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The Rule of Law in Hong Kong: Immigrant Children, the Court of Final Appeal and the Standing Committee of the National People's Congress

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I. The Constitutional Framework

The tale of the Sino-British Joint Declaration of 1984 and the enactment of the Basic Law of the Hong Kong Special Administrative Region has been often told elsewhere. The outline of that constitutional framework will be well known to many readers and need not be repeated here. But there are three points worth stressing in order to set the scene for what follows.

First of all, a unique constitutional transformation took place when, on 1 July 1997, sovereignty over Hong Kong was transferred from the UK to the People's Republic of China.[1] The differences in constitutional form and constitutional culture between the British-ruled territory and that of the PRC could not have been starker. And yet it was clear, and had been for some time, that there had to be a common future for the people of Hong Kong and the people of the rest of China. The constitutional challenge which this posed was resolved by a unique constitutional solution developed by the late Deng Xiaoping in September 1982. That solution—the 'One Country, Two Systems' concept—underlay the historic Sino-British Joint Declaration of 1984, and it now finds expression in the Basic

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[1] Hereinafter 'PRC'.

Law[2] of the Hong Kong Special Administrative Region.[3] The heart of this concept is, of course, that while Hong Kong will be part of the PRC it will enjoy a 'high degree of autonomy', that the laws in force when the Declaration was signed shall 'remain basically unchanged' and that the social and economic systems of Hong Kong will remain unaltered for 50 years. It is surely beyond argument that the success of the 'One Country, Two Systems' solution is of great importance to China as a whole, to Hong Kong in particular and to East Asia in general. So the stakes are very high.

Secondly, the Basic Law is the crucial constitutional mechanism by which the 'One Country, Two Systems' concept is given practical effect. Thus, while confirming that the HKSAR is 'an inalienable part of the People's Republic of China',[4] the Basic Law also writes into law that the HKSAR is 'to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication'[5] subject only to the provisions of the Basic Law itself. Thus the independent judiciary is preserved, but with the Court of Final Appeal (CFA) taking the place of the Privy Council (which under British rules was the final court of appeal for Hong Kong).[6] The Basic Law also establishes a Chief Executive[7] and the Executive Authorities[8] for the HKSAR (commonly known as the Government of the HKSAR). Legislative authority is vested in the Legislative Council of the HKSAR. The Legislative Council is constituted by election with the aim of 'universal suffrage'[9] and, in addition to its legislative powers, approves taxation and public expenditure.[10] There is also a 'Bill of Rights' contained in Chapter III of the Basic Law that provides for the protection of the fundamental rights of residents of the HKSAR. The rights protected are as much as expected; moreover, the International Covenant on Civil and Political Rights[11] and the International Covenant on Economic, Social and Cultural Rights 'shall remain in force and shall be implemented through the laws of the HKSAR'.[12] The right of abode is specifically protected[13] and is at the centre of the litigation—shortly to be discussed—that forms the background to this article. Generally the laws applicable before the resumption of sovereignty remain in force.[14] Many aspects of the Basic Law and the legislation implementing its provisions were the subject of controversy when they were enacted. But whatever the merits of these controversies, they lie in the past. Since no work of humankind is perfect, the Basic Law could no doubt have been better. None the less, there is little doubt that it is a serious attempt to implement the principles of the Joint Declaration.

Thirdly, the HKSAR is, of course, part of China. Thus, notwithstanding the 'high degree of autonomy' secured for the HKSAR, it must have a formal legal relationship with the rest of China. Thus, for example, the Central People's Government is 'responsible for the foreign affairs relating to HKSAR'.[15] This relationship is inevitable, but it is inherently difficult for it needs to bridge that gulf between the legal and constitutional traditions of the PRC and the legal and constitutional traditions of the HKSAR. The relationship, if it is to be successful, must be based on mutual respect and understanding. Yet given that stark gulf between the traditions, a relationship founded in wariness might be expected. If the legal and constitutional traditions of the PRC were to predominate in this relationship then the 'high degree of autonomy' of the HKSAR would be at an end.

The issues surrounding the relationship between the HKSAR and the PRC—and, specifically, the outworking of the 'One Country, Two Systems' principle—come to a head in relation to the interpretation of the Basic Law. The Basic Law is an enactment of the National People's Congress (NPC) of the PRC; and the Court of Final Appeal in Hong Kong is not given the right finally to determine the meaning of that enactment. Article 158 vests the power of interpretation of the Basic Law in the Standing Committee of the National People's Congress.[16] If this provision had stood unqualified, the Basic Law would have been fundamentally flawed, for the protection of the autonomy of the HKSAR, and all that goes with it, would have been vested in a non-judicial body—indeed, a political body—outside the HKSAR. The legal and constitutional traditions of the PRC would be bound to predominate. However, article 158 goes on to provide that the Standing Committee 'shall authorise the courts of the HKSAR to interpret on their own ... the provisions of this Law which are within the limits of the autonomy of the Region'. When questions of interpretation of other provisions of the Basic Law arise, namely, those provisions which concern

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2 Enacted by the National People's Congress in accordance with art. 31 of the Constitution of the People's Republic of China. This provides that 'the state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by laws enacted by the National People's Congress in the light of the specific conditions.'

3 Hereinafter 'HKSAR'.

4 Art. 1.

5 Art. 2.

6 Chapter IV, section 4 (arts 80–96); art. 19.

7 Who is appointed by the Central People's Government after local election or consultation (art. 45). The 'ultimate aim' is that the Chief Executive should be selected by universal suffrage (*ibid*). The present arrangements are set out in Annex I of the Basic Law. The Chief Executive must be a Chinese citizen permanently resident in Hong Kong with no right of abode elsewhere (art. 44) and is 'accountable to the Central People's Government and the HKSAR in accordance with the provisions of [the Basic Law]' (art. 43).

8 Chapter IV, section 2 (arts 59–65).

9 Art. 68.

10 Art. 73. By art. 73(9) a procedure for the impeachment (by two thirds of the LegCo after an independent investigation of charges (breach of the law or dereliction of duty) against the Chief Executive) is set up; but it is the Central People's Government that dismisses the erring Chief Executive.

11 Hereinafter 'ICCPR'.

12 Art. 39.

13 Art. 24.

14 Arts 8 and 18.

15 Art. 13. But the HKSAR may conduct relevant foreign affairs itself (*ibid*).

16 After consultation with *its* committee for the Basic Law of the HKSAR.

'affairs which are the responsibility of the Central People's Government' or 'the relationship between the Central Authorities and the Region', the CFA 'shall seek an interpretation of the relevant provisions from the Standing Committee' and shall thereafter follow that interpretation.

Thus the CFA does not have the final word on the interpretation of some provisions of the Basic Law. However, the Basic Law does not define which provisions relate to 'affairs which are the responsibility of the Central People's Government, or which concern the relationship between the Central Authorities and the Region'. So who is to decide whether a particular provision relates to these matters or not? Once more the Basic Law does not answer this question. But it is an important question, for were there to be many provisions of the Basic Law in this class, the legal autonomy of the HKSAR would be fundamentally compromised. The true meaning of article 158 is thus central to the success of the 'One Country, Two Systems' constitutional settlement in Hong Kong.

