

# Legal Policy Division





Solicitor General, Mr Frank Poon (second right), with his deputies (from left): Deputy Solicitor General (General), Mr Peter Wong; Deputy Solicitor General (Constitutional), Ms Roxana Cheng; and Secretary of the Law Reform Commission, Ms Michelle Ainsworth

## Legal Policy Division

The Legal Policy Division comprises three sections: the Legal Policy (General) Section, the Legal Policy (Constitutional) Section and the Law Reform Commission Secretariat. The Division provides legal advice and support on matters of constitutional and legal importance and has policy purview over subject matters relating to the legal system, legal and arbitration services as well as the legal profession. The Law Reform Commission Secretariat serves the Law Reform Commission of Hong Kong which is an independent body chaired by the Secretary for Justice.

### Legal Policy (General) Section

The Legal Policy (General) Section consists of two General Legal Policy Units and the China Law Unit. The General Legal Policy Units advise government

bureaux and departments on compliance of existing and proposed legislation and policies with established principles underlying the legal system, and provide advice on legal issues arising out of various types of petitions and statutory appeals to the Chief Executive and other authorities, as well as on procedures and practice of the Legislative Council. They also assist in formulating and promoting policies and bills on subject matters for which the Secretary for Justice has carriage, particularly in relation to the legal system, legal and arbitration services and the legal profession. The China Law Unit provides advice on Mainland law as well as the implementation of national laws applicable to the HKSAR. It helps foster closer co-operation and exchanges amongst the HKSAR, the Macao SAR, Taiwan and the Mainland on the legal front, and operates programmes, including the Common Law Training Scheme, to facilitate

Mainland officials' better understanding of the legal system of the HKSAR and vice versa. The section also assists in promoting the HKSAR as an international legal and dispute resolution services centre in the Asia-Pacific region.

on constitutional reforms and electoral operations. Counsel of the Human Rights Unit assist the Government in preparing periodic reports to the United Nations (UN) treaty monitoring bodies under the applicable human rights treaties and play an active part at the relevant UN hearings.

### **Legal Policy (Constitutional) Section**

The Legal Policy (Constitutional) Section consists of the Basic Law Unit, Human Rights Unit and Constitutional Development and Elections Unit. Together, the section provides legal advice to the Government on the Basic Law, human rights law (including anti-discrimination legislation) and electoral law issues in the context of legislation, policies or government litigation. The section is responsible for ensuring that new legislative and major policy proposals are in conformity with the Basic Law and human rights. The section works closely with government bureaux and departments

### **Law Reform Commission Secretariat**

Counsel in the Law Reform Commission (LRC) Secretariat, together with a team of law translation officers and other supporting staff, serve as secretaries of the independent LRC of Hong Kong and its sub-committees, providing all necessary professional and administrative support to them in their law reform work. After the LRC has published a final report, counsel may be directly involved in assisting the relevant government bureaux or departments in implementing the LRC's proposals through enacting or amending legislation.



The Solicitor General, Mr Frank Poon (centre), addressing the UN Human Rights Committee at the hearing on the HKSAR Third Periodic Report under the International Covenant on Civil and Political Rights in March 2013



The Secretary for Justice, Mr Rimsky Yuen, SC (front row, seventh left), and representatives of the participating organisations of the Hong Kong Legal Services Forum held in Guangzhou in September 2012

### Highlights of the Division's work in 2012, 2013 and 2014

- The coming into full force of the Legal Practitioners (Amendment) Ordinance 2010 in June 2012, which enables eligible solicitors to apply for higher rights of audience in the higher courts thereby widening the pool of able advocates.
- The enactment of the Legal Practitioners (Amendment) Ordinance 2012 in July 2012, which introduces limited liability partnership as an additional business model for law firms in the HKSAR.
- The enactment of the Statute Law (Miscellaneous Provisions) Ordinance 2012 in July 2012 and the Statute Law (Miscellaneous Provisions) Ordinance 2014 in November 2014, both of which introduce miscellaneous legislative amendments to various ordinances and subsidiary legislation to keep our body of legislation tidy.
- The opening by the China International Economic and Trade Arbitration Commission (CIETAC) of its CIETAC Hong Kong Arbitration Center

in September 2012, its first office outside the Mainland.

