FOCUS ON THE MA CASE

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The Jurisdiction and Legality of the Provisional Legislative Council

On 29 July 1997 the Court of Appeal in *HKSAR v David Ma Wai-kwan* held inter alia that, as regional bodies, the HKSAR courts had no jurisdiction to query the validity of any legislation passed or acts performed by the sovereign, represented by the National People's Congress (NPC). However, the HKSAR courts did have jurisdiction to examine the existence (as opposed to the validity) of the acts of the sovereign or its delegate.[1] Accordingly, the HKSAR courts could not challenge the constitutionality of the NPC decisions setting up the Provisional Legislative Council (PLC), which was an exercise of sovereignty by the PRC, once it was satisfied that the relevant NPC decisions were wide enough to empower the Preparatory Committee to establish the provisional body.

This decision is no doubt one of the most important decisions ever rendered by the Court of Appeal, and raises a large number of controversial issues. This commentary is confined to two issues, namely the jurisdiction of the court and the legality of the Provisional Legislative Council.[2]

The relevant decisions

Article 68 of the Basic Law provides that the Legislative Council of the HKSAR shall be constituted by election. The method for forming the Legislative Council shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress, with the ultimate aim of having a Legislative Council returned by universal suffrage. It further provides that the method of forming the Legislative Council up to the year 2007 is prescribed in Annex II. Annex II prescribes the composition of the second and third terms of the Legislative Council. For the first Legislative Council, Annex II states that it shall be formed in accordance with the 'Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region.' This Decision ('the 1990 Decision') was made by the NPC at the same time as the promulgation of the Basic Law, and was published together with the main provisions of the Basic Law in all official versions of the Basic Law. This Decision contains six paragraphs. Paragraph 2

1 [1997] 2 HKC 315, 335.

2 See P Wesley-Smith, 'Constitutional Dilemmas in the Hong Kong Special Administrative Region' (unpublished paper prepared for the 'Hong Kong in Transition' conference in London, 15 December 1997); J Chan, 'Amicus Curiae and Non-Party Intervention' (1997) 27 HKLJ 391 (below).

provides for the establishment of a Preparatory Committee in 1996, whose responsibility is, inter alia, to 'prescribe the specific method for forming the first Government and the first Legislative Council *in accordance with this Decision*.' Paragraph 6 then provides that the first Legislative Council of the HKSAR shall be composed of sixty members, with twenty members returned by geographical constituencies through direct election, ten members returned by an election committee (which is undefined), and thirty members returned by functional constituencies. If the composition of the last Legislative Council in Hong Kong in 1995 is in conformity with the 1990 Decision and the Basic Law, then its members, subject to their satisfying certain criteria, shall automatically become members of the first Legislative Council of the HKSAR — the so-called 'through train' model. The 1990 Decision further provides that the term of office of the first Legislative Council shall be two years.

On 31 August 1994, the NPC adopted a resolution ('the 1994 Decision') that the Legislative Council formed in 1995 shall terminate on 30 June 1997 because its composition was in contravention of the Sino-British Joint Declaration, the Basic Law, and the 1990 Decision.[3] It further resolved that the Preparatory Committee shall prescribe the specific method for forming the first Legislative Council of the HKSAR and shall constitute the first Legislative Council *in accordance with the 1990 Decision*.

On 24 March 1996, the Preparatory Committee resolved to establish the Provisional Legislative Council ('the 1996 Decision'). According to this Decision, the PLC shall be composed of sixty members, to be elected by a Selection Committee, whose composition is defined in the 1990 Decision. The responsibilities of the PLC are (1) to enact laws which are essential for ensuring the proper operation of the HKSAR; (2) to examine and approve budgets introduced by the government; (3) to approve taxation and public expenditure; (4) to receive and debate the policy addresses of the Chief Executive; (5) to endorse the appointment of the judges of the Court of Final Appeal and the Chief Judge of the High Court; (6) to participate, through the President, in the nomination of Hong Kong members to the Committee on the Basic Law; and (7) to handle all matters which must be handled by the Provisional Legislative Council before the formation of the first Legislative Council. The PLC shall be dissolved upon the formation of the first Legislative Council, and in any event on 30 June 1998.

