

# Hong Kong Right of Abode: Ng Siu Tung & Others v. Director of Immigration— Constitutional and Human Rights at the Mercy of China\*

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## I. INTRODUCTION

A parent's worst nightmare is to be permanently separated from her child. A child's worst fear is that someone will come and take his parents away. In the home, a child forms his perception of the world. He learns that it is fair or unfair, cruel or kind, civilized or barbaric.

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What kind of psychological rift results when a government separates thousands of children from their parents and places them hundreds of miles away in a foreign land? This is the question many are asking in the wake of a recent court decision in Hong Kong.

The Hong Kong Court of Final Appeal's January 10, 2002, ruling on the Right of Abode is the beginning of the end of Constitutional and human rights in Hong Kong. In *Ng Siu Tung & Others v. Director of Immigration*,<sup>1</sup> the Court of Final Appeal (The Court) affirmed that nearly 7,000 Chinese lost the right to live with their families in the Hong Kong Special Administrative Region (Hong Kong) because, unlike their family members, they were born on the mainland.<sup>2</sup> These mainland-born Chinese had until March 31, 2002, to voluntarily return to the mainland or face forcible deportation. Because of the January 10, 2002, ruling, claimants lost a right that had been given to them in the Hong Kong constitution, formerly granted by the Court itself, and promised by the Hong Kong Government. The Court's reversal trammled the legitimate expectations and human rights of thousands of Right of Abode claimants. It also affirmed the Court's retraction of its bold claim of judicial review over the National People's Congress Standing Committee's<sup>3</sup> (Standing Committee).<sup>4</sup>

Lin Yeung Ming and her twin sister Yuk-oi face forcible separation as a result of the Court's ruling.<sup>5</sup> Yeung Ming must return to the mainland

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1. *Ng Siu Tung & Others v. Dir. of Immigr.*, [2002] 1 Hong Kong Legal Reports & Digest [H. K. Legal Rep. & Dig.] 561.

2. Damien Grammaticas, *Hong Kong Families Stage Vigil*, (BBC News television broadcast, Mar. 31, 2002), available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/1903299.stm>.

3. The Standing Committee is the center of power in the Chinese government. "All members of the Standing Committee are members of the Communist Party. Supreme power is held by the Standing Committee (of around six to eight persons, who are also the key power brokers)." "The Party's organization is parallel to state institutions, as has been indicated above. At each level it is the Party body, and not the corresponding state organ, which makes the key decisions and supervises their implementation. There is a significant overlap of membership as well, which ensures the dominant role in state institutions to the Party leaders." YASH GHAI, *HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 108* (2d ed. 1999).

4. *Ng Ka Ling & Others v. Dir. of Immigr.*, [1999] 1 H. K. Legal Rep. & Dig. 577 (holding for the first time that it had the power of judicial review even over the Standing Committee).

5. In 1996 Yeung Ming lost her chance to settle in Hong Kong when authorities forced her parents to choose only one twin daughter to follow them to Hong Kong. In July 1999 she came to Hong Kong on a two-way permit and appealed her status. The January 10, 2002, ruling permanently denied her a right of abode in Hong Kong and the ability to live with the rest of her family. The twins' story gained much publicity after the ruling. Stella Lee, *Twins Face Pain of Second Separation*, S. CHINA MORNING POST, Jan. 24, 2002, available at [www.scmp.com/](http://www.scmp.com/).

after losing her appeal to stay in Hong Kong.<sup>6</sup> Lam Ka Ming, twenty, must return to the mainland while his six-year old sister Lam Ming-Sing stays in Hong Kong with their parents.<sup>7</sup> A seventy-two-year-old man must leave his sick ninety-five-year-old father to care for himself in Hong Kong alone.<sup>8</sup> A distraught mother and her mainland-born son knelt on the steps of the Central Government Offices after the ruling, begging Chief Executive Tung Chee Hwa not to separate them.<sup>9</sup> Hundreds of protesters staged hunger strikes, and four thousand held a candlelight vigil refusing to voluntarily return to the mainland as the deadline loomed over them.<sup>10</sup> Incidents of violence also followed the ruling.<sup>11</sup> Many claimants planned to hide illegally in Hong Kong.<sup>12</sup>

Thousands appealed to the United Nations for help. The U.N. Economic and Social Council responded by releasing a written statement on January 31, 2002, citing Article 10 of the International Covenant on Social and Cultural rights:<sup>13</sup> “the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society.”<sup>14</sup> The Council directly urged the Government of Hong Kong to “urgently consider granting Right of Abode to all of those who lost their court case and allow them to remain in Hong Kong with their families on humanitarian grounds.”<sup>15</sup> The United Nation’s request has so far been ignored by the Hong Kong government, which began to forcibly deport Right of Abode claimants after March 31, 2002, as promised.

This Comment argues that the Court’s refusal to sidestep the Standing Committee’s reinterpretation using either the Doctrine of Legitimate

6. *Id.*

7. Magdalen Chow & Patsy Moy, *Best of Times and Worst of Times in a Tale of Two Children*, SOUTH CHINA MORNING POST, Jan. 11, 2002, available at <http://www.special.scmp.com/rightofabode/main/ZZZGHG3M5WC.html>.

8. S. CHINA MORNING POST, available at [www.scmp.com](http://www.scmp.com).

9. *Id.*

10. Grammaticas, *supra* note 2.

11. *Jury told of ‘roast pig’ threat to officers*, S. CHINA MORNING POST, Nov. 2, 2002, available at [www.scmp.com](http://www.scmp.com).

12. Chow & Moy, *supra* note 7, available at <http://special.scmp.com/rightofabode/main/ZZZGHG3M5WC.html>.

13. U.N. ESCOR, 58th Sess., Written statement submitted by the Asian Legal Resource Center (ALRC) at 1, U.N. Doc. E/CN.4/2002/NGO/69 (2002) (quoting International Covenant on Economic, Social, and Cultural Rights, Dec. 19, 1966, art. 10(1) 993 U.N.T.S. 171).

14. *Id.*

15. *Id.*

Expectation, or the “judgments previously rendered” clause in the Basic Law, signifies its capitulation to the Standing Committee, and its inability to protect constitutional rights and/or human rights in Hong Kong. This Comment will first give a brief background on the concept of “One Country, Two Systems” and the drafting of the Basic Law. Second, it will introduce the Right of Abode cases, and explain the constitutional crisis of 1999. Third, it analyzes *Ng Siu Tung & Others v. Director of Immigration*, decided on January 10, 2002, and its failure to legitimately sidestep the Standing Committee’s reinterpretation in the name of human rights. Finally, this Comment concludes that the independence of the Hong Kong Court of Final Appeal has been irrevocably compromised, constitutional rights are mutable under the Basic Law (Hong Kong Constitution), and human rights will not be meaningfully protected by the courts of Hong Kong.

## II. ONE COUNTRY, TWO SYSTEMS<sup>16</sup>

To preserve Hong Kong’s prosperous economy while incorporating China’s sovereignty,<sup>17</sup> China and Great Britain devised a plan for the reunification of Hong Kong and China called “One Country, Two

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16. Comparisons are often drawn between the relationships of Hong Kong, Macau, and Taiwan to China. For a discussion regarding the effect of *Ng Ka Ling & Others v. Dir. of Immigr.* on Macau, see Judith R. Krebs, *One Country, Three Systems? Judicial Review In Macau After Ng Ka Ling*, 10 PAC. RIM L. & POL’Y 111 (2000). For a comparison of Macau’s and Hong Kong’s histories as Special Administrative Regions and discussions of China’s attempts to infringe upon their relative autonomies, see Frances M. Luke, *The Imminent Threat of China’s Intervention in Macau’s Autonomy: Using Hong Kong’s Past to Secure Macau’s Future*, 15 AM. U. INT’L L. REV. 717 (2000). For a discussion comparing and contrasting Hong Kong and Taiwan, see Sean Cooney, *Why Taiwan Is Not Hong Kong: A Review of the PRC’s “One Country Two Systems” Model for Reunification with Taiwan*, 6 PAC. RIM L. & POL’Y 497 (1997).

17. For many years China has harbored intense bitterness toward Great Britain for taking Hong Kong in 1842 with the Treaty of Nanking and Kowloon in 1898 with the Convention of Peking. Before the Opium Wars, China had believed it was the center of the world and that its emperor ruled the world. China did not view Great Britain as its equal and thus was shamed by Great Britain’s superior military strength. China’s surrender of Hong Kong and Kowloon was a humiliating defeat, which has never been forgotten. Because of this, the reunification with Hong Kong had great symbolic significance to China. China wanted the reunification to go smoothly, and for Hong Kong to once again be a part of the motherland. GHAI, *supra* note 3, at 1–12. Yash Ghai is the Sir Y.K. Pao Professor Of Public Law at the University of Hong Kong, having previously taught at the universities of East Africa (Dar es Salaam), Uppsala and Warwick. He has been a visiting professor at several universities, including Harvard, Yale, Wisconsin, Melbourne, Toronto, London and the South Pacific, the National University of Singapore, and the National Law School of India. He has published extensively on comparative public law, human rights, ethnic relations, state-owned companies, and the sociology of law. He has advised a number of states and political parties on the drafting and reforms of constitutions.

Systems.”<sup>18</sup> Under this plan, Hong Kong would once again be a part of the motherland, but would maintain a “high degree of autonomy”<sup>19</sup> as a Special Administrative Region of China.<sup>20</sup> Hong Kong would keep its capitalist economic system, its common law legal system, and its own final court of appeal, so long as this did not conflict with Chinese sovereignty. Like an adult child moving back home to live with her parents, Hong Kong could enjoy its freedom so long as it did not disturb the household.

Putting such a hybrid creature together was not easy. China’s legal system is markedly different from the system Hong Kong had developed while under British rule. The constitutional system of the People’s Republic of China (herein “PRC”) can best be described as a “vertical” system.<sup>21</sup> Yash Ghai describes it as a “pyramidal structure” where power funnels up from the many to the few, and “the most powerful bodies are also the smallest.”<sup>22</sup> China rejects the idea of separation of powers because the concept was condemned by Marx and Lenin as a device for bourgeois rule.<sup>23</sup>

The theoretical basis for state power in China is the Doctrine of Democratic Centralism,<sup>24</sup> which consists of two rules. First, “decisions are made after consultations with various groups and organizations, but once made, they have to be strictly observed by all concerned.”<sup>25</sup> Second, “the individual should be subordinated to the organization; the

18. *Id.* at 48–51.

19. *Id.* at 139; see CONSULTATIVE COMMITTEE, PEOPLE’S REPUBLIC OF CHINA: THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA art. 2 (1990), reprinted in 29 I.L.M. 1511 (1990) [hereinafter THE BASIC LAW].

20. *Id.* at 56 (quoting ZHONGHUA RENMIN GONGHEGUO XIANFA [Constitution] art. 31(2) (1982) [hereinafter PEOPLE’S REPUBLIC OF CHINA CONST.] (“The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s Congress in the light of the specific conditions.”) [hereinafter NPC]). The NPC is specifically given power to “decide on the establishment of special administrative regions and the systems to be instituted there.” *Id.* (quoting PEOPLE’S REPUBLIC OF CHINA CONST. art. 62(13)).

21. Byron Weng, *The Clash of Two Legal Cultures: Between the Court of Final Appeal and the Standing Committee of the NPC*, CSIS, Mar. 1, 1999, available at <http://www.csis.org/asia/hkupdate/hk15bw.html>. Byron Weng is chairman of the Department of Government and Public Administration at the Chinese University of Hong Kong.

