

# Hong Kong's Legal System: Doomed From The Beginning?

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## Introduction

When Great Britain and China signed the Sino-British Joint Declaration in 1984 announcing that Hong Kong would be reunified with the People's Republic of China (PRC) on July 1 1997, they agreed that the Hong Kong Special Administrative Region (HKSAR) would be granted "a high degree of autonomy" following an innovative philosophy of "One Country, Two Systems." Under the arrangement, Britain would relinquish control over its colony and China would become a sovereign nation; Hong Kong would have its own government; and the capitalist system would remain intact. Embedded in these expectations are contradictions and controversies left to the legal system to unravel as it tries to blend the rule of law (common law) with the rule of man in order to preserve legal stability for Hong Kong.

Because of its ability to establish precedent, Hong Kong's legal system has been the subject of heavy debate and scrutiny from all sides in the HKSAR and abroad. Opinions are split as to whether Hong Kong has "independent judicial power" as stipulated in the Joint Declaration. In this essay I argue that since 1997 the Hong Kong legal system, despite its centrality to the success of "One Country, Two Systems," has been unable to verify the prescribed "high degree of autonomy" for the region for two reasons: because of the openness and ambiguity of certain guidelines set forth by the Basic Law (Hong Kong's "mini-constitution") and because of several decisions and actions made by the Court of Final Appeal (Hong Kong's highest court). While the task of combining the two systems is a difficult one, the legal system has allowed the

independence of the judiciary, the “high degree of autonomy,” and the economic future of the region to remain uncertain.

This article begins with a brief overview of the formation of common law in Hong Kong and events leading up to the handover. It then examines how portions of the Basic Law thwarted its own apparent intentions of creating “a high degree of autonomy.” This section also considers how several parts of the Basic Law undermine itself, stripping Hong Kong of much of its political and judicial independence. Next, the article presents an in-depth look at issues surrounding the Court of Final Appeal in the foundation of the fledgling nation. After an analysis of several key decisions – including the “Right of Abode” – the article concludes with an assessment of the impact of these rulings on Hong Kong’s autonomy and success in four ways: the restrictions on human rights, deference to the mainland government, divisiveness within the Hong Kong government, and erosion of one of Hong Kong’s primary business attractions: the rule of law.

### **The Evolution of Common Law in Hong Kong**

With colonization at the end of the 19<sup>th</sup> Century, Hong Kong adopted British common law. However, because of drastic differences in culture, mentality and jurisprudence, as Berry Hsu points out, “the common consciousness of Chinese culture was preserved to an extent through the retention of some Chinese customary law by the authorities in the colony.” (Hsu, p.10) Although based primarily on the rule of law, the colony’s legal system incorporated several features of Chinese law as late as 1970, such as family law, succession and even “concubinage.” (Hsu, p.10) As Hong Kong underwent dramatic socio-cultural changes in the 1960s and `70s, however, common law supplanted most of the remaining Chinese law that had been fused into

the system for the previous hundred years. Thus, as the 1980s approached and the Sino-British discussions about Hong Kong's future began, British common law, with the help of economic and social changes, had displaced Chinese law and allowed Hong Kong to become a distinct part of Asia Pacific without ties to the mainland's legal scheme.

Some people claim that without this foundation in British common law, Hong Kong would not have been dramatically transformed from a small fishing village of 90,000 indigenous Chinese inhabitants to an economic and cultural island-metropolis of more than 7 million people in the span of 150 years. As Berry Hsu writes, "The introduction of Common Law to Hong Kong provided the population with the stability necessary for an economic and social revolution that set the colony on a course toward becoming a modern day city state." (Hsu, p.7) But as the common law has helped Hong Kong evolve, skeptics continue to be concerned that under Chinese sovereignty, Hong Kong may lose some of its judicial independence; and as a result, foreign investors may not have the confidence their contracts will be upheld that they do under the common law. This is not to say that the common law will be eliminated from Hong Kong by China, but rather that it will be altered to suit the PRC's needs. The PRC is aware that it will profit from a prosperous and stable economy in Hong Kong. (Chang, p.12) The two economies are directly linked as "Hong Kong is the largest foreign investor in Mainland China, accounting for just over fifty percent of the national total, and ninety-five percent of Hong Kong's re-exports originate from, or are destined for, Mainland China." (InvestHK) Thus the PRC must ensure that the region remains financially successful. However, many people continue to be anxious about rising communist intervention, especially in the judicial system.

