

Dr Mok Hing Yiu Memorial Lecture
St Hugh's College, Oxford
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Speech by The Honourable Mr Justice Tang PJ¹

**One Country, Two Systems:
Basic Law, Common Law and the Rule of Law**

1. Dame Elish, fellows and members of St Hugh's, Mr Edwin Mok, fellow guests, students, ladies and gentlemen. It is my happy privilege to give the Dr Mok Hing Yiu Memorial Lecture this year.

Introduction

2. The title of my talk is long. The rule of law lies at the heart of it. At the Commonwealth Law Conference 2017, my colleague, Mr Justice Fok, Permanent Judge of the Court of Final Appeal, in his talk titled “Demonstrating judicial independence in increasingly politicised times” said at para 4:

“Given Hong Kong’s unique position as a common law system operating within the sovereign territory of a country governed under the Communist Party of China’s ideology of socialism with Chinese characteristics, the

¹ Permanent Judge of the Hong Kong Court of Final Appeal. I thank Mr Jasper Wong, Judicial Assistant in the Court of Final Appeal (2017-18), for his help in preparing this speech.

preservation and protection of judicial independence in Hong Kong are matters of great importance and present interesting challenges.”

3. Judicial independence is essential to the rule of law. Judges are given security of tenure not for their own sake but so that they are better able to defend the rule of law. For rule of law to be meaningful, I believe

“the law must be accessible and so far as possible intelligible, clear and predictable, taking effect (generally) in the future and publicly administered in the courts; and that human rights are protected.”²

One complication in Hong Kong which I will highlight in this talk is the power of the Standing Committee of the National People’s Congress (“NPCSC”), operating under China’s very different system, to interpret the Basic Law, Hong Kong’s constitution.

One Country, Two Systems

4. I believe, China’s policy, captured in the well-known phrase “One Country, Two Systems”, is responsible for the success of the negotiation over Hong Kong’s future.

5. The policy predated the Sino-British negotiations and was designed

² Tom Bingham, *The Rule of Law* (Allen Lane, 2010) at p. 37 and p. 67.

with reunification with Taiwan in mind. As a Hong Kong Special Administrative Region publication explained, on 11 January 1982, Deng Xiaoping said that, by and large, the same policy may be applied also to Hong Kong and that under the policy “two different systems are allowed to coexist”.³ In December 1982, China adopted the 1982 Constitution which laid the foundation for One Country, Two Systems. Article 31 of the constitution provides:

“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.”

6. Many people in Hong Kong were sceptical at first. The success of the policy requires self-restraint on the part of the Chinese Government which could not be taken for granted. But, repeatedly, Deng Xiaoping sought to reassure Britain and the inhabitants of Hong Kong of China’s good faith. For example, in June 1984, after saying China’s policies with regard to Hong Kong would remain unchanged for 50 years and that China meant it he went on to say:

“When we adopt the policy of ‘One Country, Two Systems’ to resolve the

³ *The Basic Law and Hong Kong - The 15th Anniversary of Reunification with the Motherland* (the Working Group on Overseas Community under the Basic Law Promotion Steering Committee, 2012), Ch.1.1, p. 9. “On 11 January 1982, Deng Xiaoping first proposed the idea of solving the Taiwan question into a specific concept – ‘One Country, Two Systems’”, under which “[t]wo different systems are allowed to co-exist ... By and large, the relevant policies may be applied not just to Taiwan, but also to Hong Kong.”

Hong Kong question, we are not acting on impulse or playing tricks but are proceeding from reality and taking into full account the past and present circumstances of Hong Kong.”⁴

As Deng Xiaoping made clear the policy was in China’s national interest and would be faithfully implemented.

7. “One Country” is straightforward and requires no explanation. “Two Systems” is less straightforward though everyone knows one is the Chinese system, and the other, the Hong Kong system. The idea is that these two very different systems will coexist under one country. Naturally, there would have to be constitutional changes to Hong Kong’s political system but I am not concerned with them. I am concerned with Hong Kong’s separate legal system and the rights and freedoms enjoyed in Hong Kong. To survive, they would have to be insulated from the Chinese system.

