifies Article 24. *See NPC Explanations on Hong Kong Basic Law*, *supra* note 4, at WL 3.

82 *See id.* at WL 2.

83 Regarding Article 22, the Standing Committee Resolution states: “The original intention of this legislation is to completely ensure that mainland residents follow the procedure for entry into Hong Kong. This conforms to the overall interest of Hong Kong.” *Id.* at WL 3.

On Article 24, the Standing Committee Resolution provides: “The original intention of this legislation is to prevent a large population flow into Hong Kong, so as to facilitate Hong Kong’s long-term prosperity and stability. Therefore, item (3) in Clause two under Article 24 is inseparable from Clause four of Article 22 of the ‘Basic Law.’” *Id.*

84 Though the Standing Committee Resolution never directly states that interpretation of the Basic Law must ensure Hong Kong’s prosperity and stability, the Standing Committee Resolution supports such a conclusion. *See id.* at WL 2-3.

24, directed the Hong Kong courts to adopt the Standing Committee's interpretation of Articles 22 and 24 as a standard.⁸⁵ Accordingly, a proper interpretation of provisions in the Basic Law is to read a provision in light of the Basic Law's purpose of maintaining stability and prosperity in Hong Kong.⁸⁶

Critics do not question that Article 158 authorizes the Standing Committee to interpret Exempted Provisions. They do, however, question the Standing Committee's right to do so *after* the CFA has issued its own interpretation.⁸⁷ Lawyers for the right of abode applicants claim that, contrary to the NPC's selective reading of Article 158, "there is no residual all-embracing power of interpretation reserved to the [Standing Committee]."⁸⁸ Such a residual power contravenes the grant to the CFA of the Right of Final Adjudication in Article 82.⁸⁹ Article 82, in pertinent part, states that "[t]he power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the

85 *See id.* at WL 4.

86 The Standing Committee's method of interpretation differed from the CFA's in three respects. First, in determining whether Article 22 qualified Article 24, the CFA ruled that since Article 24 concerned a right, the right of abode, it should be read generously. *See Ng Ka Ling*, 1999-1 HKC 291 at Lexis 38. Article 22, then, should be read in a way that does not impinge on Article 24. *See id.* Standing Committee, on the other hand, never considered Article 24 as involving a "right." *See generally NPC Explanations on Hong Kong Basic Law*, *supra* note 4.

Second, though both the CFA and the Standing Committee looked at the Basic Law's purpose, each defined the purpose differently. The Standing Committee viewed the purpose as maintaining Hong Kong's stability and prosperity. *See id.* at WL 3. *See also infra* note 115. The CFA, on the other hand, viewed the purpose as ensuring Hong Kong's high degree of autonomy. *See Ng Ka Ling*, 1999 HKC 291 at Lexis 36, 39.

Third, the CFA, having determined that Article 24 is clear on its face, did not resort to legislative intent. *See id.* at Lexis 32. The Standing Committee, on the other hand, relied primarily on the "original intention" of the specific provisions as manifested in the work of the HKSAR Preparatory Committee. *See NPC Explanations on Hong Kong Basic Law*, *supra* note 4, at WL 3-4. The Standing Committee Resolution cites three documents prepared by the HKSAR Preparatory Committee purportedly implementing Article 24(2) according to "the original intention of the legislation." *Id.* The HKSAR Preparatory Committee, provided for in the Basic Law, was formed in 1996 "to prepare the establishment of the [HKSAR] and prescribe methods for forming the first [HKSAR] government." *See Donna Lee*, Note, *Discrepancy between Theory and Reality: Hong Kong's Court of Final Appeal and the Acts of State Doctrine*, 35 COLUM. J. TRANSNAT'L L. 175, 189 n.50 (1997).

87 The Right of Final Interpretation, as used in this paper, is that Standing Committee's right to interpret a provision already interpreted by the CFA.

88 Lily Dizon, *Claimants file challenge to NPC review*, HONG KONG STANDARD, 1999 WL 18726986 (July 13, 1999). The lawyers claim that the Standing Committee placed too much emphasis on the first line of the Article, which vested the Standing Committee with the power of final interpretation. *See id.*

89 "This purported free-standing power of interpretation robs the Court of Final Appeal of its power of final adjudication (and) diminishes and infringes on the power and independence of the region's courts." *Id.* (quoting the lawyers for the right of abode applicants).

