Information Note

Constitutional Review in the United States and France

Research Office
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1. Introduction

1.1 The Basic Law ("BL") is a national law enacted by the National People's Congress ("NPC") of the People's Republic of China ("PRC") in accordance with the Constitution of PRC to prescribe the systems to be practised in the Hong Kong Special Administrative Region. It is often regarded as a "mini-constitution" of Hong Kong as Articles 8 and 11 of BL provide that no law in Hong Kong shall contravene BL, illustrating its supremacy. While the Government has been taking into account BL implications in its legislative process since July 1997, there exists a need of a mechanism to ascertain whether the existing local laws are consistent with BL from time to time. This mechanism is often coined as constitutional review ("CR") in other places.

1.2 Given the aforementioned dual nature of BL, there are different views on which institution(s) has/have the authority to conduct CR in Hong Kong. On the one hand, the Constitution of PRC stipulates that only the Standing Committee of NPC ("NPCSC") has the power to interpret the Constitution.[1] Likewise, the power of the interpretation of BL is also "vested in NPCSC" under Article 158 of BL, although NPCSC "shall authorize" local courts to "interpret on their own" the provisions "within the limits of the autonomy" of Hong Kong. On the other hand, some local scholars opine that "independent judicial power, including that of final adjudication" vested in Hong Kong under Article 19 provides a part of legal basis for local courts to conduct CR.[2]

1.3 In practice, the Judiciary in Hong Kong has been conducting CR since Hong Kong's return to China in July 1997. Based on a legal study, the Court of Final Appeal ("CFA") has conducted at least 37 cases of CR during 1997-2020, with statutory provisions in about half (51%) of cases in dispute ruled

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1 Article 67 of the Constitution of PRC.

2 陳弘毅 (1998) and Chan (2007).

"unconstitutional", and in one-third (30%) declared invalid.[3] While these rulings have been largely accepted by the Government and the local community, there have been controversies from time to time over whether the local judiciary has the authority to conduct such CR. Taking the "anti-mask regulation" announced by the Government in October 2019 as an example, the initial ruling of the Court of First Instance ("CFI") in a judicial review filed over the regulation's constitutionality has re-ignited intense discussion over this issue.[4] Most recently in a case on bailing rights of a defendant under the Law of the PRC on Safeguarding National Security in the Hong Kong Special Administrative Region ("National Security Law" or "NSL") in February 2021, CFA made a final judgment that "the legislative acts of the NPC and NPCSC…are not subject to constitutional review", admitting the boundary of CR conducted by local courts.[5] This apart, there are also public concerns over the legal principles adopted by local judges in constitutional interpretation, as well as the pertinent rulings.

1.4 At the request of Hon Starry LEE Wai-king, the Research Office has conducted a fact-finding study on the CR mechanism seen in the United States ("US") and France, bearing in mind that Hong Kong is not a sovereign state and the dual nature of BL in Hong Kong. As CR is conducted by ordinary courts in the US and by a dedicated constitutional court in France, they represent two distinct mechanisms. This information note begins with an overview of CR in Hong Kong, including the legal basis for conducting CR, the practice and major issues of concerns. It is followed by a brief discussion of the recent global trends of CR, and concluded with the CR mechanisms in the two selected places.

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[3] Statistics are based on a legal study, information provided by the Department of Justice and search in legal databases. They include only cases on constitutionality of primary legislation. See Ip (2019).

[4] On 4 October 2019, the Chief Executive invoked the Emergency Regulations Ordinance (Cap. 241) ("ERO") to gazette the Prohibition on Face Covering Regulation (Cap. 241K) ("PFCR"), but this was challenged in a judicial review next day. On 18 November 2019, CFI ruled that both ERO and PFCR were unconstitutional, prompting reaction from the Legislative Affairs Commission ("LAC") of NPCSC that Hong Kong courts did not have the power to conduct CR. The CFI decisions were subsequently overturned partially by the Court of Appeal on 9 April 2020, and completely by CFA on 21 December 2020. Both ERO and PFCR are ruled in line with BL. See 新華網 (2019) and *Kwok Wing Hang and 23 Others v Chief Executive in Council and Another,* FACV Nos. 6, 7, 8 and 9 of 2020.

[5] In this case, the respondent Lai Chee Ying raised a challenge that NSL infringed the constitutional right to bail by placing the burden of proof on an accused in a bail application. CFA ruled against the challenge, stating that "the legislative acts of the NPC and NPCSC leading to the promulgation of the NSL as a law of the HKSAR in accordance with the provisions of the Basic Law and the procedure therein, are not subject to constitutional review". See *HKSAR v Lai Chee Ying*, FACC No. 1 of 2021.

2. Constitutional review in Hong Kong

2.1 BL is a national law adopted by NPC and promulgated by Order of the President of PRC on 4 April 1990 in accordance with the Constitution of PRC.[6] According to Articles 8 and 11 of BL, all laws in Hong Kong, either enacted before or after the date, cannot contravene BL. ***To comply with this requirement, the Government has been taking into account BL implications in its legislative proposals***, as shown in inclusion of "BL implications" paragraphs in the briefing documents submitted to the Legislative Council since 1 July 1997.

