
Themes and arguments

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Origin and importance of the Court of Final Appeal

This book is a study of the Court of Final Appeal (CFA) of the Hong Kong Special Administrative Region of the People's Republic of China (HKSAR). It traces the first 13 years of the work of its judges and their jurisprudence. The CFA came into being on the transfer of Hong Kong's sovereignty to China on 1 July 1997, marking the end of British rule of more than a century. It marked both a departure and a continuation, with continuation the more significant role. Its primary role is the preservation of the rule of law, widely perceived to be the most important innovation and legacy of British rule,¹ promoting both its market economy and human rights.² Its unique characteristics as a judicial body in China are the membership of foreign judges, the application of the common law, and total separation from the Mainland Chinese judicial system – the elements of continuity.

In some respects, the CFA is regarded as the successor to the Privy Council (PC), whose jurisdiction over Hong Kong ended just as that of the CFA began. But the challenges it faced are significantly different from those of the PC. The PC was the court of the imperial authority, embedded securely within the traditions of the common law, its legitimacy challenged in neither Britain nor Hong Kong. The new sovereign, China,

¹ See e.g. Steve Tsang, *A Modern History of Hong Kong* (Hong Kong: Hong Kong University Press, 2004); Steve Tsang (ed.), *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong: Hong Kong University Press, 2001).

² The assumption that Hong Kong's robust legal system was responsible for its economic system is somewhat exaggerated; many other factors contributed (e.g. cheap labour, forms of patronage, preferential position of key companies, low tax, lack of regulation of competition); see Yash Ghai, 'The rule of law and capitalism: reflections on the Basic Law' in R. Wacks (ed.), *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong: University of Hong Kong Press, 1993) 342–66.

did not understand the common law or respect the independence of the judiciary. China had agreed to an institution such as the CFA to maintain confidence of the local and international community as investors in Hong Kong, before it fully understood the implications of the CFA. Negotiations on the details of the CFA, its composition and jurisdiction, were among the most difficult and protracted of any provisions of the Sino-British Joint Declaration and the drafting of the Basic Law (BL).³ In the process, the composition as well as the jurisdiction of the CFA was modified. So unlike the PC, the CFA is not ultimately the final court for Hong Kong because in important ways, the CFA is subject to the overriding powers of the Standing Committee of the National People's Congress (NPCSC, the supreme state authority of China). Any account of the CFA has to take into consideration the impact of the NPCSC, even sometimes of its silences.

Hong Kong's legal system, based on the common law, often appears to be impenetrable to the Chinese authorities, who are not tuned in to the niceties of Western procedures and are more at home with the more flexible standards of Chinese law. The two legal systems have very different traditions, styles of interpretation, and capacity for accommodation to political pressures. The presence of a strong legal system in Hong Kong and the absence of a fully democratic system tend to convert contentious political, and sometimes social, matters into legal issues, but China prefers legal issues to be treated as political matters in which it has the upper hand. Courts thus often find themselves in the front line in the defence of the BL.

The scheme of the BL of the HKSAR, Hong Kong's constitution enacted by the National People's Congress (NPC), essentially subordinates Hong Kong's executive and legislature to the Mainland's authorities (see Chapter 2). The CFA's mandate to protect Hong Kong's autonomy and its people's rights is thus likely to bring the judiciary into conflict with other public authorities in the HKSAR. It is also likely to bring it into conflict with the Central Authorities, especially if common law assumptions of judicial review extend to the entire scheme of the BL. The law is deliberated on by the courts in an open process. Unlike the executive, the courts

³ See M. Lee and W. Szeto, *The Basic Law: Some Basic Flaws* (Hong Kong: the Authors, 1988); Jonathan Dimbleby, *The Last Governor: Chris Patten and the Handover of Hong Kong* (London: Little, Brown and Co., 1997); and Chapters 5 (Young and Da Roza) and 8 (Thomas) in this volume.

cannot fudge issues; they have to decide disputes that are presented to them, and they have to do so in public and provide reasons and justifications for their decisions. Unlike secret political negotiations, awkward issues cannot so easily be ducked or fudged in a court (as is well illustrated by the sequence of events that led to the rights of abode cases, discussed in several chapters).

Perhaps the fundamental difficulty in the exercise of the jurisdiction of the CFA lies in differing concepts of the role of the courts on the Mainland and Hong Kong. In Hong Kong, courts are separate from and independent of the executive and the legislature. It is their responsibility to review the validity of legislation and executive acts. A judgment adverse to the government is not regarded as a challenge to its legitimacy or the right to rule. In China, courts follow Chinese Communist Party directives in appropriate cases and cannot refuse to enforce a law because it might be considered to contravene the constitution. There seems to be insufficient appreciation among Mainland officials and lawyers as to the bounds within which Hong Kong courts have to make decisions. The courts have little choice about what is litigated and are compelled by the generally accepted notions of the responsibilities of common law judges to adjudicate disputes brought before them in accordance with the law, albeit that the law is frequently flexible.

In its first 13 years, the CFA had to decide weighty matters such as the legality of the Provisional Legislative Council, the relationship of the BL to the People's Republic of China (PRC) Constitution, the scope of the application of Mainland legislation in Hong Kong, the validity of rules governing disciplinary and other aspects of public service, the right of abode in Hong Kong of certain Mainland residents, the fate of thousands of refugees from Vietnam, complex issues of land law, and the regime for the protection of rights and freedoms of Hong Kong residents. These issues have raised central questions about the autonomy of the HKSAR and the competence of the Central Authorities of the PRC over Hong Kong.

They have also major consequences for the social and economic future of Hong Kong, particularly the decisions on the right of abode, which affect the flow of migrants from the Mainland, the right to public housing, and the reach of the defamation law. More specifically, the litigation on the BL has raised questions about the place of law and legality in the mediation of the relationship between Hong Kong and the Mainland, and the role of the courts in defining or sustaining that relationship. These are momentous matters in a largely uncharted territory. Consequently, it is not

surprising that the constitutional role of the courts, especially the CFA, has given rise to great controversy.⁴

But the CFA's jurisdiction goes beyond the constitution, covering all areas of the law. The foundation of its jurisdiction, in addition to the BL, is the common law, but not the common law as at the time of the resumption of Chinese sovereignty because it is freed from the English common law. Instead, it is free to choose from the common law of any particular country. This has given the CFA enormous flexibility in moulding the common law to the changing circumstances of Hong Kong. The membership of judges from other jurisdictions has enabled the CFA to understand developments in other common law countries and to assess their relevance for Hong Kong. This factor is equally, if not more, important in constitutional law, a field where Hong Kong had little experience, especially as regards human rights.

In the first 13 years of the resumption of sovereignty, Andrew Li was the Chief Justice (CJ) of Hong Kong and in that capacity presided over the CFA. The CFA must have five judges to constitute the bench. But the number of permanent judges (including the CJ) has not exceeded four (perhaps as a matter of policy) so that the CFA always had to sit with a non-permanent judge (NPJ) – in the majority of the cases with an overseas judge and occasionally with one overseas and one local NPJ. The procedures for the appointment and dismissal of judges are broadly in line with generally accepted standards (although in recent times the fairness with which the process is followed has been criticised, both for undue dominance of the influence of the executive and the lack of any public explanation as to the reasons and merits of overseas judges; see Chapter 9).