On 14 March 1997, the NPC approved (in 'the 1997 Decision') the working report of the Preparatory Committee which set out the details of the 1996 Decision.

[3] The 1994 Decision and the 1996 Decision were reproduced in A Blaustein (ed), *Constitutions of Dependencies and Special Sovereignties — United Kingdom: British Dependent Territories — Hong Kong (Booklet 7)* (edited by Johannes Chan), (New York: Oceana Publications Inc, 1996), pp 143–50.

Jurisdiction of the courts

The Court of Appeal held that, prior to the changeover, the Hong Kong courts, being colonial courts, had no jurisdiction to challenge the legality or validity of any legislation enacted by the sovereign or any ministerial acts. Under BL19, the HKSAR courts inherited the same restrictions on their jurisdiction. They did not enjoy any greater power than that enjoyed by the courts under British rule. The NPC, being the 'highest organ of state power'[4] and with its Standing Committee entrusted to 'exercise the legislative power of the state,'[5] was in an equivalent position to the United Kingdom Parliament before the change of sovereignty. Accordingly, the legality or validity of laws made by the NPC and its Standing Committee was not open to challenge in the HKSAR courts.[6]

The Court of Appeal's assimilation of the exercise of powers by the NPC under the Chinese Constitution to the exercise of powers by the previous sovereign under the British constitution is, with respect, a doubtful assumption. This is indeed recognised by Nazareth VP:

> ... I cannot say I have come to accept [the conclusion] without hesitation. Ms Li pointed to a number of matters that could impinge upon it. The analogy between NPC and the British 'sovereign' upon further examination may not hold in material aspects. There is a written constitution in China, and presumably nothing that corresponds to the Royal Prerogative. Nor has there been a detailed review of the provisions of the PRC constitution according to Ms Li, which it was hinted might bear upon the matter.[7]

Supremacy of Parliament

The doctrine of the supremacy of Parliament rests on the notion that the Queen in Parliament can make or unmake any law whatsoever on any matter.[8] Every other law-making body within the realm either derives its authority from Parliament or exercises it at the sufferance of Parliament; it cannot be superior to or even coordinate with, but must be subordinate to Parliament. Hence no court, metropolitan or colonial, is competent to question the validity of an Act of Parliament.[9] This doctrine developed in the context of a jurisdiction where there is no written constitution.

4 Art 57 of the PRC Constitution.
5 Ibid, Art 59.
6 Note 1 above, per Chan CJHC, p 335; Mortimer VP regarded this statement as 'self-evident': pp 369–70.
7 Ibid, pp 352–3.
8 A V Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 10th ed 1961), pp 39–40.
9 One of the best statements of this principle comes from Ungoed-Thomas J in *Cheney v Conn* [1968] 1 WLR 242, 247: 'What the statute itself enacts cannot be unlawful, because [it] is the highest form of law that is known to this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment ... is illegal.'

The power of a legislature is necessarily restricted by a written constitution if there is one, in which case the constitution, and not parliament, becomes supreme. China has a written constitution. The NPC is subject to and derives its legislative power from the Constitution. Art 31 of the PRC Constitution provides that 'the State may establish special administrative regions when necessary. The systems to be instituted in the special administrative regions shall be prescribed by law enacted by the National People's Congress in light of the specific conditions.' It is on the authority of this Article that the Basic Law was enacted. The Basic Law itself is unique within the PRC legal system. It is intended to be a self-contained constitution for the HKSAR. At the same time it is national law which is binding on the NPC itself.