2.2 Also, ***NPCSC has a constitutional duty to ensure consistency of local legislation with BL under the Constitution of PRC and BL.*** *First of all*, the Constitution of PRC entrusts the CR power to NPC (as "the highest state organ of power") and NPCSC, empowering the latter to revoke administrative regulations formulated by the State Council and local regulations that are in conflict with the constitution.[7] *Secondly*, Article 17 of BL stipulates that NPCSC has the power to return and invalidate laws contravening BL provisions involving the Central Authorities. *Thirdly*, according to Article 160 of BL, laws in force before 1997 were to be reviewed by NPCSC upon Hong Kong's return to China. *Fourthly*, the power of interpretation of BL is vested in NPCSC according to Article 158 of BL, in line with its power of making legally binding constitutional interpretations under the Constitution of PRC. While constitutional interpretation and CR may appear to be two different legal concepts, the former is an integral part of CR and has a determining effect on CR decisions.[8]

2.3 Meanwhile, ***it has been a long and established practice for local courts to conduct CR ever since Hong Kong's return to China***. While there is no express BL provision on CR for matters "within the limits of the autonomy" of Hong Kong, it is considered that the following BL provisions provide a legal basis for the local courts to do so. *First*, Hong Kong is vested with "independent judicial power, including that of final adjudication" under Article 19. *Secondly*, NPCSC "shall authorize" local courts to interpret BL provisions which are "within the limits of the autonomy" of Hong Kong under Article 158.[9] *Thirdly*, Article 81 stipulates that

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6 Article 31 of the Constitution of PRC provides: "The State may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions." See 全國人民代表大會 (1990).

7 Articles 62 and 67 of the Constitution of PRC.

8 王振民 (2017) and 胡錦光 (2017).

9 Department of Justice (2004), Chan (2007), and Wu (2010).

"the judicial system previously practised in Hong Kong shall be maintained", which is believed to include the CR practice. In the colonial time, local courts could invalidate those statutes in conflict with the then constitutional documents for Hong Kong (i.e. the Letters Patent and Royal Instructions), although such power was rarely exercised before 1991 and the power of final adjudication was vested in the Privy Council of the United Kingdom ("UK").[10]

2.4 ***The landmark case of Ng Ka Ling v Director of Immigration ("Ng Ka Ling case") in January 1999 is the first, albeit controversial, occasion for CFA to exercise CR power after Hong Kong's return to China.*** Put it very briefly, CFA invalidated those statutory provisions on the procedure of granting one-way permit ("OWP") to Mainland-born children of Hong Kong permanent residents, on the grounds that they infringed their right of abode provided in Article 24(2)(3) of BL.[11] In its judgment issued in January 1999, CFA stated that local courts had "the jurisdiction to examine whether legislation enacted by the legislature … or acts of the executive authorities … are consistent with the BL, and if found to be inconsistent, to hold them invalid."[12] NPCSC did not deny such CR power, despite its interpretation of Articles 22(4) and 24(2)(3) in June 1999 to restore the OWP procedure.[13] Separately, CFA asserted its power to "determine whether an act of the NPC or its Standing Committee is inconsistent with the BL" in the same judgment, resulting in strong disagreements from legal experts in the Mainland. They maintained that acts of NPC as the highest state organ of power representing the people could not be invalidated by courts at any levels.[14] In response, ***CFA issued a judgment in February 1999, clarifying that it did not intend to question the authority of NPC or NPCSC to do any act "in accordance with the provisions of the BL and the procedure therein"***.[15]

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[10] In 1991, Hong Kong Bill of Rights Ordinance (Cap. 383) was enacted, forming part of the constitutional order in Hong Kong and giving rise to CR cases concerning human rights. See Department of Justice (2004), Chan (2007), Wu (2010) and 陳弘毅 (1998).

[11] In this case, some Mainland children with parents as Hong Kong permanent residents entered Hong Kong from the Mainland without OWPs and sought the right of abode in July 1997. They argued that they were entitled to the right of abode under Article 24(2)(3) of Basic Law. Ruling in their favour, CFA declared parts of the Immigration (Amendment) (No. 3) Ordinance 1997 unconstitutional, as they restricted the right of these permanent residents by requiring them to hold OWPs before obtaining the right of abode. See *Ng Ka Ling and Others v Director of Immigration,* FACV Nos. 14-16 of 1998, Department of Justice (2019) and Ip (2019).

[12] *Ng Ka Ling and Others v Director of Immigration,* FACV Nos. 14-16 of 1998.

[13] 全國人民代表大會常務委員會 (1999) and Department of Justice (2019).

[14] 新華社 (1999).

[15] *Ng Ka Ling and Others v Director of Immigration (No. 2)*, FACV Nos. 14-16 of 1998, Ip (2019) and 佳日思 (2000).

