

Fordham International Law Journal

Volume 23, Issue 1

1999

Article 1

One Country, Two Legal Systems?

Joseph R. Crowley Program*

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One Country, Two Legal Systems?

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Abstract

From May 31 to June 13, 1999, the Joseph R. Crowley Program in International Human Rights (or “delegation”) conducted a mission in Hong Kong in conjunction with the Committee on International Human Rights of the Association of the Bar of the City of New York (‘Association’ or ‘ABCNY ‘). The purpose of the mission was to examine the status of the rule of law in Hong Kong two years after the transition from British to Chinese rule. This Special Report documents the delegation’s investigation, summarizes its findings, and sets forth its conclusions and recommendations. Part I considers the rule of law as a foundation of international human rights and China’s obligations under international law to protect the rule of law in Hong Kong. After recounting the right of abode decisions themselves, it examines both the legality and prudence of the HKSAR administration’s request for a reinterpretation, including the alternatives that it could have pursued. This Part concludes by analyzing the reinterpretation that Beijing issued and the effect it has had, or is likely to have, on subsequent related cases. Part II examines Hong Kong’s progress towards full democracy, measuring that progress against the Basic Law and international law. It begins by reviewing the relevant international obligations applicable to the PRC and the HKSAR. Next, this part details the electoral system and limits on legislative power, including the composition of LegCo, Hong’s Kong’s legislature, the selection of the Chief Executive, and the separation of powers within the HKSAR government. Finally, this Part assesses the development of democratization in Hong Kong in light of the international standards previously discussed. The third and final part of this Special Report explores the status and implementation of Hong Kong’s basic international human rights obligations under its domestic law. It then focuses on two areas, labor rights and anti-discrimination protection, as case studies in which fundamental rights protected under international law have been eroded or underenforced by the HKSAR administration.

SPECIAL REPORT

ONE COUNTRY, TWO LEGAL SYSTEMS?*

*Report of the Joseph R. Crowley Program***

* AUTHOR'S NOTE: This Special Report is based on a joint mission undertaken by the Joseph R. Crowley Program in International Human Rights and the International Human Rights Committee of the Association of the Bar of the City of New York. The views expressed in this version of the Special Report are *solely* the views of the Joseph R. Crowley Program in International Human Rights and do not represent the views of the Association of the Bar of the City of New York. For the purposes of this Special Report, any reference to the views of the delegation refers to those of the Joseph R. Crowley Program in International Human Rights. A modified version of this Special Report will appear, in part, in a forthcoming re-publication of the Joseph R. Crowley Program/International Human Rights Committee of the Association of the Bar of the City of New York. *One Country, Two Legal Systems?*, THE RECORD (forthcoming February 2000). As this Special Report went to press, two of the cases described under the heading in Part I.4.a., Pending Cases, *infra* notes 218-28 and accompanying text, were decided by the Hong Kong Special Administrative Region Court of Final Appeal (or "CFA"). In *In the case of Lau Kong Yung and 16 others v. Director of Immigration*, Nos. 10 and 11 of 1999, HKSAR Court of Final Appeal (Dec. 3, 1999), the CFA upheld the plenary authority of the National People's Congress Standing Committee ("NPCSC") to uphold the Basic Law and interpretation. In the second recently decided case, *HKSAR v. Ng Kung Siu and Lee Kin Yun*, No. 4 of 1999, HKSAR Court of Final Appeal (Dec. 15, 1999), the CFA upheld Hong Kong's flag desecration ordinances, overturning the Court of Appeal's decision, and affirming convictions in the lower court. Further treatment of these two new cases in the context of this Special Report will appear in the forthcoming RECORD.

** The joint delegation to Hong Kong benefited from the contributions, support, and advice of many individuals and organizations. We are indebted to numerous officials, judges, lawyers, scholars, activists, and other informed individuals who met and consulted with the delegation during our visit and the drafting of this Report. We would specifically like to thank Christine Loh, of the Citizen's Party, the Hong Kong Human Rights Monitor, especially Dr. Stephen Ng, and Law Yuk Kai, the Asian Migrant Resource Center, especially Apolel Ung and Chan Ka Wai, the Law Society of Hong Kong, especially Patrick Moss, and the Hong Kong Bar Association, especially Philip Dykes, SC, Denis Chang, SC, Margaret Ng, SC, Ronnie Tong, SC, and Audrey Eu, SC. None of the above named individuals or organizations bears any responsibility for the views and opinions expressed in this Special Report.

The administration of the Hong Kong Special Administrative Region (or "HKSAR") merits special mention for its help and cooperation in facilitating the delegation's access to officials and in providing information during our mission. In particular, we are grateful to Mrs. Anson Chan, Chief Secretary for Administration, Mrs. Elsie Leung, the Hong Kong Secretary of Justice, Robert Alcock, Assistant Secretary of Justice, and Michael Suen, Secretary of Constitutional Affairs Bureau.

The directors of the Crowley Program would like to thank Dean John Feerick, the alumni of Fordham law school for their unwavering support of the Crowley Program and Luke McGrath, the 1999-2000 Crowley Fellow, for his efforts in the publication of this report. They would also like to thank the Hon. Leonard B. Sand, Mae Hsieh, Esq.,

INTRODUCTION

In January 1999, the Hong Kong Court of Final Appeal (or "CFA") for the first time exercised its power of judicial review under the Basic Law of the Hong Kong Special Administrative Region ("Basic Law"). The Basic Law effectively serves as Hong Kong's constitution within the People's Republic of China ("China" or "PRC") and implements the idea that Hong Kong and the PRC will function as "One Country, Two Systems." The CFA's decisions interpreted the Basic Law's guarantee of "the right of abode," or permanent residency, within the Hong Kong Special Administrative Region (or "HKSAR"). The CFA's rulings, which interpreted the right to apply broadly to persons currently residing in mainland China, immediately generated controversy. So too did the CFA's assertion of the authority to strike down measures restricting that right or otherwise inconsistent with the Basic Law.

The HKSAR administration, itself facing the exercise of judicial review for the first time, came to resist the CFA's rulings in various ways. Initially, the administration sought and obtained a "clarification" of those aspects of the court's opinions dealing with its authority to exercise judicial review over measures of the PRC's national legislature, the National People's Congress ("NPC"). The administration then circulated figures suggesting that the CFA's rulings, if they should stand, would have grave economic and social implications for Hong Kong's populace. Especially in the wake of the 1998 Asian financial crisis, these figures became a source of great concern within Hong Kong, even as the numbers themselves were challenged as inflated or unsubstantiated.

The administration's most important response, however, was yet to come. Citing concerns about the projected flood of mainland Chinese, the Chief Executive of the HKSAR, the Hon. Tung Chee Hwa, announced the administration's intention to request the Standing Committee of the NPC (or "NPCSC"), through the State Council, to review the CFA's decision and provide a "reinterpretation" of the relevant provisions of the Basic Law that would result in a significantly more narrow application of the right of abode. Two months later, in June 1999, the

and the Association of the Bar of the City of New York, in particular, the Committee on International Human Rights and its chair, David Nachman, Esq.

NPCSC issued a reinterpretation that granted the administration virtually everything it requested.

Hong Kong's so-called right of abode controversy has resulted in substantial concern, criticism, and commentary both within Hong Kong and around the world. Critics have asserted that the actions of both the HKSAR and PRC governments fundamentally undermine the independence of Hong Kong's judiciary and traditional common law system and are thus inconsistent with China's commitment to its pledge to maintain One Country, Two Systems, as well as other obligations under international law. Government officials have defended their actions by arguing that these dire effects on the rule of law in Hong Kong are either minimal or illusory, especially in light of the social and economic disaster that would result if the original CFA holdings were enforced.

Yet the implications of the right of abode controversy do not end with the rule of law. The dispute also illustrates challenges facing Hong Kong as it attempts to realize the Basic Law's promise for increased democratization. As the reinterpretation request in part shows, the Chief Executive, who is not popularly elected, wields substantial power in relation to both the courts and the legislature. The legislature, known as the Legislative Council ("LegCo")—only a minority of directly-elected—generally cannot initiate legislation without approval by the administration. In similar fashion, the right of abode controversy raises questions about how fundamental rights will be safeguarded within Hong Kong generally. In this regard, guarantees concerning discrimination, labor rights, and access to legal and social services merit special attention.

From May 31 to June 13, 1999, the Joseph R. Crowley Program in International Human Rights (or "delegation")¹ con-

1. The Joseph R. Crowley Program in International Human Rights ("Program" or "Crowley Program") at Fordham University School of Law promotes teaching, scholarship, and advocacy in international human rights law. Principal elements of the Program include an annual fact-finding mission to an area of the world with significant human rights concerns, a student outreach project involving students in course work, research and human rights internships, both domestically and abroad, and a speaker series, bringing many of the world's foremost experts in the field onto campus, stimulating dialogue and promoting scholarship. The Crowley Program approaches its work in these areas in light of the school's commitment to public service, its widely recognized strength in the field of international law, and its close proximity to the world's leading centers for human rights advocacy. For more information about the Crowley

ducted a mission in Hong Kong in conjunction with the Committee on International Human Rights of the Association of the Bar of the City of New York ("Association" or "ABCNY").² The purpose of the mission was to examine the status of the rule of law in Hong Kong two years after the transition from British to Chinese rule. The project included extensive study of the Hong Kong's history, legal framework, and political structures, including preliminary course work and research by the Fordham Law students in the Crowley Program. This mission, which in significant part follows up a 1995 mission by the ABCNY, consisted of a thirteen-person delegation³ assisted by ten law students from the University of Hong Kong.⁴ The delegation spent two weeks in Hong Kong meeting with members of the Hong Kong government, judges, legislators, leaders of the Hong Kong Bar (barristers and solicitors), law professors, human rights advocates, consular officials, and business leaders.

This Special Report documents the delegation's investigation, summarizes its findings, and sets forth its conclusions and recommendations. Part I considers the rule of law as a foundation of international human rights and China's obligations under international law to protect the rule of law in Hong Kong. After recounting the right of abode decisions themselves, it examines both the legality and prudence of the HKSAR adminis-

Program, visit its website at <<http://www.fordham.edu/law/centers/crowley/home.htm>>.

2. The Association is one of the oldest and largest bar associations in the United States. It serves not only as a professional association, but also as a leader and advocate in the legal field on a local, state, and national level. Through its International Human Rights Committee, the Association has conducted a number of significant human rights factfinding missions, including a mission to Hong Kong in 1995 led by the Honorable Leonard B. Sand, United States District Judge for the Southern District of New York. For more information about the International Human Rights Committee or the Association generally, see <<http://www.abcny.org>>.

3. The members of the delegation from the Crowley Program were Professors Tracy Higgins and Martin Flaherty (Co-Directors of the Crowley Program), Robert Quinn (Crowley Fellow), and Elizabeth Crotty, Nate Heasley, Roger Hurley, Kara Irwin, Andrew Kaufman, Nadine Moustafa, Alain Personna, and John Rothermich (Crowley Scholars). The representatives from the Association were the Hon. Leonard B. Sand, United States District Judge for the Southern District of New York, and Mae Hsieh, Esq., member of the Association's Asian Affairs Committee and Committee on International Human Rights.

4. The students were: Charlotte Tse, Felix Ng, Jonathan Chang, Josiah Chan, Lee Lap Hang, Marina Tony, Sarah Cheng Po San, Scarlett Cheung, Susan Li Shui Jing, and Szeto Wing Chi Annie. The delegation is indebted both to them and to Prof. Andrew Byrnes for arranging their participation.

tration's request for a reinterpretation, including the alternatives that it could have pursued. This part concludes by analyzing the reinterpretation that Beijing issued and the effect it has had, or is likely to have, on subsequent related cases.

Part II examines Hong Kong's progress towards full democracy, measuring that progress against the Basic Law and international law. It begins by reviewing the relevant international obligations applicable to the PRC and the HKSAR. Next, this part details the electoral system and limits on legislative power, including the composition of LegCo, Hong Kong's legislature, the selection of the Chief Executive, and the separation of powers within the HKSAR government. Finally, this part assesses the development of democratization in Hong Kong in light of the international standards previously discussed.

The third and final part of this Special Report explores the status and implementation of Hong Kong's basic international human rights obligations under its domestic law. It then focuses on two areas, labor rights and anti-discrimination protection, as case studies in which fundamental rights protected under international law have been eroded or underenforced by the HKSAR administration.

I. *PRESERVING THE RULE OF LAW*

The right of abode controversy most directly affects the rule of law as Hong Kong has known it. Under the "One Country, Two Systems" pledge, Hong Kong was to retain its autonomous common law framework, including an independent judiciary to exercise the power of final adjudication. Beijing's reinterpretation⁵ of the Basic Law provisions, on which the Court of Final Appeals based its right of abode judgments, has dealt these guarantees a severe blow.

The threat to Hong Kong's legal system stems from the readiness of the Hong Kong Special Administrative Region gov-

5. There is a controversy over the use of the term reinterpretation over interpretation. Those who are more sympathetic to the NPCSC's power, usually use interpretation because that term is used in Article 158 or because it reflects mainland legal concepts. Those who harbor greater concern over the NPCSC's role, generally use reinterpretation, at least when the NPCSC is interpreting provisions that Hong Kong courts have already interpreted. We will employ reinterpretation, with regard to the right of abode controversy because we believe this term more accurately reflects what the NPCSC did and was asked to do in that situation.

ernment to seek relief from the PRC, having lost in Hong Kong's highest court. In so doing, it not only undermined the finality of CFA decisions, but also exposed the territory to mainland legal principles that are often antithetical to the common law. In this way, the right of abode controversy poses a danger that was largely unanticipated at the time of the Association's mission prior to the handover. Contrary to the fears expressed at the time, the Hong Kong judiciary has remained highly qualified and independent. The mainland government, moreover, had demonstrated a desire to leave Hong Kong alone. Instead, mainland intervention has come at the invitation of the Hong Kong executive. Government officials argued that turning to Beijing was the best way to meet the pressing crisis arising in the context of trying to implement an untried judicial system. Nevertheless, the potential cost to the rule of law is high. By effectively circumventing the Court of Final Appeal's interpretation of the Basic Law, the HKSAR Administration's actions have undermined judicial independence. These actions have also introduced Chinese legal concepts into Hong Kong that could further threaten Hong Kong's common law system.

Part I of the report will first consider the importance of the rule of law as a foundation for international human rights and China's obligations under international law to protect the rule of law in Hong Kong. After recounting right of abode decisions, it examines both the legality and the prudence of the Hong Kong government's request for a reinterpretation, including the alternatives that the HKSAR government could have pursued. This Part will conclude by analyzing the reinterpretation that Beijing issued and the implications of its action for cases that are likely to raise similar issues in the near future

A. *The Rule of Law*

1. General International Standards

The Universal Declaration of Human Rights⁶ (or "Declaration") enshrines an international commitment to "the rule of law" as fundamental to the protection of international human rights. No fewer than six of the Declaration's first twelve articles

6. Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. GAOR 3d. Sess. Pt. 1, Pmbl., at 1, U.N. Doc. A/810 (1948). [hereinafter Universal Declaration].

speak to the integrity of a nation's law and legal system.⁷ Both the Declaration and subsequent international instruments spell out the meaning of the phrase "international integrity" by guaranteeing an array of specific rights⁸ as well as mandating various procedures and institutions.⁹ Many of these instruments are directly binding on Hong Kong, including the International Covenant on Civil and Political Rights¹⁰ ("ICCPR"). Although nations are free to implement the rule of law in any number of ways,¹¹ certain general principles must be honored. In particular, the U.N. Basic Principles on the Independence of the Judiciary¹² ("Basic Principles") set forth guidelines to safeguard the integrity and autonomy of courts throughout the world.

The Basic Principles state that "[t]he independence of the

7. *Id.* at arts. 6, 7, 8, 10, 11, 12.

8. *See, e.g.*, International Covenant on Civil and Political Rights, *opened for signature* on Dec. 16, 1966, 999 U.N.T.S. 171, art. 9 *with reservation in* 999 U.N.T.S. 287 (entered into force Mar. 23, 1976 with reservations upon ratification by United Kingdom and Northern Ireland) [hereinafter ICCPR] (defining right to liberty).

9. *See, e.g., id.* at art. 13 (stating that everyone shall be entitled to fair and public hearing by competent, independent, and impartial tribunal established by law).

10. *See generally id.*; *see also* International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), *reprinted in* 999 U.N.T.S. 3 [hereinafter ICESCR]; International Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, art.1, at 197, U.N. Doc. A/39/51 (1984) *reprinted in* 23 I.L.M. 1027; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A, U.N. GAOR, 20th Sess., Supp. No. 14 at 66 (1965), 660 U.N.T.S. 195; Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49 at 174, U.N. Doc. A/44/736 (1989); Convention on the Elimination of All Forms of Discrimination Against Women, U.N. GAOR, 48th Sess., Supp. No. 38, at 1,2, U.N. Doc. A/47/38 (1993), *reprinted in* 35 I.L.M. 487 (1996), 1249 U.N.T.S. 13. These documents originally became applicable to Hong Kong through accession by the United Kingdom and continue to apply despite the change of sovereign. In addition, the Basic Law of the Hong Kong Special Administrative Region ("Basic Law") provides that the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), and all labor conventions "as applied to Hong Kong . . . shall remain in force and shall be implemented" through local legislation. Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Mar. 4, 1990), at art. 39, para. 20, [hereinafter Basic Law].

11. *See* Reed Brody, *Introduction: The Independence of Lawyers and Judges, A Compilation of International Standards*, CENTRE FOR THE INDEPENDENCE OF LAWYERS AND JUDGES BULLETIN, Apr.-Oct. 1990, at 3.

12. *Basic Principles on the Independence of the Judiciary*, G.A. Res. 40/32, Nov. 29, 1985 & 40/146, Dec. 13, 1985 [hereinafter *Basic Principles*]. The Basic Principles, while not comprising a treaty, have received the approval of the U.N. General Assembly and reflect a considered global consensus that provides evidence of customary international law.

judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is therefore the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”¹³ They further provide that the judiciary shall decide matters, “without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect from any quarter or for any reason.”¹⁴ In addition, the Basic Principles declare that “[t]he judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.”¹⁵ Finally, the Basic Principles prohibit “any inappropriate or unwarranted interference with the judicial process, . . . nor shall judicial decision by the courts be subject to revision.”¹⁶ In these ways, the Basic Principles make clear that legal controversies must be settled by authorities that are not beholden to policy-makers who might ordinarily have a vested or biased interest in the outcome. In the eyes of the world community, therefore, judicial independence is a cornerstone principle for the rule of law.

2. The Sino-British Joint Declaration

In the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong¹⁷ (the “Joint Declaration”), China has undertaken specific obligations to preserve Hong Kong’s legal structure beyond its obligations to respect the rule of law as an aspect of international human rights. The Joint Declaration makes it clear that for Hong Kong, “rule of law” means the common law.

13. *Id.* at No. 1.

14. *Id.* at No. 2.

15. *Id.* at No. 3.

16. The provision adds: “This principle is without prejudice to judicial review or to mitigation or communication by competent authorities of sentences imposed by the judiciary.” *Id.* at No. 4.

17. 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 (“Joint Declaration”), Sept. 26, 1984, (*signed* Dec. 19, 1984), 23 I.L.M. 1371 [hereinafter Joint Declaration]. The Joint Declaration entered into force on May 27, 1985.

This statement expressly includes judicial independence and finality of judicial decisions.

Despite its name, the Joint Declaration is a treaty. Although China initially resisted the idea of a binding international agreement, it reversed itself, partially because of the belief that such a commitment would provide the world community greater assurance.¹⁸ Accordingly, the Joint Declaration mandated that the United Kingdom restore Hong Kong to Chinese sovereignty on July 1, 1997 and, in turn, obligated China to establish the territory as a "Special Administrative Region." As such, the territory would "enjoy a high degree of autonomy, except in foreign and defense affairs, which are the responsibilities of the Central People's Government."¹⁹ In this way, China bound itself in international law to implement the formula of "One Country, Two Systems" originally envisioned by Deng Xiaoping.

The Joint Declaration makes it clear that the high degree of autonomy that Hong Kong currently enjoys extends to its legal system. The main document declares that the HKSAR "will be vested with executive, legislative, and *independent* judicial power, including the power of *final* adjudication." It further states that "the laws currently in force in Hong Kong will remain basically unchanged."²⁰

A series of Annexes, which are also binding, elaborate these commitments. Annex II states that "laws previously enforced," specifically "the common law" as well as "rules of equity, ordinances, subordinate legislation, and customary law," will remain in effect.²¹ Turning to the judiciary, Annex III preserves "the judicial system as previously practiced in Hong Kong except for those changes consequent upon vesting the courts of the Hong Kong Special Administrative Region of the power of final adjudication."²² This provision actually reflects the *strengthening* of the Hong Kong judiciary since the Joint Declaration elsewhere vests "the power of final judgment" for the HKSAR in a new "court of final appeal" for cases that previously had gone to the Privy

18. YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 53 (1999). See also *id.* at 70-72 (discussing status of Joint Declaration).

19. Joint Declaration, *supra* note 17, at art. 3, para. 2.

20. *Id.* at art. 3, para. 3 (emphasis added).

21. *Id.* at annex I, para. II.

22. *Id.* at annex I, para. III.

Council in the United Kingdom for final adjudication.²³ Annex III further provides that “the courts shall exercise judicial power independently and free from any interference . . . and may refer precedents in other common law jurisdictions.”²⁴ In addition, the Court of Final Appeal “may as required invite judges from other common law jurisdictions” to adjudicate cases.²⁵ By acceding to the Joint Declaration, China has expressly committed itself to respecting the independence of the Hong Kong judiciary, including the finality of its decisions. Any compromise of this commitment would accordingly place China in violation of international legal obligations that it both sought and accepted.

B. Implementing International Commitments: Hong Kong and the Basic Law

The PRC sought to implement its obligations under the Joint Declaration through the Basic Law. The Basic Law was enacted by the NPC on April 4, 1990 under Article 31 of the PRC Constitution, which grants the NPC broad authority to institute the systems within such regions “in light of the specific conditions.”²⁶ This document, which took effect on July 1, 1997, enjoys a legal status that remains to be fully defined and integrated. The Basic Law partially derives its legitimacy from, and is intended to comply with, the Joint Declaration. It is also a mainland statute. Finally, it serves as Hong Kong’s “constitution,” replacing the Letters Patent, which was the document issued by the British Crown that established the framework for the colonial government.²⁷

The Basic Law provides that Hong Kong will maintain its own legal system, as it will also enjoy distinct political and economic systems, for fifty years. Toward this end, it authorizes Hong Kong “to exercise a high degree of autonomy and enjoy executive, legislative, and independent judicial power, including that of final adjudication.”²⁸ More specifically, the Basic Law safeguards the existing common law framework, declaring that

23. *Id.*

24. *Id.*

25. *Id.*

26. XIANFA [Constitution of the People’s Republic of China] art. 31, (1982).

27. See GHAI, *supra* note 18, at 14-17; PETER WESLEY-SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG 42, 72-76 (1994).

28. Basic Law, *supra* note 10, at art. 2.

“the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravened this Law, and subject to amendment by the [Hong Kong] legislature.”²⁹

The Basic Law also elaborates its guarantee of the judicial independence that characterizes common law systems. After repeating the Basic Law’s grant of independent judicial power to Hong Kong, “including that of final adjudication,” Article 19 grants the HKSAR courts “jurisdiction over all cases in the Region, except that the restrictions imposed by the legal system and principles previously in force in Hong Kong shall be maintained.”³⁰

Notwithstanding its commitment to preserving the common law system, the Basic Law itself contains provisions that threaten to erode judicial independence and the rule of law. Specifically, the Basic Law’s treatment of its own interpretation and amendment includes deference to mainland legal concepts that threaten to subordinate the courts to oversight by the Standing Committee of the National People’s Congress.³¹

Article 158, which deals with interpretation, begins by declaring that “[t]he power of interpretation of [the Basic Law] shall be vested in the [NPCSC].”³² The meaning of this statement has generated considerable debate. Some analysts argue that the statement merely notes the existence of a general power that the NPCSC enjoys as a preface to the paragraphs that follow, directing the NPCSC to divide this authority between itself and

29. *Id.* at art. 8

30. *Id.* at art. 19, para. 1 & 2. The Basic Law does, however, arguably deviate from the Joint Declaration on various matters, including judicial authority. The same article that guarantees an independent judiciary, for example, denies the Hong Kong courts “jurisdiction over acts of state such as defense and foreign affairs.” *Id.* at art. 19, para. 3. Not only is this restriction not mentioned in the Joint Declaration, but it is also potentially overbroad if interpreted under mainland, rather than common law, principles. GHAI, *supra* note 18, at 318-20. This deviation from the Joint Declaration is but one of many that resulted from the Basic Law drafting process. Many of these changes reflect a hardening of Chinese attitudes in the wake of the crackdown at Tiananmen Square and Hong Kong’s strong public support for the suppressed pro-democracy movement. GHAI, *supra*, at 63-64.

31. See GHAI, *supra* note 18, at 68, 149; PETER WESLEY-SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG 69 (1994).

32. Basic Law, *supra* note 10, at art. 158.

the Hong Kong courts.³³ Others contend that this provision grants the NPCSC a general power to “clarify” the Basic Law whenever it sees fit.

The rest of Article 158 discusses who interprets the Basic Law in the context of actual cases. The next paragraph of the provision directs the NPCSC to authorize the HKSAR courts “to interpret, on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.”³⁴

The next paragraph of Article 158 specifies matters that must be referred to Beijing. It first provides that the Hong Kong courts may also interpret other provisions of the Basic Law when adjudicating cases. If, however, a court: (1) needs to interpret Basic Law provisions that both concern “affairs which are the responsibility of the Central People’s Government or concerning the relationship between the Central Authorities and the Region;” and (2) if such interpretation will “affect the judgment of the case; and (3) the judgment to be rendered will not be appealable (typically the Court of Final Appeal) the court must seek an interpretation of the relevant provision” from the NPCSC. Should the NPCSC interpret the provisions concerned, the Hong Kong courts must follow that interpretation. Judgments previously rendered, however, “shall not be affected.”³⁵

The ambiguity of the NPCSC’s role in interpreting the Basic Law under Article 158 has prompted significant concern from the beginning. Ironically, government officials generally assured the Association’s 1995 mission that the NPCSC’s power of interpretation through referral,³⁶ as well as its general power of interpretation, were specified mainly as a symbolic gesture to Beijing and would never actually be used.³⁷ Fewer than five years later,

33. See Margaret Ng, *Time for the Next Test To Begin*, S. CHINA MORNING POST, July 16, 1999, at 1; interview with Denis Chang, Lead Counsel for Appellants in *Ng Ka Ling*, in Hong Kong (June 8, 1999). In part this argument depends on the Chinese version of the provision, which bears a meaning closer to “possesses” rather than “vests.”

34. Basic Law, *supra* note 10, at art. 158, para. 2.

35. *Id.* at art. 158, para. 3. Paragraph 4 adds that the NPCSC “shall consult its Committee for the Basic Law”—a group of 12 individuals, six from the mainland and six from Hong Kong, most of whom are not legal experts—“before giving its interpretation of this Law.” *Id.* at para. 4.

36. See *supra* note 5 for discussion of interpretation versus reinterpretation/controversy.

37. Honorable Leonard B. Sand, notes from the 1995 Hong Kong Delegation of

Article 158 is at the center of the right of abode controversy.

Disagreement arises over the circumstances that might justify the Hong Kong government's request for a reinterpretation. Opponents argue that the difficulty of the Article 159 amendment process demonstrates that the Basic Law is entrenched against reinterpretations, or even NPC statutes,³⁸ that alter the Basic Law.³⁹ Supporters respond that reinterpretation is a legitimate alternative to amendment, at least in unusual circumstances.⁴⁰ For its part, mainland legal culture apparently views legislative interpretation as a potentially broad elaboration of constitutional documents while viewing amendment almost as an embarrassing admission that the original constitutional document was seriously flawed.⁴¹

C. *The Right of Abode Decisions*

The right of abode controversy in Hong Kong began with a challenge to the constitutionality of certain restrictive immigration legislation passed by the Provisional LegCo.⁴² In two cases, *Ng Ka Ling (an infant) & Ors v. Director of Immigration*,⁴³ and *Chan Kam Nga (an infant) & Ors v. Director of Immigration*,⁴⁴ the appellants challenged two ordinances that controlled the right of mainland children of Hong Kong permanent residents to immigrate to the HKSAR as unconstitutionally restricting the rights

the Association of the Bar of the City of New York (1995) (unpublished manuscript, on file with the author). Reference was made to the infrequency with which the Standing Committee's interpretative role had been invoked with regard to mainland issues. *Id.*

38. This argument came mainly in response to the *HKSAR v. Ma Wai Kwan David & Ors*, [1997] 2 HKC 315 (Court of Appeal). In *Ma*, the Hong Kong Court of Appeal in dicta stated that the National People's Congress ("NPC") could change the Basic Law through a normal statute rather than exclusively through amendment.

39. *Id.*

40. See CHIEF EXECUTIVE'S SUBMISSION TO LEGISLATIVE COUNCIL HOUSE COMMITTEE, RIGHT OF ABODE: THE SOLUTION (May 18, 1999) [hereinafter RIGHT OF ABODE: THE SOLUTION].

41. See ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 95-102 (1998); interview with Denis Chen, lead counsel for petitioners in *Ng Ka Ling (an infant) & Ors v. Dir. of Immigration*, [1997] 1 HKC 291 in Hong Kong (June 8, 1999); interview with Margaret Ng, Legislative Counselor, in Hong Kong. (June 7, 1999).

42. See *Ma*, [1997] 2 HKC at 337-44 (discussing formation and legality of Provisional Legislative Council (or "LegCo")).

43. See *Ng Ka Ling*, [1997] 1 HKC 291.

44. See *Chan Kam Nga & Anore v. Director of Immigration*, [1999] 1 HKC 347.

guaranteed by Article 24 of the Basic Law.⁴⁵

1. Background

Immediately after China's resumed sovereignty over Hong Kong, the Provisional LegCo enacted two immigration ordinances that defined the categories of eligibility for the right of abode and outlined an administrative scheme of permits for allowing mainland Chinese citizens with the right of abode to emigrate to Hong Kong. The Immigration Amendment No. 2 Ordinance ("No. 2 Ordinance"), enacted July 1, 1997, set out the categories of individuals entitled to the right of abode, adding two requirements not stated in Article 24 of the Basic Law.⁴⁶ First, the No. 2 Ordinance provided that a child of a parent with the right of abode in Hong Kong was entitled to the right of abode only if her parent already had the right when the child was born.⁴⁷ Second, the No. 2 Ordinance added a requirement that those claiming the right of abode on the basis of their fathers' right of abode must not have been born out of wedlock.⁴⁸

The Immigration Amendment No. 3 Ordinance ("No. 3 Ordinance"), enacted by the Provisional LegCo on July 10, 1997, established an administrative "Certificate of Entitlement Scheme" under which mainland Chinese with the right of abode would be allowed to immigrate to Hong Kong.⁴⁹ The immigration scheme required mainland residents claiming a right of abode through their parents to obtain a one-way exit permit from the mainland authorities before being allowed to emigrate, as well as a "Certificate of Entitlement" from the HKSAR Direc-

45. Article 24 outlines six categories of individuals entitled to the right of abode in the Hong Kong Special Administration Region or to have the status of permanent resident. These categories include: (1) Chinese citizens born in Hong Kong, (2) Chinese citizens who have resided in Hong Kong continuously for seven years, (3) Chinese Nationals "born outside Hong Kong of those residents" in the first two categories, (4) Non-Chinese who have legally resided in Hong Kong continuously for seven years, (5) children under 21 years old born of a person in category (4), and (6) people who had the right of abode in Hong Kong only before the handover. *See* Basic Law, *supra* note 10, at art. 24.

46. *See* Hong Kong Immigration (Amendment No. 2) Ordinance (1997); *Ng Ka Ling*, 1 HKC at 294.

47. *See* Hong Kong Immigration (Amendment No. 2) Ordinance, schedule 1, para. 2 (1997). Children falling outside this category have been referred to as "afterborn."

48. *See id.* schedule 1, para. 1(2).

49. *See* Hong Kong Immigration (Amendment No. 3) Ordinance (1997).

tor of Immigration.⁵⁰ The Mainland Bureau of the Exit-Entry Administration limited the issuance of such permits to 150 per day.⁵¹

In *Ng Ka Ling*, the HKSAR courts considered three consolidated challenges to these ordinances on behalf of four individuals claiming the right of abode as the natural children of Hong Kong permanent residents.⁵² Although all four had immigrated illegally in contravention of the No. 3 Ordinance, one had been born outside of marriage, and therefore denied the right of abode entirely under the No. 2 Ordinance.⁵³ Their combined cases were heard as a test case on behalf of more than a thousand named immigrants claiming the right of abode. The petitioners challenged both immigration ordinances as unconstitutionally restricting their right of abode as guaranteed by Article 24 of the Basic Law.⁵⁴

In *Chan Kam Nga*, eighty-one children born of parents who obtained the right of abode only after their birth challenged the No. 2 Ordinance's requirement that a parent hold the right at the time of the child's birth. As in *Ng Ka Ling*, the children argued that the requirement unconstitutionally denied them the right of abode granted by Article 24.⁵⁵ Thus, while *Ng Ka Ling* involved a challenge to the No. 3 Ordinance's permit scheme and the No. 2 Ordinance's legitimacy requirement, *Chan Kam Nga* involved a challenge to the No. 2 Ordinance's limitation of the right of abode to afterborn children.