- The establishment of a Working Group on Class Actions in December 2012, chaired by the Solicitor General, to follow up on the LRC's *Report on Class Actions* published in May 2012.
- The conclusion of the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards with the Macao SAR in January 2013.
- The enactment of the Arbitration (Amendment) Ordinance 2013 in July 2013, which implements the above arrangement with the Macao SAR and introduces miscellaneous amendments to enhance the arbitration regime in the HKSAR.
- Promoting the HKSAR as an international legal and dispute resolution services centre in the Asia-Pacific region at forums and events outside the HKSAR, including Beijing, Guangdong, Fujian, Shandong, India, Seoul, London, Vietnam, Cambodia and Myanmar.
- Co-hosting the second Hong Kong Legal Services Forum in Guangzhou in September 2012.



The Secretary for Justice, Mr Rimsky Yuen, SC (centre), and the then Fujian Provincial Department of Justice's Director-General, Mr Chen Yixing (third right), together with representatives of the participating organisations of the Seminar on Hong Kong Legal and Arbitration Services held in Xiamen in April 2013

- Co-organising a seminar on Hong Kong Legal and Arbitration Services in Xiamen in April 2013.
- Counsel of the Department, as members of the Chinese delegation, attended the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on Online Dispute Resolution at its 25th to 30th sessions from 2012 to 2014.
- Counsel of the Department, as members of the Chinese delegation, attended the UN hearings on the periodic reports of China (including the HKSAR) under the Convention on the Rights of Persons with Disabilities, the Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the periodic report of the HKSAR prepared in the light of the International Covenant on Civil and Political Rights, and attended the Universal Periodic Review of China (including the HKSAR) conducted by a Working Group of the UN Human Rights Council from 2012 to 2014.
- The establishment of the Inter-departmental Working Group on Gender Recognition, under the chairmanship of the Secretary for Justice, in January 2014 to follow up on the judgment of the

Court of Final Appeal in the case of *W v Registrar of Marriages* (2013) 16 HKCFAR 112.

- Co-hosting the third Hong Kong Legal Services Forum in Qingdao in September 2014.



Mock arbitration demonstrated to the participants of the Hong Kong Legal Services Forum held in Qingdao in September 2014

- The opening by the China Maritime Arbitration Commission (CMAC) of its CMAC Hong Kong Arbitration Center in November 2014, its first office outside the Mainland.
- The enactment of the Contracts (Rights of Third Parties) Ordinance (Cap 623) in November 2014, which reforms one of the aspects of the common law doctrine of privity of contract.
- The establishment of the Advisory Committee on Promotion of Arbitration, under the chairmanship of the Secretary for Justice, in December 2014.



HKSAR members of the Chinese delegation addressing questions raised by the UN Committee on the Rights of the Child during the hearing on the HKSAR's Second Periodic Report under the Convention on the Rights of the Child in September 2013

### **Looking forward: ongoing and new initiatives**

- Working towards the introduction of a bill into the Legislative Council for implementation of the LRC's reports on (1) Enduring Powers of Attorney: Personal Care, (2) Criteria for Service as Jurors, and (3) Hearsay in Criminal Proceedings.
- Providing assistance to the cross-sector Working Group on Class Actions, and the sub-committee formed under it in their deliberations of the recommendations made by the LRC.
- Participating in various seminars in the Mainland to promote Hong Kong's legal and dispute resolution services.
- Introduction of the Arbitration (Amendment) Bill 2015 into the Legislative Council in 2015.
- Ensuring Basic Law compliance of constitutional reforms relating to the Chief Executive and Legislative Council elections.