2.5 Some observers note that both local courts and NPCSC have displayed more mutual respect in subsequent cases.[16] For instance, in the right-of-abode case of *Lau Kong Yung v Director of Immigration* in December 1999, CFA explicitly acknowledged that the interpretation by NPCSC was binding on Hong Kong courts.[17] More recently on the case concerning NSL in February 2021, CFA restated that legislative acts of NPC and NPCSC were not subject to CR by local courts.[18]

2.6 ***The conduct of CR by local courts is mainly triggered by judicial reviews and adjudication in criminal or civil proceedings.*** Over the past 23 years, CFA has reviewed constitutionality of primary legislation on at least 37 cases (**Figure 1**).[19] *Analysed by origin*, 16 cases arose from judicial review ("JR") and 11 cases from criminal proceedings. *Analysed by constitutional issue*, 25 cases were related to political and civil rights (e.g. freedom of expression, freedom of person, right to a fair trial, electoral rights and right to equality), with other five cases concerning the right of abode. *Analysed by CR results*, statutory provisions in 19 cases (51%) were ruled as unconstitutional by CFA, 11 of which resulted in invalidation of provisions.[20] Apart from CR over primary legislation, CFA also conducted CR over administrative acts, some of which had politically or socially significant implications.[21]

Figure 1 — Constitutional review conducted by CFA, 1997-2020

	Period	Number of cases	Cases arising from judicial review	Ruling as unconstitutional by court
1.	**1997-2000**	4	2	2
2.	**2001-2004**	9	4	4
3.	**2005-2008**	12	4	8
4.	**2009-2012**	4	1	2
5.	**2013-2016**	3	2	2
6.	**2017-2020**	5	3	1
	Total	**37**	**16**	**19**

Note: Figures only cover review of primary legislation.
Sources: Ip (2019), Department of Justice and various legal databases.

16 Ip (2019) and 沈太霞 (2020).
17 *Lau Kong Yung and 16 Others v Director of Immigration,* FACV Nos. 10 and 11 of 1999.
18 For details of the case, see footnote 5.
19 There were 34 such cases based on a legal study. Yet three additional cases during 2018-2020 have been identified, based on information provided by the Department of Justice and search in legal databases. See Ip (2019).
20 See Department of Justice (2011) and Ip (2019).
21 CFA conducted over 60 CR cases not involving review of primary legislation during 1997-2020. See 沈太霞 (2020).

2.7 ***The Government generally accepts CFA's rulings on such CR and takes follow-up actions as deemed appropriate (e.g. enacting new ordinances or making legislative amendments)***. These could lead to significant policy changes in some cases, such as extending franchise in village representative elections in 2003 and regulation of covert surveillance by law enforcement agencies in 2006.[22] Yet some observers noted that the responses from the Government in some other cases were rather limited, with technical amendments and sometimes with much delay. Taking *W v Registrar of Marriages* concerning right to marriage for transsexuals in 2013 as an illustration, while CFA suggested a broader review on gender recognition, the Government put forward the Marriage (Amendment) Bill in 2014 revising only the definitions of "male" and "female" under Marriage Ordinance (Cap. 181) to recognize the change of gender after full sex re-assignment surgeries. For another case in 2007, an amendment was made seven years after the court invalidated the statutory provisions criminalizing homosexual conduct.[23]

2.8 Acknowledging that CR cases involve "the very rights and liberties that are protected by the BL", ***all Chief Justices of CFA ever since 1997 emphasize that courts do not play an activist role of providing answers to "any of the various political, social and economic problems which confront society in modern times"***. Their judgments "are all about legality and not the merits or demerits of a political, economic or social argument"; and a judge must "exercise self-restraint".[24]

2.9 Against this backdrop, the judicial practice of CR in Hong Kong gives rise to the following major issues of concerns:

(a) **Legal basis**: As discussed above, some opine that the CR power is only vested in NPC and NPCSC in accordance with the Constitution of PRC and BL, others hold the views that the practice of CR by the local courts for legal cases "within the limits of the autonomy" of Hong Kong should be respected under "One Country Two Systems".[25]

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[22] *Secretary for Justice and Others v Chan Wah and Others* in 2000 led to reforms three years later which (a) allowed spouses (instead of just wives) of indigenous villagers to vote in elections of indigenous representatives and (b) introduced a dual-track system for non-indigenous villagers to elect their own representatives. *Koo Sze Yiu v Chief Executive of HKSAR* in 2006 resulted in enactment of the Interception of Communications and Surveillance Ordinance (Cap. 589) to regulate interception of communications by law enforcement agencies. See Legislative Council Secretariat (2002 and 2020).

[23] Jhaveri et al. (2015).

[24] Li (2005 and 2006), Ma (2016) and Cheung (2021).

[25] For various views, see 陳弘毅 (1998), Chan (2007), Wu (2010), 王振民 (2017) and 胡錦光 (2017).