Li's role as CJ and as chair of the Judicial Officers Recommendation Commission was crucial to the fashioning of the HKSAR's legal and judicial system and ethos. Li had a brilliant legal and political career but had no judicial experience. His experience was largely in commercial and business law – and in what passed for politics in those days (as member of the Governor's Council). But these factors turned out to be no handicap, and his experience of the political and administrative system of Hong Kong was a great asset in dealing with the government and the wider

⁴ The first major controversy, about the right of abode of Mainland children with links to Hong Kong, is documented at length in J. Chan, H.L. Fu, and Y. Ghai (eds.), *Hong Kong's Constitutional Debate: Conflict Over Interpretation* (Hong Kong: Hong Kong University Press, 2001).

public. He played a decisive role in the appointment of the other CFA judges, particularly the foreign judges. In that sense, as well as in other ways, for the first 13 years, the CFA was very much Li's court. But Li as CJ developed a very collegial style of administration and decision making. He assembled a remarkable bench of outstanding talent and openness, local as well as foreign. There are three categories of judges of the CFA: permanent (PJ), non-permanent overseas (NPJ overseas), and non-permanent local (NPJ local) – contrary to the provision in the Joint Declaration (JD) and BL, which provided for only the first two categories (see Chapter 11).

This book examines how the Court discharged its responsibilities in its first 13 years and how a very special set of judges put their imprint on the court and its jurisprudence.

Note on contributors

Contributors to this volume have achieved distinction in several fields and bring to their chapters the benefits of considerable scholarship and practical experience of autonomy systems, leading to differences in perspectives. Some of them have been deeply involved in the operation of autonomy systems: Sir Anthony Mason, the longest serving foreign judge; Michael Thomas, attorney general of Hong Kong during the formative years when the Sino-British Joint Declaration took shape and the long process for its implementation began; Albert Chen, the longest serving Hong Kong member of the Committee of the BL; Paulo Cardinal, the senior legal adviser to the Macau Legislative Assembly; William Waung, a former member of Hong Kong's Court of First Instance; Josef Marko, who served on the Constitutional Court (CC) of Bosnia-Herzegovina (BiH) as a foreign judge in which he played a critical role in the jurisprudence of that country; and Ghai, who has advised in a number of countries on autonomy or federal arrangements. Others have litigated or submitted legal opinions in litigation on the BL: Johannes Chan, Thomas, P. Y. Lo, Mark Daly, Ghai, Oliver Jones, Simon Young, and Antonio Da Roza. Among the authors are also the leading scholars of the BL and Hong Kong's, as well as China's, legal systems: Chen, Ghai, Jill Cottrell, Jones, Rick Glofcheski, Young, Mason, Gary Meggitt, Xiaonan Yang, and Malcolm Merry. Many authorities bring comparative perspectives to bear on the BL: Ghai, Marko, Cardinal, Cottrell, Jorge Godinho, and Yang. And most have, in different ways, contributed to education about the BL.

emphasising its imperial origins and with the judiciary for the most part drawn from English courts. He notes a change with the independence of colonies because whereas in the early days its role was to establish a uniform understanding of the common law, after independence it made attempts to relate the law to the circumstances of the country from which the appeal had emanated (although in Chapter 13, Mason finds little evidence of this approach in respect of Hong Kong). And if in the earlier phase there might have been a tendency to favour imperial interests, later it asserted its role as the supreme court of the country concerned – and found a role for certain judges from the commonwealth. Jones notes that it is not easy to compare the PC with the CFA because one has a history of more than 150 years and the other just 13 (at the time of writing). One had appellate functions in respect of numerous jurisdictions, the other of only one. And the constitutional frameworks with which the two operated are fundamentally different (making public law a major component of the CFA's docket in comparison with the PC). Nevertheless, the history and decisions of the PC covering numerous jurisdictions might well be of interest to scholars of emerging regional and international tribunals. And a number of authors in this volume do compare the approach of the PC and the CFA, their workload, accessibility to court, principal areas of appeal, and styles of decisions.

Given that the justification for inclusion of foreign judges on the CFA was maintaining confidence in the quality and independence of Hong Kong's judiciary, it was perhaps more than coincidence that some of the foreign judges in its early years were members of the PC, such as Lords Hoffmann, Cooke, and Woolf. The diversity of the home jurisdictions of judges in the CFA is broader, although restricted to 'white' jurisdictions, with the curious exclusion of Canada. If the PC was a multijurisdictional court, the CFA is single jurisdictional but with judges from multiple jurisdictions. And unlike the PC, the CFA now looks to the precedents from several common law countries (allowing for a more flexible approach and openness to wider sources of ideas).

If the role of the PC was to preserve the interests of the empire, that of the CFA might be said to preserve the powers and authority of the HKSAR. That brings us to another point of (imperial) comparison. The CFA is not the final appeal court in the way the PC was. In one sense, the NPCSC is more like the PC – external to Hong Kong, which has no role in its composition, more concerned with the Mainland interests than Hong Kong's, able to overrule the CFA – but with the important distinction that the PC applied the common law, NPCSC Chinese law. And if the

origins of the PC lay in a citizen's right to appeal a decision to the sovereign, outside the regular court system, might one regard the NPC as the supreme authority in similar although not identical terms? And if territorial courts might have been influenced by the possibility of an appeal to the PC, how far is the CFA influenced by the presence of the NPCSC?

Although Jones focuses on the history of the PC, Young and Da Roza (Chapter 6) compare the functions, work, and impact of the CFA with those of the PC, with a wealth of statistical analyses. They say (and several other contributors say) that the intention of structuring the CFA to maintain the authority and reassurance provided by the PC to investors has been amply achieved. They imply that the CFA has been even more efficient and successful than the PC. Its caseload is considerably heavier than that of the PC (in respect of Hong Kong cases). It turns a case around more speedily than the PC used to; it deals with a much larger variety of legal issues, particularly in public law; it is more innovative and willing to look at common law developments in many more jurisdictions than the PC; and its location in Hong Kong has greatly increased access to the final court. One could also say, as Young and Da Rosa imply, that the CFA has generally played a greater role in moulding people's thinking about justice.

Of course, one must not read these necessarily as criticisms of the PC. Many of the differences are the result of the changed context of Hong Kong. For most of the period of the jurisdiction of the PC, Hong Kong had no constitution to speak of, no entrenched guarantees of human rights, and no delicate balance between the colony or autonomy and the sovereign that the CFA has to manage. Most importantly, the PC did not have to play the role that has fallen to the CFA: bringing into operation and sustaining a constitutional order, shaping it by interpretations of the founding document, the BL. That is what final courts do in most democratic states.

*Standing Committee of the National People's Congress and
the Court of Final Appeal*

This discussion appropriately brings us to the comparison between the NPCSC and the CFA. Comparisons can be drawn with regard to their function of interpretation, where their jurisdiction, style, and authority differ. Several chapters touch on these matters and the relationship between them, but the most systematic analysis is provided by Yang (Chapter 3). Her chapter is important to understand the role, influence,

an increasing trend.⁸⁷ The increased workload of the court illustrates an improved access to final justice (something that would have been unachievable had the court been located elsewhere, such as Beijing) and, given the slight decreasing trend in the workload of the Court of Appeal in the same period, highlights the confidence litigants have had in the CFA.

Since its establishment, the procedure of the court has undergone few changes. One major change introduced after three years of operation was the 'leapfrog' procedure, which again was the subject of an amendment proposed but rejected when the CFA Bill was debated. Although the procedure has only been used twice, its adoption signalled an evolution along the path of other common law supreme courts (which have a similar procedure) and away from the previous PC appeal channel (which did not).

One issue that was raised during the debates and still lingers is the justification for civil appeals as of right in the tradition of the PC. During the LegCo debates, the proposal to delete this avenue of appeal was rejected in order not to reduce access to the court. However, since the establishment of the court, there has been an increasing amount of grumbling from both Chief Justices and other members of the court that the procedure takes away valuable judicial resources which could be better spent on more worthy issues.⁸⁸ It appears likely that the executive will respond favourably to these pleas for reform in the coming years.

⁸⁷ Chapter 6 (Young and Da Roza) in this volume.

