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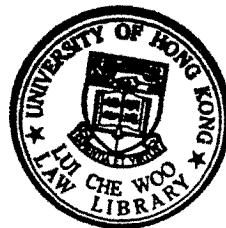


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THE COURT OF FINAL APPEAL'S RULING IN THE "ILLEGAL MIGRANT" CHILDREN CASE: CONGRESSIONAL SUPREMACY AND JUDICIAL REVIEW

The decision on 29 January 1999 of the Court of Final Appeal (CFA) of the Hong Kong Special Administrative Region (SAR) in the 'illegal migrant children' case (*Ng Ka-ling and Others v Director of Immigration* [1999] 1 HKLRD 315) has provoked the first serious controversy concerning the relationship between the SAR and the central government in Beijing since the establishment of the SAR on 1 July 1997. At the centre of the controversy was the CFA's statement in its judgment (hereinafter called 'the Statement') (which may or may not form part of the *ratio decidendi* of its decision on the legality of the Provisional Legislative Council in this case) that the Hong Kong courts have the jurisdiction 'to examine whether any legislative acts of the National People's Congress (NPC) or its Standing Committee (SC) are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent' (p 337).

In a highly publicised seminar reported in Hong Kong and mainland newspapers on 7 February 1999, four leading Chinese law professors (who were former members of the Drafting Committee for the Hong Kong Basic Law and of the Preparatory Committee for the establishment of the SAR) vehemently attacked the Statement, even to the point of saying that it has the effect of placing the courts of Hong Kong above the NPC as the supreme organ of state power under the Chinese Constitution, and of turning Hong Kong into an independent political entity. This is the strongest conceivable criticism of the judgment from the political point of view, given China's consistent stance that issues relating to sovereignty are non-negotiable and no concessions can be made in this respect under any circumstances. After the Beijing visit on 12-13 February of Ms Elsie Leung, the SAR's Secretary for Justice, to discuss the matter, it was reported that Chinese officials also criticised the Statement as unconstitutional and called for its 'rectification'. This is the strongest conceivable criticism of the judgment from the legal point of view.

In this essay, I shall confine myself to the legal point of view. Is there any objective legal ground --- objective in the sense that it can be recognised as legitimate as a matter of jurisprudence even by lawyers and judges trained in the Common Law tradition --- for the Chinese objection to the Statement? It is the purpose of this essay to demonstrate that a qualified 'yes' answer may be given to this question from the perspective of Chinese constitutional law, of which the Hong Kong Basic Law forms a part, and to explore into how the true legal position should best be stated. We shall start by examining the reasoning in the judgment itself, and then move on to more general principles and considerations. Finally, in the section entitled 'the aftermath', we shall, in the light of the preceding discussion, assess the content and significance of the 'supplementary' judgment given by the CFA on 26 February 1999 upon the unprecedented application on the part of the SAR Government for the relevant part of the CFA's judgment of 29 January to be 'clarified'.

The Statement was made in the section in the judgment entitled 'constitutional

jurisdiction of the courts'. Two lines of reasoning leading to the Statement can be identified.

The first line of reasoning

The first line of reasoning (pp 337-8 of the judgment) runs as follows.

- (a) The NPC and its SC are indeed the highest organs of state power under the Chinese Constitution and their acts are indeed 'acts of the Sovereign'.
- (b) But when the NPC enacted the Basic Law, it has implicitly empowered the courts of the SAR to review whether any of its legislative acts, or those of its SC, is inconsistent with the Basic Law, 'subject of course to the provisions of the Basic Law itself'. (N.B. There is no further explanation in the judgment of how the alleged power on the part of Hong Kong courts to review NPC acts is constrained by provisions of the Basic Law. There are two provisions which seem to be particularly relevant in this regard, and they are articles 19 and 158. These provisions are indeed mentioned subsequently in the judgment in the context of the discussion on limitations on the jurisdiction of the Hong Kong courts, but there is no commentary on how they would operate in practice to limit the courts' power to review NPC acts.)
- (c) The proposition in (b) is true because 'As with other constitutions, laws which are inconsistent with the Basic Law are of no effect and are invalid'. (p 337)
- (d) Furthermore, the Basic Law has conferred on the Hong Kong courts 'independent judicial power within the high degree of autonomy conferred on the Region. It is for the courts of the Region to determine questions of inconsistency and invalidity when they arise.' (pp 337-8) 'The jurisdiction to enforce and interpret the Basic Law *necessarily entails* the jurisdiction stated above over acts of the National People's Congress and its Standing Committee to ensure their consistency with the Basic Law.' (p 338, emphasis supplied)
- (e) It is pointed out, in support of the supremacy of the Basic Law and its capacity to be used in the SAR for the purpose of judicial review of acts of the NPC or its SC, that the Basic Law was enacted to implement the Joint Declaration, and that article 159 of the Basic Law provides a limit on the extent to which it may be amended.

The second line of reasoning

The second line of reasoning consists of a repudiation of the doctrine accepted by the Court of Appeal in *HKSAR v Ma Wai Kwan David* [1997] HKLRD 761. The doctrine was that since

- (1) article 19(2) of the Basic Law provides that the jurisdiction of the Hong Kong courts is subject to 'the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong' immediately before the establishment of the SAR, and
- (2) previously the Hong Kong courts had no power to review any legislative act of the Sovereign (e.g. Acts of Parliament) and to declare it as null and void,

therefore the SAR courts have no jurisdiction to review any act of the NPC or its SC, which represent the new Sovereign.

The CFA rejected this doctrine on the following ground:

'The analogy drawn with the old order was misconceived. Prior to 1 July 1997, Hong Kong was a British colony. According to the common law, the United Kingdom Parliament had the supreme authority to legislate for Hong Kong and the courts in Hong Kong could not have questioned that authority. For the reasons already explained, the position in the new order is fundamentally different. Article 19(2) of the Basic Law provides for the limitation on the constitutional jurisdiction of the courts "imposed by the legal system and principles previously in force in Hong Kong". This cannot bring to the new order restrictions only relevant to legislation of the United Kingdom Parliament imposed under the old order.' (pp 338-9)

Critique of the first line of reasoning

Let us now examine the correctness of the first line of reasoning. The *first query* relates to proposition (c) above. It is trite law that only a written Constitution (as distinguished from ordinary laws, with the possible exceptions of 'manner and form' or procedural restrictions imposed by an ordinary law regarding how it may be amended, and of rules of construction against 'implied repeal') can restrain the exercise of legislative power by the national legislature of a sovereign state. (N.B. It is somewhat arguable whether in a country without a written constitution, it is possible to set up an effective constitutional limitation of a substantive or procedural nature to the exercise of legislative power.) Applying this general principle to the People's Republic of China (PRC), only its Constitution can define the limits to which the legislative power of the NPC (and that of its SC) is subject.