2. The Court of Final Appeal's Decisions

The right of abode cases presented the Court of Final Appeals with its first occasion to exercise its power of judicial review under the Basic Law.⁵⁶ The CFA seized this opportunity in *Ng Ka Ling* by asserting the power to review not only acts of the

50. See *id.* schedule 1, para 2(c); *Ng Ka Ling*, 1 HKC at 314-16.

51. See *Ng Ka Ling*, 1 HKC at 317.

52. See *id.* at 319.

53. See *id.*

54. See *id.* at 294-95.

55. See *Chan Kam Nga & Anore v. Director of Immigration*, [1999] 1 HKC 347, at 352.

56. The Hong Kong Court of Appeal had previously considered the power of judicial review in *HKSAR v. Ma Wai Kwan David & ORS*, [1997] 2 HKC 315. *Ma* dealt with the legality of the establishment of the mainland appointed Provisional LegCo as Hong Kong's first post-handover legislative body. See *id.* at 333.

HKSAR, but also acts of China's NPC.⁵⁷ The Hong Kong Court of Final Appeal supported these assertions through reference to China's basic policy, as enunciated in the Joint Declaration, that the HKSAR courts should have the jurisdiction to enforce and interpret the Basic Law, "which necessarily entails [] jurisdiction . . . over acts of the National People's Congress and its Standing Committee to ensure consistency with the Basic Law."⁵⁸ This strong language planted the seed of the first political crisis to grow out of the decision.⁵⁹

a. Article 158: The Reference Issue

At the time the first right of abode decision was issued in *Ng Ka Ling*, it appeared that the most controversial question that the CFA faced was the scope of Article 158 of the Basic Law, requiring the HKSAR courts to refer questions of interpretation of the Basic Law to the NPCSC.⁶⁰ Specifically, the CFA had to decide first who should determine whether an issue fell within the scope of the referral provisions and second whether Articles 22 and 24 should be referred in this case. The CFA resolved this issue in a manner that was consistent with the language of Article 158, and at the same time minimized the threat to judicial independence.

The CFA approached this issue employing a "purposive" analysis that emphasized the second paragraph of Article 158, which provides that the NPCSC "'shall authorize' the courts of the Region 'to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of autonomy of the Region.'"⁶¹ The Court read the phrase "on their own" to "emphasize the high degree of autonomy of the Region and the independence of its courts."⁶² The opinion did, however, ac-

57. See *Ng Ka Ling*, 1 HKC at 322-23. This assertion represented a radical departure from the Hong Kong Court of Appeals decision in the *Ma* case. There, the Court of Appeals in dicta suggested that the HKSAR courts had no review jurisdiction over the "sovereign" NPC by analogy to the unreviewability of acts of the British Parliament prior to the handover. See *SAR v. Ma Wai Kwan David & ORS*, [1997] 2 HKC 315, 333-34.

58. See *Ng Ka Ling*, 1 HKC at 322-23.

59. See *infra* notes (accompanying text section I.C.3) 88-102 and accompanying text.

60. See *supra* notes 33-35 and accompanying text (discussing Basic Law, Article 158).

61. *Ng Ka Ling*, 1 HKC at 327 (quoting Basic Law Article 158).

62. *Id.*

knowledge the limitation on its jurisdiction stated in the third paragraph of Article 158, which requires mandatory referral to the NPCSC of interpretations “concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region . . . if such interpretation will affect the judgments on the cases.”⁶³

Although Article 158 does not state who determines which provisions must be referred to the NPC and which may be interpreted solely by the courts of the HKSAR, the CFA reasoned that it held this power exclusively:

In our view it is for the Court of Final Appeal and for it alone to decide [what interpretations must be referred]. . . . It is significant that what has to be referred to the Standing Committee is not the question of interpretation involved generally, but the interpretation of the specific excluded provisions.⁶⁴

Having established its jurisdiction over referral, the CFA concluded that interpretation of Article 24, guaranteeing the right of abode, was a matter for its determination rather than the NPCSC.⁶⁵

The interaction between Articles 22 and 24 raised a more difficult question. Though counsel for the Director of Immigration conceded that Article 24 was a provision “within the limits of autonomy of the Region,”⁶⁶ and thus did not mandate referral, he argued that a proper interpretation of Article 24 requires interpretation of Article 22, which did mandate referral.⁶⁷ Article 22 provides that immigrants to Hong Kong “from other parts of China” must apply for approval and that an immigration limit will be determined by the Central People’s Government (“CPG”).⁶⁸ On this basis, the Director argued that because Arti-

63. *Id.* (quoting Basic Law Article 158, paragraph 3).

64. *See id.* at 328-29.

65. *See id.*

66. *See id.* at 331.

67. *See id.* at 329.

68. Article 22 of the Basic Law states:

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.

cle 22 specifically deals with the relationship between the Central Authorities and the HKSAR, and because interpretation of Article 22 is required to interpret properly Article 24, the CFA should have referred the whole case in the beginning.⁶⁹

The CFA rejected this argument and instead held that if the “predominant provision” at issue in the case is within the jurisdiction of the HKSAR, then it is unnecessary to refer any subsidiary provisions to the NPCSC, even if they are arguably within the mandatory referral categories of Article 158.⁷⁰ The Court again justified its conclusion on “purposive” grounds, reasoning that this “predominant provision” test properly effectuates Article 158’s division of interpretive authority between the HKSAR courts and the CPG.⁷¹

The CFA’s choice of interpretive method cannot be overemphasized. Reliance on a “purposive” constitutional interpretation as one that carefully considers context and “underlying policies” of China toward Hong Kong did more than legitimize the CFA’s focus on the HKSAR’s political autonomy and the primacy of individual rights. The purposive approach, in the Court’s view, further represented a commitment to traditional common law principles of adjudication as previously practiced in Hong Kong. This commitment led the CFA to declare that “the courts must avoid a literal, technical, narrow or rigid approach.”⁷² It would later become clear that the CFA’s reliance on common law methods conflicted with the approach employed by the NPCSC, which emphasizes the true “original intent” of a given provision.⁷³

b. Articles 22 and 24 of the Basic Law

The CFA next considered the right of abode restrictions themselves. *Ng Ka Ling* and *Chan Kam Nga*, when examined together, presented three basic challenges: (1) whether the re-

Basic Law, *supra* note 10, at art. 22, para. 4. It could be argued that a literal reading of Article 22 directly conflicts with the right of abode guarantee in Article 24.

69. See *Ng Ka Ling*, 1 HKC at 329.

70. See *id.* at 330.

71. See *id.* at 331.

72. See *Ng Ka Ling*, 1 HKC at 326.

73. See GHAI, *supra* note 18, at 225-26; MICHAEL C. DAVIS, WRITTEN TESTIMONY FOR THE LEGISLATIVE COUNCIL ON THE QUESTION OF MECHANISMS FOR SEEKING NPCSC STANDING COMMITTEE INTERPRETATION (June 12, 1999).

quirement of a mainland certificate of entitlement could abridge the right under Article 24; (2) whether the right could be limited to legitimate children only; and (3) whether children, born before the right of abode had vested in at least one parent, could likewise claim that right. The CFA invalidated all three restrictions.

With regard to the first issue, the Director of Immigration had argued that because Article 22 of the Basic Law⁷⁴ qualifies the exercise of the right of abode for mainland Chinese residents, the certificate of entitlement scheme was constitutional under the Basic Law.⁷⁵ The Court in *Ng Ka Ling* unequivocally rejected this argument, holding that the right of abode was a "core right," without which all of the other rights guaranteed in Chapter III of the Basic Law would be useless.⁷⁶ Accordingly, the CFA ruled that Article 22 does not apply to those who are permanent residents under the categories in Article 24.⁷⁷

The CFA did, however, hold that the Director of Immigration must be able to verify an individual's claim to permanent resident status.⁷⁸ The court therefore ruled that the No. 3 Ordinance's requirement that a potential immigrant obtain a certificate of entitlement from the HKSAR government was constitutional, so long as the Director of Immigration operated the scheme in a "fair and reasonable manner" without "unlawful delay."⁷⁹

The Court in *Ng Ka Ling* next addressed the illegitimacy issue.⁸⁰ The CFA held that the No. 2 Ordinance's restriction of the right of abode to children born within marriage violated the Basic Law for two primary reasons. First, the Court reasoned that the No. 2 Ordinance's discrimination between legitimate and illegitimate children was antithetical to the "principle of equality" enshrined in both the Basic Law and the ICCPR.⁸¹ Second, the CFA found that the "plain meaning" of Article 24's language was to grant the right without restriction: "[a] child born

74. See Basic Law, *supra* note 10, at art. 22.

75. See *Ng Ka Ling*, 1 HKC at 331.

76. See *id.* at 332.

77. See *id.* at 332-33.

78. See *id.* at 334.

79. See *id.* at 334-35.

80. See *id.* at 339.

81. See *id.*

out of wedlock is no more or less a person born of [a permanent] resident than a child born in wedlock.”⁸²

Issued the same day as the decision in *Ng Ka Ling, Chan Kam Nga* addressed the remaining restriction on the right of abode imposed by the No. 2 Ordinance: that only children born after their parents acquired permanent residency status could claim the right of abode under Article 24(3).⁸³ Following the pattern of *Ng Ka Ling* the CFA also found this restriction on the right of abode unconstitutional.⁸⁴ Echoing its analysis of the legitimacy requirement, the CFA held that the “natural meaning” of the wording of Article 24(3) included all children born of permanent residents regardless of when the parents acquired such status.⁸⁵ The CFA also justified its holding under a purposive interpretation of Article 24, reasoning that an unrestricted right of abode “serves the purpose of enabling that child to be with that parent [in Hong Kong], thereby securing the unity of the family.”⁸⁶

Together the holdings of *Ng Ka Ling* and *Chan Kam Nga* overturned all of the major restrictions that the No. 2 and No. 3 Ordinances had placed on the enjoyment and exercise of the right of abode by mainland children born of Hong Kong permanent residents.

3. The Clarification Controversy

The CFA’s unequivocal assertion of the power of judicial review and its narrow interpretation of the mandatory referral provisions of Article 158 assuaged some commentators’ fears that the autonomy granted by the Basic Law was little more than an empty promise.⁸⁷ The CPG and others close to Beijing, however, perceived the decision as a threat to its sovereignty, and an usur-

82. *See id.* at 340.

83. *See* *Chan Kam Nga v. Director of Immigration*, [1999] 1 HKC at 352.

84. *See id.* at 348, 354-55.

85. *Id.* at 354.

86. *Id.* The CFA also noted that the ICCPR defines the family as “the natural and fundamental group unit of society and is entitled to protection by society and the State.” *Id.* at 355 (quoting ICCPR art. 23(1)).

87. *See, e.g.*, Editorial, *Landmark Ruling*, S. CHINA MORNING POST, Jan. 30, 1999 (referring to right of abode decision as “restor[ing] the public’s flagging confidence, following months of anxiety that Hong Kong’s most cherished institutions were being slowly eroded”); Yash Ghai, *Abode Verdict a Resounding Victory for the Rule of Law*, S. CHINA MORNING POST, Feb. 3, 1999.

pation of the NPCSC's ultimate interpretive authority over the Basic Law. The possibility that the HKSAR administration's fear of increased immigration might lead it to disregard the ruling further tempered celebration of the ruling.⁸⁸ This possibility became more likely when Chief Executive Tung Chee Hwa expressly supported the deportation of overstayers claiming the right of abode until a new immigration scheme could be negotiated with the mainland.⁸⁹

The most critical responses to the CFA decision initially came from Beijing. Dr. Raymond Wu Wai-yung, a professor and leading advisor to the CPG, argued that the CFA's decision was wrong, that the issue should have been referred to the NPCSC for interpretation, and that the Basic law should be interpreted according to the mainland legal system, not according to common law principles.⁹⁰ In the first official comment of the mainland government on the abode ruling, Zhao Qizheng, a senior official of the State Council, claimed that the decision was against the Basic Law and should be changed.⁹¹ Importantly, this criticism of the right of abode ruling had less to do with the substance of the CFA's ruling than with its statement in dicta in *Ng Ka Ling* that the Basic Law gave it authority to review acts of the NPC. In statements widely perceived to reflect Beijing's official position, four prominent mainland legal scholars emphatically denied that the Hong Kong courts had any authority to invalidate mainland legislation that applied to Hong Kong.⁹²

In response, Tung dispatched the HKSAR's Secretary for Justice, Mrs. Elsie Leung, to Beijing to discuss the right of abode decision with mainland government authorities on February 12,

88. See Margaret Ng, *Right of Abode Justice Speaks with a Clear Voice*, S. CHINA MORNING POST, Feb. 5, 1999. LegCo member Margaret Ng warned that "[a]ny suggestion of maintaining policies calculated to frustrate the judgment of the court will be a serious challenge to the rule of law in the SAR and will shock the world." *Id.*

89. See *Arrests Pave Way for Test Case on Right of Abode*, S. CHINA MORNING POST, Feb. 8, 1999.

90. See No Kwai-Yan, *Beijing Adviser Rejects Calls for His Resignation*, S. CHINA MORNING POST, Feb. 5, 1999, at 5.

91. See *Ruling Against Basic Law, Senior Official Says*, S. CHINA MORNING POST, Feb. 8, 1999. Zhao Qizheng later publicly clarified this statement, saying that these were his personal views only and not necessarily those of the Central Authorities. See also *Tung Sends Justice Chief to Beijing To Smooth Out Row*, S. CHINA MORNING POST, Feb. 10, 1999.

92. See Mark O'Neill, *Beijing Says Abode Ruling Was Wrong and Should Be Changed*, S. CHINA MORNING POST, Feb. 9, 1999, at 1; Chris Yeung, *Pressure on Abode Court for Rethink*, S. CHINA MORNING POST, Apr. 30, 1999, at 1.

1999.⁹³ On February 24, she filed an “application for clarification” of the right of abode judgment with the CFA. The Secretary also directly telephoned the Chief Justice of the CFA, Andrew Li Kwak-nang, to request an early hearing date for the clarification process.⁹⁴ Additionally, the Hong Kong Deputies to the NPC proposed submissions for the NPC’s next plenum meeting asking the NPCSC to interpret Articles 22, 24, and 158 of the Basic Law in order to “rectify” perceived “errors” in the right of abode judgments.⁹⁵

The CFA responded with a terse opinion “clarifying” its decision in the right of abode cases on February 26, 1999, less than one month after the original judgment. The Court acknowledged that it was following “an exceptional course” by reconsidering its prior judgment.⁹⁶ It then briefly noted that its judicial power is “derived from and is subject to” the Basic Law, and for the first time acknowledged that the first paragraph of Article 158 vests the power of interpretation of the Basic Law in the NPCSC.⁹⁷ The most important aspect of the clarification addressed the CFA’s authority relative to the NPCSC:

[T]he Court’s judgment . . . did not question the authority of the Standing Committee to make an interpretation under art[icle] 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 . . . 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.⁹⁸

Nowhere in the clarification did the CFA actually recant or modify any of its conclusions from its original opinion. The clarification simply tracked Article 158’s initial grant of interpretive authority to the NPCSC. The one area where the CFA may have made a concession beyond the Basic Law’s language was its statement that the courts of the HKSAR would have to follow an

93. See *Justice Chief Leaves for Hong Kong Talks on Friday*, S. CHINA MORNING POST, Feb. 11, 1999.

94. See Angela Li, ‘Over-Anxious’: *Elsie Leung*, S. CHINA MORNING POST, Mar. 6, 1999.

95. See *Ng Ka Ling (an infant) v. Director of Immigration*, [1999] 1 HKC 425-26 (factual background in case reporter explaining the CFA’s clarification).

96. See *id.* at 427.

97. See *id.*

98. See *id.*

NPCSC interpretation in adjudicating cases, which is nowhere provided for expressly.⁹⁹

The clarification apparently had the desired political effect on Beijing: the NPC chose neither to address the right of abode ruling at its annual plenum session eleven days after the CFA issued its "clarification,"¹⁰⁰ nor refer the matter to the NPCSC. Beijing had received adequate assurance of the CPG's sovereignty and authority under the Basic Law and seemed content to let Hong Kong deal with a potentially large influx of mainland immigrants on its own.¹⁰¹ The possibility that the NPC would authorize the NPCSC to override the CFA's decision by reinterpreting the Basic Law was defused and a constitutional crisis was narrowly averted. Chinese President Jiang Zemin signaled the ostensible end of the controversy when he poetically declared that "the ripples in the pond have become calm."¹⁰²

D. *Challenge from Within: The Request for NPCSC Reinterpretation*

Hong Kong's constitutional crisis instead came from within. Claiming that the CFA decision would produce dire social consequences, the HKSAR administration approached the mainland seeking an NPCSC reinterpretation of the Basic Law provisions on which the court had relied. Questions first arose regarding both the legality and the wisdom of the administration's request. As to the latter, the administration clearly failed to adequately explore alternatives to reinterpretation, including amendment of the Basic Law, which would have far better accorded the goal of preserving the rule of law as Hong Kong had known it. By refusing to implement the CFA judgment, pursuing a request for reinterpretation despite the questionable legality of that course, and ignoring more democratic and legally sound alternatives, the HKSAR administration damaged the Court's status and independence and undermined the rule of law in Hong Kong.

99. See interview with Denis Chang, Lead Counsel for the Petitioners in *Ng Ka Ling*, in Hong Kong (June 8, 1999).

100. See Mark O'Neill, *Abode Ruling 'Not on NPC Agenda'*, S. CHINA MORNING POST, Mar. 5, 1999, at 8.

101. See No Kwai-yan, *Beijing No Longer 'Gatekeeper' On Abode, Warns Lu Ping*, S. CHINA MORNING POST, Mar. 5, 1999.

102. See interview with Denis Chang, Lead Counsel for the Petitioners in *Ng Ka Ling*, in Hong Kong (June 8, 1999).

1. The HKSAR's Failure To Implement the CFA Judgment

The administration expressed its concern about implementing the CFA decision even before the clarification was issued. Soon after the CFA's original ruling, the HKSAR government arrested numerous mainlanders who had overstayed their two-way travel permits and were claiming the right of abode under the Court's judgment.¹⁰³ The government did agree, however, to expedite the immigration process for 13,000 mainlanders who had already been issued one-way permits but were delayed by the 150 person-per-day immigration quota.¹⁰⁴

The HKSAR government, together with mainland authorities, also conducted a survey of mainlanders to determine the likely number of immigrants generated by the CFA's decision. The preliminary results, which were issued on April 28, 1999, were ominous and controversial. According to the government's figures, enforcement of the CFA decision would result in 1.67 million additional mainlanders acquiring the right of abode over the next seven years.¹⁰⁵ The study indicated that 200,000 of the potential immigrants were illegitimate children and that the remaining 1.4 million were "afterborn" or children of Hong Kong residents who would acquire the permanent right of abode after seven years.¹⁰⁶ The analysis, which assumed that all mainlanders who were eligible for permanent residence would claim this right, further indicated that 690,000 would be immediately eligible and the remaining 980,000 would come in within the next seven years. Some critics reacted to the government's analysis, claiming that these figures were grossly inflated and that the actual numbers were as low as half the administration estimate.¹⁰⁷

103. See *Arrests Pave Way*, *supra* note 89.

104. See Billy Wong Wai-yuk & Audrey Parwani, *Joint Surveys To Tally 'Huge' Influx Total*, S. CHINA MORNING POST, Feb. 2, 1999.

105. See HONG KONG HUMAN RIGHTS MONITOR, PRESENTATION TO THE LEGISLATIVE COUNCIL ON THE RIGHT OF ABODE (May 10, 1999); THE STATE COUNCIL: THE PEOPLE'S REPUBLIC OF CHINA, REPORT ON ASSISTANCE FROM THE PEOPLE'S GOVERNMENT IN SOLVING PROBLEMS ENCOUNTERED IN THE IMPLEMENTATION OF THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA 3 (May 20, 1999).

106. See Chris Yeung, *Pressure on Abode Court for Rethink*, S. CHINA MORNING POST, Apr. 30, 1999, at 1; HONG KONG HUMAN RIGHTS MONITOR, *supra* note 105.

107. See interview with Dr. Stephen Ng, Director, Hong Kong Human Rights Monitor, in Hong Kong (May 31, 1999) (noting that survey methodology has been widely criticized and that there is little evidence that all right of abode holders would actually want to permanently immigrate to Hong Kong); remarks of Gladys Li, Barrister, at Crowley Mission Wrap-Up Session No.1, in Hong Kong (June 10, 1999).

Repeated and alarming government statements stressed that "social resources could hardly meet the immediate needs of this large group of immigrants for education, housing, medical and health, social welfare, etc., thereby triggering severe social problems."¹⁰⁸ Not surprisingly, the government's survey results and dramatic pronouncements of economic doom generated widespread public concern that Hong Kong would be overwhelmed by new immigrants and a demand that a solution be found.¹⁰⁹

The administration soon made its belief clear that only an effective reversal or nullification of the CFA's judgment could avert the imminent socio-economic catastrophe that the government's study promised. The administration accordingly considered three possible options for undoing the CFA's interpretation of Articles 22 and 24 of the Basic Law: 1) asking the CFA to reconsider its interpretation in the upcoming overstayer test cases; 2) amending the Basic Law; and 3) asking the NPCSC to give their own interpretation of Articles 22 and 24 of the Basic Law.¹¹⁰ After brief deliberation the administration determined that the third choice, requesting an interpretation from the NPCSC, was the only feasible alternative. This decision ignored substantial concern from the Hong Kong legal community about the price of such a step to Hong Kong's autonomy and the availability of alternative solutions.¹¹¹ The administration was nonetheless able to obtain a resolution supporting its plan from LegCo, after "nineteen members, led by Democratic Party chairman Martin Lee and dressed in black" walked out prior to the vote.¹¹² In the meantime, many of the Hong Kong Deputies to the NPC, who are themselves not directly elected, made public

108. See RIGHT OF ABODE: THE SOLUTION, *supra* note 40 (stating that government's opinion polls show that "public is very concerned about these unbearable consequences").

109. *Id.* Many in Hong Kong opined that government statements were essentially "scare tactics" to draw criticism away from the proposed NPCSC interpretation solution. See Jason Felton, President, American Chamber of Commerce in Hong Kong, Remarks at the Crowley Mission Breakfast with the American Chamber of Commerce in Hong Kong (June 4, 1999); Interview with Dr. Stephen Ng, Director, Hong Kong Human Rights Monitor, in Hong Kong (May 31, 1999).

110. See RIGHT OF ABODE: THE SOLUTION, *supra* note 40.

111. See Hong Kong Bar Association, Press Release, *Open Letter to the Chief Executive on the Right of Abode Case* (May 5, 1999); HONG KONG HUMAN RIGHTS MONITOR, *supra* note 105.

112. See Chris Yeung, *LegCo Walkout on Abode Vote*, S. CHINA MORNING POST, May 20,

their view favoring reinterpretation over amendment.¹¹³

On May 20, 1999, the Chief Executive formally submitted a report to the State Council in Beijing. Among other things, the report observed that the CFA's interpretation differed from the administration's understanding of the wording, purpose, and legislative intent of these provisions, that the control of mainland resident immigration into Hong Kong has a bearing on the relationship between the Central Authorities and the HKSAR, that the HKSAR is no longer capable of resolving the problem on its own, and that the CFA was compelled to approach Beijing in the face of exceptional circumstances.¹¹⁴ The Chief Executive therefore concluded his report by suggesting that the State Council should ask the NPCSC to interpret, under the relevant provisions of the Constitution and the Basic Law, Article 22(4) and 24(2)(3) of the Basic Law according to the true legislative intent.¹¹⁵

2. Legality of the Reinterpretation Request

The request for reinterpretation generated a controversy that dominated Hong Kong political life for weeks. As a threshold matter, prominent members of the Hong Kong bar and academy argued that the Chief Executive's action was flatly inconsistent with the Basic Law. The administration, with some support from the legal community, contended that the Basic Law all but mandated the request.

Led by the Hong Kong Bar Association, administration critics first contended that the request was *ultra vires*. As the critics pointed out, the Basic Law nowhere authorizes the Chief Executive to seek an interpretation. To the contrary, it expressly grants to the CFA alone, the power to refer interpretive matters

1999, at 1; Interview with Rita Fan, President, HKSAR Legislative Council, in Hong Kong (June 7, 1999).

113. See Chris Yeung, *Balance Between Legality and Reality*, S. CHINA MORNING POST, May 1, 1999, at 13 (noting that key local NPC deputies have insisted that sacred constitution should not be altered simply because of "wrong ruling" by CFA); Interview with Margaret Ng, Legislative Councilor, in Hong Kong (June 7, 1999).

114. C.H. TUNG, CHIEF EXECUTIVE, HONG KONG SPECIAL ADMINISTRATIVE REGION, REPORT ON SEEKING ASSISTANCE FROM THE CENTRAL PEOPLE'S GOVERNMENT IN SOLVING THE PROBLEMS ENCOUNTERED IN THE IMPLEMENTATION OF THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA 4 (May 20, 1999).

115. *Id.*

to the NPCSC and then only in the context of adjudicating cases.¹¹⁶ The structure of the Basic Law, moreover, contemplates that NPCSC interpretations will be issued before the CFA interprets a provision, thus according respect both to the interpretive authority of the NPCSC and the finality of CFA adjudication. Article 159 complements this structural argument by providing a mechanism to change CFA interpretations through amendment to the Basic Law, which, like many common law systems, reconciles the need for judicial finality and the need to modify fundamental legal provisions in extraordinary circumstances.¹¹⁷

As opponents further note, a government request for reinterpretation is in tension with the Basic Law's central commitments to Hong Kong's high degree of autonomy, common law system, judicial independence, and adjudicative finality.¹¹⁸ Asking a higher mainland authority to correct the judgment considered by Hong Kong's highest court, has substantially the same effect as appellate review by the mainland over the CFA. The HKSAR authorities counter that, in accord with Article 158, the reinterpretation cannot alter the judgment as it affects the 4000 named appellants. This technical argument ignores the reality that overturning the CFA's interpretation eviscerates any precedential authority that the decision would ordinarily have in a common law system.¹¹⁹ This consequence in turn undermines values of predictability, reliance, and fairness that the doctrine of *stare decisis* promotes. This point is particularly important in connection with a court, such as the CFA, with jurisdiction over constitutional cases.¹²⁰

116. Basic Law, *supra* note 10, art. 158, para. 2.

117. See Michael C. Davis, Written Testimony for the Legislative Council on the Question of Mechanisms for Seeking NPC Standing Committee Interpretation (June 12, 1999); HONG KONG HUMAN RIGHTS MONITOR, *supra* note 105; interview with Margaret Ng, Legislative Council, in Hong Kong (June 7, 1999).

118. See *supra* text accompanying notes 25-34.

119. See Margaret Ng, *Time for the Next Test To Begin*, S. CHINA MORNING POST, July 16, 1999; Hong Kong Bar Association, Press Release, *Open Letter to the Chief Executive on the Right of Abode Case* (May 5, 1999). The absence of a class action device worsens this problem by making it difficult if not impossible for individuals with similar claims to preserve their rights by joining a suit in which the CFA would issue an initial judgment.

120. Critics add that this particular request further undermined Hong Kong's autonomy in seeking a reinterpretation of both Articles 22 and 24, when before the Court, the government had conceded that Article 24 was not a referable matter dealing with the relationship between the HKSAR and the mainland. See, e.g., interview with Denis

The Hong Kong administration justified the request by asserting the NPCSC's general power of interpretation together with the Chief Executive's general powers and duties arise under the Basic Law. Based on this view, Article 158's broad grant of interpretive power "may be exercised by [the NPCSC] in the absence of any reference to it by the CFA . . . [and] . . . may also be exercised in respect of any provision of the Basic Law."¹²¹ This part of the argument turns on the mainland legal distinction between interpretation and adjudication. Assuming this dichotomy exists, legislative interpretation by the NPCSC neither usurps the rightful powers of the Hong Kong judiciary, nor does it interfere with Hong Kong judges' freedom to decide future cases in accordance with the NPCSC's interpretation.¹²² Critics have pointed out that this argument assumes that Article 158 affirmatively grants a general power of interpretation rather than merely alluding to such a power as a prelude to dividing interpretive authority between the NPCSC and the CFA.¹²³ They further contend that relying on a distinction between interpretation and adjudication subjects the Basic Law to mainland legal conceptions rather than to the common law principles it was designed to protect.¹²⁴

Assuming the NPCSC's interpretive authority, the administration locates its own power to approach that body in Basic Law Articles 43 and 48. Article 43 makes the Chief Executive the head of the HKSAR and provides that he or she shall be accountable to the CPG as well as to Hong Kong.¹²⁵ Article 48 enumerates the Chief Executive's powers, including the responsibility

Chang, lead counsel for practitioners in *Ng Ka Ling*, in Hong Kong (June 8, 1999); see also *Ng Ka Ling (an infant) v. Director of Immigration*, [1999] H.K.C. 291, 329-31 (discussing whether Article 158 of Basic Law mandates referring to Article 22 or 24 for interpretation).

121. Elsie Leung, Secretary for Justice of the HKSAR, Statement to the House Committee of LegCo (May 18, 1999).

122. See *id.*; see also RIGHT OF ABODE: THE SOLUTION, *supra* note 40 (arguing that NPCSC interpretation of Articles 22 and 24 does not undermine judicial independence).

123. See Ng, *supra* note 119; interview with Denis Chang, lead counsel for petitioners in *Ng Ka Ling*, in Hong Kong (June 8, 1999).

124. See Hong Kong Bar Association, Press Release, *A Constitutionally Acceptable Solution* (May 14, 1999); see also GHAI, *supra* note 18, at 198-207 (discussing scope of NPCSC interpretation under Article 158 and increasingly blurred distinction between adjudication and legislation in mainland Chinese law).

125. Basic Law, *supra* note 10, art. 43.

for the implementation of this law.¹²⁶ According to the administration, these general powers encompass the specific authority to request a reinterpretation. The Law Society¹²⁷ and at least one prominent academic are among those who support this view.¹²⁸

For practical purposes, the NPCSC's decision to issue a reinterpretation¹²⁹ renders arguments over the legality of the Chief Executive's request moot. In theory, the referral could be challenged in the context of a subsequent right of abode case. However, the issue of the Chief Executive's power to refer to the NPCSC would itself require referral. The NPCSC, in turn, apparently views the course as legal, having already granted such a request.

The resulting situation does not mean that the request was legitimate. The authorities' general arguments effectively undermine the Basic Law's specific allocations of authority as well as its general goal of preserving Hong Kong's legal system. At the very least, the request raises questions about the depth of the administration's own commitment to this same goal.

3. The Amendment Alternative

The prudence of the reinterpretation request generated even greater controversy than the question of its formal legality. Even assuming that the social impact of the right of abode decision had to be contained,¹³⁰ leaders of the Hong Kong legal community pointed to alternative solutions that were not only undoubtedly legal, but also better comported with Hong Kong's rule of law, autonomy, and evolving democracy. The HKSAR ad-

126. *Id.* art. 48(2).

127. In contrast to the Hong Kong Bar Association, the Law Society declared its views in a terse one paragraph statement without supporting legal analysis. Law Society Press Release, *Right of Abode: The Solution*, May 17, 1999.

128. Peter Wesley-Smith, *The Options* (May 3, 1999) (Draft paper for the seminar organized by the Central Policy Unit).

129. See The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, June 26, 1999 [hereinafter NPCSC Reinterpretation of Articles 22 and 24]; Margaret Ng, *Interpreting the Reinterpretation*, S. CHINA MORNING POST, July 16, 1999, at 3-4.

130. Though widespread, this assumption was by no means universal. During the delegation's stay, the Catholic Cardinal of Hong Kong made front page news declaring that the HKSAR could and should accommodate all right of abode claimants even accepting the 1.6 million figure. See Jo Pegg, *Cardinal Slams Tung Abode Moves*, S. CHINA MORNING POST, June 6, 1999, at 1.

ministration itself acknowledged that other possible solutions existed and merited consideration. Of these alternatives, the most widely urged was amending the Basic Law under Article 159. In contrast to legislative interpretation, amendment is the formal mechanism employed by most common law systems for changing constitutional rules.¹³¹ The Hong Kong amendment procedure, however, severely limits the role of the HKSAR's populace. As set forth in Article 159, the power to amend the Basic Law "shall be vested in the . . . National People's Congress."¹³² Bills for amendments may be proposed by the NPCSC, the State Council, or the Hong Kong government. In the last instance, the Hong Kong deputies who represent the HKSAR in the NPC shall submit an amendment bill only after clearing three hurdles; a bill must: 1) receive the consent of two-thirds of the deputies themselves; 2) the consent of two-thirds of all the members of LegCo; and 3) the approval of the HKSAR's Chief Executive.¹³³

Within Hong Kong, nearly all sides agree that overturning a judicial interpretation of the Basic Law through amendment would generate substantially less concern about maintaining the rule of law than does a reinterpretation. Advocates based the superiority of the amendment route on several grounds. First, an amendment would fully accord with the "power of final adjudication" guaranteed by both the Joint Declaration¹³⁴ and the Basic Law.¹³⁵ Instead of asking the NPCSC to "correct" a purportedly erroneous interpretation by the HKSAR's highest court, an amendment would simply alter the relevant constitutional provision. In this way, an amendment would address the ostensible crisis created by the CFA's action while avoiding the appearance of undermining the finality of the CFA's judgement or its

131. The main exception is, of course, the British Constitution, which remains unwritten. See ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF LAW OF THE CONSTITUTION 330 (1889).

132. Basic Law, *supra* note 10, art. 159, para. 1.

133. *Id.* art. 159, ¶ 2. Before the NPC considers an amendment bill, the Committee of the Basic Law shall study it and submit its views. *Id.* ¶ 3. In addition, no amendment shall contravene the established policies of the [PRC] regarding Hong Kong. *Id.* ¶ 4.

134. Joint Declaration, *supra* note 17, at art. 3. See *supra* text accompanying notes 17-25 (discussing Joint Declaration's guarantee of judicial independence and finality).

135. Basic Law, *supra* note 10, arts. 2, 19. See *supra* text accompanying notes 28-30 (discussing Basic Law's guarantee of judicial independence and finality).

independence. The amendment alternative would thus preserve the integrity of the common law system, under which the concept of final adjudication and the practice of interpretation are united.