⁸⁸ See Chapter 10 (Young, Da Roza, and Ghai) in this volume.

Final appeals then and now

SIMON N. M. YOUNG AND ANTONIO DA ROZA

Introduction

Before and after 1997, Hong Kong's economic success can be attributed to its proximity to China and its robust common law legal system. When the Judicial Committee of the Privy Council (PC) sat as Hong Kong's highest appellate court, it kept Hong Kong connected to the rest of the common law world while ensuring that appeals would be decided by high-calibre judges who were truly independent of the executive branch.

The importance of the legal system to Hong Kong's economic success meant that at its inception, there were concerns about the future quality of the Court of Final Appeal (CFA): Would the local judiciary be capable of taking up the duties of a court of final adjudication? Would the CFA be accorded the same stature that its predecessor had? Would its independence (and the independence of the judiciary in Hong Kong by extension) be vigorously defended and sufficiently safeguarded? The doubts those questions represented before and at the time of the handover can be contrasted with the recognition the Hong Kong judiciary has achieved since 1997.¹

One way to understand the impact of the CFA in Hong Kong is to compare the current system of final appeals with the previous one. This chapter examines how the conditions of final justice in Hong Kong have shifted and developed in the 20-year period that spans the last decade of appeals to the PC and the first decade of appeals to the CFA. It uses quantitative data gathered from a statistical study of the jurisprudence of the two courts to provide a comprehensive description of change and development.

¹ See e.g. the Political and Economic Risk Consultancy business survey (which rated Hong Kong's judicial system as the best in Asia), Agence France-Presse, 'Hong Kong Has Best Judicial System in Asia: Business Survey' (15 September 2008), accessible at www.abs-cbnnews.com/world/09/15/08/hong-kong-has-best-judicial-system-asia-business-survey.

Leave filter

The requirement of obtaining leave serves as an important bar by which unmeritorious cases are filtered out, ensuring that the court's resources are not wasted. There are many appeal routes from lower courts to the final appellate court, whether PC or CFA. Not all the data in respect of these routes are readily available;⁴ however, when applications for leave are made to the final appellate court itself, the study was able to collect this data on the basis of reported decisions and other accessible data. This enabled a comparison of leave applications being made to the PC and CFA.

The normal procedure for obtaining leave before the PC was broadly similar to obtaining leave in the CFA – an oral hearing before the leave committee consisting of three judges.

The data that follow show that there was a sharp rise in leave applications made to the final court after 1997 and that the CFA granted leave in a significantly smaller proportion of cases than the PC.

Granting leave

From Figure 6.2, it can be seen that the total number of reported leave decisions before the CFA (386) was significantly higher than the number of leave decisions before the PC (149). The most likely reason for this difference was the significantly greater expense of seeking leave from the PC, which required not only Hong Kong legal services but also payment for a London solicitor's firm (known as the London agent) and (typically) English barrister instructed to argue the leave petition.

The proportion of leave applications granted after hearing at the CFA (22 per cent) was slightly lower than that of the PC (26 per cent). The proportion becomes even lower when the cases dismissed by way of the Rule 7 procedure are taken into account.

Rule 7 procedure

One rule under the Hong Kong CFA Rules that has no exact parallel in the Judicial Committee Rules (as they were when applicable to Hong Kong),⁵

⁴ Data for all leave applications are not readily available; of particular note are cases that are withdrawn by consent and leave granted at the CFA by way of an oral decision without a printed or published judgment. Data made available by the Hong Kong judiciary for the period 2001 to 2008 in respect of the CFA reflect broadly consistent trends.

⁵ Rule 52 of The Judicial Committee (General Appellate Jurisdiction) Rules Order 1982, S.I. 1982 No. 1676 empowered the Registrar to refuse to receive a petition on the ground that it disclosed no reasonable cause of appeal, was frivolous, or contained scandalous matter

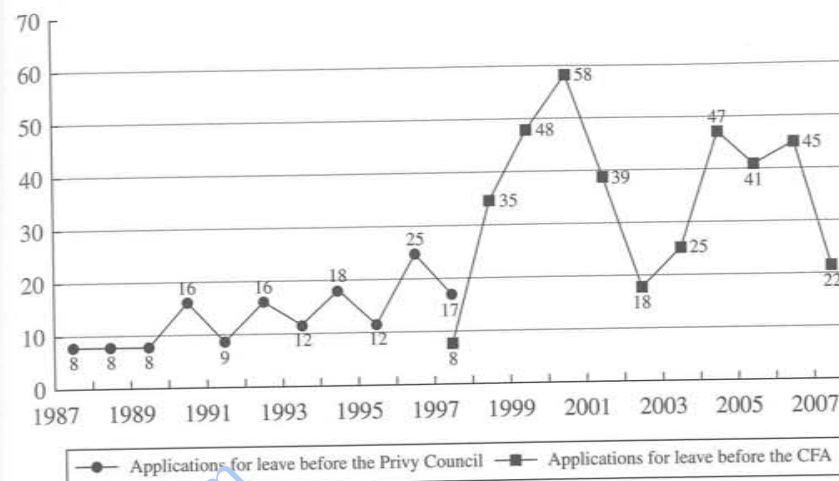


Figure 6.2 Number of leave applications by year for the Privy Council (PC) versus the Court of Final Appeal.

is Rule 7 ('Application that discloses no reasonable grounds, is frivolous or fails to comply with Rules').⁶

Rule 7 allows applications for leave to be dismissed by the CFA Appeal Committee without holding an oral hearing. Although the rule existed in 1997, the procedure was not used until 2001, presumably in response to the rising number of applications. Although Rule 7 decisions are generally not made public, data on the procedure can be found in the Judiciary's Annual Reports.

In the years 2001 to 2008, the CFA dismissed a total of 675 leave applications, representing some 80 per cent of the total number for that period. Rule 7 accounted for 471 of those dismissals or 70 per cent of all dismissed leave applications. Criminal cases tended to be dismissed more often than civil ones. In the first 10-year period, the CFA dismissed

or failed to comply with the provisions of Rule 3. However, Rule 52 also provided that the Registrar's decision could be appealed by way of motion to the Judicial Committee. It appears that an oral hearing would normally be held for such appeals; see *Ogilvy v. Minister of Legal Affairs (St Lucia)* [2002] UKPC 7; *Ramdeen v. The State (Trinidad and Tobago)* [2000] UKPC 10.

⁶ Hong Kong Court of Final Appeal Rules (Cap. 484, sub. leg. A), Rule 7. Unlike Rule 52 of the Judicial Committee (General Appellate Jurisdiction), Rules Order 1982, *ibid.*, Rule 7 only empowers the Registrar to summons the applicant to show cause before the Appeal Committee why the application should not be dismissed. Rule 7(2) empowers the Appeal Committee to dismiss the leave application without an oral hearing but may direct such a hearing if the justice of the case requires it.

a total of 723 applications for leave under the Rule 7 and normal leave procedures combined. The percentage of leave applications granted by the CFA (taking into account the Rule 7 procedure) was 10.5 per cent from 1997 to 2007. This is compared with the 26 per cent rate of granting leave in the PC. Hence, although the CFA was dealing with a much larger number of applications for leave than the PC, it granted leave in a proportionately fewer number of cases.