This apart, there are doubts whether local courts at lower levels can conduct CR;[26]

(b) **Scope of CR**: In spite of recent clarifications of CFA, there are still discussions on whether local courts could review acts of NPC/NPCSC. While some raised concerns over the lack of mechanism to deal with any "apparent inconsistencies" between acts of NPC/NPCSC and BL provisions,[27] others maintain that such issues should be resolved by NPC itself.[28] This apart, it is sometimes difficult to delineate clearly whether BL provisions concerned are purely "within the limits of the autonomy" of Hong Kong;

(c) **Interpretation of BL**: To determine questions of constitutionality, courts often need to interpret BL provisions. NPCSC places much emphasis on "lawmakers' intent" in interpretation, but local courts lean on common law approach.[29] Local courts tend to place more emphasis on "the legislative intent as expressed in the language" on the one hand, and may infer the purpose of provisions from relevant pre-enactment documents (but not post-enactment documents by lawmakers) in case of gaps and ambiguities on the other. Moreover, local judiciary tends to give "generous interpretation" over fundamental rights. While the common law approach seems to be more flexible, there are concerns over the possible inconsistencies with the understanding of the Central Authorities;[30]

(d) **Application of proportionality principle**: In rulings over fundamental rights laid down in BL, local courts declared that they applied the "principle of proportionality", striking a balance between protecting

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26 *Secretary for Justice v Ocean Technology Limited and Others,* HCMA 173/2008.

27 Hong Kong Bar Association (2020).

28 王振民(2017).

29 For instance, NPCSC interpreted Article 24(2)(3) of BL in June 1999, with reference to the Opinions at the Fourth Plenary Meeting of the Preparatory Committee for the Hong Kong Special Administrative Region of NPC on 10 August 1996, six years after promulgation of the Basic Law in 1990.

30 For example in *Chong Fung Yuen* case in 2001, judges gave a broad interpretation of Article 24(2)(1) to grant right of abode to Hong Kong-born Chinese regardless of the residential status of their parents. This was criticized by LAC of NPCSC for being inconsistent with the narrower principle of interpretation of NPCSC as expressed in the interpretation in June 1999. See Ip (2019), Shiu (2010) and 清華大學港澳研究中心(2013).

individual rights and achieving legitimate aims of public policies.[31] Yet application of this principle often leads to disputes. For instance, in cases on the right of abode and immigrants' right to social welfare, there were views that CFA did not fully appreciate burden on social resources brought by its judgments;[32] and

(e) **CR ruling on controversial socio-political issues**: Given that courts can invalidate legislation or executive acts deemed unconstitutional, there are concerns that whether the Judiciary is too involved in those political and social issues falling within the remits of the Executive or the Legislative Branches. Although all Chief Justices have emphasized political impartiality, previous rulings sometimes attracted criticism. While some opine that judicial independence has been compromised for those rulings in favour of the Government, others are concerned that the Judiciary has encroached on functions of the Executive or the Legislative Branches for those rulings against the Government.[33]

3. Global practice of constitutional review

3.1 ***Bearing in mind the dual nature of BL as a national law in PRC and a "mini-constitution" in Hong Kong, CR elsewhere serves only reference purpose***. Globally, CR was first implemented in the US in 1803, and this practice has become more prevalent in Europe after 1945, safeguarding the fundamental rights of citizens and checking the power of the governments. While this was in part a response to the bitter lessons of German Nazism and Italian Fascism during the Second World War, promulgation of major human rights conventions during

[31] According to the principle of proportionality, a restriction on a right is permissible only when it (a) serves a legitimate aim; (b) has rational connection with the aim; (c) is no more than necessary; and (d) will not limit fundamental rights in a way disproportionate to the benefit of the aim. See Department of Justice (2013), Cheung (2019), and *Hysan Development Company Limited and Others v Town Planning Board*, FACV Nos. 21 & 22 of 2015.

[32] For example, the ruling of *Chong Fung Yuen* case in 2001 led to influx of "doubly non-local" pregnant women and a total of 175 600 births in the following decade. The removal of the seven-year residence requirement for social welfare in *Kong Yunming* v *Director of Social Welfare* in 2013 also led to some concerns over the undue financial burden on the Government.

[33] Chan (2007), Shiu (2010) and 沈太霞 (2020).

1948-1950 called for CR mechanisms to protect such rights.[34] As CR mechanisms have progressively extended to newly formed states in other regions, ***they exist in some forms now in approximately 169 or 83% of places in the world***.[35]

3.2 In a nutshell, ***CR typically involves an independent body empowered to review constitutionality of decisions made by the Executive and the Legislative Branches, with two mainstream models nowadays***. The first model is the "***diffused system***", giving the CR power to ordinary courts, similar to the one adopted in Hong Kong. This model was first applied in the US in 1803, followed by most of the places practising common law (e.g. Australia and Canada) and a few places practising civil law (e.g. Japan and Argentina). While the CR power may be given to all courts (e.g. Australia, Canada and the US), the highest court has the final adjudication. The second model is the "***centralized system***", giving the CR power to a specialized constitutional court. This was first seen in Austria in 1920, and then spread to 19 out of 27 member states (e.g. France, Germany and Spain) of the European Union ("EU"), and some other 66 places (e.g. South Korea and Turkey) by 2019.[36] Few places (e.g. South Africa) adopt a mixture of these two mainstream models (so called hybrid systems) in conducting CR. This apart, a couple of countries (e.g. the UK and the Netherlands) empower the legislature to conduct CR given their long tradition of "parliamentary supremacy".[37]

3.3 ***Each CR mechanism needs to address certain institutional issues***.[38] First and foremost is the ***composition of courts responsible for CR***, with some courts consisting of professional judges only (e.g. US and Germany), whereas some including legal experts or even political figures (e.g. France and Belgium). To strengthen the credibility, constitutional judges are often selected by more than one branches of government (e.g. each of the three branches selecting one-third of judges respectively in Italy). ***CR procedures*** is the second issue, as some courts can only conduct CR when hearing concrete legal cases (e.g. US and Japan), some others are also tasked with abstract review of legislation usually before its passage (e.g. France and Germany). The ***scope of CR*** is the third issue, as courts in some

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[34] These include the Universal Declaration of Human Rights of the United Nations in 1948 and the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950. See Chen (2013), de Visser (2015) and Castillo-Ortiz (2020).