The first step in establishing the legal basis for Hong Kong's reunification was the signing of the Sino-British Joint Declaration in 1984, an internationally binding treaty that

outlines Deng Xiaoping's vision of One Country, Two Systems. The document prescribes that the Region "will enjoy a high degree of autonomy except in foreign and defense affairs" and that "the social and economic system in Hong Kong will remain unchanged and so will the life-style. Rights and freedoms will be protected by law." ("Implementation of...", p.2) It is left to the Basic Law to delineate how these stipulations are met. Promulgated by the National People's Congress (NPC), the Basic Law remains the instrument not only for the success of One Country, Two Systems, but also for the controversy surrounding it.

### **The Basic Law**

Officially passed on April 4, 1990, the Basic Law underwent a long, controversy-laden creation. Knowing that the British were under severe time constraints (their lease on Hong Kong was set to expire in 1997 regardless of negotiations) but foreseeing that China's economy, in part, depends on Hong Kong's economic well-being, Beijing set up a Drafting Committee (BLDC) in 1985 to help create a constitution. "Packed with its own officials" (Elliot) and 23 delegates (out of 59) from Hong Kong, the BLDC produced two drafts of the Basic Law by early 1989. The progression was promising. However, optimism quickly turned to skepticism on June 4, 1989, when the People's Liberation Army (the PRC's military) quashed a peaceful student protest for democracy in Tiananmen Square. The actions of the PRC were felt beyond Beijing. According to Johannes Chan, the events of June 4 "not only crushed the confidence of the people in the future of Hong Kong, but it also bred serious suspicion and distrust between the central government and the Democratic Party in Hong Kong." (Chan, p.246) With a reputation for harboring Chinese dissidents and a strong, outspoken political contingent (then known as the

United Democrats of Hong Kong<sup>1</sup> (UDHK)), which “advocated radical democratization,” (Wang, p.173) Hong Kong, along with most of the rest of the world, was aghast at the PRC’s reaction to the protest for democracy. Beijing, fearing a possible rebellion “dug its heels in”(Elliot) hoping to avoid another June 4. Along with the acts of treason, secession and sedition, *subversion*, which had been removed from the second draft, was reinstated in the Basic Law after Beijing criticized radicals in Hong Kong for attempting to undermine the Communist Regime. (Elliot) By early 1990, the final draft was created. Hailed by Deng Xiao Ping as a “creative masterpiece,” (“Renmin Ribao’...”) others believed that it was a calamity. Martin Lee “claimed that the law was not in accord with the Joint Declaration.” (Ellingsen and Elliot) Lee and other legislators believed that the BLDC had abandoned the push for full democracy, as “earlier plans had been dropped for a referendum on full universal franchise which is now only said to be ‘the ultimate goal,’ carrying no guarantees.” (Ellingsen and Elliot) Despite these grumblings there was little that could be done as “fewer than half a dozen delegates from Hong Kong’s 23-member delegation fought for greater democracy.” (Chang, p.64) Furthermore, because many Hong Kong citizens were not informed of the debates surrounding the creation of the Basic Law (Chang, p.70), there was little public outcry over the approval of the Basic Law.