The Basic Law seeks to preserve the integrity and autonomy of the social, economic, and legal systems of Hong Kong, even to the extent of excluding the application to the HKSAR of fundamental principles applicable to the mainland such as party leadership, people's democratic dictatorship, and the upholding of socialism, Marxism, Leninism, and Maoism. It contains provisions which are clearly incompatible with the PRC Constitution, such as the maintenance of the previous capitalist system and the prohibition of practising the socialist system and policies (BL5). It establishes a very distinct relationship between the central government and the HKSAR, and contains elaborate provisions to entrench the social, economic, legal, and political systems in the HKSAR by substantially circumscribing the constitutional power of the NPC. It restricts the application of PRC national laws to the HKSAR, apart from those set out in Annex III, the amendment of which has to follow a prescribed procedure (BL18). It excludes the power of the NPC to make law for the HKSAR, and lays down a specific procedure for amending the Basic Law. In contrast, the United Kingdom Parliament is subject to no restriction regarding its legislative power over Hong Kong. The Letters Patent and the Royal Instructions, the former constitution of Hong Kong, did not even attempt to set out any balance of power between the Crown and Hong Kong. On the contrary, in many ways they affirmed the unlimited sovereign power, such as the control on the appointment of the Governor and the enactment of legislation through royal assent and disallowance, and most significantly, these 'constitutional instruments' could be amended with minimal formal requirements. Hence, the Court of Appeal's unquestioned assumption that the English theory of supremacy of Parliament is applicable in its full rigour in the new constitutional setting in the HKSAR is, at the very least, doubtful.

The HKSAR government relied on *Madzimbamuto v Lardner-Burke*[10] to argue that the pre-1997 Hong Kong courts had no jurisdiction to challenge the validity of an Act of Parliament. In 1965, the British Parliament enacted the Southern Rhodesia Act which asserted authority and jurisdiction over

[10] [1968] 3 All ER 561.

Southern Rhodesia and empowered actions against unconstitutional conduct. It was argued, inter alia, that, by convention, the British Parliament did not legislate without the consent of the Rhodesian legislature. Lord Reid for the majority said:[11]

> It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.

While it is true that when Lord Reid referred to 'courts,' he meant colonial courts, the position is exactly the same with an English court. Parliament is not legally bound by any convention, and English courts cannot, of course, challenge the legality of an Act of Parliament by reason of its conformity or non-conformity with any convention. The same applies to a colonial court. The doctrine of supremacy of Parliament means that Parliament is free to legislate for a colony. It was not bound by the Letters Patent of Hong Kong or any Hong Kong legislation. Under the Colonial Laws Validity Act, an Act of Parliament will prevail if it is inconsistent with any domestic or prerogative legislation. In other words, the fact that a colonial court cannot challenge the legality of a British Act has nothing to do with its colonial status. It is entirely due to the British constitutional theory of supremacy of Parliament.

On the other hand, there is no rule that a regional or colonial court cannot question the legality of a national law. As Sir Kenneth Roberts-Wray pointed out, the jurisdiction of the superior courts in dependent territories is exactly the same as that of the courts in independent countries.[12] Indeed, under British rule the Hong Kong courts could challenge the legality of an Act of Parliament, at least in certain specific areas after the promulgation of the Hong Kong (Legislative Powers) Orders 1986 and 1989 pursuant to the Hong Kong Act 1985, which authorised the Hong Kong legislature to repeal applicable British Acts in certain areas. It follows therefore that if local legislation in these areas was in conflict with a British Act applicable to Hong Kong, the courts had to give effect to the local legislation.

The Court of Appeal's notion of an absolute doctrine of supremacy of Parliament is outdated.[13] The doctrine is not applicable in Britain regarding Community law. British courts have had to give effect to the EEC treaty when

[11] Ibid, p 573.
[12] Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966), p 466.
[13] See Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (London: Penguin, 6th ed 1989), pp 75–82.

it is inconsistent with any domestic legislation since 1971.[14] In *Gibson v Lord Advocate*, Lord Keith expressed doubt as to whether the British Parliament could pass a law to abolish the Church of Scotland.[15] Nor does the doctrine of supremacy of Parliament exclude manner and form restrictions. There is a long line of authorities (mostly in the context of entrenchment) to the effect that Parliament may bind itself as to manner and form.[16] Therefore, if a particular provision provides that law X can be amended only in a particular manner and form, law Y, which contradicts law X, but without complying with the form of amendment required by law X, is still subject to law X. In the present context, if the Basic Law prescribes a particular procedure for amendment, then any enactment (be it law or decision or resolution) contrary to the Basic Law shall have no effect unless it complies with the amendment procedure under the Basic Law. Otherwise, the elaborate requirements on amendment would become meaningless. Since the sovereign can bind itself in terms of manner and form, then compliance with such manner and form requirement must be a question of legality over which a court would have jurisdiction.