II. The Right of Abode Litigation

The most significant opportunity thus far for the courts of the HKSAR to address these issues arose in the course of the *Right of Abode* litigation.[17] The implications of both the courts' decisions in those cases and the reaction which has ensued form the central focus for the remainder of this article. It is therefore necessary to begin by setting out the background to the *Right of Abode* cases and the conclusions at which the courts—particularly the CFA—arrived.

In examining these matters, it is useful to distinguish two interrelated aspects of the litigation. We shall begin by looking at what may be termed the 'Chapter III issues' raised by the *Right of Abode* case. By this is meant the issues that concern the ambit and reach of the fundamental rights—particularly the right of abode—protected by Chapter III of the Basic Law. These are important issues, particularly to those who have lost the right of abode as a result of the outcome of the litigation. However, the implications of this litigation for the foundations of the constitutional order in Hong Kong are even more important. These are the 'constitutional issues'. They concern the relationship between the HKSAR and the PRC, as well as the relationship between the CFA and the HKSAR Government. As will be seen, the *Right of Abode* litigation and its aftermath will have an immense impact on the fundamental dynamics and legitimacy of Hong Kong's constitutional arrangements.

[17] The '*Right of Abode*' epithet is used, in this work, to refer to the decisions of the HKSAR courts in *Ng Ka Ling* v. *Director of Immigration* (*sub nom. Cheung Lai Wah (An Infant)* v. *Director of Immigration*) [1997] 3 HKC 64 (Court of First Instance); [1998] 1 HKC 617 (Court of Appeal); [1999] 1 HKLRD 315 (Court of Final Appeal); and *Chan Kam Nga* v. *Director of Immigration* [1998] 1 HKLRD 142 (Court of First Instance); [1998] 1 HKLRD 752 (Court of Appeal); [1999] 1 HKLRD 304 (Court of Final Appeal). For further discussion, see Elliott, (1999) *Judicial Review* 182.

A. *The Chapter III issues*

Article 24(3) of Hong Kong's Basic Law provides that 'permanent residents' of Hong Kong shall have the 'right of abode'. Shortly after sovereignty over Hong Kong passed from the United Kingdom to the People's Republic, the HKSAR's Provisional Legislative Council enacted legislation which sought to clarify precisely which categories of persons were permanent residents of the Region, and the exact scope of—and conditions applying to the exercise of—their right of abode. The ensuing litigation concerned a challenge to the validity of that legislation, with the applicants contending that it was unconstitutional because it ran counter to the relevant provisions of the Basic Law. It is necessary to address each of the four main issues which arose in the *Right of Abode* cases.

Articles 24(2)(i) and (ii) provide that Chinese citizens 'born in Hong Kong before or after the establishment of the HKSAR' or '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' are permanent residents.[18] Article 24(2)(iii) operates to confer permanent residency upon the children of the persons who enjoy that status under article 24(2)(i) or (ii).[19] On 10 July 1997, nine days after the entry into force of the Basic Law, Hong Kong's Provisional Legislative Council enacted a special procedure which sought to regulate, in certain respects, the exercise of the right of abode.[20] Persons who were resident in China and who wished to exercise a right of abode arising by descent (that is, under article 24(2)(iii)) were required, before entering Hong Kong, first to satisfy the Region's Director of Immigration of their status as permanent residents and, secondly, to obtain the mainland authorities' permission to travel to Hong Kong.

The CFA held that the first of these two conditions, requiring proof of entitlement, was constitutionally acceptable, since: 'It is reasonable for the legislature to introduce a scheme which provides for verification of a person's claim to be a permanent resident.'[21] Li CJ emphasised that such a scheme had to be operated in a fair and reasonable manner. The second limb, however, was more problematic, since it went much further than a simple requirement of proof. In mid-1997, 66,000 people were waiting to exercise their right of abode under article 24(2)(iii), but the mainland authorities had set a quota of 150 per day. The legislative policy of making the right of abode contingent on the discretion of the mainland authorities therefore rendered it largely illusory for many people in the short-term. Nevertheless, the lower courts had upheld this part of the legislative scheme. This conclusion was reached on the basis of article 22(4) of the Basic Law, which provides that 'people from other parts of China' must apply to the mainland authorities for permission to travel to Hong Kong,

[18] Art. 24(2) confers permanent residency upon six categories of persons; only sub-paragraphs (i), (ii) and (iii) are relevant to the present discussion.

[19] Like Art. 24(2)(i) and (ii), sub-paragraph (iii) also operates only in favour of Chinese nationals.

[20] See Immigration (Amendment) (No 3) Ordinance (No 124 of 1997).

[21] [1999] 1 HKLRD 315 at p 348.

and that the competent authorities of the Central People's Government, after consultation with the HKSAR authorities, may determine the number of persons to whom such permission will be granted.

Article 22(4) was said to confront the applicants with an insuperable hurdle, but the CFA disagreed. It adopted a narrow construction of the article, holding that it did not apply to permanent residents of Hong Kong: 'Persons with permanent resident status ... are not, as a matter of ordinary language, people from other parts of China. They are permanent residents of this part of China.'[22] Although this may not, in straightforward linguistic terms, be the most natural construction of article 22(4), it does reflect the constitutional settlement which underpins Hong Kong's status as a Special Administrative Region. To render, as the lower courts' decision on this point did, Hong Kong citizens' foundational right of abode vulnerable to the discretion of mainland authorities wholly beyond the control of the Region and its courts was inconsistent with the 'One Country, Two Systems' philosophy which underlies Hong Kong's unique status within China.

The second issue also relates to the ordinance enacted on 10 July 1997. It provided that it was a criminal offence to enter Hong Kong pursuant to a right of abode claimed under article 24(2)(iii) otherwise than in accordance with the procedure set out by that legislation. Crucially, this criminal liability was imposed retrospectively on those who had entered Hong Kong *after* the entry into force of the Basic Law (on 1 July 1997) but *before* the adoption of the legislation (on 10 July 1997). The lower courts had held that this measure did not breach Article 15(1) of the ICCPR and was therefore constitutional.[23] They reached this conclusion on the basis that, while the ICCPR (and, therefore, Hong Kong's Basic Law) prohibited *prosecutions* in respect of acts committed before 10 July 1997, it did not preclude the *assignment of criminal liability* (otherwise than by prosecution) in relation to such conduct. Once again, the CFA's approach was much more generous to the citizen and to his rights under Hong Kong's constitutional texts. Li CJ noted that the lower courts' approach may well entail 'unjust civil consequences for the persons concerned. They could then be said to have committed criminal offences and, although they could not be prosecuted or convicted, there may be adverse consequences in relation to, for example, the law of defamation and their being fit and proper persons in various contexts.'[24] The retrospective provision was thus unconstitutional and, therefore, had to be excised from the legislation.

