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Abbreviations

| | |
|----------|--|
| art. | Article/s |
| BL | Basic Law |
| CA | Hong Kong Court of Appeal |
| CBL | Basic Law Committee |
| CE | Chief Executive |
| CFA | Hong Kong Court of Final Appeal |
| CFI | Hong Kong Court of First Instance |
| ed. | Editor(s) |
| EC | European Community |
| ECJ | European Court of Justice |
| EU | European Union |
| f. / ff. | and the following (one / more) |
| HKSAR | Hong Kong Special Administrative Region |
| ICCPR | International Covenant on Civil and Political Rights |
| IOCO | Interception of Communications Ordinance |
| JLG | Joint Liaison Group |
| NPC | National People's Congress |
| NPCSC | National People's Congress Standing Committee |
| p. / pp. | page / pages |
| PRC | People's Republic of China |
| Region | Hong Kong Special Administrative Region |
| SAR | Special Administrative Region |
| v. | versus |

I. Hong Kong's legal system

A. Historical and legal background

In 1984 China and England concluded an agreement which is referred to as the Joint declaration. This document laid down the resumption of sovereignty over Hong Kong by China on 1st of July 1997. "The resumption [...] was a significant event for the legal system. The intention was that the territory's 'way of life' should remain unchanged for 50 years and in general it could be said that only those aspects of Hong Kong's government and other systems should be altered which were in some way incompatible with the transition from British colony to Chinese special administrative region."¹ Thus the Joint declaration established the principle of "one country, two systems" providing Hong Kong as a special administrative region enjoying a high degree of autonomy within the unitary and highly centralized Chinese state.² In 1997 the NPC in accordance with art. 31 of the PRC constitution enacted the Basic Law (BL), the fundamental document the HKSAR rested on. Later it became clear that the BL had three dimensions³: It was international because it implemented the Joint declaration, it was a national Chinese law and last but not least it formed the constitution of the HKSAR. Due to its national character it could not be amended except by the NPC⁴ and it provided for a separate common law system in Hong Kong coexisting with China's socialist regime.⁵ On account of its many facets the relation between BL and PRC constitution is not fully clear yet⁶, which in the past had given reason to serious controversies⁷.

"The Basic Law provides a strong constitutional regime for the protection of rights and freedoms. In addition to those explicitly mentioned in the Law, it entrenches a number of international human rights instruments, particularly the International Covenant on Civil and Political Rights ('ICCPR'). No restrictions on rights and

¹ WESLEY-SMITH, p 9.

² See CHEN CONCEPTS, p 353.

³ See Chan CJHC in [1997] HKLRD 761, N 14 and GHAI, p 24.

⁴ See art. 159 BL.

⁵ See art. 5 BL

⁶ Please refer to GHAI, pp 37ff.

⁷ See particularly the discussion of the case Ng Ka Ling, I.C.2.b.

freedoms may be imposed which contravene these instruments (article 39). Access to courts for the protection of rights and redress against unlawful administrative acts is guaranteed (article 35).”⁸

B. The judiciary of Hong Kong

1. Hong Kong’s public organization

The Hong Kong court system essentially kept its hierarchy⁹ after the handover except for the fact that the Court of Final Appeal (CFA) was established to replace the Judicial Committee of the Privy Council as the ultimate court of appeal. “Its jurisdiction is exercised by five judges sitting together, and the five judges in any particular case consist of the Chief Justice, three permanent judges, and one judge drawn from one of two panels, either a panel of former Hong Kong judges or a panel of overseas judges.”¹⁰ The CFA’s judgments are final and binding for the other courts.¹¹ The HKSAR courts pursuant to their common law jurisdiction make references to other common law decisions and use other jurisprudential sources¹². They can strike down any local executive or legislative act which is not in accordance with the BL.¹³ National laws are only applicable to Hong Kong if they are after consultation with the CBL¹⁴ listed in Annex III of the BL and promulgated or implemented by local legislation.¹⁵ Art. 19(2) and (3) BL impose restrictions on the courts stating that they have no jurisdiction over acts of state such as defence and foreign affairs and that their jurisdiction is limited by principles in force previously to 1st of July 1997 and by principles imposed by the current legal system.¹⁶ Art. 85 BL finally provides for an independent judiciary free from any interference.

⁸ GHAI, p 6.

⁹ See DOBINSON / ROEBUCK, pp 68f.

¹⁰ WESLEY-SMITH, p 71 and art. 82 BL.

¹¹ See art. 19 BL

¹² See CHEN REFLECTIONS, p 683 and art. 84 BL.

¹³ See CHEN REFLECTIONS, p 671.

¹⁴ The CBL is an advisory capacity to the NPCSC established to minimize the difficulties arising out of the interface of the two different legal systems in Hong Kong and the Mainland. For further information please refer to GHAI, p 12.

¹⁵ See art. 18 BL

¹⁶ In this context please refer to I.C.

2. The role of courts

The principle of “one country, two systems” tries to reconcile two systems which are fundamentally different. These differences particularly appear through the conceptions of roles courts play in the HKSAR on the one hand and in Mainland China on the other hand. The HKSAR system is the common law where no organ is above the law and the interpretation of law solely rests on the courts.¹⁷ Its basic principle is the rule of law which amongst other things says that everyone - including the government – must obey the law.¹⁸ The Basic Law does not establish specific procedures for constitutional review but implicitly retains Hong Kong’s original constitutional review mechanism¹⁹ when providing for a common law system in the Region.²⁰ On these grounds it is for the courts to decide on the constitutionality and validity of executive or legislative acts.