8. Much of the Sino-British negotiations were spent to produce a full, clear and credible statement of Hong Kong’s system after 1997 and to protect it from the Mainland’s very different system.

⁴ Deng Xiaoping, *One Country, Two Systems*, 22-23 June 1984, *Selected Works of Deng Xiaoping* (1982-1992), Vol. 3 (Beijing, Foreign Languages Press, 1994), pp. 69-71. See also Deng Xiaoping’s conversation with Mrs Thatcher on 19 December 1984, p. 52-53.

9. The product was the Joint Declaration which became effective on 19 December 1984.⁵ In the Joint Declaration, the Chinese Government declared its basic policies towards Hong Kong and jointly with Britain agreed to implement their respective declarations.⁶ China's policies towards Hong Kong were elaborated in Annex I which stated the Chinese Government would on 1 July 1997 establish a Special Administrative Region in Hong Kong and that "the National People's Congress would enact and promulgate a Basic Law in accordance with Article 31 of the Chinese Constitution, stipulating that after the establishment of the Hong Kong Special Administrative Region the socialist system and socialist policies shall not be practised in the Hong Kong Special Administrative Region and that Hong Kong's previous capitalist system and lifestyle shall remain unchanged for 50 years."⁷ The theme is continuity.⁸ Subject to necessary constitutional changes everything will be the same as before. So, "the laws previously in force in Hong Kong (i.e. the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, save for any that contravene the Basic Law and subject to any

⁵ Its contents were made known in September 1984 after they were initialled by representatives of the two countries.

⁶ Para 7 of the *Joint Declaration* says "the Government of the United Kingdom and the Government of the People's Republic of China agree to implement the preceding declarations and the Annexes to this Joint Declaration".

⁷ *Joint Declaration* Annex I part I "Establishment of the Hong Kong S.A.R. The Basic Law".

⁸ See *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117 (FACV 24/2007, 13 March 2008) *per* Li CJ.

amendment by the Hong Kong Special Administrative Region legislature.”⁹ Also, the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom “of the person, of speech, of the press, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, of strike, of demonstration, of choice of occupation, of academic research, of belief, inviolability of the home, the freedom to marry and the right to raise a family freely” shall be maintained¹⁰ by the Special Administrative Region Government and enforced by the courts who “shall exercise judicial power independently and free from any interference.”¹¹ The power of final judgement of the Hong Kong Special Administrative Region will be vested in the Court of Final Appeal in the Hong Kong Special Administrative Region, “which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal”.¹²

10. Annex I was silent on the interpretation of the Basic Law. The natural assumption was that the Hong Kong courts would interpret the Basic Law using the common law approach.

⁹ *Joint Declaration* Annex I part II “Laws previously in force”. In this talk, I use “common law” as shorthand for “laws previously in force”.

¹⁰ *Ibid.* Annex I part XIII “General”.

¹¹ *Ibid.* Annex I part III “Judicial Power; Precedents”.

¹² *Ibid.* Annex I part III “Power of final judgment”.

11. The Basic Law was promulgated on 4 April 1990.¹³ It has an official English text.¹⁴ It is a self-contained document and contains a comprehensive statement of the Hong Kong system under the policy of One Country, Two Systems.

12. As expected the Basic Law followed Annex I of the Joint Declaration faithfully with further elaboration. In short, fundamental rights and freedoms would continue to be protected and enforced by an independent judiciary under the rule of law. Mr Rimsky Yuen SC, Secretary of Justice at the time, said in this Lecture last year,¹⁵ that the Basic Law guarantees the maintenance of the Hong Kong Special Administrative Region's common law system, the rule of law and independence of the judiciary.

13. Although Annex I was silent on the interpretation of the Basic Law, there are express provisions on the subject in the Basic Law. Twenty years on,

¹³ In June 1985, a few months after the *Joint Declaration* was ratified by China and Britain, the Hong Kong Special Administrative Region Basic Law Drafting Committee was established. There were 59 members, 23 of whom from Hong Kong chosen from different walks of life. The 36 Mainland members were mostly government officials. The drafting committee in turn created the Basic Law Consultative Committee with 180 members drawn from different sectors of the community in Hong Kong.