In theory, the Basic Law seems to be a reasonable compromise, as it grants Hong Kong substantial autonomy in its portion of “Two Systems.” Article 2 affirms that “the National People’s Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication.” The other primary condition of the Joint Declaration is met in Article

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<sup>1</sup> Begun in 1990 the UDHK was Hong Kong’s first major political party. Headed by Martin Lee and Szeto Wah, it gained backing and respect from the people of Hong Kong after the Tiananmen Square Incident. In 1991, in the first LegCo election since 1842, the UDHK won 12 of the 18 directly elected seats. (Wang, p. 176) After merging with the democratic group Meeting Point, they changed their name to the Democratic Party. Still headed by Martin Lee and still the largest political party in Hong Kong, the DP continues to fight for rapid democratization in Hong Kong.

8 of the Basic Law: “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.” Thus, from an external point of view, the Basic Law creates a win-win-win situation. The British left their legacy of common law on the island; the Chinese regain sovereignty over an important city in Asia Pacific; and the people of Hong Kong presumably have more governmental, social and cultural independence than under either colonial or Chinese rule.

For many, however, the Basic Law is not perfect, as it is full of purposeful ambiguities. Many of the frequently quoted, pro-democracy, excerpts are qualified with the phrase “in accordance with the provisions of this Law.” An example is the previously mentioned Article 2, which grants the HKSAR three independent branches of government only to limit that independence later in the document. Thus, it appears as if a compromise is being made, but in reality the compromise remains unclear as the definitiveness of the article is left open-ended. The qualifying statement takes away from the absoluteness of the article (its authority) and changes the meaning noticeably when other contravening articles are considered.

Another example of vagueness caused by internal contradiction occurs in Article 160. While Article 8 states that the laws in force before July 1, 1997, will remain so after this date, Article 160 gives the National People’s Congress (China’s rubber-stamp parliament) the power to declare which of those are “in contravention of this Law.” Thus, in effect, the central government has the power to decide which laws remain and which do not survive the handover. (Chen, p.290) Whereas Article 8 is definitive, Article 160 is unrestrictive and leaves the door open for NPC intervention. From China’s point of view – wanting to regain sovereignty over the territory while keeping the economic system intact – the wording is appropriate as both objectives are fulfilled.

In addition to controlling the height of Hong Kong's autonomy by qualifying articles and incorporating provisions such as Article 160, the document also explicitly demarcates areas and ways in which Hong Kong is denied a "high degree of autonomy." Articles 15, 158 and 159 limit the executive, judicial and legislative powers of the HKSAR government. Article 15 asserts: "The Central People's Government shall appoint the Chief Executive and the principal officials of the executive authorities of the HKSAR in accordance with the provisions of Chapter IV of this Law." In Chapter IV of the Basic Law, Article 45 explains the "gradual and orderly process" of moving towards a "selection of the Chief Executive by universal suffrage," but nowhere does it specify a time frame. Thus, by appointing the chief executive and only giving up that power in a "gradual and orderly" (i.e. slow) process, the NPC is able to manipulate the executive branch of the government.

Although not expressly admitted by the government, many critics claim that Tung Chee-hwa, the appointed chief executive, has made several decisions that seem to be more compliant to Beijing's liking than to the progression of autonomy. In July 2001, Tung's government proposed to the legislature that Beijing should have unlimited power to dismiss the chief executive. The proposal, however, enraged many critics who contest that Tung is heading a puppet government. Opponents believe that if universal suffrage *does* come about, and if Beijing does not approve of the selected candidate, then the NPC will be able to easily remove him. (Lague, "Basic Instinct...") Tung has also been criticized for intervening in the Right of Abode cases (to be discussed shortly) and for his consistent wavering on politically charged issues such as whether to let suspected spy for Taiwan, Li Shaomin, return to Hong Kong. ("One Country, How Many...") Despite the criticism, Tung continues to carry out what one observer calls "a slow motion bureaucratic coup" ("Hong Kong's Troubled..."), thus confirming skeptics'

predictions that Hong Kong would be run by a “Chief Puppeteer,” as a consequence of Article 15 of the Basic Law.