[35] Ginsburg et al. (2013).

[36] Institute for Democracy and Electoral Assistance (2017) and Castillo-Ortiz (2020).

[37] In the UK, while courts can declare statutory provisions to be inconsistent with the Human Right Act 1988 (which is deemed part of the UK's unwritten constitution), they cannot invalidate provisions passed by the Parliament. Since 2001, a cross-party Constitution Committee has been established under the House of Lords to examine the constitutionality of bills and investigate constitutional matters. See Chen (2013), de Visser (2015) and Castillo-Ortiz (2020).

[38] Institute for Democracy and Electoral Assistance (2017) and Chen (2013).

places (e.g. Germany and India) go further to determine whether a constitutional amendment itself is constitutional and valid, on top of the routine duties of reviewing the constitutionality of legislation and executive orders. The last is the ***finality of CR decision***. While rulings by the highest court on constitutionality in both diffused and centralized systems are usually final and binding, a few places (e.g. Canada) empower the legislature to override such decisions under certain circumstances.[39]

3.4 While judicial power in conducting CR is acclaimed as "the most effective means to ensure respect for the constitution", there are challenges concerning the tension between the court and other branches of government.[40] On the one hand, some courts reported pressure from the Executive and the Legislative Branches and the media, especially when the appointment process is politicized or when the rulings may lead to reduction in power held by other branches of government. On the other hand, there are concerns over whether courts have encroached on the executive or legislative functions when they invalidate laws to extend citizens' individual rights, as commonly seen in Canada and the US.

4. Constitutional review in the United States

4.1 The US is the pioneer of CR, although its constitution in 1789 did not provide any CR mechanism. In 1803, the Supreme Court ("SC") declared for the first time that a piece of legislation enacted by the US Congress unconstitutional. The ruling was made in the context of *Marbury v Madisons*, on the grounds that (a) "the constitution is superior to any ordinary act of the legislature" and (b) judges have the duty to uphold the constitution according to their oath.[41] ***This became the precedent case of CR conducted by the judiciary in the US***.

[39] In Canada, even if a law has been ruled unconstitutional by the court, the legislature can declare that it is valid for not more than five years. However, it cannot apply to laws infringing certain important rights. See Chen (2013).

[40] Venice Commission (2016).

[41] Cornell University Legal Information Institute (undated).

4.2 ***While all levels of courts may rule on the constitutionality of laws and interpret constitutional provisions, SC as the highest court has the last word***.[42] For a focused discussion, this note discusses CR conducted by SC at the federal level only. Here are the salient features:

(a) **Judges responsible for CR**: All nine judges (named as justices in the US) of SC jointly conduct CR in the US;[43]

(b) **Proposed legislation not subject to CR**: As the US constitution limits federal courts to deal with "cases" and "controversies", SC can only decide on constitutionality issues in concrete legal cases in which actual harm has been inflicted on one party. Similar to Hong Kong, it does not advise on the constitutionality of proposed legislation;

(c) **Scope of CR**: The scope of CR is confined to four main areas of constitutional disputes, namely (i) relations between states and the federal government, (ii) separation of powers within the federal government, (iii) power of the government over economic matters, and (iv) individual rights and freedoms.[44] Nevertheless, SC does not review constitutionality of constitutional amendments;

(d) **Interpretation of constitution**: SC interprets constitutional provisions based on a couple of factors, including but not limited to: (i) language of the constitution, (ii) original intent of drafters, (iii) moral or cultural values, (iv) practical benefits of one interpretation against another, and (v) prior court decisions. Yet judges have considerable discretion and flexibility in adopting one or more factors in adjudication of a particular case;[45]

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[42] The constitution here refers to the federal constitution of the US. For state constitutions, state courts are usually the final arbiter. Yet SC could intervene if rulings of state courts involve the federal constitution and laws. See United States Courts (undated).

[43] They are nominated by the US President based on recommendations made by Congress members of the ruling party, and confirmed in the Senate after hearings by a dedicated committee to discuss their suitability. At present, all nine judges of SC have been court judges before, although this is not a statutory requirement. To insulate them from political pressure, they are appointed for a life term. See European Parliamentary Research Service (2016).

[44] SC has been allowed to exercise nearly complete discretion in deciding which cases to hear under the Supreme Court Case Selections Act of 1988. While over 8 000 annual cases are filed to SC from the lower courts, SC chooses to hear less than 1% of those cases with "wide public importance". See Medecigo (2016) and Britannica (2020).

[45] Congressional Research Service (2018a).