Increasingly more litigants wanting to be heard

One noteworthy trend is the significant rise in leave being sought from the CFA (see Figure 6.2). As noted earlier, the increasing trend of leave sought from the CFA shows a slight upward trend from the years 1987 to 1997 in the PC and then a significantly steeper upward trend in the CFA for the years 1997 to 2000. In 2001, with the deployment of the Rule 7 procedure, the number of leave hearings at the CFA fell for a period of two years and then rose again for two years before levelling out, with a steadily growing number of leave applications dismissed under Rule 7.⁷

The increasing trend of cases before the CFA, however, is not reflected in the caseload trends of the lower courts and must be attributed to the characteristics of the CFA itself.⁸ The reasons for the rise in applications to the CFA are not entirely clear. It may reflect an increasing dissatisfaction with decisions obtained in the courts below. But it may also reflect a greater awareness on the part of unrepresented litigants of their right to apply for leave and the ease by which that right can be exercised.⁹

Implications of the Rule 7 practice

With the steep and steady increase in applications for leave, there appears to be a belief in a higher level of access to final justice on the part of applicants than previously existed in respect of the PC despite the proportionately lower number of applications being granted by the CFA (Table 6.1).

⁷ The trend is reflected in the judiciary's statistics on leave file disposal from 2001 to 2008, which includes leave granted after hearing (150), applications dismissed after hearing or by Rule 7 (675), and cases that were withdrawn by consent (20).

⁸ Our data on cases filed in the High Court from 2000 to 2008 do not show a similar increasing trend in the caseload.

⁹ Data provided by the Acting Registrar of the CFA in July 2009 shows that in 2008, 65 per cent of all applications disposed of by Rule 7 were made by unrepresented persons.

Table 6.1 *Disposition of leave applications in the Court of Final Appeal, 1997–2007*

Year	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Allowed (%)	25	11	21	10	10	13	6	14	13	10	6
Dismissed after hearing (%)	75	89	79	90	44	16	24	44	27	30	10
Dismissed by Rule 7 (%)	0	0	0	0	46	71	70	42	60	60	84

Table 6.2 *Disposition of leave files in the Court of Final Appeal, 2001–2008*

Year	2001	2002	2003	2004	2005	2006	2007	2008
Files granted leave after hearing (%)	12	16	16	26	20	14	19	18
Applications dismissed after hearing (%)	53	15	22	32	23	27	21	12
Applications dismissed by Rule 7 or Rule 7 summons (%)	30	68	62	41	54	56	58	67
Withdrawn (%)	5	1	0	1	3	3	2	3

Table 6.1 shows the CFA decides more than half of its leave applications on the papers without a hearing. This is largely consistent with the statistics provided by the judiciary in respect of disposal of leave files from 2001 to 2008 (Table 6.2).

The increasing reliance on the Rule 7 procedure for dismissing leave applications raises the issue of whether or not greater transparency is required for the procedure. At present, neither reasons are given nor is an oral hearing normally held before applications are decided.¹⁰ In 2003, the Appeal Committee of the CFA found the Rule 7 procedure to be constitutionally compliant with the right to a fair hearing under the Hong Kong Bill of Rights.¹¹ The availability of oral and public hearings in the lower courts, the further opportunity to 'show cause', albeit in the form of

¹⁰ In the years 2001 to 2008, only eight per cent of all Rule 7 matters led to an oral hearing before the Appeal Committee. Forty-four per cent of these oral hearings resulted in leave being granted.

¹¹ *Chow Shun Yung v. Wei Pih and Another* (2003) 6 HKCFAR 299 (CFA AC).

Table 6.3 *Disposition of leave applications in the Privy Council, 1987–1997*

Year	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
Allowed (%)	25	13	63	38	22	19	25	17	17	24	29
Dismissed (%)	75	87	37	62	78	81	75	83	83	76	71

written submissions, and the procedure to allow members of the public to access file documents were the main reasons for finding compliance with the Bill of Rights.¹²

Greater consistency in the rate of granting leave

Despite its lower rate of granting leave, the CFA has managed to achieve greater consistency in its rate of granting leave. The standard deviation of the CFA's rate of allowing leave applications (see Table 6.1) from 1997 to 2007 was 5.5, and, from 2001 to 2007, when the Rule 7 procedure was applied, it was only 3.1. In comparison, the standard deviation of the PC's rate of allowing leave applications (Table 6.3) from 1987 to 1997 was 13.2.

The greater consistency in determining leave applications is most likely attributable to the CFA's concentration of decision making in a small handful of permanent judges (PJs). In the PC, the composition of the leave committees was largely varied. From 1987 to 1997, the PC assembled 79 distinct panels to decide leave petitions from Hong Kong. Lords Lloyd, Steyn, and Hoffmann sat together most frequently, hearing eight petitions for leave together.

By contrast, because of the smaller pool of PJs at the CFA, there were only 17 distinct panels deciding leave applications in the first decade. From 1997 to 2000, 66 of 108 leave hearings before the CFA were heard by the panel consisting of Litton, Ching, and Bokhary PJJ, and from 2000 to 2007, 158 leave hearings were heard by the panel consisting of Bokhary, Chan, and Ribeiro PJJ. The panel consisting of the Chief Justice and Bokhary and Chan PJJ heard 53 leave hearings in this period.

Achieving greater efficiency

Despite a substantial and increasing number of applications for leave, the CFA has maintained a high level of efficiency in its decision-making role.

¹² *Ibid.*, [38]–[39].

Table 6.4 *Waiting time from the issuance of notice to hearing by the Court of Final Appeal, 1997–2007*

	Overall average (2000–07)	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007*
Civil cases (days)	43.4	N/A	N/A	44	32	32	52	46	45	62	38	40
Criminal cases (days)	41.6	N/A	N/A	37	40	36	40	46	44	49	46	37

* Counting the whole year.

N/A = not applicable.

Table 6.5 *Number of days of hearing before the Privy Council (for Hong Kong cases), 1987–1997*

	1 day	2 days	3 days	4 days	5 days	7 days	9 days	11 days	12 days
Cases	45	34	18	6	1	1	1	1	1

The CFA's efficiency exceeds that seen with the Hong Kong appeals to the PC; however, one should bear in mind in making this comparison that the PC heard appeals from many jurisdictions and had a correspondingly greater judicial capacity to hear such appeals.

Table 6.4 shows how well the CFA has maintained an average waiting time of less than 1.5 months from issuance of notice to the actual hearing date.¹³

As for the time spent hearing appeals, the modal number of hearing days for both final courts was one day, but for the PC, two days was almost as likely (Tables 6.5 and 6.6).

By contrast, more than half of the CFA substantive appeals were heard within one day hearings, leading to a lower average: the average time for hearing at the PC being 2.19 days, but before the CFA, the average was 1.91 days.

¹³ Unfortunately, corresponding data for the PC were not available.

In the final analysis, the BL jurisprudence of the CFA as recounted in this chapter is thus a product of the contingent history of litigation in the HKSAR. The CFA could have done more or less or done it differently if more or fewer or different cases came before it. We can only look at what it has actually done, and in the authors' necessarily subjective opinion, the work it has done is good work. It has served us well as the custodian of the constitution of the HKSAR. It deserves our salute. And given the nature of the challenges inherent in the enterprise of 'one country, two systems', it deserves our understanding were it to encounter stormy waters again under the captaincy of the new Chief Justice.

Human rights

SIMON N. M. YOUNG

Introduction

The human rights cases comprised only 17 per cent of the Court of Final Appeal (CFA) judgments but probably attracted the greatest attention in the local community. In the years following the 1989 violence in Tiananmen Square, there was extreme concern with the protection of rights and freedoms in Hong Kong after China resumed sovereignty in 1997. People watched closely to see if they could rely upon the courts to safeguard them from rights encroachments by the Hong Kong and Mainland governments. The CFA's first rights judgment in 1999 sent the inspiring message that rights were to be interpreted generously and purposively and courts were duty bound to strike down unconstitutional laws and actions.¹ However, the Standing Committee of the National People's Congress (NPCSC)'s reversal of part of that judgment in the same year sank public confidence and gave rise to a crisis over the future of rule of law in Hong Kong.² Fortunately, it was not until 2010 that the NPCSC would come to reinterpret Hong Kong's constitution again in a non-human rights case,³ and in the interval the CFA by and large restored public confidence in the courts' independence and ability to protect human rights. This chapter analyses how that was done.

