Creating A Constitutional Relationship

Richard CULLEN[1]

It is clear from a series of recent cross-border legal disagreements that the Hong Kong Special Administrative Region (HKSAR) and the Mainland of the People's Republic of China (PRC) are now fully engaged in the fabrication of the constitutional relationship which will govern their interaction over the coming decades. This essential formation process is set to continue for some years.

At first glance this claim seems curious. After all, Hong Kong has the Basic Law. And then there is the PRC Constitution. Surely the framework for political-legal interaction between the HKSAR and the Mainland is largely settled already? This view is quite misconceived, as it happens. There are two main reasons why. First, all new constitutional arrangements take time to "bed-in". When the former colonies in Australia federated in 1901 it was some twenty years before the long-term shape of Federal-State relations began to emerge. Second, the constitutional relationship between the HKSAR and the Mainland is unique. For the first time ever, a fully-fledged Common Law jurisdiction (where the Rule of Law prevails) is subject to the sovereignty of a One Party State.

The Basic Law, like any freshly deployed constitutional document, is showing that it has not in its drafting, covered every possible matter - and it suffers from some ambiguity. This is entirely normal. Constitutions are typically sweeping and broadly worded. Their full impact is meant, in truth, to be elaborated over time. As it

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[1] Visting Fellow, School of Law, City University of Hong Kong, Professor, Monash University, Melbourne, Australia. I wish to thank Professor Wang Chenguang of the School of Law, City University of Hong Kong and Dr. H. L. Fu of the Faculty of Law, University of Hong Kong for their comments during the writing of this article. The views expressed are my own. This article has also appeared in (1999) (April) Hong Kong Lawyers, 61-64.

happens, the Basic Law shows clear signs of being generally well crafted, especially given the circumstances of its drafting.

Which brings us to the second factor mentioned above. When the Australian colonies federated, Australia gained a brand new, overarching Constitution designed specifically to mediate the central-regional relationship. Moreover, it got a new High Court which assumed the task of adjudicating all central-regional disputes. There were not fundamental, political differences between the centre and the regions. There are very clear, fundamental political structure differences between the Mainland and the HKSAR. So, a new overarching constitution (for the entire PRC) subject to independent, professional adjudication was never an option. This is the principal reason that the Basic Law spends so much time establishing the *separation* of the HKSAR from the Mainland and far less time on the *interaction* of the HKSAR with the Mainland. The latter task was simply beyond any sort of complete, detailed, written down solution. It is this "interaction void" which is now being filled (or at least high-lighted) on a case-by-case basis. Recently, for example, the impact of the PRC Criminal Code on the HKSAR became an important topic of debate. More recently, there has been much discussion about the possible (limited) impact of the Basic Law on certain acts emanating from the Mainland. There is little doubt that the Court of Final Appeal (CFA) is keenly aware of the importance of its own role in this step-by-step, de facto, constitution-building operation.

So much for why we find ourselves where we do. The next, and more important question is, what is the report card to date on this process of Constitutional formation? Although the signals are mixed, the CFA decisions in the Right of Abode cases stand out as a crucial turning point. Let us now take a brief look at these cases.

Article 24 (1) of the Basic Law confers the title of Hong Kong permanent resident on Chinese citizens born in Hong Kong before or after the establishment of the HKSAR. Article 24 (2) confers this same right on Chinese citizens who have ordinarily resided in Hong Kong for a period of not less than seven years before or after the establishment of the HKSAR. Article 24 (3) then provides that

persons born *outside* Hong Kong of a parent or parents covered by Articles 24 (1) and (2) also qualify as Hong Kong permanent residents. This category is meant to cover children born outside Hong Kong where at least one parent is a Hong Kong (Chinese) permanent resident. The operation of Article 24 is complicated by the fact that the fourth paragraph of Article 22 of the Basic Law appears to be in some conflict with Article 24 (1-3). Article 22 stipulates that people from the Mainland coming to the HKSAR must apply for approval to do so. Further provision is made for the PRC to specify who may so proceed, in consultation with the HKSAR Government. Neither Article 22 nor Article 24 specifically refer to one another.

The Immigration Ordinance[2] was amended immediately following the handover so as to provide (with some retrospective effect) that:

A. Persons claiming a Right of Abode from the Mainland would have to satisfy the Director of Immigration in the HKSAR as to the validity of their claim and obtain a "certificate of entitlement";
B. Such persons would *also* have had to have obtained a "one-way permit" from the Mainland authorities;
C. All claimants would need to have been born to parents, at least one of whom had acquired their right of abode in Hong Kong *prior* to the birth of the claimant; and
D. Children born out of wedlock where they were claiming a Right of Abode through their father (who did not subsequently marry the mother) would not qualify as eligible claimants.

