Media Alarm and the Handover

The "Right of Abode" Cases and Constitutional Crisis in Hong Kong

1. The Handover and Fear for the *Rule of Law*: Media, Jurists, and China Watchers

"For a moment the jurist's voice lost its normally powerful timbre," ***The Stanford Daily*** reporter observed, as U.S. Supreme Court Justice Anthony Kennedy addressed Stanford Law School students a year before the Handover. "He described the clock atop a tall pillar that straddles the border between the colony and China," the reporter recalls, then the Justice continued:

Hong Kong is the only place in the world where there is a visible clock that may be counting down to the moment when the rule of law is snuffed out.[1]

That was a serious prospect, it seems, in that last year. And, again, in the first months after the Handover, as mainland backers in the new hand picked Provisional Legislative Council sought to cure non-existent political and social ills by setting the clock back[2] to the days before the last British governor's democratic moves.

A year later, China law expert Frances Foster's articles showed that serious scholars were still worrying about the possibility of imminent demise of freedom of the press, and, perhaps, of the legal concept of "freedom" itself, in Hong Kong.[3]

Neither of these two legalistic threats have been realized - presumably because the dangers imagined by the PRC central government supporters from feared rampant demonstrations for civil rights after the Handover had no basis in fact in the social conditions in Hong Kong today - possibly also because the Hong Kong media are far too preoccupied with lesser local

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[1] Patrick Bernhardt, „Kennedy tells students to set example," The Stanford Daily, September 20., 1996.

[2] Among these measures:

- an appointed „Provisional Legislative Council" replaced an elected one;
- a new electoral system was established for the Legislative Council to come with only 20 members directly elected by geographical constituencies and 40 elected by proportional trade and profession based systems;
- the „Public Order" and „Societies Ordinance"s (residual legislation from the troubled period after establishment of the PRC in 1949, which compel all organizations of whatever nature to register) were made more restrictive;
- a concept of „national security" understood as „the safeguarding of territorial integrity and the independence of the People's Republic of China" was introduced; and
- the Government itself ignored non-compliance with the „Data Protection (Privacy) Ordinance" with respect to the Xinhua news agency, a central government agency.

[3] See: Frances H. Foster, „The Illusory Promise: Freedom of the Press in Hong Kong, China," 78 Indiana Law Journal 765 (1998); and „Translating 'Freedom' for Post-1997 Hong Kong," 76 Washington University Law Quarterly 113 (1998).

scandals to present a real political concern to Beijing.[4] Nor was there an unrestrainable flood of poor immigrants from the mainland.[5]

Yes, there were some rather embarrassingly undemocratic opinions voiced by people in high social position.[6] But, do these really present a major concern to those of us in the apolitical "sandwich class", so-called in Hong Kong, the fairly well-off service sector - not active among the rich and powerful, but with live memory of their modest grass roots origins, so preoccupied with fear of falling back as not to be a viable political threat to anyone?

The opening and relative prosperity in China in recent years has been accompanied there by serious social dislocation, and crime, and corruption. But Hong Kong is not like China in this respect. Clerks at the counter in government agencies may leave something to be desired in their treatment of the public. But, for ordinary public services, one does not feel pressed to give anything for service.[7] The civil service in Hong Kong is generally friendly, well educated, and helpful. And why not? We read that they are among the most highly paid in the world.[8] Unlike the United States or Britain, the danger seems to be that ***the private sector is not keeping up***, and young professional graduates are feeling pressured to quit their jobs, even in multinational corporations, to apply to become policemen[9] or civil service clerks.

What does concern me, then, about law and democracy in Hong Kong? It is not that there is no freedom of discussion - there is. Or no freedom of the press - there is that too within reasonable limits. There ***is*** limited popular franchise - yet, I do not know of another country in the world where a foreign national can vote after residing there for seven years. It is not that the same laws do not apply as obtain, more-or-less, in the rest of the free world - they do - and the courts continue to operate on common law principles, if you can manage to pay the very sizable cost of legal representation and can stand the risk of the loser pays rule.

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[4] Probably no story received more coverage in the Hong Kong press in the year and a half after July, 1997, than the initial chaos in the opening of the new airport — timed to coincide with the Handover — and the subsequent investigation as to why that occurred. The conclusion: aside from personal blame to airport managers and government officials—because it was opened too soon to meet that timetable.

[5] Every effort has been made by human rights lawyers to secure the admission of children of Hong Kong residents, who did mass along the border after the Handover, and again after a favorable decision in the Court of Final Appeal. See: discussion below.

[6] See: „Li Ka-shing outburst sparks Beijing inquiry," and „Beijing's Answer to Tycoon's Lament," South China Morning Post (SCMP), 6 Jan, '99, p. 1; and „Tung Backs Tycoon's Political Fears," SCMP, 9 Jan.,'99, p. 1.

[7] This does not mean that there is no corruption. Rather, low salaries for officials, one of the root causes of corruption, is not prevalent.

[8] See: „Civil Servants Top Pay League: Only in Singapore, in two cases, do salaries exceed those of SAR chiefs," Sunday Morning Post (SCMP) , July 12, '98, p. 3. This article lists the salaries from the Chief Secretary for Administration, the highest ranking civil service post, at HK$216,650 (or US$27,775) per month (or US$333,300 per year), down to the Director of Public Prosecutions, at the lowest paid cabinet rank, HK$162,650 (or US$20,852) per month. A civil service starting salary for a university graduate two years out may be as high as HK$30,000 (US$3,846) per month (or US$46,153 per year), which is at least double the highest starting salary in the public sector.

[9] According to an interesting piece from the Chinese press: „University Students Stoop to Become Police Constables," Oriental Daily, June 20, 1999, university graduates gladly accept the HK$16-17,000 (US$2-2,200) per month of the man on the beat, whereas they used to expect the HK$33,000 (US$4,200) per month of a beginning police inspector. By comparison, top accounting graduates today are earning only ca. HK$12,000 (US$1,500) per month at leading Big 5 firms. Many an engineering or business graduate commands only HK$8-9,000 (US$1-1,200) per month since the Asian crisis downturn—down roughly HK$1- 2,000 (US$129-250) per month from two years before. The civil service is similarly attractive— though, unlike the uniformed services, they are now offering contract terms rather than assured careers with retirement benefits. By comparison, even leading firms in the private sector offer only a precarious competitive existence—with massive cutbacks in the second year more and more common.

At the level of university faculty member, what worries me, however, is the gaps in the general education and social expectations of our students and graduates. Yes, many have fine professional talents and training. They all have dreams of becoming rich - or at least comfortable. Yet, they generally have very little experience in dealing with, or understanding of, the rest of the world - even just across the borders from Hong Kong - and they generally have very little knowledge of the less commercially profitable interests in life. Worst of all, they often seem to have no expectations of being decently treated by anyone - but their own friends and families - and they do not seem to consider that they owe any particular common courtesy to anyone else. Professor Lau Siu-kai, Chairman of the Department of Sociology at the Chinese University of Hong Kong, and a member of the PRC central government's Preparatory Committee prior to the Handover, puts it more politely - referring to: Hong Kong people's "aloofness towards society":

The Hong Kong Chinese in general neither identify with Hong Kong nor are committed to it but rather tend to treat is as an instrument. Consequently, society is conceived as a setting where one exploits. . . the opportunities available . . .to advance the interest of oneself and one's familial group.[10]

Nothing does more to undermine the spirit of law in a country than the notion that it merely represents the rules of the powerful.[11] (But that is a threat to rule of law in all countries, and at all times.) Reporting on survey research on Hong Kong people's attitudes toward concepts of "law", a senior professor of government at the Chinese University writes:

The major finding of this study concerns the inconsistent support for the rule of law among the survey respondents. It is precisely the most important theoretical aspect, the rights-based autonomy of law, that has proven least receptive to the people.[12]

It will require both broader experience and enhanced expectations for the next generation to grasp the theory that rule of law also binds the institutions of government - that government is as much subject to the law as we are. (The government does say this[13], but perhaps the people know better.) Without that essential element, there may be a kind of rule of law in Hong Kong, but for the ordinary citizen, and all too often for officers of the Government, the concept of rule of law is merely instrumental in: (1) achieving efficient administration, and (2) attracting foreign business and investment.[14]

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[10] Lau Siu-kai, Society and Politics in Hong Kong (Hong Kong: Chinese Univ. Pr., 1982), p. 87.
[11] Mr. Justice Kennedy had something to say about this too, the following year. In „Law and Belief," an address to the American Bar Association meeting in San Francisco, Aug. 5, '97. On the importance of belief as essential support for law and tradition, cf. O. Lee, Legal and Moral Systems in Asian Customary Law (San Francisco: Chinese Materials Center, 1978), at pp. 422ff.
[12] Kuan Hsin-chi, „Support for the Rule of Law in Hong Kong," [1997] Hong Kong Law Journal 187, at p. 203.
[13] There is a very gratifying understanding of these points expressed on the web page of the Hong Kong Justice Department: http://www.info.gov.hk/justice/new/legal/index.htm
[14] See: e.g., „When the rule of law is paramount," SCMP, Tues., Jan. 26, '99, p. 1. There happen to be a number of articles touching upon this subject at the opening of the „legal year", but they can be found regularly in the daily press.

2. Anxiety over *Rule of Law* and International Business: But Are the Courts Accessible to Common People ?

Admirable as either of the latter social and political goals may be, each in its proper context, - for the scholar of law and politics, these instrumental theories of "law" leave a great deal to be desired. It is too often overlooked that the price of legal process in Hong Kong may put it out of reach of ordinary people. Where then does this much vaunted principle of rule of law reside if it is not accessible through the courts?

Even a good faith lawsuit in Hong Kong carries with it the risk of having to pay the costs of both sides in the event one loses - and concomitantly an unequal opponent who can afford it will engage the most expensive legal counsel possible to enhance this risk. The practical result is that a case need not come to trial at all if you can outspend and outwait your adversary. This situation understandably tends to discourage resort to the courts for the ordinary citizen.

At the same time, the average solicitor in Hong Kong charges more in two hours than the average worker earns in a month[15]. In three hours, legal advice can cost as much as a month's salary of a well paid university graduate - who still has to live with his parents in order to make ends meet. If a case does go to court, the legacy of the colonial legal system requires instructing a barrister, who, typically may receive instructions and give advice only through the solicitor - a practice which not only doubles the expense but also creates opportunity for misunderstanding in relaying the facts. Even big business, we are told, finds it cheaper to bring in leading barristers from London, and put them up in hotels during their stay here (in what were, until the Asian financial crisis, among the highest priced hotel rooms in the world) than to hire counsel in Hong Kong[16].

The situation in the legal profession in China is rapidly replicating the situation in Hong Kong in terms of expense - which probably is only an extreme example of what applies in the rest of the developed world with respect to corporate legal costs. From 1980 until 1994, China's legal profession expanded from ca. 3000 to ca. 50,000. The PRC had set a goal of 150,000 lawyers by the year 2000[17], and was said to be two thirds of the way there two years early.[18] The cost of legal services in China - for foreign clients to whom such services are primarily directed - is rising parallel with those in Hong Kong and abroad. Use of local legal service (in addition to foreign legal counsel), which may, in favorable circumstances, only involve such transactions as, for example, obtaining approvals for establishment of a local presence, has become a requirement for international business.[19]

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[15] The going rate for solicitors in Hong Kong is ca. HK$4000 (or ca. US$512) per hour, i.e., almost double the average U.S. rate.