While Article 15 limits the power of the executive branch by giving the NPC the power to appoint the head of state, Article 158 of the Basic Law has undermined the establishment of Hong Kong’s judicial autonomy. As the controversial article clearly states, “The power of interpretation of this law shall be vested in the Standing Committee of the National People’s Congress.” The fact that the power to interpret the constitution lies not in Hong Kong but in Beijing is a hugely important one. With the power of interpretation, the NPC controls how laws are read and what they mean: a power held by the highest court in most common law jurisdictions. One would expect that this was a hotly contested issue in the creation of the Basic Law due to its grave importance. However, as many people accepted the inevitability of the Basic Law (Chang, p.70), concessions of power such as Article 158 were insurmountable by opponents.

As the article continues to read:

If the courts of the Region, in adjudicating cases needs to interpret the Provisions of this Law concerning affairs which are the responsibility of the Central People’s Government, or concerning relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek interpretation of the relevant provisions from the Standing Committee of the National People’s Congress.

Initially, the Article seems reasonable, as the NPC should be able to interpret the issues that are the responsibility of the mainland government: foreign affairs and defense, as outlined in Article 13. However, the clause “or concerning the relationship between the Central Authorities and the Region” can be read to incorporate any issue that pertains to One Country, Two Systems. Thus, if the relationship can be proved, the NPC has the authority to intervene in many decisions made

by the Court of Final Appeal. Interpretation of the law is an important and necessary function of common law courts; but as it is placed in the hands of the NPC, Hong Kong's judicial system is forced to surrender an important element of its power.

Related to the conflict-ridden article (158) is the fact that many laws outlined in the Basic Law are left open for interpretation. For example, Article 32 claims that "Hong Kong residents shall have freedom of *religious belief* and freedom to preach and to conduct and participate in *religious activities* in public." If the article were read by itself, it would appear that there is clear support for freedom of religion. However, the definitions of "religious belief" and "religious activities" are not the same to Beijing and to the people of Hong Kong. Beijing considers the Falun Gong, who blend Buddhist and Taoist beliefs, to be an "evil cult" rather than a religious group.<sup>2</sup> Because the National People's Congress has the right to interpret Article 32 (in accordance with Article 158), it is able to put pressure on the HKSAR government to suppress the group. As a result, the Falun Gong has been all but banned in Hong Kong. Although this probably does not have a direct effect on the economy, the PRC's ability to manipulate the law bodes poorly for those who depend on the stability of the legal system.

Just as Article 15 limits the powers of the executive branch and Article 158 limits the power of the judiciary, Article 159 limits the power of Hong Kong's legislature. As the article states, "The power of amendment of this Law shall be vested in the National People's Congress." Thus, the Legislative Council (LegCo) lacks the authority to amend its own constitution. Although the HKSAR is a part of the PRC (One Country), the Two Systems are not as separate and independent as one might believe. In fact China can control each of the three branches of the Hong Kong government if desired.

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<sup>2</sup> See article by Aaron Bellows in this issue of *Perspectives on Business and Economics*.

By restricting the autonomy of the three branches of government and bestowing the powers of interpretation and amendment to the Central Government, the Basic Law leaves Hong Kong in a precarious situation. As many foreign investors look for a stable legal system to make sure their contracts can be upheld, the promulgation of the Basic Law has not provided the necessary predictability of law for many businessmen. Because the judiciary – despite the aforementioned limitations – has the ability to control the common law (and thus its predictability) through establishing precedent, many have looked to the judicial system as an indicator of Hong Kong’s autonomy and economic potential. The primary focus in the judicial system is the Court of Final Appeal (CFA), Hong Kong’s highest and non-reversible appellate court.

