

LEGISLATIVE OATHS AND JUDICIAL INTERVENTION IN HONG KONG

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In this comment, we disagree with the Court of Appeal's decision to disqualify two newly elected members of the Legislative Council from office. While we accept that the judiciary is empowered under Art 104 of the Basic Law to determine whether an oath taken is valid, it is our view that after the oath is judicially deemed invalid, it should be left to the President of LegCo to determine whether the lawmaker is to be denied a second chance of retaking the oath and be disqualified. First, the CA held that para 2(3) of the relevant Interpretation by the Standing Committee of the National People's Congress "automatically disqualified [the pair of lawmakers] from assuming their offices", but the term "automatic" or "automatically" is found nowhere in the Interpretation. The Interpretation only uses the term "forthwith", which means "without delay", and it would not be inconsistent with the Interpretation for the CA to punt the issue over to the President to proceed with the disqualification expeditiously. Second, reading ss19 and 21 of the Oaths and Declarations Ordinance (Cap 11) together, we argue that a lawmaker can only be disqualified for declining to take the requisite oath if he had not taken a valid oath after a reasonable time had elapsed. Therefore, the lawmaker is not disqualified "automatically" on the first occasion where he declined to take the requisite oath. Third, the principle of non-intervention in the internal process of LegCo applies herein. Whilst the courts have jurisdiction to determine whether the President has the general power to grant or deny a newly elected LegCo member the opportunity of retaking the requisite oath after the original attempt was judicially deemed invalid, the courts will not exercise jurisdiction to determine the specific occasion or manner of exercise of this power by the President. Finally, if the Interpretation is treated as a piece of legislation instead of a judicial decision, and if Hong Kong courts were to approach this legislation using common law principles of statutory interpretation, the presumption against retrospectivity of legislation applies; and on the facts of this case, this Interpretation would not operate retrospectively to events that predated its announcement.

1. Introduction

In *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council*,¹ the Court of Appeal (CA) unanimously upheld the lower court's ruling that Leung Chung-hang Sixtus and Yau Waiching, two newly elected members of the Legislative Council (LegCo), were disqualified from assuming their offices after they declined to take the Legislative Council Oath (LegCo Oath).²

¹ [2017] 1 HKLRD 460.

² The LegCo Oath is prescribed under s 16(d) and Sch 2 of the Oaths and Declarations Ordinance (Cap 11) (ODO).

In essence, the CA's reasoning was as follows. First, Art 104 of the Basic Law (BL) established a “constitutional requirement”³ that members of the LegCo must, in accordance with law, swear to uphold the BL and swear allegiance to the Special Administrative Region when assuming office. Second, para 2(3) of the Interpretation of Art 104 of the BL by the Standing Committee of the National People's Congress (NPCSC) sets out “automatic disqualification”⁴ as the consequence when an oath taker declines to take the relevant oath. Third, s 21(a) of the ODO--the implementing law of Art 104 of the BL--states that an office holder shall vacate his office if he declines or neglects to take the relevant oath,⁵ and such vacation of office is “automatic”.⁶ Fourth, the courts have the power and responsibility to determine whether a constitutional requirement under the BL is complied with,⁷ and the court's role herein is not displaced by the common law principle of non-intervention in the internal process of LegCo.⁸ Fifth, the Interpretation applies retrospectively to the oaths previously taken by Leung and Yau as it sets out the true meaning of Art 104 of the BL “from day one”.⁹ Therefore, as Leung and Yau had failed to comply with the above constitutional requirement by declining to take the LegCo Oath,¹⁰ they were “automatically disqualified forthwith from assuming their offices”¹¹ under para 2(3) of the Interpretation¹² and shall vacate their offices under s 21 of the ODO.¹³ Accordingly, there was “no question of allowing them to retake the LegCo Oath”.¹⁴

The material facts of the case may be briefly stated. In September 2016, Leung and Yau were elected as members of the LegCo in their respective geographical constituencies. On 12 October 2016, they were requested at the first meeting of the LegCo to take the LegCo Oath. Leung and Yau purported to do so, but they departed from the statutory text of the LegCo Oath by using terms such as “Hong Kong nation” and “Sheen-na”¹⁵ in their oral affirmations. On 18 October 2016, the President of the Legislative Council (the President) gave a written ruling that the oaths taken by Leung and Yau were invalid,¹⁶ but he was prepared to allow them to “take their oath afresh

³ *Chief Executive* (n 1 above), [26].

⁴ *Ibid.*, [29].

⁵ *Ibid.*, [30].

⁶ *Ibid.*, [44].

⁷ *Ibid.*, [25].

⁸ *Ibid.*, [31].

⁹ *Ibid.*, [53].