The third and fourth issues can be dealt with together. It has already been explained that, under article 24(2)(iii) of the Basic Law, those 'born of' persons enjoying permanent residency under certain other provisions of the Basic Law acquire that status themselves by means of descent. The Provisional Legislative Council sought to define the scope of article 24(2)(iii) in a manner which—in two respects—significantly attenuated it.[25] First, for the purposes of establishing descent under article 24(2)(iii), it was provided that a child was 'born of' his father only if the latter was married to the child's mother at the time of the birth or if the child was later legitimated by marriage. In contrast, a child was 'born of' his mother irrespective of her marital status. Thus children born of informal liaisons between Hong Kong men and women elsewhere in China had no right of abode in Hong Kong. Secondly, legislation provided that when a child sought to establish a right of abode on the basis that one of his parents was a Chinese citizen who had lived in Hong Kong for at least seven years, that qualifying period was required to have run by the time of the child's birth.

The CFA affirmed the lower courts' conclusion that the limitation based on legitimacy was unconstitutional: this followed from the fact that Hong Kong's constitutional texts 'enshrined the principle of equality, [which is] the antithesis of any discrimination' and recognised 'that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.[26] The Court of Appeal had held that the second limitation, requiring the seven-year qualifying period to have run by the time of the claimant child's birth, was not an unconstitutional limitation on the status of permanent residency conferred by article 24 of the Basic Law.[27] It had been persuaded by the Director of Immigration's argument that to accept the applicants' contention would expose Hong Kong to an unmanageable growth in its population. The CFA, however, dismissed both the relevance and the validity of this point. Instead, it emphasised that the *natural construction* of article 24(2)(iii) was that which the applicants contended for, and that a *purposive construction*—having regard to the ICCPR's respect for the family unit[28]—would yield the same result.[29]

The CFA thus adopted a very robust attitude towards the legislation which sought to attenuate the enjoyment of the right of abode protected by the Basic Law. Interestingly, the Court, in reaching its crucial findings about the meaning of the Basic Law, makes little reference to decided cases on the question of the correct approach to constitutional interpretation. Perhaps this was simply the result of the Court's appreciation of the uniqueness of Hong Kong's constitutional arrangements. Perhaps the Court simply wished to show that its approach was founded in the legal traditions of the HKSAR. However, the CFA's purposive approach to constitutional interpretation marches in step with the approach adopted to constitutional interpretation elsewhere in the world. Leading jurists have long recognised that constitutional instruments are different and should be interpreted differently. The decisions from across the world that

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22 *Ibid*, p 346.

23 It will be recalled that the ICCPR remains part of Hong Kong law, by operation of the Basic Law, art. 39. There is no specific restriction on retrospective legislation in the Basic Law.

24 [1999] 1 HKLRD 315 at p 352.

25 See Immigration (Amendment) (No 2) Ordinance (No 122 of 1997).

26 [1999] 1 HKLRD 315 at pp 352–53.

27 [1998] 1 HKLRD 752.

28 Art. 23(1) of the ICCPR.

29 [1999] 1 HKLRD 304.

establish this are legion. Let the words of Mahomed CJ in *Government of the Republic of Namibia* v. *Cultura 2000*[30] serve as an example:

> A Constitution is an organic instrument ... it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism'[31] and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government ... [To hold otherwise] would be inconsistent with the international culture of constitutional jurisprudence which has developed to give constitutional interpretation a purposive and generous focus.

Measured against this standard, the CFA's judgment seems an entirely proper, but purposive and generous, interpretation of the rights secured by Chapter III of the Basic Law. Now let us turn from the practical implications of the Court's adjudication to the constitutional issues which its judgment raises.

B. The Constitutional Issues

In his argument before the CFA, counsel for the Director of Immigration sought to pre-empt arguments on the Chapter III issues which the case raised by submitting that the Basic Law rendered the Court incompetent to adjudicate on them. This provided the Court with a clear opportunity to examine Hong Kong's new constitutional landscape and to determine the judiciary's role within it. These constitutional questions were treated equally as robustly as the issues discussed above.

The first such matter with which Li CJ dealt concerned the capacity of Hong Kong's judges to adjudicate on the constitutionality of legislation.[32] They 'undoubtedly' had jurisdiction to declare the invalidity of measures enacted by Hong Kong's Legislative Council which were found to be contrary to the constitution: the more controversial issue was whether similar jurisdiction could be exercised over enactments of China's National People's Congress. In an earlier case,[33] Chan CJHC had suggested that, following the transfer of sovereignty, the courts stood in the same relationship with the National People's Congress as they had, formerly, with the Westminster Parliament, so that enactments of the sovereign legislature would remain unimpeachable in the courts of the HKSAR.

This view was rejected by the CFA. It said that Hong Kong's judges *are* competent to declare the invalidity of any legislation passed by the NPC which is contrary to the Basic Law or the ICCPR. In this manner the Court emphasised that those instruments subsist as entrenched guarantees of the constitutional freedoms of Hong Kong's residents and that the Region's courts fully accept their role as the guardian of those rights, irrespective of the agency which seeks to abrogate them. On this issue the judgment of the CFA bears favourable comparison with the great cases of *Marbury* v. *Madison*[34] and *Harris* v. *Minister of the Interior*.[35]

The second constitutional question was treated similarly.[36] As we explained earlier, article 158(3) of the Basic Law provides that when the CFA adjudicates in a case that engages provisions of the Basic Law which relate to certain classified issues – namely, 'affairs which are the responsibility of the Central People's Government' or 'the relationship between the Central Authorities and the Region'—the Court must refer the interpretation of the relevant provisions of the Basic Law to the Standing Committee of the National People's Congress (NPCSC). This provision clearly has the potential to limit substantially the autonomy of Hong Kong's judicature to interpret the constitution and provide effective protection of the rights which it enumerates. However, the CFA's construction of article 158(3) ensured—or at least appeared to ensure[37]—that this potential would not be realised. The Court's reasoning can be resolved into two parts.

First, counsel had argued that the duty to refer would arise whenever a classified provision was 'arguably relevant' to a question of interpretation. On this view, if the Court was required to construe a provision which manifestly did not relate to a classified issue, but whose interpretation could arguably be influenced by another provision of the Basic Law which did relate to such an issue, the duty to refer would be triggered. The Court recognised that accepting this argument would denude it of a significant measure of interpretative competence. This, said Li CJ, 'would be a substantial derogation from the Region's autonomy and cannot be right'.[38] The Court therefore held that its ability to interpret the Basic Law is displaced only when the 'predominant' provision which falls to be construed relates to a classified matter. The fact that a

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30 1994 (1) SA 407 (Namibia Supreme Court) at p 418. In the report, the third sentence comes before the first but here it has been transposed for reasons of elegance. There are far too many decisions supporting this proposition for them all to be listed here, but see *S* v. *Mhlungu* 1995 (3) SA 867 (South African Constitutional Court); *Hunter* v. *Southam Inc.* (1984) 9 CRR 355 (Supreme Court of Canada); and *R.* v. *Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 (Supreme Court of Canada) at pp 395–96.