The amendments to the Immigration Ordinance detailed above were challenged for their lack of consistency with the Basic Law. The principal provisions of the Basic Law under consideration included those set out above.

In early 1999, the CFA handed down powerful, unanimous decisions in the Right of Abode cases in two separate but related

[2] Laws of Hong Kong, Cap. 115.

judgments, *Ng Ka Ling and Others v Director of Immigration*[3] (*Ng-CFA* case) and *Chan Kam Nga and Others v Director of Immigration* (*Chan-CFA* case).[4] In the *Ng-CFA* case, the court took the opportunity to forge some clear and robust guidelines for Constitutional jurisprudence in the course of reversing the previous decisions related to the Right of Abode in the Court of Appeal.

On the Right of Abode issues outlined above, the CFA was clear. Those provisions in the Immigration Ordinance (and related acts under that Ordinance) mandating that claimants of a Right of Abode under the Basic Law had to secure (*as a matter of Hong Kong law*) a one-way permit from the Mainland authorities to apply to establish their Right or Abode were invalid. This requirement clearly infringed the rights given under Article 24 and those Rights could *not*, properly, be read as being subject to the fourth paragraph of Article 22. The term in that paragraph "people from other parts of China" was read by the CFA as *not* including persons whether on the Mainland, in Hong Kong or elsewhere eligible to claim a Right of Abode under Article 24.[5] The CFA also struck down the provision in the Immigration Ordinance which said that children born out of wedlock claiming a Right of Abode through their father (where the father did not subsequently marry the mother) could not qualify for a certificate of entitlement.[6] In the *Chan-CFA* case, the Court struck down the provisions in the Immigration Ordinance which purported

[3] Final Appeals 14-16 of 1998 (Civil) (http://www.info.gov.hk.jud/guide2cs/html/cfa/judmt/facv_14 16 98).

[4] Final Appeal No.13 of 1998 (Civil) (http://www.info.gov.hk.jud/guide2cs/html/cfa/judmt/facv_13 98). The same judges presided in the Ng-CFA case and the *Chan-CFA* case: Chief Justice Li; Mr. Justice Litton PJ; Mr. Justice Ching PJ, Mr. Justice Bokhary PJ; and Sir Anthony Mason NPJ (PJ stands for Permanent Judge and NPJ for Non-Permanent Judge). Li C. J. delivered the unanimous judgment in the *Ng-CFA* case and Bokhary J. delivered the unanimous judgment in the *Chan-CFA* case.

[5] *Ng-CFA* case, op. cit. note 3, "The constitutionality of the No.3 Ordinance issue". One leading commentator Professor Albert Chen, has apparently claimed that the CFA failed to reconcile the operation of the Basic Law and the Immigration Ordinance (See, *Amending Basic Law a solution*, Sunday Morning Post, February 14, 1999, 4). This claim does not seem entirely correct, however. The CFA did explicitly deal with Article 22 and essentially read that Article as being subject to the operation of Article 24 of the Basic Law.

[6] Ibid., "The birth out of wedlock issue".

to deny a Right of Abode to an otherwise eligible child unless the parent enjoyed a Right of Abode at the time of birth.[7] The CFA also found that, to the extent that the provisions in the Immigration Ordinance were supposed to apply retrospectively, they also breached the Basic Law.[8] Finally, the court declared that the Provisional Legislative Council was a legally constituted legislature and consistent with the Basic Law.[9]

These findings have given rise to significant controversy. Two basic issues have formed the focus of debate. First, for many people, the big issue has been the immediate one: how to cope with the impact of what looks certain to be a significant increase in immigration from the Mainland to Hong Kong (the "practical issue"). The second principal issue relates to the conclusions of the CFA about the essential nature of the Basic Law. In particular, the court has commented on the role of the CFA in interpreting the Basic Law and the scope of the CFA to comment on the compatibility of certain acts of Mainland bodies with the Basic Law (the "division of powers issue"). As it happens, the comments of the CFA on its circumscribed capacity to review acts of certain Mainland bodies for Basic Law compatibility were *obiter*. That is, the practical issue could have been decided in exactly the same way without those comments as only the compatibility of Hong Kong laws and Hong Kong actions were being reviewed.