[16] See: „Barristers upset at silks from overseas," SCMP, Jan. 22, '99. The new Chairman of the Hong Kong Bar Association has criticized this practice and denies the disparity in fees. The Chief Justice himself has stated that „value for money was needed from the legal profession to ensure the rule of law was maintained," but has also supported the rates for legal services in Hong Kong. See: e.g., „Value for money legal system urged," SCMP, Jan. 12, '99, p. 1.

[17] William P. Alford, Fang Liufang, and Lu Zhifang, „Legal Training and Education in the 1990s: An Overview and Assessment of China's Needs," an assessment undertaken for the World Bank, January 31, 1994.

[18] England, which has considerably more access to the courts, gets along with about 50,000 solicitors, according to P.S.Atiyah and R.S. Summers, Form and Substance in Anglo American Law (Oxford: Clarendon Press, 1987) p. 369. It is difficult for new law firms to become established even in countries with longstanding demands for litigation. Therefore, we have to wonder what all these lawyers in China will be doing to earn their fees. But see n.19 following.

[19] Those in practice in the area inform us that for obtaining official approval of, for example, establishment of a PRC corporate presence, it is desired that the foreign entity be represented by a local „sponsor", from an

It is true that there is an admirable system of legal aid available in Hong Kong "for any person whose total financial resources do not exceed HK$169,700 [ca. US$21,700]." In essence that means that services are available to the very poor - if they know how to access them.[20] Consequently, there have been a number of landmark class action suits, for example, on behalf of freedom for Vietnamese boat people[21] detained for many years, and for securing admission of mainland children of Hong Kong parents[22] - the cases discussed below, which could never have gotten into court, let alone seen their way through the Court of Final Appeal for the average citizen.

The human rights lawyers who have made it their mission to see these class action lawsuits through the years of litigation and appeals can be justifiably proud of their work - and the legal system that can sustain itself through such assaults on administration policy and still preserve judicial independence deserves our respect. But average citizens have human rights claims too. Who will see their cases through comparable civil actions? How should they protect themselves from ruin if they attempt to file such actions, and fall short of the means to carry through the final appeal, or simply cannot face the risk of the devastating cost of losing? What kind of legal system is it that can not provide the same access to the courts for the so-called "sandwich class", as for those either poor enough for legal aid, or rich enough to disregard the cost of legal services?

As PRC citizens become aware of their newfound legal rights - among them access to the courts - there has been a growing demand for legal services on the mainland as well. To some extent, there has been some provision for legal aid to the very poor, but for the average person legal representation may be both beyond his means or altogether unavailable.[23]

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approved list, who are said to be able to facilitate approval procedures. Fees for such a service may well run in the neighborhood of US$100,000.

[20] Just as elsewhere in common law countries, there is a lobby for the unfortunate in Hong Kong—where dedicated expatriates tend to play a prominent role. See: e.g., „Migrants Seek Legal Aid To Fight," SCMP , June 30, 1999.

[21] See e.g., Thang Thieu Quyen and others and The Director of Immigration , FACV No 2 (1998).

[22] See: Ng Ka Ling and The Director of Immigration FACV No. 14 (1998); and Chan Kam Nga and Director of Immigration FACV No 13 of 1998.

[23] One of our Hong Kong University of Science & Technology graduate social science students has recently addressed the problem of need for legal aid in China in an M.Phil. thesis. See: Luo Qizhi, „Legal Aid Practices in the PRC in the 1990s: Dynamics, Contents and Implications," Hong Kong, 1996.

3. What Were Our Concerns After the Handover?

To listen to the media in Hong Kong, the rule of law "brings stability to people's lives and protects them from unfair treatment," - but, most important, they tell us, it "ensures that business can be conducted with confidence and attract[ ] investment."[24] The ***South China Morning Post*** , the region's leading English language newspaper, quotes the enlightened view of the Director of Public Prosecutions who defines "rule of law" as "the absence of arbitrary action by the Government, everyone being equal before the law, an independent judiciary, and the rights of the citizen clearly defined . . . ." But, he too goes on to say, "[the business] community must know Hong Kong is a safe place to do business, that corruption will not be tolerated, that the finance system is properly regulated and that insider dealing won't be countenanced."[25] Thus the ***Post*** draws the conclusion: "[rule of law] is . . . . vital to attract business to the SAR . . . ."

Doubtless, China is also concerned about an attractive climate for international trade and business and it has enacted many laws for this purpose in the last 20 years. While something may get lost in translation, China also thinks of itself as creating a climate of "law". The ***Post*** quotes PRC President Jiang Zemin: "Rule the country by law. . . . Protect the nation's long term stability." However, the ***Post*** and its authority on Chinese law interprets this understanding of "law" as "stability" as "signify[ing] continued party dominance."[26] In other words, "law" in China here appears to be synonymous with what we sometimes call "law and order" Chinese style which is to say "the people's democratic dictatorship"[27]through "the leadership of the communist party"[28].

In both cases, "rule of law" is said to be important because it is ***instrumental*** in achieving the ***real goals*** of society, on the one hand: ***attracting international business and investment***; and on the other: "***long term stability***" - which, in China today, also means attracting international business and investment.

A number of incidents since the Handover have led to alarm in the media that the Hong Kong Government was unconcerned about the appearance of, possibly even the substance of rule of law. There were suggestions that to some extent this might also be the result of fear of, or giving in to, mainland pressure.

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[24] See: e.g., „When the Rule of Law is Paramount," SCMP January 26, 1999, p. 1
[25] Quoting Mr. Grenville Cross, SC, ibid.
[26] Quoting Stanley Lubman, China law scholar, ibid.
[27] Const. of the PRC (1982), Preamble and Art. 1., see: Laws of Hong Kong, Cap. 1559, and as amended (1993), Art. 3, sec. 3, Cap. 1561.
[28] Ibid., Preamble

Yet, in the words of the ***South China Morning Post*** , "…one of the successes of the 'two systems. . .' pledge has been in the area of media freedom. Despite concerns about self-censorship, there has been no evidence of any attempt by the Government to interfere in the customary day-to-day workings of the press or broadcasting."[29]

That does not mean that there have not been calls for greater control, or shall we say greater "balance" in reporting, by political figures whose views inevitably assume much larger impact because of their mainland associations and the tensions engendered by the transfer of sovereignty. Thus when Mr. Wong Siu-yee, a member of the Provisional Legislative Council put in place by the mainland appointed Preparatory Committee at the time of the Handover, criticized "ridicule" of the Chief Executive and the new Government on the Government sponsored radio station RTHK, under the circumstances this had to arouse deep concern about stability of institutions and practices.[30] Nevertheless, the Government, itself, was quick to attempt to dispell fears that they would jeopardize "editorial independence".[31]

Perhaps a better barometer of Beijing's hands off policy with regard to the media in Hong Kong was observable from the unamused[32] tolerance[33] shown by the Central Government during screening of a number of what were considered to be pro-Tibet films. Separatism of any kind is a taboo subject in the PRC, and territorial integrity of the PRC is specifically protected in the Basic Law.

Naturally, the media were again concerned by the trial on the mainland of persons indicted for crimes in Hong Kong. In the first case, a number of triad gang members were suspected in Hong Kong of having kidnapped the son of the business tycoon Li Ka-shing - although Mr. Li had never filed a complaint, he was generally acknowledged to have paid a large ransom. Mainland authorities apprehended the suspects. But they were conspicuously careful to restrict legal proceedings to crimes committed on the mainland - gun running and conspiracy.[34]

The second such trial to draw media attention, involved a ***feng shui*** master (i.e, a geomancy fortune teller) suspected of the swindling and murder of three women patrons in cult-like circumstances in an apartment in Hong Kong. Mainland authorities claimed jurisdiction over the accused, a Chinese national living on the mainland.[35] But in both circumstances, the media were concerned about the appearance of loss of jurisdiction by Hong Kong, or claim of extra-territorial jurisdiction by mainland authorities - not to speak of the lack of observance of procedural due process - for persons subject to the laws of Hong Kong.[36] Unquestionably this has become a sensitive area because of the relatively more frequent arrest and detention of

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[29] „Headline News," SCMP, Nov. 28, 1997.
[30] See: „RTHK Humour 'Upsets Balance' ," SCMP , Nov. 21, 1997; „ 'Partial' Comment on Radio Attacked," SCMP , Jan. 22, 1998; and „Positively Neutral Presenters," SCMP , Jan. 22, 1998.
[31] See: e.g., „RTHK's Editorial Role 'Will not be Reviewed'," SCMP , Nov. 27, 1997.
[32] „One of the three Hollywood films that Beijing said 'hurt the feelings of the Chinese people' has been bought by a Hong Kong distributor," see: „Film on Tibet to be Shown in May," SCMP , Jan. 8, 1998; and „Hollywood Film on Tibet Dismissed as 'Cheap Stuff'," SCMP , Dec. 18, 1997. See also: „ 'Anti-Chinese' Gere Fears Ban on Visit," SCMP , Jan. 10, 1998.
[33] See: „Beijing Pledges Hollywood Anti-China Films can be Screened," SCMP , Jan. 11, 1998. See also: „Bidding War Erupts Over Tibet Film," SCMP , Dec. 12, 1997; „ 'Anti-China' Films Set for Cinemas," SCMP , Dec. 4, 1997; and „New Bid to Show Tibet Film at HK Festival," SCMP , Feb. 27, 1998.
[34] See: e.g., „Borderless Crimes," SCMP , Sept. 28, 1998.
[35] See: e.g., „Mainland to Try Fung Shui 'Master' for Poisoning Five," SCMP , Sept. 10, 1998; and „Open Trial Expected for 'Fung Shui Murders'," SCMP , Dec. 12, 1998.
[36] See: e.g., „Outgoing Bar Chairwoman Raises Thorny Problem of Mainland Trials for SAR Crimes: Rule of Law 'Must not be Subverted'," SCMP , Jan. 12, 1999.

Hong Kong persons accused often only of breach of contract, or even held without charge on the mainland.[37]

One of the most serious sources of criticism of the Hong Kong Government itself arose from the Justice Secretary's decision to name the owner of a leading newspaper syndicate as an ***unindicted*** co-conspirator where a number of senior managers ***were tried*** and convicted of inflating circulation figures in order to increase advertising revenues. (Fraud of this kind is rather more vigorously pursued in Hong Kong because of the Prevention of Bribery Ordinance's applicability to the private sector as well as public service.) The owner was not indicted, the Secretary tells us, on grounds of "insufficient evidence"[38]and in the "public interest" in light of impending restructuring of her holdings:
If Aw Sian was prosecuted, it would be a serious obstacle for restructuring. If the group should collapse, its newspapers would be compelled to cease operation. Apart from the staff losing employment, the failure of a well established important media group at that time could have sent a very bad message to the international community.[39]

Perhaps we can attribute the reaction to the Justice Secretary's explanation to a certain amount of public and media ***Schadenfreude***, that is glee at the public humiliation of a prominent figure. However, there was also suspicion that Mrs. Aw escaped prosecution because of mainland political connections - she is a local member of the Chinese People's Political Consultative Conference - and her past association with the Chief Executive, a onetime board member of one of her newspapers.