Contrary to the common law principles constitutional review in Mainland China does not exist. “Under the PRC legal system, the NPC is the highest state organ which enjoys both the power to pass legislation and to interpret legislation and whose power cannot be challenged by any other state organ.”²¹ Since the NPC’s only restriction is the PRC constitution itself there is no legal remedy in cases of breach of the constitutional norms.²²

The two different conceptions are bound to collide: “The scheme of the Basic Law is [...] likely to bring it into conflict with the Central Authorities, especially if common law assumptions of judicial review extend to the entire scheme of the Basic Law.”²³ It is for instance highly controversial whether Hong Kong courts also have jurisdiction to declare acts of the Central Authorities and especially NPC laws invalid because they contravene the BL. The most demonstrative conflict arises out of art. 158 BL. This article caused severe disputes between the HKSAR government, the HKSAR judiciary and the Central Authorities in the past ten years:

¹⁷ See **CHAN JUDICIAL INDEPENDENCE**, p 63.

¹⁸ See **WESLEY-SMITH**, pp 16f.

¹⁹ Previously to the handover the courts enjoyed the power to declare legislative acts inconsistent with the Letters Patent which formed Hong Kong’s constitution during the colonial era. (see **CHAN JUDICIAL INDEPENDENCE**, p 63).

²⁰ See **FENG CRISIS**, p 291.

²¹ **CHAN JUDICIAL INDEPENDENCE**, p 62.

²² See **CHEN SUPREMACY AND REVIEW**, p 77.

²³ **GHAI**, p 8.

C. The referral system under art. 158 Basic Law

Art. 158 BL vests the power of interpretation of the Basic Law in the NPCSC. The Committee can exercise this power at all times even without the CFA asking it to do so. If the NPCSC issues an interpretation it will be binding for the HKSAR courts.²⁴ “Within the framework of overarching powers of the NPCSC to interpret any provision of the Basic Law, [art. 158 BL] authorizes the Hong Kong courts to interpret any provisions during adjudication. However, the court from which no further appeal is possible cannot interpret provisions dealing with the responsibilities of the Central Authorities or the relationship between them and the HKSAR²⁵ (which the Court of Final Appeal has designated ‘excluded provisions’). If the interpretation of an excluded provision will ‘affect’ the judgment²⁶, then that court must ask the NPCSC to provide an interpretation of the provision and then apply it in adjudicating the case.”²⁷ According to art. 158(4) BL the NPCSC is obliged to consult the CBL before delivering an interpretation. The whole referral system was originally based on the referral system to the ECJ under the EU arrangement.

1. Role model: The referral system to the ECJ (art. 234 EC Treaty)

The ECJ has the jurisdiction to give preliminary rulings on the interpretation of community laws or acts. National courts of all member states may seek such an interpretation if they consider it necessary to render their judgment.²⁸ Furthermore there are two cases in which national courts are obliged to refer questions to the ECJ: Firstly, every national court notwithstanding its level of jurisdiction must refer questions arising out of doubts as to the validity of community law.²⁹ And secondly, if a court faces a question of interpretation of community law and its decision will not be challengeable within the member state the court must refer the question to the ECJ.³⁰ The aim of this referral system is to provide for a uniform interpretation and implementation of community law. The decisions of the ECJ are binding for the

²⁴ See **CHAN FIRST DECADE**, p 415.

²⁵ So-called ‘classification condition’.

²⁶ So-called ‘necessity condition’.

²⁷ **GHAI**, p 11.

²⁸ See art. 234(2) EC Treaty.

²⁹ See **MAYER**, p 232.

³⁰ See **MAYER**, p 232.

national courts and the courts have to implement them through their own judgment.³¹

2. Difficulties in Hong Kong

a. *Questionable impacts*

Although art. 158 BL is based upon art. 234 EC Treaty there are some major differences between these two systems that give rise to problems in Hong Kong: First of all, “the ECJ is a properly constituted court, and the parties to the dispute are entitled to appear before the ECJ to have their views heard before the judgment is rendered. In contrast, the NPCSC is a political body which will decide behind closed doors. [It] will unlikely grant the parties to the hearing before the Court of Final Appeal a right to be heard. [...] They [...] will be deprived of an opportunity to be heard by the NPCSC on an issue which will be crucial to the outcome of the hearing [before the CFA].”³² This constitutes in fact a violation of the due process principle. However, it could be argued that an interpretation by the NPCSC must be seen as a legislative and not as a judicial act and therefore the procedural guarantees³³ no longer have any effect.³⁴ But since the outcome of a trial is at stake such a classification would indirectly be tantamount to a circumvention of procedural freedoms. In addition to that art. 158(4) BL does hardly ameliorate the situation of the parties because the CBL so far preferred to criticize the decisions of the CFA in a quite impartial way instead of performing its duty to conciliate the two legal systems³⁵. Lastly, art. 158 BL also provokes a conflict as to whether Chinese or common law principles should govern the interpretation of the Basic Law. This point will be elaborated on in II.A.1.

b. *The right of abode cases*

The critical referral provision was of fundamental importance in a long and delicate chain of cases that came before the CFA from the outset. They all dealt with the right of abode conferred by art. 24 BL and challenges as to the constitutionality of

³¹ See MARGEDANT, p 396.