(e) **Three-tier approach to balancing test in adjudication of right claims**: In weighing citizen rights against the laws and before the application of the proportionality test, SC first categorizes the cases into three tiers based on the types of rights and persons involved. First and foremost is the "***strict scrutiny***" concerning those laws limiting fundamental rights or discriminating against particular disadvantaged groups (e.g. ethnic minorities). These laws can only be allowed when they are "narrowly tailored" to achieve "compelling governmental interest". It is followed by a less stringent standard of "***intermediate scrutiny***", applying to laws limiting rights of other groups (e.g. a gender). For the least stringent "***rational basis review***", it applies to laws limiting "secondary rights" (e.g. economic rights) without discrimination against the aforementioned groups, permitting limitations which are "rationally related" to a legitimate end. As such, it is argued that the balancing test applied by SC leans more towards protection of a defined set of rights;[46]

(f) **Avoiding intrusion into political matters**: While CR inevitably touches upon controversial political issues, SC has adopted a few doctrines to avoid infringing the power of the elected President and Congress. For instance, it does not hear cases on political questions within the purview of other branches of government (e.g. drawing of constituency boundaries, military matters and foreign policies). It also avoids making a ruling on constitutionality if the case can be resolved on other legal grounds;[47] and

(g) **Finality of CR decision**: Once SC has ruled a law unconstitutional, the decision is final and binding on the whole nation. However, its decisions can be overruled by subsequent rulings by SC on "strong grounds", which occurred on some 140 occasions (or 2% of its constitutional rulings) during 1789-2018.[48] Also, its judgments can be superseded by constitutional amendments, which only happened on six occasions in history.

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[46] Beschle (2018), Jackson (2015) and Wex (undated).

[47] Congressional Research Service (2014).

[48] Major reasons for overruling previous decisions include faulty reasoning, unworkable standards and abandoned legal doctrines. See Congressional Research Service (2018b).

4.3 Over the past two centuries after its founding in 1789, SC has made more than 7 000 CR rulings, with almost two-thirds (4 500) of them made in the last 60 years after 1958, partly in response to the rising tide of concerns over civil rights in the US in post-war years. ***Yet SC seldom invalidates laws enacted by elected legislatures on constitutional grounds, with only some 480 cases (or one-tenth of its constitutional caseload) during 1958-2018***. Two-thirds of these unconstitutional cases were concerned with civil rights, as shown in a few examples of CR adjudication by SC in contemporary US (**Figure 2**).[49]

Figure 2 — Examples of CR judgments by the Supreme Court in the US

Year	Case	Significance of the judgment
1954	*Brown v Board of Education*	Ending race-based school segregation
1963	*Gideon v Wainwright*	Granting right to legal assistance for criminal defendants
1973	*Roe v Wade*	Ending laws severely prohibiting abortion
2003	*Lawrence v Texas*	Legalizing same-sex sexual activities
2010	*Citizens United v Federal Election Commission*	Removing restrictions on spending on election advertising by corporations

Sources: American Bar Association (2020) and National Paralegal College (2021).

4.4 **While SC plays a significant role in safeguarding the US Constitution, there are disputes over its role**. *First*, while some believe that the CR mechanism protects minority rights against the tyranny of majority, others opine that it is undemocratic for an unelected SC to invalidate laws enacted by an elected legislature.[50] *Secondly*, given that judges of SC can interpret the Constitution and choose the standards in adjudication, there are concerns over the wide discretionary power held by the judges. As some of the verdicts of SC have advanced social progress (e.g. *Brown v Board of Education* in 1954 in **Figure 2** above), others are more controversial (e.g. *Scott* v *Sandford* in 1857 denying the US Congress the power to abolish slavery in certain states).[51] *Thirdly*, some cast doubt on the impartiality of SC in the CR mechanism given the politicized appointment process, as judges are nominated by the President and confirmed in Senate.

[49] Constitution Annotated (2021).
[50] Chen (2013).
[51] Congressional Research Service (2018a) and Britannica (2019).

5. Constitutional review in France

5.1 France had resisted granting the CR power to the judiciary for almost 170 years after the French Revolution in 1789, largely because of the belief that elected parliament should hold supreme power in law enactment.[52] However, the political environment in France was very unstable before 1958, as seen in the establishment of four Republics plagued by political fragmentations and interrupted by occasional authoritarian rule in more than one and a half century.[53] In an attempt to stabilize the situation and in the light of growing application of CR in Europe in post-war years, ***France introduced a Constitutional Council ("CC") in the constitution of the Fifth Republic in 1958***.

5.2 Initially, only four heads of the French state organs (i.e. President, Prime Minister and presidents of two chambers of the French parliament) could file constitutional complaints against parliamentary bills to CC for ruling. As such, CC did not actively function during 1958-1973, with very few such complaints. ***Yet the role of CC is significantly expanded after constitutional amendments in 1974 and 2008, which empowered Members of the Parliament and individual citizens to request CR respectively***.