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[37] See: e.g., „China to Free Russians as Top Official Intervenes," SCMP , Oct. 29, 1996, p. 1:3; „Passport 'Pressure' on American," SCMP , Apr. 3, 1999; „ 'I Daren't Tell Mother How Bad it is in Jail' ," SCMP , Feb. 28, 1999; „Fears for Man Held in Mainland Hut," SCMP , Apr. 4, 1999; and „Help Free Me, SAR Man Pleads," SCMP , Apr. 18, 1999. But see also: „Mainland Agrees to Notify SAR about Detentions," SCMP , Jun. 4, 1999, p. 2, and the intriguing report of a former detainee who now assists other victims: „Self-taught Lawyer Helps Victims," SCMP , June 13, 1999, p. 3.
[38] See; e.g., „ 'Evidence Did Not Justify Fraud Charge'," SCMP , Feb. 5, 1999, p. 1.
[39] Cited in: „Anger as Justice Secretary Cites Saving papers in Aw Decision," SCMP , Feb. 5, 1999, p. 1.

4. What Led to Constitutional Crisis in Hong Kong?

No question the greatest source of public and also media concern since the Handover has been the decisions of the Court of Final Appeal in the cases involving the "right of abode", the right of persons who can establish Hong Kong permanent residency claims by descent under the Basic Law to immigrate to Hong Kong.[40]

The decisions were applauded by human rights advocates for securing the rights of mainland born children of permanent residents of Hong Kong who derive a right to be recognized as permanent residents themselves through the Basic Law. Yet, whereas the decisions in Hong Kong that extend human rights to poor immigrant children who were not otherwise likely to obtain their birthright by judicial process in their country of origin must offer something to appeal to good conscience, it does not necessarily mean that the decisions themselves were legally beyond reproach. This is a matter that must be studied more closely in the months and years to come.

Under Article 24 of the Basic Law, "Persons of Chinese nationality born outside Hong Kong of [permanent] residents" are included in the list of "permanent residents". These, and others so enumerated:

. . .shall have the right of abode in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the law of the Region, permanent identity cards which state their right of abode.

It is important to emphasize here that the Basic Law came into force on July 1, 1997, the date of the Handover. Prior to that date, the "right of abode" might be acquired in Hong Kong by immigration. But, here, for the first time, the right is said to be inherently obtainable by descent from a permanent resident by persons born outside Hong Kong, who have lived outside the Region since birth. But is it correct to say "right of abode" is only ***obtainable***? The words: "shall have the right of abode", can also be read to mean that "right of abode" has already been granted. Whether this reading is justified, and/or results from an error of draftsmanship, is something that must receive greater consideration.

Article 24 is listed in Chapter III of the Basic Law, which is captioned "Fundamental Rights and Duties of the Residents." Therefore, the "right of abode" appears to be a "fundamental right" - although established by issuance to persons so "qualified" of "identity cards which state their right of abode." The power of interpretation of the Basic Law is vested in the Standing Committee of the National People's Congress. However, in an area such as this, which concerns the autonomy of the Region, the right of interpretation is allotted to the courts of Hong Kong:

The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.[41]

On the other hand, Article 24 appears to be subject to Article 22, listed in Chapter II, which is captioned, "Relationship between the Central Authorities and the Hong Kong Special

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[40] Ng Ka Ling and The Director of Immigration, FACV No. 14 (1998) and Cham Kam Nga and Director of Immigration, FACV No. 13 of 1998, see n. 22.
[41] Basic Law, Article 158 (1)(2).

Administrative Region", an area in which the Court of Final Appeal is not free to interpret the Basic Law entirely on its own:

The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region[42].

Article 22, which governs the procedures for applying for admission to the Hong Kong Special Administrative Region from the mainland of China to establish residence, specifies in paragraph four:

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

Article 22 thus appears to make immigration itself subject to processing by mainland authorities. Accordingly, procedures adopted by the Central Government also become a sensitive issue. For if Article 24 is subject to Article 22, one might say that Article 24 only gave the right to ***claim*** "right of abode" - one could not as easily say that it ***confirmed*** an existing right.

[42] Basic Law, Article 158 (3).

On July 10, 1997, the Provisional Legislative Council enacted legislation by which those who "qualified" might establish their right - i.e., in Amendment 3 of the Immigration Ordinance, which was made retroactive to July 1. Under the Amendment, status of the relevant mainland descendants of permanent residents could be established only by possession of a valid travel document with a valid certificate of entitlement affixed thereto. The process for obtaining the certificate of entitlement required first obtaining the valid travel document which mainland authorities would submit to the Hong Kong Immigration Department. Application by mainland residents could only be made by application from the mainland through the relevant mainland authorities.

Under British administration, there had been an immigration quota from the mainland of 75 daily. The new SAR Government increased the quota to 150 per day. But, with huge numbers of mainland children now eligible for immigration gathered at the border crossing in those early days, demand could not be satisfied by such a low figure. Initial processing by mainland authorities was expected to be arbitrary, subject to graft,[43] and subject to further quota limitation. The cases here under consideration were brought on behalf of children who either managed to get across legally with "two-way" passes, or who entered illegally, and sought both to obtain the right to apply for certification in Hong Kong and relief from the need to apply for prior "one-way" exit permits from the mainland.

The Basic Law, which became Hong Kong's new constitution, specifies that "The power of interpretation of the Law shall be vested in the Standing Committee of the National People's Congress" (Article 158, paragraph one), and "The power of amendment of this Law shall be vested in the National People's Congress" (Article 159, paragraph one). As noted above, Article 158 allows courts of the Hong Kong SAR to interpret provisions of the Basic Law concerning affairs of the SAR. However, should the Court of Final Appeal be required to interpret a provision of the Basic Law "concerning affairs which are the responsibility of the Central People's Government or the relationship between the Central Authorities and the Region," in order to reach a judgment which is "not appealable", they would have to "seek an interpretation of the relevant provisions from the Standing Committee":

The Court of Final Appeal in ***Ng Ka Ling*** held, that under the circumstances, making a basic right subject to arbitrary procedures - and quotas for immigration, whether by mainland or Hong Kong authorities - deprived the persons so entitled of their "fundamental rights". It held:

Persons with permanent resident status under the Basic Law are not, as a matter of ordinary language, people from other parts of China. They are permanent residents of this part of China. Nor is it correct to describe them as persons entering for the purpose of settlement.[44]

The Court accordingly proceeded to invalidate Hong Kong legislation which precluded those eligible for the right of abode of applying for certification directly from the Immigration Department, and/or in Hong Kong. In this respect, the Court declared:

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[43] See: e.g., „Migrants Fear Graft Will Block HK Return," SCMP, Mar. 31, 1999. Graft is widely reported by workers attempting to migrate to special economic zones within China and by students going abroad to study. See: e.g., B.S. Stone, „Sino-Foreign Joint Ventures and Governmental Corruption," in S. Stewart, ed., Joint Ventures in the People's Republic of China: Advances in Chinese Industrial Studies, Vol. 4 (Greenwich, Conn.; London: JAI Press, 1994), pp. 29-48. Migrating to Hong Kong, or applying to do so, is only another sign that people are economically advantaged, or about to become advantaged. „Jumping the queue" as the Hong Kong Immigration Department likes to call attempts by mainland residents to by-pass application procedures through mainland authorities, is objectionable, in a similar way, though money is not directly involved, because taking preference over others is at the heart of what they are doing.

[44] Ng Ka Ling, p. 25.

. . .the courts of the Region have a duty to enforce and interpret [the Basic Law]. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion . . . .the courts perform their constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law.[45]

The Court's claim to constitutional authority is impressive - though one would like to know a little more about the antecedents of that authority. Nevertheless, as the Court concedes:

What has been controversial is the jurisdiction of the courts of the Region to examine whether any legislative acts of the National People's Congress or its Standing Committee. . .are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. In our view, the courts of the Region do have this jurisdiction and indeed the duty to declare invalidity if inconsistency is found.[46]

The Court points out that the National People's Congress is the highest organ of state power and the Standing Committee is its permanent body, that they exercise the legislative powers of the state, and they have enacted the Basic Law as national law and the constitution of the Region. Since the courts of the SAR derive their authority from this Law the Court continues:

It is for the courts of the Region to determine questions of inconsistency and invalidity when they arise. It is therefore for the courts of the Region to determine whether an act of the National People's Congress or its Standing Committee is inconsistent with the Basic, Law, subject of course to the provisions of the Basic Law itself. [47]

One may wonder whether these additional claims of powers of judicial review and of interpretation of the Basic Law were necessary for the decision in question. Nevertheless, this view certainly clarifies the Court's assertion that, through the Basic Law, the mainland descendants of permanent residents of Hong Kong were deriving a ***fundamental right*** not simply ***eligibility to assert a claim***. That it is novel for the sovereign power to be providing special, even more beneficial fundamental rights, to the descendants of a particular Region than to its other citizens is not the issue. Rather, it is by this means that the Court finds that fundamental substantive rights override procedural requirements.

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[45] Ibid., p. 17.
[46] Ibid.
[47] Ibid.

5. What Do You Do When You Believe a Court's Decision is Wrong?

There was almost immediate outcry by mainland law experts and authorities, following the right of abode decisions, insisting that the decisions were "mistaken" and "should be changed".[48] From the point of view of Western legal sensibilities - and the instinctive media reaction to the suggestion that the sanctity of "rule of law" might be jeopardized by mainland interference in Hong Kong - that was of course the wrong thing to say. It was immaterial why mainland authorities would attack the decisions, it could be anticipated that lawyers, government officials, and the media would have to come to the defense of the Court if there were the threat or appearance of mainland interference in judicial process in Hong Kong. Beijing also seemed to understand that.[49] The problem remained, however, that too many people were obliged to become part of the debate over judicial independence on both sides.

If the extension of human rights were all that the right of abode cases were about, questions of logic and legal reasoning might be put aside. If these decisions did not arise in Hong Kong but in the United States, or Canada, or Australia, countries which in their vast expanses can absorb all the people who can claim to come to Hong Kong under the right of abode cases, there might be no problem. However, the territory of Hong Kong consists of 1,084 square kilometers, much of which is mountainous; and it includes 235 outlying mountainous islands and vast expanses of water. There is already a population of nearly seven million, 45% of whom live in the so-called rural areas of the New Territories. The government estimated another 1.67 million would immigrate to Hong Kong in the next ten years under the right of abode decisions.[50] According to a statement by the Secretary for Justice: "The cost of providing new homes, hospitals, schools, transport infrastructure and social services was estimated at more than HK$710 billion (US$91 billion)."[51] In other words, while the figures are attacked, the potential cost of the influx could absorb almost every penny of Hong Kong's much celebrated huge foreign exchange reserves. In brief, if ever there were a case to argue on the basis of law and economics, this would appear to be one. Sadly, the Government had not made this case during the litigation itself.