22. GHAI, *supra* note 3, at 99.

23. For an academic discussion focusing on China’s transition from the absolute power of Mao to the modern commercial era, see generally ANDREW NATHAN ET AL., CHINA’S TRANSITION (1998).

24. GHAI, *supra* note 3, at 99.

25. *Id.*

minority should be subordinated to the majority; the lower level organ should be subordinated to higher-level organ; and the local authority should be subordinated to the central authority.”<sup>26</sup>

The concept for Hong Kong’s legal system is closer to a separation of powers model, a “horizontal” model, where decision-making power does not funnel up, but is shared by equal branches.<sup>27</sup> The judiciary is independent from the executive and from the legislature. How these two systems can interact without China swallowing Hong Kong’s autonomy is a ticklish dilemma.

On December 18, 1984, China and Great Britain drafted the Sino-British Joint Declaration.<sup>28</sup> It provided for British policies regarding trade, currency, tax and expenditure, international relations, the role of the executive, and the legal system.<sup>29</sup> It also provided for absolute Chinese sovereignty over Hong Kong,<sup>30</sup> along with China’s twelve short proposals for the special region.<sup>31</sup> This binding treaty relieved Great Britain of its responsibilities to Hong Kong and assured the world that the people of Hong Kong would be protected. The reunification had

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26. *Id.*

27. Weng, *supra* note 21 (explaining that the three branches in Hong Kong are the executive branch, the legislative branch, and the judicial branch).

28. GHAI, *supra* note 3, at 56 (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, signed in Beijing on December 19, 1984). *See also* <http://www.tdctrade.com/jdeclaration/join.htm>.

29. GHAI, *supra* note 3 at 51.

30. *Id.* at 47–48 (stating that England had originally proposed retaining management and control over Hong Kong, but that Deng Xiaoping was not amenable to this arrangement).

31. *Id.* at 49–50 (quoting ROBERT COTTRELL, *THE END OF HONG KONG: THE SECRET DIPLOMACY OF IMPERIAL RETREAT*, 112 (1993). Hong Kong would “1) keep its capitalist system; 2) remain a free port and a financial centre; 3) retain a convertible currency; 4) not be run by emissaries from Beijing; 5) have a ‘mayor’ elected by local inhabitants, who should be a ‘patriot;’ 6) run its own affairs without central government interference, except in matters of defence and foreign affairs; 7) have ‘considerable’ freedom to take part in international activities; 8) issue its own travel documents; 9) keep its present legal system, so long as this did not conflict with Chinese sovereignty, and have its own final court of appeal; 10) be responsible for its own law and order, to be maintained by the police force; 11) tolerate political activities, even of the Nationalists, so long as theses did not constituted sabotage; and 12) conduct its own ‘social reforms’ without impositions from Beijing.” *Id.* Deng Xiaoping’s definition of “patriot” is as follows: “The qualifications for a patriot are respect for the Chinese nation, sincere support for the motherland’s resumption of sovereignty over Hong Kong and a desire not to impair Hong Kong’s prosperity and stability. Those who meet these requirements are patriots, whether they believe in capitalism or feudalism or even slavery. We do not demand that they be in favour of China’s socialist system; we only ask them to love the motherland and Hong Kong.” GHAI, *supra* note 3, at 49 n.10 (quoting DENG XIAOPING, *ON THE QUESTION OF HONG KONG*, 11 (The Bureau for the Compilation and Translation of Works of Marx, Engels, Lenin and Stalin Under the Central Committee of the Communist Party of China trans., 1993)).

Great Britain's blessing, and Hong Kong anxiously awaited its fate.

The handover was to occur July 1, 1997. The Basic Law Drafting Committee (BLDC), comprised of both Chinese and Hong Kong citizens, spent the next few years drafting the Basic Law, Hong Kong's mini-constitution.<sup>32</sup> In many of the non-contentious areas, sections were lifted verbatim from the Joint Declaration.<sup>33</sup> Issues that had not been settled by the Joint Declaration, however, were hotly debated. For instance, some Hong Kong members of the BLDC requested a clarification of the relationship between the PRC Constitution and the Basic Law. Martin Lee<sup>34</sup> suggested that the Basic Law should specify which articles of the PRC Constitution applied to Hong Kong, but the mainland members rejected this approach. They considered the Basic Law subordinate to the PRC Constitution, and that only the National People's Congress (NPC) could specify which provisions of the Constitution would apply to Hong Kong.<sup>35</sup>

A second issue was the provision for interpretation of the Basic Law. This issue was important because it would determine the status of the Basic Law, the role of Hong Kong courts, the accommodation of the Basic Law within the common law, and the relationship between the Central Authorities and Hong Kong.<sup>36</sup> The Joint Declaration provides that the powers of adjudication would lie with Hong Kong courts, but the Chinese conception of adjudication did not include interpretation—which under the PRC Constitution was within the province of the

32. The Basic Law is the constitution of the Hong Kong Special Administrative Region and part of the People's Republic of China Constitution. It spells out the relationship between Hong Kong, China, and Hong Kong and rest of the world after Hong Kong rejoined China in 1997. "[T]he Basic Law is generally referred to as a 'mini-constitution' (although the function of the prefix is unclear, except perhaps to indicate that the HKSAR is subject to the PRC constitution)." GHAI, *supra* note 3, at 137.

33. GHAI, *supra* note 3, at 61 (explaining the provisions on the economy, international trade, social organizations and the law were in many instances lifted verbatim from the Joint Declaration).

34. *Id.* at 61–62. During 1994 through 2002, Martin C.M. Lee [hereinafter "Lee Chu Ming"] served as Chairman of the Democratic Party, which was Hong Kong's largest and most popular political party. Prior to the founding of the Democratic Party in October 1994, Mr. Lee was Chairman of the United Democrats of Hong Kong (Hong Kong's first political party), which won the first-ever democratic elections to the territory's Legislative Council in 1991. See <http://www.martinlee.org.hk/Biography.html>.

35. *Id.* at 62 (quoting MARK ROBERTI, *THE FALL OF HONG KONG: CHINA'S TRIUMPH AND BRITAIN'S BETRAYAL*, 165–66 (1994)).

36. *Id.*

Standing Committee.<sup>37</sup> Martin Lee argued that the power of interpretation should be vested in the Hong Kong courts, not the Standing Committee.<sup>38</sup> This had been the arrangement in the original draft of the Basic Law. Eventually, the drafting committee reached a compromise in which the power to interpret provisions that concerned the autonomy of the region was to be delegated to Hong Kong by the Standing Committee.<sup>39</sup>

The One Country, Two Systems concept is relevant to the power struggle between the Standing Committee and the Hong Kong Court of Final Appeal in the Right of Abode cases because it obviously evades addressing the fundamental problem with the reunification. With two systems, which system prevails when there is disagreement? The One Country, Two Systems concept simply leaves the question unanswered. Hong Kong wanted its autonomy and China wanted sovereignty over Hong Kong. China agreed to give Hong Kong its autonomy, subject to China's authority, and Hong Kong agreed to submit to China's authority, subject to its autonomy. This fundamental paradox would be the basis of the constitutional conflict between the Standing Committee and the Hong Kong Court of Final Appeal in the Right of Abode cases.<sup>40</sup>

#### A. *The Basic Law: Constitution of the Hong Kong Special Administrative Region*

The Basic Law deviates significantly from the Joint Declaration in at least three areas pertinent to this discussion of the conflict between the Standing Committee and the Hong Kong Court of Final Appeal. First, the Hong Kong legislature (LegCo) is extremely weak, but the executive is particularly dominant under the Basic Law.<sup>41</sup> This raises the question

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37. *Id.*

38. *Id.* at 61–62.

39. For a thorough chronology of the establishment of the Hong Kong Special Administrative Region, see Albert H.Y. Chen, *The Basic Law: Legal Preparation for the Establishment of the Hong Kong SAR: Chronology and Selected Documents*, 27 H.K.L.J. 405 (1997).

40. For a study on the status of the rule of law and human rights in Hong Kong two years after the transition, see generally The Joseph R. Crowley Program, *One Country, Two Legal Systems?*, 23 FORDHAM INT'L L.J. 1 (1999)..

41. The Legislative Council, or "Legco" is popularly known as a "rubber stamp," implying that the legislature merely approves whatever the executive does. Emily Lau, a 46-year-old former journalist, is one of the strongest voices in Hong Kong in support of elections. Lau, who garnered more votes in the 1995 legislative elections than any other candidate, is harshly critical of the current legislative council. "All these people have been turned into rubber stamps. They have decided in Peking, and so the legislature here, the future government here, will just have to follow suit. It is crazy," she said. Rubber stamp or not, it is the provisional legislature which will determine the future of democracy in Hong Kong. Tom Mintier, *Hong Kong's Voices of Democracy Worry About Future*, CNN World News, June, 26, 1997, available at <http://www.cnn.com/WORLD/9706/26/hong.kong.democracy/http://www.cnn.com/WORLD/9706/26/hong.k>



whether there can be any real accountability for the executive branch.<sup>42</sup>

Only a small proportion of the legislature is directly elected through universal franchise, and the electoral rules are biased in favor of pro-China candidates.<sup>43</sup> The Chief Executive is “elected” by the LegCo, and is made accountable to the Chinese Government.<sup>44</sup> In addition, the Chief Executive, Tung Chee Hwa, was hand-picked by the Standing Committee. Therefore, the absence of any accountability for the executive leaves China in control of Hong Kong’s legislative and executive branches of government. When the Chief Executive of Hong Kong asked the Standing Committee to reinterpret the Basic Law so as to overrule the Court in 1999, the executive and legislative branches of the Hong Kong government teamed up with the Standing Committee to overrule the Court.

Second, although the Joint Declaration gives Hong Kong courts the powers of final adjudication, under the Basic Law the ultimate powers of interpretation of the Basic Law are vested in the Standing Committee.<sup>45</sup> In the common law system, interpretation and adjudication usually go together. Under the Basic Law, however, this bifurcation of interpretation and adjudication is the fault line that eventually splits up families in the Right of Abode cases.

If the power of interpretation and adjudication had been vested in the Court under the Basic Law, the Standing Committee would not have been able to legitimately nullify the Court’s rulings awarding the Right of Abode to all of the claimants. China would not have had the opportunity to snuff out the power of the last independent branch of the Hong Kong government—the judiciary.

Third, China had promised Hong Kong “a high degree of autonomy except in foreign and defence affairs,”<sup>46</sup> In the Basic Law, however, China promises only a high degree of autonomy without any specific reservations. This may mean that all autonomy is qualified under the Basic Law.<sup>47</sup>

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ong.democracy/lau.jpg.

42. GHAI, *supra* note 3, at 67 (stating that the Basic Law appears to give different meanings to “elections” and “accountability of the executive to the legislature”).

43. *Id.*

44. THE BASIC LAW art. 43.

45. GHAI, *supra* note 3, at 68 (summarizing the Basic Law articles 17, 158, 160).

46. *Id.* at 68 (quoting 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 Kong, done at Beijing on December 19, 1984.)

