

# THE CONSTITUTIONAL GAME OF ARTICLE 158(3) OF THE BASIC LAW



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*In a recent civil case, the Court of Final Appeal decided to make a reference to the Standing Committee of the National People's Congress under Art 158(3) of the Basic Law to interpret certain other provisions of the Basic Law central to the issues and outcome of the case. By applying the constitutional game analytical framework, this article analyses why the Court of Final Appeal initiated the reference procedure in the way that it did.*

## Introduction

There are many constitutional taboos in the Basic Law of the Hong Kong Special Administrative Region (the Basic Law). Constitutional taboos include ambiguous constitutional provisions in the Basic Law which should be clarified to clear doubts on their scope of application and constitutional mechanisms required to be set up by the Basic Law or needed for the smooth operation of Hong Kong's constitutional order but are intentionally overlooked or untouched by all political actors owing to their political sensitivity. They all want to avoid the intense political controversy that may be generated from any attempt to clarify the meaning or to establish the mechanism.

One of those constitutional taboos is the procedure to make a reference to the Standing Committee of the National People's Congress (SCNPC) by the Court of Final Appeal (the CFA) to interpret provisions of the Basic Law under certain conditions provided in Art 158(3) of the Basic Law (the reference procedure).<sup>1</sup> Recently, in the adjudication of a civil dispute, the CFA initiated the reference procedure for the first time.

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<sup>1</sup> The other constitutional taboos may include the enactment to implement Art 23 of the Basic Law, the constitutional status of the International Covenant on Civil and Political Rights under Art 39 of the Basic Law, and the relative legal status of national laws listed in Annex III of the Basic Law as against legislation enacted by the Legislative Council.

## The Case

In *Democratic Republic of the Congo v FG Hemisphere Associates LLC*<sup>2</sup> the plaintiff, a company based in the United States launched proceedings in the courts of the Hong Kong Special Administrative Region (HKSAR) against the Democratic Republic of the Congo (DRC) to enforce its rights in two arbitration awards over a certain amount of money payable by a Chinese enterprise to the DRC representing an asset of the DRC in Hong Kong.

The DRC asserted that the HK courts have no jurisdiction over it in respect of the subject matter of the claim according to the legal principle of state immunity. As one of the major legal issues in this case, the DRC alleged that the courts of the HKSAR should follow the practice of the People's Republic of China, HK mother state, that "a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution".<sup>3</sup> On that basis, the courts of the HKSAR would still have no jurisdiction over the acts of the DRC in this case even if those acts were ruled to be commercial in nature. However, the plaintiff argued that the courts of the HKSAR should continue to apply the doctrine of restrictive immunity, which was the common law principle applicable in Hong Kong before the transfer of sovereignty in 1997. According to the doctrine of restrictive immunity, only sovereign acts are immune but not commercial acts.

On the question whether the courts of the HKSAR should apply the doctrine of absolute immunity or restrictive immunity, the CFA by a majority of three-to-two decided that it involved the interpretation of Art 13 and Art 19 of the Basic Law and resolved to seek an interpretation of the provisions from the SCNPC in accordance with Art 158(3) of the Basic Law before making the final rulings in the case.

In this comment I do not intend to provide an analysis of the legal questions involved in the case, such as what is the legal doctrine of state immunity under common law? Does the common law doctrine of state immunity continue to apply in the HKSAR? Has state immunity been waived in this case? What is the nature of the act of the DRC in this case? I may not even directly consider the legal test applied by the CFA in determining whether an interpretation should be sought from the SCNPC. Rather, I would like to apply an analytical framework of

<sup>2</sup> [2011] 4 HKC 151.

<sup>3</sup> See the First letter from the Office of the Commissioner of the Ministry of Foreign Affairs to the Constitutional and Mainland Affairs Bureau of the HKSAR government and was placed by the Secretary for Justice before the Court of First Instance in the hearing of the case.

constitutional game to explain why the CFA has chosen this case to initiate the reference procedure provided in Art 158(3) of the Basic Law and why it has adopted the particular form and manner in making the referral in this case.

### The Constitutional Game Analytical Framework

Like any game, there must be rules and players. In a constitutional game, the constitution is the rule of the game and all political actors involved in the constitutional processes are the players like the judiciary adjudicating a constitutional dispute.<sup>4</sup>

Like all games, players play to win. The winning goal of a player in a constitutional game is very much related to the institutional role or goal assigned to him or her by the constitution. This is also the constitutional position of a player in a constitutional game.<sup>5</sup>

A player will use the game resources provided to him or her by the constitution and make moves to win. Interaction between the players is the key to any game, including a constitutional game. To win a game, a player must respond to the moves of other players. On the basis of the perception of possible actions of other players, a player will develop a strategy in taking his or her moves and using his or her game resources in order to have his or her winning goals achieved.

All players are expected to play according to the rules. Moves that will be accepted by other players as legitimate are only acts that can, in the end, find authority from the rules. In other words, the constitution in a constitutional game imposes limits on the kind of actions a player can take and the strategy he or she can adopt in playing the game.