The human rights judgments can be analysed for both their jurisprudential importance and what they impart about decision-making and judgment writing in the CFA. The chapter begins with a study of the

¹ *Ng Ka Ling v. Director of Immigration* (1999) 2 HKCFAR 4, 25–8.

² The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted by the Standing Committee of the Ninth National People's Congress at its Tenth Session on 26 June 1999 ('1999 Interpretation').

³ See *FG Hemisphere Associates LLC v. Democratic Republic of the Congo* [2011] 4 HKC 151 and [2011] 5 HKC 395 (CFA) and commentary in (2011) 41(2) *HKLJ*.

court's decision-making and identifies characteristics in the rights judgments as a whole. This is followed by a critical review of decisions in different areas of human rights. Rights arguments most commonly arose in migration and criminal law cases and also found their way into disputes between private parties. The chapter concludes with a summary of the approach of the CFA to rights cases in its first 13 years and thereafter.

Decision-making

A quantitative study of the jurisprudence reveals a number of important characteristics of the court and its approach to decision making.⁴ The CFA decided 55 human rights cases during the tenure of Li CJ. The court spent a relatively large proportion of its time hearing and writing judgments in these cases (25 per cent, respectively). About 45 per cent of the cases related to criminal law, 40 per cent were administrative law cases, and the remaining cases involved litigation between private parties. Twenty per cent of all cases related to immigration and asylum law. These figures indicate the special attention the court paid to rights cases as it developed a foundational body of case law that was generally protective of individual rights.

Rights and claimants

Although a large number of different rights and freedoms were considered, four rights were given relatively more attention: right of abode, presumption of innocence, arbitrary detention and imprisonment (including review for legal certainty), and right to a fair hearing. In one case consideration was given to the right to adequate housing under the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵

Rights claimants had diverse backgrounds. Criminal defendants and immigration applicants together made up more than half of the claimants. Corporate and company director litigants were behind 10 cases, political activists were involved in four, medical and legal professionals also brought four, and four cases involved serving or former civil servants.

⁴ This updates the earlier analysis published in Simon N. M. Young, 'Constitutional Rights in Hong Kong's Court of Final Appeal' (2011) 27 *Chinese (Taiwan) Yearbook of International Law and Affairs* 67.

⁵ See *Ho Choi Wan v. Hong Kong Housing Authority* (2005) 8 HKCFAR 628, [65]–[68].

Just under half (47 per cent) of all rights claimants were legally aided. In one unusual case, a government entity brought a successful human rights challenge to legislation.⁶

International influence

A significant degree of international influence went into the rights jurisprudence. It came in three ways. First there was the overseas non-permanent judge (NPJ) sitting on every rights case. Of all the NPJs, Sir Anthony Mason had the most significant impact. He sat on 64 per cent of all rights case and authored (or co-authored) the majority opinion in 37 per cent of those cases. The other overseas NPJs, including Lord Millett, Lord Scott, and Lord Woolf, sat on fewer than 10 per cent of the rights cases and contributed in total no more than 13 per cent of all the majority judgments. Overall, the overseas NPJs contributed 36 per cent of all the majority decisions. By contrast, local NPJs had very little involvement in the rights cases.

Second, there is the international influence of counsel. About 31 per cent of all rights cases had at least one party represented by an English Queen's Counsel (QC), who was admitted to practice on an ad hoc basis. Eighty-four per cent of all rights cases had a local Senior Counsel (SC) leading junior counsel for at least one party. Most of these SCs received their legal education outside of Hong Kong and may have practiced law in jurisdictions such as the United Kingdom, Australia, New Zealand, Canada, and Zimbabwe.

Finally, international influence is evident in the citation of authorities in judgments. The CFA has been quite receptive to international and comparative law influences. Although Hong Kong and UK authorities are still cited most frequently, about a quarter of all citations were to non-Hong Kong and non-UK authorities. Similarly, around 21 per cent of the citations to legislative authorities were to non-Hong Kong and non-UK authorities. Secondary literature was cited much less frequently; on average, a single item of secondary literature was cited for every nine cases cited.

⁶ See *The Official Receiver and Trustee in Bankruptcy of Chan Wing Hing v. Chan Wing Hing* (2006) 9 HKCFAR 545.

⁷ Sir Anthony Mason NPJ wrote (or contributed to) 13 majority opinions, Lord Scott NPJ two, Sir Gerard Brennan NPJ two, Lord Millett NPJ two, and Lord Nicholls NPJ one. Lord Hoffmann NPJ wrote only a separate concurring judgment in one case.

Judges and their decisions

Li CJ demonstrated leadership in the development of the rights jurisprudence. He presided over 82 per cent of all the rights cases and delivered the majority opinion in 42 per cent of those cases. He wrote separate concurring reasons in two other cases and never dissented. Bokhary PJ was the most prolific of all the judges, having sat on all the rights cases less one.⁸ He authored (or co-authored) the majority opinion in 14 cases, a concurring opinion in 17 cases, and a dissenting opinion in six cases. Ribeiro PJ sat on 76 per cent of all the rights cases and contributed 12 majority opinions and one dissenting opinion. Chan PJ sat on 85 per cent of all the rights cases and contributed eight majority opinions and one separate concurring opinion.

Obtaining leave to appeal from the CFA Appeal Committee was no guarantee that the court was likely to accept the rights argument in the final appeal. The court accepted the rights argument in fewer than half (49 per cent) of the cases. In cases involving the government, the government party won 55 per cent of the time.⁹ Not surprisingly, of the core team of judges hearing rights cases, the judge who accepted the rights argument most often was Bokhary PJ (56 per cent) followed by Sir Anthony Mason NPJ (54 per cent), Ribeiro PJ (52 per cent), Li CJ (51 per cent), and Chan PJ (47 per cent). Decision making was very much consensus driven, and the court usually spoke with one voice. Only Bokhary and Ribeiro PJ dissented, in a total of seven cases.

The data tend to confirm that the CFA is more liberal than the court below, which is typically the Court of Appeal. In cases in which the CFA accepted the rights argument, there was a substantially greater tendency (63 per cent vs. 37 per cent) for the court below to be overturned than to be affirmed. Similarly, in cases in which the CFA rejected the rights argument, it tended to affirm the lower court more often than to overturn that court (57 per cent vs. 43 per cent).

Efficiency

The CFA also handled the rights cases efficiently. On average, each case was heard over 2.6 days and decided about 32 days after the hearing of

⁸ Bokhary PJ did not sit in the case concerned with the challenge to the common law offence of murder; see *Lau Cheong v. HKSAR* (2002) 5 HKCFAR 415.

⁹ These data exclude the unusual case in which the government party sought the constitutional relief (see *Chan Wing Hing*). The government tended to win more in criminal cases (57 per cent) than in noncriminal cases (52 per cent).

the appeal. Judgments were reasonable in length: majority judgments on average ran about 8200 words, and all judgments on average ran about 11,000 words.¹⁰

Jurisprudence

Migration

As an international city sharing a border with Mainland China, it is no surprise that there would be an abundant amount of cases on rights in migration. In general, the court was protective of these rights, notwithstanding strong government interests that weighed in the balance. The cases can be divided into three categories relating to the right of abode, the right of residents to enter and leave Hong Kong, and the right of nonresidents not to be returned to face torture.

Right of abode

The right of abode judgments, from 1999 to 2003, were the most important rights decisions in that period. The right was described as a 'core right' because without it, the full array of rights and freedoms guaranteed in the Basic Law (BL) could not be enjoyed.¹¹ The decisions demonstrated the CFA's approach to the interpretation of rights in the BL and how that approach evolved after the NPCSC's 1999 Interpretation.