¹⁰ *Ibid.*, [41].

¹¹ *Ibid.*, [42].

¹² Paragraph 2(3) of the Interpretation reads:

“An oath taker is disqualified forthwith from assuming the public office specified in the Article if he or she declines to take the oath. An oath taker who intentionally reads out words which do not accord with the wording of the oath prescribed by law, or takes the oath in a manner which is not sincere or not solemn, shall be treated as declining to take the oath. The oath so taken is invalid and the oath taker is disqualified forthwith from assuming the public office specified in the Article.”

¹³ *Chief Executive* (n 1 above), [42]. Section 21 of the ODO reads:

“Any person who declines or neglects to take an oath duly requested which he is required to take by this Part, shall- (a) if he has already entered on his office, vacate it, and (b) if he has not entered on his office, be disqualified from entering on it”.

¹⁴ *Chief Executive* (n 1 above), [42].

¹⁵ “Shee-na” is a derogatory term used by the Japanese to refer to the Chinese during the Second World War.

¹⁶ Andrew Leung, “President's Ruling on the Validity of the Legislative Council Oath Taken by Six Members at the Council Meeting of 12 October 2016” (18 October 2016), para 12(a), available at http://www.legco.gov.hk/yr16-17/english/pre_rul/pre20161018-ref-e.pdf (visited 17 February 2017).

at a Council meeting if they put forward their requests in writing”.¹⁷ On the same day, the Chief Executive and the Secretary for Justice commenced proceedings against the President and the two lawmakers, seeking declarations *inter alia* that the invalid oaths taken by Leung and Yau disqualified them from assuming their offices as LegCo members and the President had no power to re-administer their oaths. But on 7 November 2016, *before* the Court of First Instance (CFI) delivered its ruling, the NPCSC issued an Interpretation of Art 104 of the BL,¹⁸ which *inter alia* provides that “[i]f the oath taken [by a public officer specified in Article 104 of the BL] is determined as invalid, no arrangement shall be made for retaking the oath”.¹⁹ The CFI eventually held that Leung and Yau had declined to take the LegCo Oath and s 21 of the ODO should therefore operate to disqualify them as LegCo members,²⁰ without requiring any further steps to be taken by the President or any other person.²¹ The CA dismissed Leung and Yau's appeal.

In this comment, we disagree with the CA's decision to disqualify Leung and Yau from office. While we accept that the judiciary is empowered under Art 104 of the BL to determine whether an oath taken is valid, it is our view that after the oath is judicially deemed *invalid*, it should be left to the President to determine whether the lawmaker is to be denied a second chance of retaking the oath and be disqualified. First, the CA held that para 2(3) of the Interpretation “automatically disqualified [the pair of lawmakers] forthwith from assuming their offices”,²² but the term “automatic” or “automatically” is found nowhere in the Interpretation. The Interpretation only uses the term “forthwith”, which means “without delay”,²³ and it would not be inconsistent with the Interpretation for the CA to punt the issue over to the President to proceed with the disqualification expeditiously. Second, reading ss 19²⁴ and 21 of the ODO together, we argue that a lawmaker can only be disqualified for declining to take the requisite oath if he had not taken a valid oath after a reasonable time had elapsed, and not “automatically”²⁵ on the first occasion where he declined to take the requisite oath. Third, the principle of non-intervention in the internal process of LegCo applies herein. Whilst the courts have jurisdiction to determine whether the President has the general power to grant or deny a newly elected LegCo member the opportunity of retaking the requisite oath after the original attempt was judicially deemed invalid, the

¹⁷ *Ibid.*, para 7.

¹⁸ Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress (7 November 2016), available at <https://www.elegislation.gov.hk/hk/A115!en@2016-11-07T00:00:00/longTitle?elpid=254663> (visited 17 March 2017).

¹⁹ *Ibid.*, para 2(4).

²⁰ *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2016] 6 HKC 417, [47] (CFI).

²¹ *Ibid.*, [100]. The CFI also held that the outcome as far as Leung and Yau are concerned would be “the same with or without referring to the terms of the Interpretation”: *Ibid.*, [120].

²² *Chief Executive* (n 1 above), [42].

²³ Catherine Soanes and Angus Stevenson (eds), *Concise Oxford English Dictionary* (Oxford: Oxford University Press, 11th ed., 2006) p 560.

²⁴ Section 19 of the ODO reads:

“A member of the Legislative Council shall, as soon as possible after the commencement of his term of office, take the Legislative Council Oath which- (a) if taken at the first sitting of the session of the Legislative Council immediately after a general election of all members of the Council and before the election of the President of the Council, shall be administered by the Clerk to the Council; (b) if taken at any other sitting of the Council, shall be administered by the President of the Council or any member acting in his place.”