³² CHAN FIRST DECADE, p 416.

³³ See art. 14 ICCPR and art. 10 Bill of Rights Ordinance.

³⁴ SEE CHAN FIRST DECADE, p 416.

³⁵ See GHAI, p 13.

restrictions of this right. This Chapter will focus on two of the right of abode cases which clarify best what problems can arise out of art. 158 BL and how the CFA approached those matters.

The very first case touching upon the right of abode issue was *Ng Ka Ling*³⁶. It concerned “the constitutionality of certain amendments in the Immigration Ordinance, the effect of which is that children born of Hong Kong Permanent Residents in the Mainland could only claim a right of abode in the HKSAR if they are able to produce a certificate of entitlement, which could only be applied outside Hong Kong and which would only be issued upon the production of an exit permit granted by the security bureau of the Mainland.”³⁷ The ordinance had to be examined as to contravention of the BL. Therefore an interpretation of art. 22(4) BL was needed since this provision listed the constitutionally permissible restrictions of the right of abode. Unfortunately the provision fell within the responsibilities of the Central Authorities and was thus excluded from the court’s interpretative power³⁸. Hence, the CFA should have referred art. 22(4) BL to the NPCSC. However, the court was not willing to do so. In its judgment the CFA held that it was up to the court alone to decide whether a referral was to be made under art. 158 BL. It established the so-called ‘predominant provision test’ according to which the court must decide “what predominantly is the provision that has to be interpreted in the adjudication of cases. If the answer is an excluded provision, the Court is obliged to refer. If the answer is a provision which is a non-excluded provision, then no reference has to be made, although an excluded provision is arguably relevant to the construction of the non-excluded provision even to the extent of qualifying it.”³⁹ Without careful elaborations the CFA came to the conclusion that art. 24 BL and not art. 22(4) BL was the predominant provision. On these grounds the court considered a referral unnecessary and adopted its own very liberal interpretation. Furthermore the CFA held that Hong Kong courts have jurisdiction to determine whether acts of the NPC or the NPCSC are consistent with the BL and to declare them invalid if they are not.

³⁶ [1999] 1 HKC, pp 291ff.

³⁷ **CHAN DECADE**, p 413.

³⁸ See I.C.

³⁹ 1999] 1 HKC, pp 330f.

After the judgment was delivered there was a lot of criticism from the Mainland which was mostly caused by the differences explained in I.B.2.. Mainland Scholars and officials found that there was no legal basis for the CFA to assert constitutional jurisdiction and that Hong Kong courts could not challenge the supreme legislative acts of the NPC. They also took the CFA's refusal to refer to the NPCSC as a violation of art. 19 BL⁴⁰ whereas the legal profession in Hong Kong defended the judgment. The HKSAR government finally tried to end the debate by asking the CFA to clarify its judgment, which had never happened before. The CFA thereupon issued the following statement: "The court's judgment on 29 January 1999 did not question the authority of the Standing Committee to make an interpretation under Article 158 which would have to be followed by the courts of the Region. [...] The Court accepts that it cannot question the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein."⁴¹ In fact this statement did not clarify anything since the court implicitly insists on its power of judicial review.⁴² In addition to that the CFA's clarification within the HKSAR was only seen as a sufficient mean to ease a hot tempered debate whereas the Central Government perceived the court's statement to be a submission to the Central Authorities.⁴³ The HKSAR government did not appreciate the judgment and was unwilling to implement it. Thus it started a media war and tried to turn the public opinion against the CFA. Based on the results of a newly established task force the government announced that implementing the CFA's judgment would lead to a drastic decline of the social circumstances. Therefore the CE of the HKSAR requested the State Council to seek interpretation from the NPCSC of the articles the CFA dealt with in its judgment. The action taken by the CE was strongly criticized especially because it was not provided for in any law.⁴⁴ Some even reproached the CE with bypassing the judicial system.⁴⁵ Thereupon the NPCSC, after

⁴⁰ See **WEIYUN AND OTHERS**, p 55.

⁴¹ [1999] 2 HKCFAR, p 142.

⁴² Please refer to **CHAN CLARIFICATION**, pp 171 – 182.

⁴³ See **CHAN CLARIFICATION**, p 181.

⁴⁴ The government tried to justify the action based on 43 and 48(2) BL which specify the function and powers of the CE but do not provide for actions such as the taken one.

⁴⁵ See for instance the statement of senior official Allcock in a LegCo hearing in June 1999 and the letter from the Hong Kong Bar Association to the Chief Executive of 5th May 1999.

the consultation of the CBL, issued its own interpretation. As regards content it was a radical overruling of the CFA's reasoning in Ng Ka Ling. Most notably the NPCSC denied the exclusive power to examine consistency with the BL which the CFA had claimed. At least the NPCSC remarked that the judgment in the present case was not to be affected by this interpretation.⁴⁶

In the case of Lau Kong Yung⁴⁷ the CFA was concerned with the impact of the NPCSC's interpretation for the first time. The court analyzed the power of interpretation of the NPCSC under art. 158(1) BL and held that this power was conferred in general and unqualified terms.⁴⁸ Furthermore it stated that the power was not limited to the adjudication of cases. "That means the NPCSC can interpret any provisions of the Basic Law at any time, regardless of whether or not there is a case at trial at a court in the HKSAR, and such an interpretation shall be binding upon all courts in the HKSAR."⁴⁹