## FEATURE ARTICLE 1

### Promotion of the HKSAR's Legal and Arbitration Services

In his address at the ceremonial opening of the Legal Year 2013, the Secretary for Justice said, "*A combination of factors including.... our efficient legal system have placed Hong Kong in a good position to be a leading centre for legal services and dispute resolution in the Asia-Pacific region. Much effort has previously been made in this regard, and I have no doubt that this is a direction that we should continue to pursue.*" On the same event in 2014, the Secretary for Justice further stated, "*Last year, I said Hong Kong is well placed to be a leading centre for legal and dispute resolution services in the Asia-Pacific region. This remains the case, and the Department of Justice would continue with its efforts to enhance Hong Kong's strength in this regard.*"

Since taking office in July 2012, the Secretary for Justice has helped promote our international legal and dispute resolution services to the international community on numerous occasions, including on 27 September 2013 when he purposely chose the topic "*The Crucial Role of Hong Kong's Legal and Dispute Resolution Services in making it a Global Centre for Finance and Commerce*" as the theme of his address at the Hong Kong Association forum in London. As he pointed out, "*Capitalising on our well-developed legal system and legal infrastructure, it is the steadfast policy of Hong Kong's current Administration, as well as one of the priorities of my department (the Department of Justice), to consolidate, maintain, enhance and promote Hong Kong as a centre for international legal and dispute resolution services in the Asia-Pacific region.*"

The Legal Policy Division helps formulate policies concerning our legal system and legal profession and promote the HKSAR's legal and arbitration services, and as such, the addresses by the Secretary for Justice are of special significance, conveying a clear direction and a strong sense of purpose to our work. They also remind us that the endeavour is a work in progress

and that we must continue to work towards perfecting our legal system and services and to keep pace with international trends for the HKSAR to stay competitive in the region. In the ensuing paragraphs, we highlight some of the policy initiatives pursued by the Division in the period from 2012 to 2014.

#### **Legal services**

##### ***Higher rights of audience***

We brought the Legal Practitioners (Amendment) Ordinance 2010 into operation in June 2012. The Ordinance removed the long-time restriction against solicitors acting as their clients' advocates in our higher courts. Today, a solicitor who is able to meet the relevant qualification requirements can apply for higher rights of audience, and a solicitor's right to act as an advocate in our higher courts is no longer restricted by his being solicitor, so long as he has the necessary ability and experience to do so. The reform is also welcomed by members of the public who now have a wider choice of suitable advocates to represent them in the higher courts. Thanks to the efforts of the Higher Rights Assessment Board which is empowered by the Ordinance to approve applications for higher rights of audience, 24 applicants were granted the rights from 2012 to 2014, and we expect more successful applications in future.

##### ***Limited Liability Partnership (LLP)***

The Legal Practitioners (Amendment) Ordinance 2012 was enacted in July 2012. The Ordinance, upon coming into operation, would allow law firms in the HKSAR to practise in the form of an LLP. Unlike the case of a general partnership, the personal assets of



The Secretary for Justice, Mr Rimsky Yuen, SC (fourth left), with the then Secretary for Administration and Justice of the Macao Special Administrative Region, Ms Florinda Chan, after the signing of the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards Between the Hong Kong Special Administrative Region and the Macao Special Administrative Region in January 2013

innocent partners of an LLP would be shielded from liability caused by their fellow partners' professional default. Amongst others, LLP is expected to encourage small local firms to merge into bigger practices, enabling them to offer a wider range of legal services to their clients and become more competitive. Since its enactment in 2012, we have been working closely with the Law Society on draft subsidiary legislation of the Ordinance. Significant progress on this front has been made, and we aim to finalise this matter and bring the Ordinance into operation soon.