### **The Court of Final Appeal**

The construction of the CFA, specifically the requirements for judges, was heavily debated. Until June 30, 1997, the Privy Council in London was officially Hong Kong’s highest court. After the Joint Declaration was signed, a need for a Hong Kong-based court arose. The Court of Final Appeal Ordinance, enacted in 1995, laid out the provisions for Hong Kong’s court of last resort. As outlined by the CFA Ordinance, the CFA is comprised of five judges: the Chief Justice (who must be a citizen of Hong Kong), three other permanent judges from Hong Kong, and one who, through invitation “on an ambulatory or ad hoc basis” (Fung, p.6), is selected as the case requires. This final judge is often local or invited from another common law jurisdiction and cannot be from the PRC. But like so many aspects of the negotiations leading up to the handover, the regulations of the CFA Ordinance regarding the appointment of judges were surrounded by controversy and skepticism.

Both the Joint Declaration and Article 82 of the Basic Law state that the CFA “may, as required, invite judges from other common law jurisdictions to sit on the court of final appeal.” There is no mention in either document as to how many or how few foreign judges are allowed per case. As Alison Cromer points out, neither of the two documents includes “restrictions on the CFA’s composition or structure” other than the Chief Justice’s citizenship requirement. (Cromer, p.86) Thus, the CFA Ordinance’s assertion that only one judge could be non-permanent was argued to be unconstitutional by those who believed that the number of invited judges should not be limited. Cromer, an example of such a critic, continues by writing, “China viewed local judges as potentially more controllable than foreign judges, and that the CFA might ultimately be no different from—and no more independent than—courts in the PRC.” (Cromer, p.86) Although the CFA Ordinance was declared constitutional and proceeded as planned, fear of a PRC-controlled judiciary still lingers today.

The debates about the CFA did not cease on July 1, 1997. Although it has been commended on many occasions, a few notable cases and decisions have left some questioning the CFA’s ability and independence as well as the legitimacy of the concept of “Two Systems.” Legal scholars and skeptics repeatedly point to *Chan Kam Nga v The Director of Immigration* and *Ng Ka Ling v Director of Immigration*, both decided on January 29, 1999, as the starting point for the biggest legal controversy the region has seen since the handover. These cases were complimented by *Lau Kong Yung v Director of Immigration* (December 3, 1999) to fortify the debate. *HKSAR v Ng Kung-siu* (a case about flag burning) is another landmark case that has hindered the progression of autonomy. All these cases deal with what many people perceive to be basic human rights: the right to move freely in and out of one’s own country and freedom of expression.

The most frequent and controversial issue to come before the CFA since 1997 pertains to who has the right to live in Hong Kong. The CFA has heard more than a half dozen cases in which Chinese citizens claim permanent residency in Hong Kong. None has been scorned or more widely criticized than the ruling handed down in *Lau Kong Yung v Director of Immigration*. It was not the just the outcome of the decision that infuriated so many people, it was also the culmination of the controversy that had begun almost eleven months earlier. The ordeal began in January 1999 when the CFA handed down its decisions in *Chan Kam Nga* and *Ng Ka Ling*.

In *Chan*, the issue was whether Chinese nationals born in China before a parent was granted permanent residency in the Region also have the right of abode once that parent becomes a citizen. Article 24 of the Basic Law cites categories of people who qualify as permanent residents of the HKSAR, the first three being:

1. Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region,
2. Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region,
3. Persons of Chinese nationality born outside Hong Kong of those residents listed in categories 1 and 2.

As a supplement to these stipulations, the Provisional Legislative Council enacted the Immigration Ordinance (No.2) on 1 July 1997. Ordinance (No.2) required that “the parent have the right of abode in Hong Kong at the time of birth of that person.” (*Lau Kong Yung v Director of Immigration*) However, it is clear that there is no mention in Article 24 of what the CFA called “the birth limitation” – i.e., the Basic Law did not specify whether the child must be born before or after the parent acquires residency. As a result, the CFA ruled “the birth limitation” in the Immigration Ordinance (No. 2) unconstitutional and granted right of abode to the children.