47. *Id.*

The vagueness of the provision gives China more power to interfere with the autonomy of Hong Kong than was presumably intended by the Hong Kong citizens who helped to draft the Basic Law. In situations like the Right of Abode controversy where the Chinese government can reference a legitimate national concern like mass immigration, the Standing Committee might conceivably be able to directly interfere with the laws and policies of Hong Kong by directly overruling the Court of Final Appeal without resorting to reinterpretation of the Basic Law. Plausibly, the Chinese government could control almost any issue concerning Hong Kong by referencing pretextual national concerns. Neither Great Britain nor the citizens of Hong Kong ever intended for that to happen.

### *B. The Reunification of Hong Kong and China*<sup>48</sup>

July 1, 1997, the date of reunification, passed without violent uprising.<sup>49</sup> China's first order of business was to abolish the legislature elected by the people of Hong Kong in 1995, and replace it with the Provisional LegCo composed of pro-China members appointed by Beijing. Many of these appointed members had run but failed to win office in the 1995 free elections. LegCo "rubber stamped"<sup>50</sup> several laws restricting freedom of speech and assembly, rolled back the Bill of Rights,<sup>51</sup> and changed the

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48. For a bibliography of books, monographs and articles relating to the reunification of Hong Kong with China, see *The Basic Law: A Bibliography of the Hong Kong Transition*, 27 H.K.L.J. 247 (1997).

49. The Tiananmen Square Massacre, fresh in the memories of the citizens of Hong Kong, made the reunification a tense event. On June 4, 1989, the Chinese government ordered the People's Liberation Army [hereinafter PLA] to violently disperse nearly 2,600 men and women in Tiananmen Square who were protesting corruption, inflation, and the arbitrary exercise of state power in China. The Chinese government systematically arrested demonstration leaders, scholars, journalists, and officials who had supported the democratic uprising. Many prisoners were sentenced to death. The Chinese government denied that its troops had killed demonstrators, and maintained that it was the demonstrators who had violently attacked the PLA, even in the face of widespread television footage of the massacre. See *1989 Tiananmen Square Massacre Remembered*, DISPATCH ONLINE (Jun. 5, 1999), at <http://www.dispatch.co.za/1999/06/05/foreign/MASSACRE.htm>; see generally ORVILLE SCHELL & ANDREW J. NATHAN, *CHILDREN OF THE DRAGON: THE STORY OF TIANANMEN SQUARE* (1990) (containing the testimony of student participants, foreign eyewitnesses, and excerpts from the Chinese press).

50. Mintier, *supra* note 41.

51. The Bill of Rights Ordinance NO. 59 OF 1991 [hereinafter BORO], available at <http://www.hknet.com/Inform/billor.html>. This was drafted shortly after the Tiananmen Square Massacre, and was intended to protect the civil liberties of Hong Kong citizens after the reunification. "It embodies the provisions of the International Covenant on Civil and Political Rights [hereinafter ICCPR] as applied to Hong Kong. Article 39 of the Basic Law further provides that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law, and that such

electoral rules to favor pro-China candidates. In May 1998, free elections for the Legislative Council were held under the new electoral rules. Although voter turnout was fifty percent higher than any previous election in Hong Kong and the democrats won two-thirds of the votes, they obtained only one-third of the legislative positions.<sup>52</sup>

The Chinese government appointed Tung Chee Hwa as Chief Executive of Hong Kong in 1997. Although many of Hong Kong's citizens approved of him, he had strong ties to Beijing, and was accountable to the Standing Committee.<sup>53</sup>

The only branch of Hong Kong's new government that appeared to have any meaningful degree of independence from Beijing was the judiciary. The Court of Final Appeal (the Court) is Hong Kong's highest appellate court. A non-partisan commission made the judicial appointments, and the quality of judges is high. The Court is headed by Chief Justice Andrew Li, and consists of three other permanent judges: Justice Bokhary, Justice Chan, and Justice Ribeiro. Twelve non-permanent Hong Kong judges<sup>54</sup> and nine non-permanent judges from other common law jurisdictions also sit on the Court when invited to do so.<sup>55</sup> The Basic

restriction shall not contravene the provisions in the ICCPR and the International Covenant on Economic, Social and Cultural Rights [hereinafter ICESCR]." Hong Kong Special Administrative Region (HKSAR) Government, *Hong Kong Bill of Rights available at* <http://www.info.gov.hk/info/billrgh.htm> (last updated Oct. 2003).

52. *Vote for Democracy*, (PBS The News Hour with Jim Lehrer radio broadcast, May 25, 1998), available at [http://www.pbs.org/newshour/bb/asia/jan-june98/hongkong\\_5-25.html](http://www.pbs.org/newshour/bb/asia/jan-june98/hongkong_5-25.html).

53. The Standing Committee is the center of power in the Chinese government and all members of the Standing Committee are members of the Communist Party. Many believe Tung Chee Hwa, a shipping tycoon, is beholden to the Chinese government because in 1986, he obtained a \$120 million bailout loan from the Chinese government, restructured the company and turned it into a \$1.7 billion corporation. . See *Newsmaker Profiles: Tung Chee-hwa*, CNN, 1998, at <http://www.cnn.com/resources/newsmakers/world/asia/chee.hwa.html> (on file with author).

54. There are eight non-permanent Hong Kong judges: Sir Derek Cons, Mr. William James Silke, Mr. Kutlu Tekin Faud, Mr. Philip Gerard Clough, Sir Noel Plunkett Power, GBS, Mr. Gerald Paul Nazareth, GBS, Mr. John Barry Mortimer, GBS, and Mr. Henry Denis Litton, GBM. HONG KONG SPECIAL ADMINISTRATIVE REGION (HKSAR) GOVERNMENT, *Judiciary: Guide to Court Services: Final Appeal Judges List*, at <http://www.info.gov.hk/jud/guide2cs/html/cfa/judgelst.htm> (last modified Sept. 4, 2003).

55. There are ten non-permanent judges from other common law jurisdictions: Hon Sir Anthony Mason, AC, KBE, Rt Hon the Lord Cooke of Thorndon, KBE, Rt Hon Lord Nicholls of Birkenhead, Rt Hon the Lord Hoffmann, Hon Sir Gerard Brennan, AC, KBE, Rt Hon Sir Thomas Eichelbaum, Rt Hon the Lord Millett, Rt Hon the Lord Woolf of Barnes, Rt Hon the Lord of Scott of Foscote, and Rt Hon Sir Ivor Richardson. HONG KONG SPECIAL ADMINISTRATIVE REGION (HKSAR) GOVERNMENT, *supra* note 54.

Law states that the Court's decisions are final and unappealable. With such a highly qualified and independent judiciary, it appeared that the rights of Hong Kong's citizens would be protected in the Court.

### III. THE RIGHT OF ABODE CASES: CONSTITUTIONAL CRISIS OVER JUDICIAL REVIEW

The Basic Law Article 24(2)(3) confers the status of permanent resident on and affords Right of Abode in Hong Kong to citizens born in Hong Kong, citizens who have ordinarily resided in Hong Kong for a continuous period of seven years, and persons of Chinese nationality born outside Hong Kong of those residents listed in the first two categories.<sup>56</sup> Article 22(4), however, requires people coming from other parts of China to apply for approval in order to enter Hong Kong. Additionally, those who enter Hong Kong with the intent of settling there are subject to a quota determined by the competent authorities of the Central People's Government after consulting with the government of the region.<sup>57</sup>

This provision in Article 22(4) raised two legal questions: (1) whether the Right of Abode provided for in Article 24(2) is conditioned on Article 22(4); and (2) whether the Court is obliged to refer this matter for interpretation to the Standing Committee of the National People's Congress in accordance with Article 158(3).<sup>58</sup>

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56. THE BASIC LAW, art. 24(2)(1)–(3) (“The permanent residents of the Hong Kong Special Administrative Region shall be: (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).”).

57. THE BASIC LAW, art. 22(4) (“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.”).

58. THE BASIC LAW, art. 158(1)–(3) states:

(1) The power of interpretation of this Law (Basic Law) shall be vested in the Standing Committee of the National People's Congress. (2) The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region (3) The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an

If the Right of Abode issue were within the “autonomy” of Hong Kong, no referral would be necessary. However, if the issue concerned “affairs which are the responsibility of the Central People’s Government,” or “the relationship between the Central Authorities and the Region,” and the interpretation would affect the judgments in the cases, the Court was obliged to seek an official interpretation by the Standing Committee before issuing an unappealable judgment.<sup>59</sup>

The Hong Kong government, concerned about the number of potential Right of Abode claimants,<sup>60</sup> tried to resolve these legal issues legislatively by passing two immigration amendments to limit the number of claimants.<sup>61</sup> Immigration Amendment 2 provided that persons eligible under Article 24(2)(3) of the Basic Law were limited to those born *after* at least one of their parents had become a Hong Kong permanent resident.<sup>62</sup> Children born on the mainland before their Hong Kong parents had ordinarily resided in Hong Kong for seven years were not eligible for permanent residence or right of abode in Hong Kong under Article 24(2)(3). Immigration Amendment 3 required verification of permanent resident status under the Basic Law, and operated retroactively.<sup>63</sup>

Both immigration amendments violated the Basic Law Articles 24(2)(3), and in early July 1997 a number of claimants initiated judicial review proceedings to challenge the amendments. The number of claimants quickly increased, and there was growing concern about the cost of litigation. Because almost all of the claims involved the same issue (the interpretation and scope of Article 24(2)(3) and its relationship

interpretation of the relevant provisions from the Standing Committee of the National People’s Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

59. *Id.*

60. “The Hong Kong government has estimated that 1.67 million Chinese may hold a valid claim to the Right of Abode under the Basic Law.” Press Release, Hong Kong Policy Research Institute, Ltd., *The Public Opposes to Bear Burden of Influx of Residents from the Mainland*, Apr. 30, 1999, available at <http://www.hkpri.org.hk/press/hc990430/hc990430e.html>. “Many have criticized the figure as nothing more than propaganda and scare tactics.” Gren Manuel, *Survey to find Mainlanders Impact Halted*, S. CHINA MORNING POST, Oct. 25, 1999, available at <http://www.special.scmp.com/rightofabode/background/ZZZLS3DSNJC.html>.

61. The Provisional Legislative Council passed two immigration amendments to the Hong Kong Immigration Ordinance.

62. IMMIGRATION AMENDMENT No. 2 (July 1, 1997).

63. IMMIGRATION AMENDMENT No. 3 (July 10, 1997).

to Article 22(4)),<sup>64</sup> several cases were chosen as “test cases” or “representative cases.” There was no court order dictating that the applicants were actual representatives for parties not joined in the proceedings, nor was there evidence that any of the parties actually agreed to be bound by the representative cases. But senior government officials announced that the Hong Kong government would abide by the decisions of the courts. The Legal Aid Department even wrote letters to individual applicants for legal aid stating that there was no need for them to commence proceedings because the Court of Final Appeal was resolving their issue.