In the landmark companion cases of *Ng Ka Ling* and *Chan Kam Nga*, the court held that the text of rights provisions should be interpreted purposively, generously, and in context.¹² The cases concerned Mainland-born children who sought to enjoy their right of abode on the basis that one of their parents was a Hong Kong permanent resident (category 3 in Article 24).¹³ *Chan Kam Nga* (but not *Ng Ka Ling*) articulated the purpose

¹⁰ Decisions of 8200 and 11,000 words will generally run about 18 and 24 pages, respectively, of the authorized law reporter, the *Hong Kong Court of Final Appeal Reports* (Thomson Sweet and Maxwell).

¹¹ *Ng Ka Ling*, 34. ¹² *Ibid.*, 28–9; *Chan Kam Nga*, 89–90.

¹³ Only permanent residents enjoy the right of abode. Article 24 provides for six categories of permanent residents of the HKSAR. The cases considered the first four categories: '(1) Chinese citizens born in Hong Kong before or after the establishment of the [HKSAR]; (2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the [HKSAR]; (3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2); (4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the [HKSAR]'

of the right as that of 'securing the unity of the family'.¹⁴ The reasoning in *Ng Ka Ling* was animated not so much by a purposive approach but clearly by a generous approach to rights interpretation 'in order to give to Hong Kong residents the full measure of fundamental rights and freedoms so constitutionally guaranteed'.¹⁵ The generous approach was used to reject the argument that another BL provision (Article 22(4)) supplied the legal basis for the impugned scheme requiring Mainland children who had the right of abode to obtain a one-way permit from Mainland authorities before they could enjoy the right.¹⁶ Article 22(4), when read narrowly to exclude Hong Kong permanent residents, did not qualify the rights in Article 24.¹⁷ Absent any constitutional basis, the scheme had to be struck down.¹⁸

The court also struck down a provision that limited a child who was born out of wedlock from enjoying the right of abode when the father was a Hong Kong permanent resident.¹⁹ A contextual approach was applied, the context being the International Covenant on Civil and Political Rights (ICCPR), which remained in force by virtue of Article 39. The ICCPR principles of equality (i.e. treating illegitimate and legitimate children the same) and protection of the family were used to inform a generous interpretation, notwithstanding a reservation to the ICCPR precluding the direct application of those rights to immigration legislation.²⁰ In *Chan Kam Nga*, the court struck down the requirement that one of the parents be a Hong Kong permanent resident at the time of the child's birth.²¹ Bokhary PJ, writing for the court, found that to admit such a restriction was contrary to both the natural meaning of the words in category (3) and the purpose of the right.²²

The constitutional crisis that followed these two decisions is notorious.²³ In 2011, a WikiLeaks of a 2007 interview with Bokhary PJ revealed that the CFA judges had considered resigning after the 1999

¹⁴ *Chan Kam Nga*, 89. ¹⁵ *Ng Ka Ling*, 29.

¹⁶ The salient part of Article 22 reads: 'For entry into the [HKSAR], people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region'.

¹⁷ *Ng Ka Ling*, 34–5. ¹⁸ *Ibid.*, 36–7. ¹⁹ *Ibid.*, 40–3. ²⁰ *Ibid.*, 41–2.

²¹ *Chan Kam Nga*, 92–3. ²² *Ibid.*, 89–90.

²³ See generally Chapters 1 (Ghai), 2 (Ghai), and 14 (Chen and Lo) in this volume; Johannes M. M. Chan, H. L. Fu, and Yash Ghai (eds.), *Hong Kong's Constitutional Debate: Conflict Over Interpretation* (Hong Kong: Hong Kong University Press, 2000).

Interpretation.²⁴ Instead they chose to stay because it was thought that this was the better way to serve the rule of law in Hong Kong.²⁵ Choosing to remain as judges meant that they had to show their respect for the NPCSC's interpretative authority and to legitimize it as part of Hong Kong's unique system of rule of law. This they did unanimously in *Lau Kong Yung*, in which the Interpretation was applied to reach opposite results from those in *Ng Ka Ling*.²⁶ More interesting is how the crisis also changed the approach of the judges in subsequent right of abode cases. It has been said that they became more pragmatic and conscious of the possible consequences of their decisions.²⁷ There were at least three signs of this change.

First, the court was less enthusiastic about giving a generous interpretation and more attuned to the textual meaning. This was seen in the two cases of *Tam Nga Yin* and *Chong Fung Yuen*, judgments rendered together in July 2001.²⁸ In *Tam Nga Yin*, the majority held it was not possible to read the category (3) words 'Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2)' (emphasis added) to include adopted children.²⁹ In *Chong Fung Yuen*, the court held that the category (1) words 'Chinese citizens born in Hong Kong' were clear and could not imply a requirement that one of the parents have permanent residency at the time of birth.³⁰ In both judgments, the court repeatedly emphasized the importance of giving primacy to the language of the provision and, unless there was ambiguity, purpose, context, generosity, and extrinsic materials would do little to alter the literal meaning.³¹ This new approach was not designed to prefer one party to another because many abode seekers benefited from *Chong Fung Yuen*, which was thought by the executive at the time not to cause too great an influx to warrant another Interpretation and crisis.³² The approach signified a move by the court, newly reconstituted in 2000 with new judges Ribeiro and Chan PJJ, to find firmer ground in traditional common law interpretative principles

²⁴ Gary Cheung and Chris Ip, 'All City's Top Judges "Considered Quitting"', *South China Morning Post*, 8 September 2011.

²⁵ Mary Ann Benitez, 'Abode Judges "Nearly Quit"', *The Standard*, 8 Sept 2011.

²⁶ *Director of Immigration v. Lau Kong Yung* (1999) 2 HKCFAR 300.

²⁷ See e.g. Pojen Yap, '10 Years of the Basic Law: The Rise, Retreat and Resurgence of Judicial Power in Hong Kong' (2007) 36 *Common Law World Review* 166.

²⁸ *Tam Nga Yin v. Director of Immigration* (2001) 4 HKCFAR 251; *Director of Immigration v. Chong Fung Yuen* (2001) 4 HKCFAR 211.

²⁹ *Tam Nga Yin*, 262–4. ³⁰ *Chong Fung Yuen*, 231–3.

³¹ *Ibid.*, 221–5; *Tam Nga Yin*, 258. ³² See Chapter 14 (Chen and Lo) in this volume.

vary. For a small place such as Macau, which has a tiny legal community, this aspect is of high relevance – one can also have access to a ‘certain common law of academic works and judicial decisions’.⁸³ Currently, the courts of Macau only quote doctrine and case law from Portugal, not from other Portuguese-speaking jurisdictions. Macau can only gain by exploring and deepening the linkages with Portuguese-speaking legal systems. This requires political commitment, which is already quite solid in the economic field,⁸⁴ and should be fully extended to the legal area.

A fifth of the so-called transition period (1999–2049) has elapsed. The second system is, as expected, surviving and developing. However, more should be done to maintain, enrich, and develop it further, anchoring it firmly in the institutions and society of Macau thus fully fulfilling the one country, two systems paramount maxim in all of its dimensions and corollaries. In this mission, the TUI in particular – and the courts in general – is not alone, but undoubtedly part of the success depends upon it.

⁸³ For example, the case of Cape Verde illustrates the advantages of maintaining a point of reference even after independence and after a reform of the legal system. ‘All these projects follow openly in many (albeit not all) respects legal developments in Portugal. Rather than deviating from Portuguese law, they tend to re-create the similarity or even identify of the rules of the two legal systems’; see M. Bogdan, ‘The Law of the Republic of Cape Verde after 25 Years of Independence’ (2000) 44 *Journal of African Law* 94. All is done by, of course, exercising full sovereign powers and without prejudice or sense of a lesser capacity. No drama, political or other, is needed to cloud normal juridical communications and interfaces of legal systems.

