THE INTERPRETATION OF THE BASIC LAW — COMMON LAW AND MAINLAND CHINESE PERSPECTIVES

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The Basic Law of the Hong Kong Special Administrative Region is a unique legal product of the concept and practice of 'one country, two systems'. It represents an organic link between the socialist legal system in mainland China and the common law system in Hong Kong. The principles governing the interpretation of the Basic Law are primarily those developed by the common law tradition. However, in interpreting the Basic Law, it may also be necessary to take into account the peculiar features of the systems of constitutional and legislative interpretation in mainland China. This article examines the experience of constitutional interpretation in the common law world, particularly the United States with its relatively long tradition of the interpretation of a written constitution. It also introduces the characteristics of constitutional and legislative interpretation in the legal system of contemporary China. The article then reviews Hong Kong's experience in constitutional interpretation, both in the colonial era and under the new constitutional regime governed by the Basic Law. It suggests that there is much that Hong Kong can learn from comparative studies. In the author's view, Hong Kong's journey in constitutional interpretation has only just begun.

INTRODUCTION

In *Lau Kong-yung and 16 others v The Director of Immigration*,[1] the case in which the Hong Kong Court of Final Appeal (CFA) considered the effect of the interpretation of the Basic Law issued by the National People's Congress Standing Committee (NPCSC) in June 1999, Sir Anthony Mason, Non-Permanent Judge of the Court, said:

> The Standing Committee's power to interpret laws is necessarily exercised from time to time otherwise than in the adjudication of cases. So the expression 'in adjudicating cases' [in article 158 of the Basic Law] makes it clear that the power of interpretation enjoyed by the courts of the Region is limited in that way and differs from the general and free-standing power of interpretation enjoyed by the Standing Committee under Article 67(4) of the PRC Constitution and Article 158(1) of the Basic Law. This conclusion may seem strange to a common lawyer but, in my view, it follows

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1 [1999] 2 HKLRD 58 (CFI), [1999] 2 HKLRD 516 (CA), [1999] 3 HKLRD 778 (CFA).

> inevitably from a consideration of the text and structure of Article 158, viewed in the light of the context of the Basic Law as *the constitution for the HKSAR embodied in a national law enacted by the PRC.*[2] (emphasis supplied)

The paradox of 'one country, two systems' is that special administrative regions — Hong Kong and Macau — within China are allowed to practise market capitalism[3] by a Chinese government that is committed to Marxism-Leninism.[4] And the paradox of the Basic Law lies in its dual nature. It is at once a national law and the constitutional instrument of the Hong Kong Special Administrative Region (HKSAR). It was enacted by the National People's Congress in accordance with Chinese constitutional principles and legislative procedures, and yet it serves as the foundation of the common law in the post-1997 legal system of Hong Kong and is enforced by the courts of Hong Kong's common law based legal system.

How, then, should the Basic Law be interpreted? What are the appropriate approaches to or methods for its interpretation? Do common law approaches suffice? To what extent should cognizance be taken of mainland Chinese constitutional and legal norms? These are the challenging questions posed by the Basic Law. It is not the purpose of this article to answer these questions directly. The purpose is more modest, and is to pave the way for working out the answers by studying the experience of constitutional interpretation in other common law jurisdictions, particularly the USA, and the institutional framework for legislative interpretation in mainland China.

CONSTITUTIONAL INTERPRETATION IN COMMON LAW JURISDICTIONS

Although England is the home of the common law, it is in the USA that the jurisprudence of constitutional interpretation originated and reached the highest level of development within the common law family of legal systems. Unlike Britain, the USA was founded upon a written constitution. The American experience demonstrates that constitutional interpretation is inseparable from judicial review of the constitutionality of governmental actions, particularly legislative enactments. Such judicial review was first established by the American Supreme Court in *Marbury v Madison* (1803).[5]

2 [1999] 3 HKLRD 820-821.

3 See article 5 of the Basic Law of the Hong Kong Special Administrative Region (enacted in 1990, coming into force on 1 July 1997); article 5 of the Basic Law of the Macau Special Administrative Region (enacted in 1993, coming into force on 20 December 1999).

4 The commitment to Marxism-Leninism, as well as to 'Mao Zedong Thought', was stated in the preamble to the current Constitution of the People's Republic of China (enacted in 1982). The constitutional amendment of 1999 added 'Deng Xiaoping Thought' as an integral part of this ideological commitment.

5 5 US (1 Cranch) 137 (1803).

The justification for judicial review provided in that case is as forceful now as it was two centuries ago: The Constitution is a superior law, a higher law, relative to ordinary laws enacted by the legislature. But like ordinary laws, the Constitution is also law (as provided for in Article VI of the Constitution), and the judiciary has to apply the law in deciding cases. Where it finds that there is a conflict between an applicable provision in an ordinary law and one in the Constitution, the latter must prevail. In the words of Chief Justice Marshall:

> The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is consequently, to be considered, by this court, as one of the fundamental principles of our society. ... It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[6]

The American practice of constitutional judicial review has generated three questions that are inextricably linked to one another:

(a) Is it legitimate for courts to strike down laws that have been enacted by democratically elected legislatures (including the Congress and state legislatures)?
(b) How should courts interpret the Constitution?
(c) How activist should courts be, or to what extent should they practise self-restraint, in reviewing legislative acts?

[6] At 177-178.

The legitimacy of judicial review

The tension between judicial review and democracy is encapsulated in a term commonly used in American constitutional discussion, 'the counter-majoritarian difficulty'. The theoretical problem is described by Alexander Bickel as follows:

> [W]hen the Supreme Court declares unconstitutional a legislative act ... it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it. ... [I]t is the reason the charge can be made that judicial review is undemocratic. ... judicial review is a deviant institution in the American democracy.[7]

The question of the legitimacy of constitutional judicial review of legislation is ultimately a question of political theory rather than a question of law. The answer depends on the development of a coherent political theory that deals with the nature and status of the constitution, the fundamental concepts of democracy and constitutionalism and the relationship between them, and the functions served by judicial review.

One widely held view, which is basically the view expressed by Chief Justice Marshall in *Marbury* itself, traces the legitimacy of judicial review back to the intention and strategy of the framers of the constitution. A contemporary exponent of this approach is Michael Perry. In his latest book, *The Constitution in the Courts* (1994),[8] Perry argues that the framers of the American constitution and the democratic political community that adopted the constitution deliberately chose to use the strategy of establishing certain rights and liberties by means of constitutional law rather than statutory law. This was because they were skeptical about the capacity of the ordinary, majoritarian politics of the community to respect rights, particularly during political stressful times. The constitutional strategy they adopted presupposes a distrust, a lack of faith, in the future ordinary politics of the community. And judicial review is the institutional mechanism for protecting the rights enshrined in the constitution against erosion by such ordinary politics. Perry then asks: why should we, the living members of this community, support the constitutional strategy adopted by the framers and ratifiers of the constitution? His answer is that the American experience of judicial review has proved to work well as a means of protecting constitutional rights.[9]

Another defence of judicial review along similar lines has been offered by Bruce Ackerman in his famous work, *We the People* (1991).[10] He argues that the

7 Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962), pp 16-18.
8 New York: Oxford University Press, 1994.
9 Ibid at 20.
10 Bruce Ackerman, *We the People, Volume 1: Foundations* (Cambridge, Mass: Balknap Press, 1991).

'counter-majoritarian difficulty' arises only because theorists adopt a 'monistic' understanding of democracy according to which democracy means government by elected politicians. He advances instead a 'dualist' constitutionalism:

> A dualist Constitution seeks to distinguish between two different decisions that may be made in a democracy. The first is a decision by the American people; the second, by their government.[11]

The first decision refers to the making of the constitution or constitutional amendment, when the people are specially mobilized to participate in the deliberations. The conditions of constitutional politics give enhanced legitimacy to constitutional law as the supreme law. The constitution represents the will of We the People, whereas legislation — the second kind of decisions mentioned above — represents no more than the acts of We the Politicians. Such ordinary legislation cannot overturn the considered judgment previously reached by We the People. Those who question the judgment must 'move onto the higher lawmaking track' and seek a constitutional amendment. In the meantime, the courts are the appropriate institution to perform the 'preservationist function' with respect to the constitution. In Ackerman's view, this is an essential element of a 'well-ordered democratic regime'.

On the other hand, Laurence Tribe, another leading scholar of American constitutional law, questions whether the legitimacy of judicial review needs to be based on the will or consent of the people, whether at the time of adoption of the constitution or at the present moment. He argues that the *function* that judicial review serves in the American system of constitutional democracy is an extremely positive and valuable one, and this alone justifies the practice of judicial review.

In Tribe's view, the virtue of judicial review is that it enables constitutional challenges to governmental (including legislative) actions to be made in the course of which those in positions of authority are called to account for such actions in the language of constitutional principles, rights and ideals. This generates a specially valuable kind of conversation, argumentation, analysis, critique and debate:

> What counts most is how the judiciary, *in making such challenges possible*, compels our political discourse to address issues of power in the language of constitutional principle, a language that connects our past to our aspirations as a people.[12] ... By debating our deepest differences in the shared language

[11] Ibid, vol 1 at 6.

[12] Laurence Tribe, 'Federal Judicial Power and the "Consent" of the Governed,' in A E Dick Howard (ed), *The United States Constitution: Roots, Rights and Responsibilities* (Washington, DC: Smithsonian Institution Press, 1992), p 207 at 211 (emphasis in original).

> of constitutional rights and responsibilities and in the terms of an enacted constitutional *text*, we create the possibility of persuasion and even moral education in our national life ... Although the non-judicial branches, too, are sworn to uphold the Constitution, the independent judiciary has a unique capacity and commitment to engage in constitutional discourse — to explain and justify its conclusions about governmental authority in a dialogue with those who read the same Constitution even if they reach a different view. This is a commitment that only a dialogue-engaging institution, insulated from day-to-day political accountability but correspondingly burdened with oversight by professional peers and vigilant lay criticism, can be expected to maintain.[13]

For Tribe, this constitutional dialogue is one that will never end — 'looking not toward any one, permanent reconciliation of conflicting impulses but toward a judicially modulated unending struggle.'[14] 'Fundamentally, the Constitution is ... a text to be interpreted and reinterpreted in an unending search for understanding.'[15]

The American system of constitutional judicial review can perhaps best be understood as a product of the synthesis of democracy and constitutionalism.[16] Both democracy and constitutionalism uphold the dignity, autonomy and equal moral worth of each human being. The emphasis of democracy is on the sovereignty of the people, their democratic participation in political processes, including the law-making process, and the authority of the law that is democratically made. Constitutionalism stresses the need for state power to be limited and to be subject to checks and balances so as to minimize the abuse of state power, even when state power is in the hands of democratically elected leaders. This is because the individual is entitled to certain basic rights that deserve protection against majority rule:

> Each individual has, constitutionalism claims, a zone of physical and psychological space that should be largely immune from governmental regulation, even regulation that an overwhelming majority of society considers wise and just.[17]

[13] Laurence H Tribe, *American Constitutional Law* (2nd ed 1988) 14-15 (emphasis in original).
[14] Ibid at 15.
[15] Laurence H Tribe and Michael C Dorf, *On Reading the Constitution* (Cambridge, Mass: Harvard UP, 1991) 32-33.
[16] See generally Walter F Murphy et al, *American Constitutional Interpretation* (Westbury, NY: Foundation Press, 2nd ed 1995) 41-52.
[17] Ibid at 46.

From this perspective, when courts review legislation on the basis of the constitutional bill of rights, they are performing the legitimate function of protecting minority rights against majority rule.[18]

It should however be borne in mind that constitutional judicial review as it developed the USA is not only concerned with the protection of individuals' rights and the enforcement of the constitutional bill of rights. It is equally concerned with the enforcement of the constitutional division of power between different branches of government, and between the federal government and state governments. Indeed, this latter function, rather than the former, was in practice the predominant one in the first century of American constitutional history. Thus Martin Shapiro suggests that the legitimacy of judicial review was established in the USA by the Supreme Court making a major contribution to policing the boundary between different levels of government in the federal constitutional structure. A fund of legitimacy was stored up first, which could then be relied on by the Court when it turned to the business of striking down laws on the ground of individuals' rights.[19]

The global expansion of constitutional review of legislation — or what Mauro Cappelletti calls 'constitutional justice'[20] — after the Second World War means that the legitimacy of such review is gaining international acceptance. This movement is partly a response to the experience of totalitarianism and the growth of modern state power. In the late twentieth century, post-communist societies and other countries emerging from dictatorship of one form or another have also been eager to embrace constitutional review. Cappelletti, a leading scholar of comparative constitutional law, said in a 1985 lecture:

> [S]ince World War II, Western societies have been experiencing what I do not hesitate to characterize as a constitutional and civil rights revolution. ... The constitutional revolution — and I do mean what this word says — occurred in Europe only with the suffered acquisition of the awareness that a constitution, and a constitutional bill of rights, need judicial machinery to be made effective. The United States certainly provided an influential precedent. But the most compelling lesson came from domestic experience, the experience of tyranny and oppression by a political power unchecked by machinery both *accessible* to the victims of governmental abuse, and *capable*

[18] Thus it has been pointed out that the Supreme Court 'constitutes a working part of the democratic political life of the nation because the power of judicial review has been historically exercised to restrain the majority': Robert Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 Ind LJ 1 at 9, quoting Rostow, 'The Supreme Court and the People's Will' (1958) 33 Notre Dame LR 573 at 576.

[19] This point has been made in Martin Shapiro, 'The Success of Judicial Review,' in S J Kenney, W M Reisinger and J C Reitz (eds), *Constitutional Dialogues in Comparative Perspective* (New York: St Martin's Press, 1998), p 193.

[20] Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989), p 184.

> of restraining such abuse. ... Indeed, it seems as though no country in Europe, emerging from some form of undemocratic regime or serious domestic strife, could find a better answer to the exigency of reacting against, and possibly preventing the return of, past evils, than to introduce constitutional justice into its new system of government.[21]

Cappelletti was speaking in the mid-1980s. Since then dramatic progress in the global reach of democracy has been made, and Kommers and Finn have provided a more up-to-date description:

> The late twentieth century is an age of judicial review. What was generally regarded as a unique feature of the American Constitution prior to the Second World War is now a major feature of numerous constitutions around the world. The proliferation of constitutional courts in Western Europe, Latin America, Asia, and, lately, in the former communist countries of Eastern Europe, is one of the most fascinating constitutional developments of our time.[22]

It should be noted in this regard that most of these new systems of constitutional review have been modelled on the Continental European systems, particularly Germany's Federal Constitutional Court, a specially constituted court specialising in constitutional jurisprudence, rather than on the American and British Commonwealth systems of constitutional review by ordinary courts.[23]

Approaches to constitutional interpretation

There are many theories of, approaches to and methods for interpreting a constitutional instrument such as the US constitution. This article takes as the point of departure of our investigation Philip Bobbitt's theory of constitutional interpretation, because I think it is one of the best attempts to understand different theories, approaches and methods in this regard as a coherent whole.