On January 29, 1999, in *Ng Ka Ling*,<sup>65</sup> the Court held that Article 24(3) was not qualified by Article 22(4), so claimants did not need one-way exit permits issued by the mainland to exercise their Right of Abode as permanent citizens. Thus, that section of the Immigration Amendment 3 was held unconstitutional because it was inconsistent with Article 24(2)(3) of the Basic Law. The retroactive provision was also held to be unconstitutional.<sup>66</sup>

The Court also declared that Hong Kong courts could invalidate acts of the NPC (in this case LegCo) if such acts breached the Basic Law. The Court also reiterated that interpretation of the Basic Law is to be carried out by the Court of Final Appeal, not the Standing Committee, if the main issue in the case concerns Hong Kong’s autonomy.<sup>67</sup> Significantly, the Court decided that it, rather than the NPC, would decide whether a case should be referred to the NPC under Article 158.<sup>68</sup>

That same day, in *Chan Kam Nga*,<sup>69</sup> the Court also held that Article 24(2)(3) applied to Chinese nationals born outside Hong Kong of Hong Kong permanent residents, regardless of whether they were born before or after at least one of their parents had acquired the status of permanent resident. Thus, the conflicting section of Immigration Amendment 2 was also held unconstitutional.<sup>70</sup>

The decisions hit like a bombshell. The Court had unequivocally declared its power of judicial review over even the NPC.<sup>71</sup> It was a

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64. The Basic Law Art. 22(4) requires claimants to get China’s permission before returning to Hong Kong.

65. *Ng Ka Ling v. Dir. of Immigr. (I)*, [1999] 1 H.K. Legal Rep. & Dig. 315.

66. *Id.* at 348.

67. *Id.* at 342.

68. *Id.*

69. *Chan Kam Nga & Others v. Dir. of Immigr.* [1999] 1 H. K. Legal Rep. & Dig. 304.

70. *Id.* at 313.

71. For additional discussion of the *Chan Kam Nga* and *Ng Ka Ling* cases, see Albert H Y Chen, *The Interpretation of the Basic Law—Common Law and Mainland Chinese Perspectives*, 30 H.K.L.J. 380 (2000) (examining the history of constitutional interpretation in common law world, especially in the United States and suggesting Hong Kong’s journey in constitutional interpretation has only just begun); see also Maria

haughty move considering China's tremendous pride and power. The Court had determined that its interpretation of the Basic Law was superior to that of the NPC. It was unlikely that China would simply accept the Court's view. The Hong Kong government had expected the Court to follow the immigration amendments and was caught off guard when it declared them unconstitutional. Government officials made public announcements that Hong Kong would abide by the decisions of the Court, though the rulings would place a heavy burden on Hong Kong's social services, such as housing and medical care. The Hong Kong Bar Association, leading lawyers, and constitutional law scholars called the judgments a victory for the rule of law in Hong Kong.<sup>72</sup> Those claimants affected by the judgments came out of hiding and asked the government for permission to stay.

On February 5, 1999, Beijing expressed its opinion of the Court rulings, first through four prominent mainland legal scholars, Xiao Weiyun, Shao Tianren, Wu Jianfan, and Xu Congde.<sup>73</sup> They stated that the Court had no legal basis for declaring its power of judicial review over the NPC and its Standing Committee. The implication was that

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Loventime U. Estanislao, *Right Of Final Adjudication In Hong Kong: Establishing Procedures Of Constitutional Interpretation*, 1 ASIAN-PAC. L. & POL'Y J. 10 (2000) (describing China and Hong Kong's conflicting constitutions); see also Todd Schneider, *David v. Goliath?: The Hong Kong Courts and China's National People's Congress Standing Committee*, 20 BERKELEY J. INT'L L. 575 (2002) (questioning the view that the Standing Committee will always be triumphant in showdowns with the Court); see also Karmen Kam, *Right Of Abode Cases: The Judicial Independence Of The Hong Kong Special Administrative Region v. The Sovereignty Interests Of China*, 27 BROOK. J. INT'L L. 611 (2002) (discussing the fundamental difference between the common law system in Hong Kong and China's legal system as the rule of law versus a rule by law). For example, Kam states that "[t]he common law court generally defers the social consequences of its decision to the administration, focusing mainly on the interpretation of the law. On the other hand, the Chinese legal system takes into consideration such issues as the consequences of every decision and action." *Id.* at 632.

72. Weng, *supra* note 21; see also Press Release, Hong Kong Bar Association, CFA Judgment on the Right of Abode of Hong Kong Residents (Feb. 5, 1999), available at <http://martinlee.org.hk/TheBar'sViews.html>.

73. "The legal experts in question were Professors Xiao Weiyun and Shao Tianren of Peking University, Professor Wu Jianfan of the Chinese Academy of Social Sciences, and Professor Xu Congde of People's University. They are all distinguished legal scholars who had taken part in the drafting of the Basic Law, Hong Kong's mini constitution, promulgated by the NPC in 1990."

Frank Ching, Center for Strategic and International Studies, Hong Kong Update, *The Court of Final Appeal Row*. Feb.-Mar. 1999, available at <http://www.csis.org/asia/hkupdate/hk15fc.html>

“one country” would triumph over “two systems.”<sup>74</sup> China would reclaim the ultimate authority over interpretations of the Basic Law.

Public opinion was strongly adverse to the rulings. There was widespread fear of mass immigration of mainlanders into Hong Kong. In a survey conducted by the Institute for Hong Kong Policy Research on February 8, 1999, the index measuring citizen confidence in Hong Kong’s relationship with the Central People’s Government plummeted by nearly 45% in one week.<sup>75</sup> Another survey conducted by the same group just after the Hong Kong government announced that under the Court’s January rulings, 1.67 million mainlanders would have the right to live in Hong Kong.<sup>76</sup> The second survey revealed that given a choice, 83.8% of respondents preferred to amend the Basic Law or ask Beijing for help. Only 16.2% said they would insist on maintaining the ruling of the Court and be willing to bear the population burden.<sup>77</sup>

On February 24, 2002, the Secretary of Justice for Hong Kong formally requested that the Court clarify the part of its ruling that asserted a power of judicial review over legislative acts of the NPC and the NPC Standing Committee. The legal community was shocked and outraged at this unprecedented and insulting request. Some thought that the Court’s judicial independence was being questioned for purely political reasons. Many strongly urged the court to reject the government’s request.<sup>78</sup> Yash Ghai said the request was a “gross humiliation.”<sup>79</sup> Martin Lee commented that it was not necessary for the “court to explain its own clear judgment just because someone in Beijing does not understand it. Today is a sad day for the rule of law in Hong Kong.”<sup>80</sup>

The Court had clearly ruled in favor of the Right of Abode claimants against popular opinion and government pressure, but in conformity with the Basic Law. This isolation would make it difficult for the Court to maintain its position in the months ahead. The Court had championed

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74. Chris Yeung, *Litmus Test of Deng’s Concept*, S. CHINA MORNING POST, Feb. 13, 1999, available at <http://www.special.scmp.com/npcl1999/Index.asp114.html>.

75. Weng, *supra* note 21 (stating 723 people were interviewed for the survey on Apr. 30, 1999).

76. Manuel, *supra* note 60 (“A survey that could verify the number of mainlanders that could come to the SAR has been aborted, triggering allegations that officials were afraid it would contradict their previous estimate of 1.6 million. . . . The government conducted a survey earlier this year that estimated 1.6 million mainlanders would be eligible to live in Hong Kong under the Court of Final Appeal’s January 29 ruling. That figure has been heavily criticised because it includes the assumption that there are a million or so illegitimate children with a Hong Kong parent, a figure seen as by some groups as vastly inflated.”).

77. Press Release, Hong Kong Research Institute (Apr. 30, 1999), available at <http://www.hkpri.org.hk/press/hc990430/hc990430e.html> (last visited Nov. 16, 2003).

78. Weng, *supra* note 21.

79. *Id.*

80. *Id.*



the clear constitutional rights of the minority, and in doing so had directly opposed the Hong Kong government's desire to deport the Right of Abode claimants. The government's request for clarification was a thinly disguised challenge of the Court's authority to make such a decision. Hong Kong government officials hoped for a retraction or limitation of the Court's self-proclaimed power of judicial review. In addition, it was fairly obvious that the challenge was coming directly from China in response to the Court's bold assertion of judicial review over the acts of the NPC and NPC Standing Committee. The Standing Committee was drawing a line in the sand.

On February 26, 2002, all five justices cooperated with the request by issuing a short statement of clarification. It explained that:

the court's judicial power is derived from the Basic Law. . . . The courts' jurisdiction to interpret the Basic Law in adjudicating cases is derived by authorization from the Standing Committee under arts.158(2) and 158(3). . . . The Court's judgment on January 29, 1999, did not question the authority of the Standing Committee to make an interpretation under art. 158 which would have to be followed by the courts of the Region. The court accepts that it cannot question that authority.<sup>81</sup>

The last sentence of the Court's statement reads, "Nor did the court's judgment question, and the court accepts that it cannot question, the authority of the NPC or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein."<sup>82</sup> The tone was deferential, but the statement still seemed to imply that the Court retained the power to question any acts of the NPC or Standing Committee that might not be in accordance with the provisions of the Basic Law. Legal scholars in Hong Kong grumbled that politics had compromised the independence of the court.<sup>83</sup>

The reaction on the mainland was fairly positive. Two of the legal experts who had attacked the Court's January rulings said they were satisfied.<sup>84</sup> Xiao Weiyun said that the statement had clarified the

81. *Ng Ka Ling & Others v. Dir. of Immigr. (II)*, [1999] 1 H. K. Legal Rep. & Dig. 577, 578.

82. *Id.* at 578.

83. For a contrary viewpoint, see Tom Clarke, *Ng Kaling v. Dir. of Immigr.; Tsui Kuen Nang v. Dir. Of Immigr.; Dir. Of Immigr. v. Cheung Lai Wah*, 23 MELBOURNE U. L.R. 773 (1999)(suggesting the rule of law in Hong Kong did not die with the *Chan* and *Nga* cases, but rather, that the Court's surrender to the Standing Committee's reinterpretation was politically savvy).

84. "Two mainland legal experts, also former Basic Law drafters, who had attacked the ruling said they were satisfied with the clarification. Xiao Weiyun said the

relationship between the court and the NPC and that the clarification was necessary.<sup>85</sup> Wu Jianfan said that the court's statement had helped to resolve the matter, but that this did not mean that the row could be settled immediately.<sup>86</sup>

Shortly thereafter, another bombshell hit Hong Kong. The State Council took the unprecedented step of asking the Standing Committee to interpret Articles 22(4) and 24(2)(3) according to their "true legislative intent."<sup>87</sup> The State Council made this request in response to Chief Executive Tung Chee Hwa's special report to the Council concerning the Right of Abode issue.<sup>88</sup>

This was a highly controversial move because it further challenged the already bruised authority of the Court, and also because Article 158 of the Basic Law did not seem to allow Hong Kong's executive branch to appeal straight to the Standing Committee.<sup>89</sup> It also appeared to be an

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statement on Friday had clarified the relationship between the court and the NPC and that the clarification was necessary. "The NPC enjoys the highest authority, which could not be denied by other organisations," Mr Xiao said. Wu Jianfan said the court statement had given a clear explanation but said this did not imply the row could be settled immediately. This is related to many questions including the 'one country, two systems' concept, which is a complicated issue." May Sin-mi Hon, *Qian adds to easing of abode dispute*, S. CHINA MORNING POST, Mar. 1, 1999, available at <http://special.scmp.com/npc1999/Index.asp112.html>.

85. May Sin-mi Hon, *supra* note 84.

86. *Id.*

87. "The Standing Committee of the Ninth National People's Congress examined at its Tenth session the "Motion Regarding the Request for an Interpretation 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" submitted by the State Council. The motion of the State Council was submitted upon the report furnished by the Chief Executive of the Hong Kong Special Administrative Region under the relevant provisions of Articles 43 and 48(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. The issue raised in the Motion concerns the interpretation of the relevant provisions of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Court of Final Appeal of the Hong Kong Special Administrative Region in its judgment dated 29 January 1999." 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, Appendix to THE BASIC LAW, available at [http://www.info.gov.hk/basic\\_law/fulltext/content0221.htm](http://www.info.gov.hk/basic_law/fulltext/content0221.htm).