31 This phrase of unknown provenance is quoted with approval in *Minister of Home Affairs (Bermuda)* v. *Fischer* [1980] AC 319 (Privy Council) at p 328H.

32 [1999] 1 HKLRD 315 at pp 337–39.

33 *Hong Kong Special Administrative Region* v. *Ma Wai Kwan David* [1997] 2 HKC 315 at pp 334–35 (although cf *Cheung Lai Wah* v. *Director of Immigration (No 2)* [1998] 2 HKC 382 at p 395, in which Chan CJHC doubted the correctness of his earlier remarks).

34 (1803) 1 Cranch 137 (asserting the power of the US Supreme Court to review judicially unconstitutional federal statutes).

35 1952 (2) SA 429 (A) (asserting the power of the Supreme Court of South Africa to strike down as void an unconstitutional statute of a sovereign parliament denying the vote to coloured persons).

36 See [1999] 1 HKLRD 315 at pp 341–45.

37 This qualification is added in light of the events which occurred subsequent to the decision of the Court of Final Appeal in the *Right of Abode* cases. See section II.C below.

38 [1999] 1 HKLRD 315 at p 344.

classified provision is arguably relevant to the interpretation of the predominant provision is not sufficient to remove the matter from the Court's jurisdiction. Secondly, it was held that the question whether the predominant provision actually relates to a classified matter is emphatically one for the Court, not for the mainland authorities. The gateway to article 158(3) references was thus very narrow, and the Court firmly established itself as the gatekeeper. This, in turn, evinces a clear policy of preserving jurisdiction wherever possible, in order that Hong Kong's courts are placed in a strong position to vouchsafe the constitutional rights of its residents. In the light of the high degree of autonomy implied by the 'One Country, Two Systems' concept, this policy seems coherent and justified.

C. The Reaction to the Court of Final Appeal's Right of Abode Decisions

The story of the *Right of Abode* cases does not, however, end here. There have been two developments since the Court of Final Appeal's judgments were issued on 29 January 1999.

1. The clarification by the CFA

The first of these was the 'clarification' of its *Right of Abode* decision issued in the form of a judgment[39] by the Court of Final Appeal on the 26 February 1999. Having asserted that it possessed jurisdiction 'to take such an exceptional course',[40] the Court said that its judgment in the *Right of Abode* case:

> did not question the authority of the Standing Committee to make an interpretation under article 158 which would have to be followed by the courts of the Region. The Court accepts that it cannot question that authority. Nor did the Court's judgment question, and the Court accepts that it cannot question, the authority of the National People's Congress or the Standing Committee to do any act which *is in accordance with the provisions of the Basic Law and the procedure therein*.[41]

The purpose of this 'clarification' is, paradoxically, somewhat opaque for it says nothing that is not self-evident in the *Right of Abode* judgment. That judgment clearly did not question the capacity of the NPC and the NPCSC to act, in relation to Hong Kong, in a manner which is *in accordance with* the Basic Law.

2. The interpretation of article 24 by the NPCSC

In any event, the 'clarification' has largely been eclipsed by more recent events. On 26 June 1999, the NPCSC issued an 'interpretation' of the key provisions of the Basic Law which had been at stake in the *Right of Abode* cases.[42] The HKSAR Government requested a reinterpretation of the relevant provisions because, according to the Chief Executive, 'the effect of the [Court's] interpretation would be to place unbearable pressure on the HKSAR' given the predicted influx of migrants,[43] although this contention has been strongly challenged.[44] There appears to have been no formal hearing before the Standing Committee, and its 'interpretation' contains little that would be recognised as legal reasoning by anyone cognisant with the legal system as it hitherto operated in Hong Kong.

The Standing Committee's reinterpretation, if accepted as applicable, has two principal effects. First, it attenuates the *scope* of the right of abode. As discussed above, the CFA had held that article 24(2)(iii) operated to confer a right of abode on any child whose parent enjoyed permanent residency under article 24(2)(i) or (ii), irrespective of whether the parent acquired that status before or after the child's birth. The NPCSC reached the opposite conclusion without grappling with the arguments that had persuaded the CFA.[45] Consequently, article 24(2)(iii) now operates to confer permanent residency by descent only if at least one parent was already a permanent resident by the time the claimant child was born.

As well as qualifying the scope of the right of abode, the reinterpretation also places very significant restrictions on its *exercise*. The CFA had held that the requirement, under article 22(4) of the Basic Law, that 'people from all other parts of China must apply for approval' before travelling to Hong Kong, did not

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[39] *Ng Ka Ling* v. *Director of Immigration* (Final Appeal No 14 of 1998 (Civil), Court of Final Appeal, 26 February 1999).

[40] The Director of Immigration filed a notice of motion applying for clarification.

[41] *Per* Li CJ, giving the judgment of the Court. Emphasis added.

[42] The text of the interpretation is available on the internet. See, eg <www.scmp.com/Special/RightOfAbode/index.asp>. The role of the NPCSC within the Constitution of the People's Republic of China is set out in arts 57–78 of China's Constitution.

[43] Chief Executive's Report to the State Council, 20 May 1999 (see <www.info.gov.hk/basic_law/english/CE-01.doc>).

[44] The HKSAR Government estimated that 1.6 million people would, if the CFA's judgment was allowed to stand, be eligible to enter Hong Kong with immediate effect. However, a pressure group, Human Rights Monitor, puts the figure at only 562,000. Mainland officials had been conducting a new survey, in an attempt to check the accuracy of the estimated figure of 1.6 million; however, that survey has been aborted. Human Rights Monitor claims that the survey has been cancelled because the authorities feared that its findings would contradict the figure of 1.6 million; the authorities, however, say that the survey was rendered otiose by the NPCSC interpretation of the Basic Law. See further G Manuel, 'Survey to Find Mainlanders' Impact Halted', *South China Morning Post*, 25 October 1999 (<www.scmp.com/Special/RightOfAbode/Article/FullText_asp_ArticleID-19991025204244413.asp>). But not too much should be made of the figures. Although the numbers of persons who enjoy the right of abode under art. 24 may determine the urgency of the matter, they cannot affect the correct interpretation of art. 24.

[45] The Standing Committee appeared to be influenced by the 'Opinions on the Implementation of Article 24(2) of the Basic Law ...' adopted at the Fourth Plenary Meeting of the Preparatory Committee for the HKSAR of the National People's Congress on the 10 August 1996. Thus a document that came into existence several years after the enactment of the Basic Law is used to interpret it! That is the measure of the gulf that separates the two constitutional traditions.

apply to persons who were going to Hong Kong in order to exercise their right of abode. The NPCSC disagreed—once more without addressing the arguments accepted by the CFA—the consequence being that the exercise of a right of abode arising under article 24 of the Basic Law is now entirely contingent upon the discretion of the mainland authorities.

The implications of the reinterpretation cannot be underestimated. A considerable number of people who thought that they possessed a right of abode in Hong Kong now find that they do not, while those who possess the right but who do not presently live in the HKSAR are unable to exercise it unless and until the mainland authorities allow them to. The consequence is that a right purportedly protected under the laws operating in one system (that of Hong Kong) is contingent upon the political will of the authorities under the other system. Whatever the practical difficulties posed by the CFA's decision, this result is surely incompatible with the promise of 'One Country, Two Systems'.