The government seems to have been caught off-guard by the magnitude of the decisions. They knew that they had to do something - but they did not know quite what. In the meantime, there had been a number of visits to Beijing by government officials. The need to assure Beijing that Hong Kong's courts were not challenging central government prerogatives led, among other things, to the Secretary of Justice's filing a motion applying for "clarification" by the Court of Final Appeal.[52] In legal procedural terms, of course, this was highly unusual, and led in turn to extensive public commentary.[53] Yet the Court was dutifully forthcoming, and

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[48] See: e.g., „Beijing Says Abode Ruling Was Wrong and Should Be Changed," SCMP , Feb. 9, 1999, p. 1.
[49] See: e.g., „Beijing Plays Down Abode Ruling Row," SCMP , Feb. 10, 1999; and „Heads Cool on Abode, Say Officials," SCMP Feb. 15, 1999, p. 1.
[50] These numbers are attacked by the human rights camp, but no better ones are forthcoming. See: e.g., „A Sorry Survey," SCMP, May 6, 1999 , p. 19.
[51] Elsie Leung, „Upholding Hong Kong's Constitution". Formerly on website of Hong Kong Economic and Trade Office USA.
[52] See: e.g., „Judges Asked to Clarify Right of Abode Decision," SCMP , Feb. 25, 1999, p. 1; and „Hong Kong Asks Court to Clarify Abode ruling," The Asian Wall Street Journal, Feb. 25, 1999.
[53] See: e.g., „Approach 'Fundamentally flawed'," by Legislative Councillor, Martin Lee, SCMP , Feb. 25, 1999; „Views Range from Sceptical to Welcoming," SCMP, Feb. 25, 1999; „The Legal Perils of 'Rectification' ," by Legislative Councillor Margaret Ng, SCMP, Feb. 26, 1999; „Justice Chief's Conduct Questioned," SCMP , March 1, 1999; „The Theatre of the Law," by Prof. Yash Ghai, SCMP , Mar. 1, 1999; „Critics Assail Court's Move in Hong Kong," The Asian Wall Street Journal, Mar. 1, 1999, p. 10.

did issue such a "clarification", in five paragraphs, which included the following concluding statement:

. . .The Court's judgment on 29 January 1999 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.[54]

Obviously, "clarification" changed nothing in regard to the legal consequences of the judgments. The government continued to seek to return "overstayers" - i.e., those not covered by earlier decisions but seeking to take advantage of two-way permits - on grounds that for them to apply for certificates of entitlement in Hong Kong would allow them to "jump the queue" of those compelled to wait for mainland authorities to process their applications, and in light of the standing quota of 150 per day allowed to immigrate legally into the Region. But this was again rejected by the lower courts following the earlier Court of Final Appeal judgments.[55]

[54] FACV No. 14, of 1998; FACV No. 15 of 1998; FACV No. 16 of 1998, Feb. 26, 1999, p. 3; see n. 22.
[55] See: e.g., „Justices Query Migrant Removal Order," SCMP , May 28, 1999, p. 2.

Where one cannot in good conscience implement a decision, it must be possible to question it. The negative side of the doctrine of ***stare decisis*** has been a certain rigidity in common law courts - unwilling to take the first step to overturn precedent, and arguing that the prerogative of changing judge-made law, belongs to the legislature. We can be grateful, however, that that notion has given way a little in the latter half of the 20th century. In a famous dissent one of the most courageous English judges of our times let us understand that we would not be living in a civilized country if our system of law and justice did not allow our reason to correct the mistakes we can now discern in judgments of the past.[56]

The rules derived from earlier cases and followed by the majority in ***Candler v. Crane Christmas & Co.*** - now more famous for the dissent than the decision - were "in error", that learned judge tells us. But it took twelve years before the arguments in his dissent were adopted by the House of Lords[57], in dicta not necessary at all for their decision in the subsequent case. In other words, during those years, the court in ***Candler***, and any court that decided a case of similar circumstances on the basis of that decision, were guided by ***wrong law*** - such decisions had the force of law, but those decisions were based upon rules that were derived in error.

Essential to the very concept of rule of law in the English-speaking tradition is that law arises from reason,[58] and though courts are bound by precedent, and whereas only the legislature can enact new law, the law itself is assumed not to seek to do what is "absurd, harsh, or unreasonable". Though it may take time for reason to persuade the courts, the courts are expected to adopt the reasonable view when they recognize it.

That logic tells us that the courts (of course depending upon their level in the hierarchy in which decisions arise) can reconsider earlier decisions, and decide questions anew. The legislature can of course change statute law - or enact new statute law that would change the law with respect to judge-made rules. But these considerations did not assist the government of Hong Kong. The Court of Final Appeal had decided a constitutional question in the right of abode cases. But the Government and the Legislative Council of Hong Kong cannot make constitutional law.

Like it or not, there were only two possibilities here for change. Either, the Court of Final Appeal would have to change its mind - where, either circumstances were sufficiently different - or argument was more persuasive of the Government's view. Or, the Hong Kong Government would have to seek a change in the Basic Law in Beijing. In the past, that was the unspeakable alternative because the Basic Law is the only constitutional guaranty of the principle of "one country, two systems". An attempt to tamper with the Basic Law - in the National People's Congress - could lead to results we cannot anticipate.

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[56] Paraphrased from Denning, L.J., in Candler v. Crane Christmas & Co., Ltd., 1 All E.R. [1951], 426. Lord Denning must have been one of the most courageous of English judges of our era—but even he felt compelled to quote from a precedent case already 90 years old at that time, in order to make his point. See also his eloquent lecture „From Precedent to Precedent," the Romanes Lecture, 21 May, 1959, (Oxford: Clarendon Press, 1959), in which he advocated that the House of Lords return to a policy of re-thinking its own precedents when they became legally questionable—something they had not done, at that time, for a hundred years. Just as in his dissent in Candler, in this lecture he surely contributed to their ultimate reversion to that policy. But not for some years.

[57] In Hedley Byrne & Co. v. Heller and Partners, Ltd., [1963] 2 All E.R. 575 (H.L.).

[58] Found at least as far back as the writings of Coke and Blackstone in the 17th and 18th centuries, and Bracton in the 13th, with roots deep in antiquity.

But was there a third way? Feeling unable to implement the right of abode decisions fully, but unable either to maintain a manageable immigration quota system through the legislature or adequately to re-argue the decision in the Court of Final Appeal,[59] the Government determined "to request the State Council to approach the Standing Committee of the National People's Congress" to seek an "interpretation" of "the legislative intent of Article 22(4) and Article 24(2)(3) of the Basic Law" in the Standing Committee of the National People's Congress.[60]

[59] See:e.g., „ 'Little Chance' Court Would Reverse Ruling," SCMP , May 19, 1999, p. 2.
[60] See: „Chief Executive's Opening Remarks at Press Conference," Tuesday, May 18, 1999; the Secretary for Justice's „Speech on Interpretation of Basic Law"; and the Chief Secretary's „Speech at Motion Debate on Right of Abode". See also: „NPC Will Be Asked to Revoke Abode Rights for 1.5m Migrants," SCMP , May 19, 1999, p. 1; and „Legco Walkout on Abode Vote," SCMP , May 20, 1999, p. 1.

Doubtless there are still concerns not addressed here. Whereas:

- The Government could presumably have properly sought amendment of the Basic Law in the National People's Congress - doubtless a very risky business - they argued that they could not wait until the NPC met again in March, 2000 (why they did not act in March, 1999, is left unspoken[61]);
- The Basic Law (Section 158), itself, only speaks of seeking "interpretation" by the Standing Committee ***through*** the Court of Final Appeal.

However, the Court of Final Appeal here had decided that:

- The Court did not have to seek interpretation by the Standing Committee because it decided the case on the basis of Article 24 (which is within their jurisdiction), not Article 22 (which is not).

Therefore: If the Government did seek such "interpretation", what standing did it have to do so?

- If it did not have such standing, would the Government undermine the "independence" of the Court of Final Appeal?
- In other words, would the Government precipitate a still worse constitutional crisis?

The Government made a formal statement of its position on May 20, 1999,[62] The nature of the "interpretation" the Government sought here seems ***quite reasonable - if it were being asked of a judicial body capable of making a decision on that basis***. The Government argued that the "legislative intent" of the Basic Law is discernible from the Joint Declaration,[63] "which sets out categories of people who would have right of abode in Hong Kong from 1 July, 1997," and "long-standing policy of the PRC to control entry into Hong Kong from the mainland".

However, the Government had already made the same argument to the Court of Final Appeal, which found against them. It was now taking that argument higher to the Standing Committee. But that had to be extra-judicial. The Government maintained that this was not the case, by arguing that they had two options: (1) the first ***legislative***, going to the National People's Congress to amend the Basic Law; and (2) another (call it "***judicial***", or "***quasi judicial***", perhaps), going to the Standing Committee for an "interpretation":

*This arrangement [i.e., **"**the power to interpret the Basic Law. . .vested in the National People's Congress Standing Committee"] does not exist in other common law jurisdictions, but is a lawful option available to Hong Kong as an alternative to amendment, as provided for in its constitution. The distinction between interpretation and amendment is that the former must be faithful to the true intent of the legislation. An amendment can, however, change the original meaning.*

The true intent of the relevant provisions of the Basic Law finds its origin in the Joint Declaration on Hong Kong signed by Great Britain and China which sets out the categories

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[61] See: e.g., „Abode Ruling 'not on NPC Agenda'," SCMP , March 5, 1999.
[62] See: „Interpretation of Hong Kong's Basic Law," HKSAR Government Information Center, 20 May, 1999.
[63] „Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong," of December 19, 1984, codified as Cap. 1552 of the Laws of Hong Kong. See n. 41.

of people who would have right of abode in Hong Kong from 1 July 1997. In a meeting of the Joint Liaison Group of the two countries it was agreed that a person of Chinese nationality born outside Hong Kong would have right of abode in the HKSAR if the parents had right of abode in the HKSAR "at the time of his or her birth". This was subsequently reflected in the resolutions of the relevant bodies of the PRC responsible for making legislation and other arrangements for the establishment of the HKSAR.[64]

[64] „Interpretation of Hong Kong's Basic Law," HKSAR Government Information Center, 20 May, 1999, loc. cit.

It is gratifying to hear the Government arguing in terms of "true intent" here. One unforeseen beneficial effect of this controversy may, therefore, be the elevation of the standing of "legislative intent" in the estimation of the courts of Hong Kong. For, whereas that doctrine is well established in the United States, for example, it has not enjoyed the same reputation in the eyes of judges in England - or Hong Kong - until ***Pepper v. Hart*** (1992).[65] In this fairly recent tax case, the House of Lords held that ***Hansard***, the reports of parliamentary debates, may be consulted in order to attempt to establish the **"**intention of the legislature**"** in the event of ambiguous language in the statute.