Bearing in mind this principle of *constitutional* restraint on the exercise of legislative power by a sovereign legislature, and reading proposition (c) in the context of the Statement as a whole, we can see that proposition (c) may be interpreted to have *assumed* that the Basic Law should be regarded as having the same status, force and effect as the PRC Constitution itself. Now the validity of any such assumption would be highly questionable. No authority has been cited in the judgment in support

of this assumption. Indeed, the assumption has not been explicitly stated in the judgment, even though its correctness is crucial if the Statement is to be logically established.

Even if this assumption is indeed correct, and the Basic Law ranks equally with the PRC Constitution in the hierarchy of legal norms in the PRC's legal system, we can still query (and this is the *second query* in relation to the first line of reasoning underlying the Statement) whether the 'constitutional norms' stated in the Basic Law (the provisions in the Basic Law will have the status of constitutional norms if the Basic Law's legal force is as high as the Constitution, which is the assumption we have made for the purpose of the current discussion) are fully *judicially enforceable in the SAR* for the purpose of review of any legislative act of the NPC or its SC that is alleged to be inconsistent with the Basic Law.

How can this question be answered? I agree with the assumption behind propositions (b) and (d) above that the answer to the question depends on the proper interpretation of the Basic Law. Has the PRC legislature evinced an intention to confer on the SAR courts (including even the lowest courts in the Region --- as the Statement covers not only the CFA itself but also all other SAR courts) the power to review, and, if necessary, to declare as invalid whatever act of the NPC or its SC which the SAR courts determine to be contrary to the Basic Law?

To answer this question, an understanding of the basic concepts, structure and operation of the Chinese constitutional system is essential. As the judgment itself recognises (p 337, citing articles 57 and 58 of the PRC Constitution), within the Chinese constitutional system, the NPC and its Standing Committee are the highest organs of state power. Although the PRC has a written constitution, *it is important* to note in this regard that the written constitution is not enforceable (in the context of review of the constitutionality of legislative acts) by any court in mainland China, unlike the situation in common law jurisdictions like the USA, Canada, Australia or India. Nor is it enforceable (in the context of the review of the validity of any legislative act) by any other institution. The NPC (and the SC, which has the constitutional power to interpret the Constitution and the law under article 67 of the Constitution) is, from the legal (as distinguished from the political) point of view, the sole and exclusive guardian of the Constitution and its implementation. The Constitution sets up constitutional norms for the guidance of the NPC and its SC when they engage in legislative or other governmental work. They have a legal, moral and political obligation of fidelity to the Constitution. However, the implementation of the Constitution and the avoidance of legislative actions contravening it depends entirely on the self-awareness and self-restraint of the NPC and its SC. Even if it is alleged that they have acted in breach of the Constitution, there is no *legal* remedy, and any remedy would have to lie in the political domain.

This kind of constitutional system (as least in terms of some of its structural

characteristics as mentioned above) is no stranger to Common Law lawyers in Britain, Hong Kong's former master and from whom Hong Kong has inherited the Common Law tradition. In the UK, the doctrine of Parliamentary supremacy (alternatively stated as the sovereignty of Parliament) has reigned for centuries and still reigns today (despite the European Communities Act 1972 and the recent enactment of the Human Rights Act 1998). The observance of basic constitutional and human rights norms depends on Parliament's voluntary compliance, which is ultimately secured by history, politics, culture and tradition. The courts have a constitutional duty to recognise and enforce all Acts of Parliament and cannot strike any of them down as courts do (in relation to acts of their legislatures) in the USA, Canada, Australia or India. In this regard, the Chinese system is closer to the British than to these other common law jurisdictions, despite the fact that China has a written constitution.

It follows therefore that the Statement made by the CFA may be interpreted to have the effect of

- (a) elevating the status of the Basic Law to the same level as the PRC Constitution itself,
- (b) conferring on the Basic Law a degree of enforceability that is higher than the PRC Constitution itself, and
- (c) vesting the power to exercise such high degree of enforceability in the SAR courts at all levels, whereas not even the Supreme People's Court in China can declare any legislative act of the NPC or its SC to be unconstitutional and therefore invalid. (N.B. Even in federal common law jurisdictions like the USA, Canada, Australia and India, the *ultimate* constitutional guardian and *final* arbiter which enforces the constitution in the context of review of the constitutionality of legislation made by the federal legislature is the *federal supreme court* (the US Supreme Court, the Supreme Court of Canada, the High Court of Australia, the Supreme Court of India), not the courts of the member states of the federal states.)

It is inconceivable that this has been the intention of the PRC legislature when it enacted the Basic Law. The Basic Law cannot reasonably be construed to have conferred on the SAR courts the *general* power claimed for them in the Statement unless such power is conferred in the clearest express terms, because the grant of the power would mean a such fundamental alteration of the constitutional structure and principles of the PRC (or, indeed, in the words of Sir William Wade writing about the possible restriction on Parliamentary sovereignty introduced by the European Communities Act 1972, 'a constitutional revolution') that a corresponding amendment to the PRC Constitution would be necessitated from any jurisprudential point of view. Nevertheless, as demonstrated below, the Basic Law may indeed be construed to have conferred on the SAR courts a *limited* power of judicial review vis-a-vis 'Type 2 acts'

and ‘Type 3 acts’ as discussed below.

The above analysis demonstrates incidentally that although not every provision in the PRC Constitution is directly applicable to Hong Kong, the proper construction of the Basic Law on the issue of the constitutional jurisdiction of the SAR courts can only be arrived at by taking into account the nature, structure and fundamental principles of the Chinese constitutional system as a whole. The development of the jurisprudence of ‘one country, two systems’ depends therefore on the study and understanding of *both* systems, so that problems arising at the interface of the two systems can be resolved in a manner that is fair, reasonable and acceptable to both sides.

Critique of the second line of reasoning

Let us now turn to the second line of reasoning. As mentioned above, here the CFA rejected the analogy drawn by the Court of Appeal (which accepted the argument by Mr Daniel Fung, SC, Solicitor General as he then was) between the colonial situation and the situation under the new constitutional order. With great respect, I would like to point out that the analogy does hold, albeit not for exactly the same reasons as advanced by Mr Fung and as enunciated by the Court of Appeal (i.e. reasons based on the impossibility of ‘challenging’ the ‘acts of the Sovereign’). The crux of the matter is that the doctrine of ‘Congressional supremacy’ (the supremacy of the NPC and its SC) serves in the new constitutional order as the functional equivalent of the doctrine of Parliamentary supremacy in Hong Kong’s previous constitutional order.