88. Tung Chee Hwa, *The Chief Executive's Report to the State Council concerning the right of abode issue for an interpretation of the relevant provisions of the Basic Law*, available at [http://www.octs.org.hk/e\\_ce\\_doc.htm](http://www.octs.org.hk/e_ce_doc.htm).

Hong Kong respects the judgments of Hong Kong's courts. We have considered carefully and repeatedly the available options for resolving this issue. As the issue is one of principle involving how the Basic Law should be interpreted, and as the control of entry of Mainland residents into Hong Kong has a bearing on the relationship between the Central Authorities and Hong Kong, Hong Kong is no longer capable of resolving the problem on its own.

*Id.*

89. See THE BASIC LAW, art. 158 (requiring the judiciary to seek an interpretation by the Standing Committee in cases where a judgment will affect the relationship

obvious attempt by the executive to displace the rulings of the Court. Hong Kong Bar Association Chairman Ronny Tong Ka-Wah commented: "You are not saying the meaning is unclear. You are saying the effect of that meaning is not acceptable. You have to amend . . . otherwise, the Basic Law is not worth the paper it's written on."<sup>90</sup>

On June 26, 1999, the Standing Committee used its power under Article 158(1) to interpret Articles 22(4), and 24(2)(3) in a way which directly contradicted the Court's interpretation of the same provisions. According to the Standing Committee, Article 22(4) qualifies Article 24(2)(3) so that persons falling within Article 24(2)(3) must apply for approval from the mainland authorities to enter Hong Kong. Also, to qualify under Article 24(2)(3), at least one of the claimant's parents must already be a Hong Kong permanent resident at the time of the claimant's birth.

Thus, citizens born in Hong Kong, citizens who had ordinarily resided in Hong Kong for a continuous period of seven years, and persons of Chinese nationality born outside Hong Kong of residents listed in the first two categories had to apply for *approval* from the mainland authorities to enter Hong Kong. Under the Court's interpretation, no approval was necessary, and citizens who fell in these categories automatically had an enforceable Right of Abode in Hong Kong.

In addition, to qualify for the Right of Abode as the child of a Hong Kong resident under the Standing Committee reinterpretation, at least one of the claimant's parents must have *already been a Hong Kong resident at the time of the claimant's birth*. This was meant to prevent a possibly burdensome influx of children born to immigrants before they acquired their Right of Abode. The Standing Committee had reinstated the two immigration amendments and directly overturned the Court's "final" rulings.<sup>91</sup>

The Standing Committee was careful to add, however, that the two

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between the mainland and the Special Administrative Region, but there is no provision for the executive to do so if the judiciary has decided it is not necessary.)

90. Cliff Buddle, *Basic Law worthless if reinterpreted, Bar chief warns*, S. CHINA MORNING POST, May 11, 1999, available at <http://www.special.scmp.com/rightofabode/background/ZZZP158SNJC.html>.

91. The Standing Committee did not overrule the Court's decision that the retroactive provision of Amendment 2 was unconstitutional, however. 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, available at [http://www.info.gov.hk/basic\\_law/fulltext/content0221.htm](http://www.info.gov.hk/basic_law/fulltext/content0221.htm).

cases decided in January by the Court were not *overruled*; the parties to *those proceedings* could stay. But the reinterpretation prevented the Court's holdings from applying to other similarly situated Right of Abode claimants.<sup>92</sup> The Standing Committee managed to stay within the letter of the law by not expressly overruling the Court, but of course the effect of the reinterpretation was to destroy the precedential value of the *Chan* and *Nga* rulings.<sup>93</sup>

Right of Abode claimants who had come out of hiding after the Court's *Chan* and *Nga* rulings were stunned. Virtually everyone had thought the Court's rulings would be the final say on the matter. The Basic Law did not state that the Hong Kong executive could overrule the Court by appealing to the Standing Committee, yet that is exactly what happened. It was a constitutional crisis and human rights tragedy. Foreign investors watched the developing legal controversy with unease. Thousands of claimants appealed to the Hong Kong government for leniency.

In December 1999, the Court decided the third case, *Lau Kong Yung & Others v. Director of Immigration*.<sup>94</sup> The Court held that the Standing Committee's reinterpretation of the Basic Law was a valid and binding interpretation of Articles 22(4), 24(2)(3), and that the courts of Hong Kong were under a duty to follow this interpretation in the future.<sup>95</sup> On the same day, the Hong Kong government announced a "concession." It allowed "persons who arrived in Hong Kong between 1 July 1997<sup>96</sup> and

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92. 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 was adopted by the Standing Committee of the Ninth National People's Congress at its Tenth Session on 26 June 1999 *Id.* (demonstrating that the Standing Committee did not overrule the Court directly, but nullified the precedential effect of the *Chan Kam Nga* and *Ng Ka Ling* cases).

93. The effect of the Standing Committee's reinterpretation on the international business community was significant. Investors worried that the rule of law was beginning to break down in Hong Kong, and that they would no longer be able to rely on the Hong Kong legal system to enforce business agreements in China. See James Conachy, *Legal Dispute between Hong Kong and Beijing worries investors*, available at <http://www.wsws.org/articles/1999/apr1999/hk-a02.shtml> (Apr. 2, 1999). Without Hong Kong, foreign investors would have to rely on Chinese courts to enforce agreements, and China's legal record was not favorable. See Anthony Francis Neoh, *Legal Relations between Hong Kong and China*, HKDF Newsletter, Issue 14, Mar. 2000, available at [http://www.hkdf.org/newsletters/0003/0003\\_4.htm](http://www.hkdf.org/newsletters/0003/0003_4.htm).

94. *Lau Kong Yung & Others v. Dir. of Immigr.*, [1999] 3 H.K. Legal Rep. & Dig. 778.

95. *Id.* at 780.

96. July 1, 1997, is the date of Hong Kong's reunification, which is also the date the Basic Law came into effect ("[T]he Government of the People's Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997, thus fulfilling the long-cherished common aspiration of the Chinese people for the recovery of Hong Kong."). GHAI, *supra* note 3, at 532.

29 January 1999,<sup>97</sup> and had claimed the Right of Abode, to have their status as permanent residents verified in accordance with the two judgments.”<sup>98</sup>

A. *Martin Lee Denounces China's "Post Remedial Mechanism"*

The legal community denounced these developments in the “One Country, Two Systems” concept. Hong Kong’s autonomy was quickly slipping away. Martin Lee observed that there were better solutions to the possible social and economic problems associated with a potential mass immigration by Right of Abode claimants into Hong Kong—solutions that would not destroy the rule of law in Hong Kong.<sup>99</sup>

An amendment to Article 24 of the Basic Law, which could have been pursued under Article 159 of the Basic Law, could have reduced the burden on Hong Kong without compromising its autonomy. The amendment could have taken a similar form to an article in Macau’s Basic Law, and could have “denied the Right of Abode to children born outside of Hong Kong before their parents have obtained permanent resident status.”<sup>100</sup> According to Lee, the reinterpretation, which displaced the Court rulings with language similar to Lee’s proposed amendment, additionally undermined confidence in the finality of Hong Kong’s legal system. It had also given Beijing a “post verdict remedial mechanism.”<sup>101</sup>

Lee recounts how Beijing pressed the Sino-British Joint Liaison Group for a “post verdict remedial mechanism” in the final years of Britain’s rule of Hong Kong. The British refused, however, because such a mechanism would subject Hong Kong’s legal system to the

97. January 29, 1999 is the date the Court decided the *Chan Kam Nga* and *Ng Ka Ling* cases in favor of the Right of Abode claimants. *Chan Kam Nga v. Dir. of Immigr.*, [1999] 1 H. K. Legal Rep. & Dig. 304; *Ng Ka Ling v. Dir. of Immigr. (I)*, [1999] 1 H.K. Legal Rep. & Dig. 315.

98. Press Release, Hong Kong Special Administrative Region Government, June 26, 1999. “[T]o comply with the principle that judgments previously rendered by the Court of Final Appeal shall not be affected by an interpretation of the National People’s Congress Standing Committee, we will allow persons who arrived in Hong Kong between July 1, 1997 and January 29, 1999, and had claimed the right of abode, to have their status as permanent residents verified in accordance with the CFA decision. It is estimated that there are about 3,700 people in this category.” Transcript of media session on NPCSC interpretation of Basic Law (Concession) available at <http://www.info.gov.hk/eindex.htm> (in June 1999 archives).

99. Martin Lee Chu-ming, *Time to Assess Deng's Legacy*, S. CHINA MORNING POST, Feb. 22, 2000.

100. *Id.*

101. *Id.*

political whims of China. Lee argues that this is evidence that Beijing knew at that time that the Basic Law did not confer the power to overrule the Court. “Why else ask for such power?”<sup>102</sup> Lee adds that because no such mechanism was agreed on, all were entitled to expect that the Court’s decision on the Right of Abode cases would be the final word. Reliance was reasonable.

Furthermore, implementing constitutional decisions with which the government disagrees is not an uncommon governmental duty. It is a duty born of respect for “institutional integrity and autonomy.” If the government vehemently disagrees with a constitutional ruling of its highest court, the proper remedy is an amendment.<sup>103</sup>

Lee’s analysis of the legislative history of the Basic Law has several implications for the Right of Abode cases. Most importantly, it demonstrates the basis for the claimant’s faith in the finality of the Court’s judgments in the *Chan* and *Nga* cases, and the root of their legitimate expectation claim in the *Ng Siu Tung* case. The Right of Abode claimants had every reason to believe that the Court of Final Appeal had the final say in the matter, and in many cases their reliance on that belief was ultimately their undoing.

#### IV. NG SIU TUNG & OTHERS V. DIRECTOR OF IMMIGRATION: JANUARY 10, 2002

The latest case decided concerning the Right of Abode controversy in Hong Kong is *Ng Siu Tung*.<sup>104</sup> It is particularly significant because the applicants appealed on the grounds that the Standing Committee’s reinterpretation did not apply to them. This strategy provided the Court with a choice of loopholes. If the Court allowed the applicants to get around the reinterpretation, the Hong Kong judiciary would once again reclaim some of its independence from Beijing and its own executive branch. Doing so, however, would directly conflict with the Standing Committee’s clear intent to limit immigration from China to Hong Kong through its reinterpretation of the Right of Abode provision in the Basic Law. The Court’s majority decided to remain consistent with the reinterpretation, and denied most of the applicants in every significant way.<sup>105</sup>

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102. *Id.*

103. *Id.* Martin Lee advocating separation of powers, a position with which PRC clearly disagrees.

104. *Ng Siu Tung & Others v. Dir. of Immigr.*, [2002] 1 H. K. Legal Rep. & Dig. 561, at 561–62.

105. Presiding Judges in the case were Li CJ, Bokhary, Chan and Ribeiro PJJ, and Sir Anthony Mason NPJ. *Id.* at 561.

Justice Bokhary strongly dissented, asserting that under the Doctrine of Legitimate Expectation, the applicants deserved to stay. Bokhary argued that the Hong Kong government's assurances to the applicants that they would not be deported induced the applicants to reasonably rely on these statements to their detriment. The applicants' reliance caused them to refrain from taking the very procedural steps that would have saved them.<sup>106</sup> Consequently, they had to return to the mainland, while other members of their families stayed in Hong Kong. This occurred despite the Basic Law provision, which clearly guaranteed their Right of Abode, and despite the unambiguous initial rulings of the Court affirming that constitutional right.