By holding that the NPC can ignore the Basic Law and adopt decisions or resolutions contrary to the Basic Law, the Court of Appeal assumed that NPC Decisions prevailed over the Basic Law. Neither Chan CJHC nor Nazareth VP specifically addressed the issue of the relationship between NPC Decisions and the Basic Law. Nazareth VP dealt with this question almost as a passing remark. He said:

> If [the NPC Decisions 1990 and 1994] produced a result that did not accord with the Basic Law, that does not mean the Basic Law itself had to be amended. Reference was made to the PRC Constitution, but no such requirement was shown. The detailed provisions for the formation of the first Legislative Council were hived off by the NPC in the contemporaneously made Decision of the 4th April 1990. If any inconsistency arises between the Basic Law and the Decisions in relation to the formation of the first Legislative Council, clearly the latter as the more specific (and later in respect of the 8th August 1994 Decision) must prevail.[17]

This is a bare assertion that the Decisions of the NPC shall prevail over the Basic Law. It also assumes that the 1990 Decision and 1994 Decision have the

[14] *MacMahon v Department of Education and Science* [1982] 3 CMLR 91; *Macarthys v Smith* [1981] QB 180; *Factortame v Secretary of State for Transport* [1989] 2 All ER 692.

[15] [1975] Scots Law Times 134. See also *MacCormick v Lord Advocate* [1963] SC 396, 411–13.

[16] *Bribery Commissioner v Ramasinghe* [1965] AC 172 (royal assent did not cure failure to obtain a two-thirds' majority in the lower House for a measure inconsistent with the constitution); *R (O'Brien) v Military Governor, NDU Internment Camp* [1924] IR 32 (failure to submit a bill to a referendum held fatal to the validity of an ostensibly authentic Act). See also Joseph Jaconelli, *Enacting a Bill of Rights: The Legal Problems* (Oxford: Clarendon Press, 1980), ch VI.

[17] Note 1 above, pp 355–6.

same legal status, which may not be the case. BL68 provides that the specific method for forming the Legislative Council be set out in Annex II. Annex II provides that the first Legislative Council shall be formed in accordance with the Decision of the NPC on the Method for the Formation of the First Government and the First Legislative Council of the HKSAR. This decision was duly made at the same time as the Basic Law was promulgated. Therefore, the Decision referred to in Annex II can only mean the 1990 Decision, and not any subsequent decision of the NPC. Thus, it is arguable that the 1990 Decision has been incorporated by reference into the Basic Law; it forms part of the Basic Law, enjoys a different status from other NPC decisions, and can only be amended in the same manner as any other provisions of the Basic Law. The mere fact that the 1994 Decision is a later or more specific decision does not and cannot mean that it can prevail over the clear provisions of the Basic Law, including the 1990 Decision.

The Court of Appeal did not draw any distinction between Acts of Parliament and ministerial acts. It held that both were outside the jurisdiction of the Hong Kong courts. It is well established that prerogative power is now subject to judicial review, and that a minister exercising powers in the name of the sovereign is subject to law and can be made personally liable for contempt.[18] No authority could be found to support a proposition that a ministerial act is outside the jurisdiction of a colonial court if that ministerial act is contrary to laws applicable to and binding on the minister. Nor were counsel for either side able to find such authorities.[19]

Finally, Chan CJHC seemed to have confused the questions of constitutionality of the law with the entirely different question of the motive or the reason for enacting a law. He said:

> Take the example given by counsel. The Queen by Letters Patent appoints Mr X to be a governor of Hong Kong. The Hong Kong courts cannot query the validity of the Letters Patent or why and how she comes to appoint Mr X as the Governor. However, I think that the Hong Kong courts should have the power to examine the Letters Patent and its contents to see whether the Queen has in fact made an appointment and to query whether a particular person turning up at Queen's Pier is the Mr X and whether he acts according to the scope of the Letters Patent which appoints him as Governor...
>
> In the context of the present case, I would accept that the HKSAR courts cannot challenge the validity of the NPC Decisions or Resolutions or the

[18] *M v Home Office* [1992] 4 All ER 97; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25; *Bhatnager v Minister of Employment and Immigration* (1990) 71 DLR (4th) 84.

[19] Nazareth VP pointed out that 'no instance has been traced by counsel before us of such a challenge in any British colony. Nor for that matter has any direct authority been produced for the proposition that no such challenge may be entertained' (note 1 above, p 350)

> reasons behind them which set up the Preparatory Committee. Such decisions and resolutions are the acts of the Sovereign and their validity is not open to challenge by the regional courts. *I am thus unable to accept Ms Li, SC's argument that the regional courts can examine those decisions and resolutions to see if they are consistent with the Basic Law* or other policies. Nor, in my view, can the HKSAR courts examine *why* the Preparatory Committee set up the Provisional Legislative Council in exercising the authority and powers conferred on it by the NPC to carry out the Sovereign's decisions and resolutions.[20]

With respect, Chan CJHC erroneously equates the reasons for enacting a law with its legality or validity. The fact that the courts could not go behind a law to examine the reasons for its enactment does not lead to the conclusion that the courts cannot examine it for conformity with the Basic Law, which is binding on the law-making organ. His analogy of appointment of the Governor is inappropriate: the real issue is whether a colonial court could challenge the legality of the appointment of Mr X if an Act of Parliament said any appointment must be endorsed by Parliament and there was no such endorsement.[21] This is squarely a question of legality over which the courts must have jurisdiction.

Apart from its weak intellectual foundation, the decision of the Court of Appeal strikes a disastrous blow to the integrity of the legal system of the HKSAR. In the first place, Art 18 of the Basic Law provides that the laws in force in the HKSAR shall be the Basic Law, the laws previously in force in Hong Kong, the laws enacted by the legislature of the HKSAR, and other national laws set out in Annex III to the Basic Law. This is no longer an exhaustive list of the sources of laws of the HKSAR. An undefined notion of sovereignty provides an additional source of laws for the HKSAR. The NPC may, in the name of the sovereign, exercise legislative power over Hong Kong. Such power falls outside the framework of the Basic Law and is not an act of state.

Second, this new source of law can take the form of a decision or resolution of the NPC Standing Committee. According to the majority of the Court of Appeal, even a simple resolution approving a report of one of the bodies set up by the NPC could operate as a form of legislative ratification and have legal effect in Hong Kong.[22]

[20] Ibid, pp 334–5 (italics supplied).

[21] *Abeyesekera v Jayatalike* [1932] AC 260 where the legality of a provision of an Order in Council was challenged in the Ceylon court, and *Sammut v Strickland* [1938] AC 678, where the validity of the Letters Patent was considered by the Maltese court.

[22] See below. Nazareth VP regarded the resolution of the NPC in 1997 insufficient to constitute ratification of the Preparatory Committee's establishment of the Provisional Legislative Council under the common law (note 1 above, p 357). In the absence of expert evidence on Chinese law, he found himself ill-equipped to judge whether the resolution would have such effect of legislative ratification in Chinese law. He was however persuaded not to express his reservations to the point of expressing a dissenting view.

Third, the laws, decisions, or resolutions passed by the NPC or the NPC Standing Committee are valid, and their validity or legality, being acts of the sovereign, cannot be challenged in HKSAR courts, even when they are clearly inconsistent with the Basic Law, or even with the PRC Constitution. The implication seems to be that the remedies would lie in the PRC courts. However, the paradox is that the PRC Constitution is not justiciable in the PRC courts.[23]

Fourth, it follows that the NPC can amend the Basic Law simply by adopting a resolution without having to follow the elaborate procedure on amendment under BL159. This power may even be delegated, as in this case, to a body such as the Preparatory Committee.