The colonial situation was as follows (strictly speaking, this situation was not due to the fact that Hong Kong was a colony, but due to the fact that Hong Kong was subject to the legal sovereignty of Parliament. Similarly, according to one widely held view of Parliamentary sovereignty in British constitutional law, as far as the British courts were concerned, Canada and Australia continued to be subject to the legal sovereignty of the UK Parliament for decades after they became politically independent):

- (1) The written constitution for Hong Kong was the Letters Patent enacted by the Crown.
- (2) In British constitutional law, the doctrine of Parliamentary supremacy prevails. As formulated by Professor Stanley de Smith, this means that ‘The Queen in Parliament is competent, according to United Kingdom law, to make or unmake any law whatsoever on any matter whatsoever; and no United Kingdom court is competent to question the validity of an Act of Parliament.’ This principle was described by Professor de Smith as ‘the most fundamental rule’ of English constitutional law (see Stanley de Smith and Rodney Brazier, *Constitutional and*

Administrative Law, 6th ed 1989, Penguin reprint 1990, at p 64 --- the first page of the chapter entitled 'ultimate authority in constitutional law').

(3) Therefore, the Hong Kong courts could not question the validity of any Act of Parliament that was made applicable to Hong Kong by Parliament itself, nor did they have the power to review whether any such Act was inconsistent with the Letters Patent or the British constitution or to declare it to be invalid.

In the light of the discussion of Chinese constitutional law (of which the Hong Kong Basic Law is a part --- the CFA itself rightly recognised that 'The Basic Law is a national law and is the constitution of the Region' (p 337)) in the preceding section of this essay, the direct parallel between the colonial situation and that of the SAR can easily be demonstrated:

- (1) The written constitution for the Hong Kong SAR is now the Basic Law enacted by the NPC.
- (2) In Chinese constitutional law, the doctrine of *Congressional supremacy* prevails. To paraphrase de Smith's passage quoted above, this doctrine means that 'the NPC and its SC are competent, according to PRC constitutional law, to make or unmake any law whatsoever on any matter whatsoever; and no court is competent to question the validity of a legislative act of the NPC or its SC.' This principle is one of the most fundamental rules of Chinese constitutional law, and answers the question of where is the 'ultimate authority in constitutional law' in the PRC, of which the Hong Kong SAR is, in the words of the very first article of the Basic Law, 'an inalienable part'.
- (3) Therefore, the Hong Kong courts cannot, as a matter of general principle (*but subject to the distinction between 'Type 1 acts', 'Type 2 acts' and 'Type 3 acts' discussed below*), question the validity of any Act of the NPC or its SC that is lawfully made applicable to Hong Kong, nor (again subject to the distinction between 'Type 1 acts', 'Type 2 acts' and 'Type 3 acts' discussed below) do they have a general power to review whether any such Act is inconsistent with the Basic Law or the Chinese Constitution or to declare it to be invalid.

In the light of the discussion in the preceding section of this article and of the 'analogy' argument discussed in this section in the context of article 19 of the Basic Law, I think a case has been made for the proposition that it could not possibly have been the intention of the Chinese legislature, when it enacted the Basic Law, to confer on the SAR courts a *general* power (as distinguished from the *limited* power discussed below) of judicial review (using the Basic Law as the yardstick) of the validity of legislative acts of the NPC or its SC. It can also be seen now that the question whether any such act can be declared to be invalid by an SAR court is not merely a question of Hong Kong law, but also a question of Chinese constitutional law (of

which the Hong Kong Basic Law forms an integral part).

The question of reference to the NPC Standing Committee

It is important to note at this point that the question stated at the end of the last paragraph directly and crucially concerns the relationship between the Central Authorities and the SAR. Insofar as this question arises in the context of the interpretation of article 19, the issue of the interpretation of article 19 should have been referred to the NPC Standing Committee under article 158, provided that the ‘necessity condition’ and the ‘classification condition’ in article 158 are satisfied.

The correct application of these conditions has been discussed elsewhere (see my essay entitled *The Court of Final Appeal’s Ruling in the “Illegal Migrant” Case: A Critical Commentary on the Application of Article 158 of the Basic Law* (Law Working Paper Series, Paper No 23, Faculty of Law, University of Hong Kong, 1999), where I argued that the CFA has failed to apply the test plainly and unequivocally stated in article 158 (the ‘necessity test’), and has substituted for it a ‘predominant provision’ test that is completely ungrounded in the language of article 158, thus potentially rendering the CFA’s purported interpretation of article 22 ultra vires and its ruling on the ‘de-linking’ of the ‘certificate of entitlement’ scheme and the ‘one way permit’ scheme voidable). Article 19 is an article in chapter II of the Basic Law, which is entitled the ‘relationship between the Central Authorities and the Hong Kong SAR’. Insofar as article 19 expressly or by implication delineates the jurisdiction of the Hong Kong courts vis-à-vis legislative acts of the NPC or its SC, it does relate crucially to ‘the relationship between the Central Authorities and the Region’ (words used in article 158 itself). Hence the ‘classification condition’ is satisfied. The question posed by the ‘necessity condition’ is as follows (using the language of article 158 as far as possible):

Did the CFA, in adjudicating this case, need to interpret article 19, and would such interpretation affect the judgment in this case?

As I suggested in the essay mentioned above, this test can be reformulated as follows:

Would the interpretation of article 19 form an essential part of the ratio decidendi in the judgment in this case when the case is decided?

This raises the question of what is the ratio decidendi of the CFA’s ruling on the legality of the Provisional Legislative Council. In another essay (*Ming Pao*, 9 February 1999), I have suggested that the Statement (the proposition that Hong Kong courts have the jurisdiction to review acts of the NPC or its SC) is merely obiter. Earlier in this essay, I have mentioned that the point ‘may or may not’ form part of the ratio. This can be elaborated as follows.

The thesis that Hong Kong courts do not have the jurisdiction to review acts of the NPC or its SC was developed by the Court of Appeal in *HKSAR v Ma Wai Kwan* [1997] HKLRD 761, [1997] 2 HKC 315, a criminal case involving a charge of conspiracy to pervert the course of public justice. The defendants argued that the common law (under which the conspiracy offence existed) had not survived the handover, and that the Hong Kong Reunification Ordinance (which provides for the continued operation of the common law after the handover) enacted by the Provisional Legislative Council (PLC) was invalid because the PLC was not lawfully established as a legislature for the SAR. The Court of Appeal held

- (1) that as a local or regional court, it had no power to overturn an act of a sovereign authority such as the NPC or its SC;
- (2) (after examining the circumstances under which the PLC was established) that the creation of the PLC was not contrary to the Basic Law, but was necessary for the purpose of implementing the Basic Law.