The provisions of the constitution, however, are usually not accurate, owing to the nature of language. There are times when language cannot indicate clearly the institutional role of a player, the exact boundary of the game resources available to a player and whether a move taken by a player is legitimate.

The ambiguities in the constitutional provisions allow room for a player to determine and review his or her role, powers and limitations in the constitutional game by giving a certain reading to the constitutional provisions. A player may justify his or her moves by reading the rules

<sup>4</sup> "Basic Law, Basic Politics: The Constitutional Game of Hong Kong," (2007) 37 *HKLJ* 503–578.

<sup>5</sup> Benny Y. T. Tai, "Chapter One of Hong Kong's New Constitution: Constitutional Positioning and Repositioning," in Ming Chan and Alvin Y. So (ed) *Crisis and Transformation of China's Hong Kong* (M. E. Sharpe, 2002).

expansively so as to maximise the chance in achieving his or her winning goals. However, the understanding of the constitutional provisions by a player on his or her role, powers and limitations may not be the same as or may even be in conflict with how other players in the game see the same. Therefore, a player in planning his or her action in a constitutional game must take account of how other players may interpret the constitutional provisions concerning his or her acts and what possible actions they may take in response to his or her interpretation and actions in the game on the basis of their interpretations.

### The Positioning of the CFA

In applying this analytical framework to look at the decision of the CFA to seek for an interpretation from the SCNPC in this case, we must first identify the institutional goal of the CFA and the courts of the HKSAR. In other words, we have to ascertain the constitutional position of the CFA.<sup>6</sup> There may not be much objection to state that the institutional goal highly valued by the CFA is to maintain the judicial autonomy and judicial authority of the courts of the HKSAR.<sup>7</sup> To achieve this institutional goal, the CFA will strive to demonstrate to the public of Hong Kong and other political actors that the courts of the HKSAR can continue to exercise their judicial power independently not affected by any interference from outside forces, impartially without giving preference to any political interest, and professionally on the basis of applicable law only.

However, initiating the reference procedure will inevitably hurt the judicial autonomy and judicial authority of the courts of the HKSAR. On the one hand, the CFA will not be making the final ruling on all legal issues in the case. That will hurt the CFA's judicial authority. On the other hand, the final interpretation of the relevant provisions of the Basic Law will be given by the SCNPC, which is not a judicial body. That will hurt the CFA's judicial autonomy.

For the past years, the CFA has adopted an avoidance strategy and tried its best not to initiate the reference procedure so as to limit the adverse impact of the reference procedure or to render it no more than

<sup>6</sup> The CFA may not expressly state its institutional goal in its judgments. The institutional goal may have to be derived from the underlying reasoning of the judgments of the CFA on the Basic Law in the past years. Another source can be the extra-judicial speeches and writings of senior judges of the courts of the HKSAR especially the speeches of the Chief Justice at the ceremonial opening of the legal year throughout the years.

<sup>7</sup> See n 5 and Benny Y. T. Tai, "Judicial Autonomy in Hong Kong," (2010) *China Information* 24 (3).

something on paper.<sup>8</sup> However, in the first interpretation by the SCNPC on the right of abode of Mainland children,<sup>9</sup> the SCNPC has already indicated that the decision of the CFA in those cases<sup>10</sup> of not seeking an interpretation from the SCNPC was not in compliance with the requirement of Art 158(3) of the Basic Law. The CFA in a subsequent case accepted that it would have to revisit the test in determining whether a reference should be made to the SCNPC for interpretation in the future.<sup>11</sup>

The reference procedure is indeed a nightmare to the CFA that it cannot get rid of. If in the future, the CFA is found to be in a case where there is no longer any room to avoid the issue, it will then be forced to initiate the reference procedure. The damage to the institutional goals of the courts of the HKSAR will be devastating. However, courts in the HKSAR are passive actors in the constitutional processes; they can only act when there is a case before them for adjudication. Courts of the HKSAR cannot make a ruling on constitutional issues outside the context of adjudication and the courts have totally no control over what cases will come before themselves.

Therefore, the best way or the less damaging way to resolve the dilemma is for the CFA to initiate the reference procedure itself in a case that is not politically sensitive and use methods that will create the least damage to its judicial authority and judicial autonomy. The legal dispute in this case provides the best opportunity for the CFA to defuse this legal bomb.

## Game in Action

There may be several reasons to explain why this case may be a good case for the CFA to choose as the first case to initiate the reference procedure. First, the legal dispute in this case only involves a foreign enterprise and a foreign sovereign state though the dispute is over a sum of money payable by a Chinese enterprise to the DRC. The Central People's Government

<sup>8</sup> P. Y. Lo. "Rethinking Judicial Reference: Barricades at the Gateway?" Hualing Fu, Lison Harris, Simon N.M. Young (eds) *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (New York, NY: Palgrave Macmillan, 2007), 157–182 and Po Jen Yap, "10 Years of the Basic Law: The Rise, Retreat and Resurgence of Judicial Power in Hong Kong" (2007) 36 *Common Law World Review* 166–191.