In coming to its conclusions, the CFA stressed a number of principles which were to apply to constitutional interpretation in the HKSAR. First, the court stated without qualification that the Basic Law is an entrenched constitutional instrument designed to meet changing needs and circumstances.[10] Next, the court stressed the need to adopt a purposive approach when interpreting a constitution such as the Basic Law. This was necessary, said the court, because a constitution has to confine itself to general principles with the result that gaps and ambiguities are bound to arise. It is the task of

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[7] *Chan-CFA* case, op. cit. note 4.

[8] *Ng-CFA* case, op. cit. note 3, "The retrospectivity issue".

[9] Ibid., "The Provisional Legislative Council issue".

[10] Ibid., "Approach to the Interpretation of the Basic Law".

the courts to establish, with care, the principles underlying and the purposes of the Basic Law and to give effect to those principles and purposes in filling the gaps and ambiguities which are highlighted by matters arising for adjudication. The CFA stressed that the HKSAR courts must avoid a literal, narrow or technical approach when interpreting the Basic Law and must give a generous interpretation to the provisions in Chapter III of the Basic Law which guarantee the rights of Hong Kong residents to ensure that full measure is given to these rights.[11]

The CFA also laid down clear guidelines on the question of referring certain constitutional matters for interpretation to the Standing Committee of the National People's Congress (SCNPC) under Article 158 of the Basic Law. The court said that it was for the CFA to decide when such a matter arose (in litigation) that is, When:

1 A matter: (a) concerned affairs, the responsibility of the Central Government; or (b) the relationship between the Central Authorities and the HKSAR; *and*
2 Where matters (a) and (b) would affect the judgment in a given case.[12]

The CFA said that for an issue to require referral, both conditions 1 and 2 above would have to be satisfied. Moreover, a matter within condition 1 would have to be predominant in the case at hand. That is, where a court was faced with a case which raised issues for adjudication which involved matters falling *within* condition 1 and *outside* of condition 1 (and, thus, not subject to Article 158) the question would be whether the condition 1 aspect was dominant. If it were not, then a reference to the SCNPC would not be mandated.[13] Notwithstanding these comments, it seems clear from the first paragraph of Article 158, that the SCNPC enjoys a unilateral right to interpret the Basic Law. That is, the SCNPC does not have to rely

[11] Ibid.
[12] Ibid.," The reference issue".
[13] Ibid.

on a referral from the CFA before issuing an interpretation.[14] The *Ng-CFA* judgment contains no counter-claim in this regard.

In should be noted that the HKSAR Government does not appear to have argued that Article 158 *itself* fell to be considered under these referral provisions of Article 158. If we apply the CFA test summarized above, the argument might be put as follows: (a) Article 158 clearly concerns the relationship between the Central Government and the HKSAR; (b) it is necessary to consider what is the test for referral under Article 158 in order to make a judgment on the Article 24, Right of Abode cases; so (c) should the test itself, for when a matter ought to be referred, be formulated by the SCNPC?

Most controversially, the court commented on its own wide constitutional jurisdiction. The CFA said it was competent for the HKSAR courts to determine whether an act of the National People's Congress (NPC) or of the SCNPC is inconsistent with the Basic Law. The court also said that the contrary view of the Court of Appeal expressed in mid-1997, was wrong.[15] There is some ambiguity in the reach of these comments on the division of powers issue. However, the explanation of this jurisdiction was not, as has been noted, required to decide the Right of Abode cases and thus is not strictly binding. Of course its significance in terms of Hong Kong's autonomy is potentially most important. This aspect of the decision drew the strongest criticism from Beijing.

Before leaving this issue, it is appropriate to reflect briefly on the uncertainties arising from the CFA's arguments on its own broad jurisdiction. It is unclear, for example, if the CFA is suggesting that the authority of the Hong Kong courts only applies to acts of the Mainland authorities effected in the HKSAR. From the plain wording of the judgment, this would seem not to be what the court is saying. Yet later remarks on the powers enjoyed by Mainland migration authorities make this view uncertain. By considering a hypothetical case, it is possible to get a clearer feeling for this

[14] See further on this point, Ghai, Yash, Hong Kong's New Constitutional Order (2nd ed) (Hong Kong University Press, Hong Kong, 1999) 220-221.