But the implications of the way this issue was resolved—if it was resolved[46]—for the new legal and constitutional order of Hong Kong are even graver. And to these issues we now turn.

III. The Constitutional Implications of the NPCSC's Reinterpretation

A. Interpretation or Amendment?

Shortly after the Court of Final Appeal had given its judgment in the *Right of Abode* cases, it became clear that the HKSAR Government was unhappy with that judgment in light of the pressure which, it was said, would be caused by the predicted surge of immigrants. In a press release issued on 18 May 1999,[47] the Government outlined four possible courses of action. The first option—to accept unequivocally the Court's judgment and to attempt to absorb the expected number of immigrants—was rejected on economic and pragmatic grounds. Secondly, the Government could have waited until the CFA had the opportunity, in a new case, to reconsider the interpretation of the Basic Law which it rendered in January 1999. This, too, was rejected because it could not be guaranteed that a different construction would be reached and, if it was, the Court's independence would appear to have been compromised.

Thus it transpired that there were two main options open to the Government: reinterpretation by the NPCSC, or amendment of the Basic Law. Section C below addresses the constitutional implications of the HKSAR Government's decision to favour reinterpretation over amendment. First, however, it will be argued that the text of the Basic Law, properly understood, suggests that the Government did not, in the first place, possess any constitutional competence to ask for a reinterpretation.

[46] See the Conclusions below.

[47] See <www.info.gov.hk/gia/general/199905/18/0518132.htm>.

B. Did the HKSAR Government Have the Power to Request a Reinterpretation?

The Chinese authorities made it clear, following the Court of Final Appeal's *Right of Abode* decisions, that they would not become involved in the matter in the absence of a request from Hong Kong. It is therefore necessary to consider exactly what the HKSAR Government had authority to do, in terms of the reference which it could make to the mainland authorities.

Article 159 of the Basic Law provides that an *amendment* of the Basic Law can be made by the NPC pursuant to a request by the HKSAR. However, article 159(2) goes on to state that such a request can be made only with the consent of 'two thirds of the deputies of the Region to the National People's Congress; two thirds of all the members of the Legislative Council of the Region, and the Chief Executive of the Region'.

The situation is different as regards references to the NPCSC for *interpretation*. Article 158 provides that the power to interpret the Basic Law is vested in the NPCSC, but that the HKSAR courts are authorised 'to interpret on their own' the Basic Law, subject to the proviso, expressed in article 158(3), 'concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region'. As discussed above, when such matters are at stake in a particular case, the Court of Final Appeal is required to refer their interpretation to the NPCSC.

Thus Chapter VIII of the Basic Law envisages a clear distinction between amendment and interpretation. The amendment machinery exists, as one would expect, to facilitate changes to Hong Kong's constitution. But such amendment takes place in proper legislative form after approval by two thirds of the representatives of the people of the HKSAR. However, the system of references to the NPCSC for interpretation occupies a different role within the constitutional scheme. It is clear from article 158(3) that requests for interpretation are to be made within the context of specific legal proceedings, the idea being that the CFA will stay the relevant proceedings pending the provision, by the NPCSC, of its binding interpretation.[48] In this manner, the

[48] Art. 158(3) provides that 'the courts of the Region shall, *before making their final judgments* which are not appealable, seek an interpretation of the relevant provision from the Standing Committee of the National People's Congress' (emphasis added). This emphasises that references for interpretation are to be made within the context of legal proceedings, and that cases which generate art. 158(3) references cannot be finally determined until the NPCSC's interpretation is furnished. An interesting analogy can be drawn with the jurisdiction of the European Court of Justice to interpret the law of the European Union pursuant to references made to it by national courts under Art. 234 (formerly Art. 177) of the European Community Treaty. This analogy will be developed in section III.D below.

interpretative role of the Standing Committee is discharged as an integral part of the judicial process (albeit that the Committee is, self-evidently, not itself a judicial body). It is another matter entirely to suggest that the Standing Committee's interpretative competence can be used to serve the quite different purpose of changing (at least prospectively) an interpretation of the Basic Law at which the HKSAR courts have arrived. The constitutional scheme clearly envisages NPCSC interpretation as an inherent element of the process by which the courts adjudicate in individual cases, and there is nothing whatsoever to suggest that the Basic Law empowers the HKSAR Government to seek a reinterpretation of the Basic Law in order to reverse a judicial construction.[49]

Two further points should be made in this regard, both of which point towards the same conclusion. As mentioned above, article 159 places constraints on the HKSAR Government's competence to ask for the Basic Law to be amended. In particular, it precludes the Government from seeking an amendment unless it can secure the support of two thirds of the members of Hong Kong's Legislative Council. In contrast, the Government claims to possess an entirely unfettered power to request reinterpretations of the Basic Law. As public lawyers are well aware, a bold interpretative approach can often achieve just as much as outright amendment.[50] It follows that to imply[51] into the Basic Law an uncircumscribed power to procure reinterpretations would permit the effective short-circuiting of the safeguards built into article 159 *vis-à-vis* requests for amendment. This, in turn, would produce an incoherent constitutional scheme. The logical conclusion, therefore, is that it should not be assumed that the Basic Law tacitly confers authority on the Government to procure reinterpretations of Hong Kong's basic constitutional text.

A similar point arises in relation to article 158(3). It provides that 'judgments previously rendered shall not be affected' by interpretations issued by the NPCSC under article 158. However, in a case[52] which concerns the standing of the reinterpretation issued in June 1999—and which, at the time of writing, is still before the Court of Final Appeal—counsel for the Director of Immigration argued that interpretations rendered by the Standing Committee can, if it so chooses, have retrospective effect. It would appear that the only basis for such an argument is that article 158(3) limits the effect of NPCSC interpretations when they are issued pursuant to a request, under article 158(3), from the CFA, but that the NPCSC has an independent—and unfettered—competence to interpret

[49] The HKSAR Government claimed that it had jurisdiction to request a reinterpretation under art. 48 of the Basic Law, according to which the Chief Executive is responsible for the implementation of the Basic Law. We agree with the view expressed by the Hong Kong Bar Association that reading a power to request reinterpretation into art. 48 would involve 'a violent distortion of the language and meaning of Article 48'.

[50] This idea will be developed further below.

[51] As explained in *supra* n 49, the HKSAR Government contended that it was implicit in art. 48 that the Chief Executive was empowered to request reinterpretations of the Basic Law.

[52] *Lau Kong-yung* v. *Director of Immigration*.

(and reinterpret) the Basic Law in cases, like *Right of Abode*, when the request is made by HKSAR Government rather than the Court. This renders otiose the qualification which article 158(3) places on the NPCSC's powers of interpretation, thereby making the scheme of the Basic Law fundamentally incoherent. Once again, the logical conclusion is that the HKSAR Government does not, in the first place, have the competence to request reinterpretations of the Basic Law. Article 159 provides for amendment, and article 158 provides for the interpretation of the Basic Law by the Standing Committee in limited circumstances and within the context of legal proceedings. Neither of those provisions—and no other provision of the Basic Law—creates a third, and quite distinct, competence whereby the HKSAR Government is able to procure the reinterpretation of the Basic Law when it disagrees with the interpretation rendered by the judiciary.