For Hong Kong, this ***liberality*** of interpretation amounted to such a sea change that two local tax authorities remarked:

The holding in ***Pepper v. Hart*** *marks a fundamental change in the way English judges approach statutory interpretation. It remains to be seen how often and how persuasively, evidence of legislative intent will be advanced by advocates in future court cases.* [66]

Writing half a dozen years before ***Pepper v. Hart***, Atiyah and Summers called attention to the conspicuous differences between English and American approaches to "legislative intent":

Doubtless, in some cases the "plain meaning" of the words turns out in the end to be so plain that even an American court will look no further. Conversely, of course, cases occur in England where the "plain meaning" of the words is so absurd that even an English court will look for some evidence of underlying purpose, though usually only within the four corners of the enactment itself. . . .[67]

Of course, the Court of Final Appeal had contributed materially to the elevation of the doctrine of "legislative intent" itself, by holding:

The purpose of a particular provision may be ascertainable from its nature or other provisions of the Basic Law or relevant extrinsic materials including the Joint Declaration.[68]

Then, pursuant to such examination, the Court found that the relevant "legislative intent" could not be found in the Joint Declaration, because "full effect cannot be given to Article 22(4)…without any encroachment on the right of abode in Article 24":

…the Director [of Immigration] places some reliance on the Joint Declaration…which elaborated China's basic policies. It set out the categories of permanent residents which we now find in Article 24(2) of the Basic Law. The [Declaration]…later on stated that entry into the Region from other parts of China "will continue to be regulated in accordance with the present practice". The practice at the time of the Joint Declaration in 1984-85 was the practice of requiring exit permission for Mainland residents coming to Hong Kong. But there is no indication that the statement…providing for the continuation of that practice was intended to apply to permanent residents and thereby qualify their right of abode clearly set out earlier…. Accordingly we do not consider that the Joint Declaration is of any assistance in this connection.[69]

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[65] [1992] STC 898.
[66] See: A.J. Halkyard and J.P. VanderWolk, Hong Kong Tax Law: Cases and Materials (Hong Kong: Butterworths Asia, 1993), p.5.
[67] Form and Substance in Anglo-American Law, p. 110.
[68] Ng Ka Ling, p. 19. See n. 22.
[69] Ng Ka Ling, p 26. See n. 22.

Therefore, under the circumstances, and assuming that the Government enjoyed the special relationship with Beijing that it certainly believed it had, if the "interpretation" the Government was seeking was granted - in the terms sought - the gamble might be worth it. This is not to say that that would be a glorious day for judicial independence. The Court of Final Appeal was final in the past, but would not be final any longer.

Within the limits of its statement on "Interpretation of Hong Kong's Basic Law", what the Government was attempting might seem quite reasonable, if one could overcome: (1) the legal problem that there is no express power for the Government - and not the Court of Final Appeal - to seek an "interpretation" of the Basic Law by the Standing Committee; and, (2) the political, institutional problem that mainland authorities have not shown much understanding for, or patience with, the principles of rule of law in the use of their power in the past.

Other than this, there was no extensive "literature"[70]on this subject, one learned what the position of political figures was only through the press, and they seemed to be testing the waters. The Secretary for Justice had written to lawyers questioning her about the Government's action saying that they were "ignorant" of the mainland legal system, which, she said, resembled the continental civil law system [sic] rather than the common law[71]. She is also reported to have said that ". . .As a general rule, one does not need an express 'power' to ask someone to do something."[72] When questioned while traveling in the United States, Chief Secretary for Administration, Mrs. Anson Chan, told the U.S. Chamber of Commerce in Washington, that the Government's decision to ask the Standing Committee for an "interpretation" of the Basic Law was "constitutionally rock solid and iron-clad in law."[73] And we had a strange situation where the former head of the Law Society (the organization of Solicitors) supported the Government, and the head of the Bar Association (the organization of Barristers) argued that the Government could not go direct to the Standing Committee:

Bar Association chairman Ronny Tong Ka-wah SC said the body did not agree that the move was legal or constitutional. But Roderick Woo Bun, former Law Society president, said it was legal and that the local courts would have to follow the new interpretations after they were made.[74]

Granted this was not the best forum for thorough legal analysis. What was really taking place in the press was a political debate, with the Government seeking legal support for a policy decision it had already made. Yet a chance exchange in the columns of the ***SCMP*** reveals that Deputy Law Officer in the Secretary for Justice's Office, Robert Allcock, seems to have had an extraordinarily instrumental role in the formulation of the theory the Government was pursuing.

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[70] The leading work on the subject is Yash Ghai, Hong Kong's New Constitutional Order , 2d ed. (Hong Kong: HKU Pr., 1999).
[71] See: e.g., „More Heat for Law Chief Over Letter," SCMP , June 9, 1999.
[72] See: e.g., „Anson Chan Defends 'Rock Solid, Iron-Clad' Approach to Beijing," SCMP, June 16, 1999, p. 6.
[73] Ibid.
[74] See: e.g., „Tung 'Can Appeal for NPC Ruling Anytime' ," SCMP , June 13, 1999, p. 1.

In a lengthy article on June 15,[75] Bing Song, an articulate young lawyer in the influential international legal community, discussed what she considered flaws in the Government's arguments that it had the power to go direct to the Standing Committee, by-passing the Court of Final Appeal and obtaining a "judicial" interpretation in its favor:

- Whereas the Standing Committee had the power to "interpret" law, she wrote, "its interpretations often take the form of resolutions, which are meant to complement and supplement legislation by filling the gaps in the constitutional and legal framework. …However, these are not interpretations concerning particular legal disputes which have come before a court";
- Similarly, "the reference procedure in Germany or preliminary ruling procedure in the case of the European Union is involved prior to, not after a court's final decision"; and
- "…contrary to the Government's assertion, there is no recognised Chinese legal principle or practice which allows the Government to seek NPCSC interpretations to overrule part if not all of the Court of Final Appeal decision on the right of abode."

To this, Mr. Allcock responded in a "Comment" on June 24.[76] In legal terms, the greatest handicap the Government faced, in seeking to resort to interpretation by the Standing Committee, was that Article 158 (1) of the Basic Law is a bare assertion of the power to interpret:

The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.

There is no express means of invoking that power - and certainly not directly by the Government - other than the mechanism in Article 158 (3):

…the courts of the Region shall, before making their final judgements which are not appealable, seek an interpretation of the relevant provisions…through the Court of Final Appeal….

To citation of these procedural limitations Mr. Allcock responded:

Ms Song argues that BL 2, 19, 82, 158(2) and 158(3) qualify the general power possessed by the NPCSC under BL 158(1). The Government disagrees. While the SAR courts are given a delegated power to interpret the Basic Law in adjudicating cases under BL 158(2) and (3), there is nothing in the Basic Law that takes away the constitutional power of the NPCSC to interpret the Basic Law. The principles of a high degree of autonomy under BL 2 and the power of final adjudication under BL 2, 19, and 82 do not have that effect.

The real answer lies in the Chinese Constitution, he maintains, Article 67(4) of which gives the Standing Committee general powers:

The Standing Committee of the National People's Congress exercises the following functions and powers:
(1) to interpret the Constitution and supervise its enforcement; . . .
(4) to interpret laws….[77]

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[75] Bing Song, „Three Flaws in the SAR's Case," SCMP, June 15, 1999, p. 17.
[76] Robert Allcock, „Reinterpretation as a Legitimate Option," SCMP, June 24, 1999.
[77] See: Laws of Hong Kong, Cap. 1559, Sec. 67 (4).

Arguing that the "exceptional nature" of the present situation, i.e., that "the SAR simply cannot resolve the enormous socio-economic problems generated by the CFA's interpretation of the two Basic Law articles", Mr. Allcock again alluded to a power of "legislative interpretation" in civil law jurisdictions:

...while the concept of legislative interpretation may be unfamiliar to common law lawyers, it is not unique to the PRC legal system. Legislative interpretation can also be found in some civil law jurisdictions such as Belgium and Greece. The French legislature also has the power to issue interpretative statutes with retroactive effect to correct a judicial misinterpretation. ...the German Constitutional Court also has the power to conduct a review that is independent of a specific dispute before the court.

The Court of Final Appeal had made its decision - and, when given the unprecedented opportunity to "clarify" its decision, it stuck to its position. There is no substantial organized political opposition in Hong Kong - so this was an entirely intellectual constitutional crisis. The 20 member, popularly elected minority, who took the view that the Government had no authority to seek extra-judicial "interpretation" of the Basic Law by the Standing Committee, simply walked out of the Legislative Council sitting rather than be voted down.[78]

It is generally conceded, as well, that majority public opinion supports curtailing unlimited immigration from the mainland.[79] This is not the same thing as saying that majority public opinion supports public policy that will endanger rule of law - or better, put it another way, this is not to say that majority public opinion supports public policy that would materially change the way things are. The Government has done its best to make a case that it could by-pass the Court of Final Appeal - in fact, it says it reserves the right to by-pass the Court of Final Appeal in the future - and still call it "rule of law":

The Chief Executive is empowered to invite Beijing to interpret the Basic Law for Hong Kong whenever he likes or at any stage of a court trial. This emerged as lawmakers discussed criteria to avoid abuse by the Government in turning to the NPC for intervention in SAR affairs. But lawmakers remained in a fiery mood and were sceptical about the Government's promises of "only doing so in exceptional circumstances." At yesterday's special Legco constitutional affairs panel meeting, Acting Secretary for Constitutional Affairs Clement Mak Ching-hung refused to promise to set up criteria. He said: "it's a complex issue and the SAR Government is not in a position to make any commitment." Department of Justice deputy law

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[78] See n. 60 above.

[79] See, e.g., Lau Siu-kai, „Common People's Law," SCMP , June 27, 1999, p. 11. Professor Lau argues something like „Asian values" here:

In contrast to the common law perspective, law is treated by Hong Kong people primarily as a means to other ends, and hence its intrinsic value is limited. Law is valued because of its contribution to collective well-being. Abstract legal principles and arguments are not appreciated or understood. Furthermore, the public looks for substantive justice as defined by dominant social values and collective needs, not the procedural justice that is frequently held by the legal community to be the pride of common law. [Emphasis added.]

In addition, he cites survey figures that tend to show declining public regard for law as a result of inequality of access to law and the perception of privilege of the higher social strata. He also cites polls by a political organization and the popular press largely in favor of the Government's policy.

officer Robert Allcock said the NPC could interpret all provisions in the Basic Law at any time it deemed fit. Mr. Allcock cited Article 158 and said: "in theory the Chief Executive can go to the NPC [for interpretation] whenever he likes." And the intervention can be sought "before, during or after" a court trial, according to Mr. Allcock.[80]

Suspense over the outcome of the Government's "request" to the Standing Committee came to an end on Saturday, June 26. But there was no judicial hesitation of members, all leading political figures, to declare their positions. Already on Tuesday, June 22, the Legislative Affairs Commission had met, and its Vice Chairman Qiao Xiaoyang was reported to have said that the Court of Final Appeal was wrong not to have consulted the Standing Committee, and its interpretation was not in keeping with "true legislative intent".[81] Mr. Qiao reported to the full Committee, chaired by former premier Li Peng, "Article 158…required the court to put the case to the Standing Committee for interpretation, but it had not done so." On Wednesday, the official news agency Xinhua reported that members "generally agreed" with a draft resolution on reinterpretation to be put before the Committee on Saturday.[82] Saturday the Committee was reported to have accepted the Government's request for reinterpretation "unanimously" - though it was said "One of the 140 members did not press the button to vote."[83]

According to the reinterpretation of Article 22, "permanent residents' children with Chinese nationality, must seek a valid pass before entering the SAR." Under Article 24, mainland children "born before one of their parents became a permanent resident of Hong Kong do not have the right of abode."[84]

Therefore, if the world standing of Hong Kong - or the attitude of multinational business to Hong Kong - is dependent upon Hong Kong's public commitment to "rule of law", Hong Kong is publicly committed to "rule of law". The Court of Final Appeal has had its day in the limelight. But, at the moment, as far as constitutional matters are concerned, it does not have the last word.