¹⁴ *Decision of the Standing Committee of the National People's Congress on the English Text of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (Adopted on 28 June 1990), where it is stated that the official English text is "equally authentic as the Chinese text" but "in case of any discrepancy in the meaning of wording between the English text and the Chinese text, the Chinese text shall prevail." Instrument 14 to the Basic Law.

¹⁵ *The Development of Common Law in Hong Kong: Past, Present and Future*, given in this college on 25 May 2017.

it seems obvious that the power can potentially undermine the rule of law in Hong Kong. Article 158 provides (the paragraph numbers are added for easy reference):

- “(1) The power of the interpretation of this [Basic] Law shall be vested in the Standing Committee.¹⁶
- (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 judgements on the cases, the courts of the Region shall, before making their final judgements which are not appealable, seek an 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, judgements previously rendered shall not be affected.”

¹⁶ Article 57 of *the 1982 Chinese Constitution*, “The National People’s Congress of the People’s Republic of China is the highest organ of state power. Its permanent body is the Standing Committee of the National People’s Congress.”

14. Article 158(1) is the most important and I will deal with it last.

15. Article 158(2) confers on the Hong Kong courts the general power in adjudicating cases to interpret provisions, which are within the limits of the autonomy of Hong Kong. Under Article 12 of the Basic Law Hong Kong enjoys a high degree of autonomy but defense and foreign affairs fall outside the high degree of autonomy.¹⁷ The limitation to the Hong Kong courts' power to interpret the Basic Law under Article 158(2) is understandable and generally accepted. The Basic Law is silent on whether interpretation by the Hong Kong courts under Article 158(2) is final. Given Hong Kong's high degree of autonomy and the power of final adjudication in Hong Kong, one would expect it to be so.

16. How is the Basic Law interpreted in Hong Kong? The Basic Law requires it to be interpreted using the common law approach.¹⁸ This is important because as will be explained the approach under the Mainland system is very different. In *The Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, Chief Justice Li delivering the judgement of the Court of Final

¹⁷ Articles 13 and 14.

¹⁸ This is not controversial. For example, Article 84 provides: "The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdiction." The laws prescribed are, using shorthand, the common law. See also Article 8.

Appeal said at:

“The courts’ role under the common law in interpreting the Basic Law is to construe the language used in the text of the instrument in order to ascertain *the legislative intent as expressed in the language*. Their task is not to ascertain the intent of the lawmaker on its own. Their duty is to ascertain *what was meant by the language used* and to give effect to *the legislative intent as expressed in the language*. It is the text of the enactment which is the law and it is regarded as important both that the law should be certain and that it should be ascertainable by the citizen.”¹⁹
(Italics in the original)

17. He went on to say the law would not be certain, nor could it be ascertained by the citizens if their meaning cannot be gathered from the language used. That is why under the common law, the court is required:

“to identify the meaning borne by the language when considered in the light of its context and purpose. This is an objective exercise. Whilst the courts must avoid a literal, technical, narrow or rigid approach, they cannot give the language a meaning which the language cannot bear.”²⁰

18. The Hong Kong courts’ approach towards the interpretation of fundamental rights and freedoms guaranteed by the Basic Law is also important. The Court of Final Appeal has time and again said “[t]he courts should give a

¹⁹ *Chong Fung Yuen*, at p. 223.

²⁰ *Ibid.* At p. 224.

generous interpretation to the provisions in Chapter III²¹ that contain these constitutional guarantees in order to give to Hong Kong residents the full measure of fundamental rights and freedoms so constitutionally guaranteed.”²² More recently, Chief Justice Ma repeated the well-established point that under the common law, cases will be decided not only according to the letter of the law but also its spirit. And that the cases show clearly that guaranteed rights and fundamental freedoms are to be construed liberally and generously.²³

19. The courts’ common law approach towards rights and freedoms is important because the Chinese Constitution also provides for freedoms using language similar to those used in the Basic Law. For example, Article 35 of the 1982 Chinese Constitution provides “Citizens of the People’s Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.” These rights interpreted under the Mainland system are different from the same rights interpreted under the common law.