Region[.]”⁹⁰ Thus, the issue is whether the Standing Committee’s Right of Final Interpretation contravenes the Basic Law’s guarantee to the CFA of the Right of Final Adjudication.

1. *Standing Committee’s Right of Final Interpretation does not contravene the Basic Law*

Interpreting Article 158 as reserving a Right of Final Interpretation in the Standing Committee does not necessarily contradict the CFA’s final adjudicatory power, particularly in light of the respective legal systems of the PRC and Hong Kong. In the legal tradition of both China and colonial Hong Kong, a legislative body was the final authority on statutory interpretation.⁹¹ Under colonial British rule, the courts could not determine the validity of a statute passed by Parliament.⁹² This restriction on Hong Kong courts supports the principle of legislative primacy expressed in the Basic Law, because, in the same manner, the Basic Law affirms the legislature as the branch better suited to determine the scope of its legislation.⁹³ Vesting the Standing Committee with the Right of Final Interpretation is thus consistent with the common law in Hong Kong.⁹⁴ Therefore, the NPC’s ability to overrule a court’s decision through a different statutory interpretation is, in one sense, a sign of continuity and consistency of an old legal tradition common to both China and Hong Kong.⁹⁵

Further, in light of the PRC distinction between “interpretation” and “adjudication,” the Standing Committee’s Right of Final Interpretation is consistent with the Basic Law and does not contradict the CFA’s final adjudicatory powers.⁹⁶ Given this distinction, the Standing Committee does not view its remedial interpretative powers as infringing upon the CFA’s independence or Right of Final Adjudication,

90 BASIC LAW art. 82.

91 *See supra* notes 10, 17, 18.

92 *See Wang & Leung, supra* note 3, at 308. *See also supra* note 17 and accompanying text.

93 *See supra* note 18.

94 *See supra* note 17 and accompanying text.

95 *See Burkhardt, supra* note 18, at 628.

96 *See supra* notes 8-10 and accompanying text (explaining the difference between PRC definitions of “interpretation” and “adjudication”).

because adjudication is merely an application of the Standing Committee's interpretation.⁹⁷ The CFA retains its power of final adjudication; that is, it decides the merits of a particular case by applying the "law." The Standing Committee, however, determines the "law" through its interpretive powers. Thus, the Standing Committee's Right of Final Interpretation does not contradict the CFA's application of the law.

2. *Scope of the Standing Committee's Right of Final Interpretation*

Though the Standing Committee's Right of Final Interpretation may be functionally equivalent to judicial review in certain respects, the Standing Committee's Right of Final Interpretation is more narrow. Judicial review involves determining whether a lower court ascertained and applied the law correctly.⁹⁸ Vesting the Standing Committee with judicial review would directly contradict the Basic Law's grant to the CFA of the Right of Final Adjudication.⁹⁹ Though Right of Final Interpretation empowers the Standing Committee to determine whether a lower court ascertained the law correctly, it does not empower the Standing Committee to look into the merits of a particular case nor does it directly infringe on the CFA's power of final adjudication.¹⁰⁰ The Right of Final Interpretation is thus consistent with Article 158's decree that "judgments previously rendered shall not be affected."¹⁰¹ In fact, the Standing Committee Resolution states that it does not affect the CFA's decision on the merits or its application of its interpretation of the laws.¹⁰²

The Standing Committee's Right of Final Interpretation may, however, be broader in scope. Because the Standing Committee relied on Article 158, which does not expressly limit the scope of the

97 By inserting its socialist civil law definitions, however, the NPC may violate Article 8's guarantee that Hong Kong will retain its common law system and Article 18's prohibition against the application of PRC laws in Hong Kong. *See also* Jordan, *supra* note 8, at 359.

98 *See supra* note 7.

99 Under the Chinese definitions, application of the facts is within the court's purview and not the legislature's. *See supra* note 10 and accompanying text.

100 "The NPC Standing Committee's explanations will not affect the ruling handed down by the Hong Kong SAR's Court of Final Appeal on 29 January 1999, giving the right of abode in the Hong Kong SAR to the concerned party of the relevant lawsuit." *NPC Explanations on Hong Kong Basic Law, supra* note 4, at WL 4.