Bobbitt develops his theory in two major works, *Constitutional Fate* (1982)[24] and *Constitutional Interpretation* (1991).[25] The focus of his study is 'constitutional modalities', meaning forms or types of arguments that are conventionally used in arguing and deciding cases in American constitutional law. These

21 Ibid at 207, 186-187 (emphasis in original).
22 Donald P Kommers and John E Finn, *American Constitutional Law: Essays, Cases, and Comparative Notes* (Belmont, CA: West/Wadsworth, 1998), pp 43-44.
23 For different models of constitutional judicial review, see Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs-Merrill, 1971). For more recent developments, see C Neal Tate and Torbjörn Vallinder, *The Global Expansion of Judicial Power* (New York: New York University Press, 1995).
24 New York and Oxford: Oxford University Press, 1982.
25 Oxford and Cambridge, Mass: Blackwell, 1991.

constitutional modalities are crucial to the enterprise of constitutional interpretation. They are the tools of the enterprise, as well as 'the ways in which legal propositions are characterised as true from a constitutional point of view':[26]

> The modalities of constitutional argument are the ways in which law statements in constitutional matters are assessed; standing alone they assert nothing about the world. But they need only stand alone to provide the means for making constitutional argument.[27]

In Bobbitt's view, these constitutional modalities constitute the grammar of constitutional law,[28] and familiarity with them is a prerequisite for effective thinking in constitutional law.[29] Indeed, the very legitimacy of judicial decisions in constitutional law depends on, and is maintained by, the operation of these modalities of constitutional argument.[30] And the defence of each modality can be shown to correspond to one of the standard defences of the system of judicial review.[31]

As regards the relationship between these constitutional modalities, Bobbitt recognises that they are basically incommensurate with one another,[32] and thus may point to diverging outcomes when applied to the same case.[33] Yet Bobbitt believes that no single modality can be elevated to a privileged status,[34] and that it is both unnecessary and harmful to search for a 'meta-logic' that can dictate the 'right' outcome in a particular case.[35] Indeed, there is scope for choice, for conscience, for moral decisions and for justice precisely because there is indeterminacy in the operation of the modalities. In practice, more than one modality will often be employed in deciding a case.[36] As Bobbitt points out:

> If you were to take a set of colored pencils, assign a separate color to each of the kinds of arguments, and mark through passages in an opinion of the Supreme Court deciding a constitutional matter, you would probably have a multi-colored picture when you finished. Judges are the artists of our field ... and we expect the creative judge to employ all the tools that are

26 Ibid at 12.
27 Ibid at 22.
28 Ibid at 24, Bobbitt (note 24 above) at 6.
29 Bobbitt (note 25 above) at xvii.
30 Ibid at xv, 27.
31 Ibid at 25.
32 Ibid at 42.
33 He also points out that a particular problem might be more suited to resolution by a particular modality: ibid at 231.
34 Ibid at 31.
35 Ibid at 116-117.
36 Kommers and Finn (note 22 above) at 35.

> appropriate, often in combination, to achieve a satisfying result. ... What makes the *style* of a particular person ... is the preference for one particular mode over others.[37]

What, then, are the modalities of constitutional argument identified by Bobbitt? There are six of them:

(a) the textual;
(b) the historical (also known as 'originalism');
(c) the doctrinal;
(d) the prudential;
(e) the structural;
(f) the ethical.

Each of these forms of argument represents an approach to, or a method of, constitutional interpretation. In the following, each modality will be discussed, with reference to how it is understood by Bobbitt and to related analysis by other scholars.

The textual approach to interpretation (textualism or literalism)

According to Bobbitt, textualism privileges 'the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary man on the street'.[38] This corresponds to the literal rule in ordinary statutory construction, which emphasizes the plain and ordinary meaning of the words in the legislative text.[39] The strength of this approach is that it enables citizens to rely on their understanding of the words of the law, whereas it would be undemocratic for legal specialists to exercise a monopoly over the meaning of legal texts.[40] This approach, known in Australia as 'literalism',[41] was applied by the High Court of Australia in the famous *Engineers* case (1920),[42] where the court rejected any 'implication which is formed on a vague, individual conception of the spirit of the compact [i.e. the Constitution], which is not the result of interpreting any specific language to be quoted, nor referable to any recognised principle of the common law of the Constitution'.[43] It also said:

37 Bobbitt (note 24 above) at 93-94, 124 (emphasis in original).
38 Bobbitt (note 25 above) at 12.
39 However, according to Murphy et al (note 16 above, at 386), there are three varieties of textualism characterized respectively as (a) clause bound, (b) structuralist and (c) purposive.
40 Bobbitt (note 24 above) at 25, quoting Justice Joseph Story, *Commentaries on the Constitution of the United States* (New York: De Capo Press, 1970; originally published in 1833), vol 1, s 407, p 390.
41 Charles Sampford and Kim Preston(eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Sydney: Federation Press, 1996), pp 6, 16.
42 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. In this case, the High Court overruled some previous decisions and allowed the expansion of the powers of the Commonwealth relative to the States.
43 Ibid at 145.

> It is the chief and special duty of this court faithfully to expound and give effect to [the Constitution] according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed ... In doing this, to use the language of Lord Macnaghten [in a 1913 case], 'a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. ...'[44]

The historical approach to interpretation (originalism)

The historical modality of constitutional argument advocates the meaning of the constitutional text at the time of its adoption, and the intention of its framers and ratifiers. 'Historical arguments draw legitimacy from the social contract negotiated from an original position'.[45] The constitution is understood as a social contract entered into by the founding generation and binding on subsequent generations subject to the possibility of constitutional amendment. The terms of the contract, and their meaning, were fixed at the crucial historical moments of the adoption and amendment of the constitution, and the need for enforcement of such terms is the sole justification for judicial review of subsequently enacted legislation. This historical approach to constitutional interpretation, more commonly known as originalism in the US, is usually associated with the debate between 'conservatives' and 'liberals' in the domain of constitutional law. The conservatives rely on originalism to argue that it is wrong to read into the Constitution certain privacy rights such as the right to abortion,[46] or to understand its prohibition of 'cruel and unusual punishments' as including the death penalty.[47]

There are several versions of originalism. One focuses on the meaning of the constitutional text that the framers intended it to bear. Another upholds the meaning of the text as commonly understood by members of the community at the time of its enactment.[48] Within originalism, there are also different views regarding whether the interpretive enterprise should focus on the text or on the intention and purposes of the founders.[49] According to one school of thought (which can be described as the textualist version of originalism), all that matters is the words of the constitutional text as understood by the founding

[44] Ibid at 142-143.
[45] Bobbitt (note 24 above) at 26.
[46] See the discussion in Dennis Davis et al, 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in Dawid van Wyk et al (eds), *Rights and Constitutionalism: The New South African Legal Order* (Kenwyn: Juta, 1994) at 12.
[47] See the discussion in Antonin Scalia (Justice of the US Supreme Court), *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), p 46.
[48] Kommers and Finn (note 22 above), pp 35-36; Murphy (note 16 above), pp 389-390.
[49] See generally Paul Brest, 'The Misconceived Quest for the Original Understanding' (1980) 60 BUL Rev 204, especially text accompanying notes 8 and 9 therein.

generation.[50] Another school (which can be called 'intentionalism'[51] to contrast it with 'textualism') privileges the intention of the founders, what they had in mind and what objectives they sought to achieve, and advocates the liberal use of records of debates at the constitutional convention and other sources of historical evidence for the purpose of ascertaining such intention and purposes.

The leading exponents of originalism include Scalia J of the US Supreme Court and Judge Robert Bork (whose nomination to the Supreme Court was rejected by the Senate partly because of his adherence to originalism). Scalia J criticizes the 'living constitution' school of thought:

> [T]he Great Divide with regard to constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning. The ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and 'find' that changing law. Seems familiar, doesn't it? Yes, it is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures.[52]

Judge Bork advocates the following originalist approach to judicial review of legislation:

> [A]ll that a judge committed to *original understanding* requires is that the *text, structure and history* of the Constitution provide him not with a conclusion but with a major premise. The major premise is a principle or ... value that *the ratifiers wanted* to protect against hostile legislation or executive action. The judge must then see whether that principle or value is threatened by the statute or action challenged in the case before him.[53]

[50] See the discussion in Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Sampford and Preston (note 41 above) at 14-15.

[51] See Brest (note 49 above), part one, section II ('Intentionalism'). Brest also distinguishes between strict and moderate versions of originalism. See also the discussion of intentionalism in G Craven, 'The Crisis of Constitutional Literalism in Australia,' in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives* (Sydney: Law Book Co, 1992), pp 20-23; Mason (note 50 above) at 15-16.

[52] Scalia (note 47 above) at 38.

[53] Robert H Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon and Schuster, 1991), p 162 (emphasis supplied).

The doctrinal approach to interpretation (doctrinalism)

Bobbitt defines the doctrinal modality as one that applies rules generated by precedent.[54] Doctrinalism reflects the common law approach to the development of legal norms through the gradual accumulation of case law. It is based on 'the notion that the judicial function with respect to the Constitution is essentially a common law function, arising from the court's common law process respecting litigants.'[55] As formulated by several other scholars:

> A *doctrinal approach* searches out past interpretations as they relate to specific problems ... and tries to organize them into a coherent whole and fit the solution of current problems into that whole. ... *Doctrinalists* typically claim their approach is based on the notion of a developing rather than a static 'Constitution.' ... Doctrines do not exist from the beginning of time; they have been created, assembled, and reassembled.[56]

Thus instead of focusing one's attention to the constitutional text and its meaning, doctrinalism attempts to apply the relevant doctrines and verbal formulas or tests (such as whether there exists a 'compelling state interest' that can justify the restriction of certain rights) developed by the courts in the past in order to resolve current issues.[57]

Bobbitt's idea of the doctrinal modality of constitutional thinking also embraces two other elements.[58] First, doctrinalism emphasizes the importance of adherence to rules and principles, and is against considerations of expediency or policy in judicial decision-making. In this regard, it is reminiscent of Herbert Wechsler's call for 'neutral principles' of constitutional law[59] — judicial decision-making in constitutional law must be 'principled' and based on reasons which in their neutrality and generality transcend the immediate outcome of the case and are equally applicable to future cases. Secondly:

> [T]he doctrinal approach holds that fairness will result ... if methods of judging which all concede to be fair are followed scrupulously. These methods include adherence to traditional standards of dispassion and disinterest, the elaboration of convincing reasons for deciding one way or the other, the mutual opportunity for persuasion.[60]

54 Bobbit (note 25 above) at 13.
55 Bobbitt (note 24 above) at 44.
56 Murphy (note 16 above) at 394-395.
57 Kommers and Finn (note 22 above) at 37.
58 Bobbitt (note 24 above) at 39-44.
59 Herbert Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) 73 Harv L Rev 9.
60 Bobbitt (note 24 above) at 43.

The concept of doctrinalism is closely related to, and indeed overlaps with, David Strauss' idea of 'common law constitutional interpretation'.[61] Strauss suggests that constitutional law has binding authority not because it is the command of its founders, but because constitutional law as it has evolved represents the accumulated wisdom of many generations and has been well tested over time. The development of American constitutional law has followed the common law model, and 'represents a flowering of the common law tradition':[62]

> Common law constitutional interpretation has two components. ... The first component is traditionalist. The central idea is that the Constitution should be followed because its provisions reflect judgments that have been accepted by many generations in a variety of circumstances. The second component is conventionalist. It emphasizes the role of constitutional provisions in reducing unproductive controversy by specifying ready-made solutions to problems that otherwise would be too costly to resolve.[63]

The prudential approach to interpretation (prudentialism)

While doctrinalism eschews policy considerations, prudentialism upholds the legitimacy of such considerations in judicial decision-making in constitutional law. Bobbitt defines the prudential modality of constitutional argument as one that seeks 'to balance the costs and benefits of a particular rule'.[64] It is therefore a utilitarian, pragmatic and consequentialist mode of thinking. As Bobbitt puts it: 'Prudential arguments is actuated by facts, as these play into political and economic policies'.[65] He gives the following example:

> Consider whether the state can require mandatory testing for the AIDS virus antibodies. To say that it is wise, unwise, or simply unclear on the present facts whether or not it is wise to permit such testing is to propose an evaluation from a *prudential* point of view.[66]

Prudentialism is often associated with the jurisprudential thought of Mr Justice Louis Brandeis, Mr Justice Felix Frankfurter and Professor Alexander Bickel.[67] It is sometimes cited to explain the doctrines of justiciability developed by the American Supreme Court. These doctrines, which include the ban on

61 David Strauss, 'Common Law Constitutional Interpretation' (1996) 63 U Chi L Rev 877.
62 Ibid at 887.
63 Ibid at 890-891.
64 Bobbitt (note 25 above) at 13.
65 Ibid at 17.
66 Ibid at 16 (emphasis in original).
67 Bobbitt (note 24 above) chap 5; Alexander M Bickel, 'The Passive Virtues' (1961) 75 Harv L Rev 40.

advisory opinions, doctrines on ripeness, standing and mootness, and the political question doctrine, enable the court to decline to exercise jurisdiction in appropriate cases even where it is invited to enforce the constitution. In Bobbitt's words, they are 'mediating devices by which the Court can introduce political realities into its decisional process.'[68] The *Ashwander* rules,[69] according to which the court will avoid deciding a constitutional question unless it is absolutely necessary to do so, serve a similar purpose. Mr Justice Brandeis, who participated in the *Ashwander* decision, once said: 'The most important thing we do is not doing.'[70]

In his famous book, *The Least Dangerous Branch* (1962), Professor Bickel provides the classic statement of the prudential approach to constitutional interpretation:

> The accomplished fact, affairs and interests that have formed around it, and perhaps popular acceptance of it — these are elements ... that may properly enter into a decision to abstain from rendering constitutional judgment or to allow room and time for accommodation to such a judgment; and they may also enter into the shaping of the judgment, the applicable principle itself.[71]

The leading contemporary advocate of prudentialism, or what he calls 'pragmatic adjudication',[72] is Judge Richard Posner:

> The judicial pragmatist ... wants to come up with the decision that will be best with regard to present and future needs. He is not uninterested in past decisions, in statutes, and so forth. ... But because he sees these 'authorities' merely as sources of information and as limited constraints on his freedom of decision, he does not depend on them to supply the rule of decision for the truly novel case. He looks to sources that bear directly on the wisdom of the rule that he is being asked to adopt or modify.[73]