20. I turn to the Standing Committee’s power of interpretation. That

²¹ On “Fundamental Rights and Duties of the Residents”, with 19 Articles. Its length shows the feeling that nothing should be left unsaid.

²² *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 at p. 29A, cited in *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 at para 58 and *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237 at para 17.

²³ *Twenty years of the Court of Final Appeal*, talk given on occasion of Distinguished Speakers’ Luncheon on 26 August 2017 to the Young Solicitors’ Group of the Law Society of Hong Kong.

the Standing Committee, which promulgates and enacts the Basic Law, should have the power to interpret is alien to Hong Kong's previous system. The Standing Committee's power of interpretation is important because as Chief Justice Li said in *Chong Fung Yuen*:

“In interpreting the Basic Law, the Standing Committee functions under a system which is different from the system in Hong Kong. As has been pointed out, under the Mainland system, legislative interpretation by the Standing Committee can clarify or supplement laws.”²⁴

21. Professor Albert HY Chen of the Law Faculty at the University of Hong Kong has said interpretation by the Standing Committee is “a legislative rather than judicial act.”²⁵ A Mainland legal scholar, Wang Zhenmin, who is now the head of the Legal Department of the Central Government's Liaison Office in Hong Kong, said, when he was a scholar, that “the Standing Committee interprets law in its capacity as a legislative body.”²⁶ It seems clear the Standing Committee can give the language a meaning which it cannot bear.

22. The Standing Committee's power under Article 158(3) is relatively straightforward and I will deal with it first. Basically it enables the Hong Kong

²⁴ *Chong Fung Yuen*, at p. 222.

²⁵ See *Another case of conflict between the Court of Final Appeal and the NPC Standing Committee?* (2001) 31 HKLJ at pp. 179, 185.

²⁶ Zhenmin Wang, *Relationship Between the Central Authorities and the Special Administrative Region: An Analysis of Legal Structure* (Beijing: Tsinghua University Press, 2002) p. 277.

courts, in adjudicating cases, to seek interpretations from the NPCSC when it needs to interpret provisions in the Basic Law concerning affairs which “are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region”. Many would regard the power of the Standing Committee to interpret such provisions (outside the limits of Hong Kong’s high degree of autonomy) understandable and acceptable.

23. Moreover, Article 158(4) provides some comfort. It provides:

“The Standing Committee of the National People’s Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this law.”

24. The Basic Law Committee has a membership of twelve, six from Hong Kong who are nominated jointly by the Chief Executive, President of the Legislative Council and the Chief Justice of the Court of Final Appeal of the Region for appointment by the Standing Committee of the National People’s Congress.²⁷ Presumably, they could assist by making known Hong Kong’s views on any intended interpretation.

²⁷ *Decision of the National People’s Congress Approving the Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People’s Congress* (adopted at the Third Session of the Seventh National People’s Congress on 4 April 1990). Basic Law, Appendix to Instrument 13, item 4.

25. Given that such interpretation involves provisions outside Hong Kong's autonomy and the nature of the Standing Committee, one could not expect the Standing Committee to use the common law approach. That is not to say that it would ignore how those provisions are understood in Hong Kong. The creation of the Basic Law Committee under Article 158(4) suggests that Hong Kong's understanding and views on those provisions are relevant. So far, there has only been one explicit interpretation under Article 158(3), in the well-known *Congo*²⁸ case which, as the majority in the Court of Final Appeal²⁹ pointed out, involved provisions concerning state immunity which is an area involving powers which have always been reserved to the Central People's Government, falling outside the limits of the Region's autonomy.³⁰ With respect, I have no doubt about the correctness of the majority's decision.

26. The Standing Committee issued an interpretation based on China's notion of state immunity.³¹ This is understandable and acceptable since China is a unitary state. Under Article 158(3) the interpretation has retrospective

²⁸ *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95.

²⁹ Chan PJ, Ribeiro PJ and Sir Anthony Mason NPJ.

³⁰ *Ibid.*, at p. 165.