[15] *Ng-CFA* case, op. cit. note 3," Constitutional jurisdiction of the courts".

ambiguity. Suppose the NPC were to pass a law entitled the Mainland-HKSAR Immigration Law (MHIL). Next suppose the MHIL applied, in the Mainland, to claimants of a HKSAR Right of Abode resident in the Mainland, a scheme which basically replicated the scheme in the Immigration Ordinance including the requirement for a "one way permit" to be issued before a Right of Abode in the HKSAR could be established. Then, suppose a Mainland Applicant (MA) were to seek, through counsel in Hong Kong, a ruling from the CFA that the MHIL (which took effect only in the Mainland) contravened the Basic Law. Could the CFA give a declaration to the MA, to this effect (assuming the tests in Article 158 requiring referral to the SCNPC were not satisfied)? What if instead of simply passing the MHIL, the NPC were to insert some similar provisions in the Constitution of the People's Republic of China (1982) (PRC Constitution)? The Basic Law was enacted pursuant to the powers of the NPC conferred by the PRC Constitution. On one view it does not seem constitutionally possible that the Basic Law could override the PRC Constitution. On another view, it already does as there are already inconsistencies between the Basic Law and the PRC Constitution. The PRC constitution stipulates the economic system which is to apply in China, for example, yet the Basic Law essentially prohibits the application of that same economic system in the HKSAR.[16]

After being placed under unprecedented pressure, especially by the Hong Kong Government and some members of the Basic Law Drafting Committee, the CFA accepted a HKSAR Government motion, on February 26, 1999, to offer further comment on certain limited aspects of its earlier findings. The CFA agreed to do so under its inherent jurisdiction because of the "exceptional" circumstances prevailing. The court confirmed its earlier views that: the SCNPC enjoyed the right to issue binding interpretations of the Basic Law; and that acts of the NPC and the SCNPC which were in accord with the Basic Law could not be questioned by the CFA. It was wrong of the HKSAR Government to have asked the CFA to "revisit" its

[16] For futher discussion of the very difficult issue of the relationship between the PRC Constitution and the Basic Law, see Ghai, op. cit. note 14, Chapters 4 and 5.

recent findings in this way. It would have been proper for the court simply to have dismissed the motion. However, the decision to entertain the motion and then deal with it by restating the original position in alternative terms was not, in the circumstances, improper. The task of crafting the HKSAR-Mainland constitutional relationship is unparalleled. This is unlikely to be the last time that a decision will need to be made by the CFA without the aid of any complete precedent.

Although it is clear that the Right of Abode cases have created the prospect of a conspicuous increase in immigration to the HKSAR, it must be emphasized that the findings of the CFA make sense as a matter of interpretation. That is, the Basic Law provisions clearly allow the reading given them by the CFA. Moreover, the interpretation of the provisions has been plainly and carefully explained. The court has not had to "stretch" the provisions to come to its findings. The tighter wording of comparable provisions in the Macua Basic Law reinforces this view. Overall, the CFA decisions are to be applauded as a significant and positive step towards lending real substance to the one country, two systems framework.

It is important that the shorter term, major resource and logistical difficulties posed by the decisions do not "swamp" recognition of the key long term benefits for the HKSAR flowing from the findings of the CFA. In jurisdictions with fully democratic systems of governance, this level of judicial activism has given rise to serious questions about the legitimacy of judges aggregating power to the courts at the expense of the legislature. In the HKSAR, the political reality applying is quite different to that in, say, Canada or New Zealand, however, where these criticisms have been strongly made. As was noted above, two very different political and legal cultures cohabit within China today. For this reason – and in the absence of a democratically accountable government in the HKSAR – Hong Kong has to rely especially heavily, on its free press and independent judiciary to maintain the striking level of civil and political freedom which prevails.

Hong Kong will face further instances where the clear application or Rule of Law principles will give rise to significant practical

difficulties. And division of powers questions are bound to arise repeatedly. The HKSAR needs to develop conspicuous skills in resolving apparent political, practical and constitutional tensions. This will mean keeping a very steady eye on the long-term interests of Hong Kong. Recent calls from within Hong Kong for a speedy interpretation or amendment of the Basic Law to "fix" the practical and division of powers "problems" arising from the Right of Abode decisions suggest a noticeable lack of prudent, long-term thinking. It would be deeply unfortunate were the SCNPC to be propelled into a custom of using its Article 158 interpretative power reactively or expediently as a result of such urgings (now or in the future).

It is more clear than ever that the primary responsibility for crafting the HKSAR-Mainland relationship today lies with Hong Kong. It is impossible to over-state either the difficulty or the importance of developing a highly informed level of political-constitutional understanding within the HKSAR and especially within the HKSAR Government.