Second, an amendment would better accord with the HKSAR's "high degree of autonomy," especially as reflected in Article 158. Article 158 expressly assigns Basic Law provisions "within the limits of the autonomy of the Region" for interpretation by the Hong Kong courts while allocating provisions that deal with such matters as the relationship between the HKSAR and the CPG to the NPCSC. By requiring the general agreement of Hong Kong's representatives and institutions, the amendment process would preserve the HKSAR's autonomy over provisions like Article 24 by allowing it to make its own decisions about who should and should not be granted the right of abode. In contrast, an NPCSC correction of a considered judgement of the CFA, even at the request of the HKSAR government, compromises the HKSAR's autonomy and consolidates power in the CPG.

In addition, the amendment process assures at least a formal role for Hong Kong's representative institutions, and greater public debate and democratic participation than was evident with the reinterpretation option as pursued by the HKSAR administration.¹³⁶ Under Article 159, amendment bills may be forwarded to the NPC only after gaining approval by the Chief Executive, two-thirds of the LegCo, and two-thirds of the Hong Kong deputies to the NPC.¹³⁷ These requirements not only insure some degree of public deliberation, but also guarantee that Hong Kong's fundamental law, including its protections of rights, can only be altered only after overwhelming public support within the HKSAR has been formally acknowledged.

In contrast, the HKSAR administration did not make the text of the request public until over three weeks after it had been submitted to the State Council.¹³⁸ Moreover, when two LegCo members attempted to fly to Beijing to make the case against reinterpretation, they were barred from boarding the plane at

136. The government could have created opportunities for greater democratic participation in the decision to request reinterpretation, but failed to do so.

137. Basic Law, *supra* note 10, art. 159, para. 2.

138. The request was submitted on May 20 and not released until June 11. See Margaret Ng, *Wrapped Up in Secrecy*, S. CHINA MORNING POST, June 4, 1999, at 1.

the Hong Kong airport at the direction of mainland authorities.¹³⁹ These episodes tended to confirm criticisms that the hasty and secretive reinterpretation process effectively precluded a considered discussion about whether the CFA decision may have created a potential demographic crisis in the first place, much less the best legal means to resolve it.

Stung by opposition to the request, the HKSAR administration went to great lengths to refute accusations that the decision was made out of sheer expediency.¹⁴⁰ Among other defenses, it argued first that the process would take too long, and second that the amendment lacked support politically.¹⁴¹

As a practical matter, the administration asserted that an amendment could not be enacted in time to avert the impending immigration crisis even if sufficient political support existed.¹⁴² Officials pointed out that since Article 159 vests the power of amendment solely in the NPC, and since the NPC had recently concluded its sole plenary meeting for 1999 in March, the HKSAR would face a potentially massive influx of immigrants claiming the right of abode for almost a full year.¹⁴³ The administration also expressed concern that, as long as it remained good law, the CFA judgment would encourage mainlanders asserting the right of abode to immigrate illegally and then claim the right once in Hong Kong.¹⁴⁴

This argument, however, contradicts the reality of the situation. On one hand, the HKSAR government remained in negotiations with the mainland about enforcement of the CFA judgment for almost six months after it had been issued.¹⁴⁵ This de-

139. See Angela Li, *Legislators Barred from Beijing Flights*, S. CHINA MORNING POST, June 11, 1999, at 1.

140. See, e.g., Elsie Leung, Secretary for Justice of the HKSAR, *Statement at the House Committee Meeting of the Legislative Council* (May 18, 1999) ("In deciding between an interpretation and an amendment, the Administration has been guided by firm principle, not expediency.").

141. See *id.* *Right of Abode: The Solution*, *supra* note 127.

142. See *id.* (arguing that before amendment could be passed, many Mainland residents will have exercised or obtained [the Right of Abode] under the CFA ruling).

143. See *id.*

144. See *id.*; interview with Jason Felton, American Chamber of Commerce in Hong Kong (June 4, 1999) (suggesting that government was afraid that illegal immigrant smugglers would spread the word that once immigrant arrives in Hong Kong, they cannot be sent back).

145. See interview with Robert Alcock, HKSAR Dep't of Justice, in Hong Kong (June 4, 1999).

lay meant that the allegedly impending flood of immigration had yet to materialize.

On the other hand, the HKSAR government apparently failed to consider the possibility of interim legislation as a means to control the flow of mainlander immigration while abiding by the CFA's judgment pending an amendment.¹⁴⁶ Some observers argued that such legislation could mitigate the problems attributed to the alleged immigration influx, thereby making an amendment feasible and eliminating the need to request an NPCSC reinterpretation.¹⁴⁷ Neither the legality nor feasibility of this option was ever widely addressed, in large part because the HKSAR administration never seriously pursued it.¹⁴⁸ The authorities were made aware of this possible approach, however, both in public statements by the Hong Kong Bar Association and in testimony before LegCo.¹⁴⁹

The CFA's judgment implicitly endorses legislative measures that would implement the right of abode in light of the exigent circumstances that might result.¹⁵⁰ First, the CFA upheld the "certificate of entitlement scheme" aspect of the No. 3 Ordinance and thus allowed the HKSAR authorities some degree of control over the process of verifying immigrant's claims to the right of abode.¹⁵¹ Second, the CFA expressly noted that such a verification scheme was subject to a "reasonableness" re-

146. In this regard, this option presents a legislative analogy to the U.S. Supreme Court's remedial decision in *Brown v. Board of Education* ("Brown II"). *Brown v. Board of Education*, 349 U.S. 294 (1955). There, the Court ruled that equitable principles permitted enforcement of the fundamental constitutional right to equal protection of laws "with all deliberate speed," rather than immediately, in light of the massive social dislocation that immediate enforcement of that right might entail. *Id.*

147. See HONG KONG BAR ASSOCIATION, *SOLUTIONS TO THE PROBLEM OF MASS IMMIGRATION* (May 16, 1999); Michael C. Davis, *Home To Roost*, S. CHINA MORNING POST, May 16, 1999, at 10.

148. See interview with Robert Alcock, HKSAR Department of Justice, in Hong Kong (June 4, 1999); interview with Albert Chen, Dean of the University of Hong Kong Law Department, in Hong Kong (June 7, 1999).

149. See HONG KONG BAR ASSOCIATION, *supra* note 147; Michael C. Davis, Written Testimony for the Legislative Council on the Question of Mechanisms for Seeking NPC Standing Committee Interpretation (June 12, 1999).

150. See, e.g., interview with Denis Chang, Lead barrister for the petitioners in the right of abode cases, in Hong Kong (June 8, 1999) (noting that CFA's judgment is subject to "reasonableness" requirement which "gives a window" for administrative mitigation of impending influx); interview with Albert Chen, Dean of University of Hong Kong Law School, in Hong Kong (June 7, 1999) (observing that CFA's judgment left the certificate of entitlement scheme intact, lessening urgency of immigration crisis).

151. See *Ng Ka Ling*, 1 HKC at 334 (stating that "[i]t is reasonable for the legisla-

quirement.¹⁵² By allowing the HKSAR “reasonable” control over the verification of permanent resident status, it follows that the HKSAR could legally take legislative and administrative measures to implement the decision in an orderly fashion.¹⁵³

Administration authorities initially rejected the idea of interim measures as a way to pursue an amendment, but later indicated that the idea merited consideration should a similar crisis occur. Initial resistance was based on the conclusion that any administrative or legislative measure to implement the CFA judgment in anything less than a total and immediate fashion was illegal.¹⁵⁴ Some language in the decision can be read to support this view. The CFA warned, for example, that any immigrant who experiences “unlawful delay” in the acceptance or rejection of her permanent resident application could “invoke public law remedies in our courts.”¹⁵⁵ Despite this position, senior officials at the Department of Justice (“DOJ”) told our delegation that the alleged immediacy of the immigration crisis prevented them from looking into this option fully. The DOJ also stated its intention to explore the possibility in the event of a future CFA interpretation of the Basic Law would lead to dire social consequences.¹⁵⁶

For the most part, opponents of reinterpretation did not advocate interim measures as a possible way forward toward a possible amendment either.¹⁵⁷ If anything, they expressed even less interest in the idea than administration officials.¹⁵⁸ Administra-

ture to introduce a scheme which provides for verification of a person’s *claim* to be a permanent resident.” (emphasis in original)).

152. *See id.* at 335 (“[A]s a matter of statutory construction, the courts would import the requirement of reasonableness into a number of provisions for operating such verification scheme.”).

153. *See* interview with Denis Chang, lead barrister for the petitioners in the right of abode cases, in Hong Kong (June 8, 1999).

154. *See* interview with Robert Alcock, HKSAR Dep’t of Justice, in Hong Kong (June 4, 1999) (arguing that under CFA’s actual abode order, no partial implementation of judgment would have been legal).

155. *Ng Ka Ling*, 1 HKC at 335. Additionally, the CFA decision granted a statutory right of appeal to the HKSAR Immigration Tribunal for any rejected abode applicants applying for a certificate of entitlement. *Id.*

156. *See* interview with Elsie Leung, HKSAR Secretary of Justice, and Robert Alcock, HKSAR Dep’t of Justice, in Hong Kong (June 10, 1999).

157. One exception was Professor Michael C. Davis of the City University of Hong Kong, who proposed this type of approach in testimony before LegCo. *See supra* notes 147 and 149.

158. *See* interview with Denis Chang, Counsel for Petitioners in *Ng Ka Ling*, in

tion opponents, however, declined to pursue the idea in the right of abode context for different reasons than the administration. First, the HKSAR administration, not individual LegCo members, controlled the introduction of such legislation given the limits on private member bills.¹⁵⁹ Second, most defenders of the CFA decision believed the administration was committed to reinterpretation almost from the beginning, making attempts at compromise superfluous.¹⁶⁰ Finally, the lawyers who argued the right of abode cases faced the problem of whether agreeing to delay in the implementation of the CFA's decision could be squared with their ethical obligation to represent their clients zealously.

Despite concerns on both sides, reasonable steps that would address any genuine crisis precipitated by a CFA decision should be explored so long as those steps are tied to seeking an amendment of the Basic Law. Certainly the legal obstacles do not appear so great as to preclude further exploration of this type of approach. Administration arguments that the CFA judgment required complete and immediate implementation might carry more weight but for the government's failure even to begin enforcement by the time the NPCSC issued its reinterpretation almost five months later.¹⁶¹ Several judges with whom the delegation met, moreover, informally indicated that a reasonable implementation scheme might include a range of possibilities.

While the legal obstacles to interim legislation do not appear significant, the potential benefits are substantial. Assuming that the CFA's judgment could have been implemented in a reasonable, orderly, and gradual manner, the purported socio-economic crisis could have been averted in the short term.¹⁶² The delay would have allowed a public debate about the scope of the problem, permitted the formulation of a politically feasible amendment if one were deemed necessary, and would have con-

Hong Kong (June 8, 1999); interview with Elsie Leung, HKSAR Secretary of Justice, and Robert Alcock, HKSAR Department of Justice, in Hong Kong (June 10, 1999).

159. See *infra* notes and accompanying text 290-92.

160. See, e.g., interview with Denis Chang, Counsel for Petitioners in *Ng Ka Ling*, in Hong Kong (June 8, 1999).

161. See interview with Robert Alcock, HKSAR Department of Justice, in Hong Kong (June 4, 1999). To the contrary, the administration had in the meantime continued to arrest illegal immigrants claiming the right of abode without a certificate of entitlement. See *Arrests Pave Way*, *supra* note 89.

162. See HONG KONG BAR ASSOCIATION, *supra* note 147.

trolled the situation pending the next plenum meeting of the NPC in March of 2000.¹⁶³ If the Basic Law had then been amended, the controversy would have been satisfactorily resolved. The authority of the CFA would have remain unchallenged, the rule of law would have remain unquestioned, and Hong Kong's autonomy would have been preserved. If, however, the amendment had been defeated, then the administration would have been certain that a request for NPCSC reinterpretation was the only long-term solution to a genuine immigration crisis. The rule of law would still have been preserved since the principle does not compel a society to endure hardships when a source of redress is available and other legal avenues are exhausted.

Beyond the urgency of the situation, HKSAR authorities contended that the amendment commanded insufficient support in both LegCo and among the Hong Kong deputies to the NPC to meet Article 159's two-thirds requirement in each case.¹⁶⁴ Others argued that the Hong Kong deputies to the NPC doomed any potential amendment when they signed a unanimous statement stating that they would not support amendment.¹⁶⁵ Moreover, a resolution supporting the request for reinterpretation in LegCo was voted upon, albeit without the participation of the directly elected members.¹⁶⁶ Some reinterpretation opponents, however, were also confident that the NPC delegation would not stand in the way of an amendment if the administration seriously pursued the option.¹⁶⁷ On a more general note, at least one prominent lawyer observed that amendments were supposed to be difficult to obtain, especially when

163. *See id.* (stating that though administrative measures could "alleviate the threat of an immediate or sudden influx of mainlanders" that "[i]n the long term, the only acceptable solution would be to introduce amendments to the Basic Law.")

164. *But see* interview with Rita Fan, LegCo President, in Hong Kong (June 7, 1999). The members had walked out to protest the government's maneuvers undermining the authority of the CFA and the integrity of the common law. *See* Yeung, *supra* note 111, at 1.

165. *See* interview with Margaret Ng, LegCo Member, in Hong Kong (June 7, 1999). In Ms. Ng's analysis, these deputies supported the reinterpretation alternative because an amendment to the Basic Law would be equivalent to the admission that the NPC and the drafters of the Basic Law had made a mistake, not the CFA. *Id.*

166. *See* interview with Margaret Ng, LegCo Member, in Hong Kong (June 7, 1999).

167. *See* Interview with Denis Chang, counsel for petitioners in *Ng Ka Ling*, in Hong Kong (June 8, 1999).

they would restrict rights. If society lacks the consensus to support such a change despite significant social consequences, then the right should be preserved.¹⁶⁸ Whatever the obstacles, the amendment process provided the one possibility in which the consequences of the CFA's rulings could have been addressed without generating serious controversy about the court's independence. As is now obvious, the same cannot be said of legislative reinterpretation.

4. Legislative Interpretation in a "Hybrid" System

The administration's argument that an NPCSC interpretation better reflects the hybrid legal system that the Basic Law created may prove to have the most serious and far-reaching consequences for the rule of law in Hong Kong.¹⁶⁹ On this view, legislative interpretation represents one of the mainland's preferred methods of determining the "true legislative intent" behind a given law, including the Basic Law as a national law of China itself.¹⁷⁰ The administration accordingly argued that because the CFA had simply misinterpreted the legislative intent behind Article 24, the Article need not actually be amended, but simply restored to the drafters' original intent.¹⁷¹ Though the authorities recognized that "[i]t is natural for those familiar with a common law system to object to a non-judicial body revising an interpretation . . . given by a final appellate court," it nonetheless considered legislative interpretation proper because "Hong Kong is part of the [PRC], which has a civil law system."¹⁷²

Such an erosion of the "One Country-Two Systems" ideal

168. See Gladys Li, Hong Kong Barrister, Remarks at Crowley Wrap-Up Session, No. 1, in Hong Kong (June 10, 1999)

169. See RIGHT OF ABODE: THE SOLUTION, *supra* note 40, at para. 1; Elsie Leung, Secretary for Justice of the HKSAR, Statement at the House Committee Meeting of the Legislative Council (May 18, 1999); Interview with Gu Min Kang, Professor, City University of Hong Kong, in Hong Kong (June 9, 1999).

170. See RIGHT OF ABODE: THE SOLUTION, *supra* note 40, at para. 1; Elsie Leung, Secretary for Justice of the HKSAR, Statement at the House Committee Meeting of the Legislative Council (May 18, 1999); interview with Gu Min Kang, Professor, City University of Hong Kong, in Hong Kong (June 9, 1999).

171. See RIGHT OF ABODE: THE SOLUTION, *supra* note 40, at para. 24; Elsie Leung, Secretary for Justice of the HKSAR, Statement at the House Committee Meeting of the Legislative Council (May 18, 1999); interview with Gu Min Kang, Professor, City University of Hong Kong, in Hong Kong (June 9, 1999).

172. Elsie Leung, Secretary for Justice of the HKSAR, Statement at the House Committee Meeting of the Legislative Council (May 18, 1999).

threatens to supplant Hong Kong's common law framework with the very different approach to law practiced in the mainland. A number of Hong Kong officials with whom our delegation met nevertheless appear either to welcome this prospect or view it to some extent as inevitable. Both in our meetings and public statements, Mrs. Elsie Leung, the Hong Kong Secretary of Justice, indicated that resistance to mainland legal ideas reflected "arrogance" on the part of those steeped in the common law.¹⁷³ The fact remains, however, that a central purpose of the mainland's pledge to maintain "two systems" stems from the basic fact that the mainland legal system—in contrast to Hong Kong's framework—has yet to command anything approaching the confidence of the legal and investment communities outside China.¹⁷⁴

The differences begin with the Chinese constitutional framework. In contrast to liberal constitutions, China's socialist constitution serves not to constrain state power, but to enhance it in service of the policies and goals of the Chinese Communist Party ("CCP").¹⁷⁵ The most recent constitution, adopted in 1982, accordingly rejects the separation of powers and instead concentrates authority in the NPC, which meets annually,¹⁷⁶ the much smaller NPCSC, which meets bimonthly,¹⁷⁷ the State Council, which acts as the administration,¹⁷⁸ and the Central Military Commission, which directs the armed forces.¹⁷⁹ The Constitution does confer an impressive array of rights although it equally imposes duties as well. None of these provisions are directly enforceable, however, since the Constitution is not justiciable.

This framework reflects a highly distinctive approach to the rule of law. The judiciary is nominally independent, but Chinese judges typically lack legal training, do not enjoy high status, and are often subject to improper influence by local government and CCP officials. In light of the Constitution's nonjusticiability,

173. See Chris Yeung & No Kwai-yan, *Anson Pushes Two Systems*, S. CHINA MORNING POST, June 30, 1999; interview with Elsie Leung, Secretary for Justice of the HKSAR, in Hong Kong (May 18, 1999).

174. See CHEN, *supra* note 41, at 121; GHAI, *supra* note 18, at 213-14, 323-34.

175. See CHEN, *supra*, note 41, at 40; GHAI, *supra* note 18, at 84-86.

176. XIANFA art. 2, (1982).

177. *Id.* at art. 67.

178. *Id.* at art. 85.

179. *Id.* at art. 92.

judicial review of constitutional claims is unknown.¹⁸⁰

The Chinese approach further draws a functional distinction between legal interpretation, in the sense of determining the meaning of a given provision, and adjudication, defined as hearing and resolving cases. In the mainland system, the power of interpretation may be "legislative" and "administrative" as well as judicial. This conception formally contrasts with the common law tradition, in which courts generally exercise interpretive and adjudicatory authority together. Moreover, mainland interpretive methods also differ from common law approaches by, among other things, rejecting the idea of *stare decisis*.

Employing mainland conceptions, Article 158 attempts to divide the functions of adjudication and interpretation by acknowledging the NPCSC's ultimate power of interpretation while also according the CFA the power of final adjudication as mandated in the Joint Declaration. The Joint Declaration, however, appears to have proceeded on the common law assumption that any power of "final adjudication" in practice means interpretation as well.¹⁸¹

It has often been said that the Chinese system reflects the CCP's "rule by law," rather than the rule of law. This situation nominally changed in 1999, when the NPC adopted a constitutional amendment committing the mainland to the "rule of law."¹⁸² This amendment reflects vast changes in the mainland legal tradition. During the Cultural Revolution, the regime sought to dispense with the law outright, purging the nation of judges, lawyers, and law schools. Under Deng Xiaoping, the mainland recommitted itself to building a legal system, making strides that have paralleled its economic progress.¹⁸³ Notwithstanding these achievements, that system remains fundamentally different from the common law framework that Deng's pledge of "One Country, Two Systems" was designed to protect.

180. CHEN, *supra* note 41, at 46; GHAI, *supra* note 18, at 306.

181. GHAI, *supra* note 18, at 198.

182. Article 5 was adopted at the second session of the Ninth National People's Congress, on March 15, 1999.

183. CHEN, *supra* note 41, at 33-34.

E. *The NPCSC's Reinterpretation and the Implications for the Rule of Law in Hong Kong*

Notwithstanding the legal and prudential objections, the Chief Executive made the reinterpretation request in the form of a report to the State Council in Beijing. Several features of the actual request confirmed concerns put forward by members of the Hong Kong legal community. In procedural terms, the process was far from transparent. Although submitted on May 20, 1999, the contents of the request were not made public until June 11. No formal mechanism was established, moreover, for opponents of reinterpretation to formally submit their views. To the contrary, when two LegCo members attempted to fly to Beijing to present the opposition case, they were not permitted to board the plane at the behest of mainland authorities.¹⁸⁴

On the merits, the request sought reinterpretation of Articles 22(4), 24(2) and (3) by relying primarily on mainland legal principles. In particular, the Chief Executive sought to have the provisions restored to their "true legislative intent," citing among other things a 1996 "opinion" issued by Preparatory Committee for the HKSAR of the NPC, a mainland body that had been involved in drafting the Basic Law, which was approved in an NPC resolution the next year. Conversely, the request did not ask the NPCSC to consider whether the CFA should have initially referred the two articles in question to Beijing under Article 158.¹⁸⁵

As many commentators had suggested it would do,¹⁸⁶ the NPCSC granted the Chief Executive's request, issuing its own reinterpretation of Articles 22 and 24 on June 26, 1999 ("NPCSC Reinterpretation").¹⁸⁷ This section briefly examines the merits of the NPCSC Reinterpretation and explores some of its implica-

184. See Li, *supra* note 139, at 1.

185. See HKSAR Chief Executive, Report on Seeking Assistance from the Central People's Government in Solving Problems Encountered in the Implementation of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (May 20, 1999) (translation of HKSAR government's submission to PRC State Council.)

186. See interview with Denis Chang, Lead Barrister for the Petitioners in the Right of Abode Cases, in Hong Kong (June 8, 1999).

187. See NPCSC Reinterpretation of Articles 22 and 24, *supra* at 129; Ng, *supra* note 33, at 3-4.

tions for the increasingly hybrid legal system that Hong Kong may be facing.

1. The NPCSC Reinterpretation: Merits

In contrast to a common law opinion, the substance of the NPCSC Reinterpretation is short and conclusory. The NPCSC Reinterpretation sets the stage for what will follow by exceeding the Chief Executive's request and repudiating the CFA's determination that the abode cases did not require referral of Articles 22 and 24 to the NPCSC for interpretation under Article 158.¹⁸⁸ Instead, the NPCSC, without analysis, concluded that Articles 22 and 24 "concern the relationship between the Central Authorities and the [HKSAR]" and so should have been referred initially under Article 158.¹⁸⁹ At no point, however, does the NPCSC Reinterpretation address the CFA's "predominant provision" test, or any other aspect of the court's analysis concerning the division of interpretive authority under Article 158.

The NPCSC Reinterpretation proceeds, in an equally conclusory fashion, to overturn the CFA's interpretation of Articles 22 and 24, stating that "the interpretation of the Court of Final Appeal is not consistent with the legislative intent."¹⁹⁰ The NPCSC Reinterpretation briefly notes the grant of interpretive authority to the NPCSC under Article 67(4) of the PRC Constitution and Article 158(1) of the Basic Law, giving it the power to restore the true legislative intent.

The NPCSC Reinterpretation then construes Article 22(4) as requiring approval for entry into the HKSAR,¹⁹¹ and continues by proclaiming, without explanation, that there are no exceptions to this approval requirement and that to enter Hong Kong without such approval is "unlawful."¹⁹² The NPCSC Reinterpretation neither makes an attempt to explain why such a requirement should apply to those with the right of abode, nor why the CFA's interpretation of the Article was incorrect.

The NPCSC Reinterpretation comprehends Article 24 ex-

188. See NPCSC Reinterpretation of Articles 22 and 24, *supra* note 129, at 1.

189. See *id.* at 2.

190. See *id.*

191. See Basic Law, *supra* note 10, at art. 22(4). Article 22(4) states that "for entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval." *Id.*

192. See *id.*

actly the same way, quoting the relevant provisions of the article that grants the right of abode to the children of permanent residents.¹⁹³ It then states simply that these provisions “mean . . . such parents must have fulfilled the condition prescribed by category (1) or (2) of Article 24(2) of the Basic Law . . . at the time of [the child’s] birth.”¹⁹⁴ As regards Article 24, the NPCSC Reinterpretation does offer a small glimpse into its rationale by noting that its interpretation reflects the “legislative intent” as outlined by an opinion issued by the NPC’s Preparatory Committee for the creation of the HKSAR on August 10, 1996.¹⁹⁵

The NPCSC Reinterpretation concludes by mandating that the courts of the HKSAR “adhere to this Interpretation” in adjudicating all future questions under Articles 22 and 24.¹⁹⁶ In deference to Article 158’s requirement that “judgements previously rendered shall not be affected” by any NPCSC reinterpretation, the NPCSC Reinterpretation states that it “does not affect the right of abode . . . under the judgement of the [CFA] on the relevant cases dated 29 January 1999 by the parties concerned in the relevant legal proceedings.”¹⁹⁷

2. The Hybrid System Realized

The NPCSC Reinterpretation highlights the radical differences between interpreting the law in the mainland legal system and the common law, which is ostensibly guaranteed to Hong Kong by Article 8 of the Basic Law. The NPCSC’s terse statements about the proper meaning of constitutional provisions, overruling the first constitutional adjudication of Hong Kong’s highest court, are jarring to those accustomed to a common law legal perspective. Instead of a constrained interpretive approach characteristic of the common law, the NPCSC’s declaration reflects an instrumental approach that enhances rather than checks government power.

The conflict between the two interpretive methods follows from the profoundly different legal traditions previously discussed.¹⁹⁸ The key document in mainland legal interpretation,

193. *See id.*

194. *See id.*

195. *See id.*

196. *See id.*

197. *See id.*

198. *See supra* text accompanying notes 175-81 (discussing mainland legal system).

the NPC Standing Committee's 1981 Resolution on Strengthening the Work of Interpretation of Laws ("1981 Resolution"), outlines a "concept of 'interpretation' . . . quite different from that accepted in the common law or even civil law jurisdictions . . . [and] clearly inconsistent with the principle of separation of powers, judicial interpretation, and the rule of law as understood in many countries in the contemporary world."¹⁹⁹ Most importantly, the 1981 Resolution gives the NPCSC power to provide a "legislative interpretation" of any legal provisions that need to be clarified or supplemented.²⁰⁰ Legal scholars have pointed out that in practice, this idea of "legislative interpretation" is "tantamount to legislative amendment in most legal systems."²⁰¹ There also seem to be no particular limitations on the NPCSC's power of legislative interpretation, in either substance or form.

Where common law interpretation claims substantive fidelity to the law, the NPCSC approach stresses deference to government policy and ultimately the rule of the CCP.²⁰² Accordingly, many legal commentators point out in general that mainland legal interpretation is more concerned with the political correctness of adjudicative or interpretive decisions than with their legal correctness. As one leading scholar notes, "[t]he NPC and the judicial and administrative bodies under it are instruments of the Communist Party, and as their primary function is the implementation of its policy, there has been little reason to develop the science of autonomous legal interpretation."²⁰³ Nothing in the NPCSC Reinterpretation undermines this observation. To the contrary, the only instance in which the document does not follow the HKSAR's Chief Executive's request is its conclusion that the matter should have been referred to Beijing in the first place, thereby placing Hong Kong affairs more closely under the supervision of mainland policymakers.

In formal terms, mainland legislative interpretations rarely, if ever, reflect constraints that are a central feature of the common law or even civil systems. In particular, the NPCSC "does not engage in any analysis of the law that it is supposed to apply

199. See CHEN, *supra* note 41, at 95.

200. See *id.*

201. See GHAI, *supra* note 18, at 225 ("The NPCSC has, in all instances, modified law rather than interpreted it").

202. GHAI, *supra* note 18, at 213.

203. *Id.*

or interpret,” and thus “gives a strong impression that it reaches the conclusion that it desires politically.”²⁰⁴ Even mainland courts do not typically provide rationales for their judgments. According to one authority, “[t]he typical judgement of a Chinese court is short and does not set out lines or steps of legal reasoning and logical analysis in a way as detailed as in judgments of common law courts.”²⁰⁵

The sole rationale that the NPCSC Reinterpretation does suggest attempts to base its reading on Article 24’s “true legislative intent,” an argument previously made in the HKSAR government’s request.²⁰⁶ Application of this approach, however, does little to validate this basis of decision. For both the NPCSC and the HKSAR Executive, the “true legislative intent” for at least Article 24 may be found in the NPC’s resolution approving its Preparatory Committee’s report on the HKSAR, both issued in 1996. Reliance on these materials for legislative intent is problematic, among other reasons, because they were issued six years after the NPC adopted the Basic Law and because the Preparatory Committee did not draft the Basic Law.²⁰⁷ This problematic application of original intent is not surprising since there are no rules or guidelines limiting an NPCSC legislative interpretation to the “true legislative intent” of a provision.²⁰⁸ In this light, the NPCSC Reinterpretation was effectively a legislative amendment,

204. *Id.*

205. CHEN, *supra* note 41, at 114.

206. See RIGHT OF ABODE: THE SOLUTION, *supra* note 40, at para. 15 (arguing that “legislative interpretation is not equivalent to amendment, because such interpretation must be faithful to the true legislative intent”).

207. A related problem is that reliance on the NPC resolution would in effect permit amendment of the Basic Law by means of post-hoc measures claiming to clarify the true legislative intent.

208. See *supra* notes 198-205 and accompanying text (discussing lack of rules or limitations on mainland conceptions of legal interpretation). The government also supported its “true legislative intent” argument by referring to a 1996 resolution of the Preparatory Committee and a 1993 agreement of the Joint Liaison Group, both of which contradicted the CFA’s interpretations of Articles 22 and 24. This argument is disingenuous because the Basic Law was actually promulgated in 1990, several years before any of these statements of allegedly “true legislative intent” were ever conceived. Michael C. Davis, *Legislative Intent and the CFA Right of Abode Judgment*, Forum on Current Issues Under the Basic Law, sponsored by JUSTICE, The Hong Kong Section of the International Commission of Jurists (May 29, 1999); Hong Kong Bar Association, Press Release, *The Bar’s Response to the Government Paper to LegCo*, May 20, 1999. (noting that CFA rejected Joint Liaison Group Agreement as indicative of meaning of articles relevant to *Ng Ka Ling*, and that government never argued that Preparatory Committee resolution had any legal effect in actual case).

and undoubtedly an incursion of mainland legal principles into Hong Kong's common law system.²⁰⁹

For these reasons, Denis Chang, the lead counsel for the petitioners in *Ng Ka Ling*, suggested that the NPCSC Reinterpretation route was chosen by the Hong Kong government because it was the most predictable way to achieve the desired result.²¹⁰ Exemplifying this mindset, HKSAR Chief Executive Tung stated that the rule of law problem was a problem of perception, not a problem of substance.²¹¹ More striking is Secretary of Justice Elsie Leung's defense of the NPCSC Reinterpretation as a necessary infusion of mainland legal principles.²¹² This conclusion may follow on the assumption that Hong Kong should legitimately develop a truly "hybrid" legal system. Yet, this result is exactly what China pledged it would not institute under the "One Country, Two Systems" formula.

3. The Question of Guidelines Governing Future NPCSC Requests

Many observers suggested that some sort of constitutional or legislative mechanism should be promulgated in order to control and limit the influence of mainland interpretation and its undermining of the "One Country, Two Systems" ideal.²¹³ Such a mechanism might consist of legislative guidelines or a constitutional amendment limiting HKSAR government requests for NPCSC interpretation to circumstances of social emergency. Presumably, such a mechanism would implement some kind of procedure requiring legislative input and public debate on the

209. See interview with Denis Chang, lead counsel for the petitioners in *Na Ka Ling*, in Hong Kong, (June 8, 1999). On the merits, our delegation was repeatedly told that the right of abode was originally extended to offspring of Hong Kong residents to mitigate pre-handover fears of elite "brain drain." The idea underlying this "true original intent" apparently was that Hong Kong residents who settled in other jurisdictions, such as Canada, waiting to see how Hong Kong would fare under Chinese sovereignty would have additional incentive to return if their children automatically had a right of abode. Only later did the problem of mainland offspring become apparent. *Id.*

210. *Id.*

211. See interview with Yash Ghai and Johannes Chan, Professors of Law, University of Hong Kong, in Hong Kong (June 8, 1999).

212. Yeung, *supra* note 112, at 1.

213. See interview with Yash Ghai and Johannes Chan, Professors of Law, University of Hong Kong, in Hong Kong (June 8, 1999); Interview with Albert Chen, Dean of the University of Hong Kong Law School and Professor of Law, in Hong Kong (June 7, 1999).

question, and perhaps requiring some super-majority vote of LegCo. Such a convention, its proponents argue, would "judicialize" NPCSC interpretation, and prohibit its overuse or abuse simply to overrule court rulings unfavorable to the government.²¹⁴

Conversely, others argue that such guidelines or rules governing NPCSC interpretation requests would legitimize the practice.²¹⁵ As Denis Chang told the delegation, such guidelines or conventions would actually legalize a "post-remedial mechanism" by which to circumvent the rulings of the Hong Kong courts.²¹⁶ This perspective also views the legalization of such requests as a legalization of the encroachment of mainland legal norms as a legitimate method of legal interpretation, further undermining the integrity of Hong Kong's common law system.

Whether guidelines or safeguards would best defend the rule of law in Hong Kong depends on the frequency with which the HKSAR government resorts to requests for NPCSC interpretation in the future. If future requests are infrequent, then it would arguably be best to avoid promulgation of explicit guidelines, leaving the government's strategy in the shadows of questionable legality under the Basic Law. In the words of Denis Chang, "at this stage of political development in China, the less said the better."²¹⁷ On the other hand, if HKSAR government requests for NPCSC intervention become more frequent, then guidelines would arguably better protect the rule of law, forcing the government at least to clear some legal hurdles and open such requests up to some kind of more meaningful public debate.