³¹ *Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress* (Adopted at the Twenty Second Session of the Standing Committee of the Eleventh National People's Congress on 26 August 2011), Instrument 22 to the Basic Law.

effect. But since it was made prior to final judgment in Hong Kong and concerns provisions outside Hong Kong's autonomy and in the special situation of One Country, Two Systems, most people would agree that this would not damage the rule of law in Hong Kong.

27. Article 158(1) provides "The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress." Since the Standing Committee has power to interpret any Chinese law under Article 67(4) of the Chinese Constitution, it is not surprising that the Basic Law should contain a similar provision. Since the success of the policy of One Country, Two Systems depends on self-restraint on the part of the Chinese Government, it is not unreasonable to expect self-restraint in the exercise of such power. However, the power is general. In my opinion, this general power which is legislative in nature is not necessarily incompatible with the rule of law. It can be compared with the theoretical supreme power which the British Parliament used to enjoy. So, although the general power of interpretation under Article 158(1) could theoretically be used to change the Basic Law beyond recognition, for as long as it remains theoretical, it is not a real threat to the rule of law. Indeed, the Standing Committee has power under Article 159 and the Chinese Constitution to amend the Basic Law and could amend it

beyond recognition. Such theoretical power is not incompatible with the rule of law.

28. However, the Standing Committee has interpreted the Basic Law on four occasions under Article 158(1)³² and one should consider their impact, if any, on the rule of law. I say at once that the interpretations before 2016 are less concerning.

29. I adopt as a working definition of the rule of law for Hong Kong what Lord Bingham of Cornhill described as the core of the existing principle of the rule of law, namely, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.³³

30. “Publicly made” carries with it the ingredient that “the law must be accessible and so far as possible intelligible, clear and predictable.”³⁴ However, legislative interpretation by the Standing Committee, even one which overrules

³² Only one interpretation, namely the *Congo* case (see para 25 above), is made under Article 158(3), bringing it to a total of five.

³³ *The Rule of Law* (see footnote 1 above), at p. 8.

³⁴ *Ibid* at p. 37.

a binding decision of the Court of Final Appeal, is not necessarily incompatible with the rule of law if such interpretation is not given retrospective effect. As Wang Zhenmin, when he was a scholar, pointed out such interpretation is not “dissimilar to the overriding of precedence by legislation under common law systems.”³⁵

31. Moreover, as Lord Bingham was quick to add:

“even the most ardent constitutionalist would not suggest that [this definition] could be universally applied without exception or qualification. ... But generally speaking any departure from the rule I have stated calls for close consideration and clear justification.”³⁶

32. The first interpretation took place in June 1999 and requires a longer explanation. It was very controversial at the time and gave rise to serious misgivings. Time and experience have moderated views, including my own. It was made upon the request of the Chief Executive of Hong Kong for a legislative interpretation of “Articles 22(4) and 24(2)(3) of the Basic Law according to the true legislative intent” following the Court of Final Appeal’s decision in *Ng Ka Ling* of 29 January 1999. Under Article 24 there are six categories of permanent residents of Hong Kong. *Ng Ka Ling* was concerned

³⁵ Zhenmin Wang, *From the Judicial Committee of the British Privy Council to the Standing Committee of the Chinese National People’s Congress – An Evaluation of the Legal Interpretative Systems after the Handover* (2007) 35 HKLJ 605 at p. 611.

³⁶ *The Rule of Law* at p. 8.

with category (3) namely, Chinese nationals born on the Mainland of a parent who was a Hong Kong permanent resident. The Government asked the court to refer the interpretation of Article 24(2)(3) to the Standing Committee under Article 158(3) for interpretation because they said category (3) concerned Chinese residents in China who under Article 22(4) must apply for approval from the Chinese Authorities for entry into Hong Kong.