Fifth, this legislative power of the NPC is not confined to foreign affairs and defence or matters which are outside the autonomy of the HKSAR. Indeed, once it is accepted that this legislative power is derived from sovereignty, it is difficult to prescribe any limit. At any rate, whether the sovereign power is subject to limits is not a matter for the HKSAR courts.[24]

In short, the NPC can, by a rather informal decision or resolution, side-step all the elaborate guarantees laid down in the Basic Law, and there is no forum for challenging these decisions or resolutions. It is difficult to imagine what could be left in the notion of 'a high degree of autonomy' in the light of these consequences.

Legality of the Provisional Legislative Council

The Court of Appeal accepted that it had jurisdiction to determine whether the NPC Decisions authorised the establishment of the PLC. Its reasoning was as follows. In the 1990 Decision, the Preparatory Committee was authorised to set up the first legislature. By 1994, as a result of the political reform proposals made by the last Governor, it was clear that the last legislature before the changeover would not be acceptable to the PRC. Therefore, the NPC made another decision, reiterating that the Preparatory Committee be responsible for prescribing 'the specific method for the formation of the first Legislative Council and organizing the first Legislative Council of the HKSAR in accordance with the 1990 Decision of the NPC.' In the words of Chan CJHC, '[t]his is not only

[23] 'The theoretical supremacy of the Constitution may not however mean much in practice. Constitutions in communist states have traditionally been regarded as directives or guidelines for the legislature, so that the constitutional provisions are not directly enforceable in the absence of implementing legislation. This seems to be the case in China.... Indeed, it is doubtful whether the Constitution can be said to have "direct legal effect." Apparently courts are not allowed to rely on constitutional provisions directly in deciding a case and can only apply the ordinary legislation (if any) through which the Constitution is implemented. Chinese courts do not of course enjoy the power of review of legislation with regard to its conformity to the Constitution' (Albert H Y Chen, *An Introduction to the Legal System of the People's Republic of China* (Singapore, Malaysia, Hong Kong: Butterworths, 1992), p 46.

[24] See below.

a confirmation of the 1990 NPC Decision (paragraph 2). It also expressly authorises the Preparatory Committee to organize the first Legislative Council.'[25] As it was not possible to set up the first Legislative Council before 1 July 1997 without the co-operation of the British government, and as it was essential to have a legislature on 1 July 1997, the judge held that setting up a provisional legislature as an interim measure to enable the first government to begin operating in the absence of the first Legislative Council and to set about forming the first Legislative Council was necessary and incidental to the initial operation of the first government and to the setting up of the first Legislative Council of the HKSAR and hence within the ambit of the 1990 and 1994 Decisions.[26]

In other words, the sole basis of the Court of Appeal's decision was that the formation of the Provisional Legislative Council arose out of necessity. Indeed, the doctrine of necessity is likely to provide the most plausible basis for the legality of the PLC. Yet ironically, the Court of Appeal found it unnecessary to address the doctrine of necessity, and hence failed to consider its limits.[27]

The Court of Appeal's approach to construing the NPC Decisions is also questionable. Its analysis is best described as a literary approach to interpreting a contractual provision and supplementing it with reasonable and incidental powers — an approach hardly apposite to the construction of a constitution. It focused on one single aspect of the 1990 Decision, namely the power to establish the first Legislative Council, to the exclusion of other provisions in the Basic Law or the Joint Declaration. It ignored entirely the context of the NPC Decisions, namely the framework of the Basic Law, as if the Basic Law did not exist. The court paid no regard to the notion of 'a high degree of autonomy' as set out in the preamble of the Basic Law. It ignored the promise in the Joint Declaration and BL68 that the legislature of the HKSAR is to be constituted by election. It dismissed the relevance of many provisions in the Basic Law aimed at preserving the integrity of the legal system and the autonomy of the HKSAR. And, above all, it blended the PRC legal system with the HKSAR legal system and blurred the demarcation between the two systems.