²⁵ *Chief Executive* (n 1 above), [42].

courts will not exercise jurisdiction to determine the specific occasion or manner of exercise of this power by the President. Finally, if the NPCSC Interpretation is treated as a piece of legislation instead of a judicial decision, and if Hong Kong courts were to approach this legislation using common law principles of statutory interpretation, the presumption against retrospectivity of legislation applies; and on the facts of this case, this Interpretation would not operate retrospectively to events that predated its announcement.

2. Interplay between Art 104, the NPCSC Interpretation and the ODO

The CA justified its duty to disqualify the lawmakers on the basis that it was its constitutional responsibility to “adjudicat[e] on the consequence of a failure to meet the constitutional requirement”²⁶ imposed under Art 104 of the BL. As reasoned by the Court, Art 104 of the BL requires key public officials to swear allegiance to the Hong Kong Special Administrative Region before they can assume office, and it is for the courts to determine whether a constitutional requirement has been satisfied.²⁷ *A fortiori*, it must be for the courts-- and not the oath administrator--to determine whether a valid oath as required under Art 104 of the BL has been taken.²⁸ Otherwise, if a LegCo member is “wrongly ruled by the Clerk or President [of the LegCo] to have failed to comply with article 104 [of the BL] and disqualified”,²⁹ that member would have no relief.

With respect, the CA's concerns are legitimate but misplaced. Undoubtedly, for the reasons given by the Court, the judiciary must be empowered under Art 104 of the BL to determine whether an oath taken is valid. If no judicial safeguards are in place, a delinquent and partisan oath administrator can unilaterally remove lawmakers duly elected by the people. Hence, in any dispute, upon a final judicial ruling that the oath taken is *valid*, the matter should rest henceforth and that lawmaker must be permitted to assume office.

On the other hand, it is our view that if the court decides that the oath taken is *invalid*, it should be left to the President to determine if the lawmaker is to be denied a second chance of retaking the oath and be disqualified. (On the facts of this dispute, if the Interpretation has retrospective effect--an issue that we will discuss later--the President would have no discretion but be legally bound by the Interpretation to disqualify Leung and Yau.) But unfortunately, the CA took the view that the disqualification of the said legislators was automatic, and it is to its reasons we now turn.

First, the CA held that para 2(3) of the Interpretation “automatically disqualified [the pair of lawmakers] forthwith from assuming their offices”.³⁰ This is an unfortunate judicial sleight of hand. The term “automatic” or “automatically” is found nowhere in

²⁶ *Ibid.*, [31].

²⁷ *Ibid.*, [32].

²⁸ *Ibid.*, [33].

²⁹ *Ibid.*, [74] (Lam V-P).

³⁰ *Ibid.*, [42].

the Interpretation. The Interpretation only uses the term “forthwith”,³¹ which means “without delay”,³² and it would not be inconsistent with the Interpretation for the CA to punt the issue over to the President to proceed with the disqualification expeditiously. We must emphasise that the Interpretation is actually *silent* on who should do the disqualifying. In fact, the courts are not even mentioned in the Interpretation.

Second, the CA held that s 21 of the ODO provides that:

“any person who declines...to take an oath duly requested which he is required to take by this Part shall...if he has already entered on his office, vacate it, and if he has not entered on his office, be disqualified from entering on it”.

Therefore, the Court reasoned that s 21 not only did not allow the two lawmakers to retake their oaths,³³ their removal from office was “automatic”.³⁴ On the Court’s reading of s 21 of the ODO, any lawmaker who declines to take the oath shall be automatically disqualified or removed from office. If the Court was correct, this would mean that lawmakers who had declined to take the oath at the first available opportunity after being duly requested to do so, merely because they or their family members suddenly require emergency medical attention right before they were to be sworn in, those lawmakers too would be *automatically* disqualified from office. But surely this cannot be right.

More importantly, this would not even be what the ODO mandates. Section 19 of the ODO merely requires a member of the LegCo to take the oath “as soon as possible” after the commencement of his term of office, and it expressly provides that this oath can be taken at the first or “at any other sitting of the Council”.³⁵ Therefore, s 21 of the ODO,³⁶ which disqualifies a lawmaker for declining or neglecting to take the oath “duly requested which he is required to take by this Part [IV of the ODO]”, only takes effect when s 19--also in Part IV of the ODO--is flouted. This means that a lawmaker will only be disqualified after he declines or neglects to take the oath required by s 19 of the ODO, ie, he declines or neglects to take a valid LegCo Oath as soon as

³¹ The corresponding term of “forthwith” in the Chinese version of the Interpretation is “即”, which denotes “就/使” (will) or “立刻” (without delay). None of these terms means “自動” (ie, automatic). The phrase “即喪失就任該條所列相應公職的資格” mandates the consequence of disqualification for a culpable public official, but the Chinese text of the Interpretation does not mandate “automatic” disqualification. Therefore, it would not be inconsistent with the Chinese text for the disqualification to be carried out by the President of the LegCo expeditiously.