101 BASIC LAW art. 158. *See also supra* note 14 and accompanying text.

102 *See supra* note 99.

Standing Committee's right of interpretation,¹⁰³ the Standing Committee could theoretically interpret any provision of the Basic Law, including one not categorized as Exempted Provisions. Having classified Article 24 as an Exempted Provision, however, suggests that the Standing Committee may limit its power of interpretation to Exempted Provisions because the Standing Committee did not have to classify the Article. The Standing Committee can, nonetheless, classify a large number of provisions as Exempted Provisions by broadly interpreting PRC affairs or affairs that concern the relationship between the HKSAR and the PRC.¹⁰⁴

C. *Impact on the CFA's Right of Final Adjudication*

Though Article 158 grants the CFA the authority to interpret provisions that concern HKSAR affairs, the Standing Committee Resolution limits the CFA's Right of Final Adjudication where provisions of the Basic Law are classified as concerning PRC affairs.¹⁰⁵ To begin, the Standing Committee Resolution does not permit the CFA to act independently in determining when a Standing Committee interpretation is required for a provision in the Basic Law: (1) because the Chief Executive can seek a Standing Committee interpretation of an Exempted Provision when a decision of the CFA endangers Hong Kong's prosperity,¹⁰⁶ and (2) because the Standing Committee can retroactively classify provisions in the Basic Law, which the CFA has already determined not to be exempt and has therefore chosen not to submit to the Standing Committee, as Exempted Provisions.¹⁰⁷ Though there are provisions in the Basic Law that theoretically should not concern PRC affairs and that therefore are solely within the CFA's purview,¹⁰⁸ a CFA interpretation of any Basic Law provision is only final if the Chief Executive does not exercise his Right to

¹⁰³ See *supra* note 87 and accompanying text.

¹⁰⁴ See Lee, *supra* note 85, at 198-99. The view that the Standing Committee will broadly interpret PRC affairs mirrors the criticism that the Standing Committee will broadly define "acts of state." See *id.* at 196-98. Under Article 19, HKSAR courts have "no jurisdiction over acts of state such as defence and foreign affairs." *Id.*

¹⁰⁵ See *supra* notes 67, 103.

¹⁰⁶ Thus, the CFA no longer solely determines when a Standing Committee interpretation is required. See *supra* note 3 and accompanying text. See also *supra* III.A.

¹⁰⁷ See *supra* note 67.

¹⁰⁸ For example, Article 24 by itself did not concern PRC affairs or the relationship between the PRC and HKSAR. See *id.*

Assistance and the Standing Committee does not classify the provision as concerning PRC affairs. As a result, the Chief Executive's Right to Assistance and the Standing Committee's ability to determine whether provisions are exempted indirectly restrain the CFA from exercising judicial independence in determining whether a provision of the Basic Law constitutes an Exempted Provision.

By restraining the CFA from independently determining Exempted Provisions, the Standing Committee effectively deprives the CFA of its authority to invalidate HKSAR laws that are contrary to the Basic Law, because to avoid being essentially overturned, the CFA will likely first seek a Standing Committee classification, followed by an interpretation, of any Basic Law provision that may affect the HKSAR law at issue if it constitutes an Exempted Provision.¹⁰⁹ If the provision is exempted, the CFA will interpret the local law in light of the Standing Committee's interpretation of the provision. This is consistent with the principle of legislative primacy,¹¹⁰ which is the basis of Hong Kong's legal system in the eyes of the PRC. Under legislative primacy, a Hong Kong court cannot invalidate a law passed by a sovereign—essentially the Standing Committee in this case—but it may invalidate laws passed by a local or regional government within its jurisdiction, such as the HKSAR,¹¹¹ by interpreting local law as being contrary to a higher law, such as a constitution.¹¹² The court may not, however, interpret the higher law. The ability of the CFA to invalidate HKSAR laws should therefore be unlimited when the CFA reviews HKSAR laws. When a challenge to an HKSAR law possibly involves an Exempted Provision, however, the CFA cannot strike down the HKSAR law without risking Standing Committee review. Consequently, restraining the independence of the CFA to determine whether a Basic Law provision is exempt unduly restricts the CFA to function effectively under the principle of legislative primacy, because to avoid being overturned, the CFA may now defer to the Standing Committee in determining whether an Exempted Provision is involved. If

109 Yet, because the Standing Committee Resolution hampers the CFA's ability to invalidate HKSAR laws, the Standing Committee Resolution may violate Article 11's mandate that "[n]o law enacted by the legislature of the [HKSAR] shall contravene [the Basic Law]." BASIC LAW art. 11.

