

to legality or validity, it appears that what it actually means is the reason or motive of enacting a law, which is unrelated to the question of legality.

As time passes, the legality of the PLC is likely to be of historical significance only. The jurisdiction of the courts, however, will haunt our legal system for a considerable period and will have far-reaching consequences. If the Court of Appeal was correct on the question of jurisdiction, there is hardly anything left in the promise of a high degree of autonomy.

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### The Concept of Justiciability and the Jurisdiction of the Hong Kong Courts

The Court of Appeal's decision on 29 July 1997 in *HKSAR v Ma Wai-kwan*<sup>1</sup> was described by Professor Yash Ghai and Solicitor General Daniel Fung respectively as representing a 'dark day for our rights'<sup>2</sup> and 'one of Hong Kong's finest hours.'<sup>3</sup> I see in the case the dawn of a new era in the history of the judicial development of Hong Kong's constitutional law. The creative and policy-making role of law courts in constitutional adjudication has long been recognised in other well-developed legal systems.<sup>4</sup> In Hong Kong's case, the judiciary plunged into the depths of constitutional complexities immediately after the transition. It underwent a baptism of fire.

Chief Justice Marshall, founding father of American constitutionalism, once said: '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.'<sup>5</sup> 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.<sup>6</sup>

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<sup>1</sup> [1997] 2 HKC 315.

<sup>2</sup> Yash Ghai, 'Dark Day for our Rights,' South China Morning Post, 30 July 1997.

<sup>3</sup> Daniel Fung, 'A Win for the Rule of Law,' South China Morning Post, 1 August 1997.

<sup>4</sup> See eg the discussion in P J Hanks, *Constitutional Law in Australia* (Sydney: Butterworths, 1991), pp 21-6; Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2nd ed 1985), pp 97-100.

<sup>5</sup> *Cohens v Virginia* 19 US (6 Wheat) 264, 404 (1821).

<sup>6</sup> See generally the discussion in Laurence H Tribe, *American Constitutional Law* (Mineola, New York: Foundation Press, 1988), pp 67-72.

Mr Chief Judge Patrick Chan pointed out in his judgment<sup>7</sup> that, in the colonial era, the Hong Kong courts could not inquire into the propriety of the selection of a particular person as the Governor of Hong Kong, but must accept the appointment by the Crown. The appointment of a colonial governor,<sup>8</sup> as well as the appointment of the Prime Minister, the grant of honours, the conclusion of a treaty, the dispatch of armed forces etc, are examples of the exercise of *prerogative powers* under English law.<sup>9</sup> Some of them (primarily those relating to foreign affairs and foreign nationals) are called *acts of state*<sup>10</sup> (a concept now incorporated into our Basic Law).<sup>11</sup>

However, since the landmark decision of the House of Lords in the *Council of Civil Service Unions* case<sup>12</sup> the courts have no longer adhered to the traditional view that courts could not inquire into the manner of exercise of all prerogative powers. Whether a prerogative act is subject to judicial review now depends on whether the subject matter concerned is *justiciable*. 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.<sup>13</sup> The doctrine of '*political questions*' is part of this body of law.<sup>14</sup> 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 exists judicially manageable standards

<sup>7</sup> [1997] 2 HKC 315, 334–5.

<sup>8</sup> In the case of colonial Hong Kong, the appointment was made pursuant to Art 1 of the Hong Kong Letters Patent 1917.

<sup>9</sup> See Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (London: Penguin Books, 6th ed 1989), ch 6.

<sup>10</sup> *Ibid*, ch 7.

<sup>11</sup> BL19.

<sup>12</sup> [1985] AC 374.

<sup>13</sup> See Tribe (note 6 above), pp 67–155. The basic rule is that the court will not exercise jurisdiction unless there is a 'case' or 'controversy' within the meaning of the Constitution. The doctrines of justiciability which have evolved around this rule include the doctrine of 'standing,' the ban on 'advisory opinions,' the 'ripeness' doctrine (whether the issue is 'ripe' for adjudication) and the 'mootness' doctrine (which bars consideration of 'moot' cases), the prohibition of 'collusive suits,' and the 'political questions' doctrine.