5.3 Here are some salient features of the CR mechanism in France:

(a) **CC responsible for CR**: Unlike the US, a dedicated court (i.e. CC) is tasked with CR in France, with all nine members appointed for a fixed term of nine years. Yet three members are replaced once every three years, with one appointed by the President and the other two by the presidents of two chambers of the parliament. While current elected-office holders are not allowed to join CC for political impartiality, former senior officials are allowed to sit on CC.[54] After 2008, appointments can be vetoed by a three-fifths majority vote in the relevant committee(s) in the parliament. In addition, former Presidents can choose to sit on CC as ex officio members for

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[52] For example, a law in 1790 forbade judges to "obstruct or suspend the execution of the decrees of the legislative body". See de Visser (2015).

[53] Rogoff (2011).

[54] The constitution does not lay down professional qualifications of CC members, but elected-office holders are not allowed to join for political impartiality. At present, seven judges have judicial or legal background, with the remaining two being former senior officials (i.e. former Prime Ministers Laurent Fabius and Alain Juppé). See Conseil Constitutionnel (undated).

life according to the French Constitution, but currently no one does so to avoid political controversies;

(b) **Role in scrutinizing new laws**: Unlike the US model, CC in France is authorized to review laws before and after its promulgation. For ***pre-promulgation review***, all laws concerning organization of the state must be first reviewed by CC, while ordinary laws are reviewed upon request. For the latter, the request can be made by either one of the four heads of state organs after 1958, or at least 60 members in either chamber after 1974. For ***post-promulgation review***, CC can review enacted law in cases initiated by individual citizens upon screening and referral by either one of the two highest ordinary courts (i.e. Cour de cassation and Conseil d'Etat) after July 2008;

(c) **Scope of CR**: In the early years, CC largely focused on constitutional provisions on separation of power, preventing the legislature from overstepping its authority. After the early 1970s, CC has increasingly reviewed those laws related to constitutional rights, striking down for the first time a new law restricting formation of new associations on the grounds of freedom of association in 1971. In 2003, CC ruled that it has no power to review constitutional amendments, on the grounds that the constitution does not expressly provide for such power;[55]

(d) **Interpretation of constitution**: While the constitution does not say much on protection of rights in its main text, CC refers to a couple of documents mentioned in the preamble.[56] To keep up with social progress, CC derives the "objectives of constitutional value" from its "Declaration of the Rights of Man and of the Citizen". CC also makes reference to decisions of the European Court of Human Rights and the European Court of Justice when interpreting rights covered in constitutional text;[57]

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[55] Apart from conducting CR, CC is responsible for supervising electoral matters and giving advice on state of emergency decisions. See Gözler (2008) and Oxford Constitutional Law (2016).

[56] More documents can be added to the preamble through constitutional amendments, with the latest being the inclusion of a charter on environmental rights in 2005. See de Visser (2015).

[57] Oxford Constitutional Law (2016) and de Visser (2015).

(e) **Proportionality in constitutional adjudication**: When reviewing constitutionality of laws, CC follows the global mainstream by adopting the principle of proportionality. It quashes a law only if it irrationally or disproportionately curtails fundamental rights or constitutional objectives;[58]

(f) **Self-restraint in rulings on socio-economic policies**: CC acknowledges that it does not have "a general or particular discretion identical to that of Parliament". As such, it refused to invalidate the ban on same-sex marriage in 2011 or strike down a bill on same-sex marriage in 2013;[59]

(g) **Finality of CR decision**: Decisions of CC are final and binding. It will not review laws that it has declared constitutional unless circumstances have changed. However, they can be overruled by constitutional amendments (e.g. new definitions of constitutional rights); and

(h) **Relationship with European courts**: While CC sometimes refers to rulings of European courts when interpreting constitutional provisions, it does not review compatibility of domestic laws with EU law. In its decision in 1974, it explained that its responsibility is confined to ensuring constitutionality of laws only and it is the responsibility of ordinary courts to decide whether ordinary laws are consistent with international norms, of which the supremacy has been recognized in the constitution.[60]

As such, the highest ordinary courts retain the power to overturn legislation that is contrary to EU law. If the EU provisions involved are unclear, they have to seek interpretation from European Court of Justice, which is binding on subsequent rulings.[61] As for the relationship between EU treaties/laws and the French constitution,

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58 Oxford Constitutional Law (2016).

59 Oxford Constitutional Law (2016).

60 de Visser (2015) and Oxford Constitutional Law (2016).

61 Article 267 of the Treaty on the Functioning of the European Union requires highest national courts to seek interpretation from ECJ if questions concerning meaning of EU law arise. The requirement may be waived in only three situations: (a) if the question raised before the national court is irrelevant; (b) if it has already been answered by ECJ; or (c) if the correct application of EU law concerned does not leave scope for any reasonable doubt. See European Court of Justice (2018), The Law Society (UK) (2020) and Library of Congress (2020a and 2020b).

while CC on few occasions found inconsistencies between them, the constant practice has been to resolve the problems by amending the constitution, demonstrating the primacy of EU norms.[62]

5.4 ***As a result of expansion of constitutional duties, CC is not only a check and balance over the legislation enacted by the Parliament, but also a guardian of individual rights in France***. Ever since the first case of post-promulgation review was conducted in 2010, CC has made a total of 990 CR decisions by end-2020, much more than 594 CR decisions during 1958-2010.[63] Among these 990 cases, one-third of the reviewed laws were ruled unconstitutional. While CC generally avoids striking down major social reforms (e.g. labour law reforms during 2016-2018), it has invalidated some anti-riot or anti-terrorist legislation on the grounds of individual rights most recently (**Figure 3**).