33. The Court of Final Appeal held that the language of Article 24(2)(3) shows that such persons are permanent residents of Hong Kong and declared as invalid as contrary to the Basic Law, legislation which provided that their status as permanent residents depended upon approval by the Chinese Authorities. The court was of the view that Article 24(2)(3) was freestanding and should be interpreted without reference to Article 22(4), and refused to refer under Article 158(3). The Chief Executive of Hong Kong Special Administrative Region, who believed on the basis of the decision hundreds of thousands, if not more, persons then residing in the Mainland might at once settle in Hong Kong, requested an interpretation.

34. The Standing Committee issued an interpretation dated 26 June 1999 (the “June 1999 Interpretation”). It was headed: “The Interpretation by

the (NPCSC) of Articles 22(4) and 24(2)(3) of the Basic Law” and stated those provisions concerned affairs which are the responsibility of the Central People’s Government and concerned the relationship between the Central Authorities and the Hong Kong Special Administrative Region. Although the Standing Committee did not say so, it was obviously its view that the Court of Final Appeal should have referred under Article 158(3). As there was no reference the interpretation was made under Article 158(1).³⁷ Under the June 1999 Interpretation, the rights of persons covered by Article 24(2)(3) would depend on their obtaining approval under Article 22(4). Although the Standing Committee disapproved the common law interpretation adopted by the Court of Final Appeal, it expressly preserved the benefit of the court’s decision in respect of persons who were covered by that decision.³⁸ So the decision was final as between the parties. Subject to that, the June 1999 Interpretation went on to provide for retrospective effect as if it had been made under Article 158(3).³⁹

35. Given the Standing Committee’s view that there should have been a reference under Article 158(3), which is, with respect, a highly tenable view, and cannot be disputed in Hong Kong, the June 1999 Interpretation falls in a

³⁷ Preamble to the June 1999 Interpretation; *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, at pp. 319 - 320.

³⁸ They were called persons who should not be affected by the interpretation (the unaffected persons) in *Lau Kong Yung* at p. 326.

³⁹ Final paragraph of the June 1999 Interpretation.

class of its own. The situation though special does not in my view require any modification of Lord Bingham's test.

36. The next obvious question is: how should the Hong Kong courts interpret the Standing Committee's interpretations of the Basic Law? This arose in an acute form in *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211. It will be remembered that the June 1999 Interpretation was concerned with Article 24(2) under which six categories of persons are regarded as permanent residents. The June 1999 Interpretation arose out of *Ng Ka Ling* which, when summarized for our purpose, was concerned with category (3) only, namely, Chinese nationals born outside Hong Kong of Hong Kong permanent residents. *Chong Fung Yuen* was concerned with category (1), namely "Chinese citizens born in Hong Kong before or after the establishment of the (HKSAR)." In the June 1999 interpretation the Standing Committee said that the legislative intent of all categories of permanent residents under Article 24(2) was reflected in the opinions on the implementation of Article 24(2) of the Basic Law which had been adopted at the Fourth Plenary Meeting of the Preparatory Committee for the Hong Kong Special Administrative Region on 10 August 1996 ("**the 1996 Opinion**").⁴⁰ According to that Opinion Article

⁴⁰ Penultimate paragraph of the June 1999 Interpretation.

24(2)(1) applies to a person only if at least one of the parents of that person has settled or has the right of abode in Hong Kong at the time of the claimant's birth or any later time. In other words, a Chinese citizen would not acquire permanent residence in Hong Kong merely by being born in Hong Kong.

37. Relying on provisions in the Immigration Ordinance to similar effect, the Director of Immigration rejected the claim to permanent residence by Chong Fung Yuen and others of similar immigration status. It was rightly conceded on behalf of The Director that Article 24(2)(1) was not the subject of the June 1999 Interpretation, but it was argued that it was clear from the June 1999 Interpretation that the Standing Committee agreed with the Opinion, and that the Court of Final Appeal should have regard to such clear view. Chief Justice Li giving the unanimous decision of the CFA said:⁴¹

“On the common law approach, which the Court is under a duty to apply in the absence of a binding interpretation by the Standing Committee, the statement in question⁴² cannot affect the clear meaning of Article 24(2)(1) properly reached, applying the common law approach.”

38. This is a strict and principled approach. One might say it was a bold decision because the court ran the risk of being slapped down with a

⁴¹ *Chong Fung Yuen*, at p. 233F.