If it is right that the HKSAR Government lacked power to make a reference to the Standing Committee, then the question arises of what the constitutional consequences of that are. Is it the case that the safeguards that limit the power of the HKSAR Government to request the NPC to amend the Basic Law can be so readily evaded, leaving the ordinary resident of the HKSAR with no remedy? It is submitted that the constitutional order in Hong Kong does not rest upon such insecure foundations. The rule of law is clearly a fundamental principle within Hong Kong's legal system.[53] From this, two conclusions follow ineluctably. First, the executive government of Hong Kong must be able to show lawful authority for every act that it does. Secondly, where it is disputed whether such authority exists in any particular case, it is the task of the courts to determine the ambit of the executive's power and to ensure that the limits enshrined in law are not trangressed. The appropriate vehicle for this task is the application for judicial review. There can be little doubt that the Chief Executive is, in the developed law, subject to judicial review.[54] Given that there seem to be the strongest doubts whether the HKSAR Government had power to refer the matter to the Standing Committee, it is a pity that the legality of the decision by the HKSAR Government to approach the Standing Committee was not tested before Hong Kong's courts.

[53] Clearly, this derives from Hong Kong's common law heritage; and, importantly, as well as being ingrained in the ethos and habits of Hong Kong's legal system, that common law tradition is also preserved explicitly by art. 8 of the Basic Law.

[54] The Chief Executive's predecessor, the Governor, was so subject. See *Li Hong Mi* v. *Attorney General* [1920] AC 735 (Privy Council); *The Man Yee Firm* v. *Li Chan Shi* (1925) 20 HKLR 28 at p 34 and many other cases. But it should be noted that the reviewability of a deportation decision was doubted in *Osman* v. *Attorney-General* [1988] 2 HKLR 378 (Court of Appeal of Hong Kong). *Lui Man Ma* v. *Governor-in-Council* [1959] HKLR 177 at p 199 and *Ho Po Sang* v. *Director of Public Works* [1959] HKLR 632 at p 645 are wrong, being based on the erroneous approach to the reach of *certiorari* current throughout the common law world at that time.

C. Broader Questions of Constitutional Competence

Thus far, we have argued that there are a number of strong indications that the Basic Law does not countenance a regime whereby the HKSAR Government is able to request that the NPCSC reinterprets parts of Hong Kong's constitution when the Government disagrees with the interpretation which the Region's courts have reached. We now turn to consider the question from a broader perspective by looking beyond the text of the Basic Law at the wider implications of the reinterpretation for Hong Kong's constitutional order.

Notwithstanding the arguments made above, the HKSAR Government perceived that it could choose to seek either the reinterpretation of articles 22(4) and 24(2) of the Basic Law, or their amendment. The former approach raises two key problems. First, the approach based on reinterpretation tends to *regularise the de facto amendment of the constitution*. Secondly, if allowed to continue, that process of regularisation would, in turn, ultimately *erode the constitutional status* of the Basic Law in Hong Kong. It is necessary to address each of these points in turn.

We remarked earlier that a strong or creative approach to the interpretation of a text can often achieve just as much as its outright amendment. This is illustrated by the way in which American courts interpret the US Constitution. To give a well known example, the 'separate but equal' policy which resulted in racial segregation was found, in *Plessy* v. *Ferguson*,[55] to be constitutional; yet, half a century later, a different interpretation of the same provisions of the Constitution yielded the exactly opposite conclusion.[56] In this manner, interpretation and amendment ultimately shade into one another.[57] Nevertheless, the difficult nature of the distinction between interpretation and amendment cannot be permitted to obscure the fact that the two phenomena do differ from one another in crucial respects.

One of the most important of those distinctions subsists in the divergent perceptions which attend, on the one hand, the interpretation of a constitutional text and, on the other hand, its amendment. The amendment of a constitutional instrument—like Hong Kong's Basic Law—is, self-evidently, a momentous event. This derives, in part, from the formality which necessarily accompanies such a development: in Hong Kong's case, the amendment (if it is instigated by the Region) must be endorsed by the Legislative Council, and it must be implemented by the NPC rather than its Standing Committee. But the perception which attaches to constitutional amendment arises, in the main, for more fundamental reasons than these. It flows from the very permanence which constitutional texts are intended, and expected, to possess. In this manner, the notion of 'constitutional amendment' is, in a sense, paradoxical, given the immense social, political and legal significance which necessarily attaches to the alteration of a document whose very nature dictates that it should form part of a culture's legal heritage which is very nearly beyond change. Constitutional amendment should not, of course, be impossible; but to treat it as nothing more than an everyday occurrence is to deny the constitutional essence of the text.

Interpretation is a different creature. In the first place, little or no formality attaches to a mere process of construction. Thus, in relation to Hong Kong's Basic Law, the HKSAR Government requested a reinterpretation without any need to secure the support of the Legislative Council,[58] and the reinterpretation did not have to be endorsed by the NPC (which meets only annually) but could, instead, be issued by its Standing Committee (which meets regularly). Quite independently of these formal distinctions, however, interpretation is quite simply a regular, as opposed to an exceptional, legal process. The courts construe all manner of texts—constitutional and otherwise—on a daily basis; there is nothing unusual about this, and nor should there be. The interpretation—in sharp contrast to the amendment—of constitutional instruments is therefore perceived as a perfectly regular activity. Hong Kong's Secretary for Justice appealed to precisely this perception when she opined that: 'There is ... a fundamental difference between an interpretation and an amendment. An interpretation *reflects* the true legislative intent of a provision, whereas an amendment *changes* the legislative intent.'[59]

Hence there exist two fundamental characteristics of interpretation which, taken together, have important implications in the present context. First, it is possible, through processes which are—or which are at least described as—interpretative to achieve outcomes which are as radical—or almost as radical—as those outcomes which can be procured through an ostensible process of amendment. Secondly, however, interpretation is an activity which is perceived—or which can at least be presented—as something which is regular, in the sense that it upholds and affirms, rather than fundamentally alters, the foundational principles of the constitutional order. It is these dual characteristics of interpretative methodology which create significant potential for its

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[55] (1896) 153 US 537.

[56] *Brown* v. *Board of Education of Topeka* (1953) 347 US 483.

[57] Another well-known example, of which readers familiar with English administrative law will be well aware, is the decision of the House of Lords in *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147. The Foreign Compensation Act 1950, s. 4(4), provided that 'no determination of the [Foreign Compensation] Commission shall be called in question in any court of law'. Nevertheless, the House of Lords—by expansively reformulating the theory of jurisdiction and construing the ouster clause as immunising only errors made within the jurisdiction—intervened to correct an error of law. English commentators disagree on whether the House of Lords, in *Anisminic*, simply interpreted the preclusive provision or actually refused to apply it. There can be few clearer illustrations of quite how blurred is the dividing line between, on the one hand, the interpretation of a text and, on the other hand, its *de facto* amendment (or non-application).