It is somewhat doubtful whether proposition (1) formed part of the ratio of this case, because

- (a) the defendants' challenge regarding the continued applicability of the common law after 1 July 1997 could be completely disposed of, and was indeed disposed of, by the Court of Appeal by relying on the Basic Law itself rather than on the Hong Kong Reunification Ordinance;
- (b) even if the Court of Appeal did intend to state two equally important alternative routes of reasoning for the purpose of reaching its conclusion regarding the continued applicability of the common law (in which case both routes would form parts of the ratio), the exact relationship between (1) and (2) above is not clear from a reading of the three judgments delivered by the three-member court. By this I mean that it is not clear whether (1) and (2) are alternative grounds for deciding on the legality of the PLC, in which case (1) may or may not form part of the ratio, depending on the degree of emphasis the court intended to attach to it. If, however, (1) and (2) are not alternative grounds but were believed by the Court of Appeal to be organically linked to each other, then both (1) and (2) would form part of the ratio on the point of the legality of the PLC.

In the present CFA case, the legality of the PLC was re-argued, although the argument on (1) above was apparently abandoned by counsel for the SAR Government. If the point relating to (1) formed part of the ratio of the Court of Appeal's ruling on the legality of the PLC, then it is highly likely that the CFA's Statement (which states the opposite of the Court of Appeal's view on (1)) is part of the ratio of the CFA's decision on the legality of the PLC. If this is the case, and

given that the decision on the issue in (1) depends on the interpretation of article 19 of the Basic Law, then the CFA should have referred article 19 to the NPC Standing Committee for interpretation under article 158. As it has failed to do so (or even to consider the matter), *its interpretation of article 19 (and the Statement of which such interpretation constitutes a part) can arguably be regarded as ultra vires.*

If, on the other hand, the ratio of the Court of Appeal's ruling on the legality of the PLC was solely based on (2) above, and the CFA's ruling on the same issue was also based on (2) above (on this aspect its view was basically the same as that of the Court of Appeal), then the Statement is obiter, and there was no need to refer article 19 to the NPC Standing Committee for interpretation.

The conclusion of this section of the essay can be thus stated:

- (a) if the Statement is part of the ratio of the CFA's ruling on the legality of the PLC, then the making of the Statement was arguably ultra vires on the ground that the CFA was in breach of its obligation to refer article 19 to the NPC Standing Committee under article 158;
- (b) if the Statement is merely obiter, then the question of reference to the Standing Committee need not arise;
- (c) whether the Statement is part of the ratio or is merely obiter is open to debate. In my opinion, the better view is that it is obiter, since the decision actually being reviewed in this case was the decision (purportedly made pursuant to a previous legislative act of the NPC) of the SAR Preparatory Committee to establish the PLC, and not any decision made directly by the NPC or its Standing Committee. Unfortunately, the question of what exactly was the subject-matter under review was not clearly answered either by the Court of Appeal in the *Ma* case or by the CFA in the present case.

Can a 'clarified version' of the Statement be defended?

It is hoped that the above discussion has demonstrated that the Statement, given its broad scope and sweeping nature, cannot be fully sustained and may be justifiably regarded as not being entirely consistent with Chinese constitutional law (of which the Hong Kong Basic Law forms a part) and the Basic Law as properly construed. In the remainder of this essay, I would like to consider two possible *revised versions* of the Statement, so that the true position may be better understood regarding the proper constitutional limits to the jurisdiction of the Hong Kong court vis-a-vis legislative acts of the NPC or its SC. The two versions are called the 'clarified version' and the 'weaker version' respectively.

The 'clarified version' does not retreat from the original Statement but would

supplement it by pointing out that even though the Hong Kong court may review and declare as invalid legislative acts of the NPC or its SC, it is not the *final* arbiter of the validity of these acts. Here we need to distinguish between two possible constitutional models regarding the operation of the Basic Law within the Chinese constitutional framework:

- (a) *Model 1:* The Hong Kong courts may review the acts of the NPC or its SC in court proceedings where such acts are challenged as being inconsistent with the Basic Law. However, if the NPCSC issues an interpretation of the relevant provision of the Basic Law under article 158, which interpretation entails that the act being challenged is not inconsistent with the Basic Law, the Hong Kong courts would be bound by this ruling. (N.B. The NPCSC may also interpret the act being challenged for the purpose of indicating whether there is an inconsistency between the Basic Law and the act. Under article 67 of the Chinese Constitution, the NPCSC does have the power to interpret the latter act.) This means that the NPCSC remains supreme as the ultimate arbiter of the validity of Chinese legislative acts where it is alleged that they are inconsistent with the Basic Law.
- (b) *Model 2:* The Hong Kong courts have no jurisdiction to entertain any claim that a legislative act of the NPC or its SC is invalid, or otherwise to determine on the validity of the act on the basis of whether it is inconsistent with the Basic Law. This is the position argued for earlier in this essay (subject to the distinction between 'Type 1 acts', 'Type 2 acts' and 'Type 3 acts' discussed below).

Is it conceivable that Model 1 was within the contemplation of the Chinese legislature when it enacted the Basic Law? It is submitted that the answer is probably in the negative. The operation of Model 1 would mean that legislative acts of the NPC or its SC are liable to be declared invalid by any Hong Kong court at the lower echelons of the hierarchy of courts in the absence of an intervention by the NPCSC (in exercise of its power of interpretation under article 158 of the Basic Law). To forestall an unfavourable outcome in the relevant case itself, the NPCSC's intervention would need to be made *before* the court gives its judgment. A subsequent intervention, according to article 158, would not reverse the judgment in a case which has already been decided before the intervention, and would only operate prospectively.

This could not have been the intention behind the system of interpretation set up by article 158. On the contrary, the ideal scenario for the operation of that system is that a constitutional convention will gradually evolve whereby the NPCSC

- (a) will not issue on its own initiative any interpretation of the Basic Law under article 158, not even in relation to those provisions in the Basic Law

‘concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region’ (not to say Basic Law provisions ‘which are within the limits of the autonomy of the Region’), and

- (b) will only issue an interpretation when requested by the CFA to do so under article 158(3).

The exact opposite of this ideal scenario will result if the NPCSC is supposed to beware constantly of any proceedings in any court in the SAR that may raise an issue impinging on the validity of an act of the NPC or its SC.