The *Ng Ka Ling* case also dealt with a discrepancy between the Basic Law and an immigration ordinance. This time it was between Article 22 and Ordinance (No. 3), enacted on July 10, 1997. Article 22 reads: “For entry into the HKSAR, people from other parts of China must apply for approval.” The issue in this case was whether Hong Kong residents were included as “people from other parts of China” and thus needed a permit. Ordinance (No. 3) concluded that even those who have residency in Hong Kong must apply for a one-way permit to enter the region. As it had in *Chan*, the CFA deemed the ordinance unconstitutional, declaring that restrictions on entry did not apply to those with right of abode in Hong Kong.

As significant as the judgments handed down in these two cases were, however, the process by which the CFA arrived at its decisions was even more so. The CFA took the liberty to interpret the Basic Law on its own—a power, as has been previously mentioned, that belonged to the National People’s Congress pursuant to Article 158. Through its own interpretation of Article 158, the CFA devised two conditions it felt needed to be met in order for it to have a duty to make a reference to the NPCSC<sup>3</sup>. After specifying these two conditions, the CFA boldly stated, “In our view, it is for the Court of Final Appeal and for it alone to decide, in adjudicating a case, whether both conditions are satisfied” (*Ng Ka Ling v Director of Immigration*). Thus, not only did the CFA rule in favor of the immigrants, but it also took a bold step in asserting its judicial independence.

To legal professionals who had doubted the CFA’s autonomy, the judgment was a relief. Waning confidence was restored. As Margaret Ng Ngoi-ye, a member of LegCo, said, “It is really the return of common sense. I think it is no more than a proper step to take.” (Li and

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<sup>3</sup> The two conditions are that (a) the question must “concern the affairs which are the responsibility of the People’s Government or the relationship between the Central Authorities and the Region” and (b) the Court *needs* an interpretation on the provision in question and an interpretation will affect the judgment. (*Ng Ka-ling v Director of Immigration*)

Parwani) Similarly, Martin Lee was quoted as saying that the ruling “preserves the high degree of judicial autonomy that was promised to Hong Kong.” (Li and Parwani) Others, in Beijing, were not so pleased. A Chinese Cabinet member said that the decision was “a mistake, against the Basic Law, and should be changed.” (Tempest)

What concerned Hong Kong officials, however, was the massive influx of immigrants who would now have to be let into the region. On May 18, 1999, Tung Chee-hwa announced that the government would be asking the NPC for an interpretation of the two provisions of the Basic Law (Articles 24 and 22). In the “Interpretation of Hong Kong’s Basic Law,” the Hong Kong government claimed that as a result of the January rulings approximately 1,670,000 people, including 690,000 children, would have the right to become citizens of Hong Kong. The appeal by the Hong Kong government to the NPC continued to focus its need for a reinterpretation on the financial impact of such a migration. They claimed that the small territory, only 1,097 square kilometers with 6.8 million residents, could not handle such a massive influx as “the estimated cost would be over HK\$700 billion in capital expenditure alone.” (HKSAR, “Interpretation...,” p.3) The NPC agreed with the HKSAR government’s worries and on June 26 approved a reinterpretation directly contradicting the ruling of the CFA – claiming that when a child was born *did* matter and that Hong Kong residents would have to apply for a permit to enter the Region. In addition, the NPC reprimanded the CFA for “infringing on China’s sovereign right by misinterpreting the Basic Law.” (“China’s Legislature...,”)

While many Hong Kong citizens sided with the government in fear that a massive influx would have a negative impact on education, health care and sanitation, for others doubts of the government’s commitment to democracy were rekindled. Rioters filled the streets of Hong Kong. Martin Lee called the admonishing of the Court and the reversal of its interpretation a “slap in

the face.” (“Hong Kong Asks...”) Emily Lau, a Hong Kong legislator, foreseeing the controversy on the horizon, had the following to say about the reinterpretation:

The message they are sending to the Hong Kong people and the rest of the world is that the Court of Final Appeal’s decisions are no longer final. Every time where the authorities disagree with the verdict, they can go to Beijing and ask them to interpret again and thereby overturn the verdict. (“Hong Kong Asks...”)