4. Future Controversies

a. Pending Cases

A number of pending cases will determine the degree to which Hong Kong as a hybrid system will become a reality. In

214. See interview with Yash Ghai and Johannes Chan, Professors of Law, University of Hong Kong, in Hong Kong (June 8, 1999).

215. See interview with Denis Chang, lead counsel for the petitioners in *Ng Ka Ling*, in Hong Kong (June 8, 1999).

216. *Id.* Mr. Chang suggested that Beijing originally wanted such a "post-remedial mechanism" written into the Basic Law, but that Christopher Patten refused to accept such a provision. *Id.*

217. See *id.*

the fall of 1999, the CFA will decide the constitutionality of an ordinance prohibiting desecration of the Hong Kong or Chinese national flags. The National Flag and Emblem Ordinance, which makes flag desecration a serious criminal offense, was one of the eleven mainland laws specifically given effect in Hong Kong through Annex III of the Basic Law.²¹⁸ Two Hong Kong citizens, who had been charged under the ordinance for flag desecration as part of a non-violent protest about the Tiananmen massacre, challenged the ordinance as unconstitutional under the Basic Law.²¹⁹ The defendants argued that the ordinance was inconsistent with Article 19 of the ICCPR, which guarantees freedom of expression, and thus was unconstitutional under Article 39 of the Basic Law, which incorporates the rights enumerated in the ICCPR.²²⁰ The trial court found the ordinance constitutional under paragraph 3 of Article 19, which allows restriction of speech rights that are for the protection of "public order."²²¹ The Court of Appeals, however, reversed the lower court's decision and held that the ordinance violated Article 19, and was therefore unconstitutional under Article 39, because there was no evidence that such speech restriction was necessary to preserve the public order.²²²

Commentators aligned with Beijing expressed dismay that a Hong Kong court would so boldly invalidate a mainland law, especially one expressly written into the Basic Law. Maria Tam Wai-chu, a Hong Kong deputy to the NPC and a member of the Basic Law drafting committee, decried the ruling as inconsistent with the Basic Law.²²³ Mainland legal scholar Dr. Raymond Wu Wai-yung argued that "[i]nternational covenants ultimately could not have greater legal authority than local legislation."²²⁴ In response to this mainland outrage, the HKSAR government

218. See Basic Law, *supra* note 10, at Annex III: National Laws Applied in the Hong Kong Special Administrative Region.

219. See *HKSAR v. Ng Kung Siu* (Stuart-Moore JA), [1999] 2 HKC 10, 18-20 (opinion of Court of Appeals).

220. See *id.*

221. See *Ng Kung Siu* (Tong Man, Permanent Magistrate), [1999] 2 HKC 1 at, 15 (opinion of magistrate in trial court).

222. See *Ng Kung Siu* (Stuart-Moore JA), [1999] 2 HKC 1 at, 23 (opinion of Court of Final Appeals).

223. See *Tam Waves Flag at Court Ruling*, HONG KONG STANDARD, Apr. 20, 1999.

224. May Tam & Lillian Kwok, *Issue of Whether International Conventions Override Local Laws*, HONG KONG STANDARD, Apr. 20, 1999.

publicly suggested that the CFA must refer the issue to the NPCSC for interpretation under Article 158. On the other hand, academics, the Hong Kong Bar Association, and the Hong Kong Democratic Party insisted that the issue is entirely within Hong Kong's autonomy as defined by Article 158.²²⁵ It remains to be seen whether the CFA will approach the flag desecration issue with an aggressively rights-protective approach, as it did in *Ng Ka Ling*, or whether it will shy away from another constitutional crisis and defer to mainland interpretation.

Another constitutional issue likely to confront the Hong Kong courts deals with the definition of "ratable value" of property for the purposes of assessing government rent—the rough equivalent of property taxes in Hong Kong.²²⁶ The appellant property developers in *Agrila Limited v. Commissioner of Rating and Valuation* argued to the Lands Tribunal that the HKSAR government's definition of ratable value under several local ordinances was inconsistent with the government rent definition in Article 121 of the Basic Law.²²⁷ The Lands Tribunal agreed, finding the government's rent regulations to be an unacceptable modification of the valuation scheme set out by Article 121.²²⁸ A government appeal is now pending. Since this ruling, if it stands it will cost the HKSAR government substantial revenue in lost rents, the *Agrila* case may well become another instance in which the HKSAR administration will be tempted to make a request for interpretation notwithstanding the potential cost to the rule of law.

b. Other Issues Concerning the HKSAR/ Mainland Relationship

In addition to these pending case, other issues remain to be resolved in the relationship between the mainland and the HKSAR, any of which could give rise to conflict. The most serious of these issues include the absence of basic agreements on cross-border legal processes, and serious concerns about the equal ap-

225. See *Jurisdiction Controversy Looms*, HONG KONG STANDARD, Apr. 20, 1999.

226. See *Agrila Ltd. v. Commissioner of Rating and Valuation*, [1999] 2 HKC 168; interview with Johannes Chan & Yash Ghai, Professors of Law, University of Hong Kong, in Hong Kong (June 8, 1999).

227. See Basic Law *supra* note 10, at art. 121; *Agrila Ltd.*, [1999] 2 HKC at 168.

228. See *Agrila Ltd.*, 2 HKC at 168.

plication of HKSAR law to entities based, owned, or connected with the mainland or HKSAR officials.

c. Agreements on Cross-Border Legal Processes

With the reversion of sovereignty to China, Hong Kong's dealings with the mainland are no longer governed by treaty agreements on standard legal processes that apply between nations. Local agreements must be reached between the HKSAR administration and Beijing. Mutually agreeable terms may be difficult to establish, however, because any discussion of terms will necessarily raise thorny questions about the adequacy and fairness of mainland legal processes. In civil law matters, for example, agreement is necessary on the enforcement of judgments and arbitration awards and for mutual legal assistance in areas such as the collection of evidence.²²⁹ Any agreement in these areas must show a respect for Beijing's sovereign authority on the one hand and the legitimate concerns of Hong Kong's local and international business community on the other.

The most potentially combustible issues will involve questions of the criminal jurisdiction of Hong Kong and mainland courts. The Basic Law clearly provides that HKSAR courts shall not apply mainland criminal law.²³⁰ Less clear, however, are the circumstances in which mainland courts may legitimately apply

229. See HUALING L. FU, *THE FORM AND SUBSTANCE OF LEGAL INTERACTION BETWEEN HONG KONG AND MAINLAND CHINA: TOWARDS HONG KONG'S NEW LEGAL SOVEREIGNTY* (Jan. 1999) (describing many successful instances of cross-border cooperation, visits, and communications, but that authorities must still work together in areas of mutual legal assistance); see also Margaret Ng, *Reciprocal Enforcement Between the Mainland and the HKSAR*, *HONG KONG LAWYER*, Feb. 1999, at 17 (reviewing progress on discussions regarding enforcement of arbitration awards). The HKSAR has already reached agreement with Beijing on one area of cross-border process involving little controversy: service of papers. In January 1999, after consultations between the Supreme People's Court of the PRC and Hong Kong's High Court, the HKSAR and the mainland entered an agreement that provides that mainland and Hong Kong courts may entrust to each other the service in their respective jurisdictions of judicial documents in both civil and commercial proceedings. See *Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings Between the Mainland and Hong Kong Courts*. This agreement is an important early step toward a fully functional relationship between the two legal systems and may provide a model for agreements on more difficult areas.

230. See Basic Law, *supra* note 10, at art. 18. Article 18 of the Basic Law states that only those PRC laws listed in Annex III of the Basic Law are applicable to the HKSAR. Basic Law, art. 18. The PRC's criminal laws are not included in Annex III. See *id.* at annex III.

mainland criminal law to conduct committed in Hong Kong. Two recent cases have raised this question.

In the *Big Spender* case, Hong Kong permanent resident, Cheung Tze Keung, and thirty-five alleged accomplices were arrested and put on trial in the mainland on charges including kidnapping and armed robbery. The crimes allegedly occurred in both Hong Kong and the mainland.²³¹ The mainland court asserted jurisdiction under Article 6 of the PRC Criminal Code,²³² which provides jurisdiction over criminal acts committed in the "territory of the PRC" or having effect in the territory of the PRC.²³³ Notwithstanding the allegation of mainland-based conduct, a literal reading of Article 6 would suggest that a

231. See Kam C. Wong, *Legal and Political Implications of a "Cross-Border Crime,"* 22 CHINA PERSPECTIVES 41 (1999) (providing detailed account of factual background and legal implications of trial of legendary crime gang boss Cheung Tze Keung, also known as "Big Spender"). Planning and preparation for the crimes allegedly occurred in the mainland, including the smuggling of explosives and firearms. See also Hualing L. Fu, *The Battle of Criminal Jurisdictions*, 28/3 HONG KONG L.J. 273 (1998); Elsie Leung, *Viewing the Jurisdictional Issue from a Proper Perspective*, HONG KONG LAWYER, Jan. 1999, at 57 (claiming that case does not undermine Hong Kong's jurisdiction). The Hong Kong government made no effort to bring Cheung back to face trial in Hong Kong, and the Guangzhou Intermediate People's Court found all 36 defendants guilty and sentenced Cheung and five others to death. Fu, *supra*, at 273.

232. Criminal Law of the People's Republic of China, adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, revised at the Fifth Session of the Eighth National People's Congress on March 14, 1997, Peking, China Procuratorial Press, 1998 [hereinafter PRC Criminal Law]; Criminal Procedure Law of the People's Republic of China, adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, revised in accordance with the Decision on Revising the Criminal Procedure Law of the People's Republic of China at the Fourth Session of the Eighth National People's Congress on March 17, 1997, promulgated by Order of the President of the People's Republic of China, No. 64 on March 17, 1998 and entered into force as of date of promulgation, Peking, China Procuratorial Press, 1998 [hereinafter PRC Criminal Procedure Law].

233. See PRC Criminal Law, *supra* note 232, art. 6, para. 3 ("[i]f a criminal act or its consequence takes place within the territory or territorial waters or space of the People's Republic of China, the crime shall be deemed to have been committed within the territory and territorial waters and space of the People's Republic of China"). Article 24 of the PRC Criminal Procedure Law may also be relevant to the mainland court's assertion of jurisdiction. See also Wong, *supra* note 231 (stating that PRC courts had "clear and sufficient evidence to assume jurisdiction in the case as a matter of law"); PRC Criminal Procedure Law, *supra* note 232, art. 24 ("[a] criminal case shall be under the jurisdiction of the people's Court in the place where the crime was committed"). The PRC Criminal Law asserts a particularly wide basis of territorial jurisdiction, including preparation of the instruments or conditions for a crime. Fu, *supra*, note 231, at 276-77 (1998) (claiming that "[i]t is clear that an independent state has the absolute right to exercise criminal jurisdiction over a crime all the elements of which take place within its territory"); PRC Criminal Law, *supra* note 232, art. 22 ("[p]reparation of a

mainland court could assert jurisdiction over conduct committed exclusively within Hong Kong—insofar as the HKSAR is within the territory of the PRC. That reading however would undermine the authority of Hong Kong's courts, and may conflict with Basic Law Article 84, that provides for their exclusive jurisdiction over Hong Kong crimes.²³⁴ Moreover, it raises concern that a HKSAR resident could be criminally charged by mainland authorities for conduct committed in the HKSAR and wholly legal under HKSAR criminal law; for example, certain conduct exercising rights of free expression or association.

The same concern was raised by the *Telford Gardens* case in the context of Article 7 of the PRC Criminal Code. Article 7 provides jurisdiction in mainland courts for crimes committed by Chinese nationals “outside of the territory of the PRC.”²³⁵ In that case, PRC national and mainland resident Li Yuhui was arrested, tried, and convicted in the mainland on charges of murder and robbery.²³⁶ The crimes were alleged to have occurred in the Telford Gardens housing estates in the HKSAR.²³⁷ In contrast the disposition of the *Big Spender* case, the mainland court in the *Telford Gardens* case apparently determined that for jurisdictional purposes the HKSAR was outside the territory of the PRC, and therefore outside of the territoriality principle of Article 6 jurisdiction. That view, however, does nothing to relieve the concern that Hong Kong residents may face charges in the mainland because the court found jurisdiction in Article 7's nationality principle. Because most Hong Kong permanent resi-

crime refers to the preparation of the instruments or the creation of the conditions for a crime”).

234. See Wong, *supra* note 231 (citing mistakenly Basic Law Article 18); Basic Law, *supra* note 10, art. 84 (“[t]he courts of the [HKSAR] shall adjudicate cases in accordance with the laws applicable in the Region”).

235. See PRC Criminal Law, *supra* note 232, art. 7 (stating that “[t]his law shall be applicable to any citizen of the PRC who commits a crime prescribed in this Law outside the territory and territorial waters and space of the PRC”).

236. Li Yuhui was executed on April 20, 1999. See Stella Lee, *Telford Gardens Killer Executed*, S. CHINA MORNING POST, Apr. 20, 1999 [hereinafter Lee I]. Deputy Dean of Shantou University's Law Faculty, Zhou Wei, has announced that the *Telford Gardens* case will become the subject of a case study at the University because of the conflicting claims for jurisdiction. See Stella Lee, *Telford Gardens Murder To Be Studied at Shantou University*, S. CHINA MORNING POST, Apr. 20, 1999.

237. See Lee I, *supra* note 286. Li was a self-proclaimed *fung shui* master. *Fung shui* is the ancient Chinese art of geomancy, most frequently consulted before building construction or renovation. Li allegedly killed three women and two girls and robbed them of the HK\$1.2 million they allegedly owed him for a “life-lengthening” ceremony. *Id.*

dents are nationals of the PRC, the court's decision would seem to extend mainland jurisdiction to conduct by HKSAR residents in Hong Kong.

Compounding this concern that mainland courts are asserting jurisdiction over Hong Kong-based conduct is the perception that the HKSAR administration has failed adequately to assert Hong Kong's jurisdiction over such cases. In the *Big Spender* case, the HKSAR administration explained that it did not seek custody of Cheung for trial in Hong Kong because he had been arrested in the mainland and the HKSAR lacks any agreement with the mainland for rendition,²³⁸ or the transfer of prisoners, suspects, or convicted persons from one authority to another within the same sovereignty.²³⁹ This explanation, if fully credited, leaves the impression that the HKSAR administration would not adequately assist HKSAR permanent residents who may be detained in the mainland on other charges, such as charges stemming from otherwise legal conduct committed wholly in the HKSAR, merely because the defendants were arrested during a visit to the mainland.²⁴⁰

238. Priscilla Leung, "Big Spender" Cheung Tze Keung: A Brief Analysis, HONG KONG LAWYER, Jan. 1999, at 17; Elsie Leung, *Viewing the Jurisdictional Issue from the Proper Perspective*, HONG KONG LAWYER, Jan. 1999, at 57 (arguing that where there is concurrent jurisdiction, but no rendition agreement, Hong Kong has no legal basis for requesting surrender of alleged offenders). The administration also explained that the HKSAR did not seek jurisdiction because the victims had not reported the crimes to the Hong Kong police. Priscilla Leung, *Big Spender*, *supra*, at 17.

239. Rendition is the intra-state version of extradition. See BLACK'S LAW DICTIONARY, 1996 (stating that rendition is "the return of a fugitive from one state to the state where the fugitive is accused or convicted of a crime"). Before the handover, extradition of suspects between Hong Kong and other jurisdictions was governed by U.K. treaties that had been extended to Hong Kong. See Albert Chen, *Post-1997 Extradition and Criminal Law*, GAZETTE L. SOC. HONG KONG (May 1993) 41. These treaties ceased to apply to Hong Kong after the handover, and while the mainland has returned many suspects to Hong Kong under an informal administrative arrangement, Hong Kong has not reciprocated. See Hualing L. Fu, *The Form and Substance of Legal Interaction Between Hong Kong and Mainland China: Towards Hong Kong's New Legal Sovereignty* (Jan. 1999) (stating that this has led mainland to regard Hong Kong as safe haven for people who have committed crimes in mainland).

240. This concern applies not only to HKSAR democracy or free speech activists who might be detained without cause during visits to the mainland, but also even to business persons and tourists from the HKSAR. Cynthia Wan, *Security Officials Insist Sharp Increase Due to Wider Publicity, Not More*, S. CHINA MORNING POST, Aug. 28, 1999 (stating number of HKSAR people detained on mainland had almost doubled since May). For example, a permanent resident of the HKSAR is currently being detained by authorities in Inner Mongolia in relation to a business debt. Cynthia Wan, *Officials Play Out Cruel Farce*, S. CHINA MORNING POST, July 4, 1999 (reporting on futile journey of

A stronger assertion of Hong Kong's autonomy would have required the HKSAR administration to have sought a Hong Kong forum for the trial based on the comparative severity of the conduct allegedly committed in the HKSAR as opposed to that allegedly committed in the mainland. Such comparison clearly warranted a Hong Kong forum for the *Telford Gardens* case, for example, where the principle charge was the murder of Hong Kong residents in the HKSAR. To date, however, the HKSAR administration has merely stated its position that Chinese Criminal Code ("CCC") Article 6 does not apply to the HKSAR, that the language of CCC Article 7 addressing conduct "outside the territory of the PRC" should be interpreted to mean "outside the jurisdiction of the mainland,"²⁴¹ and that the language of CCC Article 7 addressing "PRC citizen[s]" should be interpreted to mean "Chinese nationals who are residents of the Mainland."²⁴²

family of Lok Yuk-shing to bring him home after 387 days in detention on mainland). The debt is not even that of the detained person, but the debt of an insolvent Hong Kong business for which the person once worked. Local mainland authorities have indicated the person's release could be secured upon payment of the debt. Glen Schloss, *Tycoon Ignores Plea Over Grandfather*, S. CHINA MORNING POST, July 6, 1999 (reporting that owner of company ignored pleas to pay off debt to secure release of employee). The HKSAR administration has failed to condemn publicly this official blackmail. Glen Schloss, *Tung Passed Up Chance To Raise Case with Jiang*, S. CHINA MORNING POST, July 11, 1999 (stating HKSAR Chief Executive failed to raise issue of Lok at key meetings with Jiang Zemin).

241. Citing the "One Country, Two Systems" formula and Basic Law Article 19 (conferring independent judicial powers on Hong Kong courts over all cases in HKSAR), the HKSAR administration has argued that although "the HKSAR is an inalienable part of the PRC from the point of view of state sovereignty," the HKSAR and the mainland are two distinct jurisdictional territories. See DEPARTMENT OF JUSTICE, INTERPRETATION OF "CITIZEN" AND "TERRITORY" IN ART. 7 OF THE CHINESE CRIMINAL CODE 3-4 (Dec. 1998) (citing also City University of Hong Kong professor and mainland practitioner Wang Chenguang stating same concept). Cf. Ling Bing, *Applicability of Mainland Criminal Law in Hong Kong SAR* (Submissions to LegCo Panel on Administration of Justice and Legal Services), LC Paper No. CB(2)1054/98-99(01), Jan. 11, 1999 at 7-9 (arguing that HKSAR Government's interpretation is "fallacy" because jurisdiction is "an attribute of state sovereignty" and state's scope of jurisdiction is defined by scope of state's territorial sovereignty).

242. See Basic Law, *supra* note 10, at art. 18. The HKSAR administration recognizes that HKSAR residents are Chinese "nationals" under the PRC's Nationality Law, which applies to HKSAR residents through its inclusion in Annex III to the Basic Law. See *id.* (incorporating PRC laws listed in Annex III, including PRC Nationality Law). Citing the absence of the PRC Criminal Law in Annex III, however, the HKSAR argues that "a distinction must be drawn between SAR residents and Mainland residents for the purposes of the [PRC Criminal Law]" because any reading that applied the PRC Criminal Law to Hong Kong residents would be contrary both to the intent of the NPC and the Basic Law. DEPARTMENT OF JUSTICE, *supra* note 241, at 2.

Of course, these interpretations are not binding on Beijing, regional, local, or mainland courts or executive authorities.²⁴³

The apparent reluctance of the HKSAR administration to confront mainland authorities over jurisdictional questions creates an impression that the administration is not adequately promoting its autonomy and instead “ceding its powers” to the mainland.²⁴⁴ This reluctance can only undermine the integrity of Hong Kong’s criminal justice system and the jurisdiction of Hong Kong courts.²⁴⁵ Moreover, the HKSAR administration’s passive approach raises serious concern that any agreements that may be reached in these areas will not adequately take into account Hong Kong’s international obligations, leading to a wide range of potential legal challenges and conflicts between the HKSAR and Beijing.

For example, the HKSAR administration and mainland au-

243. This interpretation has not been universally adopted even within Hong Kong. For example, although the Law Society of Hong Kong—the official professional association of Hong Kong’s 6000 plus solicitors—agrees that “the Mainland does not have jurisdiction to prosecute or try a person under the PRC Criminal Law or any other law in relation to an offence, the acts of which, were committed wholly in the HKSAR,” it has stated that “further discussions” are needed to determine jurisdiction in cases involving multiple, continuing, and inchoate offenses (i.e., attempts or conspiracy). See The Law Society of Hong Kong, *The Law Society’s Submissions on the Conflicts of Criminal Jurisdiction Between the Mainland and the HKSAR Courts*, LC Paper No. CB(2)1070/98-99(01) (Jan. 14, 1999).

244. See, e.g., Gren Manuel, *Justice on Trial in Big Spender Case*, S. CHINA MORNING POST, Oct. 27, 1998 (stating that Secretary for Security Regina Ip Lau Suk-ye was put under public pressure to answer why Hong Kong had not fought for jurisdiction over *Big Spender* case). Secretary for Justice Elsie Leung, however, has called worries about these jurisdictional questions “misconceived.” See Elsie Leung, *supra* note 238, at 57 (stating that when put “in their proper context,” *Big Spender* and *Telford Gardens* cases should not cause alarm because “there is no question of undermining the judicial jurisdiction of the SAR,” and “[a]llegations that SAR officials are not vigorously defending the SAR system are unfounded and only discredit unjustifiably the integrity of our legal system”).

245. Another possible explanation for the HKSAR administration’s reluctance to seek jurisdiction in these cases is political expediency: unlike Hong Kong, capital punishment is regularly imposed in mainland China. In the *Big Spender* case in particular, mainland prosecution and capital sentencing of the notorious leader of a violent gang was popular with a significant sector of Hong Kong’s general public despite condemnation by legal scholars. See Fu, *supra* note 231, at 277 (stating that *Big Spender* trial was popularly referred to as victory for cross-border liaison against organized crime, but that legal figures argued that “One Country, Two Systems” demanded that case be heard in Hong Kong). Of course any failure by the HKSAR administration to assert jurisdiction for that reason would be a complete abdication of the HKSAR’s obligations under international and local law and a dangerous circumvention of legal process.

thorities have begun discussions on a rendition agreement.²⁴⁶ There was no comparable agreement between the colonial administration and the PRC,²⁴⁷ in large part due to concerns about the mainland interrogation techniques, conditions of incarceration, lack of due process, failure to observe fair trial standards, and frequent use of capital punishment.²⁴⁸ These same concerns should complicate efforts to reach a rendition agreement between the HKSAR and the mainland, insofar as the international treaties in force in the HKSAR through the Basic Law, as well as the HKSAR's own Bill of Rights Ordinance (or "BORO"), should preclude the HKSAR administration from entering into any agreement that would require return of an individual under circumstances in which the protected rights would be violated. With this in mind, members of Hong Kong's legal community have demanded that any agreement contain clear minimum standards of treatment and process that satisfy international standards as well as Hong Kong law.²⁴⁹ Any agreement that lacks

246. Interview with Elsie Leung, Secretary for Justice, June 10, 1999; see Elsie Leung, *supra* note 238, at 57 (stating that both sides recognize need for agreement, but that negotiations are "complex"). The HKSAR administration has also begun a study of other countries' extradition rules. *Study of Foreign Extradition Rules*, S. CHINA MORNING POST, May 25, 1999. The HKSAR administration is also pursuing an agreement on criminal jurisdiction in cross-border cases. Interview with Elsie Leung, Secretary for Justice, June 10, 1999 (stating that Hong Kong government is working on such agreement). Article 95 of the Basic Law may provide a basis for a formal agreement. See Basic Law, *supra* note 10, at art. 95 (providing for judicial relations, including rendering assistance, between HKSAR and mainland); see also Priscilla Leung, *supra* note 238, at 18 (discussing judicial assistance between Hong Kong and mainland and possible criteria for determining proper forum in cases of concurrent jurisdiction, including whether act in question is crime in both jurisdictions and locus of most injury).

247. See GHAI, *supra* note 18, at 354. In fact, the PRC has extradition agreements with relatively few states: Belarus, Bulgaria, Kazakhstan, Mongolia, Romania, the Russian Federation, and Thailand, and has a semi-formal arrangement with Taiwan. See Dr. Hualing Fu, *One Country and Two Systems: Will Hong Kong and the Mainland Reach an Agreement on Rendition?*, HONG KONG LAWYER, Jan. 1999, at 52 (discussing China's international extradition regime).

248. See AMNESTY INTERNATIONAL REPORT, THE DEATH PENALTY IN CHINA: BREAKING RECORDS, BREAKING RULES, ASA 17/38/97, Aug. 1997 (discussing inadequate criminal justice procedures, lack of due process and respect for legal rights of accused, cruel and inhuman treatment of prisoners, and broad range of crimes for which death penalty is punishment in China, all of which have raised international concern); *supra* note 247, at 51-52 (stating that "the conclusion and operation of a rendition agreement is bound to be a difficult and tortuous process").

249. See Margaret Ng, *Rendition Negotiations Must Have a Bottom Line*, HONG KONG LAWYER, Jan. 1999, at 14 (discussing in particular need to include as bottom line safeguards cited in Hong Kong's Fugitive Offenders Ordinance). Under the Fugitive Offenders Ordinance, which contains procedural safeguards for criminal justice, Hong

such minimum standards will almost certainly be challenged in the HKSAR courts, setting the stage for another right of abode style crisis.

Moreover, even if an agreement could be reached that earnestly addressed concerns of due process, interrogation techniques, and conditions of incarceration, the mainland's use of capital punishment would pose an obstacle to rendition in serious cases.²⁵⁰ Hong Kong effectively does not have capital punishment, while the mainland uses the death penalty extensively.²⁵¹ Rendition of HKSAR prisoners to the mainland in a capital case may violate Hong Kong's obligations under the ICCPR and the Basic Law.²⁵² Any agreement on rendition should therefore contain a prohibition on the execution of prisoners returned under its terms.²⁵³

The mainland's use of criminal charges against acts of political, religious, or moral character is another obstacle to an effective agreement. Serious conflict between the systems could result if a rendition agreement were to require the HKSAR to return to the mainland an acknowledged political dissident on charges arising out of conduct that is not only not criminal in

Kong has created agreements with several countries, such as the United Kingdom and Singapore, but not yet with the PRC. See Fugitive Offenders Ordinance, Cap. 503 (Apr. 25, 1997) (stating, for example, at ¶ 10(6)(b)(iii), that parties requesting surrender of fugitive must prove that crime for which fugitive is wanted is also crime under Hong Kong law). Others cite the need to balance the interests in preventing criminals from escaping justice and the need to safeguard individual rights. Elsie Leung, *supra* note 238, at 57.

250. See Elsie Leung, *supra* note 238, at 57 (calling China's use of capital punishment "important factor" in negotiations).

251. See AMNESTY INTERNATIONAL, 1999 ANNUAL REPORT ON CHINA (visited Aug. 5, 1999) <<http://www.amnesty.org/ailib/aireport/ar99/asal7.htm>> (on file with the *Fordham International Law Journal*) (stating that at least 1067 people were executed in 1998, and that 89 people were executed during January 1999 in Beijing alone).

252. ICCPR, *supra* note 8, at art. 6; see Basic Law, *supra* note 10, at art. 28 (prohibiting unlawful deprivation of life of any resident). Analogous precedent for refusing rendition in capital cases may be found in international law in the *Soering* case, where the European Court of Human Rights refused the extradition of an accused murderer to the United States. The *Soering* Case, 28 I.L.M. 1063 (1989).

253. This situation would of course create a dilemma in capital cases involving two or more defendants, where one or more were apprehended in the HKSAR. If returned under a rendition agreement containing a capital punishment exception, then the defendants who reached the HKSAR prior to conviction may be spared execution without regard to their culpability relative to those who never left the mainland. This result would create an unwelcome incentive for serious criminals illegally to enter the HKSAR.

the HKSAR, but may also be protected under the Basic Law.²⁵⁴ Any agreement, therefore, would need to contain an exception for such political offenses.

Finally, even if an agreement is reached that contains language ensuring appropriate minimum standards and necessary exceptions, it is likely that counsel representing clients facing rendition to the mainland will challenge that effort with evidence showing that those standards are not observed in practice or that their client qualifies for the exceptions. Such arguments will place the HKSAR courts in the potentially difficult position of passing judgment on the fairness and adequacy of mainland processes.

The delegation recognizes that reaching appropriate agreements in these areas will be difficult. The delegation is concerned, however, that given the handling of the right of abode controversy, the HKSAR administration may be too willing to defer to mainland authorities in the drafting of cross-border agreements in the hope of avoiding these difficult questions. This application would only invite more serious controversy in the future.

d. Equal Application of Law

The HKSAR administration's apparent willingness to sacrifice Hong Kong's autonomy in order to avoid conflict with mainland interests is not limited to the negotiation of cross-border agreements, but may extend so far as to threaten the bedrock principle of equality under the law. In its first two years, the HKSAR has seen a number of cases that raise questions of preferential treatment.

In the *Xinhua* case, Legislative Councilor Emily Lau filed a request pursuant to Hong Kong's private information ordinance with the New China News Agency ("Xinhua") to see any personal information file Xinhua possessed about her.²⁵⁵ Xinhua is a private, Hong Kong-based company, which prior to the

254. See, e.g., Basic Law, *supra* note 10, at art. 27 (protecting Hong Kong residents freedom of speech, press, publication, and association).

255. Personal Data (Privacy) Ordinance (Cap. 486), enacted 1995 (stating that its goal is to "protect the privacy of individuals in relation to personal data"). Ms. Emily Lau requested the information from Zhou Nan, then director of Xinhua in Hong Kong. Emily Lau, *Who Is Above the Law?*, (Mar. 2, 1998) <<http://www.emilylau.org.hk/mar0298e.htm>> (on file with the *Fordham International Law Journal*). The current direc-

handover, was the unofficial representative of Beijing in Hong Kong.²⁵⁶ Although the ordinance requires production of requested information within forty days, Xinhua did not respond until ten months later, stating it did not have her file.²⁵⁷ Ms. Lau then filed a complaint with the office of the Privacy Commissioner, who one year later referred the case to the Department of Justice recommending prosecution.²⁵⁸ Secretary for Justice Elsie Leung declined to prosecute without public explanation.²⁵⁹ Chief Executive Tung publicly supported Mrs. Leung's decision, stating that Xinhua committed only "a technical breach" of the ordinance.²⁶⁰ The concern is that Xinhua, having clearly violated the ordinance, was spared prosecution by the HKSAR administration out of deference to its connections with Beijing.²⁶¹

tor of Xinhua in Hong Kong is Jiang Enzhu, who is also a Hong Kong delegate to the NPC. *Id.*

256. See Emily Lau, *Letter to Hong Kong*, broadcast on RADIO TELEVISION HONG KONG on April 12, 1998 (visited May 6, 1999) <http://www.democracy.org.hk/pastweek/may24_30/election/emily_plc_end.htm> (on file with the *Fordham International Law Journal*.) (explaining that Xinhua's multiple roles as news agency, Chinese Government Department, and front for Chinese Communist Party, known in Hong Kong as Hong Kong Macau Work Committee).

257. See Emily Lau, *No One is Above the Law*, *supra* note 255 (visited July 7, 1999) <<http://www.democracy.org.hk>> (on file with the *Fordham International Law Journal*.) (providing factual background of her case).

258. Lau, *supra* note 255.

259. *Id.*

260. See Lau, *supra* note 256 (noting that although most of Hong Kong press ignored *Xinhua* case, European media questioned Mr. Tung about it). Following the Department of Justice's decision, Ms. Lau brought a private suit against Xinhua Director Jiang Enzhou. On June 8, 1999, the High Court recognized that Ms. Lau had a bone fide complaint but dismissed the case on procedural grounds including statute of limitations and failure to identify a proper representative of the defendant unincorporated association. See Lau, *supra*, note 257 (calling it "regrettable" that hearing did not focus instead on whether Xinhua violated Privacy Ordinance).

261. Although some argued that Xinhua should be considered an organ of the PRC, and therefore immune from prosecution, no finding of immunity supported the administration's decision. On April 15, 1998, the Provisional LegCo passed the Adaptation of Laws (Interpretive Provisions) Ordinance, a predominantly technical ordinance aimed at adapting the laws to reflect Hong Kong's new post-colonial status by, among other things, substituting references to the "Crown" with references to the "State," including not only the HKSAR Government and the Central Government in Beijing, but also the Central Government's subordinate organs. See Adaptation of Laws (Interpretive Provisions) Ordinance, Ordinance No. 26 of 1998, passed by PRC on April 15, 1998, section 24 [hereinafter Adaptation of Laws Ordinance]; see also CHEN, *supra* note 41, at 38 (stating that HKSAR Government has admitted that definition of "State" includes office of Commissioner of PRC Foreign Ministry in Hong Kong, Chinese military forces in Hong Kong, and Hong Kong Branch of Xinhua News Agency). It is unclear whether Xinhua should be considered a state organ and if it were, whether immunity

This case raises questions about the HKSAR administration's willingness and ability to preserve Hong Kong's autonomy and equality of all parties before the laws of the HKSAR.