Compared with Ng Ka Ling the CFA had totally changed its attitude from one extreme to the other. On the one hand this could be seen as sacrificing the autonomy of the Region and the judicial independence. On the other hand it must be considered that the Central Authorities were not proactively interfering with the CFA's jurisdiction but only on the HKSAR government's request. Therefore the principal borderline does not run between the Mainland and the Region but between the regional government and the regional courts.⁵⁰ The judgment can also be esteemed as an expression of trust in the principle of "one country, two systems": The court concedes that the NPCSC's power to interpret is unlimited. But in the meantime the CFA has faith in the Committee only exerting this power if necessary, thus on the CFA's request. As to the actions taken by the HKSAR government after Ng Ka Ling there are a few concluding remarks to be made: The executive sought assistance of a political body with marginal democratic legitimacy to overturn a judgment on the ground that the executive simply did not favour its result. This constitutes a severe undermining of the judicial system and the rule of

⁴⁶ See the NPCSC's interpretation issued on 26th of June 1999.

⁴⁷ [1999] 2 HKCFA, pp 300ff.

⁴⁸ [1999] 2 HKCFA, p 323.

⁴⁹ FENG JURISPRUDENCE, p 27.

⁵⁰ See GHAI, p 8.

law⁵¹, it is a de facto violation of art. 19(1) BL and cannot be justified under any common law principles.

II. Constitutional jurisdiction in Hong Kong

A. Development and Trends of the CFA

1. Interpretation of the Basic Law

a. Approaches

In the *Chong Fung-yuen* case⁵² the CFA was concerned with the question how the BL should be interpreted. With regard to the principle of “one country, two systems” the court stated that the BL provided for a separate common law system in the Region. Thus the court argued for applying a common law approach in interpreting the BL instead of a Chinese approach which would amongst other things try to evaluate the legislative intent of the provision in question⁵³. The court came to this decision by looking at art. 8 and 18(1) BL and the possibility of HKSAR courts to refer to precedents of other common law jurisdictions⁵⁴. Defining how this common law approach should be accomplished the CFA differentiated as follows: If the provision in question is contained in Chapter III of the BL the HKSAR courts are to adopt a generous approach to the interpretation. Such an approach depends “on the desirability of protecting rights as the constitutional duty of the court”⁵⁵ because Chapter III comprises constitutional guarantees of freedoms. By contrast provisions other than those of Chapter III should be interpreted in a literal and contextual approach⁵⁶, thus strictly confined to the exact meaning of the words. Unfortunately this differentiation is not unproblematic especially when certain cases deal with provisions of both Chapter III and another Chapter and the provisions are so closely related in the present case that they cannot be interpreted separately. For such situations the CFA held that the prevailing approach for such cases will be a generous one since the “protection of fundamental rights in the

⁵¹ See **FENG CRISIS**, p 309.

⁵² [2001] 4 HKCFAR 211.

⁵³ See for example the Preamble of the NPCSC’s interpretation and please refer to **FENG CRISIS**, pp 312ff.

⁵⁴ See art. 19(1), 84 and 87(1) BL.

⁵⁵ **GHAI**, p 27.

⁵⁶ **GHAI** interprets this approach to be ‘purposive’ in the sense of giving effect to the intention of the legislature, please refer to p 28.

HKSAR is far more important than coherence in the interpretation of different constitutional provisions with different natures.”⁵⁷

b. Use of extrinsic materials

In *Chong Fung-yuen* the CFA also gave a guideline for the interpretation of provisions other than those contained in Chapter III of the BL: “The courts should simply consider the language in light of any ascertainable purpose and context.”⁵⁸ The ascertainable purpose could be gained from extrinsic materials, especially pre-enactment materials⁵⁹. Since this statement would introduce legal materials from the Mainland into Hong Kong’s constitutional discourse⁶⁰ the CFA quickly added that the use of extrinsic materials cannot lead to an interpretation which goes beyond the clear meaning of the language.⁶¹ Moreover, the court was confronted with the issue if the opinions of the Preparatory Committee⁶² are extrinsic materials. “According to Chinese jurisprudence, once they are adopted by the national legislature, [such opinions] shall have the same legal effect as national legislation.”⁶³ The NPCSC had referred to the Committee’s opinions in the second last paragraph of its interpretation. The CFA had to decide whether or not it would follow the Chinese conception and accredit a binding effect of the opinions. The court finally did not rely on the opinions and treated the NPCSC’s interpretation like a judgment rather than legislation⁶⁴: It applied a common law approach⁶⁵ for interpretation and took the NPCSC’s reference to the opinion merely as ‘obiter’ and therefore not binding.⁶⁶ “In this way, the Court of Final Appeal [was] able to protect the integrity of the common law system by re-asserting the primacy of the common

⁵⁷ **FENG JURISPRUDENCE**, p 30.

⁵⁸ [2001] 4 HKCFAR 211, 6.3.

⁵⁹ See **FENG JURISPRUDENCE**, p 31.

⁶⁰ See **JEN**, p 461.

⁶¹ [2001] 2 HKLRD 533, p 547.

⁶² „The Preparatory Committee was set up to prepare for the establishment of the first Government of the HKSAR. It had no mandate to interpret the Basic Law. It did not participate in the drafting process [...] and its view on the meaning of the Basic Law was given six years after the Basic Law had been promulgated by the NPC.” (**CHAN FIRST DECADE**, p 418).