The 1990 Decision set out the composition of the first Legislative Council. Paragraph 6 of the 1990 Decision envisaged that the last Legislative Council

[25] Note 1 above, p 339.

[26] Ibid, per Chan CJHC, p 341-2; Nazareth VP, p 356, describing these powers as reasonably necessary to enable the Preparatory Committee to carry out its duties; Mortimer VP, p 370, describing these powers as 'necessary steps.'

[27] Yash Ghai points out that the doctrine of necessity is subject to four major limitations: first, it must be established that there was a gap in the law or that the authority which was vested with the power was unable to act. Second, the extra-legal power must be exercised for purposes which are essential to the maintenance of public order or state security, not just for the convenience of the executive. Third, the acts in question must be confined strictly to what is necessary. Fourth, the acts should last for a short period of time. Steps must be taken to restore the established legal institutions and procedures, and laws enacted during the period of necessity can only continue to be in force when they are ratified. See Y Ghai, 'Back to Basics: The Provisional Legislature and the Basic Law' (1995) 25 HKLJ 2, 6.

in 1995 could be the first Legislative Council of the HKSAR. If the through train model fell through, then the Preparatory Committee shall set up the first Legislative Council in accordance with the parameters set out in para 6. Since the Preparatory Committee was to be set up in 1996, it would have up to eighteen months to prepare for the establishment of the HKSAR and the first Legislative Council. Hence no provisional legislature was envisaged in the Basic Law or the 1990 Decision. The 1994 Decision merely reaffirmed the 1990 Decision. It is therefore difficult to see how the 1994 Decision can enlarge the power of the Preparatory Committee and authorise it to set up the PLC. The HKSAR conceded that the PLC was not the first Legislative Council,[28] and that it did not derive its authority or legality from the Basic Law. That is, it is an interim body not provided for or even envisaged by the Basic Law. Then where does its power come from? What is the legal basis for it to endorse the appointment of the judges of the Court of Final Appeal, to approve the budget, to receive the policy speech of the Chief Executive and to debate on a wide range of policy issues, or indeed to enact any law at all? These are powers to be exercised by the Legislative Council under the Basic Law, but the PLC, not being a legislative council within the Basic Law, cannot derive these powers from the Basic Law. Neither the 1990 Decision nor the 1994 Decision sets out any of these powers. These powers are provided for in the 1996 Decision of the Preparatory Committee.

The Court of Appeal suggested that because of a change in the political circumstances in 1994, namely that no through train was possible, the 1994 Decision, which was a sovereign act, provided the Preparatory Committee with the mandate to take whatever steps were necessary to set up the first Legislative Council, including setting up the PLC and defining its power, composition, and terms of office. In other words, the legality of the PLC rests on a vague notion of sovereign power which exists alongside the Basic Law. If so, there is nothing to prevent the NPC or the Preparatory Committee from amending the 1996 Decision, say, by enlarging or restricting the power of the PLC or even by extending its term for an indefinite period. Albert Chen has suggested that the power of the Preparatory Committee (or of the PLC) was confined to what was necessary.[29] But if the establishment of the PLC is a sovereign act which is outside the jurisdiction of the HKSAR courts, the definition of its power must also be a sovereign act and therefore equally outside the jurisdiction of the HKSAR courts. It follows that if the NPC chooses to expand the power of the PLC beyond any notion of necessity and in a manner contrary to the provisions of the Basic Law, this is not a matter for the HKSAR courts. It is difficult to see

[28] As Mortimer VP put it, 'The establishment of the Provisional Legislative Council was outside the Basic Law and collateral with it. It was part of the arrangements and method for establishing the first Legislative Council' (note 1 above, p 372).

[29] Albert H Y Chen, 'The Concept of Justiciability and the Jurisdiction of the Hong Kong Courts,' South China Morning Post, 5 August 1997.

how such an interpretation would be consistent with the promise of a high degree of autonomy under the Joint Declaration or the Basic Law.