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[80] SCMP, June 13, 1999, p.1, cited at n. 76 above.
[81] See: „Court Wrong on Abode, NPC Told," SCMP , June 23, 1999.
[82] See: „NPC Backs Tung Call to Reinterpret Basic Law," SCMP , June 24, 1999.
[83] See: „NPC Lays Down the Law," SCMP , June 27, 1999, p. 1.
[84] Ibid.

6. Was it Necessary to Appeal Direct to Beijing?

In light of the Government's need to justify its decision to depart from the ordinary understanding of judicial independence - not only to its own constituency, but also to the whole world's legal community, the media, China watchers, foreign governments, and international business - we have to wonder again whether it was not possible to take a reasoned view of the law that would have persuaded the Court of Final Appeal to alter its position.

Professor Albert H.Y. Chen, Dean of the Faculty of Law at the University of Hong Kong, has provided a very illuminating discussion of the question of judicial review[85] - which in the Court's judgment assumes not only a questionable history of legislative intent, but also presumes a readiness on the part of the National People's Congress to have created a far more sophisticated system of constitutional and judicial review in Hong Kong than it has been willing to allow in mainland China itself. (One can, of course, maintain that that is exactly what "one country, two systems" ultimately entails.)

Dean Chen argues that, under Article 158, the Hong Kong Court of Final Appeal, itself, was obliged to ask the Standing Committee to interpret whether the ***procedural*** requirement in Article 22 means that "people from other parts of China" (i.e., people who must apply to the mainland authorities for an exit permit) also includes persons, who already enjoy the ***substantive*** "fundamental right" (i.e., of right of abode in Hong Kong) before making their judgment.[86] This requirement arises from the language of Article 158 paragraph three, cited above.

Dean Chen, compares the procedural test in requesting interpretation by the Standing Committee under the Basic Law to the judicial test for applying Article 177 of the EEC Treaty governing procedures for balancing domestic law and EEC law in English courts. "It is public knowledge," he writes, "that article 158 of the Basic Law was inspired by article 177 of the EEC Treaty."[87] In principle, it does not seem unreasonable to argue that if an English court could use this balancing test in applying domestic and EEC procedural requirements without jeopardizing its judicial independence, that a Hong Kong court should be able to apply a similar test without sacrificing the principle of "one country, two systems".

We may be able to anticipate that the Standing Committee would have said yes to such a question and that prospective immigrants would then again be obliged to apply to mainland authorities for an exit permit - whether or not they believed that they already enjoyed rights of permanent residency in Hong Kong from the language of the Basic Law itself.
The Court was able to reach a different result by concluding that no reference to the Standing Committee was necessary because "predominantly" they were interpreting ***substantive*** rights that come within their purview, not questions that are "excluded provisions" (i.e., "affairs

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[85] Albert H.Y. Chen, „The Court of Final Appeal's Ruling in the 'Illegal Migrant' Children Case: Congressional Supremacy and Judicial Review," Law Working Paper Series, No. 24, Faculty of Law, University of Hong Kong, March 1999.
[86] Albert H.Y. Chen, „The Court of final Appeal's Ruling in the 'Illegal Migrant' Children Case: A Critical Commentary on the Application of Article 158 of the Basic Law," Law Working Paper Series, No. 23, Faculty of Law, University of Hong Kong, March, 1999.
[87] Ibid., p. 4. He cites the 1958 draft of the Basic Law which says as much in commenting on what was then Article 169 („which is similar though not identical to the present article 158"). He also refers to Yash Ghai, Hong Kong's New Constitutional Order , 2d ed. (Hong Kong: HKU Pr., 1999), p. 200, in support.

which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region"):

It is, in our view, of considerable significance that Article 158 requires a reference to the Standing Committee of the interpretation of the relevant excluded provisions only. The Article does not require a reference of the questions of interpretation involved generally when a number of provisions (including an excluded provision) may be relevant to provide the solution of that question.

Applying that test, in adjudicating this case, as a matter of substance, the predominant provision which we are interpreting is Article 24, which provides for the right of abode of a permanent resident, and the content of that right. That Article is the very source of the right which is sought to be enforced by the applicants in these appeals. That being so, the Court, in our view, does not have to make a reference, although Article 22(4) is ***arguably*** *relevant to the interpretation of Article 24.*[88]

As much as human rights advocates and common law trained judges in other countries may applaud the ***result*** of the decision in ***Ng Ka Ling***, the argument of precedence of substantive over procedural rules is not typical of the underlying tradition of common law practice either in England or in Hong Kong. This is a thesis that Atiyah and Summers argue over and over again in their comparative study of ***Form and Substance in Anglo American Law***: i.e., that English courts prefer to follow formal rules, while American courts, by contrast, may sometimes look to underlying substance:

It seems clear to us that the answer lies partly in the more formal approach the English judges take to law. They believe in law having a high degree of mandatory formality, and are especially unwilling to carve out substantively grounded exceptions to general liability in what appear to be marginal cases.[89]

Moreover, appealing as it may be to hear the ring of a Chinese court in Hong Kong sustaining human rights of poor immigrant children, one must wonder again, whether this decision was necessarily judicially as good law as it was good conscience. "Persons with permanent resident status under the Basic Law are not, as a matter of ordinary language, people from other parts of China. They are permanent residents of this part of China," the Court has told us. But, is that what "permanent resident" really means as "a matter of ordinary language"?

Certainly, it is, if by "ordinary language" one means that, a "permanent resident", is a person who is physically resident or domiciled in a place. In that case "permanent resident(s)" of Hong Kong if physically resident or domiciled in Hong Kong are as "a matter of ordinary language" not "people from other parts of China".

On the other hand, one can be a "British subject", or "landed immigrant", or an "American citizen", or, a "permanent resident of the United States" - a holder of a "green card" - who is not physically resident or domiciled either in Britain or the United States at all.

With respect, what is the objection to referring to persons who are, by fundamental right, "permanent resident(s)" of Hong Kong, but resident or domiciled in other parts of China, as "people from other parts of China"? And if they are able to take advantage of their

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[88] Ng Ka Ling , FACV No. 14 of 1998, p. 24. See. n. 22.
[89] P.S.Atiyah and R.S. Summers, op.cit., p. 181f.

fundamental right to reside in Hong Kong, is it a perversion of "ordinary language" to say that they intend "to enter the Region for the purpose of settlement"?

Moreover, would it not be absurd to suggest that persons of Chinese nationality, domiciled since birth in the mainland of China, are not subject to the laws and authorities applicable in the mainland of China? Under the Basic Law, the right of abode in Hong Kong extends to "Persons of Chinese nationality born outside of Hong Kong of… [permanent] residents". But the Basic Law has only come into force since July 1, 1997. It extends a fundamental right to persons resident and domiciled elsewhere, but it does not alter their national status before it came into force, and it does not, solely on its own strength, transport them to the Region where they are entitled to right of abode after it comes into effect.

But we know how the Court decided. ***The real question here is not why the Court of Final Appeal did not hand down a different decision. It is, rather, why a Government, so convinced that the Court was wrong did not argue its case again***.

What prevented the Government from seeking a re-hearing[90] or from bringing another case[91]? Why did the Government - even when it was seeking "clarification" - insist that the Court was "correct"[92]? Why were they so convinced that they could not succeed in a new case - if their arguments were so strong that they had to ask the Legislative Council to support an appeal direct to Beijing?

With legal authorities in Hong Kong far from ill - disposed toward the Government's predicament, why was so much resourcefulness directed toward justifying direct appeal to the Standing Committee rather than convincing the Court that ***they*** should have asked Beijing for "interpretation" of Article 22 - ***if the decision could be shown to be absurd, harsh, or unreasonable?***

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[90] It may appear to be an affront to the concept of Final Appeal in Hong Kong to rehear a question. (NB: what care the Government took in order not to let its really unprecedented request for „clarification" not appear to be „to have the ruling overturned or changed". See: „Judges Asked to Clarify Right of Abode Decision," SCMP , February 25, 1999.) Fortunately that is not—or is no longer—the position of the House of Lords, so long a model for procedure in Hong Kong. Lord Denning discussed this problem in the Romanes lecture, op. cit. (n. 55 supra), at pp. 24ff.

[91] See: e.g., „ 'Little Chance' Court Would Reverse Ruling," SCMP , May 19, 1999, p. 1. Justice Secretary Elsie Leung Oi-sie is quoted as saying:

We could not be sure the court would reach a different conclusion on the relevant issues. . . .Unless there are changes in the circumstances or in legal viewpoints over a long period of time, the court will not easily reverse any of it previous decisions. [Emphasis added.]

[92] See: e.g., Yash Ghai in „The Theatre of the Law," SCMP , March 1, 1999. Reporting on the incongruity of the Government's attorney asking the Court to „clarify" what is „correct":

The learned barrister then said that the court had a duty to clarify its judgment because it had become highly controversial while conceding that it was a correct judgment. [Emphasis added.]

7. The End of the Crisis: The CFA Upholds the Interpretation of NPCSC

The decision in ***Lau Kong Yung and Director of Immigration***[93] ended the anxiety over whether the Court of final Appeal (CFA) would accept the Interpretation by the NPCSC or would allow the constitutional crisis to continue. The decision was handed down in December, 1999, six months after the Interpretation.

The decision itself is a most remarkable piece of judicial writing. The Chief Justice of the CFA declares at once that "[t]he central question in this appeal ***relates to*** the Interpretation…"[94]. In due course, he finds that:

1. The NPCSC had the authority under Art. 67(4) of the Constitution of the PRC and under Art. 158 of the Basic Law to make the Interpretation [95] ;
2. Under the Chinese Constitution, it was not necessary for the Interpretation to have been made in a case in controversy (thus it was irrelevant that the matter had been brought up by the HKSAR Government and not the CFA)[96];
3. He acknowledges that under the Interpretation, the CFA has a "***duty***" to seek an Interpretation by the NPCSC of sections of the Basic Law referring to "excluded provisions", i.e., those sections referring not to the laws of Hong Kong but to the laws relating to the relationship of Hong Kong to the mainland.[97]
4. He finds that the effect of the Interpretation is that the sections of the Immigration Ordinance that the CFA had found unconstitutional in ***Ng Ka Ling*** and ***Chan Kam Nga***, the two decisions that precipitated the constitutional crisis, in January, 1999, are, therefore, applicable retrospectively as of July 1, 1997, as the Immigration Amendments had specified.[98] However,
5. As a result of a peculiarity of the Basic Law and of Interpretation by the NPCSC, parties subject to "judgments previously rendered shall not be affected".[99]

Each of the Justices, who had previously agreed with the Chief Justice, now agreed with the Chief Justice again[100]. But ***Lau Kong Yung*** is no admission of judicial error. It is an acceptance of the power of the NPCSC to make the Interpretation. There is no question that the NPCSC made the Interpretation on the basis of the perception that the CFA had been in error. But if that was the perception of the NPCSC, then that was the perception of the NPCSC. The case that comes before the CFA in ***Lau Kong Yong*** is reversed for other reasons.