The *Sally Aw* case raises the same concerns about those affiliated with the HKSAR administration. That case involved an alleged conspiracy to defraud advertisers of the English-language daily *The Hong Kong Standard* by inflating circulation figures. The prosecution charged and convicted two senior executives and a former employee.²⁶² The owner of the paper, Ms. Sally Aw Sian, was named in the charging instrument as a co-conspirator but was neither charged nor compelled to testify at the January 1999 trial.²⁶³

The Department of Justice initially refused to explain why Ms. Aw was named but not charged, stating that the case was pending. The department then indicated that it was investigating the decision, with Secretary for Justice Elsie Leung stating publicly that she would have to wait until the investigation was complete before commenting.²⁶⁴ This reply gave the impression that either the Secretary for Justice did not know why the decision was made, or that the "investigation" was no more than an attempt to discover an acceptable basis for the decision after the fact. On February 7, 1999, Grenville Cross, the Director of Public Prosecutions reported that the decision not to prosecute was

for Xinhua, as such, would not violate the Basic Law. Article 22 of the Basic Law provides that all governmental departments "shall abide by the laws of the Region." Basic Law, *supra* note 10, at art. 22; Lau, *supra* note 256. Qualifying Xinhua as a state organ may also violate Section 3 of the Interpretation and General Clauses Ordinance, which provides that an organization that exercises commercial functions cannot be regarded as a state organ. See Interpretation and General Clauses Ordinance, Cap. 1, Section 3; see also *Xinhua Mocks the Law*, press release of the Hong Kong Human Rights Monitor, June 22, 1999 (discussing Xinhua's commercial activities).

262. The conspirators allegedly inflated circulation figures by forming a dummy corporation through which they purchased and immediately destroyed thousands of copies of the paper each day. Jimmy Cheung, *Justice Chief Blasted over Sally Aw Decision*, S. CHINA MORNING POST, Feb. 4, 1999. General manager Henrietta So Shuk-wa was sentenced to six months in jail. *Id.* Finance manager Tang Cheong-shing and ex-circulation director David Wong Wai-shing were each sentenced to four months in jail. *Id.*

263. Ms. Sally Aw is a member of the Chinese People's Political Consultative Conference and is reportedly a friend of Chief Executive Tung. Clive Buddle, *Rich Handed License To Break Law*, S. CHINA MORNING POST, Feb. 5, 1999; Cheung Yi, *The Sally Aw Case: Fears for Faith in Judicial System*, S. CHINA MORNING POST, Feb. 5, 1999; Cheung, *supra* note 262.

264. See Cheung, *supra* note 262.

“solely due to lack of evidence.”²⁶⁵ In subsequent remarks before the LegCo’s Panel on the Administration of Justice and Legal Services, Secretary Leung added that although insufficient evidence was the main factor, the “public interest” was also considered.²⁶⁶ She went on to explain that there was some fear that prosecution of Ms. Aw would lead to the collapse of her media enterprise, which would, in the eyes of the administration, send a “very bad message to the international community.”²⁶⁷ These comments were taken by many in Hong Kong as a startling admission that the HKSAR’s prosecution policy was decided “not by equality before the law but by how wealthy you are,”²⁶⁸ with one standard for the wealthy and politically influential and another for the poor.²⁶⁹

Equality under the law is a fundamental principle applicable to Hong Kong through the Basic Law,²⁷⁰ the BORO,²⁷¹ and the ICCPR.²⁷² Taken together, the *Xinhua* and *Sally Aw* cases raise serious concerns about the HKSAR administration’s commitment to that principle. Although the delegation recognizes the HKSAR administration’s desire to avoid conflict as it implements the “One Country, Two Systems” experiment, it must not do so at the expense of fundamental legal principles and safeguards or without due regard for Hong Kong’s autonomy, rule of law, and international legal commitments.

265. See *Aw Ruling: Solely Due to Lack of Evidence*, S. CHINA MORNING POST, Feb. 8, 1999. This explanation begged the question of how the Secretary for Justice could apparently not know the state of the evidence in the case until after the trial had concluded, and further, failed to explain why Ms. Aw was not called to testify. *Id.*

266. *Id.*

267. See Cheung, *supra* note 262.

268. See Cliff Buddle, *Leung Faces Wrath of Barristers*, S. CHINA MORNING POST, Feb. 5, 1999 (quoting Senior Counsel Gerard McCoy).

269. See Buddle, *supra* note 263 (quoting multiple lawyers and lecturers on their reactions to Secretary Leung’s decision not to prosecute, citing multiple critical comments of Hong Kong lawyers). Cf. Grenville Cross, *Secretary for Justice Acted with Integrity*, HONG KONG LAWYER, Mar. 1999, at 21 (defending Secretary Leung’s decision and subsequent comments). Lawyers also claimed that the comments give license to other tycoons to commit crimes and then avoid prosecution by citing the damage it would do to their business. The Hong Kong Bar Association has called for an independent counsel to reconsider whether to prosecute Sally Aw. See Chueng, *supra* note 263.

270. See Basic Law, *supra* note 10, at art. 25 (“All Hong Kong residents shall be equal before the law.”).

271. Hong Kong Bill of Rights Ordinance, Art. 22.

272. ICCPR, *supra* note 8, at Art. 26.

e. Bilingualization

In at least one crucial respect, the resumption of Chinese sovereignty promises to bring Hong Kong closer to international rule of law standards by making the HKSAR's common law system more accessible to the territory's vast Chinese-speaking majority. General international standards typically direct governments to provide adequate access to legal services regardless of language.²⁷³ The Joint Declaration in effect mandates adequate linguistic access to the justice system by assuming that Chinese shall be the HKSAR's official language while additionally permitting the use of English.²⁷⁴ Implementing this obligation, Article 9 declares that "[i]n *addition* to the Chinese language, English *may also* be used as an official language by executive authorities, legislature, and judiciary" of the HKSAR.²⁷⁵

Approximately ninety-five percent of Hong Kong's population speaks Cantonese, which is one of the main Chinese dialects.²⁷⁶ For most of the colonial period, however, Hong Kong's executive, legislative, and judicial functions were conducted almost entirely in English.²⁷⁷ With the reversion of sovereignty has come an effort to create a truly bilingual system of governance.²⁷⁸ This effort should be commended for its ability to make

273. Article 2 of the U.N. Basic Principles on the Role of Lawyers, for example, declares that:

Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

G.A. Res. 45/121, U.N. GAOR, 45th Sess. (1990); G.A. Res. 45/166 U.N. GAOR, 45th Sess. (1990) (emphasis added). As with the Basic Principles on the Independence of the Judiciary, see *Basic Principles*, *supra* note 12. The Basic Principles, while not comprising a treaty, have received the approval of the General Assembly and reflect a considered global consensus that provides evidence of customary international law.

274. See Joint Declaration, *supra* note 17, at annex I, art. I.

275. See Basic Law, *supra* note 10, at art. 9. (Emphasis added.)

276. See GHAI, *supra* note 18, at 347. Cantonese is the native language in Hong Kong, while Mandarin (locally known as "Putonghua") is spoken in most of mainland China. *Id.* The two languages have different written forms, as Hong Kong uses the classical characters and China uses the simplified characters. *Id.*

277. See *id.* at 346-49 (noting also that in some lower level courts, such as juvenile court or coroner's inquiries, courts could choose to hold proceedings in either language).

278. In 1974, the colonial government passed the Official Languages Ordinance that for the first time designated both English and Chinese the official languages for all

the HKSAR government and Hong Kong's legal system in particular more accessible to the majority of Hong Kong's residents, thereby strengthening the rule of law and Hong Kong's fledgling democratic institutions.

Already significant steps toward this goal have been achieved. All of the laws of the HKSAR have been translated and published in equally authentic English and Chinese versions,²⁷⁹ and the HKSAR judiciary is establishing a basic Chinese-language version of the common law by translating significant prior English-language court decisions from Hong Kong and other jurisdictions.²⁸⁰ The judiciary has also been developing a legal glossary to establish and record accepted Chinese equivalents to established English common law terms.²⁸¹ As for court access, sixty-five percent of lower-level court proceedings are now conducted in Chinese.²⁸² Although most upper level legal proceedings are still conducted in English,²⁸³ recent legislation allows

government communications with the public. See Official Languages Ordinance (Cap. 5) 1974, Feb. 15, 1974, ¶ 3(1). In addition, this Ordinance provided that both languages "possess equal status and . . . enjoy equality of use." *Id.* ¶ 3(2). In 1987, the government amended the ordinance to require all legislation be enacted and published in both English and Chinese and to provide for the translation of all prior ordinances into Chinese. See Official Languages (Amendment) Ordinance, 1987, ¶ 4 (creating Bilingual Advisory Committee to confirm authenticity of both versions); Interpretive and General Clauses (Amendment) Ordinance (Cap. 1) 1987, ¶ 10(b) (providing that English language text and Chinese language text of ordinance are equally authentic, presumed to have same meaning, and where comparison of two versions discloses difference of meaning which rules of statutory interpretation do not resolve meaning which best reconciles texts shall be adopted); see also Law Drafting Division of the Department of Justice, *A Paper Discussing Cases Where the Two Language Texts of an Enactment are Alleged to be Different*, May 1998 (creating further explicit guidelines for reconciliation between two versions).

279. *Id.* § 1.5. Both language texts of all laws are also readily available on a website attached to the Department of Justice's website. See *BLIS on the Internet*, (visited May 6, 1999) <<http://www.justice.gov.hk/blis.nsf>> (on file with the *Fordham International Law Journal*).

280. See interview with Patrick Chan, Chief Justice of the High Court, in Hong Kong (June 10, 1999). The Committee for a Bilingual Legal System is currently choosing the most important common law cases from both Hong Kong and other common law jurisdictions to translate into Chinese. *Id.*

281. HONG KONG COURT INTERPRETERS GRADE, JUDICIARY, A GLOSSARY OF LEGAL EXPRESSIONS. See also interview with Patrick Chan, Chief Justice of the High Court, in Hong Kong, June 10, 1999.

282. Interview with Patrick Chan, Chief Justice of the High Court, in Hong Kong, June 10, 1999.

283. *Id.* Sixty-five percent of all cases in the magistrates courts are now heard in Chinese, but only 35% of all cases in the district courts and 15% of cases in the High Court are heard in Chinese. *Id.*

members of the court, counsel, parties, and witnesses to any proceeding to use either or both languages.²⁸⁴

One serious concern, however, is that rather than develop a truly bilingual system of co-equal languages, Hong Kong will increasingly adopt the Chinese language and abandon English.²⁸⁵ The delegation met with members of the legal profession and judiciary who expressed this concern, citing as evidence a perceived decline in English-language fluency among members of the bar and law students.²⁸⁶ The gravity of this concern rests in the understanding that English is the language of the vast body of precedent and history that constitutes the common law tradition. This tradition includes not only the case law of pre-1997 Hong Kong, but also other common law systems like the Australia, Canada, Great Britain, and the United States.²⁸⁷ A deterioration of English-language usage in Hong Kong risks weakening reliance on this established body of jurisprudence. Moreover, the common law is constantly evolving. A deterioration of English-language usage risks isolating Hong Kong's system not only from its own past, but also from contemporary developments in the common law.

The delegation nonetheless finds it surprising that two and a half years after the turnover, there has yet to be a case argued in Hong Kong's highest court in anything but English. In 1995 the perception among bar leaders was that the introduction of Chinese would proceed at a more rapid pace. Indeed, several prominent members of the bar, including native-born but English-educated barristers, advised us that they were brushing up on their Chinese because they would not otherwise feel comfortable arguing in that language.

284. Official Languages (Amendment) Ordinance, Cap. 5, ¶ 5 (in force June 11, 1999). Finally, to combat the lack of proficiency in Cantonese among many members of the judiciary, the judiciary has begun sending several judges to Beijing each year for an intensive Chinese language training. See Interview with Patrick Chan, Chief Justice of the High Court, June 10, 1999.

285. Interview with Audrey Eu, Chair of the Hong Kong Bar Association, in Hong Kong, June 10, 1999.

286. *Id.* Interview with Professor Albert Chen, University of Hong Kong, in Hong Kong, June 7, 1999.

287. The Joint Declaration and the Basic Law recognize a role for the international common law tradition in adjudication by Hong Kong courts. See Joint Declaration, *supra* note 17, at § III (1984) (stating that HKSAR courts may refer to precedents in other common law jurisdictions); see also Basic Law, *supra* note 10, at art. 84 (authorizing courts to refer to precedents in other common law jurisdictions).

Judges on the higher courts have told us that English is the sole language used because some of the members of the Court, including visiting judges sitting on the CFA, speak only that language. But it is difficult to believe that Hong Kong can permanently maintain a legal system in a language other than that of its sovereign. It is of course difficult to evaluate how much of the desire to continue litigating exclusively in English is motivated by the sense that English and the common law are inexorably entwined and how much is the desire to adhere to that which is familiar and comfortable. Further, those that hope the interchange of legal thinking between Hong Kong and the mainland may have a salutary impact on China's legal system will find that hope diminished if the belief prevails that the common law is a legal system that is entirely dependant on a foreign tongue.

Modern simultaneous translation devices exist and are utilized by many courts to enable proceeding to go forward among participants who speak different languages. While we recognize that using more than a single language creates difficulties, we believe that gradual but accelerating adoption of the use of Chinese in Hong Kong courts is necessary if the courts are to be fully accessible to the populace.

Generally, the delegation strongly applauds the efforts that the HKSAR has made towards greater bilingualization. In contrast to efforts that seek to make Hong Kong's legal system a "hybrid" of common law and mainland principles, making the common law system available in both Chinese and English clearly comports with general international standards, the Joint Declaration and the Basic Law. We note local concerns about the diminution of the common law should Chinese supplant English. Nonetheless, the delegation believes that greater access to the system for the majority Chinese-speaking population would not only enhance its fairness, but also would actually broaden the support it currently commands through increased understanding.

F. *Conclusions*

The delegation proceeds on the premise that the PRC's pledge to maintain "One Country, Two Systems" seeks to preserve the rule of law as Hong Kong has known it. This commitment means respecting the common law legal system that makes

Hong Kong among the most stable, open, and productive societies both in Asia and the world. The delegation concludes that the right of abode controversy represents an assault on this system that merits the attention and concern of lawyers around the world. This assault came with unexpected swiftness, taking place within two years of the resumption of Chinese sovereignty. It also comes from an unexpected quarter, prompted not by the mainland but by the Hong Kong administration itself.

Even in isolation, the right of abode controversy is significant because it challenges Hong Kong's common law traditions on several fronts at once. First, the HKSAR administration undermined the rule of law by failing to implement the CFA's judgment. Second, the request for a reinterpretation was at worst illegal and at best inconsistent with alternative interpretations of the Basic Law that would have better secured judicial independence. Third, the administration's failure to pursue the amendment process, including interim measures that might have allowed that process to go forward, abandoned a course that might have addressed the alleged immigration crisis while avoiding significant costs to the rule of law. Perhaps most importantly, the request for reinterpretation helped introduce the concept of Hong Kong as a "hybrid" legal system, a prospect that certain HKSAR officials apparently view as an opportunity for closer ties with Beijing rather than as fundamentally inconsistent with the common law system that Beijing has pledged to uphold.

Although Beijing itself appears not to have instigated the right of abode crisis, the delegation concludes that its subsequent actions largely confirm these concerns. Not only did the NPCSC grant the HKSAR executive everything it requested, but it also went further by castigating the CFA for not having referred all relevant provisions to it in the first place. In so doing, the NPCSC engaged in an instrumental analysis that takes a significant step toward realizing a "hybrid" system.

Ironically, the HKSAR administration's insistence that it took these steps it did only to meet an unusual and compelling crisis acknowledges that Hong Kong's legal system paid a price for reinterpretation. Other cases working their way through the Hong Kong judiciary may soon give the HKSAR leadership an opportunity to demonstrate whether reinterpretation will be an extraordinary measure. The need to conclude agreements with the mainland with regard to jurisdictional conflicts will further

give the administration the opportunity to defend Hong Kong's high degree of legal autonomy. Should the right of abode controversy turn out to have been an isolated event, as the administration maintains, the delegation believes that the damage done will prove neither fundamental nor lasting. If, however, further requests lead to further reinterpretations, then Hong Kong's common law traditions will continue to give way to mainland legal conceptions, further undermining China's "One Country-Two Systems" pledge.

II. INTERPRETATION V. AMENDMENT: *LESSONS FOR THE STATE OF DEMOCRACY IN HONG KONG*

As discussed in Part I, the HKSAR administration bypassed the response most democratic and consistent with the Rule of Law when it dismissed the possibility of amendment of the Basic Law as a means of addressing the right of abode crisis. Indeed, some have suggested that the administration's reluctance to seek an amendment was motivated in part by concern that the amendment process might be used to accelerate the pace of democratization.²⁸⁸ Notwithstanding the merits of this claim, the administration, in its quest for a quick response to the feared crisis, ignored possible legislative options and discounted the value of popular deliberation regarding the status and meaning of the Basic Law.²⁸⁹ Its ability and willingness to do so reflects the political and structural weaknesses of Hong Kong's emerging democratic institutions.

This Part first examines the status of democracy in Hong Kong through the lens of the right of abode controversy. The first section discusses the HKSAR administration's attitude toward democratization within the context of the debate over amendment to the Basic Law. It also reviews the interaction between the Chief Executive and members of LegCo regarding the decision to seek interpretation, highlighting missed opportunities for democratic participation in the referral process. Finally, moving away from the right of abode controversy, this Part re-

288. See, e.g., Interview with Margaret Ng, Legislative Councilor, Hong Kong, (June 7, 1999) (suggesting that administration may fear that if Basic Law can be amended to solve right of abode crisis, then it could be amended to accelerate pace of democratic reforms).

289. See *supra* notes and accompanying text at 146-56.

views the electoral system and the limits on legislative power in greater detail. It assesses Hong Kong's progress towards full democracy, measuring that progress against the Joint Declaration, the Basic Law, and Hong Kong's obligations under international law.

A. *Democracy, Amendment, and the Right of Abode*

As Part I argues, in response to the Court of Final Appeal's decision in the right of abode cases, the HKSAR administration never seriously considered two legally sound options within a common law jurisdiction: implementing the CFA decision, or invoking the procedure under Article 159 of the Basic Law for amendment of the Basic Law.²⁹⁰ Part I criticized the administration's decision to seek reinterpretation from the standpoint of the Rule of Law.²⁹¹ This section, in turn, considers what the decision reveals about the status of democracy in Hong Kong and what it may portend for the future of democratic institutions in the HKSAR.

As a response to the right of abode controversy, any argument favoring amendment over interpretation must acknowledge at the outset that the mechanism for amending the Basic Law is not highly democratic. Indeed, the amendment procedure severely limits the role of the HKSAR's citizenry. Article 159 of the Basic Law vests the power to amend in the NPC.²⁹² Bills to amend the Basic Law may be proposed by the NPCSC, the State Council, or by the Hong Kong government.²⁹³ If the bill to amend the Basic Law originates from the Hong Kong government, then Article 159 directs the Hong Kong deputies to submit the bill to the NPC only after it has cleared three hurdles: (1) the consent of two-thirds of the deputies themselves; (2) the

290. Basic Law, *supra* note 10, ch. VIII, art. 159.

291. See *supra* notes and accompanying text 115-30; 287-88.

292. See Basic Law, *supra* note 10, ch. VIII, art. 159. For a discussion of the amendment process and its limitations, see GHAI, *supra* note 18, at 177-82. For an evaluation of the amendment process in response to the right of abode controversy, see HONG KONG HUMAN RIGHTS MONITOR, SUBMISSION OF THE HKHRM TO THE LEGISLATIVE COUNCIL PANEL ON CONSTITUTIONAL AFFAIRS ON THE PROCEDURE FOR THE AMENDMENT OF THE BASIC LAW (March 15, 1999) [hereinafter SUBMISSION OF THE HKHRM].

293. The Basic Law provides that "[t]he power to propose bills for amendments to this Law shall be vested in the Standing Committee of the National People's Congress, the State Council, and the Hong Kong Special Administrative Region." Basic Law, *supra* note 10, ch. VIII, art. 159.

consent of two-thirds of all the members of LegCo; and (3) the approval of the HKSAR's Chief Executive.²⁹⁴ After clearing these hurdles, the proposal must then be adopted by the NPC in order to amend the Basic Law.²⁹⁵

One practical implication of this procedure is that the citizens of Hong Kong are not ensured direct participation in the amendment process—there is no formal mechanism for popular approval of a proposed amendment.²⁹⁶ Moreover, their indirect participation through their popularly-elected representatives in LegCo is guaranteed only when the bill to amend originates from the HKSAR.²⁹⁷ Should the NPC choose to amend the Basic Law on its own proposal, the Hong Kong deputies to the NPC would be the only direct voice of Hong Kong.²⁹⁸ Although the Basic Law gives the residents of the HKSAR the right to elect deputies to the NPC,²⁹⁹ the Election Council nominated by the NPCSC chooses those deputies.³⁰⁰

Despite these substantial limitations on the amendment process, from a democratic standpoint, the process is superior to reinterpretation in several respects.³⁰¹ First, because a bill to amend Articles 22 and 24 of the Basic Law would have originated from the HKSAR,³⁰² it would have required the ap-

294. *Id.*

295. *Id.*

296. For a discussion of the desirability of adopting such a mechanism, see SUBMISSION OF THE HKHRM, *supra* note 292.

297. See Basic Law, *supra* note 10, ch. VIII, art. 159.

298. The power of the NPC to amend the Basic Law is qualified to some degree by a requirement that the NPC must solicit and consider the views of the Committee for the Basic Law ("CBL" or "Committee"), a group comprised of six mainland members and six HKSAR members qualified to give expert advice on the interpretation and functions of the Basic Law. The members of the CBL are not elected. See GHAI, *supra* note 18, at 196 (describing composition of Committee).

299. See Basic Law, *supra* note 10, ch. II, art. 21.

300. See GHAI, *supra* note 18, at 255 (suggesting that this process may not comport with requirements of Basic Law).

301. From a common law standpoint, the amendment course is superior in the sense that it is clearly legal under the Basic Law in contrast to the reinterpretation route. Moreover, it comports with the preservation of the Rule of Law and with respect for the finality of Court of Final Appeals interpretations of the Basic Law under a common law system of statutory interpretation. See *supra* notes 133-36 and accompanying text.

302. See Interview with Margaret Ng, Legislative Councilor, Hong Kong (June 7, 1999) (noting that, although possibility of interpretation was discussed in Beijing in immediate aftermath of CFA decision, amendment was never raised). Legislative Councilor Margaret Ng suggested that the reluctance of the part of the NPC to propose (or

proval of two-thirds of the members of LegCo.³⁰³ The administration cited the impossibility of achieving a supermajority of members of LegCo or the Hong Kong delegates to the NPC as a justification for seeking interpretation.³⁰⁴ Yet, this supermajority requirement is designed precisely to ensure considerable debate and consensus among the directly elected representatives of the citizens of Hong Kong, the representatives of the business and professional communities, and the administration advocates of the bill before any change to the Basic Law is made.³⁰⁵

Second, the extended time frame for the amendment process would have permitted a longer period of public education on the issue and the consolidation of public support for or opposition to amending the Basic Law.³⁰⁶ Although this delay was also cited by the administration as a reason to reject the amendment route,³⁰⁷ any problems created by the delay might have been addressed through interim legislation.³⁰⁸ As noted in Part I, this possibility was apparently ignored by the administration.³⁰⁹

The amendment process also would have guaranteed a more careful consideration of the implications of altering the Basic Law to limit a fundamental right under Section III. Although a consensus in favor of amendment might have emerged, the process should have allowed for careful deliberation before the scope of basic rights was restricted in favor of

accept proposals for) amendments to the Basic Law stemmed in part from unwillingness to admit that change to the law might be necessary. *Id.*

303. See Basic Law, *supra* note 10, ch. VIII, art. 159.

304. See Interview with Mrs. Anson Chan, Chief Secretary for Administration, Hong Kong (June 9, 1999).

305. Under the current composition of LegCo, the margin necessary for amendment could be sustained by a combination of all of the functional constituency seats (30) plus the Election Committee seats (10); however, it is likely, as a practical matter, to require the support of many of the popularly-elected members. See Basic Law, *supra* note 10, ch. VIII, art. 159; see also GHAI, *supra* note 18, at 177-82 (discussing entrenchment of Basic Law). Cf. Owen M. Fiss, *Hong Kong Democracy*, 36 COLUM. J. TRANSNAT'L L. 493 (1998) (noting tenuous status of entrenchment of Basic Law as national law of China).

306. The CFA decision was handed down on January 29, 1999. The administration first announced its intention to seek interpretation at the end of April and submitted its request on May 20th. In contrast, the earliest date on which an amendment could have been considered was March 2000.

307. See Interview with Mrs. Anson Chan, Chief Secretary for Administration, Hong Kong (June 9, 1999).

308. See *supra* note 144 and accompanying text (discussing interim legislation).

309. See *id.*

economic or social considerations. Finally, and perhaps most importantly, the amendment process would have allowed for the participation of the Hong Kong people in the constitutional law-making process for the first time.³¹⁰ In short, the procedure for amending the Basic Law, though imperfect from a democratic standpoint, would have afforded time for popular participation in the process, public debate, and serious reflection by the citizens whose rights were affected.

The procedure followed by the administration in seeking a reinterpretation of Articles 22 and 24 included no comparable provisions for public participation. In contrast to the relatively clear procedures for its formal amendment, the Basic Law makes no mention of the authority of the administration to seek an interpretation from the NPCSC.³¹¹ Proceeding without a constitutional framework, the administration was left to create its own procedures for referral to the NPCSC. In so doing, it repeatedly bypassed opportunities to engage the public in the process through the public's elected representatives.

First, the administration was criticized for manipulating public opinion rather than fostering informed public debate.³¹² At the end of April, the administration released the preliminary results of a survey designed to measure the magnitude of the immigration and almost simultaneously announced its decision to seek interpretation. As a result, the administration's actions left very little time for independent assessment of the survey results. It also did not account for necessity and wisdom of seeking an interpretation from Beijing. Moreover, the administration's emphasis on the dire consequences of the feared immigration

310. The Basic Law was a product of the negotiations between China and Great Britain, its parameters set out in the Joint Declaration. See Joint Declaration, *supra* note 17. The role of the people of Hong Kong was rather limited, and the document was never voted on or approved by them. See GHAI, *supra* note 18, at 41-43 (noting limited role of Hong Kong people in negotiations and concluding that "leaders and people of Hong Kong were used opportunistically and cynically by both sovereigns"); FISS, *supra* note 305 at 497 (noting that although "[a] number of prominent Hong Kong figures participated in the drafting of the Basic Law, . . . they hardly dominated that process; in any event they were chosen by Beijing, not by the people of Hong Kong").

311. For a discussion of the administration's justification of this authority, see *supra* notes 110-15 and accompanying text.

312. See, e.g., JOINT STATEMENT OF HONG KONG HUMAN RIGHTS MONITOR, HONG KONG HUMAN RIGHTS COMMISSION, JUSTICE, AND SOCIETY FOR COMMUNITY ORGANIZATIONS, (May 3, 1999) (calling upon administration "[t]o stop indulging in propaganda, and, instead to promote rational discussion on viable solutions").

for social resources triggered an understandably panicked response, primarily among the poorer economic segments of Hong Kong society.³¹³

Beyond manipulating public opinion, the administration was also criticized for its failure to consult with LegCo regarding the decision to seek an interpretation.³¹⁴ The administration did seek and obtain a resolution from LegCo supporting the plan to seek interpretation; however, the vote was taken only after the decision in favor of interpretation had been made by the administration.³¹⁵ Amendment was not presented as an alternative. In protest, almost one-third of LegCo members walked out of the vote.³¹⁶

As for public debate over the interpretation request, the administration did not release the text of the request for interpretation until over three weeks *after* it had been submitted to the State Council.³¹⁷ Mrs. Anson Chan, Chief Secretary for Administration, explained this decision to the delegation as unfortunate but necessary: "We would have liked to have published the text of our request but felt that the State Council should make that decision."³¹⁸

The only formal legal channel for opponents to express their disagreement with a request for interpretation by the administration appears to be through communication with the Committee for the Basic Law ("CBL" or "Committee").³¹⁹ The Basic Law, however, neither provides a mechanism for consulting with the CBL, nor does it oblige the CBL to take those views

313. See Interview with Dr. Stephen Ng, Hong Kong Human Rights Monitor, in Hong Kong (May 31, 1999). This perception was reconfirmed through the two weeks during which the delegation met with social service providers and advocacy groups.

314. See, e.g., Democratic Party Press Release, Democrats Urge Chief Executive to Consult Democratically-Elected Re: Right of Abode (May 3, 1999) (reproducing text of letter requesting meeting with Chief Executive Tung).

315. See *Basic Law Under Question*, S. CHINA MORNING POST, July 8, 1999.

316. See *id.*

317. The request was submitted on May 20 and not released until June 11. See *supra* note 138.

318. See Interview with Mrs. Anson Chan, Chief Secretary for Administration, Hong Kong (June 9, 1999).

319. According to Anson Chan, this would have been the appropriate venue for opponents to make their case. *Id.* Naturally, because the Basic Law does not explicitly authorize such a request by the administration, it is not surprising that it does not provide a procedure for objecting to the request.

into account.³²⁰ Furthermore, the Basic Law specifies no procedure through which opponents might express their views directly to the State Council or the NPC.³²¹

Having been largely foreclosed from the process within the HKSAR and with no clear option for participating in the interpretation process, members of LegCo sought to present their views to Beijing directly. When two LegCo members attempted to fly to Beijing to make the case against interpretation, however, they were barred from boarding the plane at the Hong Kong airport at the direction of mainland authorities.³²² When a representative of this same group attempted to present its views to a visiting Beijing official, he was again prevented.³²³ In short, after rejecting the more democratic alternative of amendment, the administration bypassed every opportunity to encourage democratic participation in the interpretation process.

The administration's decision to seek interpretation rather than amendment does not by itself pose a serious threat to democracy in Hong Kong. Nor is it the contention of the delegation that its failure to do so violated international obligations regarding democratic participation *per se*. Rather, the government's response to the crisis represents a missed opportunity to strengthen democratic values in Hong Kong by encouraging public participation in the debate over the status and meaning of the Basic Law. Moreover, the deliberate foreclosure of representatives of pro-democracy groups from participating in the referral process does not bode well for the development of democratic institutions in Hong Kong.

320. See GHAI, *supra* note 18, at 196-97 (discussing role of CBL and procedures surrounding it).

321. Despite the lack of a formal channel, opponents of reinterpretation did attempt such communication. See Democratic Party Press Release, Democratically-Elected Members of LegCo Demand Meeting with State Council to Oppose Reinterpretation of the Basic Law (June 3, 1999). As one LegCo member pointed out, however, at least 12 LegCo members are not permitted to travel to Beijing. See Interview with Emily Lau, Legislative Councilor, Hong Kong (June 1, 1999).

322. See Li, *supra* note 139, at 1. Ironically, a group of student protestors successfully presented a petition of 15,000 names opposing reinterpretation to the NPCSC representatives in Beijing. See also Emily Lam, *Legislators Barred from Mainland Soil*, S. CHINA MORNING POST, July 8, 1999.

323. See No Kwai-Yan, *Beijing Chief Shielded from Petition*, S. CHINA MORNING POST, June 30, 1999, at 2.

B. *International Obligations and Domestic Structures*

Although international law guarantees the people of Hong Kong the right to shape and to participate in their government, this right was realized only belatedly and partially under British sovereignty³²⁴ and disregarded almost entirely in negotiations over the terms of reversion to Chinese sovereignty.³²⁵ Nevertheless, several important international human rights instruments are relevant to Hong Kong and provide the standard against which the democratic institutions of the HKSAR must be measured.

The Universal Declaration of Human Rights enshrines a strong commitment to democratic principles.³²⁶ Article 21(1) states that “[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives.”³²⁷ It continues, “[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”³²⁸ Thus, the Declaration not only mandates that citizens be permitted a voice in their own government but also requires, within broad parameters, the direct accountability of the government to the people in its exercise of power.³²⁹

The ICCPR,³³⁰ which was ratified by Britain and applied to

324. The ICCPR was ratified by Britain and applied to Hong Kong in 1976 with an express reservation regarding the obligation to create and elect legislature. See ICCPR, *supra* note 8. The same reservation was included in the Hong Kong Bill of Rights Ordinance (or “BORO”), which was intended to implement the ICCPR in Hong Kong’s domestic law. See Hong Kong Bill of Rights Ordinance, Part III, § 13.

325. See GHAI, *supra* note 18, at 43.

326. See Universal Declaration, *supra* note 6. Although not legally binding when adopted, much of the Universal Declaration of Human Rights (“Declaration”) is regarded as part of customary international law. Whether this status extends to the guarantee of Article 21 is less clear. See Hurst Hannum, *The Status and Future of the Customary International Law of Human Rights*, 25 GA. J. INT’L & COMP. L. 287 (1996). Nevertheless, the Declaration does represent an international consensus regarding human rights aspirations and therefore provides a relevant standard of measurement. See NIHAL JAYAWICKRAMA, *HONG KONG AND THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 152-62 (Raymond Wacks, ed. 1995).

327. Universal Declaration, *supra* note 6, art. 21(1).

328. *Id.*

329. See Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT’L L. 539 (1992); Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. J. 77 (1988).

330. ICCPR, *supra* note 8.

Hong Kong in 1976, states that every citizen has the right "to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and be elected at genuine elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."³³¹ Article 26 adds that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law."³³²

It is undisputed that the ICCPR continues to apply to Hong Kong in some form. In the Joint Declaration, China undertook to continue in force the human rights treaties to which the United Kingdom was a signatory on behalf of Hong Kong.³³³ Moreover, because human rights treaties are increasingly regarded as surviving a change in sovereignty, the ICCPR and other treaties may be viewed as applicable to Hong Kong under international law even without this express commitment by China.³³⁴

The rights protected by these treaties are also incorporated in the domestic law of Hong Kong regardless of the precise source of international obligation. The Basic Law provides that "the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and international labor conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region."³³⁵ The Bill of Rights Ordinance also incorporates virtually all of the rights secured by the ICCPR.³³⁶

The scope of application and enforceability of these treaties with respect to individual rights will be discussed in greater

331. *Id.* art. 25. The ICCPR also guarantees the right to self-determination. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) (defining self-determination as "the right of a people to determine its collective political destiny in a democratic fashion").