#### *The Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) Supplements IX and X*

We promoted co-operation between the legal professions of the Mainland and the HKSAR, and worked closely with the legal and dispute resolution services sectors to seek better access to the Mainland market under CEPA and other platforms. Following

the signing of CEPA Supplement IX in June 2012, the maximum number of Mainland law firms with which a HKSAR law firm is allowed to operate in association has been relaxed to three. After the signing of CEPA Supplement X in August 2013, as a pilot measure, a HKSAR law firm and a Guangdong law firm are now able to enter into an agreement to enable the Guangdong law firm to second Mainland lawyers to work as consultants on Mainland law in representative offices of the HKSAR law firm in Guangdong. This is an improvement on the current restriction in the Mainland against representative offices of the HKSAR law firms employing Mainland practising lawyers. The new commitment took effect on 1 January 2014. The Agreement between the Mainland and Hong Kong on Achieving Basic Liberalization of Trade in Services in Guangdong was signed in December 2014. Liberalisation measures on legal services covered by this Agreement include allowing Hong Kong and Guangdong law firms to enter into association in the form of partnership in three pilot areas in Qianhai, Nansha and Hengqin.

## Arbitration services

Following the new Arbitration Ordinance (Cap 609) which we promoted in the Legislative Council in 2010 (the new Ordinance established a unified arbitration regime in the HKSAR based on the UNCITRAL Model Law), the Division further promoted the Arbitration (Amendment) Ordinance 2013. The Amendment Ordinance amended the new Arbitration Ordinance in response to latest developments in the field of arbitration. In particular, it introduced a statutory mechanism for the enforcement of arbitral awards made in the Macao SAR by HKSAR courts to implement the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards concluded with Macao in January 2013. To meet the need of the arbitration community, the Amendment Ordinance also made clear that emergency relief granted by an emergency arbitrator is enforceable in accordance with the new provisions of the Amendment Ordinance.

In March 2014, the Solicitor General signed an agreement for and on behalf of the Government with the Hong Kong Trade Development Council for conducting a study on the development of arbitration in Hong Kong and the challenges and opportunities that Hong Kong faces as a regional centre for international arbitration in the Asia-Pacific region. The Hong Kong Trade Development Council has engaged a consultant to carry out the study, with a view to completing the study and delivering the final report in 2015.

In December 2014, the Department of Justice established the Advisory Committee on Promotion of Arbitration to promote Hong Kong as a leading centre for international arbitration services in the Asia-Pacific region. The Advisory Committee, comprising representatives of key stakeholders and eminent members of the arbitration community, is responsible for overall co-ordination and strategic planning for

the promotion of arbitration services. We hope that with the co-ordination of the Advisory Committee, concerted efforts made by various institutions and stakeholders of our dispute resolution services will take the promotion of Hong Kong's arbitration services to another level.

Apart from assisting in policy initiatives, counsel of the Division also organised and participated in many conferences and events to promote the HKSAR's legal and arbitration services, and to build up networks with legal professionals from other places. We feel privileged to have been given the opportunity to take part in and contribute to this purposeful cause.

We have also continued our efforts in facilitating the establishment and growth of world-class arbitration institutions in Hong Kong. In September 2012, the China International Economic and Trade Arbitration Commission set up its first arbitration centre outside the Mainland in Hong Kong. In November 2014 the China Maritime Arbitration Commission, the sole professional maritime arbitration institution in the Mainland, also set up its Hong Kong Arbitration Center. The presence in Hong Kong of reputable arbitration institutions would further enhance Hong Kong's position as a leading international arbitration centre in the Asia-Pacific region.



The Secretary for Justice, Mr Rimsky Yuen, SC (fifth left), at the inauguration ceremony of the China Maritime Arbitration Commission Hong Kong Arbitration Center in November 2014

## FEATURE ARTICLE 2

### Implementation of the Reports published by the Law Reform Commission for Subjects within the Department of Justice's Policy Portfolio

Law reform plays an important role in any society which aspires to uphold the rule of law. As our society evolves, so too must our laws to keep pace with changing social needs. The Law Reform Commission (LRC) of Hong Kong was established in 1980 as an independent body to keep our laws under review. The primary objective of any LRC project is to present well-considered proposals for improving our law. LRC reports are generally the result of a highly detailed study by a sub-committee of experts in the field and involve extensive public consultation.