⁶³ **FENG JURISPRUDENCE**, pp 31f.

⁶⁴ See **JEN**, p 462.

⁶⁵ “Under common law, such a report is not even admissible as evidence.” (**CHAN FIRST DECADE**, p 418).

⁶⁶ Art. 158 BL answers the question what part of an NPCSC interpretation is binding the HKSAR courts using the term “the interpretation of the provisions concerned”. Therefore “anything which is not strictly related to the interpretation [...] is not binding.” (**CHAN FIRST DECADE**, p 419).

law principles in interpreting the Basic Law, and dispel[led] any doubt of the independence of the Court.”⁶⁷

In the same judgment the CFA confirmed its common law approach: It held that the agreements reached by the JLG⁶⁸ were not directly applicable in Hong Kong since – contrary to the Chinese understanding – international treaties require an implementation into domestic law⁶⁹.

2. Constitutional protection of fundamental rights

a. Conditional restrictions of human rights

Sequel to the generous approach the CFA applies interpreting human rights⁷⁰ the court said in various judgments that provisions restricting fundamental rights must be interpreted narrowly.⁷¹ Corresponding to these judgments “any restriction on fundamental rights must satisfy two constitutional requirements, namely that the restriction must be prescribed by law (legality test), and that the restriction must be necessary for the protection of some legitimate interests (necessity test).”⁷² In its judgment in *Shum Kwok Sher*⁷³ the CFA regarding the legality test stated that its basic idea was the principle of legal certainty. This means sufficient accessibility and precision of the law as well as predictability of consequences for the citizen. These prerequisites are consistent with the jurisdiction of the European Court of Human Rights.⁷⁴ As to the requirements of the necessity test the CFA reasoned in *Leung Kwok Hung*⁷⁵ that a proportionality test was to be applied. It specified that a restriction must have a rational connection with at least one legitimate purpose and that the curtailing means must not be more than necessary to achieve this purpose. Constitutional lists of legitimate purposes were deemed to be exhaustive. “The

⁶⁷ **CHAN FIRST DECADE**, p 417.

⁶⁸ “The Joint Liaison Group, consisting of representatives of the UK and the PRC, was established by the Sino-British Joint Declaration (Annex II) principally to consult on the implementation of the Declaration and to discuss matters relating to the smooth transfer of government in 1997.” (**GHAJ**, note 22). The nature of the agreements of the JLG is not entirely clear. It can only be said that at their highest they could reach the status of an international treaty.

⁶⁹ See **MUSHKAT**, pp 357ff.

⁷⁰ Please refer to II.A.1.a.

⁷¹ [1999] 2 HKCFAR 4, 281 - 29A; [1999] 2 HKCFAR 442, 457B; [2005] 8 HKCFAR 229.

⁷² **CHAN FIRST DECADE**, p 423.

⁷³ [2002] 5 HKCFAR 38.

⁷⁴ [1979] 2 EHRR 245, 1b.

⁷⁵ [2005] 8 HKCFAR 229.

affirmation of the application of proportionality test is a major step forward. It enables the courts to conduct a balancing exercise between protecting fundamental rights and its impact on other important social objectives, albeit with a starting point in favour of fundamental rights. [...] It is likely that in the foreseeable future, the concept of proportionality will find its way into general administrative law cases.”⁷⁶

In the majority of cases the CFA took up a liberal stance towards human rights. Doing so it set out a remarkable contrast to the more conservative Court of Appeal and often did not hesitate to reverse its judgments. However, notwithstanding the CFA’s clear commitment in the area of crime control the court seems to comply more with the concerns of the HKSAR government. As a result there is a disadvantageous impact on the human rights protection in this field:

b. Crime control

In *Ng Kung Siu*⁷⁷ the CFA held that the National Flag and National Emblem Ordinance which criminalizes flag desecration did neither violate the freedom of speech under art 27 BL nor the freedom of expression guaranteed by art. 19 of the ICCPR. The court reasoned that the offence only prohibited one mode of expression, which did not constitute a wide restriction and was therefore justified. Later in *Lau Cheong*⁷⁸ the court upheld the mandatory life sentence for all cases of murders. This sanction had been challenged to be arbitrary due to lack of distinction correspondent to the delinquent’s motivation. In *So Wai Lun*⁷⁹ the Hong Kong penal code which only criminalized male persons when engaging in unlawful sexual intercourse with underage children was challenged to violate the equality of genders. The CFA answered in the negative and upheld the code constitutional. It came to this conclusion notwithstanding the fact that the provision involved absolute liability. The CFA tried to explain itself by saying that it was up to the legislative to form a view on these moral and social issues. “All its prior exhortation

⁷⁶ CHAN FIRST DECADE, p 424.

⁷⁷ [1999] 3 HKLRD 907.

⁷⁸ [2002] 2 HKLRD 612.