³² Soanes and Stevenson (n 23 above).

³³ *Chief Executive* (n 1 above), [42].

³⁴ *Ibid.*, [44].

³⁵ Section 19 of the ODO.

³⁶ Section 21 of the ODO.

reasonably possible³⁷ after the commencement of his term of office. Therefore, it is clear that ss 19 and 21 of the ODO do not disqualify a lawmaker “automatically”³⁸ on the first occasion where he declined to take the aforesaid oath. It is unfortunate that the CA did not explore the interpretive effect s 19 has on s 21 and the interplay between both statutory provisions.

Third, the CA held that “[t]he principle of non-intervention in the internal process of LegCo cannot prevent the court from adjudicating on the consequence of a failure to meet the constitutional requirement”,³⁹ and therefore, it was for the courts to disqualify the two lawmakers after their oaths were deemed invalid.

The principle of non-intervention in the internal process of LegCo was affirmed by the Court of Final Appeal (CFA) in *Leung Kwok Hung v President of the Legislative Council (No1)*.⁴⁰ The CFA held that in construing and applying the provisions of the BL, it is necessary to apply concepts that are embedded in the common law, which include the principle that:

“the courts will not intervene to rule on the regularity or irregularity of the internal processes of the legislature but will leave it to [the legislature to] determine exclusively for itself matters of this kind”.⁴¹

On the facts in *Leung Kwok Hung*, two lawmakers had attempted to filibuster a legislative bill by moving over 1,300 amendments at the relevant LegCo debate. After 33 hours into the debate, the President relied on r 92 of the Rules of Procedure of the LegCo (RoP),⁴² which provides that in any matter not provided for in the RoP, the practice and procedure to be followed in the LegCo shall be as decided by the President,⁴³ to end the debate.

The central issue before the CFA in *Leung Kwok Hung* was whether Art 73(1) of the BL, which empowers the LegCo to “enact, amend or repeal laws in accordance with the provisions of [the BL] and legal procedures”,⁴⁴ requires Hong Kong courts to exercise jurisdiction to ensure compliance with the RoP in the LegCo's law-making

³⁷ In construing statutes, courts would avoid a construction that leads to an absurd result (an example of which is given above), since that is unlikely to be what the legislature intended: Francis Bennion and Oliver Jones (eds), *Bennion on Statutory Interpretation* (London: Sweet and Maxwell, 6th ed., 2013) p 869. Moreover, common law courts have often construed the phrase “as soon as possible” to mean “within a reasonable time”: See *Hydraulic Engineering Co Ltd v McHaffie Goslett & Co* (1878) 4 QBD 670, 673; *Vines v Djordjeviitch* (1955) 91 CLR 512, 522; *R v Greenaway* (1994) 12 CRNZ 103, 106. Therefore, “as soon as possible” in s 19 of the ODO should mean “as soon as reasonably possible” and hence within “a reasonable time”.

³⁸ *Chief Executive* (n 1 above), [42].

³⁹ *Ibid.*, [31].

⁴⁰ (2014) 17 HKCFAR 689.

⁴¹ *Ibid.*, [28].

⁴² Article 75(2) of the BL reads: “The rules of procedure of the Legislative Council shall be made by the Council on its own, provided that they do not contravene this Law.”

⁴³ Rule 92 of the RoP reads:

“In any matter not provided for in these Rules of Procedure, the practice and procedure to be followed in the Council shall be such as may be decided by the President who may, if he thinks fit, be guided by the practice and procedure of other legislatures.”

⁴⁴ Article 73(1) of the BL reads: “The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions;...To enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures”.

process. Critically, the CFA noted that Art 73(1) of the BL does not address the question of whether any non-compliance with the “legal procedures” in the legislative process would invalidate the law that was enacted after such non-compliance.⁴⁵ Since Art 73(1) of the BL is *ambiguous* on this point, the Court held that the constitutional provisions therein do not displace the common law principle of non-intervention.⁴⁶ Nevertheless, pursuant to a written constitution which confers law-making powers on the legislature, the judiciary will determine whether the legislature has a particular power or privilege,⁴⁷ but they will not exercise jurisdiction to determine “the occasion or the manner of exercise”⁴⁸ of such powers or privileges by the LegCo or its President.