⁴² Namely the statement in the June 1999 Interpretation that the legislative intent of all other categories of Article 24(2) have been reflected in the preparatory committee's opinion on the implementation of Article 24(2).

contrary interpretation. But that did not happen. Presumably because the Standing Committee recognized that the meaning of Article 24(2)(1) was within the limit of Hong Kong's autonomy and the Court of Final Appeal's determination should be final.

39. The other three interpretations were made in the absence of any prompting from Hong Kong.

40. Two were entirely political. The earlier was made on 6 April 2004 and concerned the selection of the Chief Executive and the Election of the Legislative Council subsequent to the year 2007. The later took place on 27 April 2005 regarding the selection of a new Chief Executive when the office becomes vacant, under Article 53(2). Both concern future events and are comparable to legislative acts which relate to the future and are not incompatible with the rule of law.

41. The most recent interpretation took place on 7 November 2016 (**“the 2016 Interpretation”**).⁴³ It concerns Basic Law Article 104 which

⁴³ *Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress* (Adopted by the Standing Committee of the Twelfth National People's Congress at its Twenty-fourth Session on 7 November 2016) Instrument 25 to the Basic Law.

provides:

“When assuming office, the Chief Executive principal officials, members of the Executive Council and of the Legislative Council, judges of the courts at all levels and other members of the judiciary in the Hong Kong Special Administrative Region must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China.”

42. The 2016 Interpretation, unless properly handled, can blur the boundary between the two systems. For the present purpose, I will mention two paragraphs only. Para 1 provides that the oaths stipulated in Article 104 “are not only the legal content which must be included in the oath prescribed by the Article, but also the legal requirements and preconditions for standing for election in respect of or taking up the public office specified in the Article.” Para 3 provides that “The taking of the oath ... is a legal pledge made by the public officers specified in the Article to the People’s Republic of China and its Hong Kong Special Administrative Region, and is legally binding. The oath taker must sincerely believe in and strictly abide by the relevant oath prescribed by law. An oath taker who makes a false oath, or, who, after taking the oath, engages in conduct in breach of the oath, shall bear legal responsibility in accordance with law.”

43. I express no personal view regarding the 2016 Interpretation. So far, its effect has been felt by persons elected to the Legislative Council who have been deprived of their seats as well as persons who were not allowed to stand for election because of the “preconditions for standing for election”. Already there is litigation. I believe the Hong Kong courts will resolve them in a principled way using the common law approach.

44. Using the common law approach, one should ask first whether this or any interpretation by the Standing Committee should be given retrospective effect? An interpretation under Article 158(3) has retrospective effect because it expressly so provides. Article 158(1) is silent. At common law, an interpretation by the courts in Hong Kong would have retrospective effect because of the common law declaratory theory of judicial decision. Stating the obvious, the Standing Committee is not a court and the interpretation is legislative and not judicial.

45. However, in *Lau Kong Yung*, which was decided in the immediate aftermath of the June 1999 Interpretation, the Court of Final Appeal said that the June 1999 Interpretation, “... being an interpretation of the relevant provisions, dates from 1 July 1997 when the Basic Law came into effect. It

declared what the law has always been. Compare the common law declaratory theory of judicial decisions, see *Kleinwort Benson Ltd v Lincoln City Council* [1998] 3 WLR 1095 at pages 1117 - 1119 and 1148.”⁴⁴

46. This statement was unnecessary to the decision because the June 1999 Interpretation provided expressly for retrospective effect and was binding on the Court of Final Appeal. I do not believe *Lau Kong Yung* is a binding authority on the point. However, it has been followed in Hong Kong,⁴⁵ most recently by a decision of a strong Appeal Committee of the Court of Final Appeal refusing leave where the point was basically academic.

47. But whether or not *Lau Kong Yung* is binding, the Court of Final Appeal may if it wishes to do so reconsider the point in a full court of five judges after full argument.⁴⁶ The 2016 Interpretation may provide a good opportunity for it to do so.

48. Academic writers have provided reasons why such interpretations

⁴⁴ *Lau Kong Yung* at p. 326.