Lau Kong Yung concerns removal orders made in February, 1999, against 17 applicants for permanent resident status who were illegally in Hong Kong. This was subsequent to the CFA's decision in ***Ng Ka Ling*** and ***Chan Kam Nga*** with respect to unconstitutionality of sections of amendments to the Immigration Ordinance requiring such applicants to apply from

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[93] Lau Kong Yung and Director of Immigration, FACV Nos. 10 and 11 of 1999 (3 Dec., '99). See n. 21, then 3 Dec 1999; also [1999] 2 HKCFAR 255.
[94] Ibid., p.1, emphasis added.
[95] Ibid., p. 12.
[96] Ibid. p. 12f. The Chief Justice also refers to support in this conclusion from Yash Ghai, Hong Kong's New Constitutional Order, 2nd ed., 1999, p. 198, ibid., p. 13.
[97] Ibid., p. 12.
[98] Ibid., p. 15.
[99] Ibid., p. 12.
[100] I.e, on the authority of the NPCSC to make the Interpretation. Mr. Justice Bokhary dissented on reversing the decision of the Court of Appeal quashing the removal orders.

the mainland and requiring that one parent have already been a permanent resident at the time of birth of the applicant. The removal orders had, nevertheless, been upheld by the High Court (i.e., court of first instance), but had been quashed by the Court of Appeal (i.e., the intermediate court) - two weeks prior to the Interpretation by the NPCSC in June, 1999, presumably, also following the CFA in ***Ng*** and ***Chan***.

However, the Chief Judge of Hong Kong's intermediate, Court of Appeal, and his colleagues, get serious lessons on what is called for in judicial review for reversing the lower court, and quashing the removal orders of the Director of Immigration. Surely, the Court of Appeal may also have been relying on the CFA's decisions in ***Ng Ka Ling*** and ***Chan Kam Nga*** in reversing the High Court on ***Lau Kong Yung*** , but that gets no mention.

Therefore, quite apart from the effect of the decision in ***Lau Kong Yung*** in ending the constitutional crisis in Hong Kong by effectively obliging the highest court of the Region to circumvent - if not nullify - their own prior leading decision, ***Lau Kong Yung*** will strangely remain significant in Hong Kong jurisprudence for other reasons. For:

- In correcting the CFA, the NPCSC did what politically and philosophically it probably could not avoid doing. But ***it had not done so by imperiously invoking the central Government powers. Instead it relied explicitly on the familiar common law doctrine of "legislative intent".*** The Chief Justice of the CFA quotes Mr. Qiao Xiaoyang in his speech to the NPCSC on June 26, 1999:

Before making its judgment, [the CFA] had not sought an interpretation of the NPCSC in compliance with the requirement of Article 158(3). Moreover, the interpretation of [the CFA] is not consistent with the legislative intent.[101] *...The legislative intent of the Basic Law 22(4) is to affirm the long-standing system for exit-entry administration between the Mainland and Hong Kong. ...This legislative intent is solely meant to ensure that Mainland residents come to Hong Kong in an orderly manner and is consistent with the general interest of Hong Kong.*[102]

- Much of the rest of the decision and particularly the speech of Mr. Justice Litton is devoted to the logic and principles of judicial review (where presumably the intermediate court, the Court of Appeal, went astray). The principles enunciated here are not new, and will be quite familiar to the common law lawyer. But:

    1. the ***locus*** of the restatement of these principles, in what must be a crucial constitutional decision in the judicial history of Hong Kong; and
    2. the giving of this lesson in what is no less than a significant reprimand to the Court of Appeal that these principles should have been, but had not been, followed, makes ***Lau Kong Yung*** into a primary text on the application of equity and principles of judicial review for the law of Hong Kong.

Putting first things first in what is not a systematic theoretical treatise, but, perhaps more important, a leading decision of the Court of Final Appeal, the learned Chief Justice puts both administrative good practice and, therefore, judicial review, into perspective of what the German theoreticians call "***Zweck des Rechtes***", that is, "purpose of law". The Chief Justice of the CFA speaks of the Director of Immigration here who is bound by purpose of law. But, in cases to come, it will be Directors of any Government Department who must seek and follow "legislative intent" in their actions:

...[I]n the context of the removal of a person falling within Part 1B of the Immigration Ordinance ***the Director must have regard to the overall objective of the statutory scheme*** *[emphasis added].*[103]

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[101] Ibid., p. 10.
[102] bid., p. 14.
[103] Ibid., p. 23.

Mr. Justice Bokhary, in his judgment, even outdoes the learned Chief Justice in fortifying this principle of jurisprudence in Hong Kong. "I cannot improve on how Prof. Jeffrey Jowell QC puts it ...:"
"***the powers intended by a legislative scheme...must not be construed in a vacuum***" that ***it is necessary "to identify the underlying principles which should govern the decision in question***" [emphasis added] and that:

"To this end the general notions of fairness that may reside in the common law may prove helpful, but it is more helpful still to engage openly with the necessary qualities of a modern constitutional democracy." [104]

The Chief Justice of the CFA then observes that despite the January, 1999, decisions, which found certain portions of the statutory regime of the Immigration Ordinance unconstitutional, the remainder of the statutory scheme remained in place. As suggested above, in future, this lesson will apply to any Director applying any agency ordinance. Here, however, as argued by Mr. Justice Litton, had the Court of Appeal [i.e., the intermediate court] followed this analysis, regardless of their attempt to follow the CFA in decisions now set aside by the Interpretation, it would have prevented them from quashing the removal orders on judicial review:

As mentioned earlier, the provisions of s 2AA(2) remained in place after this Court's judgment in ***Ng Ka Ling***.

Likewise s. 2AB(5) which says:

"(5) For the removal of doubt, it is hereby declared that the making of an application under subsection (1) does not give the applicant the right of abode or right to land or remain in Hong Kong pending the decision of the Director on the application."

The intention of the legislature could not have been clearer. It was not for the Director to frustrate that intention.[105]

[104] Citing Jeffrey Jowell, „Of Vires and Vacuums: The Constitutional Context of Judicial Review," [1999] P.L. Autumn 448, at 460, ibid., p. 28.
[105] Ibid., p. 23f..

As the Chief Justice of the CFA explained in the January, 1999, decisions, and does so here again, in referring to those decisions, ***statute law is not only presumed to express a permissible purposiveness and legislative intent, but is also presumed to be reasonable***:

In holding the original scheme apart from the one way permit requirement [found unconstitutional in the January decisions] to be constitutional, the Court stated that it took into account "that ***the Director must operate it lawfully in a fair and reasonable manner and that there are safeguards to which its operation is subject*** [emphasis added]" which the Court then described as follows (at 36l-37C):

"First as a matter of statutory construction, the courts would import the requirement of reasonableness into a number of provisions for operating such verification scheme. For example, the Director may specify the manner in which an application for a certificate of entitlement shall be made by notice in the Gazette....But that power is to be construed as what he may ***reasonably*** *specify."*[106]

Reverting now to Mr. Justice Litton's analysis of what the Court of Appeal [i.e., the intermediate court in Hong Kong] should have looked for on judicial review of the removal orders:

- the question was ***not*** [as it ***was*** for the Court of Final Appeal for their decision with respect to constitutionality]: "***was the*** [***statute***] ***law reasonable***?" But,
- rather, with respect to the statute [aside from portions which had been struck down as unconstitutional]: "***Had the Director acted unreasonably in applying the clearly constitutional portions***?"

Mr. Justice Litton observes, "To consider whether the Court of Appeal had erred, it is necessary to go back to the beginning" [i.e., go back to the applications for judicial review]. In these, the applicants had raised the questions of "***Wednesbury*** unreasonableness", which the Director in implementing his agency statute must consider. Applicants here cited the rule in a case in which a late Master of the Rolls [i.e., the Chief Judge of the Court of Appeal in England] had laid down a test for reasonableness in judicial review:

"...a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules he may truly be said, ... to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.[107]

In other words, the Director of a Government agency has to:

- consider what was proper under the statute to consider;
- exclude from consideration what was improper for him to consider; and
- be especially circumspect not to introduce matters so extraneous as to be absurd.

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[106] Ibid., p. 5.
[107] Citing Lord Greene, M.R., in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation, [1948] 1 K.B. 223 at 229, ibid., p. 23.

That is to say that the Director - any Director, or any Government agency - must act strictly in accordance with his - or its - enabling statute and not act in a manner that is arbitrary or capricious.
It may all be old wisdom, but if this lesson to the Court of Appeal is what outlives the constitutional crisis, judicial review - and hence public recourse against administrative arrogance in Hong Kong - is in good hands, ***providing of course, that there is accessibility to the courts.*** But that is another and a long-standing problem.

Yet, it does not end here. Nothing is more obvious than that the CFA is still reluctant to believe that there are no humanitarian grounds to allow minor children of permanent residents who have no close family ties on the mainland to remain in Hong Kong. The Director also has ***discretion*** in whether or not to exercise the power to order their removal - a ***power***, which, under the Ordinance, he unquestionably has. In this respect, the Chief Justice of the CFA appears to affirm the reasoning of the Court of Appeal with respect to the removal order's being discretionary:

*All three judges concluded that the power of removal under s.19(1)(b)(ii) was a **discretionary** power: Rightly so: Section 19(1) says "A removal order **may** be made against a person requiring him to leave Hong Kong..." This means that the Director has a discretion **not** to order removal even if the conditions in subsection (b)(ii) are satisfied.*[108]

Perhaps the constitutional crisis could have been avoided if the CFA had also relied more on humanitarian urging that the Director of Immigration exercise this discretionary power, in the first place,[109] rather than handing down the January, 1999, decisions, presumably also on humanitarian grounds. Nevertheless, if ***Lau Kong Yung*** represents acknowledgment of a power on the mainland, through Interpretation, to set aside judicial decisions in Hong Kong it has so far been a power benevolently exercised. And, if ***Lau Kong Yung*** is a decision representing concession to the greater public policy concerns of the Hong Kong Government, it also remains a decision full of lessons for successful judicial review of administrative action where administrative agencies act in a manner that is conspicuously arbitrary or capricious.

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[108] Ibid., p. 23.
[109] This was not unknown in Hong Kong prior to the Handover. See: e.g., both by the courts in Hong Kong and Privy Council in Attorney-General of Hong Kong and Ng Yuen Shiu , [1983] 2 W.L.R. 735.

Postscript on Access to the Courts

Nothing in the present paper has aroused so much concern among colleagues asked to review it as the suggestion that access to the courts in Hong Kong leaves something to be desired. After all, they say, the "right of abode" cases have proved that the poorest applicants have had their cases heard. It is true that landmark decisions have been won by corporate institutions in Hong Kong, and it is remarkable what was achieved in the "right of abode" cases and for Vietnamese internees (though for the latter it took 25 years). For both the rich and the poor, the Hong Kong courts have afforded meaningful recourse to law. Nevertheless, the average middle class person still runs a great risk in going to court.

The point has been made above as forcefully as possible that **the law** in Hong Kong resembles the law in other common law jurisdictions. However, in Hong Kong today, legal fees are magnified by a general inflation of the cost of living - comparable to other world financial centers, perhaps - but, where providers of legal services, generally, expect to live at the standard of the most prominent members of the profession, and the rest of the middle classes cannot keep up. In Hong Kong, not only the high cost of legal fees, but also the enormous disparity in the cost of legal counsel that the middle classes and the well off - or the Government - can afford, must be considered. Here, the better off party knows that if he outspends his adversary on legal fees, he can either recover them in costs if he wins - or he may completely deter the other party from continuing his case at all. Therefore, the concept of rule of law may be alive and well in theory, yet to permit class differences to play such an enormous role in access to the courts has to be repugnant to the very spirit of the common law.