The structural approach to interpretation (structuralism)

The structural modality of constitutional argument is defined by Bobbitt to mean one that infers rules from the relationships that the constitution mandates

68 Bobbitt (note 24 above) at 65.
69 *Ashwander v Tennesee Valley Authority* (1936) 297 US 288. See, eg the discussion in Kommers and Finn (note 22 above) at 34, 66. For further details of the rules, see text accompanying note 239 below.
70 Quoted in Bobbitt (note 24 above) at 65, referring to the 'Brandeis-Frankfurter Conversations manuscript' in the Harvard Law School Library.
71 Bickel (note 7 above) at 116.
72 Richard A Posner, *The Problematics of Moral and Legal Theory* (Cambridge, Mass: Harvard University Press, 1999) at 240. At pp 258-259, he advocates the use of this approach in constitutional adjudication.
73 Ibid at 242.

among the structures it sets up.[74] Structuralism is particularly useful in dealing with questions of federalism, separation of powers and inter-governmental issues, but less effective in tackling issues of civil liberties and human rights.[75] Bobbitt sees structuralism as a kind of 'macroscopic prudentialism', 'drawing not on the peculiar facts of the case but rather arising from general assertions about power and social choice'.[76]

Further exploration into structuralism would reveal that there are at least three types or levels of the structural modality of constitutional argument.[77] The first is textual structuralism. This seeks to interpret each provision in the constitution in the light of all the provisions of the constitution. The particular provision is understood as a component part of a larger whole in which inner unity and coherence is sought. The second level of structuralism has been called 'systematic structuralism'.[78] Here the unit of analysis is not simply the whole text of the constitution, but the entire political order, the totality of the constitutional scheme, including not only the text but also relevant traditions, practices and previous interpretations. The particular provision is interpreted in the light of this greater whole in which unity and coherence is sought. 'Transcendent structuralism', the third strand of structuralism, is even more ambitious:

> Suppose interpreters decide that the constitution also includes one or more political theories as well as practices, interpretations, and traditions. Interpreters would then find it necessary to employ *philosophy* to understand those political theories and their implications for constitutional meaning. But they might need yet another approach to help them bring the text, practices, traditions, and interpretations into a coherent whole with the normative demands of the relevant political theories. We call this approach *transcendent structuralism*.[79]

This third species of structuralism in fact merges with the ethical modality of constitutional argument as understood by Bobbitt, to which we now turn.

The ethical approach to interpretation

In Bobbitt's words, the ethical modality of constitutional argument attempts to derive 'rules from those moral commitments of the American ethos that are reflected in the Constitution'.[80] This type of constitutional thinking can also

74 Bobbitt (note 25 above) at 12-13.
75 Kommers and Finn (note 22 above) at 40; Bobbitt (note 24 above) at 89.
76 Bobbitt (note 24 above) at 74.
77 Murphy (note 16 above) at 386-388, 399-400.
78 Ibid at 399-400.
79 Ibid at 400 (emphasis in original).
80 Bobbitt (note 25 above) at 13.

be described as philosophical, aspirational or moral.[81] It enables philosophical reflections, social morality and the vision and aspirations embodied in the constitution to be taken into account in constitutional interpretation.

For Bobbitt, the force of ethical argument 'relies on a characterization of American institutions and the role within them of the American people', or 'the character, or *ethos*, of the American polity'.[82] In his view, this kind of argument can be used to strengthen individuals' rights, because the American constitutional ethos is one that limits the power of government and secures rights in the private sphere, which 'can be defined as those choices beyond the power of government to compel'.[83]

Both conventional morality and moral philosophy have been argued to be relevant to constitutional interpretation. For example, Harry Wellington writes:

> Judicial reasoning in concrete cases must proceed from society's set of moral principles and ideals. ... And that is why we must be concerned with conventional morality, for it is there that society's set of moral principles and ideals are located. ... the Supreme Court is ... well positioned to translate conventional morality into legal principle.[84]

On the other hand, Ronald Dworkin advocates a 'moral reading' of the constitution based on moral and political philosophy rather than conventional morality. In *Freedom's Law*, he writes:

> Most contemporary constitutions declare individual rights against the government in very broad and abstract language ... The moral reading proposes that we all — judges, lawyers, citizens — interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice. ... people who form an opinion must decide how an abstract moral principle is best understood. ... The moral reading therefore brings political morality into the heart of constitutional law.[85]

81 Kommers and Finn (note 22 above) at 40-41; Murphy (note 16 above) at 397-399.
82 Bobbitt (note 24 above) at 94.
83 Bobbitt (note 25 above) at 20.
84 Harry Wellington, 'Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication' (1973) 83 Yale L J 221 at 244, 267. He defines 'conventional morality' as 'standards of conduct which are widely shared in a particular society.'
85 Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass: Harvard University Press, 1996) at 2.

The 'political morality' that Dworkin relies on can be understood as a kind of critical morality (as contrasted with conventional morality)[86] — moral thinking based on philosophical reflections on what is a 'coherent strategy of interpreting the Constitution',[87] which stands at a distance from and can be critical towards the prevailing mores and values of the majority of people in society at a particular time, whether at present or at the time of the adoption of the constitution. Dworkin believes that this approach to constitutional interpretation is not inconsistent with the original intention of the framers of the constitution, because they only intended to lay down principles based on certain broad *concepts*, allowing succeeding generations to apply them without being bound by the founding generation's own *conceptions*.[88] This theory is based on the distinction between 'concept' and 'conception', and that between 'interpretive intent' and 'substantive intent'.

In Dworkin's view, language regarding matters such as 'equality' or 'cruelty' in the American constitution denotes concepts rather than specific conceptions. Different people can employ the same concepts while having different conceptions of what precisely are the kinds of behaviour or concrete situations which are covered by the concept. Thus when framers of the American constitution used words such as 'equality' or 'cruelty' in the constitution, they did not preclude the possibility of subsequent generations developing and then applying their own conceptions regarding these concepts as cases arise. Dworkin writes:

> [W]e must take what I have been calling 'vague' constitutional clauses as representing appeals to the concepts they employ, like legality, equality and cruelty. The Supreme Court may soon decide, for example, whether capital punishment is 'cruel' within the meaning of the constitutional clause that prohibits 'cruel and unusual punishment'. It would be a mistake for the Court to be much influenced by the fact that when the clause was adopted capital punishment was standard and unquestioned. That would be decisive if the framers of the clause had meant to lay down a particular *conception* of cruelty, because it would show that the conception did not extend so far. But it is not decisive of the different question that Court now faces, which is this: Can the Court, responding to the framers' appeal to the *concept* of cruelty, now defend a conception that does not make death cruel?[89]

[86] The distinction between conventional morality and critical morality was drawn by the legal philosopher HLA Hart in *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963) at 17-24.

[87] Dworkin (note 85 above) at 2.

[88] Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) chap 5.

[89] Ibid at 135-136.

Further theoretical clarification of the matter is provided by Paul Brest, who drew the distinction between the 'substantive intent' and the 'interpretive intent' of the adopters of the constitution.[90] The substantive intent refers to how the adopters would *themselves* interpret and apply the relevant constitutional provision to a case if the case were to come before them. The interpretive intent refers to how the adopters intended *future judges* to interpret and apply the provision to the future case, and 'what are the canons by which the adopters intended their provisions to be interpreted'.[91] Brest points out that it is possible that the adopters' interpretive intent was such that they did not intend that their substantive intent (i.e. their own views of how the provision would apply to a particular case) should govern the future application of the provision (such as the provision on 'cruel and unusual punishment'), and they intended instead to delegate to future judges significant discretion:

> [T]he adopters may have intended that their own views not always govern. ... The adopters may have understood that, even as to instances to which they believe the clause ought or ought not to apply, further thought by themselves or others committed to its underlying principle might lead them to change their minds. Not believing in their own omniscience or infallibility, they delegated the decision to those charged with interpreting the provision.[92]

The purposive approach

The six modalities of constitutional argument theorised by Bobbitt have all been considered above. They do not include, however, what is often called the purposive approach to constitutional interpretation, which has been referred to by Hong Kong courts in the context of the interpretation of the colonial constitution, the Bill of Rights and the Basic Law.[93] Where then does the purposive approach stand in relation to the other modalities of constitutional interpretation?

90 Brest (note 49 above), part one, section II, sub-sections 2 and 3.
91 Ibid, part one, section II, sub-section 2.
92 Ibid, text accompanying footnote 43 thereof.
93 See, eg, *Attorney General v David Chiu Tat-cheong* [1992] 2 HKLR 84; *R v Sin Yau-ming* [1992] 1 HKCLR 127; *Ng Ka-ling v Director of Immigration* [1999] 1 HKLRD 315. For the use of the purposive approach in Australia and Canada, see Mason (note 50 above) at 29; Peter Hogg, 'Interpreting the Charter of Rights' (1990) 28 Osgoode Hall L J 817; Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 4th student ed. 1996) at 625-626; Davis (note 46 above) at 30-35. Murphy et al (note 16 above, at 400-409) identify 5 kinds of purposive approaches or 'systemic purpose' in constitutional interpretation: (a) the prudential approach; (b) the doctrine of the clear mistake (which advocates judicial deference to the acts of Congress unless a violation of the Constitution is very clear); (c) reinforcing representative democracy; (d) protecting fundamental rights; (e) the aspirational approach. They also discuss the purposive approach in the context of 'textualism' in constitutional interpretation, and identify 'purposive textualism' as one of the 3 varieties of textualism (at 386-389).

The essence of the purposive approach can best be understood when it is contrasted with the literal approach to interpretation. Both are the most basic approaches to the construction of ordinary statutes.[94] Whereas the latter focuses on the plain meaning of the words in the legislative text, the purposive approach attempts to go beyond the literal meaning and to discern the purposes or objectives that the law was intended to achieve, and hence to interpret the provision in such a way as to enable the objective to be realised. But both the literal approach and the purposive approach are designed to ascertain and implement the intention of the legislature. While the literal approach tries to discern the intention from the words used, the purposive approach adopts a broader view of what are the relevant materials and factors to be considered in ascertaining that intention.

How, then, is the purpose of the relevant constitutional text to be identified if a purposive approach to constitutional interpretation is to be adopted? What kind of arguments about such purpose can be made? Here we need to return to the modalities of constitutional argument discussed above. For instance, the textual modality suggests that the purpose of the relevant provision can be understood by reading it, reading the related provisions and reading the constitution as a whole. This approach has been termed 'purposive textualism':

> *Purposive textualism* seeks the basic goal(s) that either an isolated clause or the text as a whole attempts to achieve, then interprets the clause or document in light of this objective.[95]

Similarly, historical, doctrinal, prudential, structural and ethical arguments can be used to discuss the purpose behind a constitutional provision. It can therefore be seen that the purposive approach to constitutional interpretation can best be understood not as an independent modality of constitutional argument, but as an integral part of each of the six constitutional modalities discussed above, particularly where the argument being made departs from the plain meaning of the text or there is no such plain meaning which can be used to resolve the issue in question.

The nature of constitutional interpretation

The constitutional modalities discussed above are no more than forms of argument that shape and propel forward the continuing conversation about the constitutionality of governmental actions, or what Tribe calls 'an ongoing discourse — a discourse with the other levels and branches of government, with

[94] See eg Michael Zander, *The Law-Making Process* (London: Weidenfeld and Nicolson, 3rd ed 1989) chap 2.

[95] Murphy (note 16 above) at 388 (emphasis in original).

the people at large, with courts that have gone before and courts yet to be appointed.'[96] They do not and cannot provide conclusive answers to constitutional questions. As Walter Murphy and his co-authors point out:

> No approach or combination of approaches can turn constitutional interpretation into an exact science or eliminate controversy about what 'the Constitution,' whether as text or text plus, means. ... constitutional interpretation involves more than intellectual analysis. It is a political act and, like many political acts in a constitutional democracy, involves both creativity and compromise.[97]

It is widely recognised that judicial decision-making in the domain of constitutional law — and this is probably more true in this domain than in other legal domains — involves moral freedom and hence moral choice on the part of judges, who have to balance conflicting interests,[98] take policy considerations into account, make value judgment[99] and engage in judicial law-making.[100] Thus, after studying various modalities of constitutional argument, Bobbitt finds that 'there is no conclusive mode, no trans-modal standard',[101] that can prescribe how the judge should decide a case. Instead, they leave him or her a space for moral reflection and choice,[102] which, according to Bobbitt, can only be made in accordance with one's conscience and moral sensibility:[103]

> That is the method of American constitutional interpretation, arising no doubt from the agnosticism of the Constitution itself, which studiedly refrains from endorsing particular values other than the structures by which our values are brought into being and preserved. ... And thus when a constitutional decision is made, its moral basis is confirmed if the forms of arguments can persuasively rationalize the decision, and the decision is not made on grounds incompatible with the conscience of the decision maker. That is constitutional decision according to law.[104]

96 Tribe (note 13 above) at 66.
97 Murphy (note 16 above) at 384. See also Kommers and Finn (note 22 above) at 34: 'interpretation is itself a political act – that is, an exercise of political power. ... there are a variety of constitutional provisions relating to the [Supreme] Court that acknowledge its status as a political actor.'
98 For 'balancing' as an approach to constitutional interpretation, see Murphy (note 16 above) at 410-414.
99 Bryan Horrigan, 'Paradigm Shifts in Interpretation: Reframing Legal and Constitutional Reasoning' in Sampford and Preston (note 41 above) at 33.
100 Sampford and Preston (note 41 above) at 2-3.
101 Bobbitt (note 25 above) at 164.
102 Ibid at 170, 177.
103 Ibid at xvii, 168.
104 Ibid at 185, 169.

