

28.6-29.6.2017



「香港主權移交 20 年
Hong Kong 20 Years
after the Handover」
研討會 Conference



地點 · Venue

香港教育大學大埔校園胡郭秀萍演講廳 (D1-LP-04)

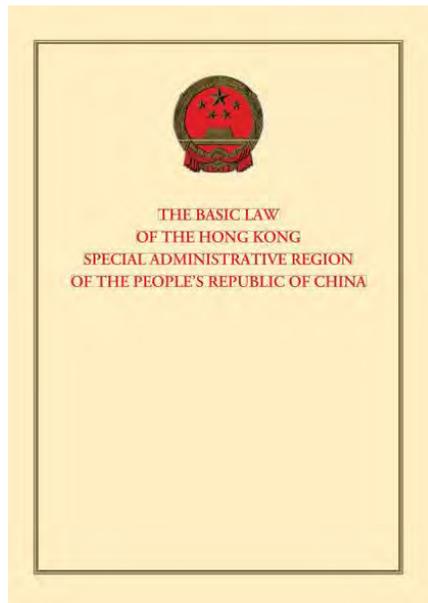
Lady Ivy Wu Lecture Theatre (D1-LP-04), EdUHK



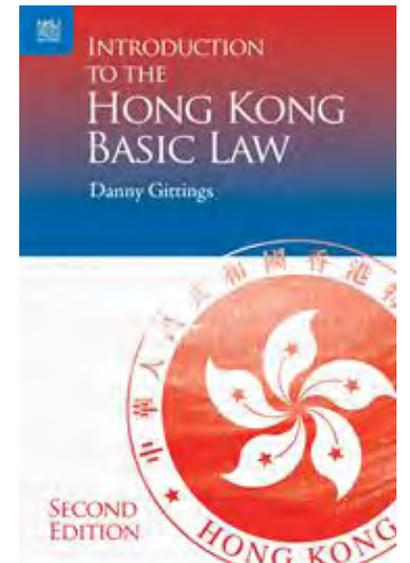
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Basic Law in the Courts: Learning to Live with China and a Changing Hong Kong



By Danny Gittings
Associate Professor
HKU SPACE



Courts Still Take Strong Stance Upholding Most Rights in Basic Law

- Right of recent arrivals to claim social welfare
Kong Yunming v Director of Social Welfare (2013) 16 HKCFAR 950
- Right to marriage of transsexuals
W v Registrar of Marriages (2013) 16 HKCFAR 112
- Rights of same-sex couples married overseas
Leung Chun Kwong v Sec for the Civil Service
(HCAL258/2015, 28 April 2017)



Go Further Than Public Opinion in Protecting Rights

“Reliance on the absence of a majority consensus as a reason for rejecting a minority’s claim is inimical in principle to fundamental rights.”

Chief Justice Ma in *W v Registrar of Marriages*
(2013) 16 HKCFAR 112, 162



Question: How would Hong Kong courts rule in case on whether same-sex couples have right to marry **in Hong Kong**?

More Cautious on Electoral Rights

- Some early rulings against government on specific issues, e.g. unfair voting system in NT village elections
Secretary for Justice v Chan Wah (2000) 3 HKCFAR 459
- But rare for government to lose in election-related cases considered “sensitive” by China:
 - 1) Corporate voting in functional constituencies
Chan Yu Nam v Secretary for Justice [2012] 3 HKC 38
 - 2) Disqualification of legislators Yau Wai Ching (游蕙禎) and Sixtus Leung (梁頌恆)
Chief Executive of HKSAR v President of Legco (HCAL 185/2016, 15 Nov 2016)

Declaring a Duty in 1999



Ng Ka Ling v Director of Immigration (1999) 2 HKCFAR 4, 26:

“What has been **controversial** is the jurisdiction of the courts of the Region to examine whether any legislative acts of the National People’s Congress or its Standing Committee are consistent with the Basic Law and to declare them to be invalid if found to be **inconsistent**. In our view, the courts of the Region do have this jurisdiction and indeed the **duty** to declare invalidity if inconsistency is found. It is right that we should take this opportunity of stating so unequivocally.”



Learning to Live With China in 2016



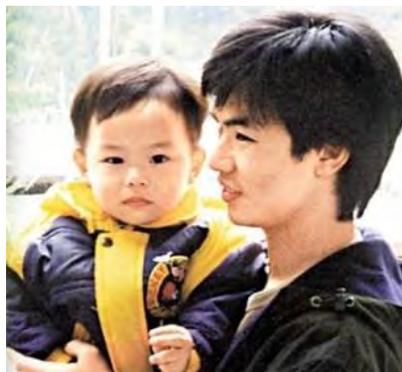
Chief Executive of HKSAR v Pres of Legco (HCAL 185/2016, 15 Nov 2016):

- Ousted legislators tried to argue court should invoke this **duty** over Standing Committee interpretation of Article 104
- Claimed not really an interpretation at all, and so **inconsistent** with Standing Committee's powers under Basic Law
- Chief Judge Cheung criticised lawyer who made this argument
- “Irrelevant” what common law lawyers thought of interpretation issued under mainland legal system



Some Crucial Cases Ahead

- Yau Wai Ching and Sixtus Leung case now being appealed to Court of Final Appeal
- Decision on separate case of Edward Leung (梁天琦) and other candidates disqualified from standing in 2016 Legislative Council elections will be particularly interesting if it comes to court
- Different candidates treated differently, some based on what they wrote on Facebook
- May raises issues of arbitrary decision-making and procedural unfairness



Little Public Criticism Of Courts in the Past



- Public criticism of court decisions unusual in Hong Kong until recently
- Even judgments that caused huge practical problems rarely led to strong criticism of the courts
- E.g. 2001 judgment opening floodgates to mass influx of mainland mothers seeking to give birth in Hong Kong
Director of Immigration v Chong Fung Yuen (2001) 4 HKCFAR 211
- Why? Part of colonial heritage of deference to those in positions of authority?

Learning to Live with a Changing Hong Kong



- Many court judgments now subject of political controversy
- Most recent example is Occupy Central-related cases
- Need to distinguish between:
 - 1) Unacceptable personal threats against the judges and lawyers involved (e.g. District Judge David Dufton after jailing of 7 police officers) and
 - 2) Criticism (even extremely strong) of actual court decisions



Accept the Reality of More Critical Environment?

- Hong Kong has some of the strongest laws in the world against “scurrilous attacks” on the judiciary
- Scandalising the court abolished in England and called “English foolishness” by US Supreme Court [in *Bridges v California* (1941) 314 US 252, 287]
- Press and political leaders now engage in much stronger criticism of the courts in UK and US
- Is it time for Hong Kong courts to learn to live with more public criticism than in the past?