⁷⁹ [2006] 3 HKLRD 394.

about giving a generous interpretation to the Chapter III (Fundamental Rights) provisions of the Basic Law was conveniently forgotten.”⁸⁰

A ray of hope seemed to arise with the decision in *Yeung May Wan*⁸¹ when the CFA quashed the convictions of peaceful demonstrators. The judgment in constitutional regards was not significant but rather the fact that the demonstrators belonged to the Falun Gong sect which was being prosecuted on the Mainland.⁸² The CFA did not hesitate to protect their freedom to demonstrate and thus treated them equally with all members of Hong Kong society. Two months later in *Leung Kwok Hung*⁸³ the court had again to decide a case in which peaceful demonstrators had been arrested. This time the constitutionality of a provision conferring discretionary power to object to an announced public procession was at stake. The applicants considered the legitimate interests stated in this provision to be too wide and uncertain. Unfortunately the court confined its examination to only one factor, namely the formulation “ordre public”. The court merely declared the remaining factors concretizing the discretionary power to be constitutional without any further explanation. “Perhaps in *Yeung* the CFA was cognizant that if the Court caved to the pressures from the Mainland government, where the validity of a NPCSC interpretation or NPC law was not at stake, and where the Court was adjudicating over a matter within the limits of Hong Kong’s autonomy, not only would the independence of this sacred institution be question, the viability of the ‘One Country, Two Systems’ principle would be impugned. [...] On the other hand in *Leung*, where the CFA was adjudicating over a law and order tussle between the State and the Individual with no Central Government implications, the court merely reverted to its general conservative stance on crime control issues. [...] The Court has been very conscious about preserving or consolidating its powers whilst arriving at decisions that are palatable to the Executive.”⁸⁴

⁸⁰ *JEN*, p 465.

⁸¹ [2005] 2 HKLRD 212.

⁸² See *JEN*, p 465 and *CHAN FIRST DECADE*, p 426.

⁸³ [2005] 8 HKCFAR 229.

⁸⁴ *JEN*, pp 467f.

This tendency was reaffirmed in *Prem Singh*⁸⁵: The court deemed a statutory immigration scheme to be unconstitutional because it imposed additional requirements on an applicant for unconditional stay which were not covered by the BL. Still the CFA did not dare to tackle the scheme on the ground that it rendered the (constitutional) right of unconditional stay dependent on the discretion of the Director of Immigration.⁸⁶ Instead the court asked the Director to re-determine his decision. Given the fact that the applicant had already been imprisoned several times before, it might be a bit more comprehensible that “the CFA judges were not going to deny the Director an opportunity to remove an undesirable character from Hong Kong.”⁸⁷

3. Maintaining continuity

As described above (I.B.1.), the “one country, two systems” principle was not least established to preserve Hong Kong’s previous system after the handover in 1997. But “it is [also] necessary that Hong Kong’s system has to move on with time, and a rigid adherence to a historical point in time will not be in the interest of the HKSAR.”⁸⁸ This tension between continuation and development kept the HKSAR courts quite busy.⁸⁹ In *Lau Kwok Fai Bernard*⁹⁰ the CFA had to decide whether it should rely on the pre-handover situation to determination whether a reduction of payment of public officers operated unilaterally by the government was permissible. The court held that not all of the elements of the previous system could be maintained. Instead the CFA weighed in favour of development and not of continuity. This was a positive step for the Region since it enables the HKSAR to free itself from bars which derived from the colonial era and probably are not suitable for the contemporary society.

4. Politicization of the CFA

A big problem for the CFA and the other HKSAR courts is that there are many cases brought before them which should actually be solved on a political level. The resort

⁸⁵ [2003] 1 HKLRD 550.

⁸⁶ Only Justice Bokhary was of this opinion, see [2003] 1 HKLRD 550, pp 556f.

⁸⁷ JEN article, p 470.

⁸⁸ CHAN FIRST DECADE, p 431.

⁸⁹ See for instance [1998] 2 HKC 138 and [2005] 8 HKCFAR 229.

⁹⁰ [2005] 8 HKCFAR 304.

to the judiciary is “to a large extent [...] a result of frustration of the political process, particularly the lack of democratic development on the political front.”⁹¹ Since Hong Kong courts have jurisdiction to review constitutionality they have become something like a backdoor for persons which fall on death ears when presenting their concerns to other authorities, be it legislative or executive, be it Mainland or regional authorities. For the judiciary it is therefore important to accomplish their balancing processes and value choices carefully.⁹²

The cases in question concern many different issues. In *Ng Kung Siu*⁹³ the CFA did not support the challenge of the offence of flag desecration. In *Chan Wah*⁹⁴ the court assessed the constitutionality of an electoral arrangement which was only accessible to indigenous people. It came to the conclusion that “the deprivation of the political rights of the non-indigenous inhabitants was unnecessary for the protection of the lawful traditional rights and interests⁹⁵ of the indigenous inhabitants.”⁹⁶ Other decisions about strongly political issues were for instance *Yeung May Wan*⁹⁷ or *Lau Kwok Fai Bernard*⁹⁸. Concluding it can be said that the CFA tried to accomplish its task as a common law court and remain uninfluenced by the political pressure. “However, if this trend continues unchecked, if the political process remains ineffective, and when the judiciary is unable to meet the expectations of the people, the rule of law will be undermined.”⁹⁹

B. Declaration of unconstitutionality

In common law jurisdictions courts have the power to strike down acts of other organs of state on the ground of unconstitutionality. Such decisions are very delicate since they cause a period of legal uncertainty which will not come to an end until corrective legislation has been enacted. Courts in several common law countries had to deal with the effects of such a declaration of unconstitutionality already. A few years ago the CFA was also concerned with this matter in the case of

⁹¹ **CHAN FIRST DECADE**, p 444.