If so much in constitutional adjudication depends on the subjective value choice of individual judges, where is the objectivity and neutrality of the law? In an article entitled 'Objectivity and Interpretation', Owen Fiss attempts to answer this question and to respond to what he describes as the 'new nihilism, one that doubts the legitimacy of adjudication':[105]

> The nihilist would argue that for any text — particularly such a comprehensive text as the Constitution — there are any number of possible meanings, that interpretation consists of choosing one of those meanings, and that in this selection process the judge will inevitably express his own values. All law is masked power.[106]

Fiss argues that the discretion of judges in interpretation and adjudication is in fact constrained, and to this extent there exists 'bounded objectivity'[107] in the law. The sources of constraint are the existence of 'disciplinary rules' by which the correctness of the judge's interpretation can be evaluated, and the existence of an 'interpretive community' — of lawyers, judges, legal scholars and others — which recognises these rules as authoritative. The disciplinary rules consist of both substantive and procedural norms.[108] They include rules 'that specify the relevance and weight to be assigned to the material (e.g., words, history, intention, consequence)' as well as 'those that define basic concepts and that established the procedural circumstances under which the interpretation must occur.'[109] Fiss attaches particular importance to the procedural norms among the disciplinary rules:

> The judiciary is a coordinate agency of government, always competing, at least intellectually, with other agencies for the right to establish the governing norms of the polity. The judiciary's claim is largely founded on its special competence to interpret a text such as the Constitution, and to render specific and concrete the public morality embodied in that text; that competence stems not from the personal qualities of those who are judges — judges are not assumed to have the wisdom of philosopher-kings — but rather from the procedures that limit the exercise of their power.[110]

105 Owen M Fiss, 'Objectivity and Interpretation' (1982) 34 Stanford L Rev 739 at 740.
106 Ibid at 741.
107 Ibid at 745. The concept of bounded objectivity is used in contrast with the 'more transcendent, less relativistic' objectivity of the physical world or the laws governing its operation. Fiss points out (at p 745) that 'the objective quality of interpretation [in law] ... is bounded by the existence of a community that recognizes and adheres to the disciplining rules used by the interpreter and that is defined by its recognition of those rules.'
108 Ibid at 754-755.
109 Ibid at 744.
110 Ibid at 755.

Fiss writes about some of the most fundamental of these procedural norms:

> The judge must stand independent of the interests of the parties or even those of the body politic (the requirement of judicial independence); the judge must listen to grievances he might otherwise prefer not to hear (the concept of a nondiscretionary jurisdiction) and must listen to all who will be directly affected by his decision (the rules respecting parties); the judge must respond and assume personal responsibility for that decision (the tradition of the signed opinion); and the judge must justify his decision in terms that are universalizable (the neutral principles requirement).[111]

Fiss' defence of the 'bounded objectivity' of interpretation and adjudication applies equally to the domains of constitutional law and ordinary law. In the former domain, some scholars have put forward the thesis that comparative study reveals that there exists a common core of universally applicable principles of constitutional adjudication among many legal systems. The shared intellectual dynamics in different countries of the operation of such principles suggest that constitutional adjudication rests on some kind of objective ground. For example, Kommers and Finn writes:

> [P]rinciples of rationality and proportionality seem to constitute the core of judicial review wherever it is practiced, despite wide variations in the vigor with which the powers of judicial review are exercised. ... The case law of constitutional courts such as the Supreme Court of Canada, the United States, India, and Ireland as well as the European Court of Human Rights and the Constitutional Courts of Germany, Italy, and Spain may apply the principles in dramatically different ways and with different results. But the fact that all of these courts invoke some variation on these principles suggests that something universal is at work here and that *some degree of objectivity and determinacy informs the process of constitutional adjudication.*[112]

The Canadian law professor David Beatty has written a book to demonstrate that the twin principles of proportionality and rationality are indeed what 'constitutional law is mostly about'.[113] 'Studying the judgments of [Canadian and] other courts entrusted with the powers of judicial review shows how the principles of rationality and proportionality are universal in space as well as in time':[114]

[111] Ibid at 754.
[112] Kommers and Finn (note 22 above) at 44, 46 (emphasis supplied).
[113] David M Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) at 104.
[114] Ibid at 104.

> Showing judges employing the same process of reasoning no matter where they sit is a powerful piece of evidence in support of the integrity and the intelligibility of the law. The body of comparative jurisprudence written by these courts gives law and these legal principles a measure of objectivity and neutrality that transcends national borders and different cultures and environments.[115]

The most interesting and ambitious part of Beatty's thesis is that principles of proportionality and rationality are not only relevant to judicial review of governmental actions on the basis of constitutional guarantees of human rights, but also to the work of the courts in determining the boundaries of the powers of federal and provincial governments in federal constitutional systems.

In Beatty's view, the principle of proportionality is concerned with the determination of the constitutional legitimacy of the objective behind an impugned act, whereas the principle of rationality is applicable to the permissibility of the means used to achieve the objective. 'Together, these two basic principles require those who have been entrusted with the powers of the state to act with a measure of moderation and proportion.'[116]

The principle of proportionality as understood by Beatty requires the court to consider whether the objective behind the impugned act is of sufficient importance to justify the imposition of limitations on the relevant right of the individual or group (in a human rights case) or on the relevant power of the other order of government (in a federal division of power case). The court has to balance the relevant interests and to engage in a cost-and-benefit analysis. In performing the balancing exercise, the court has to look 'for the closest analogies — by comparing the challenged law with other laws, both at home and abroad, that involve similar interests and ideas'[117] The principle of proportionality is therefore a principle about balance and consistency.

If the objective of the challenged law passes the test of proportionality, the next stage of analysis is to consider whether the means used to achieve the objective is 'really necessary' or whether the same objective can be achieved by the employment of some other means which would '[display] more respect for the freedom of individuals or the sovereignty of other governments'[118] (in a federal system where both the federal and provincial governments can be regarded as exercising sovereignty). The principle of rationality is therefore a principle about necessity. The court has to consider whether the means being used to achieve the legitimate objective is a rational and reasonable one,

[115] Ibid at 105.
[116] Ibid at 16. It should be noted however that the meaning of the terms 'proportionality' and 'rationality' as used by Beatty is quite different from that of the same terms as used by the Canadian Supreme Court in the leading case of *R v Oakes* [1986] 1 SCR 103. See Hogg (note 93 above), chap 35.
[117] Beatty (note 113 above) at 16.
[118] Ibid.

having regard to the possibility of other less drastic or more moderate means that may be used for the same purpose.

Beatty's analysis reinforces the view mentioned above that in constitutional interpretation and adjudication, the task of the court is by no means the mechanical application of clear and precise legal rules to the circumstances of the case. On the contrary, the court has to perform a difficult exercise of weighing competing interests, choosing among conflicting values, and making its own assessment of what is rational, reasonable, necessary and constitutionally acceptable.

Judicial restraint and judicial activism

One of the key differences between the interpretation of statutes and constitutional interpretation is that whereas the former involves no more than the application of a statute to a case, the latter may lead to a declaration that a statute or a part thereof is null and void, and hence to a deliberate judicial decision not to apply a relevant statute to a case covered by it. Whereas the purpose of ordinary statutory interpretation is to discover and implement the intention of the legislature, constitutional interpretation may lead to the rejection and frustration of the intention of the legislature. The implications of this difference between ordinary statutory construction and constitutional interpretation were explored by James B Thayer in his classic article on 'The Origin and Scope of the American Doctrine of Constitutional Law' published in 1893.[119] This article was regarded by Justice Frankfurter as 'the most important single essay' ever published in the field.[120]

In this article, Thayer emphatically rejects the view that in cases involving constitutional interpretation in the context of judicial review of legislation,

> The court's duty ... is the mere and simple office of construing two writings and comparing one with another, as two contracts or two statutes are construed and compared when they are said to conflict; of declaring the true meaning of each, and, if they are opposed to each other, of carrying into effect the constitution as being of superior obligation ...[121]

His thesis is as follows:

> in dealing with the legislative action of a co-ordinate department [Congress], a court [the Supreme Court] cannot always, and for the purpose of all sorts of questions, say that there is but one right and permissible way of construing

[119] (1893) 7 Harvard L Rev 129, re-printed in Jules L Coleman and Anthony Sebok (eds), *Constitutional Law and its Interpretation* (New York: Garland, 1994), p 1.
[120] As noted by Murphy (note 16 above) at 403.
[121] Coleman and Sebok (note 119 above) at 10.

> the constitution. When a court is interpreting a writing merely to ascertain or apply its true meaning, then, indeed, there is but one meaning allowable; namely, what the court adjudges to be its true meaning. But when the ultimate question is not that, but whether certain acts of another department ... are legal or permissible, then this is not true. In the class of cases which we have been considering, *the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.*[122]

The approach to constitutional interpretation and adjudication which Thayer advocates is known as 'judicial restraint'. Judicial restraint means that the judiciary should defer to the judgment of the legislature on most matters and should exercise the power of striking down legislation only sparingly. Judicial restraint stands in contrast to judicial activism, which means judges interpreting the Constitution will not hesitate too much before substituting their own judgment for that of the legislature (for example, as regards how to balance competing interests, values and rights), and the power of judicial review of legislation will be exercised liberally and actively.

In Thayer's view, the court should only strike down an Act of Congress where its violation of the Constitution is 'clear', 'obvious', 'plain', 'unequivocal', or 'so manifest as to leave no room for reasonable doubt'. The question is not whether the court itself would choose to legislate in this way if it were the legislator, but whether the legislature's choice is beyond the scope of its power. The problem is structurally similar to the situation where the court hears an appeal from a jury verdict, when the court will not substitute its opinion for the jury's but would only ask whether 'reasonable men could not fairly find as the jury have done':[123]

> The legislature in determining what shall be done, what it is reasonable to do, does not divide its duty with the judges, nor must it conform to their conception of what is prudent or reasonable legislation. The judicial function is merely that of fixing the outside border of reasonable legislative action ...[124]

The doctrine that Thayer proposed has been called 'the doctrine of the clear mistake':

> [The court] can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,

[122] Ibid at 22 (emphasis in original).
[123] Ibid at 19.
[124] Ibid at 20.

> — so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply, — not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it. This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.[125]

Thayer's theory of constitutional interpretation and judicial review supports a presumption of the constitutionality of legislation which can be rebutted by cogent argument. This presumption still operates in American, Canadian and Australian constitutional law in some categories of cases, albeit not in cases involving civil liberties and human rights.[126] What are the types of situations in which judicial activism is appropriate has been a central issue in American constitutional debate. One of the most influential theories in this regard originated from the famous 'footnote 4' in Mr Justice Stone's judgment in the Supreme Court decision in the *Carolene Products* case (1938).[127] The case was decided at a time when American constitutional jurisprudence was in a state of flux. The Supreme Court had just retreated from its (unpopular) activism in striking down the laws of Roosevelt's New Deal on the ground of substantive due process and protection of contractual and property rights, and returned to the older doctrine of the presumption of the constitutionality of legislation. Footnote 4 of Justice Stone's opinion was intended 'to plant the seeds of a new jurisprudence'[128] that would enable the court to play an activist role in future in the domain of civil liberties. And this possibility did materialise for the American Supreme Court in the second half of the twentieth century.

What Justice Stone suggested in 'footnote 4' is that the presumption of the constitutionality of legislation may be weaker or inapplicable to three types of cases:

[125] Ibid at 16.

[126] For relevant American materials, see *Fletcher v Peck* (1810) 10 US 87; *Munn v Illinois* (1876) 94 US 113; *Adkins v Children's Hospital* (1923) 261 US 525; *Ferguson v Skrupa* (1963) 372 US 726; Kommers and Finn (note 22 above) at 446-447. For the position in Canada and Australia, see Hogg (note 93 above) at 343, 675; K Booker, A Glass and R Watt, *Federal Constitutional Law* (Sydney: Butterworths, 1994) at 332.

[127] *United States v Carolene Products Co* (1938) 304 US 144. See the discussion in Murphy (note 16 above) at 609; Coleman and Sebok (note 119 above) at xiii. The full text of 'footnote 4' has been reprinted in Murphy (note 16 above) at 617.

[128] Murphy (note 16 above) at 610.

(a) those 'within a specific prohibition of the Constitution, such as those of the first ten amendments [i.e. the Bill of Rights adopted in 1791], which are deemed equally specific when held to be embraced within the Fourteenth';[129]

(b) cases concerning 'legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation';

(c) cases involving 'statutes directed at particular religious, or national, or racial minorities', or 'prejudice against discrete and insular minorities ... which tends seriously to curtail the operation of those political processes ordinarily thought to be relied upon to protect minorities'.

Parts (b) and (c) of 'footnote 4' formed the basis of John Hart Ely's 'political process theory' of the American Constitution which he developed in his famous book, *Democracy and Distrust* (1980).[130] According to this theory, the American Constitution is largely about democratic procedures and open processes for the conduct of politics and the enactment of policies, and it provides for few substantive values itself. Where laws have been democratically made, the judiciary should not intervene by way of judicial review, which 'can appropriately concern itself only with questions of open participation ... [including] protection of minorities against discriminatory legislation — and not with the substantive merits of the political choice under attack.'[131] Judicial review is justified when

> (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.[132]

Process-based constitutional theories like Ely's have however been criticised by Laurence Tribe, who points to 'the stubbornly substantive character of so many of the Constitution's most crucial commitments':[133]

[129] Whereas the first 10 amendments protect rights by limiting the power of the federal legislature, the 14th amendment protect rights by limiting the power of the state legislatures. The US Supreme Court has interpreted the 14th amendment in such a way that most of the protections provided by the first 10 amendments are now incorporated into the 14th amendment and made applicable against state legislatures as well as Congress.

[130] Cambridge, Mass: Harvard University Press, 1980.

[131] Ibid at 181.

[132] Ibid at 103.

[133] Laurence H Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 59 Yale LJ 1063 at 1065.

> Even the Constitution's most procedural prescriptions cannot be adequately understood, much less applied, in the absence of a developed theory of fundamental rights that are secured to persons against the state — a theory whose derivation demands precisely the kinds of controversial substantive choices that the process proponents are so anxious to leave to the electorate and its representatives.[134]

Hence the debate continues, for example, among 'conservatives' who advocate originalism and judicial restraint, 'moderates' who support judicial review where 'it is a necessary corrective for an objectively determinable failure in the political process',[135] and 'liberals' who push for judicial activism to realise the aspirations and ideals which they see in the Constitution.