On this basis, the CFA in *Leung Kwok Hung* determined that the President had the power to terminate a debate, as this was inherent in his power granted under Art 72(1) of the BL to “preside over meetings”.⁴⁹ But it was not for the Court to consider whether that power was exercised properly or whether the impugned decision to close the debate was an unauthorised making of a rule of procedure.⁵⁰

In *Leung Kwok Hung*, notwithstanding that Art 73(1) of the BL explicitly requires the LegCo to “enact...laws in accordance with the provisions of [the BL] and legal procedures”, the CFA held that Art 73(1) was ambiguous on whether any non-compliance with the “legal procedures” in the legislative process would invalidate the law that was enacted after such non-compliance.⁵¹ In view of this ambiguity, the Court held that the constitutional provisions therein do not displace the common law principle of non-intervention in the internal affairs of LegCo.⁵² Where this principle applies, the judiciary will only determine whether the legislature has a particular power⁵³--which on the facts was the power to terminate a legislative debate--and it will not exercise jurisdiction to determine “the occasion or the manner of exercise”⁵⁴ of such powers by the LegCo or its President.

The principles laid out in *Leung Kwok Hung* are apposite herein. Just as Art 73(1) of the BL is ambiguous on whether any non-compliance with the “legal procedures” in the legislative process would invalidate any legislation that was enacted after such non-compliance, Art 104 of the BL⁵⁵ and the relevant NPCSC Interpretation are *ambiguous* on whether Hong Kong courts are required to enforce the adverse

⁴⁵ *Leung Kwok Hung* (n 40above), [36].

⁴⁶ *Ibid.*, [38].

⁴⁷ *Ibid.*, [39].

⁴⁸ *Ibid.*, [43].

⁴⁹ *Ibid.*, [46]. Article 72(1) of the BL reads: “The President of the Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions:...To preside over meetings”.

⁵⁰ *Leung Kwok Hung* (n 40above), [46].

⁵¹ *Ibid.*, [36].

⁵² *Ibid.*, [38].

⁵³ *Ibid.*, [39].

⁵⁴ *Ibid.*, [43].

⁵⁵ Article 104 of the BL reads:

“When assuming office, the Chief Executive, principal officials, members of the Executive Council and of the Legislative Council, judges of the courts at all levels and other members of the judiciary in the Hong Kong Special Administrative Region must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China.”

consequences that follow from an invalid LegCo Oath. In view of this ambiguity, these provisions do not displace the principle of non-intervention in the internal affairs of LegCo. Therefore, whilst the courts have jurisdiction to determine whether the President has the general power to grant or deny a newly elected LegCo member the opportunity to retake the requisite oath after the original attempt was judicially deemed invalid, the courts will not exercise jurisdiction to determine the specific occasion or manner of exercise of this power by the President.

It is our view that the BL and the RoP confer on the President this aforesaid power to grant or deny a newly elected LegCo member the opportunity to retake the requisite oath. First, as discussed earlier, s 19 of the ODO merely imposes on a LegCo member the duty to take a valid LegCo Oath as soon as reasonably possible after his term of office begins; it also provides that this valid LegCo Oath may be taken at the “first sitting” or “any other sitting” of the LegCo.⁵⁶ Therefore, s 19 clearly contemplates that a LegCo Oath can be re-administered at another sitting if a valid one was not taken at the first sitting of the LegCo. Second, Art 72(2) of the BL empowers the President to “decide on the agenda”.⁵⁷ Thus, the President is conferred with the general power to determine that the legislative agenda should or should not include the re-administration of the LegCo Oath for its members. Third, since neither the ODO nor the RoP specifies the time limit for a LegCo member to take a valid oath, save that it must be taken within a reasonable time,⁵⁸ r 92 of the RoP applies. As mentioned, r 92 of the RoP provides that the practice and procedure to be followed in LegCo for any matter not provided for in the RoP shall be decided by the President.⁵⁹ Therefore, the President is conferred with the general power to decide--in accordance with the Interpretation, the ODO and the RoP--the practice and procedure to be followed when determining if the LegCo Oath can be re-administered.

Hence, once it is determined that the President has this general power, it is not for the courts to exercise jurisdiction to determine “the occasion or the manner of exercise”⁶⁰ of this power. Therefore, even if the Interpretation provides that no arrangements shall be made for retaking the oath after the oath taken is determined as invalid, it is not for the courts to determine, on behalf of the President, that this “occasion” does not warrant the re-administration of the oath, nor is it for the courts to dictate the “manner” by which the refusal to re-administer the oath should be performed by the President.