⁸⁴ See José Carlos Matias, ‘The Macau Forum: China’s Charm Offensive for Lusophone Countries’, in *IPRIS Lusophone Countries Bulletin*, November 2010, 5.

Foreign judges: a European perspective

JOSEPH MARKO

A structural framework of comparison

From the very beginning I must make clear that there are two important caveats with regard to this topic, which are also challenges for a scientifically sound comparison. Because of the doctrine of state sovereignty, it sounds almost inconceivable that a foreign citizen should serve on the bench of a national supreme court or a separate constitutional court of another country with the power to review the legislation, passed as an exercise of popular sovereignty, for conformity with the national constitution. Judicial review is a highly sensitive issue of legitimacy with regard to the ‘right’ balance between the two guiding principles of democracy and the rule of law. Switzerland, in this regard, must serve as an example of one of the two possible solutions, regardless of whether this is a civil law or common law system. The Swiss Constitution of 2000, in particular Article 188, still prohibits the Swiss Supreme Court to review federal law, begging the question whether the ‘law’ – that is, in Rousseauian terms, the ‘people’ – can do no wrong, for instance by violating basic principles of the rule of law. On the other hand, the US Supreme Court, having ‘invented’ judicial review of legislation in *Marbury v. Madison* (1803) under a common law system,¹ is perennially challenged to find the balance between judicial activism and judicial self-restraint, which follows

¹ The doctrine of parliamentary sovereignty under British constitutional law, which prohibits judicial review of legislation by judges must be seen as a singular exception in this respect, although the membership of the European Union and the incorporation of a bill of rights have led effectively to a measure of judicial scrutiny. Cf. Gernot Sydow, *Parlamentssuprematie und Rule of Law. Britische Verfassungsreformen im Spannungsfeld von Westminster Parliament, Common-Law-Gerichten und europäischen Einflüssen* (Tübingen: Mohr Siebeck, 2005) and Elliot Kay, ‘To What Extent Do Traditional Propositions on Parliamentary Sovereignty Survive in a Modern Context?’ (2010) *Durham Law Review*, accessible at www.scribd.com/doc/95035508/To-What-Extent-Do-the-Traditional-Propositions-on-Parliamentary-Sovereignty-Survive-in-a-Modern-Day-Context.

member states of the European Union. However, this court, in fact, was not established.⁸

Both examples, Cyprus and Croatia, make clear that foreign judges as 'neutral' mediators on the bench of national courts come into play in situations after conflict over statehood when courts are seen as important instruments for peace-building. This was also the case in Bosnia-Herzegovina (BiH), where the bloody war between 1992 and 1995, including a genocide in Srebrenica by the military and paramilitary forces of the so-called 'Republika Srpska' under the political leadership of Radovan Karadzic and the military leadership of General Ratko Mladic, was ended only by NATO intervention in the fall of 1995 and with the conclusion of a peace treaty, the Dayton-Paris General Framework Agreement for Peace (GFAP) on 14 December 1995.⁹ Karadzic was indicted and tried before the International Criminal Tribunal in the Hague, and Mladic was surrendered to the Tribunal only in May 2011.

The GFAP is composed of the Framework Agreement and 11 annexes. Annex 4 in the form of an international treaty, concluded between the warring parties, can be seen as 'the' Constitution of BiH. Article I, para 3 regulates the territorial division of the country, subdivided into two so-called 'Entities', namely the 'Federation of Bosnia and Herzegovina', which came into being by another international treaty, the Washington Agreement, concluded in April 1994, and 'Republika Srpska', which had seceded from the internationally recognized 'Republic of Bosnia-Herzegovina' in April 1992 and started the war. Annex 4 also contains a catalogue of human rights in Article II and regulates the allocation of powers between the Entities on the one hand and the so-called 'Institutions of Bosnia and Herzegovina' in Article III on the other. What is of additional relevance are Articles IV, V, and VI, regulating these institutions, namely the legislative, the executive and the judicial power. Article VI provides for a Constitutional Court as the sole judicial institution on state level. There is no supreme court of BiH¹⁰ nor any other court because the judicial power rests within the residual competence of the Entities. Hence, both Entities have a fully fledged court system including supreme courts and separate constitutional courts.

⁸ See Joseph Marko, *Der Minderheitenschutz in den jugoslawischen Nachfolgestaaten* (Minority Protection in the Yugoslav Successor States) (Bonn: Kulturstiftung der deutschen Vertriebenen, 1996) 102.

⁹ General Framework Agreement for Peace in Bosnia and Herzegovina, 14 Dec 1995, 35 I.L.M. 75, 89.

¹⁰ In 2002 a so-called 'State Court' was established to adjudicate on all civil and criminal matters arising out of the application of state laws.

A closer look into the jurisdiction of the Constitutional Court makes clear that this institution is a hybrid mix of the American and the Austrian-German model. Article VI, paragraph 3 (a) *inter alia* provides for the system of 'abstract' review of legislation through the Constitutional Court as a specialized court. Hence, without the necessity of a lawsuit before an ordinary court, a number of state authorities may submit a request to the Constitutional Court, in particular in order to decide 'whether any provision of an Entity's constitution or laws is consistent with this Constitution'. Such a 'dispute' over conflicts of norms can be referred only by a member of the three-member Presidency, composed of one Bosniak, one Serb, and one Croat (Article V), by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, namely the House of Representatives and the House of Peoples, again to be composed of five Bosniaks, five Serbs, and five Croats or by one fourth of either chamber of a legislature of an Entity.

Article VI, paragraph 3 (c) provides for the system of 'concrete' review of legislation – that is, any court in Bosnia and Herzegovina may address the Constitutional Court on 'whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention on Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina'. Finally, Article VI, paragraph 3 (b) provides for an 'appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina'. All of the legal-dogmatic problems arising out of this hybrid mix of the two models for judicial review are discussed in detail in this chapter with regard to the case law of the court.

Since there are no publicly accessible *travaux préparatoires* of the negotiations in Dayton, it remains unclear why the parties in Dayton agreed to include three foreign judges in the composition of the Constitutional Court as a 'national' court. This might even be more astonishing with regard to the fact that also 'international' judicial bodies were created under other annexes. In particular, annex 6 provided for a Human Rights Commission, composed of an Ombudsperson as first instance and a Human Rights Chamber as second instance. This institutional structure closely resembled the supranational human rights protection mechanism of the European Convention on Human Rights (ECHR) of the Council of Europe with a Commission as first instance and the European Court of Human Rights as second instance. In contrast to the Constitutional Court, whose entire composition followed the model of the US Supreme Court with all together nine judges, so that the three foreign judges were in a minority position, both the Ombudsperson and

the majority of the members of the Human Rights Court, including its President, had to be foreign citizens. In addition, a Real Property Claims Commission was established under annex 7, again with a foreigner as chairperson. Finally, annex 10 established an International High Representative responsible for the entire civilian coordination of the implementation of the GFAP, and annex 11 provided for an International Police Task Force under UN auspices. Moreover, the Governor of the Central Bank had to be a foreigner.¹¹ Taken all together, it becomes clear that this strong international presence in BiH was seen as a necessary element to support the institutional, political, and economic reconstruction of the country after four years of terrible warfare.