CONSTITUTIONAL AND LEGISLATIVE INTERPRETATION IN MAINLAND CHINA

In the debate in 1999 surrounding the HKSAR government's decision to refer the Basic Law provisions regarding the right of abode to the NPCSC for interpretation,[136] government officials said that the practice of legislative interpretation (i.e. interpretation of laws by the legislature) in China is a feature of its Civil Law based legal system.[137] They argued that although this practice is alien to the Common Law tradition in Hong Kong, the Hong Kong legal community had to recognise that under the principle of 'one country, two systems', Hong Kong must accept the practice as a necessary consequence of the marriage of the Common Law and Civil Law systems.[138] The existence of Parliamentary interpretations of law in the constitutional systems in Belgium and Greece was cited in support of this argument.[139]

The better view is that the use of 'legislative interpretation' in the legal system of the PRC is a feature of the socialist (or communist) rather than the Civil Law

134 Ibid at 1067.
135 Coleman and Sebok (note 119 above) at xiv.
136 See generally J M M Chan, H L Fu and Y Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong: Hong Kong University Press, 2000); Peter Wesley-Smith, 'Hong Kong's First Post-1997 Constitutional Crisis' [1999] Lawasia Journal 24.
137 See speech of Ms Elsie Leung, Secretary for Justice, in the Legislative Council on 18 May 1999, re-printed in Chan (note 136 above) at 322; Ms Elsie Leung's letter of 14 June 1999 to Ms Margaret Ng, Legislative Councillor and other opponents to the Government's move, re-printed in Chan (note 136 above) at 410.
138 Ibid; see also Elsie Leung, 'New Constitutional Order for Hong Kong,' China Daily, 29 July 1999. For a scholarly view, see Wang Chenguang and Zhu Guobin, 'A Tale of Two Legal Systems: The Interaction of Common Law and Civil Law in Hong Kong' [1999] 4 Revue Internationale de Droit Comparé 917.
139 See speech of 18 May 1999 and letter of 14 June 1999 cited in note 137 above and Leung's article cited in note 138 above.

heritage of this system.[140] It is true that shortly after the Revolution of 1789, due to the distrust of the judiciary in pre-revolutionary times and as an attempt to practise a pure system of separation of powers, France in 1790 enacted a law requiring the judiciary to refer questions of interpretation of laws to the legislature.[141] However, this system was abandoned when the French Civil Code was adopted in 1804. Legislative interpretation is not part of the legal systems of leading Continental European members of the Civil Law family today, such as Germany, France, Italy, Spain and Austria. Instead they have constitutional courts that specialise in the task of constitutional interpretation and review of the constitutionality of legislation.[142] Indeed, Germany's Constitutional Court has been so successful and enjoys such a high prestige that it has served as the main model for imitation in the worldwide movement of expansion of judicial control of constitutionality mentioned above in this article.

Socialist constitutionalism

It was in the former socialist countries in Russia and Eastern Europe that systems of legislative interpretation and legislatures' review of the constitutionality of legislation really abounded. These countries never accepted even in theory the bourgeois constitutional doctrines of the separation of powers and checks and balances. Their constitutions affirmed the sovereignty of the people, and the people were supposed to exercise political power through their representatives in the national assemblies (Supreme Soviet or National People's Congress). There was a 'unitary orientation toward the exercise of state power'.[143] In theory the national assembly of people's deputies exercised supreme political power; the laws they made were a supreme expression of the will of the people and were not subject to judicial restraint.[144] Courts, like other organs of the state, were themselves accountable to the national assembly. In practice, there was a concentration of power in the leaders of the Communist Party, which provided leadership for the national assembly as well as other state organs (including courts) both in theory and in practice. There were no enforceable constitutional limitations on the powers of either the party central committee (or its political bureau) or the national assembly. The 'constitution' of the socialist countries operated more like political-philosophical declarations

[140] See, eg, Philip Baker, 'Theories of Legislation, Codification and Interpretation in China and the West,' paper presented at a symposium on 'Chinese and European Concepts of Law' organized by the Chinese Law Programme, Centre for Contemporary Asian Studies, Chinese University of Hong Kong on 20-25 March 1986.

[141] See Cappelletti (note 20 above) at 195. The relevant provision reads: '[The judicial tribunals] shall refer to the legislative body whenever they find it necessary either to have a statute interpreted or to have a new statute.'

[142] See generally Cappelletti (note 20 above) and Cappelletti (note 23 above).

[143] Rett R Ludwikowski, *Constitution-Making in the Region of Former Soviet Dominance* (Durham: Duke University Press, 1996) at 36 (quoting from Mauro Cappelletti and William Cohen, *Comparative Constitutional Law* (Indianapolis: Bobbs-Merrill, 1979) at 21).

[144] Ibid at 39.

than as legally binding norms'[145] that regulated the actual operation of political forces and determined who would become political leaders of the nation. Hence Ludwikowski doubts whether constitutionalism can be said to exist in these socialist states.[146]

In the socialist legal system, the power to interpret laws was regarded as part of the legislative function and usually vested with the presidium or standing committee of the national assembly. For example, under article 49(b) of the 1936 Constitution and article 121(5) of the 1977 Constitution of the USSR, the Presidium of the Supreme Soviet enjoyed the power to 'interpret the laws of the USSR'.[147] Under article 64(4) of the 1965 Romanian Constitution,[148] the State Committee (the standing committee of the national assembly) may issue binding interpretations of laws. Supreme Courts in these socialist systems were also authorised to issue interpretations of law. For example, the Organic Law of the USSR Supreme Court (1979) empowered the Court to issue binding explanations 'concerning questions of the application of legislation which arise during the consideration of judicial cases'.[149] Similarly, the Law on Court Organization of the Russian Republic (the largest union republic of the former USSR) empowered its Supreme Court 'to give explanatory directives to courts for the application of ... legislation.'[150]

Since the late 1950's, judicial control of the legality of administrative action (as distinguished from the constitutionality of legislative enactments) began to develop in socialist countries such as Yugoslavia, Hungary, Romania and Bulgaria.[151] In the 1960's, some of the Eastern European states also began to consider introducing institutions to monitor the constitutionality of legislation. In 1963, Yugoslavia established a federal constitutional court.[152] In 1965, Romania set up a constitutional committee under its national assembly to report on the constitutionality of bills.[153] In 1984, a similar body was instituted in Hungary.[154] In the Soviet Union, the Presidium of the Supreme Soviet (equivalent to the NPCSC of the PRC) was responsible for control of the constitutionality of laws.[155] Then, in 1986, Poland achieved a breakthrough in establishing a constitutional tribunal — 'a precedent that had been followed by virtually all new European democracies until more recent years'.[156]

145 Ibid at 1.
146 Ibid at 38.
147 For the English text of the relevant provisions, see Aryeh L Unger, *Constitutional Development in the USSR* (London: Methuen, 1981) at 146, 256.
148 As amended in 1975.
149 W E Butler, *Soviet Law* (London: Butterworths, 1983) at 49-50.
150 This was provided for in article 50 of the Law: see Harold J Berman, *Soviet Criminal Law and Procedure* (Cambridge, Mass: Harvard University Press, 2nd ed 1972) at 347.
151 See Ludwikowski (note 143 above) at 40-42.
152 Ibid at 42.
153 See article 53 of the 1965 Constitution. However, the National Assembly itself had the exclusive power to determine the constitutionality of laws: article 43(14) of the 1965 Constitution.
154 Ludwikowski (note 143 above) at 42.
155 See article 121(4) of the 1977 Constitution, re-printed in Unger (note 147 above) at 256.
156 Ludwikowski (note 143 above) at 212.

After the fall of communism in Eastern Europe and Russia, new constitutional arrangements have been established in the former socialist states. Foreign models have been eagerly transplanted in attempts at 'constitutional engineering'. It has been pointed out that constitutional review of legislative and other government acts has become 'the greatest novelty of the post-socialist world'.[157] In the constitutional debates, one of the most controversial issues involved the selection of an appropriate model for the control of constitutionality of state actions.[158]

The PRC system of constitutional and legislative interpretation

In their formative years, the political, constitutional and legal systems of the PRC were much influenced by the relevant theory, practice and models of the Soviet Union.[159] The first constitution of the PRC — the 1954 Constitution — established the National People's Congress (NPC) as the supreme organ of state power, and this was the Chinese equivalent of the Supreme Soviet. In the following discussion, we shall focus on the provisions and practice in mainland China regarding the interpretation of the Constitution and laws.

Under the 1954 Constitution, the NPC was the sole state organ that was authorised to enact laws (*fald*, as distinguished from *faling*, or decrees, which the NPCSC could make). It was also responsible for constitutional amendment and for 'supervising the implementation of the Constitution.'[160] The NPCSC was given the power to interpret laws and to enact decrees.[161]

The 1978 Constitution, which was the third constitution of the PRC, reaffirmed the relevant powers of the NPC and its Standing Committee as stated in the 1954 Constitution.[162] In addition, it provided that the NPCSC had the power to interpret the Constitution itself.[163]

In 1981, the NPCSC adopted a Resolution on Strengthening the Work of Interpretation of Laws.[164] It provides for four types of interpretation:

[157] Ibid at 212.

[158] Ibid at 212. See also Herman Schwartz, 'The New East European Constitutional Courts' (1992) 13 Michigan J Int'l L 741; 'Symposium: Constitutional 'Refolution' in the Ex-Communist World' (1997) 12 Am UJ Int'l L & Pol'y 45.

[159] See generally Albert H Y Chen, *An Introduction to the Legal System of the People's Republic of China* (Singapore: Butterworths Asia, rev ed 1998), chap 3; Albert H Y Chen, 'The Developing Legal System in China' (1983) 13 HKLJ 291.

[160] See articles 22 and 27 of the 1954 Constitution.

[161] Article 31 of the 1954 Constitution.

[162] See articles 22 and 25 of the 1978 Constitution. The second Constitution was the 1975 Constitution which reflected the ultra-leftist ideology of the Cultural Revolution era. The relevant provisions in that Constitution are articles 16-18.

[163] Article 25 of the 1978 Constitution.

[164] For a more detailed discussion, see Chen, *An Introduction* (note 159 above) at 95-102. For the system of interpretation of laws in the People's Republic of China, see generally Zhang Zhiming, 'The System of Interpretation of Laws in China,' in Liang Zhiping (ed), *Falü jieshi wenti* (Problems of Interpretation of Laws) (Beijing: Falü chubanshe, 1998) at 165.

(a) The NPCSC may interpret, or enact decrees (*faling*) on, provisions in laws that need to be further clarified or supplemented. This is known as legislative interpretation.
(b) The Supreme People's Court and the Supreme People's Procuratorate may respectively or jointly interpret points of law arising from the concrete application of the law in the course of their adjudicative and procuratorial work. This is known as judicial interpretation, as both the courts and procuratorates in the PRC are regarded as judicial (*sifa*) organs.
(c) The State Council and its departments may interpret points of law arising from the concrete application of the law in areas other than adjudicative and procuratorial work. This is known as executive (or administrative) interpretation.
(d) The standing committee of a local people's congress may interpret, or enact provisions regarding, provisions in local regulations which need to be further clarified or supplemented, and a local people's government may interpret points of law arising from the concrete application of local regulations.

It is noteworthy that until the fourth (and current) constitution of the PRC was adopted in 1982, the NPCSC had no formal power to make or amend *laws* (as distinguished from decrees). The 1982 Constitution introduced for the first time a system in which the NPC and its Standing Committee share legislative power: The NPC is empowered to enact 'basic laws' relating to criminal and civil matters, state organs and other matters;[165] the NPCSC is empowered to enact and amend laws other than those which fall within the jurisdiction of the NPC itself,[166] and, when the NPC is not in session, to supplement and amend laws that have been enacted by the NPC (subject however to the 'basic principles' in such laws).[167]

As in the previous constitution, the 1982 Constitution confers on the NPCSC the exclusive power to interpret both the Constitution and the laws.[168] At the same time, it extends the power to supervise the implementation of the Constitution to the NPCSC (previously this power belonged only to the NPC itself).[169] Thus the NPCSC may annul administrative regulations (made by the State Council) or local regulations (made by local people's congresses) on the ground that they contravene the Constitution or the laws.[170]

[165] Art 62(3).
[166] Art 67(2).
[167] Art 67(3).
[168] Art 67(1), (4). Decisions of the NPCSC can however be overridden by the NPC itself (art 62(11) of the Constitution). See also the new Law on Legislation (*Lifa fa*) (2000), art 88.
[169] Art 67(1).
[170] Art 67(7),(8).

In the legal history of the PRC, there were only three occasions on which the NPCSC expressly exercised its power of interpreting laws, whereas its power of constitutional interpretation has never been expressly exercised. The three instances of legislative interpretation were the NPCSC's interpretations on the implementation of the PRC Nationality Law in the HKSAR and in the Macau SAR in 1996 and 1998 respectively, and its interpretation of articles 22 (4) and 24(2)(iii) of the Basic Law of the HKSAR in June 1999. In the cases of the first two interpretations, they were more in the nature of supplementary legislation introducing new provisions into the law (rather than 'interpretation' in the sense of clarifying the meaning of particular words or phrases in a legislative text and resolving any ambiguity therein).[171] The third interpretation, however, was intended to achieve and did achieve the purpose of indicating (in relation to each of the two provisions being interpreted by the NPCSC) which of two possible meanings that the relevant text can bear represents the correct interpretation of the text.

One leading writer, who is himself an official of the NPCSC, has suggested that these are not the only instances of legislative interpretation in the PRC. In an article published in 1993 in *Chinese Legal Science* (*Zhongguo faxue*), the leading law journal in mainland China, he and his co-author identified 6 other instances of interpretation by the NPCSC, 5 of which occurred in 1955-56 and the last in 1983.[172] On the first five occasions, the NPCSC made 'decisions' (the documents issued were entitled 'decisions' rather than 'interpretations') that amplified existing provisions in the Constitution or the laws. It should be noted that in the 1950's, the NPCSC did not have any power to make or amend laws, but it had the power to interpret laws. This probably explains why legal norms enacted by the NPCSC to fill the gaps in and thus to supplement existing laws may be regarded as 'interpretations' made by the NPCSC. This broad view of the scope of interpretation was also reflected in the 1981 Resolution on interpretation mentioned above, which regards the making of 'supplementary provisions' as falling within the legitimate sphere of 'interpretation'. It should be noted that even as of 1981, the NPCSC had not yet acquired the formal power to make and amend laws.

Let us turn to the 1983 decision of the NPCSC which has been regarded as the last instance of legislative interpretation before the NPCSC issued the three documents expressly called 'interpretations' in the 1990's as mentioned above. This was the Decision regarding the Exercise by the State Security Organs of the Public Security Organs' Powers of Investigation, Detention, Preparatory Examination and Arrest. The text of the Decision itself consists of

[171] For an English translation of the NPCSC's interpretation on the implementation of the PRC Nationality Law in the HKSAR, see (1997) 27 HKLJ 415.

[172] The official is Cai Dingjian. See Cai Dingjian and Liu Xinghong, 'On Legislative Interpretation' [1993] 6 *Zhongguo faxue* (Chinese Legal Science) 36.

only one sentence, and includes as its annex several relevant provisions of the Constitution and the Law of Criminal Procedure. These provisions vest certain powers in the public security organs, and were enacted before the establishment of the state security organs. What the 1983 Decision did was to provide that the newly established state security organs may also exercise these powers. It can therefore be seen that the Decision is, like its predecessors in the 1950's and its first two successors in the 1990's (i.e. the two interpretations on the Nationality Law), also in the nature of supplementary or amendment legislation.