⁹² See **CHAN FIRST DECADE**, p 434.

⁹³ See II.A.2.b.

⁹⁴ [2000] 9 HKPLR 610.

⁹⁵ Art. 40 BL provides for protection of traditional rights and interests of indigenous people.

⁹⁶ **CHAN FIRST DECADE**, pp 438f.

⁹⁷ See II.A.2.b.

⁹⁸ See II.A.3.

⁹⁹ **CHAN FIRST DECADE**, p 447.

Koo Sze Yiu¹⁰⁰. In its judgment the CFA referred to other common law decisions amongst which mainly two different solutions had been adopted:

1. Temporary validity

The first solution common law courts found to prevent a legal vacuum was granting temporary validity. A temporary validity order has the following effects: “First, the executive is permitted, during such temporary validity period, to function pursuant to what has been declared unconstitutional. Secondly, the executive is shielded from legal liability for so functioning.”¹⁰¹

In this context the CFA firstly looked at Tamizuddin Khan¹⁰² where the Federal Court of Pakistan had to decide on the constitutionality of a proclamation issued by the Governor-General. After certain constitutional amendments and corresponding laws had been declared invalid a Constituent Convention which had the power to validate laws was established at once. But since the Convention could not act immediately the Governor proclaimed himself to have the power to validate and enforce laws in the meantime and thus tried to overcome the emergency of the legal vacuum. This procedure was not provided for in the constitution of Pakistan but the Federal Court granted the proclamation temporary validity. The second case the CFA referred to was *Re Manitoba*¹⁰³. There the validity of statutes and regulations of the Canadian province of Manitoba which were only published in English but not in French was at stake. The Supreme Court of Canada held that the legislation was unconstitutional due to a violation of section 23 of the Manitoba Act¹⁰⁴. In order to avoid a legal vacuum the court granted temporary validity for the time necessary to translate and publish the statutes in question in French. In another Canadian decision, *Swain*¹⁰⁵, the same court ruled that a criminal code provision stating that insanity was a reason for immediate detention was unconstitutional and therefore of no effect. “At the same time the court acted to

¹⁰⁰ [2006] 3 HKLRD 455.

¹⁰¹ [2006] 3 HKLRD 455, N 33.

¹⁰² *Federation of Pakistan v. Tamizuddin Khan*, PLR 1956 WP 306 and Special Reference No. 1 of 1955, PLR 1956 WP 598.

¹⁰³ *Re Manitoba Language Rights* [1985] 1 SCR 721.

¹⁰⁴ Section 23 of the Manitoba Act 1870 required Manitoba legislation to be published bilingually. The act is entrenched in the Canadian constitution.

¹⁰⁵ *R v. Swain* [1991] 1 SCR 933.

avert the danger to the public of all insanity acquittees being immediately released into the community. The way in which the court chose to avert that danger was by according the detention provision six months' temporary validity for corrective legislation to be enacted."¹⁰⁶

The Federal Court of Pakistan and the Supreme Court of Canada agreed that granting temporary validity was not a usual power of courts. The CFA observed that they had based their decisions on the doctrine of necessity, a common law instrument. Under certain circumstances this doctrine "is involved as a source of jurisdiction, and confers on the courts powers that are exceptional to the point of being anomalous."¹⁰⁷ The courts deemed necessity to be given if temporary validity was inevitable to avert impending disasters, prevent dissolution from State and society, avoid a legal chaos and preserve the rule of law.¹⁰⁸

2. Suspension of declaration of unconstitutionality

The second solution to the problem was found to be the suspension of the declaration of unconstitutionality through the courts. Suspension means maintenance of an offending law in operation for a reasonable period¹⁰⁹. Contrary to temporary validity suspension does not provide for protection against legal liability on the side of the government.¹¹⁰ It is therefore a less encroaching measure in terms of the rule of law.

In its judgment the CFA referred to Schacter¹¹¹. This was another decision of the Supreme Court of Canada in which the court regarded benefits conferred by legislation as 'underinclusive' and therefore unconstitutional.¹¹² However, the court did not bring the declaration into operation immediately. Instead it stated that "a court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an

¹⁰⁶ [2006] 3 HKLRD 455, N 25.

¹⁰⁷ [2006] 3 HKLRD 455, N 24.

¹⁰⁸ See Special Reference No. 1 of 1955, PLR 1956 WP, p 671 and Re Manitoba Language Rights [1985] 1 SCR, p 767.

¹⁰⁹ See Bellinger v. Bellinger [2003] 2 AC, p 481.

¹¹⁰ See [2006] 3 HKLRD 455, N 34.

¹¹¹ Schacter v. Canada [1992] 2 SCR 679.

¹¹² The court deemed the right to equal benefit from the law to be violated by a provision excluding a certain group of people from benefits conferred by law.

opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (R v. Swain) or otherwise threatens the rule of law (Re Manitoba Language Rights).¹¹³

3. The CFA's decision in the present case

The issue in Koo Sze Yiu emerged because the CE of the HKSAR did not attend his duty to set up a date for the IOCO to come into operation¹¹⁴. Instead he released an Executive Order as an interim measure pending corrective legislation.¹¹⁵ The Executive Order and the IOCO differed in the requirements for admissible covert surveillance: Where the IOCO asked for the approval of a High Court judge the Executive Order confined itself to approval from a senior level of the executive in order to authorize the interception. The Executive Order was challenged and the CFI assessed unconstitutionality of the Order as well as of the Telecommunications Ordinance.^{116&117} In order to concede enough time to the legislative to draw new legislation the CFI granted temporary validity to both the Executive Order and the Telecommunications Ordinance for a period of six months.¹¹⁸ This was challenged again and later on the case came before the CFA.