There is a long tradition in English courts of awarding costs to the prevailing party. Even English courts, it is said, have "wide discretion" in imposing costs - though recognizing that they have such free reign and doing something about it are two different things. In his **Interim Report** on **Access to Justice**, Lord Woolf, now Lord Chief Justice, acknowledges: "Many of those who make their living by conducting litigation accepted…that they would not be able to afford their own services…." Thus, in his **Final Report** Lord Woolf urges a number of procedural and case management reforms, where "Orders for costs need to reflect more precisely the obligations the new rules place on parties."

Under the American rule, an award of costs should also address such equitable concerns. But the courts apply that rule with equal rigidity. The U.S. Supreme Court has spoken measuredly of "an action [taken] in good faith", "in an unsettled area of law", "with a reasonable likelihood of success" - even where the statute provided for costs to the prevailing party. Consequently, the rule tends to be that a prevailing party may be devastated by costs he can not recover, and/or contingency fee lawyers can pursue undue litigation in order to be paid at all.

Recent news reports about a failed lawsuit of Ms Emily Lau Wai-hing, a democratic activist member of the pre and post Handover, elected, Legislative Councils, seeking to assert her rights under the Personal Data (Privacy) Ordinance demonstrates the extent to which, in even a relatively simple lawsuit, a comfortably middle class person in Hong Kong risks financial ruin. The Privacy Ordinance provides that a person who believes that a "data user" maintains a file on him or her has a right to request to see the file, to seek to correct possible inaccuracies, and/or seek erasure if the purpose of collection has expired. Ms Lau believed that the Xinhua News Agency, which served as an unofficial observer of the PRC government

in Hong Kong prior to the Handover, and has recently been named the liaison office of the central government, had gathered information on persons considered to be political activists. Accordingly, when the Ordinance came into force in 1996, Ms Lau wrote to the Director of Xinhua, Mr. Zhou Nan, requesting to see her file.

Xinhua responded 10 months later, in October, 1997, that they held no such file. Ms Lau then lodged a complaint with the Privacy Commissioner, who, in February, 1998, confirmed violation of the Ordinance in Xinhua's failure to reply within the statutory 40 days. However, at about the same time the Provisional Legislative Council was considering replacing "crown" immunity with "state" immunity wherever it appeared in the Hong Kong ordinances, and for policy reasons, the Secretary of Justice declined to prosecute (see: n. 2). Therefore, Ms Lau decided to proceed on her own.

The lawsuit was dismissed for technical reasons: Ms Lau was told that Xinhua could not be sued because it was an "unincorporated association". The old Director of Xinhua had retired in 1997, and the court disagreed that the offense was ongoing, holding that the new Director, Mr. Jiang Enzhu, was, consequently, not a proper party. The merits of Ms Lau's lawsuit - and any doubts about the decision - aside, the really newsworthy significance of the case has been that Ms Lau, whose own lawyers served **pro bono**, was ordered to pay costs to Mr. Jiang of ca. HK$1.9 million (ca. US $244,000) (subsequently reduced by the court to HK$1.4 million [ca. US$179,000] + interest of ca. HK$200,000 [ca US$26,000] + interest of HK$500 a day) for a 9 day trial.

Ms Lau was only able to repay Mr. Jiang ca. HK$25,000 (ca. US $3,200) herself, and, as of, December 13, 2000, had only been able to raise a total of HK$600,000 (ca. US $51,000) largely from public contributions to a "civil and political rights fund" set up by her political party friends. Obviously she was in no position to guarantee costs if she had appealed. Mr. Jiang warned that if she did not pay within 21 days, he would petition the court for her bankruptcy, which he did. Under the Basic Law, bankruptcy would preclude Ms Lau from continuing to serve in the Legislative Council. Ms Lau's friends and supporters may save her from bankruptcy. But most ordinary citizens are not protected in that way.

Personal and public interest reasons for pursuing such lawsuits aside, it is the costs factor that is the real deciding issue in access to the courts in Hong Kong. The successive appeals pursued in the Vietnamese boat people's detention and the "right of abode" cases were possible only because they were supported by legal aid - not simply so that the case could be brought, but also so that the threat of costs could not be used to deter appeal. Clearly, Hong Kong can assure due process to the very rich - and to the very poor. The Vietnamese internees, and the illegal immigrant children, had nothing to lose and everything to gain. But this does not preserve meaningful access to the courts for the middle classes - if every time a middle class person faces a simple lawsuit he must fear playing Russian roulette with bankruptcy.

See: *"Emily Law bankruptcy writ filed,"* ***SCMP****, December 13, 2000, p.1, "Legislator misses deadline to repay legal fees," "BBC Summary of World Broadcasts", part 3, Asia-Pacific, November 22, 2000 (cited in web lexis-nexis.com - source: "RTHK Radio 3", Hong Kong 10:00 GMT, November 20, 2000); "Xinhua's immunity challenged,"* ***The Statesman*** *(India), November 17, 2000; "Fund may help Emily Lau,"* ***SCMP****, October 31, 2000, p. 6; "Bankruptcy fear for legislator,"* ***SCMP****, October 21, 2000, p. 1; "Activists warned on cost of campaign,"* ***SCMP****, October 6, 2000, p.3, and "The Xinhua Battle: Emily Lau needs your support".*

See also: *Atiyah and Summers,* ***Form and Substance in Anglo-American Law****, at pp. 197ff. on departures from the strict rule of awarding costs to the prevailing party in English practice. On proposals for reform, see: Lord Woolf,* ***Access to Justice: Interim Report to the Lord Chancellor on the the civil justice system in England and Wales****, 1995, http://www.law.warwick.ac.uk/woolf/woolf.html and* ***Access to Justice: Final Report****, 1996, http://www.law.warwick.ac.uk/woolf/report. Cf. U.S. practice in* ***Lotus v. Borland*** *, 140F.3d 70 (1st Cir., 1998), citing* ***Fogerty v. Fantasy, Inc.****, 510 U.S. 517 (1994), interpreting 17 U.S.C. § 505.*

Appendix 1: Some Notes about Chinese Names Order and Conventions of Transliteration

The family name comes first in Chinese usage. Chinese surnames are, generally, monosyllabic. Chinese given names are, generally, composed of two morphemic meaning monosyllables. The conventions in transliteration of Mandarin, the dialect of Beijing, the "national" language, historically (and on Taiwan), call for hyphenating the two monosyllable given name and capitalizing the first monosyllable - thus: **Mao Tse-tung**. However, Chairman Mao's name is still written in that form only because it was established in the media long before the PRC itself was founded in 1949. Current convention in mainland China calls for omitting the hyphen and writing the two monosyllable name together - thus: **Mao Zedong.** The convention in Hong Kong, where the prevailing dialect is Cantonese, tends to Anglicize sounds, not to hyphenate, and to capitalize all three syllables - thus: **Tung Chee Hwa**. This sometimes creates a question about name order - also for Cantonese speakers - where the Chinese name order may have been reversed for convenience of Western colleagues (see below).

Spelling and capitalization in transliteration follows different conventions: In the PRC the formalities of ***pinyin***, the system of Romanization adopted by the communist government in the early days of its reforms applies. In Hong Kong a mixture of conventions for transliteration arose in the British period. Therefore, Chinese names of Hong Kong people may be said to be "Anglicized", often employing a variety of similar English sounds, rather than "Romanized" according to uniform "scientific" systems - which tend to be somewhat obscure to English speaking sensibilities.

Hong Kong and/or Chinese people who adopt Western given names tend to reverse the order of given name and surname. Thus we speak, for example, of **Mrs. Anson Chan**, the Chief Secretary, the highest official of the Hong Kong civil service. Some business and professional people who use their Chinese names also reverse the order for convenience of their expatriate colleagues. Thus (in the article): **Bing Song (**where Song is the surname). It might be more consistent where both the Western given name and the Chinese given name or initials precede the surname. However, the media sometimes seeks to be "correct" to both systems - thus one also sees the Western given name, then the surname followed by the Chinese given name - e.g., **Elsie Leung Oi-sie (**Secretary of Justice**)**. On the other hand, many people who commonly use their full Chinese names for one purpose, seem to enjoy having a public persona in Western dress, for another. Accordingly they, or the media, write their full Chinese names, then put a comma before their chosen Western given name.

Some distinguished persons, who may not have adopted a Western given name, but have been knighted during the British period, have adopted a still further convention. In English a knighted person is properly addressed as "Sir", or "Dame", with his or her given name. Consequently, these persons have also had the order of their names reversed. If such titled familiarity offends sensibilities, however, they may at times choose to be called "Sir" with only their given name initials. Thus: **Sir T.L. Yang** (former Chief Justice of the Supreme Court, who gave up both his position, and his title, in order to run for the office of Chief Executive).

Appendix 2: Glossary of Names and Special Terms

Basic Law = The constitutional law of Hong Kong agreed to in the "Joint Declaration" and enacted by the National People's Congress.

Deng Xiaoping = The head of Government and of State of the People's Republic in the years after Mao Tse-tung. A practical, reformist leader, whose practical interpretation of ideology made many of the economic changes in China in recent years possible.

FACV = Final Appeal, Civil, case report series.

Feng Shui = "Wind and water" two of the four natural elements: earth, air, fire, and water, believed to influence by orientation in Chinese geomancy.

Joint Declaration = The agreement between Britain and China under which Hong Kong would be returned to China with continuity of its legal and social institutions assured for at least 50 years, according to the principle of "One Country, Two Systems".

Handover = the peaceful transition of power, returning sovereignty over Hong Kong to China.

Legco = The media's familiar name for the Hong Kong Legislative Council.

Li Ka-shing = A self-made billionaire entrepreneur and business tycoon in Hong Kong.

National People's Congress (**NPC**) = The highest legislative, consultative body of the PRC, which meets annually.

"One Country, Two Systems" = The constitutional principle attributed to the thought of then Party Chairman, Deng Xiaoping, under which peaceful reunification of capitalist, common law Hong Kong with the socialist People's Republic of China was made possible.
PRC = The People's Republic of China established on the China mainland in 1949. To be distinguished from the **ROC**, the Republic of China, which continued to bear that name under refugee government on the island of Taiwan, also since 1949.

SAR = The Hong Kong Special Administrative Region, the new administrative entity created within the PRC, where the law of Hong Kong would apply as before subject to the new Basic Law, and in accordance with the principle of "One Country, Two Systems".

SC = Senior Counsel, the Hong Kong replacement for: **QC** = Queen's Counsel, a senior barrister.

SCMP = The ***South China Morning Post***, the leading English language newspaper, and the newspaper of record in Hong Kong. Its significance is particularly noticeable here. For, in the absence of an effective political opposition, public debate was occurring not in the legislature, but in the press. Like all major Hong Hong newspapers it is accessible on the web, at http://www.scmp.com.

Standing Committee of the National People's Congress (**NPCSC**) = The elite permanent consultative committee of the National People's Congress, which enjoys special judicial powers to interpret laws under the constitution of the PRC.

Tung Chee Hwa = The Chief Executive of the Hong Kong Special Administrative Region, elected by a special electoral body appointed by the central government. A shipping tycoon well-known in Hong Kong elite circles before the Handover, he enjoyed a special relationship with central government figures.