332. ICCPR, *supra* note 8, art. 26.

333. The Joint Declaration states that "[t]he provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force." Joint Declaration, *supra* note 17, annex I, § XIII. For a discussion of democracy and human rights in Hong Kong as an international obligation of China, see Michael C. Davis, *International Commitments To Keep: Hong Kong Beyond 1997*, 22 S. ILL. L.J. 293 (1998).

334. See GHAI, *supra* note 18, at 418-19.

335. Basic Law, *supra* note 10, ch. IV, art. 39.

336. See Hong Kong Bill of Rights Ordinance, Part II, arts. 1-23.

length in Part III.³³⁷ For the purposes of China's obligation to establish a representative government in Hong Kong, however, the critical issue is not the overall applicability of the ICCPR but the status of the reservations entered by the United Kingdom with respect to Article 25. Article 25, quoted above, guarantees the right of citizens to participate in government through elections.³³⁸ When ratifying the ICCPR, the United Kingdom entered the following reservation: "The Government of the United Kingdom reserves the right not to apply sub-paragraph (b) of Article 25 in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong."³³⁹

The issue of whether this reservation was incorporated into the Basic Law to qualify the applicability of the ICCPR is a question still open to debate. Some have argued that, by referring to the ICCPR with the qualifying phrase "as applied to Hong Kong," and by providing that the provisions "shall remain in force,"³⁴⁰ the Basic Law incorporated the human rights treaties only to the extent that they were implemented under British rule.³⁴¹ Thus, not only would reservations regarding the establishment of an elected legislature continue to limit the scope of the treaty, but further legislation would also contravene the Basic Law.³⁴²

In the view of the delegation, however, the stronger arguments weigh against recognizing the continuing effect of such qualifications. This view points out that the validity of the reservation under the ICCPR was questionable as applied to the United Kingdom prior to the creation of the first legislative council in 1985. In 1994, the Human Rights Committee (or "HRC") issued a General Comment that reservations that derogate from rights may be invalid.³⁴³ Specifically, the HRC stated

337. See Part III, *infra* text accompanying notes 423-36.

338. See ICCPR, *supra* note 8, art. 25.

339. *Id.*

340. Basic Law, *supra* note 10, ch. IV, art. 39 (emphasis added).

341. The legal sub-group of the Preliminary Working Committee for the Joint Declaration seemed to hold this view. See George Edwards & Johannes Chan, *Hong Kong's Bill of Rights: Two Years Before 1997* (reproducing views of this subgroup).

342. It is worth noting that the Bill of Rights Ordinance explicitly incorporates the language of this reservation stating that Article 21 (Right to Participation in Public Life) "does not require the establishment of an elected Executive or Legislative Council in Hong Kong." Hong Kong Bill of Rights Ordinance, Part III, ¶ 13.

343. See Human Rights Committee, *General Comment on Issues Relating to Reservations*

that

[r]eservations that offend peremptory norms would not be compatible with the object and purpose of the ICCPR. Although treaties that are exchanges of obligations between States allow them to reserve *inter se* application of rules of international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.³⁴⁴

Although the Human Rights Committee did not mention Article 25 specifically, it did cite the right to self-determination in Article 1 and made particular reference to aspects of the covenant designed to guarantee rights.³⁴⁵ Thus, to the extent that Article 39 of the Basic Law incorporated not only the ICCPR but its interpretive jurisprudence as well, the reservation regarding the right to participate in one's own government through the exercise of the franchise may have been questionable when enacted.

One need not view the reservation regarding Article 25 as invalid when entered to conclude that it is no longer relevant to Hong Kong. Rather, the intent of the reservation was to relieve the immediate obligation to create an elected legislative body in Hong Kong. Once the United Kingdom established such a body in 1985, the reservation ceased to shield from scrutiny the undemocratic or unequally democratic character of the legislature. This was the view of the Human Rights Committee in its *4th Periodic Report on Hong Kong*.³⁴⁶ The HRC took the view that "once an elected Legislative Council is established, its election must conform to Article 25 of the Covenant."³⁴⁷ It follows from this view that the "preservation" of this reservation may not shield China from the obligation to ensure full and equal representation in the legislative council.

In addition, the ICCPR's guarantee of equal protection before the law is relevant to the latter point regarding unequal representation.³⁴⁸ Both the ICCPR and the Declaration evince a

Made upon Ratification or Accession to the Covenant, U.N. Doc. CCPR/C/21/Rev. 1/Add. 6, Nov. 2, 1994.

344. *Id.*

345. *Id.*

346. See U.N. GAOR, Hum. Rts. Comm., 145th mtg. at ¶19, U.N. Doc. CCPR/C/79/Add. 57 (1995).

347. *Id.*

348. See ICCPR, *supra* note 8, art. 26.

strong commitment to the formal equality of citizens with respect to fundamental rights.³⁴⁹ Thus, the ICCPR not only obliges states to recognize its citizens' right to political participation, but also to ensure that its citizens enjoy this right equally.³⁵⁰ This commitment to an equal right of participation is also expressed in Article 21 of the BORO, notwithstanding the reservation regarding the creation of an elected legislature.³⁵¹ In short, whatever the applicability of Britain's reservation concerning the right to representation in Article 25, no such reservation applies to the equality guarantee in Article 25 or the guarantee of equal protection in Article 26. Consequently, the legislative body created to represent the people of Hong Kong must do so in a way that respects their equality as citizens "without distinction of any kind."³⁵²

C. Areas of Concern

1. The Composition of LegCo

The Basic Law established a system of only partially direct elections for selecting the legislature, a model based on the electoral system of the pre-reversion legislature first established in 1985.³⁵³ The current system utilizes a combination of functional constituencies, defined largely by industry or professional groups,³⁵⁴ geographic constituencies apportioned equally

349. See Universal Declaration, *supra* note 6, art. 1 ("All human beings are born free and equal"); *id.* art. 2 (guaranteeing all rights to everyone without distinction); *id.* art. 10 (stating that all are equal before law); *id.* art. 21 (granting equal access to public service and universal and equal suffrage); ICCPR, *supra* note 8, art. 2 (guaranteeing rights to all without distinction); *id.* art. 14 (granting equality before courts); *id.* art. 25 (granting equal right to participate in public affairs, to vote, and to public service); *id.* art. 26 (granting equal protection of law).

350. See ICCPR, *supra* note 8, art. 25. Article 25 makes a specific point of guaranteeing rights to political participation without distinction, explicitly referring to the principles in Article 2. *Id.*

351. Hong Kong Bill of Rights Ordinance, Part III, § 13.

352. ICCPR, *supra* note 8, art. 2.

353. For a concise discussion of the establishment of an elected legislature in Hong Kong under British rule, see GHAI, *supra* note 18, at 260-61.

354. The 28 functional constituencies for the 1998 elections were: Provisional Urban Council; Provisional Regional Council; Heung Yee Kuk (rural village association); Agriculture and Fisheries; Insurance; Transport; Education; Legal; Accountancy; Medical; Health Services; Engineering; Architecture, Surveying and Planning; Labour; Social Welfare; Real Estate; Tourism; Hong Kong General Chamber of Commerce; Chinese General Chamber of Commerce; Federation of Hong Kong Industries; Chinese Manufacturers Association; Finance; Financial Services; Sports, Performing Arts, Culture, and

among five districts,³⁵⁵ and members selected by the Election Committee.³⁵⁶ This section analyzes the electoral system and composition of LegCo in some detail, particularly the inequalities in the system of functional constituencies and their impact on the distribution of political power among economic groups in Hong Kong.

In the functional constituency system, industry or professional grouping rather than geographical apportionment defines voting districts. Introduced by Britain in 1985, the system was intended as a step toward greater democratic participation by Hong Kong citizens in their government and replaced a process of nomination and appointment of representatives from the business and professional sectors.³⁵⁷ At the time, the government justified the creation of functional constituencies instead of electoral districts by reference to a need for stability and prosperity.³⁵⁸ It was feared that "direct elections would run the risk of a swift introduction of adversarial politics, and would introduce an element of instability at a critical time."³⁵⁹ Nevertheless, after the signing of the Joint Declaration, Governor Chris Patten's administration expanded the scope of the various functional constituencies in Hong Kong to include virtually all employed workers.³⁶⁰ Though the Patten reforms still discriminated against homemakers, the unemployed, and the elderly,

Publication; Import and Export; Textiles and Garments; Wholesale and Retail; and Information Technology. While the Labour constituency returned three members, the remainder are single member districts. See Legislative Council Ordinance, CAP 542 (Sept. 28, 1997) [hereinafter LegCo Ordinance], Part III, § 20-21; Schedule (listing functional constituencies and electors); see also HONG KONG HUMAN RIGHTS MONITOR, REPORT ON 1998 LEGISLATIVE COUNCIL ELECTIONS (Dec. 1998) [hereinafter MONITOR REPORT].

355. The five geographic districts are Hong Kong Island, Kowloon West, Kowloon East, New Territories West, and New Territories East. Twenty seats are allocated among these five districts according to population. See LegCo Ordinance, *supra* note 354, Part III, § 18-19.

356. Ten members are returned by the Election Committee, which consists of 800 members representing four sectors composed of 200 members each. See LegCo Ordinance, *supra* note 354, Part IV, § 22; Schedule 2, Part 1 (describing process for selecting Election Committee).

357. See REPRESENTATIVE GOVERNMENT IN HONG KONG, THE FUTURE DEVELOPMENT OF REPRESENTATIVE GOVERNMENT IN HONG KONG (Hong Kong, The Government Printer 1984) (summarizing British government's position on electoral changes and creation of democratic institutions in Hong Kong).

358. See *id.*

359. See *id.* at 9.

360. For a view of the Patten reforms and the response of the Chinese govern-

the resulting system was considerably more representative of the Hong Kong people.³⁶¹

In 1997, the Patten changes (embodied in the Electoral Provisions Ordinance) were invalidated by the NPCSC as inconsistent with the Basic Law.³⁶² The Legislative Council Ordinance, passed by the Provisional LegCo after the reversion to Chinese sovereignty, established a new framework for the selection of LegCo.³⁶³ Notwithstanding commitments to universal suffrage in the Basic Law,³⁶⁴ the new ordinance significantly reduced the representative character of Hong Kong's democratic institutions.

First, the ordinance substantially narrowed the functional constituency electorate. In the 1998 elections, fewer than 200,000 voters constituted the full electorate for the thirty functional constituency seats.³⁶⁵ Moreover, the small fraction of the electorate that voted in the functional constituencies was heavily weighted in favor of the conservative pro-business and pro-Beijing communities, which resulted in the reinforcement of economic power through the political process.³⁶⁶

This wholesale exclusion of a majority of the electorate

ment, see David Carter, *Regional Report: Hong Kong: Is Democracy in Its Future?*, 3 J. INT'L L. & PRACTICE 551 (1994).

361. The scope of the Patten reforms was limited by a desire to conform to the framework set out by the Basic Law so that the LegCo might remain in place through the reversion to Chinese sovereignty. Ultimately, China rejected the reforms as inconsistent with the Basic Law and the "through train" was derailed. See Michael C. Davis, *Constitutionalism Under Chinese Rule: Hong Kong After the Handover*, 27 DENV. J. INT'L L. & POL'Y 275, 283 (1999). Although the Patten reforms moved the functional constituency system toward universal suffrage, the apportionment of votes among the functional constituencies was highly unequal. More than one million voters in the "broad" functional constituencies returned only nine seats while 82,000 electors returned the remaining functional constituency seats. See NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS, HONG KONG REPORT NO. 2, THE PROMISE OF DEMOCRATIZATION IN HONG KONG: THE NEW ELECTION FRAMEWORK (Oct. 23, 1997).

362. See Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (adopted by Standing Committee of Eight National People's Congress at its 24th Sitting on February 23, 1997), Annex 1 (listing Electoral Provisions Ordinance among legislation previously in force that contravene Basic Law).

363. LegCo Ordinance, *supra* note 354.

364. See Basic Law, *supra* note 10, ch. IV, art. 68.

365. According to one estimate, the number of eligible functional constituency voters was reduced from 2.7 million to 180,000. See Davis, *supra* note 361.

366. See Davis, *supra* note 361, at 284-85 (noting that "the design of this model seemed clearly aimed at keeping the democratic camp in the minority").

from the functional constituencies, though the most significant, is not the only problematic aspect of the electoral system. Even among the electorate comprising the functional constituencies, voting is not equal and procedures are not uniform. First, the size of the functional constituencies varies dramatically. For example, in the 1998 election, the largest functional constituency, the education functional constituency, had 61,290 registered electors.³⁶⁷ The smallest, the urban and regional councils, had fifty each.³⁶⁸ Yet, each of these three constituencies determined one LegCo seat. Second, some functional constituencies feature individual voting, others corporate voting, and still others a combination of the two. For example, in the legal functional constituency, the electorate is made up of individual members of the Hong Kong Bar Association and the Law Society.³⁶⁹ The finance functional constituency, in contrast, has an electorate of banks and related businesses.³⁷⁰ Others, such as the real estate functional constituency, have both individual and corporate voters.³⁷¹ This complex composition of the functional constituency electorate undermines transparency and creates an opportunity for corruption. Indeed, according to one report, the practice of multiple voting of corporations via their arms or subsidiaries in the 1998 election resulted in an even greater concentration of power in the hands of a small number of individuals.³⁷²

The combined effect of these inequalities in the electoral system can be quite dramatic. According to one estimate, in the 1998 LegCo election, the five smallest functional constituencies, most of which feature corporate voting, had an aggregate of only 837 voters.³⁷³ These 837 voters determined five LegCo seats, the same number of LegCo seats as one-quarter of the entire registered electorate in the geographical constituencies, or 698,843

367. See MONITOR REPORT, *supra* note 354, ¶ 9.01.

368. See *id.*

369. See LegCo Ordinance, *supra* note 354, Schedule 1, Part 2, § 8.

370. See *id.* Schedule 1, Part 2, § 22.

371. See *id.* Schedule 1, Part 2, § 16.

372. See *Monitor Report*, *supra* note 354, ¶ 9.03. The extent of this multiple voting is difficult to determine with certainty because it must be done through a cross-referencing of elector roles and corporate ownership records. Nevertheless, the Hong Kong Human Rights Monitor has highlighted some of the more egregious instances in which a single individual controls anywhere from 6 to 20 votes in the functional constituency elections. See MONITOR REPORT, *supra* note 354, ¶ 9.04-9.08; Gren Manuel, *Tycoons Buy Extra Ballots*, S. CHINA MORNING POST, Feb. 22, 1998, at 2.

373. See MONITOR REPORT, *supra* note 354, ¶ 9.02.

individuals.³⁷⁴ The political impact was equally dramatic in that the various pro-democracy candidates received sixty percent of the popular vote but only one-third of the seats in LegCo.³⁷⁵

The ten seats chosen through the Election Committee only exacerbate the inequality created by the functional constituency system. The Basic Law provides for substantial overlap between the functional constituencies and the Election Committee.³⁷⁶ The Selection Committee, which determined the ten Election Committee seats in the 1998 election, was even more heavily weighted in favor of the pro-Beijing and pro-business sectors.³⁷⁷ The 400 members of the Selection Committee were selected by the functional constituency voters plus designated local and national political figures.³⁷⁸

Finally, Legislative Council Ordinance made significant changes to the electoral process for the geographic districts. Previously, these districts had been single member districts where the candidate with the most votes prevailed.³⁷⁹ The new ordinance created multi-member districts coupled with a complex system for proportional representation. Under some circumstances, such a system yields a more representative body by ensuring minority groups a voice in the legislature. In the context of Hong Kong, however, where more than half of the legislature is chosen by an indirect process already calculated to represent various constituencies in society, the proportional representation argument is weak. Instead, the change from single-member districts seemed calculated to reduce the number of seats held by pro-democracy candidates.³⁸⁰

374. *See id.*

375. *See Record Turnout Poised To Give Democrats Sweeping Victory*, S. CHINA MORNING POST, May 25, 1998, at 1.

376. *See Basic Law, supra* note 10, annex I, § 2 (defining composition of Election Committee).

377. In addition to the functional constituency seats, members of the Provisional LegCo and the Hong Kong delegates to the NPC of the Chinese central government also had votes in the Selection Committee election. *See Davis, supra* note 361, at 284.

378. *See id.*

379. *See* Margaret Ng, *Democrats the Losers in Tung's Game Plan*, S. MORNING POST, Sept. 19, 1997 at 29; Chris Yeung, *Greater Uncertainty for Key Candidates*, S. CHINA MORNING POST, Mar. 2, 1998 at 6.

380. *See Davis, supra* note 361, at 285. The multi-member districts also had the effect of pitting pro-democracy candidates against each other. *See* Linda Choy, *Historic Poll a Fight Among Friends; Revamped Multi-Seat Battlegrounds Pit Allies Against Each Other in Scramble for Votes*, S. CHINA MORNING POST, Feb. 23, 1998, at 6.

2. The Selection of the Executive and the Balance of Power Between LegCo and the Executive

In addition to the dramatic inequalities in the electoral process, the democratic character of the HKSAR government is further limited by restrictions on the functions and powers of LegCo relative to the Executive. The Chief Executive is not directly elected but nominated by the Election Committee and appointed by the CPG, a process that is preserved by the Basic Law at least until 2007.³⁸¹ Because international law does not expressly dictate that the Chief Executive be popularly elected, this system of indirect selection does not in itself constitute a violation. However, the combination of a powerful appointed or indirectly elected Chief Executive and a weak legislature, in which only a minority of seats is popularly elected, undercuts the right of citizens to participate meaningfully in their government.³⁸² This Part explores several examples of restrictions on LegCo's power relative to the Executive, including limitations on the introduction of legislation by LegCo members and the bicameral voting requirement for members' bills.

3. Restrictions on LegCo Member Bills

The power of LegCo members to introduce legislation is limited in very significant ways. The Basic Law prohibits LegCo members from introducing bills relating to the political structure or government operations, or bills requiring public spending.³⁸³ Furthermore, in order to introduce bills "relating to government policy," LegCo members must obtain the consent of the Chief Executive.³⁸⁴

The scope of these restrictions is potentially very broad. Indeed, the restriction on bills calling for government spending could alone virtually eliminate private member bills having any-

381. See Basic Law, *supra* note 10, annex III. After 2007, changes in the electoral process for the Chief Executive and LegCo would not entail an amendment to the Basic Law; however, they would require a two-thirds majority of the LegCo and the consent of the Chief Executive. *Id.*

382. See *supra* text accompanying notes 362-64.

383. See Basic Law, *supra* note 10, ch. IV, art. 74 (providing that "[b]ills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council.>").

384. See *id.*

thing but the most trivial impact.³⁸⁵ In an attempt to limit the scope of this restriction, LegCo members have argued that the prohibition of private member bills that require public spending in Article 74 of the Basic Law refers only to bills that directly require public expenditure.³⁸⁶ The HKSAR administration insists, however, that the prohibition also covers private member bills that indirectly or incidentally affect public spending.³⁸⁷ The current LegCo Rules of Procedure apply a “charging effect” test that would prohibit the introduction of a bill only if it has the effect of increasing government expenditures.³⁸⁸

Perhaps even more significantly, the Basic Law does not elaborate the meaning of political structure, government operations, or government policy.³⁸⁹ Taken together, these categories

385. See *Standing by LegCo*, S. CHINA MORNING POST, Jan. 21, 1999, at 14. Despite this substantial limitation on private member bills, LegCo does exercise a measure of budgetary power under the Basic Law. Article 73 provides that the government cannot collect or spend public funds without the approval of the legislative branch. However, because Hong Kong’s legislative branch cannot introduce bills on public spending, the executive branch has primary responsibility for planning revenue collection and spending, for fear of pork barrel spending by LegCo. LegCo’s power over public expenditure, then, largely derives from its power to reject the administration’s spending proposals. If LegCo does reject the administration budget, then according to the Basic Law the Chief Executive may ask it to approve provisional appropriations. If the Chief Executive and LegCo cannot agree on a budget, then the Chief Executive may dissolve LegCo. New LegCo elections and new budget talks between the administration and the next LegCo would then be necessary. The administration has some incentive to compromise, however, because if the new LegCo also refuses to pass the original administration budget bill, then the Chief Executive must resign. See GHAI, *supra* note 18, at 293-94.

386. See Angela Li, *Officials Stifling Private Bills, Says Unionist*, S. CHINA MORNING POST, Mar. 2, 1999, at 4.

387. See Jimmy Cheung, *Special Power Invoked To Halt Bills, Government Includes LegCo and Judiciary*, S. CHINA MORNING POST, Jan. 20, 1999, at 1 (explaining government’s expansive interpretation of limits on private member bills).

388. See Interview with Mrs. Rita Fan, President of the Legislative Council, Hong Kong (June 7, 1999).

389. Nor does the Basic Law specify who determines whether a private member bill falls within one of these prohibited categories. Under RULES OF PROCEDURE OF THE LEGISLATIVE COUNCIL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION 34 (amended Apr. 28, 1999) [hereinafter LEGCO RULES OF PROCEDURE], the President of LegCo has the power of decision on this issue. One influential constitutional scholar has supported this view by noting that exercising such authority is commensurate with the LegCo President’s duty under the Basic Law, art. 72, § 2, to decide on the legislative agenda. See GHAI, *supra* note 18, at 282 n.34. The HKSAR administration, in contrast, has stated that the Chief Executive should determine the scope of the restrictions. The administration has argued that giving the LegCo President the power of decision would defeat the Basic Law Article 74 purpose of restricting LegCo powers. See *Tung Should*

could conceivably cover virtually all issues that LegCo might reasonably address. Even under a relatively limited interpretation of this language, these restrictions mean that most legislation must originate with the Chief Executive, or, at a minimum, with the permission of the Chief Executive. The administration's position is that "government policy" includes policies reflected in legislation, making the definition seemingly circular and all encompassing.³⁹⁰

Legislative Councilor Lee Cheuk Yan's attempt to introduce legislation that would restore certain labor rights eliminated by the Provisional LegCo illustrates the impact of these limitations. His bill would expand the right to file a claim with the Labour Tribunal under certain circumstances and would expand available remedies for violations of labor rights.³⁹¹ LegCo President Rita Fan ruled that both bills violated Basic Law Article 74.³⁹² Mrs. Fan ruled that the proposed bills would entail additional public expenditure. Moreover, apparently adopting the administration's position regarding the definition of government policy, she determined that the bills affected government policy in that they called for the repeal of existing legislation.³⁹³

The limitations on LegCo members' powers to initiate legislation may also apply to amendments to bills introduced by the government, thereby further restricting the power of legislators to affect government policy. The Tung administration has argued that amendments related to government policy also require consent from the Chief Executive when proposed by LegCo.³⁹⁴ The administration insists that since the Basic Law requires that private member bills related to government policies

Rule on Bills, S. CHINA MORNING POST, Apr. 29, 1999, at 6 (quoting Chief Secretary for Administration Anson Chan).

390. See Cheung, *supra* note 387, at 1 (quoting representative of administration on view that Government includes executive, legislature, and judiciary).

391. See *infra* at text accompanying notes 472-74.

392. See Jimmy Cheung, Rita Fan "Conspiring to Kill Private Bills," S. CHINA MORNING POST, July 20, 1999, at 6.

393. See *id.* Councilor Lee Cheuk-yan is considering seeking judicial review of this decision, however, the risk of prohibitive legal costs (because Hong Kong follows the "British Rule" where the losing party may be required to pay costs for both sides, regardless of the merit of the losing party's claim) may cut or even forestall the appeal process. See *Unionist Weighs Cost of Lawsuit*, S. CHINA MORNING POST, July 29, 1999, at 2.

394. See Danny Gittings, *Close Encounters of a Political Kind*, S. CHINA MORNING POST, July 18, 1999.

be approved by the Chief Executive before being introduced,³⁹⁵ so too must private member amendments to government bills.³⁹⁶ The LegCo Rules of Procedure provide otherwise, subjecting amendments to the “charging effect” test for public expenditure but not to the requirement of obtaining the consent of the Chief Executive for amendments affecting government policy.³⁹⁷ Whether this rule violates Article 74 of the Basic Law has yet to be determined.³⁹⁸

4. The Bicameral Restriction on Private Member Bills

Beyond these very severe limits on the introduction of legislation by members, the Basic Law imposes different standards for bills introduced by the administration and bills introduced by members of LegCo. Administration bills require only a simple majority of all LegCo members to pass.³⁹⁹ In contrast, bills introduced by LegCo members must receive a majority of both the votes of the functional constituency representatives and a majority of the votes of the representatives of geographic districts and the Election Committee combined.⁴⁰⁰

This bicameral voting requirement has two important effects. First, the bicameral requirement for LegCo-sponsored bills means that a simple majority of either group may block the legislation. Thus, the functional constituency representatives—who are selected by a process that overlaps considerably with the selection process for the Chief Executive—may block the passage of a bill introduced by a legislator chosen from a geographic district. Of course, the converse is also true, such as where, through the votes of the ten Election Committee seats, a bill introduced by a member representing a functional constituency may be more likely to pass. Second, a bill introduced by the administration may succeed with only the support of the functional constituency and Election Committee representatives, both of which are more likely to share the position of the admin-

395. Basic Law, *supra* note 10, ch. IV, art. 74.

396. *See* Paper for the Committee on Rules of Procedure of LegCo, Part A, §5 (1999) (describing Tung administration’s position).

397. *See* LEGCO RULES OF PROCEDURE, *supra* note 389, Part K, rule 57.

398. *See* Gittings, *supra* note 394, (noting that, although time has passed for administration to invoke judicial review of rules as adopted, if LegCo passes amendment that government believes violates Article 74, then it may bring legal challenge).

399. *See* Basic Law, *supra* note 10, annex II.

400. *See id.*

istration.⁴⁰¹

In practical terms, these limitations have meant that, even under the less restrictive LegCo Rules of Procedure, no private member bill amending a government bill had passed as of June 1, 1999.⁴⁰² Under the system of bicameral voting, only one private member bill had passed LegCo as of June 1, 1999.⁴⁰³ In short, the bicameral voting requirement, combined with the restrictions on the ability of LegCo members to introduce legislation, severely limit the ability of LegCo members to pursue a legislative agenda that diverges in any way from the administration's agenda.

D. *International Obligations and the Pace of Democratization*

Neither the Universal Declaration of Human Rights nor the ICCPR prescribes in any detailed way the form a government must take. On the contrary, the structure of government is an issue largely within the scope of national sovereignty.⁴⁰⁴ Nevertheless, by guaranteeing the right of citizens to equal and meaningful participation in government, international law does impose certain broad limitations on that structure. In view of these standards, the delegation believes that the existing electoral system in Hong Kong falls short of the standard for equal participation and raises serious concerns with respect to the rights of citizens to participate in a meaningful way in their government.

First, the delegation agrees with the Human Rights Committee of the United Nations that the functional constituency system violates the requirement of equal representation guaranteed by Article 25 and 26 of the ICCPR.⁴⁰⁵ In its pre-handover *4th Periodic Report on Hong Kong*, the HRC noted that "only 20 of 60 seats in the Legislative Council are subject to direct popular election."⁴⁰⁶ It concluded that "the concept of functional con-

401. See GHAI, *supra* note 18, at 262-64, 279 (discussing structure of legislature and relationship to Chief Executive)

402. See Interview with Mrs. Rita Fan, President of LegCo, Hong Kong (June 7, 1999).

403. See Interview with Ms. Cyd Ho, Legislative Councilor, Hong Kong (June 1, 1999).

404. See *supra* note 326.

405. See ICCPR, *supra* note 8, arts. 25 & 26 (guaranteeing equal and meaningful participation and equal protection of laws).

406. U.N. GAOR, Hum. Rts. Comm., 145th mtg. at ¶19, U.N. Doc. CCPR/C/79/Add. 57 (1995).

stituencies, which give undue weight to the views of the business community, discriminates among voters on the basis of property and functions. This clearly constitutes a violation of articles 2, ¶¶ 1, 25(b), and 26."⁴⁰⁷

Notwithstanding its requirement of equal participation, the ICCPR does not prescribe a particular system of districting or apportionment. In theory, an electoral system in which citizens are classified and represented by occupation rather than (or in addition to) geographic districts would not violate international standards so long as representation is universal and equally apportioned.⁴⁰⁸ The functional constituency system in place in Hong Kong, however, falls far short of this standard. As described above, the functional constituencies are dramatically unequally apportioned and the majority of Hong Kong people are excluded altogether from representation.⁴⁰⁹ Moreover, the representation in LegCo is not merely unequal but unequal in a way that reinforces an already powerful and indirectly elected Chief Executive.⁴¹⁰

One need not argue that the ICCPR precludes any departure from equal representation to conclude that the extremely unequal system in Hong Kong violates the ICCPR. Article 25 may permit reasonable departures from equal apportionment; however, the reasons for departing may not contravene the purposes of the treaty.⁴¹¹ In contrast, the objective of providing a disproportionate voice to the business community in order to ensure economic stability and reduce the likelihood of political change undermines the goal of meaningful popular participation protected by the treaty.

The coincidence of views that is likely among the administration, the functional constituency representatives, and the Election Committee representatives also exacerbates the effect

407. *Id.*

408. The requirement of equal representation in the ICCPR is not tied to geographic apportionment. Article 25 speaks of "unusual and equal suffrage," a requirement that may be met through a number of different districting plans. See ICCPR, *supra* note 8, art 25.

409. See *supra* text and accompanying notes 364-378.

410. See *supra* text and accompanying notes 375-375.

411. Cf. Human Rights Committee, General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant, U.N. Doc. CCPR/C/21/Rev. 1/Add. 6, Nov. 2, 1994 (involving central purpose of treaty as limitation on reservations).

of the limitations on the powers of LegCo members to introduce legislation and the bicameral voting requirement for member bills. Viewed through the lens of party politics in Hong Kong, the restrictions can be seen as a deliberate constraint on the pro-democracy agenda advanced by many of the members representing the geographic districts.⁴¹²

These restrictions on the powers of the legislature to influence government policy threaten to relegate it to a consultative role, or worse, render its actions a mere rubber stamp of administration policy. This possibility contradicts the Basic Law's own goal of gradual progress towards a fully representative democracy.⁴¹³ Moreover, by handcuffing the most democratic body, and particularly the directly elected component of that body, the restrictions undermine the right of Hong Kong citizens to participate in their own government.⁴¹⁴

The Basic Law implicitly acknowledges some of these problems. Consistent with the goal of a movement toward universal suffrage, the Basic Law provides for a gradual decrease in the number of Election Committee seats in LegCo.⁴¹⁵ In the LegCo elections in 2000, the number of Election Committee seats will be reduced from ten to six, and the directly elected seats will be increased correspondingly by four.⁴¹⁶ In 2003, the remaining Election Committee seats will be replaced by directly elected seats, for the first time bringing the number of directly-elected seats up to the level of the seats returned by the functional constituencies.⁴¹⁷

Unfortunately, the Basic Law provides no corresponding timetable for the elimination of the functional constituencies. Indeed, according to Annex II, the current system will remain in place until 2007, after which any amendment will require approval by two-thirds vote of LegCo and approval by the Chief Executive.⁴¹⁸ At that time, the Basic Law provides for a review of the selection method for the Chief Executive and LegCo.⁴¹⁹

412. *See supra* note 380.

413. Basic Law, *supra* note 10, ch. IV, art. 68.

414. *See supra* text accompanying notes 368-74.

415. *See* Basic Law, *supra* note 10, annex II, Part I §1.

416. *See id.*

417. *See id.*

418. *See id.* annex II, § 3.

419. *See id.*

Changes such as universal and equal voting for the Chief Executive and all LegCo seats may be instituted only upon approval of a two-thirds supermajority of LegCo and approval of the Chief Executive.⁴²⁰ As a result, the functional constituencies and the indirectly selected Executive are well entrenched even beyond 2007.

E. *Conclusion and Recommendations*

According to Article 68 of the Basic Law, “[t]he ultimate aim is the election of all members of the Legislative Council by universal suffrage.”⁴²¹ This commitment is echoed in Article 21 of the BORO that calls for “universal and equal suffrage.”⁴²² In light of these aspirations and the requirements of international law, the delegation recommends that the system of unequal representation under the functional constituency framework be eliminated either prior to 2007 by amendment to the Basic Law, or immediately following according to the procedures specified by the Basic Law. The delegation further urges the administration and members of the LegCo to support other measures that would transform the institutions of government in the HKSAR into ones more representative of the democratically expressed will of the people of Hong Kong.

III. *LESSONS FOR THE FUTURE OF LAW AND FUNDAMENTAL RIGHTS IN HONG KONG*

The right of abode controversy and reinterpretation process suggests a significant change in the relationship between the mainland system and the HKSAR, the impact of which extends well beyond the cases itself. Looking toward the future of basic rights in Hong Kong, two important lessons emerge. First, the change in the mainland/HKSAR relationship came at the expense of the HKSAR’s autonomy, particularly the independence of its legal institutions. The change may have undermined the ability of those institutions to safeguard fundamental rights. Second, the change in the mainland/HKSAR relationship came at the expense of a fundamental right explicitly included in the

420. *See id.*

421. *See id.* ch. IV, art. 68.

422. Hong Kong Bill of Rights Ordinance, art. 21.

language of the Basic Law, raising concern that other rights contained in the Basic Law could be at risk.

In light of these concerns, this Part analyzes two areas, labor rights and anti-discrimination protection, as examples in which basic rights protected under international law have been under-enforced by the HKSAR administration.