The court compared the circumstances of all the cases mentioned in this context. It was of the opinion that with regard to potential danger to the public Koo Sze Yiu resembled Swain more than any other precedent from Pakistan and Canada.¹¹⁹ But with regard to temporary validity which had been granted in Swain the CFA held that the scenario in the present case was by far not as serious. It held that necessity was not given and set aside the temporary validity order.

Then the CFA turned to the option of suspension and held that “the judicial power to suspend the operation of a declaration [of unconstitutionality] is a concomitant

¹¹³ Schacter v. Canada [1992] 2 SCR, p 715.

¹¹⁴ See Section 1(2) IOCO.

¹¹⁵ For background information please refer to **BASIC LAW BULLETIN**, p 21.

¹¹⁶ Art. 30 BL allows infringements of the freedom and privacy of communications only in accordance with legal procedures. Pursuant to the CFI's judgment the Executive Order did not constitute such legal procedures.

¹¹⁷ The IOCO applies to communication means according to section 33 of the Telecommunications Ordinance. The ordinance was held to be unconstitutional because it enables the interception of any kind of messages without differentiation.

¹¹⁸ See [2006] 3 HKLRD 455, N 49.

¹¹⁹ See II.B.1.

of the power to make the declaration in the first place. It is within the inherent jurisdiction. There is no need to resort to the doctrine of necessity for the power. Necessity comes into the picture only in its ordinary sense: not to create the power but only for its relevance to the question of whether the power should be exercised in any given case.”¹²⁰ Since the court found that bringing the IOCO into operation was not a viable alternative¹²¹ it concluded that suspension in terms of necessity was justified. It postponed its declaration of unconstitutionality for 6 months from the date of the CFI’s judgment.

III. Conclusion

In 1997 the court had to start its business as the final judicial instance of Hong Kong during a period of great uncertainty about the future. It had to prove that it was able to defend the rights and freedoms of Hong Kong citizens under the “one country, two systems” principle and to create its own case law regime. Doing so the CFA determinedly opted for a common law approach and remained almost entirely uninfluenced by Chinese jurisprudence. The court did not hesitate to point out the autonomy of the Region and was not afraid of taking an opposite stand towards the conceptions of the Mainland. Notwithstanding the NPCSC’s interpretation after Ng Ka Ling the CFA seems to have reached a silent agreement of non-interference with the Central Authorities.¹²² With regard to the CFA’s constitutional jurisdiction it can be said that the court generally took up a very liberal position towards human rights. It brought its own conceptions in line with international human rights standards and attributed them great importance. By and large the CFA rendered carefully reasoned judgments. As a common law court the CFA had been confronted with delicate questions such as the impacts of a declaration of unconstitutionality. With reference to other jurisdictions the court tried to find a solution fitting Hong Kong’s regional circumstances and therefore proved itself capable of adequate distinction. However, when an issue was likely to bring the CFA in conflict with the regional government or legislature the court did not dare to persist in its liberal viewpoints continuously. Regrettably this resulted in a declining protection of

¹²⁰ [2006] 3 HKLRD 455, N 35.

¹²¹ See [2006] 3 HKLRD 455, N 42.

¹²² See I.C.2.b.

human rights especially in the area of criminal matters. The most challenging problem arising during the last 20 years was in fact the gradual politicization of cases. As described above¹²³, there are some serious democratic deficits in Hong Kong which trace back to the Joint declaration and the BL. The HKSAR courts cannot amend Hong Kong's constitution since this is the exclusive power of the NPC.¹²⁴ Yet, the Hong Kong judiciary has to take the blame for these deficits since the courts are forced to decide also political cases brought before them. "A consequence of having a constitution, particularly a constitutional bill of rights, is that the open texture of constitutional provisions will afford much greater room for personal value choices to influence the outcome of the balancing process."¹²⁵ This exposes judges to a great public pressure and political lobbying. Notwithstanding the CFA trying to approach political cases from a mere legal point of view there is a danger of undermining the rule of law and the (political) independence of the judiciary. Furthermore, the latter is also endangered by actions of the HKSAR government such as seeking political assistance to overturn the decisions of the CFA.¹²⁶ However, after the common excitement caused by Ng Ka Ling and the subsequent events the regional government had not taken any similar actions again and hopefully will not do so in the future.

Concluding it can be said that the CFA during the past two decades faced a highly difficult task. It has taken human rights as a general guideline especially when touching upon sensitive issues. Unfortunately the court was not able to follow this approach consistently due to struggles on a national, political or governmental level. The role the CFA plays in the public structure of Hong Kong is not simple since every constitutional issue might cause another crisis like Ng Ka Ling. From this point of view it might be justified for the CFA not to defend human rights on an unconditional basis but to balance carefully in order to retain the stability of Hong Kong's public system. It is therefore preferable that the CFA continues to develop its unique jurisprudence.

¹²³ See II.A.4.

¹²⁴ See art. 159 BL.

¹²⁵ CHAN DECADE, p 434.

¹²⁶ See I.C.2.b.

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