In the years before the enactment of the new Law on Legislation by the NPC in spring 2000, there was a debate in China about whether legislative interpretation should be abolished and the power of interpreting laws be vested in the courts as part of their adjudicatory function.[173] One view,[174] for example, was that since the NPCSC already enjoys the power of making and amending laws under the 1982 Constitution, its power of interpreting laws is superfluous. If there is a need to clarify the meaning of existing legal provisions or to supplement and elaborate on them, the NPCSC can always resort to legislative amendment. According to this view, there is a distinction between the NPCSC's power to interpret the Constitution and its power to interpret laws. The NPCSC's power of constitutional interpretation is worth retaining, because unlike the case of law (which the NPCSC can amend), the NPCSC does not have the power to amend the Constitution itself. The power of constitutional amendment vests exclusively in the NPC; the plenary session of the NPC is only convened once a year, and there may a need to interpret the Constitution when the NPC is not in session. The case for the retention of the NPCSC's power to interpret laws is weaker, because both the power to amend the law and that to interpret the law are vested in the NPCSC, and the substance of the two powers overlaps to a significant extent.

However, this argument has not been accepted by the authorities, as can be seen in the content of the new Law on Legislation.[175] The Law affirms the NPCSC's power to interpret laws,[176] although the nature of such legislative interpretation has been re-defined (i.e. formulated in a different way from that in the 1981 Resolution on interpretation). Article 42(2) of the Law provides for interpretation of laws by the NPCSC in two kinds of circumstances:

[173] See the following articles: Yuan Jiliang, 'The Defects of the System of Legislative Interpretation' [1994] 4 *Zhongguo faxue* 24; Zhou Zhenxiao, 'Also on Legislative Interpretation' [1995] 1 *Zhongguo faxue* 30; Yuan Jiliang, 'More on the Defects of the System of Legislative Interpretation' [1995] 3 *Zhongguo faxue* 44; Zhang Zhiming, 'A Study of the Problems of the Interpretation of Laws in Contemporary China' [1995] 5 *Zhongguo shehui kexue* (Social Sciences in China) 64.

[174] Chen Sixi, 'On the Pros and Cons of the System of Legislative Interpretation' [1998] 3 *Zhongguo faxue* 63.

[175] The Law was passed by the NPC on 15 March 2000. See generally Li Yahong, 'The Law-making Law: A Solution to the Problems in the Chinese Legislative System?' (2000) 30 HKLJ 120.

[176] Art 42.

(a) where it is necessary to further clarify the concrete meaning of provisions in the law; or
(b) where new circumstances have arisen after the enactment of a law, and it becomes necessary to clarify the basis for the application of the law.

It seems therefore that the range of circumstances to which legislative interpretation is now applicable is narrower than that provided for in the 1981 Resolution, which refers not only to the further clarification of the law but also to the making of supplementary provisions.

The Law on Legislation also introduces for the first time in the legal history of the PRC procedural rules for interpretation of laws by the NPCSC. The state organs which can request an interpretation from the NPCSC are specified.[177] It is provided that the work organ[178] of the standing committee will draft the bill for the interpretation, which will go to the Council of Chairpersons (which decides whether to put it on the agenda of the NPCSC) and then the plenary session of the NPCSC. The Law Committee of the NPC will further consider and, if necessary, amend the bill on the basis of views expressed at the plenary session, and the bill will then be ready for adoption by the NPCSC. When adopted, such interpretations of laws have the same force as the laws themselves.[179]

It may be noted that although the making of interpretations of laws by the NPCSC is a legislative act that is subject to the kind of procedural norms applicable to the legislative process, the provisions in the Law on Legislation on the procedures for interpretation are less elaborate than those applicable to the enactment by the NPCSC of laws themselves. For example, the latter expressly provide[180] that bills for laws should normally be considered at three separate meetings of the NPCSC before they are voted on (consideration by the NPCSC includes more detailed examination of the bill by members of the NPCSC divided into separate groups), and they also provide for the examination of the bills by relevant specialist committees of the NPC. Bills for laws may not only be submitted by relevant state organs but also by ten members of the NPCSC acting jointly.[181] On the other hand, the drafting of bills for interpretation is reserved for the work organ of the NPCSC (normally the Legislative Affairs Commission of the NPCSC).

It has been pointed out above that the NPCSC has never formally and expressly exercised its power of interpreting laws except on three occasions in the 1990's in relation to Hong Kong and Macau. It remains to be seen whether

[177] Art 43.
[178] The work organ concerned is mainly the Legislative Affairs Commission of the NPCSC.
[179] The relevant provisions are articles 44-47.
[180] Articles 27 and 30.
[181] See articles 24, 25.

the formal machinery for legislative interpretation introduced by the new Law on Legislation will result in the power being more actively used in future. The same can be said of the formal machinery introduced by this Law regarding the review of lower level legal norms against norms at higher levels of the hierarchy of legal norms in the Chinese legal order.[182]

As regards such review, the most interesting provision in the new Law is article 90. Under paragraph 1 of this article, relevant state organs may request the NPCSC to review administrative and local regulations on the ground that they contravene the Constitution or the laws. Paragraph 2 goes on to provide that any social organisation, enterprise or citizen may also make a written representation to the NPCSC suggesting that it should review the constitutionality or legality of an administrative or local regulation. Under article 91, representatives of the state organ that enacted the impugned regulation may be requested to attend a hearing.

Although some scholars have produced books and articles on the proper approaches to and principles of statutory construction in mainland China,[183] no authoritative set of rules has yet evolved in this regard. This is understandable given the paucity of acts of legislative interpretation in the PRC legal system, and the fact that most of the judicial interpretations issued by the Supreme People's Court are in effect subsidiary legislation designed to supplement and elaborate on existing laws.[184] A few rudimentary rules of interpretation can now be found in the new Law on Legislation.[185] For example, it is provided that laws will not normally have retrospective effect; where there is inconsistency between two legal norms enacted by the same organ, the one later in time will prevail; where there is inconsistency between a general norm and a specific norm enacted by the same organ, the specific norm will prevail. However, where a new general norm conflicts with an older but more specific norm and it is doubtful how they should be applied, the question shall be determined by the NPCSC. Hence, at least in theory, the NPCSC remains the ultimate interpreter of laws in the PRC.

[182] See articles 78-80, 87-88, 90-91 of the Law. For the position before this Law was enacted, see Chen (note 159 above) 90-92.

[183] See, eg, Liang (note 164 above); Liang Huixing, *Minfa jieshi xue* (The Interpretation of Civil Law) (Beijing: China University of Political Science and Law Press, 1995); Xu Guodong, *Minfa jiben yuanze jieshi* (The Interpretation of the Basic Principles of Civil Law) (Beijing: China University of Political Science and Law Press, 1992); Dong Hao, *Sifa jieshi lun* (On Judicial Interpretation) (Beijing: China University of Political Science and Law Press, 1999).

[184] See Chen (note 159 above) 98-102; Liu Nanping, *Judicial Interpretation in China* (Hong Kong: Sweet and Maxwell, 1997).

[185] Articles 83-85.

CONSTITUTIONAL INTERPRETATION AND THE BASIC LAW IN HONG KONG

Under the doctrine of Parliamentary sovereignty, the Parliament in the United Kingdom enjoys supremacy, and the courts do not have the power to strike down Acts of Parliament as unconstitutional. (However, after the UK's entry to the European Economic Community in 1972, European Communities law enjoys supremacy over any provision in Acts of Parliament that is inconsistent with it, and as a matter of construction of such an Act and the European Communities Act 1972 enacted by Parliament itself, the UK courts will give priority to European Communities law.[186]) Unlike the UK Parliament, the legislative competence of colonial legislatures is limited,[187] and colonial courts as well as the Privy Council sitting as the final appellate court from colonies have the power to declare legislative enactments of colonial legislatures as ultra vires and invalid. Whether the colonial enactment is ultra vires is, of course, a question of the interpretation of the colonial constitution that confers law-making authority on the colonial legislature and defines the scope and limits of its power.

Hong Kong's colonial constitution

Hong Kong's pre-1997 constitution was contained in the Letters Patent issued by the Crown.[188] Before the 1991 amendment of the Letters Patent, although the Hong Kong courts in constitutional and legal theory enjoyed the power to review the constitutionality of local legislation, in practice they never had the opportunity to exercise the power.[189] This was because the Letters Patent were only a crude and rudimentary written constitution for the colony. It did not contain any guarantee of civil liberties and human rights. Nor did it set up any system of division of power as between the colonial government and the metropolitan government. The colonial legislature had extensive law-making powers, but it was (until constitutional reforms began in 1985[190] — the year

[186] See generally Hilaire Barnett, *Constitutional and Administrative Law* (London: Cavendish, 2nd ed 1998), chap 7. For the position after the enactment of the Human Rights Act 1998, see Robert Blackburn, *Towards a Constitutional Bill of Rights for the United Kingdom* (London: Pinter, 1999).

[187] See generally Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens, 1966), chap 8.

[188] See generally Norman Miners, *The Government and Politics of Hong Kong* (Hong Kong: Oxford University Press, 5th ed with updated additions, 1995), chap 5; Peter Wesley-Smith, *Constitutional and Administrative Law* (Hong Kong: Longman Asia, 1995), chap 2.

[189] See generally Peter Wesley-Smith (note 188 above), chap 7; Yash Ghai, *Hong Kong's New Constitutional Order* (Hong Kong: Hong Kong University Press, 2nd ed 1999) at 305-306. There were however a few cases in which the Hong Kong courts were called upon to interpret the provisions of the Letters Patent: see Peter Wesley-Smith, 'Constitutional Interpretation,' in Peter Wesley-Smith (ed), *Hong Kong's Transition* (Hong Kong: Faculty of Law, University of Hong Kong, 1993) at 69-70.

[190] For the history of such constitutional reforms, see Albert H Y Chen, 'From Colony to Special Administrative Region: Hong Kong's Constitutional Journey,' in Raymond Wacks (ed), *The Future of the Law in Hong Kong* (Hong Kong: Oxford University Press, 1989), chap 3.

following the conclusion of the Sino-British Joint Declaration on the future status of Hong Kong) an appointed legislature of official and unofficial members, and bills passed by it would not become law until and unless they received the assent of the Governor appointed by the Crown. In any event, the British Government in London retained unlimited power to disallow and hence invalidate ordinances enacted by the Hong Kong legislature.[191]

In the light of this background, what happened in 1991 can be regarded as the first constitutional revolution in Hong Kong — the second being, of course, the reversion to Chinese rule and the Basic Law becoming into force in 1997 (which I have elsewhere interpreted as a shift in the Grundnorm).[192] In 1991, in an attempt to restore confidence in Hong Kong's future which had been deeply shaken by the Tiananmen affair of 4 June 1989,[193] the Hong Kong Government introduced and the local legislature passed the Hong Kong Bill of Rights Ordinance,[194] which incorporated into the domestic law of Hong Kong the provisions of the International Covenant on Civil and Political Rights (ICCPR) which had already been applied by the UK to Hong Kong on the level of international law since 1976. The Ordinance expressly repealed all pre-existing legislation that was inconsistent with it.[195] At the same time, the Letters Patent were amended to give the ICCPR supremacy over future ordinances of the colonial legislature.[196] As the Court of Appeal explained in 1994:[197]

> The Letters Patent entrench the Bill of Rights by prohibiting any legislative inroad into the International Covenant on Civil and Political Rights as applied to Hong Kong. The Bill is the embodiment of the covenant as applied here. Any legislative inroad into the Bill is therefore unconstitutional, and will be struck down by the courts as the guardians of the constitution.

The Bill of Rights and the corresponding amendment to the Letters Patent inaugurated the era in Hong Kong's legal history of judicial review of legislation

191 See Peter Wesley-Smith (note 188 above) at 189.

192 Albert H Y Chen, 'The Provisional Legislative Council of the SAR' (1997) 27 HKLJ 1 at 9-10; Albert H Y Chen, 'Continuity and Change in the Legal System,' in L C H Chow and Y K Fan (eds), *The Other Hong Kong Report 1998* (Hong Kong: Chinese University Press, 1999), chap 3 at p 30.

193 See Albert H Y Chen, 'The Suppression of China's Democracy Movement and Hong Kong's Future' (1989) 19 HKLJ 283; Albert H Y Chen, 'The Basic Law, the Bill of Rights and the British Citizenship Scheme' (1990) 20 HKLJ 145.

194 See generally Raymond Wacks (ed), *Hong Kong's Bill of Rights* (Hong Kong: Faculty of Law, University of Hong Kong, 1990); Johannes Chan and Yash Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Singapore: Butterworths Asia, 1993); Raymond Wacks (ed), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992); Johannes Chan, *The Annotated Ordinances of Hong Kong: Hong Kong Bill of Rights Ordinance* (Hong Kong: Butterworths, 1999).

195 See section 3 of the Ordinance.

196 The amendment related to article VII of the Letters Patent. See Chan and Ghai (note 194 above) 539-540.

197 *R v Chan Chak Fan* [1994] 3 HKC 145 at 153; cited by the Court of Appeal itself in *Lee Miu-ling v Attorney General* [1996] 1 HKC 124 at 127.

on the basis of constitutional guarantees of human rights. The case law developed by Hong Kong's courts in this new era has been well documented by other scholars,[198] and it will not be necessary to analyse it here. It suffices to emphasize five salient facts in this regard:

(a) The Hong Kong courts had already acquired considerable experience in judicial review of the constitutionality of legislation when the Basic Law came into force in July 1997.

(b) Basic principles in such judicial review, such as the principles of rationality and proportionality as enunciated by the Canadian Supreme Court in the famous *Oakes* case,[199] had already been introduced into Hong Kong case law by the time the Basic Law commenced to operate.

(c) The Hong Kong courts had also, before 1997, adopted the approach to constitutional interpretation advocated by the Privy Council in cases such as *Minister of Home Affairs v Fisher*[200] and *Attorney General of the Gambia v Jobe*,[201] which was to give provisions on rights 'a generous and purposive construction'[202] and to avoid 'the austerity of tabulated legalism'.[203]

(d) The courts were more activist in judicial review in the early history of Bill of Rights litigation, but leaned towards judicial restraint subsequently. To quote my colleague Andrew Byrnes: 'After an initial period of expansive rhetoric, reasonably generous interpretations of the Bill of Rights, and a preparedness on the part of the courts to subject legislative and executive decisions to substantive scrutiny, the trend has been towards a more conservative and parochial approach to interpretation of the Bill of Rights, with an increasing reluctance on the part of the courts to subject the legislature and executive to meaningful scrutiny against the standards of the Bill.'[204]

(e) The legitimacy of judicial review in this era was never queried. It can easily be seen that the kind of 'counter-majoritarian difficulty' that constitutional theorists encounter in the USA and other liberal democratic states was not relevant to colonial Hong Kong. In the early 1990's, Hong Kong was just beginning its journey of democratization,

198 Yash Ghai, 'Sentinels of Liberty or Sheep in Woolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights' (1997) 60 MLR 459; Johannes M M Chan, 'Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence' (1998) 47 ICLQ 306; Andrew Byrnes, 'And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights,' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press, 2000), chap 9.

199 See note 116 above.

200 [1980] AC 319.