<sup>14</sup> See *ibid*, pp 96–107.

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.'<sup>15</sup>

The doctrines of justiciability and political questions reflect the courts' self-understanding that it is wise to recognise and draw the boundary of judicial competence and hence judicial power. The exercise of judicial power should be confined to areas and issues in 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 politicisation of the judiciary and the law (which reduces their legitimacy) and of conflicts and struggles between the branches of government (which destabilise the system of constitutional rule of law).

Viewed from the perspective of justiciability, the issue of the Provisional Legislative Council (PLC) was, I believe, rightly decided by the Court of Appeal in *HKSAR v Ma Wai-kwan* although the court did not expressly rely on any doctrine of justiciability in the course of its reasoning. The PLC was established by the Preparatory Committee (PC) for the SAR, purportedly pursuant to the 1990 NPC Decision (passed at the same time as the Basic Law itself) on the establishment of the SAR government structure by the PC.<sup>16</sup> The crucial issue was whether the PC was acting ultra vires this Decision (the validity of which nobody disputed) in establishing the PLC, and this was a question of the interpretation of this Decision. Given that the NPC itself had already pronounced on this issue in its resolution in March 1997, the issue should not be justiciable in the courts of the HKSAR. Our courts should respect the NPC's authority to pronounce on this issue and defer to its judgment. It would not be appropriate for the court to inquire into whether the Chinese government (acting through the NPC Standing Committee in 1994) was wrongly interpreting the Basic Law when it said that the Patten political

<sup>15</sup> These factors were systematically and comprehensively set out by the US Supreme Court in the leading case of *Baker v Carr* 369 US 186, 217 (1962).

<sup>16</sup> The background to the establishment of the PLC was fully set out in the judgments in *HKSAR v Ma Wai-kwan*. See also Albert H Y Chen, 'The Provisional Legislative Council of the SAR' (1997) 27 HKLJ 1.

reforms introduced an electoral system which was inconsistent with the Basic Law. Neither was the court well-equipped to examine whether the Chinese government had used its best endeavours to seek British co-operation in organising an election to the first SAR LegCo before the transition, or whether it was feasible to organise an election so shortly after the transition that there was no need to establish the PLC.

Having said that, I believe the Court of Appeal's decision should *not* be so broadly interpreted as to mean that any act, decision, or resolution of the NPC that is relevant to or touches upon Hong Kong has the force of law in Hong Kong. The alleged analogy with Hong Kong's former position *vis-à-vis* the British sovereign is questionable. UK Acts of Parliament cannot be challenged because there is a doctrine of parliamentary supremacy in British law, and certain prerogative acts (eg appointment of the Governor) could not be challenged *only* because the subject matter was non-justiciable. However, after the Basic Law has come into full operation on 1 July 1997, the NPC cannot validly exercise authority over Hong Kong in any manner inconsistent with the Basic Law. Thus Hong Kong courts are under no obligation to recognise the legal force of any NPC acts that have not been made applicable to Hong Kong in accordance with Art 18 of the Basic Law, which requires prior consultation with the SAR government as well as the Committee for the Basic Law and the formal amendment of Annex III of the Basic Law.

In any system of division of power between a central national government and a local region exercising autonomy, disputes are bound to arise regarding whether the central authority is intruding upon areas reserved for local autonomy, or whether the local government is exceeding the scope of its autonomy. In federal states, such disputes are usually resolved by the federal supreme courts.<sup>17</sup> In the case of the HKSAR, the Basic Law has made the NPC Standing Committee (and not the courts of the HKSAR) the ultimate arbiter, subject to consultation with the Basic Law Committee and the SAR government.<sup>18</sup> Only the future can tell whether this will work, but I believe that the will to make it work is there, both in Hong Kong and in Beijing, and it is a very strong will indeed.

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<sup>17</sup> See generally Hogg (note 4 above), chs 5 and 15; Hanks (note 4 above), chs 1 and 7; Tribe (note 6 above), chs 5 and 6; and Durga Das Basu, *Introduction to the Constitution of India* (New Delhi: Prentice-Hall of India, 6th ed 1976), chs 4, 5, 19, and 21.

<sup>18</sup> See BL17, 18, 158, and 159.

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