[58] However, we argued above that no formal conditions qualify the HKSAR Government's purported competence to request a reinterpretation by the NPCSC because the Basic Law does not envisage the existence of such a power in the first place.

[59] Elsie Leung, speaking in the Hong Kong Legislative Council, 19 May 1999 (original emphasis).

deployment as the means by which the *de facto* amendment of Hong Kong's constitution may be effected.

Once this is recognised, the prospect arises that the Basic Law in Hong Kong will, in time, be denuded of any meaningful constitutional status. If the device of interpretation is pressed into service whenever the Government wishes to reverse the Court of Final Appeal's conclusion regarding the meaning of a particular provision of the Basic Law, then it will no longer be possible to regard the Basic Law as a guarantee of the citizen's fundamental entitlements.

D. Article 158(3) in Comparative Perspective

This is a useful juncture at which to consider these issues from a comparative perspective. We shall describe below two situations which arise in British and European contexts where a domestic court refers a question of interpretation for determination by another body. We have chosen to include each of those situations because they bear some similarity to the events described above. However, the British and European examples are, in truth, very different. Consequently, far from somehow serving to normalise what happened in the *Right of Abode* case, the fact that each of the comparator cases can be distinguished from it serves to underscore the constitutional irregularity which inheres in Hong Kong's case.

Our first example is drawn from the European Union's legal order. It is essential to the effective functioning of the EU that European law bears the same meaning in all 15 Member States. Article 234[60] of the European Community Treaty therefore provides for a system whereby the interpretation of provisions of EU law may be referred to the European Court of Justice. There are three significant similarities between references which are made under Article 234 of the EC Treaty and article 158 of the Basic Law. First, Article 234 references relate to matters of interpretation which are relevant at a European, rather than a purely domestic, level; similarly, article 158 references concern provisions which concern China or Hong Kong's relationship with it, rather than purely internal HKSAR matters. Secondly, both provisions direct that a reference *must* be made when a relevant provision is before a court from which no appeal lies.[61] Thirdly, and more generally, the existence of the Article 234 reference system demonstrates that, within the legal order of the EU, like that of the HKSAR, there are certain issues on which national courts do not possess ultimate interpretative competence. It may be thought that the existence of these similarities—particularly the third one—somehow demonstrates that the system which now operates in Hong Kong is unexceptional. This prompts two responses.

[60] Formerly Art. 177.

[61] In Hong Kong, this means the Court of Final Appeal. In the EU context, it has been held that the duty to refer applies both to national courts from which there is never any appeal and national courts from which there is no appeal in the instant case because leave to appeal has been refused. See Case 6/64, *Costa* v. *ENEL* [1964] ECR 1141.

First, the similarities between the article 234 and article 158 regimes are most apparent when the latter is viewed as it was apparently *intended* to operate by the framers of the Basic Law, rather than as it *actually* operated in the *Right of Abode* case. Looked at in that way, article 158 references, like Article 234 references, would occur only within the context of legal proceedings, and the interpretations rendered by the NPCSC would, like those rendered by the European Court of Justice, be applied by the competent court in its determination of the case before it. Nevertheless, even if article 158 operated in this manner, an essential difference would of course remain, given that the interpretation of the Basic Law pursuant to article 158 references is furnished by the NPCSC which, unlike the European Court of Justice, is a non-judicial body. An important implication of this is that the Standing Committee's reinterpretation of the Basic Law was not accompanied by any explanation of the reasoning which had led it to reach the particular conclusions stated in the text of the reinterpretation.

The distinction between article 158 and Article 234 reference procedures, however, becomes far more striking when account is taken of the way in which the former actually operated in the *Right of Abode* case. As we have already observed, the process of reinterpretation in that case effectively permitted Hong Kong's Government to procure the reversal of the CFA's decision. Article 234 references, on the other hand, are made, and can only be made, by national *courts* to the European *Court* within the context of *specific cases*. For this reason, Article 234 cannot be used by national governments or by the central European authorities to procure the *de facto* amendment of EU law. It follows that, although there may be some superficial similarities between Article 234 of the EC Treaty and article 158 of the Basic Law, this can be allowed to obscure neither the manner in which the Standing Committee's interpretative power was deployed in the *Right of Abode* case nor its substantial implications for the constitutional order of Hong Kong.

We turn, now, to a second comparison. The UK Parliament recently enacted legislation to devolve certain legislative and governmental powers to different parts of the United Kingdom. The most extensive devolution programme is that which relates to Scotland.[62] The Scottish Parliament has been given a general competence to legislate,[63] subject to the proviso that there are certain matters in relation to which it may not pass legislation.[64] In particular, there is an extensive catalogue of 'reserved matters' with which the Scottish Parliament has no

[62] The Government of Wales Act 1998 established a Welsh Assembly which performs executive and subordinate law-making functions; however, unlike the Scottish Parliament, the Welsh Assembly does not possess any primary legislative power. The devolution of governmental power to Northern Ireland is contingent upon the conclusion of the peace process and, specifically, the implementation of the Good Friday Agreement. The Government does not, at present, have any plans to establish an English Parliament.

[63] Scotland Act 1998, s. 28(1).

[64] These matters are enumerated in s. 29(2) and Sched. 5.

legislative competence to deal. This situation obtains because, according to the White Paper on the Scottish Parliament: 'The Government believe that reserving powers in these areas will safeguard the integrity of the UK and the benefits of a consistent and integrated approach [in relation to the reserved matters].'[65] The analogy with the 'One Country, Two Systems' principle in relation to Hong Kong and the rest of China is clear.

Under section 30(2) of the 1998 Act, the UK Government has an unrestricted power to modify the list of reserved matters. One further point should be noted about the devolution scheme. In order to vouchsafe the integrity of the system, there exists a mechanism, established by section 33 of the Scotland Act 1998, whereby draft legislation can be referred to the Judicial Committee of the Privy Council in order that it may determine whether or not the proposed legislation actually lies within the legislative competence of the Scottish Parliament.

Within this framework, the possibility arises that there may occur a sequence of events which, at least *prima facie*, would bear some similarity to the *Right of Abode* case in Hong Kong. Assume that draft legislation that is before the Scottish Parliament is referred to the Privy Council which, after due consideration, determines that the draft legislation lies within the powers of the Scottish Parliament and could therefore take effect as a valid Act. It appears, from the text of the Scotland Act, that in such a situation it would be open to the UK Government to exercise its power under section 30(2) to modify the list, contained in Schedule 5, of the reserved matters. There is no reason to suppose that modification of the list should not include adding to the list or expressing the exceptions which it enumerates in broader terms. If such a power was exercised *after* the Privy Council's determination, but *before* the draft legislation became law, the effect of the section 30(2) modification would be to render *ultra vires* legislation which the Judicial Committee had held to be *intra vires*. In practical terms, this would permit the Crown to reverse the Privy Council's decision and to prevent the adoption of draft Scottish legislation which had been held to be lawful.