Although the Hong Kong government tried to assure critics that it would ask the NPC for an interpretation only on “special occasions” and only if it were for the betterment of the Region, the tension and disgust did not dissipate. Prominent figures in the Democratic Party (like Lee and Lau) used the controversy to bolster the notion that democracy and autonomy were being extracted from the region. Because there was no chance that the reinterpretation would be overruled, the DP remained vocal in order to make people aware that democracy was dwindling, not because it wanted the children to be granted the right of abode. Like many others, the DP is aware of the fragile line Beijing must walk to keep the project of Hong Kong successful. Therefore, the DP’s role cannot be to support radical change, but to help slowly push the line towards a democratic Hong Kong.

Through the criticism and controversy that surrounded the reinterpretation, it still remained to be seen how the CFA would react to being “stabbed in the back” by the Region’s government. On December 3, the CFA ruled against the immigrants in *Lau*, citing the NPC’s interpretation of Articles 24 and 22. Although at this point the decision was anticipated, it still brought sharp comments from opponents. Rob Brooks, an attorney for the immigrants, said, “It’s obviously bad for Hong Kong. It makes Hong Kong a less humane place. The Court of Final Appeal finding that the NPC can simply overturn its judgments...should make people in Hong Kong feel less comfortable about their constitutional rights.” (“Hong Kong’s Top Court...”)

Likewise, the outspoken Martin Lee called it “the beginning of the end of rule of law” (Ching) and referred to the Court as that of “semi-final” appeal.

The issue of immigration did not stop with the December ruling. Since then the CFA has heard two more cases relating to the issue. To its credit in each case, *Director of Immigration v Chong Fung-Yung* (July 2001) and *Director of Immigration v Ng Siu-Tung and others* (January 2002), the CFA upheld the Basic Law as it is now understood, without disrupting the fragile political tensions between the region’s government and the Democratic Party. The DP did not oppose these two decisions as it had the others, nor did the regional government react adversely. The ruling in *Chong* acknowledged the NPC’s interpretation of two years before, saying that “the authority of the Standing Committee to interpret the Basic Law is fully acknowledged and respected” and that “another interpretation was not required.” (*Director of Immigration v Chong Fung-Yung*) As a result, those who doubted the CFA’s autonomy were reassured by the decision in favor of the immigrants. However, on January 10, 2002, the CFA ruled against migrants who had arrived after January 29, 1999, but before the interpretation, concluding that they must return to the mainland. This decision has again boosted suspicion that the CFA favors the government rather than democracy and the people. Although these two decisions did not attract the political attention of the previous cases, they remain an example of the instability and unpredictability of the law in Hong Kong.

The “right of abode” cases have not been the only highly publicized and controversial decisions by the CFA. Just twelve days after *Lau*, the CFA was faced with *HKSAR v Ng Kung-sui*. The issue in *Ng Kung-sui* focused not on interpretation of the Basic Law, but on personal freedoms versus state ideals: specifically whether the National Flag and National Emblem Ordinance – prohibiting the desecration of the national flag or emblem – contravened the Basic

Law. Article 27 of the Basic Law prescribes “freedom of speech; freedom of association, of assembly, of procession and demonstration.” Nowhere in the Basic Law is flag burning prohibited. Nonetheless, the CFA cited several other countries, including Italy, Germany and Norway, which have imposed anti-flag desecration laws in its decision to legitimize the Ordinance. In the decision, which overturned that of the lower Court of Appeal, the CFA maintained that the Ordinance was unconstitutional because it helped “preserve public order” (*HKSAR v Ng Kung*). Thus, what one author calls a “disappointing and highly nationalistic judgment” (Chan, p.271) was enforced by the CFA. Although the decision was not followed by the political uproar that followed the right-of-abode cases, many felt that the judgment by the CFA was too conservative and deferential to the NPC. Thus, the decision reinforced the lack of confidence in the CFA’s ability to litigate without bias.