Ratification

The Court of Appeal, by a majority, accepted that, even if the 1990 and the 1994 Decisions did not authorise the setting up of the PLC, the 1997 Decision adopting the report of the Preparatory Committee would be sufficient to regularise the PLC's legal status. Chan CJHC said:[30]

> In my view, the Ratification is sufficiently clear. It adopts the course of action taken by the Preparatory Committee as set out quite fully in its working report. It is clear that the NPC as the highest state organ of the sovereign of the HKSAR has adopted the setting up of the Provisional Legislative Council and its work before the establishment and formation of the first Legislative Council. The Ratification is a sovereign act which the HKSAR courts cannot challenge.

In a similar vein, Mortimer VP said:[31]

> Any lingering question as to the lawful exercise of the Preparatory Committee's powers in establishing the PLC was, in my judgment, removed on the 14th March 1997 when the NPC resolved to approve a Preparatory Committee's report which among other things detailed the way in which the provisional legislature had been established. Ms Li submits that this resolution amounted to narrative without ratification. Without any evidence to the contrary, the resolution must be accepted as meaning what it says — that the legislature approved that which the Preparatory Committee had done in the exercise of the powers granted to it.

Under the PRC Constitution, the NPC enjoys legislative, executive, and judicial power.[32] It discharges legislative functions by enacting law as well as exercising power of legislative interpretation. At the same time, it is also an executive body which makes many policy and administrative decisions, such as the election and removal of senior officials, consideration and approval of the state budget, and plans for economic and social development.[33] Without examining the PRC Constitution, and without considering the different functions of the NPC, Chan CJHC and Mortimer VP readily accepted that any

[30] Note 1 above, p 343.
[31] Ibid, p 370.
[32] Arts 62–4.
[33] See Chen (note 23 above), p 55.

decision of the NPC, administrative or otherwise, could operate as law. Even if this were right, which is by no means clear, it does not follow that such decision will have the effect of ratification. Whether the 1997 Decision has the effect of ratification must depend on PRC law, on which the court had heard no evidence or argument. Nazareth VP was more cautious, and he must be correct:

> It is this resolution then that the HKSAR submission contends, constitutes ratification of the Preparatory Committee's establishment of the PLC. It has to be said that it would be regarded as deficient if judged purely upon common law norms....[34] In its resolution the NPC praised the work of the [Preparatory] Committee. In approving the report, the NPC must have approved the action it took. But whether that amounted to ratification, I have found myself ill-equipped to judge. For instance, is a resolution of that sort an accepted form of legislative ratification? Perhaps we should have been assisted by expert evidence.[35]

Without evidence or argument, the Court of Appeal's decision in this respect is highly questionable.

Conclusion

The judgment of the Court of Appeal has a dubious legal basis in relation to its jurisdiction and the legality of the Provisional Legislative Council. It rests on many important but unjustifiable assumptions. It works on the basis of an outmoded notion of supremacy of Parliament and erroneously assumes the applicability of this absolute notion of sovereignty to the HKSAR without any regard for the change in the constitutional setting brought about by the Basic Law. It fails to notice that the constitutional relationship between Hong Kong and the British Crown under British rule was radically different from that between the HKSAR and the Central People's Government after the establishment of the HKSAR. Nor has it properly considered the constitutional position of the Basic Law within the Chinese legal system, or the relationship of Chinese law and the PRC Constitution in the HKSAR, on the one hand, and of various types of Chinese law and the Basic Law, on the other. Instead, the Court of Appeal assumed without argument that an NPC Decision prevailed over the Basic Law. It introduces an unknown source of law under the vague notion of sovereignty which is above the Basic Law. It is ambiguous as to matters over which the HKSAR courts do not have jurisdiction. When it refers

[34] Note 1 above, p 357.
[35] Ibid, p 358.

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*[1] was described by Professor Yash Ghai and Solicitor General Daniel Fung respectively as representing a 'dark day for our rights'[2] and 'one of Hong Kong's finest hours.'[3] 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.[4] 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.'[5] 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.[6]

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1 [1997] 2 HKC 315.

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

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

4 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.

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

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