Had the Court majority gone along with Bokhary, it would have had ample support in English precedent.<sup>107</sup> Instead, it chose to conform to the Chinese reinterpretation of the Basic Law. Perhaps the Court thought that it would retain *more* power if it did not draw further criticism and censure from Beijing, but it seems unlikely that Beijing will refrain from overruling the Court in the future because the Court backed down. Perhaps the Court believed it lost the battle when the people of Hong Kong did not fight for an independent judiciary, but instead supported the idea of a reinterpretation of their constitution by the Standing Committee.

#### A. *The Issues*

In *Ng Siu Tung*, the applicants presented five issues, asserting that the reinterpretation did not apply to them:

- (1) Article 158(3) of the Basic Law guarantees that "judgments previously rendered shall not be affected" by reinterpretations of the Basic Law by the Standing Committee, therefore, the judgments in the *Ng Ka Ling* and *Chan Kam Nga* case should not be affected by the reinterpretation, and the rights of other applicants similarly situated should not be affected (judgments previously rendered issue);

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106. *See id.* at 657–64.

107. Because Hong Kong retained its common law tradition, English precedent still has persuasive authority in Hong Kong courts ("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 contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.") THE BASIC LAW, *supra* note 19, at art. 8.

- (2) Even if they were affected, the similarly situated applicants had a legitimate expectation from public assurances by the government of Hong Kong that their cases would be treated in the same way as the “test cases” (legitimate expectation issue);
- (3) Because of the grave injustice that would be suffered by the applicants, it would be an abuse of process for the Director of Immigration to force them to leave by executing the removal orders against them (abuse of process issue);
- (4) Those applicants who arrived in Hong Kong before July 1, 1997, were not subject to article 22 of the Basic Law and the interpretation, and those who arrived between July 1 and July 10, 1997, were not affected by the reinterpretation or the No. 3 Ordinance, which were held by the Court and the Standing Committee not to apply retrospectively (periods-one-and-two issue);
- (5) Those applicants who arrived before January 29, 1999, had a legitimate expectation that they would be treated as if they were parties to the test cases, provided they could satisfy the conditions of the Concession. The Director of Immigration had misinterpreted the policy, thereby frustrating these expectations (Concession issue).

The majority decided the last three issues without dissent from Justice Bokhary. The court held that the abuse of process claim failed because the acts that were said to give rise to the claim were not part of the curial process, and thus could not amount to an abuse of power by the court.<sup>108</sup> Regarding the periods-one-and-two issue, the court held in favor of the applicants in period one (those who had entered Hong Kong before July 1, 1997, were not subject to Article 22(4) and did not need a one-way exit permit so long as they satisfied the time-of-birth requirement),<sup>109</sup> but against those in period two (the exit-permit requirement applied to those who entered Hong Kong without Mainland approval between July 1 and July 10, 1997).<sup>110</sup> With regard to the Concession issue, the court held that the Director of Immigration did not misinterpret the policy decision when he required applicants to meet additional criteria.<sup>111</sup>

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108. Ng Siu Tung & Others v. Dir. of Immigr., [2002] 1 H.K. Legal Rep. & Dig. at 617–19.

109. *Id.* at 619–21 (explaining that these applicants had arrived in Hong Kong before it reverted to China, their entry was not covered by the Basic Law, which came into effect July 1, 1997). Thirty-two applicants fell into this category. *Id.* at 621.

110. *Id.* at 621 (reasoning that the applicants could not take the benefit of Article 24(2)(3) without at the same time accepting the restriction in Article 22(4)).

111. *Id.* at 628, 648–49. The Director of Immigration’s additional criteria was “(1)



The majority's decisions on the judgments-previously-rendered issue and the legitimate-expectation issue drew heavy criticism from Justice Bokhary. Although some applicants' Right of Abode claims were confirmed under these arguments, many were denied.<sup>112</sup> Bokhary would have granted the Right of Abode to all of the applicants under either theory. Had the majority gone Bokhary's way, the court would have legitimately sidestepped the Standing Committee's reinterpretation of the Basic Law.

### *B. The Judgments Previously Rendered Issue*

The applicants cited Article 158(3) of the Basic Law, "judgments previously rendered shall not be affected" in support of the notion that the applicants have an accrued right under the judgments in *Ng Ka Ling* and *Chan Kam Nga* that should not be affected by the reinterpretation. The applicants argued that the word "judgments" means the "*ratio decidendi*," or holding, including "rights declared," and that "judgments" should be widely interpreted to include their accrued rights due to the similarity between their circumstances and those existing in *Ng Ka Ling* and *Chan Kam Nga*.<sup>113</sup>

The Director of Immigration took issue with the broad interpretation of "judgments," and asserted that the common law meaning (orders, declarations by the court) was more appropriate. The court sided with the Director on this issue:

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the person must have been present in Hong Kong during the period from 1 July 1997 to 29 January 1999; (2) during that period, he had made a claim to the Immigration Department for the Right of Abode; (3) he was physically in Hong Kong when the claim was made; and (4) the Director of Immigration has a record of such a claim." *Id.* at 628. Interpreting the Director's criteria, the court specified that "any document which: (i) clearly identified a person as a Hong Kong permanent resident and another person as his child; (ii) provided some details such as his or her date or place of birth; and (iii) asked for the child to come to Hong Kong either to settle or to enjoy his or her Right of Abode, should be reasonably understood as making a claim to the Right of Abode. A rejection of a document which satisfied these criteria would amount to a misapplication of the policy decision." *Id.* at 567; *see also id.* at 636-37.

112. The court quashed the removal orders of over 1,000 applicants under the Legitimate Expectation Issue. *Id.* at 616. Thirty-two applicants' removal orders were quashed under the "Periods 1 and 2" Issue. *Id.* at 621. The Director of Immigration still has discretion to remove these people from Hong Kong, but he must reconsider their cases in light of the court's ruling. *Id.* at 611. The total number of applicants who applied to the court for relief is 5,073. *Id.* at 580.

113. *Id.* at 583-86.

In the jurisprudence of the common law, the ratio decidendi and the reasons for a decision do not bind persons who are strangers to the litigation. The importance of the ratio decidendi and the reasons for a decision is that they have a precedential value in that they will be applied by the courts in other cases involving strangers to the earlier litigation.<sup>114</sup>

The court emphasized that the applicants were strangers to the earlier litigation because they were not formally represented by the parties in those lawsuits. The court additionally noted that the penultimate sentence of Article 158(3) requiring courts to “follow the interpretation of the Standing Committee” destroys the precedential value of judgments like *Ng Ka Ling* and *Chan Kam Nga*, which had essentially been overruled by the Standing Committee.<sup>115</sup> As a result, the majority did not grant relief to any of the applicants on this theory.

In his dissent, Justice Bokhary agreed that the reinterpretation by the Standing Committee destroyed the precedential value of *Ng Ka Ling* and *Chan Kam Nga*, and he noted the indubitable authority of the Standing Committee to issue such a reinterpretation. But Bokhary reasoned that there must be a good reason why the Basic Law provided that “judgments previously rendered shall not be affected” by subsequent Standing Committee interpretations. Bokhary concluded that the provision must exist for circumstances like these—cases involving “crystallised rights.”<sup>116</sup>

Had the Standing Committee not made its Interpretation, *Ng Ka Ling* and *Chan Kam Nga* would still be good law, and the applicants would have benefited from the precedent they set. Once the Interpretation was made, however, the precedential value was destroyed, and the conditional nature of the court’s rulings became apparent. Because of Article 158, the parties in the two cases were entitled to their rulings, despite the reinterpretation.

Bokhary argued that the judgments in the two cases retain some value that is less than precedent, but more than an overruled case, because they involve “constitutional litigation about an entrenched right.”<sup>117</sup> The Applicants are in a unique situation because their “circumstances existing prior to the Interpretation fit the law as stated in the judgments in *Ng Ka Ling*’s case and *Chan Kam Nga*’s case. . . [t]hey could have joined in those cases.”<sup>118</sup>

In my view, the nature of constitutional litigation about an entrenched right is such that all the persons whose existing circumstances put them in the relevant position acquire crystallised rights under a favourable judgment. The rival arguments on this part of the case are as finely balanced as any I have encountered

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114. *Id.* at 585.

115. *Id.*

116. *Id.* at 656–57.

117. *Id.* at 656.

118. *Id.* at 654.

in all my years at the Bar and on the Bench. I respect the opposite view. But for my own part I feel unable to restrict art.158's protection of crystallised rights to named parties only.<sup>119</sup>

Bokhary argued that the court should not focus on “technicalities” where crystallized rights were concerned.<sup>120</sup> Citing several cases which emphasized the importance of context to judicial opinions,<sup>121</sup> Bokhary reasoned that the proper meaning of “judgments” was broader than the majority’s definition. In applying a judgment, Bokhary would consider the surrounding circumstances and the reasoning of the judge.<sup>122</sup>

Had the majority followed Bokhary’s approach, it would have held that because all the Applicants were Chinese nationals born in the Mainland who had at least one parent who was a Hong Kong permanent resident within categories (1) or (2) or Article 24(2) when the judgments in *Ng Ka Ling* and *Chan Kam Nga* were delivered, all of the Applicants had Hong Kong permanent resident status under the Basic Law as interpreted by the Court in its judgments in those two cases.<sup>123</sup>

The effect of such a ruling by the majority would have been to legitimately sidestep the reinterpretation of the Basic Law. It would have revived the independence of the judiciary, and would have drawn a line around the power of the Standing Committee to reinterpret constitutional provisions. Accordingly, the Standing Committee could reinterpret so long as it did not significantly disappoint a legitimate public expectation of this caliber.

Had the majority created a precedent of this kind, it would have assured the citizens of Hong Kong a more predictable administration,

119. *Id.* at 656.

120. *Id.*

121. “[T]he generality of the expressions which may be found (in judicial pronouncements) are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.” *Id.* at 654–55 (quoting *Quinn v. Leathem*, A.C. 495, 506 (1901); see also *Moller v. Roy*, 49 ALJR 311 (1975), 312; *Australian Consol. Press Ltd. v. Uren*, 1 A.C. 590, 595 (1969)—(holding that determination “should be interpreted widely. . .”).

122. *Id.* at 656 (demonstrating how “technical arguments were advanced to the effect that the court could not make a declaration at the instance of a respondent” in *Regina v. Sec’y of State for the Home Dep’t, ex parte Shefki Gashi and Artan Gjoka*, No. CO/3559/1999, CO/4506/1999, 2000 WL 742056, at para. 6, however—the Honorable Mr. Justice Collins held “the argument is a barren one since a formal declaration is unnecessary when the judgment makes clear what the judge’s view of the law is.”). Thus, “[n]o narrow or technical meaning was assigned to the word ‘judgment’ in that context. Nor should anything of the kind be done in the present context.”). *Id.* at 656.

123. *Id.* at 653–54.

and restored faith in their constitution and government. Citizens would be able to rely on promises in their Constitution, and declarations made by their government officials. Even if the Court held that the claimants' legitimate expectations defeated China's reinterpretation, China would likely have found a way to bypass the Court's maneuver. The reality is that China's hunger to control Hong Kong is indefatigable. Even so, had the Court held in favor of the Right of Abode claimants under a legitimate expectation theory, it would have moved its king out of check, so to speak, rather than surrendering so completely.