The operation of article 158: an incidental remark

For precisely the same reason, it is of fundamental importance that the CFA ‘gets it right’ when applying article 158(3) in deciding whether to refer questions of interpretation of Basic Law provisions to the NPCSC. The ideal scenario will only materialise if the Central Authorities have a high degree of trust in the CFA’s fidelity to article 158(3) and its competence in apply the true tests (regarding the ‘necessity condition’ [in relation to which the jurisprudence of the European Union will be helpful, as article 158(3) was inspired by article 177 of the EEC Treaty regarding references to the European Court of Justice] and ‘the classification condition’. It is for the CFA to demonstrate that it merits such trust and confidence. Hence if the arguments presented in my earlier essay on the misapplication of article 158 are sound, the error must not stand uncorrected, and everything necessary must be done to enable a fresh start to be made.

Can a ‘weaker version’ of the Statement be defended?

Although I do not think that the ‘clarified version’ above can be defended, I do think that the following ‘weaker version’ can stand, and according to it the courts of the SAR do have a *substantial degree* of judicial power to defend the SAR against theoretically conceivable though unlikely legislative inroads on its autonomy on the part of the Central Authorities. This version depends on the distinction between three types of legislative acts on the part of the NPC or its SC.

- (a) *Type 1 acts*: These are acts done within the framework of the Basic Law, in pursuance of specific provisions in it and in accordance with the *procedures* laid down therein. Examples are
 - (1) acts under article 18(3) to apply a national law (relating to defence, foreign affairs and other matters outside the limits of the autonomy of the SAR) to the SAR. The procedure to be complied with is that the NPCSC must consult the SAR Government and the Basic Law

Committee before doing so;

- (2) acts under article 17 to invalidate a law enacted by the SAR on the ground that it ‘is not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region’. The procedure to be complied with is that the NPCSC must consult the Basic Law Committee first;
- (3) interpretations of the Basic Law issued under article 158. The procedure to be complied with is that the NPCSC must consult the Basic Law Committee first;
- (4) amendment of the Basic Law under article 159 which does not ‘contravene the established basic policies of the PRC regarding Hong Kong’. The procedures regarding how amendments may be initiated and voted for at various stages and regarding the role of the Basic Law Committee are laid down in the article.

(b) *Type 2 acts*: These are acts done within the framework of the Basic Law, in pursuance of specific provisions in it but in violation of the *procedures* laid down therein. The examples can be derived from the four examples above, by imagining that the requisite procedures in each case have not been complied with.

(c) *Type 3 acts*: These are acts done outside the framework of the Basic Law, i.e. not in pursuance of any provision in the Basic Law. For example, the NPCSC makes a law which purports to apply to Hong Kong, but the law has not been added to Annex III of the Basic Law in accordance with article 18.

The ‘weaker version’ of the Statement which I think is sustainable includes the following propositions.

(1) In relation to Type 1 acts, the Hong Kong courts have no jurisdiction to inquire whether, as a matter of substance or merits, the relevant acts satisfy the *substantive* (as distinguished from *procedural*) conditions or tests laid down by the Basic Law. The structural design of the constitutional framework set up by the Basic Law, and, in particular, the establishment of the Basic Law Committee comprising both mainland and Hong Kong members (including lawyers or jurists) to advise the NPCSC in relation to the exercise of the relevant powers, confirms the view (as put forward earlier in this essay and as mandated by the basic tenets of Chinese constitutional jurisprudence) that the NPCSC (or the NPC in the case of the amendment of the Basic Law) is the sole and exclusive arbiter of whether the relevant substantive conditions have been satisfied (e.g. whether a national law applied under article 18 relates to

'defence, foreign affairs or other matters outside the limits of the autonomy of the Region', whether a law invalidated under article 17 relates to 'affairs within the responsibility of the Central Authorities' or 'the relationship between the Central Authorities and the Region', or whether an amendment of the Basic Law adopted by the NPC 'contravenes the established basic policies of the PRC regarding Hong Kong'). When a relevant act is done by the NPCSC or NPC in these situations, the SAR courts must presume conclusively that the substantive conditions laid down for the exercise of the power have been fully satisfied, and may not substitute their own judgment for that of the NPC or NPCSC in this regard.

The doctrine of 'justiciability' in English law (or what is called 'the political question doctrine' in American constitutional law) provides an alternative formulation of the same position. Such doctrine existed in Hong Kong law before 1 July 1997 as a limit on the courts' jurisdiction, and is therefore capable of being imported into the constitutional law of the SAR under article 19 of the Basic Law. Using the language of justiciability, it can be said that the question whether the substantive conditions (referred to at the end of the last paragraph) have been satisfied is not justiciable before the Hong Kong courts. In other words, the Hong Kong courts should respect and defer to the judgment of the NPC's (or the NPCSC's) in this regard.

The most authoritative statement of the doctrine of justiciability in British constitutional law was provided in the landmark decision of the House of Lords in the *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935. According to this decision, British courts no longer have to adhere to the traditional view that courts could not inquire into the manner of exercise of all prerogative powers. Whether a prerogative act (as an act of the Sovereign) is subject to judicial review now depends on whether the subject matter concerned is *justiciable* (i.e. triable by a court). A subject matter is not justiciable if it is one which courts are ill-equipped to handle (because it involves information not easily made available as evidence in the judicial process, as well as a complex weighing of policy considerations which are more suitably dealt with by the executive branch of government). Thus most prerogative acts relating to the conduct of external relations are non-justiciable.

The doctrine of justiciability is even more highly developed in American law. The Supreme Court of the USA has developed an elaborate body of principles to justify abstention in certain circumstances from the exercise of the power to review the constitutionality of the acts of other governmental organs. The doctrine of 'political questions' is part of this body of law. This doctrine enables the court to decline jurisdiction to examine the constitutional validity of acts where the court determines that the issue is more appropriately resolved by a branch or organ of government other than the court. In making this determination, many factors can be taken into account, such as: whether the constitution has already granted the authority to decide the issue to another branch of government; whether there exist judicially

manageable standards for deciding the issue; whether the issue involves a policy determination fit for non-judicial discretion; whether the assumption of jurisdiction by the court means lack of respect due to another branch of government; whether there is an unusual need to adhere to a previous policy decision by another branch of government; whether the court's pronouncement on the issue would lead to the embarrassment of multifarious pronouncements by various departments of government on one question.