A. *Association and the Workplace: Labor Rights Concerns*

Hong Kong's pledge to respect the rights of workers is found in the Joint Declaration and the Basic Law, as well as the ICCPR, ICESCR, and various international labor conventions. Joint Declaration Article 3(5) recognizes the "rights of assembly and association, the right to strike, and the right to choose one's occupation."⁴²³ Annex I also recognizes "the right to form and join trade unions."⁴²⁴ The Basic Law echoes these provisions, recognizing in Article 27 the freedom to form and join trade unions and to strike,⁴²⁵ and recognizing in Article 33 the freedom of choice of occupation.⁴²⁶ The Basic Law also incorporates these pledges through Article 39's incorporation of the ICCPR⁴²⁷ and the ICESCR.⁴²⁸ The ICESCR, protects, *inter alia*, the right to work,⁴²⁹ the conditions of workers,⁴³⁰ the right to form trade unions,⁴³¹ and the international labor conventions in

423. See Joint Declaration, *supra* note 17, at art. 3(5).

424. See *id.*, at Annex I, "Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Hong Kong," Art. XIII, line 151.

425. See Basic Law, *supra* note 10, at art. 27.

426. See *id.* at art. 33. Other relevant provisions of the Basic Law include Article 147 (stating that HKSAR shall on its own formulate laws and policies relating to labor), Article 148 (stating that relationship between non-governmental organizations in Hong Kong, including labor organizations, and their counterparts on mainland shall be based on principles of non-subordination, non-interference, and mutual respect).

427. ICCPR, *supra* note 8. The ICCPR is important to a discussion of labor rights in that it protects the right of freedom of peaceful assembly (Article 21) and association (Article 22). *Id.*

428. ICESCR, *supra* note 10; Basic Law, *supra* note 10, at art. 39. Both the ICCPR and the ICESCR were ratified by the British on July 20, 1976 and applied to Hong Kong, with reservations. Britain ratified the ICESCR for Hong Kong on July 20, 1976, but with a significant reservation concerning trade unions in Hong Kong. The reservation "disapplied the right of trade unions to establish national federations or confederations or their right to join international federations." See GHAI, *supra* note 18, at 412 (stating that reservation reflects Britain's concern that political forces from Taiwan or mainland might attempt to use Hong Kong trade unions to cause unrest in colony).

429. ICESCR, *supra* note 10, at art. 6.

430. *Id.* at art. 7.

431. *Id.* at art. 8.

force in Hong Kong.⁴³² Three of these Conventions warrant discussion. Convention No. 87 on the Freedom of Association and Protection of the Right to Organize provides that both employers and employees shall have the right to establish and join organizations of their own choosing without interference.⁴³³ It further ensures that participation in an organization or federation will be free of interference by government authorities, and obligates member states to take measures implementing its provisions.⁴³⁴ Convention No. 98 on the Right to Organize and Collective Bargaining aims to prohibit acts of anti-union discrimination, to protect both employers and employees from interference, and to promote voluntary negotiation between management and labor.⁴³⁵ Convention No. 154 on Collective Bargaining defines collective bargaining and obligates signatories of Convention No. 98 to establish legislation to implement

432. Forty-six international labor conventions are applicable to Hong Kong. See HKSAR INFORMATION SERVICE DEPARTMENT, HONG KONG—A NEW ERA—REVIEW OF 1997, EMPLOYMENT 117 (1997). Pursuant to the Constitution of the International Labor Organization (“ILO”), the conventions were originally applicable to the HKSAR as a “non-metropolitan territory” of the PRC. See INTERNATIONAL LABOR ORGANIZATION CONSTITUTION art. 35(4). China has since notified the ILO that the HKSAR is not to be regarded as a non-metropolitan territory of China but as an “inseparable part” of China. GHAI, *supra* note 18, at 417-18. The ILO Conventions continue to be recognized by the HKSAR. It is unclear what the Chinese meant by their declaration of inseparability, but no other member state has objected and presumably the previous practice of Hong Kong being subject to reporting and dispute resolution of the ILO continues. *Id.*

433. ILOLEX 04/07/50, Convention Number 87, Freedom of Association and Protection of the Right Organize Convention, 1948 (ratified in 1963).

434. *Id.* Britain ratified Convention Number 87 with reservations designed to limit the ability of Hong Kong’s unions to expand, merge, and affiliate themselves with other entities both in the territory and abroad, and the June 1997 ordinances were intended to remove these limitations. The reservations included provisions: (1) requiring all officers of a trade union or federation to be engaged or employed in the industry or occupation with which the union is connected; (2) limiting use of union funds to objects specified in national laws or as approved by a public authority; (3) authorizing public supervision of the accounts of trade unions and the application of union rules; (4) requiring government consent for a union merger involving any union affiliated with an entity outside the territory; (5) requiring government consent for a union affiliation with an international organization; and (6) authorizing the government to prevent cross-industry federation of unions. See GHAI, *supra* note 18, at 413.

435. ILOLEX 18/07/51, Convention Number 98, Right to Organize and Collective Bargaining Convention, 1949 (ratified 1975); INTERNATIONAL LABOUR ORGANIZATION, INTERNATIONAL LABOUR STANDARDS 48 (4th Ed., 1998). Although Britain attached no reservations to Convention Number 98, it failed to pass implementing legislation, raising doubts about the convention’s efficacy in the territory. Again, the June 1997 ordinances were intended to remove those doubts.

collective bargaining if it is not widely practiced.⁴³⁶

Hong Kong's system for implementing these pledges consists of three bodies: the Labour Department,⁴³⁷ the Labour Tribunal,⁴³⁸ and the Labour Advisory Board ("LAB").⁴³⁹ The Labour Department is a part of the HKSAR administration and implements policy and legislation for the HKSAR.⁴⁴⁰ The Labour Department ostensibly promotes harmonious labor relations and responsible trade unionism, focusing on conciliation of employer-employee disputes. The LAB is an independent twelve-member board composed of six employees and six employer representatives and chaired by the Commissioner for Labour.⁴⁴¹ The LAB is charged with providing "guidance" on labor policies and legislation. It operates through special committees dedicated to particular areas of policy and legislation.⁴⁴² The Labour Department may consult the LAB on policy questions or proposed legislative changes. The Labour Tribunal is an adjudicative body designed to provide an informal venue for employers and employees to settle monetary disputes.⁴⁴³ The Labour De-

436. ILOLEX 11/08/1983 Convention Number 154, Collective Bargaining Convention (1981) (not ratified by United Kingdom and Northern Ireland).

437. HKSAR INFORMATION SERVICE DEPARTMENT, *supra* note 432, at 114-21 (outlining responsibilities of Labour Department and agencies within department). The Labour Department has five divisions principally responsible for the different aspects of protection and promotion of worker's rights: Labour Relations Division (provides conciliation service and advises on matters relating to conditions of employment and the Employment Ordinance), the Workplace Consultation Promotion Unit (strengthens the promotion of voluntary negotiation, consultation and effective communication between employers and employees), the Labor Relations Promotion Unit (organizes activities to promote harmonious labor-management relations), the Registry of Trade Unions (registers trade unions and organize educational courses for unionists), and the Minor Employment Claims Adjudication Board ("MECAB") (adjudicating small labor claims). *Id.*

438. LABOUR TRIBUNAL, GUIDE TO COURT SERVICES, JUDICIARY (May 1999).

439. *See* HKSAR INFORMATION SERVICE DEPARTMENT, *supra* note 432, at 114-21.

440. *Id.*

441. *Id.* at 117.

442. *Id.* Special Committees include: employees' compensation, employment services, occupational safety and health, labor relations, and the implementation of international standards.

443. Insofar as the Labour Tribunal is the principle adjudicative body for workplace disputes, the fairness and efficacy of the procedures before the Labour Tribunal are paramount. During the mission representatives of both employers and employees criticized the Labour Tribunal as favoring the other's interest. Nevertheless, employer's prefer the Labour Tribunal as an alternative for dispute resolution to a mandatory collective bargaining statute. *See* Interview with Dr. Eden Woon, Director of Hong Kong General Chamber of Commerce, in Hong Kong (June 4, 1999). Union

partment may refer cases to the Labour Tribunal after efforts at informal conciliation have failed.⁴⁴⁴

The HKSAR administration argues that the system of protections implemented through the Labour Department, LAB, and Labour Tribunal provide adequate legal protections for workers rights and satisfy Hong Kong's treaty obligations. Nevertheless, several substantive gaps exist in these protections, gaps that may pose a threat to workers' rights and a potential source of controversy. These include inadequate protections for union organizers, unnecessary limits on the right to strike, and inadequate measures to promote meaningful collective bargaining. Significantly, these gaps had been closed in the June 1997 ordinances repealed by the provisional LegCo immediately after the reversion. The repeal of those ordinances suggests a hostility to the rights of workers and a lack of commitment to meeting Hong Kong's obligations under international treaties and labor conventions. That hostility must be recognized as the principal threat to association and related workers' rights.

The three labor ordinance amendments passed by the LegCo in June 1997 were intended to implement Article 8 of the ICESCR and International Labour Organization ("ILO") Convention Nos. 87, 98, and 154.⁴⁴⁵ The Trade Union (Amendment No. 2) Ordinance removed all restrictions on the use of union funds and on the federation of cross-industry unions, removed the ban on the elections of persons from outside the enterprise or sector to the executive committee of unions and to the individual union federation, and lowered the age limit for union officials from twenty-one to eighteen.⁴⁴⁶ The Employment

critics claimed that the tribunal presiding officers have too much unrestrained authority and at times improperly force settlements. They also charge that there has been an increase in workload and legislation but not personnel forcing many cases to be settled out of court. See Interview with Elizabeth Tang, Hong Kong Confederation of Trade Unions, in Hong Kong (June 1, 1999).

444. The Labor Relations Division refers over 90% of cases to the Labour Tribunal after an unsuccessful attempt at conciliation. See HKSAR INFORMATION SERVICE DEPARTMENT, *supra* note 432, at 118.

445. See HONG KONG HUMAN RIGHTS COMMISSION REPORT TO ICESCR 20-23 (April 1998) [hereinafter HRC Report]. It was seen that prior to the handover that training and labor-market situations were insufficiently flexible and not really plugged in to the needs of employers and would be workers.

446. See Trade Unions (Amendment No. 2) Ordinance 1997 (Appendix 44) (providing for regulation and control of trade union activities). The Trade Union Ordinance was the only previously existing law, which had its origins in law that remained

(Amendment No. 4) Ordinance strengthened protections for the right of association and collective bargaining by providing a right of reinstatement to employees showing wrongful discharge for union activities.⁴⁴⁷ The Employee's Right to Representation, Consultation, and Collective Bargaining Ordinance ("Collective Bargaining Ordinance") implemented the right of collective bargaining by laying out a specific guidelines for representation and consultation.⁴⁴⁸ Although each of these ordinances provided new local statutory mechanisms for workers, they did not, by themselves, expand the rights of workers. Rather, the legislation was intended to fulfill obligations under the ICCPR, ICESCR,⁴⁴⁹ and the applicable ILO Conventions.⁴⁵⁰

Two weeks after the reversion, the new Provisional LegCo suspended all three ordinances,⁴⁵¹ citing an alleged need "to review" the provisions.⁴⁵² Three months later the Provisional LegCo passed the Employment and Labour Relations (Miscellaneous Amendments) Bill of 1997 ("ELRB") repealing the princi-

largely unchanged from its original enactment in 1927. See HONG KONG HUMAN RIGHTS COMMISSION, REPORT TO THE UN UNDER ICESCR, Chapter 5, ¶ 67.

447. See Employment (Amendment No. 4) Ordinance 1997 (Appendix 43) (providing for protection against discrimination on ground of employee's participation in trade union activities).

448. See Trade Unions (Amendment No. 2) Ordinance 1997 (Appendix 44) (providing for Collective Bargaining that: "Unions which organize more than 15% of the workforce of enterprises with more than 50 employees, when authorized by over half of the workforce, have the right to represent the workforce in negotiations with management").

449. See ICESCR, *supra* note 10, at art. 5(2) (stating that no restriction upon or derogation from any fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations, or customs shall be admitted on pretext that ICESCR does not recognize such rights or that it recognizes them to lesser extent.); see also, ILO Convention #87, *supra* note 433, at art. 1 (noting that each member of ILO for which this Convention is in force undertakes to give effect all its provisions); ILO Convention #98, *supra* note 435, at art 4 (stating that measures appropriate to national conditions shall be taken, where necessary, to encourage and promote full development and utilization of machinery for voluntary negotiation between employers and employees' organizations, with view to regulation of terms and conditions of employment by means of collective agreements.); ILO Convention #154, *supra* note 436, at art. 5 (stating that measures adapted to national conditions shall be taken to promote collective bargaining).

450. See ICESCR, *supra* note 10, at art. 8 (protecting trade unions and employees' right to strike).

451. Legislative Provisions (Suspension of Operation) Ordinance 1997, Ordinance No. 126 of 1997, THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION GAZETTE, July 18, 1997, Legal Supplement No 1, A329.

452. HRC Report, *supra* note 445.

ple provisions of the June 1997 ordinances.⁴⁵³ The ELRB reimposed portions of the old Trade Union Ordinance that restricted the use of union funds for political purposes and prohibited persons outside a union's enterprise or sector to sit on its executive committee,⁴⁵⁴ eliminated the right of reinstatement provided in the Employment Ordinance, and repealed the Collective Bargaining Ordinance in its entirety.⁴⁵⁵

The Hong Kong Confederation of Trade Unions ("HKCTU")⁴⁵⁶ immediately challenged the ELRB before the ILO's Committee on Freedom of Association.⁴⁵⁷ The HKCTU argued generally that the ELRB constituted a violation of Hong Kong's commitments under Conventions Nos. 87, 98, and 154 because the June 1997 Ordinances repealed by the ELRB were implementing legislation required to give the Conventions full effect.⁴⁵⁸ The HKCTU further alleged specific violations of these

453. Employment and Labor Relations (Miscellaneous Amendments) Bill October 29, 1997.

454. Andrew Byrnes, Johannes Chan, and Py Lo, BASIC LAW AND HUMAN RIGHTS BULLETIN, Mar. 1999, at 74. The additional effect of the Employment and Labour Relations Bill of 1997 ("ELRB") with Trade Unions included; that first level unions still had the requirement that union officers be engaged in trade, industry, or occupation of their employing union; and that the restrictions of trade unions funds for political purposes was re-instated.

455. *See id.* "To repeal the Employment Ordinance, thus limiting civil remedies for anti-union discrimination to cases involving dismissal and permitting reinstatement only if both employer and employee agreed . . . To repeal the Collective Bargaining Ordinance thus removing the procedure for collective bargaining that had been laid down in that Ordinance." *Id.*

456. The Hong Kong Confederation of Trade Unions ("HKCTU") is an independent trade union established in 1990. It currently represents approximately 140,000 members in 42 affiliates. *See* Hong Kong Conference Trade Union (visited on Nov. 24, 1999) <<http://www.hk-labour.org.hk>> (on file with the *Fordham International Law Journal*). The HKCTU's primary functions including assisting workers to organize unions and negotiate with employers for better employment terms, providing trade union education, providing legal counsel for workers in labor disputes, seeking better worker legislation, and establishing solidarity exchanges and cooperation with the international democratic trade union movement. *Id.*

457. ILOLEX Case No. 1942, *Report in Which the Committee Requests To Be Kept Informed of Developments Complaint Against the Government of China: Hong Kong Special Administrative Region Presented by the Hong Kong Confederation Of Trade Unions, 1997, Complainants' Allegations*, ¶¶ 238-49 [hereinafter ILOLEX Case No. 1942].

458. *See id.*; *see also*, ICESCR, *supra* note 10, at art. 8 (protecting trade unions and employees' right to strike). The HKCTU further argued that because the June 1997 Ordinances implemented the Conventions and pre-dated the reversion, their provisions were "in force in Hong Kong" within the meaning of Article 39 and their repeal other than by amendment violates the Basic Law.

Conventions.⁴⁵⁹

Regarding collective bargaining, the complaint alleged that the ELRB violated Convention 154 and Articles 2 and 4 of Convention No. 98 by repealing the Collective Bargaining Ordinance in its entirety. The complaint maintained that the Collective Bargaining Ordinance was important because it established objective criteria for the recognition of worker representatives and unions. Without those criteria, employers may effectively and without penalty deny recognition of workers' groups and refuse negotiations with them. This constitutes interference in violation of Convention No. 98 Article 2,⁴⁶⁰ and Article 4,⁴⁶¹ and frustrates the purpose of Convention No. 154.

In its response to the complaint, the HKSAR argued generally that the June 1997 ordinances were never "in force" within the meaning of Basic Law Article 39 because they had been rushed through in the final sitting of the expiring LegCo.⁴⁶² The HKSAR also argued that the ELRB was permissible because the provisions repealed were not necessary implementations of ILO Convention obligations.⁴⁶³ The HKSAR argued that the

459. The complaint alleged, for example, that by reimposing limits on union political spending and on election of cross-sector individuals to individual union executive committees, the ELRB constitutes an improper intrusion into union activity and a retraction of protections in violation of Convention # 87, Article 3. The complaint also alleged that the HKSAR violated Convention # 98, Article 1 by repealing the portion of the Employment Ordinance that provided the right of reinstatement to workers showing wrongful discharge for union activity. Article 1 states that "workers shall enjoy adequate protection against acts of anti-union discrimination in respect to employment." The complaint argued that the surviving remedies—limited monetary compensation and reinstatement on mutual consent—are insufficient because they still allow an employer intent on obstructing union activity to remove organizers from the workplace. See ILOLEX Case No. 1942, *supra* note 457, Complainants' Allegations, ¶¶ 238-49.

460. See ICESCR, *supra* note 10, at art. 2 (stating "workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.")

461. *Id.* at art. 4 (requiring government to take measures "to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organization and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.").

462. Of course, the 1995 LegCo would not have been expiring had Beijing not rejected a "through-train" procedure for legislators as was provided for the judiciary. ILOLEX Case No. 1942, *supra* note 457, The Government's Reply, ¶¶ 250-60.

463. Regarding the specific allegations of the Complaint, the HKSAR argued that the restrictions on use of union funds, affiliations, and election of officers in the ELRB do not violate Convention No. 87, Article 3 because they merely reinstate permissible

existence of the LAB and the Labour Department's Workplace Consultation Promotion Unit (established in April 1998) fully satisfied Hong Kong's obligations to "encourage and promote 'voluntary' negotiations."⁴⁶⁴

On November 18, 1998, the Committee on Freedom of Association of the ILO ("ILO Committee") reported its conclusion and recommendations in the matter.⁴⁶⁵ The ILO Committee recommended repealing parts of the ELRB and reinstating specific parts of the June 1997 Ordinances. Specifically, the ILO Committee recommended that the HKSAR take steps to repeal sections 5, 8, and 9 of the ELRB to remove restrictions on election of union officers and the use of union funds.⁴⁶⁶ The ILO Committee further recommended that the HKSAR review the ELRB with a view to ensuring that provision is made in legislation for protection against all acts of anti-union discrimination and the possibility of the right to reinstatement.⁴⁶⁷ Finally, the ILO Committee requested the HKSAR to give serious consideration to the adoption in the near future of legislative provisions laying down objective procedures for determining the representative status of trade unions for collective bargaining purposes that respect freedom of association principles.⁴⁶⁸

The HKSAR has disputed any need to implement the legislative changes called for in the ILO Committee's conclusion and

reservations in effect since 1963. Regarding reinstatement and collective bargaining, the HKSAR argued that Conventions Nos. 98 and 154 require neither mandatory reinstatement nor mandatory collective bargaining. The HKSAR argued that reinstatement on consent and "voluntary" negotiation at the level of the individual enterprise (as opposed to the sector or industry level) were permissible, and indeed preferred. Moreover, the HKSAR argued that the ELRB did not violate the Conventions because the repealing legislation had been ratified by the LAB on behalf of workers and employers. *Id.*

464. See ILOLEX Case No. 1942, *supra* note 457, The Government's Reply, ¶ 252. The government argued that

the LAB has proved to be the cornerstone of Hong Kong's harmonious labour relations . . . ha[ving] an impressive and proven track record and . . . contributed greatly to improving labour rights and benefits in Hong Kong over the past five decades. The proposals to repeal two and amend one of the three labour-related Ordinances in question were drawn up on the basis of the recommendations of the LAB. As such, it represented a reasonable balance between the interests of employers and employees.

Id.

465. ILOLEX Case No. 1942, *supra* note 457.

466. See *id.*, Committee Recommendations, (a) & (b), ¶ 271.

467. See *id.*, Committee Recommendations, (c), ¶ 271.

468. See *id.*, Committee Recommendations, (d).

recommendations.⁴⁶⁹ Nevertheless, the ILO Committee's decision is significant in two respects. First, it is an authoritative determination that the repeal of the June 1997 ordinances was contrary to Hong Kong's international legal commitments. Second, and perhaps more significantly, the decision obligates the HKSAR to submit regular follow-up reports on their efforts to implement the ILO Committee's recommendations.⁴⁷⁰ This situation will bring their progress to the further attention of the Committee of Experts on the Application of Conventions and Recommendations, and afford interested parties an opportunity to comment.⁴⁷¹

Locally, Lee Cheuk Yan, Legislative Councilor and General Secretary of the HKCTU, has tried to force the administration to act on the ILO's recommendations by attempting to introduce legislation that would restore certain provisions eliminated by the ELRB. His proposed Employment Bill⁴⁷² seeks to strengthen the right to file a claim at the Labour Tribunal for acts of anti-union discrimination as well as strengthening available remedies to include "employment, promotion, reinstatement without prior mutual consent, compensation not subject to a ceiling and possible punitive damages."⁴⁷³ His proposed Labour Relations Bill reiterates the rights accorded in the repealed Collective Bargaining Ordinance, including provisions requiring that employees get paid for time taken to pursue legitimate union activities and given remedies for an employer's breach of the employee's right to consultation and collective bargaining.⁴⁷⁴ Both bills have been stalled and the chance of their passing in the near future is small. The delegation supports the conclusions and recommendations of the ILO Committee and urges the HKSAR to implement the ILO Committee's recommendations calling

469. HK Labor Express, HK Violations of International Labor Conventions 87 & 98 (visited Nov. 24, 1999) <<http://www.hk-labour.org.hk/english/eexpress13-1.htm>> (on file with the *Fordham International Law Journal*); see ILOLEX Case No. 1942, *supra* note 457, Committee Recommendations, (a) and (b) (stating view of government that mandatory collective bargaining would harm industrial harmony and deter foreign investment).

470. See ILOLEX Case No. 1942, *supra* note 457; see also Joint Declaration, *supra* note 17, art. 3(5).

471. See ILOLEX Case No. 1942, *supra* note 457.

472. Employment (Amendment No.2) Bill 1998.

473. Labour Relations (Rights to Representation, Consultation, and Collective Bargaining) Bill (2d Draft) (Nov. 22, 1998).

474. *Id.*

for the repeal in the near future of certain provisions of the ELRB and the reinstatement of the principle provisions of the June 1997 ordinances.

B. *Equality and Anti-Discrimination*

Anti-discrimination protection is another area in which Hong Kong's international obligations have been less than fully met. Hong Kong enacted its first anti-discrimination ordinances in 1995, addressing discrimination in the areas of gender and disability.⁴⁷⁵ Although these ordinances survived the provisional LegCo's attack on labor rights, the HKSAR administration's limited implementation of the spirit of the 1995 ordinances and its resistance to the enactment of legislation prohibiting racial discrimination cast doubt on its commitment to eliminating discrimination.

1. Applicable Law

Article 2 of the Universal Declaration of Human Rights provides that everyone is entitled to all of the rights and freedoms set forth therein "without discrimination of any kind, such as race, colour, sex, . . . [or] national or social origin."⁴⁷⁶ Article 2(1) of the ICCPR and Article 2(2) of the ICESCR employ the same essential language.⁴⁷⁷ Article 3 of both the ICCPR and the ICESCR also requires states to "undertake to ensure the equal right of men and women" to the enjoyment of the rights respectively set forth therein.⁴⁷⁸ ICCPR Article 26 further requires parties to incorporate these principles of equality and anti-discrimination into their domestic legal framework. Article 26 states,

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, . . . [o]r

475. Sex Discrimination Ordinance, 1995, ch. 48 [hereinafter SDO]; Disability Discrimination Ordinance, 1995, ch. 487 [hereinafter DDO]. The next year, the Hong Kong government passed the Family Status Discrimination Ordinance. See Family Status Discrimination Ordinance, 1997 [hereinafter FSDO].

476. Universal Declaration, *supra* note 6.

477. See ICCPR, *supra* note 8, at art. 2(1); see ICESCR, *supra* note 10, at art. 2(2).

478. ICCPR, *supra* note 8, at art. 3; ICESCR, *supra* note 10, at art. 3.

national or social origin.⁴⁷⁹

Both covenants further require parties to promote respect for the rights enumerated therein,⁴⁸⁰ to provide adequate remedies for violations of those rights,⁴⁸¹ and to report to the respective international committee their progress in implementing the Conventions.⁴⁸² Article 2(2) of the ICCPR requires states "to adopt such legislative or other measures as may be necessary to give effect" to the rights recognized therein.⁴⁸³ Article 2(3)(b) further requires parties "to develop the possibilities of judicial remedy."⁴⁸⁴

Hong Kong is also bound by two international human rights treaties specifically created to promote equality of gender and race: the Convention on the Elimination of All Forms of Discrimination Against Women⁴⁸⁵ ("CEDAW") and the Convention on the Elimination of Racial Discrimination⁴⁸⁶ ("CERD"). Signa-

479. ICCPR, *supra* note 8, art. 26.

480. *Id.* at art. 2; ICESCR, *supra* note 10, at art. 2.

481. See ICCPR, *supra* 8, art. 2(3)(a) (finding States Parties undertake to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy").

482. ICESCR, *supra* note 10, at art. 16; ICCPR, *supra* note 8, at art. 40.

483. ICCPR, *supra* note 8, at art. 2(2).

484. Article 2(3)(b) makes it clear that each State Party to the present Covenant undertakes to "ensure that any person claiming such a remedy shall have his right thereto determined by competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy." *Id.* at art. 2(3)(b).

485. Convention for the Elimination of all Forms of Discrimination Against Women ("CEDAW"), Mar. 1, 1980, 1249 U.N.T.S. 13, pmbl. [hereinafter CEDAW] (available at United Nations High Commissioner for Human Rights, International Human Rights Instruments <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_8.html>). The United Kingdom, having ratified CEDAW on April 7, 1986, extended it to Hong Kong on October 14, 1996. See Centre for Comparative and Public Law ("CCPL") of the University of Hong Kong, CEDAW in Hong Kong (last modified Mar. 16, 1999) <<http://www.hku.hk/ccpl/cedaw.htm>> (on file with the *Fordham International Law Journal*). The United Kingdom has entered reservations to Articles 1, 2, 9, 11, 13, 15, and 16 of CEDAW. See *United Nations Division for the Advancement of Women* (visited July 30, 1999) <gopher://gopher.un.org/00/ga/cedaw/CEDAWSP2.EN> (on file with the *Fordham International Law Journal*). China ratified CEDAW on November 4, 1980 and extended application to Hong Kong after the handover. On June 10, 1997, the Chinese Government notified the U.N. Secretary-General that CEDAW "will apply to the Hong Kong Special Administrative Region with effect from July 1 1997 with certain reservations." See CCPL, *supra* note. China has entered one reservation to Article 29(1) of CEDAW. *United Nations Division for the Advancement of Women, supra*.

486. See International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), open for signature Mar. 7, 1966, 660 U.N.T.S. 13, 5 I.L.M. 352 (entered into force Jan. 4, 1969) [hereinafter CERD]. The United Kingdom, having ratified CERD on October 11, 1966, had extended it to Hong Kong, with certain reser-

tories to CEDAW agree “to adopt the measures required for the elimination of [gender] discrimination in all its forms and manifestations.”⁴⁸⁷ The instrument enumerates the measures governments should take to eliminate discrimination “in the political, social, economic and cultural fields.”⁴⁸⁸ As with the ICCPR and the ICESCR, CEDAW requires parties to promote respect for the rights enumerated therein,⁴⁸⁹ to provide adequate remedies for violations of those rights, and to report their progress in implementing the Convention.⁴⁹⁰ China submitted its first report on the HKSAR to the CEDAW Committee on November 25, 1998.⁴⁹¹ Hearings discussing the report were held in New York in January 1999.

Similarly, parties to CERD agree to “prohibit and bring to an end, by all appropriate means including legislation as required by circumstances, racial discrimination by any persons, group or organization.”⁴⁹² Like CEDAW, CERD requires parties to promote respect for the rights enumerated therein,⁴⁹³ to provide adequate remedies for violations of those rights,⁴⁹⁴ and to report their progress in implementing CERD.⁴⁹⁵ China filed its most recent report under CERD on January 15, 1996. Hearings discussing the report were held at the Forty-ninth Session on August 9, 1996.

Although Article 39 of the Basic Law incorporates the ICCPR and ICESCR and indicates that they “shall be implemented through the laws of the Hong Kong Special Administra-

tions, on March 7, 1969 and entered into force there on April 6, 1969. China ratified CERD on January 28, 1982, and extended its application to Hong Kong after the handover. China adopted the reservations of the United Kingdom (reservations 4, 15, 20) and added a reservation (reservation 22) of its own. *Id.* On June 10 1997, the Chinese Government notified the United Nations Secretary-General that CERD “will apply to the Hong Kong Special Administrative Region with effect from July 1 1997 with certain reservations.”

487. CEDAW, *supra* note 485, at pmbl.

488. *Id.* at art. 3.

489. *Id.* at art. 2.

490. *Id.* at art. 18.

491. The United Nations High Commissioner for Human Rights Treaty Bodies Database (visited July 30, 1999) <<http://www.unhchr.ch/tbs/doc.nsf>> (on file with the *Fordham International Law Journal*).

492. *See* CERD, *supra* note 486, at art. 2.

493. *Id.*

494. *Id.* at art. 6.

495. *Id.* at art. 9.

tive Region,"⁴⁹⁶ the Basic Law does not include an express endorsement of anti-discrimination principles.⁴⁹⁷ Basic Law Article 25 provides that "[a]ll Hong Kong residents shall be equal before the law,"⁴⁹⁸ but creates no remedy for residents who suffer official discrimination and fails altogether to address private acts of discrimination. BORO does include several provisions addressing equality and discrimination. Addressing gender, Article 1(2) states that "[m]en and women shall have an equal right to the enjoyment of all civil and political rights set forth in this Bill of Rights."⁴⁹⁹ Article 19 provides for equal rights in the dissolution of a marriage.⁵⁰⁰ BORO is weaker on racial discrimination, however, with Article 22 providing limited protection against discrimination on any grounds such as race or color. The protections of BORO do not extend to private sector acts.⁵⁰¹

The Sex Discrimination Ordinance ("SDO"), enacted on July 14, 1995, was Hong Kong's first anti-discrimination legislation forbidding discrimination in the private sector.⁵⁰² The SDO defines conduct constituting unlawful discrimination based on gender, marital status, or pregnancy.⁵⁰³ It includes specific prohibitions on discriminatory hiring and employment practices,⁵⁰⁴ sexual harassment in the workplace,⁵⁰⁵ discrimination in education,⁵⁰⁶ and "discrimination in provision of goods, facilities

496. See Basic Law, *supra* note 10, at art. 39.

497. See *id.* at ch. III, arts. 24-42. This sets forth the "Fundamental Rights and Duties of the Residents" of the HKSAR and contains 18 articles, none of which endorse anti-discrimination principles directly.

498. *Id.* at art. 25.

499. See Hong Kong Bill of Rights Ordinance, art. 1(2) (1991) [hereinafter "BORO"].

500. *Id.*, art. 19(4), art. 22.

501. *Id.* at §§ 7(1) & (2).

502. See SDO, *supra* note 475, at ch. 480. The Sex Discrimination Ordinance ("SDO") was passed by the LegCo that was elected in 1995. Along with the SDO, the 1995 LegCo passed the Disability Discrimination Ordinance ("DDO"). See DDO, *supra* note 475, at ch. 487. The LegCo passed the Family Status Discrimination Ordinance ("FSDO") the next year. See FSDO, *supra* note 475. For a discussion of the effect of these ordinances, see Carole J. Petersen, *The Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT'L 335 (1996); Carole J. Petersen, *Hong Kong's First Anti-Discrimination Laws and Their Potential Impact on the Employment Market*, 27 HONG KONG L.J. 324 (1997).

503. SDO, *supra* note 475, at ch. 480, §§ 5-8.

504. *Id.* at art. 11.

505. *Id.* § 24.

506. *Id.* § 25.

or services.”⁵⁰⁷

The SDO is enforced by an independent Equal Opportunities Commission⁵⁰⁸ (“EOC”) charged with investigating “complaints related to any act alleged to be unlawful by virtue of the . . . [anti-discrimination] ordinances,⁵⁰⁹ and to effect settlement conciliation.”⁵¹⁰ Under the SDO, the EOC may also initiate its own formal investigations,⁵¹¹ but remedies in EOC proceedings are limited to party conciliation and the issuance of enforcement notices.⁵¹² Victims of sex discrimination may also file a civil complaint in the District Courts.⁵¹³ Complainants in the District Courts may seek equitable and monetary relief, which the EOC is not authorized to order,⁵¹⁴ with monetary awards of up to HK\$150,000.⁵¹⁵

507. SDO, *supra* note 475, § 28. The majority of the complaints brought under the SDO to date allege violations in the employment context rather than with sexual harassment or other types of discrimination in education or the provision of goods and services. See Equal Opportunities Commission (“EOC”), *Statistics on Inquiries and Complaints* <<http://www.eoc.org.hk/statistic/estate2.html>> (on file with the *Fordham International Law Journal*) (indicating that from Jan. 1, 1999 to Mar. 31, 1999, 72 of 87 complaints under SDO dealt with employment).

508. See SDO, *supra* note 475, § 63(7) (stating “The Commission shall not be regarded as a servant or agent of the Government or as enjoying any status, immunity or privilege of the Government.”).