Within the Department of Justice, the Legal Policy Division has the role of considering and, if appropriate, implementing the recommendations made in the reports published by the LRC on subjects falling within the policy portfolio of the Department. This includes subjects concerning general legal principles and policies, legal services and the legal profession. Considering and implementing reports of the LRC (including preparing and introducing relevant draft legislation into the legislature) form an important part of the Division's work. Set out below are the various LRC topics on which we have been working in 2012, 2013 and 2014.

#### ***Class actions***

In recent years, the subject of an aggregate litigation mechanism has been under the spotlight around the world and there have been extensive debates on



whether it should be introduced. The need for such a mechanism most typically arises where a large number of persons have been adversely affected by another's conduct, but each individual's loss is too small to make it economically viable to undertake individual litigation. Typical examples include consumer cases (involving product liability and consumer fraud), insurance cases, personal injury cases (such as food poisoning). Under the current law in the HKSAR, the procedure for dealing with multi-party proceedings is a rule on representative proceedings under the Rules of the High Court. However, this was criticised as restrictive and inadequate by the Chief Justice's Working Party on Civil Justice Reform in its Final Report in 2004.

In May 2012, the LRC published its *Report on Class Actions*, recommending the introduction of a class action regime in the HKSAR. In December 2012, the Legal Policy Division helped establish a cross-sector working group (Working Group) to study the LRC's proposals and to make recommendations to the Government on how to take the matter forward. The Working Group is chaired by the Solicitor General with members from the private sector, relevant government bureaux and departments, the two legal professional bodies and the Consumer Council. Also on the Working Group is a representative from the Judiciary to provide input to the deliberations from the perspective of interface with court operations. The Working Group has held several meetings to study the LRC's proposals closely.

### ***Criteria for service as jurors***

Some of the HKSAR's current eligibility criteria and exemptions for jury service date back to 1845, when the original legislation created exemptions for government employees, lawyers, doctors, clergyman, service personnel and employees of the "East India Company." The extremely strict eligibility requirements which long prevailed in the HKSAR led to criticisms that the HKSAR's jury list consisted of "a cultural, social and political elite". For example, previously, "any person 'ignorant' of the English language" was a notable ground for disqualification from jury service dating back to 1851. (English language proficiency continued to be a requirement for jury service in the HKSAR until 1997, when proficiency in the Chinese language was added.)

In June 2010, the LRC published *a Report on Criteria for Service as Jurors*, aimed at ensuring that the eligibility criteria and exemptions for jury service are as appropriate as possible to current circumstances and that the relevant legislative provisions are clear and precise. The Department is currently working towards a draft bill for the purpose of consultation.

### ***Double jeopardy***

The rule against double jeopardy, which prevents a person who has been acquitted of an offence from being tried again for the same offence, is grounded on the notion that a person who has undergone the ordeal of a criminal trial and been acquitted should be left undisturbed to lead a normal life following the final verdict. However, if new compelling evidence then emerges pointing to his guilt, the question arises whether he should be allowed to escape justice. These concerns have been highlighted in recent years by

rapid developments in forensic science and DNA testing, and changes to the law have been proposed or adopted in a number of jurisdictions. In February 2012, the LRC published *a Report on Double Jeopardy* proposing that the rule against double jeopardy should be relaxed in the HKSAR in exceptional circumstances.

The Department has decided to take forward all the recommendations in the LRC report. It will work out details of the legislative amendments required in consultation with stakeholders.

### ***Enduring powers of attorney: personal care***

At present, an enduring power of attorney (EPA) applies only to decisions about a donor's property and financial affairs and cannot be used to delegate decisions about the donor's personal care (including, for example, where and with whom the donor is to live and his everyday health care matters). In July 2011, the LRC published *a Report on Enduring Powers of Attorney: Personal Care* recommending the extension of the scope of EPAs to include personal care decisions.

The Department has established an inter-departmental working group to examine the recommendations in the LRC report and is also making preparation for a working draft bill, with a view to consulting the legal professional bodies, the Judiciary and other stakeholders in 2015.