201 [1984] AC 689.

202 per Lord Diplock in the *Jobe* case at 700.

203 per Lord Wilberforce in the *Fisher* case at 328.

204 Andrew Byrnes (note 198 above) at 352.

with the first ever direct election on the basis of universal suffrage to a portion of seats in the legislature being introduced in 1991 (the 1985 and 1988 elections were both on the basis of 'functional constituencies' only).[205] Most of the laws that were on the statute books had been enacted by a legislature that consisted solely of appointed members. In these circumstances, the use by the judiciary (though predominantly expatriate)[206] of international and comparative human rights jurisprudence to review the constitutional validity of Hong Kong laws could only be a welcomed phenomenon for the local community.

The Basic Law of the HKSAR

The Basic Law is a more interesting and much richer constitutional instrument[207] than the Letters Patent (including the Letters Patent as amended in 1991). This is because the Basic Law not only provides for human rights guarantee. Like the constitutions of federal states, the Basic Law sets up a system of division of power between the Central People's Government and the HKSAR Government for the purpose of enabling Hong Kong to exercise a 'high degree of autonomy' and to practise the principle of 'Hong Kong people ruling Hong Kong'. In framing the domestic political system of the SAR, the Basic Law has designed intricate mechanisms of power sharing and checks and balances as between the executive and legislative branches of the SAR Government, intending to strike a balance between executive domination of the political system (the Chief Executive being ultimately appointed by and accountable to Beijing) and the executive's accountability to the elected legislature (a principle emphasized in the Joint Declaration), and between democratization and political stability. And in order to inspire confidence in 'one country, two systems' and trust that communism will not be introduced into Hong Kong, the Basic Law provides fairly detailed guidance on the economic and social policies and practices that should be followed in the HKSAR. All these features combine to make the Basic Law a rich and interesting document, and to expand vastly the range of subject matters over which the power of judicial review may potentially be exercised by the courts of the HKSAR.[208] As we see above, constitutional interpretation and constitutional judicial review are inextricably linked. The expanding scope of judicial review in the HKSAR would naturally

[205] On the developing political and electoral system in Hong Kong, see Lo Shiu-hing, *The Politics of Democratization in Hong Kong* (Basingstoke: Macmillan Press, 1997); Alvin Y So, *Hong Kong's Embattled Democracy* (Baltimore: John Hopkins University Press, 1999).

[206] See generally Peter Wesley-Smith, 'The Judiciary,' in Mark S Gaylord and Harold Traver (eds), *Introduction to the Hong Kong Criminal Justice System* (Hong Kong: Hong Kong University Press, 1994), chap 9; Ghai (note 189 above), chap. 8.

[207] See generally Peter Wesley-Smith and Albert H Y Chen (eds), *The Basic Law and Hong Kong's Future* (Singapore: Butterworths, 1988); Ghai (note 189 above).

[208] This point has also been made in Ghai (note 189 above) at 306; and Chen, 'Continuity and Change' (note 192 above) at 45-46.

entail increasing demands on the practice of the art of constitutional interpretation.

We have in a previous section of this article examined the various modalities of constitutional argument. There is no reason why the full array of such armaments cannot be employed in battles of constitutional litigation in the HKSAR.[209] Under the Basic Law, Hong Kong continues to practise the common law system, and these constitutional modalities have been developed in the common law tradition, particularly the American tradition which has the longest experience with constitutional litigation. Indeed, one would not be going too far even if one suggests that these modalities of constitutional argument are universal and transcend the gap between the common law and civil law families of legal systems.[210]

Would, however, the use of originalism as an approach to constitutional interpretation be particularly problematic in the case of the HKSAR, given the fact that the Basic Law was largely drafted and adopted by mainland Chinese persons despite the participation of some Hong Kong members of the drafting committee and of the National People's Congress?[211] If the original intent were to be given effect to, does this mean that the Basic Law would have to be interpreted in accordance with mainland Chinese thinking, assumptions, values and interest? If this is the case, will the common law tradition, values and principles in Hong Kong be gradually eroded?

The force of originalism as one of the legitimate and most important modes of constitutional interpretation need not and cannot be denied. The real question is how originalism is to be applied. As discussed above, originalism does not necessarily mean giving effect to the subjective intent of the framers and adopters of the constitution. How the constitutional text was understood by members of the community at the time of enactment of the constitution can be an even more important consideration. In the case of the Basic Law, the relevant members of the community would include the people of Hong Kong. Hence how they understood the wording and promise of the Basic Law in the late 1980's and 1990 (the Basic Law was adopted in 1990 by the NPC after several years of drafting and consultation work) does matter. And since much of the content of the Basic Law simply reproduces the text of Sino-British Joint Declaration, how the people of Hong Kong understood the wording and promise of the Joint Declaration in 1984 also matters.

[209] See generally Daniel R Fung and Peter H H Wong, 'Constitutional Law and Litigation in the First Year of the Hong Kong SAR: Past Trends and Future Developments' (1998) 28 HKLJ 336.

[210] See generally Winfried Brugger, 'Legal Interpretation, Schools of Jurisprudence and Anthropology: Some Remarks From a German Point of View' (1994) 42 Am J Comp L 395; Donald P Kommers, 'German Constitutionalism: A Prolegomenon' (1991) 40 Emory L J 837.

[211] See Emily Lau, 'The Early History of the Drafting Process,' in Wesley-Smith and Chen (note 207 above), chap 6.

The conceptual distinction mentioned above between 'substantive intent' and 'interpretive intent' is also instructive in the interpretation of the Basic Law. It may well be the case that the mainland Chinese framers and adopters of the Basic Law did not intend that their own ideas regarding the substantive solutions to concrete problems of interpretation of the Basic Law should be binding in future on the courts of the HKSAR. Their interpretive intent might be such that they intended to let the people of Hong Kong, including their lawyers and judges, resolve these problems themselves in accordance with canons of interpretation generally accepted in Hong Kong and with the customs and values of the people of Hong Kong. Hence it can be seen that interpreting the Basic Law in the light of liberal and democratic values and common law modes of thinking is not necessarily inconsistent with originalism.

We have also seen earlier in this article that constitutional interpretation and judicial review must be informed by an underlying political theory concerning the nature and purpose of the constitution. In the case of the Basic Law, the relevant theory is undoubtedly the theory of 'one country, two systems', which confers on the people of Hong Kong a high degree of autonomy which they exercise subject to the sovereignty of the PRC. The theory would also affirm the maintenance of the existing economic and social systems of Hong Kong, the protection of human rights, and the gradual democratization of the HKSAR as envisaged in the Basic Law itself.[212] The priority of this theory as the underlying principle that should guide the interpretation of the Basic Law is emphasized by Professor Yash Ghai in his major treatise on *Hong Kong's New Constitutional Order*:[213]

> An approach that is suitable to the interpretation of the Basic Law must suggest ways to:
> 1. balance the sovereignty of the PRC with the autonomy of the HKSAR;
> 2. bring coherence to the various powers and functions of the HKSAR which appear at the moment as so many particular instances; and
> 3. allow for the capacity to respond to changing conditions and circumstances in Hong Kong.[214]

Professor Ghai points out that the philosophy which underlies the Basic Law[215] is the theory of 'one country, two systems', and the 'essence' of the system to be practised in Hong Kong is

> a high degree of autonomy, a democratic political order (at least in the fullness of time), independent judicial powers, rights and freedoms of

[212] See articles 45 and 68 of the Basic Law.
[213] Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 2nd ed 1999).
[214] Ibid at 221.

> residents, the capitalist system and the Hong Kong way of life, the common law, and an autonomous civil society.[216]

He stresses that to enable the Hong Kong system to survive,

> sovereignty cannot be given the broad general meaning that it sometimes carries (particularly in the Chinese view) for that would effectively negate the separate system of the HKSAR and erode its autonomy. A way must therefore be found to limit the operations of Chinese sovereignty in the region.[217]

As can be seen from this passage, there exists an internal tension in the theory of 'one country, two systems' which will not be easy to resolve, and the resolution of which necessarily involves a political choice. Where is the boundary between Hong Kong autonomy and Chinese sovereignty to be drawn? We can think of a spectrum with the two poles representing the most extreme version of Hong Kong's autonomy (close to independence) and that of Chinese sovereignty (with Hong Kong's autonomy very closely circumscribed by mainland Chinese interests and policies). President Jiang Zemin has once used the phrase 'the well water should not interfere with the river water' to characterize the mutual respect and accommodation which the balance between sovereignty and autonomy will require.[218] Post-1997 events in Hong Kong such as the continued commemoration of the events of 4 June 1989, the activities of Falungong practitioners in Hong Kong and speech relating to Taiwanese independence (or at least the 'two states' theory) in the Hong Kong media can be interpreted as tests of this balance in the early life of the HKSAR.

What about the tests which the courts of the HKSAR have endured? They are represented by the series of cases involving the constitutionality of the Provisional Legislative Council, the immigration control scheme on the migration of children of Hong Kong permanent residents from the mainland to Hong Kong, and the national flag desecration law. It remains for this final part of the article to reflect on this drama in the light of the comparative materials in the earlier parts of the article.

The drama of constitutional litigation

It has been pointed out above that Hong Kong courts had been exercising the power of judicial review of legislation on human rights grounds before the 1997 transition, and that the Basic Law apparently expands the scope of matters that

[215] Ibid at 222.
[216] Ibid at 223.
[217] Ibid at 223-4.
[218] The phrase was first used on 11 July 1989 when Jiang met with leading members of the Drafting Committee and Consultative Committee for the Basic Law. See Richard Y C Wong and Joseph Y S Cheng (eds), *The Other Hong Kong Report 1990* (Hong Kong: Chinese University Press, 1990) x, 54.

can become subjects of judicial review. However, nowhere in the Basic Law can any express provision be found empowering the Hong Kong courts to strike down any legislation. Given the fact that judicial review of legislation is unknown in the mainland Chinese system, and in the light of the fact that the NPCSC, in exercise of its power under article 160 of the Basic Law to declare which of Hong Kong's pre-existing laws contravene the Basic Law and cannot therefore survive the 1997 transition, had in its February 1997 Decision on the Treatment of the Laws Previously in Force in Hong Kong[219] struck out sections 2(3), 3 and 4 of the Hong Kong Bill of Rights Ordinance,[220] it is by no means clear that — if the 'substantive intent' of the Chinese draftsmen of the Basic Law were to count — the Basic Law intended to confer on the HKSAR courts the power to review legislation.[221]

I have elsewhere argued, on the basis of the text of the Basic Law and the kind of reasoning used in *Marbury v Madison*, that the judicial review power of the post-1997 Hong Kong courts can be legally justified.[222] Whether it is justified as a matter of political theory is of course a different question. As the Hong Kong polity democratizes, the 'counter-majoritarian difficulty' will arise in Hong Kong as it has done so in the USA and Canada, particularly if the higher levels of the Hong Kong judiciary continue to be dominated by expatriate judges socially distanced from the Hong Kong Chinese community. Even as it stands, the Hong Kong legislature represents a broad spectrum of local opinion and includes politicians with strong grassroot support, and it can be argued that the courts should show appropriate deference to and respect for the judgment of the legislature, particularly on matters of social policy. On the other hand, given the fear of many members of the public in Hong Kong that Chinese sovereignty over Hong Kong may lead to a deterioration in human rights, democracy and the Rule of Law, a robust judiciary with the power to check upon not only the executive but also the legislature may be conducive to confidence building and hence receive public support.

Ma Wai-kwan

In the light of these considerations, the Court of Appeal's decision in *HKSAR v Ma Wai-kwan*[223] on 29 July 1997 may be regarded as the *Marbury v*

219 For the English translation of this Decision, see (1997) 27 HKLJ 419.

220 Section 2(3) provides guidance on the interpretation of the Ordinance. Section 3 repeals pre-existing legislation that is inconsistent with the Ordinance. Section 4 provides for the interpretation of subsequent legislation.

221 Some mainland Chinese scholars have argued that HKSAR courts have no lawful power to strike down SAR laws on the ground that they are inconsistent with the Basic Law. See, eg, Xu Chongde and Fu Siming, 'The Development of Case Law under the Framework of the Hong Kong Basic Law,' paper (in Chinese) presented at conference on the 10th anniversary of the Hong Kong Basic Law organized by the School of Law, Renmin University of China in Beijing on 1-2 April 2000. See also the discussion in Ghai (note 189 above) at 306.

222 See Albert H Y Chen, 'The Basic Law and the Protection of Property Rights' (1993) 23 HKLJ 31 at 50-55.

223 [1997] 2 HKC 315.

Madison of the constitutional history of the HKSAR. The case involved a challenge to the legality or constitutionality of the establishment of the Provisional Legislative Council (PLC), and the court considered the jurisdictional issue of whether it could review the validity of an act of the sovereign authority such as the NPC or the NPCSC, as well as the substantive issue of whether the establishment of the PLC was consistent with the provisions and purposes of the Basic Law. On a separate point of constitutional law, the court accepted the Solicitor General's submission that since Hong Kong courts had before 1997 enjoyed the power to review the constitutionality of local legislation (on the basis of the Letters Patent), and article 19 of the Basic Law enables them to retain their former jurisdiction, the courts of the HKSAR have the 'power to determine the constitutionality of SAR made laws vis-à-vis the Basic Law'.[224]

Although this part of the judgment is obiter, it dealt with the most crucial issue in the new constitutional order of Hong Kong, and the proposition it upheld has never been challenged by any party in subsequent cases. In this way, *Ma Wai-kwan* paved the way for the unanimous decisions[225] of the Court of First Instance, the Court of Appeal and the Court of Final Appeal to strike down that part of the Immigration (Amendment) (No 2) Ordinance 1997 which denied the right of abode in the HKSAR to mainland-born illegitimate children whose fathers were Hong Kong permanent residents as being inconsistent with the Basic Law as interpreted in the light of the ICCPR and the Hong Kong Bill of Rights. It should be noted that this particular limb of the controversial decision of the Court of Final Appeal (CFA) on 29 January 1999 has not in any way been affected by the NPCSC's interpretation in June 1999.[226]

The Court of Appeal in *Ma Wai-kwan* decided on a second proposition, and the rejection of that proposition by the CFA in *Na Ka-ling*[227] 18 months later was to provoke the great constitutional crisis of February 1999 leading to the CFA's infamous 'clarification' of its January judgment[228] (this first crisis was soon followed by the second constitutional crisis of May 1999 prompted by the decision of the HKSAR Government to refer Basic Law provisions on the right of abode to the NPCSC for interpretation). The proposition, originally submitted to the Court of Appeal by the Solicitor General, is that as a local or

224 [1997] 2 HKC 315 at 351.