509. The EOC is comprised of a Chairperson and 16 members. See EQUAL OPPORTUNITIES COMMISSION, 1997-8 ANNUAL REPORT 67 (1998). Between April 1, 1997 and March 31, 1998, the EOC concluded investigations on 139 of the 227 cases it handled. *Id.* at 11. Seventy-one of those cases proceeded to conciliation with 55 of those cases being conciliated successfully. *Id.* During that time period, the EOC operated on a budget of HK\$35,782,400. *Id.* at 54. It processed 90 claims under the SDO, 136 under the DDO and one under the FSDO. *Id.* at 11.

510. See Equal Opportunities Commission Website, *Position Paper on Legislative Means*, (visited Nov. 23, 1999) <<http://www.eoc.org.hk/>> (on file with the *Fordham International Law Journal*). The FSDO and DDO give the EOC responsibility for administering the ordinances. See FSDO, *supra* note 475, §§ 44-52.

511. SDO, *supra* note 475, § 70.

512. *Id.* §§ 77, 84.

513. *Id.* § 76.

514. *Id.* §§ 76(1)(c) & (3) (“Proceedings [for unlawful acts under the SDO] shall be brought in the District Court but all such remedies shall be obtainable in such proceedings as, apart from this subsection and § 75(1), would be obtainable in the High Court.”).

515. *Id.* Initial figures indicate that few complainants have filed claims in the District Court with the assistance of the EOC. *Id.* §§ 76(1)(c), 85. As of April 1999, the EOC assisted complainants in only two cases taken to completion. One case was brought under the DDO and one, a sexual harassment case in a university, under the SDO. See *EOC Welcomes Judgements in Discrimination Cases*, EOC NEWS (EOC), Apr. 1999, at 8.

There is currently no local ordinance prohibiting acts of racial discrimination by private parties.

C. Areas of Concern: Gender

Although the enactment of the SDO was a significant first step in promoting gender equality, a much more substantial commitment to enforcement is needed to ensure that the step is not merely symbolic. The most significant obstacle to effective enforcement of the SDO may be the HKSAR administration's unwillingness to acknowledge the scope of the problem. The administration cites low numbers of complaints to the EOC as evidence that discrimination is not a significant issue.⁵¹⁶ Officials also point to statistics showing that most complaints are resolved through "conciliation," indicating that Hong Kong is not a litigious society and that formal, binding, and punitive remedies are unnecessary.⁵¹⁷ This view contrasts sharply with the opinions of many academics,⁵¹⁸ geographically-elected legislators,⁵¹⁹ activists,⁵²⁰ and service providers⁵²¹ who met with the delegation and shared research, case examples, and personal experiences suggesting that gender-based discrimination is a prob-

516. See Interview with David Lam, Secretary Home Affairs Bureau, in Hong Kong (June 9, 1999) (stating Hong Kong is society in which merit, not gender, determines way people are treated and that gender discrimination was not significant problem in HKSAR). Official government reports also deny the existence of any significant problem. In its 1998 report under CEDAW, for example, China reported that the SDO and EOC largely satisfied Hong Kong's obligations. See PEOPLE'S REPUBLIC OF CHINA, INITIAL REPORT ON THE HONG KONG SPECIAL ADMINISTRATIVE REGION UNDER ARTICLE 18 OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, (Nov. 25, 1998).

517. Interview with David Lam, Secretary Home Affairs Bureau, in Hong Kong (June 9, 1999).

518. See Interview with Dora Choi, Chinese University, in Hong Kong (June 8, 1999) (stating that EOC does not perform even its relatively limited function nearly as well as it should, because it does not advocate enough).

519. See Interview with Cyd Ho, Member of Legislative Council and The Frontier, in Hong Kong (June 1, 1999) (stating that Hong Kong government cannot address issues not covered by SDO, including violence against women and care for elderly women who have not worked without institution of women's bureau).

520. See Interview with Lam Ying Hing, Hong Kong Women Worker Association, in Hong Kong (June 3, 1999) (stating that government has not dealt with problems faced by unemployed women who formerly worked in Hong Kong factories that have closed).

521. See Interview with Tsang Kar-yin, Association for the Advancement of Feminism, in Hong Kong (June 10, 1999) (criticizing EOC for failing to reach large numbers of women, most of whom do not have clear understanding of what discrimination is, who do not have access to educational programs provided by EOC).

lem.⁵²²

Determining the level of gender discrimination in Hong Kong is a complex task and beyond the scope of this Special Report. Nevertheless, it must be emphasized that, whatever the overall level of gender discrimination, Hong Kong is obliged to provide adequate remedies for *any* violation of an individual's right to be free from discrimination on the basis of gender. Before this commitment is fully realized, a number of significant gaps must be filled. Some of these gaps may be addressed within the current framework through changes in EOC policy. Filling other gaps will likely require legislative action, including provisions addressing the problems confronted by minority women.⁵²³

One area in which EOC policy should be strengthened concerns the use of EOC-initiated investigations. The EOC has the authority under Section 70 of the SDO to initiate its own investigations into possible misconduct.⁵²⁴ According to critics, the EOC has not been active enough in the use of this power.⁵²⁵ EOC statistics support this view: EOC records indicate that of 227 cases handled between April 1, 1997 and March 31, 1998, only one involved an EOC-initiated investigation.⁵²⁶ This figure at a minimum suggests a lack of enthusiasm on the part of the administration of the HKSAR to identify potential situations of gender-based discrimination.⁵²⁷ Worse, by conveying this lack of enthusiasm, the administration subtly discourages women from initiating complaints: women already facing family, cultural, or

522. Factors in Hong Kong that contribute to sex discrimination include a lack of awareness of discrimination that stems from cultural norms ascribing women to the role of a nurturer. The economic crisis has resulted in high unemployment rates among women and pressures within households contributing to domestic violence. Interview with Maryanne King, Director Hong Kong Women Christian Council, in Hong Kong (June 2, 1999).

523. Notably foreign domestic workers, who often suffer not only from the weaknesses of the SDO, but also the lack of protections from private acts of racial/national origin discrimination.

524. Interview with Tsang Kar-yin, Association for the Advancement of Feminism, in Hong Kong (June 10, 1999).

525. *See, e.g.*, Interview with Dora Choi, Chinese University, in Hong Kong (June 8, 1999) (discussing reactive rather than active role EOC has taken wherein it does not initiate actions or investigations without being prompted by complaint).

526. *See* Interview with Tsang Kar-yin, Association for the Advancement of Feminism, in Hong Kong (June 10, 1999). The investigation, which has not yet concluded, involves the higher test scores required by girls for admittance to high schools. *Id.*

527. *Id.*

other pressures against prosecuting their rights face the prospect of seeking assistance from an unsupportive EOC.⁵²⁸ Conversely, the EOC's active use of its independent investigatory powers would send a message to victims and violators that gender discrimination will not be tolerated, that victims will find support and assistance in the HKSAR administration, and that violators will suffer the legal consequences of their actions. Such a message would have ameliorative as well as deterrent effects.

Another policy area open to improvement concerns education and promotion of existing complaint procedures and remedies.⁵²⁹ In its *1997-98 Annual Report*, the EOC acknowledged that it did not reach out to the community in its first year of operation. Its mission statement for its second year therefore promised aggressive public awareness programs.⁵³⁰ Critics argue that the EOC failed to meet this objective, noting that current EOC education programs are directed toward employers only, and not employees or the general public.⁵³¹

Although the delegation agrees that education of employers or other potential violators is vitally important, educating workers about the scope of their rights and the procedures for enforcement is also necessary. Without such efforts, the government's policy seems tailored to keep the number of complaints low. This scheme is particularly problematic where the government relies on low complaint totals to argue against the existence of a problem and then fails to use its independent powers of investigation.⁵³²

The EOC's conciliation process, used in more than fifty percent of investigated cases, should also be improved in order to protect workers' rights more effectively. The process is initiated with a formal complaint, which the EOC then investigates.⁵³³ After the investigation, the EOC's only recourse is to mediate a

528. *Id.*

529. *See id.* (stating that EOC has held most training sessions in high end hotels and similar venues far from where most middle-class or poor women reside or work).

530. EQUAL OPPORTUNITY COMMISSION, *supra* note 509, at 4.

531. Interview with Tsang Kar-yin, Association for the Advancement of Feminism, in Hong Kong (June 10, 1999); Interview with Dora Choi, Chinese University, in Hong Kong (June 8, 1999).

532. Interview with Tsang Kar-yin, Association for the Advancement of Feminism, in Hong Kong (June 10, 1999); Interview with Dora Choi, Chinese University, in Hong Kong (June 8, 1999).

533. EQUAL OPPORTUNITY COMMISSION, *supra* note 509, at 11.

conciliation hearing between the parties.⁵³⁴ Although mediation can be effective under many circumstances, it is not an effective tool to resolve certain types of disputes arising from alleged violations of the SDO and may put undue pressures on complainants.⁵³⁵ Some activists suggest, for example, that a woman who files a complaint against an employer for sexual harassment may not feel comfortable confronting the employer face-to-face in the hearing.⁵³⁶ Others point to potential conflicts posed by the EOC serving in the dual role of investigator and mediator.⁵³⁷

While recognizing the benefits of communication and non-confrontational dispute-resolution, the delegation urges the EOC to adapt the conciliation procedures ensuring that victims do not suffer any undue pressures and are fully apprised of their rights and available remedies, including judicial remedies.

D. *Areas of Concern: Race*

As with gender, the most significant obstacle to eliminating racial discrimination is official and public indifference to the problem.⁵³⁸ Most members of the administration, government officers,⁵³⁹ legislators representing functional constituencies, and businesspersons⁵⁴⁰ do not regard racial discrimination as a significant problem. Those interviewed by the delegation repeatedly cited the results of a 1996 government survey in which

534. *Id.*

535. Interview with Tsang Kar-yin, Association for the Advancement of Feminism, in Hong Kong (June 10, 1999).

536. *Id.*

537. *Id.* Complainants are generally not permitted to bring counsel with them to conciliations. If both parties agree to have counsel present, however, then they may bring attorneys with them. Nonetheless, complainants rarely bring counsel to conciliations. Interview with Fanny Cheung, Equal Opportunities Commission, in Hong Kong (June 9, 1999).

538. Hong Kong is a multi-racial community. Although 96% of the population is of Chinese ancestry, over 16 ethnicities are represented in the territory. See HOME AFFAIRS BRANCH, GOVERNMENT SECRETARIAT, EQUAL OPPORTUNITIES: A STUDY OF DISCRIMINATION ON THE GROUND OF RACE (Feb. 1997). The largest among them include Filipino, Indian, Pakistani, Bangladesh, Sri Lankans, and Nepalese. *Id.* In total, there are roughly 400,000 racial or ethnic minority residents of Hong Kong, of whom a majority are permanent residents of the HKSAR under the Basic Law or otherwise entitled to long-term residency. *Id.*

539. Interview with Mr. David Lam, Secretary Home Affairs Bureau, in Hong Kong (June 9, 1999).

540. Interview with Dr. Eden Woon, Director of Hong Kong General Chamber of Commerce, in Hong Kong (June 4, 1999).

83% of those polled did not consider racial discrimination a significant problem and favored public education measures over legislation to address the issue.⁵⁴¹

In contrast, many academics, popularly elected legislators,⁵⁴² legal practitioners,⁵⁴³ activists, service providers⁵⁴⁴ and individuals shared research, case examples, and personal experiences suggesting that race-based discrimination is a problem. Among the most vocal of this group, the Human Rights Monitor denounced the government's readiness to use the opinions of the racial majority as an excuse for ignoring discrimination suffered by racial minorities.⁵⁴⁵ In response to the government survey, the Human Rights Monitor conducted its own informal survey polling only members of ethnic minorities.⁵⁴⁶ Their results contrast sharply with the government's survey. Whereas the HK-SAR's general population survey found that only a minority found racial discrimination to be a problem, sixty-seven percent of the minority respondents to the Human Rights Monitor's survey reported that they had either experienced or witnessed racial discrimination. Eighty percent agreed that legislation would be helpful, and seventy-six percent would support such legislation.⁵⁴⁷

541. HOME AFFAIRS BUREAU, THE 1996 SURVEY ON RACIAL DISCRIMINATION (1996). In an interview, Mr. David Lam, Secretary for the Home Affairs Bureau, supported this view by stating "there is no obvious problem of any significance that warrants specific legislation—if people are forced to act towards others in a special way when in the past their behavior didn't need correction, such unnecessary legislation will only create resentment." Interview with David Lam, Secretary Home Affairs Bureau, in Hong Kong (June 9, 1999).

542. Interview with Christine Loh, Frontier Party Delegate, LegCo, in Hong Kong (June 10, 1999).

543. Interview with Vandana Rajwani, Director of Indian Resources Group, in Hong Kong (June 7, 1999).

544. Interview with Belinda Winterbourne, Hong Kong Human Rights Monitor (June 7, 1999).

545. See HONG KONG HUMAN RIGHTS MONITOR, THE NEED FOR LEGISLATION ON RACIAL DISCRIMINATION, A SUBMISSION TO THE LEGCO PANEL ON HOME AFFAIRS, (Sept. 1998). In its 1996 Concluding Observations on Hong Kong, the United Nations Committee on Economic Social and Cultural Rights also criticized the HKSAR's use of the racial majority opinion, criticizing the government's "step-by-step" approach according to which legislation for the protection of vulnerable minorities is adopted primarily on the basis of public opinion surveys, that is based on majority views. U.N. COMMITTEE ON ECONOMIC, SOCIAL AND POLITICAL RIGHTS, 1996 REPORT ON HONG KONG (1996).

546. See HONG KONG HUMAN RIGHTS MONITOR, *supra* note 545, at 3.

547. *Id.* Among those who considered themselves to have personally experienced or witnessed racial discrimination, the discrimination occurred mostly in employment

The results of the Human Rights Monitor's survey are reinforced by a number of well-publicized incidents of racial discrimination. For example, in the employment area, an eighteen-year-old university graduate answered a newspaper advertisement for a Native-English speaker to teach spoken English to kindergartners.⁵⁴⁸ The advertisement called for no other qualifications. The young woman inquired by telephone about the position and after a brief exchange in which the prospective employer asked her race—to which she replied she was Indian—she was told that the school would only hire Caucasian, English-speakers from England or the United States.⁵⁴⁹ Because there is currently no law prohibiting private employers from basing hiring decisions on race, the young woman had no remedy.⁵⁵⁰

In the area of public accommodations, tavern owners in the Wan Chai district of Hong Kong island were found to be charging higher admission charges to dark-skinned or Asian clientele than to fair-skinned Caucasians.⁵⁵¹ In response to a public outcry, Secretary for Home Affairs David Lan Hong-tung said he was surprised by the incident, but there was no need to introduce legislation against racial discrimination.⁵⁵² In a similar incident, certain hotels were exposed for charging Asian tourists higher rates than Americans or Europeans.⁵⁵³ As in the employment situation, the victims of the discrimination had no legal recourse.

The HKSAR administration itself has been accused of discriminatory customs and immigration policies targeting Nepalese and Thai travelers. In October 1998, the HKSAR administration removed Nepal from the list of countries whose citi-

(45%), admission to facilities (33%), sales or delivery of goods or services (20%), government services (16%), home purchase or rental (15%), medical care (12%), access to education (6%), business investment (5%), and other settings like social occasions (12%). *Id.*

548. Lucia Palpal-latoc, *Laws Against Racial Discrimination Not Necessary, School Job Applicant Fails on Skin Color*, HONG KONG STANDARD, Apr. 25, 1998.

549. *Id.*

550. Lucia Palpal-latoc, *Schools' Policy on Teachers Discriminates Against Asians*, Apr. 25, 1998, HONG KONG STANDARD, at 1.

551. Lucia Palpal-latoc, *Disco Accused of Unfair Entry Policy*, Apr. 25, 1998, HONG KONG STANDARD, at 1.

552. *Id.*

553. HONG KONG HUMAN RIGHTS MONITOR, *RACE DISCRIMINATION IN HONG KONG* (Feb. 1998).

zens could enter Hong Kong without a visa.⁵⁵⁴ The HKSAR administration claimed it was trying to curb an increase in the use of forged travel documents and abuse of visa-free visitation rights.⁵⁵⁵ Nepalese sources, however, charged that HKSAR officials were trying to curb the growth of the Nepalese population in Hong Kong by deterring new arrivals.⁵⁵⁶ They further charged HKSAR officials with using improper immigration searches on Nepalese visitors, again in an effort to deter new arrivals.⁵⁵⁷

The most visible evidence both of the multi-ethnic character of Hong Kong society and the often marginal status of minority groups is the large population of foreign domestic workers in Hong Kong. These workers are usually vulnerable to exploitation because of language and communication barriers, lack of familiarity with local circumstances, and ignorance of available assistance or remedies.⁵⁵⁸ In addition to the lack of protections from private acts of racial/national origin discrimination, they

554. Visa-free access for visitors from Bangladesh, India, and Pakistan was also curtailed, cutting the visa-free entry period from three months to two weeks. See Glenn Schloss, *Consuls-general Express Their Fears, Allegations of Racism in Visa Ruling Rejected*, S. CHINA MORNING POST, Jan. 27, 1999, at 2. Nepalese had long served the British in Hong Kong as Gurkha soldiers. As agreed with China and Britain, Gurkha families born before December 1982 were given permanent residents with the British Nationalities in Overseas. The policy provided Nepalese permanent residents to interact freely with their families, relatives, and close friends from Nepal. See Far East Overseas Nepalese Association, Press Statement, Apr. 4, 1999 (on file with the *Fordham International Law Journal*).

555. Interview with Mr. David Tong, Assistant Director of Immigration Department, in Hong Kong (June 4, 1999). See also Glenn Schloss, *supra* note 135 (quoting Immigration Department Director Ambrose Lee Siu-kwong stating "the decision was made primarily on immigration grounds; it has nothing to do with race or nationality").

556. The Nepalese in Hong Kong is believed to have grown from just a few hundred in the early 1990s to 17,400 at the end of 1998, making it the tenth largest foreign [ethnic] group. See Glenn Schloss, *Mushrooming Nepalese Community 'Prompted Removal of Visa-Free Access'*, S. CHINA MORNING POST, Mar. 21, 1999, at 4.

557. Government figures show that of the 8785 visitors searched over the period of February 1998 to January 1999, 1565 (11.3%) were Nepalese, whereas Nepalese accounted for only 0.5% of all visitors. See Christine Loh, *Eliminate Discrimination at Customs Airport Command*, Press Release, Mar. 23, 1999 (on file with the *Fordham International Law Journal*). Secretary for Security Regina Ip Lau Suk-yea defended the searches as efforts to detain drug couriers and that some prior couriers were Nepali. See Glenn Schloss, *Customs Officers Accused of Racism in Body Searches*, S. CHINA MORNING POST, Mar. 11, 1999, at 2. Government figures, however, cast doubt on this explanation. In 1996, 11 Nepalese were found with drugs in their possession, and only four in 1997. In 1998, none of the three persons found possession drugs were Nepalese. See Loh, *supra* note.

558. See Loh, *supra* note 557.

suffer from the added vulnerability created by the HKSAR's immigration policy known as the "two week rule." Because of this vulnerability, they often endure low wages, poor living, and working conditions,⁵⁵⁹ and even physical and sexual abuse.

The HKSAR's policy for foreign domestic workers applies to those who are not residents of China, Macau, or Taiwan and are employed in Hong Kong under a standard two-year employment contract to perform duties such as domestic cooking, household chores, baby-sitting, and child minding.⁵⁶⁰ The "two week rule" applies to those whose contracts are terminated prematurely.⁵⁶¹ The rule requires them to leave Hong Kong within two weeks.⁵⁶² Introduced in early 1987, the rule was intended to curb various abuses such as "job-hopping," whereby workers deliberately terminated their contracts in order to change employers and stay on indefinitely in Hong Kong. In practice, however, the rule provides unscrupulous employers with a unilateral threat of deportation over any worker who objects to low wages, poor conditions, or abuse. Even workers willing to institute proceedings in the Labour Tribunal are vulnerable to this threat because, although they may secure extensions of the two week period dur-

559. Although the standard employment contract of foreign domestic helpers specifies certain conditions of work and living to be provided by the employer, such as level of salary, provision of suitable and furnished accommodation, food free of charge, and free medical treatment, these terms are frequently breached by employers. This situation is especially problematic where workers lack English proficiency, insofar as translations of the standard domestic worker employment contracts and accompanying explanatory notes are difficult to obtain. See HONG KONG HUMAN RIGHTS MONITOR, BRIEFING PAPER FOR THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION ON THE THIRTEENTH PERIODIC REPORT BY THE UNITED KINGDOM IN RESPECT OF HONG KONG UNDER THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (visited Apr. 10, 1999) <http://www.lawhk.hku.hk/demo/unhrdocs/cerd_EXS.htm> (on file with the *Fordham International Law Journal*).

560. See HONG KONG HUMAN RIGHTS MONITOR, SUBMISSION TO THE UNITED NATIONS ON HKSAR UNDER THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1998).

561. A change of employment upon premature termination of contract is permitted on an exceptional basis, for example, circumstances where the employer has emigrated or has become insolvent or the foreign domestic helper has been abused or exploited by the employer. See HONG KONG HUMAN RIGHTS MONITOR, *supra* note 559.

562. See HOME AFFAIRS BUREAU, *supra* note 541, at 15. The Hong Kong Judicial Committee, while recognizing past abuse of the former policy of permitting foreign workers an unrestricted six-month stay after termination of employment, see HONG KONG HUMAN RIGHTS MONITOR-UNITED KINGDOM, FOURTEENTH PERIODIC REPORT IN RESPECT OF HONG KONG UNDER THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1996).

ing labour proceedings, the rule does not permit them to work legally in Hong Kong during the two weeks or any extension thereof.⁵⁶³ This rule creates the untenable situation where a worker suffering poor conditions or abuse is forced to endure the conditions or risk homelessness (because most domestic helpers live in the home of the employer), financial collapse, and either deportation or weeks or months of uncertainty as proceedings to validate the complaint take place.

The "two week rule" has been the subject of international attention and criticism in the past. The United Nations Committee on Economic, Social and Cultural Rights recognized this issue as a matter of concern in its Concluding Observations in December 1994. This committee recommended that the HKSAR administration should review the employment conditions of foreign domestic helpers to provide the full enjoyment of rights under the ICESCR.⁵⁶⁴ It further recommended the abolition of the "two week rule" because it caused serious impairment of the foreign domestic helper's economic, social, and cultural rights.⁵⁶⁵

This account of racial and ethnic discrimination in Hong Kong is admittedly anecdotal and cannot definitively establish the rate or pattern of such discrimination in Hong Kong. Nevertheless, as with gender discrimination, whatever the actual level of racial discrimination, Hong Kong has an obligation under international law to provide an adequate remedy for any and all acts of race discrimination. The current law falls far short of that standard in that there is no remedy whatsoever for private acts of discrimination on the basis of race or ethnicity.

In response to calls for the passage of a race discrimination ordinance along the lines of the SDO, the HKSAR administration has adopted what it calls a step-by-step approach:

Anti-discrimination legislation is a new area of law in Hong Kong, which has far-reaching implications for the community

563. See HONG KONG HUMAN RIGHTS MONITOR, *supra* note 560 (noting that workers are given "visitor" status during legal proceedings challenging their contract termination, and that "visitors" are not permitted to work legally).

564. See U.N. COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, REPORT ON HONG KONG UNDER THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (Dec. 1994); see also, HONG KONG HUMAN RIGHTS MONITOR, *supra* note 560.

565. See HONG KONG HUMAN RIGHTS MONITOR, *supra* note 562.

as a whole. The Hong Kong Government accordingly maintains its view that a step-by-step approach allowing both the government and the community thoroughly to assess the impact of such legislation in the light of experience offers the most suitable way forward.⁵⁶⁶

The intent behind the policy is to give Hong Kong time to develop experience with the SDO, family status, and disability ordinances before moving to confront other areas such as race or age discrimination.

In the meantime, the HKSAR administration claims to pursue a policy of public education and voluntary compliance; however, there is little evidence of any serious efforts in this area. For example, when asked by Legislative Councilor Christine Loh to provide details on funding for anti-discrimination programs in the years 1999 to 2000 and procedures for grant making to community service providers, the administration's written response stated only that the administration "would be formulating a suitable programme of activities for implementation in 1999/2000 and they would be looking into funding arrangements" ⁵⁶⁷

With respect to voluntary compliance, the administration did release a Code of Practice Against Discrimination in Employment Areas on the Ground of Race ("Anti-discrimination Code") in November 1997.⁵⁶⁸ This voluntary code is designed to encourage employers and staff to "examine their conduct, understand what practices are discriminatory, and to stop them."⁵⁶⁹ The Anti-discrimination Code covers terms and conditions of employment, selection, recruitment, interviewing, promotion, grievances, and dismissal procedures.⁵⁷⁰ The Anti-discrimination Code, however, contains no grievance procedures for victims, no reporting requirements, and no remedies, binding or

566. *Government 'Turning Blind Eye' to Racial Discrimination*, HONG KONG STANDARD, Jan. 20, 1999, at 1.

567. HONG KONG HUMAN RIGHTS MONITOR, CAMPAIGN FOR LEGISLATION AGAINST RACIAL DISCRIMINATION, (visited May 9, 1999) <<http://www.freeway.org.hk/hkhrm/english/reports/enw/enw0199d.htm>> (on file with the *Fordham International Law Journal*) (paraphrasing written reply of Peter Lo, Acting Secretary for Home Affairs Bureau).

568. HONG KONG HOME AFFAIRS BUREAU, CODE OF PRACTICE AGAINST DISCRIMINATION IN EMPLOYMENT ON THE GROUND OF RACE (on file with the *Fordham International Law Journal*).

569. *Id.*

570. *Id.*

otherwise, and there is little evidence that the Anti-discrimination Code has had any effect. Indeed, critics of the Anti-discrimination Code point out that not only is it voluntary, but it also contains a statement essentially releasing employers from even a moral obligation to comply.⁵⁷¹ This provision states that the "Government recognizes that it may not always be feasible for everyone to follow all the good practices recommended in this Code."

The step-by-step approach is problematic on several levels. First, it sanctions an arbitrary hierarchy of rights; an effective "queue" for victims of discriminatory conduct that allows redress for gender-based claims, for example, but not race-based claims. Second, it condones a majoritarian attack on core principles of individual human dignity: because the majority of Hong Kong's people allegedly are not ready to recognize the equality of racial minorities, the administration sacrifices the rights of the minority. This represents a failure on the part of the administration to understand principles of equality and anti-discrimination as fundamental protections of inherent rights, rather than privileges to be accorded in due time.⁵⁷² Such policy squarely conflicts with Hong Kong's commitments under international law.

While recognizing the value of progressive measures, including public education, the U.N. Committee on Economic Social and Cultural Rights has expressed its concern over the absence of legislation banning racial discrimination. In its 1994 Concluding Observations, the Committee expressed "its concern

571. Interview with Vandana Rajwani, Director of Indian Resources Group, in Hong Kong (June 7, 1999).

572. Moreover, the legislative process permits a prolonged enactment that would give businesses and the community time to prepare for any legislation by drafting and disseminating company policies or procedures and training employees. This method was used with the SDO. The SDO was presented for first reading at the LegCo nine months before its enactment, and in its final version included a three year phase-in period. Finally, the step-by-step approach rests on a faulty and illogical foundation. HKSAR officials argue that delaying anti-race discrimination legislation indefinitely is acceptable because the problem is not significant and because Hong Kong needs time to adjust to existing legislation—legislation that itself ironically addresses the insignificant problems of gender, family status, and disability discrimination. But if the problem is not significant, then few claims would be expected and legislation should not prove disruptive in any fashion requiring prolonged adjustment. A more candid statement of the objection that creating policies and training employees to implement any legislative scheme would take resources away from income-generating activities; resources that employers do not want to spend, particularly when they do not perceive a widespread problem.

that in spite of recent Government initiatives to introduce legislation concerning non-discrimination in relation to sex and disability, there is an absence of comprehensive legislation providing protection against discrimination on the grounds referred to in article 2 of the Covenant.⁵⁷³ Article 2 includes prohibitions on discrimination based on race, color, or national origin. In failing to implement protections in those areas, Hong Kong fails to satisfy its obligations under the ICESCR.⁵⁷⁴ Similarly, Hong Kong's obligations under CERD include an obligation not only to "prohibit" but affirmatively "to bring to an end, by all appropriate means *including legislation* as required by circumstances, racial discrimination by any persons, group or organization."⁵⁷⁵ Although CERD does allow consideration of local circumstances, nothing in Hong Kong's current legal or political order provides grounds for delay.

E. *Conclusions and Recommendations*

The delegation recognizes the important steps Hong Kong has taken in passing the SDO and establishing the EOC. The delegation concludes, however, that additional measures are necessary to achieve and maintain gender equality.⁵⁷⁶ Most readily achievable are policy changes designed to educate women about their rights and available remedies and to encourage the EOC to use its existing powers, especially that of independent investigation. More involved legislative initiatives should be considered to address the problems of violence against women and of foreign domestic workers. Finally, public discussion should be encouraged on the proposal of a number of Hong Kong-based human rights organizations and political parties urging the creation of a Women's Bureau within the HKSAR administration, charged with analyzing the effect of all government

573. See HONG KONG HUMAN RIGHTS MONITOR-UNITED KINGDOM, *supra* note 562.

574. As Article 2 of the ICCPR contains essentially the same language, Hong Kong's failure to implement race discrimination legislation fails to satisfy the ICCPR as well. Moreover, Article 26 of the ICCPR requires Hong Kong to provide an effective remedy for violations of the rights therein. Lacking legislation creating a remedy for private discrimination, Hong Kong arguably violates Article 26 as well. See ICCPR, *supra* note 8.

575. See CERD, *supra* note 486, art. 2(1)(d) (emphasis added).

576. See *Initial Report on the Hong Kong Special Administrative Region under Article 18 of the Convention on the Elimination of all Forms of Discrimination Against Women*, at art. 2, para. 18 (Nov. 25, 1998).

policies on women as well as drafting policy proposals to promote gender equality.⁵⁷⁷

The delegation is concerned by the absence of legal protections for racial minorities and urges the government of Hong Kong to adopt legislation in the near future. Such legislation could be modeled on the SDO, or on the proposed bill of Legislative Councilor Christine Loh. As noted above, implementation could be phased in, as with the SDO. And as noted above with regard to the SDO and EOC, educational initiatives developed to promote racial equality and understanding between all races should accompany legislation.

CONCLUSION

In this time of transition for Hong Kong, the resolve of the

577. See CEDAW, *supra* note 485; see also The Democratic Party of Hong Kong, *The Initial Report on Hong Kong SAR Under CEDAW by the Democratic Party, Hong Kong*, Conclusion, Jan. 1999 (visited Apr. 25, 1999) <<http://www.hku.hk/ccpl/cedawweb/DP.html>> (on file with the *Fordham International Law Journal*); see HONG KONG HUMAN RIGHTS MONITOR, *supra* note 567, at part II(A)(2); The Frontier, *HKSAR Under Article 18 of CEDAW*, Conclusion (visited Apr. 25, 1999) <<http://www.hku.hk/ccpl/cedawweb/Frontier.html>> (on file with the *Fordham International Law Journal*). Advocates argue that the proposed Women's Bureau would allow the government to address more effectively areas of gender discrimination not covered by the narrow mandates of SDO or and EOC, including private sector conduct. For example, advocates suggest that a Women's Bureau would help promote policies and legislation intended to curb violence against women. The CEDAW Committee expressed concern about services provided by the HKSAR for victims of domestic abuse as well as the HKSAR's apparent failure to examine the problem of sexual violence. It was similarly concerned about the HKSAR's failure to mention sexual violence against women in its report to the CEDAW Committee. See CEDAW, *supra*. Advocates in Hong Kong suggest that a Women's Bureau might deal with these issues by promoting anti-stalking laws, laws expanding the definition of rape and criminalizing marital rape, and laws mandating counseling for abusers and the reporting of domestic violence. Harmony House, *Submission to the CEDAW Committee on the Initial Report on Hong Kong Under CEDAW by Non Government Organizations*, Article 5(C)(1) (visited Apr. 25, 1999) <<http://www.hku.hk/ccpl/cedawweb/CEDAW4.html>> (on file with the *Fordham International Law Journal*). Others suggest a Women's Bureau might initiate policies to train police, medical professionals, and social workers to deal with victims of domestic or sexual violence, and help to establish shelters to protect victims of sexual violence and a 24-hour rape crisis hotline. Harmony House, *supra* note; Association Concerning Sexual Violence Against Women, *Submission to the CEDAW Committee on the Initial Report on Hong Kong Under CEDAW by Non Government Organizations*, Article 5(6) (visited Apr. 25, 1999) <<http://www.hku.hk/ccpl/cedawweb/CEDAW4.html>> (on file with the *Fordham International Law Journal*); Hong Kong Women Workers Association, *Submission to the CEDAW Committee on the Initial Report on Hong Kong Under CEDAW by Non Government Organizations*, Article 3(5) (visited Apr. 25, 1999) <<http://www.hku.hk/ccpl/cedawweb/CEDAW4.html>> (on file with the *Fordham International Law Journal*).

HKSAR administration to uphold the rule of law and its commitment to fulfilling its obligations under international law will continue to be tested. In the December 15, 1999 decision of the CFA in the case of *HKSAR v. Ng Kung Siu and Lee Kin Yun*, No. 4 of 1999, HKSAR Court of Final Appeal (Dec. 15, 1999), Chief Justice Li stated:

Hong Kong is at the early stage of the new order following resumption of the exercise of sovereignty by the People's Republic of China. The implementation of the principle of "One Country, Two Systems" is a matter of fundamental importance as is the reinforcement of national unity and territorial integrity.

The successful implementation of this principle will safeguard the HKSAR's status as the premiere example of economic and political stability in Asia. It is toward this end that the Crowley Program offers this Special Report, hopeful that in this one country, these two systems of law can be sustained to advance the rights and dignity of all men and women in the Hong Kong Special Administrative Region and the People's Republic of China as a whole.