The interplay between Art 104 of the BL, the NPCSC and the ODO raises two separate and conceptually distinct issues and, with respect, the CA has conflated both. The first concerns the consequence for legislators if they intentionally decline to take the prescribed oath; the second pertains to which branch of government is tasked with enforcing any adverse consequence that follows from an invalid oath. The Interpretation has made it clear that the consequence of the abovementioned misconduct is disqualification. But one must note that the Interpretation is actually

⁵⁶ Section 19 of the ODO.

⁵⁷ Article 72(2) of the BL reads:

“The President of the Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions:...To decide on the agenda, giving priority to government bills for inclusion in the agenda”.

⁵⁸ See discussion in note 37 on s 19 of the ODO.

⁵⁹ Rule 92 of the RoP.

⁶⁰ *Leung Kwok Hung* (n 40 above), [43].

silent on whether the judiciary has to be the branch of government that disqualifies a lawmaker after his oath is deemed invalid.⁶¹ Therefore, neither Art 104 of the BL nor the Interpretation displaces the principle of non-intervention in the internal process of LegCo on the latter issue. Furthermore, the Interpretation is also silent on whether it applies retrospectively to events that predated its announcement, an issue we will now examine.

3. Retrospectivity of the NPCSC Interpretation

The CA held that the question of whether the NPCSC Interpretation applies retrospectively “cannot and does not arise”,⁶² because “the Interpretation, by definition, sets out the true and proper meaning of art.104 from day one”.⁶³ An implicit assumption in the CA's ruling seems to be that NPCSC Interpretations operate in the same way as common law decisions: when the NPCSC delegates issue an Interpretation, they are acting as common law judges who merely declare what the relevant BL provision has always meant from its inception. Underpinning this assumption is the declaratory theory of judicial decisions, where the common law is seen as “an immutable body of doctrine existing from time immemorial”,⁶⁴ waiting to be discovered and declared by judges who do not make or change it.⁶⁵ Therefore, when a new judicial proposition is announced, the law is revealed but not changed at all.⁶⁶ It follows that if NPCSC Interpretations function in Hong Kong in the same way as common law judgments do, they should apply retrospectively.⁶⁷

This approach was first adopted by the CFA when it grappled with the NPCSC's first post-handover Interpretation of the Basic Law. In 1999, following the CFA's landmark decision in *Ng Ka Ling v Director of Immigration*,⁶⁸ the NPCSC issued an Interpretation⁶⁹ of Arts 22(4)⁷⁰ and 24(2)(3)⁷¹ of the BL. When the CFA had to decide

⁶¹ It is also noteworthy that Professor Albert Chen, an eminent pro-Beijing constitutional law scholar and member of Hong Kong Basic Law Committee—a political body that advises the NPCSC prior to the official issue of any Interpretation—has revealed publicly prior to the CFI's ruling that it was open to the Hong Kong courts to punt the issue over to the oath administrator at the LegCo: Jeffie Lam and Joyce Ng, “Hong Kong Courts Can Decide Fate of At Least 10 Lawmakers despite Beijing Ruling” *South China Morning Post* (11 November 2016), available at <http://www.scmp.com/news/hong-kong/politics/article/2045224/hong-kong-courts-can-decide-fate-least-10-lawmakers-despite> (visited 14 January 2017).

⁶² *Chief Executive* (n 1 above), [53].

⁶³ *Ibid.*

⁶⁴ *Giannarelli v Wraith* (1988) 165 CLR 543, 584-585.

⁶⁵ *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 358.

⁶⁶ *Ibid.*

⁶⁷ In Hong Kong, the issue of whether courts can overrule past decisions prospectively remains unresolved; but even if the courts can do so, “the circumstances must be so exceptional that the occasions when they would be held to exist would be very rare”: *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614, [25] (Li CJ).

⁶⁸ (1999) 2 HKCFAR 4.

⁶⁹ The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted by the Standing Committee of the Ninth National People's Congress at its Tenth Session on 26 June 1999), available at <https://www.elegislation.gov.hk/hk/A106!en@1999-06-26T00:00:00/longTitle?elpid=254021> (visited 17 March 2017).

⁷⁰ Article 22(4) of the BL reads:

“For entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of

on the temporal effect of that interpretation in *Lau Kong Yung v Director of Immigration*,⁷² it held that the Interpretation “dates from 1 July 1997 when the Basic Law came into effect”⁷³ and “declared what the law has always been”.⁷⁴ Later, in *Director of Immigration v Chong Fung Yuen*,⁷⁵ when the CFA was asked to interpret Art 24(2)(1) of the BL,⁷⁶ it confined the “binding”⁷⁷ effect of the Interpretation to just Arts 22(4) and 24(2)(3),⁷⁸ even though one passage in the Interpretation suggests that it would govern Art 24(2)(1) as well.⁷⁹ In doing so, the CFA once again treated an Interpretation as a judgment, “drawing an analogy between it and the concept of obiter dictum in the common law tradition”.⁸⁰

Insofar as the CA has applied the Interpretation retrospectively to events that predated its announcement, it was bound by CFA precedents; therefore, we do not disagree with the Court's decision to do so. However, if the CFA would like to review this retrospectivity issue in the future, we would like to sketch out an alternative view for its consideration.