5.5 **The CR mechanism in France is generally regarded as satisfactory, though not without issues of concerns**. *First*, some observers found that CC is less willing to consider new social needs in interpretation of the constitution, resulting in more constitutional amendments afterwards.[64] *Secondly*, in view of its increasingly influential role, there are emerging views that former French presidents should not be given automatic right to sit on CC.[65] *Thirdly*, since the two highest ordinary courts serve as gatekeepers to screen cases for CC, they have discretion to bypass CC by deciding that a case does not involve constitutional issues, especially when it also involves EU laws.[66]

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[62] For example, when ruling on ratification of the Maastricht Treaty (which founded EU) in 1992 and the Lisbon Treaty (which amended the constitutional basis of EU) in 2007, CC concluded that amendments to the French constitution were needed. See Oxford Constitutional Law (2016) and Burgorgue-Larsen et al. (2019).

[63] During 2010-2020, 776 or 78% cases were post-promulgation cases referred by ordinary courts. The rest were pre-promulgation cases mostly done upon requested by Members of the Parliament. See Conseil Constitutionnel (undated).

[64] One case in point concerned a law imposing gender quota on boards of directors to promote equal opportunities for women. In 2006, CC struck down the law on grounds that it violated the constitutional principle of equality. The decision was overruled with a constitutional amendment in 2008 that required laws to promote equal access of women and men to professional and social positions. See Rogoff (2011).

[65] In 2019, a bill was submitted to the Parliament to cancel this arrangement. See Library of Congress (2020a).

[66] In a notable case in 2007, a steel company complained that the EU legislation requiring steel companies to pay for polluting emissions while exempting other sectors violated the French constitutional principle of equality. However, the ordinary court decided not to refer the case to CC. In another case involving an illegal immigrant arrested in Belgium by the French police in 2010, the ordinary court also decided to refer the matter to European Court of Justice instead of CC. See EUobserver (2007) and Creelman (2010).

Figure 3 — Examples of CR decisions by the Constitutional Council in France

	Year	Legislation concerned	Decision
1.	2015	House arrest during state of emergency	Constitutional
2.	2016	State-of-emergency provisions for (i) warrantless house searches with proper record; and (ii) copying data from devices during searches	 (i) Constitutional (ii) Unconstitutional
3.	2017	Identity verification, searching of bags and vehicles without cause under state of emergency	Unconstitutional
4.	2017	Prohibition on habitually accessing terrorist websites	Unconstitutional
5.	2019	Anti-rioter law authorizing the police to: (i) search demonstrators with judicial approval; (ii) ban demonstrators from covering faces; and (iii) ban troublemakers from demonstrating.	 (i) Constitutional (ii) Constitutional (iii) Unconstitutional
6.	2020	Requiring online platforms to remove hateful and terrorist content	Unconstitutional
7.	2020	Monitoring of movement of released terrorist prisoners	Unconstitutional

Source: Conseil Constitutionnel.

6. Concluding remarks

6.1 In **Hong Kong**, given the dual nature of BL as both a "mini-constitution" of Hong Kong and a national law of PRC, there are debates on which institutions have the authority to conduct CR in Hong Kong. While some opine that NPCSC is the only institution vested with the power to conduct CR on Hong Kong laws in relation to BL, others take the view that local courts are authorized to conduct CR for those matters "within the limits of the autonomy" of Hong Kong. It has been an established practice for the local judiciary to conduct CR since July 1997, albeit with controversies in certain cases, including (a) the constitutional and legal basis for the local courts to do so; and (b) application of proportionality principle in balancing rights protection and legitimate aims of public policies in courts' ruling.

6.2 In the **US**, all levels of ordinary courts are responsible for CR, similar to Hong Kong. In interpreting the constitution, SC judges have considerable discretion and flexibility in applying six factors (e.g. language of the constitution, original intent of drafters, moral or cultural values, practical benefits and prior court decisions). While the US courts applies varying standards in

weighing laws against three-tier of citizen rights, they exercise restraints in conducting CR and respect the elected legislature in principle.

6.3 The CR mechanism in **France** is distinctly different from the US model. *First*, it is conducted by a dedicated CC, not ordinary courts. *Secondly*, not only the four heads of state organs and Members of the French Parliament can request CR, but individual citizens can also raise constitution challenges through concrete cases upon screening by the two highest ordinary courts. *Thirdly*, on top of CR by request, CC is mandatorily required to review laws concerning organization of the state before their promulgation. *Fourthly,* while CC makes reference to several human rights documents in its interpretation of constitution, it likewise applies proportionality and tries to strike a balance between constitutional rights and other policy goals in their rulings. *Fifthly*, CC would not review compatibility of domestic laws in France with EU laws. Incompatibility of the French constitution and EU laws found by CC has been resolved by constitutional amendments, reflecting the supremacy of the latter.

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