The doctrines of justiciability and political questions reflect the courts' self-understanding that it is wise to recognise and draw the appropriate boundary of judicial competence and hence judicial power. The exercise of judicial power should be confined to areas and issues which the judiciary, by virtue of their background, training, and the judicial process under their command, are competent to handle. But as regards issues which other branches of government are more capable of dealing with or making judgment on, the court would show deference to and respect for the relevant branch and would not intrude on their authority. The judiciary's self-imposed jurisdictional limitations not only do not diminish their authority and the community's confidence in and respect for them, but enhance their legitimacy and public standing. Without such self-limitations, there are increased risks of the politicization of the judiciary and the law (which reduces their legitimacy) and of conflicts and struggles between the branches of government (which destabilises the system of constitutional rule of law).

At the beginning of this new era of Hong Kong's constitutional history, it may be instructive to note a famous saying on the part of Chief Justice Marshall, founding father of American constitutionalism: 'It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should.' (The statement was quoted in Laurence H. Tribe, *American Constitutional Law*, 2nd ed 1988, p 69.) The statement reflects the eternal tension between judicial restraint and judicial activism as possible orientations which a court can choose when positioning itself vis-à-vis other organs or branches of government in a constitutional state with a separation of powers. When a high-level court enunciates self-imposed limits to its own jurisdiction, it is defining its role within a larger system of multifarious authorities. It is finding its proper place in the legal-political world.

Finally, it should be noted that the above argument that the question of compliance with the relevant substantive conditions is non-justiciable *does not mean*, for example, *that any law that has been inserted into Annex III of the Basic Law in accordance with article 18 is necessarily valid and enforceable in its entirety*. Where particular provisions in such a law are found to be in potential conflict with other provisions of the Basic Law (i.e. provisions other than article 18 itself) or other legal norms in other sources of Hong Kong law, it will be up to the Hong Kong court to decide how, if possible, to reconcile the conflicting rules, and to determine which rules should prevail in case of irreconcilable conflict. If, in the course of doing this,

the Hong Kong court decides that a particular provision in a law that has been inserted into Annex III of the Basic Law is unenforceable, it will not be reviewing or declaring as invalid an act of the NPCSC under article 18 of the Basic Law. It is simply performing its natural duty of handling apparently conflicting provisions in the law of Hong Kong. In this respect, it would be perfectly legitimate for it, *as a matter of construction*, to give priority to the intention of the Chinese legislature as expressed in the Basic Law (e.g. the provisions on human rights).

(2) In relation to Type 2 acts, it is arguable that the SAR courts are not bound to recognise and give effect to the legal force of the relevant acts, if it is obvious and incontestable that the procedural requirements for the exercise of the relevant powers have not been complied with. In such a situation, the Hong Kong courts need not use the radical language of 'reviewing the act to determine whether it is consistent with the Basic Law, and declaring it to be invalid if it is determined to be so inconsistent'. The courts can instead hold that the purported act is not an exercise of the relevant power under articles 17, 18, 158 or 159 (as the case may be), because the *objective facts* which constitute the fulfilment of the procedural presuppositions of the acts do not simply exist.

(3) In relation to Type 3 acts, I believe the Hong Kong courts can legitimately claim that they have no legal force in Hong Kong (even if they purport to apply to Hong Kong by their express terms or by necessary implication), on the ground that they are outside the *sources of law* in the SAR as stipulated in the Basic Law. The thesis can be put forward that the Basic Law contains an exhaustive statement of all the sources of law in the SAR (e.g. articles 8, 18, 17, 158, 159, 160), and the SAR courts have no constitutional or legal obligation to give effect to any legislative act of the NPC or its SC that does not come within any of these sources. Again, in such a situation, the Hong Kong courts need not use the radical language of 'reviewing the act to determine whether it is consistent with the Basic Law, and declaring it to be invalid if it is determined to be so inconsistent'. The courts need only hold that the act is not relevant to or applicable to Hong Kong, and does not have legal force in Hong Kong. In other words, the Hong Kong courts are simply giving effect to a *rule of construction* that the exhaustive statement in the Basic Law of the sources of Hong Kong law has not been impliedly repealed (partially) by this act. After all, under article 104 of the Basic Law, when the judges (and other senior officials, councillors and legislators) of the SAR swear their oath of allegiance, the oath is 'to uphold the Basic Law'.

Conclusion

The thesis in this essay may be captured by the following 'thought experiment'. Imagine that Hong Kong is still under British sovereignty, and Parliament enacts an Act (let us call it, say, the Act of Hong Kong Autonomy) almost identical to the Basic Law, granting a high degree of autonomy to Hong Kong, limiting the application of

British law to Hong Kong in terms almost identical to article 18 of the Basic Law, and limiting the possibility of amendment of the Act of Hong Kong Autonomy in terms almost identical to article 159 of the Basic Law. To what extent will such an Act limit the sovereignty of Parliament or change the content of the constitutional doctrine of Parliamentary supremacy? The argument in this essay is that on the jurisprudential level, we encounter a structurally similar problem in the case of Hong Kong under the Basic Law, because although China has a written Constitution, the doctrine of Congressional (NPC) supremacy reigns in Chinese law in the same way as the doctrine of Parliamentary supremacy reigns in British law.

Although the matter is not beyond dispute and is still the subject of lively academic discussion, it has been suggested in Britain that the inability of Parliament to bind its successors (thus limiting the sovereignty of future Parliaments) may be subject to 'manner and form' or procedural exceptions. Moreover, since the UK's accession to the European Economic Community, it has been suggested that a rule of construction may be adopted by the courts to the effect that priority should be given to the intention of Parliament as expressed in the European Communities Act 1972 over subsequent Acts of Parliament that are inconsistent with EC law (and hence also with the European Communities Act), in the absence of a clearly expressed intention in the subsequent Act to override the European Communities Act.

These two legal devices, then, provide a possible solution to the dilemma faced by Hong Kong courts where any of the three types of NPC (or NPCSC) acts mentioned above is impugned in proceedings before them. The solution suggested above to the problem of Type 2 acts is based on a theory of procedural restrictions on the supremacy of the sovereign legislature. And the suggested solution in the context of Type 3 acts is based on a rule of construction against implied repeal. So, the irony of legal history is such that the high point of the practical significance of the study of Parliamentary supremacy in British constitutional law has come to Hong Kong, one and a half years after the British handover of Hong Kong to the People's Republic of China.

The aftermath

On 26 February 1999, in a fairly risky attempt to resolve the constitutional crisis on the basis of the SAR's own legal machinery and without the formal legal intervention of Beijing (through the NPC Standing Committee issuing an interpretation of the Basic Law regarding the scope of SAR judicial power), the SAR Government made a highly controversial move: it applied to the CFA for a 'clarification of that part of the judgment of the CFA dated 29 January 1999 at pages 337-9 relating to the NPC of the PRC and its Standing Committee on the ground that such matters are of great constitutional, public and general importance'.