The entire selection procedure for the three foreign judges must therefore be seen within this context. Article VI, paragraph 2 (a) of annex 4 provides that 'four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency'. Despite this seemingly ethnically 'neutral' language for the composition of the Constitutional Court, it must have been clear from the very beginning that the binational Federation parliament and the Republika Srpska (RS) parliament would appoint only members of the respective 'constituent peoples', namely Bosniaks, Croats, and Serbs, as they are labelled in the Preamble of the Dayton Constitution (annex 4). And that is how it came about. The Federation parliament elected two Bosniak and two Croat and the RS parliament two Serb jurists. Thus, the number of three foreign judges was obviously thought to counterbalance the *de facto* rigid ethnic representation so that the international judges could always prevent the 'outvoting' of one or even two of the 'members of constituent peoples' but remained themselves in a minority if all three ethnic groups were unanimous, thereby providing for a strong incentive to overcome the serious ethnic divide in the country and its institutions.

Finally, in the selection procedure for the foreign judges, the member states of the Council of Europe were asked to nominate appropriate candidates in 1996. All together 22 candidates were nominated this way. After the consultation procedure with the Presidency of Bosnia and Herzegovina as foreseen in the Dayton constitution, the President of the European

¹¹ Annexes 1 and 2 regulated military matters for the multinational military force deployed in Bosnia-Herzegovina under NATO leadership, initially called IFOR (International Force) and then renamed Stabilization Force or SFOR.

Court of Human Rights – at that time the distinguished Norwegian jurist Ralf Ryssdal – appointed the three foreign judges. One of them was Hans Danelius, a practising judge of the Swedish Supreme Court and member of the European Commission of Human Rights. Another was Louis Favoreu, Professor and 'doyen' of French constitutional law at the University at Aix-en-Provence. I was the third member, 42 years old at the time I was chosen, and had been Associate Professor of Comparative Constitutional Law and Political Sciences at the University of Graz. I was known to the Council of Europe because of my involvement as a constitutional expert and comparative lawyer in the Council's Commission for Democracy Through Law, commonly called the 'Venice Commission'. Moreover, what I see as an important added value for the position, elaborated in more detail later, I was the only one who spoke the – commonly called – 'domestic' language, that is, the Bosnian-Croat-Serbian (BCS) language.

After having outlined this context, I will come to my second caveat, the challenge in avoiding comparative fallacies. I discovered, to my astonishment, many more similarities between the situation of BiH and Hong Kong than the topic 'foreign judges' and the two institutions, the Bosnian Constitutional Court and Hong Kong's Court of Final Appeal (CFA), would suggest:

- Both 'constitutions' are strongly anchored in treaty-based international law.
- In both cases, an international human rights treaty is incorporated – in Hong Kong, the International Covenant on Civil and Political Rights (ICCPR), and in BiH, the ECHR, which, according to Article II (2) of the Dayton Constitution, 'shall have priority over all other law'.
- There are no publicly available official *travaux préparatoires* in BiH or Hong Kong.¹²
- With regard to linguistic questions, two languages, English and BCS, as well as English and Chinese, play an important role for interpretation.
- Last, but not least, in both cases, a communist system with its consequences for the understanding of rule of law and judicial review was or is involved.

¹² Yash Ghai, 'The Intersection of Chinese Law and the Common Law' in Jorge Oliveira and Paulo Cardinal (eds.), *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution. Essays on Macau's Autonomy after the Resumption of Sovereignty by China* (Berlin: Springer, 2009) 33. Some drafting material for the Basic Law is available on Basic Law Drafting History Online, accessible at sunzi.lib.hku.hk/bldho/home.action.

The most striking difference, of course, seems to be the fact that the GFAP serves to hold BiH together and to overcome the territorial and ethnic divide by 'integration' of the two Entities and their institutions into a 'common' state, whereas the autonomy of Hong Kong and the purpose of the Basic Law (BL) after the resumption of sovereignty by China is 'not to integrate the legal systems of Hong Kong and China, but rather to keep them apart' under the political formula of 'one country, two systems'.¹³ Seen from another perspective, however, this is – despite formal political party pluralism – exactly the same purpose and motivation of the entire Serb political leadership in their view and interpretation of the legal system developed by the GFAP. They see the RS until now as a 'sovereign' national state of the Serb people that is linked to BiH in some sort of confederation, if at all, and with a 'natural' right to national self-determination to break away from BiH whenever it suits them. Hence, there is no interest in constitutional reform by de-ethnification of institutions and the transfer of powers from the Entities to the state level or even a new territorial division in terms of regionalism or federalism to make state institutions more effective for further integration into the European Union.¹⁴

These considerations must suffice to make clear that the observation of similarities and differences depends on the respective perspective so that – unlike the central perspective in Western painting developed in Renaissance Italy and its belief that this is the only one, 'true' perspective – politics and law are always multiperspective because of underlying basic values and functions. Hence, similarities and differences are always relative descriptions of social, political, and legal 'realities', which, depending on the perspective, can even change their positions. The comparative method, however, needs a 'firm' *tertium comparationis*, which can never be offered only by institutions 'as such'. It makes no sense to compare the Chinese National People's Congress (NPC) with the Westminster Parliament as a 'representative' institution. Seen from this perspective, both would simply seem to be the same, namely a 'parliamentary' institution.

¹³ I hereby follow Ghai, 'Intersection', *ibid.*, 16. Strikingly, also Bosnia-Herzegovina was and is metaphorically characterized by numbering: one country, two Entities, and three peoples (or religions!).

¹⁴ Cf. Joseph Marko, 'Defective Democracy in a Failed State? Bridging Constitutional Design, Politics and Ethnic Division in Bosnia-Herzegovina' in Yash Ghai and Sophia Woodman (ed.), *Practising Self-Government: A Comparative Study of Autonomous Regions* (Cambridge University Press, 2013).

Hence, it is not the comparison of institutions according to a description of similarities and differences at first sight, but the analysis of functions and structures¹⁵ that will provide us with the necessary framework for the following comparative analysis of the jurisprudence of the Bosnian Constitutional Court.

The case law of the Constitutional Court of Bosnia and Herzegovina in comparative perspective

The starting point for analysis must thus be the function of any court of final appeal, supreme court, or constitutional court, namely to serve the value and purpose of rule of law through a politically independent body of judges who settle all sorts of disputes in an impartial and fair procedure on the basis of foreseeable rules. The lack of independence of such a body in a non-democratic system is thus not only a fact to be recognized as a 'difference' but becomes a problem in itself to be analysed. The same holds true for a structural perspective into which both Hong Kong and BiH can be put: the relationship – or 'interface'¹⁶ created – between the 'two systems' of the People's Republic of China and Hong Kong and how the CFA, committed to the BL as 'the' constitution and basis for rule of law, and the Chinese NPC and its Standing Committee (NPCSC) with the competence to interpret provisions of the BL according to Article 158 BL interact. Thereby the following questions are raised: as a court of final instance, does the CFA have to follow any 'interpretation' of the BL by the NPCSC, and what is the meaning of interpretation? Is the CFA thereby subordinated to the NPCSC, which would, of course, seriously endanger Hong Kong's autonomy? And finally, to what extent 'are the Central Authorities, particularly the NPC, bound by the Basic Law?'¹⁷

The same structural problem of institutional relationships was created in BiH through the creation of the Human Rights Chamber and the Real Property Claims Commission, both bodies with international participation as elaborated above and that were given the power to hand down 'final and binding decisions' (Article 11 paragraph 2 annex VI, and Article 12.7 annex VII of the GFAP). Moreover, according to Article V of

¹⁵ I have elaborated the functional-structural approach, that is, the turn from Parsons to Luhmann, for comparative constitutional law in some detail in Joseph Marko, *Autonomie und Integration. Rechtsinstitute des Nationalitätenrechts im funktionalen Vergleich (Autonomy and Integration. Legal Instruments of Minority Protection from a Functional Comparative Perspective)* (Wien-Graz-Köln: Böhlau Publisher, 1995) 25–36.

¹⁶ See Ghai, note 12 above, 20. ¹⁷ *Ibid.*