225 *Cheung Lai Wah v Director of Immigration* [1997] 3 HKC 64 (CFI), [1998] 1 HKC 617 (CA), [1998] 2 HKC 382 (CA), *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 (CFA).

226 For the bilingual text of this interpretation, see The Government of the Hong Kong Special Administrative Region Gazette Extraordinary, Legal Supplement No 2, 28 June 1999, p 1577 (LN 167 of 1999).

227 [1999] 1 HKLRD 315.

228 [1999] 1 HKLRD 577. See generally Albert H Y Chen, 'Constitutional Crisis in Hong Kong: Congressional Supremacy and Judicial Review' (1999) 3 The International Lawyer 1025; Albert H Y Chen, 'Hong Kong's Legal System in Transition: 1997-99,' in Wang Gungwu and John Wong (eds), *Hong Kong in China: The Challenges of Transition* (Singapore: Times Academic Press, 1999), chap 12, at pp 305-308; Yash Ghai, 'A Play in Two Acts: Reflections on the Theatre of the Law' (1999) 29 HKLJ 5.

regional court, the Hong Kong court has no jurisdiction to challenge or overturn any act of a sovereign authority such as the NPC or the NPCSC.

I believe it is unfortunate that the Court of Appeal accepted this proposition (hereinafter called Proposition 2) in its judgment — not because I think the substance of the proposition is wrong, but because

(a) it is not necessary to decide this major constitutional point in this case;
(b) the reasons cited by the court to support this proposition are of dubious validity;
(c) the proposition proved to be so controversial[229] that the CFA in *Ng Ka-ling* felt it necessary to reject it explicitly, and the direct and rather extreme way in which the CFA did this proved to be disastrous.

There are at least two reasons why it was not necessary for the Court of Appeal to decide the point in *Ma Wai-kwan*. First, as would be clear from reading the judgment of each of the three judges of the court, the court clearly held that given the fact that the 'through train' scenario for the transition of the legislature in 1997 had failed to materialise, the establishment of the PLC was not only not inconsistent with the Basic Law but in fact facilitated or contributed positively to the implementation of the Basic Law. If this is the case, then the question of the jurisdiction of the Hong Kong court to review acts of the central authority does not arise — the question would only arise if the Hong Kong court thinks that such an act is contrary to the Basic Law. Here, the situation is structurally similar to that encountered by the CFA in *HKSAR v Ng Kung-siu* (the flag desecration case).[230] As the CFA decided that the flag desecration law was not inconsistent with the freedom of expression guaranteed by the Basic Law, it was not necessary for it to consider whether the Hong Kong court has the jurisdiction to review and invalidate a Hong Kong law that has reproduced the provisions of and is designed to implement a national law which the NPCSC has decided to apply to the HKSAR.[231]

Secondly, it should be stressed that no act of the NPC or the NPCSC was being questioned in this case. The PLC was established by neither of these two organs; it was established instead by the Preparatory Committee for the SAR in pursuance of the 1990 Decision (passed on the same day as the passage of the Basic Law) of the NPC on the Method for the Formation of the First Government and the First Legislative Council of the HKSAR. The real question was whether the Preparatory Committee in establishing the PLC had exceeded the scope of its permissible powers under this NPC Decision of 1990.

[229] See, eg, the critique by Yash Ghai, 'Dark Day for our Rights,' South China Morning Post, 30 July 1997.
[230] [1999] 1 HKLRD 907.
[231] One of the issues in this case was the constitutional validity of a provision in the National Flag and National Emblem Ordinance, which was enacted by the SAR legislature to implement the PRC Law on the National Flag applicable to Hong Kong under article 18 of the Basic Law.

I have tried to demonstrate in another article[232] that this should be regarded as an issue which is not justiciable before a Hong Kong court.

I have also argued in that article that the doctrine of justiciability provides the true explanation of why a Hong Kong court before 1997 could not question the validity of the UK government's appointment of a particular person as Governor of Hong Kong, which is an example used by the Court of Appeal to support its reasoning behind Proposition 2. The court's reasoning was that since before 1997, the Hong Kong court could not question the validity of an act of the sovereign (such as an Act of Parliament or the appointment of the Governor), and since article 19 of the Basic Law maintains but does not enlarge the pre-existing jurisdiction of the Hong Kong courts, the courts of the HKSAR cannot question the validity of an act of the NPC or its Standing Committee.

I have suggested in that article that the true reason why pre-1997 Hong Kong courts could not review the relevant acts is not that cited by the Court of Appeal. Acts of Parliament could not be reviewed because of the doctrine of Parliamentary supremacy (so even the UK courts cannot review the Acts). Certain acts of the Crown such as appointment of the Governor could not be reviewed because they belong to those prerogative acts that are not justiciable before the courts (and not even the UK courts can review such acts). But after the landmark decision of the House of Lords in the *Council of Civil Service Unions* case (1985),[233] it has been established that not all prerogative acts are non-justiciable.[234]

However, the fact that the reasoning used by the Court of Appeal to reach Proposition 2 is dubious does not necessarily mean that Proposition 2 is wrong as a matter of substance. In another article[235] commenting on that part of the CFA's decision in *Na Ka-ling* which deals with the power of the Hong Kong courts to review whether acts of the NPC or NPCSC are consistent with the Basic Law, I have tried to argue that Proposition 2 is indeed basically correct, subject to some qualifications which I introduced in that article. The reason why Proposition 2 is basically correct has to do with the supremacy of the NPC under Chinese constitutional law, which is analogous to the supremacy of Parliament under British constitutional law. This also explains why the mainland Chinese side reacted so sharply when the CFA in *Na Ka-ling* flatly rejected Proposition 2 and emphatically affirmed its opposite.

[232] Albert H Y Chen, 'The Concept of Justiciability and the Jurisdiction of the Hong Kong Courts' (1997) 27 HKLJ 387.

[233] [1985] AC 374.

[234] According to this case, whether a prerogative act is subject to judicial review depends on whether the subject matter concerned is justiciable. A subject matter is not justiciable if it is one which courts are ill-equipped to handle (eg because it involves information not easily made available as evidence in the judicial process, or a complex weighing of policy considerations which are more suitably dealt with by the executive branch of government.) Thus most prerogative acts relating to the conduct of external relations are non-justiciable.

[235] Chen, 'Constitutional Crisis' (note 228 above). An earlier version of this article appears in Chan (note 136 above) at 73-96.

Ng Ka-ling

In *Ng Ka-ling*, the CFA also dealt with the interpretation and application of articles 158, 24 and 22 of the Basic Law. I have elsewhere[236] commented on these aspects of the decision in detail and criticized the court's interpretation of articles 158 and 22. Here I would like to reflect on certain other aspects of the decision, particularly in the light of the overseas jurisprudence discussed earlier in this article. Two questions are worth pondering:

(a) Was it necessary — for the purpose of reaching a decision in this case — for the CFA to invalidate the link between the 'certificate of entitlement' and 'one-way exit permit' established by the immigration legislation for mainland migrants who come to Hong Kong to exercise their right of abode?
(b) Is the right of abode such a 'core right' that restrictions thereof deserve the most rigorous scrutiny normally applicable to the most basic human rights?

As far as question (a) is concerned, I would suggest that the answer is in the negative. This is because the CFA's decision on the 'retroactivity point' was sufficient to dispose of the case.[237] All the appellants in the litigation in the *Ng Ka-ling* case had arrived in Hong Kong before the relevant immigration control scheme[238] was enacted on 9 July 1997. The CFA's ruling that the scheme could not operate retrospectively to limit the right of abode of persons entitled to that right who had already entered Hong Kong before the scheme was enacted into law would probably be sufficient ground for the court to allow the appeal and dispose of the case.

One wonders whether the CFA's decision in *Ng Ka-ling* (or even the Court of Appeal's decision in *Ma Wai-kwan* as far as Proposition 2 is concerned) would have been the same had its attention been drawn to the *Ashwander* rules developed by the American Supreme Court, which provide as follows:[239]

(1) The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it, nor will the Court formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

[236] Albert H Y Chen, 'The Court of Final Appeal's Ruling in the "Illegal Migrant" Children Case: A Critical Commentary on the Application of Article 158 of the Basic Law,' in Chan (note 136 above) at 113-141.
[237] This was the third of the five issues set out in the Chief Justice's judgment at [1999] 1 HKLRD 336.
[238] As embodied in the Immigration (Amendment) (No 3) Ordinance 1997.
[239] See note 69 above.

(2) The Court will not decide a constitutional question properly presented by the record if some other ground upon which the case may be disposed of is also present.
(3) If a statute is challenged on constitutional grounds, the Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.

As Kommers and Finn point out:[240]

> These rules are really self-imposed canons of restraint. Out of respect for the principle of separated powers, they exhort the Supreme Court to presume the constitutionality of legislative acts, to reach constitutional issues last not first, and never to anticipate a constitutional question in advance of the necessity of deciding it. The rules reflect the seriousness of any judicial decision that interprets the Constitution since there is no way to get around a constitutional decision unless — short of noncompliance — the Constitution is amended or the Supreme Court changes its mind.

In the case of Hong Kong, we should perhaps add to the last sentence, 'or unless the NPCSC intervenes and makes an interpretation'!

We now turn to question (b) above. The CFA held that the right of abode is a 'core right' because 'without it and the right to enter which is an essential element, the rights and freedoms guaranteed can hardly be enjoyed, including in particular the right to vote and to stand for election'.[241] And the court should adopt a 'generous approach' in interpreting the Basic Law so as to protect this core right and to 'scrutinize with the greatest care any submission that Article 22(4) encroaches on that core right.'[242]

With respect, it may be doubted whether the right of abode — which in the context of the case is largely the right to migrate from the mainland for settlement in Hong Kong — should be elevated to a level as high as well-established basic human rights such as the right not to be tortured, the right of freedom from arbitrary arrest and detention, the right to a fair trial, or the right to freedom of speech and association. The right of persons born and settled in mainland China to migrate to Hong Kong cannot be regarded as a core human right unless one makes the assumption that basic human rights do not exist in mainland China and hence they have to come to Hong Kong if they are to enjoy these human rights.

It is widely recognised in various parts of the world that population migration and population growth are major matters of public or social policy.

[240] Kommers and Finn (note 22 above) at 34.
[241] [1999] 1 HKLRD 346.
[242] Ibid.

On such matters, there is a reasonable case for judicial restraint and deference to the judgment of the legislature. In *Ng Ka-ling*, the judgment was apparently the unanimous view of both the executive and legislative authorities on both the Hong Kong side and mainland side, and that was the judgment that the CFA attempted to challenge and but ultimately failed to overturn.

Chan Kam-nga

It was not the CFA's decision in *Ng Ka-ling*, but its decision in *Chan Kam-nga*[243] on the same day, that proved to be its undoing and ultimately prompted the reference to the NPCSC. The question in *Chan Kam-nga* was how to interpret the ambiguous text of article 24(2)(iii) of the Basic Law: Does it confer the right of abode on all Chinese citizens who are children of current Hong Kong permanent residents ('the liberal interpretation'), or does it limit the right to those born of parents who at the time of the children's birth had already satisfied the requirements of article 24(2)(i) or (ii) (which means they were effectively Hong Kong permanent residents at the time of the children's birth) ('the narrow interpretation')? The interpretation can go either way; the judge in the Court of First Instance had chosen the liberal interpretation, and the three judges in the Court of Appeal had chosen the narrow interpretation.

In *Ng Ka-ling*, the CFA had said that while 'a generous interpretation' should be given to the rights of residents provided for in chapter 3 of the Basic Law, 'when interpreting the provisions that define the class of Hong Kong residents, including in particular the class of permanent residents (as opposed to the constitutional guarantees of their rights and freedoms), the courts should simply consider the language in the light of any ascertainable purpose and the context.'[244]

In *Chan Kam-nga*, the CFA chose the liberal interpretation of article 24(2)(iii), because this is its 'natural meaning', and because '[t]hat natural meaning gives effect to an obvious purpose of Article 24'[245] — the purpose of family re-union, and the protection of the family is provided for in the ICCPR. With respect, it should be pointed out that the meaning of article 24(2)(iii) must be recognised as ambiguous rather than obvious, for otherwise the Court of Appeal would not have adopted a construction opposite to that which the CFA inclined towards. As regards family re-union, there is no reason why family re-union cannot be achieved by the migration of the parents from Hong Kong to the mainland to join their children rather than by the reverse movement. Indeed, having given birth to their children in the mainland and then migrating to Hong Kong for settlement,[246] the parents themselves had chosen

[243] [1999] 1 HKLRD 304.
[244] [1999] 1 HKLRD 340.
[245] [1999] 1 HKLRD 310.
[246] This refers to one kind of situation. Another situation equally covered by the case is where a man has migrated from the mainland to Hong Kong for less than 7 years and his wife in the mainland gives birth to a child there.

to be separated from their own children, and they can hardly complain that their human rights or their children's are being violated.[247]

But the most crucial point about *Chan Kam-nga* is that the CFA's attention was never brought to the principle of presumption of the constitutionality of legislation, which as mentioned above has been recognised as a legitimate principle in judicial review of legislation worthy of adoption in a wide range of cases (albeit not those involving alleged violation of basic human rights and fundamental freedoms) in other common law jurisdictions.

After examining the American jurisprudence of judicial review, three prominent South African scholars of constitutional law concluded that there are certain lessons to be drawn for the future interpretation of the new South African constitution. The first guideline they formulated is as follows:

> *If in doubt, defer to legislative determinations.* The first prong of a system of judicial review must engage the problem of uncertainty in the text. If there is any uncertainty in the meaning of a constitutional provision, as there inevitably will be, however diligent the framers are and however detailed the language is, the courts must defer to the legislature.[248]

One wonders whether the decision in *Chan Kam-nga* would have been different, and the subsequent travail avoided, if the jurisprudence of the presumption of the constitutionality of legislation had been seriously addressed by the learned judges in this crucial case.

CONCLUSION

But history is made up of contingent events. Things might have been very different if just one more point had been considered in one case, and there are an infinite number of routes which history could have taken but has not taken. And we are the products of history and constrained by it. But we are not prisoners of history, nor its victims. By reflecting upon our past, we can learn from it. We learn from both our achievements and our failures, but more from our failures. There is also much to learn from others who have gone before us in the same field, as this article attempts to demonstrate. Hong Kong is a latecomer to the world of constitutional interpretation and judicial review, and she has only started the journey of her constitutional history as an autonomous part of China. The child is learning to walk; she stumbles, she falls, she rises again; she staggers, and she then moves forward with greater confidence and more hope. So hope abides; and learning never ends.

[247] This point had in fact been made by Chief Judge Chan and Vice-President Nazareth when they gave their judgment in this case in the Court of Appeal ([1998] 1 HKLRD 752).

[248] Davis (note 46 above) at 19 (emphasis in original).