The application was made pursuant to rule 46(1) in part X of the Rules of the

Court of Final Appeal. However, this provision relates to applications for orders and directions on matters of practice and procedure generally. An application to a court requesting it to 'clarify' its judgment is undoubtedly unprecedented in the legal history of Hong Kong, nor is it a generally acceptable practice in common law jurisdictions elsewhere.

In this case, the SAR Government argued that the CFA has an inherent jurisdiction to entertain such an application. The British House of Lords' decision on 17 December 1998 in the *Pinochet* case was relied on for this purpose. In that case, the House of Lords acting in its capacity as the court of final appeal in the United Kingdom made the unprecedented move of setting aside an order it made after disposing of a case and rendering judgment. In a judgment dated 15 January 1999, the House of Lords set out the reasons for setting aside the order (upon a petition brought by Mr Pinochet alleging that one of the law lords who heard the case should have been disqualified by the rule against bias, the first rule of natural justice). On the point of whether the House of Lords has the jurisdiction to re-open a case which it has tried and on which it has rendered judgment, Lord Browne-Wilkinson said:

‘... the respondents to the petition do not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House. In my judgment, that concession was rightly made both in principle and on authority.

In principle it must be that your Lordships, *as the ultimate court of appeal*, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore *its inherent jurisdiction remains unfettered*. In *Cassell & Co Ltd v Broome (No 2)* [1972] AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point. [emphasis supplied]

However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.'

In the present CFA case, the Government stressed that it was not seeking to re-open the case or to challenge any order or declaration that has already been made by the court in this case. Nor was the Government contending that any part of the judgment was incorrect. It only sought a clarification of part of the judgment on the ground that the matter had aroused great public concern and was of great constitutional importance. The *Pinochet* case was therefore only relied on for the purpose of

demonstrating the existence of an inherent jurisdiction of a court of final appeal, and for the purpose of arguing that the CFA in this case should exercise such jurisdiction to entertain the application for 'clarification' despite the absence of express statutory provisions conferring on the court the jurisdiction to do so.

The Government's move was strongly criticised by certain leading members of Hong Kong's legal profession, including the Bar Council and Legislative Councillors who are lawyers. It was argued that the Government was putting undue pressure on the court, and was behaving improperly in making a procedural move of dubious legitimacy and validity. It was said that the Government was using the judicial process for a political objective, and was thus abusing it. It was said that the move would damage local and international confidence in the independence of the judiciary and the Rule of Law in Hong Kong.

With respect, my own view is that the Government's move was legitimate and justified in the circumstances, and I do not agree that the legal process was being subordinated to politics in this case. As explained above, at the heart of the 'constitutional crisis' that the CFA judgment of 29 January 1999 precipitated was a 'Statement' (as defined above) which consists of a number of legal propositions. Beijing's reaction was based on its honest and (as demonstrated above) legitimate belief that as a matter of law some of the propositions were wrong and unacceptable. These propositions were of great constitutional importance and related to the relationship between SAR judicial power (particularly the power of judicial review of legislative acts) and national legislative power (particularly the supremacy and sovereignty of the NPC). The Central Government thus had a legitimate interest in getting these propositions 'rectified'. The SAR Government's position (and that of some members of Hong Kong's legal community) was that the propositions were not incorrect, but perhaps need to be 'clarified' if any misunderstanding resulting from the original Statement was to be removed.

Critics of the Government's move argued that if any 'clarification' was necessary, the only legitimate and lawful channel for it to be made would be the occasion of the CFA hearing a case raising similar issues in future. This would however mean that whether and when the conflict of constitutional authority (as perceived by the Central Government) could be resolved would have to depend entirely on the contingency of future litigation on the same subject-matter reaching the CFA. In the meantime, the uncertainty in the constitutional position would remain. And from the Central Government's perspective, it was unacceptable that the Statement (without any 'clarification' or 'rectification') should stand as the most authoritative judicial statement of the constitutional position indefinitely.

It can therefore be seen that in the actual circumstances, there was indeed a strong and pressing need for the constitutional position to be settled in a manner that was acceptable to both the Hong Kong and mainland sides. In some other legal

systems, there does exist the judicial machinery for constitutional questions of great import to be authoritatively determined even if no litigation concerning them has actually arisen. For example, in Canada, the federal government may refer major questions of law, particularly constitutional questions, to the Supreme Court. When this 'reference procedure' is invoked, 'it is the duty of the Court to hear and consider it and to answer each question so referred' (Supreme Court Act, section 53). Similarly, in India, the Supreme Court has an 'advisory jurisdiction' to give its opinion on questions of law referred to it by the President where such questions are of such public importance that it is expedient to obtain the opinion of the Supreme Court (Constitution of India, article 143).

In the Hong Kong SAR, there are no express statutory provisions that confer on the CFA any 'reference jurisdiction' or 'advisory jurisdiction'. However, the kind of constitutional crisis which Hong Kong found itself in after the CFA judgment of 29 January 1999 was precisely the kind of situation in which such jurisdiction would be needed. Since the crisis was not independently caused by extraneous events but was precipitated by the judgment itself, the exercise of the CFA's inherent jurisdiction to 'clarify' the judgment should be considered a legitimate and appropriate way to deal with the problem. The inherent jurisdiction would be exercised here for the purpose of answering constitutional questions of great import, and, unlike the Canadian or Indian case, the jurisdiction would be exercised here not by an independent act but by a judicial pronouncement supplementary to the court's judgment of 29 January 1999.

In the light of the foregoing analysis, the CFA's positive response on 26 February 1999 to the Government's application is to be welcomed. In an unanimous judgment (hereafter called the 'Supplementary Judgment'), the CFA said:

'... we are faced with an exceptional situation. Various different interpretations have been put on the part of the Court's judgment referred to in the motion and this has given rise to much controversy.'

Having regard to these circumstances and the limitations on the proper exercise of judicial power, we are prepared to take the exceptional course under our inherent jurisdiction of stating the following.

The courts' judicial power is derived from the Basic Law. Article 158(1) vests the power of interpretation of the Basic Law in the Standing Committee. The courts' jurisdiction to interpret the Basic Law in adjudicating cases is derived by authorization from the Standing Committee under Articles 158(2) and 158(3). In our judgment on 29 January 1999, we said that the Court's jurisdiction to enforce and interpret the Basic Law is derived from and is subject to the provisions of the Basic Law which provisions include the foregoing.

The Court's judgment on 29 January 1999 did not question the authority of the Standing Committee to make an interpretation under Article 158 which would have to be followed by the courts of the Region. The Court accepts that it cannot question that authority. Nor did the Court's judgment question, and the Court accepts that it cannot question, the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein.'