### ***Hearsay in criminal proceedings***

In November 2009, the LRC published *a Report on Hearsay in Criminal Proceedings*. The report proposes that the existing rule which prohibits the admission of hearsay evidence in criminal proceedings should be reformed and that the court should be given

discretion to admit hearsay evidence during a trial where it is satisfied that the admission of that evidence is "necessary", and that the evidence is "reliable".

In April 2012, the Department consulted the Panel on Administration of Justice and Legal Services of the Legislative Council, and in May 2012, it organised a small-scale forum to consult representatives of the Hong Kong Bar Association, the Law Society of Hong Kong and the Judiciary on the way forward. The Department is now preparing a working draft bill, with a view to consulting the legal professional bodies, the Judiciary and other stakeholders in 2015.

The Contracts (Rights of Third Parties) Ordinance (Cap 623) was enacted on 26 November 2014 and published in the Gazette on 5 December 2014. The Ordinance does not completely abolish the doctrine of privity. While it includes statutory provisions to give third parties the right to sue under agreements, it also provides that contracting parties should have the freedom to contract out of these provisions if they wish the doctrine of privity to apply. The Ordinance will come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

#### ***Privity of contract***

Under the doctrine of privity of contract, only the parties who enter into an agreement can enforce rights under it. The LRC published a *Report on Privity of Contract* in 2005 which recommended that a clear and straightforward legislative scheme should be enacted to allow parties to an agreement to confer on a third party legally enforceable rights or benefits under that agreement. After careful consideration of the views and recommendations of the LRC, the Department proposed to implement the recommendations of the LRC in full with certain necessary modifications.

## FEATURE ARTICLE 3

### Advising on Right of Abode Issues

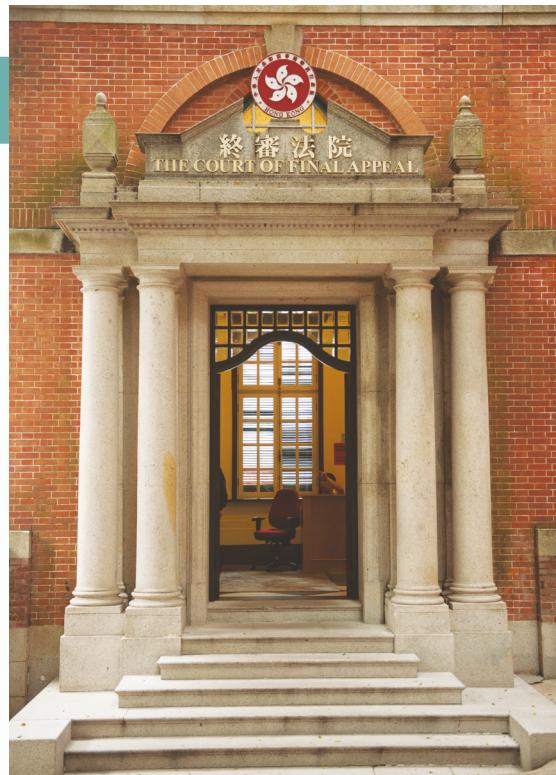
Article 24 of the Basic Law defines residents of the HKSAR to include permanent residents and non-permanent residents. There are six categories of persons who are entitled to permanent residence under Article 24. Apart from enjoying other rights and freedoms guaranteed to all HKSAR residents in Chapter III of the Basic Law, permanent residents enjoy the right of abode in the HKSAR; have the right to vote and the right to stand for election, and may serve in government departments as public servants.

From time to time, the Basic Law Unit (BLU) of the Legal Policy Division is called upon to provide advice on whether a person is a permanent resident and is entitled to the right of abode. Examples of such advice include issues arising from the cases of children born of Mainland mothers whilst in the HKSAR whose husbands are not HKSAR residents (Type II children), and foreign domestic helpers in the HKSAR.

#### **Type II children**

Article 24(2)(1) of the Basic Law stipulates that Chinese citizens born in the HKSAR before or after the establishment of the HKSAR shall be HKSAR permanent residents. In July 2001, the Court of Final Appeal (CFA) held in *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 that Chinese citizens born in the HKSAR are permanent residents regardless of the residential status of their parents. The Immigration Ordinance (Cap 115) was accordingly amended in 2002 to bring the law in line with the CFA decision.