### C. *The Legitimate Expectation Issue*

As a result of public statements and representations made by the government to the Applicants, and the manner in which the *Ng Ka Ling* and *Chan Kam Nga* litigations were conducted (test cases), the Applicants argued that they had a legitimate expectation that they would receive the same treatment as the parties in those two cases.<sup>124</sup> In addition, because of the representations by the Legal Aid Department, Applicants argue they were induced not to take the very action that would have brought them under the judgments-previously-rendered provision.<sup>125</sup> The Applicants submitted that the Director of Immigration failed to take account of these legitimate expectations when he made orders for their removal from Hong Kong. Because he was bound by law to do so, they argued that the orders should be quashed and the court should exercise the relevant discretion itself, or allow the Director of Immigration to exercise his discretion in accordance with the law.<sup>126</sup>

The majority opinion addressed the legitimate expectation issue by tracing the history and substance of the doctrine through the common law, and acknowledging that the doctrine is part of the administrative law of Hong Kong.<sup>127</sup> The court began by making it clear that the

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124. *Id.* at 587 (stating that applicants argued their legitimate expectation arose from the two "test cases" and from "(1) public statements made by senior government officials both before and after the two judgments; (2) representations made to individual applicants by the Director of Immigration and the Legal Aid Department; and (3) statements made and procedures adopted by judges and counsel during the course of litigation leading to those judgments.").

125. *Id.* at 596.

126. *Id.* at 602.

127. *Id.* at 600 (discussing how the legitimate expectation doctrine was first introduced by Lord Denning MR in *Schmidt v. Sec'y of State for Home Affairs*, 2 Ch. 149,171 (C.A. 1969)). The initial purpose was to "extend the range of rights and legal interests . . . affected by administrative determination so as to attract the rules of natural justice." *Id.* at 599. "Early attempts to review for substantive unfairness an administrative decision [denying] a legitimate expectation on policy grounds were rebuffed by the English Court of Appeal." *Id.* (citing *Regina v. Sec'y of State for the Home Dep't and Another, ex parte Hargreaves and Others*, 1 W.L.R. 906, 921, 924-25

doctrine does not preclude government agencies from changing or even abandoning policies, subject to judicial review. The court then described the four propositions or elements of legitimate expectation as summarized in *Regina v. London Borough Council of Newham, ex parte Bibi and Al-Nashed*:

- (1) When a government agency has made a promise or representation which causes people to legitimately expect that promise or representation to be honored, this expectation must properly be taken into account in the decision-making process, so long as doing so falls within the power, statutory or otherwise, of the decision maker. If the expectation is not taken into account, the decision-maker has abused his power and acted unlawfully.<sup>128</sup>
- (2) Effect should be given to these legitimate expectations unless there are reasons recognized by law for not doing so. Fairness requires that, if effect is not given to the expectation, the decision-maker should express its reasons so that they may be tested by a court should the decision be challenged.<sup>129</sup>
- (3) Even if the decision involves the making of a political choice based upon policy considerations, the decision-maker must make the choice in the light of the legitimate expectation of the parties.<sup>130</sup>
- (4) If the decision-maker does not observe the third requirement, the decision will be invalidated for failure to take account of a relevant consideration, which amounts to an abuse of power. Should the court identify such an abuse, it may ask

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(1997)). At that time, “[t]he [English] Court of Appeal held that judicial review in such cases was limited to Wednesbury unreasonableness.” *Id.* “Since then, however, the [English] Court of Appeal in a series of decisions has decided that judicial review for substantive unfairness is not so limited” to the Wednesbury unreasonableness test, and “in a case where official conduct has generated a legitimate expectation of a substantive benefit, an administrative decision based on government policy which frustrates the expectation may be reviewable on wider grounds, in particular substantive unfairness and abuse of power.” *Id.* at 563–64 (citing *Regina v. N. and E. Devon Health Auth., ex parte Coughlan*, 2 W.L.R. 622 (2000); *Regina v. Sec’y of State for Educ. and Emp., ex parte Begbie*, 1 W.L.R. 1115 (2000); (other citations omitted)).

128. *Regina v. London Borough Council of Newham, ex parte Bibi and Al-Nashed* 1 W.L.R. 237, at 248, 250 (C.A. 2001).

129. *Id.* at 251.

130. *Id.* at 252.

the decision-maker to exercise his discretion by taking the legitimate expectation into account.<sup>131</sup> The majority then added its own qualification to the fourth proposition that the court will invalidate such a decision only if the decision is materially affected by the failure to take account of a relevant consideration.<sup>132</sup>

The first proposition presented a threshold question as to whether a legitimate expectation existed. To be legitimate, an expectation had to be reasonable<sup>133</sup> and clear and unambiguous.<sup>134</sup> In circumstances where a representation was susceptible to competing constructions, the court rejected the applicant's argument that the construction most favorable to the applicant should be presumed, and held that it would accept the public authority's own interpretation, subject to the application of the "Wednesbury unreasonableness test."<sup>135</sup>

To determine whether a legitimate expectation existed, the court categorized the representations made by government officials to the public, and made separate determinations for each. The three categories were: (1) the four general statements made by the Director of Immigration and the Chief Executive addressed to the public at large; (2) The Legal Aid pro forma replies sent to applicants for legal aid; and, (3) The letter of April 24, 1998, sent by the Secretary for Security in response to letters of inquiry.

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131. *Id.* at 248.

132. *See Ng Siu Tung & Others v. Dir. of Immigr.*, [2002] 1 H.K. Legal Rep. & Dig. 561, 601. (citing *Lau Kong Yung & Others v. Dir. of Immigr.*, [1999] 3 H. K. Legal Rep. & Dig. 778, 815; *Regina v. Lord President of the Privy Council, ex parte Page*, A.C. 682, 702 (H.L. 1993); *Nguyen Tuan Cuong & Others v. Dir. of Immigr.*, 1 W.L.R. 68, 77 (1997); *Regina v. Cambridge Health Authority, ex parte B*, 1 W.L.R. 898,907 (1995)).

133. *Ng Siu Tung & Others v. Dir. of Immigr.*, [2002] 1 H.K. Legal Rep. & Dig. at 602. (citing *Att'y-Gen. of Hong Kong v. Ng Yuen Shiu*, 2 A.C. 629, 636 (P.C. 1983)).

134. *Id.* at 602 (citing *Regina v. Inland Revenue Comrs.*, *ex parte M.F.K. Underwriting Agents Ltd.*, 1 W.L.R. 1545, 1569-70 (Q.B. 1990); *Regina v. Jockey Club, ex parte RAM Racecourses Ltd.*, 2 All E.R. 225, 236 (Q.B. 1993); *Regina v. Devon County Council, ex parte Baker*, 1 All E.R. 73, 88 (C.A. 1995) (*cited with approval in Regina v. North and East Devon Health Authority, ex parte Coughlan*, 2 W.L.R. 622, 651 (2000)); *Regina v. Inland Revenue Commissioners, ex parte Unilever PLC*, C.O.D. 421, 423 (1996) (stating the "requirement for an unqualified and unambiguous representation" was described as "fundamental"); *Hong Kong and China Gas Co. Ltd. v. Dir. of Lands*, [1997] 1 H.K. Legal Rep. & Dig. 1291, 1296-97).

135. *Ng Siu Tung & Others v. Dir. of Immigr.*, [2002] 1 H.K. Legal Rep. & Dig. at 669. The "Wednesbury unreasonableness test" requires an administrative decision to be impugned only if it is "so unreasonable that no reasonable authority could even have come to it." *Assoc. Provincial Picture Houses Ltd. v. Wednesbury Corp.*, 1 KB 223, at 230, 234 (1948). In *Regina v. Chief Constable of Sussex, ex parte Int'l Trader's Ferry Ltd.*, 2 A.C. 418, 452 (1999), the test was reformulated to be less restrictive by asking "whether the decision in question was one which a reasonable authority could reach."

Regarding the first category, the court determined that most of the general statements that were made by the government before and during the two “test cases” were “of no significance and may be put aside.”<sup>136</sup> But the court decided that four specific, highly publicized statements clearly represented to the public that the rulings of the court would be followed and applied to similarly situated applicants. First, on July 13, 1997, the Director of Immigration said the government would do its best to defend its case in accordance with the law,<sup>137</sup> and that if the government lost its case it would “amend the legislation according to the judgment.”<sup>138</sup> Then, on July 23, July 31, and in October 1997, the Chief Executive assured the people that, “[w]e [the government] would do what the court eventually decides,” and that “the Hong Kong SAR Government will argue its case in court, and abide by the court’s ruling.”<sup>139</sup>

The court held that the fact that the speakers might not have intended for people to act on their statements was “not to the point. . . [T]he only point is: what did they mean?”<sup>140</sup> The court also held that these representations amounted to a “clear and unambiguous statement that the government would treat persons who fell within this category as if they were parties to the litigation.”<sup>141</sup> In addition, the representation did not say anything about the possibility of an interpretation by the Standing Committee, which could affect the decisions of the Court of Final Appeal. The court held that these representations satisfied the threshold issue, and that a legitimate expectation existed.

At this point, however, the court accepted the Director of Immigration’s argument that the applicants’ expectation could not be substantively enforced because such enforcement would be contrary to law,<sup>142</sup> and that

136. *Ng Siu Tung & Others v. Dir. of Immigr.*, [2002] 1 H.K. Legal Rep. & Dig. at 598.

137. *Id.* at 591.

138. *Id.* at 591 (quoting the Director of Immigration as reported in the *ORIENTAL DAILY*, July 13, 1997).

139. *Id.* (describing the Chief Executive’s answer that there would be no need to ask for a ruling beforehand when he was asked whether the Immigration Ordinance would be sent to the Standing Committee for interpretation to clarify whether it was consistent with the Basic Law).

140. *Id.* at 598.

141. *Id.* at 604.

142. *Id.* at 606 (citing *Att’y-Gen. of Hong Kong v. Ng Yuen Shiu*, 2 A.C. 629, 638 (PC 1983); *Regina v. N. & E. Devon Health Auth., ex parte Coughlan*, [2000] 2 W.L.R. 622, at 647, 651, 656; *Regina v. Sec’y of State for Educ. & Emp., ex parte Begbie*, 1 W.L.R. 1115, at 1125, 1132 (2000)).

the decision-maker could not satisfy an expectation by exercising his statutory discretion "in a way which undermines the statutory purpose."<sup>143</sup> The court concluded that although the Director of Immigration had discretion under Sections 11,<sup>144</sup> 13,<sup>145</sup> and 19(1)<sup>146</sup> of the Immigration Ordinance to allow people to stay on a case-by-case basis, he could not allow all of the representees of the four general statements to stay without undermining the entire legislative scheme. Further, because of the potential size of the "large innominate class" (possibly 600,000), there was no basis upon which the Director could rely to favor some, but not others.<sup>147</sup> As a consequence, the court held that the Director of Immigration could not lawfully exercise his discretionary powers in favor of such a large class, and therefore the claim based upon the general representations of the government failed.