However, although there may be superficial similarities with the article 158 reference system which applies in Hong Kong, they are considerably outweighed by the two principal differences between the systems. First, the UK Government's power under section 30(2) of the Scotland Act relates to draft legislation, rather than to law which is actually in force. Crucially, this means that the legislation will not, at the relevant time, have conferred rights or duties upon any citizen. In contrast, the NPCSC's power of reinterpretation concerns law which is in force—and, although the parties to the *Right of Abode* case itself were not affected by the reinterpretation, other people, who had no doubt ordered their affairs on the basis of the Court of Final Appeal's interpretation, found that legal rights which had been vested in them were severely curtailed by the NPCSC's reinterpretation of the Basic Law. Secondly, we referred earlier to the important differences between interpretation and amendment. The fact that the UK Government's power under section 30(2) of the Scotland Act is quite clearly a power of amendment therefore has important implications for its exercise. Given the perception which (rightly) attends the amendment of a constitutional text,[66] it is unlikely that the competence under section 30(2) will be exercised frequently: there is no scope for disguising its exercise as a mere matter of interpretation, and there is therefore no possibility that the use of the section 30(2) power will be regularised in that manner. A UK Government decision to amend the Scotland Act will have to be presented—and, most importantly, justified—in those terms. This will provide an important safeguard against the casual amendment of the Scottish constitution for the purposes of political expediency at Westminster. We have already discussed the very different position which obtains in Hong Kong, now that the HKSAR Government has asserted a competence to procure *de facto* constitutional amendments under the guise of interpretation.

Our examination of the Article 234 reference procedure under the European Community Treaty, and of the UK Government's power to modify the powers of the Scottish Parliament under the Scotland Act, points towards two conclusions. First, it is quite unexceptional that there should exist, within a legal system, mechanisms which qualify the adjudicative competence of the courts. The highest courts of EU Member States must ultimately yield to the interpretation rendered by the European Court of Justice. Equally, the Privy Council's adjudication under section 33 of the Scotland Act can, in theory, be rendered ineffective by a UK Government decision to change the powers of the Scottish Parliament after the Privy Council has adjudicated (but before the Scottish Bill has entered into force).

Secondly, however, the ways in which the Scottish and European systems place limits on judicial competence differ very markedly from the limitations which obtain in Hong Kong. Article 234 references involve *judicial interpretation* of European law, and section 30(2) cases involve *legislative amendment* of Scotland's constitutional text. The defining feature of the situation which—since the reference to the Standing Committee—applies in Hong Kong is that it confers on a non-judicial body a very extensive power which is formally categorised as interpretative but which, in substance, amounts to a power of *de facto* amendment. The consequences of this for the separation of powers, judicial independence and the 'One Country, Two Systems' principle are self-apparent.

IV. Conclusions

In assessing the significance of the events described and analysed above we may begin with one obvious point. The *Right of Abode* litigation raises a broad range

[65] *Scotland's Parliament* (Cm 3658, 1997, Scottish Office).

[66] The Scotland Act 1998 undoubtedly constitutes a 'constitutional text' within the United Kingdom legal order, notwithstanding that it is not an entrenched constitutional instrument in the traditional sense.

of issues, but it is not necessary to take the same view of all of them. In particular, while the Chapter III issues—concerning the protection of the right of abode—and the constitutional issues—concerning the CFA, article 158, and the HKSAR Government—are clearly linked, they are also distinct. It is not necessary to take the same view of both issues. Thus those who consider that the CFA's decision was wrong because it was insufficiently aware of the serious practical problems a purposive interpretation of article 24 posed for the HKSAR Government, will not, it is hoped, take the further step of concluding that the HKSAR Government was justified in avoiding the result of the decision *in the way that it did*. It is, of course, the case that from time to time it is necessary for constitutional governments to overturn the decision of the relevant judicial authorities.[67] But the correct vehicle for the reversal of a judicial decision must always be legislation. The HKSAR Government's decision not to resolve its genuine concerns raised by the CFA's decision by legislation was a profound error at variance with the constitutional traditions of HKSAR.

Executive governments the world over are often under pressure to abandon important principles in order to resolve a pressing practical problem. The HKSAR Government perceived that it had a pressing problem over the numbers of immigrant children and it acted to resolve it. However, one task of constitutions is to ensure that fundamental principles are not discarded in the pragmatic exigencies of the moment. It has been submitted above that the Basic Law did not in fact grant to the HKSAR Government the power to refer matters to the Standing Committee in the way that it did. If that is the case, what are the consequences for constitutional government in Hong Kong? If it is the case that the HKSAR Government's action was illegal, there should be a legal remedy.

For the future, as we argued above, it will be open to the courts to test the legality of any proposed request, by the Government, for a Standing Committee reinterpretation. It is to be hoped that the CFA will assert that it, and it alone, is the gatekeeper for references to the Standing Committee. For the present, the question arises whether the CFA will accept the reinterpretation from the Standing Committee.[68] As we have seen the CFA's clarificatory judgment made it clear that it did not question the authority of the Standing Committee 'to do any act in accordance with the provisions of the Basic Law'. However, since the conclusion has been reached that the reference to the Standing Committee was not in accordance with the provisions of the Basic Law, it is surely open to the Court to conclude that the decision of the Standing Committee, being founded upon a breach of the Basic Law, is itself not 'in accordance with' the Basic Law. If this were to happen there would be an acute constitutional conflict between the courts and the HKSAR. Howsoever such a conflict might be resolved, the constitutional foundations of Hong Kong would be rocked and the future would be uncertain. In the end any constitutional order depends upon trust between the different branches of government. Such trust must be built upon the clear recognition of each branch's proper area of jurisdiction; and that implies that the HKSAR Government must needs forswear the method it adopted to overcome the difficulties caused by the CFA's decision in the *Right of Abode* litigation.

One should not over-dramatise the effect of a single incident. The constitutional traditions of Hong Kong are robust and ingrained. Constitutional government and the rule of law will not vanish overnight from Hong Kong. But this comment may be ventured. The Standing Committee behaved in accordance with its constitutional forms and constitutional culture. That was to be expected and no criticism should be made of it for being true to its tradition. But the same is not true of the HKSAR Government, for it acted contrary to the constitutional traditions of Hong Kong. This, however, carries with it a crucial advantage: this problem was made in Hong Kong and may, therefore, be resolved in Hong Kong. The survival of Hong Kong's autonomy and the success of the 'One Country, Two Systems' concept will depend not upon what is done in the Standing Committee but upon what is done in Hong Kong.

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[67] To give a well-known example, the UK Government procured the reversal of *Burmah Oil Co. Ltd* v. *Lord Advocate* [1965] AC 75 by the enactment of the War Damage Act 1965. Similarly, the regulations declared void in *R.* v. *Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants* [1997]1 WLR 275 were enacted into primary legislation shortly thereafter. See Harvey, (1997) *Public Law* 394.

[68] The answer to this question should become apparent when the CFA gives judgment in *Lau Kong-yung* v. *Director of Immigration*.