Arguably, the Interpretation can be treated as a legislative enactment rather than a judicial decision. Albert Chen, a current and long-time member of the Hong Kong Basic Law Committee, has explained that an NPCSC Interpretation is “a legislative rather than judicial act”.⁸¹ Wang Zhenmin of Tsinghua University, a former member of the Hong Kong Basic Law Committee, has also argued that the NPCSC interprets laws in its capacity as a legislative body,⁸² and insofar as an NPCSC Interpretation overrides a constitutional decision made by Hong Kong courts, this is “not dissimilar

settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region.”

⁷¹ The relevant part of Art 24 of the BL reads:

“Residents of the Hong Kong Special Administrative Region (“Hong Kong residents”) shall include permanent residents and non-permanent residents. The permanent residents of the Hong Kong Special Administrative Region shall be: (1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region; (2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region; (3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2)...”.

⁷² (1999) 2 HKCFAR 300.

⁷³ *Ibid.*, 326D.

⁷⁴ *Ibid.*

⁷⁵ (2001) 4 HKCFAR 211.

⁷⁶ Article 24(2)(1) of the BL reads:

“Residents of the Hong Kong Special Administrative Region (“Hong Kong residents”) shall include permanent residents and non-permanent residents. The permanent residents of the Hong Kong Special Administrative Region shall be: (1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region”.

⁷⁷ *Chong Fung Yuen* (n 75 above), 223D.

⁷⁸ *Ibid.*, 223A-E.

⁷⁹ That relevant passage of the first NPCSC Interpretation reads:

“The legislative intent as stated by this Interpretation, together with the legislative intent of all other categories of Article 24(2) of the Basic Law of the HKSAR of the PRC, have been reflected in the ‘Opinions on the Implementation of Article 24(2) of the Basic Law of the HKSAR of the PRC’ adopted at the Fourth Plenary Meeting of the Preparatory Committee for the HKSAR of the NPC on 10 August 1996.”

⁸⁰ Albert HY Chen, “Another Case of Conflict between the CFA and the NPC Standing Committee?”(2001) 31 *HKLJ* 179, 185.

⁸¹ *Ibid.*

⁸² Zhenmin Wang, *Zhongyang yu tebiexingzhengqu guanxi: yizhong fazhi jiegou de jieshi* [*The Central-SAR Relationship: A Legal Analysis*](Beijing: Qinghua daxue chubanshe, 2002) p 277.

to the overriding of precedents by *legislation* under common law systems”.⁸³

Assuming that the NPCSC Interpretation is treated as a piece of legislation, and if Hong Kong courts were to approach this legislation using common law principles of statutory interpretation,⁸⁴ the presumption against retrospectivity of legislation would apply. According to this presumption, unless a contrary intention appears, a legislative provision is presumed not to operate retrospectively,⁸⁵ that is, to impair vested rights acquired under then-existing laws or to create a new obligation, duty or disadvantage in relation to past events,⁸⁶ regardless of whether it is “penal in the sense of punishment”.⁸⁷ In determining whether a provision is intended to operate retrospectively, the courts will consider the possible degree of unfairness so caused; the greater the unfairness, the stronger the presumption that the legislature did not so intend.⁸⁸ Therefore, penalties for non-compliance with the law, criminal or not,⁸⁹ should not be altered to the detriment of the wrongdoer after the wrong was committed, as that would be most unfair.⁹⁰

On the facts, when Leung and Yau were first requested to take the LegCo Oath, the rules on oath taking were only set out in ss 19 and 21 of the ODO and Art 104 of the BL. But the Interpretation subsequently imposes an obligation on one to take the legislative oath in a manner specified in the Interpretation,⁹¹ prescribes a penalty of “forthwith”⁹² disqualification if one declines to take the oath,⁹³ and denies the oath taker another opportunity of re-taking the oath if the prior oath has been deemed invalid.⁹⁴ All of the above requirements are *additional* to the statutory and constitutional obligations expressly laid out in the ODO and the BL. On 12 October 2016, nobody would have understood from the pre-existing statutory and constitutional provisions that the consequences for declining to take the legislative oath would be so severe, as hitherto these consequences simply did not exist.