Regarding the second category, in December 1998, shortly before the hearing of *Ng Ka Ling* and *Chan Kam Nga*, the Legal Aid Department screened applicants for the Right of Abode. Cases that were not considered urgent were sent a pro forma reply:

Regarding your application for legal aid, please note the following matters:

- (1) Extension of stay
- (2) Right of Abode

As your application for legal aid related to legal matters that are being heard in the Court of Final Appeal at this time, there is accordingly no need to bring individual cases for litigation at this stage.<sup>148</sup>

The court agreed with the Applicants' argument that these written replies caused them to refrain from lodging claims until after the test cases were complete, and that this hesitation is the only reason they were not in the same position as the parties to the test cases.<sup>149</sup> The court

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143. *Id.* (citing Sedley L.J. in *Regina v. Sec'y of State for Educ. and Emp., ex parte Begbie*, 1 W.L.R. at 1132).

144. *Id.* at 609. Section 11 gives the Director of Immigration the discretion to give permission to land at Hong Kong.

145. *Id.* Section 13 refers to permission to remain in Hong Kong.

146. *Id.* Section 19(1) refers to the power to make or refuse to make a removal order.

147. *Id.* at 613.

148. *Id.* at 596. (stating these pro forma replies were sent to over 1,000 people seeking legal aid).

149. The Legal Aid Department also made statements about the precedential effect of the test cases, and discouraged applicants from commencing or joining in the proceedings. This was done in an effort to limit the litigation to a manageable size. Officials in the Legal Aid Department stated that the court's decisions in the



found the representation clear and unambiguous, and the resulting expectation was reasonable. The court also noted that these representations were stronger than the ones in the first category, and the court held that a legitimate expectation existed with regard to these representations.

Regarding the third category, while the Court of Appeal test cases were pending, the Immigration Department and Secretary of Security made specific written representations to people who had written inquiring about the Right of Abode.<sup>150</sup> The Secretary of Security wrote:

The Court of Appeal will hear the case on 1 May. After the whole litigation process is completed, the Immigration Department will follow the final judgment of the Courts in dealing with the applications for the certificate of Entitlement.<sup>151</sup>

Although the court thought this representation was not as strong as the one in the Legal Aid pro forma replies, it determined that it was a clear statement that the final judgments of the courts would determine how applicants for certificates of entitlement would be treated.

The court sided with the second and third category Applicants on this issue of specific representations, distinguishing them from the representees of the four general representations in the first category. Because these specific representees constituted a "discrete and ascertainable class . . . the exercise in their favor of the relevant discretionary powers would not undermine the statutory policy as a whole."<sup>152</sup> The court held that although it was no longer possible to give effect to the original legitimate expectation of the applicants,<sup>153</sup> it was possible to quash their removal orders, and order the Director of Immigration to reconsider their

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representative cases would become precedent for others similarly situated, and that all of the cases did not need to be heard. These statements were reported in the press on July 15, 20, and 29, 1997. *Id.* at 594.

150. The Immigration Department's standard reply to these inquiries read, "The SAR government has appealed against the High Court's decision on 26 January 1998 that children born outside of Hong Kong before their parents became HK permanent residents also have Right of Abode if their father or mother received HK permanent resident status afterwards. As litigation is ongoing, applications of persons in this category cannot be given decisions for the time being." *Id.* at 593. The majority did not consider this statement sufficient to support a claim of legitimate expectation because "it did no more than state that, as the litigation was ongoing, decisions on applications for Right of Abode could not be made for the time being." *Id.* at 598-99.

151. *Ng Siu Tung & Others v. Dir. of Immigr.*, [2002] 1 H.K. Legal Rep. & Dig. at 593. (stating these responses were sent out Apr. 24, 1998).

152. *Id.* at 613-14.

153. Their original expectation was that they would be treated as if they were a party to the *Ng Ka Ling* and *Chan Kam Nga* cases. *Id.* at 594.

claims in light of their legitimate expectations.<sup>154</sup> The court then quashed the removal orders for the Applicants in the second and third category.

The court's distinction between the first category of general representees and the second and third categories of specific representees is strained, at best. The court essentially holds that constitutional rights will only be upheld when it is easy and efficient to do so. When the group of claimants is too large, and managing their claims would be time-consuming, their rights are less important. This rationale seems suspiciously similar to the Hong Kong government's fear of a large influx of immigrants. It is significant that the court mentioned that nearly 600,000 Applicants could fall into the category of general representees in category one. The court reasoned that there was no fair way for the Director of Immigration to differentiate between those general representees who deserve to stay, and those who do not. But what else is the Department of Immigration for, than to make such distinctions?

In his dissent Bokhary stresses the nature of the *Chan* and *Ng* cases as "test cases." In *Ng Ka Ling*, the Chief Justice said, "These are test cases."<sup>155</sup> Justice Bokhary himself in his *Chan Kam Nga* judgment said that how the "time of birth" question was answered would affect not only the named abode-seekers in that case but also "many other persons now and in the future."<sup>156</sup> The majority stated that no judge ever said that the non-joined Applicants would be treated as if they were litigants in the cases, and that no judge ever discouraged non-joined Applicants from filing their own suits in court. But under the circumstances, including intense media coverage and encouraging statements from the Chief Executive and other top government officials, it was reasonable for the public to expect that they would be treated like the litigants in the *Chan* and *Nga* cases.

Bokhary went further to discuss the nature of test cases in general, stating that the reasons test cases exist are to 1) preserve resources; and, 2) treat people in similar positions similarly.<sup>157</sup> Citing *R v. Secretary of State for the Home Department*, Bokhary quotes Lord Phillips of Worth Matravers MR commenting on public law test litigation:

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154. *Id.* at 614–15. The director of Immigration argues that even if expectation were taken into account, it would not have materially affected the decision, and therefore, the removal orders should not be quashed. *Id.* The court was not persuaded, and the orders were quashed. *Id.*

155. *Id.* at 672 (quoting *Ng Ka Ling & Others v. Dir. of Immigr.*, [1999] 1 H.K. Legal Rep. & Dig. 577).

156. *Chan Kam Nga & Others v. Dir. of Immigr.*, [1999] 1 H.K. Legal Rep. & Dig. 304, 308.

157. *Id.* at 672.

In such circumstances, those who defer proceedings to await the result of the test case will have a legitimate expectation that if the applicant in the test case demonstrates that he is entitled to a particular relief or treatment, they will be treated in the same way.<sup>158</sup>

Bokhary goes on to say that the *Chan* and *Ng* litigations were even more than public law test litigation, because it was “constitutional litigation about an entrenched right.”<sup>159</sup> Moreover, the legitimate expectation was based not only on the test case nature of the *Chan* and *Ng* litigations, but also on express representations made by government officials.

The majority argues that many of the general representations, which were made to the public before, during, and after the *Chan* and *Ng* litigations, were too general to induce reliance by the public. Bokhary contends that it is unbecoming for the government to assert that the statements it chose to make for the purpose of reassuring the public were too vague to do so.<sup>160</sup> He also adds that refusing to acknowledge the plain meaning of public representations could amount to an abuse of power in and of itself, and certainly could undermine public confidence in government statements.<sup>161</sup>

## V. CONCLUSION

The Court’s assertion of judicial review in the *Chan* and *Nga* cases, though correct, was perhaps ill-timed. The Court’s challenge was to persuade both China and the Hong Kong government to respect and enforce the Court’s decisions. Unfortunately, the Court chose a very unpopular issue on which to take a stand. By taking the side of the Right of Abode claimants, the Court effectively alienated itself from China, the Hong Kong government, and even the citizens of Hong Kong. Had the Court been more strategic and tactful, it might have avoided provoking China’s unequivocal censure. Perhaps the Court might have waited for a case in which China approved of the Court’s decision, and as a companion to that decision, judicial review.<sup>162</sup> In order to protect

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158. *Id.* at 673 (citing *R v Secretary of State for the Home Department, ex p Bajram Zeqiri*, EWCA Civ. 342 at para. 43 (2001)).

In 1999, *R v. Secretary of State for the Home Department* was good law. Although the case has since been reversed, Lord Philips’ quote remains instructive regarding Bokhary’s reasoning in his dissent.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Compare with Marbury v. Madison*, in which Justice Marshall aligned his

the constitutional and human rights of thousands of citizens, however, the Court was forced to claim a power of judicial review in the *Chan* and *Nga* cases.<sup>163</sup>

Having asserted the power of judicial review, it was a mistake for the Court to implicitly withdraw that assertion by reversing itself according to the Standing Committee's reinterpretation. As a result of the Court's uncertain position, China arguably has more power over Hong Kong than it did before. It appears that the Court will have a very difficult, if not impossible time reasserting a power of judicial review over the Standing Committee of China in the future. The Standing Committee, on the other hand, established a precedent for overruling the Court by reinterpreting the Basic Law.<sup>164</sup>

*Ng Siu Tung* makes it clear that the days of Hong Kong's independent judiciary are over. The rule of law in Hong Kong now ultimately depends on China's Standing Committee. Thus, Hong Kong's constitutional and human rights are at the mercy of China's Standing Committee, and the Communist Party.

The citizens of Hong Kong cheerfully gave up their independent judiciary for fear of mass immigration of mainlanders into Hong Kong. Instead of calling for a constitutional amendment which would have stemmed the flow of immigrants from the mainland, the citizens of Hong Kong watched while the Chief Executive worked with the Standing Committee of China to extinguish the power of judicial review, and the last independent voice for minority interests in Hong Kong.

Rather than use the Doctrine of Legitimate Expectation or the "judgments

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decision with what was politically popular in order to gain his opponents' acceptance of judicial review. 5 U.S. (1 Cranch) 137 (1803). See generally WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* (2000).

163. One possible reason for the Court's impatience is that the foreign justice who was brought into the Court for his independence might have been somewhat insensitive to the Court's delicate position in relation to China. The presiding Judges were Li (Chief Justice), Bokhary, Chan and Ribeiro (Permanent Judges) and Sir Anthony Mason (Non-Permanent Judge). Sir Anthony Mason was Chief Justice of the High Court of Australia from 1987 to 1995. See [http://www.whitlam.org/people/mason\\_sir\\_anthony.html](http://www.whitlam.org/people/mason_sir_anthony.html). Various foreign judges participate as non-permanent judges in the Court of Final Appeal in order to preserve the court's independence from China. See also <http://www.judiciary.gov.hk/en/organization/judges.htm>.

164. The Basic Law provides for Standing Committee reinterpretation upon the Court's request. THE BASIC LAW art. 158. The Right of Abode cases are significant because the Standing Committee made its reinterpretations based upon a direct request of Hong Kong's Chief Executive and LegCo—two branches of Hong Kong's government which are very loyal to China. The Basic Law does not provide for reinterpretation requests by the Chief Executive and LegCo. *Id.* The reinterpretation establishes precedent for China to directly overrule the Court in any constitutional case because China can order the Chief Executive and LegCo to make reinterpretation requests whenever China wants to overrule the Court.

previously rendered” clause of the Basic Law to validly circumvent the Standing Committee reinterpretation, the Hong Kong Court of Final Appeal surrendered its last weapons without a fight. Perhaps the Court realized the inevitability of the Standing Committee’s eventual victory, and chose to simply accept it. Perhaps the Court trusts that such reinterpretations will be a rarity, and that the Court in most instances retains the power of final review. But of what value is a power of *nearly* final review?

Once Hong Kong’s judiciary has been stripped of its independence and is nothing more than another “rubber stamp,” who will speak up for the constitutional and human rights of Hong Kong’s citizens? How then will those citizens differ from the students in Tiananmen Square who tried to oppose China’s tanks with words?

TERESA MARTIN