The number of Type II children has risen sharply in the past decade (from 629 in 2001 to 35 736 in 2011), giving rise to unintended and unforeseen consequences especially in the social and economic contexts. There is public concern about the impact



of birth tourism on the HKSAR's infrastructure and resources and the long-term sustainability of the situation. Since 2012, administrative measures have been rigorously deployed by the Government to deal with the problem, including announcement by the Chief Executive of a zero delivery quota policy for Mainland pregnant women in 2013. On the whole, these administrative measures are working effectively. The Department of Justice and the Security Bureau will continue to carefully examine appropriate and legally viable options to resolve the Type II children issue. However, it is pertinent to note that each option would have pros and cons and it is necessary to assess possible impacts inherent in each option. In this regard, BLU counsel provide advice to ensure that the options under consideration are consistent with the Basic Law.

#### **Foreign domestic helpers**

Article 24(2)(4) of the Basic Law provides that persons not of Chinese nationality who have entered the HKSAR with valid travel documents, have ordinarily resided in the HKSAR for a continuous period of not

less than seven years and have taken the HKSAR as their place of permanent residence before or after the establishment of the HKSAR shall be permanent residents of the HKSAR.

In *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45, the two appellants were Philippine nationals who entered the HKSAR for employment as foreign domestic helpers (FDHs) and have resided in the HKSAR for more than seven years as FDHs. They challenged the constitutionality of section 2(4)(a)(vi) of the Immigration Ordinance which provides that a person employed as a FDH who is from outside the HKSAR is not to be treated as "ordinarily resident" in the HKSAR and so cannot become a permanent resident of the HKSAR.

The appellants contended that they were covered by the natural and ordinary meaning of the words "ordinarily resided" in Article 24(2)(4) and the restriction in section 2(4)(a)(vi) of the Immigration Ordinance was in breach of Article 24(2)(4) and unconstitutional. Their argument was accepted by the Court of First Instance but rejected by the Court of Appeal. The CFA dismissed their appeals. The judgment which each member of the bench had contributed was handed down on 25 March 2013. The CFA decided by a majority that the residence of FDHs, as a class, in the HKSAR did not come within the meaning of "ordinarily resided" in Article 24(2)(4). FDHs were not admitted for settlement, and accordingly, FDHs were not eligible for right of abode in the HKSAR under the Basic Law.

The HKSAR has a legal system different from the rest of the Mainland, and it enjoys independent judicial power, including that of final adjudication. Our courts

apply the common law in the interpretation of laws, including the Basic Law, in the adjudication of cases. Counsel of the BLU apply the same approach when advising the Government on legal questions involving the Basic Law. However, in order to understand and interpret the Basic Law properly, the role of Article 158 in the constitutional framework of the HKSAR must be correctly understood. The Hon Sir Anthony Mason AC KBE, NPJ describes it as follows:

*"The conjunction of a common law system under a national law within the larger framework of Chinese constitutional law is a fundamental aspect of the Principle 'one country, two systems'. Article 158 is the link between the two systems."*  
*(The Rule of Law in the Shadow of the Giant: The Hong Kong Experience, [Vol 33:623 2011] Sydney Law Review 623)*

In the FDH case, apart from raising some common law arguments, a fall-back submission was made during the hearing before the CFA on behalf of the respondents that the Court should seek an interpretation of Article 158 of the Basic Law from the Standing Committee of the National People's Congress pursuant to Article 158(3) of the Basic Law in the event their primary arguments are not accepted. The Court ultimately did not find it necessary to seek such an interpretation, since the respondents' primary argument was upheld. Despite criticisms from the appellants' legal representatives, the CFA (when dealing with the issue of costs) pointed out that raising the point of Article 158 interpretation did not constitute any abuse as it was contingently relevant in the event the Court was unable to dispose of the appeal on the common law arguments put forward by the respondents.