Thus the Supplementary Judgment made it clear that the power asserted by the judgment of 29 January 1999 of the Hong Kong courts to review (and, if necessary, to regard as invalid) legislative acts of the NPC and its SC is subject to two limitations. First, interpretations of the Basic Law issued by the NPCSC under article 158 cannot be reviewed. Secondly, acts done by the NPC or its SC cannot be reviewed if they have been done 'in accordance with the provisions of the Basic Law and the procedure therein'. It is also significant that the Supplementary Judgment acknowledged that the Hong Kong courts' jurisdiction to interpret the Basic Law is 'derived by authorization from the Standing Committee'.

The Supplementary Judgment is susceptible to two possible interpretations. The first is that it expresses the position embodied by the 'clarified version' of the Statement as set out above in this essay. The second is that the CFA has in fact accepted the 'weaker version' of the Statement as discussed above, and has held that the proper interpretation of the relevant part of its original judgment of 29 January 1999 is in fact what was described above as the 'weaker version' of the Statement.

Whether the first or second interpretation represents the true intention of the CFA depends on the answer to the following question: Who is to judge whether any act of the NPC or its SC 'is in accordance with the provisions of the Basic Law and the procedure therein'? In particular, in the absence of a formal exercise of the SC's power of interpretation of the Basic Law under article 158 stating that the relevant act is in accordance with the provisions of the Basic Law and the procedure therein, can the Hong Kong court review the act for the purpose of determining whether it is in accordance with the Basic Law?

In this regard, it should be noted that the language used in the original judgment of 29 January 1999 was about whether a legislative act of the NPC or its SC was *consistent with* the Basic Law, and it was for the Hong Kong court to answer this question. If the Supplementary Judgment had said that the Hong Kong courts 'cannot question the authority of the NPC or its SC to do any act which is *consistent with* the provisions of the Basic Law and the procedure therein', then it would be quite clear that the 'clarified version' rather than the 'weaker version' was being upheld. In other words, it would be for the Hong Kong court (in the absence of a relevant interpretation of the NPCSC under article 158) to determine whether the relevant act of the NPC or its SC is consistent with the Basic Law or not.

However, the new language in the Supplementary Judgment which focuses on whether the relevant act is *in accordance with* the provisions of the Basic Law and the procedure therein is sufficiently flexible to accommodate the ‘weaker version’ as well as the ‘clarified version’. The essential difference between the two versions as discussed earlier in this essay concerns whether ‘Type 1 acts’ may be subject to review by the Hong Kong courts. Both versions hold that ‘Type 2 acts’ and ‘Type 3 acts’ are subject to such review, and it is also clear from the Supplementary Judgment that the review power claimed by the CFA extends to these two types of acts. So the only remaining question is whether, according to the Supplementary Judgment, ‘Type 1 acts’ may be reviewed by the Hong Kong court.

Let us consider the following examples. The first example is where the NPCSC, after following the consultation procedures specified in article 18 of the Basic Law, states that ‘we hereby, in accordance with article 18 of the Basic Law, add to Annex III of the Basic Law the following law, being a law relating to defence, foreign affairs or other matters outside the limits of the autonomy of the HKSAR’. The second example is where the NPC, after following the procedures prescribed by article 159 of the Basic Law, enacts an amendment of the Basic Law purportedly in accordance with article 159. In these situations, can the Hong Kong court lawfully hold that the relevant act of the NPCSC or the NPC is not in fact ‘in accordance with the provisions of the Basic Law’?

Although this question was not directly answered by the Supplementary Judgment, which, as pointed out above, is in fact susceptible to two interpretations, one consistent with the ‘clarified version’ and the other with the ‘weaker version’ discussed above, the better view is that the ‘weaker version’ is more likely to prevail in the (extremely unlikely) event of the Hong Kong court having to choose between the two in future. Where the NPC or its SC has done an act directly and expressly in exercise of a power conferred on it by the Basic Law, and the act is in its opinion in accordance with the provisions of the Basic Law, it is difficult to imagine how a Hong Kong court can legitimately substitute its judgment (on whether the act is in accordance with the provisions of the Basic Law) for that of the NPC or its SC, particularly in view of the NPCSC’s overriding power of interpretation of the Basic Law and in view of the fact that the Hong Kong courts’ power of interpreting the Basic Law is itself derived from the NPCSC. Both of the latter points have actually been highlighted in the Supplementary Judgment. Thus, in the language used earlier in this essay, the Hong Kong court should conclusively presume that the relevant act has been done in accordance with the provisions of the Basic Law, or should hold that any question about this is not justiciable before a Hong Kong court.

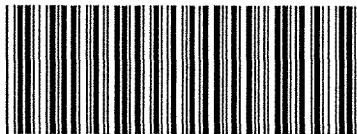
In the light of the foregoing analysis of the Supplementary Judgment, it is not surprising that the Central Government was willing to accept it and to put the constitutional dispute to rest. On 27 February 1999, the day following the issue of the Supplementary Judgment, the Legislative Affairs Commission of the NPCSC issued

a statement commenting that the clarification made by the Supplementary Judgment had been 'essential'. The statement quoted at length the last two paragraphs of the Supplementary Judgment, and concluded by stating that

'The NPC is the supreme organ of state power of the PRC. The NPC and its SC will exercise their functions and powers in accordance with the principle of "one country, two systems" and with the Basic Law.'

And, so, the first major constitutional crisis since the establishment of the HKSAR was swiftly brought to an end. Given the adventurous and experimental nature of 'one country, two systems', and, in particular, the potential conflict of legal cultures and values involved, a crisis of this nature was only to be expected. Even in jurisdictions without the complexities of 'one country, two systems', the growth of constitutional law and jurisprudence has been inseparable from constitutional crises encountered from time to time. The USA, Australia and Canada provide excellent examples in this regard. So the legal and judicial community of Hong Kong can take heart that we are not doing so badly after all, when we look around the world and at the constitutional dramas in the most advanced legal systems that have been unfolding since the advent of constitutionalism two centuries ago. The lesson of comparative constitutional history is that it takes time for constitutional jurisprudence to develop. It takes not just one case, nor two, but tens and hundreds of cases. It is a multi-generation endeavour. And so the reputations of supreme courts of leading legal systems like the USA, Australia, Canada and India have been built, not in a few years, but on the basis of the accumulation of judicial experience and wisdom in the course of decades and even centuries. We should indeed be grateful for this wondrous moment of opportunity in the legal and constitutional history of Hong Kong and China. And, I believe, we will rise, and have risen, to the challenge.

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