### **Ramifications**

The decisions by the CFA that lean towards the desires of Beijing have not only sparked legal debates but have also significantly limited the progression of autonomy in the region in four ways. First, many feel that the decisions of the CFA are detrimental to the progress of human rights in Hong Kong. By forcing permanent residents to apply for entry and not permitting the freedom of expression in regards to the national flag or religion, the HKSAR government is seen as becoming restrictive like its mainland counterpart. After the *Ng Kung-sui* case, a press release by the Hong Kong Human Rights Monitor claimed, “The court is no longer prepared to make findings against the Government in important cases with political overtones” and that the decision “is a giant step towards the Singaporisation of the Hong Kong judiciary.” (HKHRM, “Confirmation...”)

In addition to the curbing of human rights, critics also believe that the government and judiciary are bowing to Beijing, doing their best to appease the central government on issues of political concern. In addition to the instances already mentioned, the government has been scolded by critics for failure to prosecute the *Xinhua Daily News* (China's official news agency) for not releasing its dossiers on Emily Lau to her upon her request<sup>4</sup>. Likewise, Secretary of Justice Elise Leung did not prosecute *Sing Tao* newspaper tycoon Sally Aw for "allegedly fraudulently inflating newspaper circulation figures because of the damaging economic consequences." (Lague, "Basic...") By not pursuing the justice of Aw, a member of the Chinese People's Political Consultative Committee and personal friend of Tung Chee-hwa, while at the same time taking action against the three alleged co-conspirators, the government was accused of violating Article 22 of the Basic Law, which states that "all offices set up in the HKSAR...and the personnel of these offices shall abide by the laws of the Region." As a result of these types of actions, the government sends a worrisome message to foreign investors, showing that it is possible for those who are close to Tung or Beijing to be considered above the law.

Furthermore, as a result of the ambiguity of the Basic Law and of the right of abode cases, a schism has been created between the executive and judicial branches of the Hong Kong government. By appealing to the NPC after the CFA had handed down its ruling, the Executive Council effectively denied the judiciary its basic power and autonomy. It also breached a confidence with the judicial system in order to better its own situation. No longer can the CFA be trusted as final, if the Executive Council, when it does not like a decision, looks to Beijing to reinterpret the matter. The Court of Final Appeal appears to be more like a "Court of The Government's Appeal," while the executive branch seems to be playing by its own rules.

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<sup>4</sup> Hong Kong law requires that state organizations (like *Xinhua*) let citizens view any file on them at their request.

Finally, the instability of the rule of law, marked by the re-interpretation of the right of abode and the back-and-forth decisions of the CFA, also hurts the economy. After the December 1999 ruling, the president of the American Chamber of Commerce, Jason Felton, was quoted as saying, “Rule of law is one of the key attractions Hong Kong has. [Without it] Hong Kong would lose that competitive edge. There would be fewer reasons for multinational companies to locate here.” (Lague, “Spotlight...”) If the rule of law appears to dwindle in Hong Kong, so will the number of foreign investors.

Chances are, however, that the PRC will not let the rule of law collapse. Hong Kong’s prosperity and stability are far too important for China to lose because the Mainland’s economy is so strongly linked to that of Hong Kong and, more importantly, because Hong Kong is an example for Taiwan. A successful implementation of “One Country, Two Systems” in Hong Kong could lead to a similar arrangement with Taiwan, something that the Chinese strongly desire. Despite the skepticism that has surrounded the implementation in Hong Kong, especially in relation to the legal system, it is important to realize that the original goal was not to give Hong Kong complete independence, but for Hong Kong to reunite with the PRC while allowing the capitalist system to continue to flourish. While it is true that ambiguities in the Basic Law and decisions of the Hong Kong government have hindered the progression of autonomy and created controversy in the region, it is unlikely the PRC will let the valuable territory to destroy itself.

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