Nor is there any contrary intention in the Interpretation itself to rebut this presumption. We must highlight that the Interpretation is actually *silent* on whether it applies retrospectively to oaths already taken. If the NPCSC had intended to make the

⁸³ Zhenmin Wang, “From the Judicial Committee of the British Privy Council to the Standing Committee of the Chinese National People’s Congress--An Evaluation of the Legal Interpretive System after the Handover”(2007) 37 *HKLJ* 605, 611 (emphasis added). See also Anthony Mason, “The Rule of Law in the Shadow of the Giant--The Hong Kong Experience”(2011) 33 *Sydney Law Review* 623, 640.

⁸⁴ We concede that it is open to Hong Kong courts, if they so choose, to adopt principles of statutory interpretation applied by Chinese courts when they address an NPCSC Interpretation, but a discussion of such principles is beyond the scope of this case note. We are assuming herein that Hong Kong common law courts will prefer to approach the NPCSC Interpretation using common law principles of statutory interpretation, if they decide to treat the Interpretation as a piece of legislation.

⁸⁵ Bennion and Jones (n 37 above) p 291; *Spread Trustee Co Ltd v Hutcheson* [2012] 2 AC 194, [65].

⁸⁶ *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553, 558-559.

⁸⁷ *Re School Board Election for the Parish of Pulborough* [1894] 1 QB 725, 737.

⁸⁸ Daniel Greenberg (ed), *Craies on Legislation* (London: Sweet and Maxwell, 10th ed., 2012), para 10.3.8; *L’Office Cherifien des Phosphates Unitramp SA v Yamashita-Shinnihon Steamship Co Ltd (The Boucraa)* [1994] 1 AC 486, 524-529.

⁸⁹ Greenberg (n 88 above) para 10.3.13 footnote 184; see also para 10.3.14.

⁹⁰ Bennion and Jones (n 37 above) p 738.

⁹¹ Interpretation of Article 104 (n 18 above) para 2(2).

⁹² *Ibid.*, para 2(3).

⁹³ *Ibid.*

⁹⁴ *Ibid.*, para 2(4)

Interpretation retrospective, it could have easily expressed its intention in the text. For example, the NPCSC's first Interpretation expressly provides that whilst it does not affect the legal rights acquired by the parties under *Ng Ka Ling*, "...the question whether any other person fulfils the conditions prescribed by Article 24(2)(3) of the Basic Law...shall be determined by reference to this Interpretation",⁹⁵ thus implying that the first Interpretation was intended to have retrospective effect. In contrast, this Interpretation is silent on its temporal effect. Neither do the NPCSC's Explanations on the Draft Interpretation,⁹⁶ if admissible at all, evince any unambiguous intention that the Interpretation applies retrospectively. Therefore, the presumption against retrospectivity is not displaced, and if the Interpretation is viewed as a piece of legislation, it should not operate retrospectively to events that predated its announcement.

4. Conclusion

Assuming that this NPCSC Interpretation has retrospective effect, the political fates of Leung and Yau would be the same even if the CA had passed the buck to the President. But by not participating in the legislators' inglorious removal from office, the Hong Kong courts would have preserved their image as the guardian of the city's civil liberties and warded off criticisms that it had now become an enabler of the executive government's political agenda.⁹⁷ More importantly, one should note that this court victory has emboldened the Hong Kong government, which has now gone to court to seek the removal of four additional pro-democracy lawmakers.⁹⁸ By unilaterally disqualifying the lawmakers, the Hong Kong judiciary has unwittingly opened the floodgates to more (unnecessary) litigation and embroiled itself in more political controversy.

⁹⁵ Interpretation of Articles 22(4) and 24(2)(3) (n 69 above).

⁹⁶ "Explanations on the Draft Interpretation by the Standing Committee of the National People's Congress of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" (8 November 2016), available at http://news.xinhuanet.com/english/2016-11/08/c_135812367.htm visited 5 February 2017).

⁹⁷ Audrey Eu, "The Road of No Return Part 2: How the Courts Could Have Handled the Oaths Row" *Hong Kong Free Press* (7 December 2016), available at <https://www.hongkongfp.com/2016/12/07/road-no-return-part-2-courts-handled-oaths-row/> (visited 1 February 2017).

⁹⁸ While these four lawmakers had intentionally slipped pro-democracy messages into their legislative oaths, their oaths were either approved by the oath administrator or validly retaken after the first attempts were ruled invalid. See Chris Lau, "Hong Kong Lawmakers Accused of Setting aside Solemnity in Taking Oaths" *South China Morning Post* (2 December 2016), available at <http://www.scmp.com/news/hong-kong/politics/article/2051266/hongkong-lawmakers-accused-setting-aside-solemnity-taking> (visited 1 February 2017).