⁴⁵ See, for example, the decision of the Appeal Committee dated 1 September 2017, *Chief Executive of the Hong Kong Special Administrative Region & Others v Sixtus Leung Chung Hang & Others* FAMV Nos 7, 8, 9 and 10 of 2017 and case cited therein at para 35.

⁴⁶ *Solicitor (24/07)* at para 20.

should not have retrospective effect.⁴⁷ Some said that if the Court of Final Appeal should reconsider the retrospectivity issue given that an interpretation by the Standing Committee is legislative in nature, the Court of Final Appeal might wish to adopt the common law approach and have regard to the presumption against retrospectivity of legislation such that unless a contrary intention appears, a legislative provision is presumed not to operate retrospectively. The learned authors also noted that the 2016 Interpretation is in fact silent on whether it should have retrospective effect and made the point that if the NPCSC had intended to make the interpretation retrospective, it could have easily expressed its intention in the text⁴⁸ as it had done in the June 1999 Interpretation.

49. Some might say regardless of any decision in Hong Kong, the Standing Committee could expressly make any interpretation retrospective, and there is no point. *Lau Kong Yung* shows that it is not pointless. Pre-emptive action is not warranted.

50. Nor should one presume that the Standing Committee would give every interpretation retrospective effect. Firstly, they have not done so.

⁴⁷ Dr Po Jen Yap, an Associate Professor at the Faculty of Law, the University of Hong Kong together with Eric Chan, a Juris Doctor candidate.

⁴⁸ *Legislative Oaths and Judicial Intervention in Hong Kong* 47 HKLJ 1 at pp. 13-14.

Secondly, the Basic Law guarantees that the rights and freedoms protected by the laws previously in force would be maintained and these rights and freedoms include the rule of law with the presumption against retrospective legislation. One should not presume that the Standing Committee would be unmindful of these guarantees. One Country, Two Systems remains the Chinese policy towards Taiwan. As Deng Xiaoping had acknowledged the alternative would be force.⁴⁹ A calamity too awful to contemplate.

51. The Hong Kong courts should consider first whether all interpretations should be given retrospective effect. If not, that would remove one important concern.

52. However, retrospective effect is not the only way in which the rule of law can be undermined. As Lord Bingham said the rule of law should embrace the protection of human rights within its scope.⁵⁰ Fundamental rights and freedoms are guaranteed by the Basic Law.

53. Given the many assurances about the policy of One Country, Two Systems both before and after 1997 as well as assurances that Hong Kong's

⁴⁹ Third Plenary Session of the Central Advisory Commission of the Communist Party of China, 22 October 1984.

⁵⁰ *The Rule of Law* at p. 67.

previous lifestyle would continue after the handover, the Hong Kong courts should interpret any interpretation of the Standing Committee without undermining any of these fundamental rights and freedoms. Of which, freedom of conscience⁵¹ so long taken for granted that a reminder that it carries with it the freedom to embrace or not to embrace any religious or political creed will not go amiss.

54. The success of One Country, Two Systems depends on everyone playing his part. The Judges' part is to decide cases properly, in a principled way, without fear or favour. I think for as long as Hong Kong judges do so fairly, impartially, and explaining carefully why they decide the way they did, any dissatisfaction will be temporary and both the Central Government and Hong Kong will appreciate this clear demonstration of the rule of law. Happily, I have no doubt that judges have the whole-hearted support of the Hong Kong Special Administrative Region Government and the community and that they realise that unswerving adherence to principle is the hallmark of the rule of law.

55. I wish to conclude by repeating former Chief Justice Li's observation that Hong Kong should maintain a high level of vigilance against

⁵¹ Article 32 of the Basic Law.

any threats to the city's core values of judicial independence and the rule of law.⁵²

56. I thank you for your patience and apologise for taking up so much of your time. The importance of Dr Mok Hing Yiu Memorial Lecture is my only excuse.

⁵² *Hong Kong's judicial independence is here to stay - as long as "one country" and "two systems" are both fully recognised*, the South China Morning Post, 24 September 2015 accessed 21 December 2017.