110 See *supra* notes 16-20 and accompanying text.

111 The HKSAR government is not the Hong Kong sovereign. See *Ma Wai Kwan*, 1997 HKC Lexis 57, *57. The "right of abode" cases demonstrate the power of the Hong Kong courts to invalidate laws passed by the HKSAR legislature. See *supra* note 21 and accompanying text.

112 See *Jordan*, *supra* note 8, at 354. *Jordan*'s discussion of judicial interpretation refers to the common law court's adjudicatory power of "determining how to apply a [legal] provision directly to litigants." *Id.* See also *Rogers*, *supra* note 3, at 453.

an Exempted Provision is involved, the CFA may seek an interpretation of the Exempted Provision before the CFA invalidates a local law.

Further, the Standing Committee Resolution restricts *how* the CFA can interpret the Basic Law. The Standing Committee directed the CFA to interpret any Basic Law provision in light of the Basic Law's purpose of ensuring the prosperity of Hong Kong.¹¹³ The CFA, in interpreting Articles 22 and 24, viewed the Basic Law's purpose as maintaining Hong Kong's "high degree of autonomy."¹¹⁴ The Standing Committee's view of the Basic Law's purpose is consistent with the Sino-British negotiations leading up to the promulgation of the Basic Law when both China and Britain recognized that preserving stability and prosperity in Hong Kong meant maintaining Hong Kong's capitalist system.¹¹⁵ The "one country, two systems" formula guaranteed the HKSAR a "high degree of autonomy" to ensure the continued stability and prosperity of Hong Kong as a capitalist system.¹¹⁶ Practically, the "one country, two systems" formula means that Hong Kong's high degree of autonomy is restricted only when it conflicts with the continued stability and prosperity of Hong Kong. Thus, the CFA retains final adjudication as long as its decisions do not endanger the proverbial "goose that lays the golden egg."¹¹⁷

V. CONCLUSION

The Standing Committee Resolution empowers the HKSAR Chief Executive and the Standing

113 See *NPC Explanations on Hong Kong Basic Law*, *supra* note 4, at WL 3.

114 See *Chan Kam Nga*, 1999-1 HKC at Lexis 36.

115 See Jacques deLisle & Kevin P. Lane, *Hong Kong's Endgame and the Rule of Law (1): The Struggle Over Institutions and Values in the Transition to Chinese Rule*, 18 U. PA. J. INT'L ECON. L. 195 (1997).

116 See Wang & Leung, *supra* note 3, at 310. This principle is embodied as the overarching goal of the Basic Law. As one scholar noted:

The Basic Law's main goal is to implement the "one country, two systems" policy while maintaining the prosperity and stability of Hong Kong. To achieve these dual aims, it is necessary to maintain the existing legal, social, and economic systems of Hong Kong. Interpretations of the Basic Law should take these factors into consideration and should also consider the developmental needs of the SAR.

Id.

117 Similarly, then, the Standing Committee will not exercise its Right of Final Interpretation often because repeated involvement in HKSAR affairs will likely scare off investors.

Committee to intervene, and empowers the Standing Committee essentially to overrule a decision that involves Basic Law provisions concerning PRC affairs and that is adverse to PRC and Hong Kong interests. Despite the Basic Law's grant of judicial independence and power of final adjudication to the CFA, the use of vague terminology has allowed the Standing Committee to circumscribe the scope of the CFA's powers validly. The Standing Committee Resolution's emphasis on maintaining Hong Kong's prosperity, however, suggests that both the Standing Committee and the HKSAR Chief Executive will exercise restraint in employing their respective powers. Most likely, the Standing Committee and Chief Executive will weigh the risk that PRC involvement in HKSAR affairs will deter lucrative investments against the adverse effects of a CFA decision on PRC interests. In essence, the Standing Committee Resolution affirms PRC sovereignty while highlighting Hong Kong's economic importance.

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