<sup>9</sup> "Interpretation of the Standing Committee of the National People's Congress on Article 22(4) and paragraph 3 of 24(2) of the Basic Law of the Hong Kong Special Administrative Region" adopted by the Standing Committee of the Ninth National People's Congress at its Tenth Session on 26 June 1999.

<sup>10</sup> *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 and *Chan Kam Nga v Director of Immigration* (1999) 2 HKCFAR 82.

<sup>11</sup> *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300.

(CPG) and the HKSAR Government are not parties to the dispute, although the Secretary for Justice intervened to address the courts of the HKSAR on the position of the HKSAR Government on the constitutional issues in the case, and the Office of the Commissioner of the Ministry of Foreign Affairs has written three letters to the courts of the HKSAR on the position of the CPG on state immunity. As the CPG and the HKSAR Government are not directly affected by the legal dispute in this case, to initiate the reference procedure in this case will not give an impression that the CFA is appeasing or submitting to the pressure of the CPG or the HKSAR Government.

Second, the articles in the Basic Law involved in this case are related with foreign affairs. The two articles sought for interpretation are Art 13 and Art 19. Article 13(1) of the Basic Law provides that the CPG shall be responsible for the foreign affairs relating to the HKSAR. The interpretive question sought by the CFA is whether on the true interpretation of Art 13(1), the CPG has the power to determine the rule or policy of the PRC on state immunity. Article 19(3) of the Basic Law provides that the courts of the HKSAR shall have no jurisdiction over acts of state such as defence and foreign affairs. The interpretive question sought is whether the determination by the CPG as to the rule or policy on state immunity falls within “acts of state such as defence and foreign affairs”. As these questions are related with foreign affairs and most people will not dispute that this is a matter within the responsibility of the CPG, thus the decision to make a reference may be subject to less challenge.

Third, the newly appointed Chief Justice of the CFA, Justice Geoffrey Ma, was not one of the five judges adjudicating this case.<sup>12</sup> Even if the decision to make a reference to the SCNPC was to be seriously criticised by the legal community and the general public, Justice Geoffrey Ma will not be implicated affecting his personal authority. This can limit the range of damages to the CFA.

Moreover, the Office of the Commissioner of the Ministry of Foreign Affairs has already written three letters to the courts of the HKSAR informing the courts about the position of the CPG on state immunity. If the CFA were to apply the common law doctrine of restrictive immunity and decide not to make a reference, one cannot preclude the possibility that the SCNPC will issue an interpretation on its own on the relevant provisions of the Basic Law after the CFA delivered the judgment. The damage to the judicial authority and judicial autonomy of the CFA will then be even more devastating. What is important is not whether the

<sup>12</sup> He abstained from participating in the hearing of this case as his wife is a member of the Court of Appeal bench that heard this case.

SCNPC will actually issue an interpretation on its own. If the CFA considers that such an interpretation by the SCNPC is probable and the damage which will result is higher than initiating the reference procedure itself, seeking an interpretation from the SCNPC is a rational decision by the CFA under the constitutional game analytical framework.

Further, in order to minimise the damage that could be done to the judicial authority and judicial autonomy of the courts of the HKSAR, the CFA has also adopted several measures in the case concerning the manner and form of the reference procedure.

First, the CFA has delivered a very detailed judgment analysing all legal issues and has given provisional rulings on all the issues before seeking for an interpretation on the relevant articles of the Basic Law from the SCNPC. This gives an impression that the CFA has not abdicated its judicial authority over those issues raised in the interpretative questions to the SCNPC. The CFA is still the final arbiter of the case.

Second, the interpretative questions that the CFA has set for the SCNPC are clearly defined. All questions can be answered almost by a “yes” or “no”. The interpretation to be given by the SCNPC would have to be focused on the specific legal questions raised in the case and in the interpretative questions. This can limit the scope of interpretation to be given by the SCNPC and reduce the impact of the interpretation on the legal system of the HKSAR.

Third, two judges have written substantive dissenting judgments.<sup>13</sup> This can give an impression that the judges of the CFA can still maintain their independence and integrity in deciding controversial constitutional issues even if the CPG holds adverse views. Fourth, in adopting the above form and manner in seeking an interpretation from the SCNPC, the panel of judges of the CFA in this case set a precedent for future panels of judges of the CFA by laying down demanding conditions for initiating the reference procedure.

One may disagree with the decision of the CFA on the legal issues concerning state immunity or its decision to seek an interpretation from the SCNPC. However, one cannot ignore the fact that the CFA is indeed working in a difficult political environment. Therefore, its decision to seek an interpretation from the SCNPC may be considered to be wise though a painful one.

<sup>13</sup> Justice Bokhary PJ and Justice Mortimer NPJ.

